IN THE SUPREME COURT OF IOWA

Supreme Court No. 16-1078
Marion County Case No. LACV094670

VALERIE BANDSTRA, ANNE BANDSTRA, RYAN BANDSTRA, and JASON BANDSTRA,

PLAINTIFFS-APPELLANTS,

v.

COVENANT REFORMED CHURCH,

DEFENDANT-APPELLEE.

APPEAL FROM THE DISTRICT COURT
IN AND FOR MARION COUNTY
THE HONORABLE JOHN D. LLOYD

APPELLANTS' FINAL BRIEF

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V. ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised are substantial issues of first impression relating to the application of the continuing violations doctrine in a clergy sex abuse case, defamatory statements made in the context of a church community, and various discovery issues, including the application of the clergy privilege. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c),(f).

VI. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

Appellants Anne, Valerie, Ryan, and Jason Bandstra appeal from the District Court's dismissal of their claims against Appellee Covenant Reformed Church for actions taken by the Church in relation to the sexual abuse of Anne and Valerie Bandstra by Covenant's employee-pastor, and from multiple discovery rulings by the district court. The Honorable Judge John Lloyd presided at all relevant proceedings.

B. Disposition of the Case in the District Court

On May 24, 2016, the Iowa District Court for Marion County, the Honorable Judge John Lloyd presiding, granted Covenant's various Motions for Summary Judgment of the Bandstras' claims relating to the application of the doctrine of issue preclusion. (Con. App. Vol. II at 616). On June 3, 2016, Judge Lloyd granted Covenant's Motion for Summary Judgment of the Bandstras' defamation claims. (Con. App. Vol. II at 645). On June 7, 2016, Judge Lloyd granted Covenant's Motion for Summary Judgment on the issues of Negligence and Negligent Hiring, Retention, and Supervision. (Con. App. Vol. II at 654).

On June 20, 2016, the Bandstras filed a Motion to Reconsider the court's grant of summary judgment of their negligence claims. (Con. App. Vol. II at 661). The Bandstras filed their Notice of Appeal in this Court on June 23, 2016, alongside their Motion to Permit the District Court for Marion County to Retain Jurisdiction for the Limited Purpose of Ruling on Plaintiffs' Motion to Reconsider, and the Court granted that

motion on August 11, 2016. (Con. App. Vol. II at 795; Ps' Mtn. to Retain Juris.: Ruling re: Remand). The district court denied the Motion to Reconsider on September 21, 2016. (Con. App. Vol. II at 866). The case now properly proceeds before this Court. (*Id.*). Rulings on the application of the clergy privilege have been made throughout the course of this litigation.[1]

[1] *See* the district court's rulings from February 20, 2015; May 6, 2015; March 14, 2016; March 15, 2016; April 13, 2016; and April 22, 2016.

VII. STATEMENT OF FACTS

A. The Church

Covenant Reformed Church (Covenant) is a conservative Dutch Reformed Christian Church which is governed locally by a "Consistory" made up of the Pastor and a "Board of Elders." (App. 31 at Art. 21; Sittema 162:23–164:5 at App. 665–667). The Church Council is made up of the Consistory and the Deacons. (App. 31 at Art. 23).

Appellants were members of the Church from 2003 to December 10, 2010, while Patrick Edouard served as its pastor. (App. 11; A. Bandstra 14:23–25, 27:15–28:6 at App. 60, 61–62; R. Bandstra 80:14–18 at App. 118; V. Bandstra 69:1–70:18 at App. 128–129).

B. Patrick Edouard's Exploitation of Valerie Bandstra

Patrick Edouard knew that Valerie and Jason Bandstra were struggling with infertility in 2005. (V. Bandstra 91:14–92:16 at App. 131–132). In early 2006, Valerie's family encouraged her to seek counseling from Edouard. (V. Bandstra 95:12–25 at App. 133).

At Valerie's first counseling session, Edouard took her to his basement office and locked the door. (V. Bandstra 105:6–9 at App. 134). Edouard kissed and groped Valerie and told her that he understood her like no one else. (V. Bandstra 105:6–106:21 at App. 134–135). Edouard then raped Valerie Bandstra and said she had to trust him. (V. Bandstra 106:22–108:12 at App. 135–136). Valerie did not tell anyone that Edouard had raped her, and over the course of years Edouard continued to contact Valerie, to seek to "counsel" her regarding her emotional and spiritual struggles, and to sexually and financially exploit her. (V. Bandstra 109:2–12, 110:7–19 at App. 138–139). He convinced Valerie that their sexual relationship was consensual. (V. Bandstra 110:7–111:2 at App. 139–140).

In October of 2009, Valerie learned that Edouard had sexually exploited her sister, Patty Zylstra.[2] (V. Bandstra 132:3–8 at App. 157; Poldo 16:9–18, 29:14–31:21 at App. 310, 319–321). Ms. Zylstra agreed to a counseling session with Edouard, and

[2] Patty Zylstra is remarried, and her surname is now Poldo.

during the session he sexually assaulted her. (Poldo 14:6–20:20 at App. 308–314). Afterward, he continued to contact her seeking sex. (Poldo 25:12–30:10 at App. 315–321). Valerie found out that Edouard had sexually assaulted her sister, and the two women agreed they would never tell anyone because they were terrified of him. (V. Bandstra 133:2–10 at App. 158).

On December 14, 2010, Valerie Bandstra disclosed Edouard's conduct, including the rape, to her husband—just days after she learned that her sister-in-law, Anne Bandstra, had also been exploited. (V. Bandstra 271:14–273:19 at App. 163–165; J. Bandstra 244:17–245:14 at App. 112–113). The Elders blamed Valerie for "her role" in Edouard's exploitation of her, and required that the Bandstras confess their "sins" before the entire Board. (Con. App. Vol. I at 44).

C. Patrick Edouard's Exploitation of Anne Bandstra

In April of 2008, Edouard asked to counsel Anne Bandstra. (A. Bandstra 49:23–50:14 at App. 65–66). Anne discussed this

with her husband, Ryan, and they decided that she should meet him. (R. Bandstra 50:17–51:5 at App. 116–117).

Anne and Edouard met in his basement office. (A. Bandstra 51:17–53:8 at App. 67–69). Afterward, Edouard aggressively pursued Anne, calling her at least every other day. (A. Bandstra 66:19–72:18 at App. 72–78). During one visit to Anne's home in May of 2008, Edouard grabbed Anne and kissed her. (A. Bandstra 72:19–73:1, 74:11–14 at App. 78–79, 80). Edouard continued to call and visit Anne's home until he convinced her to have sexual intercourse with him. (A. Bandstra 82:21–84:12, 85:1–86:8 at App. 81–83, 84–85). Edouard sexually exploited Anne from May of 2008 until they were discovered by Ryan Bandstra on December 10, 2010. (A. Bandstra 89:24–90:3 at App. 87–88; R. Bandstra 183:11–184:17 at App. 122–123). Ryan then confronted Edouard and told him that he must resign, but Edouard refused. (R. Bandstra 204:12–205:8 at App. 124–125).

D. The Board of Elders Re-Victimizes the Bandstras

Jason and Ryan Bandstra met with members of the Board of Elders on December 13, 2010. (J. Bandstra 205:11–25 at App. 111). Edouard attended the meeting and resigned later that night. (Con. App. Vol. I at 40).

On December 15, 2010, the Elders sent a letter to the congregation, disclosing Edouard's resignation, with no explanation. (App. 20). By January 9, 2011, the Elders learned that Edouard had also sexually exploited at least two other women in the Church. (Con. App. Vol. I at 44, 45, 46). Other women complained that he had attempted to touch, kiss, or entice them. (D. Van Donselaar 120:9–125:1 at App. 680–685) (Con. App. Vol. I at 13, 16, 31).

The Board of Elders blamed the women for their conduct, informed them that they were not victims, and actively discouraged Anne and Valerie from seeking the appropriate legal assistance. (Con. App. Vol. I at 47).

Anne, Valerie, and Sandy Kanis, another of Edouard's victims, appeared before the Elders on December 27, 2010 to confess their "sins." (Hettinga 193:15–21, 216:5–8, 582:0–19 at App. 251, 252, 256; A. Van Donselaar 215:12–217:1 at App. 674–677; V. Bandstra 156:25–157:19 at App. 161–162; A. Bandstra 393:18–394:19 at App. 104–105) (Con. App. Vol. I at 44). Clarence Hettinga, Chairman of the Board of Elders, granted these victims of clergy sex abuse "forgiveness for their sins." (Con. App. Vol. I at 44).

On January 13, 2011, Julie Hooyer, a social worker with experience in similar matters and a member of the Church, wrote to the Board of Elders. (App. 55–57). Ms. Hooyer said that the women had been victims of clergy sexual abuse, that their actions were not "affairs," and that these women should not be blamed or ostracized by their religious community—to do so would be terribly damaging to the women and to the congregation. (*Id.*)

On January 14, 2011, the Board of Elders wrote to the congregation regarding the "sexual immorality" of Eduard and

several female congregants. (App. 22). Though the letter did not name the victims, the congregation was well aware of the identities of those women who had come forward. (Roozeboom 60:25–61:4 at App. 334–335; Vink 128:13–129:5 at App. 727–728).

On February 4, 2011, Ms. Hooyer and victims of Edouard's actions attended the Elders' meeting and asked them to form a task force to counsel the congregation, and to write a letter to the congregation declaring that Edouard's actions with the women were "clergy abuse" and that the women were "victims." (Con. App. Vol. I at 50) (App. 55–57).

