



CASE NO. A10-374

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Jane Doe 43C, Jane Doe 43D,
Jane Doe 43E, Jane Doe 43F,
and Jane Doe 43G,

Appellants,

vs.

Diocese of New Ulm, St. Francis Parish,
and St. Mary's Parish,

Respondents.

APPELLANTS' BRIEF

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STATEMENT OF THE LEGAL ISSUES

1. Are Appellants' fraud claims time-barred because the statute of limitations on their non-fraud claims expired?

The trial court held that Appellants' fraud claims against the Respondents were time-barred because the statute of limitations on Appellants' non-fraud claims expired.

Most apposite cases: Buller v. A.O. Smith Harvestore Prods., Inc., 518 N.W.2d 537, 542 (Minn. 1994); Hydra-Mac, Inc. v. Onan Corp., 430 N.W.2d 846, 854 (Minn. Ct. App. 1988); Jane Doe 43C v. Diocese of New Ulm, 2009 WL 605749 (Minn. Ct. App. March 10, 2009) (unpublished opinion).

2. Is there a genuine issue of material fact as to whether Father Francis Garvey was an agent of Respondent Diocese of New Ulm such that notice to him in 1970 of Roney's sexual abuse of children was sufficient to put Respondent Diocese of New Ulm on notice in 1970 of Roney's sexual abuse of minor children?

The trial court stated that even though Garvey received reports of Roney's sexual abuse of children, even though he took steps to handle the complaints, even though he served on the Diocese's priest personnel board, and even though Garvey was controlled by the Bishop, the reports to Garvey did not constitute reports to the Diocese. As a result, the Court held that Respondent Diocese did not make any misrepresentations about Roney because it didn't have knowledge of Roney's abuse of children before Appellants' abuse.

Most apposite cases: Brooks Upholstering Co. v. Aetna Ins. Co., 276 Minn. 257,

149 N.W.2d 502, 506 (1967); PMH Properties v. Nichols, 263 N.W.2d 799, 802 (Minn. 1978); Jurek v. Thompson, 308 Minn. 191, 241 N.W.2d 788 (1976).

3. Is there a genuine issue of material fact as to whether Sister Virginia McCall, principal of St. Mary's Elementary School, made affirmative representations about Roney's fitness to have unsupervised contact with children, when Sister McCall had actual knowledge that Roney had sexually abused children, and while she took some steps to keep him away from children, she did not inform parishioners, including Appellants, that he had sexually abused children, and she allowed him to continue in his position as pastor of St. Mary's Parish?

The trial court stated that even though Sister McCall received reports about Roney's sexual abuse of minor children in 1970, she did not misrepresent Father Roney because she took steps to keep Roney away from children. She told Roney not to go on the little kids' playground and not to come to the school during the lunch hour, and he complied. Therefore, the trial court held, at most, any representation by St. Mary's Parish was negligent, not intentional.

Most apposite cases: Spieß v. Brandt, 230 Minn. 246, 41 N.W.2d 561, 566 (1950); Florenzano v. Olson, 387 N.W.2d 168, 173 (Minn. 1986).

STATEMENT OF THE CASE

Appellants were sexually abused when they were minor children by Father David Roney, now deceased. David Roney was an employee and agent of the Respondent Diocese of New Ulm and was pastor of St. Francis Parish and St. Mary's Parish at the

times the abuse occurred.

Appellants filed suit against Respondents in January of 2004, alleging negligence, negligent supervision and retention, vicarious liability, breach of fiduciary duty and fiduciary fraud. After completion of discovery, Appellants moved the court for leave to amend the Complaint to include a count for punitive damages and to substitute a cause of action for intentional misrepresentation for the cause of action for fiduciary fraud. In November of 2007, the district court granted Appellants' Motions.

The case was set for trial in January of 2008. On January 18, 2008, the district court granted Respondents' Motion for Summary Judgment based on the statute of limitations in Minnesota Statute section 541.073, the "delayed discovery" statute. The district court entered summary judgment on March 7, 2008.

Appellants appealed from the Summary Judgment, dated March 7, 2008, and on March 10, 2009, the Minnesota Court of Appeals issued its decision affirming summary judgment on Appellants' claims for sexual abuse on the grounds the statute of limitations set forth in Minn. Stat. §541.073 had expired. However, the Court of Appeals reversed the district court's grant of summary judgment on Appellants' claims for intentional misrepresentation, determining that the district court erred when it granted summary judgment on these claims based on Minn. Stat. § 541.073. The Court of Appeals remanded the case to the district court for determination of Appellants' intentional misrepresentation claim, directing the district court to apply the fraud statute of limitations contained in Minn. Stat. §541.05, subd. 1(6) to the intentional

misrepresentation claims instead of the statute of limitations set forth in Minn. Stat. §541.073, subd. 2.1

Thereafter, on remand, the parties cross-moved for summary judgment on the intentional misrepresentation claim, and on November 30, 2009, the district court filed an Order granting Respondents' motions for summary judgment and denying Appellants' motion for summary judgment. The district court held that the intentional fraud claims were time barred because the non-fraud claims (those governed by the delayed discovery statute – Minnesota Statute section 541.073) were time barred and the Appellants would have discovered the fraud if they would have brought the fraud claims earlier. Judgment was entered on December 30, 2009 based on the lower court's November 30, 2009 Order. Appellants appealed from the judgment entered on December 30, 2009.

STATEMENT OF THE FACTS

A. Respondents Knew Before Appellants Were Abused That Father Roney Had Sexually Abused Minor Children, Yet Continued to Allow Roney to Have Unsupervised Access to Minor Children, Including Appellants, Thus Representing To Appellants and Others in the Parish That Roney was Safe to Be Around Children.

Plaintiff Jane Doe 43C was sexually abused by Roney between 1969 and 1972 at St. Mary's Elementary School in Willmar, Minnesota, when she was between ten and thirteen years old. A.196. Plaintiff Jane Doe 43E was sexually abused by Roney in 1975 at St. Mary's Church when she was approximately fourteen years old. A.205. Plaintiff

¹Plaintiffs acknowledge that in that decision this Court affirmed the trial court's decision on Plaintiffs' non-fraud claims under Minn. Stat. §541.073. Plaintiffs wish to preserve this issue for appeal. Plaintiffs do not believe that this Court has to address this issue again, but do not waive any arguments about the timeliness of their non-fraud claims under 541.073.

Jane Doe 43F was sexually abused by Roney at St. Francis Catholic School in Benson, Minnesota when she was eleven years old. A.208. Plaintiff Jane Doe 43G was sexually abused by Roney at St. Mary's Parish from 1968 through 1975, when she was between six and thirteen years old. A.199.

