IN THE
MISSOURI SUPREME COURT

JOHN DOE 122, Appellant, v. MARIANIST PROVINCE OF THE UNITED STATES, a Non-Profit Corporation, et al., Respondents.	)	SC98307 Appeal No. ED107767 Circuit Court Cause No. 15SL-CC03799 ORAL ARGUMENT REQUESTED

On Appeal From
St. Louis County Circuit Court
State of Missouri
Cause No. 15SL-CC03799

The Honorable Kristine A. Kerr

RESPONDENTS' SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

JURISDICTIONAL STATEMENT

This appeal originates from the trial court's March 8, 2019 and March 29, 2019 orders granting summary judgment on and dismissing with prejudice the claims asserted by Appellant John Doe 122 against Respondents Marianist Province of the United States and Chaminade College Preparatory, Inc. In its order, the trial court dismissed Appellant's action on the grounds that (1) a non-perpetrator corporate entity cannot be held liable for any alleged violation of § 537.046(1), RSMo (Cum. Supp. 2014),[1] (2) Appellant's negligence-based and breach of fiduciary duty claims are not cognizable under established Missouri law, and (3) there exists no competent evidence that Respondents acted intentionally.

On appeal to the Missouri Court of Appeals, Eastern District, the trial court's judgment was affirmed. However, the appellate court transferred the case to this Court "due to the general interest and importance of the issues on appeal," pursuant to Rule 83.02. Under Article V, § 10, of the Missouri Constitution, this Court accepted transfer.

[1] All further statutory references are to RSMo (Cum. Supp. 2014), unless otherwise noted.

STATEMENT OF FACTS

Introduction

Appellant's statement of facts in this Court, just as his statement of facts in the Court of Appeals, fails to constitute a "fair and concise statement of facts relevant to the questions presented for determination without argument," as required by Rule 84.04(c). In an almost identical fashion to his statement of facts in the appellate court, the very first sentence of Appellant's statement here incorrectly states that Respondents "did not dispute Plaintiff's [Appellant's] allegations that he was sexually abused on multiple occasions" (App. Br. at 2); although the cited summary judgment pleadings do reference Appellant's allegations and claims, they do not concede that any abuse occurred. Again, the most that can be said is that Respondents merely acknowledged the standard under which the trial court views summary judgment proceedings, namely, in "the light most favorable" to the non-moving party. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The remainder of Appellant's sixteen-page statement of facts relies heavily on the contentious opinions of Appellant's expert Father Thomas Doyle and construals of Appellant's deposition testimony aimed at establishing a repressed memory. Due to the patently argumentative nature of Appellant's statement of facts, Respondents include a statement of facts in this brief, as they did in their brief in the Court of Appeals.

Statement of Facts

In his Petition filed on November 4, 2015, Appellant John Doe 122 claimed damages against Respondents Marianist Province of the United States ("Marianist

Province") and Chaminade College Preparatory, Inc. ("Chaminade"),[2] for alleged injuries he sustained in the 1960s under theories of sexual abuse, negligent supervision of clergy, intentional failure to supervise clergy, negligent failure to supervise children, intentional infliction of emotional distress, and breach of fiduciary duty. (D6, ¶¶ 18-80). Appellant claimed that in 1971 during his senior year of high school at Chaminade, he was sexually abused by John Woulfe, a now-deceased Marianist brother who worked at the school at that time. (D6, ¶¶ 25-29).

After an adequate period of discovery had taken place, Respondents filed their motion for summary judgment on March 30, 2018, wherein they argued in pertinent part that summary judgment should be granted because Appellant's claims were time-barred, as his memory was never repressed; Appellant's negligence-based and breach of fiduciary duty claims are barred under Missouri law; and Appellant could not present evidence of all essential elements of his intentional failure to supervise clergy or intentional infliction of emotional distress claims. (*See, generally,* D14, D15).[3] The latter two of these arguments are summarized below.[4]

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[2] Appellant originally named Father Martin Solma, the Marianist Provincial in 2015, as another defendant. On October 1, 2018, after the hearing on Respondents' motion for summary judgment, Plaintiff dismissed Father Martin Solma without prejudice. (D58).

[3] Respondents also argued that they were entitled to summary judgment because Father Solma was not an officer of Respondent Marianist Province at the time of the alleged abuse; Respondent Chaminade did not exist at the time of the alleged abuse; and § 537.046 bars childhood sex abuse claims against non-perpetrators. However, Appellant does not appeal the trial court's findings on these arguments.

[4] Additional facts are laid out in more detail in the argument under the points relied on below.

Respondents argued that Appellant's claims of negligent supervision and negligent failure to supervise children are not cognizable as a matter of law. Namely, *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997), bars negligence claims against religious entities based on the entities' actions with respect to alleged sexual misconduct of their clergy members. This prohibition exists because the determination of how a "reasonably prudent Diocese" would act would require a court to "excessively entangle itself in religious doctrine, policy, and administration," in violation of the First Amendment. *Id.* at 250.

Regarding Appellant's claim of intentional failure to supervise clergy, Respondents argued that Appellant was unable to offer evidence of all essential elements of his claim of intentional failure to supervise. Respondents clarified that Appellant had not produced and could not produce any evidence that Respondents had prior knowledge that Woulfe would sexually abuse Appellant (*i.e.,* Appellant could not produce evidence of the essential elements that Respondents knew that harm was certain or substantially certain or that Respondents disregarded a known risk). Specifically, Respondents argued that:

- Appellant testified that he had no knowledge of any sexual contact between Woulfe and other students, or that Woulfe's supervisors had any information about any such alleged sexual contact. (D15 at 19-22; *see* D18, Vol. II, 317:2-5; 337:1-7; 406:22 – 407:7; 476:13-22; 491:5-12, 18-25; 493:21 – 494:20; 495:21 – 496:7; D25, at 9-11, ¶¶ 38-42).
- Appellant's additional facts, including his reliance on the opinions of his expert Father Thomas Doyle, failed to defeat summary judgment. (D54 at 6-7).

On October 1, 2018, the trial court granted Respondents' motion as to Appellant's claims of negligent supervision of clergy (Count II) and negligent failure to supervise children (Count IV), as these claims are barred by *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997). (D58). On March 8, 2019, the trial court granted the remainder of Respondents' motion for summary judgment on all counts. (D61). In its order and judgment, the trial court held, regarding Appellant's claim of intentional failure to supervise clergy:

> "An actor intends conduct when he 'knows that the consequences are certain, or substantially certain to result' from his act." *Id.* [*Gibson*, 952 S.W.2d at 248]. The court can discern 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.

