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IN THE SUPREME COURT OF MISSOURI

JOHN DOE 122,	)	
	)	
Plaintiff/Appellant,	)	
vs.	)	
	)	
MARIANIST PROVINCE OF THE UNITED STATES, and CHAMINADE COLLEGE PREPARATORY, INC.	)	Case No. SC98307
	)	
Defendants/Respondents.	)	

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant appeals from the judgment entered by the Circuit Court in favor of Defendants/Respondents. LF, D58, D61 and D68; A2, A3, A11. This appeal involves Plaintiff's claims for damages for childhood sexual abuse, including claims of negligent supervision of employee, negligent supervision of children, and intentional failure to supervise clergy. Petition, LF, D6. The abuse was perpetrated by Brother John Woulfe, who was employed and supervised by Respondents. *Id.*

The Circuit Court held that *Gibson v. Brewer*, 952 S.W. 2d 239 (Mo. 1997), required the dismissal of Appellant's negligence claims (Counts II and IV), as a matter of law. LF, D58, D61 and D68; A2, A3, A11. Appellant asserts in this appeal that under controlling United States Supreme Court doctrine, *Gibson v. Brewer* cannot control and the Circuit Court should be reversed as to those Counts.

The Circuit Court also granted summary judgment on Plaintiff's claim of intentional failure to supervise clergy (Count III), holding that there was no competent evidence to support that claim. LF, D61 and D68; A3, A11.

Defendants also sought summary judgment on their statute of limitations defense, but in light of the Circuit Court's rulings disposing of Plaintiff's claims on other grounds, the Court did not address that issue. LF, D61. Plaintiff contends that there are disputed issues of material fact regarding the statute of limitations defense and that it cannot serve as an alternative ground for affirmance of the summary judgment. *See* LF, D25 at pp. 8-9, ¶¶ 30-39, pp. 11-12, ¶¶1-5; D44 at 5-19; Statement of Facts (Section III, below).

The issues on appeal involve errors committed by the Circuit Court. Appellant appealed to the Missouri Court of Appeals, Eastern District which by a two-to-one vote indicated that it would affirm the Judgment of the trial court, but due to the general interest and importance of the issues on appeal, transferred the case to the Supreme Court of Missouri pursuant to Rule 83.02. Accordingly, this appeal is within the jurisdiction of the Missouri Supreme Court pursuant to Article V of the Missouri Constitution.

STATEMENT OF FACTS

I. INTRODUCTION AND SUMMARY OF ABUSE

In their Motion for Summary Judgment Defendants did not dispute Plaintiff's allegations that he was sexually abused on multiple occasions by a religious brother, Brother John Woulfe, at Chaminade College Preparatory School. LF, D14, D15 and D16. Woulfe was Plaintiff's guidance counselor. P's Depo, LF, D42 at 218. Woulfe sexually abused Plaintiff in Woulfe's office at Chaminade. P's Depo, LF, D42 at 223-24, 234-43; D43 at 8-19, 24-31, 47-72, 76-84. The abuse began with Woulfe providing *Playboy* magazines and cigarettes to plaintiff, escalated to Woulfe encouraging Plaintiff to masturbate while looking at the magazines, which Plaintiff did while Woulfe watched. *Id.* In some of the encounters Woulfe also masturbated himself, touched Plaintiff's penis with his hand, and during their last encounter put his mouth on Plaintiff's penis. *Id.* Plaintiff's best recollection is that he was sexually abused by Woulfe in 1971. LF, D25 at 2, ¶ 2.

As described in more detail below, Plaintiff had no memory of his abuse from a year or two after it occurred until January of 2012 when he received a letter from the

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Marianist Order to Chaminade alumni disclosing that they had received a report that another student had been sexually abused by Woulfe. The 2012 letter from the Marianists generated responses from numerous students who reported they had also been abused by Woulfe. *See* LF, D33 ¶ 11 (j).

II. DEFENDANTS' KNOWLEDGE THAT WOULFE SEXUALLY ABUSED OTHER STUDENTS

The evidence Plaintiff submitted in response to Defendants' Motion for Summary Judgment pertaining to Defendants' knowledge of Woulfe's sexual abuse of students includes the following sources:

- Brother Woulfe's personnel file and related documents, LF, D28 and D29, produced by Defendants' in discovery, LF, D30.
- Deposition testimony of Father Quentin Hakenewerth, a Priest and leader in the Marianist Order. LF, D38 and D39.
- Deposition testimony of Plaintiff's expert witness, Father Thomas Doyle, a Catholic Priest who has extensive knowledge and experience with the problem of sexual abuse in the Catholic Church. LF, D33, D34 and D37.
- Deposition testimony of Brother Lawrence McBride, a member of the faculty and Director of Resident Students at Chaminade. LF, D40.
- Deposition testimony of Father Robert Osborne, a Priest in the Marianist Order and the Chaplain for Chaminade's resident students. LF, D41.

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- Affidavits of two students who reported sexual abuse in 1971. LF, D63 and D67.

Earliest Signs of Woulfe's Troublesome Behavior

Notations in Woulfe's personnel file from 1959-1961 indicate he had a "boisterous; immature personality," that he had "**Striking faults**" that included "**Lack of judgment**," and that "**His lack of judgment will cause trouble** but he is not disqualified because of it." LF, D29 at 50-51, emphasis added.

1968 Marianists Transfer Woulfe from St. Boniface to Chaminade

The Marianist Order transferred Woulfe to Chaminade from another Marianist High School in 1968. LF, D28 at 7, 8. The letter advising Woulfe of his transfer states:

> I am sorry that things did not work out more appropriately at St. Boniface. At the same time…the actual grace left by this **unusual situation** may be one which **helps you to confront and overcome the problem**, which if left untended, would eventually become **a serious one for religious life**….

LF, D28 at 8, D39 at 1, emphasis added. The letter was from Brother Gray, Director of Education for the Marianist Province and a member of the Provincial Council. LF, D38 at 30-31 (Hakenewerth deposition).

Father Quentin Hakenewerth testified that the term "**religious life**" involves religious observance and includes the keeping and observance of the vows, including the vow of chastity. LF, D38 at 11-18. Hakenewerth also testified that making a sexual advance toward a student would violate the vow of chastity. *Id.* at 46. Hakenewerth was Assistant to the Provincial from 1965-68, was Provincial of the St. Louis Province from

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1971-79, served in the General Administration in Rome in the 1980s, and was Superior General from 1991-96. *Id.* at 11-18.

Father Thomas Doyle, an expert witness for Plaintiff, and a Catholic Priest, testified that he has reviewed more than 2000 personnel files of Catholic clergy perpetrators of sexual abuse and found that the topic of sexual abuse of minors is never addressed explicitly in those records but instead is referred to in euphemistic or coded language such as that seen in Woulfe's records. LF, D37 at 69, 91-93, 104-05 (Doyle Deposition); LF, D33, ¶¶ 9, 11(e) (Doyle Statement, adopted in his Deposition at LF, D37 at 32-33). Doyle also expressed his opinion that the Marianist leadership had notice of Brother Woulfe's sexual contact with minors as early as 1968, based on the letter advising Woulfe of his transfer to Chaminade (LF, D28 at 7, 8). LF, D33 ¶¶ 11(b), (c), (d), (e); D37 at 67-71, 91-93. Doyle also testified to the following additional facts regarding the clergy personnel files he has reviewed:

> [P]roblems such as alcohol abuse, absence from community meals, spiritual exercises or relationships with women are addressed directly. If the cleric or brother is involved with minors of either gender, it is not addressed directly. Rather, various forms of coded language are used.

D37 at 91-93; LF, D33 at 4, ¶11.e.

> In the documentation that is habitually used by religious superiors and bishops and other clerics that I've reviewed over three decades, they never -- I've never seen sexual abuse of minors directly referred to with the proper direct language.

It's always referred to in some form of coded or euphemistic language that is covering up or massage -- or masking what the reality is.

LF, D37 at 69, lines 8-15.

Woulfe's 1969 Evaluations

Marianist records also include Woulfe's 1969 evaluations, which indicate he was "**not good as a dormitory prefect because he is always running away with his other preoccupations; should be replaced in the dormitory next year**." LF, D29 at 44, D39 at 6, emphasis added. Those notes were Brother Gray's reports to Hakenewerth and the Provincial Council. LF, D38 at 60-61, 63-64.

1970 Marianists Consider Transferring Woulfe Away From Chaminade

Marianist records also show that in the spring and summer of 1970, the Marianist leadership considered transferring Woulfe to another high school, but allowed him to stay at Chaminade. LF, D28 at 9, 38-40, 44-45; LF, D39 at 2-5.

- In a May 1970 letter to Woulfe, Brother Gray "apologize[d] for the **unfortunate circumstances connected with the change itself**." LF, D28 at 9; LF, D39 at 2, emphasis added.
- In July 1970 Woulfe pleaded for his return to Chaminade or for a transfer outside the St. Louis area. LF, D28 at 4-5; LF, D39 at 4-5. Woulfe wrote:
  - "…I have been doing an excellent job and now for no apparent reason, **my services are no longer desired at Chaminade** …. **Nobody knows why I am being changed**." LF, D28 at 4; LF D39 at 4, emphasis added.

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- Woulfe then said if he can't stay at Chaminade, he should leave the St. Louis area:

  "I do not feel that the **emotional turmoil which will exist** can allow me to function efficiently at St. Mary's or any other school in the St. Louis area. **I feel that I will need a fresh start, away from Chaminade in order that the pain can be erased.**" LF, D28 at 4-5; LF D39 at 4-5, emphasis added.

- Woulfe admitted: "**I have always admitted that I did not live faithfully day to day the externals of Religious Life**." LF, D28 at 5; LF D39 at 5, emphasis added.

- Marianist leadership relented and allowed Woulfe to remain at Chaminade for the 1970-71 school year, during which he sexually abused Plaintiff. LF, D28 at 44-45:
  - Brother Gray responded to Woulfe and stated: **"with considerable misgivings and reservations**, the Provincial Council met yesterday and decided that you shall stay on at Chaminade for this coming year." *Id.* at 44, emphasis added.
  - Brother Gray expressed concerns: "Many of the same arguments you used about Chaminade's need for an excellent guidance program as the basis of your staying on there were **the very concerns** behind Chaminade's Administration's attempt to **improve the Guidance**

situation with a new man who, <u>they hoped might patch up some of the professional lacks</u> they found…" *Id.*

Father Doyle pointed out that the letter informing Brother Woulfe of the transfer is missing from his files. LF, D33 at 4, ¶ 11(f); LF, D37 at 95-97. Doyle testified that was significant because ordinarily there would have been such a letter. LF, D37 at 97-98.

Doyle also testified to his opinion, based upon the language of those letters and the fact of the missing letter, that the reason why the Marianists "attempted to remove Woulfe from Chaminade in 1970 was based in knowledge of improper sexual behavior with students." LF, D37 at 95, lines 5-12.

