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

REPLY BRIEF FOR APPELLANT

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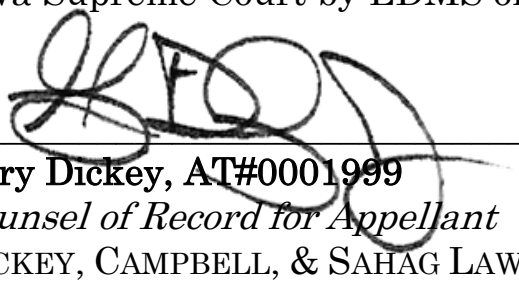

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REPLY ARGUMENT

Defendants' First Amendment argument is encapsulated in its assertion that "the e-mails at issue in this lawsuit were subject to a qualified privilege under the Ecclesiastical Shield of the Constitution because the e-mails were shared by Pastor Glenn with the congregation in furtherance of HBC's religious doctrines and practices." (Proof Br. 39). Defendants' framing is nothing more than a shell game because qualified privilege and Ecclesiastical Shield are separate and distinct concepts. *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 38 (Iowa 2018) (discussing the difference between qualified privilege in defamation cases and ecclesiastical shield as applied to negligence claims). As explained in Ryan Koster's opening brief, religious figures enjoy *immunity* from claims that involve "interpreting or deciding questions of religious doctrine." *Id.* For defamation claims, *qualified privilege* protects "communications between members of a religious organization concerning the conduct of other members or officers in their capacity as such." *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404, 407 (Iowa 2003). Defendants attempt to sow confusion by jumbling rationales from these distinct

First Amendment concepts. Because neither principle applies to Ryan's claims, the district court's summary judgment rulings must be reversed.

I. RETENTION BY THE SUPREME COURT IS NOT WARRANTED

The question presented is whether the district court erred in granting summary judgment on Ryan's breach of fiduciary duty and defamation claims because defendants were entitled to qualified privilege. Resolution of this issue involves the straightforward "application of existing legal principles." *See* Iowa R. App. P. 6.1101(3)(a). It is well established that the doctrine of qualified privilege is a creature of defamation law. *Vojak v. Jensen*, 161 N.W.2d 100, 105 (Iowa 1968). The district court's application of qualified privilege to Koster's breach of fiduciary duty claim, therefore, constitutes clear error under existing law. As it relates to Koster's defamation claim, it is equally established that qualified privilege is lost if it is abused. *Barreca v. Nickolas*, 683 N.W.2d 111, 118 (Iowa 2004)(citing Restatement (Second) of Torts § 593). Here, the summary judgment record establishes that Garth Glenn emailed confidential information about Ryan to an individual who did not attend Harvest Bible Chapel and invited further circulation of confidential information

about Ryan without regard to membership in the church. (App. at 579-80, 604). Resolution of this appeal, therefore, does not contain any of the prudential considerations that would make it worthy of retention by the supreme court.

II. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED PRIVILEGE BECAUSE GLENN CIRCULATED HIS STATEMENTS BEYOND THE HBC CONGREGATION AND ACTED WITH RECKLESS DISREGARD OF RYAN KOSTER'S RIGHTS

A. The qualified privilege doctrine does not apply to Ryan's breach of fiduciary duty claim

The central flaw of the district court's third summary judgment ruling is the application of qualified privilege to Ryan's breach of fiduciary duty claim.[1] From the earliest recognition of the qualified privilege doctrine, the Iowa Supreme has explained that it functions to shift the burden of proving malice back to the plaintiff. *Fleagle v. Goddard*, 188 Iowa 1033, 1037, 177 N.W. 51, 53 (1920). ("The doctrine of qualified privilege operates only, however, to destroy the presumption

[1] It is worth noting that the district court correctly recognized in its ruling on Defendants' second motion for summary judgment that "[u]nlike invasion of privacy and defamation, and action for breach of confidentiality *is not subject to a qualified privilege defense*." (App. at 658)(emphasis added).

of malice, and to impose upon the plaintiff the burden of proving same"). "The qualified privilege relieves the publication from the presumption of malice that would otherwise exist." *Robinson v. Home Fire & Marine*, 244 Iowa 1084, 1093, 59 N.W.2d 776, 782 (Iowa 1953). "A qualified privilege applies to statements made without regard to whether they are defamatory per se when they are made on an appropriate occasion in good faith on a subject in which the communicator and addressee have a shared interest, right or duty." *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 116 (Iowa 1984). The privilege, however, "protects only statements made without actual malice." *Id.* at 116. It makes sense, therefore, to recognize qualified privilege for intentional torts, such as defamation, in which malice is an essential element. Negligence and breach of fiduciary duty claims, on the other hand, are not amendable to qualified privilege analysis because they do not require proof of malice or contain a similar intent element.[2]

