APPELLATE COURT CASE NO. A12-1721

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State of Minnesota
In Supreme Court

JOHN DOE 169,

vs. *Respondent,*

PAUL ALAN BRANDON, ET AL.,

Defendants,

MINNESOTA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD,

Petitioner,

PETITIONER MINNESOTA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD'S BRIEF, ADDENDUM AND APPENDIX

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STATEMENT OF LEGAL ISSUES

I. Can there be a general duty of care under common-law negligence where there is no special relationship and no "misfeasance?"

The Court of Appeals held, despite the absence of a special relationship or any identified misfeasance by the Minnesota District Council of the Assemblies of God, the record was sufficient to allow a jury to decide the issue of foreseeability, and reversed the Trial Court's Summary Judgment in favor of Minnesota District Council of the Assemblies of God. (Appellate Add.12-15).

Issue was raised at the Court of Appeals in the Minnesota District Council of the Assemblies of God's Brief. (Appellate App. 58-60). Issue was raised to the Trial Court in the Summary Judgment Motion (Appellate App. 13).

The District Court held that *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011) did not abdicate the requirement of a special relationship. The District Court ruled that there was no general duty and harm was not foreseeable between John Doe 169 and the Minnesota District Council of the Assemblies of God.

Apposite legal authority: *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011); *C.B. v. ELCA*, 726 N.W.2d 127 (Minn. Ct. App. 2007).

II. Did the Court of Appeals create a new cause of action for negligent pastoral credentialing which would involve even greater entanglement than a negligent hiring claim and would constitute excessive entanglement with religion in violation of the federal and state constitutions?

The Court of Appeals held that such claim is equivalent to negligent retention and negligent supervision, and can be resolved by applying neutral principals of law. (Appellate Add. 17-18).

Issue was raised at the Court of Appeals in the Minnesota District Council of the Assemblies of God's Brief. (Appellate App. 65-58). Issue preserved for appeal at the Trial Court in the Summary Judgment Motion (Appellate App. 173-176).

Apposite legal authority: *Black v. Snyder*, 471 N.W.2d 715 (Minn. Ct. App. 1991); *J.M. v. Minnesota Dist. Council of Assemblies of God*, 658 N.W.2d 589 (Minn. Ct. App. 2003).

STATEMENT OF CASE

This case was presented to the Hennepin County District Court, Fourth Judicial District, The Honorable Susan M. Robiner, and arises out of alleged sexual misconduct, between John Doe 169 ("John Doe"), a minor at the time of the alleged misconduct, and a volunteer youth leader, Paul Alan Brandon ("Brandon"). Brandon was a volunteer at Emmanuel Christian Center of the Assemblies of God, Inc. ("ECC"), a local Assemblies of God church, located in Spring Lake Park, MN. Appellate App. 134.

The Minnesota District Council of the Assemblies of God ("District Council") is a higher level organization that is one of 60 district councils acting as a satellite branch of the National General Council of the Assemblies of God Church. Appellate App. 200. The district councils retain no authority to appoint, supervise or retain volunteers or non-clergy at local churches. Appellate App. 200-201. While the District Council certifies yearly ministerial credentials, it retains no authority to interfere, control, or otherwise impose any requirements on church volunteers, nor does the District Council have authority to supervise or control the day-to-day activities of local churches. Appellate App. 131, 200-201.

The current District Council Secretary, Gregory Hickle ("Hickle"), was previously employed at a local church, the Maple Grove Assemblies of God Church ("Maple Grove") from February, 1986 until May, 2004. Hickle was then Senior Pastor of Maple Grove, and worked with Brandon at Maple Grove. Appellate App. 129. Hickle sought Brandon's resignation in February, 1999 due to multiple issues with his performance, including

inappropriate friendships with youth and insubordination. Appellate App. 129. However, Hickle had no knowledge whatsoever of any sexual conduct by Brandon toward youth. Appellate App. 118, 130. Similarly, the District Council itself had no knowledge of any prior misconduct by Brandon. Appellate App. 106.

In 2005, John Doe alleged that Brandon, who had resigned from Maple Grove in 1999, had sexually abused him while Brandon was a volunteer at ECC. Appellate App. 155-157, 192. Brandon was not employed by the District Council at that time or any other, nor did the District Council have any contact with John Doe. Brandon's only interaction with the District Council was that he maintained his credentials after resigning his position at Maple Grove. Appellate App. 117, 138. It is undisputed that the District Council never had any interaction or involvement with John Doe at any point in time.

John Doe alleged that the District Council (1) negligently supervised and was vicariously liable for Brandon's actions, and (2) was negligent under common law. Appellate App. 194-196. John Doe also brought claims against Brandon and the ECC. Appellate App. 193-197. However, John Doe voluntarily dismissed Brandon, and the District Court entered a Judgment of Partial Dismissal on February 21, 2012. Appellate App. 186.

On April 23, 2012, the Honorable Judge Susan M. Robiner, heard motions for summary judgment by the District Council and ECC. Appellate App. 87. At oral argument, John Doe conceded that discovery had shown that the District Council did not employ

Brandon and withdrew his arguments that the District Council was vicariously liable and had negligently supervised Brandon. Appellate App. 105.

