

DONALD J. GREEN,

Law No. LA 29990

**REPLY TO PLAINTIFF'S  
MEMORANDUM IN OPPOSITION TO  
THE DIOCESE'S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

Defendants.

Although Plaintiff sets forth the basic tenets of First Amendment jurisprudence, he fails to recognize the implications of his claims against the Diocese. A long line of cases against various churches or church officials have been barred by courts as implicating First Amendment rights. These cases have included property disputes and organizational disputes that are clearly internal church workings. In addition, they have also included third party claims against churches and officials of the church, such as clergy or bishops. DeStephano v. Grabrian, 763 P.2d 275 (Col. 1988) (a claim for clergy malpractice raises First Amendment issues and was properly dismissed); Nally v. Grace Comm. Church of the Valley, 763 P.2d 948 (Col. 1988) (dismissing wrongful death case against church after decedent received counseling from a pastor). Since Nally, almost every American court has rejected claims for clergy malpractice on First Amendment grounds. See Bassett, Religious Institutions and the Law, § 8:19, n.9 (listing cases).

Contrary to Plaintiff's assertions, the Diocese has not argued that the conduct itself, child abuse, is protected by the First Amendment. However, how the church addresses such conduct by its priests, is protected by the First Amendment. The Catholic Church has at its heart beliefs that sin exists and in the repentance, and forgiveness of sin. These are beliefs in which the government cannot evaluate. Any legal claim that brings these beliefs into question necessarily implicates the First Amendment, and the inquiry is barred.

Furthermore, Plaintiff's Petition sets forth several claims of duty on the part of the church or bishop to supervise, defrock, or otherwise punish its priests. In order to evaluate the conduct of the Diocese, it is necessary to first determine what role the bishop and Diocese play within the church as a whole, and what authority they have or should have over individual priests. Evaluating these relationships in the context of this litigation necessarily implicates Canon law, which the Court simply cannot do. Once the court involves itself in internal church teachings, it has become excessively entangled in religion. The Plaintiff, by his Petition, seeks to impose a duty upon the Diocese to supervise its priests, warn parishioners of potential misconduct on the part of its priests, or somehow otherwise prevent abuse of minor children. In order to reach any conclusion on such a duty, the Court must necessarily look at the Diocese's role in the church, its interaction with parishioners, and its responsibilities under Canon law. It is simply not possible to evaluate the conduct of the Diocese using secular standards. The law of the church must be explored, and a jury would be forced to consider and evaluate core religious beliefs of the church. The Court must not consider and evaluate Canon law when determining the Diocese's duty in the context of Plaintiff's Petition.

Plaintiff states that he simply seeks a determination that the Diocese breached a fiduciary duty and was negligent in its supervision of a priest. However, in order to determine whether any duty, much less a fiduciary duty exists, the court or jury must necessarily evaluate the

relationships of the Diocese and its parishioners, a solely religious inquiry. Such an evaluation would also require imposition of a so-called neutral standard of reasonableness of the Diocese or Bishop's conduct in its evaluation of priests for assignment. See Bryan R. v. Watchtower Bible & Tract Society, 738 A.2d 839 (Me. 1999) (holding that First Amendment bars claims of misconduct against clergy). See also, Schmidt v. Bishop, 779 F.Supp. 321, 326-28 (S.D.N.Y. 1991); Roppolo v. Moore, 644 So.2d 206, 208-10 (La. App. 1994); Strock v. Pressnell, 527 N.E.2d 1235, 1239 (Ohio 1988). Furthermore, the question of fiduciary duty focuses sharply on the nature and depth of religious faith and its basis, if any, in Roman Catholic doctrine, which is a profoundly religious question, as to which courts may not inquire. Richelle L. v. Roman Catholic Archbishop of San Francisco, 130 Cal. Rptr. 2d 601, 611 (Cal. 1<sup>st</sup> App. 2003). In order to evaluate whether the relationship of Diocese and parishioner could even be fiduciary in nature, the court must necessarily evaluate the religious understandings and teachings of the relationship between a parishioner and the Diocese. See Id. This type of inquiry is specifically prohibited by the First Amendment. See Serbian East Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

Moreover, religious organizations, such as the Diocese of Davenport, which is comparatively large and bureaucratic, simply cannot be reasonably expected to have fiduciary relationships with each one of its churches' parishioners. The Diocese cannot be held to a standard of personal trust and confidence with each and every parishioner.

