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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Doe 30,

Plaintiff,

v.

Diocese of New Ulm; Diocese of Duluth; and Oblates of Mary Immaculate, a/k/a and d/b/a Oblates of Mary Immaculate, United States Province, a/k/a and d/b/a Missionary Oblates of Mary Immaculate, a/k/a and d/b/a Missionary Oblates of Mary Immaculate, United States Province, a/k/a and d/b/a Oblate Fathers of Mary Immaculate (Central Prov.),

Defendants.

Case Type: Personal Injury
File No.: 62-CV-14-871
Judge: John H. Guthmann

ORDER GRANTING AND DENYING MOTIONS FOR SUMMARY JUDGMENT

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on June 11, 2015, at the Ramsey County Courthouse, St. Paul, Minnesota. At issue were motions for summary judgment by defendants Diocese of New Ulm and Diocese of Duluth. Michael G. Finnegan, Esq., and Elin M. Lindstrom, Esq., appeared on behalf of plaintiff. Susan E. Gaertner, Esq., appeared on behalf of defendant Diocese of Duluth. Thomas B. Wieser, Esq., appeared on behalf of defendant Diocese of New Ulm. Based upon all of the files, records, submissions, and the arguments of counsel herein, the court issues the following:

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ORDER

1. The Diocese of New Ulm's motion for summary judgment is **GRANTED**. All claims against the Diocese of New Ulm are **DISMISSED with prejudice**.

2. The Diocese of Duluth's motion for summary judgment is **GRANTED in part and DENIED in part**. The motion to dismiss plaintiff's negligent supervision claim is **DENIED**. All other claims against the Diocese of Duluth are **DISMISSED with prejudice**.

3. The following Memorandum is made part of this Order.

Dated: August 21, 2015

BY THE COURT:

Guthmann, John (Judge)
Aug 21 2015 11:18 AM

John H. Guthmann
Judge of District Court

M E M O R A N D U M

I. STATEMENT OF THE CASE

Doe 30 ("plaintiff") commenced the instant lawsuit against the Diocese of New Ulm, the Diocese of Duluth and the Oblates of Mary Immaculate ("OMI") on or about January 29, 2014. The litigation arises from allegations that Father James Vincent Fitzgerald ("Fitzgerald"), a member of the OMI religious order, sexually abused plaintiff in 1978 shortly after Fitzgerald's participation in an educational program located in the New Ulm Diocese. The abuse took place in the Duluth Diocese.

Plaintiff's suit sets forth claims of statutory and common-law nuisance, negligence, negligent retention, and negligent supervision, with resulting damages,

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against each defendant. The public and private nuisance claims were previously dismissed by the court. Following discovery, OMI settled with plaintiff and it was dismissed. The remaining defendants move for summary judgment.

II. STATEMENT OF UNDISPUTED FACTS

Drawing all inferences in plaintiff's favor, the following facts are undisputed for purposes of the instant motion. OMI came to North America in 1841 as missionaries serving the Native American population. (Woestman aff. ¶ 3.) OMI began serving Native American communities within the Diocese of Duluth in the 1950's because Minnesota bishops had difficulty finding priests willing to serve these ministries. (*Id*.)

Fitzgerald was ordained as an OMI Roman Catholic priest in 1950.[1] (Anderson aff., Ex. 3.) When ordained as an OMI priest, Fitzgerald took a vow of obedience to OMI and its Provincial. (Kalert dep. at 35.[2]) For the remainder of his life, Fitzgerald was under the authority and supervision of the OMI Provincial. (*Id*.) A priest's vow of obedience is in effect twenty-four hours per day. (*Id*. at 35-36; Gagne dep. at 5-6; Gross dep. at 6; Schmit dep. at 7.)

If a Diocese needed an OMI priest to serve within its boundaries, a written or oral request was made to the OMI Provincial. (Woestman aff. ¶ 4.) The Provincial then selected a priest for the assignment and submitted his name to the requesting Bishop. (Kalert dep. at 25.) The Bishop could approve or reject the appointment. (*Id*. at 25-26.)

[1] Fitzgerald died in 2009. (Anderson Aff., Ex. 50.)

[2] Both parties included complete or partial copies of many of the same depositions in their motion documents. Accordingly, each deposition is cited without reference to the affidavit to which the deposition being cited was attached.

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If the Diocese Bishop approved the assignment, he granted the OMI priest "faculties" (permission) to minister within the Diocese. (*Id*. at 26, 132.) Thus, once working within the Duluth or New Ulm Diocese, an OMI priest had "two bosses", the OMI Provincial and the Bishop. (*Id*. at 33, 35-36; Fider dep. at 18; Gagne dep. at 12; Kelleher dep. at 25-26; Larson dep. at 14-16; Schroeder dep. at 17.) The OMI Provincial continued to supervise the priest, retained the right to remove or reassign the priest, place restrictions on the priest's ministry, regulate the priest's compensation and benefits, and mandate training and policies applicable to the priest. (Kalert dep. at 29-30.) At the same time, the Bishop could forbid a religious order OMI priest from ministering within the Diocese, restrict the priest's ministry within the Diocese, or impose rules upon the priest. (*Id*. at 32, 35-36; Fider dep. at 17; Gagne dep. at 12; Kelleher dep. at 27-28; Schroeder dep. at 15-16.) According to plaintiff's expert, Fr. Thomas Doyle:

> The bishop is in control of and has authority over all Catholic entities and people working in these entities within his diocese. This means he has control, authority, supervision, over all priests including religious order priests working in his diocese. He also has control, authority and supervision over all parishes and Catholic schools and those at these institutions in his diocese.

(Doyle aff. at 12; *see* Larson dep. at 12-14.) The Bishops of the Duluth and New Ulm Dioceses were responsible for the safety and well-being of parishioners and children within the Diocese. (Fider dep. at 22-23; Gagne dep. at 11-12, 15-16; Kelleher dep. at 26-27; Rademacher dep. at 14; Schroeder dep. at 13-15.) The Bishops also were responsible for conducting confirmation visits to review the performance of all priests, including religious order priests. (Gagne dep. at 36-37.)

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The OMI first assigned Fitzgerald to the Duluth Diocese in 1957. (Anderson aff., Ex. 3.) After several assignments inside and outside of the Diocese, Fitzgerald returned to the Duluth Diocese in 1968, following his alleged sexual abuse of a minor in South Dakota. (*Id.*; Finnegan aff., Ex. 7, 16-17.) There, he was assigned to St. Michael's Church in Northome and the Squaw Lake Indian Mission. (Anderson aff., Exs. 4-5.) In 1969, Fitzgerald's OMI Provincial approved a transfer to St. Catherine's Church in Squaw Lake. (*Id.*, Exs. 7-10.) Bishop Anderson of the Duluth Diocese granted faculties for the move. (Finnegan aff., Ex. 32.) Later, Bishop Anderson declined Fitzgerald's request for a $10,000 loan to purchase two trailers. (Anderson aff., Ex. 8.)

Fitzgerald's OMI file contains documentation that he abused both minor boys and girls prior to his abuse of plaintiff and that OMI was aware of the abuse at the time. (Finnegan Aff., Exs. 1-5, 7; *see* Kalert dep. at 83-91.) As a result, Fitzgerald was reassigned by the OMI on more than one occasion. (Finnegan aff., Ex. 5, 7.) Fitzgerald was sent to a psychiatrist after an incident in 1963. (*Id.*, Ex. 3.)