On June 13, 2012, the district court granted the District Council's motion for summary judgment on John Doe's negligence claim. Appellate App. 87. The District Court found that the District Council owed no duty to John Doe because there was no evidence of a special relationship between the District Council and John Doe. Appellate App. 105-106. The district court also addressed John Doe's argument that relied on *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011) and the general duty of care that arises when a foreseeable risk of injury occurs to a foreseeable plaintiff. Appellate App. 105-106. The district court granted summary judgment in the District Council's favor and judgment was entered in July 27, 2012. Appellate App. 187.

Following these motions, John Doe settled with ECC and filed a Stipulation for Dismissal on July 20, 2012. Appellate App. 188-189. John Doe then appealed. Appellate App. 184-185.

The sole issue of John Doe's appeal was that there was a general duty of reasonable care owed by the District Council based on the credentialing of Brandon and foreseeability of harm. Appellate App. 18-26.

The District Council argued that there was no general duty of reasonable care where there was no misfeasance, no foreseeable harm, and given that there was no employment relationship, John Doe's negligence claim violated the prohibition against laws affecting the

establishment of religion. Appellate App. 58-66.

On May 28, 2013, the Court of Appeals reversed the District Court. The Court of Appeals held that foreseeability should be submitted to a jury for a determination of whether it was reasonable to expect that the District Council's credentialing of Brandon's minister's license could cause injury to John Doe. Appellate Add. 15. The Court of Appeals also held that there were no constitutional concerns in determining whether the District Council was negligent by providing initial approval of Brandon's annual renewals for his minister's license which created a situation in which sexual abuse was foreseeable because such claim could be resolved under neutral principles of law. Appellate Add. 18.

The District Council sought further review of the decision of the Court of Appeals on two grounds: (1) Did the Court of Appeals create a new cause of action for negligent pastoral credentialing which would involve even greater entanglement than a negligent hiring claim and would constitute excessive entanglement with religion in violation of the federal and state constitutions, and (2) Can there be a general duty of care under common-law negligence where there is no special relationship and no "misfeasance?" Appellate Add. 20. On August 20, 2013, this Court granted the District Council's Petition for further review.

STATEMENT OF FACTS

I. John Doe and Defendant Brandon

John Doe believes he first stepped foot in Emmanuel Christian Center ("ECC") in 2005 for a Wednesday evening group called the "JCP," composed mostly of high-school

aged young adults. Appellate App. 145. At some point unknown to John Doe, he recalls first attending the Friday night youth group activities, which went by a couple names, including "Lifeline", "Element", or "Cell Group." Appellate App. 146-147, 161.

At some point following a Friday night Cell Group meeting sponsored by ECC at a host-house, John Doe was invited to Brandon's house for a sleep-over. Appellate App. 149. Anywhere between five and twelve teenage boys stayed at Brandon's house on those Friday night sleep-overs. Appellate App. 149. On at least one occasion there was also another adult present, Glen. Appellate App. 152.

Upon arrival at Brandon's house, the boys typically headed to the basement and spent the night watching movies, eating snacks, and playing video games. Appellate App. 149. John Doe does not recall the date, but on one occasion, after the activity ended, while John Doe slept on the floor next to Brandon, he claims that Brandon touched him in an inappropriate way. Appellate App. 153. The inappropriate contact happened a second time, and after this second incident, John Doe completely stopped going to Brandon's house and to the ECC youth events. Appellate App. 157.

Following the first incident, John Doe considered telling an adult or ECC personnel what had happened, but ultimately he kept to himself. Appellate App. 160. John Doe finally told his mother and brother about the second incident and his mother then called the police. Appellate App. 158. Paul Brandon has since pled guilty to two counts of criminal sexual misconduct in the fourth degree. Appellate App. 162-167.

II. Greg Hickle and Paul Brandon

Hickle worked at Maple Grove from February, 1986 through May, 2004. A.129. While at Maple Grove, Hickle came to know Brandon, the youth pastor there, and who was employed at the church from 1991 until February 1999. Appellate App. 129.

As the youth pastor at Maple Grove, Brandon had job performance problems, and also displayed some boundary issues when interacting with some youth participants, primarily spending a disproportionate amount of time with youth, compared to adults his age, as well as occasional sleep-overs with some teenagers. Appellate App. 130. However, during Hickle's employment at Maple Grove, never once was there any allegation of sexually inappropriate acts between Brandon and any youth.[1] In his deposition, Hickle testified that had there been any mention by any person of sexually inappropriate behavior, immediate action would have been taken by Maple Grove:

> "If I had known there had been any sexual contact with those kids, he'd have been fired on the spot and I would have reported him immediately to the police and to the District Office. I did not know that. I didn't have any basis to make that accusation and I didn't do it. You can ask anybody in my sphere of influence there at [Maple Grove] and they will tell you exactly that's my stated position. Any sexual impropriety, including sexual harassment of an adult, you are fired on the spot . . . If there had been a hint of sexual activity, it would have been a done deal. We would have been down at the District Office, we'd have been

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[1] Appellate App. 130; Appellate App. 108; Appellate App. 110 (no mention by Darrel Lindquist); Appellate App. 111 (no mention by D L); Appellate App. 112 (no mention by parents of Doe A); Appellate App. 112, 113 (no mention by any parents); Appellate App. 115, 118, 204 (L did not mention sexual activity to Ruch); Appellate App. 143 (L did not mention sexual activity to Slag).

> at the police department. It's very clear in our protocol there, any sexual abuse whatsoever, we're going to report it to the authorities. We're going to report it to the District Office if it's a minister, and we're going to take action against that person."

