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' REPLY BRIEF

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V. SUMMARY OF THE REPLY FACTS

Appellant has painted a picture in which the observant Elders of Covenant Reformed Church have done nothing but to faithfully interpret Scripture passages according to tradition, and to lovingly pass down discipline according to the teachings of the Bible. The Church would have the Court believe that Anne, Valerie, Jason, and Ryan Bandstra merely "disagree" with the teachings of the Church and that they should have simply walked away or joined another faith community. The Church's unrelenting attempts to muddle the issues by talking about sin, temptation, and religious doctrine must not prevent this Court from clearly seeing the issue at hand: that the Church failed to supervise its employee as it was required to do under Iowa law. As a result, many of its parishioners were sexually abused by its pastor. This abuse caused irreparable harm to the victims and their families. When the victims went to the Church for help, they were shamed, defamed, ostracized, and revictimized. Deciding that the Bandstras' claims have merit will not require

entanglement with the First Amendment, but rather application of tort law to the facts.

The Church claims that the Elders' role in disciplining members is "according to the principles taught in Scripture" and "is spiritual in nature." (Appellee's Brief, p. 8). The Elders' decision to discipline a church member can be influenced by their own biases, prejudices, and political motivations. (Con. App. Vol. II at 490–491, ¶¶ 12–13). The Church does not have free reign to break the law or to commit torts against its members. (*Id.*). As the governing body of the Church, "the Elders are ultimately accountable to God," but they are also accountable to the State of Iowa in their secular interactions with the public as administrators, employers, and property owners. *Brown v. Mt. Olive Baptist Church*, 124 N.W.2d 445, 446 (Iowa 1963).

The Church outlines its relationship with Edouard and the congregation as one of constant vigilance, speaking of bimonthly meetings with Edouard and yearly in-home visits with all members of the congregation. (Appellee's Brief, p. 10). Whether

any concerns had been raised prior to December of 2010 regarding Edouard's conduct is a disputed fact—the Bandstras contend that Elder Hettinga once reported to Jason Bandstra that there were "red flags" regarding Edouard's behavior that would be discussed at an upcoming council meeting. (Con. App. Vol. II at 502–503 ¶ 54; V. Bandstra 507:9–509:13 at App. 184–186).

The Church also argues that it did not suspect or have any reason to suspect that Edouard was abusing women. (Appellee's Brief, p. 11). However, the Church had no policies in place for the prevention of clergy sex abuse, performed no real substantive supervision of their employee, and provided no meaningful way for a congregation member to approach the Board to express concerns. (Con. App. Vol. II at 504–505 ¶ 58; App. 14–16 ¶¶ 11, 13–15). At least four women were abused by Edouard. (App. 738–739). The Church should have known what he was doing.

The Church's characterization of Valerie Bandstra's testimony is that she understood Edouard's predatory plans back in 2009. (Appellee's Brief, p. 11–13). However, what Valerie knew

and when is a question of fact for the jury. She testified that she was being emotionally manipulated and controlled by Edouard, and that she engaged in erratic behavior. (V. Bandstra 110:1–14, 111:18–118:23, 121:18–124:7, 126:4–11 at App. 139, 140–147, 149–152, 153). She testified that she believed that Edouard was trying to "protect her." (V. Bandstra 77:3–13 at App. 130). Valerie considered her interactions with Edouard to be part of the counseling he was providing to her. (V. Bandstra 110:1–14, 121:18–123:17 at App. 139, 149–151). She testified that she knew that something was "not right," but that Edouard used his control over her to calm her fears and to persuade her that he was caring for her. (V. Bandstra 129:8–14 at App. 129). Even when she testified that she "really knew [in her] gut . . . what [Edouard] was doing," she was under his influence and control, and unable to act. (V. Bandstra 129:21–132:2 at App. 154–157). Edouard said he would "destroy" her if she told anyone. (V. Bandstra 133:4–135:9 at App. 158–160).

Anne Bandstra had no idea that she was being abused by Edouard until after the abuse had stopped. (A. Bandstra 171:11–172:19 at App. 93–94). At one point, she testified that she "started putting all the pieces together very quickly," when she found out about his sexual relationships with two other women. (A. Bandstra 125:24–127:21 at App. 89–91). Later, she explained that she was "putting the pieces" together regarding why Edouard knew so many intimate details about those women's lives—not about the fact that she was being abused. (*Id.*).

The Church states that none of its defamatory communications about this matter "have ever identified any of the women . . . ." (Appellee's Brief, p. 17). However, the identities of Edouard's victims were known in the community. (D. Roozeboom 60:25–62:4 at App. 334–336; M. Vink 128:13–129:5 at 727–728).

VI. ARGUMENT

I. Error Was Preserved on the Bandstras' Continuing Violations Argument

The Church argues that the Bandstras have failed to preserve their argument that the continuing violations doctrine

should be applied in this case. (Appellee's Brief, p. 23–24). As outlined in Appellants' Brief of September 8, 2016, facts supporting the application of the continuing violations doctrine were raised in Plaintiffs' Resistance to Defendants' Motions for Summary Judgment. (Con. App. Vol. II at 857–860). In that brief, the Bandstras addressed the ongoing control that Edouard had over Anne and Valerie, and the ways in which it affected their abilities to understand what was happening to them:

> Clearly both Plaintiffs Anne and Valerie Bandstra placed great trust in Edouard as their pastor and counselor. Edouard exploited Plaintiffs' trust and his influence as an authority figure to manipulate Plaintiffs and conceal the true nature of his abuse. Edouard indoctrinated Plaintiffs and isolated them at the same time, ensuring his control over them was secure. As a result of Edouard's actions, Plaintiffs were unable to recognize their injuries or understand that his conduct was abuse even after their husbands discovered the abuse on December 10, 2010.