Ms. Hooyer drafted a sample letter to be distributed to the congregation. (J. Hooyer 49:20–50:10 at App. 271–272; C. Hooyer 109:11–110:11 at App. 265–266). At their February 23, 2011 meeting, the Elders declined to distribute it. (App. 52).

The Elders also declined to make a mental health professional available to the congregation, because they could not find a professional who was willing to accuse the victims of

adultery and to approve of the Elders' actions. (Con. App. Vol. I at 53, 61–63).

Throughout this time, the Elders made multiple defamatory statements about Anne and Valerie. (App. 22) (Con. App. Vol. I at 8–9; 13–15, 31–37).

E. Patrick Edouard's Criminal Trial

Edouard's criminal trial began on August 12, 2012, and on August 24, 2012, the jury returned a guilty verdict on four counts of sexual exploitation by a counselor and one count of conspiracy to commit the same. *State v. Edouard*, 854 N.W.2d 421, 430–31 (Iowa 2014). Edouard appealed, and this Court affirmed the result of the original criminal trial. *Id.*

F. The Bandstras Leave the Church and File Their Lawsuit

In July of 2012, Jason and Valerie Bandstra left Covenant. (Con. App. Vol. I at 27). Ryan and Anne Bandstra followed in September of 2012. (Con. App. Vol. I at 29). The Bandstras filed this lawsuit on December 7, 2012, after attempting reconciliation by their letter dated (Con. App. Vol. I at 210–229; 22).

VIII. ARGUMENT

A. The District Court Erred in Dismissing All of Appellants' Negligence Claims as Sufficient Disputed Material Facts Existed for the Claims to Be Submitted to a Jury

i. Preservation of Error

On June 7, 2016, the Iowa District Court for Marion County entered its final ruling granting the last of Appellee's Motions for Summary Judgment. (Con. App. Vol. II at 654). Appellants filed a timely Notice of Appeal with this Court on June 23, 2016, within 30 days of the court's ruling, in accordance with Iowa Rule of Appellate Procedure 6.101(1)(b). (Con. App. Vol. II at 795).

ii. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for corrections of errors at law. *Veatch v. City of Waverly*, 858 N.W.2d 1, 6 (Iowa 2015).

iii. Argument

The Bandstras' negligence claims against the Church follow basic precepts of tort law. When negligence is premised on a failure to act or a failure to act appropriately, a special relationship can assist in identifying a legal duty between the

actor and the victim. *See, e.g.*, *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 652 (Iowa 2000). The special relationship sits on a foundation of dependence and an expectation of protection. *See* Restatement (Second) of Torts § 314A cmt. b (1965).

Here, the Bandstras were dependent on the Church and the Elders for leadership and protection. It is the Elders' duty to protect congregation members from harm by its employees through the administration and oversight of the church. (App. at 31–49, Art. 14).

The Bandstras allege that the Church breached its duty of ordinary care by 1) negligently supervising Edouard; 2) willfully disregarding the advice of professional counselors and denouncing established and accepted mental health treatment concepts after it learned of the abuse; 3) ignoring its duty to the Bandstras by blaming them; and 4) negligently failing to investigate Edouard's offenses. Once a duty and an appropriate standard of care have been identified, the determination of causation is typically left to

the jury. *Thompson v. Kaczinski*, 774 N.W.2d 829, 836 (Iowa 2009). The Church's conduct need not be the only cause of the Bandstras' damages, only *a* cause. *See Garr v. City of Ottumwa*, 846 N.W.2d 865, 871 (Iowa 2014), *reh'g denied* (Iowa 2014).

1) The District Court's Ruling on the Bandstras' General Negligence Claims Should Be Overturned.

The district court dismissed the Bandstras' negligence claims, citing *Varnum v. Brien* for the proposition that the governing bodies of Covenant enjoy freedom of religion under that decision and under the State and Federal Constitutions. (Con. App. Vol. II at 654–655, citing *Varnum v. Brien*, 763 N.W.2d 862, 905–06 (Iowa 2009)).

While Covenant is free to reject views that are contrary to its religious beliefs, it is not free to perpetrate torts on its congregants by neglecting clearly established, self-proclaimed duties to care for and protect the church members who have been harmed because it failed to properly supervise its pastor. *Varnum* does not free the Church from its obligations under tort law. A physically abused member of a church which holds sincere beliefs

regarding the benefits of corporal punishment would have a tort claim for assault, even though the church was acting under a firmly held and sincere belief that such physical punishment is spiritually beneficial. A church member held against her will in order that she might "repent" according to the church's sincerely held belief would have a claim for false imprisonment. A woman raped by a pastor who was hired by a church proclaiming sincere beliefs that clergy's actions should never be questioned could have a claim for negligent hiring and supervision. And where a reasonable church would seek assistance for parishioners and would not label victims "adulteresses," but the Elders of the Covenant Reformed Church do, they can be held liable for failing to meet the ordinary standard of care. The Elders of the Covenant Reformed Church have every right to believe as they see fit, but counterculture practices such as those posited above will often be accompanied by negative legal consequences.

2) The District Court's Ruling on the Bandstras' Negligent Supervision Claims as Outside the Statute of Limitations is Erroneous.

The district court admitted that the Bandstras' negligent supervision claims are somewhat stronger, but dismissed those claims as outside the statute of limitations. (Con. App. Vol. II at 654). The court outlined the concept of inquiry notice—explaining that in Iowa, the statute of limitations for personal injury actions "accrues at the time a plaintiff discovers or in the exercise of reasonable care should have discovered 'all the elements of the action.'" (Con. App. Vol. II at 866–867, citing *Buechel v. Five Star Quality Care Inc.,* 745 N.W.2d 732 (Iowa 2008)).

The court's ruling on Valerie's negligent supervision claim hinged on the fact that Valerie was raped by Edouard in 2006, and that in 2009 she was supposedly aware that Edouard was abusing his position as a pastor "to recruit other women as his victims." (Con. App. Vol. II at 658). Under the court's analysis, Valerie knew or "should have known" that the conduct was "wrong"—long before her petition was filed in 2012. (*Id.*).

Edouard began abusing Anne in May of 2008, and the abuse continued through December of 2010. (*Id.*). The court ruled that Anne "appreciated from the outset of the abuse that it was wrong," with no further explanation. (*Id.*). This is a misstatement of Anne's experience, but the court dismissed Anne's claims nonetheless.

On June 20, 2016, Appellants filed a Motion to Reconsider the Court's June 7, 2016 Ruling. (Con. App. Vol. II at 661). In response, the court upheld its previous rulings. (Con. App. Vol. II at 866). It reiterated that a party is placed on inquiry notice when they "gain[] sufficient knowledge of facts that would put that person on notice of the existence of a problem or potential problem . . . . Once a person is aware that a problem exists, the person has a duty to investigate 'even though the person may not have knowledge of the nature of the problem that caused the injury.'" ((Con. App. Vol. II at 868, citing *Buechel v. Five Star Quality Care Inc.,* 745 N.W.2d 732 (Iowa 2008)). The court held that "there is nothing in this definition that requires that the person, having

been placed on notice, must also be able to act on that notice." (Con. App. Vol. II at 868, p. 3 (emphasis in original)). The court is wrong.

If a duty to investigate is imposed and the victim is unable to act until after the statute runs, then the victim is never afforded the opportunity to be made whole. In *Callahan v. State*, this Court stressed the importance of the victim's ability to act after having been put "on notice." 464 N.W.2d 268, 273 (Iowa 1990). The *Callahan* Court stated that the ability to discover an injury and to seek assistance for it necessarily requires action. An infant's inability to act preserves her claim and tolls the statute of limitations. Similarly to the infant discussed in *Callahan*, Valerie and Anne had to be able to act, to reflect on and recognize the abuse, and to seek help—before they can be said to have "discovered" the harm.

a) Framing the Question: When Were Anne and Valerie Aware that the Church Had Harmed Them?

Appellee and the district court have framed the question as one which explores the exact moment when Anne or Valerie knew

that her conduct was "wrong." When did they know, or when should they have known, that having sexual contact with a man who was not their husbands was something that was "wrong"? This has led to much exploration of the topics of adultery, sin, confession, and to probing into what was going through these women's minds as they continued what Appellee insists on calling "affairs" or "relationships" with Edouard. (*See, e.g.*, Con. App. Vol. II at 124, 128).

However, the harm that the Bandstras have demonstrated in this case does not come from having illicit "affairs," or the guilt that normally accompanies such relationships, but rather from the fact that these women were victims of Edouard's concerted search for emotionally vulnerable women to groom and to exploit—not only sexually, but also emotionally and financially—and that they were re-victimized by their Church. Sorting out the harm and the extent of the harm is much more complicated than a simple statement that "she appreciated from the outset of the abuse that it was wrong." (Con. App. Vol. II at 658). The appropriate question

for the court to ask is: when did Anne or Valerie know, or when should they have known, that each was one of many victims in Edouard's far-reaching clergy sex abuse scheme, and that the Church had failed to prevent or remedy it? The Bandstras' claims must be reevaluated with the proper question in mind.

b) The District Court's Ruling Failed to Consider the Special Psychological Conditions which Hindered Appellants' Abilities to Come to an Understanding of What Had Happened or "when they should have known" That They Were Victims of Systematic Clergy Sex Abuse and the Negligent Conduct of Their Church Administration.