In 1970 the Diocese of New Ulm, by its agent Father Francis Garvey, received complaints from parents and other concerned parishioners that Fr. Roney was sexually abusing minor children. A.59. Specifically, in 1970, a parent named "Rudy" reported to Father Francis Garvey that Roney had been observed by parents "hugging" children and "pressing them to his groin" in what the parents considered to be "inappropriate sexual contact". A.59. Also in 1970, St. Mary's parishioners Allen and Theresa Iverson reported to Father Garvey that a parent named Larry Dolce had complained that Father Roney was having inappropriate sexual contact with Dolce's daughter. A.29-A.33. Allen Iverson told Fr. Garvey that Mr. Dolce was threatening to report Father Roney to the authorities, and Iverson thought the Diocese should do something before that occurred. Id. A.29-A.30. Father Garvey told Iverson that he would do something about it. Id. He later told Iverson that he had arranged to get psychological counseling for Roney. Id.

Father Garvey also told Sister McCall that he was arranging to get Father Roney some psychological treatment, and that he was "working with Father Roney" on this. A.34-A.36. Garvey asked Sister McCall to watch Roney to see if he continued to engage in inappropriate behavior. A.59. However, he gave Sr. McCall the impression that things were "taken care of." A.34-A.36. There is no evidence in the record that Roney received

any psychological help in 1970.

After receiving the report from Mr. Dolce about Roney's sexual abuse of his daughter, and after Garvey asked Sister McCall to watch Roney for inappropriate behavior with children, Sister McCall banned Father Roney from the little kids' playground, because he would gather the children around him and put them under his cape. Id. She then banned Father Roney from the school lunchroom after she observed him touching the "little kids". Id. Shortly before St. Mary's School closed, Sister McCall found Father Roney in an empty classroom, on the floor wrestling with a 7th grade girl. Id. She told him to get off the girl and not to be doing that with any of the children. Id.

Garvey never followed up with Sister McCall to find out if she had observed any inappropriate behavior. A.60. He did not disclose the information about Roney to the Bishop or anyone else, because "[i]t didn't seem to be the thing we did in those days. I confronted the priest and I figured I did what I had to do." Id.

In addition to his work as a priest and chaplain, Father Garvey served on the personnel board for the Diocese of New Ulm from 1969 to 1984 and again from 1987 to 1990. A.57. During his first term on the board, his duties included advising the bishop on making pastoral changes. Id. He helped the bishop in evaluating and appointing "priests, pastoral leaders, to various parishes." Id. He also was involved in collecting information regarding conflicts between a congregation and their priest, meeting with members of the church council, members of the congregation, and with the priest himself. Id. Sometimes the board would try to mediate the conflict between the congregation and

its priest. A.57-A.58.

B. After the Reports to Garvey, Respondent Diocese of New Ulm Began to Receive Additional Reports That Roney Had Sexually Abused Children in the Past But Did Not Disclose These Reports to Anyone, Including Appellants, Making Discovery of the Fraud That Much Tougher.

Beginning in March of 1987, several women contacted Respondent Diocese of New Ulm to report that Roney had sexually abused them when they were children. The reports were noted in Roney's personnel file, but the Diocese did not disclose the abuse to anyone in the parishes where the women were abused. The Diocese did not investigate and did not make any of the information it had or Father Garvey had available to others.

In response to the reports, Respondent Diocese sent Father Roney to a treatment facility for a psychiatric evaluation. A.66-A.67. The report from the facility recommended that Roney participate in their treatment program beginning July 13, 1987. However, because Roney did not seem "strongly motivated" to attend the program, they recommended individual therapy as an alternative. Id.

In accordance with that recommendation, from 1988 to 1990, Roney participated in therapy with Ken Pierre, Ph.D. Dr. Pierre reported to the Diocese that Roney had touched a woman in Guatemala inappropriately. A.70. "I did treat it seriously with him. ... [Roney] does know that he has had strong sexual curiosity ... This has been with him since adolescence." A.68-A.70. Copies of his reports and records were sent to the Diocese, but were not publicly disclosed to anyone else.

More reports of Roney's sexual abuse of children were made to the Diocese in

1993, 1994, and 1996. A.71, A.80-A.81, A.84, A.234. The reports were noted in Roney's file, but again no public disclosures were made.

Publicly, the Diocese gave every appearance that it did not have any information about Roney molesting children. Instead of exposing Roney, the Diocese continued to publicly praise him. On March 17, 1994, just two weeks after the Diocese received another report of Roney's sexual abuse of a woman when she was a child, the Diocese of New Ulm presented Father Roney with the Diocesan Distinguished Service Award "for fifty years of priestly ministry to the People of God; forty years as a dedicated pastor in parishes of the Diocese of New Ulm; and twenty years of dedicated service to the missions, especially San Lucas Toliman, Guatemala." A.82. In October, 1995, the parish of San Lucas, Toliman, Guatemala, the location of the Diocese's mission, put on a "jubilee" in celebration of Roney's 50 years of priesthood. A.83. This jubilee was published in the Diocese's newsletter, as was Roney's receipt of the award. *Id.* at A.82-A.83.

Similarly the Diocese did not report Roney to the police at any point, making any public knowledge about the Diocese's coverup extremely difficult. On August 22, 2002, Jeffrey Anderson wrote to Bishop Nienstedt on behalf of a Roney victim, inquiring about Roney's status as a priest and whether his conduct had been reported to law enforcement authorities. A.97. On September 4, 2002, Bishop Nienstedt wrote back, stating that to the best of the Diocese's knowledge and information, Roney's sexually inappropriate conduct "occurred some thirty years ago." A.98. He stated that "due to the passage of time, the

age and health condition of Father Roney, I do not believe it would serve any useful purpose to submit a report to law enforcement agencies." Id.

On January 27, 2003, Father Roney died. A.99. In August of 2003, after the Diocese was named in two lawsuits involving Father David Roney, the Diocese of New Ulm finally publicly acknowledged that Father Roney sexually abused children, and invited victims of Father Roney to contact the Diocese's Victim Assistance Coordinator. A.100-A.101.

C. Appellants Discovered The Diocese's Fraud in 2003.

Appellants testified that until 2003, each thought she was the only person Roney ever sexually abused. A.196-A.198, A.199-A.201, A.205-A.207, A.208-A.210. None of them ever heard that Roney sexually abused other children until 2003. Id. Appellants also testified that their families were life-long members of the Catholic Church and were very devout Catholics. See id. Many of their parents were active in the Church and church-related activities. See id.

Appellants' parents trusted priests and bishops, and they trusted Appellants to be around priests when they were children. Id. During their entire adult lives, until 2003 no one ever said anything to Appellants about Roney having inappropriate contact with children. Id. They heard no rumors or stories about him. Id. No one from the Diocese ever contacted them with information about Father Roney. Id. No one from St. Mary's ever contacted them about Father Roney. Id.