There is no evidence in the record that either the Diocese of Duluth or the Diocese of New Ulm was ever told about Fitzgerald's sexual abuse of children prior to his abuse of plaintiff.[3] None of the priests deposed in this case knew of or suspected a thing before Fitzgerald abused plaintiff. An affidavit from one of Fitzgerald's provincials comes

[3] Plaintiff's opposition included an affidavit from a person who was abused by Fitzgerald between 1969 and 1974. (May 14, 2015 John Doe aff. ¶ 6.) (the affiant is not identified to preserve anonymity.) A nun, a housekeeper, "religious brother", and other unnamed "nuns and priests" all saw this youngster living with Fitzgerald at his residence. (*Id.* ¶¶ 7-11.) However, none of the individuals are identified and there is insufficient information in the record to support a conclusion that what they saw may be imputed to either defendant in this case. The same conclusion must be reached with regard to a second affidavit from a person whose mother worked in a janitorial position at St. Michaels during the time of the abuse in 1968-1969. (May 12, 2015 Jane Doe aff.) (the affiant is not identified to preserve anonymity.)

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closest to evidence that the defendant Dioceses might have been told about Fitzgerald's history. Fr. William Woestman was Fitzgerald's OMI Provincial from February 1975 to February 1978. (Woestman aff. ¶ 4.) He cannot recall any specific conversation that he had with either defendant concerning Fitzgerald. (*Id*.) However:

> In my experience, the assignment process was always a dialogue with the bishop, who had jurisdiction over all the ministries of his diocese. The bishop would tell me what he needed and I would tell him who I had available to serve in that kind of ministry and what their strengths and weaknesses were. If a man had a particular problem or limitation, I would advise the bishop of this orally. Bishops always had an opportunity to interview the priest I had offered or to ask me any questions they might have about his suitability.

(*Id*. ¶ 5.) Fr. Woestman also testified that "[t]he bishops in whose dioceses our men served . . . knew that the Central Province would not be providing onsite supervision of priests serving in these remote locations." (*Id*. ¶ 6.)

Although there is no evidence that either Diocese knew of Fitzgerald's history of abusing children before plaintiff was abused, neither Diocese lacked experience with clergy sexual abuse of children prior to 1978. According to documents produced in discovery, the problem of priests engaging in sexual abuse with minors was well known to the Diocese of Duluth at least by the 1950's. (Finnegan aff., Exs. 64-70, 76, 81-90 (communications with the Bishop of the Diocese of Duluth regarding several priests); Kelleher dep. at 28-29.) The Diocese of Duluth assigned at least one priest accused of abuse to a treatment center operated by the Servants of the Paraclete twenty years before Fitzgerald's abuse of plaintiff. (*Id*., Exs. 62-63.) On January 24, 1958, the Paraclete

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Servant General provided the following advice to Bishop Welch regarding a Diocese of Duluth priest in treatment:

> I feel so keenly about the terrible devastation these men accomplish in starting innocent boys toward a life career of abnormality that I personally wish that the Holy Father would make a penalty for them that would "ipso facto" bar them for life from the care of souls. They are dangerous, always dangerous and whenever we have gone against conviction and approved their activation, we have had uniformly cause to regret. "The dog returns to his vomit."
>
> . . . . In my opinion, Your Excellency will regret it if G.M. is again activated either in Duluth or elsewhere. The affliction will show up again and the adopting Bishop will have hard feelings to those who cleared him for activation. The volcano will irrupt [sic] again. I only wish the Hierarchy would provide me with what I have wanted for years, i.e. an Island whereon these most contagious lepers could be cared for with a maximum of charity including all of [sic] legitimate psychiatric treatments and yet a minimum of contact with innocent souls.

(*Id*., Ex. 62.)

There is also evidence that the abuse of minor children by priests was a well-known hazard to the Diocese of New Ulm before plaintiff was abused by Fitzgerald in 1978. Reports of child molestation by several priests were reported to and acted upon by the Diocese of New Ulm before 1978. (Finnegan aff., Exs. 110, 112-15, 121, 145.[4])

In addition to direct evidence that clergy sexual abuse of children was a well-known hazard to the Dioceses of Duluth and New Ulm before 1978, plaintiff submitted expert testimony that the hazard was well-known within the Catholic Church and to all Bishops before 1978. Fr. Thomas Doyle was ordained as a Catholic Priest in 1970.

[4] Many more allegations against the same and other New Ulm Diocese priests were documented by plaintiff's counsel. However, if the abuse was not reported to and known by the Diocese before plaintiff's abuse, it is not relevant to the issues present herein even if the abuse took place before 1978. (*E.g.*, Finnegan aff., Exs. 122-144. 146-53)

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(Doyle aff. at 1.) He is trained in Canon Law and he has taught Canon Law. (*Id*. at 1-2.) He has also acted as a Tribunal Judge. (*Id*. at 2.) He has written books and articles on the subject of clergy sexual molestation of minors. (*Id*.) He has testified as a qualified expert witness in clergy sexual abuse cases since 1988. (*Id*.) His cases included the study of documents from 190 of the 195 Catholic dioceses in the United States. (*Id*.) He has also studied religious orders and congregations, including the OMI. (*Id*.)

Fr. Doyle opines that "[s]exual abuse of minors by Catholic clerics of all ranks has been a known reality in the Catholic Church since its earliest years." (*Id*. at 7.) As a result of its knowledge of clergy sexual abuse, the Catholic Church has "passed laws, regulations and norms, aimed at curbing or controlling various forms of sexual misbehavior by clerics." (*Id*.; *see id*. at 5-7.) "It is well documented that all American bishops were clearly aware that sexual abuse of minors by clerics of all ranks was happening throughout the Church, in dioceses and religious orders alike" before public revelation of the behavior in the 1980's. (*Id*. at 8-9; *see id*. at 12.) According to Fr. Doyle, the abuse was so widespread that nineteen facilities were founded to treat the offending priests between 1947 and 1971. (*Id*. at 9-10, 12.)

In September 1977, Fitzgerald enrolled in a Clinical Pastoral Education ("CPE") program at Willmar State Hospital to obtain training aimed at enhancing his ability to work with chemically dependent individuals.[5] (Anderson aff., Exs. 39-40.) Fitzgerald's

[5] Fr. Garvey, who died shortly after the taking of his deposition, testified that Fitzgerald came to the Willmar program as a patient and not as a student. His testimony contradicts all contemporaneous records of Fitzgerald's time in Willmar as well as Fr. Garvey's own file note from 2002. (*Compare* Garvey dep. at 11 *with* Anderson aff., Exs. 39-42. *See also* Supp. Wieser aff., Ex. NN (Garvey obituary.)

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assignment to attend the program at OMI expense was approved by his OMI Provincial. (*Id*., Ex. 40.) He completed three quarters of training on May 1, 1978 under the supervision of Fr. Francis Garvey and returned to his home assignment in the Diocese of Duluth. (*Id*., Ex. 42; Wieser aff., Exs. X-Y.) On weekends during the training, he returned to Squaw Lake for Mass. (Anderson aff., Ex. 41.)

While participating in the CPE program, Fitzgerald spent his week days residing at the rectory of St. Thomas More Church in Lake Lillian, which is located in the Diocese of New Ulm. (Wieser Aff., Ex. R.) He also said Mass occasionally at St. Thomas More Church. (*Id*., Exs. Q-R.) It was during this time that Fitzgerald met plaintiff, an altar boy at the church. In June 1978, Fitzgerald arranged for plaintiff to go with him to Squaw Lake for two weeks for the purpose of serving as an altar boy and teaching catechism classes at St. Catherine's. During these two weeks, plaintiff was sexually molested by Fitzgerald on a daily basis.[6] There is no evidence in the record that anyone from either the Duluth or New Ulm Dioceses knew that plaintiff was in the company of Fitzgerald before or during these two weeks.[7]

[6] Neither defendant disputes that plaintiff was abused and their briefs describe Fitzgerald's conduct in detail. (Mem. in Supp. of Def. Diocese of Duluth's Motion for Summ. J. at 11-15; Def. Diocese of New Ulm's Mem. of Law in Supp. of its Motion for Summ. J. at 9-11.) Therefore, no purpose is served in repeating an account of the abuse or citing to the ample record that exists regarding what occurred and how it was later reported.