The district court and Appellee have consistently equated Valerie and Anne's knowledge that sexual contact with Edouard was "wrong" with the knowledge that they were victims of their pastor's systematic sexual predation and their Church's inaction. (*See, e.g.*, Con. App. Vol. II at 658–659).This line of reasoning implies that they should have known, without professional guidance or explanation, that they had been the victims of a systematic attack by a sexual predator. It implies that they should have sought assistance from their Board of Elders,

members of which have demonstrated that they reject common and universally accepted social science regarding clergy sex abuse. It implies that they should have known that their Church had done nothing to stop the abuse, and would do nothing to remedy it or to support them in healing. And, it implies that they should have sought legal counsel immediately following the first sexual contact. When viewed from the perspective of victims of sexual abuse, these implications set impossibly high standards of conduct. The district court asserted that Valerie and Anne were aware that their sexual contact with Edouard was "wrong," but it failed to analyze whether they knew that it was a legal wrong as it related to the church's actions and inactions.

A thoughtful analysis of the discovery rule as it relates to victims of sexual abuse can be found in this Court's opinion on *Callahan v. State*. 464 N.W.2d 268, 271–72 (Iowa 1990). That case involved a student at the Iowa School for the Deaf who was physically and sexually abused by staff and other students over the course of years. *Id.* at 269. The district court concluded that

the victim's claims were barred under the two-year statute of limitations, because he "knew immediately that he had been abused and who had abused him," but had failed to act. *Id.* On review, this Court held that claims could not accrue until "the plaintiff knows or in the exercise of reasonable care should have known both the fact of the injury and its cause." *Id.* at 273. The Court's language describing post-traumatic stress disorder (PTSD) as it relates to victims of sex abuse is poignant:

> It is fundamental that in order for a person to take action for a wrong, that person must perceive it as a wrong. Even after she perceives the wrong, she [the sex abuse victim] must also distinguish what kind of wrong it is—a moral wrong, a social wrong, or a legal wrong—in order to take appropriate action. The sexually abused child's world is very often a confused one and thus she may be greatly disabled both in her ability to perceive wrongs and to take appropriate legal action. The people she normally should be able to trust for protection and moral guidance are often the ones hurting her.

Id. at 272. This Court notes that PTSD can cause victims to resist reporting abuse and that victims can develop psychological coping mechanisms which make it difficult for them to appreciate the psychological damage that they have

suffered. *Id.* In the present case, both women suffer from symptoms of PTSD. (Schoener 79:23–81:6; 158:5–159:11 at App. 422–424; 501–502).

Appellants' expert clinical psychologist, Gary Schoener,[3] who has done extensive work in the area of clergy sex abuse, describes Anne and Valerie's failures to disclose and to recognize the abuse for what it was. (App. 12–19; *see also* App. 344–662). Mr. Schoener states that the Elders should not have expected parishioners to report sexual misconduct by the pastor, given the exceptional power differentials and lack of an abuse-prevention plan at Covenant. (App. 14–16). Spontaneous disclosure of abuse virtually never occurs. (*Id.*)

Mr. Schoener believes that given the particular climate at Covenant "it is extremely unlikely that all [Edouard's] victims

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[3] Gary Schoener is a licensed clinical psychologist who has examined thousands of victims of sexual abuse by persons in positions of trust and authority, including but not limited to clergy and church leaders, for more than forty years. He is the author of a book titled "Psychotherapists' Sexual Involvement with Clients: Intervention and Prevention."

have come forward, even after the criminal conviction of Mr. Edouard and resultant publicity. While keeping the abuse secret may lead a victim into serious psychological problems, coming forward has severe negative consequences which are very visible." (App. 14–15).

Based on his experience in over 3,000 cases, Mr. Schoener explains that reports of clergy misconduct by victims are extremely unlikely, due to major psychological barriers, including

> (1) Confusion about what has taken place and why it has occurred; (2) the inability of the victim to explain the problem or give it a name; (3) shame and guilt following the first incident, even including a minor one; (4) fear and intimidation brought on by the power dynamics of the situation which may be heightened by the conduct of the predatory offender if he threatens or warns the victim not to speak (as occurred in this case).

(App. 15). Valerie and Anne have testified to these very barriers in explaining why they did not come forward with reports of Edouard's abuse, why it continued, and why it took them so long to understand it as abuse. (*See, e.g.*, V. Bandstra 401:16–22 at App. 181; A. Bandstra 218:23–221:21 at App. 95–98).

Appellee has used Valerie's former status as a successful attorney at a prestigious law firm to attempt to discredit her claims. (*See* Con. App. Vol. II at 116 ¶ 92) (V. Bandstra 391–398 at App. 173–180). According to Mr. Schoener, "[v]ictims who have become ensnared in such abusive relationships have included persons of high intelligence and life attainment, including attorneys, judges, psychologists, psychiatrists and other types of physicians, theologians, and even other clergy." (App. 16, ¶ 16).

Mr. Schoener explains that the predator's successful exploitation of the victim relies heavily on the element of confusion. (App. 17, ¶ 19). "When a person is psychologically overloaded, as when a supposedly trustworthy servant of God is attempting or committing a sexual act, the victim can become quite docile and vulnerable to abuse. . . ." (*Id.*). The court's rulings and Appellee's arguments completely discount the psychological burden carried by these women when they state that Valerie and Anne "knew it was wrong," or imply that they should have

immediately sought counsel after the first incident to inquire about the legalities of the situation.

Notably, Mr. Schoener advises that the behavior of victims of sexual abuse should be compared with other people in their situation—not with the population in general. He states, "there is no behavior attributed to any of the plaintiffs that I have not seen occur in other similar cases." (App. 18, ¶ 22). The legal obligation for each Appellant is to behave as a reasonably prudent person under the same or similar circumstances, and the Bandstras must be compared with other victims of clergy sexual abuse. *Schalk v. Smith*, 277 N.W. 303, 305–06 (Iowa 1938).

Given the intricacies of the application of the law to victims of clergy sexual abuse, the court's analysis of when the cause of action accrued is oversimplified. Anne and Valerie could have known that their actions were objectively "wrong"[4] without understanding that they were victims in a systematic scheme of

[4] Though both women have asserted that Edouard's behavior was wrong, not theirs. (V. Bandstra 107:23–108:3 at App. 136–137; A. Bandstra 74:7–21, 222:18–223:11 at App. 80, 99–100).

clergy sexual abuse. Having sexual contact with a man who was not their husbands did not cause them the extensive damages they have suffered. Being exploited by their pastor for years, subsequently shamed by their Church, and then ostracized by their close-knit religious community did.

c) A More Careful Analysis of Accrual of the Harm.

i. The Discovery Rule

Under inquiry notice, the Bandstras became aware of facts which would prompt a reasonably prudent sexual abuse victim to begin seeking information only after they had discovered Edouard's systematic exploitation of church members and had been freed of Covenant's control. *See Woodroffe v. Hasenclever*, 540 N.W.2d 45, 48 (Iowa 1995).

Here, the harm the Bandstras suffered at the hands of their Church is different than the harm they might have suffered had Edouard not been a counselor. Their damages could not have been discovered by going to therapy or seeking spiritual intervention. To be put on notice of the harm complained of in this case, Anne and Valerie and their husbands had to discover that Edouard had

been abusing other women—not just one, but multiple and in a systematic fashion—and that the Church had done nothing to prevent it and would do nothing to remedy it.

The earliest date that Appellants could have been put on notice of the particular harm they suffered is December 10, 2010—the day when Anne and Edouard were discovered, and the family learned about some of the systematic clergy sex abuse within the Church. (A. Bandstra 89:24–90:3 at App. 87–88; R. Bandstra 183:11–184:17 at App. 122–123). Valerie and Anne knew that Eduard was a philanderer, but they were unaware of the extent of his abuse of women in the Church, and of the Church's failure to prevent it, until January 9, 2011 when all four known victims had finally come forward.[5] (Con. App. Vol. I at 45, referring to Wanda Brand; C. Hooyer 121:3–122:23 at App. 267–268, noting that Sandra Kanis came forward around December 19, 2010).

[5] Valerie learned in 2009 that Edouard had sexually assaulted her sister, Patty Zylstra, and Anne learned that Edouard had been involved with other women in the church, including Valerie, Patty Zylstra, and Sandy Kanis in May of 2010.

Other women who were not being counseled by Edouard reported that he had made suggestive remarks and attempted to kiss them, but that they had evaded his attempts. (Con. App. Vol. I at 45; 16–21) (D. Van Donselaar 120:9–125:1 at App. 680–685). The exposure of Edouard's actions with his victims by January 9, 2011—or December 10, 2010 at the earliest—would have put the Bandstras on inquiry notice that the Church had not fulfilled its duties under the law. Since the Petition in this matter was filed on December 7, 2012, the Bandstras filed their negligence claims within the two year statute of limitations. (Con. App. Vol. I at 210).

ii. Continuing Violations Doctrine

In Iowa, victims of sexual abuse by a professional counselor cannot "inquire" into the harm while they are still under the control of the abuser. *See Callahan*¸ 464 N.W.2d at 273. If this Court declines to apply the discovery rule as outlined above, Appellants urge the Court to apply the continuing violations doctrine.

In its Ruling on Plaintiffs' Motion to Reconsider, the district court declined to apply the continuing violations doctrine to Appellants' remaining claims, holding that since Edouard had been dismissed from the suit, the doctrine could not be applied. (*See* Con. App. Vol. II at 869). The court stated that "[t]here is no indication in this record that the church in any way exercised any control over the plaintiffs such that they would have been incapacitated in bringing an action against the church." (*Id.*).

