

Case No. A06-0295

State of Minnesota  
**In Court of Appeals**

MINNESOTA STATE BAR  
APPELLATE DIVISION

MAY 12 2008

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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.*

**BRIEF AND APPENDIX OF RESPONDENT SOUTHWESTERN MINNESOTA  
SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA**

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## STATEMENT OF THE ISSUES

1. Have Appellants produced evidence of a genuine issue of material fact regarding their vicarious liability claim to prevent summary judgment?

The district court held that Appellants had not produced evidence to demonstrate that Stene was an employee of any of the church Respondents at the time of his misconduct to impose vicarious liability.

2. Have Appellants provided evidence to create a genuine issue of material fact regarding its negligence claim?

The district court held there was no employment relationship between Stene and any of the church Respondents to impose liability for negligence, and no evidence to establish that Stene's conduct was foreseeable.

3. Have Appellants provided any evidence to create a genuine issue of material fact regarding whether the church Respondents are liable for Stene's conduct by their subsequent ratification of his acts after learning of the reported abuse?

The district court did not address the ratification issue directly, but affirmatively held there was no employment relationship between Stene and the church Respondents.

## STATEMENT OF THE CASE

Appellants initiated this action alleging sexual abuse by a retired Lutheran minister. Appellants asserted claims against the retired minister and his wife, the local church where the minister had been previously employed, the regional Synod of the Evangelical Lutheran Church as well as the national Evangelical Lutheran organization.

Respondents Evangelical Lutheran Church in America, Southwestern Synod of the Evangelical Lutheran Church in America, and Immanuel American Lutheran Church moved for summary judgment. Southwest Synod asserted that there was no liability on behalf of the Synod for Appellants' damages.

At the summary judgment motion hearing, Appellants withdrew their causes of action based on breach of fiduciary duty, fiduciary fraud, and duty to warn, and presented only their negligence and vicarious liability theories to the court.

The district court, the Honorable Jeffrey L. Flynn, granted summary judgment in favor of Respondents Evangelical Lutheran Church in America, Southwestern Synod of the Evangelical Lutheran Church in America, and Immanuel American Lutheran Church. The court held that there was no employment relationship between those defendants and the abuser, and that the abuse occurred outside the work-related limits of time and place and were not related to his employment duties.

This appeal followed.

## STATEMENT OF THE FACTS

### A. **The Structure of the Evangelical Lutheran Church in America.**

The Evangelical Lutheran Church in America (ELCA) is a national organization that is involved in a number of ministries including missions in foreign countries, education, starting new congregations and providing both clergy and congregational rosters. (A250, p. 8-9) The head of the ELCA is the presiding bishop, who is elected by the assembly. (A250, p. 8) There are also bishops in each of the individual synods. *Id.* A synod is a geographic unit of the ELCA assigned to congregations in its area. *Id.* at 7. There are 65 ELCA synods in the United States. *Id.* A congregation is a group of believers in a particular area, often referred to by the name of the local church. (A253, p.19-20)

The individual units of the ELCA involved in this action are the Southwestern Minnesota Synod and the congregation of the Immanuel American Lutheran Church. Although Oscar Stene was a retired pastor at the time of the abuse, and was therefore not employed by any of the church Respondents, a review of the relationships between the Respondents may be of assistance to the court.

The relationship between the ELCA, the synod, and the congregation is governed by the constitution of the individual synod as well as the Constitution for Synods of the Evangelical Lutheran Church in America. (See RA 1-57)

The employment of a pastor is the responsibility of a congregation. (A243, p. 67) (A211, p. 85-86; A214, p. 99) (A280, p. 34; A283, p. 47) It is the role of the synod to assist in the "call process" (the seeking out of a pastor). (A253, p. 23-24) (A283, p. 47-48) The

synod assists in this process by providing a call roster. (A254, p. 23-24) Before extending a call to a pastor, the congregation consults with the bishop of the synod regarding the needs of the congregation. (A254, p. 23-24) (RA 49, S14.11) The synod makes recommendations from the "call roster" (a list of ordained ELCA ministers) according to which pastors it believes might best fit the needs of the congregation. (A254, p. 23-24) The congregation is not limited to recommendations from the synod, but may call any minister on the call roster. The congregation's board or its designated committee then interviews the perspective pastors and discusses with him/her the terms of employment. (A283, p. 46-47) The congregation votes before extending a call to a prospective pastor. (RA 49, S14.11) A two-thirds majority vote of those congregation members present is required to issue a call. (RA 49, S14.11) Once the congregation has chosen the pastor it wishes to extend a call to, the bishop of the synod attests the call letter to the prospective pastor. (RA 49, S14.11)

