No. _____

In The
Supreme Court of the United States

JOHN DOE AP,

Petitioner,

versus

ROMAN CATHOLIC
ARCHDIOCESE OF ST. LOUIS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment shields religious organizations from accountability for negligence and negligent supervision and retention of their employees who sexually abuse children.

PARTIES TO THE PROCEEDINGS BELOW

The following party was a plaintiff below and is Petitioner here: John Doe AP. Fr. Thomas Cooper and the Roman Catholic Archdiocese of St. Louis were defendants below and are the Respondents here.

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The Missouri Supreme Court's order denying review, Certiorari Petition Appendix 31 [hereinafter "App."], is unpublished. The Missouri Court of Appeals opinion and affirmation of summary judgment, App. 1-17, is published at *Doe v. Roman Catholic Archdiocese of St. Louis*, 347 S.W.3d 588 (Mo. Ct. App. July 5, 2011). The Missouri Circuit Court's opinion and order dated March 22, 2010, App. 18-30, is unpublished. The Missouri Circuit Court's order dated May 15, 2007, is unpublished. App. 32-52.

JURISDICTION

The Missouri Court of Appeals, Eastern District, affirmed dismissal of plaintiff Doe's claims in its decision filed July 5, 2011, and the order of the Supreme Court of Missouri denying review was entered on October 4, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the First Amendment's Free Exercise and Establishment Clauses, which state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

STATEMENT OF THE CASE

Nature of the Case

This is a paradigmatic case about child sex abuse in a religious organization. With full awareness that one of its priests had previously molested a child, the St. Louis Archdiocese placed Fr. Thomas Cooper in a new position with access to children and took no action to ensure the protection of the children that would inevitably fall into his sphere of influence. Petitioner John Doe AP, a child in a devout Catholic family, who knew Cooper only through the parish, became ensnared in Cooper's web, and was subjected to intense grooming, seduction, oral rape, and attempted anal rape.

The Archdiocese was aware of past instances of child sexual abuse involving Cooper, and knew that leaving him alone with children was likely to result in harm; yet disregarded that known risk when it placed Cooper in a role of unsupervised proximity to Petitioner and other children, resulting in subsequent instances of child sex abuse. App. 22. The Archdiocese's defense was twofold: (1) reliance on *Gibson v. Brewer,* 952 S.W. 2d 239 (Mo. 1997), for the proposition that the First Amendment shields them from liability for negligence and negligent supervision and retention of clergy abusing children, and (2) a reading of *Gibson* that the sex acts must occur on their premises, not just the relationship, grooming, and seduction that leads to the sex acts.

One misguided First Amendment decision stood in the way of justice in this case: *Gibson v. Brewer*, which held that the First Amendment bars holding religious organizations accountable for their role in creating and maintaining the conditions for children to be sexually abused.

John Doe AP and his family were parishioners at St. Mary Magdalene Catholic parish in St. Louis, Missouri. App. 32. While John Doe AP attended the church, Fr. Thomas Cooper, as part of his employment, worked with, mentored, and counseled him, all the while seducing and grooming him to the point where he could sexually abuse him. The grooming started with special attention and gifts, then graduated to trips to Cooper's special "clubhouse," where Cooper took boys from the parish to initiate sexualized games, initially showing Petitioner pornography and then walking around naked in front of him and other boys. Finally, on one of Petitioner's trips with Cooper alone, the grooming and seduction escalated into oral rape and attempted anal rape.

John Doe AP filed this lawsuit in Missouri state court on June 25, 2005, against Fr. Cooper and the Archdiocese of St. Louis for alleged sexual abuse. Petitioner voluntarily dismissed claims against Fr. Cooper, who was deceased. The trial court then dismissed the claims of negligence and negligent supervision and retention of employees of religious organizations based on *Gibson*. App. 50-51.

Only Doe's claim of intentional failure to supervise clergy against the Archdiocese remained. The trial court granted summary judgment for the Archdiocese on the theory that *Gibson* further barred liability for intentional torts unless the sexual assault itself occurred on the property of the religious organization. App. 2. The Court of Appeals affirmed the dismissals and the summary judgment on intentional tort. One decision served as the basis for defeating all of Petitioner's claims: *Gibson*. The Missouri Supreme Court declined review as it has routinely done in child sex abuse cases since it first decided *Gibson* in 1997.

This certiorari petition asks this Court to address whether religious organizations have a First Amendment right to avoid accountability for negligence and negligent supervision and retention of abusive employees. This issue has percolated for years, and is subject to a split in authority between numerous state and federal courts. Petitioner asks this Court to take this case, to hold that the First Amendment is not a barrier to accountability for negligence and negligent supervision and retention of religious employees, and to reverse the decision below.

Relevant Proceedings Below

Petitioner in this case never had a chance in the Missouri courts, which since 1997 have followed the reasoning of *Gibson v. Brewer*, 952 S.W. 2d 239 (Mo. 1997). *Gibson* is contrary to established federal

constitutional law and at odds with numerous state supreme and lower federal courts.

The trial court's reliance on *Gibson* resulted in dismissal of most of the claims, and then a grant of summary judgment for the Archdiocese. App. 21-25. The trial court's inability to revisit *Gibson* resulted in absolute immunity for the harm caused by negligent employment of pedophiles in positions where they can sexually exploit children. App. 26. Although the trial court noted that *Gibson* had been repudiated in other jurisdictions, it could not depart from its ruling "until and unless our Supreme Court revisits [it]." App. 26.

The Court of Appeals for the Eastern District affirmed. Relying on *Gibson*'s reasoning, the Court held that questions of hiring, ordaining, and retaining clergy, "necessarily involve interpretation of religious doctrine, policy, and administration, and such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment." App. 15-16. The Court further held that determining the reasonableness of a church's supervision of a cleric requires an inquiry into religious doctrine, and therefore Missouri courts have declined to recognize a cause of action for negligent failure to supervise clergy.

The court, while also noting that other federal courts declined to follow *Gibson*'s interpretation of the First Amendment as a bar to asserting certain negligence claims against religious institutions, held that

Gibson was still controlling law in Missouri, until the Missouri Supreme Court or the United States Supreme Court declares differently.

Gibson relied upon an interpretation of a limited doctrine of judicial abstention, which precludes civil courts from interfering in certain intra-church theological or ecclesiastical disputes. While most courts have rejected a First Amendment mandated exemption from liability for child sex abuse by clergy, several other states have embraced this reasoning. *Franco v. Church of Jesus Christ of Latter Day Saints,* 21 P.3d 198 (Utah 2001); *Pritzlaff v. Archdiocese of Milwaukee*, 553 N.W.2d 780 (Wis. 1995) (involving abuse of adult but used throughout Wisconsin child sex abuse cases to impose First Amendment barrier against theories of negligence in supervision and retention of employees in child sex abuse cases). These courts also have misread this Court's jurisprudence.

The limited judicial abstention doctrine has clear parameters, and only bars judicial review of church decisions addressing purely ecclesiastical matters, in disputes between factions of the church that have been governed by church law. This Court has never extended this doctrine to cases that involve third party harm and that may be resolved through "neutral principles of law." *Jones v. Wolf,* 443 U.S. 595, 604 (1979).

The question in a negligence or negligent supervision or retention case concerns whether there was

conduct that put children at risk. The beliefs of the actors are simply irrelevant. Thus, even if customs and practices of the Archdiocese were involved in this case, the limited abstention doctrine would still not immunize it for its secular torts resulting in secular harm to Petitioner. The question in clergy sex abuse cases is whether the organization negligently created the conditions for child sex abuse. No ecclesiastical dispute is entailed, because the relevant evidence involves proof of conduct, whether religiously motivated or not. *See General Council on Finance and Admin. of the United Methodist Church v. Superior Court of California*, 439 U.S. 1369, 1370 (1978) (holding that where the dispute is secular, and not ecclesiastical, the abstention doctrine does not apply). Moreover, religious liberty claims in this context are particularly misplaced as it is the extremely rare religious organization that will assert that its religious beliefs required it to put children at risk.

This Court has never granted First Amendment immunity to a church for its tort liability for violation of a neutral, generally applicable law. Its doctrine is squarely to the contrary. *See Employment Div. v. Smith*, 494 U.S. 872 (1990). That doctrine needs to be brought to bear by this Court in this arena so that the states may protect children and deter those organizations that fail to create the conditions for safety.