Appellate App. 118.

In further response to John Doe's counsel's aggressive questioning, and inappropriate factual connections, Hickle further testified in his deposition that:

> "you're drawing the conclusion that I knew something about sexual misconduct that I had no knowledge of knowing. I didn't know that. If I'd have known there was sexual misconduct, we wouldn't be having this discussion today, at least not at this level, because we would have disciplined him immediately. So in the midst of that, you're continuing to fall back to a position to say you knew this sexual misconduct was going on. I did not know that. If I had known it, it would had changed everything."

Appellate App. 120.

During the last year of Brandon's employment at Maple Grove, the Board of Elders worked with him and attempted to correct both the boundary and job performance issues he exhibited in his role as youth pastor. Appellate App. 109. Eventually, Maple Grove decided to terminate Brandon's employment based on both Brandon's inappropriate emotional relationships with youth, and his job performance. Appellate App. 130; 139-140. As a condition of his separation from Maple Grove, Brandon agreed to present a letter detailing the employment concerns of the Maple Grove Body of Elders to any future church wherein Brandon sought ministerial employment. Appellate App. 135, 139-140.

Sometime in late 1999, after Brandon had left Maple Grove, and while Hickle was still pastor at Maple Grove, Hickle spoke with Pastor Mark Denyes of ECC regarding a possible position for Brandon at the ECC. Appellate App. 130. Rather than recommending for or against Brandon's employment, Hickle followed the agreed upon conditions of Brandon's departure, and informed Pastor Denyes that Brandon was required to present a letter listing the conditions of his resignation from Maple Grove. Appellate App. 130.

Brandon did not present the letter to anyone at ECC. Appellate App. 134. In 1999, again while still at Maple Grove (and five years before commencing employment at the District Council), Hickle learned that Brandon was doing some volunteer work in the youth programs at ECC. Appellate App. 131.

In May, 2004, Hickle left his employment at Maple Grove to join the District Council as its Secretary and Treasurer. Appellate App. 129. From and after commencement of his employment at the District Council, Hickle had no interaction with Brandon and no contact with ECC regarding Brandon until becoming aware of the criminal charges brought against Brandon involving John Doe. Appellate App. 131.

III. The District Council and Brandon

The Minnesota District Council of the Assemblies of God is one of 60 "district councils" acting under the National General Council of the Assemblies of God Church. Appellate App. 199. The Assemblies of God is a Protestant denomination with more than 60 million members worldwide, at least three million of whom currently reside in the United

States. Appellate App. 199-200.

As of November, 2011, there were 18,937 ordained ministers in the Assemblies of God Church, 10,055 were licensed, and 5,512 were certified.[2] Appellate App. 200. These ministers are located in approximately 13,000 churches scattered throughout the United States. Appellate App. 199. Each district council, acting as a satellite branch of the National General Council, reserves the authority to discipline or dismiss a clergy person whose conduct violates certain Biblical standards, but the district councils retain no authority to appoint, supervise or retain volunteers at those churches. Appellate App. 131, 201.

Additionally, the District Council retains no authority to interfere, control, or otherwise impose any requirements on church volunteers, nor does the District Council have authority to supervise or control the day-to-day activities of local churches in connection with their ministers and volunteers. Appellate App. 131, 201. According to the Assemblies of God Constitution and Bylaws, those powers are left to the individual churches. Appellate App. 201.

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[2] A "certified minister" devotes part of their time to Christian ministry and remain under the Supervision of a pastor or designated supervisor. They preach at least 12 times a year. The certification is the precursor to the license to preach. Appellate App. 206. A "licensed minister" is where there is clear evidence of a divine call and evident purpose to devote one's time to preaching the gospel. They shall preach at least 15 a year. Appellate App. 207. An "ordained minister" must have a license to preach and shall have been engaged in active work as a pastor, evangelist, or some other recognized and proven full-time preaching ministry for at least 2 consecutive years. They shall preach at least 15 times per year. Appellate App. 207.

From 1991 through 2006, Brandon was a credentialed member of the Assemblies of God Church. Appellate App. 122. Throughout the years, he applied for and renewed his ministerial credentials through the District Council. Appellate App. 168-169. He paid annual dues to the District Council to maintain his credentials, but he never received compensation as an employee of the District Council nor held any position within the District Council. Appellate App. 201. He was never assigned any duties or responsibilities by the District Council, nor was he ever under supervision by any person within the District Council while he volunteered at the ECC. Appellate App. 201.

IV. District Council Credentialing

The District Council is limited in authority to the licensure and credentialing of ministers, and has a role in pastoral discipline affecting the licensure and credentialing of ministers in conjunction with the General Council. Appellate App. 122. The District Council receives every credential holder's annual renewal form and gives initial approval of the renewal of their credentials to the General Council, which then decides whether or not to renew the credentials. Appellate App. 122-123.

The initial License to Preach application process involves several steps: 1) an applicant submits an application to the District Council office; 2) the application is reviewed for items of concern related to character/conduct and doctrine; 3) the District Council receives references on the applicant; 4) the District Council conducts a personal interview with the candidate; and finally 5) the District Council makes a recommendation to the

General Council for approval of the application. Appellate App. 125-126.

