STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

95 FEB -7 AM 10: 33

BY

HENN. DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

95-02183

vs.

SUMMONS

ROBERT KPOUN, Personally, and
THE CATHOLIC ARCHDIOCESE of ST. PAUL
and MINNEAPOLIS,

Defendants.

[redacted]

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANT

YOUR ARE HEREBY SUMMONED and required to answer the complaint of the Plaintiff in the above-entitled action, a copy of which is hereto attached and herewith served upon you, and to serve a copy of your Answer to said Complaint of the undersigned subscribers at their office as hereinbefore set forth in the City of Minneapolis, County of Hennepin, State of Minnesota, within twenty (20) days after the service of this Complaint upon you, exclusive of the day of such service; and if you fail to answer to the said Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

RAPOPORT, WYLDE, & DeSMIDT

BRIAN BENNETT HULING
3001 Hennepin Avenue South
Suite 309B
Minneapolis, MN 55408
(612) 825-2331
Attorney Reg. No. 193653
Attorney for Plaintiff

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

95 FEB -7 AM 10: 33

HENN CO DISTRICT COURT ADMINISTRATOR

DEPUTY

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

95-02183

[redacted]

Plaintiff,

vs.

ROBERT KPOUN, Personally, and
THE CATHOLIC ARCHDIOCESE of ST. PAUL
and MINNEAPOLIS,

Defendants.

COMPLAINT

Plaintiff, for his cause of action states and alleges the following:

PARTIES

1. [redacted] a resident of Hennepin County Minnesota, at all times relevant hereto, was a minor, and a member of St. Kevins Catholic Church, Richfield, Minnesota.

2. At all times relevant hereto, Robert Kpoun, Defendant herein, hereinafter referred to as "the Priest", was an ordained Catholic priest and assigned priest at St. Kevins Catholic Church, Richfield, Hennepin County, Minnesota. On information and belief he is now a Catholic Priest in New Prague, Minnesota.

3. At all times relevant hereto that the Catholic Archdiocese of St. Paul, Minnesota was and continues to be a non-profit organization which directed and supervised Defendant Priest and

did control Defendant Priest.

FACTS

1. From approximately 1966 through 1969, Plaintiff and his family were members of the parish known as St. Kevins Catholic Church, Richfield, Hennepin County, Minnesota.

2. Through his membership and his participation in the Parish of St. Kevins Church, and through his work as an altar boy, and as a student at St. Kevins elementary school, Plaintiff came to know, admire, trust, revere and respect Defendant Priest.

3. During the period of 1966 through 1969, at locations in Hennepin County and Sterns County Minnesota, Defendant Priest seduced, and persuaded and forced the minor Plaintiff to engage in penetrative sexual contact on a repeated basis.

4. As a direct result of the sexual abuse by the Defendant Priest, Plaintiff has suffered and will continue to suffer severe and permanent emotional distress, embarrassment, loss of self esteem, disgrace, humiliation, loss of the enjoyment of life, caused emotional problems resulting in Plaintiff's divorce, emotional problems preventing Plaintiff from having a stable relationship with females, and is prevented and will continue to be prevented from performing his normal daily activities and obtaining the full enjoyment of love and life; Plaintiff has also suffered and will continue to incur expenses for medical and

psychological treatment, therapy and counseling.

5. That during all relevant times hereto, Defendant Church, on information and belief, did know or should have reasonably known that Defendant Priest was engaging in sexual exploitation of Plaintiff.

COUNT I

Plaintiff incorporates paragraphs one through five of this complaint as if fully set forth herein.

6. From 1966 through 1969, Defendant Priest, used his position of trust and authority as a Roman Catholic Priest and inflicted harmful offensive sexual contact/battery upon the Plaintiff when Plaintiff was a minor.

7. As a direct and proximate cause Defendant Priest's illegal conduct, Plaintiff has suffered and will continue to suffer damages as previously described herein.

COUNT II

Plaintiff incorporates paragraphs one through seven of the complaint as if fully set forth herein.

8. At all times relevant hereto Defendant Priest was employed as a Roman Catholic Priest by Defendant Archdiocese and

was under Defendant Archdiocese direct supervision and control when said Defendant Priest committed the wrongful and negligent acts as alleged herein. Defendant Archdiocese is therefore liable for the wrongful conduct of Defendant Priest under the doctrine of the respondent superior.

COUNT III

Plaintiff incorporated paragraphs one through eight of the complaint as if fully set forth herein:

9. Defendant Archdiocese by and through its agents knew or should have reasonably known of Defendant Priest's dangerous exploitative tendencies as a child sexual abuser and/or an unfit agent, and despite such knowledge, Defendant Archdiocese negligently hired and/or continued to employee Defendant Priest in a position of trust and authority as a Priest where he was able to commit wrongful and negligent acts against Plaintiff. Defendant Archdiocese further failed to provide reasonable supervision of Defendant Priest and failed to provide adequate warning to Plaintiff.

10. As a direct and proximate cause of Defendant Archdiocese's negligent conduct, Plaintiff has suffered injuries and damages previously described herein.

WHEREFORE, Plaintiff demands judgment against Defendants individually, jointly and separately in an amount in excess of $50,000.00, plus costs disbursements and what other relief the court deems just.

Respectfully submitted,

RAPOPORT, WYLDE &DeSMIDT

6/23/94
Date

BRIAN BENNETT HULING
3001 Hennepin Avenue South
Suite 309B
Minneapolis, MN 55408
(612) 825-2331
Attorney Reg. No. 193653
Attorney for Plaintiff

CERTIFICATION PURSUANT TO MINN. STAT. SECT. 549.21

The parties acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties if the party or attorney against whom the costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith, assserted a claim or defense that is frivilous and is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the Court. An award under Minn. Stat. { 549.21 shall be without prejudice and as an alternative to any claim for sanction that may be asserted under the rules of civil procedure. Nothing herein shall authorize the award of costs, disbursement, or fees against a party or attorney advancing a claim or defense unwarranted under existing law if it supported by a good faith argument for extension, modification, or reversal of the existing law.

6/23/94

Brian Bennett Huling

VERIFICATION

The undersigned is the Plaintiff and the annexed complaint. The undersigned has had an opportunity to read the entire complaint and further states that the information contained in said complaint is true to the best of the undersigned belief and knowledge and for those things that are based on an information and belief it is the undersigned information of belief that those things are also true to the best of the undersigned knowledge.

6/22/94
DATE

[redacted]

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

ROBERT KPOUN, personally, and
THE CATHOLIC ARCHDIOCESE of ST. PAUL
and MINNEAPOLIS,

Defendants.

95-02183

NOTICE AND ACKNOWLEDGMENT OF SERVICE BY MAIL

TO: FATHER ROBERT KPOUN, R.R. 1, Box 218, New Prague, MN 56071 and ARCHBISHOP JOHN ROACH, Chancery, 226 Summit Avenue, St. Paul, MN 55102:

The enclosed Summons and Complaint are served pursuant to Rule 4.05 of the Minnesota Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

Signing this Acknowledgment of Service is only an admission that you have received the Summons and Complaint, and does not waive any other defenses.

You must sign and date the Acknowledgment. If you are served on behalf of a corporation, unincorporated association (including partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being

served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the Complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint was mailed on June 23, 1994.

RAPOPORT, WILDE & DESMIDT

BRIAN BENNET HULING
Attorney for Plaintiff
Calhoun Square, Suite 309B
3001 Hennepin Avenue South
Minneapolis, MN 55408
(612) 825-2331
Attorney ID No. 193653

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND PETITION

I declare, under penalty of perjury, that I received a copy of the Summons and Complaint in the above-captioned matter at R.R. 1, Box 218, New Prague, Minnesota 56071.

Dated: 8/12/94

FATHER ROBERT KPOUN

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

ROBERT KPOUN, personally, and
THE CATHOLIC ARCHDIOCESE of ST. PAUL
and MINNEAPOLIS,

Defendants.

95-02183

NOTICE AND ACKNOWLEDGMENT OF SERVICE BY MAIL

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If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being

Rec'd 6.28.94 BBA

27-CV-95-2183

served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the Complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint was mailed on June 23, 1994.

RAPOPORT, WYLDE & DESMIDT

BRIAN BENNET HULING
Attorney for Plaintiff
Calhoun Square, Suite 309B
3001 Hennepin Avenue South
Minneapolis, MN 55408
(612) 825-2331
Attorney ID No. 193653

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND PETITION

I declare, under penalty of perjury, that I received a copy of the Summons and Complaint in the above-captioned matter at Chancery, 226 Summit Avenue, St. Paul, Minnesota 55102.

Dated: 6/27/94

~~ARCHBISHOP JOHN ROACH~~

William S. Fallon
Chancellor/Secretary
Archdiocese of St Paul Mpls

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Court File No.: PI 95-2183

FILED

MAY 26 1995

DIST. COURT ADMINISTRATOR

DEPUTY

BKWing

[redacted]

Plaintiff,

v.

Robert Kapoun, Personally, and
The Catholic Archdiocese of
St. Paul and Minneapolis,

Defendants.

AFFIDAVIT OF DAVID S. BURLESON

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

David S. Burleson, first being duly sworn on oath, deposes and states as follows:

1. I am one of the attorneys representing Plaintiff in the above captioned action and I make this Affidavit in support of Plaintiff's Opposition to The Archdiocese of St. Paul and Minneapolis' Motion for Summary Judgment.

2. Attached hereto as **Exhibit 1** is a true and correct copy of portions of Robert Kapoun's deposition, taken on July 25, 1989.

3. Attached hereto as **Exhibit 2** is a true and correct copy of portions of [redacted] deposition, taken on March 17, 1995.

4. Attached hereto as **Exhibit 3** is a true and correct copy of portions of Robert Kapoun's deposition, taken on March 7, 1995.

43775

5. Attached hereto as **Exhibit 4** is a true and correct copy of Plaintiff's Complaint.

6. Attached hereto as **Exhibit 5** is a true and correct copy of Plaintiff's Answers to Interrogatories dated September 25, 1994.

7. Attached hereto as **Exhibit 6** are true and correct copies of letters from the Servants of the Paracletes to Diocese of Fall River regarding James Porter.

8. Attached hereto as **Exhibit 7** is a true and correct copy of Defendant Kapoun's Answer to Interrogatories, No. 13.

9. Attached hereto as **Exhibit 8** is a true and correct copy of portions of Monsignor Srnec's deposition, taken on July 7, 1989.

10. Attached hereto as **Exhibit 9** is a true and correct copy of the Affidavit of Rev. Thomas P. Doyle, O.P.

11. Attached hereto as **Exhibit 10** is a true and correct copy of the Affidavit of [redacted]

12. Attached hereto as **Exhibit 11** are true and correct copies of Transcripts of Legislative Proceedings, Hearings on Senate File No. 315, 2-17-89.

13. Attached hereto as **Exhibit 12** are true and correct copies of Transcripts of Legislative Proceedings, Hearings on Senate File No. 315, 2-20-89

14. Attached hereto as **Exhibit 13** are true and correct copies of Transcripts of Legislative Proceedings, House Judiciary Committee, 2-28-89.

15. Attached hereto as **Exhibit 14** is a true and correct copy of C.S.B. v. Albert C. Magnuson, et al, File No. PI-93-20685, November 4, 1994 (Decision of the Honorable Gary Larson, Fourth Judicial District).

43775

16. Attached hereto as **Exhibit 15** is a true and correct copy of O.D.A. v. Magnuson, et al, File No. 92-003468, Fourth Judicial District, November 10, 1993 (Decision of the Honorable Richard B. Solum, Amended Findings of Fact and Conclusions of Law, and Order for Judgment).

17. Attached hereto as **Exhibit 16** is a true and correct copy of Jane CC Doe v. Elk River Assembly of God Church, File No. 91-21073, Fourth Judicial District, October 12, 1993 (Decision of the Honorable Stephen D. Swanson, 'Rulings on Motions').

18. Attached hereto as **Exhibit 17** is a true and correct copy of the Affidavit of [redacted]

19. Attached hereto as **Exhibit 18** is a true and correct copy of the 1991 Minn. Laws, ch. 232, § 5.

20. Attached hereto as **Exhibit 19** is a true and correct copy of James Arndt v. Albert C. Magnuson, et al., File No. 91-23829, Fourth Judicial District, November 1, 1993 (Decision of the Honorable Peter J. Lindberg; Order and Memorandum).

FURTHER YOUR AFFIANT SAITH NAUGHT.

David S. Burleson, Esq.

Subscribed and sworn to before me this
26th day of May, 1995.

Notary Public

43775

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3

4 - - - - - - - - - - - -

5 D.M.,

6 Plaintiff,

7 vs. File No.

8 FATHER ROBERT KAPOUN, CHURCH OF
ST. RAPHAEL in Crystal, Minnesota,
9 and THE ARCHDIOCESE OF ST. PAUL
AND MINNEAPOLIS,

10

Defendants.

11

12 - - - - - - - - - - - -

13

14 Deposition of FATHER ROBERT KAPOUN, taken

15 pursuant to Notice of Taking Deposition, and taken

16 before Gary W. Hermes, a Notary Public in and for the

17 County of Ramsey, State of Minnesota, on the 25th day

18 of July, 1989, at E-1400 First National Bank St.

19 Paul, Minnesota, commencing at approximately 9:10

20 o'clock a.m.

21

22

23

24 AFFILIATED COURT REPORTERS
743 NORWEST BANK MIDLAND
25 MINNEAPOLIS, MN 338-4348

COPY

1 Q. And his name?

2 A. Alois.

3 Q. A-l-o-i-s?

4 A. Right.

5 Q. Before Good Shepard you were at St. Raphael?

6 A. Yes.

7 Q. And you were assigned to St. Raphael on what date,

8 Father?

9 A. It was the summer of 1971.

10 Q. And you served as associate there?

11 A. Yes.

12 Q. And the pastor was Monsignor Srnec?

13 A. Right.

14 Q. Before St. Raphael?

15 A. St. Kevin's.

16 Q. For how long?

17 A. Four years.

18 Q. Associate?

19 A. Yes.

20 Q. Who was the pastor?

21 A. Father Robert Vashro.

22 Q. Can you spell that?

23 A. V-a-s-h-r-o.

24 Q. Any other associates besides yourself?

25 A. No.

1 Q. Then before that?

2 A. Montgomery, Minnesota, Holy Redeemer.

3 Q. And how long were you at Holy Redeemer?

4 A. 1964 to 1967.

5 Q. So that would have been your first assignment after

6 ordination?

7 A. That's right.

8 Q. Where did you go to seminary?

9 A. Nazareth Hall Seminary.

10 Q. For how many years?

11 A. Two years.

12 Q. And where before that?

13 A. To Cretin High School.

14 Q. And graduated from Cretin then in 19 --

15 A. '56.

16 Q. Where did you grow up?

17 A. St. Paul.

18 Q. Any brothers or sisters?

19 A. One sister.

20 Q. What's her name?

21 A. Delores.

22 Q. Last name?

23 A. Stone.

24 Q. Where does she live?

25 A. Champlin.

1 the way home, had you yourself ever had any
2 homosexual experiences?
3 A. What do you mean by homosexual experiences?
4 Q. Same sex experiences.
5 A. Yes.
6 Q. How many?
7 A. One.
8 Q. When was that?
9 MR. BROWN: Well, I'm going to object on
10 the basis of relevancy. I don't see that that's
11 going to lead to the discovery of any admissible
12 evidence. If you can tell me how, you know, I can --
13 MR. ANDERSON: Well, I think the sexual
14 history, prior acts, be they homosexual or otherwise,
15 is relevant to the whole issue that we're in the
16 process of litigating, Fritz.
17 MR. BROWN: Well, there's no at this point
18 denial that there was some contact.
19 MR. ANDERSON: Well, I will tell you so
20 that you know for the record, that the breadth of the
21 experience reported by Father Kapoun differs in some
22 substance from that that is reported by D.M. While
23 there's some consistency, there's also some lack of
24 agreement on the extent of the actual sexual contact,
25 so it is an issue in this suit.

1 MR. BROWN: Well, I'm going to maintain my
2 objection, except insofar as it might relate to
3 minors.
4 MR. ANDERSON: Well, then I'll lay some
5 foundation on that and see.
6 Q. (By Mr. Anderson) When you had that experience, how
7 old were you?
8 A. Now we're talking about this --
9 Q. Earlier experience that --
10 A. -- earlier experience? Maybe around 30.
11 Q. How old was the other individual?
12 A. Around 17.
13 Q. And you say "around 17." You don't know exactly how
14 old?
15 A. No, I don't.
16 Q. He was not out of high school?
17 A. To the best of my knowledge.
18 Q. Is that the person you've identified in your answers
19 to interrogatories as D.J.?
20 A. Yes.
21 Q. And did that happen on one occasion or more than one?
22 A. One occasion.
23 Q. Now, you say he was around 17. On what do you base
24 that estimate of age?
25 A. I was at St. Kevin's parish and he was in high school

1 at the time.
2 Q. How did you come to know him?
3 A. I taught school there.
4 Q. Was he a student?
5 A. Yes.
6 Q. What grade?
7 A. Eighth when I arrived.
8 Q. And then what contact, sexual contact, if any, did
9 you have with that youth?
10 MR. BROWN: Well, I'm going to object again
11 on relevancy, but I'm not going to instruct him not
12 to answer.
13 MR. ANDERSON: Sure. And you can have a
14 continuing objection on relevancy if you want.
15 MR. BROWN: That's fine.
16 Q. (By Mr. Anderson) What happened with him?
17 A. One evening we were wrestling around before we went
18 to bed and at one point I put my penis to his.
19 Q. In other words, your penis made contact with his
20 penis as you wrestled?
21 A. That's right -- no. This was after wrestling.
22 Q. Were you in bed?
23 A. Yes.
24 Q. Unclothed?
25 A. At the time of contact, yes.

COPY

STATE OF MINNESOTA — IN DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

Robert Kapoun, personally and
the Catholic Archdiocese of
St. Paul and Minneapolis,

Defendant.

Deposition of [redacted] taken pursuant to Notice of Taking Deposition, and taken before Daniel W. McMahon, a Notary Public in and for the County of Hennepin, State of Minnesota, on the 17th day of March, 1995, at the law offices of GISLASON, MARTIN & VARPNESS, 7600 Parklawn Avenue South, Suite 444, Edina, Minnesota 55435, commencing at approximately 9:15 o'clock a.m.

* * * *

can remember that resulted in suspensions, probations, any disciplinary action?

MR. WENDORF: Jim, you're talking about eighth grade now?

MR. MARTIN: Yeah, up through the eighth grade.

A No.
Q Do you remember who your teacher was for the eighth grade?
A It was a male. No. It was a male teacher.
Q Do you remember the name of the principal of the school at the time?
A No.
Q How far did you live from St. Kevin's?
A About two miles.
Q How did you get to and from school?
A Bus.
Q Now, how is it that you went to Cretin High School in the first place?
A Father Kapoun. I believe he went through Cretin.
Q Tell me what the connection is between him going to Cretin and the fact that you went there.
A Well, my parents were good friends of him and we had cabins next door up in Cold Spring. And they wanted me to become a priest, too. And I believe that he went through Cretin.
Q Did he encourage you to go to Cretin?
A Yes.

1 Q Had you ruled out being a priest at least as early as
2 the eighth grade and never were open to that possibility
3 again?
4 A Yes, at that time.
5 Q And the reason that you ruled it out was because of what
6 had happened between you and Kapoun, right?
7 A Yes.
8 Q When did you first meet Father Kapoun?
9 A I believe that he became a pastor in, or was brought
10 into St. Kevin's sometime in the spring of '67.
11 Q At that time you would have been a sixth grader?
12 A Yes.
13 Q I don't want to put words in your mouth, that's my quick
14 --
15 A Well --
16 Q Take as much time as you want to figure that out. I
17 think we figured out you graduated high school in --
18 A '73.
19 Q '73.
20 A I believe I graduated in '69 from St. Kevin's. So that
21 would be eighth grade. So '69, '68, would be seventh
22 grade, '67 would be sixth grade.
23
24 MR. WENDORF: Figure it out so you know.
25
26 MR. EISENZIMMER: If he graduated in '73, which was
27 12th grade, working backwards it looks to me like he
28 would have been in the seventh grade from '67 to '68.
29
30 MR. WENDORF: I think that's right.

1
2 MR. EISENZIMMER: He said he repeated first grade.
3
4 MR. WENDORF: But --
5
6 Q So the first time you knew Kapoun was when you were a
7 seventh grader?
8 A Sixth grade.
9 Q So you knew him in '66-'67?
10 A In '67, yes.
11 Q Now, you said that he was a friend of your parents, is
12 that correct?
13 A Yes.
14 Q When do you recollect that he was ever in your home for
15 a social visit or for professional reasons?
16 A He was over there on a period of off and on as friends
17 with my parents for a period of years.
18 Q Beginning in what time frame?
19 A '66, '67.
20 Q So they came to know him for the first time because of
21 his assignment to St. Kevin's, is that your
22 understanding?
23 A Yes.
24 Q At that point in time did he have a cabin that was next
25 to yours up at Cold Spring?
26 A We didn't have a cabin up there at that time, he did.
27 Q So that I will have a better understanding of just how
28 close the relationship was, how frequently, as you look
29 back on it, would he actually be at your parent's home
30 beginning in '67 through the time that you got out of

1 high school?
2 A Once or twice a month.
3 Q Now, apart from that was there also interaction between
4 your parents and him up at the lake?
5 A Yes. My parents were friends of his parents.
6 Q When is it that you, your family obtained the cabin at
7 Cold Spring?
8 A After the first summer I was up there with him at his
9 cabin. The following summer I believe that they started
10 building a cabin. And it was built in roughly '68.
11 Q When you say the first summer that you were up there at
12 his cabin, do you mean the summer between your sixth and
13 seventh grades?
14 A Yes.
15 Q Now, did your parents know his parents before '66-'67?
16 A No.
17 Q So starting in the summer of '67-'68 your folks began
18 building the cabin?
19 A Yes, they had it built.
20 Q And then after that there would be weekend trips up to
21 the lake?
22 A Yes.
23 Q And on those trips would Father Kapoun often be at your
24 folks' cabin and they at his?
25 A Yes.
26 Q How frequently, for instance, talking now the summers
27 beginning in the year '69 through the time you
28 graduated, how frequently would there be that kind of
29 interaction?
30 A Actually, my parents were up at the cabin every weekend.

1 Q Can you be more specific in terms of which month it was?
2 A I would probably say July, August.
3 Q Where did the incident that you have in mind take place?
4 A At my parent's house.
5 Q Where in your parent's house?
6 A In my bed.
7 Q What time of the day in July did it occur?
8 A At night.
9 Q What day of the week?
10 A Middle of the week. I really couldn't tell you that.
11 Q Who was in the house at the time of this incident?
12 A My mom and dad.
13 Q Where were they at the time?
14 A Sleeping.
15 Q Describe what happened.
16 A Well, my parents and him had a pretty good relationship
17 and he was, according to them, like an older brother for
18 me. So he would spend evenings, more than one, at our
19 house. And the first incident is we were sleeping
20 together and he was touching me and feeling me.
21 Q Had you slept with him before that incident occurred
22 when nothing happened that you know about?
23 A No.
24 Q So the time that you are now describing was also the
25 first time that he was ever in your bed with you?
26 A Yes.
27 Q How old was he at that time?
28 A Forty, 38.
29 Q How many times had you ever had any kind of contacts
30 with him at all before this incident in July of '67? In

1 other words, times when you saw him because he was just
2 visiting, times when you were at mass serving and he was
3 the priest, or any kind of contact?
4 A A lot. Quite a few. Because I was an alter boy and we
5 would do funerals and church participation.
6 Q Is it correct up until the time of the incident that you
7 are describing right now there hadn't been any conduct
8 on his part that you felt was inappropriate or out of
9 line?
10 A No.
11 Q Now, at the time that you are describing, I guess it
12 sounds like it's in the middle of the night?
13 A Yes.
14 Q Exactly what is it that he did?
15 A Ejaculated me and him.
16 Q Had you ever had the experience of an erection and
17 ejaculation before that time?
18 A No.
19 Q Did he touch your genitals?
20 A Yes.
21 Q Did he cause your penis to become erect?
22 A Yes.
23 Q And then you had an ejaculation?
24 A Yes.
25 Q Did he himself become aroused, do you know?
26 A Yes.
27 Q How do you know that?
28 A Just his breathing, his sweating.
29 Q Did you touch his genitals?
30 A Yes.

1 Q In connection with that incident?
2 A No.
3 Q At the time that it occurred, how did you feel?
4 A Guilty, dirty, ashamed.
5 Q Did you know what masturbation was as of that time?
6 A No.
7 Q Did your attitude towards him change after that incident
8 occurred?
9 A No.
10 Q What was your attitude before the incident?
11 A Oh, as far as life or --
12 Q Anything.
13 A Had a good attitude.
14 Q Well, did you like him is what I'm getting at, for
15 example?
16 A Yes, I did like him.
17 Q What did you like about him?
18 A We use to water-ski and go to the movies. And I liked
19 to water-ski and go to the movies and stuff.
20 Q Did you ever go to him before this incident had occurred
21 to get spiritual help of any kind that you can remember?
22 A I confessed my sins to him, yes.
23 Q Did you ever go to him with any complaints about things
24 going on in your home, your mom treating you the way she
25 was?
26 A No.
27 Q Did you ever go to him because of any problems you were
28 having with your friends?
29 A No.
30 Q Did you ever seek him out for any help with school work

1 Q In terms of anything more specific than that, you
2 wouldn't be able to say it was later in July or sometime
3 in August, is that right?
4 A No.
5 Q But you're positive there was another episode before the
6 start of your seventh grade?
7 A Between the seventh and the eighth grades. To the best
8 of my knowledge that I can recall. Between the period
9 of time frame.
10 Q Well, I think we are working on the premises that the
11 first incident occurred in 1967, July of '67, right?
12 A Right.
13 Q And at that time you are between your sixth and seventh
14 grade years?
15 A Yes.
16 Q Okay. And so my question was are you reasonably sure
17 that the second episode occurred before you had actually
18 started the seventh grade?
19 A Yes.
20 Q Okay. Where did it occur?
21 A At my parent's house. At my parent's house. He was
22 spending a night there on occasions one night a week or
23 one every two weeks.
24 Q What happened on the occasion of the second incident?
25 A It was about the same thing as the first.
26 Q Everything is the same?
27 A Yes. We ejaculated.
28 Q At the time of the second incident, do you remember
29 being awakened by Father Kapoun? Do you remember
30 anything at all about the moments just before the

1 touching started?
2 A Yeah. Just I was scared. Because this was the second
3 time, I still didn't know whether this was normal or
4 right.
5 Q Were you still feeling dirty at that point?
6 A Yes. It felt good when he did it. But after you felt
7 kind of dirty or used.
8 Q Were you still having feelings of guilt as of the time
9 of the second incident?
10 A Yeah.
11 Q Then you said that, I assume you didn't feel fear or you
12 weren't scared before the first incident because you
13 didn't, you didn't have a history of it happening
14 before, you didn't know what was coming, is that right?
15 A Right.
16 Q On the occasion of the second incident, as he started to
17 do something you became scared?
18 A Yes.
19 Q Because you had the benefit now of a prior episode and
20 you knew what was coming?
21 A Right.
22 Q Did you say anything to him in the way of don't want to
23 do this, this isn't right? Do you remember saying
24 anything?
25 A No.
26 Q So was there mutual touching of the genitals on this
27 occasion?
28
29 MR. WENDORF: Object to the form of the question as
30 ambiguous as to mutual.

1
2 Q Okay. Did he touch your genitals?
3 A Yes.
4 Q Did he cause you to have an erection and ejaculation?
5 A Yes.
6 Q Did you touch his genitals?
7 A Yes.
8 Q Did he have an erection and ejaculation?
9 A Yes.
10 Q Was there any words said in connection with that?
11 A No.
12 Q Did he say to you, no, this is perfectly okay, this is
13 natural, this is the way men are suppose to react with
14 each other, anything like that?
15 A Not that I can recall.
16 Q Do you recall on either of those two episodes that he
17 had been drinking?
18 A Yes.
19 Q Tell me what you remember about that.
20 A My parents had him over and they were all having a few
21 cocktails, few drinks.
22 Q Do you now say that he was drunk at the time? Or would
23 you say you don't know one way or the other?
24 A I don't know one way or the other.
25 Q The same duration of time that was described before?
26 A Yes.
27 Q Was there any other episode like that before you started
28 the seventh grade?
29 A There was. On occasions we use to go up to his cabin
30 for water-skiing throughout that summer. And I would

1 spend in the middle of the week. And spend one night up
2 there a week with him.
3 Q These incidents that occurred then at the cabin, again
4 are we still during the summer of 1967 before you became
5 a seventh grader?
6 A Yes.
7 Q And you have a clear memory of that, do you?
8 A Because he fell down water-skiing and he, as I recall,
9 he did something to is back. Water-skiing behind his
10 pontoon that they had up at the cabin and he, I believe
11 he did have an operation that fall or later sometime.
12 Q My purpose in asking the question is, and I want to be
13 certain that we are in the right time frame here, are
14 you certain that the very first episode of sexual abuse
15 occurred at your parent's home in Minneapolis during
16 July of 1967?
17 A No, I couldn't swear to that.
18 Q Well, you did a little while ago. So now we got to go
19 back. I asked you to describe the very first incident
20 and you said it was approximately July of 1967.
21 A I said it was in the summer.
22 Q Well, I thought we pushed it further and that you came
23 up with July. If I, if that's not right, then I want to
24 hear about it.
25 A Sometime in the summer. I could not tell you an exact
26 day or month to be exact.
27 Q Are you sure, whenever it occurred, that Father Kapoun
28 was then working at St. Kevin's church?
29 A Yes.
30 Q And do you know for sure whether your parents knew

1 Kapoun before he started working at St. Kevin's?
2 A No, they did not.
3 Q So you're sure the only time that they ever knew him for
4 the first time was after he started working at St.
5 Kevin's?
6 A Yes. As far as the exact month, date, I could not tell
7 you that.
8 Q Okay. And I can understand that. But I want to now
9 make certain that I heard you right. This first
10 episode, whether it occurred in June, July or August of
11 '67, did occur at your home in Minneapolis, is that
12 correct?
13 A That's correct.
14 Q No question in your mind about that, right?
15 A Right.
16 Q And every time you have been asked that question by
17 anybody your answer has been that the first abuse
18 episode occurred in the Minneapolis home in the summer
19 of '67?
20 A Right.
21 Q And the second episode occurred in the same time frame
22 and at the very same place, is that also true?
23 A Yes.
24 Q Now, this is before you have ever gone up to the cabin
25 and had anything happen to you at the cabin?
26 A Yes.
27 Q Now, the first time that you were at the cabin when he
28 did anything sexual to you was when?
29 A Probably the third time up there.
30 Q Did that incident on the occasion of your third visit to

1 the cabin, would that be the third separate incident of
2 sexual abuse?
3 A Yes.
4 Q And again we won't hold you to whether it was June, July
5 or August, but it definitely followed after the other
6 episodes that had already taken place in your bed in
7 your home in Minneapolis?
8 A Yes.
9 Q What was the third episode? Where did it occur?
10 A At his cabin.
11 Q Where at his cabin?
12 A Cold Spring.
13 Q Where within --
14 A In his bedroom.
15 Q Who was present?
16 A Nobody.
17 Q Describe what happened.
18 A We went water-skiing that day and then towards the end
19 of the day we went to bed. We had oral sex.
20 Ejaculated. He laid on top of me, testicles touched.
21 Q When you say that you had oral sex, did you put his
22 penis into your mouth or did he put his penis into your
23 mouth?
24 A For a brief moment, yes. Anal sex, too.
25 Q Did he put your penis into his mouth?
26 A Just for a brief moment, yes.
27 Q Did he ejaculate while his penis was in your mouth?
28 A No, he didn't.
29 Q Did he have an erection?
30 A Yes.

1 Q Did you ejaculate in his mouth?
2 A I believe so, yes.
3 Q How long did these events take?
4 A Probably an hour.
5 Q Did you realize sometime during the day that he would
6 attempt to do some of the same sorts of things that he
7 had done in Minneapolis?
8 A No.
9 Q Had you and he had any discussions ever up until that
10 time about what had gone on in Minneapolis?
11 A No.
12 Q Had you talked about it with anybody else?
13 A No.
14 Q Had any of your friends described to you any conduct of
15 Kapoun that they thought was weird or strange?
16 A Yes.
17 Q Who had talked to you about that?
18 A [redacted]
19 Q When did [redacted] talk to you about Kapoun doing
20 something strange or weird?
21 A [redacted] asked me if --
22 Q No, I asked when.
23 A When. Roughly the eighth grade. Eighth grade.
24 Q Well, we are still between your sixth and seventh grade
25 in terms of our discussions here. So up until that time
26 is what I was asking. Had you had any discussions with
27 any of your friends about Kapoun being weird or doing
28 bad things?
29 A [redacted] knew that we had a cabin next to him, he asked
30 me if he had ever molested me. [redacted] thought he was gay.

MR. WENDORF: Do you understand the question? He is asking you prior to the first incident, I think he is asking prior to the first incident at the cabin had anybody talked to you about Kapoun?

A No.

Q The conversation you are telling me about occurred for the first time when you were in eighth grade?

A Right.

Q As long as you brought it up, we'll just cover it right now. [redacted] asked you whether Kapoun had ever done anything to you?

A Yes.

Q What did you say?

A No.

Q Why did you say no?

A Because it was shameful, or didn't want to feel guilty or be labeled as a gay or queer.

Q Did [redacted] imply to you that he, [redacted] believed that Kapoun probably had done something to you?

A No.

Q Was that the first time that you had ever spoken to [redacted] about the possibility that Kapoun was a homosexual?

A Yes.

Q So you would deny that the subject of whether he was homo or gay or queer had not been discussed amongst the guys before then?

A As far as I'm aware.

Q Once that subject came up, though, between you and [redacted]

1 the priesthood?
2 A That's true.
3 Q That was your attitude all the way through high school
4 and beyond, is that right?
5 A Yes.
6 Q And did you also tell [redacted] that you have had a
7 negative attitude towards the Catholic church ever since
8 the events with Kapoun?
9 A Yes.
10 Q And is the reason for the negtive attitude towards the
11 Catholic church again what Kapoun had done?
12 A Part of it, yes.
13 Q What other reasons did you have a negative attitude
14 towards the church about for other than what Kapoun had
15 done?
16 A That would be the whole thing, yes.
17 Q Was religion important to you as an elementary school
18 kid?
19 A Yes.
20 Q That would be manifested in the fact that you were an
21 alter boy, for example?
22 A Yes.
23 Q Did you go to Holy Communion and confession on a weekly
24 basis during those days?
25 A Yes.
26 Q Basically, after what Kapoun did did you quit going to
27 Communion?
28 A Yes.
29 Q And quit going to confession?
30 A Yes.

1 Q Is it correct that you didn't like him by the time you
2 got to the eighth grade, which would be after the summer
3 of '68?
4 A Yes.
5 Q And the reason you didn't like him is what he had done
6 to you?
7 A Feeling the guilt and anger towards him.
8 Q For what he had done?
9 A Right.
10 Q And you didn't like him through your high school years
11 for the same reasons?
12 A I never seen him really in my high school years.
13 Probably one of the only times I have seen him.
14 Q What is it that prompted you to bring up his name or the
15 incidents that had occurred when you were counseling
16 with Sporer?
17 A At that particular time in my life I had a mental
18 breakdown and I crawled into Carl Sporers' office and
19 that's the first thing that came out. I don't know why
20 it did but it did.
21 Q Do you remember talking about the fact that your mom had
22 beat you up coming out at the same time?
23 A Probably not really, because I was crying and I was in a
24 full blown state of depression. That's really the first
25 thing that came out.
26 Q Were you experiencing flashbacks about the incidents
27 between you and Father Kapoun when you went to see
28 Sporer?
29 A After it came out, yes.
30 Q But not before?

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3 - - - - - - - - - - - - - - - - - -
S.M.,

4 Plaintiff,

5 vs.

6 ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS,
7 and FATHER ROBERT E. KAPOUN,

8 Defendants.
- - - - - - - - - - - - - - - - - -
9 T.M.,

10 Plaintiff,

11 vs.

12 ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS,
CHURCH OF ST. RAPHAEL in Crystal,
13 Minnesota and FATHER ROBERT E. KAPOUN,

14 Defendants.
- - - - - - - - - - - - - - - - - -
15 D.S.,

16 Plaintiff,

17 vs.

18 ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS,
ST. PATRICK'S CATHOLIC CHURCH,
19 and FATHER ROBERT E. KAPOUN,

20 Defendants.
- - - - - - - - - - - - - - - - - -
21 Deposition of FATHER ROBERT E.
KAPOUN, taken pursuant to Notice, and taken
22 before Gary W. Hermes, a Notary Public in and
for the County of Ramsey, State of Minnesota,
23 on the 7th day of March, 1995, at E-1000 First
National Bank, St. Paul, Minnesota, commencing
24 at approximately 9:00 o'clock a.m.

AFFILIATED COURT REPORTERS
25 741 NORWEST BANK MIDLAND
MINNEAPOLIS, MN 338-4348

COPY

1 Q. And what was the reason for that request?
2 A. It was hard getting along with the pastor.
3 Q. To your knowledge, did it have anything to do
4 with inappropriate relationship to any of the
5 youth in the parish?
6 A. No.
7 Q. During that period of time, did you engage in
8 sexual contact and abuse of [redacted]
9 MR. STOCCO: I'm sorry, I didn't hear
10 the name.
11 MR. ANDERSON: [redacted]
12 A. Yes.
13 Q. (By Mr. Anderson) How old was he?
14 A. He was in -- in high school, approximately,
15 when I was there.
16 Q. In his teens, but you're not certain how old
17 exactly?
18 A. That's right.
19 Q. And you came to know him how?
20 A. As a server.
21 Q. And came to know his family?
22 A. Yes.
23 Q. And brought him to the cabin?
24 A. Yes.
25 Q. Slept in the same bed with him?

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

ROBERT KPOUN, Personally, and
THE CATHOLIC ARCHDIOCESE of ST. PAUL
and MINNEAPOLIS,

Defendants.

COMPLAINT

Plaintiff, for his cause of action states and alleges the following:

PARTIES

1. Plaintiff [redacted] a resident of Hennepin County Minnesota, at all times relevant hereto, was a minor, and a member of St. Kevins Catholic Church, Richfield, Minnesota.

2. At all times relevant hereto, Robert Kpoun, Defendant herein, hereinafter referred to as "the Priest", was an ordained Catholic priest and assigned priest at St. Kevins Catholic Church, Richfield, Hennepin County, Minnesota. On information and belief he is now a Catholic Priest in New Prague, Minnesota.

3. At all times relevant hereto that the Catholic Archdiocese of St. Paul, Minnesota was and continues to be a non-profit organization which directed and supervised Defendant Priest and

did control Defendant Priest.

FACTS

1. From approximately 1966 through 1969, Plaintiff and his family were members of the parish known as St. Kevins Catholic Church, Richfield, Hennepin County, Minnesota.

2. Through his membership and his participation in the Parish of St. Kevins Church, and through his work as an altar boy, and as a student at St. Kevins elementary school, Plaintiff came to know, admire, trust, revere and respect Defendant Priest.

3. During the period of 1966 through 1969, at locations in Hennepin County and Sterns County Minnesota, Defendant Priest seduced, and persuaded and forced the minor Plaintiff to engage in penetrative sexual contact on a repeated basis.

4. As a direct result of the sexual abuse by the Defendant Priest, Plaintiff has suffered and will continue to suffer severe and permanent emotional distress, embarrassment, loss of self esteem, disgrace, humiliation, loss of the enjoyment of life, caused emotional problems resulting in Plaintiff's divorce, emotional problems preventing Plaintiff from having a stable relationship with females, and is prevented and will continue to be prevented from performing his normal daily activities and obtaining the full enjoyment of love and life; Plaintiff has also suffered and will continue to incur expenses for medical and

psychological treatment, therapy and counseling.

5. That during all relevant times hereto, Defendant Church, on information and belief, did know or should have reasonably known that Defendant Priest was engaging in sexual exploitation of Plaintiff.

COUNT I

Plaintiff incorporates paragraphs one through five of this complaint as if fully set forth herein.

6. From 1966 through 1969, Defendant Priest, used his position of trust and authority as a Roman Catholic Priest and inflicted harmful offensive sexual contact/battery upon the Plaintiff when Plaintiff was a minor.

7. As a direct and proximate cause Defendant Priest's illegal conduct, Plaintiff has suffered and will continue to suffer damages as previously described herein.

COUNT II

Plaintiff incorporates paragraphs one through seven of the complaint as if fully set forth herein.

8. At all times relevant hereto Defendant Priest was employed as a Roman Catholic Priest by Defendant Archdiocese and

was under Defendant Archdiocese direct supervision and control when said Defendant Priest committed the wrongful and negligent acts as alleged herein. Defendant Archdiocese is therefore liable for the wrongful conduct of Defendant Priest under the doctrine of the respondent superior.

COUNT III

Plaintiff incorporated paragraphs one through eight of the complaint as if fully set forth herein:

9. Defendant Archdiocese by and through its agents knew or should have reasonably known of Defendant Priest's dangerous exploitative tendencies as a child sexual abuser and/or an unfit agent, and despite such knowledge, Defendant Archdiocese negligently hired and/or continued to employee Defendant Priest in a position of trust and authority as a Priest where he was able to commit wrongful and negligent acts against Plaintiff. Defendant Archdiocese further failed to provide reasonable supervision of Defendant Priest and failed to provide adequate warning to Plaintiff.

10. As a direct and proximate cause of Defendant Archdiocese's negligent conduct, Plaintiff has suffered injuries and damages previously described herein.

WHEREFORE, Plaintiff demands judgment against Defendants individually, jointly and separately in an amount in excess of $50,000.00, plus costs disbursements and what other relief the court deems just.

Respectfully submitted,

RAPOPORT, WYLDE, &DeSMIDT

6/23/94
Date

BRIAN BENNETT HULING
3001 Hennepin Avenue South
Suite 309B
Minneapolis, MN 55408
(612) 825-2331
Attorney Reg. No. 193653
Attorney for Plaintiff

CERTIFICATION PURSUANT TO MINN. STAT. SECT. 549.21

The parties acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties if the party or attorney against whom the costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith, assserted a claim or defense that is frivilous and is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the Court. An award under Minn. Stat. { 549.21 shall be without prejudice and as an alternative to any claim for sanction that may be asserted under the rules of civil procedure. Nothing herein shall authorize the award of costs, disbursement, or fees against a party or attorney advancing a claim or defense unwarranted under existing law if it supported by a good faith argument for extension, modification, or reversal of the existing law.

6/23/94

Brian Bennett Huling

VERIFICATION

The undersigned is the Plaintiff and the annexed complaint. The undersigned has had an opportunity to read the entire complaint and further states that the information contained in said complaint is true to the best of the undersigned belief and knowledge and for those things that are based on an information and belief it is the undersigned information of belief that those things are also true to the best of the undersigned knowledge.

6/22/94
DATE

[redacted]

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

Robert Kapoun, personally and
The Catholic Archdiocese of
St. Paul and Minneapolis,

Defendant.