REASONS FOR GRANTING THE WRIT

I. There Is a Split in Authority Whether the First Amendment Shields Religious Organizations From Accountability for Negligence and Negligent Supervision and Retention of Their Employees Who Sexually Abuse Children

There is a compelling need for this Court to take up this issue at this time. There is a split in authority that has taken this Court's free exercise and establishment doctrine off-track to the detriment of the protection of children in too many jurisdictions. While a number of states have held that the First Amendment is not a shield for religious organizations facing claims of negligence and negligent supervision and retention of clergy who sexually abuse children, a significant number have reached the opposite conclusion, including Missouri, Utah, and Wisconsin.[1]

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[1] There is a separate, though related, issue involving whether the First Amendment is a barrier to liability in a case involving clergy taking advantage of an adult. Cases involving adults include *Rashedi v. General Bd. of Church of Nazarene*, 54 P.3d 349 (Ariz. Ct. App. 2002); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988); *Winkler v. Rocky Mountain Conference of the United Methodist Church*, 923 P.2d 152 (Colo. Ct. App. 1996); *Doe v. Evans,* 814 So.2d 370 (Fla. 2002); *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. Ct. App. 1997); *Bivin v. Wright*, 656 N.E.2d 1121 (Ill. Ct. App. 1995); *Roppolo v. Moore,* 644 So.2d 206 (La. Ct. App. 1994); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 444 (Me. 1997); *Teadt v. Lutheran Church Missouri Synod*, 603 N.W.2d 816 (Mich. Ct. App. 1999); *Dausch v. Rykse,*

(Continued on following page)

The legislatures in these states cannot improve the safety of children from predatory adults in religious organizations, because the highest courts of the state have erected this First Amendment shield, which a legislature cannot overcome. Only this Court has the capacity to definitively remove this artificial and inappropriate barrier so that children can be protected and religious organizations deterred from putting them at risk.

Many state Supreme Courts have held to the contrary that the First Amendment is not a bar to accountability for negligent oversight of a religious employee. *Melanie H. v. Defendant Doe,* No. 04-1596-WQH-(WMc), slip op. at 8 (S.D. Cal., Dec. 20, 2005); *Roman Catholic Bishop of San Diego v. Superior Court of San Diego County*, 50 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996); *Bear Valley Church of Christ v.*

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52 F.3d 1425, 1429 (7th Cir. 1994). The law in Minnesota is unclear. *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426 (Minn. 2002); *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003); *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 911-13 (Neb. 1993); *F.G. v. MacDonell,* 696 A.2d 697 (N.J. 1997); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *Smith v. Privette,* 495 S.E.2d 395 (N.C. Ct. App. 1998); *Byrd v. Faber,* 565 N.E.2d 584 (Ohio 1991); *Hawkins v. Trinity Baptist Church,* 30 S.W.3d 446, 453 (Tex. Ct. App. 2000); *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis.2d 302 (1995)*; L.L.N. v. Clauder*, 563 N.W.2d 434 (Wis. 1997).

DeBose, 928 P.2d 1315, 1323 (Colo. 1996); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967 (Conn. Super. Ct. 1998); *Malicki v. Doe,* 814 So.2d 347 (Fla. 2002); *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996); *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806, 812 (Minn. Ct. App. 1992); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213 (Miss. 2005); *Berry v. Watchtower Bible and Tract Soc. of New York, Inc.*, 879 A.2d 1124, 1135 (N.H. 2005) (Dalianis, J., concurring in part, dissenting in part); *Kenneth R. v. Roman Catholic Diocese*, 229 A.D.2d 159, 654 N.Y.S.2d 791, 795-96 (N.Y. App. Div. 1997); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); *N.H. v. Presbyterian Church*, 998 P.2d 592, 602-03 (Okla. 1999); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. Ct. App. 1989); *Turner v. Roman Catholic Diocese of Burlington,* 987 A.2d 960 (Vt. 2009); *C.J.C. v. Corporation of the Catholic Bishop of Yakima,* 985 P.2d 262, 277 (Wash. 1999).

Federal courts have adopted this reasoning as well. *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.,* 196 F.3d 409 (2d Cir. 1999); *Doe v. Norwich Roman Catholic Diocesan Corp.,* 268 F. Supp. 2d 139 (D.Conn. 2003); *Smith v. O'Connell,* 986 F. Supp. 73, 80 (D.R.I. 1997); *Doe v. Hartz*, 970 F. Supp. 1375, 1431-32 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1175 (N.D.Tex. 1995), *aff'd*, 134 F.3d 331 (5th Cir. 1998); *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66

(D.Conn. 1995); *Isely v. Capuchin Province,* 880 F. Supp. 1138, 1151 (E.D.Mich. 1995).

The uncertainty in those states that have not yet reached a holding on this issue also demands this Court's attention if children are going to be protected and the states are going to be free to pass laws that make religious organizations accountable. The states where the highest court has not yet reached a holding on this pervasive issue include Alabama, Alaska, Arkansas, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maryland, Montana, Nevada, New Mexico, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wyoming. There is every reason to expect this issue will need to be addressed by these courts in the future as more and more child sex abuse victims come forward, and they would all benefit from this Court's guidance.

This issue affects millions. Clergy sex abuse is not peculiar to any one religious organization. Many have had to deal with the issue, and there is no end in sight at this time. *Doe v. Boy Scouts of Am.,* 224 P.3d 494 (Idaho 2009), reh'g denied (Feb. 8, 2010) (Boy Scouts of America); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1323 (Colo. 1996) (Church of Christ); *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah 2001) (Church of Jesus Christ of Latter-Day Saints); *State v. Jeffs*, 243 P.3d 1250 (Utah 2010) (Fundamentalist Church of Jesus Christ of Latter-Day Saints); *Berry v. Watchtower Bible and Tract Soc. of New York, Inc.*, 879 A.2d 1124,

1135 (N.H. 2005) (Jehovah's Witnesses); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. Ct. App. 1989) (Lutheran Church); *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996) (Pentacostal Church); *N.H. v. Presbyterian Church*, 998 P.2d 592, 602-03 (Okla. 1999) (Presbyterian Church); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999) (Roman Catholic Church); *Singh v. Keisler*, 255 Fed.Appx. 710 (4th Cir. 2007) (Sikhs).

This issue has percolated for years and there is no evidence that it is likely to abate any time soon, with the number of victims of child sex abuse increasing every day. This Court's attention to this critical issue is needed for every child in each state. No organization, including a religious organization, should be permitted to operate with impunity under a cloak constructed from the First Amendment.

CONCLUSION

Whether the First Amendment is a shield for religious organizations that negligently supervise and retain their clergy who sexually abuse children is an issue that has percolated for years, is the subject of a widespread split in authority among state and federal courts, and will continue to be an important issue in every state. For these reasons, Petitioner respectfully asks this Court to grant certiorari in this case.

In the alternative, Petitioner requests that this Court summarily reverse the decision below with an indication that *Gibson v. Brewer*, 952 S.W.2d 239 (Mo.

1997) is a misinterpretation of the First Amendment and that religious organizations are legally responsible for protecting children from their employees who sexually abuse children.

Respectfully submitted,

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APPENDIX (DECISION)

In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

JOHN DOE AP, Plaintiff/Appellant, vs. ROMAN CATHOLIC ARCHDIOCESE OF ST. LOUIS, ET AL., Defendants/Respondents.	)	No. ED 94720 Appeal from the Circuit Court of the City of St. Louis Hon. Donald L. McCullin Filed: July 5, 2011

John Doe AP ("John Doe") appeals from the trial court's grant of summary judgment in favor of the Roman Catholic Archdiocese of St. Louis ("the Archdiocese"), Father Thomas Cooper ("Cooper"), and Archbishop Raymond Burke[1] ("Archbishop Burke"). John Doe contends the trial court erred in granting summary judgment in favor of the Archdiocese on his claim for intentional failure to supervise clergy because the trial court interpreted *Gibson v. Brewer,* 952 S.W.2d 239 (Mo. banc 1997) incorrectly: (1) by including a premises requirement for the acts of sexual abuse, and (2) by finding the sexual abuse did not occur on premises. John Doe also argues the trial court erred in granting the Archdiocese's motion to dismiss his claims for negligent failure to supervise

[1] Archbishop Burke was sued only in his representative capacity as Archbishop of the Archdiocese.

children because the trial court interpreted *Gibson,* incorrectly: (1) in finding negligence in the supervision of a child requires an examination of the standard of care of a priest, and (2) in finding the First Amendment barred judicial consideration of whether the Archdiocese complied with generally applicable tort rules that apply to all employers. We affirm.

John Doe was born on September 24, 1957. John Doe was a parishioner at a Catholic Church in St. Louis, Missouri, where Cooper was a Catholic priest. While John Doe attended the church, Cooper worked with, mentored, and counseled him. From approximately 1970 to 1971, when John Doe was still a minor, Cooper sexually abused him on two separate occasions. The acts of sexual abuse, which included oral sex and attempted anal sex, all occurred at Cooper's clubhouse on the Big River.

The abuse caused John Doe to experience depression and emotional problems. However, John Doe never told anyone of his experience until he revealed it to his psychologist in 2002, at the age of 45.

John Doe filed his petition on June 22, 2005, which included the following counts: (I) child sexual abuse and/or battery against all Defendants; (II) breach of fiduciary duty against all Defendants; (III) fiduciary fraud and conspiracy to commit fiduciary fraud against all Defendants; (IV) fraud and conspiracy to commit fraud against all Defendants; (V) intentional infliction of emotional distress against the Archdiocese and Archbishop Burke; (VI) intentional

infliction of emotional distress against Cooper; (VII) negligence against all Defendants; (VIII) vicarious liability (respondeat superior) against the Archdiocese and Archbishop Burke; (IX) negligent supervision, retention, and failure to warn against the Archdiocese and Archbishop Burke; and (X) intentional failure to supervise clergy against the Archdiocese and Archbishop Burke.