None of the Appellants saw headlines about church cover-ups until sometime after

2003. Id. None of them saw such stories before 2003. Id. Appellants never suspected that the Diocese knew that Roney had molested children before he molested them. Id. They were taught by their parents and by the church to trust priests and bishops, that they could forgive sins, and that they were holy and good. Id. Appellants never heard about the Catholic Church doing anything wrong until after 2003. Id. Until 2003, they had no reason to believe the Diocese had covered up Roney's sexual abuse of children and allowed him to continue to have access to children, including themselves. Id.

Plaintiffs filed suit in 2004.

In January of 2004, the Appellants in this action served their Summons and Complaint upon the Diocese of New Ulm. A.102-A.116.

ARGUMENT

I. Standard of Review on Appeal from Summary Judgment.

On an appeal from summary judgment, the appellate court determines whether there is a genuine issue of material fact for trial and whether the district court erred in its interpretation or application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990); Antone v. Mirviss, 694 N.W.2d 564, 568 (Minn. Ct. App. 2005). "Summary judgment is not an acceptable means of resolving triable issues... ." Teska v. Potlatch Corp., 184 F. Supp. 2d. 913 (2002), (citing Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). Summary judgment may only be ordered if there is "no genuine issue of material fact. . . ." Minn. R. Civ. Proc. 56.03. The burden of proof on a motion for summary judgment is on the moving party, and the nonmoving party has the benefit of

that view of the evidence most favorable to him. Sauter v. Sauter, 244 Minn. 482, 70 N.W.2d 351 (1955). The court is to draw all reasonable inferences in the light most favorable to the nonmoving party. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981); Vacura v. Haar's Equip., Inc., 364 N.W.2d 387, 391 (Minn. 1985). See also Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

The court must not weigh the evidence presented on a motion for summary judgment. Murphy v. Country House, Inc., 240 N.W.2d 507, 512 (Minn. 1976). A genuine issue may exist even if it appears likely that the moving party will prevail at trial. City of Coon Rapids v. Suburban Engineering, Inc., 167 N.W.2d 493 (Minn. 1969). The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. D.L.H., Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997). Therefore, summary judgment is not appropriate when reasonable persons might draw different conclusions from the evidence presented. Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978).

The issue of whether or not Appellants knew or should have known that the Diocese and parishes intentionally misrepresented that Roney was fit to have unsupervised contact with children more than six years before they commenced their lawsuit, and whether or not Father Garvey and Sister McCall were agents of Respondents who intentionally misrepresented facts about Roney, are issues of fact. Issues of fact are not appropriately resolved at summary judgment, including facts relating to the date when a plaintiff knew or had reason to know of the facts constituting the fraud. See

Murphy v. Country House, Inc., 307 Minn. 344, 240 N.W.2d 507, 512(1976); Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N.W. 809, 815 (1939); Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302, 310 (Minn. Ct. App. 1993); Klehr v. A.O. Smith Corp., 87 F.3d 231, 235 (8th Cir. 1996). Any concealment of the facts constituting the fraud “by positive affirmative act and not mere silence is itself fraudulent so as to prevent the statute from running.” Normania Twp. v. Yellow Medicine County, 205 Minn. 451, 286 N.W. 881, 884 (1939).

The issues of fact in this case must be resolved at trial. Accordingly, the trial court’s grant of Respondents’ motion for summary judgment must be reversed and the case must be remanded for trial.

II. The Lower Court Erred When it Granted Summary Judgment on Appellants’ Intentional Misrepresentation Claim Based on the Delayed Discovery Statute.

A. The Trial Court Erroneously Held That Appellants Failed to Use Reasonable Diligence to Discover the Facts Constituting the Fraud by Failing to Bring Their Non-Fraud Claims Within the Statute of Limitations.

In Jane Doe 43C v. Diocese of New Ulm, 2009 WL 605749 (Minn. Ct. App. March 10, 2009), the Minnesota Court of Appeals held that the district court erred when it granted summary judgment on Appellants’ intentional misrepresentation claim based on the delayed-discovery statute of limitations. Id. at *5. The Court of Appeals therefore remanded the summary judgment on the intentional misrepresentation claim, and directed the district court on remand to apply the fraud statute of limitations contained in Minn.

Stat. §541.05, subd. 1(6) to the intentional misrepresentation claim. Id. The Court of Appeals further held that since Appellants' intentional-misrepresentation claim was not based on a negligence theory, it did not fall within the negligence category in section 541.073, subd. 3(2). Id.

Specifically, the Court of Appeals noted that section 541.073, subd. 3, the delayed-discovery statute, applies to an action for damages commenced against a person who caused the plaintiff's injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur. Jane Doe 43C, 2009 WL 605749, at *4. The Court of Appeals noted that "fraud is an intentional tort and scienter is an essential element." Id. at *5 (citing Florenzano v. Olson, 387 N.W.2d 168, 173 (Minn. 1986)). The Court stated that

[b]ecause the elements of intentional misrepresentation are identical to the elements of fraudulent misrepresentation, and because a claim of fraudulent misrepresentation is not based on a negligence theory, we conclude that appellants' intentional-misrepresentation claim does not fall within the parameters of the negligence category in section 541.073, subdivision 3(2). Appellants' intentional-misrepresentation claim, by definition, is based on an allegation of fraud, not on an allegation of negligence.

Jane Doe 43C, at *5.

Nevertheless, on remand the district court again determined that the delayed discovery statute of limitations triggered the Appellants' duty to exercise reasonable diligence to discover Respondents' fraud. The court reasoned that "when the evidence showed [Appellants] were aware of their non-fraud claims, [Appellants] could have filed suit against Respondents on those claims, obtained discovery during the litigation from

Respondents, and realized the facts which they allege are misrepresentations that they learned in 2003.” November 30, 2009 Order and Memorandum, at A.222.

However, the trial court’s reasoning again tracks the fraud claims by way of the delayed discovery statute, which the Court of Appeals specifically directed the court not to do. The trial court barred the intentional-misrepresentation claim based on the expiration of the delayed discovery statute, just as it did in the first summary judgment order. The district court used different words and different arguments to support its reasoning but ultimately issued the exact same ruling that this Court reversed.

The trial court’s reasoning is fundamentally flawed. Under Minn. Stat. §541.05, subd. 1(6), a fraud cause of action accrues upon discovery by the aggrieved party of the facts constituting the fraud. Id. The facts constituting the fraud are deemed to have been discovered when, with reasonable diligence, they could and ought to have been discovered. Blegen v. Monarch Life Ins. Co., 365 N.W.2d 356, 357 (Minn. Ct. App. 1985).