(D61 at 5). The trial court specifically declined to determine whether Appellant's claims were barred by the applicable statutes of limitations:

> Although the parties have extensively briefed and argued the issue of whether plaintiff's claims are precluded by the applicable statute of limitations, the court finds that it can reach its rulings without grasping the thorny factual thistles regarding whether or not plaintiff suffered from a repressed memory and when his alleged damages were capable of ascertainment. The court expressly declines to decide this issue, given its other rulings, above.

(D61 at 7-8).

On March 26, 2019, Appellant filed a motion to vacate, reopen and amend judgment in which he sought to supplement the summary judgment record with two affidavits that

had previously not been notarized. (D64; *see* D62-D63; D66-D67). Appellant also argued that in light of the two affidavits, summary judgment was improper. (D64). On March 29, 2019, the trial court permitted Appellant to supplement the record but persisted in its summary judgment on all counts, as the affidavits concerned complaints made ***after*** Appellant's alleged abuse and therefore had no bearing on whether Respondents had prior notice that Woulfe would sexually abuse Appellant. (D68).

On August 20, 2019, Appellant filed his appeal with the Missouri Court of Appeals, Eastern District. The Court of Appeals issued its opinion on December 31, 2019, wherein it affirmed the trial court's judgment in favor of Respondents. That same day, the Court of Appeals transferred this case to this Court, and the entire case file was transferred on January 3, 2020. On February 10, 2020, Appellant submitted his Substitute Brief. This brief of Respondents follows.

ARGUMENT

POINT 1: THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S NEGLIGENCE-BASED CLAIMS BECAUSE APPELLANT IS SIMPLY INCORRECT THAT *GIBSON V. BREWER* CONFLICTS WITH PREVIOUS U.S. SUPREME COURT DECISIONS.

In his first point on appeal, Appellant contends that the trial court erred in granting Respondents' Motion for Summary Judgment because *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997), should not be followed. However, a review of the relevant United States Supreme Court jurisprudence clearly shows that permitting Appellant's claims of negligent supervision would run afoul of the First Amendment's Religion Clauses and would improperly interfere with church autonomy. Therefore, the trial court committed no error in granting Respondents' Motion for Summary Judgment, and the judgment should be affirmed.

I. STANDARD OF REVIEW

The standard of review for an appeal from summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The appellate court reviews the record "in the light most favorable to the party against whom judgment was entered," and the non-movant is accorded all reasonable inferences. *Id.* (citations omitted). That said, summary judgment will be upheld if the lack of any genuine issue of material fact still renders the movant entitled to judgment as a matter of law. *Id.*

II. LEGAL ANALYSIS

Appellant contends that the trial court's entry of summary judgment should be reversed because United States Supreme Court precedent conflicts with this Court's holding in the seminal case *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997). As an initial matter, the United States Supreme Court has rejected petitions for writs of *certiorari* from Missouri cases on this same issue. *John Doe B.P. v. Catholic Diocese of Kansas City-St. Joseph*, 135 S.Ct. 433 (2014) (dismissing petition for writ of *certiorari*); *Doe A.P. v. Roman Catholic Archdiocese of St. Louis*, 565 U.S. 1260 (2012) (denying petition for writ of *certiorari*). Both of these came after the seminal case *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), discussed *infra*.

A. Background on the First Amendment's Religion Clauses and the Scope of the Church Autonomy Doctrine.

However, since transfer has been granted in this case, a deeper dive into the heavily detailed and sometimes confusing First Amendment jurisprudence is necessary. This brief will begin by analyzing the First Amendment's Religion Clauses, particularly the doctrine of church autonomy. All the while, the key question remains: "How deeply into the incardination process and the canonical suspension power can a federal or state judge immerse herself, before the constitutional line is crossed?" James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 43 (1994).

1. The Free Exercise Clause and the Establishment Clause, Generally.

As the First Amendment to the Constitution commands, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment made the First Amendment, including the Religion Clauses, applicable to the states. The United States Supreme Court's holding in *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), definitively held that "[t]he First Amendment applies to any application of state power, including judicial decision on a state's common law." *Gibson*, 952 S.W.2d at 246.

Within the Religion Clauses is the doctrine of church autonomy, or a religious organization's right to manage its own internal affairs regarding faith, doctrine, and internal governance. Although at first glance this doctrine may appear to be a brand of separation of church and state, arising from the Establishment Clause, a further review of United State Supreme Court case law reveals that it is rooted in both Clauses.

2. Contrary to Appellant's Urgings, the Free Exercise Clause Cannot Be Viewed in a Vacuum as Independent from the Church Autonomy Doctrine.

The facets of the church autonomy doctrine initially arose from intra-church disputes that were brought to the (secular) courts. In such instances, the United States Supreme Court held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Watson v. Jones*, 80 U.S. 679, 728 (1871). Since then, the doctrine has been elevated to a constitutional issue intrinsic to the First Amendment's Religion Clauses. The United States Supreme Court

has clarified that the Free Exercise Clause includes "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). This doctrine is therefore part and parcel of the broad purpose of the Free Exercise Clause "to secure religious liberty . . . by prohibiting any invasions thereof by civil authority." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). As such, an analysis under the Free Exercise Clause necessarily incorporates the doctrine of church autonomy, and the two cannot be viewed as separate and independent principles, as Appellant attempts to do. What follows is a review of the interplay between the church autonomy doctrine and the Free Exercise Clause, specifically as it pertains to a religious organization's employment relationship with its ministers.[5]

Relevant here, the United States Supreme Court in *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), considered a challenge to an archbishop's refusal to appoint a particular individual as chaplain. The Court reaffirmed that "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive." *Id.* at 7-8. As such, the Court applied the *Watson* church autonomy concept to the selection of clergy.

[5] Respondents note that their use of the terms "minister" and "clergy" is intended to refer generally to individuals of a variety of titles in various religious organizations, including those ordained, professed, appointed, etc.. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 198-199 (2012) (Alito, J., concurring).

In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952), the United States Supreme Court went even further and clarified that the church autonomy doctrine emanated from the Free Exercise Clause. The Court addressed a New York law that attempted to hand control of church operations from one archbishop to another. Succinctly, a separatist movement had arisen in North America that resulted in the formation of a faction that had split from the Supreme Church Authority of the Russian Orthodox Church in Moscow. *Id.* at 102-103. The aforementioned state law required that every Russian Orthodox church in New York recognize the North American churches' determinations as authoritative. *Id.* at 97-99. Pursuant to that law, New York courts refused to recognize the archbishop appointed by the Moscow Hierarchy and determined instead that an archbishop elected by the North American churches had the exclusive right to use a particular cathedral. *Id.* at 97, 106.