The Ordination process, granting ministerial credentials, involves the following steps: 1) a minister holding a License to Preach submits an application to the District Council office; 2) the application is reviewed for items of concern related to character/conduct and doctrine; 3) the District Council receives references on the applicant; 4) the District Council conducts a personal interview with each candidate; and 5) the District Council Presbytery makes a recommendation to the General Council for approval of an application. Appellate App. 126-127.

To renew ministerial credentials, a credential holder must annually submit an application to the District Council, who gives approval to the General Council, which then decides whether or not to renew the credential. Appellate App. 127.

Hickle testified that, as Secretary of the District Council, his job is not to make a recommendation as to the fitness of an applicant, only to verify that the applicant had satisfied the application process and there were no reasons not to renew the credentials of a minister. Appellate App. 116.

In seeking his Assemblies of God credentials, Brandon fulfilled his education qualification by graduating from North Central Bible College, an endorsed Assemblies of God Bible College, with a Youth Ministries major and a Bible minor. Appellate App. 128. He applied for and subsequently held a License to Preach with the General Council of the Assemblies of God from July 30, 1991 until April 21, 1993. Appellate App. 122.

Brandon then held Ordained Minister credentials with the General Council from April 12, 1993 until December 31, 2006. Appellate App. 122. His credentials lapsed due to non-renewal effective December 31, 2006, and he was notified of such on February 9, 2007. Appellate App. 127.

Brandon was never employed or supervised by the Minnesota District Council or the General Council in any way. Appellate App. 122.

Brandon's credentials carried no weight when he began doing volunteer work at the ECC. He was not hired as an Assemblies of God minister; he was a "volunteer" and "never an ECC employee." Appellate App. 171. Only Nate Ruch of ECC even knew Brandon maintained credentials. Appellate App. 136, 144. When Nate Ruch, who hired Brandon, was asked whether Brandon's credentials gave him a "leg up" coming into ECC, Ruch testified:

> "He – I'll answer this two - - two ways. One, he still had to go through the same process any other leader had to go through to become a youth leader, so that didn't short circuit that process in any way. I did feel a sense that he did care about teenagers and that he has an awareness, an excellence to whatever he did youth ministry-wise enough that I probably felt at the time that he understood some things that a volunteer that had never been in youth ministry before would not have known..."

Appellate App. 203-205.

It was only JJ Slagg that testified that Brandon's credentials "would have given him a leg up over other volunteers" because as Slagg speculated, Nate Ruch would have probably had a professional relationship with him from other events or activities. Appellate App. 144.

Despite this speculation, JJ Slagg admitted he was not at ECC at the time Brandon was hired and admitted he came in like any other volunteer. Appellate App. 144.

Brandon may have had more experience than other ECC volunteers due to his previous youth pastorship, giving him more knowledge when participating with youth programs, but he received no special treatment or recognition due to his ministerial credentials. Appellate App. 136-137. Brandon was required to attend the same ECC training programs as other non-credentialed, non-licensed youth volunteers. Appellate App. 137. His ministerial credentials were simply irrelevant when he began a volunteer position at ECC. Appellate App. 144.

ARGUMENT

I. Standard of Review

On appeal, the Court applies a *de novo* standard of review to a grant of summary judgment. *Day Masonry v. Indep. Sch. Dist. 347,* 781 N.W.2d 321, 325 (Minn. 2010). The role of this Court in reviewing a trial court's grant of summary judgment is to determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). In making this determination, the evidence must be viewed in a light most favorable to the party against whom summary judgment was granted. *Id.* When the relevant material facts are not in dispute, the district court's interpretation of the law is reviewed de novo. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007).

A defendant in a negligence suit is entitled to summary judgment when the record reflects a complete lack of proof on any of the four essential elements of the negligence claim. *Funchess v. Cecil Newman Corp.,* 632 N .W.2d 666, 672 (Minn. 2001). Existence of a legal duty is generally an issue of law for the Court to decide, and it may therefore address the issue *de novo*. *Bjerke*, 742 N.W.2d at 664*; Servicemaster v. GAB Business Servs., Inc.,* 544 N.W.2d 302, 307 (Minn.1996).

Constitutional questions should not be decided unless doing so is necessary "to dispose of the case at bar." *Meyer v. Lindala,* 675 N.W.2d 635, 639 (Minn. App. 2004). When a case is decided on other grounds, the constitutional issues may not be addressed. *Id.*

II. There is no general duty of care under common-law negligence where there is no special relationship and no "misfeasance".

At issue before the Court of Appeals was the existence of legal duty: a duty of care in the context of a common-law negligence claim. Negligence is generally defined as failure to exercise such care as persons of ordinary prudence usually exercise under such circumstances. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

The basic elements necessary to maintain a claim for negligence are (1) existence of a duty of care; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer injury. *Bjerke*, 742 N.W.2d at 664.

Generally, a defendant's duty to a plaintiff is a threshold question because in the absence of a legal duty, the negligence claim fails. *Domagala*, 805 N.W.2d at 22.

The Court of Appeals misconstrued *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011) in reversing the trial court's summary judgment in favor of the District Council. *Domagala* reiterated that there are two paths in which a duty to act with reasonable care for the protection of others arises: (1) when a special relationship exists between the parties and (2) when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff ("misfeasance"). *Id.* at 23.

In the latter case, this Court wrote: "We have imposed a duty of reasonable care to prevent foreseeable harm when the defendant's conduct creates a dangerous situation." *Domagala*, 805 N.W.2d at 26. The exercise of reasonable care upon the creation of a dangerous situation may include giving a warning to anyone placed at risk. *Id.* at 21.