However, a plaintiff must exercise reasonable diligence only when he or she *has notice of a possible cause of action for fraud*. Buller v. A.O. Smith Harvestore Prods., Inc., 518 N.W.2d 537, 542 (Minn. 1994)(emphasis added). Even if Appellants had notice of potential non-fraud claims more than six years before they filed suit, those potential claims did not put Appellants on notice of a possible cause of action for fraud. Without notice of a possible cause of action for fraud, Appellants had no duty to exercise reasonable diligence to uncover the fraud.

The trial court essentially held that Appellants should have known that by timely commencing an action for non-fraud claims, they would have uncovered evidence of fraud during discovery in the non-fraud action. There is nothing to support such a conclusion. As Appellants testified below, they had absolutely no reason to suspect that either the Diocese or the parishes had committed fraud against them.

The district court erroneously suggested that Appellants' failure to sooner discover the facts constituting the fraud was the result of *negligence* in failing to bring their non-fraud claims within the statute of limitations for such claims. See November 30, 2010 Order and Memorandum at A.221. The court quoted Bustad v. Bustad, 116 N.W.2d 552, 553 (Minn. 1962), which held that "the mere fact that the aggrieved party did not actually discover the fraud will not extend the statute of limitations, if it appears that the failure sooner to discover it was the result of negligence, and inconsistent with reasonable diligence." Id.

However, even if Appellants could be found to have been negligent in failing to bring their non-fraud claims within the statute of limitations for such claims, the non-fraud claims did not give Appellants any notice of a possible claim for fraud against the Diocese and parishes. Without any notice of a possible claim for fraud against Respondents, it cannot be held that by failing to timely bring the non-fraud claims, Appellants failed to exercise reasonable diligence in uncovering the fraud.

"[T]he requirement of reasonable diligence imposes an affirmative duty to investigate upon a party who is aware of facts that might constitute a possible cause of

action for fraud.” Klehr v. A.O. Smith Corp., 87 F.3d 231, 237 (8th Cir. 1996) (quoting Buller v. A.O. Smith Harvestore Prods., Inc., 518 N.W.2d 537, 542 (Minn. 1994); Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 919 (Minn. 1990). A party is under no duty to investigate a fraud it has no reason to suspect. Hydra-Mac, Inc. v. Onan Corp., 430 N.W.2d 846, 854 (Minn. Ct. App. 1988). Since Appellants had no reason to suspect fraud on Respondents’ part even if they had reason to suspect negligence, they cannot be held to have failed to exercise reasonable diligence in uncovering the fraud simply because they did not bring their non-fraud claims within the applicable limitations period.

Moreover, when a claim is barred because it is not brought within the applicable statute of limitations, that is, in itself, not an act of negligence. It merely is the legal consequence imposed as a result of policy considerations determined by our state legislature. See Bachertz v. Hayes-Lucas Lumber Co., 201 Minn. 171, 176, 275 N.W. 694 (1937) (“The statute of limitations ... is one of repose. ... Its general purpose is to ‘prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy’”).

B. When More Than One Statute of Limitations Is Implicated in a Case, The Court Must Apply Each Statute Separately to the Facts.

The Minnesota Court of Appeals correctly held that Appellants’ separate causes of action for negligence and for intentional-misrepresentation required application of different statutes of limitations. Jane Doe 43C v. Diocese of New Ulm, 2009 WL 605749 (Minn. Ct. App. March 10, 2009), at **5-6. It applied each statute of limitations

separately to the facts relevant to the respective causes of action. See id. Other states are in accord with this procedure. For example, in King v. Otasco, Inc., 861 F.2d 438, 441 (5th Cir. 1988), the Fifth Circuit Court of Appeals held that when a suit alleges several distinct causes of action,

even if they arise from a single event, the applicable limitations period must be determined by analyzing each cause of action separately. As the Mississippi Supreme Court has stated, ‘Where a party has two or more remedies for enforcement of a right, the fact that one remedy is barred by the statute of limitations does not bar the other remedies.’ Therefore, King’s allegations of intentional torts cannot cancel his allegations of negligence.

Id.

In Derrick Mfg. Corp. v. Southwestern Wire Cloth, Inc., 934 F. Supp. 796, 806 (D. Texas 1996), the court similarly stated that a two-year statute of limitations period applied to the plaintiff’s unfair competition claim, while a four-year limitations period applied to the plaintiff’s fraud-type claim. See id. The court noted that while the result was that two different statutes of limitations would be applied to the two separate causes of action, “[t]his is no more or less peculiar than, for example, a case involving both negligence and fraud claims, which have different statutes of limitations.” Id. The court also noted that there are numerous other examples of such inconsistencies in statutes of limitations, and cited a study of the issue by Geoffrey C. Hazard, Jr., Introduction (for Symposium: The Restatement of Suretyship), 34 Wm. & Mary L.Rev. 985, 987 (1993) (“It is familiar that legal evolution results in significant differences in the legal rules governing transactions that are substantially alike from an economic or social viewpoint.

A classic anomaly, for example, is that the statute of limitations for an economic injury is typically longer if the wrong is classified as contract than if it is classified as a tort, unless the wrong is classified as trespass to land, in which case a longer statute of limitations applies.”). See also John Doe 1 v. Archdiocese of Milwaukee, 734 N.W.2d 827 (Wis. 2007) (applying one statute of limitations for plaintiffs’ negligence claims and a different statute of limitations to their fraud claims); Browning v. Burt, 66 Ohio St.3d 544, 561, 613 N.E.2d 993 (1993) (applying one statute of limitations to plaintiff’s medical malpractice claim and another statute of limitations to plaintiff’s negligent credentialing claim).

In the case at bar, the trial court attempted to apply both the delayed discovery statute of limitations and the fraud statute of limitations to Appellants’ intentional-misrepresentation claim. It used the delayed discovery statute to reason that if Appellants had brought their non-fraud claims in a timely manner, then during discovery they would have learned of Respondents’ fraud. See November 30, 2009 Order and Memorandum at A.222. Because they did not bring their non-fraud claims within the limitations period, the court somehow linked that to a lack of reasonable diligence on Appellants’ part to discover the facts constituting the fraud. This reasoning is strained, defies common sense, and fails to separately apply the fraud statute of limitations without regard to the delayed discovery statute of limitations. The link between the non-fraud statute of limitations and the finding of a failure to exercise due diligence is too tenuous to support summary judgment. This is especially true when the question of whether or not a plaintiff

exercised reasonable diligence to discover the fraud is ordinarily a question of fact. See Estate of Jones v. Kvamme, 449 N.W.2d 428, 431 (Minn. 1989); Barry v. Barry, 78 F.3d 375, 380 (8th Cir. 1996).

C. Where the Relationship is One of Confidence and Fraud Has Occurred, the Evidence Must be Very Convincing Before the Defrauded Party Can be Charged with Discovery of the Fraud.

