CASE NO. A06-0295

STATE OF MINNESOTA
IN THE COURT OF APPEALS

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

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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STATEMENT OF THE ISSUES

1. Did the trial court properly hold on this record that Defendant Evangelical Lutheran Church in America ("ELCA") was not perpetrator Oscar Stene's employer at the time of the abuse?

The district court held that the ELCA was not, at any time, Oscar Stene's employer and therefore could not be held vicariously liable for his acts of sexual abuse.

cases: Guhlke v. Roberts Truck Lines, 268 Minn. 141, 128 N.W.2d 324 (1964); Peterson v. Colonial Ins. of California, 493 N.W.2d 152 (Minn. Ct. App. 1992).

2. Did the trial court properly hold, in the alternative, that there was no nexus between perpetrator Oscar Stene's acts of sexual abuse and any employment context with any of the church defendants?

The district court held that there was no nexus between the abuse and any employment context with any of the church defendants, including the ELCA.

cases: P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996); Ehrens v. The Lutheran Church-Missouri Synod, 385 F.3d 232 (2d Cir. 2004); Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1983); Hentges v. Thomford, 569 N.W.2d 424 (Minn. Ct. App. 1997).

3. Did Respondent ELCA "ratify" Oscar Stene's acts of sexual abuse?

The district court did not address this issue directly, but implicit in its order granting summary judgment is the district court's conclusion that there was not, in fact, any ratification, and that there could not have been ratification because the ELCA was at no time Oscar Stene's employer.

cases: Anonymous v. Lyman Ward Military Academy, 701 So.2d 25 (Ala. Ct. App. 1997)

4. Did the trial court properly dismiss Appellants' negligence claim against the ELCA because the ELCA did not at any time employ Oscar Stene and because, in the alternative, Stene's sexual abuse of C.B. was not reasonably foreseeable?

The district court held that no negligence claim could be sustained against the ELCA because the ELCA was not Stene's employer, and in the alternative that Stene's sexual abuse of C.B. was not reasonably foreseeable.

cases: Yunker v. Honeywell, 496 N.W.2d 419 (Minn. Ct. App. 1993); M.L. v. Magnuson, 531 N.W.2d 849 (Minn. Ct. App.1995); Ehrens v. The Lutheran Church-Missouri Synod, 385 F.3d 232 (2d Cir. 2004).

5. Does the First Amendment to the U.S. Constitution and/or the religious freedom clause of the Minnesota Constitution bar civil court adjudication of Appellants' claims?

The district court did not need to reach this issue because it dismissed all of Plaintiffs' claims against the church defendants on non-constitutional grounds.

cases: L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997); Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606 (Minn. Ct. App.), review denied, cert. denied, 519 U.S. 870 (1996); Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App.), review denied, cert. denied, 516 U.S. 818 (1995).

STATEMENT OF THE CASE

Plaintiffs seek to recover monetary relief against Defendant Evangelical Lutheran Church in America ("ELCA") even though the undisputed facts show that the long-retired Lutheran pastor who committed the sexual abuse was not "employed" by the ELCA, knew the victim only as the daughter of family friends whom his wife tutored and he babysat, and that the ELCA had no notice of the abuse whatsoever until after the abuse happened and could not have "ratified" the misconduct. The trial court properly granted summary judgment to the ELCA, with a well-reasoned and thorough opinion. As the court below held, there was no employment relationship between the retired pastor and the ELCA, negating an essential element of each of Plaintiffs' claims against the ELCA. The trial court also held, in the alternative, that the abuse occurred outside any employment context, and that it was not foreseeable to the ELCA. The court properly dismissed Plaintiffs' claims for vicarious liability (no employment relationship, no nexus

between abuse and any employment context) and negligence (no employment relationship hence no duty to supervise, abuse not reasonably foreseeable).[1]

This is not a complicated case. With no employment relationship between the ELCA and the retired pastor, all of Plaintiffs' claims fail as a matter of law. Interestingly, Plaintiffs' "Statement of the Legal Issues" entirely ignores this simple point. See App. Br. 1-2.[2] The fact that the ELCA maintained a roster of ordained ministers available for call (employment) by local ELCA-affiliated congregations, and that the ELCA retained the authority to discipline pastors on that roster for professional misconduct, no more created an employment relationship with perpetrator Oscar Stene than the analogous power of the Minnesota Supreme Court to admit, maintain a roster, and discipline attorneys makes that Court the "employer" of every attorney practicing law in the State of Minnesota. See Tr. Ct. Order 7 n.5, 8, 13 (A. 850-51, 856). On this appeal, the Court need not decide anything further, although each of the alternative grounds for summary judgment held by the trial court provides an additional, independent basis for affirming dismissal.[3]

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[1] At oral argument before the trial court, Plaintiffs dismissed their claims for "breach of fiduciary duty, fiduciary fraud and duty to warn." Tr. Ct. Order., Dec. 7, 2005, 4-5 & n.3 (A. 847-848). Plaintiffs have not briefed these claims to this Court and they are no longer part of this case. See, e.g., Melina v. Chaplin, 327 N.W.2d 19, 20-21 (Minn. 1982).

[2] "App. Br. __" citations refer to Appellants'/Plaintiffs' opening brief.

[3] The trial court did not reach the ELCA's additional, alternative argument that Plaintiffs' claims are barred as excessively entangling church and governmental power under the First Amendment to the U.S. Constitution and the religious freedom clause of the Minnesota Constitution. See infra Part V.

STATEMENT OF THE FACTS

The undisputed material facts in the record before the trial court unequivocally show that the ELCA was not Oscar Stene's employer at any time relevant to the abuse; that there was no nexus between the abuse and any employment context; that the abuse was not reasonably foreseeable to the ELCA; and that because the ELCA did not have any knowledge of the abuse until after it occurred, the ELCA could not have "ratified" the misconduct.

Introduction to Facts

Plaintiffs are C.B., the victim of the sexual abuse, and L.B., her mother.[4] Oscar Stene is a retired pastor. In the decades that preceded the abuse, Oscar Stene and his wife, Pearl Stene, were close family friends of Plaintiffs. L.B. thought of the Stenes as her second parents, and the Stenes' looked to L.B. as a foster daughter. C.B. referred to Oscar and Pearl Stene as grandpa and grandma. There was a "close familial relationship between" the Stenes and Plaintiffs. See Tr. Ct. Order 4 (A. 847). In addition to the family relationship between the Stenes and Plaintiffs, Pearl Stene, a retired school teacher, often tutored C.B. in an effort to improve her grades. The Stenes' farm was also an attraction to C.B. because of the various animals – kittens, horses, and dogs. As a result of the family relationship, Pearl Stene's tutoring, and C.B.'s enjoyment of the animals at the Stenes' farm, C.B. visited the Stenes on numerous occasions, with those visits ranging in duration from a few hours to overnight. By contrast, C.B. was never in

[4] This memorandum will refer to the victim only as "C.B" and her mother only as "L.B." Other family members will be referred to by reference to their relation to C.B.

church when Oscar Stene was pastor, and Oscar Stene never provided her with any religious instruction, let alone conducted any religious teachings on C.B.'s visits to the Stenes' farm.

Despite the family and other secular circumstances that surrounded the sexual abuse, Plaintiffs' Complaint asserts causes of action not only against Oscar and Pearl Stene, but also against Immanuel American Lutheran Church (the local church where Oscar Stene had been pastor from 1966 to 1978, 11 years before C.B. was even born), the Southwestern Minnesota Synod of the Evangelical Lutheran Church in American ("Southwest Minnesota Synod") (the regional Synod of the Evangelical Lutheran Church), and the Evangelical Lutheran Church in America (the national Evangelical Lutheran organization).

A. C.B. Visited The Stenes' Farm Solely Because The Stenes Were Close Family Friends, Her Visits Had Nothing To Do With Religion.

L.B. knew the Stenes before C.B. and her brother were born. While Oscar Stene was the pastor at L.B.'s church for a time in the 1970s, L.B.'s relationship with the Stenes was much more that of a friend and family member than it was that of pastor and congregation-member. (A. 76, pp. 43-44) L.B.'s in-laws were close friends with the Stenes, and had been since the 1960s. (A. 69, 106-107, pp. 13, 164-165) L.B. went to dinners at the Stenes' house, both with and without her in-laws. (A. 73, 74, pp. 29, 34) In fact, before she was married, L.B. lived with the Stenes for four years in the late 1970s. (RA. 5, p. 18) L.B. thought of Oscar and Pearl Stene as her parents, and they thought of her as a foster daughter. (A. 81, 107, pp. 63-64, 166-167; RA. 5, p. 18; RA.

40, pp. 31-32) When Oscar Stene left Immanuel American Lutheran Church to serve as pastor in Bricelyn in 1978, however, the families did not see each other as much until Oscar Stene retired. (A. 70, pp. 18-19) In 1991, Oscar Stene retired and he and his wife returned to live at their farm in Fulda, Minnesota. (A. 153-154, pp. 24-25) Thereafter, L.B.'s social relationship with the Stenes resumed. (A. 70, 74, pp. 19, 33)

For as long as C.B. and her brother can remember, the Stenes have been close family friends.[5] (RA. 36, p. 16; RA. 71, pp. 7-8) In fact, C.B. and her brother called Oscar and Pearl Stene "grandpa and grandma." (A. 81, pp. 62-63; RA. 42, p. 39; RA. 71, p. 7)

C.B.'s family and the Stenes spent Christmases and birthdays together. (A. 74, 85, pp. 34, 77; RA. 36, p. 16; RA. 72, pp. 11-12; RA. 80, p. 15) They had family dinners together on many occasions. (A. 73, p. 29) The Stenes babysat for C.B. and her brother. (A. 76, pp. 42-43) To return the favor, C.B.'s family kept the Stenes' dogs when the Stenes were away for extended periods. (A. 82, p. 66) C.B. and her brother also went to the Stenes' farm to play with the various animals – kittens, horses and the dogs. (A. 78, 87, pp. 50, 88; RA. 72, p. 11; RA. 82, p. 22) During these visits, there was no religious study with Oscar Stene. (RA. 37, 42, 65, 67, pp. 17, 38, 129-130, 138; RA. 73, p. 14; RA. 82, p. 23)

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[5] Ironically, Appellants' Brief does not reference C.B.'s (the abuse victim's) testimony even once. By contrast, to fully and fairly convey the undisputed facts to this Court, the ELCA's Statement of the Facts refers extensively to C.B.'s testimony, as well as to her brother's, her father's, and Pearl Stene's testimony, which were also omitted from Appellants' Brief.