(*Id.* citing Plaintiffs' Brief, 05/06/2016, p. 21). The continuing violations, control, and influence arguments were also set forth in expert Gary Schoener's Affidavit, which was filed along with Plaintiffs' Resistance. (*See* App. 15–20 ¶¶ 12, 17–21, 24).

Here, the Bandstras properly filed a Motion to Reconsider the district court's summary judgment rulings. (Con. App. Vol. II at 661–669). Their Motion clarified the continuing violations legal arguments on facts that had been set out in their Resistance to Defendants' Motions for Summary Judgment and in an affidavit by their expert witness, Gary Schoener. (*Id.*). The Bandstras then filed their Notice of Appeal to comport with the required deadlines and asked this Court to allow a limited remand for the purpose of the district court's ruling on their Motion for Reconsideration. (Con. App. Vol. II at 795). This Court granted a limited remand. (Con. App. Vol. II at 852). The district court entered its ruling rejecting the Bandstras' continuing violations theory. (Con. App. Vol. II at 866).

The district court's September 21, 2016 Ruling on Motion to Reconsider supports Appellants' contention that this issue has been preserved for review. (*See* Con. App. Vol. II at 867). The court held that after reviewing the parties' considerable arguments about "whether or not this additional theory is

properly before the court," the "[continuing violations] issue was sufficiently mentioned to allow the court to consider it under Rule 1.904(2)." (*Id.*).

The cases cited by the Church in support of its error preservation argument do not apply. The Church cites *Vande Kop v. McGill* for the proposition that "[a] party resisting a motion for summary judgment fails to preserve error on an issue if the party does not raise the issue in the resistance." (Appellee's Brief, p. 24) (citing 528 N.W.2d 609, 613 (Iowa 1995)). *Vande Kop* does not mandate, as the Church suggests, that all legal theories must be set forth in great detail in the resistance, but rather supports the well-settled policy that an issue must be raised before the district court and properly decided before it can be taken up on appeal.

The other cases cited by Defendants, *Lamasters* and *Pfibsen* are discussed in Plaintiffs' September 8, 2016 Brief, and do not apply for the reasons set forth therein. (*See* Con. App. Vol. II at 856–860). This Court should hold that Appellants' continuing violations arguments have been properly preserved.

J. The Bandstras Negligence Claims Against Defendant Covenant Reformed Church were Timely Filed

i. Framing the question: the Court should focus on what the Bandstras knew about the Church's supervision of its employees.

The Church's brief focuses almost exclusively on when the Bandstras knew that Edouard's actions were "wrong."[1] The proper question for consideration is: "when did Anne and Valerie Bandstra know that the *Church's* actions and inactions were tortious—not Edouard's?"

ii. The Bandstras' claims were timely filed under a proper application of the inquiry notice standard.

Defendants cite *Franzen v. Deere & Co.* in support of their contention that inquiry notice arises when "the injured person has actual or imputed knowledge of all the elements of the action." 377 N.W.2d 660, 662 (Iowa 1985). This is a correct statement of the law.

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[1] The Bandstras maintain that this question is improper because there is a distinct difference between an understanding that infidelity is "wrong" and knowing that clergy sex abuse is "wrong." Anne and Valerie may have known that having sexual contact with a man outside of marriage was "wrong," but that is not the question in this case.

A successful claim of negligent supervision must include the following elements:

1) the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time the employee engaged in wrongful or tortious conduct;

2) through the negligent . . . supervision of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused injuries to the plaintiff; and

3) there is some employment or agency relationship between the employee and the defendant employer.

Estate of Harris v. Papa John's Pizza, 679 N.W.2d 673, 680 (Iowa 2004). A negligent supervision claim must "include as an element an underlying tort or wrongful act committed by the employee." *Cubit v. Mahaska County*, 677 N.W.2d 777, 784–85 (Iowa 2004).

That there was an employment or agency relationship between Edouard and the Church and that Edouard committed a tort or wrongful act against several women in the Church is not in dispute. Many of the Bandstras' damages were caused by the Church's failure to control and supervise its employee.

The key issue is whether Anne and Valerie were on notice that the Church *knew* or *should have known* that Edouard was abusing female congregants, and that it should have acted as a reasonable employer in dealing with the situation. Each woman had to know that the church had not been properly supervising Edouard in his counseling sessions with female congregants. To start the statute running, the Bandstras had to know that the Church failed to prevent and helped to cause the damage they suffered. They had to know that the Church played a role by failing to keep tabs on its employee and by failing to put safety mechanisms in place to prevent this foreseeable type of abuse.

