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No. 20-0236
Scott County No. LACE128726

IN THE
SUPREME COURT OF IOWA

RYAN KOSTER,
Appellant,

v.

HARVEST BIBLE CHAPEL—QUAD CITIES D/B/A
HARVEST BIBLE CHAPEL—DAVENPORT, AND GARTH GLENN,
Appellees.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY
HONORABLE TOM REIDEL, DISTRICT COURT JUDGE
HONORABLE MARK FOWLER, DISTRICT COURT JUDGE

BRIEF FOR APPELLANT

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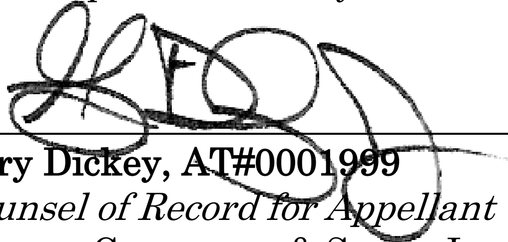

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STATEMENT OF ISSUES

I. WHETHER THE DOCTRINE OF QUALIFIED PRIVILEGE PRECLUDES RYAN KOSTER'S BREACH OF FIDUCIARY DUTY CLAIM AS A MATTER OF LAW

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Pardie v. Pardie, 158 N.W.2d 641 (Iowa 1968)
Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969)
State v. Cashen, 789 N.W.2d 400 (Iowa 2010)
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Wisconsin v. Yoder, 406 U.S. 205 (1972)

OTHER AUTHORITIES:
Iowa Code § 622.10
Iowa R. App. 6.1101

Iowa Civil Model Jury Instr. 3200.1

Restatement (Second) of Torts § 874
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II. WHETHER THE DOCTRINE OF QUALIFIED PRIVILEGE PRECLUDES RYAN KOSTER'S DEFAMATION CLAIM AS A MATTER OF LAW

CASES:
Beher v. Meredith Corp., 414 N.W.2d 339 (Iowa 1987)
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730 N.W.2d 198 (Iowa 2007)

OTHER AUTHORITIES:
1 Robert D. Sack, *Sack on Defamation*, § 2.4.2.1 (3rd ed. 2009)

ROUTING STATEMENT

Transfer to the court of appeals is appropriate under Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

In May 2015, Garth Glenn sent several emails to members, former members, and staff of Harvest Bible Chapel divulging details of Ryan Koster's marriage that were obtained in confidence. Koster sued Glenn for (1) breach of a fiduciary relationship; (2) invasion of privacy; (3) and defamation. (App. at 7-17). Because Glenn sent the emails in his capacity as pastor of his church, Koster also filed a claim for vicarious liability against Harvest Bible Chapel. (App. at 7-17). The district granted summary judgment on Koster's invasion of privacy and defamation claims on First Amendment qualified privilege grounds but allowed his breach of fiduciary claim to survive. (App. at 640-52). Defendants followed with two more summary judgment motions. (App. at 175-180). On the third attempt, the district court dismissed Koster's remaining breach of fiduciary duty claim on First Amendment "qualified privilege" grounds. (App. at 663-64). This appeal followed. (App. at 247).

STATEMENT OF THE FACTS

Plaintiff Ryan Koster ("Ryan") began attending Harvest Bible Chapel – Quad Cities ("HBC") in 2005 and became a member in 2007. (App. at 602). He served as a volunteer leader in the HBC High School Ministry from 2006 until 2015. (App. at 602). Through church activities, Ryan met his wife Lisa, who also was an active member of HBC, and they married on August 10, 2007. (App. at 602). Ryan and Lisa adopted an infant child in May of 2011 and a second infant child in May of 2012. (App. at 602).

At HBC, Ryan and Lisa regularly participated in a "Small Group" led by HBC Family Pastor Garth Glenn and his wife Deanna Glenn. (App. at 602). The "protocol" for the Small Group was that conversations made during would "stay within the [S]mall [G]roup and not be disseminated more publicly." (App. at 457). Eventually, they split off into a "Life Group" with the Glenns and another HBC couple, Christie and Koral Martin. (App. at 602). The Glenns previously had served as advocates for the Martins during their marriage counseling through a Christian

counseling center called Twelve Stones Ministry. (App. at 602). Glenn invited Ryan and Lisa to join them for Life Group meetings that were designed to mimic the counseling sessions in which he and Deanna participated with the Martins at Twelve Stones Ministry. (App. at 602). Glenn told them that he would like to apply some of the concepts they learned, specifically, how to dig down into the roots. (App. at 602). Ryan understood Life Group to be a spin-off of their former Small Group, a formal part of his membership in HBC, and viewed its purpose as changing behavior to better his marriage. (App. at 602). At the beginning of their Life Group meetings, Glenn assured Ryan and the others that it was a safe environment and the information shared would stay between the three couples only. (App. at 603). Glenn gave no indication that he would ever share information that he learned in Life Group with anyone outside of the group. (App. at 603). Glenn never referred to the Life Group as "biblical soul care" or "Biblical Soul Care." (App. at 603). Nor did he ever indicate that HBC's religious doctrine contains the practice of a "plurality of leadership" that allows him to disclose information revealed in the

Life Group to church leadership, staff, and other members. (App. at 603).