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[2] This conclusion is further supported by the fact that "malice" in the context of qualified privilege means to publish a "statement with a knowing or reckless disregard of its truth." *Barreca*, 683 N.W.2d at 123 (abandoning the common law "improper motive" test in favor of the *New York Times* test to define the malice element of the qualified privilege doctrine). Truthfulness, however, is not an element to a breach of fiduciary duty claim. Under the district court's approach, shifting the

Defendants offer no meaningful response on this issue. Sensing defeat, they instead attempt to recast the district court's ruling as holding that Glenn's emails "were privileged by the Ecclesiastical Shield of the United States Constitution." (Br. at 34). Spot the fallacy? Defendants conflate the qualified privilege doctrine with tort immunity for religious entities. The summary judgment ruling itself refutes that effort. The court below held that "Defendants are entitled to *qualified privilege* as a defense against the breach of fiduciary duty claim." (App. at 673)(emphasis added). Once this reality is accepted, there is no basis to defend the district court's ruling.

Defendants' reliance on *Kliebenstein* and *Bandstra* is baffling because both decisions highlight the district court's error in this case. (Br. at 37-48). In *Kliebenstein*, the plaintiffs sued for defamation based on statements from a minister's letter to church members and others in the community equating them to Satan. *Kliebenstein*, 663 N.W.2d at 405. The Iowa Supreme Court acknowledged that "communications between members of a religious organization concerning the conduct of

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burden of proving *New York Times* malice from defendant to plaintiff is like trying to fit a square peg in a round hole.

other members or officers in their capacity as such are qualifiedly privileged." *Id.* at 407. Yet, the court held the privilege did not apply because the letter was published to more than just church members. *Id.* at 408. Notably, the *Kliebenstein* decision says nothing about the applicability of the qualified privilege doctrine to claims other than defamation.

Defendants also find no support in the *Bandstra* decision. In that case, the court applied qualified privilege in analyzing *defamation claims* arising from the statements of church elders passing judgment on the sinfulness of plaintiff's behavior. *Id.* at 48-50. The key point to this issue is that the court made no attempt to apply qualified privilege to the plaintiff's negligence claim based on the church's failure to exercise ordinary care in supervising its pastor. *Id.* at 42-43. Defendants like the sound-bites from *Kliebenstein* and *Bandstra*, but the actual holdings in both cases only confirm that the First Amendment qualified privilege does not apply to Ryan's breach of fiduciary duty claim.

B. Defendants are not entitled to qualified privilege because Glenn shared Ryan's confidential information with members outside of the church congregation

A repeated refrain of qualified privilege cases is that a defendant loses any claim to it by excessive publication. *Brown v. First Nat'l Bank*, 193 N.W.2d 547, 552 (Iowa 1972) ("such privilege permits communication between parties with valid interests only and in such a manner that only those parties interested are recipients of the communication"); *Robinson*, 244 Iowa at 1094, 59 N.W.2d at 782 ("a qualified privilege may be abused by excessive publication of the defamatory matter, as by knowingly publishing it to a person to whom its publication is not otherwise privileged"). In defamation cases involving clergy defendants, "a statement loses its privilege if made to individuals outside the congregation." *Bandstra*, 913 N.W.2d at 48; *see also Kliebenstein*, 663 N.W.2d at 408 (holding that privilege was lost because "a communication was published to more than just church members").

That this case is not an intra-church dispute "concerning the conduct of other members or officers" should not be open to serious debate. *Kliebenstein*, 663 N.W.2d at 407. It is undisputed that Glenn

sent his May 3, 2015, email to Jim Demarest in addition to other former Small Group members. (App. at 579-80). Demarest had formally resigned his family's membership and had not attended church services at HBC altogether for many months as of May 3, 2015. (App. at 604). Glenn testified as much in his deposition that Jim Demarest was no longer a member of HBC:

> Q. So who is Jim Demarest?
> A. Jim Demarest is a former – they used to attend Harvest Baptist Chapel. *They no longer do*. But, he was a high school leader within the – within the student ministry at Harvest Bible Chapel.