Pearl Stene is a retired teacher. (A. 184, p. 148) When C.B. was having difficulty with her school work, Pearl Stene offered to help C.B. to improve her grades and boost her interest in books. (A. 78, 83, 87, pp. 49-50, 69, 87; RA. 38, 42, pp. 21-22, 37-38) L.B. agreed, and C.B. went to the Stenes' farm on numerous occasions for Pearl Stene's tutoring. (Id.; RA. 73, p. 15) During these visits, C.B. would, of course, also play with the kittens and dogs, and ride the horses. (A. 78, 82, pp. 51, 67; RA. 38, 42, 67, pp. 22-23, 37, 138) C.B.'s visits to the Stenes' farm ranged in duration from a few hours to overnight. (A. 81, pp. 61-62; RA. 85, p. 34) As before when C.B. and her brother would visit the Stenes' farm, none of these visits involved any religious teaching or spiritual counseling. (RA. 37, 42, 65, 67, pp. 17, 38, 129-130, 138; RA. 82, 111, pp. 23, 137; RA. 31, pp. 122-124)

In fact, C.B. was never exposed to any religious teaching or spiritual counseling by Oscar Stene in any context. (RA. 37, 42, 65, 67, pp. 17, 38, 129-130, 138) He never served as her pastor. (RA. 37, p. 17) She was never part of his congregation. (Id.) As C.B. testified:

> Q. ... and do you ever remember being in the church when Oscar Stene was acting as the pastor?
>
> A. No, I never went to the church when he was there.
>
> . . .
>
> Q. Do you remember that Oscar was ever the pastor at the church when you went there?
>
> A. No.
>
> Q. Has Oscar ever taught you any religious--

A. No.

Q. --teachings?

A. No.

Q. Has he ever counseled you about religion and related matters in any way?

A. No.

(RA. 37, 65, pp. 17, 129-130) The trial court stated: "It is notable that C.B. apparently never attended any religious service conducted by Oscar Stene and knew the Stenes primarily as 'family friends.'" Tr. Ct. Order 9 (A. 852).

B. The Abuse

C.B. alleges that, on at least 2 occasions while she was at the Stenes' farm in Fulda, Minnesota, she was touched inappropriately by Oscar Stene. See Compl. ¶¶ 9, 10 (A. 3). Oscar Stene has admitted the conduct and served 8 months in jail. (A. 173, pp. 102-104) The first incident occurred some time in 1998 – more than 7 years after Oscar Stene retired and 20 years since he had been the pastor at Immanuel American Lutheran Church in Fulda. (RA. 38-39, pp. 24-25) At the time of the abuse, C.B. was in the Stenes' living room laying on the couch petting one of the Stenes' cats. (RA. 40, 45, pp. 29, 50) The second incident recalled by C.B. occurred in 2002. (RA. 42, p. 37) As she testified, C.B. "went out there just to spend time with Pearl" and "to ride horse and . . . watch the horse keeper trim the horses' toenails or the hooves." (RA. 43, p. 43) C.B., herself, initiated the visit by calling the Stenes' to go to the farm on that occasion. (Id., pp. 43-44) The first thing she did when she got there was work on her English by reading with Pearl. (Id., p. 44) Again, at the time of the second instance of abuse, C.B. was in

the Stenes' living room, this time laying on the floor petting Sandy, the Stenes' dog. (RA. 44, p. 47) After the second recalled incident, C.B. reported the abuse to her mother for the first time.[6] (RA. 48-49, pp. 63-65) On both occasions of abuse, C.B. was at the farm for tutoring by Pearl Stene, and to play with the animals. (A. 184, p. 148; A. 126, p. 244) On both occasions, C.B. was relaxing in the Stenes' living room and petting one of the Stenes' pets at the time of the abuse. (RA. 40, 44-45, pp. 29, 47, 50) On neither occasion did Oscar Stene conduct any religious teachings or spiritual counseling. (A. 185, p. 149; RA. 42, 67, pp. 38, 138; RA. 31, pp. 122-124) It is undisputed that the abuse did not occur at any church facilities.[7]

C. Oscar Stene Is A Retired Pastor

At the time Oscar Stene committed the abuse in Fulda, Minnesota, he had been retired for more than 7 years, and he had not been the pastor in Fulda for at least 20 years. (A. 150-151, 153-154, pp. 11-16, 24-25) Oscar Stene served as pastor at various congregations over the course of his 31 years of service. (Id.) Oscar Stene was the pastor at Immanuel American Lutheran Church in Fulda, Minnesota from 1966 until 1978 – 11 years before C.B. was even born. (A. 151-152, pp. 16-19) For the 13 years preceding his retirement, however, Oscar Stene had served as pastor at the South Blue Earth and North Blue Earth churches in Bricelyn, Minnesota – over 100 miles from

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[6] It is undisputed that C.B. has suffered no sexual abuse since she reported Oscar Stene's abuse to her mother on June 18, 2002. (A. 97, p. 127)

[7] As the trial court stated, "There is no factual dispute in this matter that the sexual assaults perpetrated by Oscar Stene occurred in his home while C.B. was there for tutoring by Pearl Stene." Tr. Ct. Order 10 (A. 853).

Fulda. (A. 150-151, pp. 11-13) When he retired in 1991 – more than 7 years before the first abuse even occurred – he and his wife moved to their farm in Fulda. (A. 151-152, pp. 16-19; RA. 4, p. 14)

D. Oscar Stene Was Never Em ployed By The ELCA

Oscar Stene was never employed by the ELCA. This is because pastors for individual congregations are not employees of the ELCA. See, generally, Kunz Dep. (A. 227-248); Ranum Dep. (A. 249-271); Bakke Dep. (A. 190-226); Hetlund Dep. (A. 272-287); ELCA's Resp. to Pl.'s Interrog. # 16, 22 (A. 341-343).[8]

E. The ELCA Had No Knowledge Of Any Prior Conduct By Oscar Stene Or Any Propensity Of Oscar Stene To Commit Such Acts

Oscar Stene's abuse of C.B. was a shock to everyone. Prior to the report of C.B.'s abuse, there had been no prior reports or allegations of sexual abuse regarding Oscar Stene. See ELCA's Resp. to Pl.'s Interrog. # 5 (A. 336); Synod's Resp. to Pl.'s Interrog. # 5 (A. 321-322); L.B. Dep. 220-221 (A. 120-121); Bakke Dep. 58 (A. 204); Hetlund Dep. 44-45 (A. 282-283). Oscar Stene had no criminal history regarding sexual abuse nor had he ever been accused of sexual abuse. (A. 185, pp. 149-150) Plaintiffs have offered no evidence that Oscar Stene was ever involved in any other acts of abuse or ever suspected of other acts of abuse. Plaintiff C.B.'s mother, L.B., who had lived with the Stenes for 4 years and spent many family occasions with the Stenes, never suspected that Oscar Stene had ever been involved in abuse. (A. 90, p. 100; see also RA. 73, pp. 15-16, 19; RA. 90, p. 55) Prior to learning about C.B.'s abuse, the ELCA had never received

[8] Additional undisputed facts showing that Stene was never employed by the ELCA are presented *infra* in the Argument, Part I.

any reports of abuse or suspicions of abuse related to Stene. See ELCA's Resp. to Pl.'s Interrog. # 5, 9, 11, 14 (A. 336-340); see also L.B. Dep. 15-17, 152, 189, 221 (A. 69-70, 103, 113, 121); C.B. Dep. 110 (RA. 60); C.B.'s father's Dep. 101 (RA. 102). Since C.B.'s abuse was reported, the ELCA has not learned of any other credible instances of abuse involving Oscar Stene. See ELCA's Resp. to Pl.'s Interrog. # 5, 9, 11, 14 (A. 336-340).

ARGUMENT

Introduction To Argument

Dismissal of Plaintiffs' claims against defendant ELCA should be affirmed because the ELCA cannot be held vicariously liable for Oscar Stene's actions, there was no nexus between the abuse and any employment context, the ELCA did not and could not have "ratified" Stene's conduct, the ELCA committed no intentional or negligent act causing Plaintiffs' harm, and civil court determination of Plaintiffs' tort claims are barred by the First Amendment and the Minnesota Constitution.

Standard Of Review

This Court reviews the grant of summary judgment by the trial court *de novo*. Christensen v. Milbank Ins. Co., 658 N.W.2d 580, 584 (Minn. 2003). Summary judgment should be affirmed as proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Minn. R. Civ. P. 56.03.

The substantive law will identify which facts are "material." A "material fact" is one that will affect the result or outcome of the case, depending on its resolution. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L.Ed.2d 202, 211, 106 S.Ct. 2505, 2510 (1986); Zappa v. Fahey, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976); Rathbun v. W.T. Grant Co., 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974). Factual disputes that are irrelevant or unnecessary will not be counted. Anderson, 477 U.S. at 248, 91 L.Ed.2d at 211, 106 S.Ct. at 2510; see also, generally, 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2d § 2725 at 89-95 (1983).

A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248, 91 L.Ed.2d at 211-12, 106 S.Ct. at 2510; see also, generally, Federal Practice and Procedure: Civil 2d § 2725 at 95-109.

The standard for granting summary judgment in Minnesota has developed to follow changes taking place in federal law. In Carlisle v. City of Minneapolis, 437 N.W.2d 712 (Minn.Ct.App.1989), the Minnesota Court of Appeals considered that:

> The United States Supreme Court has stated that the plain language of Rule 56 mandates the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Carlisle, 437 N.W.2d at 715 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L.Ed.2d 265, 273-74, 106 S.Ct. 2548, 2552-53 (1986)). If the moving party has sustained

its burden of proof and has negated an essential element of the nonmovant's case, the nonmoving party must present affirmative evidence to defeat the properly supported motion. Carlisle, 437 N.W.2d at 715; see also Lloyd v. In Home Health, Inc., 523 N.W.2d 2, 3 (Minn. Ct. App. 1994) ("Summary judgment on a claim is mandatory against a party who fails to establish an essential element of that claim, if that party has the burden of proof, because this failure renders all other facts immaterial").