The Bandstras argue that the proper date for application of the discovery rule in this case is January 9, 2011, when all four of Edouard's known victims had come forward. (Appellants' Brief, p. 28). The earliest possible date that Appellants could be said to have inquiry notice of the Church's failure would be December 10, 2010, when Anne and Edouard are discovered and each of the Bandstra women find out that the other is being abused. (*Id.*)

K. Alternate Theories for Extending the Statute of Limitations Should be Applied

i. The psychological damage incurred by Anne and Valerie and plaintiffs like them necessitate the adoption of an "authority figure" exception.

The cases cited by the Church give little guidance to the Court in this situation. In each of these cases, the plaintiff, a sexual abuse survivor, suffers from some sort of repressed memory syndrome or post-traumatic stress disorder (PTSD). In the majority of these cases, the plaintiff is suing her abuser directly—not her abuser's employer. Tellingly, most of these are not clergy sex abuse cases or therapist/counselor sex abuse cases, but sex abuse cases between couples who were in a romantic relationship. The power dynamics in romantic relationships are completely different than those between Edouard, a pastor and counselor, and the Bandstra women, his parishioners and patients. Furthermore, Anne and Valerie have not claimed that they have repressed memories which have begun to surface, but rather, they could not see the abuse as abuse until they had been freed of the control of their abuser and their Church. They have been

diagnosed with symptoms of PTSD, but have not claimed that the PTSD in itself is the only reason that their statutes should be tolled.

The Church cites *Woodroffe v. Hasenclever*¸ a sex abuse case filed by a forty year old woman alleging that she had been sexually assaulted as a child. 540 N.W.2d 45, 46 (Iowa 1995). The woman's claims were dismissed because the Court found, and the plaintiff admitted, that she had been able to recall parts of the abuse for many years prior to filing the suit. *Id.* at 47–48. *Woodroffe* is unhelpful in this situation, as it deals with a case of repressed memory. The plaintiff was not held under the control of an authority figure, unable to act, while her statute of limitations ran out. *See id.* The Bandstras have not asked this Court to impose a "rolling statute of limitations," as discussed in *Woodroffe*, but rather, to toll the statute in cases where a victim is under the direct control of her authority-figure abuser, until she has had the opportunity to extract herself from his control and bring her case. *Id.* at 48.

The Church also cites *Borchard v. Anderson* for the Court's refusal to create a special exception to the statute of limitations for victims who have developed PTSD. 542 N.W.2d 247, 251 (Iowa 1996). The plaintiff in *Borchard* had been brutally abused by her former husband and was diagnosed with PTSD sometime after she divorced him. *Id.* at 248. About twelve years after the dissolution, plaintiff brought an action against her former husband to recover for her PTSD. *Id.* at 249. The Court rejected plaintiff's Iowa Code 614.8 arguments that the statute should be tolled because she was mentally ill, or because she suffered sexual abuse as a child. *Id.* at 249–50. The Court ultimately determined that plaintiff was "aware of all the elements necessary to commence her action" at the time she was divorced. *Id.* at 250.

Again, the plaintiff in *Borchard* has not claimed that she was under the control of her husband for the twelve years following their marriage, or that she was unable to understand that she was being abused. She argued that she did not

understand the depth of her injury, but it was clear to her that she had been physically abused during the marriage. *See id.* at 250.

The final cases cited by the Church, *Frideres* and *Steinke*, again involve victims who claim some sort of psychological repression of the incidents. *See Frideres v. Schiltz,* 113 F.3d 897 (8th Cir. 1997); *Steinke v. Kurzak*, 803 N.W.2d 662 (Iowa Ct. App. 2011). Though *Steinke* is a clergy sex abuse case, it does not apply. The Church admits in its brief that Anne and Valerie "have not claimed any mental health condition caused to them to repress their memories . . ." making the analysis of the discovery rule as it applies to individuals who have suffered memory loss symptoms of PTSD inapplicable. (*See* Appellee's Reply, p. 35).

The Church asserts that Anne and Valerie knew that Edouard's behavior was "a problem." What Defendants do not make clear, however, is whether Anne and Valerie knew that the behavior was a "problem" because they were having sexual contact with a man who was not their husbands, or because they were aware that Edouard was perpetrating clergy sex abuse on them.

The Church's muddling of these two concepts throughout this case has only served to confound the issues.

As inconsistent, unclear, and contradictory testimony exists in this case, what Anne and Valerie knew, and when, is a question of fact for the jury. The Bandstras contend that what Anne and Valerie knew, prior to December 10, 2010, was that Edouard was a married man and a philanderer, and that he was relentless in his sexual pursuit of them. (*See, e.g.,* V. Bandstra 108:3–12, 110:1–14 at App. 137, 139; A. Bandstra 44:4–45:4, 141:20–25 at App. 63–64, 92). They believed him as he explained away any worries they had about his errant behavior. (*See, e.g.*, V. Bandstra 110:24–111:2, 120:15–121:1, 356:5–357:22 at App. 139–140, 148–149, 171–172; A. Bandstra 67:4–67:20 at App. 73). Over time, they began to understand that his behavior was not normal, and that they were being hurt by his obsessive "love" for them. (*See, e.g.*, A. Bandstra 224:11–20 at App. 101; V. Bandstra 503:1–13 at App. 183).