The Archdiocese filed an answer and asserted Count X failed to state a claim upon which relief could be granted and was barred by the statute of limitations and laches. The Archdiocese also filed a motion to dismiss counts I, II, III, IV, V, VII, VIII, IX for failure to state a claim upon which relief can be granted. The trial court granted the Archdiocese's motion and dismissed counts I, II, III, IV, V, VII, VIII, and IX.

Defendant Cooper died on December 24, 2003, and John Doe dismissed without prejudice his claims against Defendant Cooper, which included counts I, II, III, IV, VI, and VII.

The Archdiocese also filed a motion for summary judgment on count X, John Doe's sole remaining claim of intentional failure to supervise clergy, arguing John Doe could not prove the alleged acts of sexual abuse occurred on property owned or controlled by the Archdiocese or while Cooper was using the Archdiocese's chattel. The Archdiocese also contended it was entitled to summary judgment because John Doe's claim was time-barred by the statute of

limitations. John Doe filed a response, arguing the abuse included "seduction and grooming," which took place on church property prior to the sex acts themselves and that the statute of limitations was tolled until May of 2002 when John Doe's repressed memories of the abuse returned to him. John Doe contends as a result the Archdiocese was not entitled to summary judgment.

The trial court granted the Archdiocese' motion for summary judgment, finding John Doe could not prove the Archdiocese possessed the premises on which he was allegedly sexually abused by its priest. However, the trial court did not grant summary judgment on the basis of the statute of limitations, finding that different conclusions could be drawn from the evidence, and thus, it was a question for a jury. This appeal follows.

The propriety of summary judgment is purely an issue of law. *Meramec Valley R-III School Dist. v. City of Eureka,* 281 S.W.3d 827, 835 (Mo. App. E.D. 2009). Accordingly, the standard of review on appeal regarding summary judgment is no different from that which should be employed by the trial court to determine the propriety of sustaining the motion initially. *Id.* Summary judgment is designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated its right to judgment as a matter of law. *Id.*

Our review of the grant of summary judgment is *de novo. Id.* Summary judgment is upheld on appeal

if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. *Id.* The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. *Meramec Valley R-III School Dist.,* 281 S.W.3d at 835. Facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. *Id.* A defending party may establish a right to judgment as a matter of law by showing any one of the following: (1) facts that negate any one of the elements of the claimant's cause of action; (2) the non-movant, after an adequate period of discovery, has not and will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or (3) there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense. *Id.* Once the movant has established a right to judgment as a matter of law, the non-movant must demonstrate that one or more of the material facts asserted by the movant as not in dispute is, in fact, genuinely disputed. *Id.* The non-moving party may not rely on mere allegations and denials of the pleadings, but must use affidavits, depositions, answers to interrogatories, or admissions on file to demonstrate the existence of a genuine issue for trial. *Id.*

Because John Doe's first two points concern the premises requirement of a claim for intentional failure to supervise clergy, we will address them together. In his first point, John Doe argues the trial court erred in granting summary judgment on his claim for intentional failure to supervise clergy because the trial court interpreted *Gibson v. Brewer,* 952 S.W.2d 239 (Mo. banc 1997) incorrectly by including a premises requirement for the acts of sexual abuse. John Doe contends an intentional failure to supervise clergy concerns the individual priest, not the premises. In his second point, John Doe argues the trial court erred in granting summary judgment on his claim for intentional failure to supervise clergy because the trial court interpreted *Gibson* incorrectly in finding the sexual abuse did not occur on premises in that the predicate acts of grooming took place on church property and were a pattern of the abuse and should not have been separately considered. We disagree.

In *Gibson,* the Supreme Court held a cause of action for intentional failure to supervise clergy is stated if (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 other requirements of the Restatement (Second) of Torts, section 317 are met. *Gibson,* 952 S.W.2d at 248. Section 317 of the Restatement (Second) of Torts provides:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

The failure to meet one of these five elements is fatal to John Doe's claim for intentional failure to supervise.

The Archdiocese cites the fifth factor, which consists of a number of factors in Section 317 of the Restatement (Second) of Torts. In particular, Section 317 requires that the servant be upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or is using a chattel of the master. In this case, the Archdiocese contends Cooper, the servant, was not on the premises of the Archdiocese and was not using its chattel when the abuse occurred.

John Doe maintains that allowing Cooper to take children off the Archdiocese's premises alone in the face of its knowledge that he had in the past engaged in sexual abuse with children is sufficient for liability to attach. John Doe contends the Archdiocese could have prevented Cooper from taking children on outings and trips, but it failed to do so and this failure to supervise occurred on its premises.

However, the elements of a claim for intentional failure to supervise are spelled out in *Gibson* as noted above and they include the incorporation of Section 317 Restatement (Second) of Torts. Thus, the Archdiocese was only under a duty to control Cooper when he was on its premises or when he was using its chattel. There is no evidence Cooper met either of these conditions when the abused occurred.

In *Weaver v. African Methodist Episcopal Church, Inc.,* 54 S.W.3d 575, 578 (Mo. App. W.D. 2001), a minister filed a claim for, among other things, intentional failure to supervise clergy against the African Methodist Episcopal Church ("AMEC") after she was sexually harassed and groped by three church elders in the lobby of the church. AMEC contended it did not own the church where the groping occurred, but the court found AMEC clearly "possessed" the church and further that the elder in question was privileged to enter the property only as the servant of AMEC, the master. *Id.* at 583. Thus, the court found the plaintiff sufficiently satisfied the premises elements of Section 317. *Id.*

The court in *Weaver* also noted a master's duty under Section 317 is applicable only when the servant is acting outside the course and scope of his employment. *Id.* at 582. This may be because the servant is not performing the work of his employer at the time of the act or at the time he commits an intentional tort which, by definition, is not done in his role as the master's agent but rather solely for his own purposes. *Id.* The limitations expressed in Section 317(a)(i) are intended to restrict the master's liability for a servant's intentional acts outside the course and scope of employment to situations where either the master has some degree of control of the premises where the act occurred or where the master, because of the employment relationship, has placed the servant in a position to obtain access to some premises that are not controlled by the master. *Weaver,* 54 S.W.3d at 582. Such limitations serve to restrict the master's liability for a servant's purely personal conduct which has no relationship to the servant's employment and the master's ability to control the servant's conduct or prevent harm. *Id.* at 582-83.

Further, comment b to Section 317 notes:

> the master as such is under no peculiar duty to control the conduct of his servant while he is outside of the master's premises, unless the servant is at the time using a chattel entrusted to him as servant. Thus, a factory owner is required to exercise his authority as master to prevent his servants, while in the factory yard during the lunch hour, from

> indulging in games involving an unreasonable risk of harm to persons outside the factory premises. He is not required, however, to exercise any control over the actions of his employees while on the public streets or in a neighboring restaurant during the lunch interval, even though the fact that they are his servants may give him the power to control their actions by threatening to dismiss them from his employment if they persist.

Restatement (Second) Torts, Section 317, comment b.

In a case from Pennsylvania somewhat similar to the instant case, a church was held liable for sexual assault under § 317 where the priest gained access to the teen-age parishioner's hotel room for the purpose of providing counseling. *Hutchison v. Luddy,* 742 A.2d 1052, 1062 (1999).

Thus, the fifth element of a claim for intentional failure to supervise under Gibson requires John Doe to show the Archdiocese owned, controlled, had a right to occupy or control the location where the abuse occurred, or had some right to control the activity which occurs thereon. In this case, all of the sexual abuse occurred at Cooper's clubhouse. John Doe even states in his brief that oral sex, masturbation, and attempted anal sex occurred "off church property." John Doe also testified nothing ever happened to him sexually at the parish school, in the church, in the rectory or the priest's living room, and that the only two instances of sexual abuse occurred at the clubhouse. John Doe also testified his trips to

the clubhouse were not sponsored by the parish and that unlike in *Hutchison,* when he was at the clubhouse he did not seek or receive religious training, mentoring, or counseling. Thus, John Doe admits the oral sex, masturbation, and attempted anal sex were not committed on premises possessed by the Archdiocese. We also note there is no evidence in the record showing the Archdiocese owned, controlled, had a right to occupy or control the clubhouse or anything that happened there.[2] As a result, John Doe fails to state an adequate claim for intentional failure to supervise.

However, John Doe argues Cooper, while on church property, engaged in "grooming" to set up a situation where the sexual abuse could happen. We note there is no evidence in the record that any sexual abuse occurred on church premises. The so-called "grooming" cited by John Doe does not qualify as sexual abuse, and, as such, does not satisfy the fifth requirement of a claim for intentional failure to supervise, which requires the sexual abuse to occur

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[2] We note John Doe asserts "[t]he Archdiocese expects its priests to be on duty 24/7." However, in finding the Archdiocese's insurance policy did not provide coverage for injuries a police officer sustained while trying to remove a priest from a protest at an abortion clinic, the court noted the fact that the priest was a priest 24 hours a day does not make the Archdiocese responsible for all his activities, and does not make any and all of the activities and actions of the priest within the scope of his respective duties. *Maryland Cas. Co. v. Huger,* 728 S.W.2d 574, 582 (Mo. App. E.D. 1987)

on property possessed by the church. John Doe contends the sexual abuse is inseparable from the grooming. We note first that the record is silent regarding specific acts of "grooming," as differentiated from mere friendly behavior, that may have occurred on church property, but, in any case, it is undisputed that the sexualization of the relationship and the acts of abuse only occurred at the clubhouse. Further, we can find no authority that conflates so-called "grooming" with sexual abuse. Thus, we find the alleged "grooming" in this case does not suffice to meet the premises requirement of a claim for intentional failure to supervise.