The moving party has the burden of proving that there is no genuine issue of material fact. Vieths v. Thorp Finance Co., 305 Minn. 522, 524, 232 N.W.2d 776, 778 (Minn.1975). When the moving party makes out a prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988) (citing Celotex Corp.). When the moving party has met its threshold burden, a nonmoving party cannot successfully resist a motion for summary judgment by "simply show[ing] that there is some metaphysical doubt as to material facts." Carlisle, 437 N.W.2d at 715; see also Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L.Ed.2d 538, 552, 106 S.Ct. 1348, 1356 (1986) (cited with approval in Carlisle, 437 N.W.2d at 715).

Summary judgment is proper in Minnesota when the nonmoving party fails to provide the court with specific facts indicating that there is a genuine issue of material fact. In order to successfully oppose a motion for summary judgment, a party cannot rely upon mere general statements of fact but rather must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial. Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 855 (Minn.1986) (citing

Erickson v. General United Life Ins. Co., 256 N.W.2d 255, 258-59 (Minn.1977)); see also St. Louis County Attorney's Office v. Twenty-Four Thousand Six Hundred Forty-Three Dollars, 524 N.W.2d 542, 546 (Minn. Ct. App. 1994) (citing Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524, 530-31 (Minn. Ct. App. 1993)).

The dismissal of Plaintiffs' claims against defendant ELCA should be affirmed because the ELCA cannot be held vicariously liable for Oscar Stene's actions, there was no nexus between the abuse and any employment context, the ELCA committed no intentional or negligent act causing Plaintiffs' harm, the ELCA did not and could not have "ratified" Stene's abuse, and civil court determination of Plaintiffs' tort claims are barred by the First Amendment and the Minnesota Constitution. As to each cause of action against the ELCA, Counts VII (vicarious liability) and X (negligence), the ELCA has identified essential elements for which Plaintiffs have no proof. Because the ELCA has negated essential elements of Plaintiffs' causes of action, and Plaintiffs' response failed to overcome those negations, summary judgment should be affirmed.

I. THE ELCA WAS NOT OSCAR STENE'S EMPLOYER, NEGATING ANY BASIS FOR PLAINTIFFS' CLAIMS AGAINST THE ELCA.

The undisputed material facts clearly established that the ELCA was not Oscar Stene's employer. As the trial court held, "Because during the time of the alleged sexual abuse (1998-2002) no employment relationship existed between Stene and any of the other Defendants, none of the Defendants can be 'vicariously liable' for the misconduct of Oscar Stene." Tr. Ct. Order 6 (A. 859).

A. There Was No Employment Relationship At Any Time Between Oscar Stene And The ELCA.

In determining whether there is an employer-employee relationship, the courts have identified the following factors:

(1) The right to control the means and manner of performance;

(2) the mode of payment;

(3) the furnishing of material or tools;

(4) the control of the premises where the work is done; and

(5) the right of the employer to discharge.

In determining whether the status is one of employee or independent contractor, the most important factor considered in light of the nature of the work involved is the right of the employer to control the means and manner of performance. Guhlke v. Roberts Truck Lines, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964) (citations omitted), quoted in Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672, 676 (Minn.1977); accord Wangen v. City of Fountain, 255 N.W.2d 813, 815 (Minn.1977); Iverson v. Independent School District No. 547, 257 N.W.2d 572 (Minn.1977).

None of these five factors weighs toward finding that Oscar Stene was an employee of the ELCA. The ELCA had no right to control the means and manner of Oscar Stene's performance of his job duties. (A. 243, p. 67; A. 252, p. 13; A. 211-212, 214, pp. 85-91, 99-100; A. 280, 283, pp. 34, 47) The ELCA had no right to determine the mode (or amount or frequency or associated benefits) of Oscar Stene's payment by the congregation. (Id.) The ELCA furnished no materials or tools for Oscar Stene's job, nor controlled the premises where Oscar Stene's work was performed, and the ELCA could

not remove Oscar Stene from his position (even if he had not retired more than 7 years before the abuse occurred). (Id.)

The ELCA congregations are separately incorporated and highly autonomous. The ELCA congregations have complete discretion and authority to "call" – that is, offer employment to – any pastor on the ELCA clergy roster (which runs over 15,000).[9] (A. 243, p. 67; A. 211, 214, pp. 85-86, 99; A. 280, 283, pp. 34, 46-47) Only the congregation, however, has the authority to discharge its pastor. See Ranum Dep. 13-14 (A. 252); Bakke Dep. 99(A. 214); see also, e.g., Black v. Snyder, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991), review denied; Hougam v. Valley Memorial Homes, 574 N.W.2d 812, 820 (N.D. 1998) (Lutheran pastor's "letter of call" did not create employment relationship); Petrell v. Rakoczy, 2005 WL 1683600 (Mass. Super. Ct. 2005) (held no vicarious liability on the part of the diocese because there was no direct involvement in hiring).[10] In short, the ELCA does not have the authority to force a congregation to hire

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[9] Plaintiffs contend that the fact that the Synod conducted background checks on ministers at the request of congregations shows that the Synod and ELCA had a right to control the means and manner of Stene's job performance. See App. Br. 32. Conducting background checks is wholly unrelated to the five factors that determine whether or not someone is an employee. Moreover, the Synod's role was merely to administer background checks to assist congregations in their own hiring process; and nothing suggests that the ELCA itself has had any role in these (irrelevant here) background checks.

[10] Plaintiffs' suggest, without citation, that the Synod and/or ELCA could force an ordained minister to submit to disciplinary proceedings if the minister refused to resign from the clergy roster. See App. Br. 32. This is not true. Under the ELCA Constitution, By-Laws and Continuing Resolutions, only certain groups and individuals (not the ELCA itself) may commence disciplinary proceedings against a person on the clergy roster, and the ELCA then administers the disciplinary process under the ecclesiastical rules. (A. 688, § 20.21.03) This process is similar to the power of the Court to administer disciplinary proceedings against a licensed attorney, Minn. R. Prof'l Conduct R. 8.5, or

or fire any pastor, nor to pay a pastor nor control the means and manner of a pastor's job performance. The ELCA was not the employer of Oscar Stene.

B. Oscar Stene Was Long Retired And His Status On The ELCA's Clergy "Roster" Did Not Make Him An Employee Of The ELCA At The Time Of The Abuse.

Plaintiffs acknowledge that Oscar Stene was retired at the time of the abuse and had in fact been retired for more than seven years before the first instance of abuse occurred. See App. Br. 4, 23-25. Plaintiffs also do not contest that under Minnesota's five factor employment test, Oscar Stene was never an employee of the ELCA. Instead, based entirely on the Affidavit supplied by former pastor Jeremiah Olson, plaintiffs conclusorily assert that Oscar Stene "in his retired status was still an employee" of the ELCA and under its control because his name appeared on the ELCA's clergy roster. See App. Br. 24-25; Olson Aff. 11 (A. 777). This argument is nonsense. Listing a pastor's name on the ELCA clergy roster no more makes the ELCA that pastor's employer than

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the power of various licensing agencies to discipline professionals who practice in their various fields. This power does not create any employment relationship. As the trial court stated in the present case, "This . . . is no different than a licensing board or entity 'suspending' the license of an employee who, for example, fails to obtain his or her continuing education credits required by the profession. While 'suspending' or otherwise revoking the license of an employee may result in that employee's dismissal by his or her employer, the board or entity invoking the suspension does not, in the Court's view, become the employer because of the suspension." Tr. Ct. Order 8 (A. 851). Moreover, reviewing the entire record submitted below, the trial court held that, "Plaintiffs have failed to present any evidence indicating that a synod bishop or the national church organization has any authority to 'dismiss' or 'fire' a local congregation's pastor. Indeed, the contrary is true. It is the local congregation that 'provides the workplace', has the authority to 'hire or fire', and otherwise specifies the terms of the employment relationship." Id. (citations omitted); Cf. Eller v. Diocese of St. Cloud, 2006 WL 163526, (Minn. Ct. App. Jan. 24, 2006) (unpublished) (dismissing claim against Roman Catholic diocese, insufficient evidence that diocese was priest's employer).

the Minnesota Supreme Court is the employer of every Minnesota attorney simply because it keeps a list of all members of the State bar, and can institute disciplinary proceedings against members of the bar.[11]

Instead, as plaintiffs' expert, Jeremiah Olson is intimately aware, it is the congregation that hires and can vote to terminate employment relations with its pastors.[12] Pastor Olson himself was discharged by a majority vote of his former congregation, Luther Memorial Church, and then sued that congregation for breach of contract and the local Synod for interference with contract. See ELCA's Memo. Mot. Strike 5 (RA. 135). Tellingly, although he was at the time an ELCA-rostered pastor, in that case, plaintiffs' expert made no allegation that he had any employment relationship with the ELCA. Id; see also, generally, Olson v. Luther Memorial Church, 1996 WL 70102 (Minn. Ct. App. 1996). This is because in the ELCA only a congregation has the authority to discharge its pastor. See Black, 471 N.W.2d at 717, 720 (ELCA pastor was employed by congregation

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[11] As noted by the trial court: "The Court can think of several examples of where a potential employer is 'limited' in whom it may employ, depending upon the qualifications of the candidates. A state or national organization publishing a 'qualified' candidate roster does not become an employer simply because it publishes the list of qualified potential employees. For example, a municipality may only employ people as police officers who are licensed and who meet certain qualifications. Cf. Minn. Stat. 626.01 *et seq.* Law firms may only send to court attorneys 'licensed' by the Minnesota Supreme Court. Cf. Minn. Stat. 481.01 *et seq.* School districts may only employ, as classroom teachers, people who have 'teaching certificates' issued by the Minnesota Department of Education. Cf. Minn. Stat. 122A.06 *et seq.*" Tr. Ct. Order 7 n.5 (A. 850). The trial court concluded that, as to the Synod and ELCA, "publication of an 'eligibility roster' does not render either the synod or national church organization the employer of a congregation's minister, thus subjecting them to 'vicarious liability.'" Id.