However, what Anne and Valerie did not understand at that time was that Edouard was using his role as Pastor and a Counselor to manipulate and abuse them. (V. Bandstra 503:1–13 at App. 183; A. Bandstra 171:11–172:19 at App. 93–94). If they were not aware that they were being abused, then they certainly were not aware that they might have a claim against the Church for negligent supervision. After December 10, 2011, when Anne and Edouard were caught, they began to understand that Edouard's behavior was part of a far-reaching and systematic sex abuse scheme. (V. Bandstra 271:14–273:19, 502:2–16 at App. 163–165, 182; A. Bandstra 171:24–172:19 at App. 93–94). Victims of sexual abuse perpetrated by an authority figure should have the statute of limitations tolled until such time as they can extract themselves from the abuser's control and seek help.

The Church cannot be said to be taken by surprise by a case brought by parishioners when it should have known of the conduct taking place and when the abuse was still being perpetrated

against Anne a mere two years before the case was filed. (*See* Appellee's Brief, p. 36).

ii. Continuing Violations

The Bandstras ask the Court to apply the continuing violations doctrine in this case and in cases like it. The Church points out that "the legislature is capable of writing an exception into a limitations statute." (Appellee's Brief, p. 37). However, this Court has demonstrated that the "limitations period can be tolled for certain aspects of a psychological condition, namely repressed memories." *Borchard v. Anderson*, 542 N.W.2d 247, n. 2 (Iowa 1996) (citing *Callahan v. State*, 464 N.W.2d 268, 271–72 (Iowa 1990)). If the statute of limitations can be tolled for victims suffering from repressed memory syndromes, it can also be tolled for other psychological harms, including manipulation and control by an authority figure. *See Borchard*¸ 542 N.W.2d n. 1 (noting that there is a "body of cases" which suggests that plaintiffs may not be charged with knowledge that certain acts are inappropriate "in instances of (sexual) abuse by an 'authority figure,'" and citing

Posttraumatic Syndrome as Tolling the Statute of Limitations, 12 A.L.R. 5th 546 (1993)).

The Bandstras recognize that the cases cited in their continuing violations section are not negligent supervision and retention claims. The purpose of citing them was to show that the doctrine has made an appearance in Iowa case law, and that the Court should use it in this case, if necessary to do justice.

L. The Bandstras' Negligent Supervision Claims Are Valid: The Church Cannot Hide Behind the First Amendment

The Church argues that the Bandstras are merely "unhappy" with its utter failure to supervise Patrick Edouard, and again states that it is being accused of practicing "negligent Christianity." (Appellee's Brief, p. 44). The Church wishes to frame the Bandstras' claim in this way, because "clergy malpractice" claims, or "negligent Christianity" claims, as the Church continuously calls them, are uniformly rejected under the First Amendment. *See, e.g., Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994); *Doe v. Hartz*, 52 F.Supp.2d 1027 (N.D. Iowa 1999).

The Bandstras have no interest in delving into the practice of the Church's version of Christianity as a part of their negligent supervision claim. They agree that this Court has "a constitutional mandate to protect the free exercise of religion in Iowa[.]" *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009). However, the Church's religious practices in no way exempt them from supervising their employee under Iowa tort law, and particularly under a claim of negligent supervision.

Generally, courts do not entangle themselves in religious matters. *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*. In its Ruling on Motions for Summary Judgment re: Negligence, the district court appears to agree. (Con. App. Vol. II at 657). Prior to deciding that the statute of limitations had run on Anne and Valerie's claims, the district court opined that "to some extent, the elders owed these plaintiffs a duty to supervise the activities of the pastor. Whether that duty

was breached in this case is a factual matter for the jury to decide." (*Id.*).

In *Franco v. The Church of Jesus Christ of Latter-day Saints*, cited by the Church, a woman sued the LDS Church after she reported an incident of abuse by another parish member to the police and was then ostracized. 21 P.3d 198, 201–01 (Utah 2001). She was told by the Church's Bishop and President to "forgive, forget, and seek Atonement" for the abuse perpetrated on her. *Id.* at 205. She brought claims of clerical malpractice, gross negligence, negligent infliction of emotional distress, breach of fiduciary duty, intentional infliction of emotional distress, and fraud. *Id.* at 201. Notably, she did not bring a negligent supervision claim, because the perpetrator was not an employee of the church. *See id.* The court decided that delving into the private counseling sessions between the Bishop of a church and a congregant would require interpretation of scripture and would risk excessive entanglement with religion. *Id.* at 205–09.

The second case cited by the Church, *Bladen v. First Presbyterian Church of Sallisaw*, involved a married couple that sued the church when the pastor engaged in a sexual relationship with the wife after having served as the couple's marriage counselor, and while continuing to counsel the husband. 857 P.2d 789 (Ok. 1993). The court determined that the husband's claims against the pastor were not cognizable, because he claimed an injury to the marital relationship—a claim which had been legislatively barred in Oklahoma. *Id.* at 796. The wife's claim that the church did not provide her with marital counseling to help her and her husband after the affair was discovered was barred because the court was "not at liberty to recognize a cause of action by the wife against her minister for engaging in a consensual sexual affair." *Id.* at 797. This case can be distinguished from the case at hand, as Oklahoma does not seem to have the same standards requiring pastoral counselors to refrain from sexual conduct with patients as Iowa. *Id.* at 794 (the court noting that "professionals who do not use the transference

mechanism are not subject to the same claim of counseling malpractice arising from the consensual sexual conduct of adults unless the conduct violates some other professional standard of conduct.").