In reviewing this determination—and definitively bringing the church autonomy doctrine to the level of a federal constitutional issue—the United States Supreme Court held that the lower court's actions "prohibit[ed] the free exercise of an ecclesiastical right, the Church's choice of its hierarchy," *id.* at 119, and impermissibly "regulate[d] church administration, the operation of the churches, the appointment of clergy." *Id.* at 107. By "displac[ing] one church administrator with another [and] pass[ing] the control of matters strictly ecclesiastical from one church authority to another," the state had "intrude[d] . . . into the forbidden area of religious freedom contrary to the principles of the First Amendment." *Id.* at 119. The Court clarified that under the Free Exercise Clause, religious institutions have the "[f]reedom to select the clergy," for "the appointment is a canonical

act, [and] it is the function of the church authorities to determine what the essential qualification of a chaplain are and whether the candidate possesses them." *Id.* at 116, n.23 (internal citations and quotations omitted). Thus, in interfering with the Moscow Hierarchy's determinations regarding its own employees and its own governance, the lower courts had infringed on the Free Exercise Clause and violated the rule of church autonomy.

Some years later, in *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713 (1976), the United States Supreme Court reviewed a court's attempt to determine the propriety of the Serbian Eastern Orthodox Church's decision to remove a bishop from office, in response to his disagreement with the division of the American-Canadian Diocese into three new dioceses. As a rule, the Court acknowledged, the First Amendment prohibits such review of a religious organization's employment relationship with its clergy, as it is a "'question[] of discipline, or of faith, or ecclesiastical rule, custom, or law'" *Id.* at 710 (quoting *Watson*, 80 U.S. at 727). In addressing whether there could be an "arbitrariness" exception to that rule,[6] the Court opined:

> For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else

[6] The Court considered this potential exception in light of language in *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), stating: "***In the absence of fraud, collusion, or arbitrariness***, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." 280 U.S. at 16 (emphasis added). In light of the *Milivojevich* Court's determination that such an exception cannot exist without offending the First Amendment, *supra*, *Gonzalez* is considered abrogated.

> in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; ***recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them***.

Id. at 713 (emphasis added). Thus, this rule applies, notwithstanding even "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives," as they are "hardly relevant to such matters of ecclesiastical cognizance." *Id.* at 715. In fact, the United States Supreme Court would later hold that this rule cannot be overcome by a court or government's "[g]ood intentions [which] can surely no more avoid entanglement [with religion] . . . than in the well-motivated legislative efforts consented to by the church-operated schools which [the U.S. Supreme Court] found unacceptable in *Lemon* [*v. Kurtzman*], *Meek* [*v. Pittenger*], and *Wolman* [*v. Walter*]." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

The *Milivojevich* Court also addressed whether the lower court was simply applying neutral principles of law to resolve a property dispute. However, in attempting to resolve the dispute, the lower court had "substituted its [own] interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation." 426 U.S. at 721. The lower court had therefore violated the rule of church autonomy, and in doing so, had infringed upon the Church's "religious freedom [which] encompasses the 'power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* at 721-722 (quoting *Kedroff*, 344 U.S. at 116). The *Milivojevich*

decision therefore reinforces the intertwined nature of the Free Exercise Clause and the doctrine of church autonomy.

Most recently, in the unanimously decided *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), the Court addressed a claim that a minister-teacher had been discriminated against and then retaliated against under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (1990) ("ADA"). After delineating the history of the Religion Clauses, including the *Watson*, *Kedroff*, and *Milivojevich* decisions, the Court specifically addressed whether those Clauses prohibit government involvement in claims regarding an employment relationship between a religious institution and its ministers:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 188-189. The Court thus approved of the ministerial exception, "rooted in the Religion Clauses," to such laws as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the ADA. *Id.* at 188, 190, 195-196.[7]

[7] In fact, the concurring opinions of Justices Thomas and Alito note that the so-called "ministerial exception" is too narrow. Justice Thomas would decline to craft a civil definition of "minister" and instead would only require that a religious organization

Notably, the Court distinguished its previous decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court had addressed whether two members of the Native American Church could be denied state benefits for having ingested peyote, in violation of Oregon's criminal code. The Court held that this denial did not violate the Free Exercise Clause because the "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)." *Id.* at 879. The *Hosanna-Tabor* Court distinguished *Smith* and held that, although the ADA is a valid and neutral law of general applicability, "a church's selection of its ministers is unlike an individual's ingestion of peyote." 565 U.S. at 190. Due to the inherently religious nature of selection of ministers, the Religion Clauses dictate that the state cannot govern, no matter how valid and neutral a law of general applicability may be. Certainly, the ADA bears the noble goal of preventing discrimination, but the *Hosanna-Tabor* Court still maintained that it would violate the First Amendment for this law to touch upon the employment relationship between a religious institution and its clergy.

"sincerely consider" an individual a minister. 565 U.S. at 197-198 (Thomas, J., concurring). Justice Alito, with whom Justice Kagan concurred, highlighted the distinctions between various religious organizations (*e.g.,* the use of the title "minister," the concept of ordination) and the corresponding shortcomings of the term "minister." *Id.* at 198, 202-204 (Alito, J., concurring). He therefore would apply the exception to "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.* at 199 (Alito, J., concurring).

Thus, the jurisprudence of the United States Supreme Court, both before and after *Gibson*, makes clear that this is not a balancing test. The inquiry here does not require a weighing of government interests and religious beliefs. Rather, once the analysis touches on matters of church governance, ***particularly*** a religious organization's employment of ministers, the inquiry must end. One cannot view the matter in a vacuum as a free exercise issue without necessarily confronting the doctrine of church autonomy.

B. Applying the Doctrine of Church Autonomy, Appellant's Claim of Negligent Supervision Cannot Stand.

Here, Appellant challenges the trial court's entry of summary judgment on his Counts II and IV, negligent supervision of clergy and negligent supervision of children, respectively. As negligence claims, both of these counts necessarily ask who is a "reasonably prudent bishop" (or pastor or provincial or congregation, etc.) or what is "reasonably foreseeable by that bishop." They seek to set a particular standard for a religious organization's hiring, supervision, discipline, and firing of its ministers and clergy. However, being ordained and professing a consecrated life are not employment relationships that can be separated from their inherently religious natures. Rather, these are "internal church decision[s] that affect[] the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190.