Ryan and Lisa had been experiencing difficulties in their marriage, which Ryan attributed to a lack of intimacy. (App. at 603). For this reason, the Kosters' sex life became a focal point of the Life Group, and much criticism was directed toward Ryan from Glenn and the women. (App. at 603). As part of the Life Group, Glenn directed Ryan to reveal everything about his sex life, which included, among other things, talking about looking at nude pictures, masturbation, foreplay with his wife. (App. at 603). Ryan never shared this information with anyone else and would not have shared it but for the express understanding that it would not be shared outside of the Life Group. (App. at 603).

On April 28, 2015, while Lisa was educating their three-year-old daughter on the difference between "good" touches and "bad" touches, their daughter allegedly disclosed that Ryan had touched her private areas in response to questioning from Lisa. Her disclosures suggested they occurred during normal parenting activities such as taking walks, going to the mall, and baths.

(App. at 603). Seizing upon this statement, Lisa took their daughter to the hospital and called the police as well as the Iowa Department of Human Services ("DHS") to report that Ryan had sexually abused their daughter. (App. at 603).[1] Lisa never confronted Ryan about the allegations or sought his input before contacting the authorities. Ryan categorically denies ever doing anything inappropriate to his daughter—sexual or otherwise. (App. at 603). Ryan believes that Lisa made the allegations to gain leverage over him in an anticipated divorce case, which she filed eight days later on May 6, 2015.[2] Lisa already had been consulting a divorce attorney before she reported the allegations. (App. at 603). Emails discovered in the course of litigation in this matter reveal that Glenn was communicating with Lisa and the

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[1] Following an investigation, DHS found the allegations against Ryan to be unsubstantiated. Law enforcement also declined to pursue criminal charges. Thereafter, Lisa made two more reports alleging Ryan abused their daughter, which DHS investigated and concluded were unsubstantiated. (App. at 604).

[2] Lisa and Ryan's divorce became final on September 14, 2016, and the court awarded physical care of their children to Ryan. *In re Marriage of Koster*, 2017 WL 6040575 at *4 (Iowa Ct. App. Dec. 2017).

other members of the Life Group during this time without Ryan's knowledge. (App. at 603).

On April 29, 2015, Glenn sent HBC pastors and directors an email revealing to them private information about Ryan's personal life, marriage, and legal issues. (App. at 578, 604). On May 3, 2015, Glenn sent the former Small Group members a similar email that also included private information about Ryan's personal life, marriage, and legal issues. (App. at 579-80, 604). He also sent the Small Group email to James Demarest, who formally resigned his family's membership several months earlier and no longer had attended HBC. (App. at 579-80, 604). On May 12, 2015, Glenn sent a third email, this time to HBC staff, once again sharing private information about Ryan's personal life, marriage, and legal issues. (App. at 582-83, 604). In all three emails, Glenn falsely suggests that Ryan had deteriorated, needed intensive help, physically abused his son, sexually molested his daughter, and could not be believed. (App. at 604). Glenn never investigated Ryan's version of the allegations giving rise to the DHS and police investigation along with the no-contact-order.

(App. at 604). Ryan did not know that Glenn was going to share that information with anyone, nor did he give Glenn consent to do so. (App. at 604). In all his time at HBC, neither Glenn nor any other staff member ever emailed Ryan information of a highly private, confidential, and embarrassing nature about another member as he did about Ryan to HBC leadership, staff, and members. (App. at 604).

ARGUMENT

I. RYAN KOSTER PRODUCED SUFFICIENT EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO EVERY ELEMENT OF HIS BREACH OF FIDUCIARY DUTY CLAIM AGAINST GLENN AND HARVEST BIBLE CHAPEL

Preservation of Error

Error has been preserved by virtue of Defendant's third motion for summary judgment seeking to dismiss Ryan's breach of fiduciary claim, which the court granted. (App. at 210-17, 669-73)

Standard of Review

Summary judgments rulings are reviewed "for correction of errors at law." *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). Summary judgment is proper only

"if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Id.* When reviewing a district court's ruling, this Court must view the record in the light most favorable to the nonmoving party. *Id.* at 199-200.

<u>Analysis</u>

A. Applicable legal principles

To establish a prima facie claim for breach of fiduciary duty, Ryan must prove the following:

1. The existence of a fiduciary relationship;
2. Breach of a fiduciary duty;
3. Causation; and
4. Amount of damage.

Iowa Civil Model Jury Instr. 3200.1; s*ee also Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986); Restatement (Second) of Torts § 874 ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation"). A fiduciary relationship exists between

two persons "when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation." *Kurth*, 380 N.W.2d at 695 (quoting Restatement (Second) of Torts § 874 comment a, at 300). Such relationship "arises whenever confidence is reposed on one side, and domination and influence result on the other." *Id.* It includes "both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another." *Economy Roofing v. Insulating Co. v. Zumaris*, 538 N.W.2d 641, 647 (Iowa 1995). "Such relationship exists when there is a reposing of faith, confidence, and trust, and the placing of reliance by one upon the judgment and advice of the other." *Kurth*, 280 N.W.2d at 696. In short, the duty exists "wherever one man trusts in or relies upon another." *Weltzin v. Cobank, ACB*, 633 N.W.2d 290, 294 (Iowa 2001). For this reason, Iowa courts consider "a fiduciary relationship as a very broad term." *Stotts v. Everleth*, 688 N.W.2d 803, 811 (Iowa 2004) (emphasis added).

