

CASE NO. A06-0295

**STATE OF MINNESOTA
IN COURT OF APPEALS**

OFFICE OF
APPELLATE COURTS

MAR 30 2006

FILED

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

Appellants,

vs.

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

Respondents.

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STATEMENT OF THE LEGAL ISSUES

1. Is there a genuine issue of material fact regarding whether or not Respondent Oscar Stene was within the course and scope of his employment with the ELCA, SMS and IALC when he sexually abused Appellant C.B.?

The trial court held that there was no evidence to show that Respondent Oscar Stene was employed by any of the three church Respondents at the times Stene sexually abused Appellant C.B.

Marston v. Minneapolis Clinic of Psychiatry and Neurology, Inc., 329 N.W.2d 306, 311 (Minn. Ct. App. 1982). Stenvik v. Constant, 502 N.W.2d 416, 420 (Minn. Ct. App. 1993), *review denied* (Minn. Aug. 24, 1993); Fearing v. Bucher, 328 Or. 367, 977 P.2d 1163 (1999).

2. Is there a genuine issue of material fact regarding whether or not Respondents ELCA, SMS and/or IALC negligently supervised Respondent Oscar Stene, which negligence was a substantial factor in causing Respondent Oscar Stene to sexually abuse Appellant C.B.?

The trial court held that there was no evidence that any of the three church Respondents negligently supervised Respondent Stene causing Stene to sexually abuse Appellant C.B., as there was no evidence of an employment relationship between the ELCA, SMS, and/or IALC and Respondent Stene, therefore there was no negligent supervision.

M.L. v. Magnuson, 531 N.W.2d 849, 858 (Minn. Ct. App. 1995)(*review denied*, Minn. July 20, 1995); Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 310 (1983).

3. Is there a genuine issue of material fact as to whether Respondents IALC and SMS ratified Respondent Oscar Stene's acts of sexually abusing Appellant C.B. by continuing to employ Stene to fill in for the regular pastor at IALC when Respondents had actual knowledge that Respondent Stene had sexually abused Appellant C.B.?

The trial court did not address this issue.

Wirig v. Kinney Shoe Corp., 448 N.W.2d 526, 534 (Minn. Ct. App. 1990), *overruled on other grounds in* Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990); Tennant Co. v. Advance Machine Co., 355 N.W.2d 720, 724 (Minn. Ct. App. 1984), *pet. for rev. denied* (Minn. Jan. 11, 1985).

STATEMENT OF THE CASE

Appellants C.B. and L.B., daughter and mother, respectively, brought this action against the Respondents for injuries they sustained as a result of Defendant Oscar Stene's acts of criminal sexual conduct against Appellant C. B. from the time C.B. was approximately nine years old until she was fourteen years old.

During the period when he was sexually abusing Appellant C.B., Defendant Oscar Stene was a retired, ordained Lutheran minister in good standing on the Evangelical Lutheran Church in America's (hereinafter referred to as "ELCA") and Southwestern Minnesota Synod's (hereinafter referred to as "SMS") "clergy rosters". Although his formal status was "retired", Stene continued to preside over Sunday worship services in Fulda, Minnesota and in other nearby communities through October of 2002.

Despite the substantial evidence supporting the existence of genuine issues of material fact with respect to respondeat superior, negligent supervision and ratification of Stene's acts, the district court granted all three of the church Respondents' motions for summary judgment on all counts. The court's initial Order, dated December 12, 2005, was made appealable by a subsequent Judgment entered on January 12, 2006, in which the court expressly determined that there was no just reason for delay and accordingly directed entry of final judgment with respect to the three church Respondents.

STATEMENT OF THE FACTS

A. The Nature of the Relationship Between Defendant Oscar Stene and the Appellants' Family Was One of Minister/Congregant.

Beginning in approximately 1997 or 1998, Defendant Oscar Stene, a retired, ordained Lutheran minister in good standing on the Evangelical Lutheran Church in America's (hereinafter referred to as "ELCA"), "clergy rosters", engaged in criminal sexual conduct with the minor child in this case, Appellant C.B.. A.3, at par. 9. C.B. was approximately nine years old in 1997. A. 54. The sexual abuse was disclosed to C.B.'s parents in mid-June of 2002. *A.89, at p. 94.*

C.B.'s parents immediately reported the sexual abuse to their pastor, Pastor Alan Bakke of Defendant Immanuel American Lutheran Church, located in Fulda, Minnesota. *A.91, at p. 104.* Pastor Bakke urged the parents not to report the abuse to law enforcement, stating that forgiveness and counseling from the Church would be much more healing. *A.99-100, at pp. 136, 138.* For months, C.B.'s parents, L.B. and Curt struggled with but obeyed Bakke's advice. *A.103, at p. 151.*

Defendant Stene's sexual abuse of C.B. was finally reported to the Fulda Police Department in November of 2002. *A.104, at pp. 155-56.* The Fulda Police Department investigated the allegations and eventually the County Attorney brought formal charges of criminal sexual conduct against Oscar Stene. *A.423-27.* Defendant Stene pled guilty to criminal sexual conduct in the second degree in June of 2003. *A. 454.* He served approximately eight months in the County jail, was placed on the registered sex offender list,

and remains on probation today. A. 429-432.

The district court has described the relationship between C.B. and her family, Oscar Stene and Pearl Stene, Oscar's wife, as a "family" relationship. Order and Memorandum dated 12-06-05, Memorandum at p. 3. A. 934. This is a distorted and misleading picture of the true nature of their relationship. The true nature of the relationship was that of clergy-parishioner, as the evidence, summarized below, clearly establishes.

L.B., C.B.'s mother, first came to know Oscar Stene as the minister of the Immanuel American Lutheran Church in Fulda, Minnesota in 1974. A. 69 at p. 13. She had just arrived from South Dakota, where she grew up. Id. at 14-15. Her then-fiancee, C.B.'s father Curt, had known Oscar Stene through his parents, who in turn knew Defendant Stene because he was the minister at Immanuel Lutheran at the time and C.B.'s grandparents "had him for dinner and went out to dinner with him, but always [called him] Pastor Stene." Id. at p. 14. L.B. grew up in a Lutheran home, but it was the Missouri Synod, which is not affiliated with the ELCA. See Id. at pp. 15-16.

L.B. received training from Defendant Stene on the differences between the doctrines of the Missouri Synod and that of the ELCA. A. 7 at p. 17. Defendant Stene married L.B. and Curt in 1979 at Immanuel American Lutheran Church. Id. P. 17-18. They chose Stene because he had confirmed Curtis, and "he had been my husband's minister for his whole life, and because he knew us" A. 72 at p. 26. The family not have much contact with Defendant Stene after that until approximately 1994, because Mr. Stene was the pastor at a

Lutheran church in Bricelyn, Minnesota until about 1994, when he returned to Fulda, Minnesota. A. 72-73 at pp. 28-29. Contrary to the lower court's statement at page 4 of its Memorandum, C.B.'s family never visited the Stenes while the Stenes were in Bricelyn. They attended church services there on one occasion while Stene was pastor. A. 71 at pp. 23-24.

When Defendant Stene returned to Fulda, Minnesota in 1994, L.B. did not know that he was 'retired' from ministry, because "he did preaching in all other churches". A. 70 at p. 20. Stene filled in for Pastor Bakke at Immanuel Lutheran, and also preached in Ruthton, Minnesota and at another church in the area. Id. at pp. 20-22. Stene also served as interim pastor at several local congregations from 1991 through 2002. He testified that he "filled in" as pastor for Sunday worship services "quite often" after his "retirement" in 1991. A. 156 at p. 35. He also was assigned as "interim pastor" for seven different congregations following his "retirement" in 1991. Id. An "interim pastor" serves as full-time pastor for a congregation after its former pastor leaves and until a new, permanent pastor is hired. Id. Respondent Stene served as interim pastor in seven different congregations from 1991 through 2002. Id. His supervisor always was the presiding Synod bishop. A. 151-152 at pp. 16, 17; A. 158 at pp. 41, 44; A. 159 at p. 46. It also was the bishop who transferred him from one congregation to another. A. 155 at p. 30. L.B. did not realize that Stene was "retired" until June of 2002. A. 70 at p. 19.

Respondent Oscar Stene testified that he knew Appellant C.B.'s parents "through the

church.” A. 162 at pp. 57-58. The Stenes returned to Fulda in 1991 after serving in Bricelyn from 1978 - 1991. The first time C.B.’s family had occasion to reacquaint themselves with Oscar Stene and his wife, Pearl, was at a Christmas dinner in 1994. A. 73 at p. 29. They attended Christmas dinners at the Stenes thereafter, at which they would say prayer before the meal, then Oscar Stene would get out the Bible and read passages about the story of Jesus’ birth. A. 75 at p. 38. Small gifts would be handed out and then C.B.’s family would go home. Id. Other than this holiday dinner, there would be “few” dinners or other social interactions with the Stenes. Id.