PLAINTIFF'S ANSWERS TO DEFENDANT'S INTERROGATORIES

Plaintiff for his answers to Defendant's Interrogatories after being duly sworn:

1. State you complete name, age, date of birth, height, weight, present residential address, martial status, and social security number.

[redacted]

2. State your business, occupation, or vocation on the date of the incidents involved herein. Identify the employer and the date you started and terminated such employment.

Answer: Was a minor attending grade school at the time of the sexual abuse.

3. State your current business, occupation, or vocation. Identify your present employer, the date you started this employment, and describe in detail the type of work that you do.

[redacted]

4. Please describe in reasonable detail such incident of sexual contact alleged to have occurred between you and Father Kapoun including:

(a) As accurately as possible, the date of such incident;

(b) Where each incident occurred;

(c) A description of the circumstances or events leading up to each incident;

(d) Whether any physical contact occurred, and if so, a description of same.

Answer: 4A 1966-1969

Answer: 4B Plaintiff's bedroom, [redacted]

Answer: 4C Parent's invited Defendant to stay overnight; Defendant behaved like a sibling.

Answer: 4D Oral and Anal Sex

5. Prior to the incidents described previously herein, did you have any evidence, awareness, knowledge, or suspicion of a propensity or tendency on the part of Father Kapoun to engage in sexual contact with persons of either sex? If so, please describe the basis for your awareness, knowledge, or suspicion, and identify all persons who provided such information to you, or otherwise were a source of said information.

Answer: No

6. Was alcohol or drugs used or consumed by you of Father Kapoun prior to , or in connection with, any of the incidents described previously herein? If so, please describe.

Answer: No

7. Identify all persons with whom you have discussed, either generally or in detail, the sexual incidents involving Father Kapoun previously described herein, from the date of the first incident to the present date, including an approximation of the date and place of each such conversation.

Answer: Carl Spore, Family Counselor, 1992; [redacted] Former Wife; David Kneffilcamp, certified polygraph forensic scientist;

8. Identify all other persons, including the parties to this action, as well as their employees or representatives, whom you claim or allege have or had information from whatever source, that Father Kapoun had made inappropriate sexual contact with any other persons, either before the incidents described by you herein, or after.

Answer: [redacted] was sexually abused by Defendant, [redacted]

9. Please describe the nature and extend of each and every injury you clam to have sustained as a result of the incidents involved herein.

Answer: The sexual abuse caused Plaintiff to have difficulty establishing relationships with females; the abuse caused emotional problems which ultimately led to Plaintiff's divorce; Plaintiff needed family therapy for issues relating to Plaintiff's divorce. Plaintiff's divorce has caused strained relationships with Plaintiff's two (2) children. Plaintiff will supplement information on additional damages.

10. Please indicated and describe any and all permanent injuries you claim you have sustained as a result of the incidents involved herein.

Answer: See answer to Interrogatory number 9. Plaintiff will supplement additional information.

11. Please identify each and every hospital, doctor, psychiatrist, psychologist, counsellor, or other healthcare professional or facility who has examined or treated you for the injuries or damages alleged in the Complaint, including the dates of each examination or treatment, and the inclusive dates of any hospitalization.

Answer: Carl Spore, 1992

12. Please itemize the medical, hospital, and healthcare expense that you claim to have sustained as a result of the

incidents. Please attach copies of all bills or statements to support the claimed medical expenses.

Answer: None

13. If you claim that you have lost any time from work as a result for you injuries, and if you claim that you have suffered wage loss or income loss because of your injuries, please state:

(a) The name and address of your employer;

(b) All dates you were off work;

(c) Your wage rate at that time;

(d) The total amount of wages or income loss claimed by you, and how you compute same.

Answer: For each of A-D None.

14. Set forth the names, addresses, and occupations of any experts that you intend to call as a witness at the time of trial and with respect to each such expert, set forth the following:

(a) A Summary of the opinions and conclusions to which such expert is to testify;

(b) A detailed statement of the factual bases for all such opinions and conclusions;

(c) Whether you have received a written report from such expert and, if so, attach a copy of such report to your answers to these Interrogatories.

Answer: None at this time will supplement.

15. State whether you have been arrested or convicted of any crimes or misdemeanor. If so, state:

(a) The county of each such arrest and conviction;

(b) The date of each such arrest and conviction;

(c) The name under which you were charged;

(d) The nature of the crime of which you were charged or convicted.

Answer: [redacted]

16. At any time prior to the date or dates of the incidents involved herein, had you been treated by a doctor, psychiatrist, psychologist, counsellor, or other healthcare professional or facility? If so:

(a) Identify each doctor, psychiatrist, psychologist, counsellor, or other healthcare professional or facility where you were treated or by whom you were treated;

(b) The nature of the injury, or other reason for the treatment received;

(c) Identify all doctors or healthcare professionals or facilities who have treated you for such aggravated condition.

Answer: No

17. Identify by name, address, and dates of enrollment all schools that you have attended, and also:

(a) Identify by name, address, and grade all teachers you believe that you had in class during each year of school;

(b) Describe all school records or documents you possess or attach copies of all such school records or documents.

Answer: [redacted]

Answer: 17B None

18. List the names, address, and dates of attendance of all churches, synagogues, or places of worship which you have regularly attended, have been a member at, or are a member, and:

(a) Identify the head pastor, priest, rabbi, etc., of each such place of worship'

(b) The time period in which you were a member or regularly attended such place of worship.

Answer: 18 Saint Kevin's Catholic Church, Richfield Minnesota, Father Kapoun, Pastor, worshiped at said church until age 21, [redacted]

19. List all activities (i.e., Sunday school, youth group, altar service, Bible study, religious schooling or training, etc.) in which you have participated at the place identified in Interrogatory No. 18, and identify the church, the date of involvement, the nature of involvement, and the church staff member or volunteer who supervised such activity.

Answer: Altar Boy 5th-8th grade, at St. Kevin's Catholic Church,

volunteer unknown, Richfield Minnesota.

20. Describe in detail all social, religious, or educational contact you ha e had with Father Kapoun:

(a) Prior to any of the alleged incidents or sexual abuse;

(b) During the time period of the alleged sexual abuse;

(c) After the last act of alleged sexual abuse.

Answer: 20A Defendant took Plaintiff to movies, Plaintiff serve mass with Defendant and Defendant was a friend of Plaintiff's family.

Answer: 20B See 20A

Answer: 20C See 20A

21. Describe the nature and extent of religious training and counselling provided by Father Kapoun to Plaintiff, along with dates of such training and counselling.

Answer: Defendant was Plaintiff's parish priest.

22. Identify all schools or community social clubs, service clubs, or athletic organizations in which you participated or were a member from grade school up until the present time.

23. Identify each person that you, your agents, representatives, or attorneys have contacted, or have been contacted by, who have provided information about alleged inappropriate sexual

contact or behavior by Father Kapoun, either before the dates of the incidents involved herein, or since. As to each such person, state the substance of the facts or information obtained.

Answer: None

24. State whether you, your agents, representatives, or attorneys have obtained statements form any person or persons concerning alleged inappropriate sexual contact or behavior on the part of Father Kapoun or relating to any other issues which are the subject of this litigation. If so, please state:

(a) the name of each person form whom a statement has been obtained;

(b) The name of the person obtaining such statement;

(c) The date of such statement;

(d) The name of the person currently having possession of such statement or a copy thereof.

Answer: None

25. Identify all persons that you have reason to believe are sexual abuse victims of Father Kapoun, including:

(a) The last known name, address, and telephone number of each such victim and his/her guardian;

(b) The approximate dates on which each such victim was allegedly abused;

(c) The places at which each such victim was allegedly

abused;

(d) The name and address of each known witness to such alleged abuse.

Answer: [redacted]

26. State the name and address of all persons known to you or your attorneys who have either reported sexual abuse or have received direct reports of sexual abuse by Father Kapoun including:

(a) Name, address, and telephone number of each such persons and his/her guardian;

(b) The dates on which each such information was reported or received'

(c) The dates of which the sexual abuse allegedly occurred;

(d) The places in which the sexual abuse allegedly occurred;

(e) The nature of each sexual abuse alleged.

Answer: None

27. State in chronological order all addresses where you have lived during the past 20 years.

[redacted]

28. Describe by date, location, and the persons involved, all instruction or direction received (prior to or during the time period of the alleged sexual abuse) from family, church, school, or friends on reproduction, sexual activity, or sexual intercourse.

Answer: None

29. Describe the extent or nature of all sexual activity, whether homosexual or heterosexual, and whether initiated by yourself or someone else, you have experienced:

(a) Prior to any social contact with Father Kapoun;

(b) After being acquainted with Father Kapoun, but prior to any alleged sexual abuse by Father Kapoun;

(c) During the time period of sexual abuse by Father Kapoun;

(d) After the alleged sexual abuse by Father Kapoun to the present.

Answer: 29A none

Answer: 29B none

Answer: 29C none

Answer: 29D [redacted]

30. Set forth in detail an itemized list of all payments related to the injury or disability in question made to the Plaintiff, or on the Plaintiff's behalf by or pursuant to any health insurance or disability insurance carrier.

Answer: None

31. With regard to the payments referred to in your answers to the preceding Interrogatory, set forth a list of all such payments for which a subrogation right has been asserted.

Answer: None

32. Identify each and every exhibit which you intend to introduce at the time of trial.

Answer: None at this time, will supplement.

33. Have you previously made claims against any other persons in which you have alleged that you were sexually or physically abused or exploited? If so, set forth the following:

(a) Whether such claims were included in any lawsuit and, if so, the venue of such action, the names of the parties to such action, and the date of commencement of such action and the names and addresses of the attorneys representing all parties in said action and the outcome of such action.

Answer: No

34. Describe your employment history from the time which you last attended high school or college up through the present and, in connection with each such employment position, state the following:

(a) The period of employment;

(b) The name and address of the employer;

(c) The name and address of your supervisor;

(d) The reason or reasons for terminating such employment.

[redacted]

9/25/94
Date

[redacted]

The following image(s) may be of poor quality due to the poor quality of the **original**.

#1

Pro Christo Sacerdote

Via Coeli MONASTERY OF THE SERVANTS OF THE PARACLETE

Cable: Paraclete - Albuquerque
Phone: Area Code 505
829-2941
829-2951

Jemez Springs, New Mexico 87025

August 24, 1967

Most Rev. James L. Connolly, D.D.
Bishop of Fall River
Chancery Office
Fall River, Mass.

Most Reverend and dear Bishop Connolly,

I wish herewith to give official notification of the arrival here of Father James Porter. Contact was made with this office last Sunday by Fr. Paul Shanley, diocese of Boston.

Fr. Shanley indicated that prompt action was necessary, and that he had not cleared the matter with your office. I told Fr. Shanley to send Fr. Porter on and that I would clear the matter with you following his arrival.

Fr. Porter has given me a summary outline of his problem. May we ask, Your Excellency, for an indication of your wishes with regard to Fr. Porter. If he is to remain here, we are prepared to put him into the hands of competent medical authorities to continue the therapy he stands in need of.

It will be our hope to help Fr. Porter reach, if that is possible, a cure for his problem. Failing that, we would hope to be given clear outlines of the fields of his safe priestly activity. Armed with this information, we may be of some assistance in finding priestly work for this young priest.

old folks!

We await your instructions about the disposition of this case.

Respectfully in Christ,

Wm. B. Swanson, S.P. - Sup.

000146

#120

BISHOP'S HOUSE
304 HIGHLAND AVENUE
FALL RIVER, MASSACHUSETTS

October 9th.,1968

His Excellency, Most Rev. James F. Davis, D.D.,
Archbishop of Santa Fe,
New Mexico.

Excellency:

Reverend James R. Porter, of the Fall River Diocese has been resident at Via Coeli, and Villa Pius XII for two years or more. He advises me that he wishes to appeal to you for assignment in your jurisdiction. He will no doubt have recommendation from some of the Fathers of the Paraclete.

I ordained Father Porter on April 2nd.,1960. Within 81 years, he had three appointments. He has a great deal of kindness; was well appreciated by sick and aged people. He was faithful to duties. His trouble was Boys. With considerable athletic prowess, he appealed to the young, but it proved his downfall. After warnin and transfers felt short of correcting him, I sent him to Via Coeli, where, as far as I can ascertain, he has conducted himself well. As far as I am concerned, it need be noquestion of an incardination. We continue to regard him as one of our diocesan priests. However, if he can be helpful to the Archdiocese of Santa Fe, and I believe he might, I cheerfully endorse his application. As far as I can judge he has improved much, since he went to Via Coeli.

Believe me, with every good and kind wish,

Sincerely yours in Xto.,

Bishop of Fall River.

Pro Christo Sacerdote

Via Coeli MONASTERY OF THE SERVANTS OF THE PARACLETE

CABLE: PARACLETE - ALBUQUERQUE
PHONE: AREA CODE 505
829-2941
829-2951

JEMEZ SPRINGS, NEW MEXICO 87025

#12

re: REV. JAMES R. PORTER

Rt. Rev. Reginald M. Barrette
Chancellor
Diocese of Fall River
Fall River, Mass. 02722

Aug. 6, 1969

Right Reverend and Dear Monsignor:

Thank you for yours of Aug. 1, in which you direct a check in the amount of sixty dollars for the professional services of Dr. John F. McCarthy, M.D., psychiatrist, for professional services rendered Fr. James Porter.

To supply you with a recent report on Fr. Porter's activities is relatively simple. He has been a very active young priest. We receive a large number of requests for supply work during the summer, and I have not hesitated to call upon Fr. Porter in each of these instances. As of this writing he has turned in satisfactory work in Alamogordo, N.M., Mountainair, N.M., Questa, N.M. and Truth or Consequences, N.M. When the Superior of our house in Nevis, Minn. called to ask for help for that house (they have a large amount of tourist trade in the area during the summer) I sent Fr. Porter, because he is a willing worker, and gets along well with pastors and people wherever he goes. Thus far there has been no occurence of the problem which plauged Fr. Porter in the past.

I wish that all of these favorable circumstances could give me leave to write Fr. Porter off as "cured," but that is the domain of the professional, not myself. I can say that he is improved so far as obvious anxiety, nervousness, etc., so apparent when he first came to us. However, even to the casual lay observer it is apparent that Fr. Porter is still a restless young man, and while I cannot give the textbook names for them his nervous symptoms are evident; viz., biting of nails, constant brushing of hair, chain smoking etc. He is better equipped to talk about his problems at this time, and has obviously derived benefit from his therapy with Dr. McCarthy. However, I would not wish to make any long range forecast at this time.

I enclose copy of Fr. Porter's last letter to me, to give you some idea of his present plans and hopes for the future.

With every best wish, I remain

Sincerely in Christ Priest,

Rev John B. Feit, S.P.

Rev. John B. Feit, SP
Superior

EXHIBIT
127

000140

#136

SERVANTS of the PARACLETE

November 3, 1970

Rt. Rev. Msgr. Reginald M. Barrette
362 Highland Avenue
Fall, River, Massachusetts

Dear Msgr. Barrette:

Fr. James Porter is writing to you requesting a year's leave of absence. This is not in accord with my recommendation to him. I believe, quite strongly, that he should apply for laicization and should never again function as a priest. Fr. Porter has the idea in his mind that after a year he may be able to return to the priesthood if he succeeds during that year in avoiding a recurrence of his problem with young boys.

He may well be able to avoid such a recurrence during a year outside of the active ministry. Nonetheless, I believe that a return to the priesthood would again place him in circumstances that would make it extremely unlikely for him to remain without trouble. Some of the contributing circumstances are the easy access to boys that is open to a priest, the lack of surveillance by parents who instinctively trust priests, his athletic abilities which are attractive to boys, and especially, a pattern of behavior over many years in which he has learned how to appeal to boys and to seduce them while functioning as a priest.

If Fr. Porter does seek to return again to the active priesthood after the year's leave of absence, he will probably suggest that he would be willing to accept an assignment at a hospital or other institution where he would have little opportunity to be with boys. I feel that even if he were to receive such an assignment, it would only be a matter of time before he had again managed to work his way into some form of parochial life, at least on a part time basis. He is able to function too easily in a parish and finds it too rewarding to be able to resist the urge to get involved again at that level.

In conclusion, I am opposed to Fr. Porter seeking only a leave of absence. Since he seems determined to do so, I strongly urge that at the conclusion of that year, he not be given faculties for any priestly activities under any circumstances whatsoever.

I have informed Fr. Porter of my feelings in this matter and that I am making my opinions known to you.

Sincerely in Christ,
Frederick Bennett, S.P.
Frederick Bennett, S.P.
Clinical Psychologist

13270 MAPLE DRIVE • ST. LOUIS, MO. 63127

#137

The Right Reverend Reginald M. Barrette
Chancellor
362 Highland Avenue
Fall River, Massachusetts

Dear Monsignor Barrette,

This letter will both bring you up to date in regard to Father Porter's future plans and our present reactions.

Father has agreed to seek work outside the ministry and seems to see the wisdom of this move for now. I have underlined the word now since we feel Father has in the back of his mind to return to the priesthood after a year or so in lay life. He does not want to seek laicization at this time as we thought he should but would rather have a leave of absence. This gives some indication that he hopes to return to the active ministry after a period of time in lay life. We would only look upon the leave of absence as a preparation for complete laicization since in no way do we think Father should be permitted to return to the active ministry. The risks to others are much too great. We do not think Father comprehends the harm he has done in his relations with young boys. Many of them may have suffered harm that will be with them the rest of their lives. I think you could ask Father to seek laicization at this time but this is your decision to make. We have certainly recommended this move. By granting a leave of absence there is always that chance that someone not knowing the full story will again help him back to the ministry and the whole story could be repeated.

We think a letter to Father Porter from the Bishop would be in order at the present time wherein the Bishop can state his mind with no ifs or buts. In the long run it will prove the best for Father and those he comes in contact with. It is so easy for a priest to have someone cover up for him and never get at the heart of the matter.

With every best fraternal wish, I remain,

Gratefully yours in Spiritu,

Claude Buchanan

Father Claude Buchanan, S.P.
Father Servant

13270 MAPLE DRIVE • ST. LOUIS, MO. 63127 • 314-965-0860

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,

Defendant,

SPECIAL VERDICT

File No.: 95-2181

We the jury in the above-entitled action, find as a special verdict the following facts by way of answers to the following questions submitted to us by the Court:

1. Did [redacted] sustain any injury as a result of the sexual abuse by Father Kapoun?

Answer: Yes X No ____

If your answer to Question No. 2 was "Yes," then answer the following question:

2. When should a reasonable person in [redacted] situation have known that he was sexually abused and that he sustained injury as a result of the sexual abuse?

9 (month) 1 (day) 1975 (year)

Regardless of your answers to any of the other questions, you must answer the following questions:

3. What sum of money will fairly compensate [redacted] for his damages up to the date of trial?

Medical, therapy and counseling expenses	$ 3472
Loss of earnings	$ 0
Disability, emotional distress and embarrassment	$ 63,750

4. What sum of money will fairly compensate [redacted] for his damages reasonably certain to occur in the future?

Medical, therapy and counseling expenses	$ 9,071
Loss of earning capacity	$ 0
Disability, emotional distress and embarrassment	$ 21,250

Dated: 3-25-96, 1996

Jury Foreperson

Time: 2:14 a.m./p.m.

Concurring Jurors: Sign below only if a 5/6 verdict is reached.

1. Nancy K. Sunden
2. Peggy Sanderson
3. [illegible]
4. Shannon Burr
5. [illegible]

Time deliberations began: _____ a.m/p.m

Six-hour period expires: 2 a.m/p.m.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,

Defendant.

ORDER

Court File No.: PI 95-2181

The above-entitled matter came before the court on May 13, 1996 pursuant to Plaintiff's post-trial motions. Jeffrey R. Anderson, Esq., and Mark A. Wendorf, Esq., appeared on behalf of Plaintiff, Mark Schutz, Daniel A. Haws, Esq., appeared on behalf of Defendant Archdiocese of St. Paul and Minnesota.

Based upon the files, records, proceedings, minutes of court, court transcripts, the arguments of counsel,

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Judgment Not Withstanding the Verdict (JNOV) on Question No. 2 of the Special Verdict Form is **GRANTED.**

2. Plaintiff is entitled to judgment against the Archdiocese of St. Paul and Minneapolis for past compensatory damages as follows:

Medical, therapy and counseling expenses	$3,472.00
Disability, emotional distress and embarrassment	$63,750.00

3. Plaintiff is entitled to judgment against the Archdiocese of St. Paul and Minneapolis for future compensatory damages as follows:

Medical, therapy and counseling expenses	$9,071.00
Disability, emotional distress and embarrassment	$21,250.00

4. Plaintiff's Motion for a New Trial on his Punitive Damages claims against the Archdiocese of St. Paul and Minneapolis is **GRANTED**.

5. Plaintiff's Motion to Amend Findings of Fact, Conclusions of Law and Order for Judgment to conform to this Order, and also to state that prior to trial, the Archdiocese of St. Paul and Minneapolis admitted liability and that prior to trial, Plaintiff voluntarily dismissed Father Robert E. Kapoun is **GRANTED**.

Dated this _____ day of May, 1996.

_____

Honorable Gary Larson
Judge of District Court

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

96 MAY -3 PM 3:52

BY DEPUTY

COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: 11

S.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis, and Father Robert E. Kapoun,

Defendants.

Court File No. PI 95-2181

AFFIDAVIT OF DANIEL A. HAWS

STATE OF MINNESOTA)
)ss
COUNTY OF)

Daniel A. Haws, being first duly sworn upon his oath, hereby states as follows:

I.

I am an attorney licensed to practice law in the State of Minnesota.

II.

Attached as Exhibit A is a true and correct copy of a chart used by Dr. Gonsiorek entitled "Traumagenic Dynamics and the Impact of a Child Sexual Abuse Chart". The "check marks" were made by defense counsel as indicated by the testimony of Dr. Gonsiorek, and the illustrative exhibit and chart used by plaintiff's counsel to show the jury from which "dynamics" plaintiff suffered as a result of the abuse.

III.

Attached as Exhibit B is a true and correct copy of JIGS given to the jury in this matter.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Daniel A. Haws

Subscribed and sworn to before me this 3rd day of May, 1996.

Mary E Lokken
Notary Public

EXHIBIT A

TRAUMAGENIC DYNAMICS IN THE IMPACT OF CHILD SEXUAL ABUSE

I. TRAUMATIC SEXUALIZATION

Dynamics

___ child rewarded for sexual behavior inappropriate to developmental level
___ offender exchanges attention and affection for sex
✓ sexual parts of child fetishized
___ offender transmits misconceptions about sexual behavior and sexual morality
✓ conditioning of sexual activity with negative emotions and memories

Psychological Impact

✓ increased salience of sexual issues
✓ confusion about sexual identity
✓ confusion about sexual norms
___ confusion of sex with love and care-getting or care-giving
✓ negative associations to sexual activities and arousal sensations
___ aversion to sex or intimacy

Behavioral Manifestations

✓ sexual preoccupations and compulsive sexual behaviors
___ precocious sexual activity
___ aggressive sexual behaviors
✓ promiscuity
___ prostitution

II. STIGMATIZATION

Dynamics

___ offender blames, denigrates victim
✓ offender and others pressure child for secrecy
___ child infers attitudes of shame about activities
___ others have shocked reaction to disclosure
___ others blame child for events
___ victim is stereotyped as damaged goods

Psychological Impact

✓ guilt, shame
✓ lowered self-esteem
✓ sense of differentness from others

Behaviorial Manifestations

✓ isolation
___ drug or alcohol abuse
___ criminal involvement
___ self-mutilation
___ suicide

III. BETRAYAL

Dynamics

✓ trust and vulnerability manipulated
✓ violation of expectation that others will provide care and protection
child's well-being disregarded
lack of support and protection from parent(s)

Psychological Impact

✓ grief, depression
extreme ~~dependency~~ Jealousy
✓ impaired ability to judge trustworthiness of others
✓ mistrust, particularly of men
✓ anger, hostility

Behaviorial Manifestations

clinging
vulnerability to subsequent abuse and exploitation
allowing own children to be victimized
✓ isolation
discomfort in intimate relationships
✓ marital problems
aggressive behavior
delinquency
Preoccupation

IV. POWERLESSNESS

Dynamics

✓ body territory invaded against the child's wishes
___ vulnerability to invasion continues over time
___ offender uses force or trickery to involve child
✓ child feels unable to protect self and halt abuse
___ repeated experience of fear
___ child is unable to make others believe

Psychological Impact

✓ anxiety, fear
✓ lowered sense of efficacy
___ perception of self as victim
✓ need to control
___ identification with the aggressor

Behavioral Manifestations

✓ nightmares
___ phobias
___ somatic complaints; eating and sleeping disorders
✓ depression
___ dissociation
___ running away
✓ school problems, truancy
✓ employment problems
___ vulnerability to subsequent victimization
___ aggressive behavior, bullying
___ delinquency
___ becoming an abuser

✓ sexual dysfunctions; flashbacks, difficulty in arousal, orgasm

___ avoidance of or phobic reactions to sexual intimacy

___ inappropriate sexualization of parenting

EXHIBIT B

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Plaintiff,

vs.

Archdiocese of St. Paul
and Minneapolis,

Defendant,

JURY INSTRUCTIONS

File No.: 95-2181

COURT'S INSTRUCTIONS TO THE JURY

March 22, 1996

Members of the jury:

Now that the evidence in this case has been presented, the time has come for me to instruct you on the law. My instructions will cover three areas: first, some instructions on general rules that define and control your duties; second, the instructions that supply the law applicable to the claims and defenses in the case; and third, some guidelines and rules for your deliberations. A copy of these instructions will be available for you in the jury room to consult if you find it necessary.

In defining the duties of the jury, let me first give you a few general rules:

It is your duty to find the facts from all the evidence in the case. To the facts as you find them you must apply the law as I give it to you.

The questions that you must decide will be submitted to you in the form of a special verdict consisting of questions. You must answer these questions by applying the facts as you may find them to be. I shall give to you the rules of law that apply to these questions and you must apply them in arriving at your answers. It is the duty of the court to analyze the answers on your verdict form and order judgment according to the law and the answers you have returned.

You must follow the law as I give it to you, whether you agree with it or not. And you must do your duty as jurors regardless of any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. And you must not read into these instructions, or into anything the court may have said or done, any suggestion from the court as to what verdict you should reach how special verdict questions should be answered.

Deciding questions of fact is your exclusive responsibility. In doing so, you must consider all the evidence you have heard and seen in this trial, and the reasonable inferences to be drawn from that evidence. And you must disregard anything you may have heard or seen elsewhere about this case. Whether or not a particular answer is favorable to one party or the other should not concern you.

You must consider these instructions as a whole and regard each instruction in the light of all the others. The order in which the instructions are given is of no significance.

Whenever the word "he" or "she" is used in these instructions, you may consider it as applying to a man, a woman or an entity, such as a corporation. In like manner, the use of the singular of a word may be taken to mean the plural.

Attorneys are officers of the court. It is their duty to present evidence on behalf of their clients and to make such objections as they deem proper, and to argue fully their client's cause. However, the arguments or other remarks of the attorneys are not evidence in this case.

If the attorneys have made, or if I have made or should make, any statement as to what the evidence is, which differs

from your recollection of the evidence, then you should disregard the statement and rely solely upon your own memory. If the attorneys' arguments contain any statements of the law which differ from the law which I give you, you should disregard their statements.

During this trial I have ruled on objections to certain testimony and exhibits. You must not concern yourselves with the reasons for my rulings since they are controlled by rules of law.

Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe evidence being offered should not be admitted under the rules of evidence. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. By receiving evidence to which objection was made, I did not intent to indicate the weight to be given such evidence. You are to disregard all evidence ordered stricken.

A fact may be proved by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.

A fact is proved by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proved by circumstantial evidence when its existence can be reasonably inferred from other facts proved in the case.

You are the sole judges of whether a witness is to be believed and of the weight to be given to the testimony of each. There are no hard and fast rules to guide you in this respect.

In determining believability and weight you should take into consideration as to the witnesses the following:

1. Their interest or lack of interest in the outcome of the case.
2. Their relationship to the parties.
3. Their ability and opportunity to know, remember, and relate the facts.
4. Their manner and appearance.
5. Their age and experience.
6. Their frankness and sincerity, or lack thereof.
7. The reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case.
8. Any impeachment of their testimony.
9. Any other factors that bear on believability and weight.

You should in the last analysis rely upon your own experience, good judgment, and common sense.

A witness who has special training, education, or experience in a particular science, profession or calling is allowed to express an opinion. In determining the believability and the weight to be given such opinion evidence, you may consider, among other things:

1. The education and training, experience, knowledge and ability of the witness.
2. The reasons given for the witness' opinion.
3. The sources of the witness' information.

4. Factors already given you for evaluating the testimony of a witness.

Such opinion evidence is entitled to neither more nor less consideration by you than the other fact evidence presented.

In deciding the believability and weight to be given the testimony of a witness, you may consider evidence of a statement by or conduct of the witness on some prior occasion which is inconsistent with the witness' present testimony. This evidence may be considered by you only for the purpose of testing the believability and weight of the witness' testimony and for no other purpose. If, however, the statement was given under oath or the witness is a party or an agent of a party in the case, the evidence of the prior inconsistent statement or the conduct of a party or an agent of a party may be considered as evidence bearing on the issues in this case as well for testing believability and weight.

In order to answer any question "yes", the greater weight of the evidence must support such an answer, otherwise you should answer the question "no". Greater weight of the evidence means that all of the evidence by whomever produced must lead you to believe it is more likely that the claim is true than not true. If the evidence does not lead you to believe it is more likely that the claim is true than not true, then the claim has not been proved by the greater weight of the evidence.

The greater weight of the evidence does not necessarily mean the greater number of witnesses or the greater volume of

testimony. Any believable evidence may be a sufficient basis to prove a fact.

An affirmative defense must be proved in the same way that a claim must be proved. For Special Verdict Question No. 2, the Defendants have the burden of the proof.

A direct cause is a cause which had a substantial part in bringing about the injury either immediately or through happenings which follow one after another.

There may be more than one direct cause of an injury. When the effects of fault of each of two or more persons actively work at substantially the same time to cause the injury, each may be a direct cause of the injury.

Question No. 2 on the verdict form asks you to determine when [redacted] knew or had reason to know that his injuries were caused by the sexual abuse.

In answering this question, you must take into consideration both when the Plaintiff knew or had reason to know that he had been sexually abused and when he knew or had reason to know that his sexual abuse caused his injuries. Both of these factors must occur.

A person has "reason to know" a fact when a reasonable person under the same or similar circumstances would know that fact.

Questions 3 and 4 in the verdict are the damages questions.

You must answer these questions regardless of your answers to the other questions in the verdict. You are not to consider the possible effect of your answers to other questions when you

determine damages. Your verdict is not complete until these questions are answered.

The term "damages" means a sum of money that will fairly compensate a person injured. Damages may include past and future injury. However, it must be proved that such future injury is reasonably certain to occur.

A party seeking damages must prove the nature, extent, duration and consequences of his injury. Determination of damages must not be based upon speculation or guess.

In answering Questions 3 and 4, you are to determine the amount of money which will fairly and adequately compensate Mark Schutz for his past and future harm, giving consideration only to such of the following items as shown by the evidence to have resulted from the incident.

Any pain, disability, embarrassment or emotional distress experienced by reason of [redacted]'s injuries up to the time of trial. There is no yardstick by which you can value these items exactly. They are not necessarily determined on a per diem or per hour basis. You should consider the nature, extent and severity of the injuries, how painful they were, what the treatment was and the pain connected with it, how long the injury persisted and such other factors as in your judgment bear upon the matter.

<u>Embarrassment</u>: The term embarrassment is synonymous with terms such as shyness, unworthiness, shame, loss of self-confidence and loss of self-pride.

Emotional distress: Emotional distress is mental suffering, mental anguish or nervous shock including mental reactions such as fright, horror, grief, humiliation, anger, disappointment, worry and nausea.

Disability: Disability is a loss of physical or mental function and/or the inability to engage in substantially a person's usual and customary daily activity.

The reasonable value of medical, therapy and counseling services of every kind, necessary for treatment.

The value of earnings lost as a result of the injury, from the time of injury to date.

Such pain, disability, embarrassment or emotional distress as [redacted] is reasonably certain to experience in the future.

The reasonable value of necessary medical, therapy and counseling services that are reasonably certain to be required in the future.

If future disability is reasonably certain to occur, you may take into consideration the effect of that disability on [redacted] future earning capacity. If [redacted]'s future earning capacity has been destroyed or reduced by his injuries, you may determine damages for such loss or reduction of future earning capacity.

In determining the amount of such future damages, you should take into consideration the age, health, skill, training, experience, and industry of [redacted] whether the loss of future earning capacity is for a limited period of time or is

permanent, and whether the number of years of [redacted] earning expectancy is equal to or less than his life expectancy.

According to life expectancy tables, the life expectancy of [redacted]

This figure is to assist you in determining the probable life expectancy of [redacted] It is not conclusive proof of his life expectancy, and you are not bound by it. It is only an estimate based on average experience. You may find that [redacted] might live a longer or shorter period than that given in these tables. This figure should be considered by you along with evidence of the health, physical condition, habits, occupation, and surroundings of [redacted] and other circumstances bearing upon his life expectancy.

A person who has a defect or disability at the time of an accident is nevertheless entitled to damages for any aggravation of such pre-existing condition, even though the particular results would not have followed if the injured person had not been subject to such pre-existing condition. Damages are limited, however, to those results which are over and above those which normally followed from the pre-existing condition, had there been no abuse.

In determining the amount of damages you should consider that one who is injured has a duty to act reasonably in obtaining treatment and caring for his harm. He is limited to those damages which he would have suffered if he had acted reasonably in obtaining treatment and care.

When you retire to the jury room, you will select one of your number to act as foreman or forewoman to preside over your deliberations.

You must not permit sympathy, prejudice or emotion to influence your verdict.

If you return a verdict during the first six hours of your deliberation, it must be agreed to by all of you. If after deliberating six hours or more you are unable to arrive at a unanimous verdict, five of you may return a verdict. The same five jurors should concur in the answers to all the questions. If the verdict is unanimous, it need be dated and signed only by your forewoman or foreman. If after six hours of deliberation, it is agreed to by five of you, the verdict must be dated and signed by the five who agree.

The final test of the quality of your service will be in the verdict which you as a jury return to this court. You will make a definite contribution to the efficient administration of justice if you arrive at a just and proper verdict.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so consistent with your individual judgment. Each of you must decide the case for yourself, but do so only after a full consideration of the evidence with your fellow jurors. In the course of your deliberations, reexamine your own views and do not hesitate to change your mind if you find that you are mistaken. However, do not surrender your honest conviction as to the weight

or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

After you return this special verdict, you will be required to hear some additional testimony, additional argument, and you will be required to do some additional deliberation.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

95-9181

AFFIDAVIT OF SERVICE

METRO LEGAL SERVICES, INC.

Thomas McCabe, being duly sworn, on oath says: that on the 27th day of November, 1995, at 4:37 p.m. (s)he served the attached Notice of Motion to Amend Complaint to Include a Claim for Punitive Damages and Motion to Amend Complaint upon Fred Brown Jr., Esq. therein named, personally at 3200 Piper Jaffray Tower, Minneapolis, County of Hennepin, State of Minnesota, by handing to and leaving with Bill Tinkham, mail clerk, an expressly authorized agent for service for said Fred Brown Jr., Esq., a true and correct copy thereof.

Thomas McCabe

Subscribed and Sworn to before me
this 28th day of November, 1995.

Carrie Eshete
Notary Public

CARRIE ESHETE
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2000

Charge $

Re: Scheffler

STATE OF MINNESOTA

COUNTY OF HENNEPIN

95-2181

AFFIDAVIT OF SERVICE

METRO LEGAL SERVICES, INC.

Aaron G. Gardner, being duly sworn, on oath says: that on the 27th day of November, 1995, at 3:08 p.m. (s)he served the attached Memorandum in Support of Plaintiff's Motion to Amend Complaint for Punitive Damages, Affidavit of Mark Wendorf, and Order upon Frederick C. Brown, Esq. therein named, personally at 3200 Piper Jaffray Tower, Minneapolis, County of Hennepin, State of Minnesota, by handing to and leaving with Gordon Majors, fax clerk, an expressly authorized agent for service for said Frederick C. Brown, Esq., a true and correct copy thereof.

CARRIE ESHETE
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2000

Subscribed and Sworn to before me
this 27th day of November, 1995.

Carrie Eshete
Notary Public

Charge $

Re: Scheffler

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

95 DEC -5 AM 10:49

BY DEPUTY

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: 11

S.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
and Father Robert E. Kapoun,

Defendants.

AFFIDAVIT OF FREDERICK C. BORWN

STATE OF MINNESOTA)
(SS
COUNTY OF HENNEPIN)

Frederick C. Brown, first being duly sworn on oath, deposes and states as follows:

1. Your Affiant is one of the attorneys representing defendant Father Robert Kapoun in the above-entitled action and provides this Affidavit in opposition to plaintiff's Motion to Amend Complaint for Punitive Damages.

2. Attached hereto as Exhibit A is a true and correct copy of relevant portions of defendant Father Robert Kapoun's deposition taken on March 7, 1995.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: 12/4/95

Frederick C. Brown

Subscribed and sworn to before me
this 4th day of December, 1995.

Notary Public

DONNA M. BAKER
NOTARY PUBLIC-MINNESOTA
ISANTI COUNTY
My Commission Expires Jan. 31, 2000

014/18089741 12/4/95

1 years.
2 Q. Did you know his family?
3 A. Just by seeing them, by sight.
4 Q. Do you remember their names?
5 A. Matt and Charlene.
6 Q. And when he was a server at St. Patrick's, how
7 old was he, would you estimate?
8 A. He was in -- I would think in grade school or
9 just starting high school would be my guess.
10 Q. Did you ever sexually abuse Dale Scheffler?
11 A. Never.
12 Q. Did you ever engage in any sexual contact with
13 him?
14 A. Never.
15 Q. Were you ever with him outside of the context
16 -- alone outside the context of him working as
17 a server in the church?
18 A. No.
19 Q. Did you ever take him swimming?
20 A. Not that I can recall.
21 Q. It's possible?
22 A. It may be.
23 Q. At that time, did you go to the swimming pool
24 at the St. Thomas College?
25 A. No.

1 Q. What pool did you use?

2 A. We didn't go -- go swimming in any pool.

3 Q. Where would you have gone swimming with Dale

4 Scheffler, if you had?

5 A. It may have been up at the cabin.

6 Q. Did you take him to the cabin?

7 A. Yes.

8 Q. How many times?

9 A. Once.

10 Q. When was that, would you estimate?

11 A. In 1982.

12 Q. What were the circumstances, Father?

13 A. I asked [redacted] if he would come up

14 to --

15 Q. Now I'm talking about Dale Scheffler.

16 MR. BROWN: Let him finish.

17 Q. (By Mr. Anderson) Okay. I'm sorry. Go ahead.

18 A. Yeah, you're -- okay -- if he wanted to -- if

19 he would come up to help clear up the yard, and

20 he said, "Can I take Dale Scheffler?" And I

21 said yes.

22 Q. Oh, okay.

23 A. Or, no, he didn't say it that way. He just

24 said, "Can I bring somebody?" And I said yes.

25 Q. Did both of the youth, then, drive there with

1 you?
2 A. Yes.
3 Q. And this is your cabin on the lake in Cold
4 Spring?
5 A. Yes.
6 Q. And this would have been on a Saturday?
7 A. Probably unlikely because I'd be working in the
8 parish.
9 Q. Did you have him stay overnight?
10 A. No -- yes. Yes.
11 Q. And are you able to tell us what day of the
12 week, then, it would have been that they would
13 have stayed with you overnight at the cabin?
14 A. Could have been almost any -- any day.
15 Q. Where did you sleep?
16 A. Slept in the -- inside the cabin.
17 Q. Where did they sleep?
18 A. They slept on either side of me.
19 Q. In the same bed?
20 A. We slept on the floor.
21 Q. All of you?
22 A. Yes.
23 Q. Why on the floor?
24 A. Because it was under construction.
25 Q. What construction? The bedroom was under

1 construction or what?
2 A. My mother was adding an addition to her house
3 there and -- and it was unfinished, no windows.
4 Q. This actually wasn't the family home, this was
5 actually the family cabin?
6 A. Well, my mother was making it her primary
7 residence.
8 Q. Oh, she was?
9 A. Yeah.
10 Q. Your folks or your mother had lived in South
11 St. Paul before, had they not?
12 A. Yes.
13 Q. And was your dad alive then? I'm not sure.
14 A. He died in 1979, December.
15 Q. And so you slept on the floor because there
16 were no beds available?
17 A. That's right.
18 Q. Did you engage in any physical contact with
19 Dale Scheffler that night?
20 A. No.
21 Q. Did you engage in any physical contact with
22 [redacted] that night?
23 A. No.
24 (Discussion out of the hearing of the
25 court reporter.)

1 MR. BROWN: Which [redacted] did you
2 say?
3 Q. (By Mr. Anderson) I said [redacted] but it was
4 [redacted]?
5 A. [redacted], right.
6 Q. Thanks. Other than the time that you took Dale
7 Scheffler with [redacted] to the cabin, did you
8 spend any other time with Dale?
9 A. No.
10 Q. Did you ever have him to your folks' home in
11 South St. Paul?
12 A. No.
13 Q. Did you ever take him anywhere in your car?
14 A. No.
15 Q. Did you ever perform any attempted anal
16 intercourse or simulated intercourse upon Dale
17 Scheffler?
18 A. Never.
19 Q. Did you ever perform attempted anal intercourse
20 or simulated intercourse with any youth?
21 A. Never.
22 Q. Sometime last year I trust you received a copy
23 of the complaint that names Dale Scheffler as a
24 claimant or a plaintiff in a civil lawsuit?
25 A. Yes.

1 Q. Prior to having received that complaint -- and
2 I don't have an exact date in mind, but I think
3 it was last year, wasn't it?
4 A. Yes.
5 Q. Prior to having received those papers, had you
6 ever discussed your relationship to or with
7 Dale Scheffler with anybody?
8 A. Never.
9 MR. EISENZIMMER: For the record, the
10 date of the summons in the Scheffler case is
11 September, 1994.
12 Q. (By Mr. Anderson) And since that time, other
13 than with your lawyer, Mr. Brown, have you
14 discussed your relationship to or with Mr.
15 Scheffler with anybody?
16 A. No.
17 MR. BROWN: Well, we've had some
18 meetings with other counsel, we've had a
19 meeting with Kevin.
20 A. Yes, Father Kevin McDonough.
21 MR. BROWN: I don't know if you
22 intended to include those sorts of
23 conversations or not, but there may have been,
24 obviously, times that inquiries were made.
25 Q. (By Mr. Anderson) When did you meet with Father

1 McDonough?
2 A. Probably after that was filed.
3 Q. And at that time, were you asked by Father
4 McDonough whether you had sexually abused Dale
5 Scheffler?
6 A. I don't know if he was inquiring about the
7 specifics.
8 Q. What did you understand the purpose of the
9 meeting to be, then, with Father McDonough?
10 A. To inform me --
11 MR. BROWN: Well, I was present and I
12 think that -- and we might as well get this out
13 in the open -- there were like three or four
14 lawsuits all involved at the same time, and I
15 think it was defense issues and coordination
16 issues and representation issues, etcetera.
17 That's I think what the testimony would be
18 because I was there. So I don't see the
19 relevancy, the materiality. I mean, if you've
20 got something specific in mind that -- if you
21 want names of people he's talked to, that's
22 one. I was there, etcetera.
23 MR. ANDERSON: Other attorneys were
24 there?
25 MR. BROWN: No, I don't think so.

