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No. 64566-8

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

M.H., Plaintiff/Appellant,

vs.

CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE,
Defendant/Respondent.

REPLY BRIEF OF APPELLANT

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ABBREVIATED REFERENCES

Consistent with prior briefing, references to the parties remain as follows: Plaintiff/Appellant will be referred to as “M.H.”; Defendant/Respondent Corporation of the Catholic Archbishop of Seattle will be referred to as the “Archdiocese”; and Father Edmund Boyle will be referred to as “Father Boyle.”

OVERVIEW

This appeal addresses the scope of liability for defendants in negligence actions that arise from childhood sexual abuse. Set against the backdrop of Washington’s scant and evolving case law, the Archdiocese endorses a narrow application of current authority, while M.H. argues that the reality of how sex abuse crimes are conceived and perpetrated, together with compelling public policy concerns, requires a more expansive interpretation.

The Archdiocese argues the trial court committed no error when it dismissed M.H.’s negligence claim pursuant to a CR 12(c) motion and denied that Father Boyle’s actions to promote and facilitate her sexual abuse by another subjected the Archdiocese to any liability. (Archdiocese Br., at 1). Specifically, the Archdiocese maintains that the court acted properly in resolving the issues presented as matters of law, namely, in ruling that (1) the lack of a provable link between the Archdiocese and

M.H.'s unnamed molester foreclosed the existence of a special relationship and an attendant duty of care; (2) the harm M.H. suffered was not foreseeable; and (3) the Archdiocese's actions or inactions were not the legal cause of her abuse. (Archdiocese Br., at 1). In its ruling, the trial court erred in finding all inferences in the Archdiocese's favor.

Based on Father Boyle's long history of sexually abusing, exploiting and endangering children, the Archdiocese had extensive knowledge the he posed a severe risk to children. Instead of protecting children from the danger it knew Father Boyle presented, the Archdiocese allowed him to be around vulnerable, unsuspecting children like M.H. Because reasonable minds could differ and a reasonable jury could find that the harm M.H. suffered was foreseeable and the Archdiocese's actions or inactions were the legal cause of her abuse, this court, after engaging in de novo review, should reverse the order granting judgment on the pleadings and remand this matter for further proceedings in the trial court.

ASSIGNMENT OF ERROR AND ISSUES PRESENTED

1. The trial court erred when it granted the Archdiocese's CR 12(c) motion dismissing M.H.'s negligence claim because she has offered sufficient, specific evidence to support a claim upon which relief may be granted.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR:

- (a) Did the Archdiocese owe a duty of to protect M.H. from reasonably foreseeable harm by virtue of the existence of a “special relationship”?
- (b) Was it foreseeable to the Archdiocese that Father Boyle would endanger M.H. and enable her sexual abuse by a fellow pedophile?
- (c) Were the actions or inaction of the Archdiocese the legal cause of M.H.’s abuse?

REPLY TO SPECIFIC ARGUMENTS OF RESPONDENT

A. The Archdiocese Owed M.H. a Duty of Reasonable Care.

The Archdiocese argues that the lack of a connection between it and the unnamed molester who sexually abused M.H. precludes the existence of a duty owed to M.H. (Archdiocese Br., at 4-5). However, M.H. contends that it is the special relationship between the Archdiocese and its employee and agent, Father Boyle, together with the Archdiocese’s prior knowledge of his extensive history of sexually abusing multiple children, that is dispositive of the existence of a duty of care.

In its landmark 1999 en banc decision, the Washington Supreme Court broadly construed RCW 4.16.340, which pertains to civil claims based on childhood sexual abuse, to encompass causes of action for negligence against parties who did not themselves directly perpetrate acts of childhood abuse, but who allegedly failed to protect child victims or to

otherwise prevent the abuse. C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wash.2d 699, 722-24, 985 P.2d 262 (1999). The court held that churches and other religious organizations are subject to the same duties of reasonable care as would be imposed on any person or entity in selecting and supervising their workers or protecting vulnerable persons within their custody, so as to prevent reasonably foreseeable harm. Id. at 722. Likewise, when such a protective special relationship exists, the court said, a principal is not free to ignore the risk posed by its agents, place such agents into association with vulnerable persons it would otherwise be required to protect, and then escape liability because the harm was accomplished off premises or after hours. Id. at 724. In its opinion, the C.J.C. court devoted significant discussion to the legislative history and intent of the statute, and concluded that the Legislature intended it be broadly read and applied. Id. at 707-13. The court also observed that the Legislature was concerned with safeguarding children, not protecting the entities who enable their abusers: “Nowhere in RCW 4.16.340 does the Legislature articulate concern for defendants who might be sued. If the Legislature had intended the act to apply exclusively to the perpetrators of the abuse, the statute would have included specific limitations to that effect. It does not do so.” Id. at 713 (emphasis added).