1971 Two Chaminade Students Report Woulfe's Sexual Abuse

Evidence obtained by Plaintiff's attorneys during their investigation shows that during 1971 two Chaminade students reported to members of the faculty at Chaminade that Woulfe had sexually abused them. Student CM was sexually abused by Woulfe on several occasions, and in late 1971 CM reported to Father Robert Osborne that Woulfe had abused him. LF, D67. Father Osborne had been a Priest in the Marianist Order since 1966, and in 1971 he was the Chaplain for Chaminade's resident students. LF, D41 at 3 (Osborne Deposition p. 7-8). Student KFS also was sexually abused by Woulfe at Chaminade. In November or December 1971 KFS reported Woulfe's abuse to Chaminade's residence hall prefect, Brother Murphy. Murphy referred KFS to the resident assistant, who made excuses for Woulfe and caused KFS to feel even greater shame for reporting the abuse. LF, D63.

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The Marianists' personnel records for Woulfe contain no reference to reports of sexual abuse in 1971, the year that CM and KFS reported that Woulfe had sexually abused them. LF, D28-29.

1974-75 Another Chaminade Student Reports Woulfe's Sexual Abuse

In discovery from Defendants, Plaintiff obtained evidence that in the mid-1970s, probably 1974 or 75, Brother Lawrence McBride was told that Woulfe molested a Chaminade student. LF, D40 at 27-34 (McBride deposition). McBride had been a Marianist Brother since 1963, on the faculty of Chaminade from 1966-79, and in the mid-1970s, when he received the report of Woulfe's abuse, was the Director of Resident Students. *Id.* at 7, 9, 27, 29-30. When McBride received the information that Woulfe molested a student he believed it was true and Woulfe was still Chaminade. *Id.* at 34-35.

The Marianists' records for Woulfe contain no reference to a report of sexual abuse in the mid-1970s. LF, D28-29.

1976-77 Woulfe Removed From Chaminade Due to Sexual Abuse

Deposition testimony of Marianist leaders establishes that sometime during the 1976-77 school year Woulfe finally was removed from Chaminade, and that his removal was due to a report to Father Robert Osborne of Woulfe's sexual abuse of a student. LF, D38 at 36-37, 44 (Hakenewerth Deposition); LF, D41 at 6-7 (Osborne Deposition, pp. 18-22). Neither Osborne nor Hakenewerth were certain of the date that they learned of the sexual abuse. LF, D38 at 76-79, 85-86; LF, D41 at 6, 7 (depo pp. 18-19, 21-22).

At that time Osborne was the president of Chaminade and a member of the Provincial Council of the Marianist Order of St. Louis and Hakenewerth was the

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Provincial. LF, D41 at 4, 6 (depo pp. 10-11, 17-18). Father Hakenewerth testified, that as the Provincial, he reported Woulfe's sexual abuse to the Provincial Council, his small group of direct advisors, and made the decision to remove Woulfe with the approval of the Council. The Provincial is the highest authority in the Marianist Province. LF, D38 at 13, 17, 30-31, 44.

Marianists' Records for Woulfe Never Explicitly Mention Sexual Abuse

The Marianists' records for Brother Woulfe contain no explicit mention of a report of sexual abuse in 1976 or 1977, or at any other time. LF, D28-29 (personnel records); LF, D38 at 77-78, 126-130 (Hakenewerth Deposition). Father Hakenewerth cannot explain why there are no such records. LF, D38 at 84-87, 96-97, 126-130. Hakenewerth also testified he has no independent recollection of when he first learned of an allegation of sexual abuse against Brother Woulfe. LF, D38 at 77-78, 126-130.

The Marianists' records from 1976-77 regarding Woulfe's removal from Chaminade, which they admit was due to sexual abuse, say nothing explicitly about sexual abuse. Instead, the records reflect that Woulfe was continuing to have difficulty with "**religious life aspects**" and that he had engaged in "**some professional negligence**." LF, D29 at 57-60; LF, D39 at 11-14, emphasis added.

The records of the Provincial Council, to whom Father Hakenewerth testified he reported Woulfe's sexual abuse, and the official body that approved Woulfe's removal from Chaminade due to sexual abuse, include the following:

- The November 18, 1976 Provincial Council Minutes state: "**The situation with Bro. John Woulfe has not improved in the**

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religious life aspects. Also, it is now becoming a **school problem** because of some **professional negligence** on his part. . . . When Quentin [Hakenewerth] returns from Peru he will confront John on the **religious life aspects**." LF, D29 at 57; LF, D39 at 11, emphasis added).

- The Council Minutes from February 4, 1977 state: "The impasse has arisen since the local decision has been made by the Director and the Principal that John Woulfe should move. John Woulfe does not want to mo[ve]. . . . **The community does not know many of the facts and some are taking the side of Bro. John**. **John does not face the problems of prayer, religious life and his personal problems**. **The council decision is that Bro. John will be asked to move** to another assignment." LF, D29 at 58; LF, D39 at 12, emphasis added.

In April of 1977 Father Hakenewerth responded to a letter from a Chaminade student who had written about Woulfe's removal from the school. Hakenewerth refused to reveal anything about the accusation of sexual abuse, but told the student: "**The real reasons for which Bro. Woulfe has been asked to take another assignment lie within the realm of religious life and obedience**. **I do not believe those reasons are the property of the public**, even those whom Bro. John serves." LF, D28 at 51-51, emphasis added; LF, D39 at 9-10; LF, D38 at 70-72 (Hakenewerth Deposition).

Father Hakenewerth's deposition testimony establishes the connection between the report that Woulfe had been accused of sexual abuse and the documentation of his removal from Chaminade in 1976-1977. LF, D38 at 70-72, 76-87.

Although his testimony was not consistent on the matter, Hakenewerth stated that the November 18, 1976 Provincial Council Minutes were written "after [he] had learned of the allegation of a sexual advance toward a student." D38 at 77, lines 12-15.

Hakenewerth also testified that could not explain the reference to "the facts" in the statement in the February 4, 1977 Provincial Council Minutes: "The community does not know many of the facts, and some are taking the side of Brother John." LF, D38 at 80, lines 10-25. Hakenewerth agreed, however, that "the community would know that [Woulfe] was not showing up for services and things like that." D38 at 81, lines 8-10.

The record is not clear about the date that Hakenewerth received the information from Father Osborne about Woulfe's sexual abuse because Hakenewerth could not recall when it happened, and he made no record of it. D38 at 83-86.

When asked if "an allegation of a sexual advance by Brother Woulfe at Chaminade" is "something that you would purposely not want to put in a record," Hakenewerth response was: "No, I don't think so." D38 at 86, line 19 to 87, line 10.

III. FACTS REGARDING PLAINTIFF'S MEMORY OF SEXUAL ABUSE

Plaintiff's Immediate Memories of Abuse

Plaintiff graduated from Chaminade in 1971. LF, D42 at 28. Plaintiff then spent one year at Mizzou (LF, D42 at 28-29), before transferring to Meramec Community College in the fall of 1972 (LF, D42 at 35). After leaving Meramec after two semesters,

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Plaintiff moved to Arizona (LF, D42 at 39), where he spent a little over a year or perhaps two years (LF, D42 at 51, 64). Plaintiff was uncertain about when he lived in Arizona, but his friend testified that plaintiff went there in August 1973 and spent "only a year." LF, D42 at 64; LF, D36 at 51-52).

Plaintiff testified that after he graduated from Chaminade, in the Spring of 1971, the sexual abuse "was fresh in [his] mind." LF, D43 at 108. He would "think about it from time to time" and that it was "st[u]ck in [his] mind for a while." LF, D43 at 108. Plaintiff testified that he remembered the abuse when he first went to college in the fall of 1971 and during the summer of 1972. LF, D43 at 109-110. By 1973, when Plaintiff moved to Arizona, he no longer had any memory of Brother Woulfe's sexual abuse. LF, D43 at 127.

Plaintiff was born on May 7, 1953. LF, D42 at 7. Thus, Plaintiff was 19 or 20 years old when he lost all memory of the abuse.

Plaintiff's Lack of Memory of Abuse Until 2012

Plaintiff had no memory of the abuse from the age of 19 or 20, until January 2012, when he received a letter from Father Solma, Provincial of the Marianist Province of the United States, indicating that the Marianist Province had received allegations of sexual abuse against Brother Woulfe and another former Chaminade teacher. LF, D26 (P's Affidavit); LF, D43 at 127, 136-141 (P's Depo); LF, D27 (Solma letter). Plaintiff described his reaction to reading the letter from Father Solma:

Q. And so when you read this letter from Father Solma, Exhibit C, what was your reaction?

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A. I was stunned, literally. I knew finally what it meant when someone says you could have knocked me over with a feather. It -- it was like I got punched in the gut. It was -- it was the most bizarre reaction I'd ever had to reading something.

LF, D43 at 139-40.

Plaintiff had not thought about Woulfe "in decades" until the letter "brought the memories back" and "the whole scene just flashed in [his] mind." LF, D43 at 140, 141.

IV. PROCEDURAL HISTORY

Plaintiff filed this lawsuit in 2015. LF, D6.

After substantial discovery, in 2018 Defendants filed a Motion for Summary Judgment arguing that the entire case should be dismissed on the ground that the statute of limitations had expired and challenging each of Plaintiff's claims on legal and/or factual grounds. LF, D14-24. Plaintiff responded to Defendants' Motion for Summary Judgment by objecting and responding to Defendants' Statement of Uncontroverted Material Facts, LF, D25-43, and arguing that Defendants' motion lacked legal merit and should be denied. LF, D44-52. Defendants replied to Plaintiff's submissions with a Motion to Strike, or in the Alternative, Objections and Responses to Plaintiff's Statement of Additional Facts, LF, D53, and a Reply Memorandum. LF, D54. Plaintiff responded to Defendants' Motion to Strike. LF, D55. Defendants filed a Reply in Support of Their Motion to Strike. LF, D56.

On October 1, 2018, counsel argued Defendants' Motion to Strike and Motion for Summary Judgment before the Circuit Judge, Kristine Kerr.

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In their Motion to Strike, Defendants challenged a substantial portion of the evidence submitted by Plaintiff in response to Defendants' Motion for Summary Judgment: three affidavits that were signed under penalty of perjury but not notarized; and all of Defendants' records regarding the sexual abuser, Brother Woulfe, as "bulk exhibits that constitute hearsay." LF, D55 at 1-3. At the hearing on October 1, 2018, Judge Kerr made the following rulings on Defendants' Motion to Strike:

> "1. Plaintiff shall submit his Affidavit (Ex 1) duly sworn and notarized.
>
> 2. The Court will take all other issues in the Motion to Strike under advisement."

LF, D57; A1.

Plaintiff submitted his notarized affidavit on October 10, 2018. LF, D59-60.

Judge Kerr also made the following ruling on October 1, 2018, on Defendants' Motion for Summary Judgment:

> "2. The Court grants Defendants' Motion as to Plaintiff's claims based on negligence, Counts II and IV, as a matter of law under Gibson v. Brewer.
>
> 3. All other issues taken under advisement."

LF, D58; A2.