(App. at 437)(emphasis added). Worse still, Glenn invited all the email recipients to pass the information about Ryan to others without any limitation to membership within the church. (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"). As a result, information from the emails made its way into the public domain. For example, the Kosters' baby-sitter, Marissa Sorenson, learned about the allegation that Ryan molested his daughter thirdhand from a recipient

of Glenn's email. (App. at 467-68).[3] These undisputed facts constitute excessive publication and preclude Defendants' claim of qualified privilege. *See id.* (explaining that qualified privilege is lost upon "proof of publication to *non*-church members"). In the very least, they are sufficient to generate a jury question.

The district court erroneously believed that Demarest "continued to participate in certain activities, such as Small Group." (App. at 647). From this misunderstanding of the record, the court below surmised that "he had a similar interest in learning the information in the emails as the rest of the congregation." (App. at 647). Both findings are, quite simply, demonstrably false. Rather than acknowledge the district court's mistake, Defendants double down in their brief and try to perpetuate the error on appeal. (Def's Br. at 43).

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[3] Ryan does not offer Sorenson's testimony to prove the truth of the matter asserted—i.e. that he molested his daughter. In fact, he categorically denies the truth of the matter asserted. Instead, Sorenson's testimony is offered to show that information about Ryan contained in Glenn's emails had been circulated and recirculated three times over. Accordingly, Sorenson's testimony is not hearsay. *See State v. Plain*, 898 N.W.2d 801, 812 (Iowa 2017) (explaining that an out-of-court statement offered only to explain responsive conduct "is not offered to prove the truth of the matter asserted and is therefore not hearsay").

In truth, there is not a scintilla of admissible evidence in the summary judgment record to suggest that Demarest continued to participate in Small Group or any other HBC activities. At best, the record contains a secondhand report that Demarest and Koster maintained sporadic email contact.[4] To reiterate, the Glenns, Martins, and Kosters had separated from the Small Group and formed their own Life Group *more than two years earlier*." (App. at 579)("The Kosters are not just friends but family and know that we have journeyed with them for at least 2.5 years with one on one corrective care"). Obviously then, Demarest could not have been participating in Small Group with Ryan at the time of the emails. Once the hollow core of the district court's summary judgment ruling is exposed, Defendant's claim to qualified privilege collapses.

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[4] In his affidavit, Glenn states that Demarest "informed me through email that he had been checking in by email with Ryan monthly for continued discipleship with the men in High School Leadership Small Group." (App. at 604). Defendants did not introduce Demarest's email into the summary judgment record because it does not support Glenn's characterization. In any event, Glenn's statement about the email is hearsay, and therefore, cannot be considered. *See Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012)("The court should only consider such facts as would be admissible in evidence when considering the affidavits supporting and opposing summary judgment").

Defendants' sole response is to mischaracterize the holdings in *Kliebenstein* and *Bandstra*, which make clear that qualified privilege is lost if statements are communicated "to more than just church members." *Kliebenstein*, 663 N.W.2d at 408. To shoehorn its claim of qualified immunity under these holdings, Defendants contend that Demarest remained part of the "church community" even if he was no longer a member by virtue of his email contact with Ryan. (Def's Br. at 43). Taken to its logical conclusion, Defendants' view of qualified privilege would apply to anyone who has ever attended HBC as well as anyone who communicates with Ryan by email. Yet, "a communication is qualifiedly privileged" only if it is "published on a proper occasion, in a proper manner, *and to proper parties only*." *Bandstra*, 913 N.W.2d at 47-48 (emphasis added)(citing *Barreca*, 683 N.W.2d at 118). "In the clergy context, a statement loses its privilege *if made to individuals outside the congregation*." *Id.* (emphasis added). This limitation is sensible considering it is the "common interest of the members of religious associations" that forms the basis of the privilege as it relates to clergy. *Kliebenstein*, 663 N.W.2d at 407. Glenn's communication with Demarest—a non-member—abused the privilege. As did his

invitation to share the information about Ryan with others without regard to their membership in the church. For this reason, the district court erred in granting summary judgment on Ryan's defamation and breach of fiduciary duty claims on qualified privilege grounds.