A person generally has no duty to act for the protection of another person, even if he realizes or should realize that action on his part is necessary. *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn.1995). Whether a legal duty exists "depends on the relationship of the parties and the foreseeability of the risk." *Id.* The existence of a legal duty is a question of law. *Bjerke*, 742 N.W.2d at 664.

Here, there is no special relationship between John Doe and the District Council. John Doe has never challenged the District Court's conclusion that there was no special relationship between himself and the District Council.

The issue before the Court of Appeals was solely whether the District Council engaged in "misfeasance", by creating a foreseeable risk of injury to a foreseeable plaintiff

in credentialing Brandon. *Domagala* and its ancestor decisions, requires misfeasance or active misconduct to create the foreseeable risk of injury. The Court of Appeals inexplicably failed to address the element of misfeasance or misconduct, and instead focused on foreseeability. However, it is clear under Minnesota law, promulgated by this Court, that without a special relationship and without misfeasance, there can be and is no duty owed by the District Council to John Doe.

A. The District Council's Act of Certifying Brandon as a Minister did Not Create Any Harm and was not Misfeasance as Required by this Court Under *Domagala.*

Domagala detailed that the distinction between the specific duty to warn and the exercise of reasonable care stems from liability for misfeasance vs. nonfeasance. *Domagala*, 805 N.W.2d at 22. "Misfeasance is 'active misconduct working positive injury to others' while nonfeasance, or nonaction, is 'passive inaction or a failure to take steps to protect [others] from harm.'. *Id.*

In *Domagala*, the Plaintiff, Domagala, engaged Rolland, and his company, to perform landscaping work on Domagala's property. While Rolland was using a "skid loader" to perform the landscaping work, Domagala picked up rocks and debris around the yard. The two used hand signals to communicate over the noise of the equipment. *Domagala*, 805 N.W.2d at 19.

At various points, Rolland had to change attachments to the skid loader to complete the landscaping. It was not uncommon for debris to jam in the levers, preventing Rolland

from lifting the levers to release an attachment before switching to another one. Rolland would then "flutter the hydraulics" so that the attachment shook and dislodged the debris. Rolland admitted that shaking the attachment when it was connected to the skid loader by a single pin was "very" dangerous. *Id.*

When Rolland was attempting to switch attachments, he saw debris lodged in one of the levers and began fluttering the hydraulics while the bucket was raised. While Rolland was shaking the bucket, Domagala noticed a rock was jammed in the lever. Domagala approached the skid loader with his hands raised, but without any further communication, and he removed the rock. In removing the rock, Domagala released the lever and the bucket fell on his foot which resulted in the amputation of three toes. *Id.*

Domagala brought suit claiming that Rolland negligently operated the skid loader and failed to warn him of the dangers inherent in detaching the skid loader bucket. This Court held that a reasonable person could expect that forcefully shaking a bucket attachment that was hanging vertically from a skid loader by one pin could cause injury to those in proximity to the skid loader. Therefore, Rolland owed a duty to act with reasonable care to prevent injury to others as a result of his conduct. *Domagala,* 805 N.W.2d at 27-28.

In the instant case, John Doe asserts that the District Council, in certifying the application for Brandon's minister license to the General Council, for final approval, created a dangerous situation that led to the sexual abuse of John Doe.

Unbelievable as it seems, John Doe equates the District Council's certification of Brandon's minister license (for approval by the General Council) with the creation of a duty of reasonable care, as found in *Domagala* - - where Rolland shook the attached bucket while fully knowing it was a "very" dangerous thing to do.

In *Domagala*, this Court explained that the exercise of reasonable care stems from liability for misfeasance (not nonfeasance which requires a special relationship). *Id.* at 22. John Doe argued that a general duty of reasonable care arose because of the District Council's own active misconduct: their certification of the pastoral credentials of Brandon, which then created a dangerous situation for John Doe.

In the instant case, however, there is no evidence which supports a conclusion that the District Council, in their initial approval of the certification of Brandon, committed active misconduct. Quite the opposite is true.

One of the functions of the District Council is to receive every credential holder's annual renewal form, verify that the applicant satisfied the application process, paid the appropriate fee, and then give initial approval of the renewals to the General Council.

As the Court of Appeals correctly stated, The District Council, through Hickle, provided the "initial approval" of the applications for renewal of minister credentials. The District Council is limited in authority to the licensure and credentialing of ministers, and its role in the process is in conjunction with the General Council. The District Council receives every credential holder's annual renewal form, and in the applicable case, gives initial

approval of the renewal of their credentials to the General Council. The General Council then decides whether or not to renew the credentials.

Hickle testified that, as Secretary of the District Council, his job is not to make a recommendation as to the fitness of an applicant, only to verify that the applicant had satisfied the application process, and there were no reasons not to renew the credentials of a minister.

The District Council did not create any harm by certifying Brandon's applications to the General Council. While Brandon maintained a minister's license, he was not employed by the District Council, was not compensated by the District Council, did not hold any position at the District Council, nor did the District Council supervise him or assign him duties or responsibilities.

Even more to the point, the District Council retains no authority to appoint, supervise or retain volunteers at local churches, such as ECC. And that is what Brandon was: a volunteer. Moreover, the District Council similarly does not have authority to supervise or control the day-to-day activities of local churches in connection with their ministers and volunteers.

