IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

JANE DOE 49, by and through her parents, JOHN DOE 50, and JANE DOE 51, as Next Friend, and JOHN DOE 50 and JANE DOE 51, individually	)	**Case No. 1116-CV21447**
Plaintiffs,	)	**Division 5**
vs.	)	
FATHER SHAWN RATIGAN, et al.	)	
Defendants.	)	

DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED PETITION WITH SUGGESTIONS IN SUPPORT

COME NOW Defendant the Catholic Diocese of Kansas City-St. Joseph ("the Diocese") and Defendant Bishop Robert Finn ("Bishop Finn"), by and through their respective counsel, and pursuant to Missouri Supreme Court Rule 55.27(a)(6) move this Court to enter an Order dismissing all claims brought against them by Plaintiffs Jane Doe 49, John Doe 50 and Jane Doe 51.

I. Introduction

Plaintiffs John Doe 50 and Jane Doe 51, both individually and as legal representatives for their daughter, Plaintiff Jane Doe 49, have sued the Diocese, Bishop Finn and Defendant Shawn Ratigan ("Ratigan") by filing a 37-page First Amended Petition ("Amended Petition") containing no fewer than 195 numbered paragraphs and eleven separate counts. Like its predecessor petition, the Amended Petition is rife with sensationalized allegations that create an illusion that a viable claim has been asserted against the Diocese and Bishop Finn. However, close inspection of the allegations reveals that Plaintiffs fail to state a claim upon which relief can be granted. The Diocese and Bishop Finn stress that careful examination of the Amended Petition

is necessary, because the repetitive and amorphous allegations relied on by Plaintiffs are a ruse—there is simply no viable claim alleged against the Diocese or Bishop Finn.

II. Legal Standards for a Motion to Dismiss

"A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *Nazeri v. Mo. Valley College,* 860 S.W.2d 303, 306 (Mo. 1993). When reviewing a petition on a motion to dismiss, "[n]o attempt is made to weigh any facts alleged as to whether they are credible or persuasive." *State ex rel. Henley v. Bickel,* 285 S.W.3d 327, 329 (Mo. 2009). "Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id*

In addition, Missouri is a "fact pleading state." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. 1993); *Jones v. St. Charles County*, 181 S.W.3d 197, 202 (Mo. Ct. App. 2005). Accordingly, the "Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts." *In re Transit Cas. Co.*, 43 S.W.3d 293, 302 (Mo. 2001). The court will accept the pleaded *facts* as true, but "*the mere conclusions of the pleader are not admitted.*" *Pogue v. Assoc. Elec. Co-op, Inc.*, 760 S.W.2d 169, 171 (Mo. Ct. App.1988) (emphasis added). "*The plaintiff cannot merely assert conclusions.*" *Williams v. Barnes & Noble, Inc.*, 174 S.W.3d 556, 559-60 (Mo. Ct. App. 2005) (emphasis added). "Courts disregard conclusions not supported by facts in determining whether a petition states a cause of action." *Id.*; *see also Briboise v. Kansas City Public Service*, 303 S.W.2d 619, 621 (Mo. 1957) ("neither conclusions of law nor conclusions of the pleader on the facts are admitted by the motion [to dismiss].").

Plaintiffs' Petition contains eleven counts, nine of which are asserted against the Diocese and Bishop Finn.[1] The counts are addressed in the order used by Plaintiffs in their Amended Petition.

III. Count Two: Childhood Sexual Abuse

In Count Two, Plaintiffs purport to assert a statutory claim against the Diocese and Bishop Finn pursuant to section 537.046, RSMo. This section does not apply to the Diocese or Bishop Finn because: (a) section 537.046 does not apply to non-perpetrator defendants; (b) there are no allegations of any acts by Bishop Finn or the Diocese that would satisfy the requirements of this section; and (c) vicarious liability under this section is precluded as a matter of law.

a. Section 537.046 does not apply to non-perpetrator defendants.

Section 537.046 does not apply to the Diocese or Bishop Finn because, based on the plain language used in this section, it only applies to the *actual perpetrator of the abuse*. *Walker v. Barrett*, 650 F.3d 1198, 1205 (8th Cir. 2011) ("[W]e conclude that the Missouri legislature did not intend to subject nonperpetrator defendants to liability under § 537.046"). At best, Plaintiffs allege that Ratigan—not the Diocese or Bishop Finn—was the perpetrator of the abuse, and therefore Plaintiffs' claim in Count Two fails as a matter of law.

b. The Diocese and Bishop Finn did not engage in "childhood sexual abuse."

Section 537.046 is limited to claims for "childhood sexual abuse." To constitute "childhood sexual abuse" the act committed against the minor must have been "a violation of section 566.030, 566.040, 566.050 [repealed], 566.060, 566.070, 566.080 [repealed], 566.090, 566.100, 566.110 [repealed], or 566.120 [repealed], RSMo, or section 568.020, RSMo." RSMo § 537.046 (1990) and (2004). These criminal statutes require: (1) physical contact, (2) incest, (3)

[1] Counts One and Three are asserted against Ratigan only.

marriage, or (4) attempted marriage between the perpetrator and the alleged victim. RSMo §§ 566.030 (rape, forcible sexual intercourse); 566.040 (sexual assault, sexual intercourse); 566.060 (forcible sodomy, deviate sexual intercourse); 566.070 (deviate sexual assault, requiring "sexual contact"); 566.090 (sexual misconduct, requiring "sexual contact"); 566.100 (sexual abuse, requiring "sexual contact"); 568.020 (incest, requiring marriage, attempted marriage or sexual intercourse).