In fact, the Church administration exercised significant control over the personal lives of all its parishioners. (Hol 32:11–33:25)(App. 259–260). The Church teaches that Christian brothers and sisters should not bring lawsuits against one another, and that doing so is a sin. (Horstman 59:18–60:5 at 259–260; Hartman 34:13–24 at App. 237; Van Mersbergen 70:21–73:8 at App. 699–702; A. Van Donselaar 61:21–62:7 at App. 670–671; Hol 59:24–60:9 at App. 261–262; Clarence Hettinga, Chairman of the Board of Elders, stated that the Bandstras have violated a Biblical teaching by bringing a lawsuit, and that willful violation of a

Biblical teaching could send them to hell. Hettinga 59:13–22 at App. 242). The Elders frequently provided their "guidance" on the Valerie and Anne's "sins." (*See, e.g.*, App. 22) (*See, e.g.*, Con. App. Vol. I at 44, 47–48).

The Church supported Edouard while urging the Bandstras to resolve their complaints outside of the legal system. (Con. App. Vol. I at 47–48).

The Bandstras were under the control of the Board of Elders through their membership and active participation in the congregation. (Hol 32:11-33:25 at App. 259–260). Their closest family and many friends were members of the church community. (*See, e.g.*, A. Bandstra 27:25–28:9 at App. 61–62; R. Bandstra 80:19–81:7 at App. 118–119; J. Bandstra 81:2–6 at App. 108). As such, the Bandstras could not have brought their lawsuit until they had fully removed themselves from the Elders' control by leaving the Church.

Under the continuing violations doctrine, which provides an equitable exception to the usual rules governing statute of

limitations periods, the statute is tolled so long as the tortfeasor perpetuates his or her misconduct. *See O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001). The continuing violations theory most applicable to this case is the cumulated wrongs method. *See Page v. United States*, 729 F.2d 818, 821–22 (D.C. Cir. 1984). It applies when no single incident in a chain of tortious activity can be identified as the cause of significant harm. *See id.* Here, no single act can be identified as the cause of all of the Bandstras' harm, and viewing the actions of Appellee in aggregate is essential.

The Bandstras were in a relationship of trust and confidence with the members of their Board of Elders. There was an extreme power differential between congregants and the Elders, since the Elders had "ultimate authority" over Church matters and exercised power over all aspects of congregants' lives. (Hol 32:11-33:25 at App. 259–260). Covenant engaged in tortious activity by continuously shaming and victimizing Anne and Valerie and their

husbands until the Bandstras left the Church. (Con. App. Vol. I at 27; 29).

The continuing violations doctrine has been applied in Iowa in at least one non-employment case. *See Briener v. Nugent*, 111 N.W. 446, 447–48 (Iowa 1907). In *Briener v. Nuegent*, the Iowa Supreme Court holds that a plaintiff in a seduction case may recover for all of the seductive acts in a series, including incidents occurring outside the statute of limitations. *Id.* In its Ruling on Plaintiffs' Motion to Reconsider, the district court expressly declines to apply *Briener*, explaining that *Briener* presents an "issue of the admissibility of evidence, not a statute of limitations case," and that the statements on this issue are "clearly *dictum*." (Con. App. Vol. III at 869–870). Appellants' purpose in citing *Briener* is to show that the continuing violations doctrine was applied in Iowa as early as 1907. Applying the doctrine in the present case would not require the adoption of an entirely new legal theory. Further, Iowa courts have not expressly rejected the doctrine in other cases, but have declined to apply it because the

violations in question were singular in nature. *See, e.g., S.O. ex rel. J.O. Sr. v. Carlisle School Dist.*, No. 07-2096, 2009 WL 605994, at *5 (Iowa Ct. App. March 11, 2009). Although the continuing violations doctrine has not been applied specifically in a clergy sex abuse case in this jurisdiction, this Court should apply the doctrine in this case.[6]

Courts have routinely held that the existence of a continuing violation and the period for which it tolls the statute of limitations presents questions of fact for the jury. *E.E.O.C. v. J. W. Mays, Inc.*, No. 88CV3020, 1989 WL 106890, at *2 (E.D.N.Y. Sept. 13, 1989)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). Because they present questions of fact, they must be "determined

[6] Iowa courts have also recognized and applied the continuing violations doctrine in civil rights and corporate law cases. *See, e.g., Farmland Foods, Inc. v. Dubuque Human Rights Commission*, 672 N.W.2d 733 (Iowa 2003)(applying the continuing tort doctrine in a hostile work environment claim); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Com'n*, 453 N.W.2d 512, 527–530 (Iowa 1990)(applying the continuing violations doctrine in a civil rights case).

by the jury under the evidence in any given case." *Lutz v. Davis*, 192 N.W. 15, 17 (Iowa 1923).

B. The District Court Erred in Dismissing Appellants' Defamation Claims Against the Church

i. Preservation of Error

On June 3, 2016, Judge Lloyd granted Covenant's Motion for Summary Judgment of the Bandstras' defamation claims. (Con. App. Vol. III at 645). The Bandstras filed a timely Notice of Appeal with this Court on June 23, 2016, within 30 days of the court's ruling, in accordance with Iowa Rule of Appellate Procedure 6.101(1)(b). (Con. App. Vol. II at 795).

ii. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for corrections of errors at law. *Veatch*, 858 N.W.2d at 6.

iii. Argument

1) The District Court's Ruling.

In its June 3, 2016 ruling, the district court dismissed the Bandstras' defamation claims, holding that (1) the majority of the statements made by members of the Board of Elders were

protected by the First and Fourteenth Amendments to the U.S. Constitution, since the Elders are the "elected spiritual leaders of the church" and their decisions on matters of faith and ecclesiastical law are protected and the statements were made "entirely within the church"; (2) a majority of the statements were made only to the Bandstras, and were therefore not "published"; (3) the Elders may claim the qualified privilege for their statements under Iowa law; and (4) the statements were opinion, and not fact. (*See* Con. App. Vol. II at 645– 653). Each of these holdings was in error. Appellants will focus on the most clearly defamatory statements—those included in written documents sent to the congregation and others—as examples, but urge the Court to reconsider all the defamatory statements. None of the letters discussed below were distributed with the specification that they should be confidential, and indeed the whole town knew of the situation. (*See* Roozeboom 60:25–61:4 at App. 334–335; Vink 128:13–129:5 at App. 727–728; Hartman 53:16–20 at App. 238; A. De Waard 61:20–64:21 at App. 205–208).

2) Defamation Per Se

The statements made in this case accusing Valerie and Anne of adultery are defamatory *per se* under Iowa law, since they are "[a]n attack on the integrity and moral character of a party. . . ." *Vinson v. Linn-Mar Community School District*, 360 N.W.2d 108, 116 (Iowa 1984). This Court has expressly held that accusing a person of adultery is slanderous *per se*. *See McDonald v. Nugent*, 98 N.W. 506 (Iowa 1904). In *McDonald*¸ the plaintiff sued his mother-in-law for defamation, alleging that she said he "was in the habit of consorting with lewd women, and, through such adulterous intercourse, had contracted a loathsome sexual disease." *Id*. at 507. The trial court's jury instructions directed that insofar as "the words alleged to have been spoke by defendant constituted a charge of adultery against the plaintiff, then they were actionable per se." *Id.* This Court held that the jury instruction was "undoubtedly correct." *Id.*

In *Arnold v. Lutz*, the Iowa Supreme Court again held that accusing a person of adultery was slander *per se*. 120 N.W. 121,

121 (Iowa 1909). As recently as 2004, this Court has recognized the continuing validity of this line of cases. *See Barreca v. Nickolas*, 683 N.W.2d 111, 116 (Iowa 2004).

3) The Defamatory Statements

Appellee has made many statements against Anne and Valerie which are libelous *per se* and slanderous *per se*. These statements have been thoroughly discussed in the record, but the most obviously defamatory among them include:

1. A letter dated January 14, 2011, in which Covenant's Board of Elders conveyed to the entire congregation that: "the consistory has learned of a prolonged period of sexual immorality and/or inappropriate contact between Patrick Edouard and multiple women congregant members." (App. 22). Though the letter did not name the women, the congregation was widely aware of which women had come forward with reports of abuse by Edouard. (Roozeboom 60:25–61:4 at App. 334–335; Vink 128:13–129:5 at App. 727–728).

2. On December 10 and 11, 2012, the Elders prepared and read statements to the entire congregation which stated: "In characterizing the action of Mr. Edouard as predatory, we don't mean to imply that he alone committed sin. God calls it sin when someone who is married willingly has intimate relations with a person who is not their spouse, and we have learned that other members rejected the manipulations of a man who never should have sought to lead them astray." (Con. Vol. I at 13–15). Neither the letters nor the statements read to the congregation ever included any request to keep the matters private nor directed congregants to refrain from discussing content with others not in the congregation. Indeed, the whole town knew and commented on the behavior of the women. (Roozeboom 60:25–61:4 at App. 334–335; Vink 128:13–129:5 at App. 727–728; Hartman 53:16–20 at App. 238; A. De Waard 61:20–64:21 at App. 205–208).

3. The content of the letters sent by the Board of Elders to the congregation reached the news media. The news media published information about the Bandstras and their relationship with Edouard. (*See, e.g.*, V. Bandstra 299:17–300:1 at App. 168–169; A. De Waard 61:20–64:21 at App. 205–208; G. Horstman 139:22–140:4 at App. 279–280; Mathes 38:23–40:12 at App. 298–300).

4) The First Amendment Does Not Relieve the Church of Liability for Damage Caused by Its Defamatory Statements

Typically, Iowa courts avoid interfering in purely ecclesiastical matters due to entanglement issues under the First Amendment. *Brown v. Mt. Olive Baptist Church*, 124 N.W.2d 445, 446 (Iowa 1963). However, courts do have jurisdiction over "civil, contract, and property rights which are involved in or arise from a church controversy." *Id.* These civil defamation claims made against Appellants have secular meaning and were published to people outside of the Covenant community.