A person standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of

the duty imposed by the relationship. Restatement (Second) of Torts § 874. "A fiduciary has a duty to deal with utmost good faith and solely for the benefit of the beneficiary." *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988); *see also F.G. v. MacDonell*, 696 A.2d 697, 564 (N.J. 1997). In addition, a fiduciary has of loyalty, the exercise reasonable care, and impartiality. *Destefano*, 763 P.2d at 284 (citing Restatement (Second) of Trusts §§ 170, 174, 183). The nature of the fiduciary relationship may also give rise to additional duties. "[T]he liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation." Restatement (Second) of Torts § 874 cmt. b.

B. Ryan Koster introduced sufficient evidence in the summary judgment record to create a genuine issue of material fact on all elements of his breach of fiduciary duty claim

Viewed in the light most favorable to Ryan, the summary judgment record established that he had a fiduciary relationship with Glenn by virtue of the trust he placed in him as well as Glenn's position of domination and influence. *See Kurth*, 380 N.W.2d at 695. Glenn's status as a pastor is an important fact in

that analysis, but it is not the *sine qua non* of their fiduciary relationship. Glenn was as much a marriage counselor as he was a pastor. By his own admission, Glenn provided Ryan extensive and intensive “corrective counseling” and “one on one corrective care.” (App. at 578-80, 582-83, 604). As Glenn explained it, he “attempted—and exhaustively so—to deal with all issues that [were] currently active in their marriage.” (App. at 582-83). Ryan understood Life Group as a form of group counseling because Glenn asked him to discuss specific problems in his marriage and offered solutions to get past those problems. (App. at 589). And, people outside of Life Group understood it to be a form of marriage counseling. (App. at 483); *see also* (11/04/19 Pl’s App. in Resistance to 3rd MSJ at 3).

Several courts have recognized that marriage counseling gives rise to a fiduciary relationship to a pastor and congregant. In *Doe v. Evans*, 814 So.2d 370 (Fla. 2002), for example, a former parishioner brought a breach of fiduciary duty claim against her pastor who had been providing counseling and spiritual advice for her marital difficulties. *Id.* at 372. The Florida Supreme Court

explained that a "counselor-counselee relationship" is "a fiduciary one." *Id.* at 374. For this reason, "a clergy member who undertakes a counseling relationship creates a fiduciary duty to engage in conduct designed to improve the plaintiffs' marital relationship." *Id.*

In *Destefano*, a wife brought a breach of fiduciary duty claim against her Catholic priest with whom she had sex while the priest was providing her with couples marriage counseling. *Destefano*, 763 P.2d at 278. The Colorado Supreme Court had "no difficulty finding that [the priest], as a marriage counselor to [the couple] owed a fiduciary duty to [the wife]." *Id.* at 284. The priest's duty, according to the court, "was created by his undertaking to counsel her." *Id.*

Lastly, in *Doe v. Libertore*, 478 F. Supp.2d 742 (M.D. Penn 2007), a parishioner sued his former priest for breach of fiduciary duty arising from inducements to engage in sex after having provided counseling to the plaintiff and his mother following his father's death. *Id.* at 749-50. After surveying Pennsylvania law on fiduciary relationships, the federal district court concluded that

the priest became a fiduciary once he accepted "the parishioner's trust and accept[ed] the role of counselor." *Id.* at 771. The court reasoned that "[i]n order receive and make use of the priest's advice and counsel, a parishioner must necessarily depend upon the priest's knowledge and expertise, resulting in the priest's superiority and influence over the parishioner." *Id.* "The relationship therefore becomes fiduciary in nature and the recognition of a breach of fiduciary duty claim is necessary to protect a beholden parishioner from a self-serving priest." *Id.* at 771-72.

Even apart from his role as marriage counselor, Glenn exercised influence and dominance over Ryan in many other ways. For starters, there was an inherent inequality between Glenn and Ryan by virtue of the roles of pastor and congregant. According to Plaintiff's expert, Gary Schoener, a "pastor is viewed as an arbiter of right and wrong, and therefore possesses significant power over a congregant seeking assistance form marital or personal problems," which is true "regardless of faith or denomination." (App. at 589). It is also demonstrated by the fact that Ryan

followed Glenn's referral to Twelve Stones Ministry for intensive marriage counseling. (App. at 590). Later, Ryan changed course and followed Glenn's recommendation against attending Twelve Stones Ministry because of Glenn's fear that, as mandatory reporters, the staff of Twelve Stones Ministry would report Ryan for child abuse. *See Wilson v. IBP, Inc.*, 558 N.W.2d 132, 139 (Iowa 1996) (noting that occupational health services manager's responsibility for directing and managing employee's medical care could reasonably be interpreted as involving of a degree of dominion, even though employees had the freedom to seek alternative treatments).

At the same time, Ryan clearly placed his trust and confidence in Glenn. He shared highly intimate details about his marriage and sexual history that he did not share with anyone else. (App. at 604). Glenn assured Ryan and the others in Life Group that it was a safe environment, and the information shared would stay between the three couples only. (App. at 602). Not only did Ryan place his trust in Glenn, everyone who participated

in Life Group trusted Glenn to help improve their marriage. (App. at 502).