Plaintiff is correct in stating the Diocese cannot claim that sexual abuse of minors is authorized or even supported by church law, but the basic tenets of First Amendment jurisprudence require that the Court not even consider church law at all. Plaintiff is seeking to use church law to impose a duty on the Diocese based on the relationships of Diocese/priest, Diocese/parishioner, or priest/parishioner. Although facially tort law is neutral and of general applicability, when Plaintiff seeks to impose a duty based on Canon law, then the law is not

neutral, and such suits are barred by the First Amendment. Additionally, when a tort claim involves the disciplinary review process of a church, the court is precluded from determining disputes touching on matters of doctrine, canon law, or discipline. Callahan v. First Congregational Church of Haverhill, 2004 WL 1088563 (Mass. 2004). It is not possible to evaluate the conduct of the Diocese in any other context other than the one in which it exists. (This is obvious by Plaintiff's own presentation at the Motion for Summary Judgment wherein Plaintiff presented evidence on Canon law, church hierarchy, and church practices through the testimony of Father Thomas Doyle. The consideration of such evidence is specifically prohibited by the First Amendment.)

Plaintiff cites Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2<sup>nd</sup> Cir. 1999) as support for jury consideration of this case. However, several other jurisdictions have prohibited similar inquiries. Bryan R. v. Watchtower Bible & Tract Society, 738 A.2d 839 (Me. 1999); Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997); L.L.N. v. Clauder, 563 N.W.2d 434 (Wisc. 1997); Ehrens v. Lutheran Church – Missouri Synod, 269 F.Supp.2d 328 (S.D.N.Y. 2003). Plaintiff further cites Doe v. Hartz, 52 Supp. 2d 1027 (N.D. Iowa 1999), in support of a "wait and see" approach, but fails to point out that the Hartz court also dismissed several theories advanced by the Plaintiff here. For example, the Hartz court specifically found that Plaintiff had failed to allege a claim of fraud or fraudulent concealment because there was no duty to disclose. Hartz, 52 F.Supp.2d at 1057-58.

Although in some cases, the First Amendment does immunize churches from tort liability, the United States Constitution is the supreme law of the land, and the government is prohibited from excessive entanglement in religion. "To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide church law...would violate the First Amendment." Serbian, 426 U.S. 696, 709. Likewise, for civil

courts to determine whether the actions of a church are arbitrary implicates ecclesiastical doctrine and the First Amendment. See Id. at 713. Furthermore, the Martinelli court specifically noted that "Martinelli's claim neither relied upon nor sought to enforce the duties of the Diocese according to religious beliefs, nor did it require or involve a resolution of whether the Diocese's conduct was consistent with them." Martinelli, (1999). In contrast, Plaintiff here is seeking to impose a duty on the Diocese based on religious beliefs, mores, and values.

Plaintiff's claims against the Diocese are barred by the First Amendment, and should be dismissed.