On March 8, 2019, Judge Kerr ruled on the remaining issues in Defendants' Motion to Strike and Motion for Summary Judgment. LF, D61; A3.

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Judge Kerr granted the portions of Defendants' Motion to Strike regarding the affidavits of two former Chaminade students that were signed under penalty of perjury but not notarized, but denied the portion of the Motion to Strike challenging Defendants' records pertaining to Brother Woulfe. *Id.* at 1-3.

In her ruling on the Motion for Summary Judgment, Judge Kerr ruled in favor of Defendants and dismissed the remaining Counts in Plaintiff's lawsuit. *Id.* at 3-8. Judge Kerr granted Defendants' Motion on Count III, intentional failure to supervise clergy, on the ground that there was no "*competent* evidence in the record, including but not limited to the deposition testimony of plaintiff's expert Fr. Thomas Doyle, from which such conclusions could be reached without repeated speculation and reliance on hearsay, even when viewed in the light most favorable to the plaintiff, as the court is required to do." *Id.* at 5, emphasis in original.

The Court also granted summary judgment for Defendants on Count I, Childhood Sex Abuse or Battery; Count V, intentional infliction of emotional distress; and Count VI, breach of fiduciary duty. *Id.* at 4, 6-7. Plaintiff elected not to appeal the Circuit Court's rulings on Counts I, V and VI.

As to Defendants' statute of limitations defense, the Court expressly declined to decide the issue, commenting that it was not necessary to "grasp[] the thorny factual thistles regarding whether or not plaintiff suffered from a repressed memory and when his alleged damages were capable of ascertainment." *Id.* at 7-8.

On March 26, 2019, Plaintiff filed two motions regarding the Court's Order and Judgment: Plaintiff's Motion to Vacate, Reopen and Amend Judgment (LF, D64) and

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Plaintiff's Motion to Supplement the Record on Summary Judgment (LF, D62). The Court granted both motions on March 29, 2019, reopening the Judgment and Order to allow Plaintiff to supplement the record with notarized versions of the two witness affidavits that had been stricken. LF, D68. Nevertheless, upon consideration of the two notarized affidavits (LF, D63, D66-67), the Court issued an Amended Order and Judgment granting summary judgment on all Counts of Plaintiff's Petition. *Id.*

Plaintiff appealed the Circuit Court Orders and Judgment to the Missouri Court of Appeal, Eastern District. LF, D69-72.

The Court of Appeals, by a two-to-one vote indicated that it would affirm the Judgment of the trial court, but due to the general interest and importance of the issues on appeal, transferred the case to the Supreme Court of Missouri pursuant to Rule 83.02. Opinion (December 31, 2019).

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POINTS RELIED ON

POINT 1

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S NEGLIGENCE CLAIMS (COUNTS II AND IV) BASED ON *GIBSON V. BREWER*, BECAUSE UNDER CONTROLLING UNITED STATES SUPREME COURT DOCTRINE THE DECISION IN *GIBSON V. BREWER* CANNOT CONTROL, IN THAT NEITHER THE FREE EXERCISE CLAUSE NOR THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BAR JUDICIAL CONSIDERATION OF WHETHER THE RESPONDENTS COMPLIED WITH NEUTRAL, GENERALLY APPLICABLE TORT RULES THAT APPLY TO ALL EMPLOYERS.

Employment Div. v. Smith, 494 U.S. 872 (1990)

Texas Monthly v. Bullock, 489 U.S. 1 (1989)

Jones v. Wolf, 443 U.S. 595 (1979)

POINT 2

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF INTENTIONAL FAILURE TO SUPERVISE CLERGY (COUNT III) BECAUSE DEFENDANTS FAILED TO SUPPORT THEIR MOTION WITH ANY STATEMENTS OF "MATERIAL FACT" AS REQUIRED BY MISSOURI RULE OF CIVIL PROCEDURE 74.04, IN THAT DEFENDANTS' STATEMENT OF UNCONTESTED MATERIAL FACTS RELATING TO

COUNT III CONTAINS NO MATERIAL FACTS BUT ONLY REFERENCES TO PLAINTIFF'S DEPOSITION TESTIMONY

ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 381 (Mo.1993)

Dilley v. Valentine, 401 S.W.3d 544 (Mo. App. W.D. 2013)

Strable v. Union Pac. R.R. Co., 396 S.W.3d 417 (Mo. App. E.D. 2013)

Adams v. USAA Cas. Ins. Co., 317 S.W.3d 66 (Mo. App. E.D. 2010)

POINT 3

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF INTENTIONAL FAILURE TO SUPERVISE CLERGY (COUNT III) BECAUSE THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO DEFENDANTS' PRIOR KNOWLEDGE THAT BROTHER WOULFE WAS DANGEROUS TO STUDENTS, IN THAT CIRCUMSTANTIAL EVIDENCE CREATES A REASONABLE INFERENCE THAT DEFENDANTS HAD KNOWLEDGE OF WOULFE'S DANGER TO STUDENTS BEFORE HE ABUSED PLAINTIFF

Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997)

Truck Ins. Exchange v. Pickering, 642 S.W.2d 113 (Mo. App. W.D. 1982)

State v. Smith, 502 S.W.3d 689 (Mo. App. ED 2016)

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ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S NEGLIGENCE CLAIMS (COUNTS II AND IV) BASED ON *GIBSON V. BREWER*, BECAUSE UNDER CONTROLLING UNITED STATES SUPREME COURT DOCTRINE THE DECISION IN *GIBSON V. BREWER* CANNOT CONTROL, IN THAT NEITHER THE FREE EXERCISE CLAUSE NOR THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BAR JUDICIAL CONSIDERATION OF WHETHER THE RESPONDENTS COMPLIED WITH NEUTRAL, GENERALLY APPLICABLE TORT RULES THAT APPLY TO ALL EMPLOYERS.

A. Standard of Review

The standard of review on appeal from an order granting a motion to dismiss or a motion for summary judgment is de novo. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. 2008); *ITT Commercial Finance Corp. v Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993).

B. This Court Must Apply Federal Constitutional Law as Established by the United States Supreme Court

The Court below dismissed the negligence claims in this case, Counts II and IV, "as a matter of law," based upon *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997). *Gibson* is derived from an erroneous interpretation of the First Amendment of the United States Constitution, which has now been rejected by the vast majority of states. The First

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Amendment does not act as a bar to application of neutral, generally applicable tort principles in clergy sex abuse cases. *See infra* n. 3. The United States Supreme Court is the supreme interpreter of the United States Constitution, and state courts are bound by the precedent of the United States Supreme Court under the Supremacy Clause. U.S. Const. art. VI. While state courts are free to decide federal constitutional issues, they are nevertheless constrained to follow Supreme Court doctrine. *Arizona v. Evans*, 514 U.S. 1, 8-9 (1995). The Supreme Court of Missouri recognized this principle in *Kraus v. Board of Education*, 492 S.W.2d 783, 784 (Mo. 1973), by confirming that "state court judges in Missouri are bound by the 'supreme law of the land,' as declared by the Supreme Court of the United States."

C. *Gibson v. Brewer* Is Contrary to Established Federal Constitutional Law

The decision in *Gibson v. Brewer* is contrary to federal constitutional doctrine and, therefore, cannot control this case. Following the reasoning of numerous Supreme Court decisions, many other state courts have concluded that negligence claims against religious institutions may lie. *See* cases cited in n. 3, *infra*. The majority of the states' highest courts have held that the First Amendment is not a bar to negligence claims against religious institutions for child sex abuse by clergy. *See id.*

1. Respondents Are Not Shielded by the Free Exercise Clause of the First Amendment

The First Amendment's Free Exercise Clause "embraces two concepts, freedom to believe and freedom to act. The first is absolute[;] the second [is not and] cannot be

[absolute]. Conduct remains subject to regulation for the protection of society." *Cantwell*, 310 U.S. at 303-04. As the Supreme Court stated in a 1990 majority opinion by Justice Antonin Scalia:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.
>
> We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145, (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. 'Laws,' we said, '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 be to 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.'

Smith, 494 U.S. at 879.[1]

The First Amendment thus requires the application of neutral principles to religious actors and organizations, unless the state has enacted a religious exemption. *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Jones v. Wolf*, 443 U.S. 595 (1979). There is no religious exemption to torts based on child sex abuse in the state of Missouri.

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[1] In order to raise a free exercise claim, Respondents bear the burden of establishing a substantial burden on religiously motivated conduct, *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85 (1990), or coercion of a sincerely-held religious belief. *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). It is not possible to violate the Free Exercise Clause if the conduct is not based in a religious belief, and there is no evidence in this case that the Catholic Church or the Marianist Province of the United States believes that children should be placed at risk of harm from clergy who seek to have sex with them.

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The United States Supreme Court's consistent approach to free exercise has held religious belief is absolutely protected, but religious conduct is subject to duly enacted laws. In the words of Thomas Jefferson, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pockets nor breaks my leg." *Notes on the State of Virginia (1787),* in 2 THE WRITINGS OF THOMAS JEFFERSON 221 (Albert Ellergy Bergh ed., 1905). The framing generation, while seeking to protect the religious freedom they crossed the ocean to secure, regardless did not believe religious actors deserved unlimited license to act. They even had a name for too much liberty: "licentiousness." *See City of Boerne v. Flores*, 521 U.S. 407, 541 (1997) (Scalia, J., concurring; *see also* Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why it is Not Protected Under Religious Liberty Constitutional Provisions*, 18 WM & MARY BILL RTS. J. 953 (2010).

When the Supreme Court decided its first case interpreting the Free Exercise Clause in 1879, *Reynolds v. United States*, 98 U.S. 145 (1879), the Justices upheld a federal law outlawing polygamy in the Utah Territory, and articulated what would eventually become the settled doctrine for the free exercise of religion: religious belief is absolutely protected, but religious conduct is subject to the rule of law. The *Reynolds* Court quoted Thomas Jefferson: "The legislative powers of the government reach actions only, and not opinions." *Id*. at 164 (quoting 8 JEFFERSON WORKS 113). The fact that the conduct arose from belief did not immunize the actor from the force of the law. One may believe what one wants with impunity; one may not act with impunity. Laws protecting

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the safety of children are applicable to the general public and are applicable to religious actors. The *Smith* Court said, "Our decisions reveal that the [correct] reading [of the Free Exercise Clause] is…[that] [we] have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79. The Supreme Court in *Jones*, 443 U.S. at 604, states that neutral principles of law can and should be applied to religious bodies. *See also Smith*, 494 U.S. at 885.

There is a limited intra-church, ecclesiastical doctrine that has clear parameters. Courts may not interfere with purely ecclesiastical decisions including who a religious group may choose as a minister, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 (2012); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952). This abstention requirement is heightened when the issue involves judicial review of church factions or disputes over belief. The Supreme Court has never extended this doctrine to cases involving third-party harm and those which may be resolved through "neutral principles of law." *Jones*, 443 U.S. at 604. Neutral principles of law requiring child protective practices apply to all entities, religious or secular. The First Amendment does not grant special rights to religious entities to endanger children.

