

CASE NO. A06-0295

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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OFFICE OF  
APPELLATE COURTS

MAY 31 2006

C.B., a minor, by her mother and natural guardian,  
L.B., and L.B., individually,

**FILED**  
*Appellants,*

vs.

Evangelical Lutheran Church in America,  
Southwestern Minnesota Synod of the Evangelical  
Lutheran Church in America, Immanuel American  
Lutheran Church, Oscar Stene and Pearl Stene,

*Respondents.*

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**APPELLANTS' REPLY BRIEF**

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## ARGUMENT

**I. SUBSTANTIAL EVIDENCE IN THE RECORD SHOWS THAT THE CHURCH RESPONDENTS WERE RESPONDENT STENE'S EMPLOYER AND THUS SUBJECT TO VICARIOUS LIABILITY FOR HIS INTENTIONAL TORTS; THUS, A GENUINE ISSUE OF MATERIAL FACT EXISTS AND THE SUMMARY JUDGMENT MUST BE REVERSED.**

Respondent ELCA argues that, based on the five-factor test for determining whether an employment relationship exists, as set forth in Guhlke v. Roberts Truck Lines, 268 Minn. 141, 143, 128 N.W.2d 324(1964), the evidence conclusively establishes that Respondent Stene was never an employee of the ELCA. Id. at p. 15. (citations omitted). Respondent concludes that the undisputed evidence shows that none of the five factors can be applied against it to determine it had an employment relationship with Oscar Stene. See Id.

However, for each item of evidence Respondent ELCA cites in support of its conclusion, there is evidence in the record supporting a contrary conclusion. For example, Respondent states that the evidence shows the ELCA had no right to control the means and manner of Stene's performance of his job duties. Id. However, there is substantial evidence in the record to the contrary: The ELCA determines who can and is a qualified person to serve as a minister of the church. The person must have graduated from an approved Lutheran seminary owned and operated by the ELCA. The person must pass the ELCA's annual examination as to character and fitness for each of the four years the person is attending the seminary. The person must be listed on the ELCA clergy roster. One cannot be placed on the ELCA roster until that person has received a "call", or an invitation for

employment, from a congregation. In order to receive a “call”, the person must be on the list of names suggested by the area synod to a particular congregation.

While theoretically a person who has graduated from a Lutheran seminary can decline to serve at a congregation which has made a “call” to him or her through the synod, in practice the call is always accepted, because it is through the synod that the person receives calls to other congregations, so “you don’t want to ... align yourself wrongly with the synod.” A.209.

In addition, ministers working in the Evangelical Lutheran Church of America are governed and must agree to abide by, the ELCA’s Constitution, By-Laws, and Continuing Resolutions. The Constitution contains an entire chapter of requirements for its ordained ministers, chapter 7. See 2001 ELCA Constitution, chapter 7, at pp. A.554 - A.576. All of this evidence strongly supports the conclusion that the ELCA in fact exercises significant control over the means and manner of performance of its ministers.

Respondent ELCA next argues that it could not remove Oscar Stene from his position. Id. at p. 16. This statement is patently false. Evidence from several different sources establishes that the ELCA has the power to remove an ordained minister, both from his or her employment position and from the ELCA roster of ordained clergy. See, e.g., testimony of Bishop Paul Ranum at A.251-52 at pp. 12-13 (a bishop or a minister can be removed through the disciplinary process of the synod and then the ELCA’s disciplinary process); chapter 20, part 20.21.02(c) of the 2001 ELCA Constitution at p. A.687(disciplinary actions

which may be imposed against an ordained minister by the disciplinary committee of the ELCA include removal from the ordained ministry of the church); Deposition of Allan Bakke, at A.192-194(pp.9-10, 16, 18)(Bishop Ranum of the Southwestern Synod required that Bakke resign his position as pastor of Immanuel American Lutheran Church and as pastor of First Presbyterian Church, as well as from the ELCA clergy roster; the congregation at Immanuel American Lutheran Church did not even know about the forced resignation until the following day).

Respondent ELCA attempts to obscure its power to remove clergy both from their positions of employment and from the clergy rosters by stating that it is “not the ELCA itself”, but rather “certain groups and individuals” who may commence disciplinary proceedings against a minister. Respondent’s Brief at p. 16 n. 10. This statement is disingenuous. The “groups” and “individuals” who commence the disciplinary proceedings against a minister are sub-groups of the ELCA and individual committee members, all participating in the process at the church-wide, or national level of the ELCA. See p. A.689 at par. 20.21.08. These groups, committees and individuals are the ELCA. As a corporate entity, the ELCA can only act, including acting to exercise its power and authority to discipline, through such groups and individuals.