[12] See, generally, Memorandum of Defendant ELCA in Support of Motion to Strike Affidavit of Jeremiah Olson ("ELCA's Memo. Mot. Strike __") at 5 (RA. 135). The trial court "carefully considered the affidavit of Jeremiah Olson" before determining to grant summary judgment. See Tr. Ct. Order 6 n.4 (A. 849).

and fired by congregation: "The congregational vote was conducted according to church procedure established in its constitution."). Thus, contrary to Olson's current claims, his own and other cases demonstrate that it is the congregation, not the ELCA, that hires and fires pastors. In short, the ELCA does not have the authority to force a congregation to hire or fire any pastor, nor to pay a pastor nor control the means and manner of a pastor's job performance. The ELCA was never the employer of Oscar Stene.

There is no basis on which to hold the ELCA vicariously liable [Count VII] for Plaintiffs' injuries. Plaintiffs allege that Oscar Stene was employed by the ELCA, but the undisputed facts show otherwise. Oscar Stene retired in 1991, many years prior to the alleged abuse, and was never an employee of the ELCA. Prior to his retirement, Oscar Stene was an employee of congregations in Bricelyn, Minnesota, over 100 miles from his Fulda, Minnesota farm where the abuse occurred. Since his retirement from Bricelyn in 1991, however, Oscar Stene has not been employed. Where no employment relationship exists between the alleged tortfeasor and a defendant, summary judgment may be granted dismissing all claims of vicarious liability against that defendant. See Peterson v. Colonial Ins. of California, 493 N.W.2d 152, 155 (Minn. Ct. App. 1992). Because no employment relationship existed between the ELCA and Oscar Stene, dismissal of Plaintiffs claims based on vicarious liability or *respondeat superior* against defendant ELCA should be affirmed.

II. THERE IS NO NEXUS BETWEEN OSCAR STENE'S ABUSE AND ANY EMPLOYMENT CONTEXT.

Even if Oscar Stene were considered to be an employee of the ELCA (which the ELCA denies) under Minnesota law, employment does not itself equate to liability. Plaintiffs have failed to demonstrate the other factors necessary to impose liability on an employer based on an employee's conduct. For example, to recover against the ELCA under vicarious liability, plaintiffs must show that Oscar Stene was an employee of the ELCA, but the inquiry does not end there. Plaintiffs must also show that Oscar Stene's abuse of C.B. was (1) related to his duties as an employee and (2) occurred within work related limits of time and place. P.L. v. Aubert, 545 N.W.2d 666, 667 (Minn. 1996) (quoting Lange v. National Biscuit Company, 211 N.W.2d 783, 786 (Minn. 1973)). Plaintiffs have failed to satisfy either of these required elements.

First, as noted *supra* in § D of the Statement of Facts and in Part I of the Argument, Plaintiffs' cause of action for vicarious liability must fail because Oscar Stene was not, and never has been, an employee of the ELCA. In addition, Plaintiffs' vicarious liability claim must also fail because the alleged abuse did not occur at a work related time or place. Instead, it occurred: (1) many years after Oscar Stene retired, (2) at the Stenes' farm, not at any church facilities, and (3) during Oscar Stene's leisure time. Moreover, the alleged abuse occurred outside of Oscar Stene's duties and was not related to his religious work: (1) obviously, sexual misconduct is not within the scope of a pastor's employment; (2) C.B. was at the Stenes' farm for secular, not religious purposes, as she considered the Stenes to be "grandparents", the Stenes often babysat, Pearl Stene

(a retired substitute teacher) tutored C.B., and C.B. enjoyed visiting the animals at the Stenes' farm; and (3) no religious teachings took place. Because the undisputed material facts establish that Oscar Stene was unemployed at the time of the abuse, was never employed by the ELCA, and, in any event, the alleged abuse was not within the scope of his employment and occurred outside of the time and place of his work, there is no basis on which to hold the ELCA liable for Plaintiffs' injuries, and dismissal of Plaintiffs' vicarious liability claim against the ELCA should be affirmed.

A. Stene's Relationship With C.B. Was Not Part Of Any Of His Religious Duties.

Realizing that all of Plaintiffs' claims against the ELCA rely on there being a religious context for the abuse, Plaintiffs desperately attempt to recast the families' relationship with the Stenes as one of clergy-parishioner, not that of family friend. See App. Br. 4-8. But this contention is flatly contradicted by the undisputed testimony and Plaintiffs' own briefing.

At best, Plaintiffs highlight facts that do nothing more than suggest that at some level, the origin of the family relationship with Oscar Stene may be in dispute. But Plaintiffs cannot contest that the relationship between the Stenes and C.B.'s family at the time of the abuse was that of family friends. See supra § A of the Statement of Facts. After Oscar Stene retired in 1991 and moved back to Fulda, the Stenes frequently socialized with C.B.'s parents and grandparents at restaurants and at each others' homes. (A. 76, 126, pp. 34-36, 243; RA. 80, 86, pp. 14-15, 38-39) They also spent parts of holidays together. (Id.) And the families also did favors for each other. (A. 76, 82, pp.

42, 66) The Stenes would babysit C.B. and her brother (A. 76, pp. 42-43); Pearl Stene provided C.B. with educational tutoring; the Stenes encouraged C.B. to come to their farm to play with the animals. (A. 79, p. 56) C.B.'s parents in turn watched the Stenes' dog when the Stenes left town. (A. 82, p. 66) Indeed, plaintiff's own briefing acknowledges that the families were still friends before the abuse came to light by contending that "[a]s time went on [the] relationship with the Stene's became more and more tense, and less and less a friendship." Pl.'s Summ. J. Resp. 7 (RA. 145) (emphasis added) (citing L.B. Dep. 99 (A. 90)).[13]

Plaintiffs do not attempt to argue that Oscar Stene's relationship with C.B. was that of a pastor. It never was. Moreover, plaintiffs have pointed to no aspect of Oscar Stene's relationship with C.B. in which he performed any religious function. The only activity plaintiffs can point to where Oscar Stene may have addressed a religious topic in the presence of C.B. is when the families celebrated Christmas together and Oscar Stene read a biblical passage regarding the birth of Jesus. See App. Br. 4; L.B. Dep. 38 (A. 75). Rather than suggest a religious relationship, Plaintiffs' reliance on the families' shared celebration of Christmas as the only example of any religious interaction between C.B. and Oscar Stene itself demonstrates the opposite. This celebration was at the Stenes' farm, not a church, and as such it shows that the families as friends celebrated Christmas

[13]Appellants' Brief has an identical sentence, except that "and less and less a friendship" has been omitted. See App. Br. 11. Curiously, the citation remains; L.B. was asked "...as time went on, your friendship with the Stenes...became more and more tense and less and less a friendship...," and she responded "Correct." (A. 90, p. 99) Plaintiffs made that clear to the trial court, but attempt to conceal it from this Court.

together, nothing more. It certainly cannot convert a family friendship into a clergy-parishioner relationship. [14]

Absent such a direct pastoral relationship, Plaintiffs attempt to impute a pastor-congregant relationship between Oscar Stene and C.B. by mischaracterizing L.B.'s relationship with Stene.[15] Plaintiffs attempt to extend this argument further by claiming that the "sole reason they entrusted their young daughter" to Oscar Stene was because he was "an ordained minister with the ELCA." App. Br. 38; see also App. Br. 8. But it's just an argument, with no basis in fact or legal significance. The real reason C.B. went to the Stene's was for educational tutoring; she also went to play with the animals. See supra § A of the Statement of Facts. In addition, the same effort to give a religious flavor to a secular arrangement was expressly rejected in Doe v. Newbury Bible Church, 2005 WL 1862118 (D. Vt. 2005). While the abuser in Newbury Bible Church had been the victim's pastor and had engaged in at least one instance of abuse on church property, the Court granted summary judgment in part because the family's "personal relationship with [the abuser] gave him the opportunity to molest [plaintiff]." As the Court noted in full:

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[14] The fact that L.B. trusted Oscar Stene does not mean that Oscar Stene was her daughter's pastor. Had C.B.'s mother entrusted her daughter for babysitting to a doctor because he was a doctor, that would not make that doctor C.B.'s doctor. The doctor, like the Stenes, would simply remain C.B.'s babysitter. It is the duties and functions of a babysitter and tutor that the Stenes were performing, nothing more.

[15] Appellants' opening brief makes no reference to the fact that, before she was married, L.B. lived with the Stenes for four years in the late 1970s. (RA. 5, p. 18) Plaintiffs' Response also omits any reference to L.B.'s testimony that she thought of Oscar and Pearl Stene as her parents, or C.B.'s testimony regarding her mother's relationship with the Stenes. (A. 81, 107, pp. 63-64, 166-167; RA. 40, pp. 31-32) Nor is there any reference to the fact that that feeling was reciprocated by the Stenes. (RA. 5, p. 18)

> Although [the abuser] had some contact with [plaintiff] because of his position with the church, he also had contact because of his friendship with [plaintiff's] father and stepmother. Only one of the incidents took place in [the abuser's] office at the church; the other incidents took place in his home and car. [Plaintiff] was present in the home and car because his parents had asked that [the abuser] babysit him or drive him home from activities. Even if [plaintiff's] parents were more inclined to begin a friendship with [the abuser] because of his position as pastor, it was their personal relationship with him that gave him the opportunity to molest [plaintiff].

Id. at *4 (emphasis added).