Appellants were raised in the Lutheran faith and were taught by the church to respect its authority, to follow its teachings, and to obey its leaders, including Defendant Oscar Stene. A. 25. Appellants further were taught to view their ministers as representatives of God in whom they could repose absolute trust, and toward whom they were to show respect and deference. Id. It was through these teachings of the Respondents together with the authority Respondents conferred upon Defendant Stene by making him a minister of the church that Stene was able to gain Appellants’ trust, confidence and obedience. Id. Having Appellants’ complete trust, confidence and obedience, Stene wielded considerable power over the Appellants’ lives. Id.

Respondents held out Defendant Oscar Stene to the Fulda community as a pastor at Defendant Immanuel American Lutheran Church. See Appellant’s Answers to Defendant Southwestern Minnesota Synod’s Interrogatories, at A. 38. As such, he was presented to the

community and to the congregation as a man of character, a man who could be an example to them, and a man worthy of their respect and admiration for his willingness to himself tend to the spiritual development of his congregation. A. 37-38. He could not perform these functions as a minister in the Lutheran faith without the express consent and guidance of the Respondents. Id. In addition, Defendant ELCA was responsible for his training and formation. Id. His assignment at Defendant Immanuel American Lutheran Church would not have been possible had it not been for the express consent and assignment of the Defendant Synod. Id. He also presided at Sunday services on an occasional basis. Id.

B. Respondent Oscar Stene's Sexual Abuse of Appellant C. B.

When C. B. was about six or seven years old, Oscar and Pearl Stene began to offer to babysit C.B. and her older brother while L.B. and C.B. went out. The Stenes volunteered to do this, and did so about once or twice per year. A. 76 at pp. 43-44. L.B. testified that she was "very careful in where I left my children. I had four sets of people that took care of my children. ..." A. 75 at p. 40. She allowed Oscar and Pearl Stene to babysit because he was a minister and she was a teacher, and therefore she trusted them. See Id. Pearl Stene got C.B. to call her "Grandma Pearl" and Oscar Stene "Grandpa Oscar" by sending cards and signing them "Grandma Pearl and Grandpa Oscar." A. 81 at p. 64.

At some point after 1997, Pearl Stene occasionally would call L.B. and ask her if C.B. could come to the Stene's farm to see some new kittens or a new foal. Pearl would call, then come to pick C.B. up. A. 79 at p. 56. C.B.'s family never initiated these visits. A. 82 at p.

67. This usually occurred on weekends during the summer months. At first C.B. would be anxious to go, because she loved animals. A. 79 at p. 56. But in approximately 2001, C.B. did not want to go anymore, but would not say why not. A. 80 at p. 59. By this time, C.B. was being tutored by Pearl and L.B. assumed that C.B. did not want to do the school work, and so she would force her to go. Id. p. 60.

The first time C.B. stayed with the Stenes overnight was in late 1999 or early 2000. A. 82 at p. 68. She and her brother stayed overnight to attend a spiritual concert the following day with the Stenes. A. 83 at p. 70. Then Oscar and Pearl Stene began to encourage overnight visits for tutoring, because "C.B. worked better in the early morning". Id. at p. 71. At first the tutoring was not to help C.B. with her grades, but to "teach her to learn to love to read." Id. at p. 69. Oscar Stene helped C.B. with "tutoring" by reading to her and then asking her to summarize what he had read. Id. p. 71. Pearl Stene bought children's books in order to read to C.B. Tutoring to help C.B. with her grades began when C.B. was in the seventh grade, when her grades in English dropped significantly. A. 87 at pp. 87-88.

In December of 2000, the Stenes purchased two expensive gifts for C.B. A. 85-85. In early 2001, L.B. telephoned Oscar Stene to tell him that "something terrible [was] going on." A. 84 at p. 74. She wanted to know why Oscar and Pearl bought C.B. a \$300.00 doll for Christmas and \$175.00 boots for C.B. on her birthday on December 29, 2000, and why C.B.'s stomach was always hurting so bad. Id. Defendant Stene replied that he bought the

gifts because he loved C.B. Id. p. 76.

Then at the age of 11, Pearl Stene suddenly signed C.B. up for ballerina classes without consulting C.B.'s parents. A. 85 at p. 79. She then dropped off ballerina shoes and a tutu at C.B.'s home. Id. L.B. confronted Pearl, and told her that it was not her place to sign C.B. up for ballerina classes without asking L.B. or Curt., and that C.B. would not be attending ballerina classes. Id.

C.B. had temper tantrums about going to the Stenes about 5 - 6 times before the last time she visited on June 17, 2002. A. 88 at pp. 89-90. On June 17, 2002, both L.B. and Curt had to physically drag C.B., kicking and screaming, out to the Stene's car for the overnight visit. A. 88 at p. 91. Defendant Stene sexually abused C.B. that day, and when C.B. returned home the following day, she told her parents what Defendant Stene did to her. A. 89 at p. 94. She also told them that it had been going on since she was ten or eleven years old, and that Pearl Stene "saw the abuse on more than one occasion." A. 95 at p. 118.

Respondents Oscar and Pearl Stene accused Appellant C.B. of provoking Defendant Oscar Stene into sexually abusing her by dressing provocatively and engaging in provocative behavior. Appellant's Answers to Defendant ELCA's Interrogatories, at A. 26. They also stated that the incidents of abuse were "blown way out of proportion". Id. Respondents Oscar and Pearl Stene each wrote letters to Appellants, asking for forgiveness, asking them to keep the matter inside the church, and asking that they be friends again. Id.

At other times before June 17 of 2002, when C.B. was staying overnight at the Stenes,

C.B. would call her parents in the evening and ask them if she could come home. A. 89 at p. 95. They always came to get her. Id. One night C.B. called at about 11 p.m. and seemed desperate to come home. Curt got out of bed and went to get her, and Defendant Stene was very upset that he came to get her. Id.

As time went on, L.B. testified that she and her husband's relationship with the Stene's became more and more tense. A. 90 at p. 99. But it never crossed her mind that Oscar Stene was sexually abusing C.B., because "he was a minister, and she was a teacher." *Id. p. 100.*

When C.B. told her parents about the abuse, one of L.B.'s first responses was to say to her husband, "we need to call the cops". A. 91 at p. 103. Curt replied that she needed to calm down and that they needed to "think about this." *Id.* "It was a very serious situation and they needed some guidance." A. 92 at p. 105. They decided to call Pastor Bakke because he was a "mandated reporter". A. 91 at p. 104. When Bakke told them they should "stay silent", they "couldn't believe it." *Id.*

Pastor Bakke continued to urge silence about the allegations, and advised C.B. and her family that it would be unwise to report the matter to the police. Id. Respondent Stene recalls that Bakke asked the Stenes and C.B.'s family to come to the church for a meeting, just a few days after the C.B. family had found out about Stene's sexual abuse of C.B. A. 171 at pp. 93-96. At the meeting, Pastor Bakke said to C.B.'s family that they "have a choice. You can either forgive or the other road would be a road of bitterness. And nobody would

forgive.” Id. p. 97. Pastor Bakke encouraged everyone at this meeting to keep things “kind of quiet.” Id. p. 99.

Pastor Bakke was informed of the allegations by C.B. against Respondent Stene in late June of 2002. A. 90-91 at pp. 101-104. Four months later, with actual knowledge of the sexual abuse allegations against Respondent Oscar Stene, and with knowledge that the congregation was unaware of the allegations, Pastor Bakke allowed Oscar Stene to “fill in” for Bakke and preside over Sunday worship services. A. 201 at pp. 47-48. Bakke testified that he “didn’t believe it would be inappropriate as our theology teaches that all have sinned and fallen short of the glory of God and I didn’t believe that it would reflect on the church services being an endangerment...” because “in such a public situation, I didn’t believe that the action could or would be repeated.” Id. p. 48.

Bakke never bothered to inform C.B. and her family that Stene would be presiding over Sunday worship services on October 6, 2002. A. 202 at p. 50. When they contacted him to say they were offended by it, he replied that it was not within his control as there were no other pastors available, and that they might want to stay home on October 20, 2002, because Stene would be presiding over Sunday worship services again on that date. Id. pp. 50-51. Bakke also allowed a “retirement” party for Respondent Oscar Stene to go forward because it had already been planned and scheduled. Id. p. 50.

An unnamed person finally contacted the police in late November of 2002 and reported C.B.’s allegations against Respondent Oscar Stene. A. 104 at pp. 155-56. On

December 6, 2002, Bishop Ranum contacted Pastor Bakke and asked him to meet with him that same day. A. 191 at pp. 8-9. Bakke claimed that Bishop Ranum “required” his resignation. A. 192 at pp. 9-10. Bishop Ranum did not offer Bakke the choice of going through the disciplinary process of the ELCA, and Bakke did not know at the time that there was such a disciplinary process. A. 193 at p. 13. Bakke said that he was forced to resign, and that he was not given any other choice. Id. p. 15.

Bakke claimed he was forced to resign because of a report that he had an inappropriate relationship with a woman. A. 192 at p. 11. However, Joyce Piper, a Synod minister, told Appellant L.B. that the real reason Bakke was asked to resign was because of his failure to report C.B.’s allegations to law enforcement, and that the Synod felt they could not reveal the true reason they asked Bakke to resign, because “it would have made them liable.” A. 139 at p. 294. In addition, Bakke came to Appellant’s home the day after he was forced to resign, and told Appellant C. B. that it was “her fault” that he had been forced to resign. A. 132 at p. 266.