Both Respondent ELCA and Respondent Southwestern Minnesota Synod have borrowed from the trial court’s Order and Memorandum the supposed “analogy” between the disciplinary powers of a licensing board and the disciplinary powers of the ELCA, to

support the argument that the ELCA was no more an employer of Respondent Oscar Stene than a licensing board is the employer of those whose licenses it approves or removes. The fallacy in this analogy is that the power and authority of the ELCA over its ordained ministers is far broader than the powers of a licensing board, and the ELCA's relationships with the synods, congregations and ordained ministers is far more interdependent and intertwined than is the relationship between a licensing board and the professionals it oversees.

The most significant difference is in the financial interrelationships between the congregations, synods, and the church-wide organization. In the ELCA, individual congregations are expected to contribute financially to the synod and to the national organization: "Since congregations, synods, and the churchwide organization are partners that share in God's mission, all share in the responsibility to develop, implement, and strengthen the financial support program of this church." A.577, 2001 ELCA Constitution, at par. 8.15.

Congregations vote on the amount of financial contributions they will make to their synod and to the national organization. A.263, at pp. 58-60. The synods, in turn, contribute a certain percentage of the funds they receive from the congregations to the national organization. The contribution is significant - for example, in the year 2004, the Southwestern Minnesota Synod contributed between 52 to 53 percent of the funds it received from the local congregations to the national organization. A.263, at p. 60.

In contrast, a licensing board receives funds from its licensees only through an annual license fee. It does not receive an ongoing, significant percentage of the income generated by its licensees.

Furthermore, a licensing board is completely independent of those professionals to whom it grants licenses. It does not have any input into the hiring of the licensed professionals, their income, their education, or their day-to-day activities. The ELCA, on the other hand, has direct involvement in the education of its ordained ministers - the ministers are educated at seminaries owned and operated and funded by the ELCA. The national-level ELCA and its synods have significant control over where and when an ordained minister will receive a "call" or offer of employment. See, e.g., Brief of Respondent Southwestern Minnesota Synod at pp. 3-4 ("It is the role of the synod to assist in the 'call process' (the seeking out of a pastor)... Before extending a call to a pastor, the congregation consults with the bishop of the synod regarding the needs of the congregation. ... The synod makes recommendations from the 'call roster' ... according to which pastors it believes might best fit the needs of the congregation"); Affidavit of Pastor Jeremiah Olson at pp. A.772-73 ("It is the bishop of the local synod who decides what candidates for a call will be chosen and passed on to ... whatever congregations are in need of a pastor."); Deposition of Bishop Paul Ranum at pp. A.254, page 24 (Congregations in need of a pastor "may get a list of names from the synod ... [the synod] is a clearinghouse of some names that would fit or be appropriate for that congregation."); Deposition of Pastor Allan Bakke at pp. A.210(p.81-

82);A.212-13(pp. 92-93) (Bakke was not “okay” with his assignment to the congregation at Immanuel American Lutheran Church; he wanted to be pastor for the Atwater congregation which was very interested in him and it would have been close to Pastor Bakke’s wife’s employment, but Bakke did not have the ability to put his name in at a congregation as a first call and the synod disregarded his interest in that congregation; furthermore, “it’s frowned upon by the synod and suggested that you don’t contact the congregations directly, but go through the synod.”)

Finally, the ELCA’s control over the means and manner of performance of an ordained minister differs from the control exercised by a licensing board in that the ELCA’s national organization, the synods and the local congregations consider themselves to be “interdependent”. A.577 2001 ELCA Constitution, chapter 8, at par. 8.10. In the words of their Constitution, “interdependent” means that “[e]ach part, while fully the church, recognizes that it is not the whole church and therefore lives in a partnership relationship with the others.” Id. In contrast, a licensing board is not interdependent with any other entity or agency.

**II. RESPONDENT STENE ATTAINED “RETIRED STATUS” IN 1991, BUT REMAINED ACTIVELY EMPLOYED BY THE CHURCH RESPONDENTS THROUGH 2002; THE CHURCH RESPONDENTS THEREFORE ARE LIABLE FOR STENE’S WRONGFUL ACTS COMMITTED IN THE SCOPE OF HIS EMPLOYMENT.**

Contrary to Respondent ELCA’s assertion, Appellants do not acknowledge that Oscar Stene was retired at the time of the abuse. Appellants acknowledge that Stene obtained

“retired status” in 1991, but assert that he continued his employment with the ELCA through several “interim pastor” assignments as well as through “pulpit supply” work.

Respondent Stene testified that, after his “retirement” in 1991, he served as interim pastor for seven different congregations. A.156(p.35). His work as interim pastor continued up until 2002. RA.4(p.13). His work as interim pastor “was necessary because we did not have enough money to live on.” Id. An “interim” pastor works full-time. The interim pastor comes into a congregation “during a specific period of transition.” A.273(p.6). The interim pastor serves a congregation which has lost a pastor, until the congregation has selected a new, permanent pastor.