John Doe also argues the Archdiocese has a general duty to avoid creating an unreasonable and foreseeable risk of harm to its children. In support of his theory, John Doe relies on *Snowbarger v. Tri-County Electric Cooperative,* 793 S.W.2d 348, 350 (Mo. banc 1990), which involved an appeal by an employee's widow for benefits under the Workers Compensation Act where an employee, after working 86 hours in a 100.5 hour time period during an emergency created by an ice storm, fell asleep while driving and crashed into another vehicle, killing the employee. The Supreme Court held that the facts before it satisfied an exception to the requirement of Section 287.020.5 that workers be "engaged in or about the premises where their duties are being performed or where their services require their presence as a part of such service," but did not address whether the employer had any duty to the woman injured when

the employee collided with her after falling asleep. *Id.* Thus, we do not find the case to be helpful to John Doe here.

John Doe also relies on *Berga v. Archway Kitchen and Bath, Inc.,* 926 S.W.2d 476, 477 (Mo. App. E.D. 1996), which involved a negligence claim brought against an employer, where its employee was driving home after being exposed to noxious fumes at work and collided with plaintiff's son's car. In that case, the court found after analyzing Restatement (Second) of Torts Section 317 and *Snowbarger,* that the law did not support imposing a duty on employer. *Id.* at 482. Thus, the *Berga* case is not supportive of John Doe's argument here. In addition, it is distinguishable because it involved a negligent supervision case as opposed to an intentional failure to supervise claim. We can find no Missouri case supporting the imposition of a general duty to avoid creating an unreasonable and foreseeable risk of harm in an action for intentional failure to supervise.[3]

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[3] The cases John Doe relies on from other jurisdictions, namely *Robertson v. LeMaster,* 171 W.Va. 607 (1983), *Faverty v. McDonald's Restaurants of Oregon, Inc.,* 133 Or.App. 514 (1995), and *Fazzolari v. Portland School Dist. No. 1J*, 734 P.2d 1326 (1987), all rely on a theory of negligent supervision. In *Gibson,* the court found applying a negligence standard to the actions of a Diocese in dealing with its parishioners offended the First Amendment. 952 S.W.2d at 248. Thus, we cannot impose a duty under a theory of negligence here, and we can find no case involving an intentional failure to supervise that has relied on the imposition of a general duty to avoid creating an unreasonable and foreseeable risk of harm.

Therefore, we find the trial court did not err in granting summary judgment on John Doe's claim for intentional failure to supervise clergy. Point denied.

Because John Doe's third and fourth points both involve claims that are based on a theory of negligence, we will address them together. In his third point, John Doe argues the trial court erred in granting the Archdiocese's motion to dismiss his claims for negligent failure to supervise children because the trial court interpreted *Gibson* incorrectly in finding negligence in the supervision of a child requires an examination of the standard of care of a priest in that *Smith v. Archbishop of St. Louis,* 632 S.W.2d 516 (Mo. App. 1982) and its progeny establish the Archdiocese owed a duty of care to John Doe commensurate with the foreseeable risks to which he was exposed. In his fourth point, John Doe argues the trial court erred in dismissing his negligence claims based on *Gibson* because neither the Free Exercise Clause nor the Establishment Clause of the First Amendment bars judicial consideration of whether the Archdiocese complied with generally applicable tort rules that apply to all employers. We disagree.

Appellate review of a trial court's grant of a motion to dismiss is de novo. *Stahlman v. Mayberry,* 297 S.W.3d 113, 115 (Mo. App. E.D. 2009). We accept as true all of the plaintiffs averments and view the allegations in the light most favorable to the plaintiff. *Id.* We review the petition 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.*

John Doe filed two negligence claims: Count VII for general negligence and Count IX for negligent supervision, retention, and failure to warn. The latter claim involved only a negligent failure to supervise Cooper, not a negligent failure to supervise children, which is John Doe's claim in his third point. Therefore, because John Doe did not plead negligent failure to supervise children in Count IX, his argument with respect to Count IX is meritless.

In addition, while John Doe attempts to phrase his claim as a negligent failure to supervise children, his claim for general negligence in Count VII still involves the Archdiocese's negligence in failing to supervise Cooper. The Supreme Court has held questions of hiring, ordaining, and retaining clergy, necessarily involve interpretation of religious doctrine, policy, and administration, and such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment. *Gibson v. Brewer,* 952 S.W.2d 239, 46-47 (Mo. banc 1997). Further, adjudicating the reasonableness of a church's supervision of a cleric – what the church "should know" – requires inquiry into religious doctrine. *Id.* at 247. Thus, Missouri courts have declined

to recognize a cause of action for negligent failure to supervise clergy.[4] *Id.*

Although some federal courts[5] diverge on the issue of whether the religion clauses in the First Amendment bar plaintiffs from asserting certain negligence claims against religious institutions, those decisions do not authoritatively compel us to revisit a First Amendment analysis already conducted by the Supreme Court of Missouri in *Gibson*. *Doe v. Roman Catholic Diocese of St. Louis,* 311 S.W.3d 818, 824 (Mo. App. E.D. 2010). Such decisions merely inform us that other courts disagree as to the application of First Amendment law to the facts at bar. *Id.*

The holding in *Gibson,* which was that the First Amendment barred the assertion of tort claims against a religious institution based on its alleged negligence in supervising, retaining, or hiring sexually abusive clerics, has recently been reaffirmed as the controlling law in Missouri. *See Nicholson v. Roman Catholic*

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[4] John Doe relies on *Smith, By and Through Smith v. Archbishop of St. Louis on behalf of Archdiocese of St. Louis*, (Mo.App. E.D. 1982). While that case involved negligent supervision, it did not involve negligent supervision of a member of the clergy, and thus, it did not involve any First Amendment entanglement. The current case is distinguishable because the negligent supervision claim involves the Archdiocese's supervision of one of its priests, which implicates the First Amendment as discussed above.

[5] *See Mary Doe SD v. The Salvation Army,* 2007 WL 2757119 (E.D. Mo. 2007) *and Perry v. Johnston,* 2011 WL 2272142 (8th Cir. 2001).

Archdiocese of St. Louis, 311 S.W.3d 825, 827 (Mo. App. E.D. 2010) *and Doe,* 311 S.W.3d at 824. Until the Missouri Supreme Court or the United States Supreme Court declares differently, *Gibson* constitutes controlling law in Missouri, law which we are bound to apply. *Doe,* 311 S.W.3d at 824.

Therefore, the trial court did not err in granting the Archdiocese's motion to dismiss John Doe's claims for negligent failure to supervise. Point denied.

The judgment of the trial court is affirmed.

ROBERT G. DOWD, JR., Judge

Roy L. Richter, P.J. and
Lucy D. Rauch, Sp.J., concur.

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

JOHN DOE AP, **Plaintiff,** **vs.** **FATHER THOMAS COOPER, et al.,** **Defendants.**	**Cause No. 052-07056** **Division No. 20**

ORDER AND JUDGMENT

(Filed Mar. 5, 2010)

The Court has before it "Defendant Archdiocese of St. Louis's Motion for Summary Judgment." For the reasons set forth below, the motion is granted.

Plaintiff John Doe AP filed this lawsuit on June 25, 2005 against Defendant Father Thomas Cooper and the Archdiocese of St. Louis for the alleged sexual abuse of Plaintiff by Fr. Cooper. On June 30, 2006, Plaintiff dismissed all counts against Fr. Cooper[1], which included Counts I, II, III, IV, VI, and VII. On May 15, 2007, this Court dismissed Counts I, II, III, IV, V, VII, VIII, and IX against the Archdiocese,

[1] Father Cooper died on December 24, 2003.

leaving Count X, a claim of intentional failure to supervise clergy against the Archdiocese, as the sole remaining cause of action.

Briefly, Plaintiff alleges he was sexually abused by Fr. Cooper from approximately 1970 to 1971 while Plaintiff was a minor[2]; that Fr. Cooper's supervisors in the Archdiocese knew that Cooper had a history of sexual abuse of minor parishioners; and that they intentionally failed to supervise him to prevent the sexual abuse suffered by Plaintiff. The specific acts of sexual abuse allegedly took place at what Plaintiff describes as a clubhouse on the Big River. Plaintiff alleges the psychological trauma from the incidents caused him to lose all memory of the abuse until 2002 when his memories returned during psychiatric treatment.

The Archdiocese moves for summary judgment on two grounds: (1) that Plaintiff cannot prove the incidents of sexual abuse occurred on property owned or controlled by the Archdiocese; and (2) that Plaintiff's claim is barred by the applicable statute of limitations found in § 516.120(4) RSMo. Plaintiff opposes the motion, arguing that (1) the abuse included "seduction and grooming" which took place on church premises prior to the sex acts themselves; and (2) the statute of limitations was tolled until May of 2002 when Plaintiff's repressed memories of the abuse returned to him.