[7] Father Garvey, who gave separate depositions in multiple abuse cases involving different priests on the same day, also contradicted himself as to whether he was aware of Fitzgerald's trip with plaintiff before plaintiff was abused. (Garvey dep. at 35-36; *see* Supp. Wieser aff., Ex. MM.) Fr. Garvey's testimony concerning his contact with plaintiff and plaintiff's family *vis-a-vis* Fitzgerald is so convoluted and inconsistent with undisputed and well-documented facts that it cannot be used to defeat summary judgment. *Cf. Johnson v. Moore*, 275 Minn. 292, 301, 146 N.W.2d 599, 605 (1966) (directed verdict cannot be prevented by evidence that "is absolutely impossible, either physically or morally, nor of evidence offered by the adverse party which is so unreasonable and inconsistent and so opposed by undisputed evidence as to be wholly incredible.")

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III. STANDARD GOVERNING MOTIONS FOR SUMMARY JUDGMENT

The remaining defendants move for summary judgment. Summary Judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). Summary judgment is improper when reasonable minds could differ and draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997); *Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Strauss v. Thorne*, 490 N.W.2d 908, 911 (Minn. Ct. App. 1992).

A party opposing summary judgment may not rely merely on its pleadings, but must present specific facts demonstrating there is a genuine issue of material fact. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998); Minn. R. Civ. P. 56.05. The court must view the facts in the light most favorable to the nonmoving party. *Id*. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Russ*, 566 N.W.2d at 69 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Once the moving party has established a prima facie case that entitles it to summary judgment, the burden shifts to the nonmoving party to present specific facts that raise a genuine issue for trial. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App.

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2001). A genuine issue of material fact exists when a fact may be reasonably resolved in favor of either party. *DLH, Inc.*, 566 N.W.2d at 69. However, there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue. *Id.* at 71. If any legitimate doubt exists as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of finding that the fact issue exists. *Poplinski v. Gislason*, 397 N.W.2d 412, 414 (Minn. Ct. App. 1986), *rev. denied* (Minn. 1987).

IV. ANALYSIS OF PLAINTIFF'S NEGLIGENCE CLAIMS

On May 25, 2013, amendments to the statute of limitations applicable to sex-abuse cases took effect. Child Victims Act, ch. 89, 2013 Minn. Laws 728, 729 (codified as Minn. Stat. § 541.073). Defendants do not dispute that the Child Victims Act revived plaintiff's direct negligence claims against the Diocese of Duluth and the Diocese of New Ulm. Plaintiff's surviving claims against the non-settling defendants are all negligence-based. Plaintiff asserts claims of negligent supervision, negligent retention, and general negligence against one or both defendants.[8]

A. Whether the Diocese of Duluth Negligently Supervised Fitzgerald is a Jury Question.

Plaintiff maintains a negligent supervision claim against the Diocese of Duluth.[9] "[N]egligent supervision is the failure of the employer 'to exercise ordinary care in supervising the employment relationship, so as to prevent the foreseeable misconduct of

[8] Plaintiff concedes that the Child Victims Act did not revive his otherwise time-barred claim that the Diocese of Duluth and the Diocese of New Ulm are vicariously liable for Fitzgerald's conduct.

[9] In his opposition, plaintiff waived the negligent supervision claim he pled against the Diocese of New Ulm. (Pl.'s Mem. of Law in Opp. to Def.'s Motion for Summ. J. at 25 n.11.)

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an employee from causing harm to other employees or third persons.'" *M.L. v. Magnuson*, 531 N.W.2d 849, 858 (Minn. Ct. App.) (quoting *Cook v. Greyhound Lines, Inc.*, 847 F. Supp. 725, 732 (D. Minn. 1994)), *rev. denied* (Minn. 1995). The tort of negligent supervision is descended from respondeat superior, so the claim is not cognizable unless "the employee's actions occurred within the scope of employment." *Id*. (citations omitted); *accord Olson v. First Church of Nazarene*, 661 N.W.2d 254, 261 (Minn. Ct. App. 2003); *L.M. ex rel. S.M. v. Karlson*, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002). Nevertheless, negligent supervision of an employee imposes direct liability upon the employer. *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App.), *rev. denied* (Minn. 1993). Negligent supervision occurs if the employee's actions occurred within the scope of employment, the employer failed to exercise reasonable care to supervise the employee's activity, and the employee's conduct was foreseeable. *See Oslin v. State*, 543 N.W.2d 408, 414-415 (Minn. Ct. App. 1996) (citations omitted). "[W]hether the employer is at fault is immaterial." *Id*. at 414.

1. Did Fitzgerald Act in the Scope of Employment?

Scope of employment determinations are generally for the jury. *See Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 583 (Minn. 2008). "No hard and fast rule can be applied to resolve the 'scope of employment' inquiry. Rather, each case must be decided on its own individual facts." *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979) (citing *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 232 N.W.2d 236 (1975)). "But when the evidence in the record is conclusive on all of the necessary elements or there is an absence of evidence to support a necessary element, no fact issue

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is presented for the jury and the scope of employment is determined as a matter of law." *Hentges v. Thomford*, 569 N.W.2d 424, 427 (Minn. Ct. App. 1997).

Two factors are examined when making a scope of employment determination in intentional misconduct cases. First, the tort must be foreseeably "related to the duties of the employee." *Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999) (citing *Lange v. Nat'l Biscuit Co.*, 297 Minn. 399, 404, 211 N.W.2d 783, 786 (1973)). Second, the conduct must occur "substantially within authorized time and space restrictions." *Edgewater Motels, Inc.*, 277 N.W.2d at 15 (citing *Boland v. Merrill*, 270 Minn. 86, 132 N.W.2d 711 (1965) and RESTATEMENT (SECOND) OF AGENCY § 228 (1958)); *see Fahrendorff*, 597 N.W.2d at 910; 4 Minn. Prac., *Jury Instruction Guides—Civil*, CIVJIG 30.20 (6th ed. 2015) (scope of authority elements).[10]

a. <u>Fitzgerald's Conduct was Foreseeably Related to his Work Duties</u>

Scope of employment cases involving intentional torts, particularly sexual abuse torts, have proven particularly troubling for Minnesota appellate courts. Adult employees in a position of authority over minors who sexually abuse their charges engage in criminal activity universally prohibited by all responsible employers. How can such activity ever be foreseeable or employment related? *Lange* answered the question:

> "[T]he master is liable for any such act of the servant which, if isolated, would not be imputable to the master, but which is so connected with and

[10] In the case of intentional torts, an additional requirement mandating that the employee's "acts [be] motivated by a desire to further the employer's business" was eliminated in 1973. *Lange v. National Biscuit Co.*, 297 Minn. 399, 401, 211 N.W.2d 783, 784 (1973); *see Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 310-11 (Minn. 1982) (distinguishing between the applicable standard in intentional tort and negligence cases; "motivation test" not applicable in intentional tort cases).

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> immediately grows out of another act of the servant imputable to the master, that both acts are treated as one indivisible tort."