This Court in *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997), was therefore correct that these are "quintessentially religious matter[s]" that, under the First Amendment's Religion Clauses, must be left to the religious organizations, themselves. 952 S.W.2d at 247 (internal quotations omitted). *See also Hosanna-Tabor*, 565 U.S. at 187

(quoting *Milivojevich*, 426 U.S. at 720) (holding that even where it is alleged that a religious organization did not follow its own procedures in selecting or supervising a minister, this remains a "'quintessentially religious controvers[y] whose resolution the First Amendment commits exclusively to the . . . church'"). For the state to delve into this type of decision "would result in an endorsement of religion, by approving one model for church hiring, ordination, and retention of clergy," *Gibson*, 952 S.W.2d at 247 (citation omitted), which is exactly the kind of inquiry prohibited by the First Amendment. *See Hosanna-Tabor*, 565 U.S. at 190; *Smith*, 494 U.S. at 877 (stating that government may not "lend its power to one or the other side in controversies over religious authority or dogma"). *See also Kedroff*, 344 U.S. at 119 (stating that a law intruding on a church's freedom to select clergy "displaces one church administrator with another" and "passes the control of matters strictly ecclesiastical from one church authority to another"); *Watson*, 80 U.S. at 728 (holding that government must remain "committed to the support of no dogma"). For all the reasons outlined above, a claim of negligence that thus examines a religious organization's employment relationship with its clergy is a law "respecting an establishment of religion" and violating the doctrine of church autonomy. As such, it remains outside the government's authority and thus is not allowed by the First Amendment.

C. Appellant's Arguments Are Fraught with Logical Fallacies, Misconceptions about the First Amendment, and Attempts to Direct the Focus from the Issue at Hand.

1. Appellant's Arguments Regarding Respondents' Beliefs Ignore the True Focus of the Church Autonomy Doctrine, the Protection of Ecclesiastical Decisions.

In outrageously arguing that Respondents must show a specific "belie[f] that children should be placed at risk of harm from clergy who seek to have sex with them" (App. Br. at 22 n.1), Appellant misunderstands the contours of the First Amendment's Religion Clauses. "The purpose of [these protections] is not to safeguard a church's decision to fire [or hire or retain] a minister only when it is made for a religious reason. [They] instead ensure[] that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-195 (internal citations omitted). In other words, the protection does not depend on an institution's having a particular religious rationale for an employment decision; rather, the very nature of the employment decision, as being made by a religious institution, dictates that the institution, alone, must be able to make it without the government's interference. Quite simply, ***any*** government interference with a religious institution's employment decisions concerning its own ministers violates the First Amendment's Religion Clauses. Therefore, Appellant is misguided in his attempt to ascribe and then attack a particular (offensive and incorrect) belief as underlying Respondents' employment of Brothers who have professed their vows. This perspective fails to acknowledge that Respondents' existence as a religious organization renders their employment relationship with their Brothers protected from ***any*** state involvement under the First Amendment.

2. Appellant's Focus on the Distinction Between Religious Belief and Religious Conduct Is a Veritable Straw Man Argument.

Relatedly, the distinction between religious belief and religious conduct, discussed for several pages of Appellant's brief (App. Br. at 21-25), is irrelevant because the religious conduct at issue here is the hiring, supervision, discipline, etc., of clergy. It is not, as Appellant argues, the act of sexual abuse—which, albeit conduct, is certainly not religious in any form. In fact, in crafting his argument in this manner, Appellant again misses the point that the First Amendment, as a rule, protects religious organizations from government interference with their employment relationships with their ministers. In fact, the *Hosanna-Tabor* Court highlighted the *Smith* Court's distinction between "the government's regulation of 'physical acts' [and] its 'lend[ing] its power to one or the other side in controversies over religious authority or dogma.'" *Hosanna-Tabor*, 565 U.S. at 190 (quoting *Smith*, 494 U.S. at 877). Certainly, the physical act of sexual abuse of a minor can be and is regulated by the government, as our courts have consistently held that claims against the alleged perpetrator are cognizable. *See State ex rel. Heart of Am. Council v. McKenzie*, 484 S.W.3d 320, 327 (Mo. banc 2016). By arguing that the First Amendment does not protect such conduct, Appellant commits the logical fallacy of attacking a strawman; Respondents, of course, agree that sexual abuse of a minor is an abhorrent act that should be addressed by the state. Appellant thus attacks an argument not posed (and in fact, agreed with) by Respondents, and in doing so, he fails to confront the First Amendment's protection of a religious organization's employment of clergy.

3. Valid and Neutral Laws of General Applicability under *Employment Div. v. Smith* Cannot Apply to a Purely Ecclesiastical Question.

Likewise, Appellant's reference to valid and neutral laws of general applicability is a red herring. This phrase, as adopted by the United States Supreme Court in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), examines whether a law has an incidental effect on a religious practice or "represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising or one's children in those beliefs." *Id.* at 882. As clarified distinctly by the *Hosanna-Tabor* Court, the selection of a minister is a purely ecclesiastical decision, "an internal church decision that affects the faith and mission of the church itself," such that it trumps even "valid and neutral law[s] of general applicability." 565 U.S. at 190 (distinguishing *Smith*). Because a claim of negligent supervision necessarily inquires into this purely ecclesiastical employment relationship and attempts to regulate the selection, supervision, and discipline of clergy, negligent supervision cannot possibly be a "valid and neutral law of general applicability." Again, once an inquiry breaches the threshold of such an employment relationship, it delves beyond the limitations mandated by the First Amendment, and the inquiry must end. Therefore, this principle has no bearing on the employment relationship between a religious organization and its ministers.

4. Neutral Principles under *Jones v. Wolf* Cannot Be Applied Here, For These Principles' Neutrality is Derived from Their Neutrality Towards Religion.

Appellant further conflates the above concept of valid and neutral laws of general applicability with the "neutral principles" of *Jones v. Wolf*, 443 U.S. 595 (1979). The former refers to the motivation behind a particular law, and the latter refers to principles that can be applied without infringing on the First Amendment. *See Presbyterian Church*

in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969). The "neutral principles" notion arose as courts sought to resolve intra-church disputes while honoring the doctrine of church autonomy. *See Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (single-paragraph opinion approving of court's resolution of property dispute, as it involved "no inquiry into religious doctrine"). However, even the Court in *Jones v. Wolf*, the key case on "neutral principles," acknowledged that this concept may function "so long as the use of that method ***does not impair free-exercise rights or entangle the civil courts in matters of religious controversy***." 443 U.S. at 608 (emphasis added). Once "neutral principles" begin examining ecclesiastical questions such as the hiring, supervision, and discipline of ministers, the principles cease to be neutral. For a court to dictate the extent to which a religious organization must perform background investigations on and supervise clergy and clergy-to-be would inevitably require the state to involve itself in quintessentially religious minutiae. The neutrality of the principles is derived from their neutrality ***towards religious questions***. Inherently, then, a claim of negligent supervision cannot be a "neutral principle," for it asks what a "reasonable bishop" (or here, a "reasonable provincial") would do.[8] It bears repeating: Once this inquiry begins to question begins to invade this employment relationship, it violates the First Amendment's Religion Clauses.

