

CASE NO. A06-0295

OFFICE OF
APPELLATE COURT

STATE OF MINNESOTA
IN COURT OF APPEALS

MAY 16 2016

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.

BRIEF OF RESPONDENT IMMANUEL AMERICAN LUTHERAN CHURCH

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STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT IN FAVOR OF IALC ON THE GROUNDS THAT OSCAR STENE WAS NOT AN EMPLOYEE OF IALC AND THAT HIS ACTS COULD NOT HAVE TAKEN PLACE WITHIN THE COURSE AND SCOPE OF ANY EMPLOYMENT?

The trial court held that Stene was not an employee of IALC or either of the other respondents and further held that even assuming some employment, whatever Stene did could not have occurred within work-related minutes of time and place. (A845, 849-55).

Guhlke v. Roberts Truck Lines, 128 N.W.2d 324, 326 (Minn. 1964); Marston v. Minneapolis Clinic of Psychiatry and Neurology, 329 N.W.2d 306 (Minn. 1982).

II. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT IN FAVOR OF IALC ON THE THEORY OF NEGLIGENT SUPERVISION?

The trial court held that there was no evidence supporting a negligent supervision theory on several grounds, primarily that none of the respondents were Stene's employer. (A856).

Yunker v. Honeywell, 496 N.W.2d 419 (Minn. App. 1993).

III. IS THERE ANY EVIDENCE THAT WOULD ENTITLE A FACT-FINDER TO CONCLUDE THAT IALC RATIFIED THE CONDUCT OF STENE?

The trial court did not address the ratification issue.

Kwiechen v. Holmes & Hollowell Co., 106 Minn. 148, 118 N.W. 668, 669 (1908); Fox v. Morse, 255 Minn. 318, 96 N.W.2d 637 (1959).

STATEMENT OF THE CASE

This matter arises out of sexual abuse of C.B., then 13 years old, by defendant Oscar Stene. He pled guilty to a criminal charge arising out of his conduct. C.B. and her mother sued the case out in a ten count Complaint. The first six counts are solely against Oscar Stene and/or his wife, Pearl. The last four counts are against the named church entities, i.e., the Evangelical Lutheran Church in America (ELCA), the Southwestern Minnesota Synod of the Evangelical Lutheran Church in America (Synod), and Immanuel American Lutheran Church (IALC), the local congregation in Fulda, Minnesota.

After discovery, the Church respondents moved for summary judgment. The motion came on for hearing before Judge Jeffrey Flynn on November 21, 2005. The transcript of the argument appears in the appendix at A865.¹ By order dated December 6, 2005, the court granted summary judgment in favor of the Church respondents. (A844). That order left the claims against the Stenes pending, but the judge entered a subsequent Rule 54.02 order to clear up any question of this court's jurisdiction. By order dated April 19, 2006, this court allowed respondents until May 15, 2006 to file briefs.

STATEMENT OF THE FACTS

A. Oscar Stene was a retired minister and employed by no one.

Oscar Stene was ordained a Lutheran minister in 1960. (A151). He served a congregation in Madison, Minnesota from 1960 through 1966. (Id.). From 1966-78 he was the pastor at IALC in Fulda, Minnesota. In 1974 he officiated at the marriage of C.B.'s parents. In

¹ References are to appellants' comprehensive appendix.

1978 he resigned as pastor at IALC to pastor a Lutheran church in Bricelyn, Minnesota where he remained until he retired in 1991. (A153).

After retirement, the Stenes returned to an acreage they owned in rural Fulda. (A156). Meanwhile, the pastor at IALC had quit. Oscar Stene functioned as the interim pastor there while the Church was looking for a new permanent pastor. Allan Bakke accepted the call to be permanent pastor at IALC in August 1992. That ended Oscar Stene's position as interim pastor. Stene accepted a few other short-term positions as interim pastor at other local churches. (Id.). He also functioned as the fill-in pulpit supply minister at IALC and other local churches when the regular pastors were on vacation or not available for any other reason. (A183).

Stene served as fill-in pulpit supply minister on October 11, 1998, October 18, 1998, October 28, 2001, December 30, 2001, April 14, May 12, October 6 and October 20, all in the year 2002. He received a \$100 honorarium for each such service. His duty as fill-in pulpit supply minister was to conduct the one-hour Sunday morning worship service. (A352).