A religious organization has an unassailable right to believe in forgiveness of pedophiles and in trying to help them. It should not and may not, however, negligently craft the conditions which will permit those pedophiles to have access to children to

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abuse. Thus, even if religiously motivated customs and practices of the Marianist Order were involved in the relationship between a Brother and his superiors in this case, the limited abstention doctrine would still not immunize Respondents for their failures and secular torts resulting in secular harm to Plaintiff. No ecclesiastical dispute is entailed, because the relevant evidence involves proof of conduct, whether religiously motivated or not. *See General Council on Finance and Admin. of the United Methodist Church v. Superior Court of Cal., Cnty. of San Diego*, 439 U.S. 1369, 1370 (1978) (holding that where the dispute is secular, and not ecclesiastical, the abstention doctrine does not apply).

The Supreme Court has never granted First Amendment immunity to a church for its tort liability for violation of a neutral, generally applicable law. Its doctrine is squarely to the contrary. *See Smith*, 494 U.S. at 881; *Church of Lukumi v. City of Hialeah*, 508 U.S. 520, 531-32; *see also Hosanna-Tabor*, 565 U.S. at 195 (setting aside actions involving breach of contract or tortious conduct by religious entities).

The issue in this case involves the secular issue of whether an organization created the conditions providing an alleged pedophile contact with children, leading to the sexual abuse of a child to whom the organization owes a duty. Plaintiff is not disputing the Church's internal beliefs, and he is not a member of the Church's clergy who willingly accepted employment on an implicit understanding that employment disputes were to be left solely to the church. *See Hosanna-Tabor*, *supra*. The standards for negligence and negligent supervision claims are civil law standards of conduct which do not require courts to determine religious law or dogma. The Respondents' absolute right to believe

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whatever they choose is not affected by the law governing conduct at stake in this case. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). The case at hand asks this Court only to analyze conduct, which is properly subject to neutral laws of general applicability, even if religiously motivated or performed by religious actors. *See Smith*, 494 U.S. at 878-79; *Blakely v. Blakely*, 83 S.W.3d 537, 547 (Mo. 2002); *Oliver v. State Tax Comm'n*, 37 S.W.3d 243, 248 (Mo. 2001). As the Supreme Court has declared: "Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense." *Kedroff*, 344 U.S. at 109. The same principle applies to religious institutions and organizations.

The question of whether the Respondents were negligent or engaged in negligent supervision, is assessed by analyzing the reasonableness of *any employer*, secular or otherwise, in permitting suspected child abusers to have access, through their employment, to more children. This Court is not being asked to determine what a reasonable "Church" would do, but only what any ordinary, prudent employer whose employees are regularly in contact with children would do.

Since the *Gibson* decision in 1997, courts in many states have held religious organizations can and should be held responsible for sexual misconduct by their clergy, just as secular entities are held responsible for child sex abuse, and that the First Amendment is not a barrier to such liability. *See, e.g.*, *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*,196 F.3d 409, 431-32 (2d Cir. 1999); *Doe v. Liberatore*,

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478 F. Supp. 2d 742, 774 (M.D. Pa. 2007); *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1194-95 (D. Colo. 2006); *Malicki v. Doe*, 814 So. 2d 347, 351 n.2, 357-58, 360-62 (Fla. 2002); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1232 (Me. 2005); *Petrell v. Shaw*, 902 N.E.2d 401, 406 (Mass. 2009); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 436 (Minn. 2002); *Roman Catholic Diocese v. Morrison*, 905 So. 2d 1213, 1242-43 (Miss. 2005) (expressly ; *McKelvey v. Pierce*, 800 A.2d 840, 850, 857-58 (N.J. 2002); *Turner v. Roman Catholic Diocese of Burlington*, 987 A.2d 960, 972-73 (Vt. 2009). Two of those decisions expressly recognize and disagree with the *Gibson v. Brewer* decision. *Malicki v. Doe,* 814 So.2d at 358 n.10, 365 n.19; *Roman Catholic Diocese v. Morrison*, 905 So. 2d at 1226-27.

It is well-established that the First Amendment "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring)). Employment *tort* law is a "valid and neutral law of general applicability." *Id.* Appellant simply seeks application of this law to Respondents' conduct endangering children in the same manner as it is applied to all employers. *See L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247 (Mo. 2002) (a suit may proceed against the owners, operators, and managers of a mall, along with security company employed by the mall for negligent failure to prevent sexual assault of a minor); *M.C. v. Yeargin*, 11 S.W.3d 604, 613 (Mo. Ct. App. 1999)

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(proceedings against a hotel for failure to prevent or intervene in the sexual assault of a guest may proceed because the hotel owed a duty of care).

As the Supreme Court repeatedly has made clear in *Employment Div. v. Smith*, *supra*, *Gillette v. United States*, 401 U.S. 437 (1971), *Cantwell*, *supra*, *Reynolds v. United States*, 98 U.S. 145 (1879), and *United States v. Lee*, 455 U.S. 252, 255 (1982), Respondents' religious beliefs do not mitigate their legal obligation to avoid harmful acts to others.

The Supreme Court's settled doctrine requires deference to and application of state laws that are neutral and generally applicable, even if they burden religious conduct. Even if strict scrutiny were applied, however, the negligence law in this case serves an overriding governmental interest. *Lee*, 455 U.S. at 257. The state's interest in preventing child sexual abuse by trusted authority figures is certainly a compelling state interest. *See e.g.*, *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1740 (2017) (Protecting children from sexual misconduct is a "government objective of surpassing importance."). *See also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 795 (2011); *FCC v. Pacifica Found.*,438 U.S. 726, 749 (1978); *Ginsberg v. New York*, 390 U.S. 629, 641 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) ("[P]rotecting children from abuse is a compelling state interest."); *Cannon v. Cannon*, 280 S.W.3d 79, 88 (Mo. 2009) (the protection of children is an interest of the highest order).

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Where, as here, the church's negligent conduct results in devastating secular harm to children, civil courts can, and indeed must, be the final arbiters of justice. *See Prince v. Massachusetts*, 321 U.S. 158 (1944) (prohibiting even parents from allowing their children to distribute religious literature, is constitutionally proper where necessary to protect the health and safety of children, even when parents consider such work a religious duty).

2. The Limited Doctrine of Judicial Abstention Under the First Amendment Does Not Grant Civil Immunity to Respondents for the Secular Harm They Caused by Committing Secular Torts

Gibson relied upon an interpretation of a limited doctrine of judicial abstention, which precludes civil courts from interfering in certain intra-church theological or ecclesiastical disputes. Most courts have rejected a First Amendment mandated exemption from liability for child sexual abuse by clergy. Missouri is one of only three states to embrace the notion that the First Amendment is a haven for child endangerment. *See Franco v. Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (Utah 2001); *Pritzlaff v. Archdiocese of Milwaukee*, 553 N.W.2d 780 (Wis. 1995) (involving abuse of adult but used throughout Wisconsin child sexual abuse cases to impose First Amendment barrier against theories of negligence in supervision and retention of employees in child sexual abuse cases). These courts also have misread the Supreme Court's jurisprudence.

The limited judicial abstention doctrine has clear parameters, and only bars judicial review of church decisions addressing purely ecclesiastical matters, in disputes

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between factions of the church that have been governed by church law. The Court has never extended this doctrine to cases that involve third-party harm and that may be resolved through "neutral principles of law." *Jones*, 443 U.S. at 604.

The question in a negligence or negligent supervision or retention case concerns whether there was conduct that put children at risk. The beliefs of the actors are simply irrelevant. Thus, even if customs and practices of the institution were involved in this case, the limited abstention doctrine would still not immunize it for its secular torts resulting in secular harm to Petitioner. The question in clergy sex abuse cases is whether the organization negligently created the conditions leading to child sex abuse. No ecclesiastical dispute is entailed, because the relevant evidence involves proof of conduct, whether religiously motivated or not. *See General Council*, 439 U.S. at 1370 (holding that where the dispute is secular, and not ecclesiastical, the abstention doctrine does not apply).

The United States Supreme Court has never granted First Amendment immunity to a church for its tort liability for violation of a neutral, generally applicable law. Its doctrine is squarely to the contrary. *See Smith*, *supra*. Under the Religion Clauses, the Supreme Court has developed a limited doctrine of judicial abstention that precludes civil courts from interfering in certain intra-church disputes. However, this abstention doctrine only bars judicial review of church decisions addressing purely ecclesiastical matters, in disputes between factions of the church that have agreed to be governed by church law. The Supreme Court has refused to extend the doctrine of judicial abstention to cases that may be resolved through "neutral principles of law," like those at issue here. *Jones*, 443

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U.S. at 604. *Gibson* expanded this limited doctrine of judicial abstention to civil disputes involving employer conduct resulting in secular harm and clearly governed by civil law. That expansion is thoroughly unwarranted by, and indeed contrary to, the constitutional principles enunciated by the United States Supreme Court, to which the state courts are bound. The First Amendment does not grant churches or other religious organizations immunity from liability for the secular harm resulting from their negligent employment of a molester in a supervisory role over children.

The doctrine of judicial abstention was established by the Court in *Watson v. Jones*, 80 U.S. 679 (1872) and further elaborated in *Jones v. Wolf*, *supra*. That case involved a dispute between the National Presbyterian Church and a local church over possession of church property. Under *Watson*, churches are free to decide purely ecclesiastical matters for themselves, and civil courts will not interfere with disputes if they are: (1) between internal factions of the church body; or (2) where the parties have impliedly consented to be bound by the church governance; or (3) where the dispute is governed by controverted questions of faith; and (4) where the church doctrine does not "violate the laws of morality and property and . . . does not infringe personal rights." *Id*. at 722-23. At the same time, *Watson* clearly limited the doctrine of judicial abstention. The civil courts retain their obligations to apply civil law:

> [I]t may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in

> no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up.

Id. at 733. If church action violates a person's legal rights, the civil law, not the church law, controls. Courts have no discretion to avoid application of the civil law. *Kedroff*, 344 U.S. at 109.

The limited doctrine of judicial abstention was plainly applied by the United States Supreme Court in *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), where there was an internal dispute over whether church member was entitled to appointment of chaplain's position. See also *Kedroff*, *supra* (internal dispute between mother church in Russia and U.S. faction over control of St. Nicholas Cathedral); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (intra- church schism resulting in dispute over ownership of church property); and *Milivojevich*, *supra* (internal dispute over who is rightfully the bishop in control over dioceses in the United States and Canada). Each of these cases met the criteria established in *Watson*.