Approximately ten days after Appellant L.B.’s husband reported Stene’s criminal sexual conduct against Appellant C.B. to Pastor Alan Bakke, Bakke held a meeting in the church basement. A. 99 at pp. 134-136. L.B., her husband, her husband’s parents, Oscar and Pearl Stene and Pastor Bakke attended the meeting. Id. At this time Bakke advised Appellant and her husband to “keep the matter quiet”, and told them it was unnecessary to contact law enforcement. Id. Bakke further stated that if Appellants were questioned by police, they

should tell law enforcement that “it didn’t happen”, if the officer didn’t have the full story straight - then they wouldn’t be lying. Id. Bakke further told Appellant L.B. and her husband that Appellant C.B. wasn’t molested, she was touched. Id.

In approximately November of 2002, Appellant L.B.’s husband went to Bakke in a distraught state and said “We have to turn this in.” A. 27. Bakke said “Let’s call Sioux Falls and see if we can get her some counseling, then we don’t have to turn it in.” Id. . He continued to make such misrepresentations up to the day before L.B. and Curt did report the abuse to the police in November of 2002. Id.

In approximately the spring of 2003, the church called a special meeting. Id. At the meeting, the Synod repeated what “nice people the Stenes were”, and that the Stenes should not be kicked out of the church. Id. At about the time this action was commenced, Appellants were told that they were not welcome at the church. A. 146 at pp. 321-322. Also, the pastor who replaced Pastor Bakke received calls from congregants who said they would no longer donate to the church because all of the money would be going to the lawsuit. A. 311 at p. 95. The church newsletter also printed updates regarding the lawsuit, naming the family. Id. pp. 93-94.

C. Respondent Stene’s Employment History with the Church Respondents.

Stene testified that the local congregations paid his salary and provided him with tools and materials. A. 158 at p. 41; A. 159 at p. 45. He receives pension benefits from the ELCA, had vacation time and the local congregation paid for his continuing education

requirements. A. 175 at pp. 110, 112; A. 176 at p. 113. He also received an automobile allowance, again from the local congregation. A. 176 at p. 114. He received W-2s for his work as a fill-in pastor. A. 184 at p. 146. The Synod offered health insurance benefits for its pastors. A. 187 at p. 158.

During his 31+ years as an ordained Lutheran minister, Respondent Stene never received any training or education related to sexual misconduct or sexual abuse. A. 159 at p. 47. He recalled that the ELCA mailed something to him related to these issues in the 1980s. Id. p. 48. It was not mandatory for Lutheran pastors to attend seminars on sexual abuse. A. 160 at p. 50. Stene was not aware of any policy regarding pastors having sex with their parishioners. Id.

Oscar Stene testified that he was convicted of a crime regarding C.B. but he did not think it was a crime. A. 160 at p. 52. He said that when C.B. was ten years old she would push the bathroom door open while he was urinating, that she would lay down on the bed with him and expected him to fondle her, took her pants down once and showed him her panties, and sat in front of him with her leg spread and no panties on. A. 162-165 at pp. 59-69. He thought C.B. was “tantalizing” him. A. 166 at p. 73.

Defendant Oscar Stene was a pastor at Defendant Immanuel American Lutheran Church, which is where the Appellants first came to know Defendant Oscar Stene. Appellant’s Answers to Defendant IALC’s Interrogatories, at A. 60. He was referred to by the congregation as “Reverend Oscar Stene,” and the congregation knew him as a minister

of their faith. Id. Furthermore, after the incidents of sexual abuse, Defendant Oscar Stene continued to give sermons from the pulpit in the church, with the express consent of Pastor Bakke. Id.

In a statement regarding the charges against Defendant Oscar Stene, Stene was referred to as “Pastor Oscar Stene.” Id. Furthermore, the statement said that “Bishop Paul Ranum of the Southwestern Minnesota Synod ELCA has asked Stene not to function in pastoral ministry until this matter has been resolved under the legal process in the State of Minnesota and, if appropriate, the disciplinary process of the Evangelical Lutheran Church in America.” Id.

D. Respondents Immanuel American Lutheran Church, Southwestern Minnesota Synod, and Evangelical Lutheran Church in America Are Interrelated and Interdependent Entities Which Each Have a Role in the Hiring, Supervision and Discharge of Their Ordained Ministers.

Pastor Jeremiah Olson, a former ELCA ordained minister and now an ordained minister of the Lutheran Church, Missouri Synod, has submitted a detailed affidavit explaining the organizational structure of the three aspects of the Evangelical Lutheran Church in America and how power and control are exercised among the three divisions of the Church. A. 767-787.

According to Pastor Olson, The Evangelical Lutheran Church in America is a rather complex, three-tiered and interdependent system. A. 769. The Evangelical Lutheran Church in America resulted from a union of three North American Lutheran Church bodies: The American Lutheran Church, the Association of Evangelical Lutheran Churches and the

Lutheran Church in America. Id.

The three churches agreed to unite in 1982. A. 770. They formed a 70-member Commission for a New Lutheran Church, which planned the merger. Id. The plan was approved by church conventions in 1986, and the ELCA constituting convention was held April 30 through May 3, 1987, with the church actually beginning operations on January 1, 1988. Id.

The name “Evangelical Lutheran Church in America” “refers, in general reference, to this whole church, including its three primary expressions - congregations, synods, and the churchwide organization.” A. 770. The ELCA’s Constitution, Bylaws, and Continuing Resolutions govern the Church’s “life together as congregations, synods, and churchwide organization.” Id.

The ELCA Constitution defines a “congregation” as “a community of baptized persons ... which assembles regularly for worship and nurture, organizes and carries out ministry to its people and neighborhood, and cooperates with and supports the wider church to strive for the fulfillment of God’s mission in the world.” Id. The ELCA defines a “synod” as a body of the church which coordinates the work of the several congregations within the particular Synod’s territory. Id. Synods plan for the ELCA’s mission in their area. Id. The ELCA is comprised of nine geographic regions and 65 synods throughout the United States. Id. The Synod at issue in this case, the Southwestern Minnesota Synod, covers a territory of 27 counties and portions of two other counties. Id. The congregation of the Immanuel

American Lutheran Church is located in Fulda, Minnesota, which is part of the Southwestern Minnesota Synod. Id.

The highest level of the ELCA is the “churchwide organization” Id. The churchwide organization is responsible for developing “churchwide policy ... standards for leadership, ... criteria for the church’s endeavors, and coordinate the work of [the] church.” A. 770-771. It provides a means of sharing resources as well as programs and services. A. 771. Finally, the ELCA controls the work of its ordained ministers through the requirements set forth in its Constitution, Bylaws and Continuing Resolutions, which include standards of performance expected of ordained ministers and complex disciplinary proceedings through which it punishes misconduct committed by an ordained minister. Id. Punishment can ultimately include removal from the clergy rosters of the Synod and the ELCA. Id. If a minister is removed from the clergy rosters, that minister can never again work as a pastor in the Evangelical Lutheran Church in America unless formally reinstated by the churchwide organization. Id.

The ELCA characterizes the relationship between its three “expressions” as Interdependent partners sharing responsibly in God’s mission. In an interdependent relationship the primary responsibility for particular functions will vary between the partners. Whenever possible, the entity most directly affected by a decision shall be the principal party responsible for decision and implementation, with the other entities facilitating and assisting.

Id. (*Citations omitted*).

Chapter 8 of the ELCA Constitution also discusses the interdependent nature of the

Church, and uses this “interdependent” character to justify requiring congregations to contribute financially to the churchwide organization:

This church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. Each part, while fully the church, recognizes that it is not the whole church and therefore lives in a partnership relationship with the others. ... Since congregations, synods, and the churchwide organization are partners that share in God’s mission, all share in the responsibility to develop, implement, and strengthen the financial support program of this church.

Id. (Citations omitted).

Pastor Olson described how both the synod and the churchwide organization exercise significant control over the local congregations and their ministers. Id. According to Pastor Olson, the local congregation, the local synod, and the churchwide organization all have responsibilities and involvement in the selection, hiring, supervision, training and discharge of ordained Lutheran ministers. A.772. They each have separate spheres of influence but they are overlapping, and there is direct involvement and supervision by the churchwide organization over the synods and local congregations. *Id.*

Ordained Lutheran ministers look to the bishop of the local synod, who is considered “pastor of the synod” and all of the congregations within it, as an authority figure. Id. A “request” by a synod bishop for a pastor to resign his office or sign letters of termination is not regarded as a suggestion but is regarded as a command. Id. The effect of a minister’s refusal to resign voluntarily or to voluntarily sign letters of termination is referral to the

ELCA disciplinary proceedings and the guarantee that that minister will never get a call or any type of work in the church again. Id.

In fact, even when ministers have not been asked to resign, they tend to be very concerned that they stay on the good side of their bishop and the bishop's staff in order to retain their call and to get other calls down the road. Id. The minister's knowledge that the bishop controls whether the minister will receive a "call" and whether that minister will retain his employment is a hidden, but very powerful, form of control over the minister. Id.