1 Q. (By Mr. Anderson) Who else was there besides
2 Father McDonough, yourself and your attorney?
3 A. That -- that's it.
4 Q. And you understand Father McDonough's the
5 chancellor?
6 A. Yes.
7 Q. I guess he's the vicar general, excuse me.
8 A. Vicar general.
9 Q. Other than your attorney, has anybody ever
10 asked you if you engaged in any sexual abuse of
11 Dale Scheffler?
12 A. No.
13 MR. ANDERSON: Let's take a break,
14 shall we?
15 MR. EISENZIMMER: Sure.
16 MR. BROWN: Sure.
17 (Recess taken.)
18 Q. (By Mr. Anderson) I'd like to go back to the
19 time when you took [redacted] and Dale
20 Scheffler to the cabin.
21 A. Yes.
22 Q. And they spent the night with you and you slept
23 on the floor?
24 A. Right.
25 Q. Do you recall at that time that [redacted] slept

1 in a sleeping bag?
2 A. As far as I know, he didn't.
3 Q. Well, you all slept on the floor in what
4 location in the cabin?
5 A. It was in what was gonna be the dining room.
6 Q. And what did you use for sheets or bed
7 covering?
8 A. Just blankets.
9 Q. And as you laid on the floor, was [redacted] to
10 your left or your right?
11 A. Well, if I'm sitting like I am now, he would be
12 to this side and Dale was over here
13 (Indicating).
14 Q. So Dale would have been to your left if you
15 were on your back?
16 A. Right.
17 Q. And [redacted] would have been to your right if you
18 were on your back?
19 A. Yes.
20 Q. Do you recall if you all shared the same sheets
21 and/or bed coverings or not?
22 A. We all had separate.
23 Q. During the night, do you have any recollection
24 of having rolled over and made any physical
25 contact with Dale Scheffler?

1 A. No.
2 Q. Do you deny that you did?
3 A. That's right.
4 Q. Earlier in that day, had you gone swimming with
5 Dale and [redacted]?
6 A. I don't know.
7 Q. It's possible?
8 A. It may have been.
9 Q. Do you have any recollection of having rubbed
10 up against Dale Scheffler while in the lake
11 swimming?
12 A. No, I never did that.
13 Q. He reports that you rubbed up against him with
14 an erection in the water --
15 A. No.
16 Q. -- either with your suit down or up, I don't
17 recall. But in any case, you deny having done
18 that?
19 A. Yes.
20 Q. Were there any other times, other than those
21 you've described, when you spent any time with
22 Dale Scheffler?
23 A. That was the only time.
24 Q. Before you served and worked at St. Patrick's
25 and St. Catherine's, you were at the Home of

1 A. No.
2 Q. When you say, "sisters," what sisters are you
3 referring to?
4 A. The Sisters of the Good Shepherd.
5 Q. And they staffed the home, primarily?
6 A. Yes.
7 Q. Were you called the pastor there or what?
8 A. Maybe a chaplain.
9 Q. Chaplain, okay. So you served at the Home of
10 Good Shepherd for a period just some months
11 under two years?
12 A. About a year and a quarter.
13 Q. During that time, did you engage in any sexual
14 abuse, molestation or in any sexual contact
15 with any youth?
16 A. No.
17 Q. Did you know [redacted]?
18 A. Yes.
19 Q. How did you know him?
20 A. I knew him from the parish of St. Raphael's.
21 Q. And when did you first come to know him?
22 A. I imagine when I arrived.
23 Q. And you arrived at St. Raphael's in 1973,
24 correct?
25 A. 1971.

1 Q. Oh, excuse me. July 1, '71 sound right?
2 A. That sounds right.
3 Q. And during your work at St. Raphael's, you came
4 to know the [redacted] family, did you not?
5 A. Yes.
6 Q. They were parishioners?
7 A. That's right.
8 Q. Had a number of kids active in the parish?
9 A. Yes.
10 Q. And [redacted] was one of them?
11 A. Yes.
12 Q. And he was a teenager?
13 A. I think so.
14 Q. Did you have any contact with [redacted] in
15 any context after you were assigned from St.
16 Raphael's to the Home of Good Shepherd?
17 A. I invited him over to the Home of the Good
18 Shepherd one time.
19 Q. One time?
20 A. Yes.
21 Q. No more than one?
22 A. That's right.
23 Q. How old would he have been when that happened?
24 A. Seventeen, 18.
25 Q. And why did you invite him to the Home of Good

1 Shepherd?
2 A. I wanted him to -- to see where I was, wanted
3 to show him where they made altar breads,
4 wanted to show him -- show the home where
5 wayward teens were staying because he was a
6 teen.
7 Q. And how much time did he spend with you on that
8 occasion?
9 A. Just one evening, one night.
10 Q. Stayed overnight?
11 A. Yes.
12 Q. At your request?
13 A. Yes.
14 Q. And where did you sleep?
15 A. I slept in my bedroom.
16 Q. And where did he sleep?
17 A. On the couch.
18 Q. And did you at any time on that occasion engage
19 in any sexual contact or attempted sexual
20 contact with him?
21 A. No.
22 Q. Did you try?
23 A. No.
24 Q. Other than the one occasion where you invited
25 him to come and visit you and stay with you at

1 Q. Okay. So as far as you know, the transfer from
2 St. Raphael's to Home of Good Shepherd had to
3 do with your physical health, your back?
4 A. Yes.
5 Q. And as far as you know, there was no other
6 reason behind that?
7 A. That's right.
8 Q. Before I get to the period of time at St.
9 Raphael's, I want to ask you a few more
10 questions about that period of time you were at
11 the Home of Good Shepherd, and in particular,
12 some questions relating to [redacted] At any
13 time, did you engage in any rubbing of your
14 nude body against him while in the sauna or the
15 shower?
16 A. No.
17 Q. Did you provide alcohol to him?
18 A. No.
19 Q. Did you ever consume alcohol with him?
20 A. No.
21 Q. Did you consume alcohol at all during that time
22 for your own consumption?
23 MR. BROWN: During what time now?
24 MR. ANDERSON: Home of Good
25 Shepherd.

1 A. No.

2 MR. BROWN: At the Home of Good

3 Shepherd?

4 MR. ANDERSON: No.

5 Q. (By Mr. Anderson) During that time, did you

6 consume alcohol for your own consumption during

7 that period?

8 A. Oh, just having a social drink during that year

9 or more?

10 Q. Yes.

11 A. Yeah, I would drink socially.

12 Q. Did you ever lick [redacted] on the neck?

13 A. No.

14 Q. Did you fondle his genitals?

15 A. No.

16 Q. Or attempt to masturbate him?

17 A. No.

18 Q. Or expose your own genitals to him?

19 A. No.

20 Q. Did you ever get nude in front of him?

21 A. No.

22 Q. In the shower or otherwise?

23 A. That's right.

24 Q. That's right, you did not?

25 A. I did not.

1 Q. Okay. Did you ever rub your penis against him
2 while hugging him?
3 A. No.
4 Q. Did you ever invite him or ask him to have sex
5 and use the words, "Let's have sex"?
6 A. No.
7 Q. Did you ever have any sexual interest in him?
8 A. No.
9 Q. Did you ever have any sexual interest in Dale
10 Scheffler?
11 A. No.
12 Q. Did you ever have any sexual interest in
13 [redacted]?
14 A. No.
15 Q. Did you ever have any sexual interest in [redacted]
16 [redacted]?
17 A. What do you mean? What -- in what sense?
18 Q. Well, do you know what I mean by sexual
19 interest?
20 A. I mean, I was curious.
21 Q. So you did have a sexual interest in [redacted]
22 [redacted] amounting to curiosity?
23 A. Yes.
24 Q. I'm going to turn to the period of time at St.
25 Raphael's and ask you some questions in

1 there another [redacted]? [redacted] is it?
2 A. Yes, [redacted]
3 Q. Pardon me. Maybe it's [redacted] But do
4 you know [redacted]?
5 A. Yes.
6 Q. When and how did you come to know him?
7 A. Through his family and a group at St. Kevin's.
8 Q. And did you actually have any contact with him
9 after you were assigned to St. Raphael's from
10 St. Kevin's?
11 A. That I couldn't say, I mean, you know.
12 Q. But his family was associated with St. Kevin's?
13 A. That's right. Yes.
14 Q. I'll go to that because I'm working back
15 chronologically here. I want to deal with St.
16 Raphael's at least during that period of time,
17 okay?
18 A. Yeah.
19 Q. You came to know [redacted] during that period
20 of time?
21 MR. BROWN: Which time now?
22 MR. ANDERSON: St. Raphael's.
23 A. Yes.
24 Q. (By Mr. Anderson) Did you ever engage in any
25 sexual contact with him?

1 A. No.

2 Q. Did you fondle his genitals?

3 A. No.

4 Q. Did you attempt to engage in anal intercourse

5 or simulated intercourse?

6 A. No.

7 Q. Did you engage in mutual fondling and/or

8 masturbation with him?

9 A. No.

10 Q. When is the first time you became aware that he

11 had complained of any inappropriate contact

12 with you?

13 A. Again, that came up at the [redacted] lawsuit.

14 Q. I'm asking your memory of that, though,

15 Father. When is the first time in time did you

16 learn that [redacted] had complained of any

17 inappropriate conduct?

18 A. I hadn't known he complained.

19 Q. Until when?

20 A. Until you handed me that -- or shortly before

21 the deposition that I took here.

22 Q. Okay. And I think the date of the deposition

23 was --

24 MR. ANDERSON: Was it July of 1989?

25 MR. BROWN: That's correct.

1 Q. (By Mr. Anderson) So the first time that you
2 had learned that [redacted] had ever complained
3 of inappropriate sexual contact was around the
4 time of the deposition in 1989?
5 A. Yes.
6 Q. Monsignor Srnec had never told you and
7 Archbishop Roach had never told you, correct?
8 A. That's right.
9 (Discussion out of the hearing of the
10 court reporter.)
11 Q. (By Mr. Anderson) Do you know a [redacted]
12 that may have been associated with St.
13 Raphael's?
14 A. No.
15 Q. Okay. I'd like to turn, then, to the period of
16 time you served at St. Kevin's, and that would
17 have been the years 1967 through July of '71?
18 A. That's right.
19 Q. And did you serve continuously during that
20 period?
21 A. Yes, I did.
22 Q. And what was the reason that you understand for
23 your transfer from St. Kevin's to St.
24 Raphael's?
25 A. I made the request.

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

Donna Baker of the City of Zimmerman, County of Isanti; in the State of Minnesota, being duly sworn says that on December 4, 1995, she served the annexed:

Defendant Father Kapoun's Response to Plaintiff's Memorandum in Support of Motion to Add Punitive Damages; and

Affidavit of Frederick C. Brown

on the following attorneys in this action, by mailing to each of them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota directed to said attorneys at their last known address, as follows:

Mark A. Wendorff, Esq.
Reinhardt and Anderson
E-1000 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101

Andrew J. Eisenzimmer, Esq.
Meier, Kennedy & Quinn
2200 North Central Life Tower
445 Minnesota Street
St. Paul, MN 55101

Daniel A. Haws, Esq.
Murnane, Conlin et al.
1800 Piper Jaffray Plaza
444 Cedar Street
St. Paul, MN 55101

Donna Baker
Donna Baker

Subscribed and sworn to before me
this December 4, 1995.

Chris Wengronowitz
Notary Public

CHRIS WENGRONOWITZ
NOTARY PUBLIC-MINNESOTA
WASHINGTON COUNTY
My Commission Expires Jan. 31, 2000

014/18089741 12/4/95

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

PI 95 - 2181

JULIE E. PETERSON, being first duly sworn on oath, deposes and states that on the 6th day of December, 1995, she served the attached:

1. Archdiocese's Memorandum in Opposition to Plaintiff's Motion to Amend Their Complaint to Add a Claim for Punitive Damages;
2. Affidavit of Mark D. Covin; and
3. Proposed Order.

upon:

FREDERICK C. BROWN
POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.
3300 PIPER JAFFRAY TOWER
222 NINTH STREET SOUTH
MINNEAPOLIS, MN 55402

by depositing a true and correct copy in the United States Mail with postage prepaid to the last known address of the above.

Julie Peterson

Subscribed and sworn to before me this 6th day of December, 1995.

Victoria E. Bauer
Notary Public

VICTORIA E. BAUER
NOTARY PUBLIC-MINNESOTA
DAKOTA COUNTY
My Comm. Expires Jan. 31, 2000

STATE OF MINNESOTA

COUNTY OF HENNEPIN

95-2181

AFFIDAVIT OF SERVICE

METRO LEGAL SERVICES, INC.

Pete Taylor, being duly sworn, on oath says: that on the 6th day of December, 1995, at 11:07 a.m. (s)he served the attached Archdiocese's Memorandum in Opposition to Plaintiff's Motion to Amend Their Complaint to Add a Claim for Punitive Damages; Affidavit of Mark D. Covin; and Proposed Order upon David S. Burleson, Esq. therein named, personally at E-1000 First National Bank Building, St. Paul, County of Ramsey, State of Minnesota, by handing to and leaving with Judy Franklin, receptionist, an expressly authorized agent for service for said David S. Burleson, Esq., a true and correct copy thereof.

Pete Taylor

Subscribed and Sworn to before me
this 6th day of December, 1995.

Carrie Eshete

Notary Public

CARRIE ESHETE
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2000

Charge $

Re: 38479

EXHIBIT A

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

S.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
and Father Robert E. Kapoun,

Defendants.

ANSWERS TO INTERROGATORIES

Court File No.: _____

TO: Defendant Archdiocese of St. Paul and Minneapolis and its attorney, Daniel A. Haws, 1800 Meritor Tower, 444 Cedar Street, St. Paul, Minnesota 55101

Plaintiff, for his Answers to Defendant Archdiocese's Interrogatories states under oath as follows:

1. State your full name, age, date of birth, weight, height, present residential address, marital status and social Security number.

ANSWER:

Name: [redacted]

2. State your business, occupation or vocation on the date of the incidents involved herein. Identify the employer and the date you started this employment.

29240

ANSWER:

[redacted]

3. State your current business, occupation or vocation. Identify your present employer, the date you started this employment, and describe in detail the type of work that you do.

ANSWER:

Occupation:
Present Employer:

Dates of Employment:
Duties:

[redacted]

4. Please describe in reasonable detail each incident of sexual contact alleged to have occurred between you and Father Robert Kapoun, including:

(a) As accurately as possible, the date of each incident;

(b) Where each incident occurred;

(c) A description of the circumstances or events leading up to each incident;

(d) Whether any physical contact occurred, and if so, a description of same.

ANSWER:

a. Due to the amount of time that has passed since the sexual abuse occurred, Plaintiff is unable to recall the specific dates of abuse. Plaintiff recalls that he was sexually abused in approximately the winter of 1974 or 1975 by defendant Robert Kapoun.

b. The locations of sexual abuse include the St. Paul Seminary, and the Good Shepherd rectory home.

c. While playing sports at the St. Paul Seminary, Father Kapoun would ask Plaintiff to enter into the sauna with him totally nude. On these occasions Father Kapoun would brush up against Plaintiff as if to provoke some type of sexual response

while in the sauna and/or shower.

On one occasion while Father Kapoun was drinking heavily and playing cards at Plaintiff's parent's home in New Hope, Defendant Kapoun asked Plaintiff to accompany him to see Kapoun's "new place." Upon arriving at Kapoun's residence, the Defendant resumed his drinking and offered alcohol to the Plaintiff. Plaintiff initially refused the alcohol, but upon insistance by Defendant Kapoun he eventually did take the drink but did not consume. At that time Defendant Kapoun suggested they go to bed and insisted the Plaintiff "use my bed tonight."

d. When Father Kapoun came out of the bathroom, he was wearing only his underwear. Kapoun crawled into bed with the Plaintiff, took his shorts off and said "lets jack each other off." Plaintiff said no but Father Kapoun proceeded to lick Plaintiff's neck, kiss him, and fondle Plaintiff's genitals in an attempt to masturbate the Plaintiff. Plaintiff rolled over and Father Kapaun continued to masturbate himself thus ejaculating all over Plaintiff's backside and legs.

5. Prior to the incidents described previously herein, did you have any evidence, awareness, knowledge, or suspicion of a propensity or tendency on the part of Father Robert Kapoun to engage in sexual contact with persons of either sex? If so, please describe the basis for your awareness, knowledge, or suspicion, and identify all persons who provided such information to you, or otherwise were a source of said information.

ANSWER:

No.

6. Was alcohol or drugs used or consumed by you or Father Kapoun prior to, or in connection with, any of the incidents described previously herein? If so, please describe.

ANSWER:

Yes, Father Kapoun drank quite often in front of the Plaintiff.

7. Identify all persons with whom you have discussed, either generally or in detail, the sexual incidents involving Father Kapoun previously described herein, from the date of the first incident to the present date, including an approximation of the date on which each conversation or discussion took place.

ANSWER:

Plaintiff's Parents:

[redacted]

8. Identify all other persons, including the parties to this action, as well as their employees or representatives, whom you claim or allege have, or had, information, from whatever source, that Father Kapoun had made inappropriate sexual contact of any other persons, either before the incidents described in the Complaint, or after.

ANSWER:

All those involved in the lawsuit of T.M. vs. Archdiocese of St. Paul and Minneapolis, et al.

9. Please describe the nature and extent of each and every injury you claim to have sustained as a result of the incidents involved herein.

ANSWER:

As a result of the sexual abuse by Defendant Robert Kapoun, Plaintiff suffers from severe emotional distress accompanied by physical manifestions including in part, extreme nervousness leading to Plaintiff's hospitalization. In addition, Plaintiff suffers from shame, humiliation, embarrassment, self-blame, loss of self-esteem, loss of confidence and lack of trust in relationships with his family, wife, and boss. Plaintiff has also lost all faith in God and the Catholic Church.

Plaintiff also has difficulty with relationships with men as well as problems in his marriage. (Plaintiff has sought marriage and individual counseling for these problems) Plaintiff is overly anxious, e.g. Plaintiff has difficulty changing his son's diaper for fear he may accidently touch his penis.

Discovery is continuing.

10. Please indicate and describe any and all permanent injuries you claim you have sustained as a result of the incidents involved herein.

ANSWER:

Plaintiff believes all injuries to be permanent, however, permanency of injuries will be determined by expert review and testimony prior to trial. This Answer will be supplemented pursuant to Rule 26.02 of the Minnesota Rules of Civil Procedure.

11. Please identify each and every hospital, doctor, psychiatrist, psychologist, counselor, or other health care professional or facility who has examined or treated you for the injuries or damages alleged in the Complaint, including the dates of each examination or treatment, and the inclusive dates of any hospitalization.

ANSWER:

The following facilities and/or health care providers may have treated Plaintiff for his injuries or damages which are related to the subject matter of this lawsuit, without Plaintiff's awareness at that time, as to the causation of those injuries. Also included are Plaintiff's medical providers who have treated Plaintiff for injuries which may or may not be related to the incidents alleged.

[redacted]

12. Please itemize the medical, hospital and health care expenses that you claim to have sustained as a result of the incidents. Please attach copies of all bills or statements to support the claimed medical expenses.

ANSWER:

Plaintiff is not in possession of any medical bills or statements at this time. This Answer will be supplemented prior to trial.

13. If you claim that you lost any time from work as a result of your injuries, and if you claim that you suffered any wage loss or income loss because of your injuries, please state:

(a) The name and address of your employer;

(b) All dates you were off work;

(c) Your wage rate at that time;

(d) The total amount of wages or income loss claimed by you, and how you compute same.

ANSWER:

Plaintiff's loss of income from work as a result of the sexual abuse will be determined by expert review and testimony prior to trial.

14. Set forth the names, addresses and occupations of any experts as follows:

(a) Whom you have consulted regarding the subject matter of this litigation;

(b) Whom you expect to call as an expert witness at trial;

(c) Whom you retained or specifically employed in anticipation of litigation or preparation for trial, but not listed in Subsection (a) or (b) of this Interrogatory.

ANSWER:

Plaintiff objects to subparts (a) and (c) of this Interrogatory. Such information is not discoverable except under limited scope of Rule 26.02(d)(2), Minnesota Rules of Civil Procedure. If Defendant can establish to the satisfaction of the Court upon proper motion the limited and narrow grounds for discovery of such information, Plaintiff will disclose this information. Without waiving this objection, Plaintiff has not retained experts at this time. Answer to Interrogatory 14(b) will be supplemented in accordance with Minnesota Rules of Civil Procedure.

15. As to each individual named in Answer to Interrogatory No. 14.
(b) above, describe in detail and state:

(a) The subject matter on which the expert is expected to testify;

(b) The substance of the facts and opinions to which the expert is expected to testify;

(c) A summary of the grounds for each opinion; and

(d) Attach a copy of any and all reports prepared by such expert.

ANSWER:

Please see Answer to Interrogatory No. 14. This Interrogatory will be supplemented in accordance with Minnesota Rules of Civil Procedure.

16. State whether you have been arrested or convicted of any crimes or misdemeanors. If so, state:

    (a) The county of each such arrest and conviction;

    (b) The date of each such arrest and conviction;

    (c) The name under which you were charged;

    (d) The nature of the crime of which you were charged or convicted.

ANSWER:

No.

17. Please state when you first contacted any attorney regarding your claims in this lawsuit, stating the name of the attorney and the date in which contact was first made.

ANSWER:

Plaintiff contacted David S. Burleson of Reinhardt & Anderson on 12/21/92.

18. Please state the date on which you retained your present attorney regarding the claims of the present lawsuit.

ANSWER:

Please see Answer to Interrogatory No. 17.

19. At anytime prior to the date(s) of the incidents involved herein, had you been treated by a doctor, psychiatrist, psychologist, counselor or other health care professional or facility? If so:

    (a) Identify each doctor, psychiatrist, psychologist, counselor, or other health care professional or facility;

    (b) The nature of the injury, or other reason for the treatment received by each;

(c) Identify all doctors or other health care professionals or facilities who have treated you for this aggravated condition.

ANSWER:

[redacted]

20. Identify by name, address, and dates of enrollment all schools you have attended, and also:

(a) Identify by name, address and grade all teachers you believe you had in class during each year of school;

(b) Describe all school records or documents you possess, or attach copies of all such school records or documents.

ANSWER:

[redacted]

[redacted]

21. List the names, addresses and dates of attendance of all churches, synagogues or places of worship which you have regularly attended, have been a member, or are a member, and:

(a) Identify the head pastor, priest, rabbi, etc. of each such place of religious worship;

(b) The time period in which you were a member or regularly attended such place of worship.

ANSWER:

22. List all activities (i.e.. Sunday school, youth group, alter service, bible study, religious schooling or training, etc.) in which you have participated at the places identified in Interrogatory No. 19, and identify the church, the date of involvement, the nature of involvement and the church staff member or volunteer who supervised such activity.

ANSWER:

a. Plaintiff was an altar boy at St. Raphaels, attended CCD classes, religious instruction and regular Sunday Mass, field trips.
b. Various chaperones

23. Describe in detail all social, religious and educational contact you had with Father Robert Kapoun:

(a) Prior to any of the alleged incidents or sexual abuse;

(b) During the time period of this alleged sexual abuse; and

(c) After the last act alleged sexual abuse.

ANSWER:

a. Altar boy instruction, family get togethers, canoe trips on the St. Croix, church retreats and polka festivals.
b. Counseling on family issues, family get togethers including dinner, playing cards, polka dancing and polka festivals.
c. None.

24. Describe the nature and extent of the religious training and counseling provided by Father Kapoun to plaintiff, along with the dates of such training and counseling.

ANSWER:

Father Kapoun would attend Plaintiff's CCD classes and give lectures. Father Kapoun would also take Plaintiff aside during altar boy exercises and other social occasions to offer advice on "issues" regarding family, dating, sports, prayer and beliefs of of the Catholic faith.

25. All school or community social clubs, service clubs or athletic organizations in which you participated or were a member from grade school up until the present time.

ANSWER:

26. Identify each person that you, your agents, representatives, or attorneys have contacted, or have been contacted by, who have provided information about alleged inappropriate sexual contact or behavior by Father Kapoun, either before the dates of the incidents involved herein, or since. As to each such person, state the substance of the facts or information obtained.

ANSWER:

Objection. Attorney-client work-product doctrine. Notwithstanding said objection, none other than those listed in Answer to Interrogatory Nos. 7 and 8.

27. State whether you, your agents, representatives, or attorneys have obtained statements from any person or persons concerning alleged inappropriate sexual contact or behavior on the part of Father Kapoun, or relating to any other issues which are the subject of this litigation. If so, please state:

(a) Identify each person from whom a statement has been obtained;

(b) Identify the person who obtained the statement;

(c) The date of each such statement;

(d) Identify who currently possesses the statement, or a copy thereof.

ANSWER:

Plaintiff is not in possession of any statements at this time.

28. Identify all persons that you have reason to believe are sexual abuse victims by Father Kapoun, including:

(a) The last known name, address, and telephone number of each victim and his guardian;

(b) The approximate dates on which each victim was abused;

(c) The places at which each victim was abused; and

(d) Identify by last known name, address, and telephone number, each witness to such abuse and the nature of the abuse witnessed.

ANSWER:

None other than those listed in Answer to Interrogatory No. 8. Discovery is continuing.

29. Identify all persons known to you or your counsel who have either reported sexual abuse or received direct reports of sexual abuse by Father Kapoun, including:

(a) The name, address, and telephone number of each such person and his/her guardians;

(b) The dates on which each such information was reported or received;

(c) The dates on which the sexual abuse allegedly occurred;

(d) The places in which the sexual abuse allegedly occurred; and

(e) The nature of each sexual abuse alleged.

ANSWER:

None other than those listed in Answer to Interrogatory No. 8.

30. List in chronological order all addresses where you have lived during the past 20 years.

ANSWER:

31. List in chronological order the name, address, phone number, and dates of employment of each place you have been employed or provided volunteer personal work or services during the past ten years. As to each such employment or service, state the nature of the work or service you provided and the name of your immediate supervisor or superior.

ANSWER:

[redacted]

32. List by date, place, and people involved, all incidents of personal or social trouble or difficulty for which you report to school, church or police authority from the time you were four years old to the present time. This is to include such incidents as shoplifting, reported fights, sexual problems, attempts at self-injury, etc. ; and is not limited to the following:

(a) Give the name and address of each person or place of authority where such difficulty or trouble was reported, investigated, treated, or managed; and

(b) Attach copies of all documents in your possession concerning such incidents.

ANSWER:

None.

33. Describe by date, location and persons involved in all instruction or direction received (prior to or during the time period of the alleged sexual abuse) from family, church, school, or friends on reproduction, sexual activity or sexual intercourse.

ANSWER:

34. Describe the extent or nature of all sexual activity, whether homosexual or heterosexual, and whether initiated by yourself or someone else, you have experienced:

    (a) Prior to any social contact with Father Kapoun;

    (b) After becoming acquainted with Father Kapoun, but prior to any alleged sexual abuse by Father Kapoun;

    (c) During the time period of sexual abuse by Father Kapoun; and

    (d) After the alleged sexual abuse by Father Kapoun to present.

ANSWER:

35. Set forth in detail an itemized list of all payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf by or pursuant to:

    (a) A federal, state or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;

    (b) Health, accident, and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage;

    (c) A contract or agreement of a group, organization partnership, or a corporation to provide, pay for or reimburse the cost of hospital, medical or other health care services; or

(d) A contractual or voluntary wage continuation plan provided by employer or any other system intended to provide wages during a period of disability except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.

ANSWER:

Objection. Plaintiff objects to this Interrogatory on the basis that it is relevant to post-verdict proceedings. Without waiving this objection Plaintiff states he is without this information at this time.

36. With regard to the payments referred to in your answer to Interrogatory No. 33 above, set forth a list of all such payment for which a subrogation right has been asserted.

ANSWER:

Objection, vague and ambiguous. This Interrogatory does not correlate with Interrogatory No. 33. Without waiving said objection, please see Answer to Interrogatory No. 35.

37. With regard to the payments referred to in your answer to Interrogatory No. 33 above, set forth a specific and detailed list of all amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or member of the plaintiff's immediate family for the two year period immediately before the date of the accident to secure the right to any such benefits that the plaintiff is receiving as a result of loss of cause by the occurrence in questions.

ANSWER:

Please see Answer to Interrogatory No. 36.

38. Describe in detail, not in summary fashion, all facts which support your claim in Paragraph No. 18 of plaintiff's Complaint that defendant Archdiocese knew . . . of defendant Father Kapoun's dangerous and exploitive propensities as a child sexual abuser, and/or an unfit agent" prior to the occurrence of the alleged sexual conduct between Father Kapoun and plaintiff.

ANSWER:

Plaintiff's Complaint alleges that "Defendant Archdiocese by and through its agents, servants and employees knew or should reasonably have known of Defendant Father Kapoun's dangerous and exploitive propensities."

Plaintiff is aware of another sexual abuse victim of Father Kapoun, while he was serving St. Raphael's Parish in Crystal, Minnesota. This other victim was sexually abused prior to the abuse of the Plaintiff. (See T.M. vs. Archdiocese of St. Paul and Minneapolis, et al.) This case is venued in Hennepin County District Court, however not yet filed, and Defendant possesses information regarding this matter.

Additionally, deposition testimony reveals that in approximately August of 1973, a woman parishioner of St. Raphaels Parish reported the sexual molestation to Monsignor Srnec, then pastor of St. Raphael's Parish. Within approximately one month after having received this report, Monsignor Srnec met with Archbishop Roach, then Bishop Roach, head of personnel for the Defendant Archdiocese. At this meeting, Monsignor Srnec informed Roach of Father Kapoun's sexual molestation of a minor parishioner. Roach then made the comment "well, it might be true and then again maybe it isn't." Instead of reporting Defendant Father Kapoun's criminal misconduct to local law enforcement authorities, commencing laicization proceedings or canonically removing Father Kapoun's faculties to operate as a Roman Catholic priest, the Defendant Archdiocese permitted Father Kapoun to remain in his capacity as a priest at St. Raphael's Parish.

Because Father Kapoun's conduct constituted compulsive sexual misconduct, and due to his position of authority and access over many parish boys, research indicates there was likely many other victims, yet undiscovered.

Furthermore, Plaintiff has learned through the deposition testimony of diocesan officials, in other unrelated yet factually similar cases, that the Archdiocese failed to conduct reasonable psychological testing, assessment and evaluation of candidates ordinated into the priesthood nor did the Archdiocese's Seminary Officials properly train candidates for the priesthood in dealing with celibacy and interaction with parish youth with whom they were counseling. The type of conduct perpetrated by Father Kapoun as alleged in Plaintiff's complaint amounts to a compulsive disorder which should have been discovered had the Archdiocese conducted reasonable psychological testing and assessment as mentioned above, or could have been prevented by proper training.

Father Kapoun was a Roman Catholic priest, educated, trained, ordained, and employed by and under the direct supervision and control of Defendant Archdiocese. At all times, Father Kapoun's employment duties with the Archdiocese included providing for spiritual and emotional needs, religious instruction for parishioners and providing proper training and supervision of altar boys entrusted to his care. Father Kapoun sexually molested the then minor Plaintiff during extracurricular activities in which Father Kapoun supervised.

Discovery is continuing.

39. Describe in detail, not in summary fashion, all facts which support your claim in Paragraph No. 18 of plaintiff's Complaint that "defendant Archdiocese . . . should reasonably have known of defendant Father Kapoun's dangerous and exploitive propensities as a child sexual abuser, and/or an unfit agent" prior to the occurrence of the alleged sexual conduct between Father Kapoun and plaintiff.

ANSWER:

Please see Answer to Interrogatory No. 38.

40. Describe in detail, and not summary fashion, all facts which support your allegation set forth in Paragraph No. 6 of plaintiff's Complaint.

ANSWER:

Defendant possesses information contained in the pending lawsuit of T.M. vs. Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota and Father Robert Kapoun. Defendant also has the deposition testimony of Monsignor Srnec.

41. Describe in detail, and not in summary fashion, all facts which support your claim that defendant Father Robert Kapoun was under the direct employment and supervision of the Archdiocese at the time of the alleged sexual misconduct.

ANSWER:

Please see Answer to Interrogatory No. 38.

42. Describe in detail, and not in summary fashion, all facts which support your claim that such alleged sexual misconduct was in the course and scope of Father Kapoun's duties as a priest within the Archdiocese.

ANSWER:

Please see Answer to Interrogatory No. 38.

43. Describe in detail, and not in summary fashion, all facts which support your claim in Paragraph No. 18 of plaintiff's Complaint that defendant Archdiocese negligently hired, failed to provide reasonable supervision, and failed to properly warn plaintiff.

ANSWER:

Plaintiff objects to this Interrogatory so far as it inquires into the negligent hiring of

Defendant Kapoun. Plaintiff did not allege that the Archdiocese negligently hired Father Kapoun. Notwithstanding said objection, and in response to the the remainder of this Interrogatory, please see Answer to Interrogatory No. 38. Additionally, the Defendant held Father Kapoun out to the public as a competent and trustworthy priest even after having learned information regarding Father Kapoun's conduct toward Plaintiff. This information in connection with the fact that there existed a prior victim of Father Kapoun leads Plaintiff to believe that Defendant failed to provide reasonable supervision over Father Kapoun and failed to properly warn the Plaintiff of his propensities prior to and after the sexual abuse.

45. Identify the witnesses who will testify in support of your answers to Interrogatory Nos. 36, 37, 38, 39, 40, 41, 42, and 43 providing, the names, addresses and telephone numbers of these witnesses.

ANSWER:

Please see Answer to Interrogatory Nos. 8 and 38. Witnesses have not yet been determined. Discovery is continuing.

46. Describe any documents which support your answers to Interrogatory Nos. 36, 37, 38, 39, 40, 41, 42, and 43 providing a summary of the contents of such documents.

ANSWER:

Please see Answer to Interrogatory No. 43. Other than the pleadings in this case, none at this time. Discovery is continuing.

[redacted]

Subscribed and sworn to before me this
16th day of December, 1993.

Carol A. Kollodge
Notary Public

CAROL A. KOLLODGE
NOTARY PUBLIC-MINNESOTA
WRIGHT COUNTY
My Commission Expires Jan. 31, 2000

Dated: 12/16/93

REINHARDT AND ANDERSON

David S. Burleson

By: Jeffrey R. Anderson, #2057
Mark A. Wendorf, #173484
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332 Minnesota Street
St. Paul, Minnesota 55101
(612) 227-9990

29240

EXHIBIT B

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3

4 - - - - - - - - - - - -

5 D.M.,

6 Plaintiff,

7 vs. File No.

8 FATHER ROBERT KAPOUN,
CHURCH OF ST. RAPHAEL
9 in Crystal, Minnesota,
and the ARCHDIOCESE OF
10 ST. PAUL AND MINNEAPOLIS,

11 Defendants.

12 - - - - - - - - - - - -

13

14 Deposition of MONSIGNOR STANLEY J. SRNEC,
15 taken pursuant to Notice of Taking Deposition, and
16 taken before Gary W. Hermes, a Notary Public in and
17 for the County of Ramsey, State of Minnesota, on the
18 7th day of July, 1989, at E-1400 First National Bank,
19 St. Paul, Minnesota, commencing at approximately 9:40
20 o'clock a.m.

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24 AFFILIATED COURT REPORTERS
743 NORWEST BANK MIDLAND
25 MINNEAPOLIS, MN 338-4348

COPY

1 Q. Could you tell me in your own words what happened
2 when you went there?
3 A. I presented him with this transcript, he read it and
4 said, "Well, it might be true and then maybe again it
5 isn't." And I felt I had done my work, I didn't
6 pursue the matter any farther.
7 Q. Did you tell Bishop Roach that in fact you had known
8 or had had some contact with this T.M. before you
9 took the statement?
10 A. Oh, I don't remember that coming up and I don't think
11 that I said that.
12 Q. Did Bishop Roach ask you if you believed T.M. or not?
13 A. No, he did not.
14 Q. Did Bishop Roach ask you if you had any other
15 information of a similar nature regarding Father
16 Kapoun?
17 A. No, he did not.
18 Q. Monsignor, when Bishop Roach said, "This may be true
19 or it may not be" after reading the statement, did he
20 ask you any other questions about the circumstance or
21 the statement?
22 A. I don't remember his asking any questions about it.
23 Q. Monsignor, before you went to Bishop Roach with this
24 information and this statement, do you have any
25 recollection of telling T.M. that you intended to go

1 to the Chancery with it?
2 A. I don't have any recollection of what I told him.
3 I'd have to conjecture that I probably said very
4 little about that because I felt he was a boy and
5 that wouldn't be the kind of person to say that to.
6 But that's conjecture now, I don't remember saying
7 it.
8 Q. At the time that you brought this to Bishop Roach and
9 had the meeting with him in his office in the
10 Chancery, did he ask you if T.M. was having any
11 problems because of this?
12 A. No, Bishop Roach never asked any question like that.
13 Q. Did Bishop Roach during that meeting and as a result
14 of the information you gave him, give you some
15 instruction as to what to do?
16 A. He gave me no instructions.
17 Q. Did he give you any information that he intended to
18 do anything?
19 A. He didn't indicate anything.
20 Q. Did you feel that once you had brought this
21 information to the proper authority; that being then
22 Bishop Roach, that it was then the Chancery's and his
23 responsibility to take further action?
24 A. Yes, I felt that I had done my part and when he said,
25 "Maybe it isn't true," that made me feel that maybe I

1 had been mistaken in giving this much credibility to
2 it. I was ready to dismiss it.
3 Q. That last part you said "I was ready to dismiss it,"
4 does that mean that raised some questions in your
5 mind that you had not had before about the
6 truthfulness of this claim?
7 A. No. It meant that I was ready to dismiss the
8 accusation and I filed this away and never brought it
9 up to anybody after.
10 Q. Until recently?
11 A. Well, until the matter came up, yes.
12 Q. When you met with then Bishop Roach, was anybody else
13 present?
14 A. Nobody else was there.
15 Q. Did you discuss with Bishop Roach in that meeting any
16 other matter not related to the T.M. accusation
17 regarding Father Kapoun?
18 A. I have no recollection of discussing anything else
19 but this.
20 Q. You certainly didn't go there for any other reason?
21 A. No. Just for this.
22 Q. Did you have any conversation with Mrs. [redacted] between
23 the time that you first talked with her that you've
24 already mentioned and the time you went to Bishop
25 Roach?

1 A. No, I did not.
2 Q. After you brought this statement -- incidentally,
3 Monsignor, did you give Bishop Roach a copy of
4 Exhibit 1, the statement?
5 A. I don't remember.
6 Q. Do you remember bringing it back with you, a copy?
7 A. I had the original copy, I probably brought him a
8 Xerox or thermofax copy and if he gave it back to me,
9 I brought it with me. If he kept it, I'm not sure.
10 Q. And what did you do with it?
11 A. I filed the original just in the event that some day
12 something might come up in which connection I might
13 want to know what had been said.
14 Q. Where did you file it?
15 A. In my file.
16 Q. It was a file that you had regarding Father Kapoun or
17 it was just a personal file? What kind of file did
18 you put it in?
19 A. I have a file in which I keep pertinent material
20 about priests that I have on my staff. Now with the
21 job evaluations, I file those in the same file. At
22 that time I wasn't doing a job evaluation, so I
23 probably had his letter of appointment in that file.
24 Q. Was this a file that you maintained for particularly
25 sensitive information or just any kind of

1 information?
2 A. No. No. Any kind of information. I was not privy
3 to all kinds of sensitive information.
4 Q. You would consider this to be sensitive, however?
5 A. This I considered sensitive. I probably put a note
6 on the file saying confidential.
7 Q. Do you have any knowledge whether or not any of your
8 secretaries or staff either read this or learned of
9 its contents?
10 A. I have no suspicion at all that anybody goes through
11 my files.
12 Q. Yeah, that was my next question. I mean, it was your
13 file, right?
14 A. It's my personal file.
15 Q. It was not at least made available by you to anybody
16 else?
17 A. Not made available to anybody else.
18 Q. After your meeting with Bishop Roach having received
19 this information contained in Exhibit 1, did you in
20 any way restrict then the activities or duties or
21 responsibilities of Father Kapoun?
22 A. No, I did not.
23 Q. Did you believe at that time that if such a
24 restriction or if a restriction was appropriate, it
25 would be the province and the duty of the Bishop or

EXHIBIT C

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3

4 - - - - - - - - - - - -

5 D.M.,

6 Plaintiff,

7 vs. File No.

8 FATHER ROBERT KAPOUN, CHURCH OF
ST. RAPHAEL in Crystal, Minnesota,
9 and THE ARCHDOICESE OF ST. PAUL
AND MINNEAPOLIS,

10 Defendants.

11

12 - - - - - - - - - - - -

13

14 Deposition of ARCHBISHOP JOHN R. ROACH, taken

15 pursuant to Notice of Taking Deposition, and taken

16 before Gary W. Hermes, a Notary Public in and for the

17 County of Ramsey, State of Minnesota, on the 24th day

18 of July, 1989, at E-1400 First National Bank, St.

19 Paul, Minnesota, commencing at approximately 9:20

20 o'clock a.m.

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22

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24 AFFILIATED COURT REPORTERS
743 NORWEST BANK MIDLAND
25 MINNEAPOLIS, MN 338-4348

1 A. I do, very well.
2 Q. And you've known him for many years?
3 A. I do. I have.
4 Q. How have you come to know him?
5 A. We were in the seminary together, he was about three
6 years ahead of me in the seminary. I've known him
7 over the years for 45 years in several of the
8 capacities in which he's served in the Archdiocese
9 and in which I've served.
10 Q. And I understand that he received his appointment as
11 Monsignor many years ago, so you would not have been
12 the one who made that appointment, were you?
13 A. I was not, no.
14 Q. He has testified that in or about early September of
15 1973, he came to the Chancery on Summit to report
16 some information directly to you then as personnel
17 director. Do you recall him coming to you at the
18 Chancery to report some information to you?
19 A. I can recall a conversation with him, and this is in
20 review of the documentation. I do not recall his
21 seeing me with the memo, with the hand-written memo
22 which I have since seen.
23 Q. Were you in September of 1973 or late August of 1973
24 then the personnel director?
25 A. I was.