Moreover, the Court said the Legislature's adoption of "findings and intent" as part of its 1991 amendments to RCW 4.16.340 indicated that "its primary concern was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation." Id. at 712. According to the C.J.C. court, not only has the Legislature made clear that the prevention of child abuse is "of the highest priority," the court itself acknowledged that "as a matter of public policy, the protection of children is a high priority," Id. at 727, 722.

Because of its employment of Father Boyle as an associate pastor of the St. James Cathedral parish, the Archdiocese had a special relationship with him. CP 37. Because M.H. and her family were St. James parishioners, involved with the Catholic Church, had an unusually close relationship with Father Boyle, and resided in close proximity to the cathedral where he lived and worked, the Archdiocese had a special relationship with M.H. CP 37. Although the trial court minimized the connection of the abuser to the Archdiocese by describing it as only a "known momentary association with Father Boyle," it was Father Boyle himself who set the stage for M.H.'s abuse and empowered the abuser to perpetrate his crime against her. CP 131. Even if it was only "momentary," a reasonable jury could find that but for that association,

M.H. would never have been sexually abused. The trial court erroneously stripped a jury of its ability to make this finding. Because of the conjunction of the specific facts of this case and the broad scope of RCW 4.16.340, the Archdiocese owed M.H. a duty of reasonable care to protect her from reasonably foreseeable harm.

B. The Sexual Abuse Father Boyle Enabled Against M.H. was Reasonably Foreseeable to the Archdiocese Because it Knew He was a Pedophile with a Long History of Sexually Deviant Behavior.

The Archdiocese argues that the risk of harm to M.H. was unforeseeable because it had no knowledge of or connection with the unnamed molester. (Archdiocese Br., at 5). It selectively chooses to focus on the pedophile who actually committed the sexual abuse of M.H., rather than its employee and agent, Father Boyle, who promoted and facilitated it. Father Boyle conspired with a fellow pedophile known to him and arranged for circumstances that would enable the pedophile to have unfettered access to a vulnerable little girl of age 4 or 5. CP 38.

In approximately 1960, during the period when Father Boyle was sexually molesting M.H.'s brothers, he invited the abuser and another man and woman to participate in a picnic with M.H.'s family, which the priest had planned and organized to be held at Seward Park. CP 38. Father Boyle brought the three individuals to M.H.'s home and introduced them

to her and her family. CP 38. He vouched for the character of the abuser and the other man when he assured M.H.'s mother that it would be a good idea for them to drive M.H. and her older brother to Seward Park, and to stop along the way ostensibly to pick up supplies for the picnic. CP 38.

Although very young at the time, M.H. believed that based on their affiliation with Father Boyle, her abuser and the other man were involved with the church in some way. CP 38.

They drove M.H. and her brother to an apartment building very close to St. James Cathedral, where, over M.H.'s crying and protests, her abuser ordered her to comply, separated her from her brother, took her inside to an apartment, and sexually abused her on a kitchen table. CP 38. The abuser gave M.H. paper and pencils to play with while he sexually abused her, and she could see the cathedral out the apartment window as he did so. CP 38.

At the picnic afterward, M.H. told her mother about the abuse. CP 38. That evening, her mother had her tell Father Boyle. CP 38. He acted very upset, and assured her that he would never let anyone do anything like that to her again. CP 38 (emphasis added). Although Father Boyle appeared to comfort M.H., he also instructed her that she must never tell anyone else about the sexual abuse. CP 38-39. They prayed together and he told her that she was special to him and that he would look after her.

CP 39. At the time, M.H. looked up to Father Boyle as a father figure and a well-respected Catholic priest who was to be trusted and obeyed. CP 39. He did not report M.H.'s abuse to the authorities. CP 39. M.H. did not talk again about her sexual abuse until November 2006, when she disclosed to it to Father Alexander J. Brunett, Archbishop of the Seattle Archdiocese, who came to her home with an associate to apologize to M.H. for Father Boyle's actions. CP 39.

In order to establish foreseeability, the harm sustained must be reasonably perceived as within the general field of danger covered by the defendant's specific duty. Shepard v. Mielke, 75 Wn.App. 201, 206, 877 P.2d 220 (1994) (citing Hansen v. Friend, 118 Wash.2d 476, 483-84, 824 P.2d 483 (1992)). The scope of liability extends to foreseeable results from unforeseeable causes; it is not necessary to foresee the exact manner in which the injury may be sustained. King v. City of Seattle, 84 Wn.2d 239, 248, 525 P.2d 228 (1974). Foreseeability is normally a question of fact for a jury, unless the circumstances of the injury "are so highly extraordinary or improbably as to be wholly beyond the range of expectability." Shepard at 206, (quoting McLeod v. Grant Cy. Sch. Dist. 128, 42 Wash.2d 316, 323, 255 P.2d 360 (1953)).