Respondent Stene served as interim pastor for Immanuel American Lutheran Church, where he remained for seven months. A.156(p.35). He also served as interim pastor for the Adrian and Kenneth congregations, then the Balleton congregation, then Russell. Id. at pp. 35-36. He next served as full-time interim pastor at the Heron Lake congregation. Id. at p. 36. He returned to do another interim pastorate for the Russell congregation, where he stayed for four months. Id. He also did interim pastorships for the Zion Lutheran Church and for the congregation in Dundee. Id. at pp. 37, 43. He received W-2 forms for his interim pastorships at the end of each year. A.184(p. 146). He also received housing, an automobile allowance, vacation pay and funds for books and continuing education during his interim pastorships. A.176(at pp. 112-114).

Pastor Stene also did “pulpit supply” work, in which he presided over Sunday worship

services for pastors who were going to be absent. Respondent Stene did pulpit supply work for several different congregations, and continued to do so until October 20, 2002, *four months after Pastor Allan Bakke learned of Stene's sexual abuse of Appellant C.B.* A.201(pp. 47-48)(emphasis supplied).

Respondent Stene's "retirement" status really only reflected that he had retired from serving as the full-time, permanent pastor of a given congregation, but he continued to be very active in his work for the Respondents.

**III. TO IMPOSE VICARIOUS LIABILITY UPON THE CHURCH RESPONDENTS, APPELLANTS ARE NOT REQUIRED TO SHOW THAT RESPONDENT STENE'S ACTS WERE COMMITTED AT LEAST IN PART TO FURTHER THE INTERESTS OF HIS EMPLOYER.**

Respondent ELCA attempts to portray Appellants as "desperately attempt[ing] to recast the families' relationship with the Stenes as one of clergy-parishioner, not that of family friend." This is not the case. Appellants do not dispute, and have never disputed, that they had a close friendship with the Stenes. What Appellants wish to emphasize, however, is that this friendship has its roots in the clergy-parishioner relationship between C.B.'s parents and Respondent Oscar Stene. It was Stene's role as pastor of their church that caused the family to meet him, and it was in their interactions with Respondent Stene *as a pastor* that a close, trusting relationship developed. It was the trust that the family had for Stene as their pastor and as their friend that caused them to grant permission for C.B. to visit the Stenes alone. The argument advanced by Respondent ELCA in this regard is thus simply a red herring. See Respondent's Brief, at p. 21 - 25.

Respondent ELCA argues that Respondent Stene's acts of sexual abuse were not committed within the scope of his employment because there is no evidence that he was acting, at least in part, to further the interests of his employer. Respondent's Brief, at p. 28. The ELCA cites Hentges v. Thomford, 569 N.W.2d 424 (Minn. Ct. App. 1997) as support for its argument. Respondent's Brief at pp. 27-28. However, Hentges' "motivation standard" does not apply to the instant case, because Hentge addresses a *negligent* act by an employee, not an *intentional* act. Different tests apply depending on whether the employee's tort was negligent or intentional. See Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306, 310 (Minn. 1982).

In Marston, the Minnesota Supreme Court held that, when the alleged tort committed by the employee is an intentional act, it need not be shown that the employee was acting at least in part in furtherance of the interests of the employer. Id. at 310. Marston held that it was reversible error for the trial court to give the jury a scope of employment instruction that included the phrase, "and was brought about, at least in part, by a desire by the agent to serve the principal." Marston, 329 N.W.2d at 311.

Thus, Respondent ELCA's argument using the motivation test set out in Hentges is erroneous and unhelpful in the instant case. It is undisputed that Respondent Stene's acts of sexual abuse against Appellant C.B. were intentional. The motivation test does not apply.

Respondent ELCA further argues that Appellants' assertion that Respondent Stene was essentially a 24-hour employee, is "nonsense." Respondent's Brief at p. 28, n.17.

However, in Hentges, the Court of Appeals accepted just such an assertion - that a Lutheran pastor is considered to be in a “twenty-four hour job’ not restricted to the pulpit.” Hentges, 569 N.W.2d at 428.

In Hentges, an Evangelical Lutheran pastor was out hunting on his day off with two members of his congregation. Id. at 426-27. The group did not discuss anything spiritual or religious or church-related while hunting, it was the pastor’s day off, and they were not on church property. Id. Nevertheless, the Court of Appeals found that there was evidence from which a jury reasonably could have found that the pastor’s accidental shooting of his hunting partner was within the scope of the pastor’s employment. Id. at 428.