The ELCA requires that congregations only call a minister who is affiliated with and ordained by the ELCA. A. 773. In other words, only someone who has graduated from a Lutheran seminary and passed the ELCA's examinations as to character can be called as pastor to a congregation. Id. It must be an ordained minister in good standing on both the synod and the ELCA "clergy rosters", or lists of qualified, ordained ministers eligible to receive a call. Id. Importantly, the minister also must be someone who is known by and approved of by the synod bishop. Id.

The Respondents suggested below that the congregation is free to employ whomever it chooses, but, according to Pastor Olson, in actual fact and practice, this is not the case. Id. Much more control is exercised by the synod and the churchwide organization. Id. Further evidence of the extent of the synod's control over who is chosen as pastor is the synod's responsibility to conduct criminal and character background checks of their pastors. A. 774. It is the local Synod which has the responsibility to make sure these checks are done with law

enforcement and by writing letters to past congregations to make inquiry as to the pastor's suitability for the office. Id. That this is the responsibility of the synod shows that it has in effect significant control and supervision over who may be "called" to a congregation as pastor. Id.

The duties of a Lutheran pastor in the ELCA are governed by the ELCA Constitution, Bylaws and Continuing Resolutions. A. 532. First, the Constitution requires that its clergy be "ordained ministers." A. 554. An ordained minister, including a retired minister, must "be a person whose commitment to Christ, soundness in the faith, aptness to preach, teach, and witness, and educational qualifications have been examined and approved in the manner prescribed in the documents of this church." Id. The ELCA's Constitution also requires that its ministers, including retired ministers, accept and adhere to Lutheran doctrine and that their lives and conduct be "above reproach." *Id.* In addition, "an ordained minister shall comply with the constitution of this church." *Id.* Ordained ministers, including retired ministers, must comply with the standards for acceptance and continuance of pastors in the ordained ministry as set forth in the ELCA bylaws. Id.

Specifically, all ordained ministers, including retired ministers, must "commit to lead a life worthy of the Gospel of Christ and in so doing be an example in faithful service and holy living, that they preach the Word, administer the sacraments and provide pastoral care."

A. 554-555. They must:

- 1) preach the Word;

- 2) administer the sacraments;
- 3) conduct public worship;
- 4) provide pastoral care;
- 5) seek out and encourage qualified persons to prepare for the ministry of the Gospel;
- 6) witness to the Kingdom of God in the community, in the nation, and abroad; and
- 7) speak publicly to the world in solidarity with the poor and oppressed, calling for justice and proclaiming God's love for the world. A. 555.

Each ordained minister *with a congregational call shall, within the congregation:*

- 1) offer instruction, confirm, marry, visit the sick and distressed, and bury the dead;
- 2) supervise all schools and organizations of the congregation;
- 3) impart knowledge of this church and its wider ministry through distribution of its periodicals and other publications;
- 4) endeavor to increase the support given by the congregation to the work of the churchwide organization and synod of the Evangelical Lutheran Church in America;
- 5) install regularly elected members of the Congregation Council; and
- 6) with the council, administer discipline. Id.

The provision of pastoral care is an important duty of the ordained minister, and includes work out in the community such as care and counseling of congregants or others, hearing confession and granting absolution, or more casual ministry such as visiting people, praying with people, or reading from the Bible at the home of a congregant. A. 775. In fact, of all of the duties of an Evangelical Lutheran minister, 80 percent of the work is performed out in the community, with only 20 percent performed in the church building itself. *Id.* And the work of an ordained minister cannot be confined to a specific time either, because such a minister is expected to live his or her entire life in accordance with the standards set forth in the Constitution of the ELCA. A. 775-76. Above all, **at all times the ordained minister must “be true to [the] sacred trust inherent in the nature of the pastoral office.”** A. 776.

(Citations omitted).

E. The Employment Status of Retired Pastors.

Defendant Oscar Stene served as the full-time pastor for Defendant Immanuel American Lutheran Church in Fulda, Minnesota from 1966 to 1978. A. 152 at p. 19. He then served as full-time pastor at South and North Blue Earth Lutheran Churches in Brice lyn, Minnesota from 1978 to 1991, when he was granted retired status on the ELCA clergy roster. A. 153 at p. 24.

After reaching the age of 60 or after 30 years on the clergy roster of ordained ministers of the ELCA, one may attain “retired” status. A. 559. A retired minister may continue on the roster of ordained ministers of the church only upon endorsement of the

synodical bishop and by action of the Synod Council in the synod in which the ordained minister is listed on the roster. Id. A retired minister may not exercise ministerial functions in a congregation which they do not serve unless invited to do so by the pastor. A. 736.

For example, in the case before this court, Defendant Oscar Stene, as a retired minister still on the clergy roster, could not preside over worship services as he did at Immanuel American Lutheran Church without being invited to do so by the then-presiding pastor, Allan Bakke. In addition, as is the case for all ordained ministers on the ELCA and Synod clergy rosters, Mr. Stene in his retired status was still subject to the disciplinary process of the ELCA pursuant to the ELCA Constitution, chapter 20. A. 565. As is the case with all ordained ministers, Mr. Stene in his retired status was required to comply with the standards of conduct for ordained ministers as set forth in chapter 7 of the ELCA Constitution. A. 554-565. And, as is the case with all ordained ministers, Mr. Stene in his retired status was required to submit a report of his ministry to the bishop of the synod at least 90 days prior to each regular meeting of the Synod assembly. A. 734. The number of times Mr. Stene actually exercised ministerial functions in the congregation is immaterial; he was still subject to the rigorous standards of conduct imposed by the church and he was subject to the church's supervision and control.

As a result, it is clear that, contrary to the assertions of the Respondents in this case, Defendant Stene in his retired status was still an employee of the congregation, Synod and churchwide organization, subject to their supervision, control and discipline. In fact, the

Synod exercised its right to control and discipline Mr. Stene by conducting an investigation into the allegations of criminal sexual conduct of a minor child, by requiring him to resign from the clergy rosters of the ELCA, and by forbidding him from using the title of “pastor” or “reverend” in the future. A. 256 at p. 30; A. 257 at p. 35; A. 309-310 at pp. 86-89.

Defendant Oscar Stene served as interim pastor for several congregations following his retirement in 1991, including Defendant Immanuel American Lutheran Church in Fulda, Trinity Lutheran in Balleton, Grace Lutheran Church in Russell, Heron Lake Lutheran Church in Heron Lake, back to Grace Lutheran in Russell, as well as interim pastorships in Dundee and Worthington. A. 156-159. Mr. Stene served in these interim pastorships from 1991 to 2002. *Id.* In each assignment as interim pastor, Respondent Stene served full-time until a replacement was installed.

F. The Synod and the Churchwide Organization Supervise the Employment Duties of Ordained Ministers.

Synods exercise significant supervision and control over ordained ministers serving in the local congregations. A. 778 at p.12. For example, the local synod’s role in the ELCA is described in the ELCA Constitution as including the provision of pastoral care for congregations and ordained ministers, approving candidates for the ordained ministry, and “encouraging and supporting persons on the rosters of this church in stewardship of their abilities, care of self, and pursuit of continuing education ... discipline of congregations, ordained ministers ... as well as for termination of call, appointment, adjudication, and appeals” A. 602.

As the synod's pastor, the bishop may discipline an ordained minister for preaching and teaching in conflict with the faith confessed by the church, for conduct incompatible with the character of the ministerial office, and for willfully disregarding the provisions of the constitutions or bylaws. A. 687 at Par. 20.21.01(a) - (e). The bishop may impose a private censure, an admonition, suspension from the office and functions of the ordained ministry for a designated period, or remove a minister from the ordained ministry of the ELCA. *Id.* at p. 158, Par. 20.21.02.(a) - (c). Consistent with these policies and procedures, Defendant Stene always considered the synod bishop to be his supervisor, both when he served as full-time pastor to a congregation and during his retirement. A. 151-52 at pp. 16 - 20; A. 157-159 at pp. 38-46.

The Synod in this case first learned of Defendant Stene's sexual misconduct in July of 2002. A. 234-35 at pp. 31-34. Although the Synod did not commence its investigation until November of 2002, it did request Mr. Stene's resignation from the clergy roster in approximately May of 2003. A. 257.