297 Minn. at 404, 211 N.W.2d at 785-86 (quoting *Gulf, C. & S.F. Ry. Co. v. Cobb*, 45 S.W.2d 323, 326 (Tex. Civ. App. 1931)). The Supreme Court's approach to scope of employment issues involving intentional torts was refined in *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306 (Minn. 1982). In *Marston*, a clinic employed a psychologist who engaged in sexual misconduct with several patients. *Id*. at 308. Noting that employment created the opportunity for abuse, and citing admitted evidence that "sexual relations between a psychologist and a patient is a well-known hazard and . . . foreseeable and a risk of employment", it was for a jury to determine whether the employee was in the scope of employment. *Id*. at 311.

The plaintiff's burden of producing admissible evidence on the question of foreseeability was emphasized in *P.L. v. Aubert*, 545 N.W.2d 666 (Minn. 1996). In *P.L.*, the court held that foreseeability cannot be implied and there is no jury question absent "expert testimony or affidavits . . . regarding the potential for abuse of such power in these situations." *Id*. at 668. Because plaintiff furnished no evidence of foreseeability through fact witnesses or expert affidavits, the case was dismissed. *Id*.

The meaning of "foreseeability" in the scope of employment context was further clarified and defined in *Fahrendorff*. When analyzing scope of employment issues, information specific to either the employer or the employee need not be produced because liability "stems from public policy rather than from any fault of the employer." 597 N.W.2d at 912. Quoting from a California case, the court stated:

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> "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. In the latter sense "foreseeable" means a level of probability which would lead a prudent person to take effective precautions whereas "foreseeability" as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.

Fahrendorff, 597 N.W.2d at 912 (quoting *Rodgers v. Kemper Constr. Co.*, 50 Cal. App. 3d 608, 619 (Cal. Ct. App. 1975)). Thus, as in *Marston*, the *Fahrendorff* court found an expert affidavit indicating that child abuse is a well-known hazard in the group home industry sufficient to create a jury issue on the question of whether the employee's "acts were foreseeable, related to and connected with acts otherwise within the scope of employment."[11] *Id*. at 912-13.

In this case, plaintiff submitted sufficient evidence to create a jury issue. As summarized in the Statement of Facts, Fr. Doyle provides expert testimony that clergy sexual abuse of children was a well-known hazard to the Diocese of Duluth. The Diocese levels the same criticism against the Doyle affidavit that was rejected by the Supreme Court in *Fahrendorff*. If anything, Fr. Doyle's extensive practical and academic background provides a stronger foundation for the admissibility of his opinions than the conclusory affidavit that the *Fahrendorff* court found sufficient. *Compare Fahrendorff*,

[11] The Diocese of Duluth essentially argues that plaintiff must make two foreseeability showings. It characterizes the Boyd affidavit as insufficient to satisfy the *Lange/Marston/Fahrendorff* foreseeability test applicable to the respondeat superior/scope of employment analysis. (Reply in Supp. of Def. Diocese of Duluth's Motion for Summ. J. at 8-9.) Then, it argues for dismissal of plaintiff's negligent supervision claim because the potential for Fitzgerald's specific conduct was not foreseeable. (*Id*. at 9-10.) The Diocese of Duluth misstates the law and the authorities it cites do not stand for the asserted proposition. Only a single foreseeability showing must be made by the plaintiff. *See, e.g., L.M. ex rel. S.M. v. Karlson*, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002) (*Fahrendorff* establishes the sole foreseeability test in negligent supervision cases); *Doe v. Centennial Ind. Sch. Dist. No. 12*, No. A04-413, 2004 WL 2939861, at *2-3 (Minn. Ct. App. Dec. 21, 2004) (unpublished) (the only foreseeability showing plaintiff must make in negligent supervision cases is the standard applicable to respondeat superior).

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597 N.W.2d at 911-12 (expert affidavit raised a fact question) *and Marston*, 329 N.W.2d at 311 (fact issue existed in light of expert testimony) *with P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1996) (in the absence of evidence that relationships between teachers and students are well-known hazards, defendant entitled to summary judgment).

In addition to the Doyle affidavit, plaintiff provides lay evidence that the Diocese of Duluth had specific knowledge, starting as early as the 1950's, that clergy abuse of minors was a well-known hazard. Consequently, even without the Doyle affidavit, plaintiff presents a prima facie case of foreseeability that must go to a jury.

Moreover, the undisputed evidence demonstrates that Fitzgerald's contact with plaintiff arose out of a church-based relationship. Fitzgerald's duties put him in direct contact with plaintiff and he arguably used that proximity to establish a sexually abusive relationship. Based upon the documentary evidence of direct knowledge, Fr. Doyle's testimony, and Fitzgerald's use of his position to sexually abuse plaintiff, a jury could conclude that Fitzgerald's alleged conduct was related to his duties and that his conduct was foreseeable. The Diocese of Duluth is not entitled to summary judgment on the questions of foreseeability and work relatedness.

b. <u>A Reasonable Jury Could Conclude that Fitzgerald's Conduct Occurred Substantially Within Authorized Time and Space Restrictions</u>.

The Diocese of Duluth makes no claim that Fitzgerald's conduct occurred outside of his authorized time and space restrictions. That is likely because the clergy essentially is on call and must be available to minister twenty-four hours daily. The undisputed testimony of priests deposed in this case is consistent with the Minnesota cases involving

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other professions. *See, e.g., Hentges v. Thomford,* 569 N.W.2d 424, 428 (Minn. Ct. App. 1997) (jury's finding of respondeat superior when minister testified that his was a twenty-four-hour-a-day job was not a basis for reversal); *Edgewater Motels, Inc.*, 277 N.W.2d at 17 (employee was an out-of-town supervisor on call twenty-four hours a day). The fact that an employee's conduct occurs "after hours" is not in itself determinative.

Fitzgerald's job duties were arguably analogous to the employees in *Hentges* and *Edgewater Motels, Inc.* The personal relationship leading to sexual misconduct occurred at church. The premise of plaintiff's trip with Fitzgerald was related solely to his work as a Roman Catholic priest. The abuse occurred in whole or in part in Fitzgerald's employment-based living quarters. The Diocese of Duluth is not entitled to summary judgment on the time and space issue.

2. <u>Fitzgerald was Arguably Employed by the Diocese of Duluth</u>

Assessing whether a reasonable jury could conclude that Fitzgerald acted within the scope of employment when he abused plaintiff is the least complicated part of the negligent supervision analysis. The most challenging issue is determining whether Fitzgerald was employed by the Diocese of Duluth. No one disputes that Fitzgerald was employed, supervised, and assigned by the Oblates. Over vehement opposition, plaintiff contends that Fitzgerald was also employed by the Diocese of Duluth. Despite their dispute over the outcome, the parties agree on how the issue must be analyzed. They both cite the same five-part test:

> Whether an employment relationship exists is an issue of fact when the evidence is disputed. . . . [F]actors traditionally used to determine the nature of a work relationship are: (1) the right to control the means and

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> manner of performance; (2) the mode of payment; (3) furnishing of materials and tools; (4) control of premises where work is performed; and (5) right of employer to hire and discharge.

Olson v. First Church of Nazarene, 661 N.W.2d 254, 261 (Minn. Ct. App. 2003) (quoting and citing *Stenvik v. Constant*, 502 N.W.2d 416, 420 (Minn. Ct. App.), *rev. denied* (Minn. Aug. 24, 1993)). The right to control the means and manner of performance is the most significant factor. *Id.; see Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (Minn. 1964) *reh'g denied* (Minn. May 29, 1964). When there is disputed evidence, the employment relationship question is an issue of fact. *Olson*, 661 N.W.2d at 261 (citing *Stenvik*). Here the parties each cite different evidence purporting to support their position.

a. <u>Right to Control the Means and Manner of Performance</u>.