The Diocese and Bishop Finn are not aware of any authority holding that a corporation—which is not a natural person—can make physical contact, engage in incest or marry with anyone. Moreover, there is no allegation that Bishop Finn ever physically contacted, engaged in incest, married or attempted to marry any of the Plaintiffs. In fact, the only person who may have physically touched Jane Doe 49 is Ratigan. *See* Amended Petition at ¶¶ 187 (Jane Doe 49's panties were "pulled aside"). Accordingly, Plaintiffs fail to state a claim against the Diocese or Bishop Finn under section 537.046. Plaintiffs' claim in Count Two fails as a matter of law.

c. No indirect liability under section 537.046.

While a *direct* claim against the Diocese or Bishop Finn fails as a matter of law, it should also be noted that Plaintiffs cannot assert an *indirect* claim against either defendant because the Missouri Supreme Court has expressly rejected claims based on a theory of respondeat superior or agency for sexual misconduct by a priest. *Gibson v. Brewer*, 952 S.W.2d 239, 245-46 (Mo. 1997) ("sexual misconduct ... [is] not within the scope of employment of a priest, and [is] in fact forbidden"). Again, Plaintiffs' claim in Count Two fails as a matter of law. To the extent Plaintiffs' Claim in Count One (which is directed to Ratigan only) is an *indirect* claim against the Diocese or Bishop Finn, such a claim would fail for the same reason.

IV. Count Four: Possession of Child Pornography

In Count Four, Plaintiffs purport to assert a statutory claim against the Diocese and Bishop Finn pursuant to section 537.047, RSMo, for the alleged possession of child pornography. Plaintiffs' claims fail for at least four reasons: (a) section 537.047.1 requires a criminal conviction before a civil claim can be asserted; (b) Plaintiffs' allegations do not establish that photographs of Jane Doe 49 are "obscene" or "child pornography" as a matter of law; (c) the allegations do not establish that the Diocese possessed "child pornography" involving Jane Doe 49; and (d) John Doe 50 and Jane Doe 51 (the parents) lack standing to assert a claim under this section because they are not the "victim" of the alleged child pornography.

a. A criminal conviction is a prerequisite to civil liability.

The plain language of section 537.047 makes it clear that a conviction under the applicable criminal statutes is a prerequisite to a civil claim. "Any person who, while a child or minor as defined by section 573.010, RSMo, ***was a victim of a violation*** of sections 573.023, 573.025, 573.035, or 573.037, RSMo ... shall be entitled to bring a civil action[.]" RSMo § 537.047. The Missouri legislature enacted a similar statute prescribing civil claims for childhood sexual abuse. RSMo § 537.046; *see also* Section II, *supra*. A comparison of sections 537.046 and 537.047 reveals that the Missouri Legislature enacted a more strenuous test for "violations" in the latter section. Significantly, section 537.046 authorizes civil suits for child sexual abuse where the act "*would have been* a violation" of the applicable criminal law. (emphasis added). In comparison, section 537.047 only authorizes civil suits for child pornography where the act "*was* ... a violation" of the applicable criminal law. Thus, a criminal conviction is a prerequisite to the filing of a civil action under section 537.047. Plaintiffs do not identify any criminal convictions in their Petition, which renders their claim meritless.

b. The photographs are not "child pornography" or "obscenity."

Even assuming that a criminal conviction under this section is not a prerequisite, Plaintiffs'' claims still fail. The point is this: *there is a sharp distinction between inappropriate or even disturbing photographs and legally-actionable photographs.*

To assert a civil claim for sexual and pornographic offenses involving a minor, the plain language of Section 537.047 requires that a plaintiff demonstrate a "violation of sections 573.023, 573.025, 573.035, or 573.037, RSMo." *Id.* Unfortunately, an analysis of the various statutory sections is complex, tedious, and at times, circular. To assist the Court in applying the statutes at issue, the Diocese and Bishop Finn have attached a flow chart as Exhibit A.

To begin with, a claim under section 537.047 requires a violation of one of the four criminal statutes below. The key language in each section is in **bold**, and is further discussed and defined below.

> **Section 573.023.1:** A person commits the crime of sexual exploitation of a minor if such person knowingly or recklessly photographs, films, videotapes, produces or otherwise creates **obscene** material with a minor or **child pornography**.
>
> **Section 573.025.1**: A person commits the crime of promoting child pornography in the first degree if such person possesses with the intent to promote or promotes **child pornography** of a child less than fourteen years of age or **obscene** material portraying what appears to be a child less than fourteen years of age.
>
> **Section 573.035.1**: A person commits the crime of promoting child pornography in the second degree if such person possesses with the intent to promote or promotes **child pornography** of a minor under the age of eighteen or **obscene** material portraying what appears to be a minor under the age of eighteen.
>
> **Section 573.037.1**: A person commits the crime of possession of child pornography if such person knowingly or recklessly possesses any **child pornography** of a minor under the age of eighteen or **obscene** material portraying what appears to be a minor under the age of eighteen.

Plaintiffs do not allege that the Diocese or Bishop Finn *created* the photographs (section 573.023) or attempted to *promote* them (sections 537.025 and 573.035). As a result, the only section that could possibly apply to the Diocese or Bishop Finn is section 537.037.1 for *possession* of the alleged child pornography. In order to constitute possession of child pornography, the photographs at issue must portray "**obscene**" material or "**child pornography**," as these terms are defined in Missouri law. *See* RSMo § 537.037.1.

i. "Obscene"

To qualify as "obscene," the "average person, applying contemporary community standards," must find that the "material depicts or describes **sexual conduct** in a patently offensive way[.]" RSMo § 573.010(12)(b) (emphasis added). The term "**sexual conduct**" requires:

> [A]ctual or simulated, normal or perverted acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification or any sadomasochistic abuse or acts including animals or any latent objects in an act of apparent sexual stimulation or gratification[.]