1 something we weren't able to get at as to the reason
2 for his inability to perform, and he was not a
3 performer.
4 Q. Perform in the priesthood, in the parish?
5 A. Perform in the priesthood, that's right. Monsignor
6 Srnec was complaining about his lack of performance.
7 I would talk to him and all I would get from Father
8 Kapoun was a fairly mysterious list of physical
9 complaints. And I would urge that there would be
10 some kind of physical evaluation of that. And in the
11 meantime, as I say, my being upset with him came from
12 the fact that I would see billboards of the Polka
13 Padre out with his accordion and here's a guy who
14 wasn't performing.
15 Q. When you say not performing, specifically what are
16 you referring to? What is it he wasn't doing that he
17 was supposed to?
18 A. Well, he wasn't able physically to do, according to
19 him, just to do the normal work of a parish. And
20 Father -- Monsignor Srnec was upset about that and
21 that was the ultimate reason for the transfer.
22 Q. What would have been the normal work of the parish
23 that he wasn't able to do, at least as far as you
24 knew?
25 A. Well, you know, I'm talking about a normal ten-hour

1 day of all the things that would be involved in a
2 parish; visitation of sick, some teaching in the
3 school, sick calls, counseling, that kind of thing.
4 Q. How did the difficulties with Father Kapoun come to
5 your attention?
6 A. Well, my recollection is that Monsignor Srnec
7 indicated either to me or to someone in the personnel
8 board that he was unhappy with Father Kapoun. Father
9 Kapoun also came in to see me, whether that was at
10 his request or mine, I really don't know, there's no
11 evidence in the files of that, and I talked to him
12 about his health at some length.
13 Q. Did your meeting with Father Kapoun predate his
14 assignment out of St. Raphael?
15 A. Yes.
16 Q. And can you give me an estimate, Archbishop, of how
17 long it did predate his actual assignment out of St.
18 Raphael?
19 A. Well, I don't know that, but I would guess, once
20 again, that it probably would be a matter of a month
21 or two.
22 Q. And was that meeting at your request?
23 A. I don't know that. That's what I don't remember.
24 And the files don't indicate whether it was at his
25 request or my request.

1 Q. Was there more than one meeting with him?
2 A. It was at least one and possibly two, but I'm not
3 sure of the second one.
4 Q. Would that have been at the Chancery itself?
5 A. It would have been at the Chancery.
6 Q. To your recollection, you never went to the St.
7 Raphael parish to meet specifically with Father
8 Kapoun at any time?
9 A. No, I didn't.
10 Q. How many meetings in number were there with Monsignor
11 Srnec where the subject of Father Kapoun was
12 discussed?
13 A. My recollection is that there was only one meeting at
14 my office. I'm sure you understand that he was
15 relatively active in the Presbytery and so was I, so
16 I might see him at other occasions and I would
17 inquire, but I can only recall one meeting formally
18 in which we discussed Father Kapoun.
19 Q. Do you recall who initiated that meeting with
20 Monsignor Srnec?
21 A. I do not, no.
22 Q. Now, you'd indicated that Father Kapoun was claiming
23 that he was unable to perform some of these tasks
24 required in the parish as a result of some injury
25 that he had, is that correct?

1 witness to testify as to matters through the years
2 1974 and through the calender year 1975 because there
3 are allegations by the plaintiff that some of the
4 contact did possibly take place as late as the winter
5 of 1974, and giving him the benefit of the doubt,
6 we'll assume that extended into 1975. So with that
7 caution in mind, I will allow Archbishop Roach to
8 testify as to whether or not he received any
9 complaints of sexual misconduct by Father Kapoun up
10 through and including calender year 1975. But before
11 he answers, I believe Mr. Brown has an objection as
12 well.
13 MR. BROWN: On behalf of Defendant Kapoun,
14 I would join in the objection, however, I would
15 object to any information after January 1, 1975.
16 THE WITNESS: After January 1, 1975?
17 MR. EISENZIMMER: However, Archbishop, you
18 are allowed to testify and I'll instruct you to
19 testify through the calender year 1975 as to whether
20 you received any complaints regarding Father Kapoun.
21 THE WITNESS: Is that the question?
22 MR. EISENZIMMER: That's the question.
23 A. I have no information, received no information
24 through 1975 on the part of Father Kapoun.
25 Q. (By Mr. Anderson) So I'll re-ask the question so it

1 other words, a minor. Have you ever received any
2 information from any source that Father Kapoun
3 touched the genital area of D.J. while D.J. was under
4 the age of 18?
5 A. I did not.
6 Q. And before I brought this information to you today,
7 had you heard that from any source?
8 A. I did not, no.
9 Q. Now, other than Mr. Eisenzimmer, with whom have you
10 discussed the subject matter of D.M.'s claim of
11 sexual abuse by Father Kapoun?
12 MR. EISENZIMMER: Excuse me, counsel, can
13 we include Mr. Hoffman and Mr. Haws in that? Other
14 than Mr. Hoffman and Mr. Haws and myself, as they're
15 counsel to the Archdiocese as well.
16 MR. ANDERSON: Sure, if they are counsel to
17 the Archdiocese.
18 MR. EISENZIMMER: In this matter they are.
19 MR. HOFFMAN: You didn't know we were?
20 (Discussion off the record.).
21 MR. ANDERSON: Yeah, you can include them.
22 I'll rephrase the question.
23 Q. (By Mr. Anderson) Other than with attorneys
24 representing you or the Archdiocese, with whom have
25 you discussed the claim of sexual misconduct by

1 Q. And it is a three-page statement written in
2 somebody's hand. Do you know whose hand?
3 A. I do not. It is signed by a T.M.
4 Q. Is it a fair statement or am I correct in stating
5 that the writer of this document claims that Father
6 Kapoun engaged T.M. in sexual misconduct sometime in
7 the year 1973?
8 A. According to this memo, that's correct.
9 Q. Now, Monday Srnec has testified that in 1973,
10 specifically September, early September 1973, that he
11 brought this very memo to you and presented it to you
12 in the Chancery. Are you aware that he has testified
13 to that?
14 A. I am, correct, yes, I am.
15 Q. My question to you, Archbishop, is did Monsignor
16 Srnec ever present this memo to you?
17 A. Not to my knowledge, no.
18 Q. If this memo had been presented to you in September
19 of 1973 or thereabouts, what would have been done
20 with it?
21 MR. EISENZIMMER: Object to the extent that
22 the question calls for speculation on the part of the
23 witness, but I'll allow him to answer it without
24 waiving the objection.
25 MR. ANDERSON: Sure.

1 A. I would have treated this as a very serious issue. I
2 certainly would have called Father Kapoun in at that
3 time, would have tried to determine the correctness
4 or the incorrectness of the charge. I certainly
5 would have inquired as to what we as an institution
6 might do to be of assistance to T.M. Those things
7 certainly I would have tried to do.
8 Q. (By Mr. Anderson) Now, earlier I had asked you some
9 questions about maintenance of priest files and you
10 gave me some descriptions and maybe in some other
11 cases as well the kind of materials that are
12 maintained in the priest files, and you also I think
13 this morning talked about a vault where certain
14 sensitive type documents are maintained. Can you
15 tell me today, based on your knowledge of the
16 maintaining of the priest file, the general file, and
17 the maintaining of the personnel files and the
18 maintaining of the files that are maintained in the
19 somewhat secret vault, if this particular document in
20 1973 had been presented to you, where it would have
21 been maintained, if it would have been maintained?
22 MR. EISENZIMMER: I'll object again on the
23 basis that the question calls for speculation and
24 instruct the witness not to answer. He doesn't have
25 to engage in that kind of speculation. It's a little

1 conversation with Monsignor Srnec, not Father Kapoun.
2 Q. (By Mr. Anderson) That's what I intended to say.
3 Excuse me.
4 A. I do not recall that, but the memo is certainly
5 reflective of that.
6 Q. But you do recall having sat down with Father Srnec
7 and discussed Father Kapoun, at least in 1974, is
8 that correct?
9 A. That's correct.
10 Q. Okay.
11 A. The content of this memo, which I had had a chance to
12 review, I must say is somewhat puzzling to me in view
13 of the prior memo or the question of this T.M.
14 person. That was a year prior to that and it would
15 seem to me strange that Monsignor Srnec and I would
16 not have talked about that problem, had we talked
17 about it before. There's nothing in here, nor is
18 there anything in here, which would indicate that
19 Monsignor Srnec was talking about a sexual problem in
20 this memo (Indicating). I find that puzzling.
21 Q. Is it your testimony then that if Monsignor Srnec had
22 talked about a sexual problem regarding Father
23 Kapoun --
24 A. It would have been in this memo.
25 Q. In July of '74 it would have been in the memo?

1 A. Correct.
2 Q. And you wouldn't have intentionally left it out?
3 A. No, I would not have, no.
4 Q. We're going to skip 5 and show you what's been marked
5 for identification as Exhibit 6. Can you tell me
6 what this is?
7 A. I cannot tell you. Well, it is -- it is -- it's to
8 Archbishop Byrne, it's in response to a letter which
9 apparently Archbishop Byrne had sent to me from
10 Monsignor Srnec.
11 Q. Now, is this a memo from you then?
12 A. It's a memo from me.
13 Q. In your handwriting?
14 A. In my handwriting.
15 Q. Maybe you can read it for me then.
16 A. You can't read that? "Thank you for Monsignor
17 Srnec's letter. He is probably right about Kapoun,"
18 and I don't understand the file above. "We must
19 check on him after a few months."
20 Q. Now, this memo doesn't have a date on it, does it?
21 A. Does not.
22 Q. Why don't you look at Exhibit 7.
23 A. (Examining documents.)
24 MR. EISENZIMMER: For purposes of
25 clarification, it's my understanding that in the

EXHIBIT D

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3

4 - - - - - - - - - - - -

5 D.M.,

6 Plaintiff,

7 vs. File No.

8 FATHER ROBERT KAPOUN, CHURCH OF
ST. RAPHAEL in Crystal, Minnesota,
9 and THE ARCHDIOCESE OF ST. PAUL
AND MINNEAPOLIS,

10 Defendants.

11

12 - - - - - - - - - - - -

13

14 Deposition of FATHER ROBERT KAPOUN, taken

15 pursuant to Notice of Taking Deposition, and taken

16 before Gary W. Hermes, a Notary Public in and for the

17 County of Ramsey, State of Minnesota, on the 25th day

18 of July, 1989, at E-1400 First National Bank, St.

19 Paul, Minnesota, commencing at approximately 9:10

20 o'clock a.m.

21

22

23

24 AFFILIATED COURT REPORTERS
743 NORWEST BANK MIDLAND
25 MINNEAPOLIS, MN 338-4348

COPY

1 Q. And his name?

2 A. [redacted]

3 Q.

4 A. Right.

5 Q. Before Good Shepard you were at St. Raphael?

6 A. Yes.

7 Q. And you were assigned to St. Raphael on what date,

8 Father?

9 A. It was the summer of 1971.

10 Q. And you served as associate there?

11 A. Yes.

12 Q. And the pastor was Monsignor Srnec?

13 A. Right.

14 Q. Before St. Raphael?

15 A. St. Kevin's.

16 Q. For how long?

17 A. Four years.

18 Q. Associate?

19 A. Yes.

20 Q. Who was the pastor?

21 A. Father Robert Vashro.

22 Q. Can you spell that?

23 A. V-a-s-h-r-o.

24 Q. Any other associates besides yourself?

25 A. No.

1 about 30 years old, is that right, and you were at
2 St. Kevin's?
3 A. Right.
4 Q. Let's see, that would be between '67 and '70?
5 A. '71.
6 Q. '71?
7 A. Well, somewhere in there.
8 Q. That's close enough.
9 A. He was in eighth grade when I came.
10 Q. How old was he when the contact happened?
11 A. It was several years later after I came.
12 Q. Was he still in high school?
13 A. Yes.
14 Q. And the exact grade you don't know?
15 A. No.
16 Q. Did you ever have any discussion with him about that?
17 A. No.
18 Q. Other than your attorney, have you ever told anybody
19 else, besides myself now, about that?
20 A. No.
21 Q. Nobody at all?
22 A. I mentioned that in confession.
23 Q. Okay. Other than the Sacrament of Confession?
24 A. No.
25 Q. Or the context of confession?

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
Case Type: 11

S.M., | Court File No:

Plaintiff,

vs. | **ORDER**

Archdiocese of St. Paul and Minneapolis, and Father Robert E. Kapoun,

Defendants.

The above-entitled matter came on for hearing before the Honorable Gary Larson on December 7, 1995, upon plaintiff's motion for leave to amend his Complaint to include a claim for punitive damages.

Mark A. Wendorf, Esq., Reinhardt & Anderson, E-1000 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101, appeared for and on behalf of the plaintiff.

Daniel A. Haws, Esq., Murnane, Conlin, White & Brandt, 1800 Piper Jaffray Plaza, 444 Cedar Street, St. Paul, MN 55101 appeared for and on behalf of Defendant Archdiocese of St. Paul and Minneapolis.

Frederick C. Brown, Esq., Popham, Haik, Schnobrich & Kaufman, 3300 Piper Jaffray Tower, 222 Ninth Street South, Minneapolis, MN 55402, appeared for and on behalf of Defendant Father Robert E. Kapoun.

Now, therefore, based upon all files, records, proceedings and arguments of counsel:

IT IS HEREBY ORDERED:

That plaintiff's motion to amend its Complaint to assert a claim for punitive damages against defendant Archdiocese of St. Paul and Minneapolis is hereby, in all respects, denied.

DATED: BY THE COURT:

The Honorable Gary Larson
Judge of District Court

FILED

96 MAR 12 PM 3:41

BY _____ DEPUTY

CLERK OF DISTRICT COURT ADMINISTRATOR

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: 11

S.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis, and Father Robert E. Kapoun,

Defendants.

Court File No: PI 95-2181

MEMORANDUM IN SUPPORT OF ARCHDIOCESE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF ALLEGED 'OTHER VICTIM' ABUSE

INTRODUCTION

This Memorandum of Law is submitted in support of defendant the Archdiocese of St. Paul and Minneapolis' ("Archdiocese"), Motion in Limine to exclude any testimony or evidence regarding allegations of sexual abuse or relationships with persons other than the plaintiff.

ARGUMENT

I. ANY TESTIMONY REGARDING ALLEGATIONS OF FATHER KAPOUN'S SEXUAL ABUSE OR RELATIONSHIPS WITH PERSONS OTHER THAN S.M. SHOULD BE EXCLUDED FROM THE EVIDENCE OF THIS TRIAL.

Plaintiff has alleged that Father Kapoun engaged other victims in acts of alleged sexual abuse. Plaintiff has identified: [redacted] as potential witnesses in this case. Presumably,

plaintiff intends to calls these persons at the time of trial as witnesses to testify as to their sexual involvement with Father Kapoun. Such testimony should be excluded on the grounds that it is both irrelevant and prejudicial.

A. Any testimony of sexual misconduct between Father Kapoun and persons other than the plaintiff is irrelevant.

Minnesota Rule of Evidence 401 defines "relevant evidence" as follows:

> Relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Id.

The existence of evidence that Father Kapoun engaged any other person in inappropriate sexual conduct does not make it more or less probable that the Archdiocese knew about Father Kapoun's propensity to engage minor children in inappropriate sexual conduct.

Other than the statement of [redacted] to Monsignor Srnec in 1973, there is no other allegation that the Archdiocese knew of Father Kapoun's alleged inappropriate conduct until the late 1980's.

In addition, there is no evidence of alleged victims' sexual abuse being brought to the attention of the Archdiocese until the late 1980's, after the alleged incident that forms the basis of this lawsuit. If there is no evidence of any notice of other sexual abuse victims complaining of abuse to the Archdiocese until after the incident with plaintiff in this case, none of the "other

alleged acts of victim sexual abuse", could in any way make the existence of any fact in this lawsuit more probable or less probable than it would be without such evidence. As such, this evidence is irrelevant.

Furthermore, Rule 404 of the Minnesota Rules of Evidence specifically excludes character evidence and "other act" evidence whose sole purpose is to prove action in conformity therewith on a particular occasion.

Rule 404(b) provides that "evidence of "another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith . . . " Minn. R. Evid. 404(b). Application of Rule 404(b) to sexual abuse cases like the present was recently discussed in M.L. v. Magnuson, 531 N.W.2d 849 (Minn. Ct. App. 1995).

In Magnuson, the court considered whether, under Rule 404(b), evidence of "other acts of abuse" would be admissible against either Magnuson or the Redeemer Covenant Church. Id. at 859-60. The court held:

> [w]e cannot discern a basis for finding that the evidence of other sexual abuse victims . . . was relevant to any issue in the case aimed at establishing the liability of Magnuson. Moreover, this evidence could only have the ill effect of inflaming the passion and prejudice of the jury

Id. at 859-60.

Regarding Redeemer, the court held that evidence of other sexual abuse was "arguably admissible" in the negligence case to prove that they "knew or should have known Magnuson would engage in sexual abuse." Such evidence, however, would be limited to "only

incidents that occurred prior to the time M.L. was abused . . . " Id. at 860. (emphasis added).

Here, should the court find that the limited probative value of such evidence outweighs it's prejudicial effect, evidence of "other acts" of sexual abuse by Father Kapoun must be limited to the T.M. claims of sexual abuse which allegedly occurred in 1973, two years prior to the time that S.M. claimed he was abused. There are no other alleged incidents of abuse where there is any evidence that the Archdiocese arguably knew or had reason to know Father Kapoun had engaged in abuse.

B. Even if evidence or testimony with respect to other alleged victims of sexual abuse is relevant, the testimony should be excluded pursuant to Minnesota Rule of Evidence 403.

Minnesota Rule of Evidence 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id.

The probative value of allegations of other alleged victims of sexual misconduct by Father Kapoun even if probative, is substantially outweighed by the danger of unfair prejudice. As the Court stressed in Magnuson, "we cannot discern a basis for finding that evidence of other sexual abuse victims . . . was relevant to any issue in the case aimed at establishing the liability of Magnuson . . . [a]dmission of this evidence was sufficiently

prejudicial to entitle Magnuson to a new trial." Magnuson, 531 N.W.2d at 860.

Here such evidence has no probative value. Allegations by other victims of sexual abuse by Father Kapoun are simply of such slight probative value, that they could only have the "ill effect of inflaming the passion and prejudice of the jury." See, Magnuson, 531 N.W.2d at 860.

Secondly, the admission of such testimony would confuse the jury on the real issues at trial, i.e., the Archdiocese's liability to the plaintiff. Evidence or testimony regarding 'other victims' allegations of sexual abuse by Father Kapoun have no bearing on whether the Archdiocese had knowledge prior to 1975 that Father Kapoun had engaged in inappropriate sexual conduct.

Finally, allowing the testimony of other victims' allegations of abuse by Father Kapoun would cause undue delay and a waste of the Court's time. The Archdiocese would be required to cross-examine each of the witnesses regarding the allegations of sexual misconduct by Father Kapoun. Numerous other witnesses would have to be called to determine whether the Archdiocese should have had any knowledge regarding these alleged inappropriate sexual activities by Father Kapoun. The jury would be forced to listen to numerous witnesses testify regarding allegations of sexual abuse which occurred after the allegations of abuse in this case.

For all of the aforementioned reasons, the probative value of any such witnesses' testimony is clearly outweighed by the danger of unfair prejudice, jury confusion and waste of time.

Should this court find, however, that "other act" evidence is more probative than prejudice, than this court must limit that evidence to allegations of abuse that occurred prior to the incident with the plaintiff and which the Archdiocese arguably had reason to know about, ie. T.M. See, Magnuson, 531 N.W.2d at 860.

CONCLUSION

Based upon the foregoing arguments and authorities, the Archdiocese requests an Order of this Court excluding any evidence, testimony or reference to allegations of sexual abuse with persons other than the Plaintiff.

Dated this 13th day of March, 1996.

Respectfully submitted,

MURNANE, CONLIN, WHITE & BRANDT
Professional Association

Daniel A. Haws, #193501
Mark D. Covin, #218820
Attorneys for Defendant
1800 Piper Jaffray Plaza
444 Cedar Street
St. Paul, Minnesota 55101
(612) 227-9411

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff

-vs-

Archdiocese of St. Paul and Minneapolis, and Father Robert E. Kapoun,

Defendants

JUDGMENT

DATE: August 2, 1996

DOCKETED: 7:30 a.m.

FILE NO: 95-2181

JUDGMENT ROLL

The above entitled action having been regularly placed upon the calendar of the above named Court, came on for trial before the Court and Jury duly impaneled and sworn to try the same on the 18th day of March, 1996; which said Jury did, on the 25th day of March, 1996, duly render a special verdict as to certain interrogatories herein, and thereafter, on the 28th day of March, 1996, the Court did make and file its order for judgment herein, adopting said special verdict as a finding of fact.

Now, pursuant to said order and on motion of Mark D. Covin, Esq., Attorney for the Defendant Archdiocese of St. Paul and Minneapolis,

IT IS HEREBY ADJUDGED:

1. That defendant Archdiocese of St. Paul and Minneapolis is entitled to judgment against the plaintiff, [redacted] dismissing plaintiff's claims as a matter of law, with prejudice and on the merits.

2. That judgment is entered in favor of Defendant Archdiocese of St. Paul and Minneapolis and against Plaintiff for the sum of three thousand, three hundred twelve and 04/100 ($3,312.04) Dollars for costs and disbursements.

$3,312.04

BY THE COURT
DISTRICT COURT ADMINISTRATOR

BY _____
DEPUTY

HC 2899

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

FILED
96 AUG -2 AM 7:09
BY DEPUTY
HENNEPIN DISTRICT COURT ADMINISTRATOR

S.M.,

Plaintiff

vs

Archdiocese of St. Paul and Minneapolis,
and Father Robert E. Kapoun,

Defendants

Order Amending Title

File No. 95-2181

Upon motion of (Plaintiff) (Defendant) (Stipulation of the Parties) in Open Court,

IT IS HEREBY ORDERED that the title of this action is amended to read as follows:

[redacted]

Plaintiff

vs

Archdiocese of St. Paul and Minneapolis,
and Father Robert E. Kapoun,

Defendants

Date 8/1/96

Judge

FILED

96 MAR 28 AM 8:36

HENN. CO. DISTRICT COURT ADMINISTRATOR

CASE TYPE: 11

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

Court File No. PI 95-2181

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

Archdiocese of St. Paul and Minneapolis and Father Robert E. Kapoun,

Defendants.

WHEREAS, the above-entitled matter came on for jury trial before the Honorable Gary Larson on March 18, 1996, through March 22, 1996, at the Hennepin County Government Center, City of Minneapolis, State of Minnesota.

WHEREAS, Jeffrey Anderson, Esq. and Mark Wendorf, Esq. appeared on behalf of the plaintiff, Mark Schutz, and Daniel A. Haws, Esq. and Thomas A. Gilligan, Esq. appeared on behalf of defendant Archdiocese of St. Paul and Minneapolis.

NOW, THEREFORE, based upon the files, records, proceedings, and special verdict entered by the jury on March 25, 1996, the court makes the following:

FINDINGS OF FACT

1. That the matter was tried before a jury of six. The jury returned a special verdict on March 25, 1996.

2. That the jury in this matter found the following in the form of a special verdict:

1. Did [redacted] sustain any injury as a result of the sexual abuse by Father Kapoun?

Answer: Yes __X__ No _____

If your answer to Question No. 2 was "Yes," then answer the following question:

2. When should a reasonable person in [redacted] [redacted]'s situation have known that he was sexually abused and that he sustained injury as a result of the sexual abuse?

9	1	75
month	day	year

Regardless of your answers to any of the other questions, you must answer the following questions:

3. What sum of money will fairly compensate [redacted] [redacted] for his damages up to the date of trial?

Medical, therapy and counseling expenses	$ 3,472.00
Loss of earnings	$ 0.00
Disability, emotional distress and embarrassment	$63,750.00

4. What sum of money will fairly compensate [redacted] [redacted] for his damages reasonably certain to occur in the future?

Medical, therapy and counseling expenses	$ 9,071.00
Loss of earnings	$ 0.00
Disability, emotional distress and embarrassment	$21,250.00

Dated March 25, 1996.

3. That the above verdict submitted to the court was a 5/6th verdict reached after six hours of deliberation.

CONCLUSIONS OF LAW

1. That the court adopts the jury's special verdict as its findings of fact which are reasonable and in accordance with the evidence submitted in this case.

2. That pursuant to the jury's finding that a reasonable person in [redacted]'s situation should have known that he was sexually abused and sustained injury as a result of this sexual abuse by September 1, 1975, plaintiff's claims are time barred pursuant to the statute of limitations set forth in Minn. Stat. § 541.073.

ORDER

1. That defendant Archdiocese of St. Paul and Minneapolis is entitled to judgment against the plaintiff [redacted] dismissing plaintiff's claims as a matter of law, with prejudice and on the merits.

2. That the Archdiocese is entitled to an award of costs and disbursements as will be submitted and as provided by law.

3. That entry of the above judgment shall be stayed for 30 days from the date hereof, as provided by the General Rules of Practice 125 for the Minnesota Rules of Civil Procedure.

LET JUDGMENT BE ENTERED ACCORDINGLY.

3/28/96
Rule 125 STAY

Gary Larson
Judge of District Court

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]	)	
	)	
Plaintiff,	)	**DEFENDANT ROBERT KAPOUN'S RESPONSES TO PLAINTIFF'S INTERROGATORIES**
	)	
vs.	)	
	)	
Robert Kapoun, personally and The Catholic Archdiocese of St. Paul and Minneapolis,	)	
	)	
Defendant.	)	

TO: Plaintiff above-named and his attorney, Brian Bennett Huling, Esq., 3001 Hennepin Ave. S., Suite 309B, Minneapolis, Minnesota 55408.

Defendant Father Robert Kapoun, for his responses to Plaintiff's Interrogatories, states as follows:

INTERROGATORY NO. 1: State the full name, age, date of birth, occupation and address of the person answering these Interrogatories.

ANSWER: Reverand Robert E. Kapoun; R.R. #1, Box 218, New Prague, MN; born on December 1, 1938; pastor of Church of St. Scholastica, Church of St. Joseph and Church of St. Thomas.

INTERROGATORY NO. 2: State the full name, address of every person with whom you consulted in preparing your answers to these Interrogatories.

ANSWER: I consulted only with my attorney, Frederick C. Brown.

INTERROGATORY NO. 3: Identify by name, current address, and occupation all individuals who have any information related to the allegations referred to in Plaintiff's complaint and state that knowledge possessed by each person.

ANSWER: [redacted] apparently has knowledge of the facts relating to his claims. It is possible that [redacted] and plaintiff's doctors and therapists may have some knowledge, but the details of such knowledge are unknown to me at this time. Following service of the Complaint in this action, I discussed the general accusations with several individuals, none of whom had any knowledge of the allegations prior to my discussions.

INTERROGATORY NO. 4: Identify by name, current address, occupation each person whom you expect to call as a witness at trial of this action and state facts to which each witness is expected to testify.

ANSWER: The witnesses have not yet been identified. This response will be supplemented prior to trial.

INTERROGATORY NO. 5: State which of the persons referred to in your answers to Interrogatories herein you have interviewed giving the date, time and location of each interview, and identifying each person conducting or otherwise present at each interview.

ANSWER: None, other than discovery responses and treatment records and reports received from plaintiff's counsel herein.

INTERROGATORY NO. 6: Identify any reports, statements, memoranda, investigations, writings, pamphlets, or any other information including, but not limited to, any medical information relating in any matter to this case.

ANSWER: To my knowledge, none since the allegations regarding occurrences are denied.

INTERROGATORY NO. 7: Fully relay, in as much detail as you recall, all conversations which took place at the time of, prior to or following the occurrences referred to in Plaintiff's complaint.

ANSWER: No conversations have taken place to my knowledge.

INTERROGATORY NO. 8: Identify all persons who overheard or may have overheard such matters.

ANSWER: Not applicable.

INTERROGATORY NO. 9: Identify all persons whom you may call at trial to give testimony in a form, expert opinions or conclusions and for each person, state the subject matter on which he or she may be asked to give expert testimony, his or her qualifications to give expert testimony, all facts to which the expert will testify, all opinions or conclusions in which the expert will testify, and the grounds for those opinions or conclusions.

ANSWER: Expert witnesses have not yet been identified or retained. This response will be supplemented prior to trial.

INTERROGATORY NO. 10: State whether you have been arrested or convicted of any crime and provide the jurisdiction, the date of arrest and/or conviction, an the basis for the criminal charge and the disposition of the matter.

ANSWER: No.

INTERROGATORY NO. 11: State whether you have ever been treated by a psychiatrist, psychologist, counselor, or any other mental health care provider, and identify the provider, the date of the treatment and the reason for the treatment and give the address of each provider.

ANSWER: Defendant objects to this Interrogatory on the grounds that it seeks information which is immaterial to any allegation at issue herein and is not intended to lead to the discovery of any admissible evidence. In addition, the Interrogatory seeks disclosures protected from disclosure by Rule 35 of the Minnesota Rules of Civil Procedure and applicable statutory privileges.

INTERROGATORY NO. 12: Identify by name, address, and dates of enrollment of all schools that you have attended.t

ANSWER:

a) St. Paul Seminary
2200 Grand Ave.
St. Paul, MN 55101
1958-1964

b) Nazareth Hall Seminary
Arden Hills, MN
1956-1958

c) Cretin High School
St. Paul, MN
1952-1956

d)

INTERROGATORY NO. 13: Since your ordination, identify all parishes where you have served giving the addresses and dates you served.

ANSWER: a) St. Scholastica, St. Joseph, St. Thomas
1989-present

b) St. Patrick Church
St. Patrick, MN
1977-1984

c) Home of the Good Shepard
North Oaks, MN
1974-1976

d) St. Raphael
7301 Bass Lake Rd.
Crystal, MN
1971-1974

e) St. Kevin's
5844 - 28th Ave. S.
Minneapolis, MN
1967-1971

f) Holy Redeemer
Montgomery, MN
1964-1967

INTERROGATORY NO. 14: Identify all claims of misconduct, including but not limited to, financial misconduct, sexual abuse, physical abuse, emotional abuse, made against you, giving the date of the claim, the basis for the claim and the disposition of the said claim.

ANSWER: Defendant objects to this Interrogatory on the grounds that it seeks information which is immaterial to any allegation at issue herein and is not intended to lead

to the discovery of any admissible evidence. In addition, the Interrogatory seeks disclosures protected from disclosure by Rule 35 of the Minnesota Rules of Civil Procedure and applicable statutory privileges.

INTERROGATORY NO. 15: For any incident referred to in the above Interrogatory, identify all witnesses or persons who have knowledge of said incident.

ANSWER: Not applicable

INTERROGATORY NO. 16: Identify all your sexual activities.

ANSWER: I cannot understand this Interrogatory and therefore cannot provide a meaningful response.

INTERROGATORY NO. 17: Identify any insurer which provides coverage for the claims in Plaintiff's complaint, identifying the insurer, the policy number, and the terms and limits on that coverage.

ANSWER: To my knowledge, I had no personal liability insurance policy in effect during whatever may be the material time herein.

INTERROGATORY NO. 18: Describe your employment history from high school until the time you became an ordained priest, giving the place of employment, employer, and the address of the employer, and the reason for terminating such employment.

ANSWER: None, other than part-time miscellaneous jobs.

Rev. Robert E. Kapoun

Robert E. Kapoun

Subscribed and sworn to before me
this 12th day of December, 1994.

Notary Public

FREDERICK C. BROWN JR.
NOTARY PUBLIC-MINNESOTA
HENNEPIN COUNTY
My Commission Expires Dec. 9, 1997

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.21, Subd. 2, to the party or parties against whom the allegations in this pleading are asserted.

Frederick C. Brown

1 A. I do not know.
2 Q. How long did Father Kapoun after August of 1973
3 remain an associate at St. Raphael?
4 A. I'm not sure. I think you can get that information
5 from the Chancery. My best guess is that he was
6 there to about September of '74, but I could be
7 mistaken.
8 Q. Did he continue after, let's say, August of 1973
9 through the rest of his tenure there, be it September
10 '74 or whatever, did he continue to have the usual
11 youth contact that the associate pastor would have at
12 St. Raphael?
13 A. Yes, I did not restrict him and I was not aware that
14 he was operating under any restrictions.
15 Q. So that would include working with servers?
16 A. Working with mass servers, working with kids in
17 school in the CCD program.
18 Q. And those are things that Father Kapoun had done
19 while at St. Raphael and continued to do through his
20 tenure there?
21 A. That was part of his responsibility.
22 Q. Okay. Do you know if Father Kapoun brought the youth
23 on any particular, for example servers, on retreats
24 or anything of that kind during his service at St.
25 Raphael?

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Case Type: 11

A.M. Plaintiff vs. ARCHDIOCESE OF ST. PAUL IMMACULATE HEART OF MARY CHURCH IN MINNETONKA and FATHER JEROME C. KERN Defendants	)	AFFIDAVIT OF REV. THOMAS P. DOYLE, O.P.

I, Rev. Thomas P. Doyle, O.P., J.C.D., being first duly sworn, do hereby depose and say:

1. I am a Roman Catholic priest and a member of the Dominican Order. I was ordained a priest in 1970. At the present time I am on active duty with the United States Air Force serving as a chaplain. I am presently Catholic Chaplain at Hurlburt Field, Florida. I reside at 10 Hume Drive, Hurlburt Field, Florida.

2. I hold the following degrees: MA in philosophy, MA in theology, MA in Political Science, MChA in Church Administration, MA in Canon Law and JCD or Doctor of Canon Law. I have held a wide variety of positions in Church Administration, including serving as a judge in the Tribunals of several dioceses and archdioceses and as Secretary-Canonist for the Vatican Embassy, Washington DC. My curriculum Vitae is attached.

3. Since October, 1984 I have been involved in the issue of sexual abuse of persons, especially young people, by Catholic clergy. I have functioned as a Canon Lawyer, presenting workshops and seminars to priests groups on the issue of sexual abuse around the country since 1985. I have had extensive contact with victims of sexual abuse and

of the Code of Canon Law will be in reference to the canons of the 1917 Code unless otherwise noted.

9. The defendant is a Roman Catholic priest. As such he is always bound by the obligation of chastity which entails refraining from any and all sexual activity with anyone (c. 132). In addition to this, it is correct to say that the calling of a priest is not an employment but a way of life. As such, a prist is never "off duty". He may have specific duties which he fulfills as a priest, such as celebrating religious ceremonies, counseling, teaching etc. But his fundamental obligation as a priest is one that is always with him, whether he is fulfilling specific duties, on vacation or a day off or away from the church or other church institution to which he is assigned. Canon 124 refers to the priest's obligation to lead and teach by example:

> Clerics must live both interiorly and exteriorly a holier life than lay people, and must excel the, in giving the example of virtue and good deeds.

Of this it is said in a noted commentary on Canon law (Canon Law: A Text and Commentary, Bouscaren and Ellis, 1966):

> This is the primary and fundamental obligation of clerics and especially of priests. Their example will be more powerful than their preaching....It would be impossible to list all the documents by which the Apostles and the Supreme Pontiffs [popes] have urged this obligation. p. 108

10. The Ad Altare Dei is an award given by the Boy Scouts of America to Roman Catholic members of the Boy Scouts. It requires that candidates for the award participate in a program of learning and practical application of Roman Catholic principles. The award also requires the involvement of the candidates with a priest to a certain extent. Although a candidate may be a member of a Boy Scout Troop that is not sponsored by a Roman Catholic institution, the candidate nevertheless must seek out a priest to assist him in fulfilling the requirements. In assisting Boy Scouts with regard to this program, a priest is most certainly fulfilling duties that are directly related to his role as a priest. If the Boy Scout Troop is not affiliated with a Catholic parish or other Catholic Institution, it is common for a candidate for the award find a priest to help in a nearby parish or at least

in another parish that is available to him.

11. The subjects of a parish priest include not only those who have domicile or residence within the geographic territory of the parish but also those who come into the parish for some reason such as seeking pastoral or ministerial care (c. 94). Roman Catholic parishes are ordinarily territorial in that they include as their parishioners those who live within the geographic boundaries. The authority or jurisdiction of the pastor and the assistant pastors of the parish includes those who are actually living within the parish or who come to it for some special reason. A priest is responsible for fulfilling his obligations of chastity and giving good example to all who come to him for assistance of whatever kind, whether they are formal members of his parish or not. If a person is seeking the assistance or guidance of a Catholic priest, it has been and continues to be the common custom to first contact a parish since priests are, in the minds of the lay persons, associated with parishes. It is very common for priests in parishes to be sought out for pastoral help by persons who are not technically members of the parish. They are still responsible for maintaining the standards of proper conduct expected of the priesthood no matter where the people are from.

12. In general, pastors and assistant pastors are obliged to what is known in Canon Law and Catholic theology as the "care of souls" in regards to the laity. This term, though poetic sounding, is actually somewhat technical in that it includes all that would enhance or strengthen the spiritual welfare of the lay persons. (canons 464 and 476). By reason of both ordination to the priesthood as well as appointment as a pastor or assistant, a priest has a duty towards all those who are subject to him. This includes those who are properly members of a parish but it also includes all others. There are no hours, specific work locations nor other factors which determine when or where a priest is to fulfill his duties of the "care of souls." This is a long standing tradition in the Catholic Church and is spoken to in countless Church documents. The Vatican Council II spoke of this overall and fundamental obligation in its decree on the "Ministry and Life of Priests," (Dec. 7, 1965):

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
CASE Type 11
Court File No.: PI 95 2182

T.M.,

Plaintiff

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal.
Minnesota and Father Robert Kapoun

Defendants

AFFIDAVIT OF [redacted]

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

I, [redacted] being duly sworn under oath, deposes and states as follows:

1. My name is [redacted] I live at [redacted]

2. I was born in [redacted]

3. I attended the [redacted] from the ages of six through thirteen.

4. Father Robert Kapoun was Assistant Pastor during some of my years at St. Kevins.

5. Father Kapoun taught Religion Class. During this class he would invariably turn religous topics

into sexual topics. I vividly recall his interpretation of Communion. He told us that "Communion was the same as having intercourse with Christ." When he told us this he graphically illustrated his point with hand gestures. He would form a circle with the thumb and index finger of one hand.He would insert the index finger of his other hand through the circle. His finger would go in and out of the circle, in and out. Over and over. His speech would speed up, his breathing would grow harder, his nostrils would flare. He would come close to snorting. This made a terrible and long lasting impression on me. It made me anxious and uncomfortable.

6. To this day when I hear Father Kapoun's name, the images of his gestures and his behavior come to mind.

7. I remember talking with my girlfriends about this and how awful it made us feel.

8. Father Kapoun also wanted us to ask him questions about sexual matters. He would get mad if we didn't have any questions.

9. Our male classmates told us that Father Kapoun would watch them take showers and grab their testicles while they were swimming.

10.My brother [redacted] told me that Father Kapoun would have them write down their questions about sex on a piece of paper and then turn that paper over to him.

11. When I was thirteen years old I cleaned the Rectory on Saturdays. One Saturday while cleaning his room I opened the drawer to a bedside table. I saw pieces of scratch paper with questions regarding sexual matters on them. I saw approximately 15 or 20 pieces of paper with questions. I remember one piece of paper had written in a child's handwriting, "What is a wet dream?" I went home and told my Father what I had found. I was disturbed by what I had found.

FURTHER AFFIANT SAYETH NAUGHT

[redacted]

Subscribed and sworn to before me this
30 day of April 1995

Karen Northcott
Notary Public

KAREN NORTHCOTT
NOTARY PUBLIC MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31, 2000

FEBRUARY 17, 1989

HEARINGS ON SENATE FILE # 315

SENATE FILE NO. 315
Date: 02/17/89

SEXUAL ABUSE

Mr. Chair and members of the Committee, this bill is part -- is a Crime Victims Bill as well, _____ that are in this came from the Attorney General's office and some of the things are from the Task Force on Sexual Violence Against Women. The essence of the bill is on -- on page one is a technical change in reference to the change that's on page three. What this does is say that the Statute of Limitations which currently is two years from the time the sexual abuse was committed, and what we're doing is adding to that, or two years from the time the complainant knew or had reason to know the injury was caused. That would be the change. T h e second thing that we're doing with this is that the complainant need not establish which act in a continuous series of sexual abuse -- ah -- which sexual abuse acts by the defendant caused the actual injury and then the third thing is that the knowledge of the custodial parent or guardian of a minor -- um -- would not -- um -- change that statute of limitations. The sexual abuse on lines 11 and 12 that's used here is any sexual abuse except that of by a psychotherapist. On the -- um -- on page three towards the end, what we have is a -- um -- the deletion is not that we're deleting that particular provision but it's a clean-up and I think Senate Counsel can refer as to where it is, or how -- and now I'm going to stop with that. Because, can you -- will you explain that one -- it's a clean-up provision I know that, we're not eliminating that particular request. Um -- Madam Chair, are you on page three?

Page three, line 25, 26, 27.

This -- this really is just removing a duplication, because the language that protects this information in terms of privacy is actually in that same section at the end. So somehow in amending this section in a previous session we ended up saying the same thing twice. We're just taking one of those out. So we're striking that sentence because its -- ah -- duplicative. And Madam Chair the amendment that also rewrites the language in this section's been passed out.

But, there's an amendment A-1 and it rewrites the -- the Senate Counsel's right -- it rewrites the language that's in this, in the language of what we're doing here it's saying that the Commissioner should be notifying the victim of not only of the release of the defendant once they've done their time, but the conditions that are governing the offender's release would also be known to the victim, and the amendment just simply clarifies that language as to -- um -- making it clearer.

Senator Peterson is that the only thing A-1 does; it's clarification of the --- ?

It's clarification, it's also a clarification on page one as well as in the top part of page three. These are just technical as I know it on that part.

Is there further discussion of Amendment A-1? Hmm?

I'd like to add that ---

I'd move that amendment.

Now have a quorum again.

Senator Peterson moves the adoption of Amendment A-1. Any discussion, if not, all those in favor, say aye.

Aye.

Opposed. Motion carried.

Then continuing on page four, lines 5 and 6, what that is -- um -- in the previous section we used the term, well that's part of the amendment but it's the same -- um -- the terms that we're using are basically those persons who -- um -- the crime against the person we're talking about the violent crimes. That's what -- that notification pertains to. And then, Section 4 is a notification when someone who has been arrested for criminal sexual conduct or attempted criminal sexual conduct -- um -- that when they're released from their pre-trial detention that the victim would be notified of that. The language in this is the same language that is in current statute for the battered woman being given notice when the person was released on pre-trial detention. This would add to that -- um -- anyone -- sexual abuse victim.

I have a question for Counsel because this seems to be, if I am reading it correctly, Section 3 is the notice of right to release when they get out of prison. Section 4 is when their pre-trial release -- um -- one of them just stylistically one of them numbers the conditions and the other one discontinues it -- seems to be the same conditions time of release and that sort of thing. Am I reading that wrong or is it -- is there a reason for this style difference?

Mr. Chairman, I look to Senate Counsel, but as I recall on Section 3 we're just adding in what was already in statute -- in statute -- in Section 4 we copied what was in statute for the release of a -- actually that legislation was passed either last year or the year before and we just copied that for the pre-trial release.

Further questions from the Committee? Senator Peterson I have one question about top of page three, knowledge of a custodial parent or guardian of a minor. Abuse may not be imputed to -- is that in the situation where if you're a ten-year-old abuse victim and one of the parents knows about it and you don't go to the Courts until you're twenty-two years old, ah -- the fact that the parents knew about it cannot -- cannot be used to put the statute of limitations in there?

Mr. Chair, Senator --, Mr. Chair, yes that's my understanding of it.

And one other thing, the language at the top -- about the two years from the time the complainant knew or had reason to know the injury was caused by the sexual abuse which ever, in other words -- I presume this is the same case of a minor who or anybody whose a victim of it but doesn't realize its done some psychological harm or something to them.

Mr. Chair, we have someone here that can speak to this, if you would like, as well as we have several handouts that can go out also pertaining to this time. We have two witnesses. We have a

victim as well as an attorney that can give more definition to this if the Committee would like.