At least part of the evidence supporting that the pastor was “on duty” or “on call” was the testimony of three other ministers who stated that it was “very important for a pastor to develop comfortable relationships with members of the congregation and that social and recreational activities, including hunting, could help a pastor to develop those relationships and lay a foundation for pastoral visits.” Id. at 427. See also Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (Minn. 1979)(reinstating jury verdict of vicarious liability for employee’s negligent actions in hotel while completing reports when employee was on duty or on calls twenty-four hours a day); Laurie v. Mueller, 248 Minn. 1, 78 N.W.2d 434(1956)(reversing denial of JNOV for employer when twenty-four hour caretaker negligently injured tenant).

That is precisely the situation presented in the case at bar. Here, too, an important part

of Respondent Stene's ministry was in developing "comfortable relationships" with members of the congregation - in this case, C.B. and her family. Social and recreational activities, such as gathering at the Stenes on Christmas, sharing the story of Jesus' birth, reading from the Bible, and exchanging small gifts, helped Respondent Stene develop his relationship with the family, and created the trust that the family had for him as their pastor. His acts of sexual abuse were made possible by the family's trust in him to care for their minor daughter when her parents were not present. The family's trust in turn came from the many years they had known Stene, as well as the contexts in which they had known Stene. His role as their pastor was a significant factor in earning their trust.

Further supporting the Appellants' assertion that Respondent Stene was basically a twenty-four hour per day employee is the testimony of Pastor Jeremiah Olson. Pastor Olson testified that

"[t]he provision of pastoral care is an important duty of the ordained minister, and includes work out in the community such as care and counseling of congregants or others, hearing confession and granting absolution, or more casual ministry such as visiting people, praying with people, or reading from the Bible at the home of a congregant. In fact of all of the duties of an Evangelical Lutheran minister, I would say 80 percent of the work is performed out in the community, with only 20 percent performed in the church building itself. And the work of an ordained minister cannot be confined to a specific time either, because such a minister is expected to live his or her entire life in accordance with the standards set forth in the Constitution of the ELCA. Above all, at all times the ordained minister must "be true to [the] sacred trust inherent in the nature of the pastoral office."

Affidavit of Jeremiah Olson, at p. A.775-76(quoting 2001 ELCA Constitution, Bylaws and Continuing Resolutions at p. 37, par. 7.45).

Respondent ELCA argues that Fearing v. Bucher, 328 Or. 367, 977 P.2d 1163(1999), cited by Appellants in support of their position that Stene committed acts within the scope of his employment which resulted in the sexual abuse of C.B., is distinguishable from the case at bar and thus inapplicable. Respondent's Brief at p. 29. However, Respondent ELCA has mis-read the Fearing opinion.

Respondent ELCA argues that Fearing is inapplicable to the case at bar because in Fearing, "[t]he priest was spending time with his victim as youth pastor on each and every occasion of abuse." Id. The facts in Fearing, however, do not support this statement. In that case, the perpetrator, Bucher, acted as youth pastor, friend, confessor and priest to plaintiff and his family. 977 P.2d at 1165. Bucher was a frequent guest in the plaintiff's family's home, and gained the trust and confidence of the plaintiff's family as a spiritual guide and priest and as a youth pastor and mentor to plaintiff. Id. By virtue of that relationship, Bucher gained the support, acquiescence and permission of plaintiff's family to spend substantial periods of time alone with plaintiff. Id. Bucher then began to "socialize with plaintiff and to spend time alone with him." Id. Eventually, Bucher committed a series of sexual assaults on plaintiff. Id.

Nowhere in the Fearing opinion does the court state that Bucher was acting as plaintiff's youth pastor on each and every occasion of abuse. Rather, the court noted that there was a time-lag between the act allegedly producing the harm and the resulting harm.

Id. at 1166. In such a case, the Supreme Court held that it is inappropriate to determine whether *respondeat superior* applied as of the time when the injury occurred. Id. Instead, the “focus should be on the *act* on which vicarious liability is based and not on when the act results in *injury*.” Id. (Citations omitted; emphasis in original). In other words, “it virtually always will be necessary to look to the acts that led to the injury to determine if *those* acts were within the scope of employment.” Id. at n. 4.

In the case at bar, the acts that Appellants claim led to their injuries were Stene’s acts in befriending C.B.’s *parents*, who met Stene through Immanuel American Lutheran Church, when he was their pastor, married them in the church, educated C.B.’s mother in the Lutheran faith, taught C.B.’s father’s confirmation classes, prayed with them at Christmas time, and acted as their pastor and friend and thereby gained their trust and confidence. These acts occurred years ago, in the 1970s, but the acts were the foundation upon which the family formed their friendship with him. Stene’s acts during the early years when the family was getting to know him, were the acts Appellants allege were committed within the scope of employment. It certainly is within the scope of employment for a pastor to teach congregants confirmation, to marry congregants, to educate them in the faith, to read the Bible and pray with them, and to befriend them. All of these acts would fall under the parameters of what the ELCA Constitution characterizes as “pastoral care”. A.555. By those early acts, as their pastor, Stene gained the “support, acquiescence, and permission of [Appellants] to spend substantial periods of time alone with” Appellant C.B. See Id. at

1165. What Appellants are asking this Court to do is allow a jury to determine whether those acts were committed within the scope of Stene's employment with Respondents, and then whether those acts resulted in the acts which caused injury to C.B..