Id. at 573.010(17); *see also* RSMo § 556.061(29) (similar definition).

In reviewing Plaintiffs' Amended Petition, the most specific and egregious description of the photographs of Jane Doe 49 is found in Count Eleven. *See* Amended Petition at ¶ 187.

> 187. * * * Specifically, Defendant Ratigan took pictures of Plaintiff in her bedroom, in poses wearing night clothes, up her skirt on Church premises, naked, with her panties pulled aside to reveal her buttocks and pubic areas as well as other poses and places that were private.

Based on the applicable definitions, this allegation does not describe "sexual conduct" because it does not allege masturbation, sexual intercourse, or "physical contact ... in an act of apparent sexual stimulation or gratification"; nor does it describe any of the other sexual acts listed in the applicable statutory definitions. *See* RSMo §§ 573.010(17); 556.061(29). Since the photographs

of Jane Doe 49 do not depict "sexual conduct" they are, as a matter of law, not "obscene." RSMo § 573.010(12)(b).

ii. "Child pornography"

Since the photographs are not "obscene," the fate of Plaintiffs' claims depends on whether the alleged photographs constitute "child pornography." The term "child pornography" is specifically defined in Missouri law. Again, the key language is in **bold**, and is further discussed and defined below.

> (a) Any **obscene** material or performance depicting **sexual conduct**, **sexual contact**, or a **sexual performance**, as these terms are defined in section **556.061**, RSMo, and which has as one of its participants or portrays as an observer of such conduct, contact, or performance a minor under the age of eighteen; or
>
> (b) Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of **sexually explicit conduct** where:
>
> a. The production of such visual depiction involves the use of a minor engaging in **sexually explicit conduct**;
>
> b. Such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in **sexually explicit conduct**; or
>
> c. Such visual depiction has been created, adapted, or modified to show that an identifiable minor is engaging in **sexually explicit conduct**;

RSMo § 573.010(2) (emphasis added).

As discussed above, the photographs are not "obscene" and do not depict "sexual conduct." *See* RSMo §§ 556.061(29); 573.010(12)(b); RSMo §§ 573.010(17). Thus, to constitute "child pornography," the photographs at issue must depict "**sexual contact**," a "**sexual performance,**" or "**sexually explicit conduct**." RSMo § 573.010(2).

> **Section 556.061(30): "Sexual contact"** means any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

Section 556.061(31): "Sexual performance," any performance, or part thereof, which includes **sexual conduct** by a child who is less than seventeen years of age.

Section 573.010(18): "Sexually explicit conduct," actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) Bestiality;

(c) Masturbation;

(d) Sadistic or masochistic abuse; or

(e) Lascivious exhibition of the genitals or pubic area of any person;

Applying the definitions above to Plaintiffs' allegations, the photographs at issue are not "child pornography." Again, the most specific description of the photographs of Jane Doe 49 are found in Count Eleven (Amended Petition at ¶ 187), which describes a "naked [Jane Doe 49], with her panties pulled aside to reveal her buttocks and pubic areas as well as other poses and places that were private." However, this allegation does not describe a portrayal of "sexual contact" because there is no allegation of touching (e.g., of the genitals, anus or breast) "for the purpose of arousing or gratifying sexual desire of any person." RSMo § 556.061(30). The allegation also does not describe a portrayal of a "sexual performance" because a sexual performance requires "sexual conduct." As discussed above, the photographs do not depict "sexual conduct."

The only remaining statutory definition is for "sexually explicit conduct." RSMo § 573.010(18). Like the others definitions, "sexually explicit conduct" requires sexual acts (e.g. intercourse or bestiality). However, this section also includes a "[l]ascivious exhibition of the genitals or pubic area of any person[.]" RSMo § 573.010(18)(e). At best, Plaintiffs have alleged that Jane Doe 49's "pubic areas" were "reveal[ed]" (Amended Petition at ¶ 187), but there is *no* allegation of a "lascivious exhibition."

Based on the plain language of section 537.010(18), nudity alone does qualify as a "lascivious exhibition," and this is especially true when that phrase is compared to the other "hard core" sexual acts identified in the statute (e.g., bestiality, oral sex, anal sex, and "sadistic or masochistic" abuse). *See State ex rel. Foster v. Morris*, 913 S.W.2d 85, 86 (Mo. Ct. App. 1995) ("[t]he provisions of a legislative act must be construed and considered together and, if possible, all provisions must be harmonized and given some meaning."). In other words, the phrase "lascivious exhibition" clearly refers to "hard core" acts, which is much more than mere nudity.

The interpretation offered by the Diocese and Bishop Finn comports with the Missouri Supreme Court's holding that the term "lascivious," when used to describe pornography, refers to "patently offensive representations or descriptions of that specific '*hard core*' *sexual conduct*" described in United States Supreme Court obscenity opinions. *McNary v. Carlton*, 527 S.W.2d 343, 346 (Mo. 1975) (emphasis added).[2] Plaintiffs have simply not alleged any facts that would establish that the photographs at issue are "hard core" pornography or even "sexual contact."

In short, Plaintiffs allegations describe inappropriate or even disturbing photographs of Jane Doe 49. However, there is a distinction between inappropriate photographs and actual "child pornography" under Missouri law. Plaintiffs' claim in Count Four fails because the allegations do not establish that the photographs were "child pornography" or "obscenity" as a matter of law.

c. Neither the Diocese nor Bishop Finn *possessed* child pornography.