I guess I would be interested.

Okay.

Please identify yourself for the tapes.

My name is Jeff Anderson. I am an attorney in Minnesota, and I do and have represented many, many victims of sexual abuse. The proposal before the Committee, and in the Bill, is to adopt a "delayed discovery rule"(?) applying to victims of sexual abuse, particularly youthful victims because it is patently obvious to all of us that when many victims of abuse sexual are abused usually by a person in position of authority they develop a number of psychological mechanisms to keep them from discovering it, and thereby doing anything about it; reporting it to the police, bringing legal action. What the delayed discovery rule does is acknowledges that this happens that these people suffer traumatic amnesia, they don't remember the abuse in order to cope. They suffer post-traumatic stress disorder much like the Vietnam Vets have and did in Vietnam, and because of those psychological mechanisms that develop that are necessary for them to survive, it's only later, sometimes they get therapy, sometimes they breakdown, sometimes they attempt suicide or whatever else that they realize and appreciate that they had been wronged years earlier. And for that reason it is absolutely necessary to adopt this "delayed discovery rule" and I think that's what this bill includes. The question I have about it is -- is that period

specified after the discovery two years too short under the circumstances and I have some concerns about that. Why it should be two shorter than most other statutes that apply to this, and I would consider proposed considering perhaps a longer than two-year period.

Mr. Anderson -- they -- why -- I don't know where the language came from and I realize that I've heard before of delayed awareness of some of these things, why is there not the decision to dislengthen the limitation that the regular limitation instead of saying if you discover it later because doesn't that provide one more burden you have to prove that you didn't discovery the injury 'til ten years later or so.

Well, this is a rule right now and the statutory rule is you have to bring it within a certain period after the actual wrong, and the delayed discovery provision accounts for the psychological mechanisms that keep one from discovering that they're appreciating it so that that delayed discovery provision is necessary to account for that reality. It's the injustice of that reality right now that prevents these people from bringing the action that they weren't aware of earlier.

My question is -- if you need say if somebody doesn't discover it for ten years -- um -- I guess I'm not familiar enough with the rationale for why we have such a short limitation on it anyway. My thought would be that you have to prove, maybe it's not a difficult preponderance to the evidence if something -- you have to prove you

didn't find out about the damage until within two years of when you finally brought the charges.

It does put a burden on the victim. If you do use a delayed discovery rule of two years or five years or what ever it is that's not an undue burden in my judgment because the reality is that the coping mechanisms is such that the person never tells anybody else and you can show that. The person is never reported to the police or the parents or to anybody else and you can show that so I don't think that places an unrealistic burden on the reality of sexual victimization.

Are there questions to the witness?

Help me -- where are we on this?

Senator Moe we're on top of page, top of page three. The language on line 4 - or two years of the time the complainant knew or had reason to know the injury was caused by sexual abuse.

Okay. Ah -- Mr. Chairman, Sir, your name?

Anderson. Jack Anderson.

Mr. Anderson, -- ah -- what would be the -- is there a maximum length of time -- um -- following a -- the commission of a crime -- ah -- where a complaint could be made or is there not?

Well, as it presently exists there is a maximum length of time, it's two years in the case of intentional torts and six in the case of negligence nonintentional torts. My adaptation of this particular provision, the length of time could be extended and should be extended way beyond that potentially, simply by virtue of the delayed discovery aspects of it. So this, in my judgment,

would not put a cap on the actual time, it could be invoked using the delayed discovery.

Do you have problems with that?

I don't see constitutional problems or due process problems with that, no. Because if we do say, or you do say, well there's a matter of ten years, you're in essence by doing that punishing the victim and rewarding the perpetrator because it is the deeds of the perpetrator that caused the psychological mechanisms that keep the people from remembering or knowing that they've been damaged. So, indeed there are considerations, I don't think they weigh unfairly --

Is it possible that as long as forty years could elapse between the -- ah -- commission of a -- ah -- or the incident -- ah -- I guess we're talking about sexual assault here.

Yes.

And the -- ah -- recognition or understanding or awareness that a crime occurred.

I'd say it's possible. It's rare. But it's certainly possible and --ah -- albeit rare, I think that ten years is not unrealistic and I am aware of cases where there has been as many as fifteen years when, for example, a seventeen-year-old girl is sexually abused by a Catholic priest, she absolutely represses that memory until the age of thirty when she is being treated for an attempted suicide and then it starts to come back. So, I am aware of periods extending that long and forty years is very unlikely but it's not altogether impossible.

Mr. Chairman, I think this is an interesting idea, but, -- ah -- it's a very, very open-ended provision at this point and -- ah -- I'm not sure what to think about it.

Maybe -- I have a question for counsel, I vaguely recall seeing some language like this before. Did we do this anywhere else in statute of limitations?

Ah -- Madam Chair, or Mr. Chair, I'm not familiar with the civil statute of limitations but I would like to clarify that we're talking here about the civil statute of limitations. And I'm not sure if, if that's evident, but we're not doing anything about the time within which a person can make a criminal complaint and charge somebody with an actual crime of sexual assault. What we're looking at is the time period for receiving some kind of compensation from the perpetrator in a civil context.

That's right.

This would not affect the -- the -- three year criminal statute of limitations.

That's right.

It applies to everybody except minor victims.

That's why I don't see any due process or constitutional concerns over it in its present form at all.

Counsel, my recollection must be than of the criminal one and if it's the case of a minor who is sexually or physically abused and they don't discover it, the statute is three years after they reach age of majority or?

Ah -- Mr. Chairman, under our criminal statute of limitations it's three years for victims of sexual assault with the exception of a victim who is under eighteen at the time. That minor victim has seven years from the -- ah -- let's see -- yeh, seven years from the commission of the offense so there is no -- there's this delayed discovery concept is not a part of the criminal statute of limitations.

Except if it's a minor.

No, that is with a minor it's still seven years from the commission of the offense. Not from a discovery that the offense caused some sort of injury.

Counsel, seven years from when they become an adult or seven years from the crime.

Ah -- Mr. Chairman, it's seven years from the commission of the offense.

Any further questions?

Well -- I -- help me understand what other exceptions exist to this -- ah -- to the _____ statute of limitations on commencing a civil action. Know of any?

Right now there are no exceptions to that with the exception of _____ by virtue of minority.

By what? What?

Minority. Being under the age of eighteen. Or, being in the military service as Soldiers and Sailors Relief Act. Or, incompetence; incompetence -- mental incompetence, and those three provisions toll the statute of limitations.

How would mental incompetence -- ah -- give an example of how that would --

Somebody is absolutely incompetent to handle their own affairs by virtue of trauma or psychological incompetence -- it's absolute mental disability -- it's a form of mental illness. And statutorily that's acknowledged and recognized as tolling the statute until you're -- even the form of requisite mental ability to realize you've been wronged. And in some ways it has similarities to delayed discovery, but, it's not the same and is not being acknowledged as being the same as delayed discovery as contemplated by this Act. _____ if somebody's in the hospital in persistent vegetative state, but incompetent to bring a legal action.

I see. So, in a case like that the statute is tolled until two years after they regain competence.

That's right.

Okay. The military -- ah -- what's that?

The Soldiers and Sailors Relief Act acknowledges that it was passed as a result of World War II actually, but when somebody was overseas and they had an action -- they're fighting in Germany they weren't really able to enforce that legal right so it's said that while our men are in the Armed Forces we are not going to require them to assert these legal rights. Similarly, they can't be sued while in the military either.

Oh -- yeh.

But that's a statutory provision that's long been recognized in every state in the country.

And what we want to do here is toll the statute until -- ah -- until what happens exactly?

Until the person realizes that they had been wronged. And, it's a reality that victims of sexual abuse particularly youthful victims can't tell others, they feel guilt, shame and responsibility and because what's going on in their mind when it's happening to them they develop these psychological mechanisms - coping mechanisms to keep them from doing anything about it. From telling anybody, from enforcing their legal rights, from realizing they've been wronged until some time later. And a triggering mechanisms that often trigger the realization, the discovery you're talking about here are intensive psychotherapy. They have a severe breakdown either attempted suicide, chemical dependency, severe depression and they get into psychotherapy and there begin to realize and regain a memory of what had happened to them to cause the problems that they are having.

I under -- I -- you know I think I understand -- ah -- what happens and I believe that it does, I think it maybe a relatively common experience, but, -- ah -- the -- you know what we're doing here is establishing a point in time at which someone has a right to bring a civil action and exactly what -- you know -- where do we -- how do we define that point in time. What -- do we rely on the person's testimony or -- ah --

I think you can do that. It is something that is happening to that person and you can prove it -- it puts the burden on the one who is claiming the delayed discovery. So it's not just a Pandora's box. It puts the burden on the person to show that they hadn't been able to tell anybody before, that they had not received the psychotherapy before, and they didn't have an appreciation for the wrong until this time of the discovery. So, it puts a burden on them to do that, but you can do that.

Those are two different things though. An appreciation of wrong and -- ah -- an inability to be consciously aware of the wrong which would be more of a repressive state.

Well, they are different things, and I think the statute addresses both of those things by the language -- ah -- two years or two years of the time the complainant knew or had reason to know the injury was caused by the sexual abuse which ever is later. So it's either that they knew the abuse occurred, which applies to traumatic amnesia the post-traumatic stress, or it applies to the person who didn't have an appreciation for the fact that they had been damaged by this. They thought -- for example, the twelve-year-old boy thought that it was his fault. He's the one that thought he was doing something wrong in engaging in sex with a forty-year-old man. So it applies to both of those. And I think that recognizes the reality of the dynamics of sexual abuse. And that's what necessitates this statute and statutes like it across the country that are being passed. Washington just passed this identical statute acknowledging this very reality.

Senator Ballenger.

Mr. Chairman, as I understand it in the total context then, with the new language at the top of page three, that the criminal statute of limitations runs out after seven years, but under this new language on the civil side it would be -- it would never run out in effect. I guess my question is -- ah -- ten, twenty, thirty years later what's to be gained by -- you know -- what are these damages going to accomplish?

Well, bringing a civil damage claim accomplishes a number of things; first, it compensates the injured victim for the damages suffered. It also does more than that, it brings an awareness and consequence to the perpetrator that engaged in the conduct; it brings consequence there, and it brings awareness to those around him or her that enabled it. And for that reason prevents a future abuse. So, public policy is accomplished by it as well as justice by virtue of compensation for the wrong done.

Mr. Chairman, Mr. Anderson, but this can happen so far after the fact that I wonder if it even has any pertinence.

Oh it has -- it has real pertinence because the entire psychotherapy community and anybody dealing with victim sexual abuse, I don't think there's any issue that this is a reality that happens. Your concerns are -- in time -- it goes to far out in time does it become fair? Well, I think it is fair if the abuse happened and the perpetrator caused a psychological mechanism that kept the victim from realizing it, that perpetrator shouldn't be rewarded by the passage of time -- as a barr to it. And for that

reason the time considerations are not unfair or unrealistic if you applied delayed discovery rule. As a matter of fact, the question by Senator Moe as to forty years in time -- that is a rare, rare occurrence and that is the aberrant as opposed to the usual.

Further questions to the witness? Alright, I believe that we have one more person to testify.

Thank you very much.

Please identify yourself to the tape.

My name is Mark Douglas. I'm a resident of Hennepin County. I happen to be an attorney, but I'm a real estate and probate attorney. The reason I'm here today is that I was victimized as a child from about age twelve through out my early teenage years and into my early adult years by a man in South Minneapolis. I was aware of the conduct that occurred, but, I did not connect up the harm with the damages that I was sustaining until many years later. My -- I'm thirty-eight years old and I still struggle with recurrent depression. It happens to be a low level depression, but, my early twenties were marked with depression, thoughts of suicide, I still tend to overeat a bit. Ah -- and various attempts to avoid facing an inner worthlessness that I felt. As it turns out, what my awareness to the level of doing something and appreciating what had happened to me -- a number of things came together. There was discussion on television about sexual abuse, I was feeling bad about myself and by sheer coincidence Senator Peterson's husband, my landlord at the time, lawyer/landlord, called me into his office and said, Mark what is the matter with

you? You walk around and there's this cloud over your head, you have no confidence, you are unable to convey confidence and as long as this is the case in your life you -- your clients will not be able to take your advice with confidence. And that happened in November of 1983. Now, there were several things prior to that -- it was that incident that brought me to say, you know maybe this stuff is really severe. Maybe there is something to this. And I checked into our weekly treatment program and I've been in treatment on and off for several years. In no case has it been a residential setting, but, it has taken me a great deal of effort to understand what happened to me. There are areas of the law where delayed discovery is allowed. In the area of negligence oftentimes workers are exposed asbestosis -- asbestos or silicon or various things like that and the exposure in cases these days may have been as long ago as World War II or the Korean War and yet the time they knew or should have known the connection between the exposure to the harm and the damages caused by the harm is many years later. Often it is when a doctor says you have asbestosis or you have silicosis. Now, I brought suit in my case and last summer I won a moral victory of $1.27 million dollar verdict in Hennepin County. I've not been able to collect any of this, but I did win the moral verdict. The issue statute of limitations was brought up. The perpetrator in my case, Mr. Steven Gillies, through his attorney, did move for summary judgment in my case. But, Judge Posten of Hennepin County District Court suggested this is rather like silicosis or the asbestosis cases where again this delayed

discovery. Because I speak on the topic quite often, I do happen to represent one victim of sexual abuse, a young woman named Terese Guise. And in McCloud County, recently, Judge Martin Mansuer faced the question, and focused in on the very first part of the existing statute and said well, I really want to find for you, but, I'm bound by the statute of limitations and it appears as unfair as it may be, that this is simply an assault and battery. And Judge Martin Mansuer in the Guise case granted the perpetrator summary judgment on all counts except for one count in the lawsuit and that was a count where the perpetrator, the father, had threatened the life of my client for having gone forward and gone public with her abuse. So we have -- we're hanging on by a thumbnail it terms of a lawsuit over a death threat at two in the morning several years ago. As a matter of fact, February 10th -- oh -- just a week or so ago, the Guise case was filed with the Court of Appeals and the Court may address this question. Throughout the country there are a lot of lawsuits in this area, and judges are coming up with a lot of different decisions. Many times the Courts will say, you know it's a complicated area and we are not equipped to address it. And they defer to the Legislature. In those cases the people that have gone public and brought the lawsuit are penalized. When things are brought in front of the Court, Courts many times tend to be rather conservative and rather than address something in a comprehensive and appropriate fashion will dismiss a case on some technical aspect. So the issue is before the Court of Appeals here, but, the Legislature this session is in a wonderful position to address this

question. And I guess I would like to just cite your attentions to the Minnesota Constitution itself in Article One, Section 8 with regard to regressive injuries or wrongs. Every person is entitled to a certain remedy in the laws of all injuries or wrongs which he may receive in his person, property or character. And to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformidable to the laws. I would fear that if the Court of Appeals in the Guise case says, no I'm afraid we have to do a two-year statute, and if the Legislature does not address the issue, many, many victims will be figuratively raped by the law when they were in fact raped by their perpetrator or perpetrators many years before.

I didn't catch your ---

My name is Mark Douglas, Senator.

Mr. Douglas, I gather then from what you're saying is that under the two cases in which you've been involved, your own case and your client's, the judges reached contradictory decisions as to whether there could be a delayed discovery of the current law.

That's correct.

Are those cases both under appeal.

No. In my case, I won this tremendous verdict and as it turns out my perpetrator is judgment-proof; has no money and he just decided not to appeal it. There is no reason for me to appeal it because it was a verdict in my favor. In the Guise case with the grant of summary judgment it virtually gutted the case and we had to appeal to protect her rights. Seriously, last summer in June,

in Suffolk County, which is essentially Boston, Massachusetts a case entitled Unknown Plaintiff versus Unknown Defendant, Judge Herbert Abrahms issued a decision in response to the same question of summary judgment and said these cases are routinely delayed discovery. The extreme cases are where you simply have amnesia. The more common cases are the situation where the victim, in order to remain sane, unconsciously acts in an insane manner, and that is, refuses to recognize the connection between the harm and the damages. They don't make this connection until many years later. Again, crisis in their lives, marital troubles, arrest for some kind of crime, victims tend to deal with victimization by engaging in compulsive behavior whether that is chemical dependency, aberrant sexuality, overwork, perfectionism -- any number of things. But, the -- some of your -- Senator Moe, some of your questions are eloquently addressed by this legal opinion in Massachusetts by Judge Abrahms.

Senator Spear --

Mr. Chairman, To follow-up the view, expect in the appeal on your client's case that at some point, if we would not pass this -- at some point the Supreme Court -- this would get to the Supreme Court, and the Supreme Court would make some judgment as to whether the current law allows for delayed discovery in these cases?

I'm optimistic, I would hope that they would do that, but, even though I am a lawyer and I'm a member of the Court licensed in the State of Minnesota, sometimes you can't depend upon the Courts to arrive --

It's neater and surer to do it legislatively.

Pardon me?

It's neater and surer to do it legislatively.

Yes. Yes.

I have one other line of questioning, Mr. Douglas, in terms of Senator Ballenger's questions earlier about -- you know -- what good this does, I'm wondering if in your own case you haven't been able to collect anything from the defendant, but has there been any salutary effect here in terms of preventing this person from victimizing further -- exposing this person -- I was thinking, for example, of the well publicized case of the Catholic priest, where it was only the filing of a suit that led the man's employer who in this case was the Catholic Church to begin to really be examined in its positions and do something about the existence of sexual abuse among priests within the Church. And I was just wondering -- I don't know what kind of position the man who abused you is in, whether he's in a position of authority with other people or not, but, with the -- in the case of Father Adamson there's no doubt in my mind there that the institution of a suit or at least even the threat to institute a suit had a very salutary effect in opening up to exposure -- practices that have been existing for many years.

I believe that my filing of the lawsuit did a number of things. For myself, first of all sexual abuse is not a sexual issue but a power issue, as is often rape. For me, because I'm a lawyer and if you will, I'm a part of the priesthood of the lawyers, I needed to use the system and I needed to believe in the

system and I needed the system to help me regain personal power that had been taken away from me by the abuser. The direct question, did I cool his jets? I believe I did. I changed his focus from molesting teenagers, twelve through eighteen or twelve through twenty-one, unfortunately, he changed his focus and that was he started focusing in on adult gay men that were chemically dependent. Presumably because they're adults they were able -- you know -- consenting. But, in this case he targeted his audience to be a weaker audience, if you will, or a weaker subject of prey. I believe that by bringing my lawsuit -- when I brought it, because I was a lawyer, I had some understanding of the risks of statute of limitations, but my bringing of my lawsuit I felt was a pioneering achievement and I hoped that others would -- other men would recognize that this had occurred, and that they ought to do something about it. In fact, I don't think the floodgates of litigation would be opened by this legal change. First of all, most perpetrators have only exempt assets: their house, their car, family bible, a few items of clothing, furniture and homeowners insurance does not cover these kind of things.

Ah -- no but -- on that point, you do, of course, have cases if the perpetrator is in the employ of some kind of institution while the abuse is going on you have employer liability in some of those cases within the _____ judgment.

If, of course, you could prove the employer's knowledge or that they should have known what was going on.

Or negligence.

Yes. Yes.

I would ask the Committee to move approval of this statute, I think it is salutary.

Senator Ballenger.

Mr. Chairman, Mr. Douglas, you're getting ahead of --

I'm sorry.

I'm not -- you mentioned silicosis and asbestosis. Did they have this same provision that years later within two years if it's discovered then that you can go with the delayed discovery?

First of all, I'm not a personal injury lawyer so I may be speaking out of school here. In asbestosis cases and the silicosis cases usually those are brought in a negligence setting as opposed to what is known as an intentional tort, such as assault and battery. In an intentional tort you intend to take a hammer and hit someone; take a gun and hit something -- there's a level of intent. In a negligent situation you may as an employer or property owner or any number of things allow a condition to exist which would obvious to a reasonable person that a danger or harm exists. Now, in those cases, typically the asbestos worker may realize that he or she has difficulty breathing, coughs up flem, or blood or any number of things, has less energy but, there usually has to be some kind of water shed and it's often a doctor's diagnosis at age 40 or 50 or 60 -- Mr. Johnson, you're going to die over the course of the next few years because you have this disease and no doubt it was caused by this exposure to Manville asbestos years ago or maybe working for the Navy putting asbestos is a ship

or something like that. So there is a slight distinction. Often in cases of sexual abuse, lawyers will, as in my case my lawyer brought a whole array of claims, some of them intentional torts, namely assault and battery, some of them in a negligent setting, negligent parenting, fraud, breach of fiduciary duty, now going back to Senator Moe's line of questioning, I believe that in cases of fraud, just general business cases of fraud, that the statute doesn't run until the discovery of the fraud, I believe -- but I may be wrong. Is that correct? Okay. So for instance, if you have an employee that has embezzled from you over the years, and conceivably it may have gone on for several years -- ten or fifteen years -- that's an extreme case, but, if you were to discover it then, you could then start the lawsuit. So, if that's responsive to your question.

Thank you.

Further questions for the witness? If not, thank you very much.

Further discussion of the Bill? Senator Merriam.

Mr. Chairman, Senator Peterson. You may have discussed this earlier, and I apologize for having missed part of this -- on page three, that first sentence that establishes the time that when the statute start running -- there's um -- there's a disjunctive there and it can be one of either two things -- I can't envision when the second one is not always going to be -- when the second one is not going to be the one that's used. So I guess, consequently, why do we have the first one?

Good point. I don't know.

What do you mean -- the complainant knew?

Senate Counsel?

_____ the complainant knew -- is that what you're --

Yeh.

In order to have the action for damages there has to be a personal injury caused by sexual abuse, and you're going to start the statute running within two years of some event and the two events that you can have to start it is either the time when the abuse was committed or when the complainant knew or had reason that the injury was caused by the sexual abuse. The second one is always going to come after the first one, so why have the first one in there?

Right.

You're always going to have the second one. Otherwise you aren't going to have the cause of action to begin with.

Mr. Chairman, I agree.

Mr. Chairman, --

So what would you do?

Senator Merriam.

I move to amend on page three -- um -- line 4 -- delete everything before the second time. Line 6, delete -- comma which ever is later.

Senator Merriam, I think you also have to delete either in line 3.

Oh, I'm sorry. Yeh.

Is there a discussion on the Merriam amendment? If not, all those in favor say aye.

Aye.

Opposed? Motion carrys.

Mr. Chairman.

Senator Merriam. Mr. Chairman, Senator Peterson, on the last sentence on the existing -- the way the bill is introduced in this section -- talks about imputing to a minor the knowledge of the parent, I think what we're saying is, you can never impute knowledge to a minor from anybody. Right? Let me -- maybe Mr. Chairman -- just quick to focus this concern, let me move an amendment, you can tell me if it's wrong -- um -- page three, line 9, I move to amend Mr. Chairman, line 9, delete "custodial" -- line 9 delete everything after "guardian"; line 10, delete "abuse"; line 10 delete "the" and insert "a."

What do you mean?

Why do we need it there at all? What's the value of that?

Mr. Chairman, Senator Moe, my understanding is so that it cannot be said that because a parent knew this took place, therefore, the child should have known, or the therefore something should have been done about it. And Senator Merriam, I think your motion is fine. I don't know that it doesn't --

You made the motion. Senator Merriam's motion is before us. All those in favor say aye.

Aye. Aye.

Opposed? Motion carrys.

Mr. Chairman.

Senator Merriam.

Mr. Chairman, Senator Peterson, or Senate Counsel, -- um -- page three, lines 11 and 12, by defining sexual abuse as a violation of those statutes, do we have to get a conviction to trigger this section?

Mr. Chairman, Senator Merriam, the -- the -- my understanding would be that the plaintiff would have to show by a civil standard that the violation occurred. Since we don't say a conviction using the term violation is intended to encompass an action that would fall within that behavior in the criminal sexual conduct statutes but the level of proof would be different.

Counsel, quick question --

And since we're giving civil relief to a person well beyond the time period that criminal relief is available, I suspect that fits with the purpose.

Counsel, question about 342 to 345 -- does that include interfamilial sexual abuse?

Mr. Chairman that is a reference to all of our criminal sexual conduct provisions first, second, third and fourth degree.

Including interfamilial.

Yes. Includes interfamilial.

Mr. Chairman.

Senator Peterson.

I'm sorry, the answer to the question was it would not have to have a criminal conviction. Is that correct?

Yes.

[Background comments, not distinguishable]/

Mr. Chairman, that's my point. Why do we use the term violation?

[Background comments, not distinguishable].

Yeh.

Mr. Chairman, Senator Merriam, I agree with your point. I think that we could adequately take care of this, perhaps, by substituting something that would refer to the conduct of finding those criminal statutes rather than having to prove there had been a violation of the criminal law.

Counsel.

Mr. Chairman, we -- I have no problem with that. We do use the term violation to refer to a civil penalty of some kind and that's often the case when there's an overlap between the criminal and civil law but, we could say instead of a violation, conduct described in -- and delete "a violation" -- and delete "of any provision of".

Would you like to move that, Senator Merriam?

Mr. Chairman. Yes. I'd feel much more comfortable. As used in the Section, sexual abuse means conduct described in Section 609342 to 345.

Senator Merriam, motion is before us. All those in favor say aye.

Aye.

Opposed. Motion carrys.

Mr. Chairman, if we approve this bill, when -- ah -- what effect will this provision on -- new provision on page three have on past offenses?

Senator Spear. I was wondering -- ah -- if ah -- Mr. Chairman and Senator Peterson if maybe there should be one of those customary effective dates if this applies to causes of action commenced after the date of final enactment so that we don't -- it doesn't apply to cases that are currently under appeal?

Well, the effect of that, of course, would be to delay the effectiveness of the act for many years. But --

-- We need something to clarify it.

That's right because -- we ah --

But can we do this?

I was trying to think of some way so that we're not affecting cases that are -- I guess there is no way of really doing that in this one.

Senator Spear, Mr. Chair, if you want to -- I mean if the purpose of the bill is still to allow somebody to do it, the case that's currently before the Appeals Court, if it did affect the -- that's purpose of the bill in the first --

[Background discussion indistinguishable]

What would be the effect of a -- of a -- extending the statute of limitations from two to three years would that allow -- on all civil actions would that allow someone who missed the two-year deadline to take -- to a -- take advantage of the extension on the --

Senator Peterson.

Mr. Chair, I'm sorry, I didn't hear what Senator Moe had set-up. _____ some suggested language here.

My basic question is, I'm trying to understand the effect of the provision. What will happen if we pass this law?

Mr. Chairman, I'm not clear on when it would take effect; it's a good point. The language that was just handed to me, if this is the direction the Committee would want to go, that they have in Washington is that this act applies to all causes of action commenced on or after the effective date of this Act. We could either leave it as action commenced or we could add action pending or commenced. So, it would apply to those cases currently in the system, or we could put it to those that haven't brought action but anything -- action brought after the date of so that would be --

Any legal action commenced after it, not relating to any sexual abuse after, but ---

Right.

Mr. Chairman.

Senator Merriam.

The problem with that is -- excuse me -- that the pending ____ is the better way to go.

Or the effect of it is really kind of moot anyway, isn't it? I mean -- all you have to do is commence a new civil action.

Unless the time had run. The time is for commencing the action, not for completing the action.

Right.

Right?

Commenced or pending, I think is what you want.

Counsel.

Mr. Chairman, I think actually this would be best in the effective date of the bill so that in the end we would have an effective date. Maybe -- I'm not sure. I'm not sure whether it should be in the effective date or the actual statute. And it would -- if in the effective date it would simply say Sections 1 and 2 are effective August 1, 1989 and apply to actions commenced on -- pending on or commenced on of after that date.

Mr. Chair.

Senator Merriam.

Mr. Chairman, Counsel, it would seem peculiar to have an effective date that becomes effective, perspective in the future, but by its terminology becomes retroactive. It would make more sense to say it would be effective in the day following the final enactment and applies to actions commenced of pending on or after that date.

Counsel, can you read the new language?

Mr. Chairman, Senator Merriam, Sections 1 and 2 are effective the day following final enactment and apply to actions pending on or commenced on or after that date.

Senator Peterson moves that amendment. Any discussion? If not, all in favor say aye.

Aye.

Opposed. Motion carrys.

Further discussion.

If not, I move the Bill, Mr. Chairman, as amended.

Senator Peterson moves Senate File 315 be recommended to pass as amended. All those in favor say aye.

Aye.

Opposed. Motion carrys.

FEBRUARY 20, 1989

HEARINGS ON SENATE FILE # 315

SENATE FILE 315

Dated: 2/20/89

Senate File 315, and I believe that comes from the Criminal Law Division and Senator Peterson moves the adoption of the Division Report all in favor signify by saying aye.

Aye.

Opposed. Motion carrys.

Senator Peterson.

Mr. Chairman and Members, The bill is from the Attorney General's Office dealing with victims of crime. The first section is a technical change because of the changes that are being made on page three which is the essence of the bill. What this allows for is civil -- um -- in the civil side, for actions for damages on personal injury caused by sexual abuse could come about -- could begin -- would have to begin within two years of the time the complainant knew or had reason to know the injury was caused by sexual abuse. This would be on any sexual abuse other than that which the language is in the amended part that you have, that this section would not apply for sexual abuse by a psychotherapist. On the bottom of the page the deleted language is technical because that language is somewhere else and then the second part is on page three, is that a victim of a crime could -- a victim against -- that has been a victim on violent crime could make a written request when the release of their perpetrator -- what conditions are governing that release. Currently, they can ask for that -- to be notified when they are released. This way, they could know the

conditions governing that. Then on the back of the page four what this is for a victim of sexual assault could be notified upon the release of the arrested person prior to the trial so -- when they're being released on the pre-trial detention. And this language is patterned after language that is used for the battered women -- ah -- they get notice when someone is being released on -- from pre-trial detention. And I would move the bill and answer the questions.

Questions for Senator Peterson?

Senator Peterson.

Mr. Chairman and Senator Peterson, what problem are you trying to correct with the bill?

Mr. Chairman and Senator Peterson, two things, one is under current civil action can be commenced only within two years after it happens. This change allows for the fact that there is often denial or not even recognition of what has been done to someone in the belief that maybe the person who testified for this change who had been a victim had talked about the denial or the inability to recognize you have been abused. And it takes some time for the person to accept what's happened, or to recall what's happened to them and so this recognizes that phenomena and says that it -- that you could bring civil action within two years of knowing what has happened to you. The other part of it is that you're correcting the fact that when for a victim to be notified what the conditions of the -- ah -- convicted person what conditions they are being released on, so that that victim is aware of: one, that

they are being released, and what the conditions of that would be and then the third thing is if someone has been sexually assaulted, the person has been arrested and then they are going to be released from jail, that victim needs to know or may want to know that that person is now being released from jail so that they may feel either they need to get some protection for themselves or just a right that the victim should know this.

Mr. Chairman.

Senator Peterson.

On the first point with the statute of limitations, how do you determine at what point in time somebody knows that they were a victim?

Mr. Chairman, Senator Peterson, the testimony that we had by an attorney as well as a victim in the sub-committee, basically it would be something that would need to be proven that the victim would know or would have reason to know at what point that would be.

Mr. Chairman.

Or the victim just simply stating that this is the time in their life that they became aware that this was an issue for them. And in general, if this is what the case would be, they would probably be seeking some type of help in working this situation out.

Mr. Chairman and Senator Peterson, well, what kind of evidence would somebody actually be able to produce that of -- it -- -- it -- I assume that in many instances it may even be something that

doesn't occur to you like a flash and you don't go from not knowing to knowing at one point in time but, it's not at all clear to me how I could actually demonstrate that if somebody came to me and wanted to bring an action like this, how I would know at what point to start counting the days.

Mr. Chairman, if it would be alright, the -- um -- -- um -- Mr. Anderson, who testified at the subcommittee hearing, is also here and I think probably better answering Senator Peterson's question.

Okay. Mr. Anderson, I think you addressed that question in the Division and maybe you should do that again for the benefit of those who were not there.

Thank you. Thank you, Senator. My name is Jack Anderson, I am an attorney, and I represent victims of sexual abuse, and many of them and have for years. To answer that question Senator, there are a number of things that happen, let me give you a typical example. Somebody is sexually abused as a seven-year-old child; they repress that memory as you know. They repress the fact that it even happened, much less that they were injured by it. Sometime later in adult life, for example, they'll have a myriad of problems. Sometimes they'll attempt suicide, or something like that. It is that event that gets them into some kind of therapeutic situation where they start to go back and deal with the issues that brought them to that point. So it often happens in intensive psychotherapy that we have a "delayed discovery." There are other situations were we have much a kin to the Vietnam veterans post-

traumatic distress disorder. Where they have repressed the memory, or repressed the fact that they have been injured by it, and it is a triggering event later on. Let me give you an example. We have a young man who's abused as a thirteen-year-old boy. He was sodomized violently -- and bound -- and his hands were bound and his neck was bound. He never dealt with that, never told a soul of the abuse, because he felt responsible for it, until he was in the Navy and he was similarly bound in the side of the ship while painting that ship and it was that memory, that experience brought him back to that flashback, and he had a severe psychotic reaction. He was admitted to the hospital in the Navy; he was able to go back in time and appreciate what happened. So there are a number of ways where somebody can appreciate that they had been harmed and realize that they had been wronged later on in their life. And those are a couple of the more dramatic examples.

Mr. Chairman.

Senator ??????.

Chairman, Mr. Anderson, let me ask then some of the questions I have relative to that, one is the situation apart from the repression of the knowledge, if somebody who is say a child and maybe the question might be better directed to Senator Peterson, but if someone is a child who has not repressed what took place, but has cognisance throughout but has no awareness of -- you know -- how to call a lawyer or how to deal with it legally. It seems to me the language in the bill doesn't address that.

I think it does in part because the language says when they appreciate the fact of the injury. Now, victims of sexual abuse know there's something wrong going on when its going on. And for that reason they feel guilt, shame and responsibility. But, sometimes its later that they appreciate that they have been harmed by it. So the injury language, I think, deals with that in part. When they appreciate they've been injury, for example, a client is sexually abused by a priest, actually two priests, over a period of time; he felt like he was doing something wrong and he was the responsible party. It was later on that he read something that said hey -- that happened to me, maybe that's why I have these problems today, and before that he had no appreciation for the fact that his problems were attributable to the abuse. And so that's when he discovered the injury and so I think the language in the bill -- discovery of the injury -- covers that to some extent.

Mr. Chairman.

Mr. _____

Mr. Anderson, you've indicated to some extent of -- again in a hypothetical -- what happens with somebody who maybe is not five, six, seven years old but possibly thirteen, fourteen, fifteen and is closer to an age where that person would have a very clear sense of what took place, possibly might even have a sense of the system of civil law and some sense of maybe I should do something, but, give the age of minority of that person really has no place to turn to and maybe until that person becomes twenty-one, twenty-two

doesn't have the sense of - I should have called a lawyer or should have called the police or whatever.

Well, there is a problem with that and particular problem with sexual abuse. The statute of limitations can work to buy that action that all types of cases and that is a problem in general with statutes of limitations. This still doesn't address that - that situation I believe.

Mr. Chairman. Maybe I could ask Senator Peterson at least relative to the AG's Task Force as to whether or not there has been consideration of that or if that's an issue that you feel is something we shouldn't address in this bill.

Mr. Chairman, Senator Cohen. That's an issue obviously with any civil suit and with any statute of limitations, but, why this is being brought forth is because of the sexual abuse is different than someone's breaking their leg is that there's a recognition immediately you've fallen and broken your leg, where this in some cases takes longer for the recognition to develop and that's what this is trying to recognize. The inability or the not to having the knowledge of how to go get an attorney or if you should get an attorney that's an issue in any civil case.

Course -- we've -- you know -- there are physical ailments too that don't appear until many years later, we've been fighting that battle for some years as to when the statute of limitations should start tolling, whether it should be from the time the injury occurred or the time that it was discovered, and I think we do allow for a delayed -- a delay in the beginning of the tolling the

statute of limitations when it's a minor. And so we have begun to carve out that exception and this would be another one.

Senator Knoch (?).

Point. How would this, and this is a question more of counsel 'cause I don't have the statute in front of me, how would this work with existing legislation? It seems to me that up until -- what -- eighteen years let's say that the abuse occurred when a child was ten or eleven, you'd have up until eighteen years and then what. Would there be another two years beyond that or would it be at eighteen that the -- or doesn't that statute of limitation apply to all of these cases?

Mr. Chairman, Senator Knoch. My reading of the current law on disability for minors would be that you'd have two years following attaining the age of eighteen. Because the way our statute of limitations provision works, we don't count the years before you turn eighteen; so this would begin that process of counting that time period. They would have until age of twenty in other words.

Further discussion.

Senator Stump(?) I think has a -- an amendment that he wants to offer that deals with a situation that occurred up in his district.

Senator Stump.

Mr. Chairman, Members, I do have an amendment that's 315A-2. I'm not sure if that's in the --

That should be in the packet.

Packet? The amendment is on lines 11 and 12, where it says that the contents of the plea agreement recommendation including the amount of the time the defendant will serve in jail or prison if the Court accepts the agreement. The problem that came up actually in my district was one that of the victim's family, the parents, really didn't understand what it meant if they accepted a plea bargain, what it meant in terms of the sentence. And what this would do would be to spell out that -- that -- you would have -- they would know or could find out what it really means if they went into a plea bargain situation.

So currently we -- we require that a victim be notified of a plea agreement recommendation but sometimes these people just aren't understanding what that means so this spells it out a little more clearly.

Senator Merriam.

Yeh. I don't know who to ask this question of -- is the -- is the decision made about jail or prison time, at this time? We're talking -- go back to line 7. Prior to entering the plea you gotta provide this information.

Counsel, can you help us.

Mr. Chairman, Senator Merriam. The prosecutor's, I think in the room, who maybe can speak to this, but I think that the plea would include a recommended sentence. So the prosecutor in presenting that would make that recommendation, and this would simply include the recommended amount of time.

Isn't that, after all, what a defendant usually wants to know most before agreeing to a plea bargain?

Discussion on the amendment of Senator Stump?

Mr. Chairman.

Senator Merriam.

Mr. Chairman, maybe then what ought -- on line 11 ought to talk about a recommended sentence. We're talking about the prosecutor's recommendation at this point, right.

Well of course, we do have the clause if the Court accepts the agreement.

Mr. Chairman.

Senator Merriman.

How about on line 11 after "time", insert "recommended for" and change "will" to "to."

Okay. Is that all right with you, Senator Stump?

Yes. I would include that in there.

We'll incorporate that change in the amendment. Further discussion on the amendment? If not, all in favor signify by saying aye.

Aye.

Opposed. Motion carrys.

Mr. Chairman.

Senator Pogomiller(?).

Senator Peterson, I missed the subcommittee meeting -- division meeting where this -- why is the -- on the first page of

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wouldn't be repeating the requirement to give notice. You're only talking about giving one notice to a victim of a crime against the person aren't you?

Right.

When this says shall also make a good faith effort to notify, it leaves you with this suggestion or leaves me with the thought anyway that there's two notices involved here. And if what you're really trying to do is insure that when a victim has been a victim of a crime against the person they receive this information. I think this amendment would do that. Is that what we're trying to do?

Yes.

Okay. Heard the amendment. Senator Donna Peterson does that sound alright to you?

Yes.

Discussion on the amendment? Senator Randy Peterson.

Mr. Chairman.

Senator Merriam.

I'd just ask Senator Peterson to read it one more time.

Yes. Mr. Chairman, it would delete the sentence that begins at the end of the line 27 and goes down through line 30, and then after notice on line 30 would insert "given to a victim of a crime against the person" so it would say that -- notice given to a victim of a crime against the person must include the conditions etc.

Further discussion on the amendment? All in favor signify by saying aye.

Aye.

Opposed. Motion carrys.

Further discussion? Senator Pogomiller.

The current 148A.06 says an action for sexual exploitation will be commenced within five years after the action arises that's in the psychotherapists law. It seems to me that the effect is that they've got psychotherapists now have a five-year statute of limitations whereas your language would put others -- there's no five years -- its two years time that complainant knew or had reason to know the injury was caused by the abuse. Do you really what to give a break to the psychotherapists? Why shouldn't they also -- I could see how on the first part of your language says two years after sexual abuse was committed so that is shorter than this five years, but the second piece of your language says or two years after the complainant knew or has reason to believe -- so it seems to me you've created a situation here where psychotherapists will be prejudiced positively compared to others.

Senator Pogomiller, that five years, as I recall, was arrived after a good deal of negotiation and sparring and it was a hard-fought compromise and I'm not sure that at this point we ought to tamper with it.

Well, Mr. Chairman, that was at the time we, in 1986 when we passed this statute dealing with psychotherapists.

Right.

We now have before us language that would put others who abuse people on notice that ten years later, if someone, as the examples were given, discover and become aware that the abuse they received as a child is now affecting them makes them liable for damages, why should psychoanalysts be treated differently. As a matter of fact, I would say we should maybe make it five years for them. That would be a consistent thing to do, if you wanted to keep it consistent with the hard-fought arrangement that was made in 1986, then what you ought to do is say that two years on top of this five years would be appropriate. It just seems to me that you're carving out an exception for psychotherapists that isn't justified. Particularly, since they're in a professional position.

Senator Peterson.

Mr. Chairman, as I recall, is what Senator Spear said is that was a long negotiated time of coming up with the five years. The attempt here was to -- and some of the folks who worked on that as a matter of fact contacted us to make certain they were not included in this. As I recall, and I haven't looked at that language for a while, but potentially they have a longer time but potentially they could have a shorter time also.

Mr. Chairman, Senator Peterson, in the example of the young sailor, you said perpetrated by a psychotherapist that person would have no cause of action under your language. I guess I don't understand why that would be.

Well, I'm not sure if that's true.

With this exemption language in here that is true.

Well. That was -- the psychotherapist statute -- I can't remember exactly how it's worded. But it really isn't dealing with situations where people are tied up with their hands behind their back. The psychotherapist that we felt was covered -- was covered by other law. What the psychotherapist statute did was to go into situations where we were dealing with consenting adults. And the psychotherapist statute deals with consenting adults who consent to the sexual contact, but, we nevertheless created a cause of action there because of their psychological dependency on the psychotherapist. But, I'm not -- that statute was not meant to deal with a case where someone was bound and gagged and raped.

Mr. Chairman.

Senator _____.

That may be true, but, if the sexual exploitation is as I look at the language for psychotherapists, if sexual exploitation is binding the person and raping them, and the person doesn't --, ah -- until ten years later have some kind of flashback in the instance of the sailor, then the language on the Committee Report from lines 30 to 31 exempts that psychotherapist from liability. And that doesn't seem right.

I don't think so, though, because I don't think that action would have to be brought under Chapter 148A. You see that action then could be broad under our general civil liability laws. The only reason you would have to go to Chapter 148A is if it were a -- if this were an adult involved in a consensual relationship where other civil liability laws would not cover. Am I right on that?

Yes.

I think, I -- Mr. Anderson and some of the folks from the lawyers are shaking their heads that I am so --.

Mr. Chairman.

Senator Merriam.