Once a pastor has accepted a call, the local congregation becomes his or her employer. (A252, p. 13) (A243, p. 67) (A281, p. 39) (A214, p. 99) The congregation is the body with the authority to fire its pastor. (A252, p. 13) (A214, p. 99) A congregation may remove its pastor by vote. (A252, p. 14) The congregation sets the terms of the pastor's employment, including pay and benefits, as well as the place and time for services. (A283, p. 47) (A212, p. 90) (A211, p. 85)

The synod is responsible to see that the local pastors are delivering a message in accordance with the ELCA standards of belief. (A253, p. 20) A bishop of the synod cannot remove a pastor. (A214, p. 99-100) He or she is limited to the disciplinary process set forth

in the synod guidelines. (A252, p. 15) The discipline process involves a hearing of a local synod committee followed by a recommendation to the disciplinary committee of the ELCA. (A252, p. 15-16) The ELCA would then conduct its own disciplinary hearing. *Id.*

The Southwestern Synod had issued a Statement of Policy Regarding Sexual Misconduct by Members of the Clergy and Rostered Lay Leaders in effect at the time of the alleged acts of abuse. (RA 58-66) The policy explicitly describes the relationship between the local congregation and the synod:

The Synod and its member congregations have different responsibilities and thus different roles to play in preventing and responding to reports of clergy sexual misconduct.

Each ELCA congregation calls its own pastor, determines its pastor's duties and responsibilities, supervises its pastor's day-to-day ministry, and decides whether to terminate its pastor's call. The Synod has neither the authority nor the ability to make those decisions.

(RA 59)

**B. Appellants' Allegations.**

Appellants' claims in this case allege sexual abuse by retired pastor Oscar Stene. (A1-A13) Oscar Stene was the pastor at Immanuel American Lutheran Church from 1966 until 1978. (A151, p.16; A152, p. 17-19) Mr. Stene had served as pastor at various congregations for 31 years prior to his retirement in 1991. (A153, p. 24; A164, p. 25) There was no prior history of sexual abuse during his 31 years of service and approximately eight years of retirement before the alleged abuse. (A185, p. 149-150) Since his retirement in 1991, Mr. Stene has occasionally performed "pulpit supply," a service where he would fill in for a pastor

during a Sunday service. (A183, p. 144) He performed this service at the request of the congregation. (A184, p.145)

At the time of the alleged abuse, Mr. Stene was retired and was not performing pulpit supply service at Immanuel American. (A184, p. 148) Oscar Stene's wife was a retired teacher. *Id.* C.B. knew Mr. and Mrs. Stene as family friends. (RA 70, p. 16) Mrs. Stene tutored C.B. to help her improve her grades in school. (RA 70, p. 21, RA 71, p.22) From 1998 until 2002, C.B. received tutoring from Mrs. Stene. (RA 76, p. 37-38) Oscar Stene did not participate in the tutoring and provided no religious instruction to C.B. during her visits from 1998 through 2002. *Id.* at 38. C.B. and her family would have dinner with the Stenes at their home. (A74, p. 34-36; A75, p.37-39) In addition, Mr. and Mrs. Stene babysat C.B. and her brother when they were younger. (A75, p. 40; A76, p. 41-42)

On the day of the abuse, C.B. visited the Stene home to receive tutoring from Mrs. Stene. (A184, p. 148) (A126, p. 244) At that time, Oscar Stene was not engaged in any religious instruction or counseling with C.B. (A185, p. 149)

#### **STANDARD OF REVIEW**

An appellate court reviews a grant of summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Wanzek Constr., Inc. v. Empls. Ins.*, 679 N.W.2d 322, 324 (Minn. 2004). On appeal from summary judgment, the court's review is *de novo*. *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 584 (Minn. 2003).

In order to oppose a motion for summary judgment, the non-moving party must demonstrate at the time of the motion that specific material facts are in existence which create a genuine issue for trial. *Hunt v. IBM Mid-America Employee's Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986). The United States Supreme Court has clarified the role and importance of summary judgment proceedings. In noting the need for disposing of weak cases, the Court stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (emphasis added). This perspective, concerning the utility of summary judgment proceedings, has been cited favorably by the Minnesota Supreme Court. See *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988). "Summary judgment is not to be avoided simply because there is some metaphysical doubt as to a factual issue. The non-moving party must demonstrate that there is indeed a genuine issue of material fact." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323 (Minn. 1993).