The statute of limitations for fraud is six years. Minn. Stat. §541.05, subd. 1(6)(2007). A fraud cause of action accrues upon the plaintiff's discovery of the facts constituting the fraud. Id. The facts are deemed to have been discovered when with reasonable diligence they could or should have been discovered. Blegen v. Monarch Life Ins. Co., 365 N.W.2d 356, 357 (Minn. Ct. App. 1985). A plaintiff must exercise reasonable diligence when he or she *has notice of a possible cause of action for fraud.* Buller v. A. O. Smith Harvestore Prods., Inc., 518 N.W.2d 537, 542 (Minn. 1994) (emphasis added). A plaintiff's due diligence in the statute of limitations context is ordinarily a question of fact. Murphy v. Country House, Inc., 307 Minn. 344, 240 N.W.2d 507, 512 (1976); Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N.W. 809, 815 (1939); Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302, 310 (Minn. Ct. App. 1993); Klehr v. A. O. Smith Corp., 87 F.3d 231, 235 (8th Cir. 1996). Any concealment of the facts constituting the fraud "by positive affirmative act and not mere silence is itself fraudulent so as to prevent the statute from running." Normania Twp. v. Yellow Medicine County, 205 Minn. 451, 286 N.W. 881, 884 (1939).

Where the relationship between the parties is one of confidence, the evidence that

the plaintiff failed to exercise reasonable diligence to discover the fraud must be very convincing before the plaintiff's claim can be barred. In Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N.W. 809 (1939), the Minnesota Supreme Court rejected the argument that Keough's fraud claim was barred for failure to use reasonable diligence to discover the fraud, because of the confidential relationship that had existed between Keough and Ryan. Keough, 205 Minn. 96, 285 N.W. at 815.

The Court held that whether Keough's failure to discover the fraud and bring suit earlier than he did was reasonable could "only be determined in the light of the circumstances surrounding the transactions and the relationship of the parties during the relevant time." Id. The court noted that the president of the Respondent company, Ryan, was respected and highly regarded by Keough, and that he "reposed trust and confidence in Ryan and not without justification or invitation." Id. The business was well run, Ryan's management produced excellent dividends, and "on the surface there was no reason for [Keough] to suspect that he was being duped. The evidence sustains the trial court's finding that a confidential relationship existed and that the delay [in discovering the fraud] was reasonably explainable under the circumstances." Id. The court further held that "[w]hen a confidential relationship exists failure to discover fraud is looked upon with more indulgence since generally a false sense of security and trust is present in the mind of the injured party. The statute of limitations is not a bar." Id. (citing Stark v. Equitable Life Assur. Soc., 205 Minn. 138, 285 N.W. 466 (1939)).

The court applied the same reasoning in rejecting the defendants' argument that

the claim was barred by laches:

[w]here the relationship is one of confidence, and fraud has occurred, the evidence should be very convincing before the defrauded party should be barred. Plaintiff's ignorance of his rights was proved and explained, and this "excuses his delay in suing to enforce the claim, particularly when his claim is based on the fraud. ..." Upon discovery, action was immediately instituted. The doctrine of laches depends largely upon the particular facts and in this case presented a question of fact for the trial court.

Id. at p. 816 (citation omitted). See also Stark v. Equitable Life Assur. Soc., 205 Minn. 138, 285 N.W. 466, 472 (1939) (holding that diligence in discovering fraud is not required if the defrauding party stood in a relation of trust and confidence to the party defrauded); Murphy v. Country House, Inc., 307 Minn. 344, 240 N.W.2d 507 (1976) (holding that delay in discovery of the fraud may be excusable when a confidential relationship exists); John Doe 1 v Archdiocese of Milwaukee, 734 N.W.2d 827, 844-45 (Wis. 2007) (holding that it does not follow from the fact of being sexually molested that any plaintiff would suspect that the Archdiocese knew that the priests had prior histories of sexual molestation of children and yet placed them in a position where they could molest more children).

In the case at bar, as in John Doe 1, all of the Appellants were in a confidential relationship with the Diocese and parishes. Appellants have all testified that they were taught by their parents and by the church to trust and respect priests and bishops, that priests and bishops could forgive sins, and that priests were holy and good. See Affidavits of Appellants at A.196-A.198, A.199-A.201, A.205-A.207, A.208-A.210. Appellants continued in this belief with respect to church leadership throughout their

adult lives, with Respondents giving them no reason to question the confidence they reposed in Respondents. See id.

Respondents invited this confidence by their outreach to and work with children and by continuing to hold Roney out as a fit and competent priest, even awarding him a Diocesan Distinguished Service Award for 50 years of priestly ministry, 40 years as a dedicated pastor in parishes of the Diocese of New Ulm, and 20 years of dedicated mission service. A.82. Respondents presented Roney with this award even though numerous reports had come in to the Diocese regarding Roney's sexual abuse of children, including one report of abuse that was made just two weeks before Roney received the award. These reports of Roney's sexual abuse of children were known only to the Respondents, who consciously chose to withhold the information from the parishes where Roney had served as pastor in the past. A.72, A.75.

As in John Doe 1 v. Archdiocese of Milwaukee, 734 N.W.2d 827, 834-35 (Wis. 2007), the confidential relationship between the Appellants as children and Respondents, as leaders of the local Catholic church who sought children out and provided facilities for them, gave Appellants a "false sense of security and trust". See also Keough, 205 Minn. 96, 285 N.W. at 815. Given this confidential relationship and the fact that the Appellants received no information until 2003 that would cause them to even suspect fraud, the statute of limitations did not begin to run until 2003 at the earliest.

D. Appellants Did Not and Could Not Have Discovered Respondents' Fraud Until 2003.

It was not until 2003 that any of the Appellants heard of any church covering up the sexual abuse of children by priests employed by the church². Affidavits of Appellants, at A.196-A.198, A.199-A.201, A.205-A.207, A.208-A.210. Nor had they known of the Respondents ever engaging in any wrongdoing. Id. It therefore logically does not follow that Appellants reasonably should have discovered Respondents' fraud more than six years before they commenced this action. Since Appellants commenced this action in 2004, the suit was brought well within the statute of limitations. The district court therefore erred in determining that Appellants could have learned of the facts constituting the fraud more than six years before they commenced this action.

Respondents have argued in the past that Appellants should have discovered their cause of action for fraud against the Respondents when they became adults, because they always remembered Roney's sexual acts. They have argued that Appellants have therefore known long before 1998 that Roney was not a competent priest and that the parishes were not safe environments.