Mr. Chairman, wouldn't the problem be addressed if you removed that specific exemption? It seems to me that's going to lead to confusion, if -- I mean you -- we've got the sexual abuse for this section means conduct described in the first, second, third and fourth degree criminal sexual assault. That's not what's described in 148A. So why do we carve it out from something where it's not described in the first place? We run the risk of I suppose -- where do you go if you've got first, second, third or fourth degree criminal sexual assault by a -- ah -- psychotherapist? We certainly don't want to exclude them from this. Seems to me that Senator Pogomiller's point is get rid of that sentence -- we don't need a -- if it's not covered, we don't want to provide an exclusion. I mean, if it is covered we don't want to provide an exclusion, if it's not covered we don't need it.

One of our counsel's help on this? I don't know which one is -- this is a bill --

We're working on it.

This is a civil bill that was dealt with in the criminal law division.

[Comments and much laughter - not distinguishable]

Mr. Chairman and Senator Merriam, the -- there are -- I just want to point out there are two -- there are provisions in the criminal sexual conduct law that refer to situations where the actor is a psychotherapist and the complainant is a patient or former patient and the act is accomplished by either therapeutic or therapeutic deception or where the patient is emotionally dependent on the psychotherapist. Now, I don't have 148A in front of me, but I'm told by my co-counsel here that that's the same language, so there is an overlap.

Mr. Chairman.

What did you have -- but -- if you will bring in -- if this had been a case of either a minor or a nonconsensual -- a not consensual sexual conduct, wouldn't you have a choice of where to bring your suit and what you then choose not to bring your suit under Chapter 148A, because you wouldn't need Chapter 148A in those cases.

Mr. Chairman, I agree with that. I think that since 148A sets up a specific cause of action, if one didn't file the action under that and could file it under ordinary civil liability provisions that that statute of limitations wouldn't apply to that. And if -- you know there's certainly other factual circumstances that might exist in the criminal sexual conduct statute.

Mr. Chairman.

Senator Pogomiller.

Going back to the basic question though, if we're going to pass this bill that gives this new two -- the basic thing here is

the two years after you've discovered or come to the recognition that there was a problem, why would we want to treat psychotherapists any different? I mean, aside from what the purpose of one 148A is, just leaving that aside, it seems to me that Senator Merriam's point is well taken. If there is no overlap then you don't need the language -- then you don't need the exemption. And if there is an overlap, then why would we give the exemption to psychotherapists? Why should they be special? So I --

The psychotherapy law is a --

Consenting adults --

Creates a separate cause of action for actions that are not covered under our general civil liability law.

Okay.

And we created a separate statute of limitations for that. Senator Peterson is talking about laws -- you know -- actions that are brought under general civil liability law and doesn't care to tamper with that law. I don't see any great problem with doing it that way.

Mr. Chairman, Senator Pogomiller, and keep in mind that other situation was created because it's consenting adults. Which was -- this is not. What we're dealing with here is not consenting.

Would a consent under conditions that are different than normal consent -- I mean that's why we created 148. I guess, you know, there may be reasons why we need this exemption, but I don't know that they're on policy grounds. Why don't we try to -- ah --

Mr. Chairman, I would move that on the Committee Report page one, lines --- the appropriate language, I'm not sure, do we just need to do on lines -- after the -- strike all the language "and after the" and then delete lines 30 and 31, is that how we do it? Senate Counsel? You still want to delete "of any provision of," that's apparently not necessary language.

Mr. Chairman, Senator Pogomiller, you also need to deal with the exception that's added on page one, line 19.

So delete all -- delete line 19 also?

Actually, Mr. Chairman, Senator Merriam, and Senator Pogomiller, I think that probably should have been added when the psychotherapist statute was initially adopted so it probably should remain.

So the amendment is on page -- on line 29 after the word "of," delete the rest of the line, and then delete lines 30 and 31? Then would take the exemption out. Mr. Chairman, I would move that.

Further discussion on that amendment?

Senator Peterson.

Mr. Chairman, I guess I would oppose the amendment, and I feel uncomfortable making the argument because I'm taking it from a little bit from what was told to me initially, and I didn't get into a long conversation about it, but, I'm raising the question of this -- at the time and maybe Senator Spear knows this too, of why does the flat out five years was carved out instead of this, has reason to know. And I'm concerned that there may be some cases that the reason to know will -- I mean what we're doing now is

limiting these people just to a flat two years, and that reason to know may be a more difficult standard in those situations then in this situation. And I don't know that without having somebody here to say that, and the fact that I got a phone call from some of the folks who worked on this initially to make certain that they were going to be exempt from that leads me to believe that there was some difficulty in them coming under this. Otherwise, it seems like they would have wanted to come under this, because it would just be two years from the time that you have reason to know that the harm was done, and therefore they would just have two years from the time they recognized harm is done where now -- so my concern is it more difficult to prove at what point harm is done in that situation then it is in a sexual assault case rather than the consenting case.

Mr. Chairman.

I think Senator Pogomiller's is a kind of questions that Senator Randy Peterson was asking earlier about how do you know this. Is even much foggier in a psychotherapist bill where you are dealing with what was a consenting act. And I think you could have a lot of trouble -- you know -- trying to determine when you knew. You knew you did it. You know -- these are people that knew that they had sex with the psychotherapist, it's that when did they realize that that was exploitative.

Mr. Chairman.

Senator Merriam.

Mr. Chairman, I don't think that that's an issue. You've still got five years for the psychotherapists, and you've still got the two years from the knowing of the injury for the whole population including psychotherapists. So you could use either one. So this would not carve you out from the five years, from the day of the cause of action under that statute which is the date that the deed was perpetrated. So this isn't in any way going to limit you when it deals with psychotherapists. The problem -- the strange results you get, and I think Senator Pogomiller identified it very well is that -- um -- it may be years later for the whole world at large, except for the very people that should be held to a higher standard. And that just seems strange. What this special exception for psychotherapists here.

Okay. Further discussion on the Senator Pogomiller's amendment. All in favor signify by saying aye.

Aye.

Opposed.

No.

The motion carrys.

Okay, further discussion on the bill.

Mr. Chairman.

Senator Cohen.

Mr. Chairman, I wanted to go back to the issue I touched upon and Senator Knoch touched upon a few minutes ago, and Counsel has some language which I think would clarify my concerns, and that is when you deal with the disability period of eighteen years, when

you juxtapose that against what is in Senator Peterson's bill, my concern is that when you -- if somebody would say under the age of eighteen, say fifteen, sixteen, would they then with -- Senator Peterson's language, possibly and it's not explicit by any means, but I'm wondering if the Court could interpret as such, to then allow that person only an additional couple of years or that the disability would not continue until the age of eighteen. So Counsel has language which I think clarifies that and makes sure that there could be no confusion between the two statutes.

Mr. Chairman, Senator Cohen, it would be -- if you look on the bill itself on page three, line 10 after the period insert, this section does not affect the suspension of the statute of limitations during a period of disability under Section 541.15.

Mr. Chairman, what Counsel has read would, I think ensure that for somebody who was a minor that that disability would not begin -- would not be tolled then until the person was eighteen, and then would have the additional two years. And I think would offer some clarification of that. I would move the amendment and hope that Senator Peterson would agree to it.

Senator Peterson agrees to it. Is there discussion on the amendment? All in favor signify by saying aye.

Aye.

Opposed. Motion carrys. Further discussion on the bill? Senator Peterson who's Senate File 315 as amended be recommended to pass. All in favor signify by saying aye.

Aye.

Opposed. Motion carrys.

FEBRUARY 28, 1989

HOUSE JUDICIARY COMMITTEE

REPRESENTATIVE KELLEY:

Thank you Madam Chair and Members. This bill is the result of the Attorney General's Task Force on the Prevention of Sexual Violence Against Women. And it is the specific component that deals with providing some additional help to the victims. And one way that does that in about three different ways. The first way that it does that is by extending the statute of limitations, and I would just read from the conclusions from the Task Force Report where they say that victims and survivors of sexual abuse often do not recognize that the abuse has occurred or discover their psychological injuries until many years after that abuse. The statute of limitations in Minnesota for intentional tort such as assaults is two years in duration which is Minnesota Statutes 541.07. And a case must be brought within this time period or it will be dismissed without reaching merits. Although the running of the statute of limitations is suspended until a person is eighteen years of age, the time limit begins to run again as soon as a person reaches his or her eighteenth birthday and that's Minnesota Statutes 541.15A1. And except in the case of fraud, Minnesota Statutes do not require that a person have disclosed that they were injured in order for statute of limitations to run. And they go on to describe their rationale and feeling, based upon their hearings and examination of the evidence that we ought to, in fact, expand this provision under 541.07 to a two or three-year limitations. And Debbie, since you have most

recently just rewritten -- I wonder if I could get you to clarify for us the distinctions that this change would make based -- and contrast that with our current law.

Ms. McKnight.

Mr. Chairman and Representative Kelly, I wasn't involved in the deliberations and all this, so to some extent I'm gonna defer to Emily. But, essentially, what this -- what the Section 2, the limitation does is allow for the plaintiff to bring an action two years after discovery of the injury as well as -- the basic approach for an intentional tort which would be what an act of sexual abuse would constitute is that it has to be brought two years after the tort occurs and this spill provision would allow the action to be brought in addition to that it could be brought two years after the person discovers that they have been injured by this action, which as you said could be a more delayed occurrence.

So, Mr. Chairman and Members, this is pretty much parallelling what we did is as you recall with Representative Lasly's bill on the criminal side and this would then extend that statute of limitations from the point of discovery on the civil side. So then, Mr. Chairman and Members, we would move then to page three of the delete everything amendment where we would add some language. Currently under 611A03, we require that the contents of the plea -- certain contents of plea agreements, if possible, should be given to the victims. And we're including in that statute lines 18 and 19, that would say: including the amount of time recommended for the defendant to serve in jail or prison if the Court accepts the

agreement. And that is pretty much of a refinement to Chapter 611A03. So that the victims can in fact know if there is not a prison sentence, if there's a nonimprison sanction provided that assailant -- that it would -- the victims would be informed of that in that plea agreement. And then under Section 4 -- Mr. Chairman and Members, we require that a notice under 611A, again, the victim can ask in writing that they'd be informed if a person is sent to prison and we require in a 611A06 that the Commissioner of Corrections provide that notice to a victim prior to the time that individual is released if they so request that. This language on page four then, lines 4 through 9, would extend that to say that the notice given to the victim of a crime against a person must include the conditions governing the offender's release and either the identify of the corrections agent who will be supervising the offender's release or means to identify the Court's Services Agency that will be supervising the offender's release. So, if the person is released under -- and has supervised release time, the victim could also find out that when it's going to happen and the -- who would be supervising that supervised release time. And then, finally, Mr. Chairman and Members, under Section 5, Notice To Sexual Assault Victim Regarding Release of an Arrested Person, if they are in jail this would be pre-sentence, we take this language directly from our battered woman's language that we have in statute, and we put it here also for those persons who are -- have been sexually abused or have experienced criminal sexual conduct against them so that they could have a right to have the

information from the jail, i.e. the conditions of the release of the assailant; the time of the release; the time, date and place of the next scheduled court appearance and then also, they would be required to provide the location and telephone number of the area's sexual assault program as designated by the Commissioner of Corrections. And then after that, that would be done orally, and then they would be required to give a written notice as they also do under our battered women's section. And then Section 6 is the effective date where the statute of limitations language would go into effect the day following final enactment and would apply to actions pending on or commenced on or after that date to allow those persons who might have had cause of action today or back two years ago to come into play. We have -- Mr. Chairman and Members, we have two witnesses here who'd like to testify on behalf of this bill, Mr. Jeff Anderson I'd call first, if it would be okay with the Chairman.

Madam Chair, Committee, my name is Jeff Anderson, I'm an attorney, and I have been for thirteen years. The last six years I have been representing victims of sexual abuse, and many of them. What the proposed bill does by allowing for a delay discovery rule -- what it accomplishes is a recognition of a reality when it relates to sexual abuse. Victims of sexual abuse, particularly victims abused by people in positions of authority: parent, priest, teacher, things like that particularly suffer a unique kind of psychological damage that keep them from recognizing either at the time or after that they are being injured by it. So they commonly

experience delayed discovery. And that has not been recognized to date by our courts and that's what necessitates legislative action recognizing that reality. And example -- a fifth grade boy sexually sodomized by his teacher, he is bound by wire and rope in order to accomplish the sodomization and sexual assault. He not only represses the memory of it, because he is told if he tells anybody his parents will be killed, he not only represses the memory, he represses the fact that he has been injured by it until fourteen years later he is in the Navy, and he is bound on the side of ship while painting that ship as part of his duties and experiences the same kind of constriction that he experienced in the sexual assault and flashes back to that memory much the way a Vietnam vet does. That's a dramatic example but it's not uncommon for the discovery of the harm to be delayed sometimes many years. He was incapable of bringing any action before he discovered that injury at the time he was bound on the side of that boat. The proposal does acknowledge reality. And I don't think there's any dispute about that knowing what I know about victims of sexual abuse and the particular syndrome that they suffer. There is one concern I would like to address in that presently in Minnesota if somebody either an institution or an individual enables a child abuser, for example, to continue in a position of authority there is a negligence action that lies against that institution or individual. The language of this seems to shorten the time with which a victim would have a viable legal action. It makes it two years instead of six. So in essence, it is rewarding the person

who enables the abuser to continue his abuse, and for that reason I would urge consideration of one of two things. I would urge consideration of lengthening the period for which somebody can bring an action once they discover the injury from two to five years. Okay? The five-year statute has been recognized by the Legislature as applies to exploitation by psychotherapists. So if it were amended to read "five years from the discovery of the abuse" the passage of this bill would not reward the enablers of the abuse. Would not limit them from exposure for their negligent liability. An alternative to that is applying it to the two years from the discovery of the intentional tort which means the wrong doer and is specifically saying that as to negligence, or reckless enablement of it, applies six years. But, there is a bit of an incongruity there that I think probably is a matter of policy -- doesn't justify. So I believe that knowing that victims of sexual abuse, particularly those that are disempowered by the abuser, the child abused by the priest, the child abused by the parent, they are particularly disempowered and they are the ones least able to really come forward and go to the police or go to the attorney to bring that action so that the two years is in reality probably insufficient recognition of their disempowerment. And for that reason, Representative - Madam Chair, would urge consideration of at a minimum five years from the date of discovery of the injury.

Representative Blatz.

Madam Chair, maybe the witness could respond to this or maybe Counsel. You know, a couple years ago when we amended the statutes

dealing with tort reform medical malpractice, it was my understanding, I worked with some people on that legislation, that a child, a minor could bring an action against a health professional so many years after they turned the age of majority. Yet, it's been our policy, as I understand it really not to allow that in civil actions in the case of child abuse. It just strikes me as really strange because the injury is so apparent on a medical malpractice, I mean, maybe you don't find out 'til the age of eight if there's like learning disabilities or something like that - that's what the pediatricians say. But in the case of child abuse -- I mean it's so covered in many instances and the child is not able to speakout and sometimes the victim of the abuse is in the family. I just can't believe -- I guess I'm in support of the bill -- that why we would have had for so many years in the physical injury through health care but not in the emotional and everything else. I just -- I guess that's just not a question.

Mr. Anderson.

Well, I think that is a recognition of the simple reality that victims of sexual abuse do suffer hidden injuries, injuries they themselves can't appreciate. And, I'm not intimately aware of the issues dealt with as it relates to medical malpractice, but I do appreciate that this is a special situation deserving special recognition of this reality.

Representative Seaberg.

Madam Chair, question either for Representative Kelly or Mr. Anderson, the way I read the proposed bill right now, I can think

of a set of circumstances where the statute of limitations is really open-ended. It could last fifty years. Is that what your intention is?

Well,

Mr. Anderson.

It is a -- Madam Chair, it is a possibility, although one of the more remote ones. That is a rare occurrence, and it does leave it open until the person, the victim discovers the injury. Now, in that instance the burden is upon the victim/complainant/plaintiff to prove that there's been a delayed discovery. So it's not automatic. So you place the burden on that person to prove that, that there's been forty years of delayed discovery. My experience is that is very, very rare. I personally am not aware of any forty -- cases where the discovery is delayed forty years although I am intimately aware of cases where the discovery is delayed ten years, perhaps fifteen at the outset. But, that is a very rare circumstance, and again, the way its modeled it would put the burden on the plaintiff, on the complainant, on the victim to show in fact there had been such a delayed discovery and in that instance, there are other defenses to that action -- laches -- things of that kind could apply. But, Representative, that is the way its written a possibility albeit unlikely.

Madam Chair, Representative Kelly, in dealing with the Lasly Bill, didn't we cut that off at age twenty-five of the criminal action the other day?

Representative Kelly.

Mr. Chairman, or Madam Chair, Representative Seaberg, we did -- that was dealing specifically with child abuse, this is going to cover the whole gammit of criminal sex conduct. So, you know, you may well have a person that was thirty that could have been injured.

At the time of the abuse.

Pardon. Sure, at the time of the abuse. I don't think that -- ah -- it is a bit different and I think that we're trying to parallel it more with other civil actions that you the clock start running from the time of discovery and so on -- so I think your point is well taken, but, I think there -- it is a bit different from the Lasly proposal.

Madam Chair.

Representative Seaberg.

I could follow up then and when we're dealing with sexual abuse it could be sexual abuse to a senior citizen, to anyone really. I guess it does bother me for that open-ended type of situation.

Representative Swenson.

Madam Chair, Representative Kelly, or Mr. Anderson, what other civil actions are there where we have some sort of an open-ended situation where discovery of something or recollection of something would cause a statute to start to run?

Mr. Anderson.

Madam Chairman, Representative, in the case of asbestosis exposure there is often a delayed discovery, the pipefitter, for

example, has been working with asbestos for many, many years and only after the accumulative exposure to asbestos does he develop asbestosis, a disease of the lung. And our legislature in 541.09, I believe, acknowledged a delayed discovery reality in asbestosis and there is such a provision there for delayed discovery and it is open-ended in nature.

Madam Chair.

Representative Swenson.

Are there any others that you're aware of where there is some sort of open-ended to a -- to discovery type of thing?

Ms. Shapiro would like to comment on that.

Madam Chair, Representative Swenson, in 541.05 which is the six-year statute of limitations provision, there is a discovery rule in cases of fraud, so it commences at the discovery by the aggrieved party of the facts. I'd also like to make a point about the language which is that this bill says plaintiff knew or had reason to know, there are some limits related to the reasonableness of the discovery and if the plaintiff had reason to know the injury then the statute of limitations would commence at the that time. Of course that is subject to dispute in a court action, I would imagine.

Madam Chair, Representative, the bill clearly places the burden on the plaintiff in this case to show that they did not know or had reason to know, so it is, again, requires the plaintiff to carry that burden so it does not relinquish all protections afforded defendants in criminal or civil cases by any measure.

Representative Kelly.

Yes, Madam Chair, I have one other witness that I would like to give an opportunity to visit with us and that is Mark Douglas.

Mr. Douglas.

Madam Chair. My name is Mark Douglas, only by coincidence am I an attorney. I'm primarily a real estate attorney, probate attorney, business attorney. The reason I'm here today --

Alright Mr. Douglas, you're painted with the attorney colors if you've got the _____.

[Laughter and indistinguishable comments]

Well, I wouldn't want the people to some how look at these bills as being some how a money engine and only attorneys are here to speak. I'm here to speak on this issue because I'm a survivor -----.

Mr. Douglas, I'll remind you you're speaking to seven member attorneys and two staff attorneys here so --.

Wonderful.

Maybe you should push that side of it.

[Great laughter]

So often among -- well, I'm getting side-tracked. The reason I'm here is that I was a sexual abuse victim, and my sexual abuse that I endured at the hands of a man named Steven Gillies began in 1963 when I was about 12½. And it ran two or three times a week for although out my minority and even into my early adulthood years. I went to college; I went to law school; I got married and I didn't fully discover what was wrong and what the problem was

with me until I was about thirty years old. And it wasn't a great big light bulb necessarily, but there were several watersheds. At the time Scott County cases were in the news the area was just being to be discussed in a broad media sense. I was suffering and to a degree continue to suffer from ongoing depression, although through many years of therapy the acuteness of that depression has diminished. For many, many years I entertained on a almost daily basis suicidal thoughts, sort of how could I escape all of this by the magic solution of suicide. Many -- for many of those years I feared that I must have been a homosexual to have encouraged or to have invited this particular conduct, obviously that was a foolish thought, it's rather like a woman rape victim saying well it's something I must have worn or a certain mannerism that I must have exhibited that caused the rape. In any case, my situation was a very definite delayed discovery, I was married fully two years maybe a little bit more before I even broached the subject with my wife, I had gone many, many years without discussing it with my family. The man that abused me was a close member -- a close friend of the family, rather like being an uncle, but not in fact a blood relative. In 1984, I filed suit. And -- ah -- last summer the wheels of justice ground slowly, but, last summer the Hennepin County District Jury awarded me a moral victory of $1.27 million dollars. To date I haven't collected a dime and it's likely I will not collect anything, but they did give me that moral victory. The statute of limitations was an issue in my case and Judge Posten of Hennepin County District Court analogized in deciding a summary

judgment decision that it was rather like asbestosis or silicosis in that although you might be aware of the facts and circumstances that occurred to you, you don't connect up the harm that has resulted from those facts and circumstances. So, in my case, I did not have an amnesia, although many sexual abuse victims have an amnesia of sorts, and they don't discover -- I mean -- I'm -- honest to god -- you know -- something is lifted from their eyes, they don't discover that until a major life crisis: an arrest, a divorce, possibly a later rape or assault, chemical dependency, any number of triggering events. In my case I was aware, yes, this man had done all these things to me, but I didn't connect up my complete lack of self esteem and my ongoing depression and why I was working so hard at going to college and going to law school and establishing a practice in order to avoid the feelings within me. Unfortunately, the -- my case, the Douglas v. Gillies case was not appealed. So, it's like the proverbial tree falling in the forest, nobody hears about it. It has to be appealed before it hits the law books and becomes of substance to practicing lawyers out there. A similar situation happened out in Massachusetts, a decision was made just in this last year, named Unknown Plaintiff versus Unknown Defendant, it's a Boston case, Suffolk County, and the Judge Herbert Abrahms was faced with the same precise question of summary judgment and he decided based upon the psychological literature and the legal literature that it was appropriate to allow from a judicial perspective delayed discovery. This may be the law in

Massachusetts, it's not the law here in Minnesota. If I may I'd -- if I submit this because it does give an excellent discussion of

We'll have that copied for Committee Members, and thank you Mr. Douglas.

The other thing I'd like to point out is that there are cases that are pending in Minnesota, although again I'm primarily a business lawyer, I do with a co-counsel represent a young woman who that is suing her adoptive father for her sexual abuse. And Judge Martin Mansuer of McCloud County in the face of a summary judgment motion granted summary judgment to the father based on his interpretation of the statute of limitations. What was curious, in that case, was that in his first opinion he gave us everything. He said, yes, delayed discovery is great, then he waffled -- I mean he slept on it a little bit and he thought, no, I have to look to the statute of limitations and I have to apply a very narrow decision. Judge Mansuer decided against my client, Ms. Guise and presently that's before the Minnesota Court of Appeals. I understand Mr. Anderson has a very recent case just within the last couple weeks where Hennepin County District Court made the same decision. It's not in the statute. My fear in the Guise case is that courts, a least in Minnesota, unlike the Massachusetts case, courts in Minnesota are a bit conservative in that they feel that it is not within their realm to be legislators. And that that obviously under the constitution and just general public policy is best left to the Legislature. I would hope that you adopt this or similar legislation extending the statute. If I might address

Representative Seaberg's question about the fifty-year kind of question, I don't -- at least address it indirectly. I don't think that by mending the statute in this way that a great floodgate of litigation will be opened. Many, many victims don't go to law school like myself and choose to mount a white horse and tilt against windmills. Most victims prefer to remain very quiet about it and to go into court and fight something like this, I'd say many victims would choose a rather -- taking a different therapeutic approach and just focus on their therapy. For those victims who do want to take back some power, and it is a power question, it is not a sexual question, really, it's a power question. For those victims that do want to take back some power, they should be allowed that chance -- ah -- one final point, and to -- no, I'll just shutup -- lawyers go on and on.

Representative Bishop.

We know. Speaking of.

Madam Chair, Mr. Douglas, you heard probably the question that Mr. Seaberg used as preliminary to his question; what did we just do to extend the criminal statute of limitations for sex abuse? Didn't we extend it so that the seven year statute of limitations could be applied as late as age twenty-five for an offense that was committed to a minor? Mr. Douglas, if you're an attorney, and you're giving us your opinion, do you have the opinion that civil statute of limitations should be available to a civil plaintiff to seek money damages for a period longer than the criminal statute of

limitations should be available to the general public to punish someone for the crime of child sex abuse?

Yes I do.

Mr. Douglas.

Oh --

Would you give the justification for that? Because I am an attorney also, and I don't share your opinion.

Mr. Douglas.

Criminal statutes typically provide for a forfeiture of one's liberties, and generally, criminal statutes, I believe would be for a shorter time period. Civil Statute is simply for -- or civil suits rather -- all you can possibly lose is money. And that's quite historically, in the long term, money is significantly less value than one's life, liberty -- ah -- so in that sense, I think civil statutes do go on a bit longer. As a for instance, if I and again, I'm not an expert in the law although I am a lawyer, so I may be one of the few lawyers who would admit that -- but, if I steal money --

[Much laughter and indistinguishable comments]

If I steal money from you, I believe that I've breached the King's Peace, and the king or the sovereign in the case of the sovereign State of Minnesota, have to indict me within -- is it three years? If you discover the loss of that money, I'm assuming that I stole it from by embezzlement you would have in one of the statutes of limitation six years from the time of your discovery. So if you were to do your books on perhaps not a yearly basis, but

only every couple of years, it's possible that you might bring a civil suit eight years after the actual theft, but the County Prosecutor would have to have got me, the thief, within three years.

Representative Bishop.

Madam Chair, Mr. Douglas, when did you finish law school? At what age?

Mr. Douglas?

In 1979, within about twenty-nine -- twenty-eight.

Twenty-eight years old?

Representative Bishop.

Madam Chair, I take it then Mr. Douglas that you think that someone age twenty-five might not be old enough or aware enough or alert enough or one thing or another, to be able to commence action to enforce an entitlement to a cause of action, of this nature? Whereas, they would be old enough at age twenty-four to enforce any other kind of personal injury? Correct?

Mr. Douglas.

I'm not certain of all of the ramifications, but, I can give you a couple of examples. Again, many victims do not get out of their amnesia, a therapeutic amnesia 'til some crisis or until some therapeutic event. In the state of Washington there was a case Tyson versus Tyson where the woman was abused up to about age eleven or -- certainly in her early years. And she didn't bring suit until she was twenty-five or thirty or many years after the fact. In the case of Tyson versus Tyson, the state of Washington

dismissed her case based on narrow reading of the statute of limitations. One of the results of that, by the way, was that the statute of limitations was changed in the state of Washington and the -- that's ones of the bases for the present bill -- the Washington statute. I've rambled on and I've missed your point, I'm afraid.

No you haven't --

Representative Bishop.

Mr. Douglas, it seems to be entirely hypothecated with a basis of sex and sexual abuse as foundation. It seems to me that there are other forms of -- other torts , other torts such as false imprisonment, such as abuse of physical -- physical abuse rather than sexual abuse, which could very easily produce the same kind of depression, repressed injury to the psyche is the best way I can think of it. That's your _____. You're basically talking about a liberated psyche that has been repressed because of abuse.

Representative Bishop.

And I just don't think that frankly, that this particular thing that you're talking about is that unusual and should get -- that it should be left open-ended the way it is. Consequently, when we get to the point of handling of the bill, I'm going to ask that the Committee discover -- a _____ of Section 2, separately from the other Sections.

Thank you very much Mr. Douglas for being willing to come forward and talk about this.

Representative Kelly.

Madam Chair, I would like to in response to the point that Mr. Anderson made it _____ to the confusion on the Section 2 with the negligence and the tort differences. I'd like to suggest that we make an amendment on page two of the delete everything amendment. Representative Ornstein has been kind enough to develop for me. That page two, line 32, after commence, insert a comma and new language that would read in the case of intentional tort, -- it's on page two, line 32 after commence insert comma in the case of an intentional tort, and then page two, line 32 after years -- or in the case of an action for negligence within six years,; so it would be page two, line 32 after "years" insert "comma" or in the case of an action for negligence with in six years so that if this were adopted it would then read: an action for damages based on personal injury caused by sexual abuse must be commenced in the case of an intentional tort within two years or in the case of an action for negligence within six years of the time the plaintiff knew and had reason to -- and so on. So that we take care of that anomaly that -- that Mr. Anderson talked about in regard to shortening the time of the intentional from six to two. And Madam Chair, I would move adoption of that amendment.

Representative Kelly moves adoption of the amendment, and need to make sure that counsel has this, I know the court doesn't quite have it. Do you have it written down somewhere? Okay.

Representative Ornstein, do you have a further amendment? Maybe we could get this one written up and bring it back in a

minute, if you want to withdraw your motion for the moment we can take that other amendment first and that way --

Does Representative Ornstein have another amendment?

Do you have another amendment Representative Ornstein?

No. I said that was the one Representative Ornstein --

Do you have this one written out already? I thought you had it written out.

Yeh. There it is.

She has it.

Okay.

-- I drafted that one, but I have another one of my own which I previously discussed with you.

Which is written out?

Yeh.

So maybe you could withdrawn the motion for this amendment and take up the one that's already written out so we could get members copies of this and make sure that counsel has copy. Representative Kelly withdraws his motion on this amendment and Representative Ornstein do you want to offer your amendment; do you have copies of that?

Yes. Thank you Madam Chair, I move adoption of the amendment H461A.

Representative Ornstein moves adoption of amendments H461A.

Maybe I'll wait until it's passed out before we start explaining it.

Madam Chair, this is an amendment which I've shared with you and with Representative Kelly, so far as I know there's no opposition. It comes to me from a particular constituent, but I think it would apply whether that person was affected was a constituent of mine or not. I support what Representative Kelly is trying to do with the bill, but, what he does unfortunately, will only apply prospectively and there are small a number of people who have lost their causes of actions in the past even though they duly tried to investigate them and bring them on account of the lack of discovery rule. And what my amendment would do is say that if the -- if someone had in the past consulted an attorney to investigate one of these causes of action, and the plaintiff received legal advise that the cause of action would likely be disbarred by the statute of limitations, that that person would have until August 1, 1990, to commence a new cause of action. This isn't open-ended, we're not saying they have for ever to bring one of these cases but if this happened a long time ago, and if they're barred even under the new Kelly language, I wanted to give them an -- and if they had exercised diligence in trying to bring a cause of action at the time, I want to give them at least a short period of time to commence that action. I had Ms. McKnight do some legal research on whether it was constitutional to revive a cause of action where the statute of limitations had expired and she provided me with the memorandum saying that so far as she could tell there was no constitutional problem with this, and I have a copy of the memorandum if any member wants to see it.

Representative Dempsey.

Madam Chair, maybe Representative Ornstein could tell me, would it apply in those cases that were referred to here where they were brought before the court and dismissed, because -- would it revive those also? I mean, I can understand where that -- you obviously come within the provision about seeing the attorney, but suppose the parties had gone through the processes and it was in fact dismissed.

Representative Ornstein.

Representative Dempsey and Madam Chair, that's a good point, I hadn't really been thinking cases where it got that far but more likely a case where it got into the attorney's office and the attorney sent it away. I suppose you could argue that under clause 2, on line 15 that plaintiff received legal advise that would include a summary judgment opinion of the court, but I think probably we ought to tighten that some.

Representative Blatz.

Madam Chair, Representative Ornstein, regardless of how you fill in the amendment, I don't know why you would want to tighten it because does that mean that if your attorney was -- saved you the time and expense and advised you that in fact the statute of limitations, in his or her opinion, would toll or would prevent the action, and you had another attorney who either wanted to take the risk or the client wanted the risk or wasn't really aware of the statute of limitations issue, then that instance you're out. That

doesn't make sense. I mean either you do it for all, or you don't do it in my opinion.

Madam Chair, Representative Blatz.

Representative Ornstein. I agree with you and maybe the word tighten wasn't the right word to use. I guess I meant to draw the language more carefully rather than more restrictively. And I -- I'm just thinking of how to do that as an answer to your question and Representative Dempsey's question.

Representative Bishop.

Madam Chair, Representative Ornstein, while you're thinking about how to do it, think about also how far back to go. Because, if three years ago there was a ruling that your action was barred by the statute of limitations, two years ago you went to a lawyer, I mean, what -- how far back are we going to go to resurrect claims that have been previously barred?

Madam Chair, Representative Bishop, my intent was that in any case where a claim was previously barred, but where the plaintiff had consulted an attorney within two years of the discovery that that person would now have until August 1, 1990, to resurrect that lawsuit. I think the way to do it would simply to be to eliminate clause 2 there and simply leave it at clause 1. Would that _____ your concern Representative Dempsey --

Representative Bishop.

Madam Chair, Representative Ornstein, or Mr. Shapiro, it seems to me that if you're going forward with Representative Ornstein's suggestion, pretty much what the bill is doing, you're eliminating

the statute of limitations for prior actions, leaving it until -- replaced by this new language which is two years after becoming aware on an injury. Having at least a window until August 1, 1990, to _____ all prior actions that would -- that have been based on prior statute of limitations.

Representative Ornstein.

Madam Chair, Representative Bishop, I'm not sure what point you're making except that -- are you asking whether I'm actually putting restrictions on Representative Kelly's language for certain people?

No. It's just that the way I understand it your -- you would have the prior -- existing statute of limitations would be out for the period between now and 1990 for accrued causes of action. It would be parallel to the ones that would go forward under Kelly's language.

Yes. It -- Madam Chair, Representative Bishop, for those plaintiffs who had actually consulted an attorney within two years of discovery of the injury. Not for anybody, but for the plaintiff who did exercise diligence with respect to their potential claim. We would be reviving that for a short period of time so that they could have advantage of the same new law that Representative Kelly would be making for people whose -- who had discovered their claim within the past two years.

Representative Seaberg.

Madam Chair, Representative Ornstein, why shouldn't we just eliminate the statute of limitations for anything that's come up in

the past? Why do we want to limit this to sexual abuse? If someone went to an attorney for some other action and was told it was barred by the statute of limitations and consequently had his claim dismissed or what ever, why should we limit this?

Madam Chair, Representative Seaberg, I guess I'm working within the context of the bill that we've been told by the witnesses that there's something unique about sexual abuse which causes a delayed discovery. While some of us might think it would be just to effect a discovery rule in every claim, that's not before us and I don't propose to bring it before us. I think that would be a major change in the court system which ought to have more hearings than we're doing now.

Madam Chair, Representative Ornstein, I couldn't agree with you more, but I think you're pointing towards that direction when something is barred, it's barred.

Well Madam Chair, Representative Seaberg, I think that that would be the point to make in opposition to my amendment, but I don't understand, I mean this would only apply in a very cases, I would assume, where people had actually gone to the trouble of seeking out an attorney and were told that they couldn't bring the claim because the statute of limitations -- it doesn't seem just that they are -- they continue to be shut-out of court, while under Representative Kelly's language the people who had been the subject of sexual abuse at a later date would now be able to get into court, and so I'm trying to limit it -- yes -- so I'm trying to limit it in several ways. Number 1, with the August 1, 1990, date

so that we don't have some sort of open-ended liability; number 2, by the two-year discovery, or by the two years by the time of discovery; and number 3 by the fact that they would have had to consulted an attorney during that time period. So I think it's fairly restrictively drawn and meant to apply to people who ought to get their cases into court now.

Madam Chair, Representative Ornstein, I think you could apply that same logic to any claim that's been barred by the statute of limitations.

Madam Chair, Representative Seaberg, I'm not proposing that if a discovery rule generally were proposed for the State, I guess we could take that up. Many states have a discovery rule. Many attorneys feel it's only just and damages is an essential part of the case you have to prove along with negligence and causation that your cause of action wouldn't accrue until you knew you had damages. But the courts of Minnesota have not yet adopted that broad rule and it's left to the Legislature to try to prove why certain cases are unique.

Members, I think this amendment is before us. Is there any other discussion on it? You've moved the amendment, Representative Ornstein? Is there any discussion from the audience on this?

Madam Chair, I guess I want to amend it as Representative Dempsey has suggested. On line 8 take out the "following"; on line 9 take out the colon; add the word "that"; line 10 take out number one; line 14 put a period after "abuse" and delete everything after that.

Do the Members understand the amendment to the amendment?

I'll incorporate that into my amendment.

Madam Chair, on line 8 of the proposed amendment, what would we be deleting?

Why don't you repeat the whole thing, Representative Ornstein.

Okay. Line 8 delete "the following"; line 9 delete the colon and insert "that"; line 10 delete open parenthesis one close parenthesis; line 14 put a period after "abuse" and delete everything else on line 14 and 15 and 16.

Madam Chair, I think that what Representative Ornstein is saying and trying to do is -- is to try to strike a little fairness for those who went forward and were told by an attorney that they were barred and for those who chose not to, or didn't discover and didn't go forward, would be treated differently. I don't think that we can be talking about too many cases here. We're having -- I mean I guess if people are real concerned -- I s'pose there could be -- we could shorten the window or something. But, I certainly think that it's a fair amendment and I would support it.

Is there other discussion on Representative Ornstein's amendment? Now, I want to get this right. We do have a chairback, is the Chair coming with us?

Nope. Just do it.

We will vote on the amendment to Representative Ornstein's amendment right now. All those in favor say aye.

Aye.

Those opposed.

No.

Motion carrys.

We now have which before us?

Madam Chair, what we have is a -- I had passed out an amendment -- I had passed out an amendment which would modify section 2 on page 2. I believe you have the handwritten amendment? Thank you. Yes. So that we would take care of the anomaly that Mr. Anderson pointed out that we do not want to, in this language, limit the six-year statute of limitations in which a negligence case action could be brought against someone who allowed the injury to occur. And so that would -- the amendment would be intended to correct that inadequacy of the original delete everything amendment. And I would move adoption of that amendment.

So this is the handwritten amendment? Alright.

Representative Kelly's moved the adoption of the amendment. Any further discussion. If not, all in favor say aye.

Aye.

Opposed. Same sign.

Motion carried. Is there any further discussion on the bill? Representative Bishop.

I would like to ask for a division -- well no, I'll do it this way. I move that we delete Section 2.

Representative Bishop moves we delete Section 2 which is on page -- Representative Bishop, Counsel advises me you want to delete Section 1 and 2. To accomplish what you --

Yes. Thank you.

Alright, Representative Bishop moves to delete Section 1 and 2.

Representative Kelly.

Madam Chair, obviously, I would consider that a very unfriendly motion. And I'm surprised. Quite honestly I'm shocked --

And dismayed?

Never shocked.

[Laughter and indistinguishable comments]

Representative Kelly, there was an amendment offered yesterday afternoon on the floor to Representative Lasly's bill, wasn't that amendment essentially what you have in Section 1 and 2? Wouldn't that enable victims to recover some of the costs of restitution? Cover some of the costs of their treatment?

Yeh. By Representative Tompkins who will be bringing that amendment to the full committee I'm told. Ah but,

Section 1 and 2 were deleted, she wouldn't have a Section 2 amend.

That's true. Madam Chair, as I'm, I am sort of astounded that a member of the Task Force, the Attorney General's Task Force, that made this recommendation that worked so hard in developing some very sound thoughtful recommendations would offer to gut the bill that would accomplish those recommendations; I'm amazed at that and I'm strongly opposed to Representative Bishop's motion.

Representative Bishop, Counsel advises me that you would also want to eliminate or delete Sections 6 and 7? Which would leave us with Section 3, 4 and 5. Representative Blatz.

Madam Chair, I don't know that Representative Bishop needs anymore help. That just took care of my amendment too.

Representative Bishop, did you understand Counsel's thinking in this?

I don't see --

Perhaps, we should have Ms. Shapiro explain why you would want to -- we added Section 7 as Ornstein's amendment.

-- Madam Chair, if I could --

Representative Blatz wanted to speak first. Unless Representative Bishop wants Counsel to explain why you have to eliminate -- alright.

Representative Blatz.

Madam Chair, I was just going to ask Representative Bishop wouldn't it be just as easy just to vote no against the bill?

No.

Representative Bishop.

No. I don't think that's true. Sections 3, 4 and 5, I think are _____. I'm sorry to hear Representative Kelly take _____.

[Inaudible comments].

_____ open-ended narrative all lawyers for the rest of their lives to have cause of action that can be very favorable. Though I think that Sections 3, 4 and 5 are a different purpose and

that's why I think it's _____ divided. As far as the section -- the Task Force is concerned [inaudible comments] help things in that Task Force are different than others.

Madam Chair, if I might --

Representative Kelly.

Ms. Zeppler who is the co-chair of that Task Force has not taken the opportunity to testify in support of the bill, I guess -- since I think she feels strongly about this provision, I wonder if we might give her an opportunity to share her thoughts with us.

Ms. Zeppler.

Ms. Zeppler has the floor.

Madam Chair, I'm Fern Zeppler, I'm the executive director of the Crime Victim Witness Advisory Council which has endorsed this bill as well as Co-chair of the Attorney General's Task Force. And I am standing in opposition to Representative Bishop's motion to delete the provision in this bill which accommodates the very natural suppression of sexual assault and sexual abuse following the devastation of the initial instance, and often for many years. We are talking -- I want to clarify not only about sexual abuse against children, but about sexual assault against adult women. There are several syndromes well documented in the literature both in the psychiatric literature and in the social literature speaking to the phenomenon of sexual assault which empirically demonstrate that suppression of the trauma of rape is a natural response. It is an expected response to sexual assault and discovered injury is part and parcel of the phenomenon of sexual violence against

children and against women. If we do not accommodate the reality, we are expecting the reality of victims to fit the legal fiction which we've created and I think that -- I think -- I understand the concerns about open-endedness; I am not lawyer, and I certainly understand the concerns about creating full employment for attorneys' bills but the Task Force heard time and time again from women who were unable to seek monetary compensation for the thousands of dollars they had spent to get counseling and therapy to make themselves whole. We -- I also was part of a restitution work group in this past year and our bill was before you, and I believe we have a better system for that bill. However, I can tell you that many women and children who are victimized sexually have no alternative but to proceed civilly if they are to get any kind of compensation for the damage done to them. We have to make the system accessible to them and I would urge you to defeat the proposed amendment. Thank you.

Representative Vogenius(?).

I don't know whether I want to follow that or not. I was going to ask Representative Bishop if he could try to explain his reasoning to me, because I didn't follow it. Are you saying that because there's a criminal limitation we should have the same civil limitation.

Representative Bishop.

Succinctly, Representative Bishop.

Madam Chairman, Representative Vogenius, thank you for the opportunity to standing in response as to your question and also to

_____ remarks. I guess that the open-endedness of the thing -- I have seen the need for statutes of limitation. I think that having no statute of limitations of this scary area of -- of so much of almost an invitation to claims that are so difficult to prove and so difficult to defend that I'm worried about it. But, I also know from being -- having my memory refreshed in the last few minutes that there were in fact many situations that spoken in favor of having a discovery rule for this kind of tort, and consequently, Ms. Zeppler has done what is often done with the last word and has persuaded me to _____ where I withdraw my motion.

Thank you Representative Bishop. Is there any further discussion on the Bill? I'd like --

Are we supposed to speak against the Bishop motion?

[general laughter].