As discussed in the Statement of Facts, Fitzgerald was hired and ordained by OMI. Fitzgerald served and was assigned at the pleasure of OMI. However, OMI could not assign a priest to the Duluth Diocese without gaining the Diocese's approval. If the Diocese Bishop approved the assignment, he granted the OMI priest "faculties" to minister within the Diocese. (Kalert dep. at 26, 132.)

With regard to day-to-day control, both OMI and Duluth Diocese witnesses agreed that an OMI priest working within the Duluth Diocese, had "two bosses", the OMI Provincial and the Bishop. (*Id*. at 33, 35-36; Fider dep. at 18; Gagne dep. at 12; Kelleher dep. at 25-26; Larson dep. at 14-16; Schroeder dep. at 17.) While the OMI Provincial continued to supervise the priest, retained the right to remove or reassign the priest, place restrictions on the priest's ministry, and mandate training and policies applicable to the

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priest, (Kalert dep. at 29-30), the Duluth Diocese Bishop could forbid a religious order OMI priest, from ministering within the Diocese, restrict the priest's ministry within the Diocese, or impose rules upon the priest. (*Id*. at 32, 35-36; Fider dep. at 17; Gagne dep. at 12; Kelleher dep. at 27-28; Schroeder dep. at 15-16.)

In fact, neither OMI nor the Diocese of Duluth exercised any daily supervision over Fitzgerald. OMI advised the Duluth Diocese that it did not provide on-site supervision. (Woestman aff. ¶ 4.) However, the record supports a conclusion that the Bishop of the Duluth Diocese conducted confirmation visits to review the performance of all priests, including religious order priests. (Gagne dep. at 36-37.) The dual right of control over Fitzgerald is demonstrated by evidence in which both the Bishop and OMI Provincial are equally deferential to the other's authority over Fitzgerald. (*See, e.g.*, Finnegan aff., Exs. 30-32, 37-38.)

Finally, the Statement of Facts includes Fr. Thomas Doyle's expert opinion concerning a Diocese Bishop's broad control over priests ministering within a Diocese. (Doyle aff. at 12.) Fr. Doyle's expert opinion supports sending the first factor to a jury.

The right of control does not necessarily require control to be exercised under all circumstances. A reasonable fact finder could conclude that both OMI and the Diocese of Duluth, through the Bishop, each had a right to control Fitzgerald.

b. <u>Mode of Payment</u>.

OMI did not pay a stipend to Fitzgerald. (Anderson aff., Ex. 1 (Answer to Int. No. 2(b).) Any payment or remuneration Fitzgerald received from the parish he served was turned over to OMI. (*Id*.) OMI did pay for health care and other benefits Fitzgerald

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received. (*Id*.) OMI also controlled Fitzgerald's vacation. (Anderson aff., Exs. 16-17.) Significantly, in its Handbook, the Duluth Diocese set the salary payable to all priests serving in the Diocese and expressly included religious order priests. (Finnegan aff., Ex. 26, at 11.) Benefits were only provided to diocesan priests. (*Id*., at 11-12.) The mode of payment factor permits a fact finder to conclude that Fitzgerald had two employers.

c. Furnishing of Materials and Tools.

The record demonstrates that OMI was Fitzgerald's primary source for the materials and tools of the ministry. (*See, e.g., id*., Exs. 11-16.) However, the record is equally clear that the Diocese of Duluth controlled certain instrumentalities of the job. For example, Fitzgerald sought approval for the purchase of trailers to be funded by the Bishop of the Duluth Diocese and other items for use in his Duluth Diocese ministry. (Finnegan aff., Exs. 31, 33.) This factor could support a finding of dual employment.

d. Control of the Work Premises.

Fitzgerald's work premises were not controlled by either OMI or the Duluth Diocese. Based upon documents furnished by the Duluth Diocese, it cannot be disputed that the St. Catherine's Church property was owned by the Minnesota Chippewa Tribe and leased to St. Catherine's, a separate corporate entity. (Second Anderson aff., Ex. 1 (lease); Finnegan aff., Ex. 53 (St. Catherine's Certificate of Incorporation).) This factor does not support a finding of employment by either OMI or the Duluth Diocese.

e. Right to Hire and Discharge.

Although OMI could hire, assign, and discharge Fitzgerald, the Duluth Diocese Bishop could forbid a religious order OMI priest from ministering within the Diocese,

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restrict the priest's ministry within the Diocese, or impose rules upon the priest.[12] (Kalert dep. at 32, 35-36; Fider dep. at 17; Gagne dep. at 12; Kelleher dep. at 27-28; Schroeder dep. at 15-16.) As such, Fitzgerald could not work in the Duluth Diocese without the Bishop's permission and his work could end on the Bishop's whim. This factor could support a finding of dual employment.

f. A Jury Could Conclude that Fitzgerald was Employed by Both the OMI and the Diocese of Duluth.

The five-factor test favors plaintiff in some respects and the Diocese of Duluth in others.[13] Record evidence concerning the most important factor, the right of control, permits an inference in favor of a dual employment relationship. Although the evidence is not disputed, the inferences to be drawn from the evidence are. In deciding a motion for summary judgment, the court does not make inferences or impose the weight given to evidence when applying a multi-factor test. If inferences are necessary, they are viewed from the plaintiff's perspective. Thus, whether Fitzgerald was acting in the scope of

[12] The Duluth Diocese compares its priest-supervision role to the Supreme Court as analogized in *C.B. ex. rel. L.B. v. Evangelical Lutheran Church*, 726 N.W.2d 127, 133-34 (Minn. Ct. App. 2007). The analogy is distinguishable. Here, unlike the Synod and the ELCA in *C.B.*, there was no intervening congregation control of Fitzgerald. The Diocese of Duluth, through the Bishop, was a direct-hands-on decision maker. The evidence supports a conclusion that the Bishop's involvement goes far beyond the licensure and professional oversight role of the Supreme Court.

[13] The Diocese of Duluth relies in part on an affidavit from Fr. James Bissonette, its current Vicar General. He provides opinions as to how Fitzgerald was appointed, supervised, and compensated. (Bissonette aff. ¶¶ 3-9.) He also confirms that the Duluth Diocese Bishop had the authority to remove an OMI priest from his assigned parish. (*Id.* ¶ 3.) Although his testimony is largely consistent with the testimony of other witnesses referenced in the Statement of Facts, there appears to be no foundation for his testimony. Fr. Bissonette acknowledges that his testimony concerning Fitzgerald is an assumption based upon the process followed with OMI priests "for many years" and not based upon his own personal knowledge of the pre-1978 process. (*Id.* ¶ 5.) In fact, during his deposition, Fr. Bissonette testified that he could only comment on the scope of a Bishop's directive "from 1988 on." (Bissonette dep. at 70.) Ironically, in the same deposition, which post-dated the affidavit, counsel for the Duluth Diocese objected to a question requesting testimony concerning Diocese disciplinary practices in 1978 for lack of foundation. (*Id.* at 62.) In light of Fr. Bissonette's self-disqualification, the objection was well-taken.

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employment with the Diocese of Duluth at the time of the abuse involves a classic fact dispute. The fact pattern is unique and the evidence is not conclusive with regard to all of the elements. Based upon the presented record, a verdict could go either way.

Nevertheless, the court's evaluation of the evidence does not end the discussion. The Bishop's role as leader of the Duluth Diocese is the driving factor in making the employment-relationship-issue a fact question. Although Bishops exercise extensive control over activities within a Diocese, the Diocese of Duluth contends that the sole source of its Bishop's authority was ecclesiastic Canon Law. It argues that the Bishop had no authority to act on behalf of the Minnesota civil corporation the plaintiff sued.[14] *See* Minn. Stat. §§ 315.10, 15-.16 (1986) (authorizing diocesan corporations; defining their powers; and, subjecting them to civil suits). Arguing that there is no evidence that its Bishops acted under civil rather than ecclesiastic authority, the Duluth Diocese maintains that it cannot be legally liable for any Bishops' action or inaction.