C. Defendants abandoned their claim to qualified privilege by failing to present any arguments in their brief that Glenn's statements were made without malice

Defendants' qualified privilege defense fails for another reason. For clergy defendants, qualified immunity "only protects statements without actual malice." *Marks v. Estate of Hartgerink*, 528 N.W.2d 539, 546 (Iowa 1995). Actual malice "focuses upon whether the defendant published the statement with a knowing or reckless disregard for its truth." *Barreca*, 683 N.W.2d at 123. In his opening brief, Ryan argued that qualified privilege was lost because Glenn acted with malice. (Appellant's Br. at 41-42, 50-52). Ryan's brief cites to legal authorities and identifies portions of the record that show Glenn acted with malice—namely by making statements on matters about which he did not have personal knowledge and failing to make a reasonable investigation as to the truth. (Appellant's Br. at 50-52). Defendants have no answer on this key point. In fact, they do not even address the

issue in their brief. By presenting no argument on the issue, Defendants forfeit their position. *See Morris v. Steffes Grp., Inc.*, 924 N.W.2d 491, 498 (Iowa 2019) (finding that appellee waived unbriefed issue that was not ruled on by the district court). Consequently, summary judgment on Ryan's defamation and breach of fiduciary duty claims must be reversed.

III. DEFENDANTS ARE NOT ENTITLED TO RELIGIOUS IMMUNITY BECAUSE GLENN DID NOT SEND THE EMAILS AS PART OF ANY RELIGIOUS PRACTICE OR DOCTRINE

With qualified privilege unavailable to them, Defendants attempt to repackage their First Amendment argument into a bid for ecclesiastical immunity. The meandering discussion about "Biblical Soul Care," "counseling in the community," and "plurality of leadership" is the reddest of herrings. (Appellee's Br. at 20-25). Even accepting the sincerity of Defendants' beliefs, they are irrelevant because Glenn did not send the emails in furtherance of any church doctrine or pursuant to any religious practice or sacrament. From the beginning of this litigation, Defendants have emphasized that Glenn was not acting in his capacity as an HBC pastor while participating in Life Group. (App. at 88)("It is undisputed that Pastor Garth did not participate in Life

Group as a pastor"). Also, they have gone to great lengths to disassociate the Life Group entirely from HBC. (App. at 89)("It is undisputed that this group was not an authorized small group through HBC"). But, for all their handwringing about religious entanglement, Defendants offer no evidence to suggest that Glenn had a religious duty to share the confidential and defamatory information that he obtained from his personal counseling relationship with Ryan. Just the opposite—Glenn testified in his deposition that the impetus behind the emails was simply "to inform" everyone about what was going on in Ryan's marriage so they would not be "caught off guard":

> Q. Okay. What's the context of you sending this [April 25th] E-mail out?
>
> A. A. The context is for the purpose of informing our pastors and directors about the current situation that had escalated to the point, like I said, there for the necessity of police and DHS involvement. Ryan and Lisa both obviously had been part of our church for a long period of time in multiple ways and multiple capacities. *And so it was a way to inform them, so they are not caught off guard, and able to respond appropriately.*
>
> * * *
>
> Q. What was the purpose of sending this [May 3rd] E-mail?

A. *To inform them and to let them know the situation that was going on*, because a lot of them were somehow, some way connected and involved in all of that.

* * *

Q. Well, what was the purpose in sending this [May 12th] E-mail?

A. In similar fashion of the pasters and directors, because of the connection that many of them would have had or potential connection that they would have with – with Lisa and the situation, and of course, we're getting out a little ways from the incident, and word is getting out. So it was, again, *another opportunity to inform in what I thought was the proper way to do so*.

(App. at 427-28, 431-32, 434-35)(emphasis added).

Defendants' attempt to invoke the ecclesiastical shield is a masterpiece of revisionist history. If HBC doctrine compelled Glenn to send the emails, surely he would not have waited until May 2015—*over two years into his "corrective counseling"*—to share with HBC members *for the first time* the Ryan and his wife were experiencing marital difficulties. (App. at 579, 582). It also bears repeating that Glenn had never sent an email talking about the marital problems of any other HBC members prior to the emails at issue in this case.[5] *See* (11/04/19

[5] Glenn previously served as an advocate for HBC members Christie and Koral Martin during their marriage counseling at 12

Pl's App. in Resistance to 3rd MSJ at 12). Nor has Glenn sent a similar one since. *See* (11/04/19 Pl's App. in Resistance to 3rd MSJ at 12). From this evidence, a reasonable juror could find that Glenn was acting as a busybody rather than pursuant to any religious doctrine.[6]

"The general rule is that civil courts will not interfere in purely ecclesiastical matters, including membership in a church organization or church discipline." *Marks*, 528 N.W.2d at 544. Deciding whether Glenn's statements were defamatory or breached Ryan's confidences would not require the court or jury to pass judgment on any religious doctrine. *Compare Bandstra*, 913 N.W.2d at 37 ("The First Amendment

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Stones Counseling. (App. at 602). If HBC doctrine compelled "community-based discipleship," Glenn would have emailed the congregation about the Martins' marriage difficulties. He did not. From this evidence alone, a reasonable juror could conclude that Glenn was not acting pursuant to religious discipleship when he sent the three emails about Ryan.