There are many cases which demonstrate that churches may not use the First Amendment as a shield when they behave negligently by failing to supervise an employee. In *Nutt v. Norwich Roman Catholic Diocese*¸ former altar boys who were sexually abused by a parish priest brought an action against the Diocese. 921 F. Supp. 66 (D. Conn. 1995) (reversed in part on other grounds in *Nutt v. Norwich Roman Catholic Diocese*, 56 F.Supp.2d 195 (D. Conn. 1999)). Plaintiffs alleged negligent supervision, among other claims. *Id.* at 68. Defendants moved for summary judgment, arguing that claims related to the way in which they hire or supervise their parish priests are barred by the First Amendment. *Id.* at 72–73. Defendants claimed, as the Church in this case does, that such claims foster "excessive state

entanglement" with religion. The Court denied defendants' motion, explaining:

> . . . [I]t is difficult to see how the plaintiff's claims against the defendants would foster excessive state entanglement with religion. The common law doctrine of negligence does not intrude upon the free exercise of religion, as it does not "discriminate against [a] religious belief or regulate or prohibit conduct because it is undertaken for religious reasons." The court's determination of an action against the defendants based upon their alleged negligent supervision of Doyle would not prejudice or impose upon any of the religious tenets or practices of Catholicism. Rather, such a determination would involve an examination of the defendants' possible role in allowing one of its employees to engage in conduct which they, as employers, as well as society in general expressly prohibit. Since the Supreme Court has consistently failed to allow the Free Exercise Clause to "relieve [an] individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs," the defendants cannot appropriately implicate the First Amendment as a defense to their alleged negligent conduct.

Id. at 74 (internal citations omitted). In *Nutt*, the court correctly determined that the Free Exercise Clause does not grant religious organizations a pass to behave negligently in supervising their employees, musing that

> Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Id. at 73 (quoting *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586, 594–95 (1940)).

In *Smith v. Privette*, three former clerical staff of Defendant White Plains United Methodist Church brought a negligent retention and supervision claim against the church and the Conference, for various nonconsensual sexual violations. 128 N.C. App. 490, 492 (N.C. App. 1998). Defendants argued that the court lacked subject matter jurisdiction to hear the case, and that the court's evaluation of clergy assignments would constitute excessive entanglement between church and state. The district court agreed and dismissed Plaintiffs' claims. *Id.* at 492–93.

On appeal, the court noted that, like Iowa, "North Carolina recognizes a cause of action for negligent supervision and retention as an independent tort based on the employer's liability

to third parties." *Id.* at 495. The court advised that "[t]he First Amendment . . . does not grant religious organizations absolute immunity from liability." *Id.* at 494. While acknowledging that "the decision to hire or discharge a minister is inextricable from religious doctrine and protected by the First Amendment," the court rejected the idea that "the resolution of Plaintiffs' negligent retention and supervision claim requires the trial court to inquire into the Church Defendants' reasons for choosing [the pastor] to serve as minister." *Id.* at 495. Instead, the court refused to bar plaintiffs' claims:

> The Plaintiffs' claim . . . presents the issue of whether the Church Defendants knew or had reason to know of [the pastor's] propensity to engage in sexual misconduct, conduct that the Church Defendants do not claim is part of the tenets or practices of the Methodist Church. Thus, there is no necessity for the court to interpret or weigh church doctrine in its adjudication of the Plaintiffs' claims for negligent retention and supervision. It follows that the First Amendment is not implicated and does not bar the Plaintiffs' claim against the Church Defendants. Certainly, "a contrary holding–that a religious body must be held free from any responsibility for wholly predictable and foreseeable injurious consequences of personnel decisions, although such decisions incorporate no theological or dogmatic tenets–would go

> beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded."

Id. (citing *Jones v. Trane*, 591 N.Y.S.2d 927, 932 (N.Y. 1992)). These courts provide a clear method for addressing First Amendment entanglement issues in negligence cases which results in justice for both parties.

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

i. Consideration by this Court of defamatory statements made by Church has not been waived.

The Bandstras have not waived their claims in relation to the more than a dozen defamatory statements made against them. In the Brief submitted to this Court, Appellants indicated that they would "focus on the most clearly defamatory statements," but asked the Court to consider all the defamatory statements discussed in the district court's Ruling on the Motion for Summary Judgment re: Defamation. *McCleary v.* Wirtz, 222 N.W.2d 409, 415 (Iowa 1947) (noting that an issue will be waived if argument is not presented or if reference to some authority is not made).

Given the large number of issues in this appeal and the strict word limit, it is impossible for Appellants to discuss each statement individually.

1) The qualified privilege does not apply.

Defendants argue that their communications to the congregation accusing Anne and Valerie of "sexual immorality" and "sin" are protected by the qualified privilege. (Appellee's Brief, p. 48; App. 22; Con. App. Vol. II at 13). The "ecclesiastical shield" can be lost, however, when proof of "excess publication or publication 'beyond the group interest'" is provided. *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404, 407 (Iowa 2003).

The Church points to *Marks v. Estate of Hartgerink* as an example of an instance in which the qualified privilege applied. 528 N.W.2d 539, 545–46 (Iowa 1995). In *Marks*¸ the alleged defamatory statements were made "in the context of a church disciplinary proceeding." *Id.* at 546. The letter in question "constituted formal disciplinary charges against [the plaintiff]" by

an elder who had been tasked with carrying out the discipline. *Id.* The court also noted that the statements were confined within the church community. *Id.*; *see Kleibenstein*, 663 N.W.2d at 408.