Brandon was functioning as a youth leader at the direction and discretion of the ECC. His position of youth leader did not require a minister's license.[3] John Doe's assertion that

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[3] Which, ironically, is the only basis upon which the Court of Appeals remanded this case back to the trial court.

the events, and the resulting contact, could not have taken place without the District Council holding Brandon out as a trustworthy leader and facilitating access to children, is beyond speculation, and well into fantasy. He was not hired as an Assemblies of God minister, and only Nate Ruch of ECC even knew Brandon maintained pastoral credentials.

Brandon may have had more experience than other volunteers due to his previous youth pastorship, giving him more knowledge when participating with youth programs, but he received no special treatment or recognition. As recognized by the Court of Appeals, he was required to attend the same ECC training programs as other non-credentialed, non-licensed youth volunteers. Indeed, his ministerial credentials were simply irrelevant when he joined ECC as a volunteer.

But the central point is this: the certification is the only action John Doe asserts the District Council did to "create harm". The imposition of a duty of care in *Domagala* - - based upon the creation of harm - - has nothing to do with John Doe's negligent credentialing argument.

The Court of Appeals simply did not address the distinction between nonfeasance and misfeasance. The decision, unfortunately without any discussion, went on to equate the limited, annual credentialing function, performed by the District Council, with conduct which creates a dangerous situation such as hunting with rifles, driving golf balls where a person is standing, or shaking heavy landscape equipment with a person standing nearby ("misfeasance").

As a result, the decision of the Court of Appeals in this case has three unsound effects: (1) it erroneously links what it considers "negligent credentialing" by the District Council with "misfeasance"; (2) a special relationship--required to impose a legal duty in "nonfeasance" cases--is now apparently no longer required; and (3) the decision threatens to broadly expand Minnesota tort liability: by equating a perceived "nonfeasance" with a legal duty to warn. This decision must be overturned and the District Court affirmed.

B. There can be no duty when there is no foreseeable harm

When a person acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others. *Domagala*, 805 N.W.2d at 26. "To determine whether risk of injury from the defendant's conduct is foreseeable we look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Id.*

A harm which is not objectively reasonable to expect, is too remote to create liability. *Foss v. Kincade*, 766 N.W.2d 317, 322-23 (Minn. 2009). Although in most cases the question of foreseeability is an issue for the jury, the foreseeability of harm can be decided by the court as a matter of law when the issue is clear. *Id.*

In *C.B. v. ELCA*, 726 N.W.2d 127 (Minn. Ct. App. 2007), the Court of Appeals affirmed the District Court's dismissal of the plaintiff's negligent supervision claims. The contention in that case was that certain "red flags" established that a child's sexual abuse was

foreseeable and preventable. Those red flags included the minor's frequent overnight visits with a church family, the lavishing of inappropriate and expensive gifts on the minor, and the minor's vigorous protesting about spending time with the church family where the minor was abused.

The Court of Appeals concluded that the negligent supervision claim against the church entities, the ELCA, Synod and local church, failed as a matter of law because there was an insufficient showing that any of the church entities were aware of the alleged "red flags." The *C.B.* Court stated thus:

> "Appellants have failed to provide any evidence that any of the Respondent church entities were aware of the alleged 'red flags.' Even if Respondents were aware of the alleged 'red flags,' Appellants failed to establish how the 'red flags' should have put on Respondents on notice of the abuse. In light of Appellant's relationship with the Stenes, it would not be abnormal for C.B . to spend the night at the Stenes, or for the Stenes to buy nice gifts for somebody they considered to be their granddaughter. It is not abnormal for a teenager to put up a fuss when instructed that she spend time with a tutor to work on her school work. There is nothing in these 'red flags' to indicate that Oscar Stene was abusing C.B., or that Respondents were aware of the existence of these 'red flags.'"

Id. at 136. *See, also, Oslin v. State*, 543 N.W.2d 408, 415 (Minn. Ct. App. 1996) (stating that there must be some factual evidence that the employer has some basis for suspecting that a certain employee has such dangerous proclivities).

In the instant case, it is evident that the District Council lacked any knowledge of "red flags" which would identify Brandon as sexually abusing John Doe or any youth. The only evidence John Doe points to is that Hickle, while still at Maple Grove, had worked with

Brandon, and was aware of Brandon's job performance problems and that Brandon had developed some inappropriate emotional relationships with some youth participants.

However, during Hickle's tenure at Maple Grove, never once was there any allegation of sexually inappropriate acts between Brandon and any youth. While there was a separation letter that detailed the employment concerns of the Maple Grove Body of Elders regarding Brandon, that letter was created for Brandon to provide to any future church where he sought employment as a minister. The letter had no mention of, nor any relation to, sexual misconduct by Brandon, because there were no allegations of sexual misconduct by Brandon while employed at Maple Grove.

During 1999, while Hickle was still at Maple Grove, he spoke with Pastor Mark Denyes of ECC regarding a possible position for Brandon at ECC. Hickle didn't recommend Brandon for employment; he simply informed Pastor Denyes that Brandon was required to present a letter listing the conditions of his resignation from Maple Grove. Brandon did not do so and was not hired by ECC as a pastor.

It was not until five years later, in May, 2004, that Hickle left his employment at Maple Grove to join the District Council as its Secretary and Treasurer. Since his commencement of employment at the District Council, Hickle had no interaction with Brandon and no contact with ECC regarding Brandon.