The *limited* scope of the judicial abstention doctrine, even in intra-church dispute cases, has been firmly established by the Supreme Court. In *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970), the Court again was asked to determine which of two factions of the church should control the local churches and their property. The trial court decided in favor of the local church. The regional church appealed, claiming that this decision was contrary to the position of the hierarchical church and therefore violated the judicial abstention

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doctrine of the First Amendment. The United States Supreme Court refused to apply the doctrine of judicial abstention because resolution of this dispute was not based upon "inquiry into religious doctrine," but rather was based upon civil law principles. *Id*. at 368. The Court affirmed that the judicial abstention doctrine was not applicable where the dispute may be decided by application of "neutral principles of law." *Id*. at 370 (J. Brennan and J. Marshall, concurring).[2]

The limited scope of the judicial abstention doctrine is also illustrated in *General Council*, *supra*. In that case, then-Justice Rehnquist refused to apply judicial abstention, stating in accordance with established precedent:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating *intra-church disputes* . . . [T]his Court never has suggested that those constraints similarly apply outside the context of such intraorganizational disputes. Thus, Serbian Eastern Orthodox Diocese and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intra-church disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are *not applicable to purely secular disputes between third parties and a particular Respondent, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.*

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[2] *See Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. at 449 (1969) (civil courts are the proper tribunals for resolving internal church property disputes where those disputes may be resolved by "neutral principles of civil law.") *See also Jones v. Wolf*, 443 U.S. at 605-06 (emphasis added) in which the Court stated:

> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. . . We cannot agree . . . that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved

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Id. at 1372-73 (emphasis added) (internal citations omitted).

Contrary to the reasoning in *Gibson*, none of the essential requisites for application of the judicial abstention doctrine are applicable here. The case at bar simply requires the court to apply neutral principles of civil tort law to conduct between appellant and an organization that created a risk of harm to children. The harm to children and the requirements of civil law are the touchstones, not the beliefs or identity of the bad actors. This Court need only address what the entity did or failed to do—its conduct—not whether its conduct is consistent with or derived from its religious beliefs.

The standards established by the Supreme Court have been applied in the majority of jurisdictions in allowing negligent employment actions against church entities and religious employees.[3] The Florida Supreme Court stated in 2002 that the "majority of

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[3] *See*, *e.g.*, *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 431 (2d Cir. 1999); *Muegge v. Heritage Oaks Golf and Country Club, Inc.*, 209 F.Appx. 936 (11th Cir. 2006) (*unpublished*); *Doe v. St. John's Episcopal Parish Day Sch., Inc.*, 997 F.Supp.2d 1279 (M.D. Fla. 2014); *Colomb v. Roman Catholic Diocese of Burlington, Vt., Inc.*, 2:10-CV-254, 2012 WL 4479758, at *6 (D. Vt. Sept. 28, 2012); *Jane Doe 130 v. Archdiocese of Portland in Or.*, 717 F.Supp.2d 1120, 1138 (D. Or. 2010); *Pycsa Panama, S.A. v. Tensar Earth Technologies, Inc.*, 625 F.Supp.2d 1198 (S.D. Fla., Apr. 16, 2008) *aff'd*, 329 Fed.Appx. 257 (11th Cir., 2009); *Mary Doe SD v. The Salvation Army*, No. 4:07CV362MLM, 2007 WL 2757119, at *5 (E.D. Mo. Sept. 20, 2007); *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMc), slip op. at 11 (S.D. Cal. Dec. 20, 2005); *Lowe v. Entcom, Inc.*, No. 2:04CV610FTM33DNF, 2005 WL 1667681 (M.D. Fla., July 14, 2005); *Doe v. Norwich Roman Catholic Diocesan Corp.*, 268 F.Supp.2d 139 (D.Conn., June 26, 2003); *Doe v. Hartz*, 970 F.Supp. 1375 (N.D. Iowa, June 23, 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir.1998); *Smith v. O'Connell*, 986 F.Supp. 73, 80 (D.R.I. Nov. 25, 1997); *Nutt v. Norwich Roman Catholic Diocese*, 921 F.Supp. 66 (D. Conn. Mar. 28, 1995); *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1175 (N.D. Tex. 1995), *aff'd*, 134 F.3d 331 (5th Cir. 1998); *Isley v. Capuchin Province*, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995); *Rashedi v. General Bd. of Church of Nazarene*, 54 P.3d 349 (Ariz. Ct. App. 2002); *Roman Catholic Bishop of San Diego v. Superior Court of San Diego County*, 50 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996); *Destefano v. Grabrian*, 763 P.2d 275

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both state and federal jurisdictions that have found no First Amendment negligent/supervision bar" to claims against church entities. In *Malicki*, the Florida Supreme Court rejected the First Amendment claims raised in that case based upon Supreme Court precedent and also because "to hold otherwise and immunize the Church Defendants from suit could risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment." 814

(Colo. 1988); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *Gelineau v. Rocky Mountain Conference of the United Methodist Church*, 923 P.2d 152 (Colo. Ct. App. 1996); *Doe No 2 v. Norwich Roman Catholic Diocesan Corp.*, No. HHDX07CV125036425S, 2013 WL 3871430 (Conn. Super. Ct. 2013); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967 (Conn. Super. Ct. 1998); *Doe v. Evans*, 814 So.2d 370, 371 (Fla. 2002); *Carnesi v. Ferry Pass United Methodist Church*, 826 So.2d 954 (Fla. 2002); *Malicki v. Doe*, 814 So.2d 347 (Fla. 2002); *Wal-Mart Stores, Inc. v. Caruso*, 884 So. 2d 102, 105 (Fla. Dist. Ct. App. 2004); *Doe v Coe,* 135 N.E.3d 1, (Ill. 2019); *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. App. Ct. 1997); *Bivin v. Wright*, 656 N.E.2d 1121 (Ill. App. Ct. 1995); *Konkle v. Henson*, 672 N.E.2d 450 (Ind. Ct. App. 1996); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005); *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426 (Minn. 2002); *C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726 N.W.2d 127, 137 (Minn. Ct. App. 2007); *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003); *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213 (Miss. 2005); *Berry v. Watchtower Bible and Tract Soc. of New York, Inc.*, 879 A.2d 1124, 1135 (N.H. 2005) (Dalianis, J., concurring in part, dissenting in part); *Doe v. Diocese of Raleigh*, 776 S.E.2d 29, 36-37 (N.C. Ct. App. 2015); *Smith v. Privette*, 495 S.E.2d 395 (N.C. Ct. App. 1998); *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997); *Kenneth R. v. Roman Catholic Diocese*, 654 N.Y.S.2d 791 (N.Y. App. Div. 1997); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Mirick v. McClellan*, No. C-930099, 1994 WL 156303 (Ohio Ct. App., Apr. 27, 1994); *N.H. v. Presbyterian Church*, 998 P.2d 592, 602-03 (Okla. 1999); *Erickson v. Christenson*, 781 P.2d 383 (Or. Ct. App. 1989); Young v. Gelineau, No. PC/03-1302, 2007 R.I. Super. LEXIS 130 (Super. Ct. Sep. 20, 2007); *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 452-53 (Tenn. 2012); *Martinez v. Primera Asemblea de Dios, Inc.*, No. 05- 96-01458, 1998 WL 242412 (Tex. Ct. App., May 15, 1998); *Turner v. Roman Catholic Diocese of Burlington, Vt.*, 987 A.2d 960, 973 (Vt. 2009); *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 985 P.2d 262 (Wash. 1999).

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So.2d at 365. The Florida Court's reasoning reflects the United Supreme Court's doctrine and a significant majority of the states on this issue. *Id*. at 351. Justice, logic, and fundamental fairness demand the same result here.

3. The *Gibson v. Brewer* First Amendment Analysis Would Require Unlimited Civil Immunity for Any "Alleged Religious Conduct"

The approach in *Gibson* is an attack on the rule of law on which this country was built. No entity is above generally applicable, neutral laws like those at issue in this case—religious or not. *Gibson* expanded religious immunity far beyond the bounds of controlling precedent, creating an exception to the rule of law that is unacceptable in a democratic society. Would a bishop who murders a priest or parishioner as a form of religious discipline be immune from civil liability? Would a bishop who decides that payment of an electrician's bill for repairs to the chancery is not authorized under church law, be immune from a breach of contract action? In neither case can the answer be "yes." Indeed, in *Gibson* itself, the Missouri Supreme Court acknowledged that civil law must apply to a religious organization in some circumstances. "Religious organizations are not immune from civil liability for the acts of their clergy. If neutral principles of law can be applied without determining questions of religious doctrine, polity, and practice, then a court may impose liability," such as where negligent operation of a vehicle by a pastor in the scope of his employment is alleged. *Gibson*, 952 S.W.2d at 246. Drawing the line at child sex abuse by clergy makes no sense. If religious entities must obey the laws governing commercial transactions, they must also follow the laws that protect children from sexual abuse, even if committed by members of the clergy.

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Broad claims of First Amendment immunity have been universally rejected by the United States Supreme Court, which has consistently held the Free Exercise Clause was never intended to prohibit state action for the punishment of acts inimical to the peace, good order, safety, and morals of society. *See generally Locke v. Davey*, 540 U.S. 712 (2004); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *United States v. Lee*, 455 U.S. 252 (1982); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1879). That is precisely why the limitations on the judicial abstention doctrine, as established by the Supreme Court, are constitutionally required.

4. Appellant's Negligence Claims Are Not Barred by the Establishment Clause, While Granting Immunity to the Respondents for Child Sex Abuse Would Constitute a Violation

The Establishment clause provides, "Congress shall make no law respecting an establishment of religion." U.S. Const. Am. 1. The Clause "aim[s] to foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2067 (2019). One of the keys to harmonious co-existence is the enforcement of the laws that prevent and deter harm to others. The tort laws that require employers—religious or secular—to avoid negligently endangering children have become a critically important legal feature in the United States in the fight to end child sex abuse. These laws are necessary to prevent harm to children by organizations and if left unenforced, children in the state remain at risk. That is unforunately true in Missouri.

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See, e.g., Kurt Erickson, *More abuse survivors and witnesses step forward in Missouri Catholic clergy probe*, ST. LOUIS POST-DISPATCH (Jan. 26, 2019) https://www.stltoday.com/news/local/govt-and-politics/more-abuse-survivors-and-witnesses-step-forward-in-missouri-catholic/article_0632d38e-b9e7-5a82-bbad-9b0f2ae8cfb2.html (showing survivors coming forward in Missouri); Andy Ostmeyer, *Diocese Releases Names of Additional Priests Accused of Abusing Minors*, JOPLIN GLOBE (Apr. 2019) https://www.joplinglobe.com/news/diocese-releases-names-of-additional-priests-accused-of-abusing-minors/article_f8e24ae6-54b3-11e9-8418-33ed5d2d07d9.html (identifying 23 accused priests); *see also Diocese of Jefferson City Updates List of Credibly Accused Clergy; Adds Two Names, Changes Status of One priest*, JEFFERSON CITY (Dec. 16, 2018) https://diojeffcity.org/blog/2018/12/16/diocese-of-jefferson-city-updates-list-of-credibly-accused-clergy-adds-two-names-changes-status-of-one-priest/ (showing updates to 2002 database examining records of bishops and identifying those who protected priests accused of sexual abuse and/or allowed them to continue working; 35 credibly accused religious leaders were on the list from the Diocese of Jefferson City); Cathy Lynn Grossman, *Survey: More Clergy Abuse Cases Than Previously Thought*, USA TODAY (February 10, 2004), https://usatoday30.usatoday.com/news/nation/2004-02-10-priests-abuse_x.htm (with AP table of data for 74 dioceses); *Priests with Allegations of Sexual Abuse of a Minor*; DIOCESE OF SPRINGFIELD-CAPE GIRARDEAU WEBSITE (Revised July 26, 2019) http://dioscg.org/wp-content/uploads/PriestsWithAlligationsall073019.pdf; Mark Bliss,

Springfield-Cape Girardeau diocese spent more than $517,000 to settle clergy abuse claims, SOUTHEAST MISSOURIAN (April 3, 2019).