Even assuming that the nude photographs identified in Count Eleven constitute "child pornography" or "obscenity," close inspection of Plaintiffs' Amended Petition confirms that

[2] To extent section 573.010(8) could be interpreted as applying to photographs of nude or partially clothed genitals without physical contact or sexual acts, it should be struck down by the Court as unconstitutional under the First Amendment of the U.S Constitution. This section would also violate the Fourteenth Amendment of the U.S. Constitution and Article 1, section 10 of the Missouri Constitution because it is overbroad, vague and ambiguous.

neither the Diocese nor Bishop Finn possessed such photographs. First, it should be noted that Plaintiffs' allegations of possession are limited to the Diocese, which allegedly made a copy of certain images that were found on Ratigan's personal laptop computer. Amended Petition at ¶¶ 22-23, 29. Second, there are no pleaded facts that *Bishop Finn* ever copied or possessed any images of Jane Doe 49. *See* Amended Petition at ¶ 29 ("The *Diocese* made a copy of the images found on the laptop computer") (emphasis added).

As noted in the introduction of this motion, close scrutiny is necessary to make sense of Plaintiffs' allegations, which are amorphous, hyperbolic and conclusory. In reviewing Plaintiffs' Petition to determine whether it states a cause of action, the Court grants to Plaintiffs the "reasonable inferences" from the Amended Petition and reviews the allegations in an "almost academic matter" to determine if a claim has been stated. *State ex rel. Henley v. Bickel,* 285 S.W.3d 327, 329 (Mo. 2009). In addition, "[n]o attempt is made to weigh any facts alleged as to whether they are credible or persuasive." *State ex rel. Henley v. Bickel,* 285 S.W.3d 327, 329 (Mo. 2009). However, a reasonable and academic interpretation of Plaintiffs' allegations only supports the finding that, if the Diocese possessed photographs of Jane Doe 49, they were photographs of a *fully-clothed* Jane Doe 49.

Specifically, Plaintiffs allege that Ratigan was having problems with his *personal* laptop. Amended Petition at ¶ 22. Plaintiffs further allege that the computer was taken to a repair person, who then took the computer to Deacon Mike Lewis, who then turned the computer over to the Diocese for review. *Id.* at ¶¶ 23, 27-28. Plaintiffs allege that the computer presented to the Diocese "had naked pictures of little girls" on it. *Id.* at ¶ 22. However, there is ***no allegation that Jane Doe 49 was one of those "little girls."*** Plaintiffs also allege that the computer contained a single "nude photograph focused on the genitals of a minor female." *Id.* at ¶ 26.

However, there is ***no allegation*** **that Jane Doe 49 was this "minor female."** In addition, Plaintiffs allege that the "Diocese and Defendant Bishop Finn possess[ed] the child pornography of **Plaintiff Jane Doe 173**[.]" (Amended Petition at ¶ 57) (emphasis added). But this is not Jane Doe 49; Jane Doe 173 is a *different plaintiff* in a *different lawsuit.*

Plaintiffs' Amended Petition never alleges that any photographs of Jane Doe 49 existed on the personal computer that was presented to the Diocese. Moreover, other than the unidentified "little girls" and "minor female" discussed above, Plaintiffs allege that "many of the photographs were "'up-skirt' photographs taken covertly with the focus of the picture being on the vaginal area ***while clothed.***" *Id.* at ¶ 26 (emphasis added). Thus, even assuming that photographs of Jane Doe 49 were located on Ratigan's personal computer that was presented to the Diocese, and assuming all the photographs on the computer were copied by the Diocese, those photographs would be limited to a *fully-clothed* Jane Doe 49. Thus, Plaintiffs' allegations suggest, at best, that the Diocese possessed *clothed* photographs of Jane Doe 49. There is simply no allegation that any photograph of Jane Doe 49 that was copied or possessed by the Diocese would constitute "obscenity" or "child pornography" as these terms are defined under Missouri law.

The Amended Petition also establishes that there are at least two sets of photographs: (1) a set of photographs from Ratigan's personal computer that was presented to, and allegedly copied by the Diocese; and (2) a different set (or sets) of photographs that allegedly included nude photographs of Jane Doe 49. It appears, based on Plaintiffs' allegations, that the nude photographs of Jane Doe 49 (as described in Count Eleven) were in this second set of photographs. Specifically, Plaintiffs allege that on "May 13, 2011, officials in the Diocesan headquarters turned [*sic*] the pictures it had downloaded from Father Ratigan's computer to the

police." Amended Petition at ¶ 55. "In May 2011, [a different set of] child pornography of Plaintiff Jane Doe 49, as well as other girls, was turned over to law enforcement." *Id.* at ¶ 58. Thus, if nude photographs of Jane Doe 49 exist, they existed outside of the personal computer that was presented to the Diocese. There is no allegation that the Diocese or Bishop Finn ever possessed this second set of photographs.

In summary, there is no allegation that the Diocese (or Bishop Finn) ever possessed or copied any photographs of Jane Doe 49 that would constitute "child pornography." Plaintiffs simply do not allege that any pornographic photos of Jane Doe 49 (as defined by Missouri law) were on the computer presented to the Diocese. Plaintiffs' claim against Bishop Finn is also baseless, because there are no pleaded facts that *Bishop Finn* ever copied or possessed any images of Jane Doe 49. *See* Amended Petition at ¶ 29 ("the *Diocese* made a copy of the images found the laptop computer.") Even assuming that the nude photograph referenced in Count Eleven constitutes "child pornography," there is no allegation that this photograph was possessed by the Diocese or Bishop Finn.

d. John Doe 50 and Jane Doe 51 lack standing to assert a claim for child pornography

Section 537.047, RSMo, permits the victim (and only the victim) of pornographic offenses to recover damages in a civil lawsuit. Even assuming that the photographs possessed by the Diocese constitute "child pornography" or "obscene" material that depicts Jane Doe 49, the only party who has standing to assert a claim is Jane Doe 49—not her parents. "Any person who, *while a child or minor ... was a victim* of a violation of [criminal statutes] ... and who suffers physical or psychological injury or illness as a result of such violation, shall be entitled to bring a civil action[.]" RSMo § 537.047 (emphasis added). The plain language of the statute makes it clear that a victim's *parents* are not among the class of persons permitted to bring such

a claim. As a result, Plaintiffs John Doe 50 and Jane Doe 51 lack standing and their claims must be dismissed. *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. 2002) ("Where, as here, a question is raised about a party's standing, courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented.").