[6] If anything, the emails violate HBC's religious principles. HBC's bylaws expressly prohibit spreading gossip. (App. at 563) ("I will neither gossip nor listen to gossip concerning any member(s) of this body and will, when personally offended, speak directly and lovingly with those involved"). Recognizing that this bylaw gives away the game, Defendants make the absurd claim that it only applies "outside of the church congregation." (Appellee's Br. at 23); (App. at 400-01)(explaining how Glenn's emails violate the HBC bylaws against gossip).

plainly prohibits the state, through its courts, from resolving internal church disputes that would require interpreting or deciding questions of religious doctrine"). As explained in *Kliebenstein*, the test is whether a jury could determine liability "without resort to theological reflection." *Kliebenstein*, 663 N.W.2d at 407. Because the obligation to avoid defamatory statements and the duty of confidentiality apply to all persons who provide counseling within a fiduciary relationship, the jury would not need to decipher any religious doctrine. Indeed, failing to hold Glenn accountable for his defamatory emails "would grant immunity to religious figures, which the state may not do." *Bandstra*, 913 N.W.2d at 43.

The Iowa Supreme Court's analysis in *State v. Edouard*, 854 N.W.2d 421 (Iowa 2014), illustrates why there is no First Amendment religious entanglement problem in this case. In *Edouard*, the State criminally prosecuted a pastor for sexual exploitation after having sex with three parishioners. *Id.* at 430. The defendant claimed the prosecutor's introduction of evidence at trial about the victims' faith and his status as pastor violated the Establishment Clause of the First Amendment and the Iowa Constitution. *Id.* at 445. The court rejected

the argument. *Id.* at 447. Observing that the evidence touched upon "the religious setting in which the defendant's conduct took place," the court noted that the legal dispute involved "neutral" principles of law that applied to "all persons who provide or purport to provide mental health services." *Id.* at 446. As was the case in *Edouard*, so too is it here. While testimony will be presented at trial regarding the religious setting in which Glenn sent the emails, liability will be determined by neutral, secular principles without the need to dwell upon any religious doctrine. *See Employment Div. Dept. of Human Res. v. Smith*, 494 U.S. 872, 882 (1990)(expressly rejecting the view that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation"). 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 proscribes (or prescribes) conduct that his religious prescribes (or proscribes). *Bandstra*, 913 N.W.2d at 42 (quoting *Smith*, 494 U.S. at 879).

Defendants lean heavily into the Texas Supreme Court's decision in *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007). (Appellees' Br. at

49-52). *Westbrook* is easily distinguishable on multiple grounds. First, the communication in *Westbrook* was directed only to members of the congregation. Glenn's emails, in contrast, were not limited only to members, nor did he direct the recipients to treat Ryan's situation as a members-only issue.

Second, the letter in *Westbrook* directing members to shun the plaintiff occurred as part of a church disciplinary proceeding. *Id.* at 391. The fact that it was part of the disciplinary proceeding was essential to holding. As the court explained, the "disclosure cannot be isolated from the church-disciplinary process in which it occurred, nor can Westbrook's free-exercise challenge be answered without examining what effect in the disciplinary process that the church requires would clearly have a 'chilling effect' *on the churches ability to discipline its members*." *Id.* at 400 (emphasis added). The same concern is not present in this case because Glenn did not share the confidential information about Ryan as part of a church discipline process. (App. at 438, 440-41).

Third, the church's constitution in *Westbrook* required elders to announce the removal of any member who engages in conduct that

"violates Biblical standards, or which is detrimental to the ministry, unity, peace or purity of the church," and who remains unrepentant. *Id.* at 392. In other words, the disclosure of the "confidential information to the church elders *was mandated by church doctrine*" and "an integral party of the church's three-step disciplinary process." *Id.* at 404 (emphasis added); *In re Diocese of Lubbock*, 2019 WL 6693765 at *6 (Tx. Ct. App. Dec. 6, 2019) ("Westbrook's action was founded upon church tenet obligating church members to respond in a particular way to the discovery of a particular act"). As demonstrated above, no such requirement exists in this case. Instead, Glenn testified that he sent the emails simply to give the recipients a heads-up to be able to respond to talk about the Kosters. (App. at 427-28, 431-32, 434-35).