The defamation claims in the case at hand bear striking resemblance to the facts in *Kliebenstein v. Iowa Conference of United Methodist Church*. 663 N.W.2d 404 (Iowa 2003). In that case, Jane Kliebenstein and her husband, members of Shell Rock United Methodist Church (UMC), sued the church after the district superintendent published a letter to the congregation and other members of the community describing Kliebenstien as the "spirit of satan." *Id.* at 405. The defendants argued that the term was "purely ecclesiastical" and that examination of the term in a suit for defamation would require the church to engage in the interpretation of religious dogma. *Id.* at 406. The district court granted summary judgment. *Id.* On appeal, this Court determined that the phrase "spirit of satan" has unflattering secular and sectarian meanings. *Id.* That determination led this Court to hold that since the terminology was generally understood to be "unflattering" in the secular community, and since the letter had been published to individuals outside the church community,

Kliebenstein's claims should not have been summarily dismissed by the district court. *Id.* at 408.

Under *Kliebenstein*, the First Amendment does not protect a phrase with "a secular meaning that could be in a civil suit for defamation without treading on—or wading into—religious doctrine." *See id.* at 407. There is no blanket protection for statements made in a religious context. The Iowa Supreme Court has held that a minister who impugns the honesty of a congregant and the probity of his actions is not excused from answering for false statements. *State v. Cooper*, 116 N.W.2d 691, 693 (Iowa 1908).

Here, Appellee has publically accused Anne and Valerie of committing adultery. (App. 22). "Adultery" is commonly understood in the secular world as the act of voluntary sexual intercourse between a married person and another who is not a spouse. *Adultery*, Webster-dictionary.org. This definition is consistent with the Elders' description of the "sin" of adultery as that which takes place when "someone who is not married

willingly has intimate relations with a person who is not their spouse." (Con. App. Vol. I at 13–15). The term "adultery" has a stronger secular meaning than the term "spirit of Satan," held to be actionable in *Kliebenstein.* 663 N.W.2d at 407 (Iowa 2003).

The district court noted in its ruling dismissing Appellants' defamation claims that adultery "has not been a crime in Iowa for over 40 years," opining that:

> secular society no longer ascribes any negative connotations to that conduct [adultery] outside of a moral context. At least one state court has even held that accusing someone of adultery is no longer defamation per se because it is no longer a crime in that state.

(Con. App. Vol. II at 651). This statement is confusing, because the standard for identifying a defamatory statement in Iowa is one which attacks "the integrity and moral character of a party . . . ." *Vinson*, 360 N.W.2d at 116. That adultery is no longer a crime has little to do with the fact that being falsely accused of it is still a direct attack on the integrity and moral character of the subject of the statement.

After determining that "spirit of satan" has a secular meaning, the *Kliebenstien* Court went on to find that this defamatory statement was actionable because it had been published to people outside of the church community. *Kliebenstein*, 663 N.W.2d at 408. In the case at hand, the Elders' statements made it into the local news media due to their careless distribution of letters containing defamatory statements to the entire congregation. (*See, e.g.*, V. Bandstra 299:17–300:1 at App. 168–169; A. De Waard 61:20–64:21 at App. 205–208; G. Horstman 139:22–140:4 at App. 279–280; Mathes 38:23–40:12 at App. 298–300). Under *Kliebenstein*, the Elders' statements are actionable.

5) The Statements Were Published

In its June 3, 2016 Ruling on Motions for Summary Judgment Re: Defamation, the district court held that "a number of . . . statements were made only to the plaintiffs . . . ." Many of the Elders' statements were included in written communications to the entire congregation, their families, friends, members of each household regardless of membership in the Church, and

eventually to the entire town of Pella. (Roozeboom 60:25–61:4 at App. 334–335; Vink 128:13–129:5 at App. 727–728). The publication requirement is satisfied for all of the documents discussed in this brief, and for many others outlined in the pleadings.

6) The Elders May Not Claim the Qualified Privilege

"The elements of a qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner to proper parties." *Marks v. Estate of Hartgerink*, 528 N.W.2d 539, 545–46 (Iowa 1995), abrogated on other grounds by *Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004). The defense of qualified privilege is not available if the privilege is abused, for example, "when a defamatory statement is published with 'actual malice.'" *Barreca*, 683 N.W.2d at 118. To defeat a qualified privilege, "a plaintiff must prove the defendant acted with knowing or reckless disregard of the truth of the statement." *Id.* at

121. Whether or not statements were published with actual malice is a matter for the jury. *Id.* at 123.

Here, the Elders made their statements with knowing or reckless disregard for the truth. They repeatedly called Anne and Valerie adulteresses even though each woman—and especially Valerie, who told them that she had been raped—had reported that her sexual intercourse with Edouard was not voluntary. (*See* Con. App. Vol. II at 16–22). In fact, three of Edouard's four known victims called their first sexual contact with him rape. (App. 738–739; V. Bandstra 106:22–108:12 at App. 135–136; Hettinga 122:5–124:22 at App. 246–248). Rape, by definition, requires that the sexual act is *not* voluntary. When the Elders repeatedly accused the Bandstras of committing adultery, they knew that the acts were not voluntary, because Edouard's victims had told them that the acts were not voluntary. They knew that their statements were untrue. Their knowledge of the falsity of their statements is even more obvious when one considers that a couple of the Elders apparently raised concerns about making the defamatory

statements, and chose instead to be supportive of the Bandstras. (*See, e.g.*, Con. App. Vol. I at 16–21).

7) The Elders Did Not Believe Their Statements to Be Statements of Opinion, but Rather, Believed Them to Be Statements of Fact

The district court discusses only a few of the defamatory statements in ruling that they were all opinions. (Con. App. Vol. II at 645–653). One such statement was made by Elder Clarence Hettinga during a conversation with Ryan Bandstra, in which he stated that a woman could not be raped unless the act was done by physical force. (Con. App. Vol. II at 649). This comment, and all of the other comments made by the Elders throughout the course of this case which are not discussed by the district court, were not statements of "opinion" but were statements of fact, according to the Elders who made them. (*See, e.g.,* Hettinga 84:10–24 at App. 245). They were also received by the congregation as such, since the Elders are the last word and authority of the Church. (App. 31–49, Art. 14; Hol 32:2–33:25 at App. 259–260).

The statements made by the Elders in the letters outlined above, and in other pleadings filed throughout the course of this case, meet the requirements of this Court's four-factor test in *Yates v. Iowa West Racing Association* for determining whether the average listener would view the statement as fact or opinion. 721 N.W.2d 762, 769 (Iowa 2006). The *Yates* test requires that statements 1) have a precise core meaning; 2) be objectively capable of disproof; 3) be analyzed according to the context in which the statement occurs; and 4) consider the broader social context. *Id.* at 770.

First, these statements have a precise core meaning. The term "adultery" means the same thing in the Church and in secular society. (Con. App. Vol. I at 13–15) (Van Mersbergen 83:2–4 at App. 703; Hettinga 73:3–74:14 at 243–244; D. Van Donselaar 80:11–21 at App. 679). The term "adultery" is not indefinite or ambiguous. Second, the statements that these women committed adultery is objectively capable of disproof. Anne and Valerie were victims of clergy sex abuse. Their abuser was convicted under a

statute which states, in part, that victims are "significantly impaired in the ability to withhold consent to sexual conduct." Iowa Code § 709.15(1)(b). Even members of Covenant church chastised the Elders for labeling these women as adulteresses when they could not consent to sex with Edouard, given the power he wielded as their Pastor and counselor. (*See* Con. App. Vol. I at 16–21; 31–37). Third, the context in which these statements were made was not one of Elders merely giving their "opinions" regarding what had taken place. They were instructing the congregation that these women are adulteresses, and that the women must be forgiven for their grave sins. They do not state that they "believe" or "think" that these women are adulteresses. They state that these women have definitively participated in consensual "sexual immorality." (App. 22). Finally, the broader social context in which these statements were made only bolsters Appellants' assertions that these statements were delivered and received as fact. The Elders wield great power and are the final authority on discipline of church members. (Hol 32:11–33:25 at

App. 259–260). If anyone had any doubts about whether the women had committed adultery, or whether Edouard was "alone" in his sin, the Elders' statements settled the issue. (Con. App. Vol. I at 13–15).

C. The District Court's Ruling Declining to Apply Issue Preclusion in This Case is Not Consistent with Iowa Law

i. Preservation of Error

On May 24, 2016, the Iowa District Court for Marion County, the Honorable Judge John Lloyd presiding, granted Appellee's various Motions for Summary Judgment of Appellants' claims relating to the application of the doctrine of issue preclusion. (Con. App. Vol. II at 616). Appellants filed a timely Notice of Appeal with this Court on June 23, 2016, within 30 days of the court's ruling in accordance with Iowa Rule of Appellate Procedure 6.101(1)(b). (Con. App. Vol. II at 795).

ii. Scope of Review

A district court's application of a legal standard will be reviewed for error. *Comes v. Microsoft Corp.*, 709 N.W.2d 114, 117 (Iowa 2006).

iii. Argument

1) Issue Preclusion is Appropriate for Fully Adjudicated Matters

Issue preclusion prevents parties from further litigating issues which have been determined in a previous action. *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981).

a) Offensive Versus Defensive Use of Issue Preclusion.

Issue preclusion may be used offensively or defensively. *Hunter*, 300 N.W.2d at 123. "'[O]ffensive use' . . . mean[s] that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim." *Id.*

b) Establishing a Prima Facie Claim

The party asserting issue preclusion must demonstrate four elements to establish a prima facie claim: (1) the issue must be identical to the issue previously litigated; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior

action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Hunter*, 300 N.W.2d at 123; *see also Am. Famil Mut. Ins. Co. v. Allied Mut. Ins. Co.*, 562 N.W.2d 159, 163 (Iowa 1997).