For the reasons discussed in Section IV(a)-(d), *supra*, the Court should dismiss Plaintiffs' claim in Count Four.

V. Count Five: Intentional Failure to Supervise Clergy

Plaintiffs' own allegations demonstrate as a matter of law that they have failed to state a claim for intentional failure to supervise clergy. The Missouri Supreme Court has held that the tort of intentional failure to supervise clergy requires a plaintiff to establish the following five elements: (1) a supervisor exists; (2) the supervisor knew that harm was certain or substantially certain to result; (3) the supervisor disregarded this known risk; (4) the supervisor's inaction caused damage; and (5) the requirements of the Restatement (Second) of Torts, section 317 are met. *Gibson v. Brewer,* 952 S.W.2d 239, 248 (Mo. banc. 1997). And because Plaintiffs' claim is an intentional tort, they must establish that the Diocese or Bishop Finn "*desire[d]* to cause consequences" or "believe[d] that the consequences [were] substantially certain to result ...." *Id.* at 248.

Plaintiffs simply do not allege that the Diocese or Bishop Finn disregarded a "known risk" because the Petition does not allege a single fact indicating that either defendant had any prior notice that Ratigan was taking inappropriate photographs of children. Moreover, Plaintiffs cannot establish that Ratigan's photographs were "known" or that Bishop Finn and the Diocese intentionally disregarded a "known risk" because Plaintiffs themselves allege that Ratigan was

acting secretly. Amended Petition at ¶ 25 (the photographs were taken "covertly"); *see also id.* at ¶ 187 (the photos were taken "surreptitiously").

At best, Plaintiffs allege that the Diocese or Bishop Finn had received reports of "suspicious" and "inappropriate" behavior by Ratigan and that parents and teachers had "concerns" about his interaction with children. *Id.* at ¶¶ 17, 20, and 20 (b). However, *suspicious* behavior or *concerns* merely establish *questionable* conduct or raise the *possibility* that Ratigan could harm children. Suspicion and concern do not, however, establish that Ratigan was a *known risk* to harm children or was *substantially certain* to do so. Plaintiffs' petition is utterly devoid of any allegation that would establish that the Diocese and Bishop Finn were aware that Ratigan was a *known risk* of harming children. There is certainly no allegation that Ratigan was a *known risk* to harm Jane Doe 49. Thus, there is no basis for a claim that the Diocese or Bishop Finn *intentionally* failed to supervise Ratigan because *they* desired for him to harm Jane Doe 49 by photographing her or that they believed that by failing to supervise him that such consequences were substantially certain to result. *Gibson,* 952 S.W.2d at 248.[3]

In actuality, Plaintiffs are attempting to assert a claim for the Diocese and Bishop Finn's supposed *negligent supervision* of Ratigan, based on the potential harm of which they allegedly could or should have been aware. However, a claim for negligent failure to supervise clergy has been abolished in Missouri. *Id.* at 247 (adjudicating the reasonableness of a church's supervision of a cleric—what the church "should know"—requires inquiry into religious doctrine [and is prohibited by the First Amendment].").

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[3] Plaintiffs' allegations further support dismissal of a claim against Bishop Finn because Plaintiffs allege that Bishop Finn "did not read the 4 ½ page letter from Principal Hess." Amended Petition at ¶ 21. As a result, Plaintiffs have alleged that Bishop Finn did not have notice of Ratigan's alleged unusual behavior.

VI. Count Six: Negligent Failure to Supervise Children

In Count Six Plaintiffs attempt to assert a claim for negligence based on an alleged failure to supervise children. However, Plaintiffs' claim in Count Four fails because Missouri does not recognize negligence claims against the Diocese or Bishop Finn based on the allegations in the case at bar. In *Gibson*, the Missouri Supreme Court barred the prosecution of all negligence claims arising from the relationship between members of a church and its clergy. 952 S.W.2d at 249. *Gibson* remains controlling precedent in Missouri. *See e.g., Nicholson v. Roman Catholic Archdiocese of St. Louis*, 311 S.W.3d 825 (Mo. Ct. App. 2010) (circuit court bound to follow controlling case law barring negligence claims against a diocese, including negligent supervision); *SN Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 824 (Mo. Ct. App. 2010) (circuit court bound to follow controlling case law barring negligent supervision claim); *Doe AP v. Roman Catholic Diocese of St. Louis*, 347 S.W.3d 588,595 (Mo. Ct. App. 2010) (holding that *Gibson* is controlling law). In addition, the United States Court of Appeals for the Eighth Circuit recently confirmed that it was bound by *Gibson* and held that "the First Amendment was a *complete defense to the negligence claims.*" *Perry v. Johnston*, 641 F.3d 953, 956-57 (8th Cir. 2011) (emphasis added). In short, the First Amendment and the controlling opinions of *Gibson* and its progeny require this Court to dismiss Plaintiffs' claims in Count Six.