The Duluth Diocese's position is built around the Court of Appeals' unpublished opinion in *Eller v. Diocese of St. Cloud*, No. A05-828, 2006 WL 163526 (Minn. Ct. App. Jan. 24, 2006) (unpublished). *Eller* considered whether a Bishop's ecclesiastic and civil authority merged to any extent based upon a juxtaposition of Minnesota corporate law and the evidence before it. *Id.* at *4-7. The *Eller* record included Articles of

[14] To prevent what he regards as the untenable scenario in which no entity or person could be held responsible for Fitzgerald's conduct, plaintiff argues that his Complaint asserts a claim against the Duluth Diocese as both a Minnesota corporation and an ecclesiastic organization. (Compl. ¶ 2.) However, plaintiff fails to explain how an unincorporated organization can be sued absent statutory authority. A partnership can be sued but there is no allegation that the Diocese of Duluth was a partnership. Absent protection by the corporate or partnership forms, the Bishop might be susceptible to individual liability or the Pope or the Roman Catholic Church might be potential defendants. Yet, none of these persons or entities was sued.

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Incorporation containing wording virtually identical to the Duluth Diocese's Certificate of Incorporation, discussed later in this section. *Compare id.* at *5 *with* Anderson aff., Ex. 34. The articles gave the St. Cloud Diocese, through its Board of Directors, power to transact "all business of the corporation", but no specific authority was given to any individual. *Eller* at *6. The *Eller* record contained no by-laws or any evidence "that as the president and a member of the Diocese, the bishop had authority to appoint and remove priests." *Id*. at *5-6. Consequently, the court found insufficient evidence to conclude that the St. Cloud Diocese employed the abusive priest. *Id.* at *8.

In *Eller*, the court had nothing in its record to contradict the St. Cloud Diocese's argument that its Bishop acted according to Canon Law adopted by ecclesiastic authority and that the defendant corporation's governing documents did not grant similar power to the Bishop. The present record is different and compels the opposite outcome as to the Diocese of Duluth. As in *Eller*, the general purpose of the Diocese of Duluth:

> is to take charge of and manage all the temporal affairs of the Roman Catholic Church of the said Diocese of Duluth belonging or in anywise appertaining thereto; to promote the spiritual, educational and other interests of the said Roman Catholic Church in said Diocese, including all the charitable, benevolent, eleemosynary and missionary work of said Church in said Diocese, and to establish churches and cemeteries therein, and also to establish and conduct schools, seminaries, colleges and any benevolent, charitable, religious or missionary work or society of the said Roman Catholic Church within said Diocese.

(Anderson aff., Ex. 34 (Amended Certificate of Incorporation), Art. II.) Like the St. Cloud Diocese in *Eller*, the Duluth Diocese Board of Directors had the "power to transact all of the business of the corporation." (*Id*., Ex. 34, Art III.) The amended certificate names the Bishop as the *ex officio* President of the corporation. (*Id*., Ex. 34, Art. IV.)

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The directors were given authority to adopt by-laws "not contrary to the laws of this State, the Statutes of the said Diocese of Duluth, the discipline of the Roman Catholic Church, and this Certificate, as may be deemed necessary for the proper government of this Corporation and the management of the . . . business thereof." (*Id*., Ex. 34, Art. VI.)

The record in Eller did not contain the St. Cloud Diocese by-laws. Pursuant to its Amended Certificate of Incorporation, the Diocese of Duluth adopted by-laws. (Hoefferle aff.[15]) The by-laws state that the Diocese of Duluth must exercise its powers "in strict conformity with the statutes of the Diocese of Duluth, the discipline of the Roman Catholic Church, the Certificate of Incorporation, and the State of Minnesota Statutes." (*Id*.) The by-laws also state that the President "shall have and perform the duties ordinarily pertaining to the office of President." (*Id*.)

Both the amended certificate and the by-laws merge Roman Catholic Church discipline into the civil corporate governance of the Duluth Diocese. In addition, the amended certificate makes it the civil corporation's business to "take charge of and manage" all diocese affairs including the religious and missionary work Fitzgerald performed. (Anderson aff., Ex. 34, Art. II.) By incorporating the church's ecclesiastic functions and rules into its civil governance, the authority of the Diocese of Duluth as a Minnesota corporation led by the Bishop appears co-extensive with the Diocese of Duluth as a Roman Catholic religious enterprise led by the Bishop.

[15] Despite references by all three parties to the governing documents of each diocese and some parishes, the by-laws of each diocese were not included in the record. Therefore, after the motions were submitted, the court requested the documents through its law clerk. The last documents were filed following a telephone conference with counsel that was initiated by plaintiff's counsel. During the conference call, the parties were given the opportunity to object in writing to the court's request. However, the records were submitted without a formal objection by any party.

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The grant of individual executive authority found missing in *Eller* is in the by-laws adopted by the Duluth Diocese. The by-laws put the Bishop in charge of the civil corporation, broadly vesting in him authority to perform "the duties ordinarily pertaining to the office of President." (Hoefferle aff.) The ordinary duties of a corporate President include providing overall leadership to and management of the entity. *See Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 458 (Minn. Ct. App.) ("corporate presidents generally control and supervise a corporation's business"), *rev. denied* (Minn. 2001); BLACK'S LAW DICTIONARY 1348 (rev. 4th ed. 1968) (a corporate President is "[t] he chief officer of a corporation . . . generally having the main direction and administration of their concerns"). A President's duties typically include overseeing the hiring, firing, and performance of all employees within the organization. *See, e.g.*, America's Job Exchange, President Job Description, http://www.americasjobexchange.com/president-job-description (last visited August 16, 2015) (President Job Description); Pratt, *Corporate President Job Descriptions and Duties*, http://work.chron.com/corporate-president-job-descriptions-duties-15395.html (last visited August 16, 2015).

Contrary to *Eller*, the record in this case includes evidence granting the Bishop specific authority to transact Diocese business in the same manner as the President of a civil corporation. Accordingly, *Eller* is distinguishable on its facts. A jury could find that the Diocese of Duluth's Bishop had "authority to appoint and remove priests [and to] ensure that policies and procedures were in place to protect parishes, students, teachers, and the public from sexual misconduct of priests." *Eller*, at *6. The Diocese of Duluth is

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not entitled to summary judgment on the employment question. A jury must decide whether Fitzgerald served two masters—OMI and the Diocese of Duluth.

3. A Jury Could Find That the Diocese of Duluth Failed to use Reasonable Care to Supervise Fitzgerald

A jury must also determine whether the Diocese of Duluth failed to use reasonable care when supervising Fitzgerald as one of his employers. Virtually every Diocese of Duluth priest deposed by plaintiff agreed that the Bishop is responsible for ensuring the safety of the children the Diocese ministers. The undisputed record also demonstrates that the Bishop controlled which priests were allowed to minister within the Diocese. According to the OMI Provincial from 1975-1978, the Duluth Diocese knew that OMI would not be providing any site supervision to its priests. The Diocese was also aware of child sex abuse by priests working within the diocese for at least twenty years before Fitzgerald abused plaintiff. In fact, it cooperated in the treatment received by priests and was told that the pedophilia being treated was incurable. Yet, before 1993, the Diocese of Duluth provided no sex abuse training, no instruction to non-abusers on how to identify the red flags and warning signs indicating that abuse might be taking place, and had no system in place for reporting, investigating, and responding to child sexual abuse by priests. (*See, e.g.*, Fider dep. at 20-24; Gagne dep. at 17-20; Hoffman dep. at 31-33; Kelleher dep. at 20-22; Schroeder dep. at 18-21.) Although Fitzgerald was temporarily assigned to the New Ulm Diocese to participate in the Willmar State Hospital CPE program, the assignment ended before plaintiff was abused. (Finnegan aff., Ex. 42; Wieser aff., Exs. X-Y.) Moreover, the abuse occurred in the Duluth Diocese when

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Fitzgerald was performing his permanent assigned duties. Under these circumstances, a reasonable jury could conclude that the Diocese of Duluth failed to supervise Fitzgerald's activities using reasonable care.