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[2] Plaintiff was born on September 24, 1957.

The propriety of summary judgment is purely an issue of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993). To be entitled to summary judgment, the moving party must demonstrate that: (1) there is no genuine dispute as to the material facts on which the party relies for summary judgment; and (2) on those facts, the party is entitled to judgment as a matter of law. Rule 74.04. The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question. *Id*. at 380. A defending party may establish a right to judgment as a matter of law by showing any one of the following: (1) undisputed facts that negate any one of the elements of the claimant's cause of action; (2) the non-movant, after an adequate period of discovery, has not produced and would not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or (3) there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense. *Id*. at 381. Defendant has chosen the second method.

Once a prima facie case is made for summary judgment, an adverse party may not rest upon the mere allegations or denials of the party's pleading; the response must "show – by affidavit, depositions, answers to interrogatories, or admissions on file – that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed." *ITT Commercial Finance Corp.*,

854 S.W.2d at 381. If such a showing is not made by the non-movant, judgment for the movant is proper. *Id*. "A 'genuine issue' is a dispute that is real, not merely argumentative, imaginary or frivolous." *Id*. at 382. A "genuine issue" exists where the record contains competent evidence of "two plausible, but contradictory, accounts of the essential facts." *Id*. The Court, mindful that summary judgment is "an extreme and drastic remedy," exercises great caution in granting summary judgment because the procedure implicates the denial of due process by denying an opposing party his day in court. *See Horner v. Spalitto*, 1 S.W.3d 519, 522 (Mo. App. W.D. 1999).

Property of the Archdiocese

The elements of a cause of action for intentional failure to supervise clergy are: (1) a supervisor (or supervisors) exists (2) the supervisor (or supervisors) knew that, absent supervision, harm was certain or substantially certain to result, (3) the supervisor (or supervisors) disregarded this known risk, (4) the supervisor's inaction caused damage, and (5) the other requirements of the *Restatement (Second) of Torts,* Section 317 are met. *Gibson v. Brewer,* 952 S.W.2d 239, 248 (Mo. banc 1997). Section 317 of the Restatement provides that

> [a] master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as

> to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.

The Archdiocese concedes that Plaintiff has evidence of the first four elements – that is, that Father Cooper's supervisors in the Archdiocese knew prior to the date of the alleged acts of sexual abuse of Plaintiff that Father Cooper had a history of sexual abuse of children in his care; that his supervisors in the Archdiocese knew that leaving Father Cooper alone with children was certain or substantially certain to result in harm to them; yet they disregarded that known risk; and as a result Plaintiff was sexually abused by Father Cooper. The Archdiocese argues the cause of action nevertheless fails because Plaintiff cannot prove he was sexually abused by Father Cooper on property owned or controlled by the Archdiocese.

The Archdiocese can be held liable under an intentional failure to supervise claim only if the abuse Plaintiff suffered occurred on premises in possession of the Archdiocese or upon which Fr. Cooper was privileged to enter only as its servant. § 317(a) of the Restatement. The term "possesses" does not necessarily mean to own or control the property in question. As used in § 317 the term includes property

occupied by the master which the master has some right to occupy or to control the activity which occurs thereon. *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575, 582 (Mo. App. W.D. 2001). As explained in *Weaver*,

> a master's duty under § 317 is applicable only when the servant is acting outside the course and scope of his employment. Restatement (Second) of Torts § 317(a) comment a. This may be because the servant is not performing the work of his employer at the time of the act or at the time he commits an intentional tort which, by definition, is not done in his role as the master's agent but rather solely for his own purposes. *Id*. at comment b. The limitations expressed in § 317(a)(i) are intended to restrict the master's liability for a servant's intentional acts outside the course and scope of employment to situations where either the master has some degree of control of the premises where the act occurred or where the master, because of the employment relationship, has placed the servant in a position to obtain access to some premises that are not controlled by the master.

Weaver, 54 S.W.3d at 582. In the present case, Plaintiff has presented no evidence that the Archdiocese "possessed," within the meaning of § 317, the clubhouse on the Big River where the sexual abuse is alleged to have occurred.

Plaintiff argues that while it is true that no sexual acts occurred at the Church or the rectory, the abuse started there in the form of "small seductions or pedophilic grooming." Plaintiff contends that where the overt sex acts occurred does not matter, as proper supervision of the Plaintiff and Fr. Cooper while on the premises of the church would have prevented the sexual conduct that occurred off premises. Plaintiff argues that "[s]ince the precedent acts of sexual abuse occurred on Church grounds and they are intrinsically tied to the incidents of sexual activity subsequently taking place off premises, failure of the Archdiocese to control its Priest renders it liable for the abuse in its entirety."

The Court is not persuaded. The only evidence offered of the alleged seduction and pedophilic grooming is Plaintiff's testimony that Fr. Cooper took a special interest in Plaintiff, taking him on trips alone and with others, and lavishing him with attention and affection. Moreover, in cases of this sort Plaintiff's argument would essentially eliminate Section 317's requirement that to be liable the Church must possess the premises on which the Priest's objectionable conduct occurred because virtually all priests, by the nature of their work, have close personal contact with parishioners on church premises, conduct which in the context of a lawsuit could be characterized as "seduction" or "grooming," as has been alleged in this case. The Court believes that the location of the inappropriate sexual conduct itself is the determinative issue under § 317 of the Restatement in an

intentional failure to supervise clergy action. Father Cooper's taking a special interest in Plaintiff and lavishing him with attention and affection is not itself objectionable, and does not establish liability on the part of the Archdiocese for failing to supervise that conduct.

Plaintiff next argues, citing cases from other jurisdictions[3], that Missouri recognizes a "general duty exception" to the premises requirement of § 317 of the Restatement that requires employers to avoid conduct that unreasonably creates a foreseeable risk of harm to a plaintiff. This is simply not the law in Missouri, and the cases cited do not support the contention.

Plaintiff next argues that the special relationship of the Archdiocese to Plaintiff vitiates any premises requirement. Plaintiff contends the Archdiocese acted in loco parentis to Plaintiff by taking custody of him, and that the duties of the priest and that of the Archdiocese, are not confined to the four walls of the church, because as a priest of the Archdiocese, Fr. Cooper was at all times clothed with the apparent authority of the Church. Again, this is not the law in Missouri. The fact that Father Cooper was a priest 24 hours a day does not make the Archdiocese

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[3] *Robertson v.LeMaster,* 171 W.Va. 607, 30 S.E.2d 563 (1983); *Faverty v. McDonald's Restaurants of Oregon, Inc*. 133 Or. App. 514, 892 P.2d 703 (1995); *Fazzolari v. Portland School Dist. No. 1J,* 303 Or. 1,734 P.2d 1326 (1987).

responsible for all his activities, and does not make any and all of his activities the actions of a priest within the scope of his respective duties. *Maryland Casualty Co. v. Huger,* 728 S.W.2d 574, 582 (Mo. App. E.D. 1987). The argument is rejected.

Next Plaintiff argues *Gibson v. Brewer* has been repudiated in other jurisdictions. While this is undoubtedly true[4], until and unless our Supreme Court revisits *Gibson v. Brewer* this Court is obliged to abide by its rulings.

Because the Court finds that under the summary judgment record Plaintiff cannot prove the Archdiocese possessed the premises on which Plaintiff was allegedly sexually abused by its priest, Plaintiff cannot prove all the elements of his claim that the Archdiocese intentionally failed to supervise Fr. Cooper, and the Archdiocese is entitled to summary judgment.

Statute of Limitations

Having so ruled, for the sake of completeness the Court will nevertheless take up the Archdiocese's remaining argument that Plaintiff's cause of action is

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[4] *SeeRoman Catholic Diocese v. Morrison,* 905 So. 2d 1213, 1226 (Miss. 2005); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.,* 45 Conn. Supp. 397, 401 (Conn. Super. Ct. 1998); *Malicki v. Doe,* 814 So. 2d 347, 358 (Fla. 2002).

time barred. Section 516.120 RSMo[5] provides a five year statute of limitations for claims of intentional failure to supervise.

The Archdiocese characterizes Plaintiff's testimony as showing "that Plaintiff knew at the time he was first sexually abused by Cooper and thereafter that what happened was "not normal," that part of the abuse was extremely painful to Plaintiff and he told Cooper to stop because Cooper was hurting him; that, afterward, Plaintiff deliberately "never told a soul" what had happened – not even his fraternal twin brother who "knew everything about [him]' – because Plaintiff was embarrassed, ashamed, and knew that what happened 'wasn't right'; that Plaintiff consciously and intentionally avoided Cooper after the second incident of sexual abuse to ensure that Cooper would never have the opportunity to sexually abuse him again; that Plaintiff was so embarrassed and ashamed by the sexual abuse that he chose to keep the abuse as 'secret' for more than 30 years after it occurred; and that Plaintiff has always known – from the time the sexual abuse occurred – that it was 'wrong, plain and simple.'" Based on this characterization of the testimony, the Archdiocese argues Plaintiff

[5] In relevant part section 516.120(4) provides a five year statute of limitations for "[a]n action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated."

has always remembered the abuse and always knew it was wrong. Therefore, the Archdiocese argues, the statute of limitations expired in 1982, five years after Plaintiff turned 21 years of age[6], when Plaintiff's injury was capable of ascertainment.

