

64566-8

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NO. 64566-8

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

M.H., individual

Appellant,

v.

CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE,

Respondent.

RESPONDENT'S BRIEF

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COURT OF APPEALS
DIVISION I

ORIGINAL

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I. INTRODUCTION

This case arises from an act of sexual molestation inflicted upon plaintiff M.H. when she was a child in about 1960 by an indentified person. Plaintiff asserts that the defendant Corporation of the Catholic Archbishop of Seattle (hereinafter “Archdiocese”) is liable for the alleged molestation because a priest introduced her to the person who later allegedly abused her. The Superior Court’s dismissal was appropriate in this case because plaintiff’s claim of negligence fails as a matter of law where no duty was owed to prevent abuse by an unknown individual; the abuse that occurred was not foreseeable to the Archdiocese; and the Archdiocese’s actions or inactions were not the legal cause of the abuse. Accordingly, plaintiff’s claims and causes of action against the Archdiocese were properly dismissed by the Superior Court as a matter of law.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Respondent Archdiocese assigns no error to the Superior Court’s dismissal in this case.

Issues Pertaining to Assignment of Error

Plaintiff has not presented her Issues Pertaining to Assignments of Error. The Archdiocese believes that the issues on appeal are stated as follows:

Whether the Superior Court properly dismissed M.H.'s claims against the Archdiocese when, despite the compelling facts related to Father Boyle, no special relationship existed to create a duty to M.H. for the acts of an unidentified third party who has no provable connection to the Archdiocese.

III. STATEMENT OF THE CASE

Plaintiff M.H. asserts that when she was a child she was routinely under the supervision of Father Boyle. CP 37. Plaintiff further claims that the Archdiocese had the right to control Father Boyle; that Father Boyle had a well-documented history of sexually abusing children, and that the Archdiocese knew or should have known of Father Boyle's history of sexually abusing young children.

In approximately 1960, when plaintiff was about 5 years old, she claims that Father Boyle allegedly "facilitated" her abuse. CP 38. More specifically, plaintiff asserts that Father Boyle brought an unknown person to her family's home and, when the unknown person offered to drive her to a picnic, Father Boyle reassured plaintiff's mother that this would be a good idea. *Id.* The unknown person, another man, plaintiff

and one of plaintiff's brothers drove off together. *Id.* On the way to the picnic, the unknown person allegedly stopped at an apartment and sexually abused plaintiff. *Id.*

M.H. filed a Complaint for Damages on May 7, 2009, alleging that she has suffered physical and emotional injuries as a result of the Archdiocese's negligent supervision. CP 143-49. In addition to a claim for negligence, plaintiff's complaint asserted claims for negligence infliction of emotional distress and estoppel/fraudulent concealment. *Id.* The Archdiocese moved for dismissal of all plaintiff's claims and causes of actions. CP 1-9. The Superior Court granted that motion and dismissed all of M.H.'s claims with prejudice. CP 127-131. This appeal follows. CP 132.

IV. ARGUMENT

A. The applicable standard of review in this case is *de novo*

In reviewing a trial court's ruling on a motion for judgment on the pleadings brought under CR 12(c), the facts alleged in the complaint, as well as hypothetical facts *consistent therewith*, should be considered in the light most favorable to the nonmoving party. *Davenport v. Washington Educ. Ass'n*, 147 Wn.App. 704, 715, 197 P.3d 686 (2008). In reviewing a trial court's dismissal pursuant to CR 12(c), the review is *de novo*.

Gaspar v. Peshastin Hi-Up Growers, 131 Wn.App. 630, 634, 128 P.3d 627 (2006), *review denied*, 158 Wn.2d 1029, 152, P.3d 1033 (2007).

Here, plaintiff alleges that circumstantial evidence establishes that Father Edmund Boyle cavorted and conspired with fellow pedophiles and exposed her to them. *See* Brief of Appellant at p. 18. However, the standard of review provides that dismissal under CR 12 is appropriate if the plaintiff can prove no facts that would justify recovery. *Gaspar*, 131 Wn.App. at 634. As the trial court pointed out, “both counsel stated at argument that there is no further investigation that can be done to learn about the identity of the man who sexually assault M.H.” CP 130. Thus, plaintiff is unable to prove any facts that would justify recovery based on the acts of the unidentified man who is the individual responsible for the assault.

B. There is no duty by the Archdiocese to control Father Boyle and his associations with the individual responsible when no special relationship can be established

In order to establish a cause of action for negligence, a plaintiff must establish: (1) the existence of a duty owed to the complaining party; (2) a breach of the duty; (3) resulting injury; and (4) that the breach was the proximate cause of the injury. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). If a defendant owed a plaintiff no duty, the negligence action fails thereby making the primary question: whether a

duty of care existed. *Id.* The existence of a duty of care owed is a question of law. *Id.*

Plaintiff concedes that the Archdiocese does not owe a duty to M.H. for the acts of the unidentified individual who has no provable connection to the defendant. Plaintiff asserts, instead, that the court did not place enough emphasis, if any, on the facts presented involving Father Boyle and the Archdiocese's knowledge of his dangerous propensities. The lower court did address those assertions in its dismissal by stating that even if evidence exists that shows the Archdiocese's awareness of Father Boyle's association with other child molesters; there would still be no connection to the unidentified man as one of Boyle's associates. CP 140.