On this point, *Vivone v. Tewell*, 820 N.Y.S.2d 682 (N.Y. Sup. Ct. 2006), is instructive. In *Vivone*, a parishioner brought breach of fiduciary duty claim against his former minister and marriage counselor who was having an affair with the parishioner's wife. *Id.* at 684. The New York Supreme Court had no difficulty concluding that the minister was acting in a fiduciary capacity:

> [Defendant's] undertaking to act as marriage counselor made him a fiduciary. It put him in a position of trust, in which he had a duty to act honestly and advise plaintiff in furtherance of plaintiff's interest in preserving his marriage, which was the object of the relationship.

Id. at 686-87. From *Vivone*, it follows *a fortiori* that Glenn's undertaking of "corrective counseling" and "one-on-one corrective care" to deal "exhaustively" with the issues in Ryan's marriage made him a fiduciary. Accordingly, there is more than sufficient evidence in this record to survive summary judgment on the issue of fiduciary relationship.

Glenn's corresponding fiduciary duty to maintain Ryan's confidences arises from several aspects of their fiduciary

relationship. First, Glenn expressly promised that he would maintain the confidentiality of information that was shared within the Life Group. (App. at , 502-503, 602). Second, Iowa law establishes a privilege of confidentiality for counselors and members of the clergy that prohibits them from being allowed to "disclose any confidential communication properly entrusted to the person in the person's professional capacity." Iowa Code § 622.10(1); 2 Richard E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 14.2 (Thompson-West 2005). This privilege creates "a belief of most Iowans that information communicated by a patient to a doctor or counselor will be confidential." *State v. Cashen*, 789 N.W.2d 400, 411 (Iowa 2010) (Cady, Chief J., dissenting) (emphasis added), overruled on other grounds by statute; *see also Pardie v. Pardie*, 158 N.W.2d 641, 645 (Iowa 1968) (observing that statements made by husband and wife to minister regarding marital problems are privileged). Third, the HBC Bylaws identify a membership commitment that includes the promise to "neither gossip nor listen to gossip concerning any

member(s) of this body and will, when personally offended, speak directly and loving with those involved." (App. at 563).

The summary judgment record establishes that Glenn breached his fiduciary duty of confidentiality by sending emails to former Small Group members, staff that disclosed, among other items, the following information:

- Ryan had participated in "one on one corrective care" or "corrective counseling" for "at least two years;"

- In "past 3 months . . . more things came to light that Ryan needed intensive help;"

- He and Lisa have "issues that were active in their marriage;"

- "Due to some unfortunate circumstances [the Kosters] were not able to go to 12 Stones;"

- "It has been the hardest thing we have ever been a part of;"

- It "is no longer about habitual sins in the life of Ryan but has entered a far more serious level of involvement;"

- "I trust you can connect the dots and realize that what we are talking about are horrific allegations;"

- "[R]egardless of what he says the allegations are serious enough that I would counsel you to not have

> Ryan stay in any of your homes if he asks to do so especially if you have children."

(App. at 579-580, 582-83). Glenn went the added step of inviting the recipients to share the information with others. (App. at 579) ("I thought it best to do it this way *so that you can discretely pass this information on to others* who you think need to know"); (App. at 582)("So in your interactions with people, please use much discretion and maturity *in how and when you have conversations about them*"). Moreover, on May 12, 2015, Glenn had a second email with staff member Carmen Fish:

> Our plan was for the four of us to be at 12 stones right now –10th-13th. We pulled the plug for reasons I can explain later. As far as psychiatric counselor—no. We had no idea the depth of the issue sand need before the last 3 weeks. He did see one on his own once (Gary Nordic) the Monday before that Tuesday and from what he shared he was not very honest about everything. Or anything.

(App. at 584). Glenn also met face-to-face with a former Small Group member, Andy Ellingson, and shared information about Ryan that he obtained in the course of his one-on-one corrective counseling. (App. at 448-50); *see also* (11/04/19 Pl's App. in Resistance to 3rd MSJ at 14-15). Ryan did not authorize Glenn to

have any of these communications about the details of his personal life.

Lastly, Ryan introduced sufficient evidence of damages. In his deposition, Ryan testified about how Glenn's breach of his duty of confidentiality has caused damage:

> Q. Tell me how this E-mail damaged you.
>
> A. It's extremely hurtful for my friends to be told things about me that aren't true. Again, they have a relationship with my children, and I'm not comfortable and I struggle with that they believe things about me that aren't true and that I would harm my children that way. leave my house. And it affects my level of trust and understanding of what true friends are. When a friend goes through the roughest time, usually I would expect friends to be there for me, and none of these people were.
>
> * * *
>
> Q. Okay. How did this statement to Andy damage you?
>
> A. Well, again, it's hurtful that a friend would be told by someone in a position of authority, a pastor of a church, a family pastor at the church, that, you know, the church is taking a stand and that -- yeah, it's just hurtful to know that my friend is being told things that are not true about me from the standpoint it affects our relationship. We used to do hobbies together, and we used to go to each other's houses.
>
> It makes me feel alienated when friends don't reach out to me when I'm going through the toughest part of my life, when I need them the most. I felt very

> alone when I had very few people to help me during this rough time when this was going on. I did not want to
>
> * * *
>
> Q. Besides that now, have we discussed everything that you are alleging against Harvest?
> A. Yeah. I mean, all of those things led to all of the injury and hurt, feelings of alienation, how I act, my confidence, how I relate to people, but we've talked about that.