In light of ordinary Establishment Clause doctrine, the issue in the instant case is whether the application of neutral principles of tort law governing child protection is appropriate. Such application does not violate *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This application has a secular purpose, and its primary effect neither advances nor inhibits religion. Appellant seeks only to apply the civil law to religious employers in conformity with "neutral principles of law," as has been sanctioned by the Supreme Court.

Nor is there excessive entanglement. The application of tort law to an employment relationship by a court requires examination of conduct divorced from the religious context. There is no threat of or necessity for the court's on-going monitoring of the church's employment decisions. Thus, no excess administrative entanglement is at issue. *Lemon, supra; Am. Legion*, 139 S. Ct. 2067 (2019); *see also*, *N.L.R.B. v. Hanna Boys Center*, 940 F.2d 1295, 1304 (9th Cir. 1991) (finding no entanglement where the National Labor Relations Board's jurisdiction over a church-owned school required government involvement only with respect to specific claims filed on behalf of specific employees); *U.S. v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979); *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994) (allowing an age discrimination case against a synagogue by a "non-spiritual" employee does not constitute excessive entanglement).

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Gibson creates a privileged class of employers based on religious status in violation of settled law, and endangers children as a result. That is a violation of the Establishment Clause. *See generally Texas Monthly v. Bullock*, 489 U.S. 1 (1989). Moreover, the primary effect of the reasoning of *Gibson v. Brewer* is to advance religion, by exempting religious employers, unlike all other employers, from their just obligations under tort law. Religious status cannot be sufficient to relieve an employer from the compelling obligations to protect children, as established by state tort law. *See L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247 (Mo. 2002) (a suit may proceed against owners, operators, and managers of a mall, along with security company employed by the mall for negligent failure to prevent sexual assault of a minor); *M.C. v. Yeargin*, 11 S.W.3d 604, 613 (Mo. Ct. App. 1999) (proceedings against hotel for failure to prevent or intervene in sexual assault of guest may proceed because hotel owed duty of care).

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012), which held that religious organizations are immune from discrimination lawsuits brought by ministers, does not require any different conclusion. In discussing the ministerial exception, developed in response to the requirement that government should not become entangled with religion, *Hosanna-Tabor* asserts the exception was not developed to provide religious entities a defense to liability for neutral, generally applicable torts. *Id.* at 196. Instead, it was developed to ensure that "authority to select and control who will minister to the faithful – a matter 'strictly ecclesiastical' – is the church's alone" and precludes application of employment discrimination laws, only. *Id.*

at 194-05 (citations omitted). The ministerial exception does not, however, provide avoidance of liability under neutral laws generally applied to tortious conduct. At issue here is not religious doctrine or employment discrimination disputes. At issue here is the abuse of children, a tort of neutral and general applicability, to which rare religious organizations may be able to defend on grounds of religious belief.

Because *Gibson* confers an extraordinary benefit exclusively on religious entities for actions that seriously harm third parties, it is in violation of the Establishment Clause of the First Amendment to the Constitution and cannot control cases involving child sex abuse brought against religious employers or clergy.

POINT 2

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF INTENTIONAL FAILURE TO SUPERVISE CLERGY (COUNT III) BECAUSE DEFENDANTS FAILED TO SUPPORT THEIR MOTION WITH ANY STATEMENTS OF "MATERIAL FACT" AS REQUIRED BY MISSOURI RULE OF CIVIL PROCEDURE 74.04, IN THAT DEFENDANTS' STATEMENT OF UNCONTESTED MATERIAL FACTS RELATING TO COUNT III CONTAINS NO MATERIAL FACTS BUT ONLY REFERENCES TO PLAINTIFF'S DEPOSITION TESTIMONY

A. Standard of Review

The standard of review of a summary judgment "is essentially de novo." *ITT Commercial Finance Corp. v Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376

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(Mo.banc 1993). On a motion for summary judgment, the moving party bears the burden of establishing its right to judgment as a matter of law. *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 580 (Mo. Banc 2006). It must prove that right based on material facts about which there is no genuine dispute. *ITT Comm'l Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo. banc 1993).

B. Defendants Failed to Present any Undisputed Material Facts on the Issue of Their Prior Notice of Woulfe's Sexual Abuse

In Count III, Plaintiff claimed that Defendants intentionally failed to supervise Brother Woulfe. Such a claim requires proof that a supervisor knew that harm was certain or substantially certain to result from a servant's conduct and that the supervisor disregarded this known risk. *Gibson v. Brewer*, 952 S.W.2d 239, 248 (Mo. 1997). The issue is "what knowledge or notice [the church] had about a risk presented by [the abuser] to which it then failed to respond." *Weaver v A.M.E. Church*, 54 S.W.3d 575, 583 (Mo. App. W.D. 2001).

Ignoring all the evidence that shows Defendants did have prior notice of Woulfe's sexual abuse (*see* n. 5, *infra*), Defendants improperly based their summary judgment motion in Count III entirely on the fact that Plaintiff testified in his deposition that he had no personal knowledge about Defendants' awareness of Brother Woulfe's history of sexual abuse. LF, D16 at 6-7 (¶¶ 38-42), D15 at 20-22. Based solely on Plaintiff's deposition testimony, Defendants argued that Plaintiff could not establish the elements of his intentional failure to supervise claim that Defendants had prior knowledge that

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Woulfe was certain or substantially certain to cause harm and Defendants failed to take any action to protect Plaintiff. *Id.*

Under Point 3 of this Brief, Appellant details the evidence from which a jury could conclude that Defendants did have knowledge that Woulfe was dangerous to their students.[4] But this Court need not even consider the evidence on this issue because Defendants failed to support their motion with statements of "material fact," as required by Rule 74.04.

Rule 74.04(c)(1) provides:

> **A statement of uncontroverted material facts** shall be attached to the motion. The statement **shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue**, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts.

Missouri Courts repeatedly hold that compliance with that rule is mandatory. "When, and only when, the movant has made the prima facie showing required by Rule 74.04(c),

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[4] Plaintiff disclosed this evidence in discovery, prior to Defendants' Motion for Summary Judgment. Plaintiff identified the documents pertaining to Woulfe produced by Defendants in a related case (Boisaubin), named several of the Marianists who were deposed in both cases as persons with knowledge of this information, identified former Chaminade students who were abused by Woulfe between 1969 and 1977, named the students who reported to Defendants in 1970-71 that they were sexually abused by Woulfe, and identified an expert witness who testified that Defendants had notice in 1968 that Woulfe was sexually abusing minors. LF, D52 (Interrogatory Answers Nos. 22, 25 and 26), D35 (expert disclosure).

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Rule 74.04(e) places burdens on the non-movant." *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo.1993).

> "Generally, failure to comply with Rule 74.04(c)(1) warrants a trial court's denial of a summary judgment motion and warrants an appellate court's reversal of the grant of summary judgment." *Hargis v. JLB Corp.*, 357 S.W.3d 574, 586 (Mo. banc 2011) (internal quotes and citation omitted). Even if no responsive pleading is filed in opposition to a summary judgment motion, the trial court is prohibited from granting summary judgment unless the facts and the law support it.

Dilley v. Valentine, 401 S.W.3d 544, 550 (Mo. App. W.D. 2013). "Because the underlying purpose of Rule 74.04 is directed toward helping the court expedite the disposition of the case, compliance with the rule is mandatory." *Strable v. Union Pac. R.R. Co.*, 396 S.W.3d 417, 422 (Mo. App. E.D. 2013).

It is a denial of due process to grant summary judgment against plaintiffs, when defendants have failed to comply with the summary judgment rules:

> [U]nder the circumstances, a grant of summary judgment on either of Plaintiffs' counts would be inappropriate because the trial court did not require the parties to comply with the specific procedures set forth in Rule 74.04. . . . Rule 74.04(c) requires summary judgment movants . . . to submit a statement of uncontroverted material facts. . . . Summary judgment borders on a denial of due process; therefore, strict compliance with the rule's requirements is necessary to prevent summary judgment proceedings "from crossing over the border."

Adams v. USAA Cas. Ins. Co., 317 S.W.3d 66, 74 (Mo. App. E.D. 2010) (citations omitted).

That a witness said something in a deposition is not a material fact. As then Circuit Judge Julian Bush explained:

> This is a real problem area. Frequently, defendants list scores of facts (sometimes more than 100), including the "fact" that a party said this in a

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> pleading, the "fact" that a witness said that at a deposition, or the "fact" that a court said the other in a published decision. This is unhelpful. These may be facts of a sort, but they are not material facts, and material facts are what Rule 74.04 provides for. Missouri courts have often described material facts as those that have legal probative force as to a controlling issue.

Julian Bush, *How to Write a Motion for Summary Judgment*, 63 J. MO. BAR 68, 69-70 (2007).

As recently explained in *Columbia Mut. Ins. Co. v. Heriford*, 518 S.W.3d 234 (Mo. App. SD 2017), the mischaracterization of evidence as material facts creates unnecessary burdens for the Courts and the parties opposing summary judgment. The Court concluded: “Such miscategorizations are a misapplication of Rule 74.04(c) and, at a minimum, should be ignored.” 518 S.W.3d at 240. The Court further explained that “a repeated misapplication of Rule 74.04 in this respect would justify the denial of a motion for summary judgment without any further inquiry or analysis.” 518 S.W.3d at 240 n. 6.

The Court of Appeals rejected Appellant’s argument in Point 2 because, in their summary judgment motion, “Respondents ‘clearly chose to proceed under the second method for a defending party to establish summary judgment by arguing that [Appellant] had not been able to produce evidence’ of Respondents’ prior knowledge of Bro. Woulfe’s abuse.” Opinion at 16. The Court of Appeals is correct that Respondents made that argument in this case, but that does mean they were excused from complying with the requirement of Rule 74.04 that a party must support its motion with statements of material fact. The case upon which the Court of Appeals relied in rejecting Point 2, *Custer v. Wal-Mart Stores E. I, LP*, 492 S.W.3d 212 (Mo. App. SD 2016), is clearly distinguishable. In *Custer*, the court acknowledged that setting forth “deposition

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testimony as purported material facts . . . fails to comply with the requirements of Rule 74.04 and is problematic for two reasons." 492 S.W. 3d at 215. But the defendant in *Custer* also supported its motion with two statements that were material to its motion.[5] 492 S.W. 3d at 216. So the Court went on to analyze the question "whether Custer produced substantial evidence to establish a genuine issue." 492 S.W. 3d at 219.