Oscar Stene testified that local congregations paid his salary, but that was when he was working full time for a local congregation before his retirement in 1991. He did not receive W-2 forms for his work as a pulpit supply minister. He did receive W-2 forms for work as interim minister at churches that were trying to hire a full-time pastor. (A184). Payment for work on the odd Sunday as a pulpit supply minister was an honorarium. He did not know whether anyone deducted taxes or whether he got any sort of form evidencing the payment at the end of the year. (Id.) Former Bishop Paul Ranum stated that the usual practice was for a congregation to pay a small honorarium to the pulpit supply minister, and that if the annual honoraria do not exceed \$500, the congregation could not issue a 1099 form. (A269).

After the allegations of sexual abuse of C.B. came to light, Oscar Stene eventually pleaded guilty to a charge of criminal sexual conduct in the second degree. He admitted one incident of touching C.B. at the plea hearing. (Transcript of plea hearing at 10). He acknowledged that C.B. and her parents were family friends. They were also parishioners of IALC, but he stated that “the church really had nothing to do with it. It just happened to be a private thing. We were friends but it had nothing to do with the church.” (Id. at 11).

B. Oscar Stene abused appellant C.B. at his own home on his own time.

Plaintiff C.B. lives with her parents, L.B. and Curtis B. and one brother in Fulda. They live two miles away from the Stenes. (A81). Curtis B. first came to know Oscar Stene as a child. Stene taught confirmation classes which included Curtis B. (Curtis B. Depo at 9). Stene officiated at the wedding ceremony of Curtis B. and L.B. (Id. at 10). After the Stenes moved to Bricelyn, Minnesota, they remained on friendly terms and visited the Stenes in Bricelyn a few times. (Id. at 10). After the Stenes moved back to Fulda, they would socialize several times per year. (Id. at 15). L.B. and her brother began to visit the Stenes at home unattended when C.B. was 10 or 11 years old. (Id. at 19). They went over to the Stenes to see the animals and for tutoring by Mrs. Stene. (Id. at 22). There was no religious component to these visits. (A126; Depo of C.B. at 138).

C.B.’s mother, L.B., testified that one of the reasons for the children visiting the Stenes was for babysitting. (A75-76). Later, C.B. went there for tutoring in school subjects by Mrs. Stene. (A78). C.B. called the Stenes Grandpa and Grandma. (A81).

On June 17, 2002, C.B. came back from the Stenes. When C.B. came home in the early evening, she was obviously upset. (A91). Eventually, C.B. told her parents that Oscar Stene had

abused her and gave details. (Id.). They called Pastor Bakke and not the police. (A92). There has been no further abuse of C.B. since June 17, 2002. Later, C.B. described one other incident of abuse by Stene. (A134). After that date, L.B. learned of other allegations that Stene had abused other women. All of this information came to her attention after June 2002. (A116).

C.B. testified that the first incident of abuse occurred when she was in the fourth grade, age 9. (Depo of C.B. at 24-28). It may have been 1998. (Id. at 25). On June 17, 2002, she was at the Stenes. She was there on that day to see the horses. (Id. at 43). Oscar Stene put his hand up her pants and touched her vagina. She got up and ran into a bedroom. He came in and unzipped his pants and started to expose himself. (Id. at 48-56). She was upset and asked to go home. She went home the next day. (Id. at 61).

Everything that Oscar Stene ever did to her occurred at the Stenes' home. She never went there for any religious instruction. (Id. at 138). She believes there were other incidents of abuse by him between 1999 and 2002, but cannot remember the details. (Id. at 120).

STANDARD OF REVIEW

In reviewing a trial court's grant of summary judgment, the role of this court is to determine whether there are any genuine issues of material fact and whether the trial court properly applied the law. Rule 56.03 MRCP; Niccum v. Hydra-Tool Corporation, 438 N.W.2d 96, 98 (Minn. 1980). A party opposing summary judgment may not rely upon the mere averments or denials of the pleadings, but must point to specific matters which raise a reasonable inference of a material question of fact. Rule 56.05 MRCP; Bebo v. Delander, 632 N.W.2d 732, 737 (Minn. App. 2001). A metaphysical doubt is not enough to create a fact question. Id.

SUMMARY OF ARGUMENT

There are three church respondents, i.e., Evangelical Lutheran Church in America (ELCA), Southwestern Minnesota Synod of the Evangelical Lutheran Church in America (Synod), and the local congregation, Immanuel American Lutheran Church (IALC). This is the responsive brief of IALC. The main argument on behalf of IALC is that appellants have no arguments specifically directed against it. Appellants never mention the local church by itself in connection with any legal argument. Appellants lump together all three church entities as respondents throughout the argument portion of their brief, but no argument against the local church alone appears.