In the past, issue preclusion was limited by requiring mutuality of parties. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). This Court has since abandoned the doctrine of mutuality in offensive applications. *Hunter*, 300 N.W.2d at 125. However, where mutuality is lacking, the party asserting issue preclusion has the extra burden of proving that 1) the [Defendant] was afforded a full and fair opportunity to litigate the issues in the prior action, and 2) that no other circumstances are present which would justify further litigation of those issues. *Id.* at 126, citing Restatement (Second) of Judgments § 88 (Tent. Draft No. 2, 1975).

c) Application to These Facts

In the present case, the Bandstras say that Patrick Edouard "physically, psychologically, and sexually threatened, assaulted, and/or abused Plaintiffs Valerie Bandstra and Anne Bandstra," that

this abuse "was a proximate cause of the injuries and damages to the Plaintiffs," and that Covenant shares responsibility for Edouard's actions. (*See* Con. App. Vol. I at 277). The Bandstras' claims rely on a jury's determination that Edouard sexually abused Anne and Valerie from his position of power—specifically, as their counselor and Pastor. Edouard was convicted of these very acts in the criminal trial of the matter.

In its May 24, 2016 ruling, the district court denied the Bandstras' request that the court preclude defendants from litigating facts established during the criminal proceedings—including utilizing the defense that Anne and Valerie consented to sexual relations with Edouard, and that the court take judicial notice of the criminal proceedings against Edouard. (Con. App. Vol. II at 625–628). The court noted that the jury had acquitted Edouard of three counts of sexual abuse, and that none of the charges required the jury to find on the issue of consent in order to convict or acquit. (Con. App. Vol. II at 625–626). Additionally, the court held that the fact that Edouard is no longer a party to the case, and

that none of the defendants were party to the criminal proceeding presents additional difficulties. (*Id.*). Appellants urge this Court to reverse the district court's decision.

2) Issues Affirmatively Decided in the Criminal Case Against Patrick Edouard

a) Patrick Edouard was Convicted of the Sexual Exploitation by a Counselor or Therapist of Anne and Valerie Bandstra Under Iowa Code 709.15 and of Engaging in a Scheme, Pattern, or Practice of Sexual Exploitation under Iowa Code 709.15(2)

Under the doctrine of issue preclusion, Covenant should be prevented from presenting any argument or evidence that Edouard did not engage in "sexual conduct with a patient or client," that he was not counseling Valerie and Anne, that either woman consented to Edouard's sexual contact, that either woman willingly entered into a "relationship" with Edouard, or any other argument which contradicts any fact necessary to have brought about his criminal conviction for Sexual Abuse by a Counselor or Therapist or Engaging in a Scheme, Pattern, or Practice of Sexual Exploitation. Iowa Code §709.15 (2014).

b) The "Consent" Defense

The fact that certain classes of individuals are easily manipulated into sexual activity with counselors is so well accepted in Iowa that a criminal statute has been put in place in order to protect those vulnerable individuals. *See* Iowa Code § 709.15 (2014). Members of the clergy will be held to the same professional standard as other mental health professionals, even if they are not formally licensed as counselors. *See* Iowa Code § 709.15(1)(a) (2014); *Edouard*, 854 N.W.2d at 432.

Edouard argued throughout the course of his criminal trial that each of his victims had consented to having a sexual relationship with him. On appeal, he maintained that "[i]mplicit in the jury's verdict finding [him] not guilty of sexual abuse in the third degree is the conclusion that his sexual relationships with all four women were consensual." *Edouard*, 854 N.W.2d at 443. Edouard is no longer a defendant in this matter, but Covenant intends to use a similar consent argument if this matter proceeds to trial. Since the basis for Edouard's conviction under the statute

is that the "counselor . . . *knows* or has reason to know that the patient or client . . . is significantly impaired in the ability to withhold consent to sexual conduct . . . by the counselor," such a defense should not be allowed. *See* Iowa Code § 709.15(1)(b) (2014). Under Iowa law, Valerie and Anne were not able to consent to sexual relations with their counselor, and Appellee should not be permitted to argue that they did.[7]

In its discussion of Edouard's constitutional claims during his criminal trial, this Court discussed the idea of "full and knowing" consent. *Edouard*, 854 N.W.2d at 443–44. This Court determined that consent to sexual activity must be given fully and knowingly, and that it must be given between people who are able—physically, intellectually, and emotionally—to give it. *Id.* In its review of Edouard's case, this Court noted that

> Based upon their testimony, the relationships between Edouard and each of the four women did not involve full and mutual consent. In each case, Edouard used—

[7] This argument has been thoroughly briefed in Plaintiffs' Brief in Support of Their Motion for Summary Judgment, filed April 5, 2016.

> misused—his position of authority as a counselor to exploit the vulnerabilities of his victims.

Edouard, 854 N.W.2d at 443. Several other courts throughout the country have also found that a therapy patient is impaired in her ability to consent to sex with her therapist.[8]

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[8] In *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*, the court held that a psychiatrist who engaged in sex with patients had imposed "his personal, improper designs on the patient" and that the patient "submit[ted] to the advances because of the very mental and emotional problems for which she [was] being professionally treated, thereby exacerbating these problems." 329 N.W.2d 306, 310 (Minn. 1982). In *Roy v. Hartogs*, the court explained that the relationship between a psychiatrist and a patient was a fiduciary one, which could also be explained in the context of a "guardian/ward" relationship. 366 N.Y.S.2d 297 (Civ. Ct. 1975), quoting *Graham v. Wallace*, 50 A.D. 101, 107–108 (N.Y. App. Div. 1900)(internal citations omitted). The *Roy* court held that "[w]hen the guardian thus betrays his trust and ruins the morals, the character and reputation of his ward, he should not be heard to say in a court of justice . . . that the ward was capable of consenting. Consent obtained under such circumstances is no consent and should stand for naught." *Id.* In *Omer v. Edgren*, a woman had a nonviolent sexual "relationship" with her psychiatrist. 685 P.2d 635, 638 (Wash. Ct. App. 1994). The *Omer* court stated that "the relationship was an assault on a patient who, arguably, was not capable of giving consent to such a relationship." *Id.*

Appellants' expert psychologist, Gary Schoener, explains the inadequacy of a victim's consent in relation to a sexual relationship with her pastor in a book he co-authored, stating

> To be meaningful, consent to sexual activity must take place in a context of mutuality, choice, and equality and in the absence of coercion or fear. These factors are not present when an imbalance of power arises out of life circumstances or role differences between two persons, thus coercion or fear is likely to be employed, overtly or covertly, to achieve sexual access. . . . [T]he "consent" of the parishioner or client is not authentic because of the difference in role, authority, and power. The lack of authenticity may not be immediately apparent, but as the counseling and sexual relationship progress they lead to increased confusion and conflict of expectations and the effect of coercion will begin to be felt.

Gary Richard Schoener et al., Psychotherapists' Sexual Involvement with Clients: Intervention and Prevention 83 (Walk-In Counseling Center ed., 1990) (1989).

The Bandstras ask the Court to reverse the district court's ruling which allows Appellee to suggest that Anne and Valerie consented to sexual contact with Edouard.

c) Establishing a Prima Facie Claim.

Appellants contend that the issue of whether or not Valerie and Anne consented to sexual contact with Edouard is identical to the consent issue presented during the criminal trial, and that it was raised and litigated at that time. In convicting Edouard, the jury found that Anne and Valerie were "emotionally dependent patients" and that their ability to consent was impaired. Therefore, factors one and two for collateral estoppel are satisfied. *Fischer v. City of Sioux City*¸ 654 N.W.2d 544, 546–47 (Iowa 2002).

The third and fourth factors—that the issue be material and relevant, and that determination of the issue was essential to the judgment—are also satisfied. The jury could not have made its determination without considering the victims' ability to consent. The consent issue was essential to the judgment. The jury had to determine that Anne and Valerie were emotionally vulnerable patients who had an "impaired" ability to consent in order to convict Edouard.

Appellants also must show that Appellee had a "full and fair" opportunity to litigate these issues, although they were not defendants in the criminal trial. If Appellee had been named as a defendant in the criminal trial, its interests would have been identical to its employee, Edouard, in that its liability in this matter stems directly from his criminal behavior.

One Iowa case demonstrates how a third party can have a "full and fair" opportunity to litigate, even though he or she is not named in a prior criminal action. In *Dettmann v. Kruckenberg*, this Court determined that the defendant teenager's father was precluded from further litigating issues in a civil action which had been previously determined in the criminal trial, even though he was not a defendant. 613 N.W.2d 238 (Iowa 2000).[9] In rejecting the father's arguments, this Court held that an "identity of interests existed between [the son] and [the father] at the time of the

[9] This application of this case is thoroughly discussed in Plaintiffs' Brief in Support of Their Motion for Summary Judgment, filed April 5, 2016.

criminal proceeding." *Id.* at 243, 249. The father "should have been on notice that he was subject to potential civil liability . . . ." *Id.*

Covenant—though not a named defendant in the criminal matter—had an identity of interest with Edouard. Covenant was on notice that Edouard's criminal behavior could subject it to civil liability. There are no exceptional circumstances which would justify further litigation of the consent issue.