B. Plaintiff's Negligent Retention Claims.

Negligent retention is a direct liability theory that is not based upon vicarious liability. *Yunker*, 496 N.W.2d at 422 (citing *Ponticas v. K.M.S Inv.*, 331 N.W.2d 907, 911 n.5 (Minn. 1983)). The theory of recovery does "not rely on the scope of employment but [addresses] risks created by exposing members of the public to a potentially dangerous individual." *Id*. (citation omitted). The intentional tort forming the basis for liability "almost invariably [occurs] outside the scope of employment, when the employer knew or should have known that the employee was violent or aggressive and might engage in injurious conduct." *Id*. (citations omitted). Thus, unlike negligent supervision, plaintiff's claim for negligent retention requires the plaintiff to prove that the employer had knowledge specific to the employee who engaged in the alleged misconduct:

> Negligent retention . . . occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment.

Yunker, 496 N.W.2d at 423-24 (quoting *Garcia v. Duffy*, 492 So. 2d 435, 438-39 (Fla. Dist. Ct. App. 1986)).

Plaintiff's negligent retention theory requires proof that Fitzgerald's dangerous propensity was foreseeable to one or both defendants. *Id*. at 424. To determine whether

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the risk of injury from the defendant Fitzgerald's conduct was foreseeable to either Diocese, the court examines "'whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.'" *Domagala v. Rolland*, 805 N.W.2d 14, 26 (Minn. 2011) (quoting *Foss v. Kincade*, 766 N.W.2d. 317, 322 (Minn. 2009) (citing *Whiteford ex rel. Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998))). "Close questions on foreseeability should be given to the jury." *Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984).

Plaintiff presents no evidence that either Diocese had any knowledge whatsoever about Fitzgerald's prior conduct, prior psychiatric evaluation, or dangerous proclivities in advance of Fitzgerald's abuse of plaintiff. As discussed in the Statement of Facts, plaintiff failed to identify many of the people who witnessed a possible "red flag" involving Fitzgerald. In addition, there is no basis to conclude that any knowledge possessed by these witnesses, whether they were identified or not, can be imputed to either Diocese. Finally, there is no evidence that any OMI Provincial said anything to either Diocese about Fitzgerald's prior conduct. Fr. Woestman's affidavit does not provide personal knowledge concerning the customs and habits of other Provincials and he does not even indicate that disclosing prior sexual misconduct by a priest being considered for assignment to the Duluth or New Ulm Diocese was his own custom and practice. (Woestman aff. ¶ 5.) Plaintiff can only speculate as to whether an OMI Provincial ever told the Diocese of Duluth or New Ulm anything about Fitzgerald's

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history of sexual misconduct with minors.[16] In short, the specific danger posed by Fitzgerald was not objectively reasonable to expect by either of the Dioceses. Plaintiff presents at most a speculative case of foreseeability. He cannot establish a prima facie case for a negligent retention claim because there is no evidence in the record that either Diocese "knew or should have known that [Fitzgerald] might engage in injurious conduct." *Yunker*, 496 N.W.2d at 422. On the issue of foreseeability alone, the Diocese of Duluth and the Diocese of New Ulm are entitled to summary judgment in connection with plaintiff's negligent retention claims.[17]

C. <u>Plaintiff's General Negligence Claims</u>.

The final negligence-based cause of action asserted by plaintiff against the defendants is a claim for "general negligence." (Pf.'s Mem. of Law in Opp. to Def.s' Motion for Summ. J. at 42.) It must be emphasized from the outset that plaintiff's general negligence claim cannot be tied to an alleged employment relationship between Fitzgerald and either Diocese. Employment-based claims for negligent supervision and retention and claims for general negligence are mutually exclusive. In Minnesota, there

[16] Without citing the rule, plaintiff appears to suggest that Fr. Woestman's affidavit supports application of Rule 406 of the Minnesota Rules of Evidence. The rule states: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Minn. R. Evid. 406. However, Fr. Woestman never testified that it was his or OMI's custom and practice to discuss the prior sexual misconduct of a priest with a prospective Diocese's Bishop. The record is inadequate to support application of the rule.

[17] Thus, the additional defenses raised by defendants need not be considered. The Diocese of Duluth interposed the same employment defense that it argued in connection with the negligent supervision claim. In addition, the Diocese of New Ulm accurately notes the absence of actual evidence that the OMI Provincial ever assigned Fitzgerald to the New Ulm Diocese, the OMI Provincial ever contacted the New Ulm Diocese about Fitzgerald, the New Ulm Bishop ever granted faculties to Fitzgerald, and, if faculties had been granted, they would have expired at the end of the CPE program, which was prior to Fitzgerald's abuse of plaintiff. These facts arguably compel a different outcome for the New Ulm Diocese's employment defense.

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is no such thing as a claim for general negligence against an employer when based upon the conduct of an employee. *M.L*, 531 N.W.2d at 856 (citations omitted; negligent hiring, supervision, and retention are the only direct negligence causes of action recognized by Minnesota based upon the conduct of an employee and it is error for the trial court to submit employer negligence using a general failure to use reasonable care instruction). Thus, plaintiff may only recover based on a general negligence theory if the court or a jury finds that one or both of the Dioceses did not employ Fitzgerald.

Plaintiff asserts a direct negligence claim based upon each Diocese's failure to use reasonable care to protect plaintiff. To reach a jury on the issue of negligence, plaintiff must establish a prima facie case as to each of the negligence elements. "The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (citing *Schmanski v. Church of St. Casimir*, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954)). The moving party is entitled to summary judgment "if there are no facts in the record . . . giving rise to a genuine issue for trial as to any one of these essential elements." *Id.*

Plaintiff's negligence claim cannot succeed unless one of the Dioceses had a duty to prevent Fitzgerald from abusing him. The existence of a duty of care is usually a question of law. *Domagala*, 805 N.W.2d at 22; *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007) (citation omitted).

A person does not generally owe a duty of care to another if the harm is caused by a third person. *Doe 169 v. Brandon*, 845 N.W.2d 174, 177-78 (Minn. 2014) (citing

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Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979)). However, there are two established exceptions to the general rule.[18] *See Domagala*, 805 N.W.2d at 23. First, such a duty exists "when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Id*. (citation omitted); *see Doe 169*, 845 N.W.2d at 178. The term "own conduct" refers to "'active misconduct working positive injury to others'" and not "[n]onfeasance, which is 'passive inaction or a failure to take steps to protect [others] from harm.'" *Doe 169*, 845 N.W.2d at 178 (quoting W. Page Keeton, PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984)).