All of appellants' arguments depend upon an employment relationship between IALC and retired minister Stene. There is no question that Stene had once been an employee of IALC from 1966 to 1978. His full-time employment relationship with anybody ended when he retired in 1991. In that year, he returned to the Fulda area and transferred his membership to IALC. Thereafter, he served as interim minister and pulpit supply minister from time to time while maintaining his retired status.

A former employee is not a current employee. The acts of abuse complained of came to light in 2002, 11 years after Stene had retired. Functioning as an interim minister or a pulpit supply minister does not create an on-going or continuous employment relationship. The respondeat superior claim fails entirely.

Although the court need not reach the issue, the acts of Stene could not have taken place within the course and scope of any employment because they took place at his rural home and not substantially within limits of time and space of employment, assuming he had any.

Since the theory of negligent supervision depends upon an act within the course and scope of employment, it necessarily fails under these facts as does the imaginative theory of ratification.

ARGUMENT

I. SINCE RETIRED MINISTER STENE IS A FORMER EMPLOYEE OF IALC, NOT A CURRENT EMPLOYEE, RESPONDEAT SUPERIOR DOES NOT APPLY.

Appellants argue that the IALC is vicariously liable for the acts of Oscar Stene.

Vicarious liability arises only in the context of employment, so they also allege that Stene was an employee of the IALC and that the conduct complained of took place in the course and scope of his employment.

The district court granted summary judgment to IALC on the grounds that the facts plainly allow no other conclusion than that Stene was not an employee of IALC. He was a former employee, but a former employee is not a current employee. He was an occasional fill-in pulpit supply minister, but a temporary replacement is not a current employee. At most, a temporary replacement is an employee only during the hours when he is providing replacement services.

The district court granted summary judgment on the further basis that the acts of abuse did not arise in the course and scope of employment, assuming there was any employment. (A851-55). These findings and conclusions are plainly correct and overwhelmingly justified by the undisputed facts.

The undisputed facts show that Oscar was not on the Church's payroll when the abuse of C.B. was going on. He was on the Church's list of members, but not on its payroll. He received

a \$100 honorarium for each day that he provided replacement pulpit supply services. From 1998 through 2002, he performed that service six times for a total of \$600. The Church did not withhold taxes. It would have issued him a 1099 form, not a W-2, and probably not even a 1099, since the amounts each year were so low. The Church did not provide the Stenes with health benefits or any other kind of benefit. The Church did not provide payments on his behalf into a pension plan. He was already receiving his pension. He did not declare vacation days. He did not have set hours – he did not have any hours except on those rare occasions when the Church contacted him for pulpit supply services. The Church did not have the right to control his discharge of the duties he was performing for the Church – he performed no duties for the Church except for one hour on each of six Sunday mornings over the course of 4-5 years when he conducted the worship service. The Church had no right or ability to control anything he did at his own home.

If, under these facts, Oscar Stene can be a current employee of IALC, then he would also be a current employee of the Lutheran church he served in Bricelyn, Minnesota from 1966 through 1978. He would be a current employee of those six other churches where he served as interim minister. He would be an employee of any other church where he filled in as a pulpit supply minister, even for as little as one Sunday morning. But this is plainly ridiculous. Employment relationships begin and end. One day employment relationships exist. Smith v. Employers' Overload Co., 314 N.W.2d 220, 223 (Minn. 1981). (One day labor arrangement with wages for one day paid immediately does not create ongoing employment relationship.) If the parties contemplate a one day or one hour term of employment, the law permits them to do so.

The only reason why the IALC is a party to this lawsuit is that it once employed Stene as its minister. If Stene were simply a member of the congregation and not its former minister, no one would claim that he was an employee. But his status as a former employee does not create a claim where none exists otherwise. A past employee is not a current employee. IALC no more controlled Stene's actions than it controlled the actions of any other member of the congregation.

The principal factor in determining an employment relationship is the ability to control what the supposed employee does and how he does it. Guhlke v. Roberts Truck Lines, 128 N.W.2d 324, 326 (Minn. 1964). In this case, that factor is entirely absent. Oscar Stene was free to do whatever he wanted at his own home on his own time without any control over his actions by anyone. The Church had no right to tell him what to do or how to do it when he was at home, even where children of neighbors happen to come over to look at the animals. The Church had no ability to control what he was doing or even to know what he was doing. No one could have dreamed that the Church would be called upon to control the actions of Stene at his own home, particularly where there is no claim that the visits of C.B. to the Stene farm had any spiritual component.