This argument misunderstands the crux of Appellants' fraud claim. They do not

² In 2002, Appellants heard of media stories about other priests sexually abusing children in other jurisdictions. See Affidavits of Appellants at A.196-A.198, A.199-A.201, A.205-A.207, A.208-A.210. They obtained no information that any priests in Respondents' employ had sexually abused children. They obtained no information that Roney had sexually abused other children. That information did not come to them until 2003. See id. Even if they had received such information, that in itself would have been insufficient notice of the possibility that Respondents had defrauded them. They trusted and respected Respondents as their church leaders. They had been given no information or reason to suspect that Respondents knew since 1970 that Roney was sexually abusing children. Moreover, even if 2002 was used to trigger the statute of limitations in this case, the claims were all still timely as they were filed in 2004.

simply claim that Respondents held Roney out as fit and competent and the parishes as safe environments. Rather, Appellants' fraud claim is that Respondents held out such facts to be true *when Respondents knew those facts were false*. Appellants did not know that Respondents knew about Fr. Roney's criminal sexual proclivities towards children, nor that they possessed such knowledge both while Appellants were being abused by Roney and for decades thereafter. Respondents did not voluntarily disclose their knowledge about Roney to anyone. It is extremely unlikely that they would have disclosed their knowledge if Appellants had inquired.

Nor did Appellants have any means of acquiring that information. Respondents actively worked to conceal this information from parishioners in the parishes where Respondents knew Roney had victimized children. A.75. Appellants had no means of knowing the extent of Respondents' knowledge or how long Respondents had been in possession of such knowledge. As a result, Appellants' cause of action for fraud did not accrue until Respondents disclosed in 2003 that Roney had sexually abused children in the past.

The Wisconsin Supreme Court recently faced these same issues in John Doe 1 v. Archdiocese of Milwaukee, 734 N.W.2d 827, ¶ 55 (Wis. 2007)). The Archdiocese in that case argued that as soon as a person knows that he or she was sexually abused they should have investigated the abuse and been able to find out that they had possible fraud claims against the Archdiocese. The court rejected these arguments and held that "it does not follow from the fact of being sexually molested that any plaintiff would suspect that

the Archdiocese knew that the priests had prior histories of sexual molestation of children and yet placed them in the position where they would molest more children.” In the Wisconsin case, the Court even went one step further and held that it was not enough to know that the abuser was a priest. The Court held that it was not reasonable to charge the victims with knowledge that the Archdiocese knowingly placed sex offenders in positions with access to children when the children only knew that they had been abused by their priest. *Id.* at ¶58. Similarly, Appellants in the case at bar should not be charged with knowledge of the fraud simply because they knew that they were sexually abused by a priest.

E. Respondents’ Public Actions With Roney Made it Difficult if Not Impossible to Discover Their Fraud.

Appellants, having been sexually abused by Roney, had no reason to suspect that the Diocese or parishes knew that Roney had sexually abused children before he abused them, and, that in spite of this knowledge, Respondents still chose to place Roney in a position where he could molest more children. This was unthinkable to most people, especially Catholics, until at least 2002. Who would suspect that your religious leaders would knowingly place a sex offender in a position with access to unsuspecting children?

Not only was it unthinkable that church leaders would do this, the Diocese of New Ulm’s public actions with Roney after he abused made it appear that they thought he was a great employee. During and after Roney sexually abused Appellants, Respondents continued to fraudulently withhold from Appellants information about Respondents’ prior

knowledge of Roney's abuse of children, causing Appellants to be unaware of any basis for holding Respondents liable resulting in their delay in bringing suit against the Respondents.

Respondents continued to hold Roney out as a fit and competent priest until 2002. The Respondents continued to assign Roney to parishes where he was allowed unsupervised access to children, even after 1987, when several adult women came forward and complained that Roney had sexually abused them when they were children. As a result of the Respondents' fraudulent representation that they did not know that Roney had a history of sexually abusing children, Appellants had no reason to suspect that Respondents were complicit in Roney's acts, or that Respondents could have prevented at least some of Appellants' abuse if they had acted on complaints by parents to Fr. Francis Garvey in 1970.

Moreover, that the Diocese had received complaints beginning in 1970 and continuing up until at least 1996 was information known only to the Diocese and to the persons who had made the complaints. No amount of diligence on Appellants' part would have uncovered that information unless the Diocese voluntarily disclosed it. As a result, Respondents hid from Appellants the facts which formed the basis of Appellants' causes of action against them. This constitutes fraud, and the statute of limitations did not begin to run until Appellants knew or had reason to know of the fraud. They had no reason to suspect fraud until 2003 at the earliest, when the Diocese and parishes finally acknowledged that Roney had sexually abused several children in the past.

III. The Trial Court's Determination that the Diocese Had No Knowledge of Roney's Sexual Abuse of Children Until 1987 Was Erroneous.

A. There Is Substantial Evidence in the Record Showing that Father Francis Garvey Was Acting as an Agent of the Diocese When He Received Reports in 1970 of Roney's Sexual Abuse of Children, and His Knowledge, Inaction and Representations About Roney Are Imputable to the Diocese.

The district court held that Appellants' fraud claim also failed on the merits. November 30, 2009 Order and Memorandum, at A.283. It found that the claim failed on the merits because there was no evidence that the Bishop of the Diocese of New Ulm had knowledge of Roney's sexual abuse of children before 1987. A.225. The claim against St. Mary's Parish failed on the merits because Sister Virginia McCall, Principal of St. Mary's Elementary School, took steps to keep Roney away from children and therefore any representation she made about Roney was negligent, not intentional. November 30, 2009 Order and Memorandum, at A.224-A.225. The trial court further stated that Father Garvey's efforts to deal with parents' complaints about Roney's sexual abuse of their children was "as a fellow priest only." *Id.* at A.225.

The lower court's conclusions in this regard are erroneous. The evidence shows that Father Garvey was acting as an agent of the Diocese of New Ulm in taking the parents' complaints about Roney and acting upon them. As an agent of the Diocese, Garvey's knowledge in 1970 of Roney's sexual abuse of children is imputable to the Diocese. *See, e.g., Brooks Upholstering Co. v. Aetna Ins. Co.*, 276 Minn. 257, 149 N.W.2d 502, 506 (1967).

Agency has been defined as “the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act”. Jurek v. Thompson, 308 Minn. 191, 241 N.W.2d 788, 791 (1976). Agency is a legal concept which the law imputes to the factual relation between the parties. PMH Properties v. Nichols, 263 N.W.2d 799, 802 (Minn. 1978). An agency exists if the following factual elements are met:

the manifestation by the principal that the agent shall act for him, the agent’s acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow.

Nichols, 263 N.W.2d at 803 (quoting Restatement (Second) of Agency §1).

The creation of an agency relationship need not be in writing. Nichols, 263 N.W.2d at 803. An oral offer can be accepted orally or by conduct. Id. Furthermore, when the evidence is conflicting, whether an agency relationship exists presents a question of fact for the trier of fact to determine. Id.