VII. Count Seven: Fraud; Count Eight: Fraudulent Misrepresentation; Count Ten: Fraud

In Count Seven and Count Ten, Plaintiffs attempt to state a claim for fraud. In Count Eight, Plaintiffs purport to state a separate claim for fraudulent misrepresentation. Although fraud and fraudulent misrepresentation are the same cause of action, each is analyzed separately below. Under Missouri law, all three counts fail because Plaintiffs do not properly plead the necessary elements. To plead fraud, a plaintiff must allege:

> "1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity; 5) the speaker's intent the representation be acted upon by the other party; 6) the other party's ignorance of its falsity and right to rely on its truth; and 7) proximately caused injury."

Miller v. Ford Motor Co., 732 S.W.2d 564, 565 (Mo. Ct. App. 1987). The elements of a fraudulent misrepresentation claim are the same:

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury.

Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 131-32 (Mo. 2010). In addition, Missouri law holds that a party asserting fraud must state the circumstances constituting the fraud "*with particularity.*" Rule 55.15 (emphasis added). Failure to plead any essential element of a fraud claim renders the allegation "*fatally defective.*" *Miller*, 732 S.W.2d at 565 (emphasis added).

Plaintiffs' Petition falls far short of pleading the elements of fraud or fraudulent misrepresentation with "particularity." Indeed, the only "statements" or "representations" identified in Plaintiffs' 37-page Amended Petition are as follows:

> "In a statement, Bishop Finn indicated that he did not read the 4 ½ page letter from Principal Hess." Amended Petition at ¶ 21.
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> A church "congregation was told that Fr. Ratigan had an accident and was suffering from carbon monoxide poisoning." *Id.* at ¶ 32.
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> When Ratigan was arrested, "the Diocese announced that Fr. Ratigan had not obeyed its command to stay away from children and turned the matter over to the Police." *Id.* at ¶ 59.
>
> "Defendants Bishop and Diocese deliberately mischaracterized Fr. Ratigan's absence as an illness, requesting children and parishioners to send get well cards and requesting prayer by parishioners for his recovery." *Id.* at ¶131(e).

The first flaw in the Amended Petition is that Plaintiffs never allege with *particular facts* that they heard such statements or relied on them to their detriment. In addition, Plaintiffs have not established—with particular facts—that any of the statements were *intended to deceive them.* It also appears impossible that any harm could have been proximately caused by these statements because, based on Plaintiffs' allegations, the statements were made *after* the photographs were discovered (and thus, after they had been taken).

The closest Plaintiffs get to an allegation of a false statement is when they assert that the Diocese and Bishop Finn "deliberately mischaracterized Fr. Ratigan's absence as an illness." This statement refers to Ratigan's alleged attempt to take his own life (Amended Petition at ¶¶ 30-31). Such a statement can hardly be considered a material misrepresentation that Plaintiffs were supposed to rely on to their detriment. Plaintiffs' position also presents a bizarre requirement for organizations with members that allegedly attempt suicide. In Plaintiffs' view, if an organization has a member that has engaged in alleged misconduct, and then allegedly attempts suicide, the organization cannot describe the attempted suicide "an accident" or an "illness," but should instead issue a statement announcing all allegations of supposed misconduct by that member, regardless of whether such misconduct has been verified or is true. And if the organization uses such words as "illness" or "accident" to describe a failed suicide attempt, it should be haled into court. Plaintiffs' position is simply absurd.

Moreover, Plaintiffs base their fraud claims on the allegation that, after the alleged suicide, the Diocese asked children and parishioners to send Ratigan get well cards and pray for his recovery." Amended Petition at ¶ 131(e). In other words, Plaintiffs are seeking money damages because the Diocese—a *religious organization*—or Bishop Finn—*a Catholic bishop*—asked *church members* to *pray* for and send get well cards to a *priest* who allegedly suffered

from carbon monoxide poisoning after allegedly attempting to take his own life. Such allegations of "fraud" by the Diocese and Bishop Finn are insulting. Plaintiffs' claims in Counts Seven, Eight, and Ten must be dismissed.

VIII. Count Seven: Conspiracy to Commit Fraud

In Count Seven, Plaintiffs attempt to assert two claims: fraud and conspiracy to commit fraud. Since Plaintiffs' fraud claim fails (as discussed above), the conspiracy to commit fraud claim also fails. Specifically, Plaintiffs cannot assert a claim for conspiracy to commit fraud because they have not pleaded an underlying fraud claim. *See Stegeman v. First Mo. Bank of Gasconade County,* 722 S.W.2d 349, 354 (Mo. Ct. App. 1987); *see also Bockover v. Stemmerman,* 708 S.W.2d 179, 182 (Mo. Ct. App. 1986) (where an "underlying count did not state a cause of action, ... allegations ... of a conspiracy could not breathe life into a cause of action which was otherwise nonexistent"). Without a valid fraud claim, Plaintiffs do not state a claim for conspiracy to commit fraud.

Assuming, *arguendo,* that Plaintiffs could state a fraud claim against the Diocese or Bishop Finn, they are still unable to establish the requisite elements for civil conspiracy. A plaintiff must establish that "two or more persons with an unlawful objective, after a meeting of the minds, committed at least one act in furtherance of the conspiracy, damaging the plaintiff." *Gibson*, 952 S.W.2d at 245. For example, the plaintiffs in *Gibson* alleged that the defendant diocese conspired with a priest to commit acts of sexual misconduct, because it: (1) knew or should have known that [the priest] was committing sexual misconduct and failed to take any action to prevent it or to warn them, (2) failed to remove [the priest] from his position, (3) hid the conduct of [the priest] and other priests from the public, (4) refused to acknowledge the problem or educate the public, (5) ignored the problem, and (6) extracted confidentiality agreements from sex abuse victims. *Id.* The court in *Gibson* held that these allegations did not support an

inference that there was a "meeting of the minds." *Id.* Here, Plaintiffs' allegations are very similar to those made in *Gibson*. Thus, Plaintiffs' claims for "conspiracy" fail as matter of law.