In Pastor Olson's opinion, the local congregation does not exercise much supervision over its pastor, for several reasons. First, it is the church council which oversees church operations, but the council generally only meets for perhaps one two-hour meeting once a month. A. 779. Second, when the council does engage in some action with respect to its pastor, it is nearly always after the fact. *Id.* Much of the time congregational members really do not know what the pastor does during a given week because there really is no day-to-day

supervision. *Id.*

The people in the local congregations have an understanding that they are in an organization where they vote for leaders at the synod level and the national church level, and they vote for leaders expecting those leaders to exercise control and exercise authority on their behalf. A. 780. Virtually every congregation has an awareness of the power of the synod and the national church and look upon their bishop, the Synod and the national councils as governing authorities. Id. In this context, then, if a pastor has committed crimes or other misconduct, the congregations expect the governing authorities such as the bishops and the councils to have some interest and expertise, and also authority to stop the person and prevent the person from doing further harm. *Id.* As Bishop Ranum noted, the synod can temporarily suspend a pastor and this is seen as great power in the congregation. Id. The individuals in the congregation and pastor certainly see this as power and supervision exercised and largely controlled by the people in the bishop's office and by the bishop him or herself behind the scenes. *Id.*

There are also implied punishments if the ELCA finds that a congregation is not following certain policies of the ELCA. Id. In such cases, the ELCA can take a variety of actions. *Id.* It can refuse to recognize a call, or not sign the letter of call documents, which would be a great pressure on the congregation and minister not to continue in that situation. *Id.* It can issue a verbal or a written reprimand to, in effect, put the congregation out of fellowship with the group. *Id.* Congregational members and leaders often feel they must obey

the ELCA in order to receive a pastor or to remain a part of the ELCA. *Id.*

Congregations also feel this pressure to take part in the pension plan and contribute to it. *Id.* They fear that if they do not contribute to the pension plan, they will not be considered part of the group, they will not be able to get a pastor, or that their congregation may fail and not thrive and perhaps go out of “business.” A. 780-81. The use and administration of the pension plan is a strong form of exercise and control. *Id.*

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING THE CHURCH RESPONDENTS SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER RESPONDENT STENE WAS EMPLOYED BY THE CHURCH RESPONDENTS AND WHETHER HIS CONDUCT WAS SUFFICIENTLY FORESEEABLE TO JUSTIFY APPLICATION OF RESPONDEAT SUPERIOR.

A. STANDARD OF REVIEW.

Summary judgment was not appropriate in this case because fact issues are disputed. “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, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (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 evidence must be viewed in the light most favorable to the nonmoving party. Sauter v. Sauter, 244 Minn. 482, 70 N.W.2d 351 (1955); 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 Respondents did not meet their burden of showing that no genuine issue of material fact exists in this case and, that as a matter of law, they are entitled to summary judgment. To the contrary, the facts are disputed. The Respondents' central arguments below were that none of them employed Defendant Oscar Stene because he was a retired minister, and that Stene's acts were not committed within the course and scope of his employment with any of the Respondents.

However, this argument ignores the substantial evidence that Respondents ELCA and Synod exercised strict control over Defendant Stene's actions as a retired ordained minister in good standing on their "clergy rosters", that they employed him at the time of Stene's sexual abuse of Appellant C.B. and had employed him as an ordained minister for over thirty years, and that they were responsible for disciplining him and supervising him.

On appeal, all of the facts must be construed in the light most favorable to the Appellants. The issues of whether or not the Respondents employed Defendant Stene, whether Stene's acts of criminal sexual conduct occurred within the course and scope of his employment for purposes of respondeat superior liability, or whether Respondents negligently supervised Stene and thus proximately caused the harm to Appellant C.B. are disputed issues of material fact. Issues of fact are not appropriately resolved at summary judgment, including facts relating to the employment status of a defendant and whether or not a defendant committed a tort in the course and scope of his employment. Stenvik v.

Constant, 502 N.W.2d 416, 420 (Minn. Ct. App. 1993), *review denied* (Minn. Aug. 24, 1993); Marston v. Minneapolis Clinic of Psychiatry and Neurology, Inc., 329 N.W.2d 306, 311 (Minn. Ct. App. 1982). Whether or not a defendant-employer negligently supervised an employee, which negligence proximately caused harm to a third party, is also ordinarily a question for the trier of fact. Id.

The issues of fact in this case must be resolved at trial. Accordingly, the trial court's grant of summary judgment must be reversed, and the case must be remanded to the lower court for trial on the merits.

B. SUBSTANTIAL EVIDENCE EXISTS WHICH DEMONSTRATES THAT RESPONDENTS SYNOD AND ELCA JOINTLY POSSESSED THE RIGHT TO CONTROL THE MEANS AND MANNER OF STENE'S PERFORMANCE, THUS ESTABLISHING AN EMPLOYMENT RELATIONSHIP BETWEEN THE SYNOD, THE ELCA AND STENE.

Whether an employment relationship exists is an issue of fact when the evidence is disputed. Stenvik v. Constant, 502 N.W.2d 416, 420 (Minn. Ct. App. 1993), *review denied* (Minn. Aug. 24, 1993). The factors traditionally used to determine the nature of a work relationship are: 1) the right to control the means and manner of performance; 2) the mode of payment; 3) furnishing of materials and tools; 4) control of the premises where the work is performed; and 5) the right of the employer to hire and discharge. Id. (Citations omitted). The right to control is the most significant factor. Id.

There is substantial evidence in the instant case that Respondents Synod and ELCA possessed the right to control the means and manner of Stene's performance. That evidence

includes, but is not limited to, the following:

- 1) Defendant Stene considered the Bishop of the Synod to be his supervisor;
- 2) The Bishop of the Synod was the one who transferred Stene to different congregations during the course of Stene's thirty-plus years of employment as an ordained minister with the ELCA;
- 3) The Bishop asked Stene to withdraw his name from the clergy roster;
- 4) The Bishop had the power to require a pastor to resign A. 193.;
- 5) Defendant Oscar Stene was authorized by the Synod and the ELCA to perform services at Lutheran churches because he was on the clergy roster of the Synod and on the clergy roster of the ELCA. As a rostered minister, Stene could administer sacraments, such as Holy Communion, preside over worship services, and perform all of the other sacraments of the Evangelical Lutheran Church - in accordance with the relevant provisions of the ELCA Constitution. A. 203 at pp. 55-56; A. 775.
- 6) The Bishop had the right to control the manner and means of Stene's work performance by providing him with educational materials and trainings regarding clergy sexual misconduct, and both the Synod and the ELCA had the right to control the manner and means of Stene's work performance by forbidding him from engaging in clergy sexual misconduct;
- 7) Part of Bishop Ranum's and Marcus Kunz's job duties at the Synod was to

involve themselves in the investigation of allegations of sexual abuse by ordained ministers, and they did investigate the allegations against Oscar Stene;

- 8) Bishop Ranum asked Stene to no longer hold himself out as an ordained minister of the ELCA;
- 9) The Synod and the ELCA were responsible for the ordination process regarding Stene;
- 10) The Synod was responsible for conducting background investigations of all proposed ministers; and
- 11) The Synod and ELCA could force an ordained minister to submit to disciplinary proceedings at the national level if the minister refused to resign upon the Synod's request.

The evidence summarized above clearly demonstrates that the Respondents Synod and ELCA exercised control over the means and manner of Stene's performance as an ordained minister. As a result, whether or not an employment relationship existed between Stene and Respondents Synod and ELCA is a disputed issue of material fact for a jury to determine.

C. APPELLANTS HAVE A VALID CLAIM FOR RESPONDEAT SUPERIOR LIABILITY AGAINST RESPONDENTS.

"Vicarious liability", or respondeat superior, is related to an action for negligent supervision in that liability is imposed only when the employee's conduct occurs within the scope of the employee's employment. The issue of whether an employee is acting within the

scope of employment is a question of fact. Marston v. Minneapolis Clinic of Psychiatry and Neurology, Inc., 329 N.W.2d 306, 311 (Minn. Ct. App. 1982). The test for determining whether an employee's act was committed within the scope of employment was stated by the Marston court as follows:

An agent is acting within the scope of his employment when he is performing services for which he has been employed or while he is doing anything which is reasonably incidental to his employment. The conduct must occur within work-related limits of time and place. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the employer but rather whether such conduct should fairly have been foreseen from the nature of the employment and the duties relating to it.

Id.

In the instant case, Respondents argue that Appellants' vicarious liability claim fails first because Stene's acts were not foreseeable, and second, because Stene's acts did not occur while he was on duty. Respondents are wrong on both counts.

Even if there was no evidence showing that Defendant Stene's specific acts were foreseeable to Respondents, such specific foreseeability is not required in order to establish foreseeability in respondeat superior cases. Fahrendorff v. North Homes, Inc., 597 N.W.2d 905, 912(Minn.1999). As the Supreme Court noted in Fahrendorff,

Contrary to liability based on negligence, liability based on respondeat superior stems from public policy, rather than from any fault of the employer. ... if we were to predicate liability in respondeat superior cases upon a showing that the employer should have reasonably anticipated the employee's specific misconduct, this distinction would be lost. Accordingly, other jurisdictions that, like us, use foreseeability as a consideration

in determining respondeat superior liability, have distinguished the degree of foreseeability required in the respondeat superior context from that required in direct negligence cases: ...[In direct negligence cases] “foreseeable” means a level of probability which would lead a prudent person to take effective precautions whereas “foreseeability” as a test for *respondeat superior* merely means that in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.

Id. (Citations omitted).