The Guhlke court listed other factors in considering whether a person is an employee or not. The other factors are mode of payment, furnishing of tools, control of premises where the work is done and right of the employer to discharge. Guhlke, 128 N.W.2d at 326. None of these factors apply or even make sense as applied to the facts here. The Church was not paying Stene for anything. He was receiving a pension, but that was not wages and it did not come from IALC. IALC did not control the premises where Stene did any work. He wasn't doing any work. IALC did not control the Stenes' home. IALC did not have the right to discharge Stene.

Discharge him from what? The only thing he was doing for the Church was occasional pulpit supply preaching. IALC could not discharge him from that. If it was dissatisfied, it would have simply stopped calling him, as indeed it did.

The Guhlke test is really addressed to the question of whether a person who is currently doing work for someone else is an employee or an independent contractor. But that is not the issue here. Guhlke fits much less neatly to the question of whether a person is a current or former employee. Minnesota has not articulated a standard for that question, probably because it is obvious in almost all cases. It is obvious in this case. Appellants' arguments here would apply so broadly that the only way a church entity could divest itself of ongoing responsibility for a retired minister is by defrocking him. A local congregation would not have that option. If appellants are correct, then all retired ministers are current employees of any church where they ever worked until the end of time regardless where they are, or what they are doing, or with whom, or when. There is nothing in Minnesota law that remotely supports such a view of the employment relationship.

Appellants' brief on pp. 21-22 provides a list of functions which the Lutheran Church expects of all ordained ministers, such as preaching the word, administering sacraments, conducting public worship and other matters. There is no evidence that Oscar Stene was actively discharging any of the listed items except on those rare occasions when he conducted a public worship service as a pulpit supply minister. The second half of the list on appellants' brief at page 22 is expectations of ordained ministers who have a present congregation. These items include confirming the youth of the Church, marrying couples, visiting the sick and burying the dead. There is no showing that Oscar Stene did any of these at all in 2002 or at any time after his

last interim ministerial position. There is no showing that Oscar Stene did any of these at IALC after his interim ministry position there which lasted around seven months in 1991-92. The first task in the list of job duties for ministers with a congregation is to offer religious instruction. C.B. went to the Stene household ostensibly for instruction, but it was given by Pearl Stene and related to school subjects. C.B. acknowledges that she never received any kind of religious instruction at the Stene home.

Appellants cite to the affidavit of Jeremiah Olson quoting the ELCA constitution to the effect that an ordained minister must at all times “be true to the sacred trust inherent in the nature of the pastoral office.” (A776). It may be true that all ministers, retired or not, are expected at all times to be true to their sacred trust, but it is irrelevant to the question of employment. The statement is aspirational in character rather than a specific job requirement. One can imagine any number of particular violations of the sacred trust of an ordained minister. Some of them might breach duties of employment; others might not. Some breaches of sacred trust might or might not amount to breaches of employment duties, depending upon other circumstances, such as when and where the breach occurred and with whom. Whether an act breaches a minister’s sacred trust is an ecclesiastical question which adds nothing to the legal question of employment.

The facts are not disputed. There are no facts reasonably tending to show that Oscar Stene was an employee of IALC in 2002. The district court was manifestly correct in so concluding. This court should affirm.

II. ASSUMING STENE WAS EMPLOYED BY ANYONE, HIS ACTS DID NOT TAKE PLACE IN THE COURSE AND SCOPE.

Appellants argue that there is a fact question whether the acts of Stene took place within the course and scope of employment. There is no dispute that all the acts of Stene took place at his home in the country. There is no dispute that C.B. was on the premises to receive tutoring in school subjects from Pearl Stene and not for the purpose of receiving any religious instruction from Oscar Stene. C.B. acknowledged she never received any religious instruction from Oscar Stene.

In spite of these facts, appellants take the position that a fact-finder could reasonably conclude that the acts of abuse took place in the course and scope of some supposed employment. In support, they cite (on page 36 of their brief) to a district court decision from Harrison County, Texas. Texas can create whatever test for respondeat superior it likes, but there is no support in appellants' brief for the claim that a jury reached a verdict against the ELCA in Texas. The cite to the appendix is to a write-up of a pending case in the magazine *The Lutheran*. The magazine article states that the lawsuit is pending. The article mentions no verdict or opinion from any court. It is unclear where appellants got their information about the matter. It does not come from the materials in their appendix.

Appellants rely on the Minnesota case of Marston v. Minneapolis Clinic of Psychiatry and Neurology, 329 N.W.2d 306 (Minn. 1982). Marston is still good law. It and its progeny has resulted in the current test for scope of employment found in CIVJIG 30.20 which provides that an act is within the course and scope of employment if:

1. The employee's conduct is substantially within work-related limits of time and place; and

2. The employee's conduct is of a kind authorized by the employer or reasonably related to that employment; and
3. The employer should have foreseen the employee's conduct given the nature of the employment and the duties relating to it.