### ARGUMENT

#### **I. APPELLANTS SHOULD NOT BE PERMITTED TO USE MISCHARACTERIZED AND UNSUPPORTED FACTUAL ALLEGATIONS TO PREVENT SUMMARY JUDGMENT.**

Appellants' Brief mischaracterizes many facts and makes unsupported factual assertions in an effort to create a genuine issue of material fact and prevent summary judgment.

Appellants should not be permitted to persuade the court that factual issues exist using mischaracterized and unsupported factual assertions.

Appellants claim that the district court was incorrect in characterizing the relationship between C.B.'s family and the Stenes as a "family" relationship, asserting "[t]his is a distorted and misleading picture of the true nature of their relationship . . . that of clergy-parishioner." (App.'s Brief at 5) Appellants go even further to claim that Stene's status as an ordained minister was "the sole reason they trusted their young daughter in his care." (App.'s Brief at 38) (emphasis in original)

The sole reason for C.B. being at the Stene's residence was to receive tutoring from Mrs. Stene. The purpose of C.B.'s visit had nothing to do with church or receiving religious training. If Pearl Stene was not a teacher, C.B.'s visit would not have occurred. As explained in L.B.'s deposition, the Stenes were family friends. (A74, p. 34-36; A75, p. 37-40; A76, p. 41-42) C.B.'s family would have dinner at the Stene home. *Id.* In addition, the Stenes would send C.B. Christmas and birthday gifts, and C.B. referred to the Stenes and Grandma Pearl and Grandpa Oscar. (A81, p. 64; A84, p. 75-76; A85, p. 77) C.B.'s interactions with the Stenes was in large part due to the family's friendship with the Stenes.

Moreover, Appellants allege "[t]he Synod in this case first learned of Defendant Stene's sexual misconduct in July of 2002." (App.'s Brief at 26, 50) In July of 2002, the Synod received a phone call from outside of the Fulda area, relating an anonymous tip that an unnamed pastor was accused of misconduct in the Fulda area. (A234, p. 31-32; A233, p. 33-35) The report did not identify the pastor or even indicate that it was an ELCA pastor. *Id.* There is no

evidence to support that the Synod knew in July of 2002 of misconduct involving Oscar Stene. When the Synod did learn that the allegations involved Stene, the Synod reported the allegations to the authorities and monitored the sheriff's investigation. (A256, p. 31-32) As soon as the investigation by the sheriff's office was complete and the allegations were substantiated, the Synod immediately requested that Stene stop performing pastoral acts. (A257, p. 33-34)

Appellants also make mischaracterizations and unsupported allegations regarding the role of the bishop. Appellants assert that the bishop "had the power to require a pastor to resign." (App.'s Brief at 31) In support of this allegation, Appellants cite the deposition testimony of Allen Bakke:

Q. Did you believe at the time that Bishop Ranum told you you had to resign that he had the power to require you to resign?

A. Yes, or I wouldn't have resigned.

(A193) The bishop's authority, however, is not defined by the subjective perception of a minister.

The Affidavit of Jeremiah Olson, relied on extensively by Appellants, seems to accept that the Synod cannot fire a pastor. "When the synod and bishop perceive a threat to the church such as . . . a desire to take unilateral action against its pastor, they suddenly appear to the congregation and exercise great pressure to get the congregation to do as the Synod's [sic] wishes." (A780) Olson recognizes that the Synod cannot control or command the

congregation to take specific action against its pastor nor can the Synod take such action on its own.

In addition, Stene's actions support that the bishop lacks the authority to fire a pastor. While the bishop asked Stene to withdraw his name from the roster, the bishop does not have the power to force a pastor to resign. In fact, Stene waited a week after being asked to resign before making his decision, indicating that he believed he had the right to choose not to resign, and was not under the strict control of the bishop. (A257., p. 35) The facts that Bishop Ranum *asked* Stene to resign and *asked* him to no longer hold himself out as an ordained minister demonstrate the lack of authority which the Synod had over Stene.