IX. Count Nine: Constructive Fraud

In Count Nine, Plaintiffs attempt to assert a claim for constructive fraud. In Missouri, a claim for "constructive fraud" is the same claim as a claim for breach of fiduciary duty. *See Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. 1997) ("A breach of a fiduciary obligation is constructive fraud."). To establish the existence of a fiduciary relationship, a plaintiff must plead that the purported fiduciary was entrusted with "things of value such as land, monies, a business, or other things of value which are the property of the subservient person[.]" *Chmieleski v. City Products Corp.*, 660 S.W.2d 275, 294 (Mo. Ct. App. 1983); *Birkenmeier v. Keller Biomedical, LLC,* 312 S.W.3d 380, 391 (Mo. Ct. App. 2010); *In re Estate of Goldshmidt*, 215 S.W.3d 215, 221 (Mo. Ct. App. 2006). Plaintiffs do not allege any facts establishing a fiduciary relationship between them and the Diocese or Bishop Finn. In the absence of a fiduciary relationship, there cannot be a breach of a fiduciary duty.

In addition, Missouri courts uniformly hold that no cause of action exists for breach of fiduciary duty in cases arising from the sexual misconduct of clergy. *See Gibson*, 952 S.W.2d at 239; *Gray v. Ward,* 950 S.W.2d 232, 234 (Mo. 1997) (diocese not liable for breach of fiduciary duty); *H.R.B. v. J.L.G.,* 913 S.W.2d 92, 98-99 (Mo. Ct. App. 1995). Plaintiffs' claim in Counts Nine therefore fails as a matter of law.

X. Count Eleven: Invasion of Privacy

In Count Eleven, Plaintiffs purport to assert a claim for invasion of privacy against the Diocese and Bishop Finn. Under Missouri law, "invasion of privacy is a general term used to describe four different torts, each with distinct elements and each describing a separate interest that can be invaded, although the separate interests may, and often do, overlap." *Sofka v. Thal*,

662 S.W.2d 502, 510 (Mo. banc. 1983). The four different torts are: "(1) unreasonable intrusion upon the seclusion of another; or (2) appropriation of the other's name or likeness; or (3) unreasonable publicity given to the other's private life; or (4) publicity that unreasonably places the other in a false light before the public." *Id.* Plaintiffs fail to state a claim against the Diocese under any of the four torts.

The first recognized tort, "unreasonable intrusion upon the seclusion of another" requires that the defendant obtain the plaintiff's private information through "unreasonable means." *St. Anthony's Med. Ctr. v. H.S.H.*, 974 S.W.2d 606, 609-10 (Mo. Ct. App. 1998). Here, Plaintiffs only allege that Ratigan, not the Diocese or Bishop Finn, used "unreasonable means," such as surreptitious photographs, to intrude on Jane Doe 49's private affairs. *See* Amended Petition ¶¶ 187, 191. As for the Diocese and Bishop Finn, Plaintiffs merely allege that the Diocese made a copy of certain images as part of its *investigation* (*id.* at ¶¶ 29, 104) and ultimately turned the images over to law enforcement (*id.* at ¶¶ 55, 58). As a result, there is no allegation that the Diocese ever used unreasonable means to intrude upon the seclusion of any of the Plaintiffs.

The second version of the tort, "appropriation of the other's name or likeness," is simply not applicable in the case at bar. For example, "[n]ame appropriation occurs where a defendant 'makes use of the name to pirate the plaintiff's identity for some advantage.'" *Nemani v. St. Louis Univ.*, 33 S.W.3d 184, 185 (Mo. 2000) (quoting *Haith v. Model Cities Health Corp.*, 704 S.W.2d 684, 687 (Mo. Ct. App. 1986)); see *also Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998) ("A person who appropriates the name or likeness of another for his benefit may be liable for invasion of the other's privacy.") There is simply no allegation that the Diocese or Bishop Finn appropriated the likeness of anyone to gain an advantage or a benefit.

Lastly, neither the third of four versions of the tort could be asserted against the Diocese or Bishop Finn because these torts are based on "publicity," which requires a "communication ... [of private matters] to the public in general or to a large number of persons, as distinguished from one individual or a few." *Corcoran v. Sw. Bell Tel. Co.*, 572 S.W.2d 212, 214-15 (Mo. Ct. App. 1978) (emphasis added, internal citations omitted). There are simply no allegations that the Diocese or Bishop Finn *publicized* any of the photographs that were allegedly taken of Jane Doe 49. At best, Plaintiffs allege that Ratigan—not the Diocese or Bishop Finn—distributed photographs of Jane Doe 49 over the internet. Amended Petition at ¶ 16. As for the Diocese and Bishop Finn, Plaintiffs allege that the images were *concealed* by the Diocese (*id.* at ¶ 57) before they were ultimately turned over to law enforcement (*id.* at ¶¶ 55, 58). Thus, at no point did the Diocese or Bishop Finn ever *publish* the photographs "to the public in general or to a large number of persons." *Corcoran*, 572 S.W.2d at 215. Plaintiffs' claim in Count Eleven fails as a matter of law.