The jury instruction actually expands the ruling of Marston. The Marston court held that the employee's acts must occur within work-related limits of time and place. 329 N.W.2d at 311.

The jury instruction expands this slightly to *substantially* within work-related limits of time and place. Appellants wish to expand the test to the point where there are no work-related limits of time and place. But no Minnesota court has ever done so. In Marston, the psychiatrist's offending conduct took place at his clinic during or shortly after regular therapy sessions. All of the conduct occurred at the clinic in the same room where the therapy took place. 329 N.W.2d at 308.

Similarly, in P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996), the sexual contact between the student and high school teacher took place in the school during regular hours. In Fabrendorff v. North Homes, Inc., 597 N.W.2d 905 (Minn. 1999), the offensive contact between the group home counselor and the underage inmate took place at the group home when the counselor was on duty. Similarly, in L.M. v. Karlson, 646 N.W.2d 537 (Minn. App. 2002), the sexual abuse by the teacher currently employed by the daycare took place during regular hours at the daycare. 646 N.W.2d at 541.

Currently employed ministers are in a sense on call 24 hours a day, but not on duty. The law recognizes that churches are not potentially liable for their ministers every minute of every day by virtue of respondeat superior. Hentges v. Thomford, 569 N.W.2d 424 (Minn. App. 1997). In Hentges, the minister managed to shoot a parishioner in a hunting accident. The minister had

taken a vacation day and indeed had arranged a substitute to take over a confirmation class. Maintaining social relations with parishioners was part of his job description, but he went hunting that day with two friends who happened to be parishioners. There was nothing spiritual about their activities. He would have gone hunting by himself if the other two had not been available. 569 N.W.2d at 427. There was testimony that ministers on vacation were not on duty but on call. Id. Under these circumstances, the court of appeals reversed a jury finding that the minister was acting in the scope of his employment. The “residual benefit” of maintaining good relations with members of the Church was “too tenuous” to support respondeat superior. 569 N.W.2d at 429. The court concluded, “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.

Nothing remotely supports the claim that substantially within work-related limits of time and place can be expanded as far as the employee’s home after hours, much less after retirement. Appellants seem to argue for a new test – that if the abuser first becomes acquainted with the eventual victim or the victim’s family through employment, then any eventual abuse falls within the course and scope. Of course, there is no Minnesota law supporting that theory. Undaunted, appellants turn to the State of Oregon which has a different test for the course and scope of employment. In Oregon, the employee must be motivated, at least in part, to serve the interests of the employer. Fearing v. Bucher, 977 P.2d 1163, 1166 (Or. 1999). Minnesota once had the same motivational test but got rid of it in Marston. The Fearing opinion addresses the question of whether the amended complaint alleged sufficient facts to permit an inference that the

eventual acts of sexual abuse were motivated at some level by a desire to serve the archdiocese. That entire inquiry would be completely irrelevant in Minnesota. Furthermore, the Fearing decision sheds no light on employment-related limitations on time and place. The motion was brought on the pleadings, which alleged that the acts of abuse were within such limits. 977 P.2d at 1166.

Appellants in effect are asking this court to create a new test for the scope of employment in derogation of Marston and its progeny. They have adduced no sound reason why any court would do so, but in any event, it would be a matter for the supreme court.

III. IALC HAD NO DUTY TO SUPERVISE RETIRED MINISTER STENE AT HIS OWN HOME OR ANYWHERE ELSE.

The theory of negligent supervision derives from respondeat superior and so requires an act within the scope of employment. Yunker v. Honeywell, 496 N.W.2d 419 (Minn. App. 1993). Without an employment relationship, the claim necessarily fails. Without in any way conceding that any of appellants' arguments on the employment relationship have the remotest persuasive power, IALC addresses appellants' arguments on the specific theory of negligent supervision.

Negligent supervision is a legal theory by which the law obligates employers to act reasonably in supervising their current employees within work-related limits of time and place. Minnesota has never extended the theory to impose duties upon former employers to continue supervising their ex-employees in the ex-employees' own homes. Yunker, 496 N.W.2d at 422 (Negligent supervision did not apply to murder of Honeywell employee by an ex-employee where the murderer had resigned from Honeywell two weeks before the murder, and the murder did not take place on Honeywell premises.)