D. The District Court's Broad Application of the Clergy Privilege Expands the Privilege

i. Preservation of Error

The district court has ruled on the Bandstras' various motions to compel and motions to reconsider its rulings on the application of the clergy privilege throughout this litigation. The Bandstras have challenged Covenant's claims to the clergy privilege throughout the course of discovery as well as in pleadings filed with the district court. The Bandstras filed a timely Notice of Appeal with this Court on June 23, 2016, within 30 days of the court's ruling in accordance with Iowa Rule of Appellate Procedure 6.101(1)(b).

ii. Scope of Review

Evidentiary matters are reviewed for corrections of errors at law. *State v. Richmond*, 590 N.W.2d 33, 34 (Iowa 1999). However, the district court's decision regarding whether a privilege exists is discretionary. *Id.*

iii. Argument

1) Overview of the Clergy Privilege and a Framework for Analysis

The clergy privilege[10] originated in the Roman Catholic sacrament of Penance, where a person privately confesses sins to a priest. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4505, at 683. The privilege has been codified, and members of the clergy in Iowa

> shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the [clergy]person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

[10] "Clergy privilege" and "priest-penitent privilege" are used interchangeably.

Iowa Code § 622.10(1)(2008). To be protected, communications between a member of the clergy and a citizen must be "(1) confidential; (2) entrusted to a person in his or her professional capacity; and (3) necessary and proper for the discharge of the function of the person's office." *Richmond*, 590 N.W.2d at 35.

Though undefined in § 622.10(1), the court in *State v. Duvall* explored the phrase "member of the clergy" as it is invoked in Iowa Code §709.15(1)(a). No. 08-1382, 2009 WL 3086545, at *3–4 (Iowa Ct. App. Sept. 17, 2009). The *Duvall* court determined it could utilize the common dictionary definition, which defines "clergy" as "persons ordained for religious service, as ministers, priests, rabbis, etc., collectively." *Id*. The court explained that whether or not a person is considered to be a "minister" or "member of the clergy," is left to the determination of that denomination. *Id.* at *3.

In *State v. Beloved*, the Defendant was charged with sexual abuse in the second degree. No. 14-1796, 2015 WL 8390222 (Iowa Ct. App. Dec. 9, 2015). Beloved confessed his crime to Quovadis

Marshall, the leader of a prayer service at the International House of Prayer, which is a nondenominational evangelical organization. *Id.* at *1. Marshall testified about the conversation and confession at Beloved's trial. *Id.* at *2. On appeal, Beloved claimed that his invocation of the clergy privilege should have prevented Marshall's testimony. *Id.* at *1. The Iowa Court of Appeals affirmed the district court's finding that Marshall, who was a missionary and prayer leader, was not a clergyman within the meaning of the statute. *Id.* The court held that Marshall's lack of formal theological training was determinative, stating that Marshall was not "a priest, pastor, or confessor, as he was neither ordained nor licensed." *Id.* at *4. Marshall testified that he did not consider himself to be a member of the clergy. *Id.*

In *State v. Burkett*, this Court upheld the application of the clergy privilege to conversations between an inmate and a chaplain at the Polk County jail. 357 N.W.2d 632, 636–37 (Iowa 1984). In its analysis, the Court focused on the fact that the chaplain was an ordained clergyman and church pastor for ten

years prior to becoming a jailhouse chaplain, and that his duties included conducting religious services. *Id.* at 637.

This Court should evaluate whether a person claiming the privilege has been "ordained for religious service" pursuant to the common understanding of that term, and should then look to the church or religious organization's teachings for guidance regarding which offices can be properly considered clerical in that particular denomination. *See Duvall*¸ No. 08-1382, 2009 WL 3086545, at *3–4. Here, no Elder is ordained and no Elder is a member of the "clergy" as that word is commonly understood.

Further, a protected conversation must be held with the expectation of confidentiality. *Richmond*, 590 N.W.2d at 35. The information provided by the penitent must be necessary and proper for the discharge of the clergy member's office—meaning, that any common conversation on a non-spiritual matter will not suffice. *Id.* And finally, the penitent must be seeking some sort of religious counseling or service from the clergy member. *Id.* Many

of the communications protected as privileged by the district court in the present case simply do not qualify.

2) The Elders of the Covenant Reformed Church are Not Clergy

The Elders of Covenant Reformed Church are not members of the clergy. Based on the teachings of their own Covenant Reformed Churches of North America, the Chairperson of the Board of Elders has expressly admitted that he does not consider himself to be a clergyman. (App. 31–49; Hettinga 580:3–5 at App. 255).

A clergy person must be ordained—one who has engaged in formal study of the theology of the denomination in question—who performs duties like leading worship and prayer services, counselling congregants. *Duvall*, No. 08-1382, 2009 WL 3086545, at *3–4. The duties of the Minister of the Word are consistent with a layperson's understanding of the duties of a Minister or Pastor of a Christian church, and include tasks like "administering the sacraments, catechizing the youth, and assisting the elders in the shepherding and discipline of the congregation." (App. 31).

Candidates for this position must study and train, and generally receive a "thoroughly reformed theological education." (App. 31–32). No man may be named a Minister of the Word until he has

> sustained an examination at a meeting of this classis . . . of his Christian faith and experience, of his call to the ministry, of his knowledge of the Holy Scriptures . . . of the Church Order, and of his knowledge and aptitude with regard to the particular duties and responsibilities of the minister of the Word, especially the preparation and preaching of sermons.

(App. 32, Art. 4). Candidates must receive a Masters of Divinity. (App. 42–47). They must take a licensure exam, and must provide a seminary faculty recommendation and a medical evaluation of health. (App. 41–47). Ministers of the Word are bound to the service of the church for life, and are provided financial support for themselves and their families while they serve. (App. 33).

The Board of Elders, on the other hand, is made up of "male confessing members" whose only requirement for services is that they "meet the biblical requirements for office and indicate their agreement with the Form of Subscription." (*Id.*). Elders are

elected for a specific term. (*Id.*). They must oversee each other, the Ministers, and the deacons, and ensure that each office performs its duties. (App. 33–34). Elders do not administer the sacraments, and are not required to have formal theological training. (App. 33–49).

Pursuant to the Church's own documents, Ministers of the Word and Elders serve distinct roles. The Elders, who require no formal theological training or ordination, are responsible for more administrative tasks. Both roles are important, but only one is clerical, and only one is subject to the clergy privilege—that of the Minister of the Word.

3) Under Iowa Law, the Clergy Privilege Does Not Apply to the Elders

Under Iowa law, according to the Covenant's own doctrine, and by the admission of Elder Hettinga, the Church Elders are not clergymen. (Hettinga 580:3–5 at App. 255). In a Motion to Compel filed on January 5, 2016, the Bandstras argued that Clarence Hettinga's statement that he was not a member of the clergy was sufficient reason for the court to reexamine its rulings on the

application of the clergy privilege. (Con. App. Vol. I at 402–403). The court disagreed in its February 3, 2016 ruling. (Con. App. Vol. I at 420–427).

Mr. Hettinga denied that he was a member of the clergy in his deposition testimony:

> Q: As a member of the clergy, aren't you – Well, are you a member of the clergy?
>
> A: No.

(Hettinga 580:3–5 at App. 255). The court notes that this was a response by "one individual defendant" to "one question" in a "lengthy deposition." (Con. App. Vol. I at 420). However, none of the other defendants were asked whether they consider themselves clergy. Appellants have no reason to believe that Mr. Hettinga, who was the Chairman of the Board of Elders at the time the sexual exploitation was discovered and through the end of 2011, did not answer truthfully. (Hettinga 580:3–5 at App. 255). Surely a person who is elevated to a leadership position in his church has a clear understanding of whether or not he is a

clergyman. He says he is not. Applying the clergy privilege in this circumstance defeats the intent and spirit of the rule.

Another pertinent example of the district court's improper application of the clergy privilege is the application of the privilege to the David Te Grontenhis documents. David Te Grotenhis was an Elder in 2012. At that time a parishioner, Dan Hol, wrote two letters to Te Grotenhis voicing concerns he had about Patrick Edouard and how the events involving Edouard were handled.[11] (Con. App. Vol. I at 436). The letters apparently addressed issues of "sin, confession, the partaking of elements during the Lord's Supper, and other spiritual matters." (Con. App. Vol. I at 436–437). Appellee moved for a protective order on March 23, 2016. (Con. App. Vol. I at 436–452). Appellee submitted these documents to the court for in camera inspection and the court determined that all of the identified pages were "privileged clergy

[11] The David Te Grotenhuis documents were withheld after having been initially produced at Mr. Te Grotenhuis's first deposition on March 3, 2016. They include Bates numbers DTG0004–08.

material and need not be produced" based on the principles defined in its earlier rulings. (Con. App. Vol. I at 453–454).