[8] Furthermore, civil employment practices are not always commensurate with employment practices by religious institutions. For example, it is unclear what response would be necessitated after an accusation of sexual abuse. The frameworks for discipline of clergy differ from religious organization to religious organization, are often based on religious beliefs, and incorporate their own safeguards. Even a "neutral principle" would be unable

5. Any Distinction Between Torts and Other Types of Claims, as Pertaining to the Doctrine of Church Autonomy, Is Illusory.

Contrary to Appellant's Substitute Brief at 25, 40-41, the ministerial exception recognized in *Hosanna-Tabor* is applicable to a broader set of cases than just employment discrimination claims filed under a civil rights statute. *Hosanna-Tabor* did reserve passing on this issue (565 U.S. at 196), but subsequent federal circuit court cases have held that the exception also applies to claims sounding in tort and breach of employment contract. *See Lee v. Sixth Mount Zion Baptist Church of Pittsburgh,* 903 F.3d 113, 122-23 (3d Cir. 2018). To the same effect are another half dozen federal opinions collected at J. Gregory Grisham and Daniel Blomberg, *The Ministerial Exception After Hosanna-Tabor, Firmly Founded, Increasingly Refined*, 20 THE FEDERALIST SOCIETY REVIEW 80, 87 nn.79-83 (2019). This is common sense. Church autonomy does not depend on a plaintiff's legal theory; it depends on whether implementation of that theory results in an entanglement with a matter reserved to the church.

6. Respondents Are Not Immune from Suit.

Institutions like Respondents are not, as Appellant claims, granted "immunity from liability." (App. Br. at 31). Under Missouri law, intentional torts are still cognizable against religious institutions, and of course, the alleged abusers, themselves, may be liable. Indeed, even the *Gibson* Court acknowledged as much. *Gibson*, 952 S.W.2d at 246 ("Religious organizations are not immune from civil liability for the acts of their clergy.").

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to capture the fine distinctions between religious organizations, from hierarchical to non-hierarchical to congregational to other forms and combinations thereof.

7. Appellant's Arguments Regarding Other State Courts Are Irrelevant.

Appellant argues that because courts in other jurisdictions recognize negligence claims against religious institutions, *Gibson* must be contrary to the U.S. Constitution. (*See* App. Br. at 34-36). However, this argument misses the mark. The First Amendment is not a "majority rules" concept, and state courts typically do not address such constitutional issues frequently, if ever. Indeed, the federal courts have stated that such "an extremely expansive view of the claims allowed against religious organizations is not even particularly persuasive in light of the analysis by federal courts on this issue." *Ayon v. Gourley*, 47 F.Supp.2d 1246, 1248 (D. Colo. 1998).[9] *See also Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 528 (8th Cir. 1995) (noting that court had "no authority to require [pastor] to vacate the pulpit," as it constituted ecclesiastical matter).

Furthermore, the Missouri Constitution[10] grants broader protections than the federal Constitution, and they are "mandatory and must be obeyed." *Harfst v. Hoegen*, 163 S.W.2d

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[9] Respondents note that Appellant has cited three cases from various federal circuits. However, a review of these cases clearly reveals that they are substantively and/or procedurally inapposite here. *See Bollard v. Calif. Province of Soc. of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (where seminarian did "not complain that the Jesuits refused to ordain him or engaged in any other adverse personnel action"); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409,431 (2d Cir. 1999) (where "Diocese point[ed] to no disputed religious issue which the jury or the district judge . . . was asked to resolve"); *Muegge v. Heritage Oaks Golf & Country Club, Inc.*, 209 Fed.Appx. 936, 940-941 (11th Cir. 2006) (involving no claim against religious organization and no discussion of First Amendment, and affirming summary judgment in favor of defendant on negligent supervision claims).

[10] Although the Missouri Constitution was not the basis for the trial court's order granting summary judgment in this case, this Court may address this issue, as it is the final arbiter of issues regarding the Missouri Constitution. *See* Mo. Const. art. V, § 3. Missouri law is also clear that summary judgment may be affirmed on any theory, regardless of whether it

609, 614 (Mo. 1941). Article 1, § 5, of the Missouri Constitution states that "no human authority can control or interfere with the rights of conscience; . . . neither the state nor any of its political subdivisions shall establish any official religion, nor shall a citizen's right to pray or express his or her religious beliefs be infringed; [and] that the state shall not coerce any person to participate in any prayer or other religious activity." As such, "the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." *Paster v. Tussey*, 512 S.W.2d 97, 101-102 (Mo. banc 1974); *see Gibson*, 952 S.W.2d at 246. Therefore, even when state action is "'verging' on unconstitutionality" under the federal Constitution, that same action may still violate the Missouri Constitution's "more strict policy of church and states separation." *Paster*, 512 at 104 (internal citations omitted).

Thus, summary judgment on Appellant's negligence-based claims under *Gibson v. Brewer* must be affirmed.

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is raised by a party or raised *sua sponte* by the Court. *City of Washington v. Warren County*, 899 S.W.2d 863, 868 (Mo. banc 1995). For this same reason, if this Court determines that the statute of limitations issue is dispositive, Respondents refer the Court to its briefing on Appellant's Point 4 in the Missouri Court of Appeals and respectfully request that this Court affirm the trial court's judgment.

POINT 2: THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF INTENTIONAL FAILURE TO SUPERVISE CLERGY BECAUSE APPELLANT'S ADMISSIONS (AND HIS RESPONSE TO RESPONDENTS' MOTION) SUPPORT THE UNDISPUTED MATERIAL FACT THAT APPELLANT LACKS *ANY* EVIDENCE FROM WHICH A REASONABLE JUROR COULD FIND THE EXISTENCE OF TWO ESSENTIAL ELEMENTS, NAMELY, THAT RESPONDENT KNEW THAT HARM WAS CERTAIN OR SUBSTANTIALLY CERTAIN AND THAT RESPONDENTS DISREGARDED A KNOWN RISK.