Under these facts, the Court of Appeals believed this to be a question for a jury to determine whether Hickle's knowledge should be imputed to the District Council, and

whether the sexual abuse of John Doe was foreseeable. The Court of Appeals concluded that the annual credentialing function of the District Council was accordingly "negligence" based upon Hickle's knowledge of Brandon's performance issues at Maple Grove in the late 1990's. The District Council respectfully submits that Hickle's knowledge does not remotely constitute "foreseeability of harm".

There were no "red flags" involving Brandon which would have made any sexual abuse foreseeable to the District Council. The District Council had no knowledge of any inappropriate behavior and Hickle's own knowledge, from his time at Maple Grove, did not encompass any concerns about sexual misconduct. And, there were never any allegations of any sexual misconduct.

The Court of Appeals' decision will, if not reversed, result in a broad expansion of ordinary negligence claims, based upon credentialing functions. A licensing authority can, as the Court of Appeals held, now be liable in negligence for the intentional acts of any of its credential holders even in the most tenuous cases. All credentialing bodies, including this Court, can be potentially liable under the Court of Appeals' decision.

C. There are No Limits to Duty Under John Doe's Theories

John Doe's broad argument is this: by certifying the renewal of the credentials of a person, with allegedly known tendencies to harm others (not provably known tendencies), the credentialing entity must be held accountable because the harm was foreseeable. In other words, John Doe will contend, a licensing authority can be held liable in negligence for the

intentional act of any of its license-holders. This legal theory would exponentially disrupt tort law in this state.

Public policy cannot favor John Doe's proffered theories of foreseeability. A conclusion that Brandon's misconduct was foreseeable, and that the District Council owed a duty to John Doe, by certifying the credentials of Brandon, effectively results in all licensing entities in Minnesota becoming subject to lawsuits.

The District Council's limited involvement in the ministerial credentialing process is so remote to the harm suffered by John Doe in this case. The connection is simply non-existent. John Doe's attempts to hold the credentialing entities liable because the harm committed by a license holder was "foreseeable" has no basis in law or fact, and broadening the foreseeability to survive summary judgment in this case is against policy considerations.

III. Did the Court of Appeals create a new cause of action for negligent pastoral credentialing which would involve even greater entanglement than a negligent hiring claim and would constitute excessive entanglement with religion in violation of the federal and state Constitutions.

The Minnesota Supreme Court has the power to adopt or reject common law causes of action new to the State of Minnesota. *See Lake v. Wal-Mart Stores, Inc.,* 582 N.W.2d 231 (Minn. 1998). This Court "may modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable." *Silesky v. Kelman*, 161 N.W. 2d, 632 (Minn. 1968). The Court of Appeals is an error-correcting Court without the authority to change the law or create new causes of action. *Federated Mut Ins. Co. v. Lichfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990).

The Court of Appeals' decision has, in essence, created a new cause of action for "negligent credentialing" by a church organization (even though Brandon was actually working as a volunteer, not as a credentialed pastor). Yet, a "negligent credentialing" claim is even more First Amendment entanglement than negligent hiring claims involving churches which have been specifically rejected in Minnesota.

The United States and Minnesota Constitutions prohibit interference by the courts into decisions made by religious entities that cannot be resolved under neutral common law principles. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const. amend. I. The amendment is applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903 (1940).

The District Council asserts that John Doe's common law negligence claim violates the prohibition against laws affecting the establishment of religion. In order to be valid under the Establishment Clause, a governmental action 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 v. Snyder*, 471 N.W.2d 715, 719-20 (Minn. Ct. App. 1991), *review denied* (Aug. 29, 1991). Here, the issue is the third prong of the *Lemon* test, excessive entanglement with religion by

the government. *See Franco v. The Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198, 203 (Utah 2001).

The Minnesota Constitution provides heightened protection for religious entities from governmental intrusion. State law protections for civil liberties may exceed those provided by federal law. W. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARVARD L. REV. 489, 491 & 495 (1977).

> The Federal Constitution, it is said, establishes a floor, a level of protection for individual liberties, beneath which a state constitution may not go. A state constitution may raise the floor by adding additional guaranties, but it may not lower the level.

J. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 234 (1994).

Under the Establishment Clauses of Article I, Section 16, of the Minnesota Constitution, the government does not have jurisdiction to determine matters of religious belief or practice. The state constitution protects the jurisdictional autonomy of religious organizations over matters of religious belief and practice.

The claim of negligent credentialing is analogous to a claim of negligent hiring of an employee, which has been recognized in Minnesota. *Larson v. Wasemiller*, 738 N.W.2d 300 (Minn. 2007) citing *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 909-11 (Minn. 1983). Some jurisdictions that recognize the tort of negligent credentialing do so as a natural extension of the tort of negligent hiring. *Larson v. Wasemiller*, 738 N.W.2d 300 (Minn. 2007).

In *Larson v. Wasemiller*, this Court was tasked with determining if there was a cause of action in negligent credentialing in the medical field. This Court held that given the previous recognition of a hospital's duty of care to protect its patient from harm by third persons and of the analogous tort of negligent hiring, that the tort of negligent credentialing was inherent in the natural extension of well-established common law rights. *Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007).

Minnesota courts, however, have consistently held that there is no subject matter jurisdiction for claims of negligent hiring against a religious organization. See *Black v. Snyder*, 471 N.W.2d 715 (Minn. Ct. App. 1991), review denied, (Minn. Aug. 29, 1991).