(App. at 355-57, 396-97). Andy Ellingson corroborated the extend of Ryan's damages in his deposition testimony:

> Q. Did you notice any change in Ryan after these events?
> A. After the allegations?
>
> Q. Yes.
> A. Yeah. I think he was -- well, his whole life had been disrupted. So he was -- I mean, he seemed more depressed. He was -- had a lot of anxiety. I don't think he was sleeping great. He said that he lost all of his friends.
>
> So I think given that basically everything that was stable in his life was now upside down and, you know, I think his response was probably appropriate.
>
> Q. How about his participation at Harvest Bible Chapel, did it continue?
> A. No. He wasn't welcome to Harvest, given the allegations.

Q. And what did you observe that would lead you to believe he wasn’t welcome there?

A. He told me that he didn't feel welcome there. And that based on the conversations that he had with Glenn, that it -- given the allegations, that he shouldn't -- again, I don't remember exactly – the exact words that were used. But that he was – he shouldn't return at that point, just given what was going on.

Q. Did you notice any change in the way other members of the church treated Ryan?

A. Based on what Ryan told me. I don't have any direct observations of his interactions with them. But he said that -- that the friends that he had at Harvest, that he lost his friends, that they believed the allegations.

Q. Okay. How about you, was there any change in the way that other members at the church treated you because of your relationship with Ryan?

A. Yeah. My wife and I felt like there was probably some coldness or distance in the fact that we maintained a relationship with Ryan in light of the circumstances.

Q. So if we could go back before April 28th, 2015. Was -- Ryan, did he appear to you to be a happy person in general?

A. Yes.

Q. Okay. What about after April 28th and the events at Harvest Bible Chapel, did you notice a change in --

A. Yeah.

Q. -- in his happiness?

A. Yes.

> Q. And what is your relationship like with Ryan today?
> A. We meet less frequently. Probably once every couple of months, we will get together for lunch.
>
> Q. And when you say you meet less frequently, why is that?
> A. I'd say our relationship changed somewhat during the couple of months when I was trying to decide if the allegations were true or not. So I was very cautious. And we would -- we would still meet. But again, I was a lot more cautious, given obviously what was going on with that.
> And no -- yeah. Again, I just don't see Ryan as much as I used to. He doesn't attend Harvest. So, you know, I don't see him twice a week like I used to before. But, yeah, we still occasionally E-mail. We will still occasionally have lunch or hang out for -- hang out for a while and do something. But, again, just not as frequent.

See (11/04/19 Pl's App. in Resistance to 3rd MSJ at 15-16). From this testimony, a reasonable jury could conclude that Glenn's breach of his duty of confidentiality resulted in pain and suffering as well as reputational injury to Ryan.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON RYAN KOSTER'S BREACH OF FIDUCIARY DUTY CLAIM ON THE BASIS OF A FIRST AMENDMENT QUALIFIED PRIVILEGE

Preservation of Error

Error has been preserved by Defendant's motion to reconsider, amend, and enlarge findings. (App. at 225-234); *see UE Local 893/IUP v. State* 928 N.W.2d 51, 60 (Iowa 2019) (filing a motion to reconsider, amend, and enlarge findings preserves error for appeal).

Standard of Review

Summary judgment rulings are reviewed for correction of errors at law. *Walderbach*, 730 N.W.2d at 199.

Analysis

A. Applicable legal principles

Iowa law recognizes that the Establishment and Free Exercise Clauses of the First Amendment provide two distinct defenses to civil liability in certain circumstances: (1) tort immunity; and (2) qualified privilege. The decision in *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19 (Iowa 2018), illustrates how both First Amendment defenses apply to religious

entities. *Id.* at 38-40. In *Bandstra*, the Iowa Supreme Court explained that the First Amendment "plainly prohibits the state, through it courts, from resolving internal church disputes that would require interpreting our deciding questions of religious doctrine. *Id.* at 38. But, as the court clarified, "the right to free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribe (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 42. Likewise, a defendant's "status" as a "religious figure," working pursuant to his or her "deeply held faiths," does not "excuse them from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 42. In other words, if "neutral principles of law can be applied without determining the underlying question of religious doctrine or practice, a court may intervene." *Id.* at 38 (citing *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969)). Otherwise, the defendant is immune from liability under the Establishment Clause.

In *Bandstra*, the Iowa Supreme Court recognized that, *in defamation cases*, statements made by religious actors may be entitled to the protection under the doctrine of qualified privilege. When the doctrine applies, "actionable statements may be nevertheless rendered non-actionable when spoken or written pursuant to a qualified or absolute privilege." *Id.* at 47. A communication is qualifiedly privileged if:

> (1) the statement was made in good faith; (2) the defendant had an interest to uphold; (3) the scope of the statement was limited to the identified interest; and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only.

Barreca v. Nickolas, 683 N.W.2d 111, 118 (Iowa 2004). As it relates to the Establishment and Free Exercise Clauses, "communications between members of a religious organization concerning the conduct of other members or officers in their capacity as such are qualifiedly privileged." *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404, 407 (Iowa 2003) (quoting 50 Am. Jur. 2d *Libel and Slander* § 340 at 663 (1995)).