In this case, because the only "facts" presented by Defendants on the issue of their prior knowledge of Woulfe's sexual abuse are not "material facts" as required by Rule 74.04, but only statements about what Plaintiff said in his deposition, summary judgment on Count III should have been denied and should be reversed by this Court.

POINT 3

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM OF INTENTIONAL FAILURE TO SUPERVISE CLERGY (COUNT III) BECAUSE THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO DEFENDANTS' PRIOR KNOWLEDGE THAT

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[5] The Court in *Custer* stated:

> The two paragraphs in Wal-Mart's statement of uncontroverted facts that are material to its motion for summary judgment are:
>
> > 50. [Custer] has not identified any party or fact witness who has testified they observed anything on [Wal-Mart's] floor where [Custer] fell that caused [Custer] to fall.
> >
> > 51. [Custer] has not identified any party or fact witness who has provided a factual explanation for why [Custer] fell because of the condition of [Wal-Mart's] floor.

492 S.W. 3d at 216.

BROTHER WOULFE WAS DANGEROUS TO STUDENTS, IN THAT CIRCUMSTANTIAL EVIDENCE CREATES A REASONABLE INFERENCE THAT DEFENDANTS HAD KNOWLEDGE OF WOULFE'S DANGER TO STUDENTS BEFORE HE ABUSED PLAINTIFF

A. Standard of Review

The standard of review of a summary judgment "is essentially de novo." *ITT Commercial Finance Corp. v Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). The moving party bears the burden of establishing its right to judgment as a matter of law. *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 580 (Mo. Banc 2006). It must prove that right based on facts about which there is no genuine dispute. *ITT Comm'l Fin. Corp.,* 854 S.W.2d at 378.

The Missouri Supreme Court and each of the branches of the Court of Appeals have characterized summary judgment as "an extreme and drastic remedy," and insist that trial courts exercise great caution when considering requests for summary judgment. *See, e.g., Cooper v. Finke,* 376 S.W.2d 225, 229 (Mo. 1964); *Mems v. LaBruyere*, No. ED 106319, 2019 Mo. App. LEXIS 809, *4 (Mo. App. E.D. May 21, 2019); *Walters Bender Strohbehn & Vaughan PC v. Mason,* 316 S.W.3d 475, 481 (Mo.App.W.D. 2010); *Merrick v. Southwest Electric Cooperative,* 815 S.W.2d 118, 123 (Mo.App.S.D. 1991). There is good reason for that admonition: summary judgment denies a litigant his day in court and, granted improvidently, deprives him of due process.

Courts considering summary judgment must "scrutinize the record in the light most favorable to the [non-moving] party . . . and must accord that party the benefit of

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every doubt." *Kemp Construction Co. v. Landmark Bancshares Corp.,* 784 S.W.2d 306, 307 (Mo. App. E.D. 1990); *see also, Powel*, 197 S.W.3d at 580. "Summary judgment should not be granted unless the evidence could not support any reasonable inference for the non-movant." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). "Furthermore, where competent materials in the record show there are two plausible but contradictory accounts of the necessary facts, there exists a genuine issue for trial." *Ruppel v. City of Valley Park*, 318 S.W.3d 179, 184 (Mo. App. E.D. 2010).

B. The Evidence of Defendants' Prior Knowledge of Woulfe's Sexual Abuse is a Disputed Issue of Fact and Precludes Summary Judgment

Viewing the evidence in the light most favorable to Plaintiff, and according to Plaintiff the benefit of all reasonable inferences, this Court must find that the issue of Defendants' prior knowledge of Woulfe's sexual abuse is a disputed issue of fact and reverse the grant of summary judgment. Plaintiff described that evidence above in the Statement of Facts section of this brief. It was presented to the Circuit Court in Plaintiff's Statement of Additional Facts, filed in response to Defendants' Motion for Summary Judgment. LF, D25 at 12-20, ¶¶ 6-28.

A plaintiff bringing a claim of intentional failure to supervise must prove that a supervisor knew that harm was certain or substantially certain to result from the servant's conduct and that the supervisor disregarded this known risk. *Gibson v. Brewer*, 952 S.W.2d 239, 248 (Mo. 1997). The issue is "what knowledge or notice [the church] had

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about a risk presented by [the abuser] to which it then failed to respond." *Weaver v A.M.E. Church*, 54 S.W.3d 575, 583 (Mo. App. W.D. 2001).

Law Regarding Proof of Knowledge

It is well established in Missouri law that proof of knowledge, like any mental state, does not require an admission of such knowledge by the defendant but can be inferred from circumstantial evidence. *Minor v. Edwards*, 12 Mo. 137, 142 (Mo. 1848); *Truck Ins. Exchange v. Pickering*, 642 S.W.2d 113, 116 (Mo. App. W.D. 1982). In criminal prosecutions for child endangerment, which like the tort of intentional failure to supervise requires proof of knowledge that defendant's conduct "is practically certain to cause" harm, Missouri courts have held "[t]here is no bright line test to determine whether or not a person's actions knowingly create a substantial risk." *State v. Rinehart*, 383 S.W.3d 95, 101, 103 (Mo. App. WD 2012). "Instead, the determination as to whether a defendant acted knowingly is based on the totality of the circumstances." *Id.*; *see also State v. Randle*, 456 S.W.3d 535 at 540, 543 (Mo. App. ED 2015).

Summary judgment is rarely appropriate in cases in which proof of knowledge, or similar facts such as intent or motive, are at issue, because such facts almost always must be proven by circumstantial evidence. This is the law in fraud cases, where proof of knowledge of the falsity of a representation is required. *Wagner v. Uffman*, 885 S.W.2d 783, 787 (Mo. App. E.D. 1994). The same is true in discrimination cases, where intent is the issue, "because such cases are inherently fact-based and often depend on inferences rather than on direct evidence." *Lampley v. Mo. Comm'n on Human Rights*, 570 S.W.3d

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16, 22 (Mo. 2019); *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 588 (Mo. banc 2013) (quoting *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. banc 2009)).

The Direct Evidence in this Case Precludes Summary Judgment

Appellant contends that in this case the Circuit Court and the Majority of the Court of Appeals erred in concluding that the there is insufficient evidence to allow a jury to draw the inference that Defendants knew Brother Woulfe was dangerous before he abused Plaintiff. Even without the testimony of Plaintiff's expert, Father Doyle, the evidence shows there are two plausible but contradictory accounts of events, so that summary judgment was inappropriate. In summary, the evidence directly shows:

- Woulfe was a member of the faculty at Chaminade from 1968 to 1977.
- Woulfe sexually abused many students during his tenure at Chaminade, including Plaintiff in 1971.
- Defendants' records pertaining to Woulfe prior to his abuse of Plaintiff include references to a "problem," an "unusual situation," his failure to abide by the requirements of "religious life," his "always running away with his other preoccupations," and his "lack of judgment [that] will cause trouble."
- The requirements of "religious life" for a Marianist Brother include adhering to the vow of chastity.
- Four students reported Woulfe's sexual abuse to school officials after Plaintiff was abused.

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- Defendants' records regarding Woulfe after the four students' reports of sexual abuse, and even when Defendants admit they were removing him because of a report of sexual abuse, describe his misconduct in the same or similar terms as they used prior to Plaintiff's abuse, indicating he had a "problem" with "religious life" and "professional negligence."

Father Doyle's Expert Testimony Further Confirms that Defendants' Prior Knowledge of Woulfe's Sexual Abuse is a Disputed Issue of Fact

The Majority of the Court of Appeals would have affirmed the Circuit Court's judgment because it concluded that Father Doyle's testimony would have been inadmissible. Opinion at 22. In analyzing Father Doyle's testimony, the Majority focused solely on Doyle's opinions about when Defendants knew of Woulfe's history of sexual abuse. Opinion at 16-20. The Majority overlooked the fact that Doyle's expert testimony consisted of both his opinions and facts about the standard practice in the Catholic Church of failing to document its knowledge of child sexual abuse.

Mo. Rev. Stat. §490.065 governs the admissibility of expert testimony in civil cases and allows both opinion and factual testimony. It provides:

> if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. (Emphasis added).

To offer an opinion, the expert's knowledge on the subject must be superior to that of the ordinary juror, and the opinion must aid the jury in deciding an issue in the case. *Duerbusch v. Karas*, 267 S.W.3d 700, 710 (Mo. App. ED 2008). A person who possesses

specialized knowledge may testify as a fact witness to facts which can only be observed or understood by someone with that specialized knowledge. *State v. Yingst*, 651 S.W.2d 641, 644-45 (Mo. App. S.D. 1983).

Missouri courts allow a person who has gained specialized knowledge through education, training and/or experience to synthesize or generalize his knowledge for the jury. *State v. Gola*, 870 S.W.2d 861, 864 (Mo. App. W.D. 1993). Testimony providing historical information that is beyond the common knowledge of an average juror, along with expert opinions and conclusions based on that information, is admissible. *Hill v. City of St. Louis*, 371 S.W.3d 66 (Mo. App. ED 2012).

A central issue in this case is whether Defendants were aware or "knew" that by failing to control Woulfe, "harm was substantially certain to result." *Gibson*, 952 S.W.2d at 248. The issue of a defendant's knowledge of risk often arises in criminal cases, including those involving the crime of first-degree child endangerment, and Missouri Courts allow expert witnesses to testify about the risk of harm to the child victims in those cases.

> Under *§ 568.045.1(1)*, "[a] person commits the crime of endangering the welfare of a child in the first degree if . . . [t]he person knowingly acts in a manner that creates a substantial risk to the life, body, or health of a child less than seventeen years old." *Section 562.016.3(2)* states that "[a] person 'acts knowingly' or with knowledge, . . . [w]ith respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result."

State v. Rinehart, 383 S.W.3d 95, 101 (Mo. App. WD 2012) (emphasis added; footnote omitted). The elements of child endangerment based on a failure to act mirror those in an intentional failure to supervise claim: "the supervisor (or supervisors) knew that harm

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was certain or substantially certain to result, [and] the supervisor disregarded this known risk." *Gibson v. Brewer*, 952 S.W.2d at 248 (emphasis added).

The caselaw on proving child endangerment supports the admissibility of Doyle's testimony. Expert testimony is admissible in child endangerment cases on the issue of the level of risk created by defendant's conduct. *State v. Smith*, 502 S.W.3d 689 (Mo. App. ED 2016). In *Smith*, defendant was convicted of child endangerment for keeping her autistic child in an enclosed bed. The Court approved the admission of the expert's testimony about the level of risk, even though it related to an ultimate issue in the case: "Experts may testify to ultimate issues in a case so long as it aids the jury and does not invade its province." 502 S.W.3d at 699.