In the instant case, the January 14, 2011 and December 10 and 11, 2012 statements made by the Elders were not part of any "formal disciplinary charges" against Anne or Valerie, as they were in *Marks*. (Dep. Exs. 4, 9). Their mention in the letters was incident to discipline being taken against Edouard, but they suffered the negative consequences of the Elders' decision to publicly admonish them nonetheless—especially when the content of the letters was published in the news media. (G. Horstman 139:22–140:4 at App. 279–280; Mathes 38:23–40:12 at App. 298–300; A. De Waard 61:20–64:21 at App. 205–208). The news media and the entirety of Pella and surrounding communities did not share "a corresponding interest or duty in a manner and under circumstances fairly warranted by the occasion" with the Elders, and as such, the "ecclesiastical shield" claimed by the Church is broken. *See Marks*, 528 N.W.2d at 545.

2) The statements were published.

The Bandstras have not merely "speculated" that the defamatory content of the Elders' letters reached the news media, but several individuals, including Elder Greg Horstman and Elder David Mathes, have testified under oath that the content of the letters reached the news media. (G. Horstman 139:22–140:4 at App. 279–280; Mathes 38:23–40:12 at App. 298–300). Mr. Mathes served on the Board of Elders between January of 2012 and December of 2014. (Mathes 10:11–10:20 at App. 297). Mr. Horstman began his service in January of 2011. (G. Horstman 16:24–17:15 at App. 275–276). That "other individuals may have learned about the letter's content," and in fact *did* learn about the letters' content, does defeat summary judgment, because whether or not the letters reached the media, and when, is a disputed fact and should be brought to the jury for resolution. *Fischer v. UNIPAC Serv. Corp.*, 519 N.W.2d 793, 796 (Iowa 1994) (noting that the moving party has the burden of showing that a material fact does not exist). Furthermore, the Elders are liable for

damages resulting from the repetition of their defamatory statements, if the repetition was reasonably foreseeable. *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 222 (Iowa 1996). The communications were recklessly distributed without any specification that they should remain confidential, and the Elders should not have been shocked that the press was made aware of the scandal.

ii. The Elders' statements are not protected by the First Amendment, because they are not "opinions."

The Church takes issue with only one of the four factors outlined in *Yates* for determining whether a statement is a fact or opinion: whether the statement is objectively capable of disproof. *Yates v. Iowa West Racing Association*¸721 N.W.2d 762, 770 (Iowa 2006). The *Yates* Court explained that the framework for analyzing allegedly defamatory statements is no longer whether the statement is a fact or opinion, but rather "whether the alleged defamatory statement can reasonably be interpreted as stating actual facts and whether those facts are capable of being proven true or false." *Id.* at 771. The Court further explained that

"statements of opinion can be actionable if they imply a provable false fact, or rely upon stated facts that are provably false." *Id.* There is little question that the Elders intended their statements accusing Anne and Valerie of adultery to be statements of fact and to be received as such, rather than as statements of "Biblically informed" opinion.

The first statement at issue in Appellants Brief was made on January 14, 2011, that Anne and Valerie had been party to "a prolonged period of sexual immorality" with Edouard. (App. 22). At this point, the Elders had very little information, but they did know that Anne and Valerie had reported that they were abused by Edouard. (V. Bandstra 156:13–157:19 at App. 161–162; A. Bandstra 393:18–394:19 at 104–105). They knew that Valerie characterized her first sexual contact with Eduard as rape. (V. Bandstra 342:1–9 at App. 170). This statement was made as one of fact, meant to instruct the community of the "wrongdoing" of multiple congregants. It was easily verifiable as false.

In the communication of January 10 and 11, 2012, the Elders again accused Anne and Valerie of adultery, stating that "God calls it sin when someone who is married willingly has intimate relations with a person who is not their spouse. . . ." (Con. App. Vol. I at 13). At that time, they knew that three of the four known victims had characterized their first sexual contact with Edouard as "rape." (V. Bandstra 342:1–9 at App. 170; App. 738–739). Again, the Church's statement was easily verifiable as false.

Sexual assault is capable of objective proof or disproof in the secular community. That is why trials are carried out in relation to such events and laws exist prohibiting rape and sexual assault. The Elders could have investigated further before making their defamatory statements, or could have remained silent on the issue, but instead chose to broadcast their own version of the "facts" to the congregation and to the entire community, in the meantime causing significant damage to the Bandstra family. (V. Bandstra 299:17–300:1 at App. 168–169; G. Horstman 139:22–

140:4 at App. 279–280; Mathes 38:23–40:12 at App. 298–300; A. De Waard 61:20–64:21 at App. 205–207). Their communications could "reasonably be interpreted as stating actual facts" and were provably false. *Yates*, 721 N.W.2d at 771.

3) Determining whether the statements are "opinions" would not excessively entangle the Court with the First Amendment.