Appellants also claims "[t]he 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." (App.'s Brief at 31) There is no evidence to support that the Bishop transferred Stene's employment. It was Stene's decision to answer a call and transfer congregations. (A183, p. 141-144)

Similarly, Appellants falsely assert that Stene's assignment at Immanuel American could not have been possible but for the express consent and assignment of the Synod. (App.'s Brief at 8) The Synod may refuse to sign a letter of call to a minister chosen by the congregation, however this creates only "great pressure on the congregation and minister not to continue in that situation." (A780) The decision in choosing a pastor is made by the congregation.

Appellants also misstate facts in their assertion “[t]he Synod offered health insurance benefits for its pastors.” (App.’s Brief at 15) Appellate cites page 158 of the deposition transcript of Oscar Stene in support of this assertion. Mr. Stene testified:

Q. Did you have to buy health insurance through, you know, like an insurance agent or was there a synod health insurance policy?

A. I don’t remember the synod had a health insurance policy. You know, you’ll have to correct me if I’m wrong, but I don’t think they did. I don’t know. Do you know? I don’t know.

Q. So you don’t remember - -

A. No.

Q - - getting health insurance through the synod, is that right.

A. No. No.

(A.187, p. 158) This cited testimony does not support Appellants’ declaration that the Synod offered health insurance to its pastors. In fact, the Synod did not provide health insurance to its pastors. The congregation contributes to a pastor’s health insurance plan and determines the amount and deductible paid. (A269, p. 84; A270, p. 85-86)

There is also no citation to support the assertion made in Olson’s Affidavit that “[a]s Bishop Ranum noted, the synod can temporarily suspend a pastor and this is seen as great power in the congregation.” (App.’s Brief at 27) Bishop Ranum testified that the Synod can ask a pastor to resign or begin a disciplinary action through the ELCA. (A252, p. 13-16) In response to the question, “Are there any actions the bishop could take that are short of asking for a resignation, probation, anything like that?”, Ranum responded “Not if there’s been actual

malfeasance.” (A256, p. 29) Appellants have offered no citation to support their characterization of Bishop Ranum’s testimony.

Finally, Appellants’ Brief takes the role of the Synod and its duties out of context. The relationship between the pastor and the Synod is ecclesiastical. Appellants’ Brief mischaracterizes this relationship in such a way to attempt to create an employment relationship and characterizes the bishop as a pastor’s supervisor. However, Appellants’ Affidavit of Jeremiah Olson recognizes that the congregation, not the bishop, is the body responsible for the terms and conditions of a pastor’s employment. Olson’s Affidavit recognizes that the congregation, not the bishop, is the body who chooses the minister it wishes to employ and acknowledges that the congregation is the body who selects the candidates it is interested in. The church council interviews the candidate and the church council votes for candidates to whom it wishes to extend a call. While Olson notes that the bishop has the exclusive responsibility “to install” the candidate as pastor, this does not give rise to an employment relationship between the pastor and the bishop or Synod. The Synod’s role is as a religious advisor, not employer. While the bishop does represent religious and moral authority, neither the bishop nor the Synod have employment authority over ministers.

Professionals, whether lawyers, doctors or ministers, are subject to accreditation rules promulgated by a sanctioning body. The Synod’s role is analogous to the relationship between other authorizing bodies and their members. For example, the supreme court of each state is responsible for the accreditation of new attorneys to practice law within the state. The supreme court, by licensing an attorney, represents that the attorney has met certain

prerequisites for admission to the state bar and is qualified to work in the state. The court does not, however, become that attorney's employer by virtue of its accreditation. In addition, much like the Synod, the courts of each state require certain continuing obligations of its attorneys, including continuing education requirements, and are responsible for ensuring that the attorney abides by its rules of professional conduct. This too, however, is not sufficient to hold the courts in an employment relationship with the attorney.

Finally, Olson recognizes that the employment of a retired pastor is determined by the pastor of a congregation. "A retired minister may not exercise ministerial functions in a congregation which they do not serve unless invited to do so by the pastor." (A776) Appellant should not be permitted to mischaracterize the role of the Synod and take its duties out of context to create an issue of fact precluding summary judgment.

## **II. THE SYNOD IS NOT VICARIOUSLY LIABLE FOR STENE'S ACTS.**

### **A. There is no Employment Relationship between Stene and the Synod.**

The district court properly held that there was no employment relationship between Stene and the Synod. "Under the well-established principle of respondeat superior, an employer is vicariously liable for the torts of an employee committed within the course and scope of employment." *D.M.S. v. Barber*, 645 N.W.2d 383, 390 (Minn. 2002); *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999). Because the Synod has no employment relationship with Stene, it cannot be held vicariously liable for his actions. Appellants have failed to present evidence to create a genuine issue of material fact regarding the existence of an employment relationship between the Synod and Stene.