Finally, *Westbrook* is different for a more fundamental reason. Iowa courts employ the "neutral-principles" methodology to analyzing claims of religious immunity from torts. *See Bandstra*, 913 N.W.2d at 37-42. In contrast, the Texas Supreme Court declined to expressly adopt the neutral-principles methodology in *Westbrook*. *See Retta v. Mekonen*, 338 S.W.3d 72, 77 (Tx. Ct. App. 2011)(quoting *Westbrook* and observing "the Texas Supreme Court [in *Westbrook*] implied that the

neutral-principles approach does not extend beyond the property-ownership context"). Defendants' attempt to find a foothold in the *Westbrook* decision, therefore, is unavailing.

IV. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE ELEMENTS OF RYAN'S BREACH OF FIDUCIARY DUTY CLAIM

Unable to explain why they should be given First Amendment protection, Defendants next lead the Court on an extended detour through inapposite caselaw involving Ryan's fiduciary duty claim. The district court rejected theses arguments in its ruling on Defendants' first and third summary judgment motion. (App. at 627-36). This Court should follow suit.

A. Glenn's fiduciary relationship with Ryan does not turn solely upon his status as a pastor

For their opening salvo, Defendants argue that Glenn owed Ryan no fiduciary duty. Their argument follows in three steps. First, they claim that Glenn was not acting as a fiduciary because he did not hold himself out as a secular counselor. (Appellee's Br. at 55-56). Second, relying upon *Doe v. Hartz*, 52 F. Supp.2d 1027 (N.D. Iowa 1999), Defendants claim that Glenn's status as a pastor is not sufficient to establish a fiduciary relationship. (Appellee's Br. at 55). Accordingly,

they contend Glenn was not a fiduciary as a matter of law. This argument fails at every step.

Proof that Glenn "held himself out to have professional or secular counseling experience" is not required to establish a fiduciary relationship. (Appellee's Br. at 56). To the contrary, 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 v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986) (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 & Insulating Co.*, 538 N.W.2d at 647. A fiduciary relationship can even arise between purely "personal" acquaintances. *Kurth*, 380 N.W.2d at 696. For this reasons, the district court was correct to hold that "[w]hile secular credentials would be relevant to establishing a fiduciary relationship in the present case, there is no

reason to conclude that secular credentials are an indispensable requirement." (App. at 633).

Glenn and Ryan's relationship contains all the hallmarks of a fiduciary relationship identified in *Kurth* to be determinative. First, Glenn, by his own admission, was acting on Ryan's behalf by providing extensive and intensive "corrective counseling" and "one on one corrective care." (App. at 578, 579, 582). As Glenn explained it, he "attempted—and exhaustively so—to deal with all issues that [were] currently active in their marriage." (App. at 579). Ryan, likewise, viewed the Life Group as a form of group counseling because Glenn would ask him about specific problems in his marriage and offer solutions to get past those problems. (App. at 316). Second, Glenn exercised influence and dominance over Ryan. For example, Ryan followed Glenn's advice on whether to seek intensive marriage counseling at 12 Stones Ministry. (App. at 269, 420); *see also 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). Third, Ryan clearly reposed confidence in Glenn. He shared highly intimate details about his marriage and sexual history that he did not share with anyone else. (App. at 603). Fourth, the summary judgment record demonstrates that Ryan depended upon Glenn's counsel. He viewed Glenn as the leader of the Life Group as reflected in the March 30, 2015, email exchange in which Ryan states to Glenn, "God is using you and the group to break my will and that is what I need." *See* (Pl's App. in Resistance to 1st MSJ at 258-59). Most importantly, 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). Fellow parishioner, Andy Ellingson, also observed the power differential in his deposition by noting that Glenn "is in a position of authority" such that his opinions carried more weight than those of others. (App. at 589). Taking these facts in the light most favorable to

Ryan, a reasonable juror easily could conclude that Glenn had a fiduciary relationship with Ryan.