In the case at bar, Pastor Jeremiah Olson has testified that the risk of clergy sexual misconduct is a well-known hazard in the ELCA organization:

Sexual misconduct by ordained ministers has been a well-known hazard in the Evangelical Lutheran Church for many many years. The Church in response to this problem has offered training and education to its ministers in an attempt to prevent its occurrence. I recall one training I attended which took place at a church in the St. Paul area in November of 1990. I believe all ordained ministers in the St. Paul Area Synod were required to attend this training about sexual abuse by ordained ministers. This also included training with regard to Minnesota Statute section 148A and the process of background checks.

This was not just a St. Paul Area Synod issue but it was something that was important throughout the whole ELCA. Each Synod, however, was responsible for developing and conducting their own training events. And by this time in 1990, pastors certainly were aware that things could happen in any congregation. ... This training was required because Lutheran pastors had often crossed sexual boundaries. And it certainly was clear to me at the end of that day that pastors should not engage in sexual conduct with any

parishioners....Interestingly, in

June of 2002, the same month that the child sexual molestation in this case became known to Respondents, the theme for that month's issue of *The Lutheran* magazine, one of the ELCA's official publications, was "*Breaking the silence on clergy sexual abuse*". In one of the related articles in this issue, entitled "*Crossing Boundaries*", the author quotes from the "director for the program for the prevention of clergy sexual misconduct", a program that is part of the ELCA Division for Ministry, a unit of the churchwide organization. *Exhibit 3*. Larramie Frampton, the director of the program, stated that in the ELCA, about 10 percent of clergy have engaged in some form of sexual misconduct. A. 781-82. Frampton based this estimate on several Protestant and Catholic studies, but admitted that the estimate "is likely low".

Id.

This testimony by Pastor Olson is alone sufficient to establish the type of general foreseeability required in order to impose respondeat superior liability upon the Respondents. At the very least, the evidence is more than sufficient to show that there is a genuine issue of material fact with respect to whether Defendant Stene's criminal sexual conduct against Appellant C.B. was foreseeable to Respondents.

Respondents also are wrong in their conclusion that there can be no respondeat superior liability in this case because Stene's acts did not occur within work-related limits of time and place. In Marston v. Minneapolis Clinic of Psychiatry and Neurology, 329 N.W.2d 306(Minn. 1982), the Minnesota Supreme Court found that a psychologist's sexual relations with a patient "during or *shortly after* regular therapy sessions" were committed within work-related limits of time and place. *Id.* (Emphasis supplied). Certainly if the

psychologist in Marston engaged a patient in sexual relations after a regular therapy session, the psychologist would not be considered to be still working as a psychologist for that particular patient. Yet, the Supreme Court found the conduct was sufficiently connected to the psychologist's "work-related limits of time and place" to constitute an act committed within the scope of employment.

Similarly, in John Alfred Doe #1 v. Northern Texas/Northern Louisiana Synod, Cause No. 02-0157, Harrison County, Texas(2002) the district court affirmed a jury verdict in favor of the Appellants against the ELCA and Northern Texas/Northern Louisiana Synod on respondeat superior grounds in a case alleging sexual abuse by an ordained minister who met his victims on a basketball court, whose victims were not even members of a congregation in the ELCA, and whose acts were committed in his home. A. 822.

The Marston court also noted that relevant to the issue of whether the psychologist's acts occurred within the scope of employment was the fact that the sexual acts would not have taken place "but for Dr. Neurenberger's employment; it was only through his relation to Appellants as a therapist that Dr. Neurenberger was able to commit the acts in question." Id. And the court found that where the doctor imposes his personal, improper designs on the patient in a professional setting, and where the patient submits to the advances because of the very mental and emotional problems for which she is being professionally treated, a jury could find that the acts were so related to the employment that the employer may be found vicariously liable. Marston, 329 N.W.2d at 310-11. The same can be said in the present

case.

Pastor Jeremiah Olson has testified that ordained ministers with the ELCA do not have set limits of time and place with respect to their employment:

The duties of a Lutheran pastor in the ELCA are governed by the ELCA Constitution, Bylaws and Continuing Resolutions. First, the Constitution requires that its clergy be “ordained ministers.” A. 792. An ordained minister, including a retired minister, must “be a person whose commitment to Christ, soundness in the faith, aptness to preach, teach, and witness, and educational qualifications have been examined and approved in the manner prescribed in the documents of this church.” *Id. at Par. 7.22.* The ELCA’s Constitution also requires that its ministers, including retired ministers, accept and adhere to Lutheran doctrine and that their lives and conduct be “above reproach.” *Id.* Specifically, all ordained ministers, including retired ministers, must “commit to lead a life worthy of the Gospel of Christ and in so doing be an example in faithful service and holy living, that they preach the Word, administer the sacraments and provide pastoral care.” *Id. At Par. 7.31.11(e); 7.31.12.(1), (2) and (4).* They must:

- 1) preach the Word;
- 2) administer the sacraments;
- 3) conduct public worship;
- 4) *provide pastoral care;*
- 5) seek out and encourage qualified persons to prepare for the ministry of the Gospel;
- 6) witness to the Kingdom of God in the community, in the nation, and abroad; and

- 7) speak publicly to the world in solidarity with the poor and oppressed, calling for justice and proclaiming God's love for the world.... A. 793.

The provision of pastoral care is an important duty of the ordained minister, and includes work out in the community such as care and counseling of congregants or others, hearing confession and granting absolution, or more casual ministry such as visiting people, praying with people, or reading from the Bible at the home of a congregant. In fact of all of the duties of an Evangelical Lutheran minister, I would say 80 percent of the work is performed out in the community, with only 20 percent performed in the church building itself. And the work of an ordained minister cannot be confined to a specific time either, because such a minister is expected to live his or her entire life in accordance with the standards set forth in the Constitution of the ELCA. Above all, **at all times the ordained minister must "be true to [the] sacred trust inherent in the nature of the pastoral office."** A. 564, par. 7.45. (*emphasis supplied*).

And the Appellants' trust in Defendant Oscar Stene, because he was an ordained minister with the ELCA, was the sole reason they entrusted their young daughter to his care. As L.B. testified, she allowed Oscar and Pearl Stene to babysit because he was a minister and she was a teacher, and therefore she trusted them. A. 75 at p. 40. L.B. further testified that it never crossed her mind that Oscar Stene was sexually abusing C.B., because "he was a minister, and she was a teacher." A. 90 at p. 100. She further stated: [I]n my upbringing ... there is one person my parents have always taught me to trust, and that was a minister." A. 112 at p. 188.

L.B. elaborated on this point in her Answers to Interrogatories, where she stated that she and C.B. were raised in the Lutheran faith and were taught by the church to respect its

authority, to follow its teachings, and to obey its leaders, including Defendant Oscar Stene. Appellants further were taught to view their ministers as representatives of God in whom they could repose absolute trust, and toward whom they were to show respect and deference. It was through these teachings of the Respondents together with the authority Respondents conferred upon Defendant Stene by making him a minister of the church that Stene was able to gain Appellants' trust and confidence. Having Appellants' complete trust, confidence, and obedience, Stene wielded considerable power over the Appellants' lives. A. 64.

Because Defendant Oscar Stene was an ordained minister in good standing on the clergy rosters of the ELCA and the Synod, he was thus cloaked with all the powers, appearances, and indices of a Man of God which permitted him to infiltrate the Fulda community and earn the trust of the Appellants, the congregation and the community at large. Although Respondents argue that Appellant C.B. had never seen Defendant Stene preside over worship services and did not know what the ELCA was, what is material in this case is that C.B.'s *parents* knew that Stene was a minister, they had seen him preside over worship services on many, many occasions, and were aware that the ELCA had power and authority over Stene. C.B.'s *parents* entrusted the care of their daughter to Stene because of *their* trust in him, which in turn derived from the position he held in their church. In their eyes, Stene at all times was first and foremost a minister of God and therefore they trusted that he would do no harm to their child.

Because C.B. was a minor child at the time of the criminal sexual conduct committed

against her by Stene, it was only her parents who could have given Stene authority to care for C.B.. C.B. had no independent authority of her own to entrust herself to Stene's care. As a result, *whenever* C.B. was in Defendant Stene's care, he was acting in his position as a minister of God, as an ordained minister of the ELCA whose life was to be "above reproach", as a minister providing pastoral care out in the community as ministers are known to do, and thus he was acting in the course and scope of his employment with Respondents when he committed his criminal acts. Therefore, as in Marston, Stene's acts were so related to his employment as an ordained minister that the employer should be subject to vicarious liability.

At least one state has imposed respondeat superior liability on an employer even though the tortfeasor committed the tort outside of the limits of time and space. In Chesterman v. Barmon, 305 Or. 439, 753 P.2d 404 (1988), the Oregon Supreme Court held that in order to hold an employer vicariously liable when there has been a time lag between the acts taken on the employer's behalf and the later intentional torts, the plaintiff must establish a causal connection between the two sets of acts. Chesterman, 305 Or. at 443-44, 753 P.2d 404.

Subsequently, in Fearing v. Bucher, 328 Or. 367, 977 P.2d 1163 (1999), the Court held that "the focus should be on the *act* on which vicarious liability is based not on when the act results in *injury*. Id.(quoting Chesterman, 305 Or. at 444, 753 P.2d 404 (emphasis in Chesterman)). The Court recognized that an employee, as part of his or her job, may

establish a relationship with another person that results in sexual abuse. Fearing, 328 Or. at 377, 977 P.2d 1163.