The application of the pertinent statute of limitations, § 516.120, is governed by § 516.100, which provides that the limitations period does not begin to run, "when the wrong is done or the technical breach of . . . duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment." *Powel v. Chaminade College Preparatory Inc.*, 197 S.W.3d 576 (Mo. banc 2006). In determining when damage sustained is capable of ascertainment, the test is an objective one.

> The issue is not when the injury occurred, or when plaintiff subjectively learned of the wrongful conduct and that it caused his or her injury, but when a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages. At that point, the damages would be sustained and capable of ascertainment as an objective matter.

Powel, 197 S.W.3d at 584-85. The capable of ascertainment test being an objective one, where relevant facts are uncontested the statue of limitations issue

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[6] See § 516.170.

can be decided by the court as a matter of law. *Powel,* 197 S.W.3d at 585. It is only when contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run that it is a question of fact for the jury to decide. *Id*.

The Court's reading of Plaintiff 's deposition testimony as a whole is that Plaintiff 's memory of the sexual abuse was lost to his conscious mind sometime after the incidents took place but before he reached majority, and that looking back from the time of the deposition after his memory of the events was recovered, Plaintiff could say that shortly after the acts of abuse occurred he felt they were wrongful, that he avoided Fr. Cooper to prevent recurrence, but that for most of his life he had no memory of the events. The Court cannot say as a matter of law that memory cannot operate in this manner following sexual abuse and psychological trauma perpetrated against a child by his priest. The Court finds that different conclusions may be drawn from the evidence as to whether the statute of limitations has run. That makes it a question for a jury. Summary judgment on the ground that the statute of limitations has expired is denied.

In sum, the Court concludes that while Count X is not barred by the statute of limitations, the Archdiocese is entitled to summary judgment because Plaintiff has not, and cannot, present evidence to support a necessary element of his cause of action – that the Archdiocese possessed the premises on which the sexual abuse of Plaintiff allegedly occurred.

THEREFORE, it is Ordered and Decreed that Defendant Archdiocese of St. Louis' Motion for Summary Judgment on Count X of Plaintiff 's Petition is granted. Judgment is hereby entered in favor of Defendant Archdiocese of St. Louis, and against Plaintiff John Doe AP.

SO ORDERED:

/s/ Donald L. McCullin
Donald L. McCullin, Judge

Dated: 3/5/10

cc: Attorneys of record

ELECTRONIC NOTICE OF ENTRY
(Supreme Court Rule 74.03)
Supreme Court

CASE NO: SC92001 – JOHN DOE AP, APP V ROMAN CATHOLIC ARCHDIOCESE,RES

TO: Rebecca M. Randles

YOU ARE HEREBY NOTIFIED that the court duly entered the following:

Filing Date	Filing Time	Description	Last Activity
04-Oct-2011	13:00:00	Disp-App Tran to SC Denied	04-Oct-2011 13:14:08

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

JOHN DOE AP,	)	
Plaintiff,	)	
vs.	)	Cause No. 22052-07056
FATHER THOMAS COOPER, et al.,	)	Division No. 2
Defendants.	)	

ORDER

(Filed May 15, 2007)

The Court has before it Defendant Archdiocese of St. Louis' Motion to Dismiss Counts I, II, III, IV, V, VII, VIII, and IX of Plaintiff's Petition for Failure to State Claim Upon Which Relief Can Be Granted. The Court now rules as follows.

The facts as pleaded by Plaintiff are summarized as follows: Defendant Thomas Cooper was a Roman Catholic Priest at St. Mary Magdelen Parish in St. Louis, Missouri at all relevant times. Plaintiff was raised in a devoutly Roman Catholic family and attended St. Mary Magdalen parish. Defendant Cooper worked with, mentored, and counseled Plaintiff at St. Mary Magdalen. From approximately 1970 to 1971,

Defendant Cooper sexually abused and exploited Plaintiff. The sexual abuse of Plaintiff, and the circumstances under which the abuse occurred, caused Plaintiff to develop various psychological coping mechanisms and symptoms of psychological distress, including great shame, self-blame, and depression.

Defendant Archdiocese of St. Louis moves to dismiss Count I (Child Sexual Abuse and/or Battery), Count II (Breach of Fiduciary Duty), Count III (Fiduciary Fraud and Conspiracy to Commit Fiduciary Fraud), Count IV (Fraud and Conspiracy to Commit Fraud), Count V (Intentional Infliction of Emotional Distress), Count VII (Negligence), Count VIII (Vicarious Liability), and Count IX (Negligent Supervision, Retention, and Failure to Warn).[7] A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. banc 1993). It assumes that all of the plaintiff's averments are true, and liberally grants to the plaintiff all reasonable inferences therefrom. *Murphy v. A.A. Mathews, a Division of CRS Group Engineers, Inc.,* 841 S.W.2d 671, 672 (Mo. banc 1992). No attempt is made to weigh any facts as to whether they are credible or persuasive. Instead, the petition is reviewed to see

[7] Count X is also directed at Defendant Archdiocese and alleges Intentional Failure to Supervise Clergy. The Archdiocese has answered this Count and does not move to dismiss Count X. Count VI, alleging Intentional Infliction of Emotional Distress against Defendant Cooper only, is not included in this Motion.

whether the facts alleged meet the elements of a recognized cause of action, or a cause of action that might be adopted in that case. *Nazeri,* 860 S.W.2d at 306.

Count I (Child Sexual Abuse and/or Battery)

Count I is an action for Child Sexual Abuse and/or Battery. "Childhood sexual abuse" is a statutory cause of action and is defined in §537.046.1(1) as "any act committed by the defendant against the plaintiff which act occurred when the plaintiff was under the age of eighteen years and which act would have been a violation of §§ 566.030, 566.040, 566.050, 566.060, 566.070, 566.080, 566.090, 566.100, 566.110, or 566.120, RSMo, or § 568.020, RSMo."

Plaintiff alleges that Defendant Cooper engaged in unpermitted, harmful and offensive sexual conduct upon Plaintiff, and that such acts were committed while Defendant Cooper was acting within the course and scope of his employment with the Archdiocese, while Cooper was a managing agent of the Archdiocese, and/or that Cooper's acts were ratified by the Archdiocese.

Section 537.046 explicitly applies to "any act committed **by the defendant**." (Emphasis added.) Plaintiff argues that the Archdiocese may be civilly liable under this section under the aiding and abetting doctrine. Section 562.041 RSMo, the "aiding and abetting" statute, states that "A person is criminally responsible for the conduct of another when (1) the

statue defining the offense makes him so responsible; or (2) either before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense."

The Missouri Supreme Court and Courts of Appeals have yet to decide whether collateral defendants such as the Archdiocese can be held liable under §537.046 under an aiding and abetting theory.[8] However, the Court need not decide that issue today because Plaintiff has failed to allege that Defendant aided, or agreed to aid, or attempted to aid Defendant Cooper in his offenses.

Plaintiff alleges that the Archdiocese may be liable for Childhood Sexual Abuse because Defendant Cooper was acting with the course and scope of his employment with the Archdiocese when the acts were committed. Archdiocese argues that there is no vicarious liability for a church for the sexual abuse by its priest. Under the doctrine of respondeat superior, a principal is liable for its agent's acts that are

[8] There is a split in authority in other states regarding whether very similar statutes apply on such a basis to collateral defendants. Compare *C.J.C. v. Corporation of the Catholic Bishop of Yakima,* 985 P.2d 262, 266-270 (Wash. 1999) (statute on its face does not specifically include or exclude those persons who may bring claims, or against whom claims may be brought), with *Kelly v. Marcantonio,* 678 A.2d 873, 875-76 (R.I. 1996) (statute's applicability is limited to causes of action against "the" defendant who had himself engaged in the criminal conduct).

(1) within the scope of employment and (2) done as a means or for the purpose of doing the work assigned by the principal. *Henderson v. Laclede Radio, Inc.,* 506 S.W.2d 434, 436 (Mo. 1974). Intentional sexual misconduct is not within the scope of employment of a priest, and is in fact forbidden. *Gibson v. Brewer,* 952 S.W.2d 239, 246 (Mo. banc 1997). Therefore, Defendant can have no vicarious liability for sexual abuse or battery.

Plaintiff alternatively alleges that Archdiocese is liable for the sexual abuse because of ratification. Ratification is an act by a principal whereby he adopts or confirms an act of another purported to have been done on behalf of the principal. *Vogel v. A.G. Edwards & Sons, Inc.,* 801 S.W.2d 746, 756 (Mo.App. E.D. 1990). Ratification, however, requires that the principal have full knowledge of all material facts. *Id.* Plaintiff does not allege that Archdiocese had full knowledge of all material facts, only that Archdiocese "knew or should have known that their allowing Defendant Cooper access to young children as part of his official duties after reports of impropriety involved an unreasonable risk of causing emotional distress to Plaintiff and other similarly situated individuals." Further, this court could find no Missouri authority to hold a party civilly liable for a sexual assault based on a ratification theory. Count I is dismissed.