XI. Punitive Damages

Plaintiffs also attempt to state a claim for punitive damages by tacking on a conclusory allegation of punitive conduct to every count in the Petition. *See, e.g.,* Petition at ¶ 194 ("Defendant's [*sic?*] actions and/or inactions were willful, wanton or reckless for which punitive damages are appropriate."); *see also* ¶¶ 94, 105, 119, 126, 140, 151, 170 and 185 (all using virtually identical language).[4] However, mere conclusions do not support a claim for punitive damages. Instead, Plaintiffs must "allege *facts* indicating the defendant maliciously, willfully, intentionally or recklessly injured the plaintiff by his tortuous act." *Dyer v. Gen. Am. Life Ins.*

[4] It is unclear from the Amended Petition as to which Defendant or Defendants the purported claim for punitive damages applies. Some counts refer to a "Defendant's" actions (e.g. Amended Petition at ¶ 194), others to "Defendants'" actions (*id.* at ¶ 140). As a result, Plaintiffs' petition fails to provide sufficient notice as to which of the three defendants is allegedly liable for punitive damages.

Co., 541 S.W.2d 702, 705-06 (Mo. Ct. App. 1976) (emphasis added; affirming trial court's dismissal for failure to state a claim for punitive damage); *Greaves v. Junior Orpheum Co.*, 80 S.W.2d 228, 235 (Mo. Ct. App. 1935) (allegations "merely that the acts were unlawful or wrongful" were insufficient to plead malice).

Plaintiffs only conclude that a "Defendant" (or perhaps two of the three "Defendants") engaged in punishable conduct, but there are utterly no *facts* to support that claim. In addition, Plaintiffs' claim for punitive damages should be dismissed or otherwise stricken because it fails to give the Diocese or Bishop Finn sufficient notice, as required by due process, as to the grounds upon which the Diocese or Bishop Finn should be punished. The Amended Petition also fails to give the Diocese or Bishop Finn sufficient notice because the vague references to "Defendant" or "Defendants" do not identify the party against whom a claim is being asserted. As a result, the Petition fails to state a claim for punitive damages as a matter of law.

XII. Conclusion

The Diocese and Bishop Finn request that the Court enter an Order dismissing all claims purportedly asserted against them in Plaintiffs' Amended Petition, and grant such other relief as the Court deems just and proper.

Dated: April 27, 2012

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I hereby certify that a copy of the foregoing was served via e-mail and First Class Mail, postage pre-paid, this 27th day of April 2012, on the following counsel of record:

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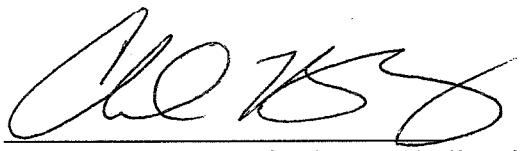

An Attorney for Defendant Catholic Diocese of Kansas City-St. Joseph

Exhibit A

DEFENDANTS' EXHIBIT A -- APPLICATION OF RELEVANT STATUTES AND DEFINITIONS

RSMo 537.047: Any person who, while a child or minor ... was a victim of a violation of sections **573.023**, **573.025**, **573.035**, or **573.037**, **RSMo**, and who suffers physical or psychological injury or illness as a result of such violation, shall be entitled to bring a civil action to recover the actual damages sustained as a result of the violation ....

RSMo 573.023.1: A person commits the crime of sexual exploitation of a minor if such person knowingly or recklessly photographs, films, videotapes, produces or otherwise creates obscene material with a minor or **child pornography**.

RSMo 573.025.1: A person commits the crime of promoting child pornography in the first degree if such person possesses with the intent to promote or promotes **child pornography** of a child less than fourteen years of age or obscene material portraying what appears to be a child less than

RSMo 573.035.1: A person commits the crime of promoting child pornography in the second degree if such person possesses with the intent to promote or promotes **child pornography** of a minor under the age of eighteen or obscene material portraying what appears to be a minor under the age of

RSMo 573.037.1: A person commits the crime of possession of child pornography if such person knowingly or recklessly possesses any **child pornography** of a minor under the age of eighteen or obscene material portraying what appears to be a minor under the age of eighteen.

RSMo 573.010(2)
"Child pornography":
(a) Any **obscene** material or performance depicting sexual conduct, sexual contact, or a sexual performance, as these terms are defined in section 556.061, RSMo, and which has as one of its participants or portrays as an observer of such conduct, contact, or performance a minor under the age of eighteen; or
(b) Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where:
a. The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
b. Such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
c. Such visual depiction has been created, adapted, or modified to show that an identifiable minor is engaging in sexually explicit conduct[.]

RSMo 573.010(12):
"Obscene", any material or performance is obscene if, taken as a whole:
(a) Applying contemporary community standards, its predominant appeal is to prurient interest in sex; **and**
(b) The average person, applying contemporary community standards, would find the material depicts or describes sexual conduct in a patently offensive way; and
(c) A reasonable person would find the material lacks serious literary, artistic, political or scientific value.

RSMo 556.061(29): **"Sexual conduct"** means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification. *See also RSMo* 573.010(17).

RSMo 556.061(30): **"Sexual contact"** means any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

RSMo 556.061(31): **"Sexual performance"**, any performance, or part thereof, which includes sexual conduct by a child who is less than seventeen years of age[.]

RSMo 573.010(18) **"Sexually explicit conduct"**, actual or simulated:
(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
(b) Bestiality;
(c) Masturbation;
(d) Sadistic or masochistic abuse; or
(e) Lascivious exhibition of the genitals or

BASIC ANALYSIS: To assert a civil claim under RSMo 537.047, the photographs at issue must satisfy one of the four boxes in BLACK. The BLACK boxes require that the photographs satisfy the color-coded terms in either a RED or a BLUE box. To satisfy the RED or a BLUE box, the photographs must satisfy the color-coded terms in a GREEN or ORANGE box.