The courts have used the following factors to determine an employee/employer relationship:

- (1) The right to control the means and manner of performance;
- (2) the mode of payment;
- (3) the furnishing of material or tools;
- (4) the control of the premises where the work is done; and
- (5) the right of the employer to discharge.

*Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324, 326(Minn. 1964) (citations omitted). “In determining whether the status is one of employee or independent contractor, the most important factor considered in light of the nature of the work involved is the right of the employer to control the means and manner of performance.” *Id.* (The district court recognized that although there is no claim that Stene was an independent contractor, this analysis is helpful in determining an employment relationship.)

The employment relationship of a pastor exists with the local congregation. (A243, p. 67) (A252, p. 13) (A214, p. 99-100) First, the congregation is responsible for controlling the means and manner of performance. The congregation determines the pastor’s duties, and supervises the pastor’s daily ministry. *Id.* (RA 59) Each congregation defines the role of its pastor in its governing documents. (A241, p. 57-58) The congregation also supplies its pastors with a parsonage and determines how much vacation will be afforded to the minister. (A211, p. 88) Continuing education is also decided between the pastor and the congregation. *Id.* at p. 86. In addition, the congregation determines the goals and priorities of the church and decides how many services to have and when they will be held. (A211, p. 88) (A212, p. 90)

Finally, the congregation outlines the pastor's duties regarding education of the congregation's youths and pastoral care to homebound persons. (A212, p. 91-92)

Second, the congregation determines the pastor's mode of payment. The congregation is responsible for setting a pastor's pay. (A283, P. 47) This is true for retired pastors as well. (A243, p. 67-68)

Third, the congregation furnishes the materials and/or tools for the pastor's employment. While there are not many tools used in a pastor's employment, the congregation supplies its pastor with a parsonage. (A211, p. 85)

Fourth, the congregation controls the premises where the work is to be done. The congregation owns the church building where services are held and supplies the office and furnishings of its pastor. (A211, p. 86) The congregation also determines whether and when the church will be used for weddings, funerals, baptisms and other occasions. (A212, p. 90-91)

Finally, the congregation has the right to discharge a pastor. A synod has no authority to hire or fire a pastor. (A252, p. 15) (A214, p. 99) The call procedure used for hiring pastors allows only the congregation to determine which pastor to extends its call to. The synod can neither force nor prevent the congregation from calling an individual pastor. The role of the synod in developing and maintaining the call roster is only to establish a pool of available candidates, it does not create an employment relationship or allow the synod to control the pastor's employment with its congregation. The congregation remains responsible for setting the terms and conditions of the pastor's employment.

The district court also correctly noted that the disciplinary measures permitted by the Synod and ELCA do not give rise to an employment relationship. The district court compared the role of the Synod and ELCA to a professional licensing board. The act of a Synod or the ELCA in removing a pastor from its call list is equivalent to a professional licensing board suspending the license of a doctor or attorney. Just as the licensing board does not have an employment relationship with the professional, the Synod and ELCA have no employment relationship with Stene by virtue of its call roster.

Moreover, the relationship with the Synod is voluntary and determined by the congregation. (A212, p. 89) This relationship with the Synod is ecclesiastical, not supervisory. (A253, p. 20; A254, p. 21) The Synod sets aspirational goals for its pastors to preach in accordance with the church's religious beliefs; however, the Synod does not control the manner and means of a pastor's employment. Therefore, according to the factors set forth by the court in *Guhlke*, Stene was not an employee of the Synod.

**B. The Misconduct of Stene did not occur within the Scope of his Employment.**

Notwithstanding the lack of an employment relationship, Appellants' vicarious liability claim must also fail because Stene was not acting within the course and scope of any employment at the time of the abuse. In a similar case involving alleged sexual abuse by a clergy member, the Minnesota Court of Appeals explained, "an employer is only vicariously liable for the wrongful acts of its employees committed within the scope of their employment." *Oelschlager v. Magnuson*, 528 N.W.2d 895, 902 (Minn. App. 1995). The

court continued to explain that in a clergy abuse allegation involving intentional conduct, an employee is acting within the scope of employment if the conduct occurs within the “work related limits of time and place” and “the conduct should fairly have been foreseen from the nature of the employment and the duties relating to it.” *Id.* See also *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 421 (Minn. App. 1993) (an employer’s duty to the victim is limited to its ability to “control and protect its employees while they are involved in the employer’s business or at the employer’s place of business”).