Count II (Breach of Fiduciary Duty)

Count II is for the breach of fiduciary duty. The petition alleges that Plaintiff had a fiduciary relationship with all Defendants. Plaintiff alleges that he reposed trust and confidence in Defendants as his spiritual guides, authority figures, teachers, mentors, and confidantes. Count II does not state a justiciable controversy, in that the analysis of the confidential relationship between a priest or a church and a parishioner inevitably entangles government with religion and violates the First Amendment. *H.R.B. v. J.L.G.,* 913 S.W.2d 92, 98 (Mo.App. E.D. 1995).

As explained in *H.R.B.,* clergy and religious organizations are not absolutely immune from civil liability. Tort actions against religious groups or persons are not offensive to the First Amendment if based on purely secular activities. *Id.*

However, Missouri courts have refused to recognize breach-of-fiduciary-duty actions against clergy for sexual misconduct. *Id.* Other causes of action are available to Plaintiff which do not require this court to determine whether the "Archdiocese and Archbishop breached their fiduciary duties to Plaintiff and abused their position of trust and confidence for their own personal gain." *See Id.* Count II is dismissed.

Count III (Fiduciary Fraud and Conspiracy to Commit Fiduciary Fraud)

In Count III, Plaintiff alleges that Defendants entered into fiduciary relationships with him, and had a duty to obtain and disclose information relating to sexual misconduct and other inappropriate behavior of Defendant Cooper. He alleges that Defendants misrepresented, concealed, or failed to disclose information relating to the sexual misconduct of Defendant Cooper, and conspired to do the same.

Defendant moves to dismiss, arguing that there is no' recognized cause of action in Missouri for "fiduciary fraud," and that Plaintiff's claims for Breach of Fiduciary Duty laid out in Count II and Fraud alleged in Count IV fail to state a claim. "Fiduciary fraud" has not been recognized as a separate tort in Missouri, and it is not entirely clear what the elements of such a tort would be that would make it different from "fraud" or "breach of fiduciary duty." Plaintiff argues that "fiduciary fraud" is the same as "constructive fraud," which is recognized in Missouri.

A breach of a fiduciary obligation is constructive fraud. *Gardine v. Cottey,* 360 Mo. 681, 230 S.W.2d 731, 739 (Mo. banc 1950); *In re Oliver,* 365 Mo. 656, 285 S.W.2d 648, 655 (Mo. banc 1956). Constructive fraud is a long-recognized cause of action. *Baker v. Humphrey,* 101 U.S. 494, 502, 25 L. Ed. 1065 (1879); 1 Joseph Story, EQUITY JURISPRUDENCE, 252-422, *esp.* 301-09 (12th ed. 1877). However Missouri courts typically label these claims as breach of

fiduciary duty. *Klemme v. Best,* 941 S.W.2d 493, 495-96 (Mo. banc 1997). Whether characterized as breach of fiduciary duty or constructive fraud, the elements of such a claim are the same. *Id.* Plaintiff's claim for constructive fraud/fiduciary fraud fails for the reasons stated above regarding Count II.

Having failed to state a claim for constructive fraud, Plaintiff's claim for conspiracy to commit constructive fraud also fails. *See Williams v. Mercantile Bank of St. Louis NA,* 845 S.W.2d 78, 85 (Mo.App. E.D. 1993).

Count IV (Fraud and Conspiracy to Commit Fraud)

In Count IV, Plaintiff alleges that Defendant Archdiocese knew or should have known of the sexual misconduct of Defendant Cooper, and misrepresented, concealed, or failed to disclose information relating to that sexual misconduct. Plaintiff further alleges that Defendants conspired to commit such fraud.

Defendant argues that Count IV fails because Plaintiff failed to allege with particularity the elements of fraud as required by Rule 55.15, and because Defendant lacks any "duty to disclose" as a matter of law. The rules governing the pleading of fraud are more precise than those which generally govern pleading a claim for relief. *Miller v. Ford Motor Co.,* 732 S.W.2d 564, 565 (Mo.App. E.D. 1987). Failure pp comply with Rule 55.15 fails to state a

claim for fraud. *Williams v. Belgrade State Bank,* 953 S.W.2d 187, 189 (Mo.App. S.D. 1997).

The elements of fraud are: 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. *E.g., Green Acres Enterprises, Inc. v. Nitsche,* 636 S.W.2d 149, 153 (Mo.App. W.D. 1982). Plaintiffs' petition attempts to state a claim for fraud by alleging:

> 55. Defendants knew or should have known of the sexual misconduct and other inappropriate behavior of their agents, including Defendant Cooper, as described herein.
>
> 56. Defendants misrepresented, concealed or failed to disclose information relating to sexual misconduct of their agents as described herein.
>
> 57. Defendants knew that it misrepresented, concealed, or failed to disclose information relating to sexual misconduct of their agents.
>
> 58. The fact that Defendants' agents had in the past and/or would in the future be likely to commit sexual misconduct with another minor at Defendants' St. Mary Magdalen Parish was a material fact in Plaintiff's and his family's decision whether or not to allow Plaintiff to attend and participate in activities at St. Mary Magdalen Parish and with Defendants' agent – Defendant Cooper.

59. Upon information and belief, Defendants, in concert with each other, with the intent to conceal and defraud, conspired and came to a meeting of the minds whereby they would misrepresent, conceal or fail to disclose information relating to the sexual misconduct of Defendants' agents. By so concealing, Defendants committed at least one act in furtherance of the conspiracy.

60. Defendants actions and/or inactions were willful, wanton and reckless for which punitive damages and/or damages for aggravating circumstances are appropriate.

61. As a direct result of Defendants' fraud and conspiracy, Plaintiff has suffered, and continues to suffer great pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, humiliation, and loss of enjoyment of life; was prevented and will continue to be prevented from performing his daily activities and obtaining the full enjoyment of life; has sustained loss of earnings and earning capacity; and/or has incurred and will continue to incur expenses for medical and psychological treatment, therapy, and counseling.

Defendant argues that Plaintiff has failed to state a claim for fraud because he has failed to identify any particular representation alleged to be fraudulent. A representation does not have to consist of words or positive assertions. It could also include "deeds, acts or artifices calculated to mislead another." *Kestner v.*

Jakobe, 446 S.W.2d 188, 193 (Mo.App. 1969), citing *Universal C.I.T. Credit Corporation v. Tatro,* 416 S.W.2d 66, 702 (Mo.App. 1967). Nonetheless, Plaintiff has failed to identify any particular deed, act or artifice in Count IV. The petition merely refers generally to Defendant's alleged misrepresentation of or failure to disclose information relating to the sexual misconduct of various agents.

Silence or nondisclosure of facts can be an act of fraud if it relates to a material matter known to the party sought to be accountable for fraud. *VanBooven v. Smull,* 938 S.W.2d 324, 328 (Mo.App. W.D. 1997). Plaintiff alleges that "the fact that Defendants' agents had in the past and/or would in the future be likely to commit sexual misconduct with another minor at Defendants' St. Mary Magdalen Parish was a material fact in Plaintiff's and his family's decision whether or not to allow Plaintiff to attend and participate in activities at St. Mary Magdalen Parish and with Defendants' agent – Defendant Cooper."

However, in order to base a fraud claim on silence or nondisclosure, there must be a duty to disclose arising from a relationship of trust and confidence, inequality of condition, or superior knowledge that is not within the fair and reasonable reach of the other party. *Dechant v. Saaman Corp.,* 63 S.W.3d 293, 295 (Mo.App. E.D. 2001). *Id.* There is no allegation in the petition of Defendant's superior knowledge. Plaintiff does generally allege a relationship of trust and confidence and a power imbalance as follows:

> 17. As a result of representations made by Defendants Archdiocese, Archbishop, and Cooper (collectively, "Defendants") and by virtue of the fact that Defendants held themselves out as the counselors and instructors on matters that were spiritual, moral, and ethical, Defendants had domination and influence over Plaintiff. Defendants, by maintaining and encouraging such a relationship with Plaintiff, entered into a fiduciary relationship with Plaintiff. In addition, by accepting the care, custody and control of the minor Plaintiff, Defendants stood in the position of an in *loco parentis* relationship with the minor Plaintiff. As a result of these special relationships between Plaintiff and Defendants, Plaintiff trusted and relied upon Defendants to nurture and protect him while he was in Defendants care and custody. The power imbalance between Defendants Plaintiff increased the young boy's vulnerability to Defendant Cooper.

The Court cannot find a duty to disclose based on the alleged special relationship between Defendant and Plaintiff. As the Missouri Court of Appeals said in *H.R.B. v. J.L.G.,* 913 S.W.2d 92, 99 (Mo.App. E.D. 1995):

> Religion was not merely incidental to plaintiff's relationship with defendant, the archbishop, and the church; it was the foundation for it. Counts I and VIII will inevitably require inquiry into the religious aspects of this relationship, that is, the duty owed by

> Catholic priests, parishes, and dioceses to their parishioners. The First Amendment does not allow secular courts to judge sectarian matters.