Respondent ELCA next argues that a subsequent Oregon Supreme Court case, Minnis v. Oregon Mut. Ins. Co., 48 P.3d 137(Or. 2002), clarified Fearing by holding that "Fearing presupposed that the abuse occurred within the work-related limits of time and place." Respondent's Brief, at p. 30. However, that is not what the Minnis court held. What the Minnis court held was that, in order to apply the "time-lag" theory, there must be an allegation of acts the employee engaged in within the time and space limits of his employment which were "generally actions of a kind and nature" that the tortfeasor was required to perform in his employment position, which in turn caused the acts which resulted in injury. Minnis, 48 P.3d at 144-45.

In Minnis, the plaintiff sued her employer, alleging sexual harassment, wrongful discharge, sexual assault, and intentional infliction of severe emotional distress. 48 P.3d at 138-39. The allegations included a charge that the plaintiff's supervisor, Tuck, sexually harassed and assaulted plaintiff at work, during work hours, and that Tuck sexually assaulted her at his apartment one night when he called saying his brother died and asked the plaintiff to come over. Id. at 139-140.

The plaintiff in Minnis did not allege that the sexual harassment at the workplace "resulted in" the sexual assault at the apartment. Id. at 143. She alleged instead that the

episode at the apartment was one of several episodes in a series. Id. From the allegations of the complaint, “a reasonable juror could not have inferred that one example of Tuck’s misconduct *resulted in or caused* another. Id. The Minnis court therefore found that the time-lag standard did not apply because the allegations of the complaint did not include the requisite *causal* connection between the workplace harassment and the sexual assault at her supervisor’s apartment.

In the instant case, Appellants do allege that Respondent Oscar Stene “accomplished the sexual abuse by virtue of his job-created authority.” Complaint, at A.9, par. 38. As a result, the requisite causal relationship between the acts of Oscar Stene in developing the relationship of trust with C.B. and her family and the eventual sexual abuse has been alleged and the time-lag standard would, and should, be applied in this case to impose vicarious liability upon the Respondents.

**IV. THE CHURCH RESPONDENTS’ FAILURE TO TIMELY DISCIPLINE OR REPRIMAND RESPONDENT STENE FOR HIS ACTS OF SEXUAL ABUSE, AS WELL AS THEIR AFFIRMATIVE CONDUCT AFTER LEARNING OF THE ALLEGATIONS OF ABUSE BY STENE, SERVED TO RATIFY RESPONDENT STENE’S CRIMINAL ACTS AND RENDERS THE CHURCH RESPONDENTS LIABLE FOR RESPONDENT STENE’S ACTS.**

All of the Respondents attack Appellants’ argument that they are liable for Respondent Stene’s acts because they ratified his conduct after learning of it and after confirming the allegations with Stene himself. See Respondent ELCA’s Brief, at pp. 32-35; Respondent Southwestern Minnesota Synod’s Brief, at pp. 23-25; and Respondent Immanuel American Lutheran Church’s Brief, at pp. 18-24. First, Respondent ELCA takes issue with

one out-of-state case cited by Appellants, and then criticizes Appellants for relying on a case that does not even appear in Appellants' Brief! See Appellants' Brief, at pp. 48-51. Respondent ELCA argues that Anonymous v. Lyman Ward Military Academy, 701 So.2d 25(Ala. Ct. App. 1997) merely holds that an employer is not liable under the theory of ratification if it did not have any knowledge of the employee's wrongful acts until after the last instance of abuse. Respondent's Brief, at p. 32. But what Lyman actually stated was that when an employer ratifies the wrongful acts of a current employee, the employer is directly rather than vicariously liable. 701 So.2d at 27. The employer in Lyman, however, was held not liable for ratification of the employee's wrongful acts when the employer confronted the employee immediately upon learning of the alleged wrongdoing, interviewed witnesses, and asked for the employee's resignation within one month of first learning of the allegations. Id. Thus, Lyman is instructive on the issue of ratification because it demonstrates that timely and appropriate action on the employer's part upon learning of the wrongful acts will save the employer from a claim of ratification of the acts. Lyman does not hold, as Respondent ELCA claims, that there can be no ratification if the employer did not learn of the wrongful acts until after the last instance of abuse. See Id.