This case was removed from the umbrella of First Amendment protection the moment the Elders' defamatory statements made their way into the secular news media. Under *Kliebenstein*, the First Amendment does not protect a phrase with a "secular meaning that could be applied in a civil suit for defamation without treading on—or wading into—religious doctrine." 663 N.W.2d at 407. This is because the term "adultery" means the same thing in both secular society and in the Church. The Church argues that understanding what it meant when it called Valerie and Anne adulteresses would "require an inquiry into church doctrine about temptation, forgiveness, immorality, repentance, sin, and adultery." (Appellee's Brief, p. 55). This

argument is disingenuous, since the Elders tell us exactly what they mean by their statements in their December 10 and 11, 2012 communications to the congregation: "God calls [it] sin when someone who is married willingly has intimate relations with a person who is not their spouse . . . ." (Con. App. Vol. I at 14). No doctrinal interpretation is necessary to understand that the Elders believe that having sex outside of marriage is adultery—the same conclusion that would likely be drawn by secular people who are asked to define the term.

The *Kliebenstein* Court was very clear that proof that a defamatory statement with clear secular meaning was published outside the church community supports the conclusion that the statement should not be protected by the Establishment Clauses of the federal and Iowa Constitutions or by "ecclesiastical status." *Id.* at 407. Such proof has been offered in this case by way of multiple deponents, and under *Kleibenstein*, should not have been dismissed. *Id.*

The Church goes on to argue that its alleged statements are "substantially true," because "both admit to having sexual relations with Edouard while they were married." (Appellee's Brief, p. 55). Truth is a complete defense in a defamation claim. *Huegerich*, 547 N.W.2d at 221.

The Church's truth defense is completely unworkable in this situation, however, because neither Anne nor Valerie admits to a consensual relationship with Edouard. In fact, Valerie claims that she was raped by him.[2] (V. Bandstra 106:22–108:12 at App. 135–137). Even the Elders' own description of the "sin" of adultery includes the words "willingly has intimate relations . . . ." (Con. App. Vol. I at 14). The "sting" or "gist" of the defamatory claims is that Anne and Valerie had free, willing, and consensual sex with Edouard, in spite of being married women, and that is simply not what happened. The issue of consent changes the meaning of the

[2] Edouard was convicted of four counts of sexual exploitation by a counselor—a crime which for conviction requires that the counselor know that the patient is "significantly impaired in the ability to withhold consent to sexual conduct . . . ." 854 N.W.2d 421, 430–31 (Iowa 2014); Iowa Code 709.15(1)(b)(2016).

statements entirely. Whether or not the women consented to a relationship with Edouard is more than a mere inaccuracy or "inoffensive detail, immaterial to the truth of the defamatory statement"—it is the heart of the argument. *See Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884, 891 (Iowa 1989) (disapproved of on other grounds by *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217 (Iowa 1998)).

N. Issue Preclusion Should Apply

The basis for Edouard's conviction under the statute is that he "[knew] or ha[d] reason to know that the patient or client . . . [was] significantly impaired by the ability to withhold consent to sexual conduct," and he nevertheless had sex with his patients. Iowa Code § 709.115(1)(b)(2014). This means that Edouard's victims were "impaired" in their ability to withhold consent, meaning that they did not give full and knowing consent to a sexual relationship with Edouard. This is the very essence of why sexual relationship between patients and therapists or counselors

have been criminalized—because patients are unable to give consent.

O. The District Court's Incorrect Application of the Clergy Privilege has Impacted Appellants' Ability to Collect the Evidence They Need to Bring Their Case and Should Not Be Upheld.

Appellants thoroughly discussed this issue in their Brief, and will not reiterate those arguments here. The Church cites *Reutkemeier v. Nolte*, no doubt because in that case the Court found that the elders of the Presbyterian Church were within the meaning of "minister[s] of the gospel" under a previous statute. 161 N.W. 290, 291–93 (Iowa 1917). In its analysis, the Court asked: "[w]hat is a 'minister of the gospel?'" and determined that a court must look to the particular church's doctrine for guidance in answering that question. *Id.* The *Reutkemeier* Court examined the Presbyterian "Confession of Faith" booklet and determined that in accordance with Presbyterian teachings the church's elders are responsible for the "ministry of the gospel." *Id.* at 293. As such, confessions to them are subject to the clergy privilege. *Id.*

That *Reutkemeier* deems the Presbyterian elders to be "ministers of the gospel" is not dispositive in this case. The Elders of the Covenant Reformed Church (CRC) play a vastly different role than the Presbyterian elders in *Reutkemeier*. In *Reutkemeier*, the Presbyterian elders "have nothing to do with the temporal affairs of the church, but deal wholly with its spiritual side and its discipline." *Id.* at 293. The majority of the duties performed by the CRC Elders are administrative. (Appellants' Brief, p. 65–67). Unlike those of the CRC Elders, the offices of Presbyterian Elders are "perpetual, and no person can be divested of [them] except by removal." *Id.* Presbyterian Elders, unlike the CRC Elders, are given "the keys of the kingdom of heaven . . . [and] have power respectively to retain and remit sins . . . ." *Id.* In fact, in the Presbyterian Church, "no power of discipline" is conferred upon the pastor at all, except "in conjunction with the ruling elders." *Id.* The pastor is not even denominated a "minister," but rather an "elder" or "presbyter." *Id.* The Presbyterian Elders have far

more significant clerical duties and power within that church than the CRC Elders have in their Church.