Here too, far from supporting plaintiffs' position, the fact that C.B.'s parents asked the Stenes to babysit their children simply underscores the secular nature of Oscar Stene's relationship with C.B.. Babysitting is not any part of the function of the clergy; and babysitting, not religion, provided Oscar Stene with the opportunity to abuse C.B.. Moreover, the Stenes were not the only couple to babysit C.B.. There were three other couples – C.B.'s paternal grandparents and two other couples who were also friends of the family. (A. 76, pp. 41-43) The only common factor to all the babysitters utilized was that they were either family or friends of the family. (Id.) Regardless of how C.B.'s mother met the Stenes, the record is clear that by the time C.B. was visiting the Stenes' farm, they were all such good friends that C.B. called the Stenes grandma and grandpa. (A. 81, pp. 62-63; RA. 71, p. 7; RA. 42, p. 39) Indeed, for as long as C.B. and her brother could remember, the Stenes have been close family friends. (RA. 36, p. 16; RA. 71, pp. 7-8)

By contrast, C.B. was never exposed to any religious teaching or spiritual counseling by Oscar Stene in any context. (RA. 37, 42, 65, 67, pp. 17, 38, 129-130, 138)

He never served as her pastor. (RA. 37, p. 17) She was never part of his congregation. (Id.) And Oscar Stene never provided C.B. with any religious counseling, training or education of any sort. (RA. 37, 65, pp. 17, 129-130)

B. Stene's Abuse Of C.B. Was Not Linked To Work-Related Limits Of Time And Place.

Even if one were to assume that Oscar Stene was an ELCA employee at the time of the abuse (which the ELCA denies), no one could credibly claim that this abuse was related to his duties as a retired pastor or that the abuse occurred within work related limits of time and place, because it occurred (1) more than seven years after Oscar Stene retired, (2) exclusively at the Stenes' farm, never at any church facilities, (3) during Oscar Stene's leisure time, (4) while C.B. was at the Stenes' farm for non-religious activities including educational tutoring by a close family friend she referred to as "grandma" and to visit the animals at the Stenes' farm, (5) when no religious teachings ever took place, and (6) by a person she never considered her pastor but only as a family friend.

It is undisputed that on the occasions when C.B. was abused, the abuse did not occur on church property or in a religious setting. Both instances of abuse that C.B. recalled occurred at the Stenes' farm. (RA. 65, p. 129) On both occasions, C.B. was at the farm for tutoring by Pearl Stene, and to play with the animals. (A. 184, p. 148; A. 126, p. 244) C.B., herself, initiated the second visit by calling the Stenes' to go to the farm on that occasion. (RA. 43, pp. 43-44) On both occasions, C.B. was relaxing in the Stenes' living room and petting one of the Stenes' pets at the time of the abuse. (RA. 40,

44-45, pp. 29, 47, 50) On neither occasion did Oscar Stene conduct any religious teachings or spiritual counseling. (A. 185, p. 149; RA. 42, 67, pp. 38, 138; RA. 31, pp. 122-124) For just these reasons, in a similar case, involving abuse committed by a retired pastor for the Lutheran Church – Missouri Synod, the Second Circuit granted summary judgment in part because the abuse, which did not take place on church property, occurred outside the employment context. See Ehrens v. The Lutheran Church-Missouri Synod, 385 F.3d 232, 236 (2d Cir. 2004).

Recognizing that Oscar Stene's conduct does not satisfy these additional elements for the imposition of vicarious liability, Plaintiffs contend (1) that ELCA pastors "do not have set limits of time and place with respect to their employment" and (2) that that issues of vicarious liability are ultimately questions of fact for the jury. App. Br. 37, 44. Both assertions are incorrect.

First, one need look no further than plaintiffs' own brief to discover that retired ministers in the ELCA are in fact extremely limited in what they can do in a congregation they do not serve: "a retired minister may not exercise ministerial functions in a congregation they do not serve unless invited to do so by the pastor." App. Br. 24; Olson Aff. 10 (A. 776). Plaintiffs have provided no evidence that Oscar Stene was "invited" by Pastor Alan Bakke to provide C.B. with any religious instruction or counseling, and there is no evidence that he ever provided C.B. with any religious instruction or counseling of any sort.

Equally unavailing is Minnesota law. Plaintiffs suggest that Oscar Stene's conduct was within "work related limits of time and place" by noting that in Marston, the

Minnesota Supreme Court found a psychologist's sexual relations with a patient at his offices "shortly after regular therapy sessions" satisfied this element. App. Br. 35 (citing Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1983)). Here, however, the abuse was not on church property and did not occur "shortly after" any religious activity by Stene.[16]

Second, under Minnesota law, the "scope of employment" is not always a question of fact for the jury. Hentges v. Thomford, 569 N.W.2d 424, 427 (Minn. Ct. App. 1997). In Hentges, the Minnesota Court of Appeals reversed a jury verdict imposing vicarious liability on the employer of a Lutheran pastor, notably his congregation, for the accidental shooting death of one of Pastor Thomford's hunting companions. The Court of Appeals held that "when the evidence in the record is conclusive on all the necessary elements or there is an absence of evidence to support a necessary element, no fact issue is presented for the jury and the scope of employment is determined as a mater of law." Hentges, 569 N.W.2d at 427 (emphasis added) (citing Marston). The court went on to hold that in order to demonstrate that an employee's acts occurred within the scope of

[16] Plaintiffs' citation to John Alfred Doe #1 v. Northern Texas/Northern Louisiana Synod, Cause No. 02-0157 (Harrison Cty., Tex. 2002) is not on point. See App. Br. 36. In John Alfred Doe, the jury found that the Synod was liable for the Synod's own employees' negligence, not that the Synod was vicariously liable, or liable under respondeat superior, for the perpetrator's actions. Both plaintiffs and defendants stipulated that two individuals were Synod employees, a former Bishop and former Bishop's assistant who (unlike pastors serving congregations) were in fact employed by the Synod. Id. at 1. This is completely different from the issue presently before this Court, where Plaintiffs contend that the perpetrator (not Synod staff) was an employee of the Synod and ELCA. In the current litigation, the undisputed material facts clearly show that Oscar Stene was never an employee of either the ELCA or the Synod, and none of the defendants has ever stipulated that he was.

employment, "it must be shown that the conduct was, to some degree, in furtherance of the interests of his employer."[17] Hentges states that this factor, that the conduct was in furtherance of the employer's interest, is "a central question" that "must be satisfied" as a matter of law in order for the court to submit the "scope of employment" to a jury. Id.

Plaintiffs' response here, however, is totally devoid of any effort to explain how they contend Oscar Stene's conduct in relation to C.B. was in furtherance of the interests of his employer. This is because, as was detailed above, the undisputed facts establish that C.B.'s visits to the Stenes' Farm had nothing to do with furthering any religious interests whatsoever.[18] As the Hentges Court expansively explained,

> The justification for holding an employer liable for the torts of employees is that the employer can and should consider the liability as part of the full endeavor and a cost of doing business. See Lange, 297 Minn. at 403, 211 N.W.2d at 785. But the employer's responsibility for the overall endeavor

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[17] Appellants' opening brief spends a great deal of time arguing that a pastor is essentially a 24-hour employee, always working, making the congregation (and Synod and ELCA) absolutely liable for anything any person who has been ordained ever does for the rest of their life. This is nonsense, as explained in the text above. Plaintiffs also argue at length that sexual abuse is foreseeable as to every ordained Lutheran pastor simply from the fact of ordination. This is also nonsense, and would make the congregation (and Synod and ELCA) absolute guarantors of ordained ministers' conduct forever. See infra Part IV of the Argument. On the issue of vicarious liability under Minnesota law, Plaintiffs' (baseless) arguments only address what Hentges lumped together as the "other factors" in determining the scope of an employee's conduct in serving the interests of his or her employer. They are entirely unsupported, baseless speculation, and most importantly wholly irrelevant here.

[18] Plaintiffs may attempt to confuse this issue by arguing that Oscar Stene's conduct was in furtherance of Minister/Congregant relations, but Hentges derails that attempt. In Hentges, the undisputed facts clearly demonstrated that the pastor's conduct – dear hunting with parishioners – "did not have the planned purpose of furthering pastoral-parishioner relationships. Id. at 429. Likewise, C.B.'s visits to the Stenes' farm had absolutely nothing to do with such relationships – her visits were for the Stenes to babysit her, to play with animals, and to receive tutoring and help with her secular reading from Pearl Stene, a substitute teacher.

> is not carried "to the point where an employer is absolutely liable for every tortious act of his employees." Laurie, 248 Minn. at 4, 78 N.W.2d at 437. When the connection between the activity and the employer's interest is as marginal as established on these facts, the rationale for the doctrine does not support the extension of the employer's liability; the doctrine of vicarious liability does not transform an employer into a comprehensive insurer. See Id.

569 N.W.2d at 429.

Recognizing that no notion of work-related limits of time and space would encompass the Stenes' farm, after hours (indeed, more than 7 years after Oscar Stene's retirement), where it is undisputed that no work-related activities ever occurred involving C.B., Appellants attempt to apply what has been called a "time-lag" theory, relying on an obscure case out of Oregon, Fearing v. Bucher, 328 Or. 367, 977 P.2d 1163 (1999).[19] Marston provides the time-lag test in Minnesota. Recognizing that Marston does not save their case, Appellants turn to Oregon and the Fearing case.

Fearing focused on whether a Roman Catholic priest's abuse of minors who were part of his church's youth ministry, during the time the priest was working at the parish, could be considered motivated by a purpose to serve the employer and acts of the kind he was hired to perform. The Oregon court held that the priest's time spent with the victim as his youth pastor could be considered, at least partially, to serve the employer's interest and the kind of act he was hired to perform. The priest was spending time with his victim as youth pastor on each and every occasion of abuse. Fearing, 977 P.2d at 1166-67; 936 P.2d 1023, 1024.

[19] As noted below, this is not the Minnesota test. Indeed, Fearing has never been relied upon, nor even cited, by any court outside of Oregon. It is cited in one dissent in a South Dakota case, and has never been followed outside of Oregon.

That is obviously not the case here. Oscar Stene had no pastoral relationship with C.B. at any time;[20] the abuse occurred long after Stene had retired, not during his time as a parish pastor; none of his acts of babysitting, nor his wife's tutoring, nor any other actions of Oscar Stene with C.B. could be considered motivated by a desire to serve Oscar Stene's (former) employer.

Appellants, however, not only mistakenly try to apply Fearing here, but try to extend Fearing far beyond its actual holding. Appellants seem to argue that, under Fearing, if the abuser first becomes acquainted with the eventual victim's family through employment, then any later abuse falls within the work-related limits of time and space regardless of where, when or during what activities the abuse occurred. See App. Br. 40-44. This is appellants' "time lag" theory. The Supreme Court of Oregon, however, says that is not what Fearing held. In Minnis v. Oregon Mut. Ins. Co., 48 P.3d 137, 144-45 (Or. 2002), that Court clarified Fearing. The Court noted that Fearing presupposed that the abuse occurred within the work-related limits of time and place, and the only issues were whether the priest was motivated at least partially to serve the employer and it was the kind of act he was hired to perform. Appellants here fail to note that their "time lag" theory is not even an issue in Fearing where the abuse took place within work-related

[20] Appellants allege only that because he was a pastor, they trusted C.B. with Oscar Stene. They do not allege that while she was with him there were religious activities or he was performing any work-related duties.

limits of time and space.[21] Minnis, 48 P.3d at 144. Accordingly, Fearing adds nothing to Appellants' time-lag theory, even if Oregon law were applicable.[22]

In sum, the trial court wisely rejected Plaintiffs' contention that Lutheran ministers are 24/7 employees, on duty continually and, if retired, perpetually.