On thing that I appreciate about Representative Bishop Ornstein is that he takes his work seriously, he's not afraid to admit it when he reached a conclusion that someone else contradicted and in doing so may have cutoff some wonderful speeches from the rest of his committee members. I appreciate everyone that came to speak on this subject. I realize it is one that it's very difficult to speak about in public on tape and I appreciate all of you who were willing to do that. Representative Kelly renews his motion that House File 461 be recommended to pass as amended and referred to full judiciary committee. Any further discussion? If not, all in favor of the motion say aye.

Aye.

Opposed same sign. Motion carrys.

Tomorrow we hope to -- we need to start right on time, Members, so please make every effort to stall off everyone that wants to talk to you. We'll start at ten in the morning. We have to take up House File 20 and then we'll be doing House File 315. Meeting adjourned.

Thank you.

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

C.S.B.

Plaintiff,

v.

ORDER

File No. PI93-20685

Albert C. Magnuson, the Redeemer Covenant Church of Brooklyn Park, the Northwest Conference, the Evangelical Covenant Church of America,

Defendants.

The above-entitled matter came on for Hearing before the Honorable Gary Larson on August 2, 1994 upon Defendants' motions for summary judgment.

Appearances:

Teresa K. Patton, 332 Minnesota Street, St. Paul, MN, for Plaintiff.

W.D. Flaskamp, 33 South Sixth Street, Minneapolis, MN for Defendant Redeemer Covenant Church.

Kenneth F. Daniels, 4725 Olson Memorial Hwy., Minneapolis, MN, for Defendant.

THE COURT HEREBY ORDERS:

1. That Defendant Redeemer Covenant Church's motion for summary judgment on grounds that this action is barred by the statute of limitations under Minn. Stat. §. 541.05 is hereby denied.

2. That Defendants' motions for summary judgment on grounds

that this action is barred by the statute of limitations under Minn. Stat. § 541.073 is hereby denied.

3. That Defendant Redeemer Covenant Church's motion for summary judgment on grounds of improper retroactive application of Minn. Stat. § 541.073 is hereby denied.

4. That Defendant Redeemer Covenant Church's motion for summary judgment on the claim of negligent hiring is granted. Plaintiff's claim of negligent hiring against Defendant Redeemer Covenant Church of Brooklyn Park is hereby dismissed with prejudice.

5. That Defendant Redeemer Covenant Church's motion for summary judgment on the claim of negligent retention is hereby denied.

6. That Defendant Redeemer Covenant Church's motion for summary judgment on the claim of breach of fiduciary duty is hereby denied.

7. That Defendant Redeemer Covenant Church's motion for summary judgment on the claim of negligent counseling is granted. Plaintiff's negligent counseling claims are hereby dismissed with prejudice.

8. That Defendant Redeemer Covenant Church's motion for summary judgment on the claim of respondeat superior liability is hereby denied.

9. That Plaintiff's motion to amend his complaint for punitive damages against Defendant Magnuson is granted.

10. That Plaintiff's motion to amend his complaint for punitive damages against Defendant Redeemer Covenant Church is denied.

BY THE COURT

DATED: 11/4/94

Gary Larson

Judge of District Court

Statement of Facts

Defendants Northwest Conference and the Evangelical Convenant Church of America have settled with Plaintiff C.S.B. The court assumes the following facts for the purpose of adjudicating summary judgment motions by remaining Defendants Magnuson and Redeemer Covenant Church. Defendant Magnuson was a pastor at Redeemer Covenant Church from 1965 to 1989. Plaintiff attended Redeemer Covenant Church from 1965 to 1980. Plaintiff was employed as a lawn and church custodian at Redeemer Covenant Church while he was in high school and part of the time when he was at Bethel college, where he earned a degree in biblical and theological studies.

Plaintiff alleges he was sexually abused by Defendant Magnuson from 1969 to 1979. In September 1979 Defendant Magnuson and another pastor presided over Plaintiff's marriage. After his marriage, Plaintiff attempted to earn a living selling insurance for about two years. He then returned to college to pursue a master's degree in elementary education. Plaintiff subsequently left school to pursue a career in carpentry and construction. On November 30, 1993, Plaintiff commenced suit against Defendant Magnuson for sexual abuse and Defendant Redeemer for negligence and vicarious liability. Defendant Redeemer Covenant Church and Defendant

Magnuson have brought motions for summary judgment. Plaintiff has moved to amend his complaint to include punitive damages.

Analysis

A. The Standard of Review

On a motion for summary judgment, the court shall render judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. Proc. 56.03. The moving party has the burden of proof and the nonmoving party has the benefit of that view of the evidence which is most favorable to him. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981), citing Sauter v. Sauter, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955). If there is any doubt as to the existence of a material fact, the doubt must be resolved in favor of finding that a fact issue exists. State v. City of Mounds View, 518 N.W.2d 567, 571 (Minn. 1994). Since all factual inferences must be drawn against the movant, "even where the movant's supporting documents are uncontradicted, they may in themselves be insufficient to sustain his burden of proof." Burner Svc. and Combustion Controls Co., Inc. v. City of Minneapolis, 250 N.W.2d 224, 226 (Minn. 1977). Summary judgment should be denied if reasonable men might reach different conclusions given the evidence. Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593,

605 (1957).

B. The Statute of Limitations

1. Minn. Stat. § 541.05

Defendant Redeemer Covenant Church moves for summary judgment on the claims of negligent hiring and supervision on grounds that Plaintiff failed to bring suit within the six-year statute of limitations required by Minn. Stat. § 541.05. The policy of statutes of limitation is to "compel the exercise of a right of action within a reasonable time so that a defendant will have a fair opportunity to prepare an adequate defense." Swenson v. Emerson Elec. Co., 374 N.W.2d 690, 696 (Minn. 1985), cert. denied, 476 U.S. 1130 (1986). Minn. Stat. § 541.05, subd. 1, states in relevant part:

> Except where the uniform commercial code otherwise prescribes, the following actions shall be commenced within six years:
>
> ....
>
> (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated....

However, Minn. Stat. § 541.073, subd. 2(a) states:

> An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.

Minn. Stat. § 541.073, subd. 3, states:

> This section applies to an action for damages commenced against a person who cause the plaintiff's personal injury either by (1) committing sexual abuse against

> the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur.

Both of these statutes are applicable to this action. Whereas § 541.05 applies to a broad array of actions, § 541.073 applies to sexual abuse actions only. Minn. Stat. § 645.26, subd. 1 specifies the rule for choosing between them:

> When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, <u>the special provision shall prevail and shall be construed as an exception to the general provision</u> unless the later provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail. (Emphasis added.)

Therefore, as a special provision, § 541.073 must prevail over Minn. Stat. § 541.05. First, § 541.073 was enacted in 1989 and is the later of the two provisions. Second, the legislature has indicated that § 541.073 is applicable to all suits that are commenced on or after May 20, 1989. 1989 Minn. Laws ch. 190, § 6. Further, the special focus of § 541.073 is necessary because sexual abuse victims are more likely to repress the memory of the abusive incident, and the psychological injuries caused by sexual abuse are different than for victims of other torts. <u>K.E. v. Hoffman</u>, 452 N.W.2d 509, 514 (Minn. Ct. App. 1990). Therefore, § 541.05 is not applicable to this case against any claims that fall under § 541.073. Such claims include Plaintiff's claims of negligent hiring or retention and respondeat superior liability against Defendant

Redeemer Covenant Church. Roe v. Archdiocese of St. Paul, 518 N.W.2d 629, 632 (Minn. Ct. App. 1994).

Plaintiff argues that Minn. Const. art. 12, § 1 prohibits special legislation and thus, Minn. Stat. § 541.073 is unconstitutional. Minn. Const. art. 12, § 1 states in relevant part:

> In all cases when a general law can be made applicable, a special law shall not be enacted except as provided in section 2. Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject.

The prohibition against special legislation does not prevent the legislature from creating classes and applying different rules to different cases. In re Tveten, 402 N.W.2d 551, 558 (Minn. 1987). A classification is constitutionally proper if:

> (a) the classification applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation;
>
> (b) the distinctions are not manifestly arbitrary or fanciful but are genuine and substantial so as to provide a natural and reasonable basis justifying the distinction; and
>
> (c)there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide. Id.

First, § 541.079 applies to all similarly-situated plaintiffs who are victims of sexual abuse and who bring suit according to its requirements. It does not distinguish its applicability on any

other basis. Second, the legislature has recognized the special needs of victims of sexual abuse who are more likely to repress the memory of the abusive incident. K.E. v. Hoffman, 452 N.W.2d 509, 514 (Minn. Ct. App. 1990). Third, the "delayed discovery" rule in § 541.079 is an appropriate and necessary means of addressing a sexual abuse victim's repressed memory, because it tolls the statute of limitations at a point dictated by the victim's special circumstances. Therefore, this court finds that § 541.073 is constitutional. Defendant Redeemer Covenant Church's motion for summary judgment on grounds that Plaintiff failed to bring suit within the six-year statute of limitations required by Minn. Stat. § 541.05, subd. 1 is denied.

2. Minn. Stat. § 541.073

Defendant Redeemer Covenant Church and Defendant Magnuson move for summary judgment on the grounds that Plaintiff failed to bring suit within the six-year statute of limitations required by Minn. Stat. § 541.073. Under Minn. Stat. § 541.073, "the limitations period begins to run when the plaintiff knows or has reason to know that an injury was caused by sexual abuse, rather than when the abuse actually occurred." Roe v. Archdiocese of St. Paul, 518 N.W.2d 629, 631 (Minn. Ct. App. 1994). It is an objective standard. Id. The "delayed discovery" rule is necessary because sexual abuse victims are more likely to repress the memory of the abusive incident. K.E. v. Hoffman, 452 N.W.2d 509, 514 (Minn. Ct. App.

1990).

The Minnesota Court of Appeals has addressed the "delayed discovery" statute of limitations on four occasions. Three of the four cases have upheld the bar by the statute of limitations. In H.D. v. White, 483 N.W.2d 501, 502 (Minn. Ct. App. 1992), the court found the action time-barred because the plaintiff "knew he had been injured by the alleged sexual misconduct of the [defendant] seven years prior to filing suit." (Emphasis added.) In ABC v. Archdiocese of St. Paul, 513 N.W.2d 482, 486 (Minn. Ct. App. 1994), the court upheld the statute of limitations because the record "conclusively" established that the plaintiff "had reason to know and [left] no question for jury determination." The court focused on the fact that: 1) the plaintiff was aware that priests had to remain celibate; 2) the plaintiff discussed her relationship with the defendant on numerous occasions to different people, including another member of the clergy and the defendant's sister-in-law; and 3) the plaintiff suffered a miscarriage due to pregnancy by the defendant. Id. at 486-87. In Roe v. Archdiocese of St. Paul, 518 N.W.2d 629 (Minn. Ct. App. 1994), the court held that the plaintiff knew of her injury more than six years prior to commencing her action. The court's conclusion in Roe was based on evidence: 1) the plaintiff attempted suicide because she felt defendant abandoned her; and 2) the plaintiff moved to another state to get away from the defendant. Id. at 632. In K.E. v. Hoffman, 452 N.W.2d

509, 515 (Minn. Ct. App. 1990), the court remanded for trial the issue of when the plaintiff knew or should have known that the alleged abuse was the cause of his injuries. The plaintiff in Hoffman had suffered traumatic amnesia which inhibited his memory of the assaults. Id. at 511.

After reviewing the facts of this case and carefully examining the above appellate court decisions, this court finds that the statute of limitations did not begin to toll in this case until 1989, when Plaintiff first discussed the abuse with others and sought counseling. Prior to 1989, plaintiff did not know nor should he have known that the alleged abuse was the cause of his injuries. Viewing the facts most favorable to the plaintiff on a motion for summary judgment, the facts in this case distinguish it from those in ABC and Roe.

There appears to be conflicting testimony as to whether plaintiff understood the sexual acts with Defendant Magnuson to be wrong. Plaintiff alleges he was severely confused as to the the propriety of the sexual acts. Defendant Magnuson, as Plaintiff's pastor, had great influence and control over Plaintiff. He told Plaintiff that masturbation was God's gift to the unmarried man. Plaintiff accepted this pronouncement so completely he felt he could refuse Defendant Magnuson's advances only after he was married.

Plaintiff's claims regarding his understanding of the alleged sexual acts are corroborated by the fact that Defendant Magnuson presided at Plaintiff's wedding and by the contents of Plaintiff's letters of support to his pastor when the first allegations of sexual abuse against other parishioners surfaced.

Prior to 1989, Plaintiff did not discuss his incidents of abuse with anyone who might have helped Plaintiff understand his confusion. The plaintiffs in ABC and Roe had numerous discussions about their relationships with other people. In ABC, the plaintiff discussed her relationship with two members of the clergy, a friend, defendant's family, her current husband and her therapist. ABC v. Archdiocese of St. Paul, 513 N.W.2d 482, 486-7 (Minn. Ct. App. 1994). The court in Roe found that the plaintiff had discussed her relationship with a similar number of people. Roe v. Archdiocese of St. Paul, 518 N.W.2d 629, 630-31 (Minn. Ct. App. 1994). Plaintiff in this case kept the alleged abuse a purely private matter until 1989.

Lastly, Plaintiff did not realize he had suffered any injury until 1989. The plaintiffs in ABC and Roe suffered injuries that were a direct result of their involvement in the abusive relationships. The court in ABC took particular note of plaintiff's miscarriage as evidence that plaintiff knew or should have known that she had been injured by the abuse. ABC v. Archdiocese of St. Paul, 513 N.W.2d 482, 488 (Minn. Ct. App. 1994). In Roe, the court

found evidence that plaintiff felt used and abused and attempted suicide sufficient to trigger the statute of limitations. Roe v. Archdiocese of St. Paul, 518 N.W.2d 629, 630 (Minn. Ct. App. 1994).

In this case, Plaintiff's injuries are not of the type that are necessarily attributable to Defendant Magnuson's abuse. Plaintiff's injuries include low self-esteem, marital and relationship difficulties, depression, headaches and other psychological injuries. His understanding of the alleged cause of these injuries did not surface until after he discussed the alleged abuse with his family and therapist.

Defendants' motions for summary judgment on the grounds that Plaintiff failed to bring suit within the six-year statute of limitations required by Minn. Stat. § 541.073 are denied.

C. Criminal Conduct under Minn. Stat. § 541.073

Defendant Redeemer Covenant Church moves for summary judgment on grounds that it received no complaints of sexual misconduct during the period Plaintiff was sexually abused as defined under Minn. Stat. § 541.073. Defendant Redeemer Covenant Church alleges that Plaintiff turned 16 years of age in 1971 and that any contact that Plaintiff had with Defendant Magnuson after 1971 does not constitute sexual abuse under Minn. Stat. § 541.073. Subdivision 1 of Minn. Stat. § 541.073 states "As used in this section, 'sexual abuse' means conduct described in sections 609.342 to 609.345." Minn. Stat. § 609.345, subd. 1 states:

> A person who engages in sexual contact with another

> person is guilty of criminal sexual conduct in the fourth degree if any of the following circumstances exists:
>
> ...
>
> (i) the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and:
>
> (i) the sexual contact occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or
>
> (ii) the sexual contact occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private.
>
> Consent by the complainant is not a defense. (Emphasis added.)

Plaintiff has alleged sexual contact with Defendant Magnuson who was a member of the clergy. The definition of sexual contact premised on touching is broadly applicable in Minnesota's criminal sexual conduct statute. State v. Ohrtman, 466 N.W.2d 1, 3 (Minn. Ct. App. 1991). Sexual contact includes touching "primarily by hand or fingers or other organ used for feeling, like mouth or penis...." Id. at 4. Plaintiff has alleged that Defendant Magnuson both touched Plaintiff's genitals and performed oral sex on him. The sexual contact is alleged to have occurred over numerous times in the period from 1969 until 1979 when Plaintiff sought spiritual advice from Defendant Magnuson. Plaintiff has pointed to evidence in the record that Redeemer Covenant Church had notice of Defendant Magnuson's misconduct in 1975, which is within the period of

alleged abuse. See Trial Transcript dated December 8, 1992 in Walker v. Magnuson and Transcript of 1975 Meeting with Redeemer Board of Directors. Minn. Stat. § 609.345, subd. 1(l) does not have an age requirement. Defendant Redeemer Covenant Church argues that Defendant Magnuson's conduct was not criminal after 1973 when Plaintiff turned 18 years of age. Minn. Stat. § 609.345 was first enacted in 1975 but did not include a provision for sexual abuse by members of the clergy until the legislature revised it 1993. The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1993). Laws are not to be construed as retroactive unless clearly and manifestly so intended by the legislature. Minn. Stat. § 645.21. The following presumptions are guides for legislative interpretation:

> (1) The legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
>
> (2) The legislature intends the entire statute to be effective and certain;
>
> (3) The legislature does not intend to violate the constitution of the United States or of this state;
>
> (4) When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction be placed upon the language; and
>
> (5) The legislature intends to favor the public interest as against any private interest. Minn. Stat. § 645.17

Although the legislature did not amend the statute to include

members of the clergy until 1993, this court finds that the legislature intended application of Minn. Stat. § 541.073 retroactively given the broad scope of its language to compensate victims of sexual abuse. First the "delayed discovery" rule takes into account the special circumstances of plaintiffs which may have blocked their awareness of the cause of their injuries. A delayed discovery rule implies retroactive application.

Second, the legislature has indicated that Minn. Stat. § 541.073 is applicable only to suits that are commenced on or after May 20, 1989. 1989 Minn. Laws ch. 190, § 6. The Minnesota Court of Appeals has extended the reach of the statute to include those cases which were pending at the time that the statute was enacted. K.E. v. Hoffman, 452 N.W.2d 509, 512 (Minn. Ct. App. 1990). These constraints are sufficient to prevent the absurd result of opening the floodgates of litigation if the statute is applied retroactively.

Third, Minn. Stat. § 541.073 is a reflection of the legislature's growing understanding of the numerous forms of sexual abuse and is intended to provide victims of sexual abuse with civil recourse. K.E. v. Hoffman, 452 N.W.2d 509, 513-14 (Minn. Ct. App. 1990). Minn. Stat. s. 609.345 has undergone several revisions since it was first enacted in 1975. These revisions were primarily in the form of additions to the list of acts considered criminal under § 609.345. Minn. Stat. § 541.073 was enacted as the legislature came

to understand the special circumstances of sexual abuse victims and the need to create special laws that accounted for those circumstances to allow victims civil recourse.

This court finds that the legislature intended the references to §§ 609.342 to 609.345 in § 541.073 to serve as a means for identifying sexual abuse victims, regardless of when the abuse took place. Such an interpretation clearly favors the public interest. Otherwise, victims of forms of sexual abuse not expressly enacted in §§ 609.342 to 609.345 at the time the abuse took place would have no recourse, even though the legislature went out of its way to create a sexual abuse statute with retroactive application. This court does not find that the legislature intended such an inequitable result. Further, the construction of delayed discovery rule supports this interpretation. The delayed discovery rule and the applicability of § 541.073 only to suits commenced or pending as of May 20, 1989 prevent the opening of the floodgates of litigation.

Nevertheless, this court does not rest its holding solely on this pronouncement. Minn. Stat. § 609.345, subd. 1(c) criminalizes sexual abuse when "the actor uses force or coercion to accomplish the sexual contact...." This section has existed in all versions of the law during the period of Plaintiff's alleged sexual abuse. There is no age requirement. Further, where there is a counselor/counselee relationship, the equivalent of coercion is

present as a matter of law. State v. Ohrtman, 466 N.W.2d 1, 2 (Minn. Ct. App. 1991). Therefore, Defendant Magnuson's conduct is arguably criminal at least during the period from 1975 to 1979. Defendant Redeemer Covenant Church's motion for summary judgment on grounds that any contact between Plaintiff and Defendant Magnuson did not constitute sexual abuse after 1971 is denied.

D. **Negligent Hiring/Retention**

Defendant Redeemer Covenant Church moves for summary judgment on grounds that Plaintiff has failed to established the elements of a claim of negligent hiring and retention. Minn. Stat. § 514.073, subd. 3, allows plaintiffs to bring negligent hiring/retention claims:

> This section applies to an action for damages commenced against a person who caused the plaintiff's personal injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur. (Emphasis added.)

Restatement (Second) Agency § 213 (1958) states:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (b) in the employment of improper person or instrumentalities in work involving risk of harm to others. Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

An employer has the duty to exercise reasonable care in view

of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public. Ponticas v. KMS Investments, 331 N.W.2d 907, 911 (Minn. 1983). Negligent hiring and negligent retention are based on direct, not vicarious, liability. Id. at n5. Before a breach of this duty may be found by a jury, it must be established that the employee was in fact unfit, taking into consideration the nature of the employment and the risk posed by the employee to those who foreseeably would come into association with him. Id. at 912. Negligence is not to be determined by whether the particular injury was foreseeable. Id. If the employer "knew or should have known" of the incompetence, and notwithstanding hired the employee, there would exist a breach of duty. Id. Negligent hiring and negligent retention do not rely on the scope of employment but address risks created by exposing members of the public to a potentially dangerous individual. Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. App. 1993), pet. for rev. denied (Minn. 1993). Liability is determined by the totality of the circumstances surrounding the hiring and whether the employer exercised reasonable care. Id.

In Minnesota, negligent hiring and negligent retention are two separate torts. Id. at 423. The difference between negligent hiring and negligent retention focuses on when the employer was on notice that an employee posed a threat and failed to take steps to insure the safety of third parties. Id. Negligent hiring occurs when,

prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. Id. at 423-24, citing Garcia v. Duffy, 492 So.2d 435, 438-39 (Fla. Dist. Ct. App. 1986). Negligent retention, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment. Id.

Plaintiff has not produced any evidence that Defendant Redeemer Covenant Church knew or should have known of Defendant Magnuson's unfitness before it hired him. Defendant Magnuson was a graduate of Augsberg College and a licensed minister. Prior to joining Redeemer Covenant Church, Defendant Magnuson was a pastor at Excelsior Covenant Church and Willmar Covenant Church. His service at these institutions was exemplary. Defendant Redeemer Covenant Church's investigation into Defendant Magnuson's background prior to employment was adequate. Therefore, Defendant Redeemer Covenant Church's motion for summary judgment on the claim of negligent hiring is granted.

The tort of negligent retention does not rely on a foreseeable injury nor does it rely on whether an act was within the scope of employment. See supra. Plaintiff claims that the Board of Directors

of the Redeemer Covenant Church became aware of Defendant Magnuson's misconduct back in 1975, when the parents of parishioner Steven Walker complained to them of Defendant Magnuson's sexual abuse of their son. The board of directors of a corporation is responsible for the business of the corporation. Minn. Stat. § 302A.201, subd. 1 (1993). Thus, knowledge that is imputed to the board of directors is by definition also attributed to the business. Viewing the facts most favorable to the non-movant, Defendant Redeemer Covenant Church was aware of the misconduct in 1975 during the period of alleged abuse against Plaintiff. Therefore, Defendant Redeemer Covenant Church's motion for summary judgment as to the claim of negligent retention is denied.

E. Breach of Fiduciary Duty/Negligent Counseling

Defendant Redeemer Covenant Church argues that Plaintiff cannot proceed against Defendant Magnuson for breach of fiduciary duty or negligent counseling because these theories of action encroach religious freedoms which are protected under the First Amendment of the United States Constitution and Art. 1, Sec. 16 of the Minnesota Constitution. However, the Free Exercise Clause does not prohibit valid and neutral laws of general applicability if such laws do not specifically target acts related solely to religious practices. Employment Div., Oregon Dept. of Human Resources v. Smith, 494 U.S. 872, 878 (1990). The free exercise of religion under the First Amendment includes both the freedom to

believe and the freedom to act. Cantwell v. Connecticut, 310 U.S. 296, 303-4 (1940). Freedom to believe is absolute, but freedom to act is subject to regulation for the protection of society. Id. The Minnesota Constitution provides greater protection for religious liberties against government action than under the First Amendment. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). Nevertheless, the Minnesota Constitution expressly places a limit on the freedom to act: "But the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state." Minn. Const. art. 1, § 16. Therefore, Plaintiff's claims of negligent counseling and breach of fiduciary duty present no entanglement with constitutional protection of religious freedoms.

Defendant Redeemer Covenant Church argues that Minnesota law does not recognize any generalized breach of fiduciary duty or negligent counseling claim arising out of a pastoral relationship. This court in Walker v. Magnuson, File No. 89-8821 (Order dated November 13, 1992), has permitted a claim of breach of fiduciary duty against a minister to survive a motion for summary judgment. The essence of a fiduciary is that the two parties involved do not deal on equal terms. Barbara A. v. John G., 145 Cal. App. 3d, 369, 382-83 (1983). The one party has placed his trust and confidence in the other, who has accepted that trust and confidence and is

therefore in a superior position to capable of exerting unique influence over the dependent party. Id. A fiduciary's duties include, among other things, a duty of loyalty (Restatement (Second) of Trusts, § 170 (1959)) and a duty to exercise reasonable care. Id. at § 174. A person standing in a fiduciary relationship with another is subject to civil liability for any damages suffered by the other resulting from the breach of any duty arising from the relationship. Restatement (Second) of Torts, § 874 (1979).

When Plaintiff was fourteen years old, Defendant Magnuson allegedly invited Plaintiff to his private study for chats that became counseling sessions. These sessions began to focus on sexual matters and later took the form of sexual exploitation. Thus, Defendant Magnuson created a special relationship of trust and confidence with the Plaintiff. As a counselor, Defendant Magnuson owed a fiduciary duty to Plaintiff to refrain from sexual relations with minors.

The Minnesota Court of Appeals has broached the issue of negligent counseling by the clergyman. In Houg v. State Farm Fire and Cas. Co., 481 N.W.2d 393, 397 (Minn. Ct. App. 1992), the court noted that any alleged negligence in the defendant's counseling centered on his entering into a sexual relationship with the plaintiff. The Houg court held that "[a]ny negligent counseling is so intertwined with [the defendant's] sexual exploitation of a psychologically dependent person as to be inseparable." Id. The

allegations against the defendant in that case included misinstruction in matters of faith, morals and sexual misconduct; failure to withdraw from the counseling relationship; and failure to direct the plaintiff to seek other counseling. Id. Although Houg involved a defendant therapist, the degree of trust and confidence placed in a pastor is no less than that of his non-secular counterpart. This court finds that Plaintiff's claim of negligent counseling is part and parcel of his claim of sexual abuse and is merged into Plaintiff's claim of sexual abuse. Thus, Defendants' motions for summary judgment on the claim of negligent counseling is granted.

F. Respondeat Superior

Defendant Redeemer Covenant Church moves for summary judgment on the claim of liability through respondeat superior. Respondeat superior or vicarious liability is a principle whereby responsibility is imposed on the master who is not directly at fault. Lange v. NABISCO, 211 N.W.2d 783, 785 (Minn. 1973). An employer is vicariously liable for the torts of an employee committed within the course and scope of employment. Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988). In Minnesota, the liability of master and servant is joint and several liability. Id., citing Kisch v. Skow, 233 N.W.2d 732, 734 (1975). Further, where there is joint and several liability, a plaintiff may sue one, all, or any number of joint tortfeasors and may proceed in

separate actions or one action. Id.

For an intentional tort, the focus is on whether agent was acting within his scope of employment, not his motivation. Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306, 310 (Minn. 1982). However, a principal is not liable for the unauthorized intentional tort of its agent. Semrad v. Edina Realty, Inc., 493 N.W.2d 528, 535 (Minn. 1992). In the case of an intentional wrong, an agent is acting within the scope of his employment when he is performing services for which he has been employed or while he is doing anything which is reasonably incidental to his employment. Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306, 311, n.3 (Minn. 1982). The conduct must occur within work-related limits of time and place. Id. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the principal but rather whether such conduct should fairly have been foreseen from the nature of the employment and the duties relating to it. Id. When the claim lies in negligence, the relevant duty of care is determined by employment status. Id. at 310. The requirement that the employee act, at least in part, in furtherance of his employer's interest requires both the existence of the duty and its exercise. Id.

The first inquiry of a respondeat superior claim is the existence of an employment relationship between Defendant Redeemer Covenant Church and Defendant Magnuson. The existence of an

employment relationship is a question of fact. Holzemer v. Minnesota Milk Co., 259 N.W.2d 592, 593 (Minn. 1977). Defendant Redeemer Covenant Church hired Defendant Magnuson as a pastor. Defendant Magnuson worked at the Redeemer Covenant Church from 1965 to 1989. Plaintiff alleges that he was sexually abused by Defendant Magnuson from 1969 to 1979. Therefore, an employment relationship existed between Defendant Redeemer Covenant Church and Defendant Magnuson with the relevant time period.

The second inquiry of a respondeat superior claim is whether the tort was intentional or negligent. Plaintiff has alleged both claims of intentional and negligent torts. Under a claim of negligence, Plaintiff must show that the agent acted in furtherance of his employer's interests. Assuming the facts most favorable to the non-movant, Defendant Magnuson committed the alleged acts of sexual abuse while he was counseling Plaintiff. As a church counselor, Defendant Magnuson had a duty to the Plaintiff to avoid exploiting the counseling relationship. He breached that duty during the counseling sessions. Therefore, Defendant Magnuson was acting in furtherance of his employer's interests when the breaches occurred.

Where Plaintiff has alleged an intentional tort, he must show that Defendant Magnuson was acting within the scope of his employment. The alleged sexual abuse occurred when Defendant Magnuson was counseling Plaintiff in Defendant Magnuson's study at

the Redeemer Covenant Church and was being driven by Plaintiff to speaking engagements and evening classes. Defendant Magnuson was performing services for which he had been employed or was doing something which was reasonably incidental to his employment. Further, the conduct occurred within work-related limits of time and place. Thus, Defendant Magnuson was acting within the scope of his employment when he committed the acts of sexual abuse.

However, Defendant Redeemer Covenant Church argues that the Minnesota Supreme Court in Semrad v. Edina Realty, Inc., 493 N.W.2d 528 (Minn. 1992), held the employee's motivation is a relevant element of vicarious liability. Specifically, the Court said: "Generally speaking, a principal is liable for the act of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent." Id. at 535, citing Larson v. Fidelity Mutual Life Ass'n, 73 N.W. 711 (Minn. 1898). This court does not find any conflict with the Minnesota Supreme Court's earlier holding in Marston. The Court in Semrad was merely saying that the liability of the principal for the act of an agent is to be determined by whether the act was within the scope of agency, not by the motives of the agent.

Defendant Redeemer Covenant Church argues that Minn. Stat. § 541.073 does not authorize imposing vicarious liability on the employer of the person alleged to have committed sexual abuse. However, vicarious liability is a common law theory of action.

Opatz v. John G. Kinnard and Co., 454 N.W.2d 471, 475 (Minn. Ct. App. 1990). Ordinarily statutes are presumed not to alter or modify the common law unless they expressly so provide. Agassiz v. Magnusson, 136 N.W.2d 861, 868 (Minn. 1965). A statute will not be construed as abrogating a rule of the common law unless such intention is clearly expressed. Verben v. County of St. Louis, 12 N.W.2d 193, 196 (Minn. 1943). Minn. Stat. § 541.073, subd. 3, states:

> This section applies to an action for damages commenced against a person who caused the plaintiff's personal injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur. (Emphasis added.)

Minn. Stat. § 541.073 does not specifically limit other causes of action that may be brought against a defendant who did not (1) commit sexual abuse against the plaintiff or (2) act negligently to permit the sexual abuse to occur. A respondeat superior theory of recovery may be had against an employer where Minn. Stat. § 541.073 does not apply.

Defendant Redeemer Covenant Church argues that the doctrine of respondeat superior is not viable because Minnesota law does not recognize such a theory on facts similar to those in this case. This court in Walker v. Magnuson, File No. 89-8821 (Order dated November 13, 1992), found that vicarious liability is applicable to a church defendant. Therefore, Defendant Redeemer Covenant Church's motion for summary judgment on the claim of vicarious

liability is denied.

G. **Punitive Damages**

Plaintiff moves to amend his complaint to include punitive damages. The purpose of punitive damages is to both punish and deter according to the gravity of the act giving rise to a punitive damage award, but an award should not exceed the level necessary to properly punish and deter. Melina v. Chaplin, 327 N.W.2d 19, 20 n.1. (Minn. 1982). Minn. Stat. § 549.20, which has been amended several times, specifies the standards for determining punitive damages. This court in Walker v. Magnuson, File No. 89-8821 (Order dated November 13, 1992), held that the applicable version of § 549.20 is the version in effect at the time that the alleged acts constituting the cause of action took place. Minn. Stat. § 549.20 was enacted in 1978 and not amended for the first time until 1986. That statute states, in relevant part:

> Subd. 1. (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.
>
> Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:
>
> ...
>
> (b) the agent was unfit and the principal was reckless in employing him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of that employment.... (Emphasis added.)

Further, a court shall grant the moving party permission to amend

the pleadings to claim punitive damages, if the court finds that the movant has provided prima facie evidence in support of the motion. Minn. Stat. § 549.191.

"Willful indifference" does not imply purpose of actually intending to harm plaintiff, but malicious, reckless or knowing disregard of plaintiff's rights or safety. Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 812 (Minn. App. Ct. 1992). A showing of mere negligence is not sufficient for recovery of punitive damages; the conduct must be done with malicious, willful, or reckless disregard for rights of others. Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 267 (Minn. 1992). To determine whether the evidence is "clear and convincing," the trial court must determine whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Swanlund v. Shimano Indus. Corp., 459 N.W.2d 151, 154 (Minn. Ct. App. 1990). The determination does not require the trial court to make credibility determination of any kind, and therefore, does not denigrate the role of the jury. Id.

1. Defendant Magnuson

Defendant Magnuson argues that Plaintiff has failed to make a prima facie showing of willful indifference, and in the alternative, that this case is not appropriate for the imposition of punitive damages. A prima facie case is one that prevails in the

in the absence of evidence invalidating it. Wojtowcz v. Belden, 1 N.W.2d 409, 410 (Minn. 1942). The requirements of a proper prima facie case vary from case to case and with each set of differing factual circumstances. Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973). The term "prima facie" does not refer to a quantum of evidence, but to a procedure for screening out unmeritorious claims for punitive damages. Swanlund v. Shimano Indus. Corp., 459 N.W.2d 151, 154 (Minn. Ct. App. 1990).

This court finds that Plaintiff has made a prima facie showing of the elements of a claim for punitive damages against Defendant Magnuson. Plaintiff has shown that Defendant Magnuson had knowledge of facts or intentionally disregarded facts that his actions were harming Plaintiff. Defendant Magnuson had notice in 1965 and then again in 1975 that his conduct was not appropriate, even though no official action was taken against him. Yet, despite this knowledge of the inappropriateness of his conduct and of the feelings of confusion and animosity which this conduct generated, he continued to sexually abuse Plaintiff. Defendant Magnuson acted with malicious, reckless and knowing disregard of Plaintiff's rights and safety. Plaintiff has alleged sufficient facts to constitute a prima facie showing of clear and convincing evidence of willful indifference on the part of Defendant Magnuson

Defendant Magnuson then argues that whatever fault he is guilty of, he has already been punished "egregiously" for it, "by the loss of his position, by the public scorn and ridicule to which he has been exposed and from which he will continue to smart in the future, and finally, by criminal prosecution and confinement of one year, probation of fifteen years and ongoing counseling and treatment." Minn. Stat. § 549.20, subd. 3 states:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and <u>the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject</u>. (Emphasis added.)

The mitigating factors that Defendant Magnuson has cited in opposition to a claim of punitive damages are only a few among the long list of factors under Minn. Stat. § 549.20, subd. 3. Other factors including the seriousness of his misconduct, his awareness of the harm it was causing and the duration of the misconduct are countervailing considerations. This court will permit Plaintiff to amend his complaint for punitive damages against Defendant Magnuson.

2. **Defendant Redeemer Covenant Church**

There is no common law rule exempting religious or nonprofit organizations from punitive damage awards. Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 810 (Minn. Ct. App. 1992. Nor does the award of punitive damages violate the First Amendment of the United States Constitution or Art. 1, Sec. 16 of the Minnesota Constitution. Id. at 811-12. This court has held that Defendant Redeemer Covenant Church had knowledge of the misconduct of Defendant Magnuson as early as 1975, sufficient to uphold a claim against summary judgment. However, on a motion to amend the complaint to add punitive damages against a defendant based on vicarious liability, Plaintiff additionally show must either that the principal was reckless in employing the agent or that the agent was employed in a managerial capacity and was acting in the scope of that employment. Plaintiff has pointed to evidence in the record of Defendant Redeemer Covenant Church's knowledge of Defendant Magnuson's unfitness as a pastor: a transcript of a 1975 meeting between the board of directors of Redeemer Covenant Church and Steven Walker and his parents, and the trial testimony of Bertil Johnson in Walker v. Magnuson.

Defendant Redeemer Covenant Church first argues that Plaintiff's evidence is hearsay and is not admissible in a summary judgment motion. This court disagrees.

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would

> be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein." Minn. R. Civ. Proc. 56.05 (emphasis added).

Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c) (1993). Where a statement is hearsay and would not be admissible at trial, it must be disregarded on a motion for summary judgment. Murphy v. Country House, Inc., 240 N.W.2d 507, 511 (Minn. 1976). However, if the out-of-court statement is being offered for some other purpose, such as to prove knowledge, notice or for impeachment purposes, it is not hearsay. State v. Hanley, 363 N.W.2d 735, 740 (Minn. 1985). In this case, the trial testimony is not being used to prove the truth of the matter asserted, but is being used to show notice to the church of Defendant Magnuson's misconduct. As evidence of notice, these statements are not hearsay.

Defendant Redeemer Covenant Church argues that Minn. Stat. § 549.20 does not support Plaintiff's motion to amend because Plaintiff has not produced clear and convincing evidence that Redeemer Covenant Church recklessly employed an unfit agent. Although Plaintiff has pointed to a tape transcript and trial testimony from Walker v. Magnuson to support his claim, this court finds that he has not shown clear and convincing evidence of recklessness. Assuming that the Redeemer Covenant Church Board of

Directors heard charges of misconduct against Defendant Magnuson from Steven Walker's parents, it heard of only one charge of sexual misconduct by Defendant Magnuson. It was not aware of the 1965 charges of misconduct at the Northwest Conference. Despite the unfortunate result of the board's dismissal of Walker's allegations, its actions were based on the hearing of a single charge of misconduct by Magnuson and did not rise to the level of recklessness. Therefore, Defendant Redeemer Covenant Church is not liable for punitive damages under Minn. Stat. § 549.20, subd. 2(b).

Minn. Stat. § 549.20, subd. 2(c) permits a finding of liability if Defendant Magnuson was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment. To determine managerial capacity, the critical inquiry regards the degree of discretion the employee possesses in making decisions that ultimately will determine corporate policy. Tennant Co. v. Advance Mach. Co. Inc., 355 N.W.2d 720, 724 (Minn. App. Ct. 1984). Plaintiff argues that as a pastor at Redeemer Covenant Church, Defendant Magnuson functioned in a managerial capacity. He was an ex officio on all the boards of the Redeemer Covenant Church, including its board of trustees. He was in charge of the church's spiritual guidance and counseling and responsible for directing the youth of the parish through the parish confirmation classes. Further, Robert Bentz in his deposition dated December 12,

1992 spoke of Defendant Magnuson as being "strong in administration in the church." Although this is evidence of some managerial capacity, it is not clear and convincing evidence that Defendant Magnuson possessed the degree of decision-making ability sufficient to trigger punitive damages against Defendant Redeemer Covenant Church under Minn. Stat. § 549.20, subd. 2(c). Therefore, Plaintiff's motion to amend his complaint for punitive damages against Defendant Redeemer Covenant Church is denied.

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

O.D.A.,

Plaintiff,

vs.

AMENDED FINDINGS OF
FACT CONCLUSIONS OF
LAW AND ORDER FOR JUDGMENT
File No. 92-003468

Albert C. Magnuson, personally
and as Pastor for the Redeemer
Covenant Church of Brooklyn Park
and the Redeemer Covenant
Church of Brooklyn Park,

Defendants.

The above-entitled matter came on for trial before the Honorable Richard B. Solum, one of the judges of the above-named court, on the 26th day of July, 1993, through the 9th day of August, 1993, at the Hennepin County Government Center, Minneapolis, Minnesota.

Jeffrey Anderson, Esq., and Theresa Fett, Esq., appeared for and on behalf of plaintiff O.D.A. Kenneth Daniels, Esq., appeared for and on behalf of defendant Albert Magnuson. William Flaskamp, Esq., and Leatha Wolter, Esq., appeared for and on behalf of the defendant Redeemer Covenant Church.

Now, therefore, based on the Special Verdict and on Special Verdict 2 (Punitive Damages), and the parties post trial motions the court makes the following:

FINDINGS OF FACT

1. The matter was tried before a jury of six. The jury returned a Special Verdict dated August 6, 1993, and Special Verdict 2 (Punitive Damages) dated August 9, 1993 which are attached hereto and incorporated herein by reference.

AMENDED CONCLUSIONS OF LAW

1. Plaintiff O.D.A is entitled to judgment against the defendant Albert Magnuson in the amount of $4,040.00 and against defendant the Redeemer Covenant Church in amount of $1,616.00 for the reasonable value of therapy and counseling up to the time of trial.

2. Plaintiff O.D.A. is entitled to judgment against the defendant Albert Magnuson in the amount of $170,100.00 and against defendant the Redeemer Covenant Church in the amount of $68,040.00 for plaintiff's past disability, embarrassment and emotional distress as experienced up to the time of trial.

3. Plaintiff O.D.A. is entitled to judgment against the defendant Albert Magnuson in the amount of $20,130.00 and against defendant the Redeemer Covenant Church in the amount of $8,052.00 for plaintiff's past expenses for therapy and counseling.

4. Plaintiff O.D.A is entitled to judgment against the defendant Albert Magnuson in the amount of $115,500.00 and against defendant the Redeemer Covenant Church in the amount of $46,200.00 for plaintiff's future loss of earning capacity.

5. Plaintiff O.D.A is entitled to judgment against the defendant Albert Magnuson in the amount of $134,125.00 and the against defendant the Redeemer Covenant Church in the amount of $53,650.00 for any disability, embarrassment and emotional distress as plaintiff may experience in the future.

6. Plaintiff O.D.A is entitled to judgment against the defendant Albert Magnuson in the amount of $160,000.00 as and for punitive damages against the defendants.

AMENDED ORDER

1. The clerk of this court shall enter judgment in favor of David Oelschlager and against Redeemer Covenant Church in the amount of $177,558.00, along with costs and disbursements as allowed by law.

2. The clerk of this court shall enter judgment in favor of David Oelschlager and against the defendant Albert Magnuson in the amount of $603,895.00.

3. The entry of the above judgment shall be stayed for thirty days from the date hereof, as provided by General Rule of Practice 125.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: November 10, 1993

BY THE COURT:

Richard B. Solum
Judge of District Court

EXHIBIT
Court's #1

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

Albert C. Magnuson, and the
Redeemer Covenant Church
of Brooklyn Park,

Defendants.