## **II. No Fiduciary Relationship Exists Between a Diocese and its Parishioners**

Once again Plaintiff cites Martinelli and Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993) to support his position that a fiduciary relationship may exist between a minor parishioner and a diocese. However, the Iowa District Court disagreed with these decisions to find that a fiduciary relationship does not exist between a Diocese and one of its parishioners, although it is conceivable in some instances that one may exist between clergy and parishioner. As in Hartz, Green's Petition does not allege any direct relationship or contact between Green and the Diocese, that the Diocese was acting for Green, that the Diocese had any influence over Green, or that Green was in any way dependent upon the Diocese. See Hartz, 52 F.Supp.2d at 1062. [T]he status of the Diocese...is an insufficient basis for asserting such a [fiduciary] duty." Id. at 1064. This conclusion is supported by many jurisdictions across the country. Gray v. Ward, 950 S.W.2d 232 (Mo. 1997); Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907 (1993); Schmidt v. Bishop, 779 F.Supp. 321 (S.D.N.Y. 1991). Hawkins v. Trinity Baptist Church, 30 S.W.3d 446 (Tex. 2000); Langford v. Roman Catholic Diocese of Brooklyn, 677 N.Y.S.2d 436 (1998); H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. App. 1995).

No Iowa court has found a fiduciary relationship between a member of the clergy and a parishioner, much less the Diocese and a parishioner. The Hartz court determined that such a relationship **may** exist between the member of the clergy and a parishioner, but a fiduciary relationship does not exist between the Diocese and the parishioner. The Plaintiff does not plead any facts, and cannot do so, that show that he was dependent upon the Diocese at any time. This is not a relationship such as a doctor/patient (wherein a patient is depending upon the doctor for medical care), accountant/client or lawyer/client (wherein the client is depending upon the lawyer or accountant for financial or legal advice). Contrary to Plaintiff's assertions, Hartz is not distinguishable from this case at all in its claims.

Plaintiff's claims of breach of fiduciary duty and fiduciary fraud should be dismissed by this court.

### **III. Plaintiff's Fiduciary Fraud Claim Should be Dismissed.**

Plaintiff claims that he was in a confidential and therefore fiduciary relationship with the Diocese, such that a special relationship arose that imposed a duty on the part of the Diocese to disclose misconduct of its priests. For all the reasons set forth above, there is no basis for the finding of any fiduciary relationship between the Diocese and Plaintiff. In addition, the cases cited by Plaintiff do not support his claims. No Iowa case has provided that a special relationship exists between a Diocese or church organization and its members to create duty to disclose any misconduct. Plaintiff cites § 551 of the Restatement (Second) of Torts as support that the Diocese had a duty to disclose misconduct of priests. However, this section appears to be applicable only to disclosures required in the context of business transactions between two persons.

#### **§551. Liability for Nondisclosure**

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting **in a business transaction** is... [liable] to the other as though he had represented the

nonexistence of the matter...if... he is under a duty to the other to exercise reasonable care to disclose the matter in question.

Restatement (Second) of Torts §551.

Comment f of § 551 does provide that a priest and parishioner may be in a relationship of trust and confidence, but this comment says nothing about a diocese or church organization and its parishioners, and it is only applicable to business transactions, as evidenced by the many other comments of § 551. No Iowa case has interpreted § 551 to apply to any situation other than business transactions. In fact, those cases cited by Plaintiff are business transactions. § 551 has no applicability to the current case.

Plaintiff attempts to distinguish himself from the Plaintiff in Hartz. However, the law remains that there is simply no support under Iowa law for a finding that the Diocese and Plaintiff have a fiduciary relationship. These claims based on fiduciary duty should be dismissed.

#### **IV. The Diocese is under No Duty to Warn Plaintiff of any Misconduct**

Plaintiff contends that the Diocese stands in a special relationship with him, such that the Diocese had a legal duty to warn parishioners of priest misconduct. However, as stated above, no special relationship existed between Plaintiff and the Diocese. Furthermore, even if such a relationship existed, the Diocese had no duty to warn of any misconduct. The duty to inform arises only in relation to business transactions under § 551 of the Restatement (Second) of Torts. This is not a situation similar to a school district who stands in loco parentis with its students. Minors are legally required to attend school, and they do so without parent supervision. In this instance, a minor is not obligated to attend church, or interact with a parish priest. The Diocese has no direct involvement with Plaintiff, is not legally responsible for that minor's education, and is not responsible for the minor's health and welfare as a parent is. Furthermore, the duty of a school district is not absolute. In Godar v. Edwards, 588 N.W.2d 701 (Iowa 1999), the school

district was granted summary judgment as a matter of law when one of its students was sexually abused by a teacher.