Expert testimony is also admissible in other criminal cases to help juries understand the behavior, language and motivation of the accused. For example, in *State v. Seddens*, 878 S.W.2d 89 (Mo. App. ED 1994), the court allowed the testimony of a police officer "regarding 'gangs' and 'gang want-to-bes.'" *Id.* at 92. The officer was qualified as an expert due to his "practical experience . . . investigating the criminal activities of gangs" over the course of which "he has interviewed approximately sixty gang members." *Id.* The officer was allowed to testify "about the practices, symbols, terminology and history of street gangs," and, as Doyle's testimony would be used in this case, "his testimony was used to aid the jury in understanding the implications of many of the facts in evidence." *Id.* at 93. Similarly, in *United States v. Delpit*, 94 F.3d 1134 (8th Cir. 1996), a police officer was qualified by his experience to "understand drug dealers'

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cryptic slang." *Id.* at 1145. The court noted it was "well established that experts may help the jury with the meaning of jargon and codewords." *Id.*

Respondents argued below that "Missouri courts have plainly rejected attempts to comment on another person's intent and state of mind as inadmissible." Respondents' Brief at 27. This sweeping statement does not accurately reflect Missouri law. In a will contest, an expert can testify to the decedent's susceptibility to undue influence. *Duerbusch v. Karas*, 267 S.W.3d 700, 710 (Mo. App. ED 2008). Experts may also render opinions regarding the context of the events at issue, even when the opinion relates to a party's mental state. In *Hill v. City of St. Louis*, 371 S.W.3d 66, 74 (Mo. App. E.D. 2012), plaintiff's expert, a historian, was allowed to testify regarding the symbolism of a noose in American history and opine as to whether the display of a noose in the African American plaintiff's workplace would have been perceived as a "practical joke." 371 S.W.3d at 73.

Father Doyle has extensive experience in the Catholic Church in the United States. He has studied and written extensively relating to clergy sexual abuse in the Church. He has testified as an expert witness in criminal and civil cases involving such abuse since the late 1980s, and has studied the documentation in such cases and reviewed clergy personnel files from almost all of the Catholic dioceses in the United States and from Catholic religious orders around the world. LF, D33 at 1-3.

Doyle clearly is competent to provide <u>factual evidence</u> that personnel records of Catholic clergy who have sexually abused minors never explicitly mention the abuse, whereas they do directly describe other problem behaviors, "such as alcohol abuse,

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absence from community meals, spiritual exercises or relationships with women." LF, D33 at 4, ¶11.e. For sexual abuse of minors, on the other hand, various forms of coded or euphemistic language are used. *Id.*; LF, D37 at 69, lines 8-15.

Father Doyle and other experts with similar qualifications have testified about similar issues in multiple trials. *Doe v. Roman Catholic Diocese of Galveston-Houston,* 2007 U.S. Dist. LEXIS 71330, *59 (S.D. Tex. Sept. 26, 2007) (Doyle qualified to testify that defendants followed a pattern of "failure to warn the public when transferring a known abuser from one assignment to another, failure to honestly report to secular judicial and law enforcement authorities about sexual abusers."); *Sheehan v. Oblates of St. Francis De Sales,* 2009 Del. Super. LEXIS 2082 (Del. Super. Ct. Nov. 6, 2009) (former Monk and priest qualified to testify about defendants' knowledge of and pattern and practice in responding to priests who sexually molested minors); *Conaty v. Catholic Diocese of Wilmington*, 2011 Del. Super. LEXIS 238 (Del. Super. Ct. May 19, 2011).

Doyle's testimony does not improperly comment on another's state of mind. The Dissent in the Court of Appeals Opinion disagreed with the Majority's conclusion that Father Doyle's testimony is inadmissible and determined instead that the evidence supports the inference that Woulfe's superiors knew was abusing students before he abused Plaintiff:

> It would not be impermissible speculation . . . for Fr. Doyle to testify regarding the pattern of excluding any direct reference to child sexual abuse that he observed in his 30-plus years of reviewing the files of hundreds of perpetrators of child sexual abuse in the Catholic Church. It would not be

> impermissible speculation for Fr. Doyle to testify that he has never seen sexual abuse of children explicitly stated.
>
> . . .
>
> The evidence regarding Bro. Woulfe along with Fr. Doyle's testimony regarding the habitual use of language excluding direct references to child sexual abuse creates a genuine dispute of material fact that the appellant has the right to have the jury determine. Rather than deeming all of Fr. Doyle's testimony as merely speculative, the jury should be allowed to consider, weigh, and determine the meaning of the following evidence regarding Bro. Woulfe along with Fr. Doyle's testimony about his research and experience.

Dissent at 2-3.

The Dissent then explained how her view leads to a different outcome than the Majority. Father Doyle testified to his opinion that the Marianist leadership had notice of inappropriate sexual contact with minors by Brother Woulfe as early as 1968, when the Marianist records first mention "the problem, which if left untended, would eventually become a serious one for religious life." *See* LF, D25 at 19-20 ¶ 27. With respect to those records from 1968, regarding Woulfe's transfer to Chaminade, the Dissent stated:

> In a letter dated July 1, 1968, Bro. Gray wrote to Bro. Woulfe concerning Bro. Woulfe's departure from St. Boniface:
>
> > I am sorry that things did not work out more appropriately at St. Boniface. At the same time . . . the actual grace left by this *unusual situation* may be one which helps you to confront and overcome *the*

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> *problem*, which if left untended, would eventually become a *serious one for religious life* . . . .

(Emphases added). While the majority believes this language is speculative and can reference many things, Fr. Doyle testified that "not going to mass or not going to daily prayers is very common in religious orders. . . . [I]t's not an unusual situation, and it's not something that would eventually become a serious one for religious life." In addition, Fr. Doyle testified from his review of Bro. Woulfe's personnel file that failure to attend mass and the like was explicitly addressed. Bro. Woulfe was directly confronted about spiritual and community exercises many times. Thus, a reasonable inference exists that "the problem" cited in the 1968 letter referenced something other than spiritual exercises. Further, in Fr. Doyle's "experience in reviewing several hundred personnel files of clergy perpetrators [he has] found that problems such as alcohol abuse, absence from community meals, spiritual exercises, or relationships with women are addressed directly" while he has never seen sexual abuse of minors directly referenced. These facts give rise to a reasonable inference that Bro. Gray's 1968 letter was not referring to spiritual and community exercises when it refers to "the problem" "becom[ing] a serious one for religious life." While Fr. Doyle did not state that "religious life" specifically is an established code term or euphemism for sexual abuse of minors, Fr. Hakenewerth testified that "religious life" includes observance of the vow of chastity.

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Dissent at 3-4.

In addition, the Dissent explained how the records relating to the Marianists' consideration of transferring Woulfe out of Chaminade in 1970, the year before Plaintiff was abused, coupled with the evidence of what the records say and don't say when we know that students were reporting Woulfe's sexual abuse, further supports the inference that his superiors knew he was abusing students before he abused Plaintiff. Dissent at 4-5.

The Majority Opinion expressed concern that although the testimony clearly established that Woulfe was removed from Chaminade "following a student's accusation that Bro. Woulfe was making sexual advances toward him, no direct connection between the language used in the 1976 and 1977 evaluations and sexual abuse was established." Opinion at 21. As described in the Statement of Facts, above, however, Father Hakenewerth's deposition testimony does establish the connection between the report that Woulfe had been accused of sexual abuse and the documentation of his removal from Chaminade in 1976-1977. LF, D38 at 70-72, 76-87. Hakenewerth's testimony also confirms much of what Father Doyle said about the Marianists' records. Hakenewerth could not explain the reference to "the facts" in the statement in the February 4, 1977 Provincial Council Minutes: "The community does not know many of the facts, and some are taking the side of Brother John." LF, D38 at 80, lines 10-25. Hakenewerth agreed, however, that "the community would know that [Woulfe] was not showing up for services and things like that." D38 at 81, lines 8-10.

Any lack of direct connection between the report of abuse and the records from the same timeframe, is explained by the fact that Defendants were following the standard

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practice described by Father Doyle of never directly documenting anything about sexual abuse in their records. Neither Father Osborne, who was then President of Chaminade, nor Father Hakenewerth, who was the Provincial of the Marianists, could be certain of the date they learned of the sexual abuse because there is no documentation of their conversation about it. LF, D38 at 76-79, 85-86; LF, D41 at 6, 7 (depo pp. 18-19, 21-22). But the connection is obvious from reviewing the deposition testimony of Hakenewerth and Woulfe's personnel records. D38 at 77-78, 84-87, 96-97, 126-130; LF, D29 at 57-60; LF, D39 at 11-14. As the Dissent concluded:

> [W]e know from undisputed facts that Bro. Woulfe was removed from Chaminade in 1977 because of an allegation of sexual abuse of a student. . . . Fr. Hakenewerth testified in his deposition that he did not mention the sexual-abuse allegation in his petition to the pope for Bro. Woulfe's dispensation, instead referring to difficulties with "religious life." . . . . [T]his exclusion supports Fr. Doyle's contention that there exists a pattern of not specifically documenting sexual abuse of children, and that sexual abuse is always referenced in some form of code or euphemistic language.
>
> . . . . This is not piling of inference upon inference that results in rank speculation as the majority asserts. Rather, the evidence presents two plausible, but contradictory, accounts. As a result, the jury should be able to consider these facts, weigh the evidence, and reach a conclusion as to

whether the pattern of exclusion of direct reference to child sexual abuse constitutes sufficient evidence of the respondents' prior knowledge.

Dissent at 4-5.

Doyle's testimony will assist the jury in determining whether Defendants' knew Woulfe was dangerous. As the police officer was allowed to testify in *State v. Seddens*, 878 S.W.2d at 93, "about the practices, symbols, terminology and history of street gangs," in order "to aid the jury in understanding the implications of many of the facts in evidence," Doyle's testimony provides a context for the consideration of Defendants' actions (or inactions) to assist the jurors in their determination whether Defendants knew Woulfe was dangerous and "certain or substantially certain" to cause harm. Doyle possesses specialized knowledge regarding sexually abusive clergy. He applied this knowledge to the evidence about Woulfe's background to draw a conclusion regarding Defendants' knowledge of Woulfe's abuse. Jurors without Doyle's knowledge of the practices of the Church would be less capable of drawing these conclusions themselves.

For the reasons set forth above, Defendants were not entitled to summary judgment on Plaintiff's claim that they intentionally failed to supervise Brother Woulfe. This Court should reverse the Circuit Court's Judgment on that issue.

CONCLUSION

For all the foregoing reasons, the judgment of the Circuit Court should be reversed and this matter remanded for further proceedings, allowing Appellant to pursue his claims of Negligent Supervision (Count II), Negligent Supervision of Children (Count IV), and Intentional Failure to Supervise (Count III).

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This Court should also rule that Respondents' affirmative defense based on the statute of limitations cannot serve as an alternative ground for affirming the judgment of the Circuit Court because there are disputed issues of fact regarding that defense. *See* LF, D25 at pp. 8-9, ¶¶ 30-39, pp. 11-12, ¶¶1-5; D44 at 5-19; Statement of Facts (Section III, below).

CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing Brief of Appellant complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 18,236 words as determined by MS Word 2010. The foregoing Brief also complies with Supreme Court Rule 55.03.

Respectfully submitted,

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