In addition, the ELCA argues that the only basis for applying the doctrine of ratification in the case at bar is evidence that the sexual abuse continued after the church Respondents learned of it, or evidence that the church Respondents failed to report the abuse to law enforcement. Respondent ELCA's Brief, at pp. 33-35. However, that is not

Appellants' claim, nor does it accurately reflect the law on ratification. Appellants claim the employer ratified Respondent Stene's acts of sexual abuse by affirmative conduct, such as allowing Stene to preside over Sunday worship services on two occasions after it learned of the allegations of sexual abuse, allowing a retirement party held by the church in Stene's honor to go forward after learning of the abuse allegations, defending the Stenes as "good people" when informing the congregation of Stene's resignation, and publishing details of this litigation in the church bulletin. See Appellants' Brief, at pp. 48 - 51. The only non-action that Appellants assert constituted ratification was the Synod's failure to investigate the allegations when it first learned of them in July of 2002, the church Respondents' failure to discipline or reprimand Stene until months after they learned of the abuse, and Respondents' failure to properly educate its pastors on sexual abuse by clergy and how to handle such allegations when they do arise. See Id. As a result, Respondent ELCA's arguments regarding failure to report the abuse to law enforcement are not relevant.

Respondent IALC argues that Appellants "invented" facts when they claimed that employees of Respondent Synod learned of the allegations in July of 2002 yet did nothing for four or five months. Respondent IALC's Brief, at pp. 18-19. However, a review of the record shows that the evidence fully supports this fact. Marcus Kunz, Synod minister at the time of the abuse, testified that he received a phone call from a pastor in Hutchinson, Minnesota, who told him that there were allegations of sexual abuse committed by a "retired pastor in the Fulda area". A.234(p.32). This conversation took place in July of 2002.

A.235(p. 34).

Fulda is a small town. There could not be many “retired pastors” living in the area. And all Mr. Kunz had to do to learn more was do what he waited until November to do - call the Hutchinson pastor back, ask where he received his information, and then call that person. See A.236. In November, 2002, Mr. Kunz called the pastor back, got the name of the person who reported the information, called that person, got the name of the original reporter and spoke with her, and in doing so learned the name of both the perpetrator and the victim, and made a report to the Murray County Sheriff’s Department. A.236 (pp. 38-40). Until then, however, neither Mr. Kunz nor anyone else from the Synod made any attempt to learn who the pastor was. There was no justification for waiting until November to even begin to make inquiries. In any event, the evidence clearly shows that the Synod had information in July of 2002 that would lead a reasonable person in the Synod’s position to make immediate inquiries. And the evidence that it was a retired pastor from Fulda should have given the Synod a pretty good idea of the probable identity of the alleged perpetrator.

Respondent Synod argues that Bishop Ranum never identified the Stenes as “good people”. Synod’s Brief at p. 24. However, Appellant L.B. testified that he did identify them as good people when Ranum announced to the congregation that Respondent Stene had resigned, and that Ranum said the congregation needed “to forgive and forget” and that the Stenes did not need to be kicked out of the church. A.136(p.282). As a result, whether or not Bishop Ranum made the remarks is a disputed issue of material fact.

Respondent Synod also inaccurately stated that as soon as the law enforcement investigation confirmed the allegations, “the Synod immediately confronted Stene, asked for and received Stene’s resignation, and asked that Stene no longer hold himself out as pastor.” Respondent Synod’s Brief, at p. 24. Ranum testified that in February of 2003, once the investigation had been completed and charges had been filed, he asked Stene not to do any pastoral work, but he did not ask for his resignation. He did not ask for his resignation until almost three months later - in early May of 2003. A.257(at p. 35). Furthermore, Bishop Ranum had known of the allegations since late November of 2002, and knew or should have known that Stene had admitted to the allegations. There was thus no justification for waiting until February of 2003 to ask Stene not to do pastoral work.

Both Respondent Synod and Respondent IALC argue that the conduct of their employees after learning of the abuse allegations cannot constitute ratification because Stene was not acting for their benefit when he committed the abuse. Respondent Synod’s Brief at p. 24, Respondent IALC’s Brief at p. 21-22. They rely on two very old cases, Kwiechen v. Holmes & Hollowell Co., 106 Minn. 148, 118 N.W. 668 (1908), and Fox v. Morse, 255 Minn. 318, 96 N.W.2d 637 (1959). Moreover, Fox contains no language requiring that the act of the employee be for the benefit of the employer in order for the doctrine of ratification to apply. Rather, the court stated that

“[r]atification of another’s unauthorized act occurs when a party, with full knowledge of all material facts, confirms, approves, or sanctions the other’s acts. Where an act is done without precedent authority, ratification creates the relationship of

principal and agent, and the principal is bound to the same extent as if the act had been done under prior authority.”

Fox, 96 N.W.2d at 641.

Finally, Respondents ignore Wirig, even though that is the most recent statement of the law on ratification in Minnesota, and even though it clearly applies to the facts in the case at bar.