Qualified privilege may be lost, however, if the speaker abuses the privilege by speaking with actual malice or excessively publishing the statement "beyond the group interest." *Id.* A statement is made with actual malice if the speaker "acted with knowing or reckless disregard of the truth of the statement." *Barreca*, 683 N.W.2d at 121. In the clergy context, a statement loses its privilege if made to individuals outside the congregation. *Kliebenstein*, 663 N.W.2d at 407.

B. The district court clearly erred by applying the qualified privilege doctrine to Ryan Koster's breach of fiduciary duty claim

In granting Defendants' third motion for summary judgment and dismissing Ryan's breach of fiduciary duty claim, the district court explained:

> In its ruling on the first summary judgment motion, the Court found that Glenn's communications were made in furtherance of the HBC's congregation's common interest in discussing the Koster's divorce and Plaintiff's moral conduct. The Court also previously found that Glenn's communications were made exclusively to proper parties. These findings apply with equal force in establishing that *Defendants are entitled to qualified privilege as a defense against the breach of fiduciary duty claim.* The Court therefore finds that Defendants are entitled to summary judgment in their favor.

(App. at 673). This holding is clearly erroneous on multiple grounds. Qualified privilege, as recognized in *Bandstra* and *Kliebenstein*, is an affirmative defense *to a defamation claim only*.[3]

Even if the district court was correct to chase the rabbit down the qualified privilege hole, genuine issues of material fact still should have precluded summary judgment. For a conditional privilege to exist, "there must be a valid interest on the party of both the person making the communication and the person to whom it is communicated." *Brown v. First Nat. Bank of Mason City*, 193 N.W.2d 547, 552 (Iowa 1972). Glenn was not upholding any religious interest in revealing Ryan's confidences to others. The private details of his personal life were not disclosed in the course of any disciplinary matter or part of any other formal religious proceeding.

[3] To its credit, the district court used the correct analysis in its second motion for summary judgment ruling, when it ruled that "[u]nlike invasion of privacy and defamation, an action for breach of confidentiality *is not subject to a qualified privilege defense* and the issue of whether or not the statement was true is irrelevant to the claim." (App. at 658)(emphasis added).

Neither HBC staff members, nor former Small Group members, have a valid interest that required them to be advised about the personal details of Ryan's private life. They certainly did not need to know about his history of corrective counseling, need for intensive help, prior physical abuse against his son, "horrific" nature of the sexual abuse allegations, and a warning that he was not to be trusted—*especially when all of that information is false*. Bear in mind, by the time Glenn sent the emails about Ryan, the Small Group *had not met for "at least 2.5 years*." (App. at 582)(emphasis added). And, Small Group members did not continue to meet socially after it disbanded. *See* (11/04/19 Pl's App. in Resistance to 3rd MSJ at 13).

More importantly, nothing in HBC's doctrine required Glenn to share the details of Ryan's marital strife with the staff or other members. Just the opposite—HBC's bylaws require members to promise to "neither gossip nor listen to gossip concerning any member(s) of this body and will, when personally offended, speak directly and loving with those involved." (App. at 563). On top of that, HBC had in place a confidentiality policy for Small Group

participation, which required members to commit to *"[m]aintaining confidentiality within [the] group."* (App. at 581) (emphasis added). The dead giveaway lies in the fact that Glenn repeatedly assured Ryan that the details he gave in Life Group would not be shared with others. If HBC doctrine compelled Glenn to share Ryan's martial struggles with the church, surely Glenn would not have promised Ryan to keep them confidential in the first place. On this point, Andy Ellingson's deposition testimony belies the suggestion that disclosure of martial struggles was a common occurrence within the church:

> Q. Okay. Do you know if Glenn had obtained Ryan's permission to send this E-mail to you?
> A. I'm not aware that he obtained Ryan's permission to send this.
>
> Q. Okay. And this E-mail from Glenn to the small group members, is that a normal type of E-mail that Glenn would send to the small group?
> A. No. I'd say this is an unusual E-mail that he would send to the small group.
>
> Q. And to be more specific, had Glenn ever E-mailed the small group to provide an update on the marital problems of other members?
> A. No.

Q. How about since, is that something that Glenn has sent out to the small groups?
A. No.

See (11/04/19 Pl's App. in Resistance to 3rd MSJ at 12). On these facts, a reasonable juror could find that Glenn was not upholding any religious interest in revealing Ryan's confidences.

Whatever qualified privilege that may have existed was extinguished when Glenn sent the email to Jim Demarest. "[A] statement loses its privilege if made to individuals outside of the congregation." *Bandstra*, 913 N.W.2d at 48 (citing *Kliebenstein*, 663 N.W.2d at 407). Here, there is no factual dispute that Demarest was no longer attending HBC and had not participated in Small Group with Ryan for at least two years. (App. at 604). Further, Glenn invited the recipients to pass the information to others without any limitation to membership within the church. (App. at 579-80) ("I thought it best to do it this way so that you can discretely pass this information on to others who you think need to know"); (App. at 582-83)("So in your interactions with people, please use much discretion and maturity in how and when you have conversations about them"). By doing this, Glenn chose

to place "the controversy in the realm of Caesar or the secular world by opting to leave the confines of the church." *In re Diocese of Lubbock*, 2019 WL 6693765 at 19 (Tx. Ct. App. Dec. 6, 2019).