The Minnesota Court of Appeals has addressed the scope of employment for a pastor in *Hentges v. Thomford*. In *Hentges*, the church’s pastor went hunting with fellow members of the congregation. *Hentges v. Thomford*, 569 N.W.2d 424, 426-27 (Minn. App. 1997). There was no mention of church matters during the hunting trip and the pastor considered the day a personal day, or a day off work from his ministry. *Id.* While hunting, the pastor accidentally shot a fellow member of his hunting party. *Id.* The court held that the act occurred outside the scope of the pastor’s employment. “When the connection between the activity and the employer’s interest is as marginal as established on these facts, the rationale for the doctrine does not support the extension of the employer’s liability; the doctrine of vicarious liability does not transform an employer into a comprehensive insurer.” *Id.* at 429.

Moreover, courts in other jurisdictions have addressed whether or not a minister’s abuse is committed during the course and scope of employment. In *R.A. v. First Church of Christ and Chick*, the court refused to hold the church vicariously liable for the alleged sexual abuse of its pastor when the abuse was not committed during the course and scope of

employment. *R.A. v. First Church of Christ and Chick*, 748 A.2d 692, 700 (Pa 1999). As the court explained:

Nothing about [the minister]'s sexual abuse . . . had any connection to the kind and nature of his employment as a minister. None of the abuse occurred at [his] place of employment. Nor was [his] abusive behavior actuated by any purpose of serving the Church. As [the minister] himself testified . . . he was not [the child]'s spiritual advisor and was certainly not acting as such when he was abusing [her].

*Id.* See also *Alpharetta First United Methodist Church v. Stewart*, 472 S.E.2d 532 (Ga. App. 1996).

Appellants rely on *Martson v. Minneapolis Clinic of Psychiatry and Neurology* to support their argument that Stene's actions were committed within the work related limits of time and place. 329 N.W.2d 306 (Minn. 1982). *Martson*, however, does not support this conclusion. In *Marston*, claimants were patients who alleged sexual advances and touching by their psychologists after routine therapy appointments. *Id.* at 308. During the session, the psychologist would begin a neck and back massage, his conduct would then escalate into kissing or touching "during or shortly after regular therapy sessions." *Id.* The misconduct alleged in *Marston* clearly began during the psychologist's work related limits of time and place as the psychologist was engaged in routine therapy of the claimants.

In contrast, the conduct alleged against Oscar Stene did not occur within the work related limits of time and place. At the time of the abuse, Stene was a retired pastor. (A253, p. 24; A154, p. 25) He was not working at Immanuel American nor was he providing pulpit service for Immanuel American at the time. (A184, p. 148) C.B.'s interaction with Stene on

the day of the abuse was in no manner related to Stene's previous pastoral work. (A184, p. 148; A185, p. 49) (RA 76, p. 38) C.B. had visited the Stene house on that day to receive tutoring from Mrs. Stene. *Id.* The Stene's were family friends of C.B.'s. (RA 70, p. 16; RA 71, p. 17) C.B.'s family had dinner with the Stenes and Mr. and Mrs. Stene would babysit for C.B. and her brother when they were younger. (A74; p. 34-36; A75, p. 37-40; A76, p. 41-42) At the time of the abuse, C.B. was not receiving religious instruction or counseling from Mr. Stene. (A185, p. 149) (RA 76, p. 38) The abuse did not take place on church property, but at Stene's home, and was in no manner related to Mr. Stene's role as a pastor. The abuse did not occur within the work-related limits of time and place as required to sustain Appellants' vicarious liability claim.

### **III. APPELLANTS HAVE NOT CREATED A GENUINE ISSUE OF MATERIAL FACT REGARDING THE NEGLIGENCE OF THE SYNOD.**

There are three causes of action where a claimant may sue an employer in negligence for injuries caused by one of its employees: negligent hiring, negligent retention and negligent supervision. *M.L. v. Magnuson*, 531 N.W.2d 849, 856 (Minn. App. 1995). "Negligent employment [unlike vicarious liability] imposes direct liability on the employer only where the claimant's injuries are the result of the employer's failure to take reasonable precautions to protect the claimant from the misconduct of its employees." *Id.* at 853 n.3; *citing Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 911 n.5 (Minn. 1983); *Yunker*, 496 N.W.2d at 422.