"When claims involve 'core' questions of church discipline and internal governance, the Supreme Court has acknowledged that the inevitable danger of governmental entanglement precludes judicial review.... [Appointment and discharge] claims are fundamentally connected to issues of church doctrine and governance." *Black v. Snyder*, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991) (holding that prohibition against litigating matters at the core of church's religious practice required dismissal of assistant-pastor's discharge related claims), *review denied* (Minn. Aug. 29,1991); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 435 (Minn. 2002) (under the entanglement doctrine, a state may not inquire into or review the internal decisionmaking or governance of a religious institution).

Where individuals are "called" to ministry, hiring-related claims implicate core, fundamental church doctrines. *J.M. v. Minnesota District Council of the Assemblies of God,* 658 N.W.2d 589, 594 (Minn. Ct. App. 2003). A determination of how information should be used in a hiring decision, information from a pastor-candidate's former employer, would force the court into an examination of church doctrine governing who is qualified to be a pastor. *Id.* at 594. Such an examination of the hiring decision would require entanglement between church and state precluded by the Establishment Clause of the First Amendment. *Id.*

The Court of Appeals, in this case, repeatedly focused on the District Council's failure to do more in approving or renewing Brandon's credentials and connecting that with the injury suffered by John Doe. But the determination of whether Brandon was fit to be accepted or "hired" at ECC, as same relates to the District Council's credentialing function, cannot be resolved under neutral common law principles. Religious beliefs and church doctrine are the foundation of credentialing a minister. How religious employment, religious volunteer, and religious credentialing decisions are determined cannot be subject to judicial review when neutral common law principles cannot be employed.

Here, where the claim is based upon allegations that a church entity made an unreasonable credentialing decision, the issue becomes the reasonableness of the decision. For example, a pastoral credential might not be renewed because the pastor is not effectively teaching the religious tenants of that faith. The pastoral credentials might not be renewed

where the pastor is not living up to the core religious beliefs of the religious organization.

Determination of reasonableness of a credentialing decision naturally hinges upon the processes by which the decision was made, the basis for the decision, and the outcomes of the decision.

Thus, a defense against a claim that a credentialing decision was negligent would require analysis into church doctrine, practices, and beliefs. The Courts could also be tasked with deciding whether the principals underlying each faith - - Methodist, Catholic, Jewish, Muslim, Hindu - - could be reasonably and effectively applied to the ministerial credentials and whether the processes of becoming a minister in a particular faith was rigorous enough, whether the candidate showed enough devotion, etc. In this case, the Court would need to evaluate the Fundamental Truths and District Council Bylaws that are applicable in order to make a determination about whether Brandon was unreasonably credentialed pursuant to Assemblies of God faith.

It is evident that the decision of the Court of Appeals - - allowing for negligent credentialing of a church minister - - brings about the same forbidden analysis seen in negligent hiring cases, if not more intrusive, because as with many credentialing entities and their license holders, there is no employment relationship nor a special relationship between the credentialing entity and a potential plaintiff. Indeed, here the District Council had no authority to retain or appoint volunteers at the local church level nor did they have a special relationship with John Doe.

In *Jensen v. Leonard*, 2009 WL 3364264 (Minn. App. 2009) (*unpublished)* the Court of Appeals dismissed the claims of negligent credentialing and a breach of duty to warn. In that case, there was a standard of care by which to evaluate the claims for credentialing a colonoscopist, unlike the facts before this Court. Insightful to the instant analysis, the *Jensen v. Leonard* Court held:

> "Even if we assume that the university knew in 1988 that Leonard was incompetent to perform colonoscopies, that knowledge, by itself, is not sufficient to establish a duty by the university to warn Jensen about Leonard. Knowledge of Leonard's incompetence may make it foreseeable that Leonard's future patients will be at risk of harm, but for a duty to exist there must also be a **special relationship** between Jensen and the University."

Id. at 7 (emphasis added). Appellate App. 207-214.

Without a special relationship, and even more, without a secular standard of care by which to evaluate the religious credentialing process, there can be no duty. More to the point, there is no jurisdiction over such a claim. The Court of Appeals' decision must be reversed because a negligent credentialing claim is not recognized in this factual setting, and would result in excessive entanglement with religion.

CONCLUSION

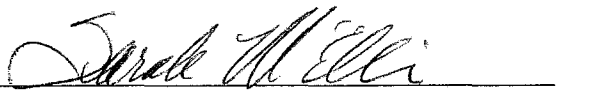
There was no misfeasance by the District Council and John Doe's injury was not foreseeable. As a result, there was no duty to protect and no general duty of reasonable care. Moreover, the First Amendment prohibits review of the credentialing process of a minister

whereby no cause of negligent credentialing can exist. For these reasons, the Court of Appeals' decision should be reversed and the District Court's order affirmed.

Respectfully submitted,

COLLINS, BUCKLEY, SAUNTRY & HAUGH, P.L.L.P.

Dated: September 19, 2013

BY: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner Minnesota District Council of the Assemblies of God's Supreme Court Brief in Case No. A12-1721 complies with Minnesota Rules of Appellate Procedure 132.01, Subd. 3(a)(1) and that the brief contains 8,427 words in 13 point font. The Brief was prepared using Word Perfect X5.

COLLINS, BUCKLEY, SAUNTRY & HAUGH, P.L.L.P.

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