> Plaintiffs claim that because Oscar Stene had a continuing 'obligation' to conduct himself in accordance with the precepts and moral code of the Lutheran faith, his 'violation' of those moral and ethical duties gives rise to vicarious liability on the part of the local church, the synod and the national organization. [¶] In this regard Stene's misconduct may have, after the fact, provided grounds for the synod or national church organization to terminate his status as a 'credentialed' or 'rostered' minister of the [ELCA] or [Synod]. Stene's 'removal from the clergy roster' by the synod or national church organization under their 'ecclesiastical law' does not have the retroactive effect of making Stene an employee of either organization.

Tr. Ct. Order 12-13 (855-856). Indeed, as the trial court continued,

> Disbarment of a licensed attorney by the Minnesota Supreme Court does not make the disbarred attorney an employee of the supreme Court. Pete Rose has never been considered an employee of the Commissioner of Baseball because the latter 'banned him for life' from major league baseball. 'Removal' from the clergy roster, in the Court's view, renders the

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[21] Minnis refused to allow a time-lag theory to save a claim where "according to [Plaintiff's] allegations, [Plaintiff's] bodily injury was caused by [Assailant's] actions at his apartment, not by [Assailant's] actions at the workplace." Id. at 143.

[22] The earlier case of Chesterman v. Barmon, 753 P.2d 404 (Or. 1988), allowed a time-lag theory to save the claim. The case involved unique facts, where the company president was also a company employee, and he ingested a drug one night to give him more energy to work, thinking it was "chocolate mescaline" but it was actually LSD. While under the influence, he broke into a house and sexually assaulted a woman. The court stated that, under the somewhat unusual facts of Barmon's dual relationship to the corporation, a jury might find that Barmon was authorized by the corporation's management to take the drug. (chocolate mescaline). Barmon was both president and employee of the corporation....A jury might find that Barmon, in his role as president, had authority to take steps enabling his continued work on the project for the corporation, even to the extent of ingesting a drug.

Id. at 406. Still, the Oregon court required an act within work-related limits of time and place, and a causal connection between that act and the injury. Id.

'defrocked' minister unavailable or ineligible for employment by a local congregation; it does not make him an employee of the synod or national church organization.

Id. at 13 (A. 856).

III. OSCAR STENE'S ABUSE WAS NOT AND COULD NOT HAVE BEEN RATIFIED BY THE ELCA.

Plaintiffs round out their attempt to overcome the undisputed facts defeating any finding of vicarious liability by arguing ratification. See App. Br. 48-51. Plaintiffs reliance on Anonymous v. Lyman Ward Military Academy, 701 So.2d 25 (Ala. Ct. App. 1997), for this proposition is misplaced, as Lyman Ward Military Academy does not support the broad ratification argument plaintiffs propound. Lyman Ward Military Academy merely holds that a school is not liable under the doctrine of respondeat superior for actions by a teacher that were personal and not for the benefit of the school (i.e., outside of scope of employment), and the school "did not authorize or ratify the [teacher's] alleged wrongful acts since it did not have any knowledge of any wrongful acts until" after the last instance of abuse. Plaintiffs erroneously argue that this is support for ratification, without reference to the undisputed fact that the ELCA knew nothing of the abuse until after it had ceased. Thus, like the school in Lyman Ward Military Academy, the ELCA is not liable. Likewise, plaintiffs cite Saville v. Houston County Healthcare Authority, 852 F. Supp. 1512 (M.D. Ala. 1994), but they misapply it to the facts at hand. This is not a case where abuse was allowed to continue after the abuse came to light. Instead, it is undisputed that C.B. suffered no sexual abuse after she

reported Oscar Stene's abuse to her mother on June 18, 2002. It is also undisputed that the ELCA knew nothing of Oscar Stene's abuse of C.B. until after that date.

Plaintiffs' claims of ratification are equally unsupported by the undisputed facts. Plaintiffs make much of their assertion that, once C.B. reported to her mother that she had been abused, the family immediately reported it to Pastor Alan Bakke and that he urged them not to report the abuse to law enforcement. See App. Br. 4, 11-14. This is both a misstatement of the record and irrelevant. C.B.'s parents did not tell Pastor Bakke of the abuse until three (3) days after C.B. reported the abuse to them. (A. 92, pp. 107-108) Before reaching Bakke, however, C.B.'s parents had told two other couples with whom they are friendly, their son and C.B.'s paternal grandparents. All of seven of these persons were asked by C.B.'s mother to keep the information about the abuse confidential, before C.B.'s parents ever even talked to Pastor Bakke. (Id.) One reason the family considered in not immediately reporting C.B.'s abuse to the police was concern over how such a report might impact the family plumbing business. (RA. 91, pp. 58-59) Later, C.B.'s mother also shared the fact that her daughter had been abused with other friends, including Sheila Hawkinson. (A. 105-106, pp. 160-161) Again, C.B.'s mother, asked this friend to keep the fact of the abuse confidential. (Id.)

Far from needing Pastor Bakke to provide instruction as to what to do once she learned of her daughter's abuse, C.B.'s mother, a nurse, is herself a mandatory reporter of abuse under Minnesota law. (A. 67-68, pp. 8-9) Moreover, she admitted during her deposition that she understood that reporting abuse was not only a legal obligation, but an issue of the "best practices" as to how one should respond to abuse, and that in deciding

not to promptly report the abuse she was not following the "best practices" she had learned in her nursing training. (A. 93, p. 110) The family had many reasons to keep the abuse quiet, including concerns that C.B. might be teased and concern over how publicity of the abuse might impact the family plumbing business. (A. 100, pp. 139-140; RA. 91, pp. 58-59) The point is not to blame C.B.'s family for not having reported the abuse to law enforcement until five months later, but to undermine plaintiff's contention that someone -- anyone -- else is responsible for this decision not to report the abuse to law enforcement – when C.B.'s parents were admittedly telling everyone they told of the abuse not to report the abuse to anyone else.

Equally undisputed is the fact that any delay in reporting the abuse did not result in any further abuse of C.B.. Said differently, after C.B. reported the abuse to her mother in June 2002, C.B. was never again sexually abused by Oscar Stene. (A. 97, p. 127) Plaintiffs have neither pled nor proven any damages other than those arising from Oscar Stene's abuse of C.B.. Further, they do not dispute – in fact they admit – that their damages stem solely from Oscar Stene's abuse of C.B.. Because that abuse had ceased prior to plaintiffs' report to Pastor Bakke, the report itself is irrelevant.[23] Finally, like Oscar Stene, Pastor Bakke is not and never has been an employee of the ELCA.

Because the undisputed material facts establish that Oscar Stene was unemployed at the time of the abuse, was never employed by the ELCA, and, in any event, the alleged abuse was not within the scope of his employment and occurred outside of the time and

[23] Factual disputes that are irrelevant or unnecessary will not be counted. See Anderson, 477 U.S. at 248, 91 L.Ed.2d at 211, 106 S.Ct. at 2510; see also, generally, Federal Practice and Procedure: Civil 2d § 2725 at 89-95.

place of his work, there is no basis on which to hold the ELCA liable for Plaintiffs' injuries, and dismissal of Plaintiffs' vicarious liability claim against the ELCA should be affirmed.

IV. PLAINTIFFS' NEGLIGENCE CLAIM AGAINST THE ELCA FAILS AS A MATTER OF LAW.

Plaintiffs' Complaint alleges that the ELCA was negligent in retaining and supervising Oscar Stene [Count X]. Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment. See Yunker v. Honeywell, 496 N.W.2d 419, 423-24 (Minn. Ct. App. 1993). Negligent supervision is derived "from the doctrine of respondeat superior" and, therefore, in order to successfully make out a claim for negligent supervision, a party must show: (1) employment, and (2) "that the employee's actions occurred within the scope of employment." M.L. v. Magnuson, 531 N.W.2d 849, 858 (Minn. Ct. App.1995).

First, as discussed *supra* in § D of the Statement of Undisputed Material Facts and in Part I of the Argument, Plaintiffs' causes of action for negligent retention and supervision must fail because Oscar Stene was not, and never has been, an employee of the ELCA. Moreover, Plaintiffs' negligent retention and supervision claims must fail because, as discussed *infra* in Sections A and B of this Part, there is no evidence that the ELCA knew of Oscar Stene's actions or his propensity to commit such acts.

Further, Plaintiffs' negligent supervision claim must fail because Oscar Stene's actions were not within the course and scope of his employment – they occurred: (1) after he had retired; (2) at the Stenes' farm, not at any church facility[24]; (3) during visits with plaintiff for secular, not religious purposes – C.B. considered the Stenes to be "grandparents", the Stenes often babysat, Pearl Stene (a substitute teacher) tutored C.B., and C.B. enjoyed visiting the animals at the Stenes' farm; and (4) in the absence of religious teachings.

Finally, Plaintiffs' negligent retention claim fails for the same reasons that the negligent supervision claim fails. Oscar Stene's actions were not within the scope of his employment (see above). Both claims fail on this basis. Moreover, the negligent retention claim also fails because only the congregation could remove Oscar Stene once he had been called (not the ELCA), thus, the ELCA, even if it had the requisite

[24] A pastor is not subject to "close supervision or domination by the employer" in his home, even where his home is the parsonage - provided by his employer. See Napieralski v. Unity Church, 802 A.2d 391 (Me. 2002). While it is not controlling precedent for this Court, that case is instructive because it likewise involved alleged improper conduct that occurred at a pastor's residence, during a visit for a private matter unrelated to the business or function of the church. Napieralski recognized that extending negligent supervision to such facts would go far beyond the scope of any traditional negligent supervision action. The court held that such an interpretation would impermissibly suggest that employers should become the guarantors of their employee's good conduct in private matters merely because the initial contact with the employee occurred in the regular course of business. The present case is even more egregious than that case because the initial contact did not even occur in the regular course of business – Oscar Stene retired in 1991, more than 7 years prior to the alleged abuse and C.B. was never in church when he was the pastor.

knowledge – which it is undisputed that it did not have – could not be liable for negligent retention.[25]

Because the undisputed material facts establish that Oscar Stene was not employed by the ELCA and the ELCA had no knowledge of Oscar Stene's acts or his propensity to commit such acts, and, in any event, the alleged abuse was not within the scope of Oscar Stene's employment, there is no basis on which to hold the ELCA liable for Plaintiffs' injuries, and dismissal of Plaintiffs' negligence claim against defendant ELCA should be affirmed. In addition, dismissal of Plaintiffs' negligence claim should be affirmed because the ELCA did not know, nor should it have known, of Oscar Stene's propensities as a child sexual abuser.