Even if Ryan is required to prove the existence of a counselor-counselee relationship (which he need not do), the summary judgment record is replete with facts to support such a relationship. Under Iowa law, a "counselor" is understood to include a "marriage or family therapist . . . member of the clergy, or any other person, whether or not licensed or registered by the state, who provides or purports to provide mental health services." Iowa Code § 709.15(1)(a). "Counseling," in turn, is "a word of ordinary usage" that covers any conduct "addressing a cognitive, behavior, emotional, mental, or social dysfunction, including an intrapersonal or interpersonal dysfunction." *Edouard*, 854 N.W.2d at 435. For example, in *State v. Allen*, 565 N.W.2d 333 (Iowa 1997), the Iowa Supreme Court found that hypnotherapist who plied his client with alcohol and Tarot cards was engaged in counseling. *Edouard*, 854 N.W.2d at 435 (explaining the *Allen* holding as applied to the ordinary understanding of "counseling").

In this case, the summary judgment record establishes, at a minimum, a genuine issue of material fact as to the existence of a

counselor-counselee relationship. Schoener, for example, opined that "Pastor Glenn's interactions with [Ryan] in the Life Group was characteristic of a counselor and client relationship." (App. at 589). Additionally, Ryan viewed the Life Group as a form of group counseling. (App. at 304). The purpose of the Life Group was for "changing behavior" and "bettering [their] marriages." (App. at 304). Moreover, Glenn himself referred his conduct as "corrective counseling" and "one-on-one corrective care." And, Ryan shared highly private and personal information about himself in Life Group that he otherwise would not have shared but for the express understanding that it would not be shared with others. (App. at 603). Viewed in the light most favorable to Ryan, these facts are sufficient to generate a jury question. *Moses v. Diocese of Colorado*, 863 P.2d 310, 322 (Colo. 1993)("the existence of the fiduciary relationship is a question of fact for the jury").

B. A jury question exists as to whether Glenn had a fiduciary duty to maintain Ryan's confidences

Defendants next contend that Glenn did not violate his fiduciary duty by disclosing information obtained in Life Group. (Appellee's Br. at 58-62). Their contention rests upon a mischaracterization of two cases. The first case, *Lightman v. Flaum*, 97 N.Y.2d 128 (N.Y. Ct. App.

2001), involved a breach of fiduciary duty claim against a rabbi who disclosed to congregant's husband his wife's admission that she stopped engaging in religious purification laws and was seeing another man in a social setting. *Id.* at 131. The New York Court of Appeals dismissed the wife's claim, holding that a breach of a statutory privilege rule does not give rise to a private right of action. The court explain that Accordingly, the New York statute, "directed at the admissibility of evidence—does not give rise to a cause of action for breach of a fiduciary duty involving the disclosure of oral communications between a congregant and a cleric." *Id.* at 137. The second case, *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987), communications made to a member of the clergy does not constitute a professional standard of care in a claim for clergy malpractice. *Id.* at 554. Neither of these cases preclude a breach of fiduciary duty claim based on divulging confidential information. Rather they merely stand for the unremarkable premise that statutory privileges do not, standing alone, give rise to a private cause of action. Koster, however, does not base his claim solely upon the statutory clergy privilege, nor does he assert a claim of clergy malpractice. Further, *Lightman* and *Hester* say nothing

about the viability of a breach of fiduciary duty claim based on disclosure of confidential information obtained during martial counseling provided outside of church.

Defendants further attempt to limit Ryan's claim by reference to the clergy privilege in Iowa Code section 622.10 also misses the mark. Ryan does not raise a statutory claim under section 622.10, but a common law. It has long been recognized that 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. "[T]he liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary *but results from the relation*." *Id.* at cmt. b (emphasis added). "In principle, the same reasons why assurances of confidentiality by trustees and lawyers should be enforced apply to many relationships that do not rise from to the same strict fiduciary level; the same reliance on the assurance of confidentiality is present in each case." Alan B. Vicker, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1460 (1982). "The relationship of the parties here was one of trust and confidence out of which sprang

a duty not to disclose." *MacDonald v. Clinger,* 446 N.Y.S.2d 801, 805 (N.Y. Sup. Ct. 1982) (holding that psychiatrists are fiduciaries with respect to confidential information); *see also Gracey v. Eaker*, 837 So.2d 348, 354 (Fla. 2002) (holding that a fiduciary therapist has duty not to disclose the confidences reposed in him by his patients); *Eckhardt v. Charter Hosp. of Albuquerque*, 953 P.2d 722, 727-28 (N.M. Ct. App. 1997)(holding that non-physician mental health counselors have fiduciary relationship patients and corresponding duty to maintain patient confidences).