However, it was not sufficient for purposes of vicarious liability that the employment merely brought the tortfeasor and the victim together in time and place, and therefore gave the tortfeasor the opportunity to commit the assaults. Id. Rather, the allegations must permit the jury to infer that the acts taken “were a necessary precursor to the sexual abuse and that the assaults were a direct outgrowth of and were engendered by conduct that was within the scope of [the employee’s] employment.” Fearing, 328 Or. at 377, 977 P.2d 1163.

In Fearing, the Oregon Supreme Court found that the acts of the priest in gaining the confidence of the plaintiff and providing the opportunity for the sexual assault were motivated by a desire to fulfill his priestly duties and so were within the scope of his employment. Id. at 375, 977 P.2d 1163. If the jury found that the priest’s performance of his pastoral duties with respect to the plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of employment, the Archdiocese could be held vicariously liable for the sexual abuse. Id. at 377, 977 P.2d 1163.

Facts which the Oregon Supreme Court found could lead to such a conclusion were as follows: From 1970 to 1972, Pastor Bucher was a priest and youth pastor at a local parish. Id. at 371-72, 977 P.2d 1163. He acted as priest, youth pastor, friend and confessor to Plaintiff and his family. Id. at 372. He became close with the family and was a frequent

guest at their home. Id. He gained the trust and confidence of the family as a spiritual guide and priest and with the plaintiff as a youth pastor and mentor. Id. Because he had gained the family's and plaintiff's trust and confidence, the family allowed him to spend substantial periods of time alone with the plaintiff. Id.

Plaintiff's complaint alleged that Bucher gained the family's trust and confidence by acts committed within the scope of his employment as a youth pastor and priest, and that they were committed out of a desire, at least initially and partially, to fulfill his duties as youth pastor and priest. Id. The Oregon Supreme Court found that these allegations sufficiently alleged facts from which a jury could find that Bucher's performance of his pastoral duties were a necessary precursor to the sexual abuse and thus that the assaults were a direct outgrowth of and engendered by conduct that was within the scope of Bucher's employment. Id. at 377. As a result, the Court reversed the district court's order dismissing plaintiff's causes of action on the pleadings. Id. See also Order Denying Summary Judgment in C.P. v. Premier Security, Inc., Goodhue County Court File No. 25-C1-04-001936 (April 18, 2005)(finding that it was a question of fact whether defendant security company was liable under respondeat superior for acts of defendant security guard who sexually abused child of park managers, who lived on site, because the security guard befriended the family and the child while guarding the park during security guard's normal work hours, which constituted a "grooming" process whereby the guard gained the trust of the family and their son, which ultimately led to sexual assaults outside of work-related limits of time and space). A. 932.

The facts in the case at bar are very similar to those in Fearing. Here, Appellants and their family came to know Respondent Stene as their pastor. He had been C.B.'s grandparents' pastor and minister, had confirmed her father, married Appellant L.B. and C.B.'s father, and was close friends with C.B.'s grandparents. He educated L.B. on the differences between the Missouri Synod and the ELCA. He and his wife, Respondent Pearl Stene, frequently dined with C.B.'s grandparents. C.B. and her parents and brother also had dinner with the Stenes, although on a less frequent basis. At these dinners, Respondent Stene would get out the Bible and read from it, then discuss it with everyone. The family traveled to Bricelyn on one occasion to hear Respondent Stene's sermon.

As a result of these interactions between C.B.'s family and the Stenes, and the pastoral duties performed by Respondent Stene for the family over the years, C.B.'s parents came to trust Respondent Stene, enough to allow the Stenes to babysit their children and visit the farm animals without the parents present. Eventually the parents allowed C.B. to spend an occasional overnight with the Stenes. This eventually led to Respondent Stene's acts of sexual assault against Appellant C.B..

Thus, Respondent Oscar Stene's position as pastor and ordained minister, and his performance of various pastoral duties with C.B.'s family over a number of years, that caused the family to trust him and to allow he and his wife to have unsupervised time with their children. These acts of pastoral care, such as confirming C.B.'s father, presiding over her parents' marriage, educating L.B. on the Lutheran faith as observed by those in the ELCA

and reading the Bible together, were acts that were committed within work-related limits of time and space, and were a “necessary precursor” to the sexual assaults. In addition, a jury could infer that Respondent Stene’s acts of pastoral care of C.B.’s family over the years also were a “direct outgrowth of and were engendered by conduct that was within the scope of Respondent Stene’s employment with the church Respondents. Accordingly, the district court’s grant of summary judgment in favor of the church Respondents must be reversed.

There is a genuine issue of material fact regarding the question whether Defendant Stene committed his sexual assaults on C.B. within the scope of Stene’s employment. And the question is ordinarily one for the jury to decide. Marston. As in Marston, the jury must decide this question in the case at bar.

II. THE APPELLANTS HAVE A VALID CLAIM FOR NEGLIGENT SUPERVISION AGAINST THE CHURCH RESPONDENTS.

In any negligence action, four elements must be established: (a) the existence of a legal duty, (b) a breach of that duty, (c) injury to the Appellant proximately caused by the breach, and (d) damages to the Appellant. See, M.M.D. v. B.L.G., 467 N.W.2d 645 (Minn. Ct. App. 1991). The existence of a legal duty depends on the relationship of the parties and the foreseeability of the risk involved. Schweich v. Ziegler, Inc., 463 N.W.2d 722, 729 (Minn. 1990). Every person in the conduct of their affairs is under a legal duty to act with care and forethought to reasonably prevent injury to another. Swanson v. LaFontaine, 238 Minn. 460, 57 N.W.2d 262 (Minn. 1953).

More specifically, to prevail in a case alleging negligent supervision, the Appellant

must prove that the employee's conduct was reasonably foreseeable, and that the employer failed to exercise reasonable care in supervising the employee. Patterson v. Wu Family Corp., 594 N.W.2d 540, 551(Minn. Ct. App. 1999); Oslin v. State, 543 N.W.2d 408, 415 (Minn. Ct. App. 1996). The reasonable care that must be exercised is care in preventing "the foreseeable misconduct of an employee from causing harm to other employees or third persons." M.L. v. Magnuson, 531 N.W.2d 849, 858 (Minn. Ct. App. 1995)(*review denied*, Minn. July 20, 1995).

Negligent supervision is derived from respondeat superior, which relies on connection of the wrongful act to the employer's premises or chattels. Odenthal v. Minnesota Conference of Seventh Day Adventists, 657 N.W.2d 569, 575 (Minn. Ct. App. 2003). In other words, the claimant must prove that the employee's actions occurred within the scope of employment in order to succeed on this claim. Magnuson, 531 N.W.2d at 858; See also Yunker v. Honeywell, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993).

To establish liability under negligent supervision, while the Appellants must show that the conduct occurred within the scope of employment. Appellants do not have to show that the employee's act was "actuated, at least in part, by a purpose to serve the master". That test was abandoned in Minnesota in Lange v. National Biscuit Co., 297 Minn. 399, 211 N.W.2d 783 (1973); see also Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 310 (1983)("For an intentional tort, the focus is on whether the assault arises out of a dispute occurring within the scope of employment. It is irrelevant whether the actual

assault involves a motivation to serve the master”).

The evidence in this case clearly establishes that Stene’s sexual abuse was foreseeable to Respondents, and preventable if Respondents had properly supervised Stene in his duties as an ordained minister. First, the perpetrating minister in this case, Defendant Stene, was aware of but did not attend any trainings on clergy sexual misconduct. A. 159 at p. 17. He recalled that the ELCA sent him something relating to such training back in the 1980s. *Id.* p. 48. Mr. Stene testified that it was not mandatory to attend these seminars. A. 160 at p. 50. He was not aware of any policy relating to pastors having sex with their parishioners. *Id.* He was not aware of any policy regarding sexual touching. *Id.* p. 52. Mr. Stene agreed that he was convicted of criminal sexual conduct against the child in this case, but he did not think that what he did was a crime. *Id.*

Pastor Bakke had received materials regarding clergy sexual misconduct, but had not gone to any trainings on clergy sexual misconduct. A. 217 at pp. 111-12. He had received the Synod’s written sexual misconduct policy but he had not read it beyond the first page. *Id.* p. 112; A. 218 at pp. 115-16. According to Pastor Olson, this was not appropriate on the part of either one of these pastors. In his opinion, they should have been required to attend the trainings and to demonstrate familiarity with the Synod’s written policy regarding clergy sexual misconduct. A. 778.