Plaintiff has failed to state a claim for fraud against Defendant.

Plaintiff also alleges that Defendants committed conspiracy to commit fraud. A civil conspiracy is an agreement between two or more persons to perform an unlawful act, or to use unlawful means to do a lawful act. *Oak Bluff Partners, Inc. v. Meyer,* 3 S.W.3d 777, 780-81 (Mo. banc 1999). A claim of conspiracy must allege that 1) two or more persons; 2) with an unlawful objective; 3) after a meeting of the minds; 4) committed at least one act in furtherance of the conspiracy; and 5) Plaintiff was thereby damaged. *Id.* at 781. "The gist of the action is not the conspiracy, but the wrong done by acts in furtherance of the conspiracy or concerted design resulting in damage to plaintiff." *Gettings v. Farr,* 41 S.W.3d 539, 542 (Mo.App. E.D. 2001).

"Strictly speaking, the fact of conspiracy is not actionable, there is no distinct writ of conspiracy, but the action sounds in tort and is in the nature of an action on the case upon the wrong done under the conspiracy alleged." *Mills v. Murray,* 472 S.W.2d 6, 12-13 (Mo.App. 1971). If the underlying wrongful act alleged as a part of a civil conspiracy fails to state a cause of action, the civil conspiracy claim fails as well. *Rice v. Hodapp,* 919 S.W.2d 240, 245 (Mo. banc

1996). As Plaintiff's claim for fraud fails, so must his claim for conspiracy to commit fraud.

Count V (Intentional Infliction of Emotional Distress)

Count V is an action for the Intentional Infliction of Emotional Distress against the Archbishop and Archdiocese. Defendant argues that this tort does not lie where there is no allegation that the Archdiocese acted with the sole purpose of causing emotional distress.

Plaintiff alleges that Defendant's conduct was extreme and outrageous and intended to cause or committed in reckless disregard of the probability of causing emotional distress and harm. He alleges its conduct was unconscionable and outrageous beyond all possible bounds of decency and utterly intolerable in a civilized society. The facts alleged to support these conclusions, however, merely re-allege the claims that the Archdiocese failed to supervise, remove or otherwise sanction Defendant Cooper, and breached its fiduciary duty to Plaintiff. Additionally, Plaintiff alleges that the Archdiocese "failed to adequately review and monitor the services which were provided by Defendant Cooper, intentionally turning a blind eye to his misconduct" and they "intentionally failed to confront, remove or sanction Defendant Cooper."

To state a claim for intentional infliction of emotional distress, a plaintiff must plead extreme and

outrageous conduct by a defendant who intentionally or recklessly causes severe emotional distress that results in bodily harm. *Gibson,* 952 S.W.2d at 249. The conduct must have been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Warrem v. Parrish,* 436 S.W.2d 670, 673 (Mo. 1969). The conduct must be "intended only to cause extreme emotional distress to the victim." *K.G. v. R.T.R.,* 918 S.W.2d 795, 799 (Mo. banc 1996).

Plaintiff has failed to state a claim. Intentional infliction of emotional distress requires not only intentional conduct, but conduct that is intended only to cause severe emotional harm. *Id.* Plaintiff's allegations do not support the inference that the Archdiocese's sole purpose in its conduct was to invade Plaintiff's interest in freedom from emotional distress. Count V is dismissed.

Count VII (Negligence)

Count VII is for negligence. Plaintiff alleges that the Archdiocese breached its duty to Plaintiff when it failed to protect him from sexual abuse. To establish a negligence claim, a plaintiff must show: (1) defendant had a duty to the plaintiff; (2) defendant failed to perform that duty; and (3) defendant's breach was the proximate cause of the plaintiff's injury. *Gibson,* 952 S.W.2d at 249.

Whether negligence exists in a particular situation depends on whether or not a reasonably prudent person would have anticipated danger and provided against it. *Id.* In order to determine how a "reasonably prudent Archdiocese" would act, a court would have to excessively entangle itself in religious doctrine, policy, and administration. *Id.* at 249-50. A claim of negligence can not be maintained against Archdiocese as it violates the First Amendment. *Id.* Plaintiff's claim for negligence is dismissed.

Count VIII (Vicarious Liability (Respondeat Superior))

Count VIII is for Vicarious Liability. Plaintiff alleges that Defendants Archdiocese and Archbishop are vicariously liable for the acts and omissions of Defendant Cooper, because Defendant Cooper was under the direct supervision, employ and control of Defendants when he sought and gained access to Plaintiff at St. Mary Magdalen parish. As discussed supra under Count I, sexual misconduct is not within the scope of employment of a priest, and there can be no vicarious liability on the Archbishop or Archdiocese. *Gibson,* 952 S.W.2d at 246. Count VIII is dismissed.

Count IX (Negligent Supervision, Retention, and Failure to Warn)

In Count IX, Plaintiff alleges that Defendant knew or reasonably should have known of Defendant Cooper's dangerous and exploitive propensities and/or

that he was an unfit agent, and despite such knowledge, Defendant negligently retained and/or failed to supervise Defendant Cooper in the position of trust and authority as a Roman Catholic priest and spiritual counselor where he was able to commit the wrongful acts against Plaintiff. Plaintiff alleges that Defendant failed to provide reasonable supervision of Defendant Cooper, failed to use reasonable care in investigating Defendant Cooper and failed to provide adequate warning to Plaintiff and his family of Defendant Cooper's dangerous.' propensities.

Negligent supervision implicates the duty of a master to control conduct of a servant:

> A master is under the duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts, sec. 317 (1965). This cause of action requires evidence that would cause the employer to foresee that the employee would create an unreasonable risk of harm outside the scope of his employment. *Reed v. Kelly,* 37 S.W.3d 274, 278 (Mo.App. E.D. 2000). Plaintiff has alleged that Defendant Cooper performed much of his work as a priest on the premises owned by Defendant, and when he was off the premises, he was traveling at the authority and request of Defendant on trips paid for by Defendant. Plaintiff alleges that Defendant Cooper had access to Plaintiff only by virtue of his employment at the time of the sexual abuse, and that Defendant knew information about Cooper's history which made the abuse foreseeable.

However, Plaintiff's claim for negligent supervision fails as a matter of law. The Missouri Supreme Court has determined that adjudicating the reasonableness of a church's supervision of a cleric requires inquiry into religious doctrine that is prohibited by the First Amendment to the U.S. Constitution. *Gibson v. Brewer,* 952 S.W.2d 239, 247 (Mo. banc 1997).

Plaintiff's claim for negligent retention similarly fails. To establish a claim for negligent hiring or retention, a plaintiff must show: (1) the employer knew or should have known of the employee's dangerous proclivities, and (2) the employer's negligence was the

proximate cause of the plaintiff's injuries. *Gaines v. Monsanto Co.,* 655 S.W.2d 568, 571 (Mo.App.1983). See also *McHaffie v. Bunch,* 891 S.W.2d 822, 825-26 (Mo. banc 1995); *Porter v. Thompson,* 357 Mo. 31, 206 S.W.2d 509, 512 (1947). Whether negligence exists depends on whether a reasonably prudent person would have anticipated danger and provided against it. *Reed,* 37 S.W.3d at 277.

Defendant argues, citing *Gibson v. Brewer,* 952 S.W.2d 239, 246 that Plaintiff has failed to state a claim for negligent retention. A church's freedom to select clergy is protected "as a part of the free exercise of religion against state interference." *Id.* at 247. As the Missouri Supreme Court has pointed out, questions of hiring, ordaining, and retaining clergy "necessarily involve interpretation of religious doctrine, policy, and administration" that has the effect of inhibiting religion in violation of the First Amendment. *Id*. at 246-47.

As to negligent failure to warn, Plaintiff's claim also fails. In order to state a claim for the failure to warn, there must be a duty to warn. *Anderson v. Cinnamon,* 282 S.W.2d 445, 452 (Mo. 1955). *Id.* In order to determine whether Defendant owed Plaintiff a duty to warn, a court would have to excessively entangle itself in religious doctrine, policy, and administration. *Gibson,* 952 S.W.2d at 249. The claims alleged in Count IX must be dismissed.

THEREFORE, it is Ordered and Decreed that Defendant Archdiocese's Motion to Dismiss is GRANTED

as to COUNTS I (Childhood Sexual Abuse), II (Breach of Fiduciary Duty), III (Fiduciary Fraud and Conspiracy to Commit Fiduciary Fraud), IV (Fraud and Conspiracy to Commit Fraud), V (Intentional Infliction of Emotional Distress), VII (Negligence), VIII (Vicarious Liability), and IX (Negligent Supervision, Retention, and Failure to Warn). Counts I, II, III, IV, V, VII, VIII, and IX are dismissed without prejudice as to the Archdiocese.

SO ORDERED:

/s/ Donald L. McCullin
DONALD L. McCULLIN, Judge

Dated: May 15, 2007
cc: Daniel Curry, Kristen Ahmad

This petition involves the First Amendment's Establishment Clause and Free Exercise Clause. These Clauses provide:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

U.S. Const. amend. I.