Plaintiffs' tort claim depends on the existence of an independent duty on the part of the ELCA toward Plaintiffs, a duty Plaintiffs must show was breached by specific conduct of the ELCA (and not mere vicarious liability for Oscar Stene's conduct based on employment status). The undisputed facts, however, establish that the ELCA did not breach any such duty to Plaintiffs. Not a single deponent has testified that the ELCA knew or had any reason to suspect Oscar Stene's conduct or propensity to commit such acts, nor have any documents been produced indicating the ELCA knew or had any reason to suspect Oscar Stene's conduct or propensity to commit such acts. Although

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[25] Plaintiffs also contend that Stene's present lack of awareness of mandatory policies or training on sexual abuse by the ELCA for rostered ministers shows that the ELCA negligently trained/retained/supervised Stene. See App. Br. at 14-16. This is a red herring. With no duty to supervise Stene's activities, whether religious (ELCA was not his employer) or non-religious (no causal nexus to abuse), how the ELCA supervised (or failed to supervise) Stene is not relevant. It also defies common sense that the ELCA needed to train Stene that pastors should not have sex – or try to have sex – with children.

Plaintiffs' Complaint is replete with allegations that the ELCA "knew or should have known" of Oscar Stene's propensities to commit sexual abuse, see Compl. ¶¶ 43-47, 54-55 (A. 10, 12), discovery has brought forward no basis for those allegations.

At this stage of the proceedings, Plaintiffs cannot rest on the mere averments in their Complaint but must produce material, admissible evidence in support of their claims. Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). They have not, and cannot do so – no such evidence exists. Because Plaintiffs have completely failed to prove these essential elements of their claims, no genuine issue of material fact exists as to Plaintiffs' negligence claim, and, thus, dismissal of that claim against the ELCA should be affirmed. See, e.g., Doe 67C v. Archdiocese of Milwaukee, 700 N.W.2d 180 (Wis. 2005) (motion to dismiss on the pleadings granted because no allegations or evidence that defendant had knowledge, except for the Archdiocese's knowledge after the abuse had already ended); Newbury Bible Church, 2005 WL 1862118 (summary judgment granted because no evidence that anyone told the church about the abuse, thus, no evidence that it knew or should have known); Petrell, 2005 WL 1683600 (summary judgment granted because no evidence of knowledge); Poole v. North Georgia Conference, 615 S.E.2d 604 (Ga. App. 2005) (summary judgment granted because no evidence of knowledge – an employer is liable only when it knew or should have known of "an employee's tendencies to engage in certain behavior relevant to the injuries alleged"); Ehrens, 385 F.3d 232 (summary judgment granted because plaintiff failed to counter defendants' motion with admissible evidence from which a reasonable juror could infer that the defendants, at any time prior

to the relevant incident, knew or should have known of propensities to assault minors or otherwise engage in inappropriate sexual conduct).

A. "Red Flags" Signifying Nothing.

Plaintiffs' only response is to have their "expert" state that "in his opinion" Oscar Stene's abuse was "foreseeable" to "the church" based on three "red flags." App. Br. 46-47; Olson Aff. 19 (A. 785). The "red flags" identified by Pastor Olson were:

(1) C.B.'s frequent overnight visits at the Stenes;

(2) the Stene's lavishing of inappropriate and expensive gifts on C.B.; and

(3) that on at least one occasion C.B. had to be dragged, kicking and screaming by her parents to the Stene car to spend time with the Stenes.

Olson's suggestion is absurd. First, these "red flags," are nothing short of the worst form of Monday morning quarterbacking; in hindsight everything is foreseeable. Second, having trotted out these "red flags" Olson censoriously claims that the presence of these "red flags" "should have put the church on notice that something might be amiss." (A. 785, p. 19) What neither Olson nor plaintiffs' brief explains is how "the church" could have known of these "red flags." Neither Olson nor plaintiffs' brief provides any evidence that these "red flags" were known by or shared with anyone outside C.B.'s immediate family. For example, C.B.'s mother testified that although she directly confronted the Stenes to explain the expensive gifts given to C.B., she did not talk to her husband's parents about them (even though they too were friendly with the Stenes), "because it was something that I didn't think they needed to know." (A. 85, p. 78) In

fact, C.B.'s mother never even talked to her in-laws about whether or not C.B. should be allowed to go to the Stenes. (A. 79, p. 56)

Similarly, it is hard to fathom how "the church" could have known "that on at least one occasion C.B. had to be dragged, kicking and screaming, to the car to visit the Stenes." App. Br. 47. It was her parents that were doing the dragging, and according to their testimony this happened only once -- on the very day that the last instance of abuse occurred. (A. 88, pp. 90-91; RA. 87, pp. 41-42) Further, it is hard to know what "the church" should have done had they known of this incident, because reading one page further in the testimony of C.B.'s mother one learns that C.B. on occasion also had to be "drag[ged] kicking and screaming" to visit her father's parents. (A. 88, pp. 91-92)

As a result, Olson's testimony that the abuse was foreseeable to "the church" based on his "red flags" is unsupportable and irresponsible. To mix metaphors, they also widely miss the mark. Instead of casting blame on "the church," if they mean anything, which is doubtful, they would end up placing blame on C.B.'s parents, instead of on Oscar Stene where it belongs. Finally, Olson's suggestion that the ELCA should "educate" the congregation to interpret these types of "red flags" is equally irresponsible. This type of "education" could only be effective, if the underlying "red flags" were shared with "the church," which in this instance clearly they were not. Second, C.B.'s mother – as a nurse – already had a great deal of detailed training regarding the warning signs of and the need to report suspected instances of abuse. (A. 67-68, pp. 8-10) But, as we have seen, Olson's "red flags" point in all directions such that if "the church" knew of them and acted on them, they might implicate not only the Stenes but C.B.'s paternal

grandparents as well. In the end, these "red flags" just highlight the fundamental fact that this abuse occurred in the setting of family friends, not church.

B. No Prior Suspicion of Abuse.

Plaintiffs submission is eloquent in its absence of any account, before C.B. came forward, of any prior suspicion – let alone knowledge -- by anyone that Oscar Stene was or could have been involved in any abusive conduct. In her deposition, time and again, L.B. repeatedly testified that she never dreamed that Oscar Stene could have abused anyone. Had she had any suspicion, she would never have allowed her daughter to spend any time at the Stene farm. The same is true for her husband, her brother and C.B.'s grandparents. (A. 140, p. 298; RA. 90, 124, pp. 55, 190; RA. 73, 74, pp. 16, 19)

Similarly, L.B.'s "dear friend," Sheila Hawkinson, did not believe it was possible. (A. 105, p. 160; A. 292, p. 18) Her own daughter, Melissa Howrey, many years before spent time at the Stene farm, and never reported any abuse or "weird" conduct to her mother by Stene. Had she done so, Hawkinson would have warned C.B.'s mother, and she would not have stopped there, she would also have made sure it was "headline news in the newsletter at Immanuel American Lutheran Church and the Fulda Free Press and the Worthington Daily Globe." (A. 317, p. 120) But Hawkinson's daughter, Melissa Howrey, never raised any "red flags" then. In fact, reading her affidavit it is clear that even now with the benefit of hindsight, Melissa Howrey could think of no conduct by Oscar Stene toward her that she now thinks of as abuse, and the only other person that she knows who she thinks may have been abused "totally denie[s] that she was ever even around Stene at all." Howrey Aff. ¶ 11 (A. 843).

Thus, it remains undisputed that Oscar Stene's abuse of C.B. was a shock to everyone. It remains undisputed that, prior to the incident of C.B.'s abuse, there had been no prior reports or allegations of sexual abuse regarding Oscar Stene. See ELCA's Resp. to Pl.'s Interrog. # 5 (A. 336); Synod's Resp. to Pl.'s Interrog. # 5 (A. 321-322); L.B. Dep. 220-221 (A. 120-121); Bakke Dep. 58 (A. 204); Hetlund Dep. 44-45 (282-283). It remains undisputed that Oscar Stene had no criminal history regarding sexual abuse nor had he ever been accused of sexual abuse. (A. 185, pp. 149-150) It remains undisputed that plaintiffs have offered no evidence that Oscar Stene was ever involved in any other acts of abuse or ever suspected of other acts of abuse. And, finally, it remains undisputed that, prior to learning about C.B.'s abuse, the ELCA had never received any reports of abuse or suspicions of abuse. See ELCA's Resp. to Pl.'s Interrog. # 5, 9, 11, 14 (A. 336-340); see also L.B. Dep. 15-17, 152, 189, 221 (A. 69-70, 103, 113, 121); C.B. Dep. 110 (RA. 60); C.B.'s father Dep. 101(RA. 102).

The trial court summarized the state of the record with respect to foreseeability:

> The Plaintiffs have not provided any evidence suggesting that prior to 1998 [or 2002] any person or organization had any reason to suspect that Oscar Stene was likely to sexually abuse anyone. Indeed, had [C.B.'s parents] even suspected this as a possibility they certainly would have not allowed their daughter to associate with the Stenes, let alone visit their rural residence. Plaintiffs' 'stunned' reaction, upon learning of the abuse, belies any notion that Stene had demonstrated any 'dangerous proclivities' to sexually abuse young girls.

Tr. Ct. Order 15 (A. 858). The trial court held that Jeremiah Olson's purported "red flags" about Oscar Stene are wholly insufficient to meet the standard for evidence of foreseeability.