Appellants' Brief asserts that Respondents were negligent in their supervision of Stene. "[N]egligent supervision is the failure of the employer to exercise ordinary care in supervising

the employment relationship, so as to prevent the foreseeable misconduct of an employee from causing harm to other employees or third persons.” *M.L.*, 531 N.W.2d at 858. A claimant must prove that the conduct occurred during the scope of employment to maintain a negligent supervision claim. *Id.*; citing *Yunker*, 496 N.W.2d at 422.

The district court correctly held that none of the church defendants were Stene’s employer. (A252, p. 13) (A243, p. 67) As discussed above, Stene in fact was not employed by any of the defendants on the day in question. At the time of the abuse, Stene was a retired pastor. (A184, p. 148) In addition, although Stene occasionally performed pulpit service, this temporary engagement, like that of a church’s regular pastor, is determined solely by the congregation. The congregation is the employer of a pastor. (A252, p. 13) (A243, p. 67) The individual congregation is the body responsible for the hiring and firing of its pastors. *Id.* Because the Synod was not Stene’s employer, it cannot be held liable for negligent supervision.

In addition, the alleged abuse occurred at Stene’s home. Stene was not performing pastoral duties, nor providing religious training to C.B. at the time of the abuse. Stene was a retired minister, and was not providing pulpit service on the day of the abuse. Appellants seek to impose a requirement on the church respondents to supervise Stene twenty-four hours a day, at his own home, despite the fact that Stene was a retired minister and not providing pastoral duties at the time. Appellants’ argument would require an employer to supervise its retired employees personal activities at their homes, for an indefinite period of time following their retirement. Appellants have offered no legal support for imposing this radical obligation.

Moreover, Stene's misconduct was not foreseeable. Despite Plaintiffs' allegations of Stene's "dangerous and exploitive propensities as a child sexual abuser," prior to C.B.'s report, there were no reports of sexual misconduct involving Oscar Stene. (A336, Answer 5) (A322, Answer 5) Appellants have not produced any evidence to support that the Synod had prior knowledge of Stene's alleged abuse. Stene had no criminal history regarding sexual abuse nor had ever been accused of sexual abuse. (A185, p. 149-150) Indeed, the Immanuel American congregation was shocked to learn of the allegations against Stene. (A282, p. 44) The persons in the best position to ascertain Stene's abusive activities were C.B.'s family, who were close family friends with the Stenes. C.B.'s family, however, had no suspicions regarding Oscar Stene prior to learning of the abuse. (A90, p. 100) In congregation meetings held after the abuse became known, no members of the congregation knew of any other instances of abuse involving Stene. (A282, p. 44; A283, p. 45)

Because there is no history of prior abuse by Stene, Appellants rely on alleged "red flags" identified in the Affidavit of Jeremiah Olson to argue that Stene's acts were foreseeable. There is no evidence, however, that any of the church Respondents had knowledge of these events prior to C.B.'s report. In fact, the only persons with direct knowledge of these events were C.B.'s parents.

The district court correctly reasoned that Appellants cannot rely on the vague and general Affidavit of Jeremiah Olson to create a fact issue concerning foreseeability. The Affidavit of Jeremiah Olson proclaims that sexual abuse in the Lutheran church is widespread, therefore, Stene's behavior should have been foreseeable to the church respondents. Olson

is proclaiming that any Lutheran minister is automatically in a suspect class of persons likely to commit sexual abuse against a minor, simply by being a minister. This assertion is completely unsupported by any facts and is an outrageous condemnation of these ministers. Moreover, as the district court noted, there is an “evidentiary requirement that the employer have some basis for suspecting that a certain employee has such ‘dangerous proclivities.’” (A860); citing *Patterson v. Wu Family Corp.*, 594 N.W.2d 540 (Minn. App. 1999); *Oslin v. State*, 543 N.W.2d 408 (Minn. App. 1996). There are no former allegations, acts, or other evidence prior to C.B.’s report to provide a basis for suspecting Stene of sexual abuse. Stene’s abuse of C.B., therefore, was not foreseeable.