The additional information disclosed regarding Mr. Hol's letters appears to be less about Mr. Hol seeking spiritual guidance for himself, and more about his ability to voice his concerns regarding Patrick Edouard's activities. These letters must be produced. Appellants request that rulings by the district court in regard to the footnoted documents be reversed.[12]

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[12] The district court incorrectly sustained Appellants' asserted clergy privilege on the following documents: CRC- Privileged 0116; CRC- Privileged 0141; CRC- Privileged 0146-0147; CRC- Privileged 0162-0163; CRC 1658-1659; CRC 2328; CRC 2333; CRC 2335, 2336, 2338; CRC 2341; CRC 2367-2372; CRC 2374; CRC 2375; CRC 2376; CRC 2379; CRC 2380-2381; Te Grotenhuis 0004-05; Te Grotenhuis 0006-08; 2-16-11 email from Elder Arnold Van Donselaar to the Edouard family and 2-21-11 response to same from Patrick Edouard; 7-10-11 and 9-12-11 emails from Patrick Edouard to Elder Arnold Van Donselaar; 1-14-12 emails between Elder Arnold Van Donselaar and the Edouard family; 4-7-12 emails between Elder Arnold Van Donselaar and the Edouard family; Van Mersbergen 0081-0082; Van Mersbergen 0085-0088; Van Mersbergen 0098-0100; Van Mersbergen 0118-119; Van Mersbergen 0120-121; Van; Mersbergen 0122-123; Van Mersbergen 0124; Van Mersbergen 0133; Van Mersbergen 0140; Van Mersbergen 0145 (copy of 0140); Van Mersbergen 0151-152; Van Mersbergen 0157-162; Van Mersbergen 0188; Van Mersbergen 0189; Van Mersbergen 0190-191; Van Mersbergen

Appellants challenged several aspects of the privilege log provided by Appellee in their November 4, 2014 Motion to Compel on the grounds that Defendants failed to identify the author or recipient of listed documents, to provide information relating to which of the Elders was the member of the clergy and which was the penitent, or to explain how the communication was necessary for the discharge of the clergy member's office. (Con. App. Vol. I at 230–241). Defendants also failed to explain how the communications might be confidential, given that they took place among a group of several individuals. (*Id.*).

In explaining its ruling denying Appellants' access to many relevant documents[13] on the basis of its application of the clergy privilege, the court stated that "the governing document of the

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0192; Van Mersbergen 0193-194; Van Mersbergen 0195-196; Van Mersbergen 0197-199; Van Mersbergen 0202; Van Mersbergen 0204; Van Mersbergen 0209; Van Mersbergen 0212-0214; Van Mersbergen 0233; Veenstra 00; Veenstra 008; Veenstra 010.

[13] In its Ruling on Plaintiffs' Motion to Compel, the court upheld the clergy privilege for Board of Elder meeting minutes, emails between Elders and the pastor, Edouard, and emails between the Elders themselves.

United Reformed Churches places elders and 'ministers of the Word' on an equal footing as members of the Consistory." (Con. App. Vol. I at 251). Nothing in the case law suggests that "equal footing" is a consideration.

The court's determination that communications between Elders regarding the discipline of congregants are privileged is confusing. Even if this Court determines that Elders are "members of the clergy" under the Iowa Code, which they are not, they may not claim the clergy privilege for conversations taking place amongst themselves—even if those conversations involve the discipline of a church member. The clergy privilege, as thoroughly discussed above, can only be claimed by a person who has entrusted a confidential communication to the Elder in his or her professional capacity, and where the confidential communication is necessary and proper to enable the discharge of the functions of the Elder's office. Furthermore, members of the congregation cannot claim any expectation of privacy in their conversations with Elders, since they can expect to be publicly admonished for

any sins that they might confess to the Elders if they "reject[] the Scriptural admonitions of the Consistory." (App. 39–40). When an Elder discusses the matter with other Elders, he necessarily breaks the expectation of confidentiality (if there was one in the first place given the high potential for the exposure of the confessor's secrets to the entire congregation).[14] There is no Iowa case that holds that communications amongst members of the clergy, outside the presence of the confessor and without his or her knowledge, are protected by the clergy privilege.

The district court's ruling regarding communications between the Elders and third parties as protected by the clergy privilege is similarly incorrect. Even if the Elders are found to be members of the clergy, which they are not, there is no precedent protecting communications between Elders and third parties who

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[14] Appellants challenge the district court's ruling as it relates to all minutes from Board of Elder meetings, which the Elders have claimed as privileged. *See* Ruling on Plaintiffs' Motion to Compel, p. 5–13, including bates numbers CRC 2333/3; 2335; 2336; 2338/4-6; 1658-59; 1670-71; 2374; 2375-78, 2379; 2376-81; 2380-83; 2383-85.

are not clergy members or assisting with the discharge of pastoral functions.

E. The District Court Repeatedly Abused its Discretion on Numerous Discovery Motions

i. Preservation of Error

The district court has made several other discovery rulings in error throughout the course of this litigation. Appellants filed a timely Notice of Appeal with this Court on June 23, 2016, within 30 days of the court's ruling in accordance with Iowa Rule of Appellate Procedure 6.101(1)(b).

ii. Scope of Review

A district court's discovery ruling is reviewed for abuse of discretion. *Mediacom Iowa L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004). A district court abuses its discretion when "the grounds underlying a district court order are clearly untenable or unreasonable." *Id.* A ground is untenable or unreasonable when it "is based on an erroneous application of the law." *Office of Citizens' Aid/Ombudsman v. Edwards*, 825 N.W.2d 8, 14 (Iowa 2012).

iii. Argument

The Bandstras have struggled to obtain the discovery to which they are entitled throughout this litigation. They have filed five separate motions to compel and various motions to reconsider in this case. (*See* Con. App. Vol. I at 230–241; 401–419, 293–400 (attachments); 428–430; 490–496, 455–489 (attachments); Con. App. Vol. II at 36–43, 44–83 (attachments); 88–91; 609–613). In several of its rulings on these Motions to Compel, the district court ordered Covenant to produce documents, and Covenant simply ignored the court's order. (*See* Con. App. Vol. I at 248–249; 250–269; 270–276; 420–427; 431–432; 433–435; Con. App. Vol. II at 84–87; 96–98; 606–608; 614–615). The Bandstras requested that the court reconsider rulings made in error, and that it enforce its prior orders. (*See* Con. App. Vol. I at 497–501; Con. App. Vol. II at 88–91). It did not. (*See* Con. App. Vol. II at 614–615). The Bandstras ask this Court to reverse the district court's rulings in

regard to the footnoted documents.[15] To do otherwise encourages recalcitrant parties to ignore the court's orders when they do not like them.

The district court agreed that Covenant should submit documents for the court's in camera review, some of which they never did. (*See* Con. App. Vol. I at 245–247). The Bandstras requested that the court require Covenant to submit the documents for review. (Con. App. Vol. II at 609–613). It refused to do so. (*See* Con. App. Vol. II at 614–615). The Bandstras ask this Court to reverse the district court's ruling in which it refused to enforce its prior orders regarding the footnoted documents.[16]

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[15] CRC- Privileged 0095; CRC- Privileged 0098; CRC- Privileged 0100; CRC- Privileged 0110; CRC- Privileged 0111-0112; CRC- Privileged 0113-0114; CRC- Privileged 0137; CRC- Privileged 0138; CRC- Privileged 0139; CRC- Privileged 0143; CRC- Privileged 0144-0145; CRC- Privileged 0148; CRC- Privileged 0149; CRC- Privileged 0151; CRC- Privileged 0154; CRC- Privileged 0155-0156; CRC- Privileged 0164; CRC- Privileged 0165-0166; CRC- Privileged 0167-0169; CRC- Privileged 0173; CRC- Privileged 0174

[16] CRC- Privileged 0096-0097; CRC- Privileged 0099; CRC- Privileged 0106; CRC- Privileged 0109; CRC- Privileged 0115 CRC- Privileged 0117; CRC- Privileged 0118-0119; CRC- Privileged 0120; CRC- Privileged 0121-0122; CRC- Privileged

IX. CONCLUSION

For all of the reasons outlined above, Appellants urge this Court to find that the district court erred as set forth above.

X. REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

0123; CRC- Privileged 0124; CRC- Privileged 0125-0126; CRC- Privileged 0127-0128; CRC- Privileged 0129; CRC- Privileged 0130-0132; CRC- Privileged 0133; CRC- Privileged 0134; CRC- Privileged 0135; CRC- Privileged 0136; CRC- Privileged 0140; CRC- Privileged 0142; CRC- Privileged 0157-0158; CRC- Privileged 0159-0160; CRC- Privileged 0175; CRC- Privileged 0176; CRC- Privileged 0177; CRC- Privileged 0178-0179; CRC- Privileged 0180; CRC- Privileged 0181; CRC- Privileged 0182-0183; CRC- Privileged 0184; CRC- Privileged 0185; CRC- Privileged 0186; CRC- Privileged 0187-0188; CRC- Privileged 0189 CRC- Privileged 0190; CRC- Privileged 0191-0192; CRC- Privileged 0193; CRC- Privileged 0194-0195; CRC- Privileged 0196-0197; CRC- Privileged 0198-0199; CRC- Privileged 0200-0202; CRC- Privileged 0203-0204; CRC- Privileged 0205; CRC- Privileged 0206-0207; CRC- Privileged 0208; CRC- Privileged 0209; CRC- Privileged 0211-0212; CRC - Privileged 0267; CRC - Privileged 0268; CRC - Privileged 0269; CRC 2329; CRC 2379; De Jong 093-0102; Hartman 0229; Hartman 0230; Hartman 0231; Hartman 0313-0314; Hartman 0314-0317; Hartman 0323; Hartman 0346; Hartman 0377-0378; Te Grotenhuis 0105-106; Te Grotenhuis 0107-110; Te Grotenhuis 0111-114; Te Grotenhuis 0115-117; Te Grotenhuis 0118-119; Te Grotenhuis 0120; Te Grotenhuis 0121-122; Te Grotenhuis 0125-127; Te Grotenhuis 0128; Van Mersbergen 0266; Veenstra 001; Veenstra 002; Veenstra 003; Veenstra 004; Veenstra 005; Veenstra 006; Veenstra 009; Veenstra 011; Cammenga Report

Respectfully submitted,

ROXANNE BARTON CONLIN

XII. CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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

[X] this brief contained 13,954 words at the original filing, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). It now contains 14,020 words with inserted references to the appendices.

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[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14 point font.

ROXANNE BARTON CONLIN Dated: June 9, 2017