In the present matter, all of the acts at issue took place at Stene's home on his own time. Ordinarily, an employer has no duty to supervise an employee at the employee's own home and on his own time. The C.B. family asserts that the Church respondents had an obligation to supervise Stene at his own home 24 hours a day. That is an extraordinary claim that should require extraordinary citation to authority. Instead, there is none. There are citations in that section of appellants' brief but none of them represent cases of an employer supervising employees other than within work-related limits of time and place.

Appellants base their argument upon certain supposed factual red flags which should have tipped the Church respondents off that something was amiss at the Stene household and that 24 hour a day supervision was demanded. C.B. and her brother did from time to time stay overnight at the Stene household. The Stenes did give one or two expensive gifts to C.B. one Christmas which C.B.'s parents immediately gave back. C.B. once had to be dragged kicking and screaming to visit the Stenes. Appellants' expert, Jeremiah Olson, is of the opinion these were red flags. But nothing in the record, including the affidavit of Jeremiah Olson, allows an inference that these matters, even if they were red flags, ever came to the attention of IALC. There is no such evidence. These matters never came to the attention of anyone other than the Stenes and the family of C.B. until after this lawsuit began. Jeremiah Olson has no opinion on how any of these matters should have come to the attention of anyone in the congregation other than C.B.'s parents.

Appellants argue that there are other incidents which should have put IALC on notice that Stene was an abuser. They allege it, but voluminous discovery disclosed nothing other than vague, unsubstantiated rumors – nothing that IALC knew about or could have acted on. To the

extent there are any facts behind these rumors, there is no showing that IALC had any reason to know about them before the abuse of C.B. became public knowledge. For example, the most definitive such allegation is a claim that Stene touched Melissa Howry inappropriately over her clothing. Her own mother, Sheila Hawkinson, had no knowledge of it until after the C.B. matter became public. (A292). There is no showing that Melissa Howry herself made any complaint to anyone or that any information about it came to the attention of the Church.

Appellants, in their statement of the legal issues, cite Marston and M.L. v. Magnuson, 531 N.W.2d 849 (Minn. App. 1995) in support of their arguments on this issue. Neither of those cases is apposite. Both involve current and not former employees. In Marston, the psychiatrist was a current employee of the clinic. As far as one can tell from the opinion, he came into the office daily and put in a full day or more. The abuse occurred at the clinic. In M.L., the abuser was a minister currently employed at Redeemer Covenant Church. He abused M.L. and others on the Church premises. These cases simply stand for the obvious – that employers have the ability and duty to supervise employees within work-related limits of time and place. There is no basis to extend the duty beyond those limits to the employee’s own home on the employee’s own time, particularly where the employee is a former employee.

The practical difficulties with any supposed duty of supervision find eloquent expression in the colloquy between the district court and appellants’ attorney at the summary judgment hearing in the appendix at A909-912. The court asked questions such as who is to check up on the Stenes at their home and how is this to be done. There are no good answers. There need be no answers at all because there is no such duty.

As applied to the facts of this case, there was no occasion for IALC to do anything relating to the Stenes other than accept them as current members of the congregation. If IALC had ever had the bizarre idea of supervising the Stenes at their own home, the Church would have had no means to do so. Anyone who has read *1984* can imagine methods of home surveillance, but anything like that would have been illegal. But the question of practical methods of supervising never arises since IALC never had a duty to do so.

IV. FAILURE TO DEMONIZE IS NOT RATIFICATION.

Appellants' argument that the respondents (apparently including IALC) ratified Stene's conduct is an exercise in fantasy. Appellants' brief does not say what Minnesota law on ratification is, or whether Minnesota has ever applied ratification under similar circumstances. The brief even invents new facts in unavailing support for a plainly lost cause.

The invented fact is that staff at the Synod learned of C.B.'s allegations in July of 2002. (Appellants' Brief at 50). That supposed fact makes it look as though staff were doing nothing for four or five months. However, the cited reference is the deposition of Marcus Kunz. (A. 232 at p. 24). The witness said no such thing on that page of his deposition. The only report that anyone made in July 2002 was from a pastor, Randy Chrissis, from a Lutheran church in Hutchinson who reported an anonymous tip that an unnamed pastor had molested an unidentified female in the Fulda area. He made this report to Marcus Kunz. (A234). Kunz asked if the anonymous minister was ELCA and Pastor Chrissis did not know. (A235).

Appellants' expert, Jeremiah Olson, put the same supposed fact in his affidavit. (A. 779). But he would not have any knowledge of any such thing apart from the materials he read. His affidavit in support of that supposed fact simply states "(cite)." (A779). The inference is that

whoever drafted the affidavit thought that it would be nice if the facts were as stated, and drafted the affidavit that way intending to plug in the proper citation later.