Glenn's duty to maintain confidentiality arises from several aspects of his fiduciary relationship with Ryan. First, Glenn expressly committed to maintaining the confidentiality of information that was shared within the Life Group. (App. at 309). As a result, Ryan shared highly intimate details about his marriage and sexual history that he did not share with anyone else. (App. at 604). Second, Ryan understood Life Group as Glenn's attempt to perform marriage counseling. (App. at 602). Third, Iowa law regarding privileges between individuals and their clergy and counselors 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). Fourth, the HBC Bylaws identify membership commitment to include the promise to "neither gossip nor listen to gossip concerning any member(s) of this body." (App. at 563). Given the nature of this counseling relationship, a fact finder could easily find that Glenn had a fiduciary duty to maintain the confidentiality of information concerning Ryan's participation in Life Group. *Compare Economy Roofing & Insulating Co.*, 538 N.W.2d at 648 (holding that jury question existed whether former employee had duty to maintain secrecy of trade secrets given their relationship and confidentiality afforded in Iowa Code chapter 550).

C. A jury question exists as to whether Glenn breached his fiduciary duty to maintain Ryan's confidences

Defendants also claim that Glenn did not breach his fiduciary duty because nothing in the emails was confidential. According to Defendants, Ryan did not have an expectation of privacy because the

corrective counseling occurred in a group setting. In this regard, Defendants confuse clergy privilege with Glenn's fiduciary duty of confidentiality. The former is an evidentiary privilege, the latter is a duty to avoid exploiting the fiduciary relationship to the detriment of the other. The decision in *Iowa Supreme Court Atty. Disciplinary Bd. v. Marzen*, 779 N.W.2d 757 (Iowa 2010), illustrates the difference. While attorney-client privilege is ordinarily lost when information is publicly available, the duty of confidentiality is broader. *Id.* at 766. The rule of confidentiality applies "to *all* communication between the lawyer and the client, even if they information is otherwise available." *Id.*; *see also Healy v. Gray*, 184 Iowa 111, 119, 168 N.W. 222, 226 (1918) ("It is also a general rule that an attorney will not be permitted to make use to his own advantage or profit, of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business").

At the same time, Defendants' argument concerning privilege is incorrect. The fact that Ryan's statements were made in the presence of his wife, the Glenns, and the Martins does not destroy the privilege. *State v. Deases*, 518 N.W.2d 784, 788 (Iowa 1994) (explaining that

privilege is not destroyed by presence of third parties if they are necessary to enable the party to obtain treatment"). The members of the Life Group "were not casual observers." *Id.* To the contrary, they were participants in group marriage counseling along with Ryan.

A genuine issue of material facts exists as to whether Glenn breached his fiduciary duty of confidentiality in several respects. As Schoener explains in his expert report, Glenn breached his duties by sending the emails to HBC leadership, staff, and small group members. (App. at 590). Glenn neither informed Ryan that he was sharing information obtained from Life Group to third parties, nor did he obtain Ryan's consent. (App. at 428, 430, 434). Nor was there any therapeutic benefit to sending the emails. (App. at 590). Nor were they necessitated by any emergency. (App. at 590).

The content of the emails is also problematic for someone acting as a fiduciary. They disclose the existence of a counseling relationship, which in itself is confidential information. (App. at 590). The emails essentially offer a diagnosis by declaring that in the "past 3 three months things got to a point that intensive counseling was absolutely necessary. . . . Ryan is in a bad spot." (App. at 579-80). The emails

reference consideration of attending 12 Stones Ministry, which Glenn has expressly admitted was expected to "remain within the Life Group." (App. at 421). Further, Glenn refers to "horrific allegations" that render Ryan unsafe to be around children, but he did no investigation to verify the veracity of the allegations. (App. at 428-30). The clear implication is that Glenn possessed personal information that Ryan had sexually molested his three-year-old daughter when in reality he did not. (App. at 578, 579-80, 582-83)("I trust you can connect the dots and realize that what we are talking about are horrific allegations and are tough to even discuss openly"); *see also Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 771 (Iowa 2006)(recognizing that expressions of opinion often imply an assertion of fact"). Glenn even went so far as to speculate on whether the Kosters' marriage could be saved. (App. at 579-80)("divorce at this point seems inevitable"). These facts, when viewed in the light most favorable to Ryan, are sufficient to allow a reasonably juror to conclude that Glenn violated his fiduciary duty.

CONCLUSION

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

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's proof reply brief was $11.00, and that that amount has been paid in full by me.

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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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