Second, in Pastor Olson’s opinion, Defendant Stene’s sexual abuse of the child in this case was foreseeable. He testified that several “red flags” were present which should have

put the church on notice that something might be amiss and that Stene's conduct should be investigated. A. 785. First, Pastor Olson testified that the Stenes having C.B. frequently staying overnight was a warning flag. *Id.* Second, the lavishing of inappropriate and expensive gifts upon C.B. by the Stenes was a warning flag. *Id.* That on at least one occasion C.B. had to be dragged, kicking and screaming, to the car to visit the Stenes was a warning flag. *Id.* In Pastor Olson's opinion, if the synod and churchwide organization had exercised reasonable supervision over Stene, or even if they had adequately educated the congregation on the warning signs of a possibly inappropriate relationship, this tragedy could have been prevented. *Id.* The exercise of supervision over Defendant Stene by the synod and the churchwide organization was, in Pastor Olson's opinion, negligent. *Id.*

Moreover, the testimony of Bishop Ranum in this case was "disturbing" to Pastor Olson in that it showed the bishop did not have a good appreciation of his role in situations involving clergy sexual abuse. A. 785-86. He placed the responsibility for action upon the local congregation when that clearly is not the role of the congregation, but that of the bishop, according to the ELCA Constitution and related documents. *Id.* In Pastor Olson's opinion, the ELCA did not provide its ministers with enough training on the issue of clergy sexual misconduct. A. 786. Furthermore, none of the ministers in the instant case showed much sensitivity to the victims of such misconduct, in the pastor's opinion. *Id.*

In summary, sufficient evidence of the Respondents' negligent supervision of Defendant Stene has been presented to establish a genuine issue of material fact for the trier

of fact to decide on the issue of whether such negligent supervision was the proximate cause of the harm to Appellants.

III. THE CHURCH RESPONDENTS' CONDUCT AFTER THEY LEARNED OF C.B.'S ALLEGATIONS OF SEXUAL ABUSE AGAINST RESPONDENT STENE CONSTITUTED RATIFICATION OF STENE'S ACTS SUFFICIENT TO IMPOSE LIABILITY ON THE CHURCH RESPONDENTS FOR THE HARM DONE TO C.B. AS A RESULT OF STENE'S SEXUAL ASSAULTS.

A related point with respect to the Respondents' conduct after they became aware of Stene's sexual abuse of C.B. is that their conduct indicated ratification of Stene's acts. Ratification of his acts itself is sufficient to impose liability on the Respondents for the harm done to C.B. as a result of those acts. An employer may impliedly ratify or approve the acts of an employee by failing to discharge or even to reprimand an agent for illegal activity. Wirig v. Kinney Shoe Corp., 448 N.W.2d 526, 534 (Minn. Ct. App. 1990), *overruled on other grounds in Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374(Minn. 1990); Tennant Co. v. Advance Machine Co., 355 N.W.2d 720, 724 (Minn. Ct. App. 1984), *pet. For rev. denied*(Minn. Jan. 11, 1985). See also Anonymous v. Lyman Ward Military Academy, 701 So.2d 25 (Ala. Civ. App. 1997), (holding that a school district which ratified the employee's conduct after the fact would be directly, rather than vicariously, liable to the student who was injured); DeBose v. Bear Valley Church of Christ, 890 P.2d 214, 230-31(Colo. Ct. App. 1994)(question whether church ratified behavior of church counselor who allegedly inappropriately touched minor counselee was for jury where minutes of church elders' meetings reflected that they were concerned about the church's potential liability and

responsibility for counselor's counseling, and there was other evidence that church failed to respond effectively to plaintiff's allegations); Restatement (Second) of Torts §909 (1965)(punitive damages can be awarded against a master or other principal because of an act done by an agent, but only if, among other possibilities, the employer or manager of an employer ratified or approved the act).

In Wirig, the plaintiff complained to several managers that she was being sexually harassed by a co-worker. Wirig, 448 N.W.2d at 528. Several managers also witnessed the sexual harassment. Id. at pp. 528-29. The plaintiff asked the managers on several occasions to stop the coworker from harassing her. Id. at p. 529. On only one occasion did a manager attempt to put a stop to the harassing conduct; a young manager "inappropriately" slammed the coworker up against a wall and said he would fire him if he ever sexually harassed the plaintiff again. Id. The coworker, Thorson, was never disciplined for harassing the plaintiff, and the managers never made an investigation to determine whether she was in fact being harassed. Id.

Also, at the time of the sexual harassment, the company had no sexual harassment policy in effect. Id. Kinney Shoe Corporation had not trained any of its managers to identify or deal with sexual harassment and had not instructed its employees about sexual harassment. Id.

The Court of Appeals noted that Thorson's acts of battery and sexual harassment against the plaintiff were illegal, which made it appropriate to apply implied ratification or

approval of the acts by the company when it failed to discipline or even reprimand Thorson. See Id. at p. 534. Additionally, the Court noted that the inappropriate use of physical force by one manager “illustrates the dilemma faced by a young manager observing an incident of gross sexual harassment, but who was without the guidance that clear company policy and training might have afforded him.

In the case at bar, it is clear that Respondent Stene’s acts of criminal sexual conduct against Appellant C.B. were illegal. Yet, after C.B.’s parents disclosed Stene’s sexual abuse of C.B. to Pastor Allan Bakke, Bakke allowed Stene to preside over worship services twice. A. 201 at pp. 47-48. In addition, Bakke allowed a retirement party for Stene to go forward in July of 2002. A. 202 at pp. 50-51. Further, staff at the Southwestern Minnesota Synod first learned of C.B.’s allegations in July of 2002, but did not begin an investigation of the matter until November of 2002. A. 232 at p. 24.

Bishop Ranum told the congregation when he announced Stene’s resignation that the Stenes were good people. The Stenes were allowed to continue to attend Sunday worship services until November of 2004. According to Pastor Olson, Bishop Ranum’s defense of the Stenes when Oscar Stene’s resignation was announced set a barrier against the family. According to Pastor Olson, in such a small town, in a congregation like this, where the Stenes were known and had served for years, the remarks and the attitude of the bishop set up a scapegoating situation. A. 786-87. “The bishop should have been standing with the victim’s family, re-incorporating them into the church, recognizing that crimes like this do happen and

that the remedy for the crime is punishment. *Id.* Such a stance would have made all the difference in the world in how this family was treated. *Id.* All of this conduct served to ratify the Stene's actions in the eyes of the congregation." *Id.*

Exacerbating the above acts of ratification of Respondent Stene's conduct was the IALC's publication of the progress of this lawsuit in its church newsletter. The newsletter named the family, and recounted events in the litigation as they occurred. A. 310-11. This also served to generate hostility on the part of the congregation towards C.B. and her family, as it appeared that the lawsuit might deplete the church's funds. *See* A. 311 at p. 95.

Also, as in *Wirig*, Pastor Bakke was without clear guidelines on how to deal with Respondent Stene's sexual abuse of C.B. This may have been the result of his own negligence in failing to read the Synod's policy on sexual misconduct, or it may have been the result of the ELCA and the Synod's failure to provide proper training of all of their ordained ministers on the proper handling of sexual misconduct by a minister. In either event, ratification of Respondent Stene's conduct may have been avoided if the ELCA and Synod had properly educated and trained its ministers. Its failure to do so justifies the application of ratification of Respondent Stene's acts and concomitant liability on that basis.

CONCLUSION

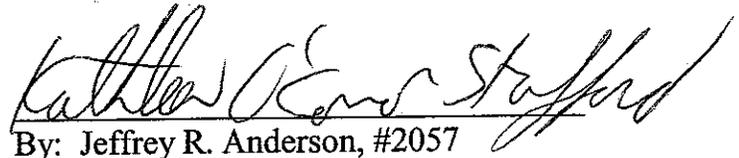
For all of the foregoing reasons and upon the evidence submitted in this case, the district court erred in granting the Church Respondents' motions for summary judgment. The Appellants therefore respectfully request that this Court reverse the judgment of the lower

court and remand the case for trial on the merits.

Respectfully submitted,

JEFF ANDERSON & ASSOCIATES

Dated: 3-29-06



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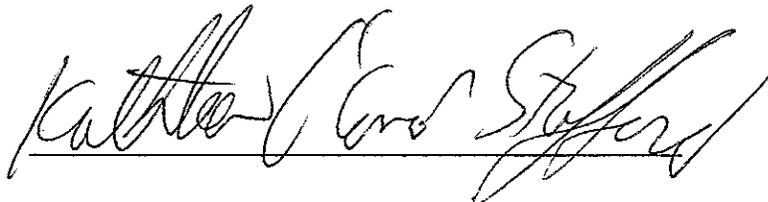
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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellants' Brief in Case No. A06-0295 complies with Minnesota Rules of Appellate Procedure 132.01, Subd. 3(a)(1) and that the brief contains 13819 words.

The brief was prepared on Word Perfect 10.0.


Kathleen Ann Stafford

C.B., a minor, by her mother and natural guardian, L.B., and L.B., individually v. Evangelical Lutheran Church in America, et al.

Case No.: A06-0295

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Erin M. Dalluge, being first duly sworn, deposes and says that on March 29, 2006, she served the attached document(s):

- Two bound copies of Appellants' Brief;
- Two bound copies of Appellants' Appendix - Volume I;
- Two bound copies of Appellants' Appendix - Volume II;
- Notice Regarding Oral Arguments.

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

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

Erin M. Dalluge

Subscribed and sworn to before me
this 29 day of March, 2006.

Therese A. Treichel
Notary Public