Even if there had been rumors of prior abusive acts by Stene, the Synod cannot be held liable for failing to investigate or report rumors of alleged abuse. In *Meyer v. Lindala*, the claimant argued that the Jehovah’s Witnesses congregation and governing body, Watchtower, owed a duty because of their unique relationship with the claimants. *Meyer v. Lindala*, 675 N.W.2d 635, 639 (Minn. App. 2004). The religious organizations had complete control over investigating allegations of wrongdoing and reporting child abuse to authorities, as well as instructing their congregation members with whom to associate. *Id.* at 638-40. Upon receiving allegations of abuse, the religious institution instructed the alleged victims not to talk to anybody about the abuse or else face excommunication. *Id.* at 638. The Minnesota Court of Appeals held that the religious organization was not negligent in its investigation or failure to report allegations of abuse.

A negligence claim requires a showing of duty, breach of duty, injury proximately caused by the breach and damages. *Id.* at 639; citing *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). The court in *Meyer* found that there was no special relationship to give rise to a duty supporting a negligence claim. *Id.* at 641. The acts of abuse occurred at the abuser's residence, automobile and snowmobile, not during religious functions or on religious property, therefore the religious institution had no custody or control over the victims at the time of the acts. *Id.* at 640. In addition, the court held that the Child Abuse Reporting Act (CARA), mandating reporting of alleged child abuse under certain circumstances, does not give rise to a private civil cause of action. *Id.* at 641.

As in *Meyer*, the acts of abuse in this case occurred at Mr. Stene's residence, not on church property or during religious functions. At the time of the abuse, C.B. was at the Stene residence to receive tutoring from Mrs. Stene. Mr. Stene was not engaged in any religious instruction or counseling with C.B. Accordingly, similar to *Meyer*, C.B. was not in the custody or control of the Synod at the time of the abuse, and there is no special relationship with the Synod to impose a duty and support a negligence theory.

#### **IV. THE SYNOD CANNOT BE LIABLE FOR SUBSEQUENT RATIFICATION OF STENE'S ACTS.**

Finally, Appellants argue that the church Respondents are liable because they ratified Stene's acts by their conduct after becoming aware of the abuse. Appellants assert, "[a]n employer may impliedly ratify or approve the acts of an employee by failing to discharge or even to reprimand an agent for illegal activity." (Pl.'s Brief at 48) (emphasis added). *See*

*Wirig v. Kinney Shoe Corp.*, 448 N.W.2d 526, 534 (Minn. App. 1990), *overruled on other grounds in Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn. 1990).

Bishop Ranum never suggested that Stene was not the perpetrator or identified the Stenes as "good people" as Appellants allege. (A267, p. 73-74) In fact, as soon as the law enforcement investigation confirmed the allegations against Stene, the Synod immediately confronted Stene, asked for and received Stene's resignation, and asked that Stene no longer hold himself out as a pastor. The essence of Appellants' claim is not ratification, but that the church Respondents did not adequately denounce Stene's acts. Appellants desire that the church Respondents had more forcefully condemned Stene's actions does not give rise to legal liability.

An employer may be liable for an employee's acts where the employer accepts and/or ratifies the act after the fact, and where the act is "so connected with the employment that he would have been liable for them as master if the latter had been his servant when committing them." *Kwiechen v. Holmes & Hallowell Co.*, 118 N.W. 668, 669 (Minn. 1908). *Kwiechen* requires that someone act without authority for the benefit of another, who later accepts the benefits of the act. Ratification, therefore, requires that the employee act with the intent of benefitting the employer. There can be no assertion that Stene's alleged abuse was committed with the intent of benefitting the church Respondents.

In addition, the court in *Meyer* held that the church had no duty to the alleged victim despite its prior knowledge of the perpetrator's previous abuse. 675 N.W.2d at 640. If prior

knowledge was insufficient to create liability in *Meyer*, knowledge after the fact should not create liability either.

Finally, as previously discussed, the Synod was not Stene's employer. The pastor is an employee of the congregation, not the Synod. Because there is not an employment relationship between Stene and the Synod, the Synod cannot be liable for any alleged ratification.

### CONCLUSION

Appellants have failed to establish a genuine issue of material fact to prevent summary judgment on its claims against the Synod. The Synod was not Stene's employer, and is not liable for his misconduct. The district court's grant of summary judgment should be affirmed.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Southwestern Minnesota Synod of the Evangelical Lutheran Church in America's Brief in Case No. A06-0295 complies with Minnesota Rules of Appellate Procedures, 132.01, Subd. 3(a)(1) and that the brief contains 6,622 words. The brief was prepared on Word Perfect 9.0.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).