Therefore, Plaintiff's argument of similarity to a school district is unpersuasive and not applicable.

#### **V. The Diocese's Conduct is Not Outrageous as a Matter of Law.**

Plaintiff is attempting to impose liability upon the Diocese for an intentional tort, for allegations that are, at the most, negligent behavior. The allegation is simply that the Diocese knew or should have known of the Priest's history of abusing children and negligently placed the priest in a parish. This is not intentional conduct as a matter of law, and is not outrageous. This case is directly analogous to Burrow v. Pottsville Comm. Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996). In Burrow, the Plaintiff complained of peer sexual harassment of a constant nature over the course of many years directly to the school district. The conduct was reported to the school district; and the school district acknowledged that it was aware of the harassment. Despite actual knowledge by the school district, the school district failed to take any disciplinary action against any of the harassing students. The conduct of the school district and its failure to act to protect the Plaintiff was not "outrageous" as a matter of law, even if the failure to act was intentional. The Defendant school district was granted summary judgment on the Plaintiff's claim of intentional infliction of emotional distress. See Id. The facts are clear that any physical harm that occurred was because of the direct act of Father Janssen, and the Diocese itself did not inflict any physical harm upon Plaintiff.

The Diocese, is therefore, entitled to dismissal of Plaintiff's claim of intentional infliction of emotional distress.



## **VI. Intentional Conduct is Not Foreseeable as a Matter of Law**

This claim is barred by the law of Godar v. Edwards, 588 N.W.2d 701 (Iowa 1999). Plaintiff's attempts to distinguish Godar do not avail him of its findings that an employer is not responsible for intentional torts that occur outside the scope of employment. Plaintiff concedes that abuse of minor children is outside the scope of any of a priest's alleged employment and contrary to church policy and law. Under no conceivable circumstances could the Diocese have endorsed such behavior. Although ordinarily whether an act is within the scope of employment is ordinarily a jury question, Plaintiff concedes that abuse is not, but attempts to still apportion liability to the Diocese claiming that the allegation that such conduct was foreseeable by the Diocese. The fact, however, remains that intentional, criminal conduct is not foreseeable as a matter of law.

Finally, Plaintiff fails to address the Diocese's argument that respondeat superior is not a separate claim, but is merely an element of other claims against the Diocese. Because Plaintiff has failed to address this argument and resist its contentions, this claim should be dismissed.

LANE & WATERMAN LLP

By Rand S. Wonio (lrs)  
Rand S. Wonio 06080  
By Mikkie R. Schiltz  
Mikkie R. Schiltz 17672

**ATTORNEYS FOR DEFENDANT  
DIOCESE OF DAVENPORT**

Of Counsel:  
LANE & WATERMAN LLP  
220 N. Main St., Ste. 600  
Davenport, IA 52801-1987  
Phone: (563) 324-3246  
FAX: (563) 324-1616  
E-mail: rwonio@l-wlaw.com

Copies to:

Craig A. Levien  
Betty, Neuman & McMahon  
600 Union Arcade Building  
111 E. Third Street  
Davenport, IA 52801

Martin Petersen  
Klinkenborg, Hansmann & Petersen  
1201 Highway 57  
P.O. Box 682  
Parkersburg, IA 50665

Jeffrey Anderson  
Patrick Noaker  
Jeff Anderson & Associates  
E. 1000 First National Bank Bldg.  
St. Paul, MN 55101

*(Attorneys for Plaintiff)*

Edward N. Wehr  
Wehr, Berger, Lane & Stevens  
900 Kahl Building  
326 W. Third Street, Suite 900  
Davenport, IA 52801  
*(Attorneys for Father Janssen)*

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 7-30 2004

By: ☐ U.S. Mail ☐ FAX  
☒ Hand Delivered ☐ Overnight Courier  
☐ Certified Mail ☐ Other

Signature Mikkie R. Schiltz