The Minnesota case law which appellants cite is not apposite. They cite two Minnesota cases, Wirig v. Kinney Shoe Corp., 448 N.W.2d 526 (Minn. App. 1990) (overruled on other grounds at 461 N.W.2d 374 (Minn. 1990) and Tennant Co. v. Advance Machine Co., 355 N.W.2d 720 (Minn. App. 1984). Both of those cases involve acts of current, rather than former, employees. Minnesota acknowledges the possibility of ratification by an employer of acts of current employees under some circumstances. But in both cases, the issue was whether the employer would be liable for punitive damages and not whether ratification would extend the scope of respondeat superior where it did not otherwise apply. That procedural posture presupposes that the employers were liable under respondeat superior for the acts of the current employees done within the course and scope of employment. If the employees did not act in the course and scope of their employment, the employers would not be liable for either compensatory or punitive damages. The reported decisions confirm that the acts of the employees were done in the course and scope. Wirig, 448 N.W.2d at 529; Tennant, 355 N.W.2d at 723. Furthermore, in Tennant, the offending acts took place in California, and the Minnesota court applied California law. Tennant tells us nothing about Minnesota law on ratification or anything else.

The case law from other states which appellants cite is even less helpful. Anonymous v. Lyman Ward Military Academy, 701 So.2d 25 (Ala. Civ. App. 1997) does state that an employer which ratifies a current employee's wrongful acts would be directly rather than vicariously liable for actual damages. That is the law of Alabama, not necessarily Minnesota. Furthermore, Lyman Ward held that ratification did not apply to the facts there where the employer had no

knowledge of any past bad acts by the employee and where it got the employee's resignation within a few months of first learning of allegations against the employee. 701 So.2d at 27.

Appellants' other non-Minnesota case, DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. App. 1994) similarly fails on the facts. The church there was aware of allegations against the employed counselor for several years before the abuse of plaintiff. The minutes of meetings of the church elders reflected those complaints and concerns about potential liability. There was other evidence the church failed to adequately respond to these complaints. 890 P.2d at 231.

Minnesota does have its own law on ratification. In Kwiechen v. Holmes & Hollowell Co., 106 Minn. 148, 118 N.W. 668, 669 (1908), the court held that retaining an employee in his employment after the employee has injured someone by an act not in the course and scope of employment does not constitute ratification. The court provides no guidance on what ratification is, only that continued employment is not ratification. The court went on to note that ratification, whatever acts may constitute it, would create the agency necessary for respondeat superior if such agency were otherwise wanting. In other words, if the employer has ratified an employee's deed, the employer's liability would be vicarious and not direct. That means that C.B.'s citation to the Lyman Ward case from Alabama is completely beside the point.

Minnesota law on ratification is not particularly well developed. The better view is that "the principal may ratify only such acts as he or she might have authorized at the time of affirmance. Acts which cannot be legally delegated, because in violation of law or contravention of public policy, cannot be ratified where they are illegal and void." 3 Am.Jur.2d, Agency, §187. Wirig holds that an employer may ratify acts that are in willful disregard of the rights or

safety of others, but an employer may not ratify blatantly criminal acts such as criminal sexual conduct because the principal could not have authorized the act in the first place.

Kwiechen holds that ratification applies where someone acts for the benefit of another, but without authority, and where the other person accepts the benefit of the act. Specifically, the court held, “Thus, ratification of acts which another has done without authority performed as his servant and for his benefit will render him liable for the latter’s negligent acts which were 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.” 118 N.W.2d at 669-70.

Fifty years later, the court again addressed the issue of ratification in Fox v. Morse, 255 Minn. 318, 96 N.W.2d 637 (1959). Fox arose out of a fire at a hotel. The hotel owner hired a manager. The manager needed help and hired an extra man who started a fire while removing varnish from floors with a flammable solvent. After lawsuits started, the owner tried to claim that the man was not his employee because the manager had no authority to hire extra help without the owner’s express consent. The evidence showed that the owner signed a check representing the man’s wages, although the check was never delivered. Fox does not cite Kwiechen, but the two cases are consistent. The work done in Fox was plainly for the benefit of the owner who would have accepted the benefit of revarnished floors had they not burned to ashes. The work being done was plainly within the scope of employment of a hotel handyman.