There is substantial evidence in the case at bar that an agency relationship existed between Respondent Diocese of New Ulm and Father Francis Garvey. Bishop Nienstedt testified that when a priest is functioning as a priest he is acting as an agent of the bishop. A.158. It is the bishop’s singular and sole responsibility to assign a priest to a particular

parish. A.145. See also p. 104. The bishop is the agent of the diocese. A. 213, ¶8. The bishop is the head of the diocese. A.216. Priests apply to the diocesan personnel board for an assignment to a particular parish. Id. The bishop can remove a priest's faculties if the priest engaged in the sexual abuse of minors. A.147. The bishop has the power to send priests to a number of psychologists in cases of sexual abuse of minors. A.148.

The Diocese of New Ulm keeps records of a priest's assignments to different parishes, letters of complaint or praise regarding a priest, file memos of meetings between the bishop and a priest, investigations into alleged misconduct by a priest, records of the priest's seminary training, and therapy records if a priest was sent to therapy for sexual misconduct. A.149-A.153. Criminal records and police records regarding a priest are maintained by the Diocese. A.154.

The Diocese directs where the priest will live. A.156. The bishop gives the priest the faculties to minister. Id. The bishop has the power to discipline a priest for malfeasance and to remove a priest from an assignment. A.161.

The evidence stated above demonstrates "manifestation by the principal [the bishop] that the agent [Garvey] shall act for him" and that the bishop, or Diocese, was "in control of the undertaking." Nichols, 263 N.W.2d at 803.

Father Thomas Doyle testified that in his opinion, in 1970 Father Garvey was an agent or representative of the Diocese at the policy and planning level, because he was a member of the priest personnel board. A.184. Garvey testified that part of the board's responsibilities were to make decisions regarding where a priest would be assigned, and

to help mediate disputes between individual parishes and their priests. A.57-A.58. Garvey testified that the board advised the bishop on making pastoral changes, and helped the bishop evaluate and appoint various priests to various parishes. A.57. Garvey testified that he would get involved in moving a priest at his request, and/or asking him to move. A.57. This evidence demonstrates that Garvey, by accepting the position as a member of the priest personnel board, “accepted the undertaking” to act for the bishop. Nichols, 263 N.W.2d at 803. According to Doyle, given the level of authority Garvey assumed as a board member, he had the power to speak and act on behalf of the Diocese, and reports or complaints by parishioners to Garvey could be considered a report to the Diocese. A.184.

Garvey was also acting on behalf of the Diocese when he directed Sister McCall to watch Roney and to “report to me if ... she observed any misbehavior.” A.60. Garvey testified that he told Sister McCall that if she did observe any inappropriate behavior, then “we should try to get him some professional help.” Id. Sister McCall testified that Garvey told her that he was “arranging to get Father Roney some psychological treatment, and that he was ‘working with Father Roney’ about this. Father Garvey gave me the impression that things were ‘taken care of’”. A.35.

If Garvey were acting solely as a “fellow priest”, he would not have had the authority to give Sister McCall any directions to watch Roney or to get Roney psychological help. Garvey and Roney worked in different parishes. Therefore, the only power Garvey had over Roney was the power conferred on him as a member of the priest

personnel board, which was established by the Diocese. A.57-A.58.

Allen Iverson, one of the parishioners who told Garvey in 1970 about Roney's sexual abuse of a child, testified that he reported the complaint to Garvey because he thought it would be appropriate for the Diocese to do something about it before it was reported to authorities. A.30. Iverson therefore believed that a report to Garvey was a report to the Diocese. Garvey in turn responded that he, Garvey, would do something about it. Id. Garvey later told Iverson that he had arranged for Roney to get treatment or counseling for his problems. Id. Again, Garvey was undertaking to act on behalf of the Diocese when he promised to take action regarding the problem with Father Roney.

Garvey's promises to get Roney psychological help induced others, such as Allen Iverson and Sr. McCall, to take no further action to prevent Roney from continuing to sexually abuse children. It caused them to believe the problem had been "taken care of." A.35.

The reports to Garvey and his response to them also indicate that he intended to take action to correct the problem. If he were a mere priest with no connections to the Respondents, as Respondents claim, he would have had no authority to take any action regarding Roney and he would not have claimed that he could take action regarding Roney.

As a result, Garvey's knowledge of Roney's sexual abuse of children, his failure to take action as promised to prevent Roney from abusing children in the future, and his knowledge that Roney was continuing to work at St. Mary's Parish with unsupervised

access to children, all were imputable to the Diocese. Brooks Upholstering Co. v. Aetna Ins. Co., 276 Minn. 257, 149 N.W.2d 502, 506 (1967). Allowing Roney to continue to have unsupervised access to minor children at St. Mary's Parish, and to continue there as its pastor, amounted to an affirmative representation that Roney was safe to be around children. The Diocese, through its agent, Garvey, knew that this representation was false. The trial court's conclusion that "there is no evidence in this record that the Diocese had the intent to conceal facts about Father Roney or fraudulently misrepresented to Plaintiffs that he was safe to be around children" is therefore incorrect. A.225. The evidence discussed above at the very least creates a genuine issue of material fact as to whether Garvey was acting as an agent of Respondent Diocese of New Ulm when he took the reports of Roney's sexual abuse of children and promised to do something about it. The trial court's grant of summary judgment must, therefore, be reversed.

B. Even Without the Overwhelming Evidence on Garvey's Agency in This Case, the Determination of Whether Someone is an Agent is a Fact Issue for the Jury.

The trial court should have submitted the question of Garvey's agency status to the fact finder. The existence of an agency relationship is a question of fact. PMH Properties v. Nichols, 263 N.W.2d 799, 802 (Minn. 1978); Jurek v. Thompson, 308 Minn. 191, 241 N.W.2d 788 (1976). Similarly the determination of an employment relationship is a question of fact. LeGrand Supper Club v. Seline, 348 N.W.2d 805, 807 (Minn. Ct. App. 1984). "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." D.L.H., Inc.

v. Russ, 566 N.W.2d 60, 70 (Minn. 1997). Here, instead of allowing this issue to be decided by the jury, the trial court erred when it made this factual determination on its own.

IV. The Trial Court's Determination that Sister McCall Did Not Misrepresent Roney was Erroneous Because There is a Material Fact Issue About Her Representations Which Should be Heard by the Fact Finder.

A. The Trial Court Erroneously Determined that Sister McCall Did Not Misrepresent Roney or Only Negligently Misrepresented Roney.