The harm done to M.H. was not the result of a random act of sexual violence. It was part of an ongoing course of conduct in which

Father Boyle used his position as a parish priest to befriend M.H.'s mother so he could sexually molest her children and subject them to sexual molestation. Father Boyle initiated the contact between M.H. and her abuser and actively promoted and facilitated her abuse. Father Boyle brought his fellow pedophile into M.H.'s family circle and enabled him to sexually abuse her. CP 38.

In ruling that there was a lack of reasonable foreseeability, the trial court seemingly ignored the Archdiocese's knowledge of Father Boyle's extensive history of sexually abusing minors and placing young children directly in harm's way. Based on Father Boyle's long, documented history of harming young children, it was reasonably foreseeable that he would subject other young children to injury. The Archdiocese disregarded Father Boyle's past predatory behavior as a pedophile, including the fact that he had repeatedly reoffended and demonstrated he could not be trusted with young children. Fully aware of the danger and risks to children posed by Father Boyle, the Archdiocese still allowed him to gain access to M.H. and her family. A jury, not the trial court, should be allowed to decide whether the sexual abused suffered by M.H. was within the foreseeable zone of danger.

C. **The Archdiocese's Failure to Affirmatively Act to Isolate Father Boyle From Children and to Report Him to Authorities Was the Legal Cause of Harm to M.H.**

The Archdiocese argues that it owed no duty to M.H., but even if the court finds the existence of a duty, dismissal of M.H.'s negligence claim was still proper because the Archdiocese was not the legal cause of any harm to her (Archdiocese Br., 11). It grounds the lack of causation in the absence of any provable link between the abuser and the Archdiocese, and argues that public policy requires it not be held liable for the abuser's actions because any connection between the Archdiocese and the abuser is so remote that the imposition of liability would be unjust. (Archdiocese Br., 11-12). Likewise, it contends that extending liability for M.H.'s injuries violates fundamental fairness because that would be to find the Archdiocese as an insurer against intentional wrongs committed by an unknown individual who was not an agent of the Archdiocese and over whom it had no control. (Archdiocese Br., 12).

The inquiry into determining legal causation involves "mixed considerations of logic, common sense, justice, policy, and precedent." Keates v. City of Vancouver, 73 Wn.App. 257, 265, 869 P.2d 88, review denied, 124 Wn.2d 1026, 883 P.2d 327 (1994) (omitting cases cited to and quoted). It is both logical and fair to acknowledge that the Archdiocese's actions and inaction allowed Father Boyle to ingratiate himself with

M.H.'s mother and family, which was a proximate cause of M.H.'s abuse. It is not an attenuated possibility that a pedophile priest with a long history of sexual deviancy would facilitate the sexual abuse of a child, even if he himself didn't commit the actual abuse. By allowing Father Boyle access to children in the St. James Cathedral parish and failing to isolate him from minors, the Archdiocese violated its duty to protect vulnerable persons in its custody, such as M.H., from reasonably foreseeable harm. C.J.C. at 722.

Likewise, policy considerations favor the extension of liability to the Archdiocese because the Washington Legislature and Supreme Court have both acknowledged that keeping children safe from sexual abuse is a matter of priority. Id. at 722, 727. Given the Archdiocese's knowledge of Father Boyle's past actions as a pedophile and his propensity to sexually abuse and exploit minors, especially when viewed through the lens of the Washington Legislature's explicit intent to protect children from such acts, a reasonable jury could find that the Archdiocese's lack of supervision and control over Father Boyle was the legal cause of M.H.'s sexual abuse.

After engaging in de novo review in which the facts, as well as hypothetical facts consistent therewith, are considered in a light most favorable to M.H., this Court should reverse the trial court's grant of the

Archdiocese's CR 12(c) motion for judgment on the pleadings and the dismissal of M.H.'s claim for negligence.

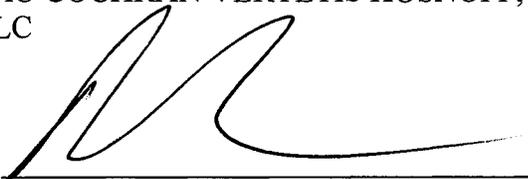
CONCLUSION

For the above reasons, as well as those discussed in Appellant's opening brief, this Court should reverse the trial court's dismissal of M.H.'s negligence claim and remand this case for further proceedings in the trial court.

RESPECTULLY SUBMITTED this 6th day of July, 2010

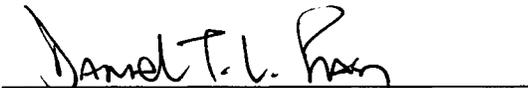
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CERTIFICATE OF SERVICE

I, Bernadette Lovell, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Pfau Cochran Vertetis Kosnoff, PLLC.701 Fifth Avenue, Suite 4730, Seattle, WA 98104, attorneys for plaintiff/respondent.

C. On July 6, 2010, I caused a copy *Appellant's Reply Brief* to be served upon the following via Faxed Mailed Hand-Delivered Legal Messenger.

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