Although the supreme court later in Marston eliminated the requirement that the employee act at least in part with the intention of benefitting the employer as a test for respondeat superior, that element is still part of the test for ratification. This makes perfect sense. If an employee commits some injurious act with no relationship to employment or any intent to benefit

the employer, there is no reason why respondeat superior should apply if the employer does something foolish like making statements to the press approving the act. It might be tasteless, but it has nothing to do with employment.

All these arguments apply with that much more force where the person who commits the act is an ex-employee and the person alleged to have ratified the conduct is a former employer. Appellants have not cited anything remotely suggesting that Minnesota has ever applied or would ever apply ratification under those circumstances. That would be an extension of an employer's potential liability completely without precedent in Minnesota law. Appellants seem to take the position that ratification should give rise to respondeat superior even where the acts have no nexus to any employment because they were not done within work-related limits of time and place. Nothing in Minnesota law supports such an extension of an employer's potential liability. Appellants might wish that the law is so, but that does not make it so.

Appellants' argument is really not that the congregation or anyone else ratified the acts of Stene, but that they failed to demonize Stene, or that they failed to handle the matter with as much sensitivity as the C.B. family might have preferred. Whether or not any of this is true is irrelevant since none of it gives rise to any liability on any theory of law recognized in Minnesota.

Rev. Bakke's failure to cancel a reception for Oscar Stene,² the failure of IALC to immediately kick the Stenes out as members, and Rev. Bakke's decision to ask Oscar Stene to fill in as a pulpit supply minister on two Sundays following the abuse cannot constitute

² Appellants characterize this as a retirement party (Appellants' Brief at 50) which makes little sense for someone who retired in 1991. It appears that the reception was more accurately in celebration of the 42nd anniversary of Stene's ordination. (A297).

ratification under the Kwiechen standard. The trial court did not rule on the question, but it is plain that the acts could not amount to ratification or approval of the acts of Stene. The acts are a failure to demonize rather than a ratification.

The theory of ratification appears to be an imaginative attempt to avoid the rule that violation of the mandatory reporter statute does not create a private civil cause of action. This court has already resolved that issue in Meyer v. Lindala, 675 N.W.2d 635, 641 (Minn. App. 2004) and Valtakis v. Putnam, 504 N.W.2d 264, 266 (Minn. App. 1993). Violation of the Child Abuse Reporting Act, Minn. Stat. § 626.556, does not give rise to a private civil cause of action.

No doubt that is the reason why appellants did not make such a claim. However, they have claimed that Rev. Bakke's failure to report the abuse for about four months is ratification of the act of Stene. The operative fact is the failure to report, whether counsel chooses to characterize it as failure to make a mandatory report, or as ratification of the act of another. The facts are all the same. Calling it ratification is simply an attempt to get around the rule that there is no civil claim for failure to report.

Appellants complain about Bakke's inaction after C.B. reported the acts of abuse to him. But that is comparable to the Meyer v. Lindala case. This court in Meyer held that "mere knowledge coupled with power is insufficient to impose a duty." 675 N.W.2d at 640. In Meyer, certain acts of abuse took place after the defendant Congregation of Jehovah's Witnesses learned that one of its members had abused other female members. The plaintiff argued that this prior knowledge gave rise to a duty on the part of the congregation to protect her by warning that the abuser was not a safe person to hang around with. This court repeated the well-established rule that there is no duty to protect another absent a special relationship. Providing religious

instruction does not create a special relationship. The knowledge of the congregation that one of its members was an abuser, together with power to do something about it did not create a special relationship or a duty. 675 N.W.2d at 640.

If prior knowledge does not create a duty, it follows that knowledge after the fact should not create a duty, much less liability, where none would otherwise exist. There is no dispute that IALC had no idea that anything was going on between Oscar Stene and C.B. until after the fact. Even though prior knowledge does not create a duty, appellants here take the position that failure to react to C.B.'s disclosure in a way that C.B. and her family approve of should become the basis for not only duty, but breach and causation. This represents overreaching on a vast scale with absolutely nothing to support it.

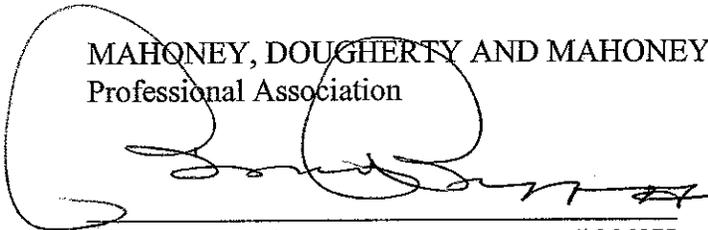
CONCLUSION

For all the above reasons, the court should affirm the trial court in all respects.

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Respectfully submitted,

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