C. The risk of harm was unforeseeable because the Archdiocese did not know the identity of the individual responsible

In determining whether a duty is owed, the court should look to the relationship of the parties and the foreseeability of a risk of harm involved in the relationship. *Shepard v. Mielke*, 75 Wn.App. 201 205, 877 P.2d 220 (1994). In general, courts will find a duty only when reasonable persons would recognize it and agree that it exists. *Tallarti v. Kildare*, 63 Wn.App. 453, 456, 820 P.2d 952 (1991) (citing *Prosser and Keeton* § 53, at 350), rev. denied, 118 Wn.2d 1012, 824 P.2d 491 (1992). The concept of foreseeability limits the scope of the duty owed. *Christen v. Lee*, 113

Wn.2d 479, 492, 780 P.2d 1307 (1989). Washington courts have been reluctant to find criminal conduct foreseeable. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, fn.3, 943 P.2d 286 (citing *Jones v. Leon*, 3 Wn.App. 916, 926, 478, P.2d 778 (1970); *Shelby v. Keck*, 85 Wn.2d 911, 541 P.2d 365 (1975); *Christen*, 113 Wn.2d at 496).

The seminal case in Washington on church sex abuse cases is *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). In *C.J.C.*, the court followed an earlier New Hampshire decision which it found to be persuasive, *Marquay v. Eno*, 139 N.H. 708, 662 A.2d 272 (1995). The *Marquay* decision involved former school students who allegedly had been sexually abused off school premises and outside normal school hours by school employees. *C.J.C.*, 138 Wn.2d at 723. Following the rationale of *Marquay*, the Washington court held that where a special relationship exists, a principal is not free to ignore the risk of harm *by its agents* simply because the harm was accomplished off premises or after hours. *Id.* at 275. The court framed the issues as whether a church and its officials have a special relationship with either its workers or the children of its congregation which gives rise to a duty to take reasonable measures to prevent harm intentionally inflicted on the children by a *church worker*. *Id.* at 273.

Addressing the key facts of the case, the Washington Supreme Court noted that a church elder had received a telephone call asserting inappropriate sexual conduct by Orin Wilson toward a young girl. *Id.* at 273. Nevertheless, Wilson was placed into various church leadership positions in which he had extensive contact with children. *Id.* Later, several girls in the church were sexually molested by Wilson. *Id.* at 265.

The court held that “where a special relationship exists a principal may not turn a blind eye to a known or reasonably foreseeable risk of harm posed *by its agents* toward those it would otherwise be required to protect simply because the injury is arbitrarily perpetrated off premises or after-hours.” *Id.* at 277. (emphasis added). The court cautioned that its holding was limited and stated that it was not suggesting a principal is an insurer against all harms simply because the work situation fortuitously provides an opportunity to perpetrate harm. *Id.* at 276-77.

The facts asserted by plaintiff in this case are easily distinguished from *C.J.C.* where the relationship between the Archdiocese and the unidentified individual differs markedly from the cases finding a special relationship sufficient to impose a duty of care. Specifically, plaintiff here asserts that the Archdiocese is liable, not for the actions of an Archdiocesan priest, Father Boyle, but for the actions of some other unknown individual. The other unknown individual was not an agent or

employee of the Archdiocese. It is undisputed that the unknown individual was not someone who was under the control or supervision of the Archdiocese. Plaintiff makes no assertion that the Archdiocese had knowledge of any propensity on the part of the unknown individual to engage in sexual molestation.

There is no basis in Washington law for an assertion by plaintiff that the Archdiocese had a duty to supervise or control the unknown individual. Any claim by plaintiff that the Archdiocese is responsible for the actions of some other unidentified and unnamed individual is unreasonable. Plaintiff here makes no assertion that she was molested by Father Boyle. Essentially, plaintiff's claim is that the Archdiocese should be forced to act as her insurer for harms over which the Archdiocese had no knowledge or control.

In analyzing foreseeability, Washington cases have focused upon the history of violence known to the defendant. *Wilbert v. Metropolitan Park Dist. of Tacoma*, 90 Wn.App. 304, 308, 950 P.2d 522 (1998).

Where no evidence is presented that the defendant knew of the dangerous propensities of the individual responsible for the crime, and there is no history of such crimes occurring on the premises, the courts have held the criminal conduct unforeseeable as a matter of law.