In his second point on appeal, Appellant contends that the trial court erred in granting Respondents' Motion for Summary Judgment on his Count III (Intentional Failure to Supervise Clergy) because Respondents failed to present any undisputed material fact negating the essential element of notice. However, Respondents repeatedly cited Appellant's own testimony (*i.e.,* party admissions against interest), wherein he acknowledged that he has no information on the issue of prior notice. Therefore, the trial court committed no error in granting Respondents' Motion for Summary Judgment on this count, and the judgment should be affirmed.

I. STANDARD OF REVIEW

The standard of review for an appeal from summary judgment remains *de novo*. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. Once a movant has established a *prima facie* showing that it is entitled to summary judgment, the non-movant must then "'***set forth specific facts*** showing that there is a genuine issue for trial.'" *Id.* at 381 (quoting Rule

74.04(e)) (emphasis in original). A genuine dispute is one that is real, not merely argumentative, imaginary, or frivolous, or consisting of conjecture, theory, or possibilities. *Id*. at 378, 381. For this reason, the Court in the oft-cited *ITT Commercial Finance* case clarified that it constitutes a misapplication of law to find that ***any*** doubt or the "slightest possibility" defeats summary judgment. *Id.* at 378. Rather, "[t]he key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." *Id.* at 380 (citations omitted).

II. LEGAL ANALYSIS

A. The Trial Court Appropriately Relied On Established Missouri Law Concerning the Essential Elements of a Claim of Intentional Failure to Supervise Clergy.

To state a claim of intentional failure to supervise clergy, a plaintiff must show that: (1) a supervisor exists; (2) the supervisor knew that harm was certain or substantially certain to result; (3) the supervisor disregarded this known risk; (4) the supervisor's inaction caused damage; and (5) the other requirements of the Restatement (Second) of Torts, § 317 are met.[11] *Doe v. Roman Catholic Archdiocese of St. Louis*, 347 S.W.3d 588,

[11] Section 317 of the Restatement (Second) of Torts, in turn, provides that:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
> (a) the servant
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
> (ii) is using a chattel of the master, and
> (b) the master
> (i) knows or has reason to know that he has the ability to control his servant, and

591 (Mo. App. E.D. 2011) (citing *Gibson*, 952 S.W.2d at 248). A plaintiff's failure to satisfy any one of these five elements is fatal to a claim for intentional failure to supervise. *Gibson*, 952 S.W.2d at 592.

Here, the trial court found that Appellant had failed to produce evidence from which a reasonable juror could find element 2 above, namely, that Respondents "knew that harm was certain or substantially certain to result." The trial court explicitly noted that this element is what makes this claim an intentional tort and that Appellant was required to show that Respondents "desire[d] to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." (D61 at 5 (citing *Gibson*, 952 S.W.2d at 248 and Restatement (Second) of Torts, § 8A (1965))). Finding that Appellant had failed to produce such evidence, even when the evidence was viewed in the light most favorable to him, the trial court concluded that summary judgment was appropriate on Count III.

B. Appellant's Argument Fails to Consider That Appellant's Own Deposition Testimony Constitutes a Party Admission That There Exists No Evidence From Which a Reasonable Juror Could Find All Essential Elements of Appellant's Claim of Intentional Failure to Supervise.

Appellant argues that Respondents did not present any undisputed material facts showing their lack of notice. However, Appellant completely ignores the material facts supported by ***Appellant's own deposition testimony.*** Certainly, an admission by a party-opponent is not only admissible at trial, *see Around The World Importing, Inc. v.*

(ii) knows or should know of the necessity and opportunity for exercising such control.

Doe, 347 S.W.2d at 592.

Mercantile Trust Co., N.A., 795 S.W.2d 85, 89 (Mo. App. E.D. 1990), but it may also constitute evidence of a material fact when, as here, it directly negates at least one of the essential elements of a claim. Although Plaintiff cites the Honorable Julian Bush's article for the proposition that a witness's testimony is not a material fact (*see* App. Br. at 44-45), this conclusion misconstrues the article and fails to consider that the ***very next paragraph*** states that a material fact may indeed be supported by a party-opponent's admission. Hon. Julian Bush, *How to Write A Motion for Summary Judgment This Article Provides A "How-to" Guide for Navigating the Proper Submission of A Summary Judgment Motion by Either A Defendant or Plaintiff*, 63 J. Mo. B. 68, 70 (2007) ("Thus, if plaintiff made an admission in his deposition in a rear-end case that he suffered no damage as a result of the accident, the material fact that entitles defendant to summary judgment is that there was no damage, not that plaintiff testified at the deposition that there was no damage."). In other words, while testimony may not, itself, be a material fact, that testimony can ***support*** a material fact—and Appellant is not just any witness but is Respondents' party opponent, such that his testimony constitutes an admission.

Here, Respondents cited Appellant's deposition as supporting the ***material fact*** that he has no evidence from which a reasonable jury could find the following essential elements: (1) that Respondents "knew that harm was certain or substantially certain to result;" and (2) that Respondents disregarded a "known risk." Quite simply, Appellant's deposition testimony makes clear that he has ***absolutely no information*** whether (as Appellant alleges in his Petition) Woulfe "had sexually assaulted at least one other boy at Chaminade before assaulting Plaintiff" or Respondents "knew that Brother Woulfe was

abusing children before Plaintiff was abused." (D6, ¶¶ 30-31; D15 at 20-22; D16, ¶¶ 38-42; D18, Vol. II, 317:2-5; 337:1-7; 406:22 – 407:7; 476:13-22; 491:5-12, 18-25; 493:21 – 494:20; 495:21 – 496:7). In fact, Appellant admitted that he had no such knowledge in his summary judgment pleadings. (D25, at 9-11, ¶¶ 38-42).

Under Missouri law, "[a] negative fact may be proved by negative evidence." *Morris v. Israel Bros., Inc.*, 510 S.W.2d 437, 441 (Mo. 1974) (citations omitted). In elucidating the absence of evidence of the above two elements, Respondents offered evidence of absence; this may seem to be a philosophical distinction, but it is essential to this and any other motion for summary judgment based on the negation of elements of a plaintiff's claims. Furthermore, controlling Missouri law makes clear that a defending party need not refute ***every*** element to be entitled to summary judgment. *ITT Commercial Fin.*, 854 S.W.2d at 381 (holding that a defendant may establish a right to judgment by negating "***any one*** of the claimant's elements") (emphasis in original).

Here, the trial court considered this and found that no reasonable juror could conclude that Respondents knew that harm was certain or substantially certain to result:

> The court can discern 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.