The qualified privilege analysis does not end there. The affirmative defense of qualified privilege protects only statements made without actual malice. *Taggart v. Drake University*, 549 N.W.2d 796, 803-04 (Iowa 1996). Viewing the evidence in the light most favorable to Ryan, as the Court must at the summary judgment stage, a reasonable jury could conclude that Glenn acted with malice.[4] Glenn expressly promised the information learned at Life Group would be confidential. He did not notify Ryan that he was going to send the emails disclosing his struggles, nor did he seek Ryan's permission. (App. at 430). There was no therapeutic reason to send the emails. (App. at 590). Glenn made

[4] In the district court's ruling denying Defendant's second summary judgment motion, it found that "a reasonable jury could still find that, even if Pastor Glenn did not disregard the truth, *his inclusion of Plaintiff's confidential information in the email manifested either actual or legal malice*." (App. at 658)(emphasis added). Ryan pointed out this finding as to the question of malice in his motion to reconsider. (App. at 229). Oddly, the district court was not persuaded by the district court's own prior analysis of the same issue. (App. at 675).

no attempt to obtain Ryan's version of events giving rise to the DHS and police interventions, nor can he say that he even read the no-contact order. (App. at 429-31). The email to the Small Group alludes to Ryan physically abusing his son, but Glenn admitted at his deposition that he did not witness any physical abuse:

> Q. And when you talk about admitting to abuse, what are you referring to?
> A. The abuse that was admitted to clearly by Ryan was the fact that at one time, his -- he was angry, and he picked up Ryan by the -- or I'm sorry -- he picked up [J.K.] by the hair out of his saucer.
>
> Q. And you didn't consider that to be abuse that needed to be reported, right?
> A. At that time, no.
>
> Q. How about now, do you consider that to be abuse that needed to be reported?
> A. No.
>
> * * *
>
> Q. Did you observe Ryan do this?
> A. No.

(App. at 422, 579-80).

It is undisputed that Glenn knew sharing the information to the Small Group members and former HBC attendees would be embarrassing and distressing to Ryan. On this point, Glenn testified that the prospect of attending Twelve Stones Ministry for marriage counseling was something Ryan and Lisa specifically did not want shared outside of the Life Group:

> Q: So this E-mail exchange, was there an expectation that this information about going to 12 Stones would remain with the life group?
> A: *Certainly*. But I don't believe it was a huge secret. I don't think – I mean certainly, they don't want to broadcast it. But – yeah.

(App. at 421). Furthermore, Glenn expressly acknowledged in the email that it would be "unwise" for him to "give all the details." (App. at 579). To be sure, the email was not a single, isolated occurrence. Instead, Glenn invited the Small Group members and former HBC attendees to "pass this information on to others who you think need to know." (App. at 579). He also sent similar emails to HBC staff and the HBC pastors and directors. (App. at 578, 582-83). And, around the same time, Glenn also had a conversation with Andy Ellingson, in which he characterized Ryan

as a "master manipulator" who was capable of "deluding people." (App. at 451).

From this evidence in the summary judgment record, a fact finder could find that Glenn was aware that disclosure of the information in his email to members of the Small Group and former members of the church would be highly embarrassing to Ryan. (App. at 431). A fact finder could further find that Glenn intentionally shared this information to smear Ryan's reputation, portray him as a liar, and isolate him from their shared community within HBC. (App. at 579-80) ("I am not saying don't talk to him but use discretion and remember there is always more to the story and you don't know everything – even if he tells you that he has told you everything"). And, he did this with the knowledge that Ryan was already struggling with marital problems and participating in a DHS child abuse investigation. Thus, the jury could reasonably conclude that Glenn acted with malice sufficient to defeat any claim of qualified privilege.

C. The district court confused tort immunity under the First Amendment with the doctrine of qualified privilege

The district court's ruling clearly shows that it did not know where the contours of tort immunity for religious entities ends and where the doctrine of qualified privilege begins. The court explicitly identified the doctrine of qualified privilege as the basis for its ruling, but then it relied heavily upon the analysis from *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Westbrook, Jr. v. Penley*, 231 S.W.3d 389 (Tex. 2007). This is clear error because neither case involves the doctrine of qualified privilege. Indeed, neither *Yoder*, nor *Penley*, *mention qualified privilege at all.*

As previously explained, the proper analysis under a claim of tort immunity for a religious entity is whether Plaintiff's breach of fiduciary duty claim can be decided under neutral principles of law. The district court thoroughly and correctly decided the issue in its first summary judgment ruling:

> Under the Establishment Clause, a religious institution cannot be immune from tort actions when it is possible for a court to decide the action using only "neutral principles of law," as opposed to directly analyzing religious doctrine. The duty to keep information confidential is a sufficiently neutral

> principle of law, and the present case does not require the Court to directly analyze HBC's religious doctrines.

(App. at 635)(citations omitted). The "imposition of liability based on a breach of fiduciary duty has a secular purpose and the primary effect of imposing liability under the circumstances of this case neither advances nor inhibits religion." *Evans*, 814 So.2d at 376. The district court's clear misapplication of the qualified privilege doctrine in its summary judgment ruling must be reversed.

III. THE DISTRICT COURT CLEARLY ERRED IN GRANTING SUMMARY JUDGMENT ON RYAN KOSTER'S DEFAMATION CLAIM ON THE BASIS OF QUALIFIED PRIVILEGE

Preservation of Error

Error has been preserved by virtue of Defendant's first motion for summary judgment seeking to dismiss Ryan's breach of defamation, which the court granted. (App. at 125-52, 647-52)

Standard of Review

Summary judgments rulings are reviewed "for correction of errors at law." *Walderbach*, 730 N.W.2d at 199.