The second circumstance in which a duty to protect plaintiff from harm caused by a third person may exist is "when action by someone other than the defendant creates a foreseeable risk of harm to the plaintiff and the defendant and plaintiff stand in a special relationship." *Domagala*, 805 N.W.2d at 23 (citation omitted); *see Doe 169*, 845 N.W.2d at 178. A special relationship exists when "the defendant is in a position to protect against and should be expected to protect against" the harm experienced by the plaintiff. *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995). There is a special relationship when "one accepts responsibility to protect

[18] Plaintiff also argues that another negligence-based theory of liability applies, drawing an analogy from cases imposing upon school districts the duty to use reasonable care for the protection, safety, and welfare of children entrusted to them. (Pf.'s Mem. of Law in Opp. to Def.s' Motion for Summ. J. at 38-41 (citations omitted).) Plaintiff's argument is without merit. The cases plaintiff cites impose liability because a school has a duty to supervise the programs and activities it sponsors. *Verhel ex. rel Verhel v. Ind. Sch. Dist. No. 709*, 359 N.W.2d 579, 586 (Minn. 1984) (cheerleading); *Sheehan v. St. Peter's Catholic School*, 291 Minn. 1, 3, 188 N.W.2d 868, 870 (1971) (recess); *S.W. v. Spring Lake Park Sch. Dist. No. 16*, 592 N.W.2d 870, 872, 874 (Minn. Ct. App. 1999) (swim test at school). Here, Fitzgerald took plaintiff to St. Catherine's Parish on his own and there is no evidence in the record that his conduct was part of a program specifically sponsored by either Diocese.

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another." *Laska v. Anoka County*, 696 N.W.2d 133, 138 (Minn. Ct. App. 2005) *rev. denied* (Minn. 2005).

Each of the two exceptions to the general rule includes a foreseeability requirement. This Memorandum discusses foreseeability in two contexts. First, the court reviewed the relaxed foreseeability standard applicable to the respondeat-superior-based claim of negligent supervision. *See* Section IV.A.1.a, *supra*. The second foreseeability standard applies to negligence claims generally. *See* Section IV.B, *supra*. It is the latter standard that controls plaintiff's general negligence claims. *Doe 169*, 845 N.W.2d at 178 (conduct is foreseeable when the specific danger posed by the actor was objectively reasonable to expect). As already explained in detail, a reasonable jury cannot find that the possibility of Fitzgerald's abuse of plaintiff was foreseeable to the Diocese of Duluth or the Diocese of New Ulm without engaging in speculation. Because plaintiff cannot meet the foreseeability threshold, both exceptions are inapplicable as a matter of law.

Even if plaintiff could meet the ordinary negligence foreseeability test, the first exception is inapplicable because plaintiff also fails to cite any active misconduct by either Diocese. Plaintiff asserts that the defendants failed to train and supervise Fitzgerald and that they failed to have sexual abuse and reporting policies in place. (Pf.'s Mem. of Law in Opp. to Def.s' Motion for Summ. J. at 52-53.) The alleged shortcomings involve passive conduct that is not actionable.

Plaintiff's special relationship argument also falls short. A duty to prevent another from harm at the hands of a third person exists in "three distinct scenarios." *Bjerke*, 742 N.W.2d at 665. "The first arises from the status of the parties, such as 'parents and

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children, masters and servants, possessors of land and licensees, [and] common carriers and their customers.'" *Id*. (quoting *Delgado*, 289 N.W.2d at 483-84). The second scenario occurs when a person has custody of another "under circumstances in which that other person is deprived of normal opportunities of self-protection." *Id*. (quoting *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993); RESTATEMENT (SECOND) OF TORTS § 314A (1965)). Finally, the third scenario arises "when an individual assumes responsibility for a duty that is owed by another individual to a third party." *Id.*

Scenario one is inapplicable because none of the requisite relationships exist. To the extent there was a master and servant relationship between one or both Dioceses and Fitzgerald, the court has already held that liability for the conduct of an employee is limited to three distinct theories. The existence of a special relationship based on employment still requires plaintiff to establish that a fact issue exists in connection with one of the available theories. Viewed in this way, scenario one is superfluous.

The second and third scenarios are inapplicable because neither defendant had custody of plaintiff or assumed Fitzgerald's responsibility to protect plaintiff. Plaintiff was in Fitzgerald's custody. There is no evidence that plaintiff was placed in the custody of either Diocese or that either Diocese even knew that plaintiff was in Fitzgerald's custody. This case does not resemble *Bjerke*, where Johnson knowingly took plaintiff into her home far from plaintiff's residence, provided room and board, and established rules for plaintiff's conduct. *Id.* at 665. Nor is there any comparison between the instant case and *Laska v. Anoka County*, which involved a day-care provider who knowingly accepted custody of and responsibility over an infant child. 696 N.W.2d 133, 136-37

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(Minn. Ct. App. 2005). Here, there is no evidence that either Diocese accepted the responsibility to protect plaintiff when he left home with Fitzgerald. *See id*. at 138.

Similarly, there was no non-employment custodial relationship between Fitzgerald and defendants. The instant case bears no similarity to the authority cited by plaintiff, *Lundgren v. Fultz*, 354 N.W.2d 25 (Minn. 1984). In *Lundgren*, the defendant psychiatrist treated the person who killed plaintiff's decedent. *Id*. at 26-27. Defendant knew of his patient's violent propensities and gun fixation but advised the police to return a handgun to the patient. *Id*. at 27. Based on these "special facts", the court held that a jury could find a special relationship because the evidence supported a conclusion that defendant had some ability to control his patient's access to firearms. *Id*. at 27-28, 29.

Plaintiff's argument emphasizes the *Lundgren* defendant's ability to control his patient. However, the Supreme Court based its decision on much more. The Court's holding was based upon the unique and toxic combination of the psychiatrist's care and treatment, his knowledge of the patient's dangerous propensities, and his role in the patient obtaining the instrumentality of violence. *Id*. at 28-29. As discussed earlier, the present record is devoid of any evidence that either Diocese knew of Fitzgerald's dangerous propensities or of his relationship with plaintiff. There are no special facts in the present case, as in *Lundgren*, which permit a conclusion that one of the defendants had controlling custody over Fitzgerald for purposes of the second *Bjerke* scenario.

Plaintiff's general negligence claim against both Dioceses must be dismissed. There is insufficient evidence to create a jury issue regarding either exception to the general rule that relieves a person from any duty to prevent another from doing harm.

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D. Plaintiff's Premises Liability Claim is Without Merit.

Plaintiff also asserts that Minnesota's premises liability jurisprudence supports his claim against the Diocese of Duluth. (Pf.'s Mem. of Law in Opp. to Def.s' Motion for Summ. J. at 53-55.) Plaintiff's opposition describes Fitzgerald as a "dangerous condition on the Diocese of Duluth's property." (*Id*. at 54.) The argument fails for two reasons.

First, plaintiff was not abused on property owned or leased by the Diocese of Duluth. St. Catherine's Parish was owned by the Minnesota Chippewa Tribe and leased to the Parish, not to the Diocese of Duluth. (Second Anderson aff., Ex. 1 (lease).) St. Catherine's, the lessee, was a separate corporate entity. (Finnegan aff., Ex. 53 (St. Catherine's Certificate of Incorporation).) As such, plaintiff's argument is based upon a mistaken premise.

Second, there must be a special relationship between the owner or possessor of the land and the injured person for premises liability to apply. *See, e.g., Funchess v. Cecil Newman Corp*., 632 N.W.2d 666, 674 (Minn. 2001). As the Minnesota Supreme Court observed long ago, a criminal act by a third party "is not an activity of the owner and does not constitute a condition of the land." *Pietila v. Congdon*, 362 N.W.2d 328, 333 (Minn. 1985); *see Errico v. Southland Corp*., 509 N.W.2d 585, 588-89 (Minn. Ct. App. 1993) (duty to maintain premises in safe condition extends to the premises' physical condition unless a special relationship exists), *rev. denied* (Minn. 1994). As already discussed, there was no special relationship between plaintiff and the Diocese of Duluth. Plaintiff's premises liability claim must be dismissed.

J H G