(D61 at 5).[12]

[12] Appellant may argue (as he did to the trial court) that Judge Kerr's emphasis of the word "competent" implied that Appellant was simply missing notarizations of two affidavits. (*See* D64 at 2). However, these two affidavits referenced reports of alleged sexual abuse

Finally, as a minor point, the cases cited by Appellant under his Point 2 are readily distinguishable. While Appellant attempts to categorize Respondents' summary judgment pleadings as a failure to comply with Rule 74.04, even a cursory review of the case law in Appellant's brief makes clear that these cases involved the complete lack of required pleadings, evidence supporting statements of material facts, and in some instances, legal bases for summary judgment. *See Hargis v. JLB Corp.*, 357 S.W.3d 574, 586 (Mo. banc 2011) (finding that motion for summary judgment "did not contain a legal basis explaining why [movant] was entitled to summary judgment on [non-movant's] third count, . . . nor did it set out uncontroverted facts that negated this claim"); *Columbia Mut. Ins. Co. v. Heriford*, 518 S.W.3d 234, 239, 243 (Mo. App. S.D. 2017) (finding that neither movant nor non-movant alleged material facts of ownership of vehicle or residency with named insured); *Dilley v. Valentine*, 401 S.W.3d 544, 551 (Mo. App. W.D. 2013) (finding that motion for summary judgment "did not contain a legal basis explaining why they were entitled to summary judgment on [non-movant's] recklessness claims" but rather "asked

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in "December 1971" and "late November or early December 1971." (D63; D67). It is undisputed that Appellant claims to have been sexually abused by Woulfe in early 1971, prior to his graduation that spring. (D18, Vol. I, 27:10-14, Vol. II, 496:8 – 497:1; D25 at 2, ¶ 2). Appellant also argues in his Substitute Brief that he "named the students who reported to Defendants in 1970-1971 that they were sexually abused by Woulfe" (App. Br. at 43 n.4); however, a review of these names reveals that the sole individual who allegedly reported abuse to Respondents between 1970-1971 is the very same affiant who stated under oath that he reported abuse in "December 1971." (D67). Accordingly, Judge Kerr's order is correct in definitively concluding that Appellant was unable to defeat summary judgment. (D68; *see* D65 at 5 (noting that because the subject affidavits reference alleged complaints ***after*** Appellant's alleged abuse here, they cannot possibly show that Respondents had ***prior*** knowledge "that harm was certain or substantially certain to result")).

generally for summary judgment on all claims"); *Strable v. Union Pac. R.R. Co.*, 396 S.W.3d 417, 425 (Mo. App. E.D. 2013) (finding that "[t]he only citation [non-movant] provided was to inadmissible hearsay that was not sworn, that was not an affidavit, that was not authenticated, and did not constitute legal authority of any kind"); *Adams v. USAA Cas. Ins. Co.*, 317 S.W.3d 66, 74 (Mo. App. E.D. 2010) (finding that "[n]either [movant] nor [non-movant] submitted a statement of uncontroverted facts"). In addition, Appellant's attempt to distinguish the facts of *Custer v. Wal-Mart Stores East I, LP*, 492 S.W.3d 212 (Mo. App. S.D. 2016), misses the reason why the appellate court cited this case. The Court of Appeals did not refer to the facts of *Custer*; rather, it simply used the language to highlight the type of summary judgment argument made by Respondents. (*See* Opinion at 15-16).

Thus, for all these reasons, the trial court, the appellate court, and this Court have all been presented with sufficient, undisputed material facts negating the essential elements (1) that Respondents "knew that harm was certain or substantially certain to result;" and (2) that Respondents disregarded a "known risk." Therefore, Appellant's Point 2 should be denied, and the trial court's judgment on Appellant's Count III alleging intentional failure to supervise clergy must be affirmed.

POINT 3: THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF INTENTIONAL FAILURE TO SUPERVISE CLERGY BECAUSE APPELLANT'S CLAIMED ISSUE OF FACT WHETHER RESPONDENTS KNEW THAT HARM WAS CERTAIN OR SUBSTANTIALLY CERTAIN TO RESULT DOES NOT RISE ABOVE THE LEVEL OF PURE SPECULATION, WHICH CANNOT DEFEAT SUMMARY JUDGMENT.

In his third point on appeal, Appellant contends that the trial court erred in granting Respondents' Motion for Summary Judgment on his Count III (Intentional Failure to Supervise Clergy) because there remains a disputed issue of fact whether Respondents had prior notice that Woulfe was "certain or substantially certain" to sexually abuse Appellant. Because Appellant's arguments consist of pure speculation, the trial court committed no error in granting Respondents' Motion for Summary Judgment, and the judgment should be affirmed.

I. STANDARD OF REVIEW

The standard of review for an appeal from summary judgment is *de novo*. *ITT Commercial Fin.*, 854 S.W.2d at 376. The appellate court reviews the record "in the light most favorable to the party against whom judgment was entered," and the non-movant is accorded all reasonable inferences. *Id.* (citations omitted). That said, summary judgment will be upheld if there is no genuine issue of material fact, and the movant remains entitled to judgment as a matter of law. *Id*.

II. LEGAL ANALYSIS

A. Appellant's "Evidence" of Respondents' Prior Notice That Woulfe Was Certain or Substantially Certain to Harm Appellant Relies on Nothing More Than Pure Speculation.

Again, Appellant's claim of intentional failure to supervise clergy requires the essential element that the supervisor knew that harm was certain or substantially certain. *Doe*, 347 S.W.3d at 591 (citing *Gibson*, 952 S.W.2d at 248). In other words, Appellant must prove that Respondents had prior notice that Woulfe would sexually abuse Appellant.

Appellant argues that it is still a disputed issue of fact whether Respondents had such notice. However, Appellant's ***only*** "evidence" of Respondents' alleged prior notice constitute excerpts from Woulfe's personnel file. Again, Appellant admitted that he had no knowledge of any sexual contact between Woulfe and other students, or that Woulfe's supervisors had any information about any such alleged sexual contact. (D18, Vol. II, 317:2-5; 337:1-7; 406:22 – 407:7; 476:13-22; 491:5-12, 18-25; 493:21 – 494:20; 495:21 – 496:7; D25, at 9-11, ¶¶ 38-42). Even with the opportunity to offer additional facts in opposition to summary judgment, Appellant failed to present any facts (that is, anything beyond speculation) indicating prior notice.[13] As such, Appellant relies solely on the speculative and unfounded conclusions of his expert witness Father Thomas Doyle to extrapolate that "euphemistic or coded language" in Woulfe's personnel file must

[13] In his Additional Statement of Facts, Appellant stated that Respondents received reports of allegations of sexual abuse by Woulfe in late 1971 and in 1974 or 1975. (D25 at 16, ¶¶ 13-15). However, none of these allegations goes to ***prior*** notice, as it is undisputed that Appellant claims to have been sexually abused by Woulfe in the spring of 1971. (D18, Vol. I, 27:10-14, Vol. II, 496:8 – 497:1; D25 at 2, ¶ 2).

constitute references to sexual abuse. (*See* D25 at 19-20, ¶ 27). For the reasons laid out below, such pure speculation cannot possibly defeat summary judgment.