Analysis

To establish a prima facie case of libel, Ryan need only show that Defendants published a statement that was defamatory of and concerning him. *Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004). Nothing in the cause of action requires Ryan to show that every single sentence of the emails is independently actionable. To the contrary, "[a] court will not pick out and isolate particular phrases and determine whether, considered alone, they are defamatory." 1 Robert D. Sack, *Sack on Defamation*, § 2.4.2.1 at 2-19 (3rd ed. 2009). Iowa courts have long adhered to the principle that a defamatory statement must be viewed in the context of surrounding circumstances and within the entire publication. *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996) (citing *Kidd v. Ward*, 91 Iowa 371 374, 377, 59 N.W. 279, 280-81 (1894)). The Iowa Supreme Court has even gone so far as to recognize that defamation need not be directly apparent from the statements themselves. *See Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (expressly adopting defamation by implication). Instead, defamation can be implied

when a defendant juxtaposes a series of facts so as to imply a defamatory connection between them or creates a defamatory implication by omitting facts. *Id.*

When read in the proper context, the "gist" or "sting" of Glenn's emails is:

1. Ryan was suffering from some mental health or psychiatric condition that required "intensive help;"

2. Ryan physically abused his son;

3. Ryan sexually molested his three-yea-old daughter;

4. Ryan is not safe to be around; and

5. Ryan cannot be trusted.

Beher v. Meredith Corp., 414 N.W.2d 339, 342 (Iowa 1987) ("The gist or sting of the defamatory charge . . . is the heart of the matter in question—the hurtfulness of the utterance"). Ryan, of course, categorically denies that any of these implications are true. (App. at 604). For this reason, a genuine issue of material fact exists on the issue of substantial truth sufficient to allow Ryan's defamation claim to survive summary judgment.

Iowa law is clear that a statement is libelous per se if it unambiguously tends "to provoke the plaintiff to wrath or expose

him to public hatred, contempt, or ridicule." *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). Accusations of indictable crimes of moral turpitude are libel per se. *See Huegerich*, 547 N.W.2d at 221 (accusing plaintiff of possessing illegal drugs is libel per se); *Rees v. O'Malley*, 461 N.W.2d 833, 835 (Iowa 1990) (accusing plaintiff of extortion is libel per se); *Vinson v. Lin-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 117-18 (Iowa 1984) (accusing plaintiff of falsifying time cards is libel per se). Likewise, an accusation of immorality or dishonesty is libel per se. *See Kiesau*, 686 N.W.2d at 178 (stating that substantial evidence supported a jury finding that a doctored image of plaintiff appearing topless was libel per se); *Wilson*, 558 N.W.2d at 139-40 (stating that an accusation of untruthfulness was sufficient evidence to support a jury finding of libel per se). Accusations of mental illness and sexual immorality are also libelous. *Bierman v. Weier*, 826 N.W.2d 436, 464 (Iowa 2013) ("We agree with the district court that stating a person has been molested by their father and suffers from bipolar disorder constitutes libel per se under Iowa law"). Under these authorities, Glenn's false

assertions in his emails regarding Ryan's need for intensive help, physical abuse of his son, sexual molestation of his daughter, and lack of trustworthiness are libelous per se.

Despite the clear proof of libel per se, the district court held that Defendants were entitled summary judgment under the doctrine of qualified privilege. (App. at 652). This holding is clearly erroneous for the same reasons that qualified privilege does not apply to Ryan's breach of fiduciary duty claim. Qualified privilege is lost "if the speaker abuses the privilege by speaking with actual malice or excessively publishing the statement beyond the group interest." *Bandstra*, 913 N.W.2d at 48. Both circumstances are present here.

With respect to malice, the summary judgment record establishes that Glenn's emails were sent with a knowing or reckless disregard for the truth. He did not notify Ryan' that he intended to send the emails, nor did he seek his permission. There was no therapeutic reason to send the emails. He made no attempt to get Ryan's version of events giving rise to the DHS and police interventions, nor did he even read the no-contact-order.

The email the Small Group refers to Ryan physically abusing his son, but Glenn acknowledged at his deposition that he did not witness any physical abuse. Glenn knowingly sent multiple emails to multiple distribution lists and invited the recipients to share them with others.

As for publishing the statement beyond the group interest, Glenn had no reason to send the email to former Small Group members that had not met for more than two years and did not continue to meet socially. He had even less reason to send the email to HBC staff. They were not part of a disciplinary matter, nor were they sent in furtherance of any church business, activity, or proceeding. The *coup de gras*, however, is that Glenn sent the Small Group email to Jim Demarest who no longer attended HBC. This fact is fatal to Defendants' claim of qualified privilege because "[i]n the clergy context, a statement loses its privilege if made to individuals outside the congregation. *Id.* (citing *Kliebenstein*, 663 N.W.2d at 407). Accordingly, the district court clearly erred in granting summary judgment on Ryan's defamation claim on the basis of qualified privilege.

CONCLUSION

Ryan Koster asks this Court to reverse the district court's summary judgment on his breach of fiduciary duty and defamation claims.

REQUEST FOR ORAL ARGUMENT

Ryan Koster requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $13.00 and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

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