**V. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER THE CHURCH RESPONDENTS NEGLIGENTLY RETAINED RESPONDENT STENE AND/OR NEGLIGENTLY SUPERVISED HIM BY FAILING TO EDUCATE STENE REGARDING SEXUAL ABUSE BY CLERGY, BY FAILING TO MONITOR ANY OF HIS ACTIVITIES, AND BY FAILING TO EDUCATE THEIR CONGREGATIONS ABOUT CLERGY SEXUAL ABUSE.**

Respondents argue that they cannot be held liable for negligent retention or supervision of Stene, first, because he was not their employee, second, because his acts occurred at his home and not in the course of providing religious training to C.B., and third, because his acts of abuse were not foreseeable. Brief of Respondent ELCA, at pp. 35-43; Brief of Respondent Synod, at pp. 19 - 23; Brief of Respondent IALC, at pp. 15-18. The arguments regarding Respondent Stene’s status as an employee of the Respondents is discussed elsewhere in this Reply Brief.

While it is true that Stene’s acts of sexual abuse occurred in his home, it also is true that Respondent Stene testified that, during his three decades of service as a minister, he did most of his work as a pastor at his house. A.176 (at p. 113) (emphasis supplied). In addition, Pastor Olson testified that approximately 80 percent of all of a pastor’s work is performed

out in the community, and that a pastor's entire life must be lived in accordance with the standards set forth for ministers by the ELCA's Constitution, Bylaws and Continuing Resolutions. See A.775-76.

Respondents argue that to impose a duty to supervise an employee 24 hours per day is "ridiculous" and "nonsense". But the Court of Appeals has recognized that some employees are on call 24 hours per day. See discussion, *supra*, at pp. 9-12. And here, the requirement that the employee live his or her entire life in accordance with the standards set forth in the ELCA Constitution has been imposed by the Respondents themselves. If Respondents feel it is ridiculous or nonsense to state they have a duty to supervise an employee who is on duty 24 hours per day, then the Respondents should not have imposed the requirement upon their ministers to be on duty 24 hours per day. The fact remains that they did impose such a requirement, and now they must abide by the duties that arise upon them as a result of imposing such requirements.

Respondents' third argument is that Respondent Stene's conduct was not foreseeable. In making this argument, Respondents cannot credibly argue that sexual abuse by clergy is not foreseeable. It certainly was foreseeable to the Respondents, who routinely conduct trainings and distribute materials on the subject to their pastors. Their failing in this regard was their failure to require such training and education of their pastors. Their failure to require such training allowed Respondent Stene to conduct his life as a minister not knowing that sexual touching of a child was a crime. A.160(at p. 52). It led Pastor Bakke to attempt

to keep the allegations quiet and to allow Respondent Stene to continue work as a pastor and to be around children whose parents were unaware of Respondent Stene's crime.

If it "defies common sense that the ELCA needed to train Stene that pastors should not have sex - or try to have sex - with children", (Respondent ELCA's Brief, at p. 37 n. 25) then it appears that Stene lacked common sense. See A.160(at p. 52). And apparently those in authority at both the national and Synod levels of the ELCA believe that it is necessary to train pastors that sexual contact with congregants - adults or children - is not acceptable and is prohibited, otherwise they would not publish materials and conduct trainings on the issue.

Respondents next argue that Respondent Stene's specific acts of sexual abuse were not foreseeable because they had no knowledge of prior similar misconduct on Stene's part. But if Respondents were not supervising Stene's activities, they could not have known because they did not make any effort to become knowledgeable about his activities. If Respondents can escape liability by claiming they did not know that Stene might commit acts of sexual abuse, which in turn was due to their failure to supervise, then such a rule of law would encourage other employers to simply look the other way, or not look at all, to uncover misbehavior. Such a rule of law would be contrary to this state's policy of protecting children from sexual abuse.

Finally, if Respondents had been properly supervising Respondent Stene, or even if they had made efforts to educate the congregation about the potential danger of clergy sexual abuse and what to look for, Appellant C.B.'s family would have known to look with

suspicion upon the Stene's continuous unsolicited invitations to have C.B. at their home without her parents, upon the Stene's lavishing of extravagant, inappropriate gifts upon C.B., and upon C.B.'s vehement opposition to visiting the Stenes near the time the abuse was disclosed.

Respondents did not ensure that their clergy or their congregations received the proper education and training on clergy sexual abuse, failed to exercise any supervision over Stene's activities, and now claim they could not have foreseen what happened. This is irresponsible, not Pastor Olson's criticism of Respondents' conduct.

**VI. THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT BAR COURT REVIEW OF CIVIL ACTIONS AGAINST RELIGIOUS INSTITUTIONS WHEN THE ACTION IS FOR INJURY TO A THIRD PARTY AND CAN BE ADJUDICATED BY APPLICATION OF NEUTRAL PRINCIPLES OF LAW.**

Respondent ELCA's final argument is that this Court is prohibited by the religion clauses in the First Amendment to the United States Constitution from adjudicating this claim. Respondent ELCA's argument reflects a misunderstanding of Establishment Clause analysis in cases involving a third party's allegations of harm inflicted by a member of a religious organization.