B. Because Appellant's Proposed "Evidence" of Respondents' Prior Notice (*i.e.*, Father Doyle's Testimony on Others' States of Mind) Is Inadmissible and Purely Speculative, No Disputed Issue of Fact Exists to Defeat Summary Judgment on Appellant's Claim of Intentional Failure to Supervise Clergy.

Missouri courts have plainly rejected attempts to comment on another person's intent and state of mind as inadmissible. *State v. Churchill*, 98 S.W.3d 536, 538-39 (Mo. banc 2003) ("[E]xpert witnesses should not be allowed to give their opinion as to the veracity of another witness's statement, because in doing so, they invade the province of the jury."); *Am. Fam. Mut. Ins. Co. v. Lacy*, 825 S.W.2d 306, 311-13 (Mo. App. W.D. 1991) (holding that, in summary judgment proceedings, witnesses' testimony "as to what [another witness] meant or intended . . . were opinions, conclusions and speculations neither admissible nor usable at trial, and were not probative of the material issue of fact in contention").

This principle does not give way even when a plaintiff is confined to presenting only constructive evidence; indeed, parties frequently present constructive evidence without resorting to rank speculation. In criminal cases regarding, for example, possession of a methamphetamine precursor with intent to manufacture, the prosecution will likely be required to present constructive evidence of intent, for "direct evidence of intent is rarely susceptible to direct proof." *State v. Agee*, 37 S.W.3d 834, 837 (Mo. App. S.D. 2001). Even then, any inferences drawn "must be logical, reasonable, and drawn from established fact." *Id.* Such constructive evidence may include exclusive control of the premises,

proximity of the defendant's personal belongings to the substance, and possession of large amounts of money in small denominations. *State v. Clark*, 490 S.W.3d 704, 710-712 (Mo. banc 2016). Notably, it does not include an expert witness's direct testimony about the defendant's knowledge or intent. Even when direct evidence of intent is lacking, this does not give a party leeway to ***create*** such evidence in the form of speculative and inadmissible expert testimony. Therefore, Father Doyle's testimony regarding the states of mind of Respondents' representatives is improper to rebut summary judgment.

Furthermore, a non-moving party is entitled only to all ***reasonable*** inferences. *ITT Commercial Fin.*, 854 S.W.2d at 376. A genuine issue of material fact is present only "where the record contains ***competent materials*** that evidence two ***plausible***, but contradictory, accounts of the essential facts." *Id.* at 382 (emphasis added). It is also well-established under Missouri law that "[a] non-movant who relies upon mere doubt and speculation in its response to the motion for summary judgment fails to raise any issue of material fact." *Holzhausen v. Bi-State Development Agency*, 414 S.W.3d 488, 493 (Mo. App. E.D. 2013) (citing *Rice v. Hodapp*, 919 S.W.240, 244 (Mo. banc 1996); *Miller v. City of Arnold*, 254 S.W.3d 249, 254 (Mo. App. E.D. 2008)). Father Doyle's "opinions" are apparently based on his review of other files regarding other alleged cases of sex abuse. However, nothing is known about these files; there is no evidence that any of these were substantiated claims, that these files were as old as the documents here, or even that they involved the same Respondents. Doyle's methodology is also not clear—likely because there simply is no methodology for speculatively attributing thoughts to another person.

Thus, even with Father Doyle's testimony, Appellant has utterly failed to state anything beyond "mere doubt and speculation" consisting of unreasonable inferences.

The trial court acknowledged this by finding that although the record included Father Doyle's testimony, no other conclusion 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." (D61 at 5) (emphasis added). The Court of Appeals agreed and found *Bryant v. Bryan Cave, LLP*, 400 S.W.3d 325 (Mo. App. E.D. 2013), instructive. There, like here, an expert's "opinion" regarding another person's intent was "not premised upon scientific, technical or specialized knowledge, [but] amount[ed] to nothing more than speculation." *Id.* at 335-336. This fact remained, despite the expert's knowledge and experience with family law; similarly, Father Doyle's familiarity with other claims of abuse fails to bring his "opinions" outside the scope of "the common knowledge and experience of the human condition that any juror would possess." *Id.* at 335. As such, Respondents remain entitled to summary judgment on the claim of intentional failure to supervise, and the judgment should be affirmed.

CONCLUSION

For all the above reasons, the trial court's summary judgment should be affirmed. *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997), remains good law, as the First Amendment's Religion Clauses, particularly the doctrine of church autonomy, protect a religious institution's employment relationship with its ministers from the inquiries inherent to a claim of negligent supervision of a minister. Secondly, Appellant's own admissions during his deposition and in his summary judgment pleadings negate two

essential elements of Appellant's intentional failure to supervise claim: (1) that Respondents "knew that harm was certain or substantially certain to result;" and (2) that Respondents disregarded a "known risk." Third, Appellant's expert's "opinions" as to the states of mind of other individuals (some of whom are deceased) and guesswork as to the meaning of certain words remain pure speculation that cannot defeat summary judgment. Thus, this Court should affirm the trial court's order granting summary judgment on all counts.

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IN THE
MISSOURI SUPREME COURT

JOHN DOE 122,	)	
	)	
Appellant,	)	SC98307
	)	
v.	)	Appeal No. ED107767
	)	
MARIANIST PROVINCE OF THE UNITED STATES, a Non-Profit Corporation, et al.,	)	Circuit Court Cause No. 15SL-CC03799
	)	
	)	ORAL ARGUMENT REQUESTED
	)	
Respondents.	)	

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Rule 103.08, a true and correct copy of this brief was filed electronically with the Clerk of the Court and served by operation of the Court's electronic filing system this 30th day of March, 2020, on Mr. Ken Chackes, Ken Chackes LLC, 230 S. Bemiston Ave., Ste. 510, St. Louis, MO 63105, KChackes@cch-law.com, *Attorney for Appellant*.

The undersigned further certifies that this brief complies with the word limitation set forth in Rule 84.06(b). This brief was prepared in Microsoft Word and contains approximately 11,086 words. The font is Times New Roman 13 point type.

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