Id. at 308-09. Plaintiff requests this Court to find that it was foreseeable to the Archdiocese that Father Boyle would associate and conspire with fellow pedophiles to molest children because it was “plainly predictable,” comparing the relationship to that of an employer and a drug addict. *See* Brief of Appellant at p. 22. At no time does the plaintiff provide any support or authority where a court found that it was foreseeable for an employer that a pedophile would associate and conspire to molest with another pedophile. Plaintiff repeatedly refers to the “pedophile conspiracy,” but again provides no authority for such a term.

In *Minahan v. Western Washington Fair Ass’n*, 117 Wn. App. 881, 73 P.3d 1019 (2003), a school employee brought a negligence action against her school district employer and a county fair association when a car driven by an intoxicated driver struck her while she was working at a high school dance. The trial court denied summary judgment, but the court of appeals reversed, holding both that the defendants owed no duty and that there was no legal causation. *Id.* at 885. The court’s holding on plaintiff’s claim of employer liability is instructive: “Where there is no evidence that the defendant knew of the dangerous propensities of the individual responsible for the crime and there is no history of such crimes on the premises, the criminal conduct

is unforeseeable as a matter of law.” *Id.* at 895. The court cited numerous cases involving claims of employer liability for a third person’s criminal acts. *Id.* at 896. Summarizing those cases, the court stated that foreseeability can be created by prior occurrences and clear dangers, but that those characteristics were absent in the case before it. *Id.*

In this case, which involves a claim of liability for a third person’s criminal acts, plaintiff makes no showing that the Archdiocese had knowledge of the dangerous propensities of the individual responsible for the crime. Thus, following the rationale of *Minahan*, the actions of the third party abuse of M.H. was unforeseeable as a matter of law.

As a matter of law, the Archdiocese had no duty to control the actions of an unidentified and unnamed person.

D. Plaintiff fails to establish that the actions or inactions of the Archdiocese were the legal cause of the abuse

Proximate cause includes two elements: cause in fact and legal causation. *Tyner v. Dep’t of Social and Health Services*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). Legal causation has been described as follows:

Legal causation is a much more fluid concept [than cause in fact]. It is grounded ‘in policy determinations as to how far the consequences of a defendant’s acts should extend.’ The focus in

legal causation analysis is on ‘whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.’ This inquiry depends upon ‘mixed considerations of logic, common sense, justice, policy, and precedent.’

Tyner, 141 Wn.2d at 82. “[T]he concept of legal cause permits the courts to limit liability, for policy reasons, even though duty and foreseeability concepts would indicate liability.” *Id.* “Legal causation is a question of law.” *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311, 151 P.3d 201 (2007).

Here, even if the court finds that the Archdiocese owed a duty (it should not), dismissal was still proper because the Archdiocese was not the legal cause of any harm to plaintiff. When conducting a legal cause analysis, the court must decide whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *Lynn*, 136 Wn. App. at 311. Legal causation rests on policy considerations as to how far the legal consequences of a defendant’s act should extend. *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 214, 890 P.2d 469 (1995).

As a policy matter, the court should find that the Archdiocese cannot be liable for the actions of the alleged abuser. Any connection between the Archdiocese and the alleged abuse is so remote that

imposition of liability would be unjust. It would be fundamentally unfair for the Archdiocese to be held liable for the actions of someone over whom it had no control. Plaintiff does not assert that the Archdiocese had any knowledge of the existence of “the abuser.” Plaintiff makes no showing that the Archdiocese had reason to know the unknown person would molest M.H. The abuser was not an agent of the Archdiocese. The Archdiocese is not an insurer against intentional wrongs committed by other unknown individuals over whom it has no control.

The policy question before the court is whether an employer can be held liable for one of its employee’s introducing someone to a third person who later causes harm when the employer (1) has no knowledge that the introduction is occurring, and (2) has no knowledge of any propensity on the part of the third person to do harm. The answer to these questions is simply no. Any connection is too attenuated to justify submitting this case to a jury. The legal causation requirement is not met because the Archdiocese cannot protect its parishioners from unidentified individuals whose existence and, therefore, dangerous propensities is unknown to the Archdiocese in order to prevent this individual from harming M.H.

V. CONCLUSION

The decision of the Superior Court in this case should be affirmed. The Superior Court's dismissal was appropriate in this case because no duty was owed by the Archdiocese to the plaintiff and plaintiff's injuries inflicted by an unidentified individual was unforeseeable. Moreover, if a duty was owed, plaintiff failed to establish that the Archdiocese's actions or inactions were the legal cause of the abuse. M.H. does not allege that anyone but the unidentified individual touched her in an offensive manner. This being the case, no one but the unidentified individual can be held directly liable for M.H.'s injuries. Plaintiff's alleged "conspiracy theory" is not based on circumstantial evidence but pure speculation and possible expert analyses that are not part of the record. Accordingly, the Superior Court's dismissal of M.H.'s claims and causes of action should be affirmed.

RESPECTFULLY SUBMITTED this 1 day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2010, I caused to be served a true and correct copy of the foregoing document **Brief of Respondent** as set forth below:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington, this 1st day of June, 2010.


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