Appellants specifically challenge the district court's rulings as they relate to *all* minutes from Board of Elder meetings, which the Elders have claimed as privileged. (*See* Con. App. Vol. I 250–269, 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). Meeting minutes summarizing the business of a group of ten or more individuals are not protected by the clergy privilege. The privilege is meant to protect a communication between a penitent and clergy member. *See State v. Richmond*, 590 N.W.2d 33, 35 (Iowa 1999). The communications between the penitent and clergy person are meant to be *confidential*, for the benefit of the penitent, not the clergy person. *Id.* The Bandstras contend that the clergy privilege does not and should not apply to the Elders of Covenant Reformed Church. Each discovery ruling protecting these documents resulted from a misapplication of the clergy privilege and was an abuse of discretion—"an erroneous

conclusion and judgment, one clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *McFarlan v. Fowler Bank City Trust Co.*, 12 N.E.2d 752, 754 (Ind. 1938).

P. The District Court's Discovery Rulings Should Be Overturned.

The Church argues that the Bandstras have waived their discovery issues by failing to thoroughly brief them. With the sheer number of issues and limited space in the opening brief, it is impossible for Appellants to address each discovery issue in detail. Appellants deny that any discovery issues have been waived, and have attempted to describe them for the Court by providing detailed references to the motions, orders, rulings, and documents in question in their opening brief.

On January 9, 2015, the Church submitted a Motion for In Camera Inspection of Documents in response to Appellants' November 4, 2014 Motion to Compel. (*See* Con. App. Vol. I at 230–241; 245–247). The court agreed that documents at issue in

Appellants' motion to compel should be submitted to the court for in camera review. (Con. App. Vol. I at 248–249). Appellee took some, but not all, of the documents to the court and the court ruled on the documents it got. (Con. App. Vol. I at 250–269; 270–276). Throughout discovery, other documents were never produced to Appellants even though the court ordered their production. (*See* Con. App. Vol. I at 401–419, 293–400 (attachments); 490–496, 455–489 (attachments); Con. App. Vol. II at 36–83; and Court Orders at Con. App. Vol. I at 250–269; 270–276; 420–427; 431–432; 433–435; Con. App. Vol. II at 6–7; 84–87; 606–608). Some documents were never submitted to the court for inspection, in spite of Appellants' repeated requests that the Church do so. (*See* Con. App. Vol. II at 609–613). When Appellants requested that the Court enforce its Order requiring that documents be provided for in camera review and reviewed, or produced pursuant to its prior orders, it refused to do so. (*Id.*). This failure to enforce discovery orders has prejudiced Appellants' ability to collect essential evidence and to meet their evidentiary

burden. It also cast doubt on the necessity of complying with court orders.

Precedent on a court failing to enforce its own order is scarce. In *People v. Brophy*, a California Court of Appeals case, the defendant filed a motion to dismiss the charges against him based on the U.S. Postal Service's failure to provide him with information and documents under a discovery order issued by the court. 7 Cal.Rptr.2d 367, 369–70 (Cal. App. 4th 1992). The court denied defendant's motion, and defendant was subsequently unable to gather information to support his motion to suppress evidence. *Id.* The appeals court noted that district courts have discretion to decide whether they wish to sanction parties that do not comply with their orders, but ultimately held "[b]ecause defendant's discovery order was neither enforced nor complied with he was unable to meet his evidentiary burden . . . ." and reversed the lower court. *Id.* at 370.

Here, the Court refused to enforce its discovery orders, in spite of Appellants having submitted their motion prior to the

motions deadline. (*See* Con. App. Vol. II at 36–83). In its Ruling on Plaintiffs' Fourth Motion to Compel and in response to Appellants' request for the court to enforce its prior order that documents should be submitted for *in camera* review, the court states

> Discovery is closed. The documents now challenged by plaintiffs were identified as privileged long ago and were not challenged until now. The court is not inclined to essentially reopen and prolong the discovery process by now engaging in the time consuming project of *in camera* inspection of a large number of documents on the virtual eve of trial. The motion is denied.

(Con. App. Vol. II at 606–608; 614–615). Appellants asked the court to reconsider its ruling, and provided detailed explanations of each document or category of documents, the difficulties faced with redactions and failure by Appellee to produce the required documents to Appellants and the court, and lists of the multiple occasions on which the privilege had been challenged or requests made that the documents be presented for in camera review. (Con. App. Vol. II at 609–613). Appellants argued that their Fourth Motion to Compel

had been filed prior to the close of pleadings and discovery, and that the court's ruling was unfair and deprived them of documents needed to prove their case. (*Id.*). The court responded by stating "Plaintiffs' motion to reconsider the ruling on the fourth motion to compel is denied." (Con. App. Vol. II at 614–615). The District Court erred and its error was extremely prejudicial to the Bandstras' case.

The court's discovery rulings amount to an abuse of discretion based on an erroneous application of the law, and deny Appellants access to documents which are relevant and unprotected by any privilege, and which they need in order to prove their case. *See Mediacom Iowa L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004); *Office of Citizens' Aid/Ombudsman v. Edwards*, 825 N.W.2d 8, 14 (Iowa 2012). The district court's discovery rulings should be reversed.

VII. CONCLUSION

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

VIII. REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

Respectfully submitted,

ROXANNE BARTON CONLIN

IX. 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 contains 7,999 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 8,220 with inserted references to the various appendices.

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[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