> The only 'fact' presented by Plaintiffs in support of their claim that abuse by Oscar Stene was 'foreseeable' is that Oscar Stene was a retired Lutheran minister. To suggest that this solitary fact imposed a duty on the church Defendants to 'foresee' the likelihood of Stene's sexual abuse of a child eludes comprehension.

Id. at 17 (A. 860). Plaintiffs' submission simply do not provide a basis upon which a reasonable person could conclude that Stene's abuse of C.B. was foreseeable. Id.

V. PLAINTIFFS' CLAIMS AGAINST THE ELCA ARE BARRED BY THE ESTABLISHMENT CLAUSE AND RELIGIOUS FREEDOM CLAUSE.

Should this Court not affirm the judgment of the trial court on the grounds stated above, then the Court must reach the ELCA's contention that the First Amendment to the U.S. Constitution and religious freedom clause of the Minnesota Constitution bar subject matter jurisdiction over the claims asserted by Plaintiffs in this matter.

A. The First Amendment Bars Civil Court Adjudication Of Plaintiffs' Claims.

The Establishment Clause of the United States Constitution provides an additional independent basis on which to dismiss Plaintiffs' claim of negligence [Count X]. The trial court did not reach this grounds for dismissal; if this Court were to reverse the trial court, Defendant ELCA respectfully requests that the Court affirm dismissal of Plaintiff's negligence claim against the ELCA as outside the subject matter jurisdiction of the civil courts. This is because this claim necessarily involves an inquiry into how church organizations *ought to* hire, supervise and retain clergy. Such an inquiry is prohibited by the Establishment Clause of the First Amendment to the United States Constitution. L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995), cert. denied, 516 U.S. 1116 (1996); Schmidt v. Bishop, 779

F. Supp. 321 (S.D.N.Y. 1991). Although none of these cases is controlling precedent, each case follows the same Establishment Clause analysis employed by the Minnesota Supreme Court, and should be followed here. See Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606 (Minn. Ct. App.), review denied, cert. denied, 519 U.S. 870 (1996); Black, 471 N.W.2d 715.[26]

The First Amendment to the United States Constitution prohibits the making of laws "respecting an establishment of religion." In order to be valid under the Establishment Clause, a governmental regulation, including a court order granting relief in a civil case, must (1) have a secular purpose; (2) neither advance nor inhibit religion in its primary effect; and (3) not foster excessive governmental entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Black, 471 N.W.2d at 719-20. The issue here is the third prong of the Lemon test, excessive entanglement by government with religion.

Whether government action creates excessive entanglement depends on the character and purpose of the involved institutions, the nature of the intrusion into religious administration, and the resulting relationship between the government and religious authority. Lemon, 403 U.S. at 615; Singleton, 541 N.W.2d at 610; Black, 471

[26] The decision of the Minnesota Court of Appeals in Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806 (Minn. Ct. App. 1992), review denied, is not relevant here because in that case, the Roman Catholic Church conceded that it was constitutionally permissible for the court to examine the reasonableness of its actions and the bases for its decisions regarding priest placement and discipline under negligence theories. Id. at 812. ELCA does not make that concession, and the structure of the Lutheran entities involved in the present case is very different from the hierarchical structure of the Roman Catholic Church involved in Mrozka.

N.W.2d at 720. When a claim involves a "core" issue of ecclesiastical concern, the inevitable danger of governmental entanglement precludes judicial review. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-23 (1976) (Establishment Clause bars judicial consideration of bishop's wrongful discharge claim); Singleton, 541 N.W.2d at 610; Black, 471 N.W.2d at 720.

"Core" ecclesiastical issues beyond review by civil courts include personnel decisions and a church's decision-making process with respect to religious personnel. "Religious freedom" includes the power of religious bodies to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Milivojevich, 426 U.S. at 721-22.

Personnel decisions by church-affiliated institutions affecting clergy are per se religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made. This is precisely the kind of second-guessing of decision-making by religious organizations that the [First Amendment] forbids. Farley, 821 F. Supp. at 1289 (quoting Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991)); see Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1358-60 (D.C. Cir. 1990); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1167-71 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986). In affirming dismissal of a clergy discharge claim, the First Circuit concluded that [b]y its very nature,

the inquiry . . . into the circumstances of [a minister's] discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance. Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989); quoted in Singleton, 541 N.W.2d at 612. As succinctly stated by the Sixth Circuit, court jurisdiction has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be. The claim here relates to appellant's status and purported employment as a minister of the church. It therefore concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law. Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir.), cert. denied, 479 U.S. 885 (1986); quoted in Singleton, 541 N.W.2d at 612; see also Ehrens v. Lutheran Church-Missouri Synod, 269 F. Supp.2d 328 (S.D.N.Y. 2003) (observing the distinctive means by which pastors are chosen in the Lutheran Church - i.e., by the local congregation's right to "call" its own pastor, and the fact that pastor may be removed from office only by a 2/3 vote of the members of the congregation assembled)

These principles were applied to dismiss negligence claims arising out of clergy sexual abuse of a parishioner in L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995), cert. denied, 516 U.S. 1116 (1996); and Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991). Inquiry into what the ELCA "should have known" or what "duty" it held toward Plaintiffs, members of Immanuel American Lutheran Church, raises precisely the kind of entanglement with religious belief and practice which is forbidden by the Establishment Clause. Dismissal

of Plaintiffs' tort claims against the ELCA should be affirmed under the First Amendment.

Plaintiffs' Brief ignores this Constitutional issue, presumably because it was not reached by the trial court. However, inquiry into what the ELCA "should have known" or what "duty" it held toward plaintiffs, members of Immanuel American Lutheran Church, raises precisely the kind of entanglement with religious belief and practice which is forbidden by the Establishment Clause. All of this, of course, is very well known to plaintiff's new found expert, Pastor Jeremiah Olson, because his own lawsuit against his former congregation and Synod was dismissed on summary judgment on precisely these grounds. Olson, 1996 WL 70102; see also Singleton, 541 N.W.2d 606.

For all these reasons, dismissal of plaintiffs' tort claims against the ELCA should be affirmed under the First Amendment.

B. The Religious Freedom Clause Of The Minnesota Constitution Independently Bars Civil Court Adjudication Of Plaintiffs' Claims.

Article 1, Section 16 of the Minnesota Constitution proscribes "any control of or interference with the rights of conscience." Minn. Const. art. 1, § 16. Consistent with First Amendment protection of church autonomy, the Minnesota Constitution bars civil courts from intervening in intra-church controversies involving church doctrine, church polity and administration, employment of clerics and other ecclesiastics, and the governance of the spiritual conduct of church members. See, e.g., Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App.), review denied, cert. denied, 516 U.S. 818 (1995); Black, 471 N.W.2d 715.

Minnesota's freedom of conscience clause has been held to be of a "distinctively stronger character" in protecting religious liberties than the First Amendment of the Federal Constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn.1990); Hill-Murray Federation of Teachers, St. Paul, Minn. v. Hill-Murray High School, Maplewood, Minn., 487 N.W.2d 857 (Minn. 1992). As stated by this Court:

> The First Amendment limits the government from prohibiting the exercise of religion. Section 16, however, precludes even "an infringement on or an interference with religious freedom. . . ." Government actions that do not prohibit religious practices could still violate the Minnesota Constitution if they interfere with those religious practices.

Geraci, 526 N.W.2d at 398-99.

Judicial determination of the issues presented by Plaintiffs' claims is thus barred under the Minnesota Constitution for the same reasons it is barred under the federal constitution.

Even if plaintiff had alleged a facially "secular" claim, that would not be determinative of the jurisdiction of the civil courts. In Geraci, the plaintiff alleged the facially secular claim of sex discrimination. 526 N.W.2d at 395. The defendant church asserted that plaintiff was terminated because she had been excommunicated, and church policy precluded employment of non-members. Despite plaintiff's protestations that the proffered reason for termination was a sham, this Court declined to permit plaintiff to pursue her discrimination claim because its resolution would necessarily "require a court to question [defendant's] monitoring of plaintiff's compliance with church doctrine, its reasons for excommunication and the veracity of Eckankar's responses." Id., 526 N.W.2d at 399.

Application of "neutral principles" which leads to an "judicial entanglement over core issues of ecclesiastical concern," or "excessive burden on religion" violates the Minnesota Constitution. See id., 526 N.W.2d at 400-01. As argued above, Plaintiffs' claims here implicate myriad issues involving church doctrine, church polity and administration, the relationship between the Bishop and pastors, and the ecclesiastical authority of the Bishop.

The exercise of court jurisdiction over the intimate details of church doctrine and polity, and its relationship with its clerics, would involve substantial court entanglement in core ecclesiastical matters. Accordingly, irrespective of the First Amendment, the Minnesota Constitution acts as an independent bar to judicial intervention in this case.

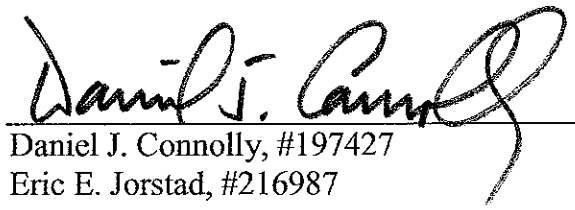
CONCLUSION

For all these reasons, Defendant Evangelical Lutheran Church in America respectfully requests that the Court affirm the judgment of the district court dismissing Plaintiffs' Complaint as against the ELCA in its entirety under Minn. R. Civ. P. 56.

Respectfully submitted,

Dated: May 15, 2006

FAEGRE & BENSON LLP



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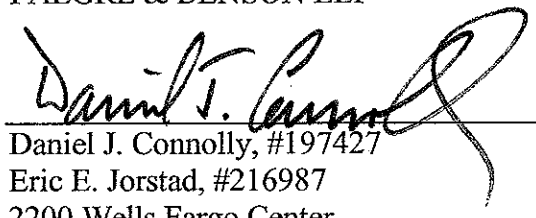
CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Evangelical Lutheran Church in America's Brief in Case No. A06-0295 complies with Minnesota rules of Appellate Procedure 132.01, Subd. 3(a)(1) and that the brief contains 12,730 words. The brief as prepared on Word 2003, and that this word processing program has been applied specifically to include all text, including headings, footnotes.

Dated: May 15, 2006

FAEGRE & BENSON LLP



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