The trial court attempted to dispose of the issue of St. Mary's intentional misrepresentation of Roney as safe to be around children by stating that Sister McCall, principal of St. Mary's School, did not misrepresent Roney because she took steps to keep him away from children. November 30, 2009 Order and Memorandum at A.225. The court noted that McCall told Roney not to go on to the little kids playground and told him not to come to the school during lunch hour, and Roney complied. A.224. However, those steps were clearly insufficient to keep Roney away from children altogether. He still was pastor of St. Mary's Parish. He still had the ability to visit parishioners and their children, to say Mass, and to seek access to children at any time other than on the school playground or during the school lunch hour. No one was warned about his proclivity to abuse children. Sister McCall did not tell anyone to keep their children away from Roney. Rather, she was silent. Because of her silence, St. Mary's parishioners continued to believe that Roney was a holy man, chaste and celibate, and fit to have unsupervised access to their children. In short, St. Mary's Parish continued to hold Roney out as safe

to be around children, and because of this intentional misrepresentation, Appellants were sexually abused by Roney.

The district court next stated that because Sister McCall took steps to keep Roney away from children, and because Father Garvey was not associated with St. Mary's Parish and his efforts to deal with the complaint were as a fellow priest only, "any representation by St. Mary's Parish was negligent, not intentional." A.225. The court's conclusion that any representation was negligent is not supported by the fact that Sister McCall took steps to keep Roney away from children. Sister McCall still knew, had actual knowledge, that Roney had sexually abused minor children. "A bad motive is not an essential element of fraud". Spiess v. Brandt, 230 Minn. 246, 41 N.W.2d 561, 566 (1950). "There is no doubt of fraudulent intent when the misrepresenter knows or believes the matter is not as he or she represents it to be." Florenzano v. Olson, 387 N.W.2d 168, 173 (Minn. 1986). Because Sister McCall knew that Roney was not safe to be around children, yet she allowed him to carry on and go about his duties as if he were safe to be around children (except for on the little kids' playground or in the school during lunch hour), she had fraudulent intent. Her motives were good, but the representation was still fraudulent. Her good motives do not convert her state of mind from intentional to negligent.

The trial court next stated that while Garvey and McCall "essentially confronted Father Roney", they did not have authority to remove Father Roney from his duties. November 30, 2009 Order and Memorandum, at A.225. "Therefore, there is a lack of

proof that St. Mary's Parish made a false representation to Plaintiffs." Id. But whether Garvey or McCall themselves had authority to remove Roney from his duties is irrelevant to whether a representation was made. Sister McCall, as principal of St. Mary's School, had actual knowledge of Roney's danger to children, knowledge that was imputable to St. Mary's Parish. By continuing to allow Roney to act as a priest with opportunities for unsupervised access to children, Sister McCall, as agent of St. Mary's Parish, was representing to all parishioners that Roney was safe around children. Nothing prevented Sister McCall from telling parishioners to keep their children away from Roney, or from telling parishioners the truth – that Roney had sexually abused minor children in the parish. She chose not to inform parishioners of this fact, and by choosing not to tell anyone, she was making a representation about Roney that was false.

Furthermore, either Garvey or McCall could have had Roney removed by making a request for his removal to the Diocese. In fact, recommending the removal of a priest from a particular parish was one of the functions of the priest personnel board of which Garvey was a member. A.57. But neither Garvey nor McCall requested his removal. Instead, they just continued to allow Roney to serve as pastor of St. Mary's, and to allow him to have unsupervised access to children. By doing so, they represented to all in the parish that Roney was safe around children when they knew that he was not safe around children. There is more than sufficient evidence that St. Mary's made a false representation to Appellants about Roney's safety around children. The trial court's grant of summary judgment in favor of Respondents therefore must be reversed.

B. Whether a Party Made Material Misrepresentations is an Issue for the Trier of Fact, and it is an Issue which is Often Proved by Circumstantial Evidence.

The issue of whether Sister McCall made a misrepresentation should have been submitted to the jury as it is a fact question. As early as 1903, Minnesota courts have held that “in cases where the existence of fraud depends upon a variety of circumstances arising from motive, intent, and inference from circumstantial evidence, the court should submit the question to the jury, with proper instructions concerning the tests of fraud.” Brown v. Bayer, 91 Minn. 140, 97 N.W. 736 (Minn. 1903). Additionally, “it is within the province of the trier of fact to determine whether a party has misrepresented material facts and whether the misrepresentations proximately caused the other party's injury.” Johnson Bldg. Co. v. River Bluff Dev. Co., 374 N.W.2d 187 (Minn. Ct. App. 1985) (citing Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46, 51 (Minn.1983)). Moreover, in Clark v. Clark, a divorce proceeding, the court found that the issue of whether the father fraudulently failed to disclose his income was a question of fact for the jury to decide. Although the court’s language did not address fraudulent intent specifically, the court reasoned generally:

The existence of fraud is a factual question. See, e.g., Doering, 629 N.W.2d at 130 (noting district court may summarily dispose of fraud claim only if there are no disputed facts). This court cannot resolve that question. See Kucera v. Kucera, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966) (stating “[i]t is not within the province of [appellate courts] to determine issues of fact on appeal”).

Clark v. Clark, 642 N.W.2d 459 (Minn. Ct. App. 2002). Accordingly this issue should

have gone to the jury.

One of the main reasons that the issue of misrepresentation should normally be decided by a jury is that fraud is most often proved by circumstantial evidence. It rarely if ever happens that a defendant will come out and admit that they intended to deceive someone else. “Fraudulent intent is, in essence, dishonesty or bad faith. What the misrepresenter knows or believes is the key to proof of intent. Wrongful intent, as a state of mind, is rarely proved directly, e.g. by an admission of bad faith, but is normally established through circumstantial evidence.” Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986)(citation omitted). Additionally, the 8th Circuit reasoned in a tax fraud case that “[b]ecause fraudulent intent is rarely established by direct evidence, it may be established through circumstantial evidence. Accordingly, we look for “badges of fraud” to determine whether there is substantial circumstantial evidence to support a finding of specific intent to evade taxes. McGraw v. C.I.R., 384 F.3d 965, 971 (8th Cir. 2004)(citation omitted). The Minnesota Supreme Court conceded that “fraud cannot be proved, ordinarily, except by circumstantial evidence, as it was in this case.” Townsend v. Johnson, 26 N.W. 395 (Minn. 1886).

Because misrepresentation is often proved by circumstantial evidence and it is a fact issue, the trial court should have allowed the fraud claim to be heard by a jury.

CONCLUSION

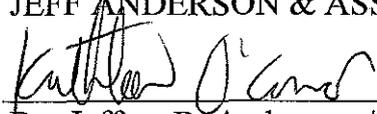
For the reasons stated above, Appellants respectfully request that the Court of Appeals reverse the district court’s grant of summary judgment in favor of Respondents,

and remand this case for trial on the merits.

RESPECTFULLY SUBMITTED,

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DATED: 3-25-10



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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellants' Brief in Case No. A10-374 complies with Minnesota Rules of Appellate Procedure 132.01, Subd. 3(a)(1) and that the brief contains 10,299 words. The brief was prepared in Word 2007.