The parameters of the Establishment Clause of the First Amendment are well known. State action does not violate the Establishment Clause if such action (1) has a secular purpose; (2) has a primary effect which neither advances nor inhibits religion; and (3) does not foster excessive state entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602,

612-13 (1971). The first two prongs of this test are not even arguably implicated in this case. At issue here is application of the common law doctrine of negligence. This application has a secular purpose, and its primary effect neither advances nor inhibits religion. Rather, Appellant seeks only to apply the civil law to church employers in conformity with "neutral principles of law" as previously sanctioned by the United States Supreme Court.

In contrast, Appellants' case involves a single inquiry, under neutral principles of law, into whether the church negligently employed a single minister. There is no threat of or necessity for the court's on-going monitoring of the church's employment decisions. Thus, no excess administrative entanglement is at issue. Id.

Respondent ELCA cites Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995) in support of its claim that court review of the Appellants' causes of action against it would violate the Establishment Clause. However, Pritzlaff is readily distinguishable from the case at hand.

The harm in Pritzlaff was a priest's sexual conduct with an adult woman, which constituted a violation of the canon law vow of celibate chastity. In Appellants' case, the potential danger is a minister sexually abusing a child, a criminal violation of the secular law

In Appellants' case, the legal duty that Respondents allegedly breached arose solely out of the minister's foreseeable violation of the secular law. The secular duties imposed upon Respondents here, which prevents their employees from engaging in foreseeable criminal misconduct that injures the public, apply to all employers. As a result, the rationale

employed by the Court to bar the negligent employment claims in Pritzlaff does not apply to this case.

This court is not asked to "determine what makes one competent to serve as a Catholic priest." Respondents may adopt and employ any "competency standards" for ministers that they desire. But if a pastor molested a child-congregant in the scope of the pastor's employment, Respondents are liable for that secular harm under the civil law.

Respondent ELCA cites several United States Supreme Court cases in support of its argument that judicial review of this case would excessively entangle the government with religion, in violation of the Establishment Clause. See, e.g., Respondent's Brief at pp. 45-46. All of these cases, however, involve *intra-church* disputes between an employee and the religious institution-employer.

In such cases, based upon the Free Exercise Clause, the United States Supreme Court has developed a limited doctrine of judicial abstention which precludes civil courts from interfering in certain intra-church disputes. However, this abstention doctrine only bars judicial review of church decisions addressing purely ecclesiastical matters, in disputes between factions of the church that have agreed to be governed by church law. The Court has refused to extend the doctrine of judicial abstention to cases that may be resolved through "neutral principles of law." Jones v. Wolf, 443 U.S. 595, 604 (1979). Respondents here seek to expand this limited doctrine of judicial abstention to civil disputes involving religious conduct which results in secular harm, which are clearly governed by civil law. That

expansion is thoroughly unwarranted by, and indeed contrary to, the constitutional principles enunciated by the United States Supreme Court. The First Amendment does not grant churches immunity from liability for the secular harm resulting from their employment of a child molester in a supervisory role over children.

### CONCLUSION

For the reasons stated above, Appellants respectfully request that the Minnesota Court of Appeals reverse the judgment of the trial court, and remand this case for trial on the merits.

Respectfully Submitted,

JEFF ANDERSON & ASSOCIATES

Dated: 5-30-06



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**CERTIFICATE OF COMPLIANCE**

I hereby certify that Appellants' Reply Brief in Case No. A06-0295 complies with Minnesota Rules of Appellate Procedure 132.01, Subd. 3(a)(1) and that the brief contains 6962 words. The brief was prepared on Word Perfect 10.0.

Kathleen D'Amico Steffen

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF RAMSEY )

CASE NO.: A06-0295

Erin M. Dalluge, being first duly sworn, deposes and says that on May 30, 2006, she served the attached document(s):

Two copies of Appellants' Reply Brief

upon the following attorneys and Respondents by placing a true and correct copy thereof in an envelope addressed as follows:

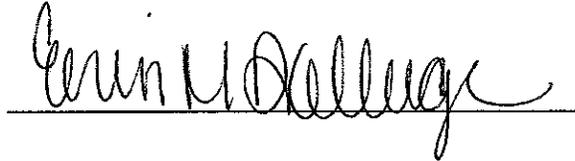
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(which is the last known addresses of said attorneys and Respondents) and depositing the same, with postage prepaid, in the United States Mail at St. Paul, Minnesota.



Subscribed and sworn to before me  
this 30 day of May, 2006.

  
Notary Public