SPECIAL VERDICT

File No. PI 92-03468

We, the jury duly empaneled and sworn in the above-entitled matter, for our Special Verdict, answer the questions submitted to us as follows:

Question 1. Did Defendant Albert C. Magnuson commit a sexual battery or sexual batteries on [redacted]

ANSWER: YES
(Yes or No)

Question 2. Was such sexual battery or were such sexual batteries a direct cause of injury to [redacted]

ANSWER: YES
(Yes or No)

Question 3. Was Albert C. Magnuson acting in the scope of his employment with Redeemer Covenant Church when he committed such sexual battery or batteries?

ANSWER: YES
(Yes or No)

Question 4. Was Redeemer Covenant Church negligent?

ANSWER: YES
(Yes or No)

If your answer to Question 4 was "Yes", then answer Question 5.

Question 5. Was Redeemer Covenant Churches' negligence a direct

cause of injury to [redacted]?

ANSWER: YES
(Yes or No)

Question 6. Was the Northwest Conference of the Evangelical Covenant Church of America negligent?

ANSWER: YES
(Yes or No)

If you answered "yes" to Question 6, then answer Question 7.

Question 7. Was the negligence of the Northwest Conference of the Evangelical Covenant Church of America a direct cause of injury to [redacted]?

ANSWER: YES
(Yes or No)

Question 8. Was [redacted] negligent?

ANSWER: NO
(Yes or No)

If your answer to Question 8 was "yes", then answer Question 9.

Question 9. Was the negligence of [redacted] a direct cause of injury to [redacted]?

ANSWER: _____
(Yes or No)

Question 10. Taking all the negligence that you have found to have been a direct cause of [redacted]'s injuries as 100%, what percentage of fault do you attribute to:

Redeemer Covenant Church	40 %
Northwest Conference of the Evangelical Covenant Church of America	60 %
[redacted]	0 %
TOTAL	100%

[redacted] may not recover from a defendant when [redacted]'s fault is greater than the fault of the defendant.

Regardless of your answers to any of the above questions, you must answer the following questions 11, 12 and 13.

Question 11. What sum of money will fairly and adequately compensate [redacted] for damages he has experienced to the date of this verdict for:

Therapy and counseling expenses	$ 4,040
Disability, emotional distress and embarrassment	$ 170,100

Question 12. What sum of money will fairly and adequately compensate [redacted] for damages he is reasonably certain to experience in the future for:

Therapy and counseling expenses	$ 20,130
Loss of earning capacity	$ 115,500
Disability, emotional distress and embarrassment	$ 134,125

Question 13. Did plaintiff, [redacted] know or have reason to know prior to July 27, 1985, that his injuries were caused by sexual battery or batteries of Albert C. Magnuson?

ANSWER: NO
(Yes or No)

Dated: Aug 6 1993

Edward T Rice
FOREPERSON

* *

Concurring jurors sign below only if a five-sixths verdict is returned:

1. _____ 4. _____

2. _____ 5. _____

3. _____

EXHIBIT
Court's
#5

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

Albert C. Magnuson, and the
Redeemer Covenant Church
of Brooklyn Park,

Defendants.

SPECIAL VERDICT 2
(Punitive Damages)

File No. PI 92-03468

We, the jury duly empaneled and sworn in the above-entitled matter, for our Special Verdict, answer Question 1 and 2 submitted to us as follows:

Question 1. Did defendant act with deliberate disregard for the rights or safety of others?

ANSWER: YES
(Yes or No)

Question 2. If you answered "Yes" to Question 1, then answer the following question: what amount of money will serve to punish the defendant and deter others from the commission of like acts?

ANSWER $ 160,000

Dated: Aug 9, 1993

Edward T Rio
Foreperson

I. INTRODUCTION

The jury returned its special verdicts on August 6, and August 9, 1993. On August 23, 1993, the court entered its findings, conclusions and order for judgment based on such verdicts. Defendants Redeemer and Magnuson have made various motions for post trial relief, as follows:

1. Defendant Redeemer's motion for amended findings, conclusions and order for judgment notwithstanding the jury's verdict and as a matter of law so as to delete any recovery against defendant Redeemer based on its liability in respondeat superior for the acts of defendant Magnuson. This motion is based on two contentions:

> a. That any claim against defendant Redeemer for liability based on respondeat superior was, as a matter of law, time-barred, and such claim was not saved from any by the so-called "delayed discovery" statute of limitation provided by Minn. Stat. Sec. 541.073.
>
> b. That there was insufficient evidence, as a matter of law, to submit to the jury or to sustain the jury's finding that defendant Magnuson was acting within the scope and course of his employment with defendant Redeemer. (In this regard, defendant Redeemer also seeks a new trial, contending that the court erroneously failed to require the jury to find that defendant Magnuson was motivated in the interests of defendant Redeemer when the subject activities took place.)

2. Defendant Redeemer's motion for the court to amend its conclusions and order for judgment notwithstanding the verdict and as a matter of law so as to reduce the liability of Redeemer by the amount found by the jury to be associated with the comparative fault of Northwest Conference (60%).

Redeemer argues that the effects of a Pierringer settlement between plaintiff and Northwest requires that plaintiff cannot recover against defendant Redeemer that amount represented by Northwest's proportionate comparative fault.

3. Defendant Magnuson's motion for a reduction in the punitive damage award.

4. Defendant Redeemer's motion for a new trial based on various claimed errors in jury instructions, evidentiary rulings and misconduct of opposing counsel. (Most of the contentions supporting the new trial motions were the subject of rulings and related discussion on the record at trial. Based on the memorandum and argument presented by counsel, these issues do not appear to be genuinely disputed. Given the trial rulings and record relative to the claimed errors now associated with the motions for a new trial, and the lack of any additional argument as to them, the court will not revisit them here.)

II. THE DELAYED DISCOVERY STATUTE

There is no disagreement that but for the 1989 legislation providing a new statute of limitations for sexual abuse, the tort claims against the defendants in this case would have been time-barred pursuant to Minn. Stat. Sec. 541.07. However, in 1989, the Minnesota Legislature enacted "special provisions" within its statute of limitations Chapter (Chapter 541), which provided that an action based on personal injury caused by sexual abuse (as

defined in the criminal sexual conduct statutes) must be commenced within six years of the time the "plaintiff knew or had reason to know that the injury was caused by sexual abuse." Minn. Stat. Sec. 541.073. Here the jury found that plaintiff did not know or have reason to know his injury was so caused prior to six years preceding the commencement of his action.

The issue raised by the application of this so-called "delayed discovery" statute derives from the last sentence of the statute (now designated "Subd 3 Applicability"), which provides:

> This section applies to an action for damages commenced against a person who caused the plaintiff's personal injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur.

There is no dispute that the battery (intentional tort) claims against defendant Magnuson are covered by this statute and accordingly are not time-barred under the stricter two year limitation period of Minn. Stat. Sec. 541.07. And, it is clear that the negligence claims against defendant Redeemer are also covered by this statute and similarly are not time-barred under any stricter limitation period.

However, the court submitted to the jury not only the negligence claims against Redeemer, but also the claim that Redeemer could be liable for Magnuson's acts if the factual requisites of respondeat superior were found. Obviously, if

a respondeat superior or vicarious responsibility claim is not "an action" to which the delayed discovery statute's special provision "applies," the claim would be time-barred.

But it was the court's view that all would benefit from having a jury finding on respondeat superior so that the issue would not have to be retried regardless of any appellate ruling. Since the jury found that defendant Magnuson was acting within the scope of his employment by defendant Redeemer, the legal issue now must be determined on Redeemer's motion for judgment notwithstanding the jury's verdict. Accordingly, the court is left to construe the statute and determine whether a claim against a sex-abuser's employer based on respondeat superior, which long ago would have otherwise been time barred, is covered by the "special provisions" of the delayed discovery statute.

The court has listened to the entirety of the tapes of the legislative hearings on the delayed discovery statute and has reviewed the drafting history of the statute. Unfortunately, there is virtually nothing in the legislative history which offers any insight into the rationale of this "applicability" provision.

The obvious place to start in determining the construction and application of a statute is, of course, the language of the subject provision. First, the object of the provision is an action commenced against a person "who caused" the plaintiff's injury in one of two ways. So the first issue is whether an action against an employer based

on respondeat superior is an action against a person "who caused" the injury. Nowhere in the law of respondeat superior liability is there an element that the employer caused the injury. In short, an action against an employer for respondeat superior, without more, would not be an action against a person "who caused" the injury.

The conclusion that an action against an employer based on respondeat superior alone is not the object of the provision is even clearer when analyzing the balance of the provision which discusses the means by which the person "caused" the injury. The language provides that the injury be caused:

> ". . . either by committing sexual abuse against the plaintiff, or negligently permitting sexual abuse against the plaintiff to occur."

Thus it is clear that an action to which the delayed discovery statute "applies" is one against a person who caused the injury either by "committing" the abuse or by "negligently permitting" it to occur. In neither event is a person sued on the basis of respondeat superior, without more, such a person.

However, this analysis merely defines certain causes of action to which the statute applies. While this last sentence does not state that the delayed discovery statute "applies" to an action for respondeat superior, the operative provisions of section 541.073 set out prior to the last sentence would include actions based on respondeat superior. It says:

> An action for damages based on personal injury caused by sexual abuse must be commenced . . .

Obviously an action against an employer based on respondeat superior is an "action for damages based on personal injury caused by sexual abuse. . . "

Is there a conflict between the operative provision and the last sentence of the statute, or can they be read in harmony? Does the statute include and thereby save otherwise barred respondeat superior claims in the operative clause, and then exclude them in the last "applicability" clause? The answer lies, of course, in determining whether the last sentence was meant to limit or exclude, or to expand or clarify, the scope of the statute. Unfortunately, both meanings can be reasonably argued.

On the side of limitation/exclusion is the question of why else, but to limit, would the last sentence have been added. The argument would posit that certainly the sentence was not meant to expand the scope to actions against the perpetrator and those acting negligently, as such actions are already covered by the plain language of the operative sentence. The argument is persuasive, as we hesitate to assume the legislature engaged in needless redundancy by enacting the last sentence.

On the other hand, plaintiffs offer the argument that expansion or at least clarification was the aim, and the legislators added the last sentence to make it clear that, unlike a Washington statute which plaintiff claims was the

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model for section 541.073, our delayed discovery statute would not be limited to actions against the perpetrator, but would include actions against those negligently allowing the perpetrator to abuse. This too is a persuasive argument, as the legislative history does in fact reflect that the Washington statute was considered. (The Washington legislation is contained in the files of this bill, is referenced in the files of the Task Force, and legislators discuss the Washington legislation.) An examination of the Washington legislation confirms that, at least arguably, it applies to claims for an injury resulting from criminal sexual conduct "by the defendant." Thus, the rationale for the last sentence--namely to clarify that negligent as well as direct conduct is included, has some support.

More important to the court, however, was an examination of the first four words of the last sentence of section 541.073. These words are

"This section applies to . . ."

It is of some significant note that the words are not: "This section does not apply to . . . ." or "This section applies only to . . . ." Had such words of limitation or exclusion been chosen by the legislature, this court would conclude that the last sentence must be read to limit the delayed discovery scope to only direct or negligently based claims.

Concluding that the last sentence is one of limitation becomes even more difficult when examining other statute of

limitation provisions in Chapter 541 which are designed to limit the impact of the limiting period. For instance, Minn. Stat. Sec. 541.02, providing for recovery of real estate, has a limiting provision such that claims involving adverse possession are not included. The provision reads:

> "The provision of paragraph two shall not apply to actions relating to . . . " (emphasis added)

And Minn. Stat. Sec. 541.051 has a limiting provision which states:

> "This section shall not apply to actions . . . "

See also section 541.21. Thus, it can be argued, that in the statutory scheme of our Chapter 541, the legislature uses clear limiting or excluding language to limit or exclude. Since such language was not used in the last sentence of section 541.073, it must not have been designed to limit or exclude. Otherwise, one would argue, the legislature would have followed the scheme and simply stated: "This section shall not apply to actions other than . . .," or "This section shall apply only to . . . " For instance, when one reviews section 541.023 we see the use of "this section shall apply" when inclusivity, clarification or expansion is desired, and "shall not" apply when limitation or exclusion is the goal.

The court has struggled with the inability to become certain with respect to this issue. It has finally concluded that the most reasonable construction, in light of all of the circumstances involving the source of the delayed

discovery statute, its remedial purpose (as confirmed by the legislative history) and the word choices in other sections of Chapter 541, is that the language was intending to clarify and not to limit the statute. Accordingly, the court has denied defendant Redeemer's motion to enter judgment notwithstanding the verdict as it is based on the claimed limitation of section 541.073.

III. SUFFICIENCY OF THE EVIDENCE AS TO RESPONDEAT SUPERIOR.

Defendant Redeemer claims that the issue of its respondeat superior responsibility should not have been submitted to the jury. The claim is founded on three contentions:

1. Law from other jurisdictions does not recognize respondeat superior liability for sexual abuse.
2. That our Supreme Court's decisions do not support the submission of the instant case to the jury.
3. That the jury should have been instructed that there is no respondeat superior responsibility where the subject conduct was motivated by the personal interests of the actor as opposed to the interests of the principal.

With respect to the law of other jurisdictions, it is axiomatic that such law is not controlling here, and would be persuasive only if there was not clear law provided by our own appellate courts. As discussed below, there is

controlling Minnesota law on this issue. Further, the law surrounding respondeat superior and other principles of vicarious responsibility is significantly influenced by policy considerations concerning the allocation of risks and injuries. Obviously such considerations, unlike more basic legal principles, may well vary between states.

As to the issue of the actor's personal motivations, defendant's positions do not accord with what appears to be the clear requirements of Minnesota law. Defendant Redeemer contends that Semrod v. Edina Realty, Inc., 493 N.W.2d 528 (Minn. 1992) somehow modifies or at least clarifies Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306 (Minn. 1982), such that motivation by the employer's interest is an element of respondeat superior liability. Marston was, of course, a sexual abuse/exploitation case arising out of a professional relationship between the actor and the abused.

Defendants contend that Marston should be largely ignored because in Marston it was foreseeable to the employer that the employee may engage in physical touching (body massages) as part of the psychotherapy. Of course, it is just as arguable that sexually oriented conversation (which could lead to sexual stimulation and ultimately to touching) is foreseeable to churches employing pastors who often provide marital and sexual counseling. More importantly, however, this distinction does not seem adequate to alter the clear expressions of the Marston opinion.

While the relationship in Marston was different than that here (psychiatrist/patient v. minister/congregant), the issues with respect to respondeat superior could hardly be closer. First, the employee in Marston formed a relationship with the abused in the course and furtherance of the employer's business (psychotherapy). Similarly, Magnuson here formed his relationship with O.D.A. in the course of Redeemer's business (pastoral counseling and youth work). Second, the employee in Marston exploited this relationship (body massages) to intentionally engage the abused in sexual contact. Such was the case here as Magnuson exploited his pastoral relationship (counseling about circumcision and homosexuality) to intentionally engage O.D.A. in sexual contact. Finally, the activity in Marston largely took place in the employer's place of business, as the activity here largely took place in the Redeemer church.

With respect to the rule enunciated in Minnesota with respect to respondeat superior liability for an employee's intentional torts, these comparable facts are determinative:

> " . . . an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and . . . occurs within the work related limits of time and place . . . the motivation test [is] abandoned.

Marston at 310, quoting Lange v. National Biscuit Company, 297 Minn. 399, 405, 211 N.W.2d 783,786 (1973).

Plainly the situation in both Marston and here involved substantial evidence that the "source of the abuse" was

"related" to the employee's duties, and that the activities in most instances occurred "within the work related limits of time and place." Further, the policy reason for abandoning the motivation test which would virtually eliminate Minnesota's favor toward allocating loss of those victimized by an employee's work related intentional torts, is applicable here. "It would be a rare situation where [work related sexual abuse by an employee] would actually further an employer's business." Marston at 311, again quoting Lange.

The issues in Marston were much closer to those here than were the issues in Semrad, which involved alleged fraud and other business abuses by an independent contractor (not employee) of the targeted principal. Plainly the policy considerations involving vicarious responsibility and the allocation of risks and injuries can be, probably should be and seemingly are fully different when assessing the elements of respondeat superior liability for the intentional torts of an independent contractor compared to those of an employee. Vicarious liability for one without apparent authority and over whom, by definition (of an independent contractor), the principal has no direction and control, compared to such liability for intentional torts for one with such authority and over whom, by definition (of an employee) the principal has direction and control, are plainly different issues.

That such a line of departure with respect to the respondeat superior elements is drawn at the point of difference in such relationships is not only understandable, one of the differences between the relationships ("actual or apparent authority") was regarded as the "pivotal issue" by the Semrod court. Semrod at 534-35. Obviously given the strength of the Supreme Court's opinion in Marston (it is reversible error to instruct on motivation with respect to employee's intentional torts), the Supreme Court would hardly focus on motivation and even discuss the Marston case, and then intend to overrule Marston without saying so.

In short, for the court here to have kept this case from the jury or to have varied from the Civil JIG and given a motivation instruction would have been just as much "reversible error" as it was in Marston, where trial courts were advised that in situations such as this, respondeat superior is "a question of fact" for the jury. Marston at 311.

IV. THE PIERRINGER RELEASE AND RESPONDEAT SUPERIOR LIABILITY FOR INTENTIONAL TORTS.

This issue derives from the unusual mixing of vicarious liability for the intentional tort of employee Magnuson and the negligent liability of the employer Redeemer for its failure to use reasonable care when it arguably learned of Magnuson's inappropriate behavior. Both parties agree that there is no Minnesota authority on this precise question,

which is probably unique as it would be rare that a given case would have all of the following:

1. Multiple defendants, one of which is an employer of a person accused of intentional conduct in connection with the plaintiff's injury, the other accused of mere negligence.

2. One such defendant settles before trial on a Pierringer release, leaving the defendant employer in the suit.

3. The settling defendant's and the employer's negligence is compared at trial on the question of employer's liability for its own negligence.

4. The employer's respondeat superior liability for its employee's intentional tort is submitted at trial.

5. The jury returns its verdict in which it finds both that the employee-actor was acting within the scope of his authority (leading to the possibility of respondeat superior liability for the employee's intentional tort), and that the employer's negligent fault was much less than 100%.

6. There was an appeal such that a published appellate opinion resulted from such facts.

It is the confluence of these facts which presents the following issue implicating the law of Pierringer, contribution and indemnity, comparative fault, joint liabilities and respondeat superior:

> Must the plaintiff credit all or any portion of a payment made by a settling defendant (pursuant to a Pierringer agreement) against any liability of a nonsettling defendant employer and employee when the jury found:
>
> a. Settling defendant's (Northwest) comparative fault (negligence) was 60%.
>
> b. Nonsettling defendant (Redeemer) employer's comparative fault (negligence) was 40%.

c. Nonsettling defendant (Magnuson) employee committed intentional torts and was acting within the scope of employment with nonsettling defendant employer.

Since the jury has determined that the total compensatory damages resulting from the subject sexual abuse were $443,895, and since plaintiff has already received an undisclosed but presumably significant amount from settling defendant Northwest, there is no question that if plaintiff recovers 100% of these damages ($443,895) from defendants Redeemer or Magnuson, plaintiff will receive a windfall in the amount of the payment already received from Northwest.. While such a windfall recovered from defendant Magnuson does not appear to be contested (as he was the intentional perpetrator of the sexual abuse and because as a practical matter defendant Magnuson appears relatively judgment proof), the recovery of the windfall from Redeemer is hotly contested.

Defendant Redeemer claims the plaintiff, as a result of the Pierringer-type settlement entered into with Northwest, must forgive as against Redeemer 60% of the jury's award. It supports its position as follows:

1. Since plaintiff has presumably entered into a Pierringer-type settlement in which he has "relinquished whatever portion of damages the jury assessed against [Northwest]," such portion (namely 60%) should be discharged (or credited) in order to make meaningful the Pierringer agreement.

2. That absent such a reduction, Redeemer will be required to pay more than its "fair share" as established by the jury (40%), in contradiction of Minnesota law.

3. That unless the court reduces the award as against Redeemer, the comparative fault findings of the jury will be rendered meaningless.

Plaintiff, while essentially agreeing that its position renders the jury's apportionment of fault meaningless, argues that plaintiff is entitled to recover 100% of the damages (which would admittedly provide a windfall in the amount of the recovery from Northwest) against Redeemer. Plaintiff claims:

1. That under Ranbaum v. Swisher, 435 N.W.2d 19 (Minn 1989), the plaintiff who took the risk and struck the Pierringer bargain is entitled to the benefit of the windfall so long as Redeemer is not required to pay more than its "fair share." The value of the bargain is determined when the Pierringer is agreed to, not after the trial.

2. Since Redeemer was found to be liable as an intentional tortfeasor, and since intentional fault is not comparable to negligent fault (citing Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1968), the jury has found that Redeemer's "fair share" is 100% of the award.

3. That only joint tortfeasor's liability is subject to comparison and rights of contribution, and Redeemer is not a joint tortfeasor with respect to its respondeat superior liability for Magnuson's intentional torts.

4. That plaintiff has the right to choose what judgment against Redeemer it wishes to enforce, either that flowing from the negligence of Redeemer (40%), or that flowing from Redeemer's respondeat superior liability (100%).

5. That if the award was reduced, then Redeemer would have the windfall in that it would be unjustly spared from paying its "fair share" as found by the jury. That Redeemer has no rights of contribution as an intentional tortfeasor.

6. That if Northwest is liable for 60%, then there would be an absurd result of Northwest being more responsible (60%) than both Magnuson and Redeemer combined (for the remaining 40%).

The court has a number of views with respect to many of these positions. First, the court does not know what the precise terms of the Pierringer agreement are. However, given the typical Pierringer terms and plaintiff's failure to challenge defendant's description, it is assumed that plaintiff has contractually committed to "relinquish" whatever amount is associated with any jury award attributed to the fault of Northwest, and to "satisfy" any judgment to such extent. See Hosley v. Armstrong Cork Co., 383 N.W.2d 289, 294 (Minn. 1986).

Second, the jury has not determined Redeemer's "fair share" of damages. Liability is a legal conclusion which the court determines based on the findings made by the jury. The very legal issues (many of which are of first impression) being argued in these post trial motions will govern whether Redeemer's fair share or liability is 40% or 100%.

Third, Redeemer, Northwest and Magnuson are joint tortfeasors, as all have been adjudged by the jury to have committed torts on the plaintiff. See Restatement of Torts 2d, section 882. All defendants (along with Northwest absent the workings of the Pierringer), are jointly and severally liable. Id. See also Farmers Ins. Exch. v. Village of Hewitt, 274 Minn. 246, 249, 143 N.W.2d 230,233 (1966). If any intentional tortfeasors were judgment-proof, 100% of the award would be the obligation of the other tortfeasors, whether liable for their negligence or their

intentional torts. Id. It is only in examining the law of contribution and indemnity that the intentional tortfeasor and the negligent tortfeasor may be in different positions with respect to ultimate allocations of these liabilities. Restatement at sections 882-886.

Fourth, the fact that one tortfeasor's fault is not compared to that of another because the former's fault was intentional, influences the submission of the questions associated with comparative fault to the jury and contribution/indemnity rights. It does not mean that any defendant found to have committed injury causing torts is not jointly and severally liable.

Fifth, the Florenzano case stands only for the proposition that the intentional actor's fault is not subject to comparison and therefore subject to a potential reduction amongst, and/or contribution between, negligent actors. Neither Florenzano nor any other Minnesota case answers the precise questions involved here relative to the rights of one having only vicarious liability with respect to intentional acts.

Sixth, whether a portion of the jury's verdict is meaningless is not influential here, as the court is obligated to make legal conclusions and enter judgment based on the law, one of which could be that certain facts found by the jury, given the peculiarities of a given case and other of the jury's findings, do not influence the judgment.

Seventh, Ranbaum is not necessarily controlling, as it involved a case where the liabilities arose from the finding of fault that was comparable. These were the liabilities to which the Ranbaum court was referring with respect to the concept of "fair share." What constitutes fair shares in the context of liabilities arising out of both intentional acting, respondeat superior for the acts of an intentional actor and negligence, has not been expressly addressed by our appellate courts. Nevertheless, Ranbaum seems instructive, as discussed below.

Eighth, while plaintiff may have a right to choose from among judgments he may obtain, this argument begs the question, as the court would first have to determine, as a matter of law, what judgments should be entered against Redeemer. Obviously there will be only one judgment against Redeemer, either for an amount equal to 100%, or an amount equal to 40%, of the damages.

In short, there is no one easy answer, as this question seems to be governed by an analysis of various related issues. They are:

1. The obligations imposed by the common law of restitution (dealing with contribution and indemnification) or by statute. Samuelson v. Chicago, Rock Island R.R., 178 N.W.2d 620, 623 (Minn. 1970). Underpinning these restitutionary requirements is the proposition that there shall only be one recovery for an injured party, and accordingly civil plaintiffs are required to credit any amount paid on account of their injury against the obligations of other tortfeasors. Doctrines involving active versus passive, and actor versus vicarious, responsibility also influence these restitutionary rights.

2. The law (including the contractual rights and obligations) involving Pierringer releases. Such law involves considerations of encouraging settlement, protecting non-settling parties with respect to their restitutionary rights described in (1) above and allocating windfalls which can be associated with Pierringer releases.

3. The statutory law of comparative fault which has its own mechanisms for assuring certain restitutionary rights (of contribution) among those whose "fault" is compared, and which has its own mechanisms for reallocating responsibility and again assuring certain restitutionary rights when one tortfeasor is not financially capable of satisfying his equitable portion of the plaintiff's judgment. Minn. Stat. Sections 604.01 and 604.02.

4. Equitable considerations surrounding the fair and just allocation of the plaintiff's damages and the benefits from any windfall, as the law of restitution is a law of equity.

We start with the basic proposition stated in the Restatement of Torts, 2d, at section 885, that:

> A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person . . .

The above principal is one of equity, deriving from the law of restitution. Samuelson, supra. See also Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362, 367-68 (Minn. 1977). The principal is founded on the notion that it would be inequitable for the plaintiff to be unjustly enriched by other tortfeasors being held to account for the same harm without any rights of restitution (by way of a credit in the amount of the advance payment). See generally, Restatement of the Law, Restitution, Sections 1-3, 76 and 81.

While in some states there is a question as to the effect of a payment made by one who has no liability to the injured party, it is clear that absent other statutory or contractual obligations, a payment made by one who has liability to the plaintiff, made in compensation of the claim for harm, will reduce to the extent of the payment the claim against other tortfeasors. See Anunti v. Payette, 268 N.W.2d 52 (Minn. 1978) (no reduction if the payor is ultimately determined to have had no liability).

Thus, solely on the basis of this general principal of the law of restitution, the advance payment of Northwest (who, in accordance with the jury's verdict would have liability to plaintiff for the harm claimed against Redeemer and Magnuson) would "diminish the claim . . . to the extent of the payment." In short, the entirety of any windfall associated with plaintiff entering into the Pierringer settlement would be relinquished, and to the extent that windfall exceeded the proportionate responsibility of defendants Redeemer and/or Magnuson, such defendants would benefit. (As will be noted below, such a result is probably contrary to specific Minnesota law dealing with Pierringer releases, probably contrary to the intent of the parties to the Pierringer agreement, and probably contrary to notions of equity if the advance payment was so substantial that defendants Redeemer or Magnuson would, by reason of the credit, escape from their responsibility for the harm.)

In Minnesota, in addition to the common law principles discussed above, the restitutionary rights, with respect to both payments for personal injury and economic loss, are governed by statute. Minn. Stat. Sec. 604.01 subd. 5, provides that "all settlements or payments" made to an "injured person" shall be "credited against any final settlement or judgment" so long as there is no obligation of the injured party "to refund" any such advance payments. Thus, the statute, in much the same manner as the common law of restitution, would credit defendants Magnuson and Redeemer with the amount paid by Northwest, so long as the amount paid was not in excess of the jury's award such that plaintiff was obligated to make a "refund."

However, this result has been materially altered with respect to payments made pursuant to Pierringer settlements by virtue of our Supreme Court's decision in Ranbaum, supra. While Ranbaum was a case involving the allocation of responsibility among various negligent tortfeasors, the ultimate holding must be considered here:

> We hold, therefore, that the term "payments" as used in section 604.01 subd. 5, with respect to Pierringer settlements, refers only to payment for that portion of plaintiff's damages representing the settling defendant's share of the liability. The settlement payment does not extend to any further portion of plaintiff's award. Id. at 23.

Since, as the Ranbaum court indicated, this holding was significantly based on concepts of equity relative to windfalls, benefits of the contract in the Pierringer agreement and notions relative to encouraging settlement, it

is presumed that our Supreme Court would similarly construe the common law of restitution with respect to advance payments pursuant to Pierringer settlements.

Accordingly, absent any other considerations, a number of conclusions with respect to the instant case are governed by Ranbaum and the statutory provisions it has interpreted. First, of course, contrary to the last clause in section 885 of the Restatement, there would be no credit if the advance payor (the settling defendant) was found to have no liability, as "the settling defendant's share of the liability" would be zero. See also, Anunti, supra.

Here, however, settling defendant Northwest arguably would be found, in accordance with the jury's verdict, to have liability in the amount of 60%. (I say "arguably," because, as will be discussed below, whether the jury's verdict would have imposed any liability upon Northwest is somewhat dependent upon legal conclusions arising from the application of the law of contribution and indemnity.)

Next, we see that an application of Ranbaum, while requiring a credit in favor of non-settling tortfeasors, does reduce the amount of the credit and create some opportunity for a windfall to the plaintiff. In Ranbaum, this meant that the entire $200,000 paid by the settling defendant did not have to be credited, even though the total damages determined by the jury was $268,241 and the settling defendant's fault was only determined to be 10%, or $26,824. The Supreme Court limited the impact of the statute as

discussed above, and required that only 10% or $26,824 of the settling defendant's share be credited.

What does this mean here? Plainly if this was a case in which all liabilities were based on compared fault (not including liabilities based on intentional conduct which are not compared given section 604.01 subd 1a and Florenzano v. Olson, supra.) the plaintiff would not have to credit the entire amount of his advance payment from Northwest, but would have to credit so much of this amount as equates to that "portion of plaintiff's damages representing the settling defendant's [Northwest's] share of the liability." Here that share (again arguably) is 60% of $483,895, or $290,337. Of course, if the actual payment from Northwest was less than $290,337, then presumably (under the common law of restitution or under section 604.01 subd 5), only such lesser amount would be credited.

But the plaintiff here, while seemingly championing the Ranbaum decision as it permits of Pierringer related windfalls, contends that there should be no reduction, and the entire windfall should be plaintiff's. In short, he contends that there should be no restitution associated with Northwest's payment--that the matter should essentially be treated as if the jury found no fault on the part of Northwest such that its payment should be ignored. While at first blush this claim seems somewhat absurd and unjust, it is susceptible of some legal support.

First, plaintiff claims that section 604.01 subd. 5 is not applicable because it is found in the comparative fault statute, a statute which, plaintiff contends, does not relate to intentional conduct. However, there is nothing in the operative language of the statute to limit the restitutionary provisions (as opposed to the comparative provisions) as plaintiff suggests. Furthermore, as discussed above, the common law of restitution would be the same in any event, and, again, with respect to advance payments under Pierringer settlements it is assumed that the Ranbaum (credit limiting) analysis would apply.

Thus, to this court the difficulty is not in determining whether restitution as required by the statute or Ranbaum applies, but in determining what answer flows from such an application. Again, the holding in Ranbaum is that with respect to Pierringer payments, the credit is "only . . . for that portion of plaintiff's damages representing the settling defendant's share of liability." Thus the important issue here is the determination of Northwest's "share of liability." Defendant Redeemer argues that such share has been determined by the jury at 60%. But again, the jury has not and does not determine liability, as liability is an issue of law to be determined from the jury's findings. The jury here was instructed:

> It is the duty of the court to order judgment according to the law and the answers you have returned. JIG 2.

Of course, the reality is that, because of the operation of the Pierringer agreement and the application of our Pierringer law (see Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978)), the court compared the fault of, but could not find any liability on, Northwest. However, as was the case in Ranbaum, the issue is what "portion of the plaintiff's damages" are "represented" by such liability. To determine this amount, we must ignore the advance payment and analyze what Northwest's liability would have been had there been no Pierringer settlement.

The first possibility which needs only brief mention is that Magnuson would be responsible for all of the damages, leaving the other defendants, or at least Northwest, responsible for none. This would be the result if Magnuson discharged the judgment, as he, an intentional actor, plainly would have no rights of restitution against the others. Restatement of Law, Torts 2d, section 886A.

However, all of the evidence here is that Magnuson will not be capable of paying any significant portion of the judgment (and insurance will probably not respond with respect to Magnuson's liability founded on his intentional acts.) Assuming the allocation scheme associated with uncollectable damages described in section 604.02 essentially describes the result which will obtain here, Magnuson's uncollectable share would be reallocated between Redeemer and Northwest. Thus, we are again left with the question of allocating this responsibility in order to

determine the "portion" of plaintiff's damages "representing" Northwest's liability.

If we assume that Magnuson was out of the picture, then the issue would have been determined between Northwest and Redeemer based on rights of contribution and indemnity--again the law of restitution. This is, of course, precisely how the issue should be determined contractually assuming the Pierringer, as essentially the plaintiff has agreed to put himself in the shoes of, and to indemnify, Northwest with respect to its liability to Redeemer (the non-settling defendant) for any contribution or indemnification rights which Redeemer had against Northwest, and plaintiff has contractually "satisfied" (assuming a typical Pierringer agreement) any "future judgment" against Redeemer. See Hosley v. Armstrong Cork Co., 383 N.W.2d 289, 294 (Minn. 1986).

Thus, if Northwest was still in the suit there would be a judgment against Northwest and Redeemer from which plaintiff could execute 100% of his compensatory damages. If plaintiff elected to execute 100% from Redeemer, Redeemer would then seek contribution or indemnity from Northwest, and this court would be faced with the exact issue with which it is now struggling.

Similarly, if Northwest was out of the suit on the Pierringer (as it is), Redeemer would argue that Plaintiff is responsible either under its Pierringer indemnity of Northwest or under its Pierringer relinquishment or

satisfaction of future judgments, to pay or credit Redeemer with that portion of the judgment "representing" Northwest's liability in contribution or indemnity to Redeemer. Again, this court would be faced with the exact issue with which it is now struggling.

The law governing the question of whether Redeemer would have any right of contribution or indemnity against Northwest (whether directly or against plaintiff by way of plaintiff's Pierringer indemnification of Northwest) is, of course, the equitable law of restitution:

> The basis for indemnity is restitution, and the concept that one person is unjustly enriched . . .

Restatement, section 886B comments. Again, see Tolbert, supra at 367, n. 10. While there is no Minnesota case directly on point, this court concludes, on the basis of the following analysis, that the law would support a right of restitution favoring Redeemer under the facts of this case.

First, of course, it is clear that Redeemer would not have any right to indemnification, as Northwest (while found more at fault than Redeemer) would be found liable by reason of its negligence. Indemnification cannot be had against a negligent tortfeasor, and relative fault governs the allocation. See Tolbert, supra.

As to Redeemer's right of contribution against Northwest, the question is more difficult. One can argue that there should be no right because Redeemer's liability is based on intentional acts for which it has vicarious

responsibility for 100% of the damages, and that Redeemer stands in Magnuson's shoes as an intentional actor. One would support the argument by referencing law which disallows an intentional or active tortfeasor any rights of contribution against negligent or passive tortfeasors:

> There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.

Restatement of the Law, Torts 2d, section 886A.

While the Minnesota common law as set out in Florenzano (as well as our comparative fault statute) essentially precludes contribution rights in favor of an intentional actor, this law does not provide clear guidance as to the contribution rights of one held vicariously responsible for an intentional actor's conduct. (The Florenzano court was clear in its expression respecting the comparison of fault of an "actor." Florenzano, supra at 176, n. 7.) Again, the remedies of indemnity and contribution are equitable ones, and the inability of an intentional actor to obtain contribution, and the right of a negligent party to have full indemnification against an intentional actor, are based on the degree of the actor's culpability. Society's interest, as it equitably allocates responsibilities for losses, is to allocate losses in a way which deters, punishes and/or does not reward the conduct of intentional actors:

> The basis of the rule is . . . that courts will not aid one who has deliberately done harm, so that no man can be permitted to found a cause of action on his own intentional tort.

Restatement, section 886A, comment to subsection 3.

So the question is whether Redeemer stands in Magnuson's shoes, whether Magnuson's intentional conduct is imputed to Redeemer. Obviously an employer vicariously liable is not a "man . . . who has deliberately done harm." When dealing with respondeat superior responsibility which is, as here, unrelated to any direction, oversight or control on the part of the employer[1] and is based largely on notions of allocating losses amongst those capable of paying, there are strong arguments that restitution may be considered. Much in the same way as insurance provides benefits to an intentional actor's employer while denying them to the actor himself, the law might understandably allow restitution benefits on behalf of an employer while denying them to the intentional actor.

The law, what little there is, seems to favor such a distinction between restitution rights in favor of the intentional actor and those in favor of one liable only vicariously for the actor's conduct. In Roe v. Bryant & Johnston Co., 193 F. Supp. 804, 807 (E.D. Mich. 1961), the court held that the active conduct of a truck driver was not imputed to the employer held vicariously liable, and

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[1] Where the principal directed the wrongful conduct, restitution favoring the principal will not be allowed. See Olson v. Thompson, 273 Minn. 152, 155, 140 N.W.2d 321 (1966). In essence, the principal becomes a wrongdoer. Such is not the case here, where Redeemer's liability (beyond its negligence) is based entirely on vicarious responsibility.

accordingly the employer could seek restitution from a third party whose negligence contributed to the accident. See Prosser on Torts, section 51 (4th Ed.) (employee's conduct is not imputed to the employer for purposes of determining the employer's restitutionary rights).

There is ample reason to believe that Minnesota law is in accord. In addition to our strong favor of restitution based on actual fault (Tolbert, supra), our Supreme Court has approvingly cited Prosser's view that restitution is available to one:

> held responsible solely by imputation of law because of his relation to the actual wrongdoer, as where an employer is vicariously liable for the tort of the servant . . .

Hillman v. Wallin, 215 N.W.2d 810, 812 n. 2 (Minn. 1974). See also Tolbert, supra at 367. While admittedly the issues are not identical, these authorities stand for the proposition that restitution "prevents those only vicariously liable from having an unjust burden thrust upon them by others (i.e., tortious acts by servants or employers . . . " (emphasis added).

The no imputation rule seems to make sense, and equity demands that it be applied here. It is one thing for an injured party to obtain a windfall because the law denies restitution rights to an intentional actor. It is quite another to allow a windfall at the cost of restitution rights of a party whose liability is vicarious only. This is particularly so here where the institutional fault of the

other vicariously liable party (Northwest) was shown, both by the evidence and the jury's verdict, to be greater than that of Redeemer.

In the final analysis, to deny restitution rights to Redeemer here would mean that a church and its membership, neither of which had any active culpability, would be made to pay. To compound the injustice, the payment would not be fully devoted to accommodating plaintiff's compensatory damages, but largely accommodating of the plaintiff's windfall.[2]

Accordingly, this court believes the best analysis of the law is that the intentional actor's conduct is not imputed to the employer so as to deny the employer, whose liability is only vicarious, restitutional rights. Therefore, the court will apply section 604.01 subd.5, as interpreted by Ranbaum. While this result will still leave plaintiff with a windfall, the windfall will be moderated by the amount "representing [Northwest's] share of the liability." Again, assuming plaintiff received $400,000 from its settlement with Northwest, then the following

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[2] While the court is unaware of the amount of Northwest's payment, indications are that it was substantial. Assume plaintiff has received $350,000 from Northwest. If restitution rights to Redeemer were unavailable, such that this court would have a reason not to apply Minn. Stat. Sec. 604.01 subd. 5 or common law restitution doctrine, as interpreted by Ranbaum, plaintiff will recover $833,895, an amount $350,000 in excess of his total damages as found by the jury. Of this amount, Redeemer will be required to pay $483,895, solely because of its vicarious liability--because of its legal relationship with Magnuson. Such a result is inequitable.

(again assuming Magnuson is judgment proof) will be the ultimate responsibilities:

Damages	(found by jury)	$483,895
Credit Northwest payment	(60% of 483,895)	$290,337
To be paid by Redeemer	(483,895-290,337)	$193,558
Paid by Northwest	(assumed)	$350,000
Received by plaintiff	(400,000+193,558)	$593,558
Plaintiff's windfall	(593,558-483,895)	$ 59,663

Not only is the above equitable, it seems to be in accord with and dictated by plaintiff's own contractual agreement (of which Redeemer is a third party beneficiary). In the Pierringer agreement, plaintiff agreed to satisfy and relinquish the liability Northwest was ultimately found to have, namely $290,337. Finally, the result makes meaningful an important jury finding which otherwise would be without meaning, namely that other than Magnuson, Northwest was the most culpable contributor to plaintiff's damages.

V. PUNITIVE DAMAGES AGAINST DEFENDANT MAGNUSON

The court has "specifically reviewed the punitive damage award" against defendant Magnuson with respect to those factors set out in Minn. Stat.Sec. 549.20 subd. 3, and finds as follows:

A. The seriousness of the hazard posed by one in the position of enjoying the trust of many young people as did defendant Magnuson, and then abusing such trust by sexual

exploitation of the most vulnerable of them, warrants significant punishment. While the number of youths potentially injured were not as many as in a product liability or mass tort case, the depth of the injuries were substantial.

B. The misconduct of the defendant was not profitable.

C. The duration of the misconduct was long term, and the misconduct was concealed by Magnuson. Indeed, notwithstanding his obvious duties of truth and care toward parishioners, he lied to the only parents to confront him about the abuse of their son, demeaned them and their son's truthfulness, and in the guise of furthering the interests of the family and the church Magnuson exacted from this injured family a pledge of silence.

D. Defendant Magnuson, a man educated in psychology and otherwise well educated, was plainly aware of the hazard and its excessiveness.

E. The financial condition of defendant Magnuson is modest, and less than the $160,000 punitive damage award here may be adequate to punish. As a practical matter, the punitive damages will not be paid. However, the fact that a perpetrator of sexual abuse on young people is judgment proof should not diminish the extent of punitive damages to a degree which trivializes the conscious disregard defendant had for the welfare of vulnerable young people who trusted him.

F. Defendant Magnuson has been subjected to other punitive damages in at least one other case. Defendant Magnuson also received a workhouse jail sentence (one year, or eight months after goodtime) associated with one of the abused youth. However, in the court's view the criminal punishment was woefully short given the extent of the wrong, and woefully short when compared to the punishment of sexual abusers who are not as "white collar" as defendant Magnuson. The court also appreciates that in some civil cases there will be no award to victims because the lives of the victims and their upbringings were so dysfunctional without Magnuson's abuse that causation is difficult to prove. Accordingly, as to many victims Magnuson will go without any criminal or civil consequences.

In short, given the above considerations, the court sees no reason to modify the jury's informed and deliberate verdict with respect to punitive damages.

RBS

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

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Jane CC Doe,	*	RULINGS ON MOTIONS
Plaintiff,	*	
vs.	*	File No. 91-21073
Elk River Assembly of God Church, et al.,	*	
Defendants.	*	

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The above-entitled matter came on for trial before the Honorable Stephen D. Swanson, Judge of the above Court, at the Hennepin County Government Center, Minneapolis, Minnesota, commencing on the 12th day of October, 1993.

* * * * *

A P P E A R A N C E S:

JEFFREY ANDERSON, Esq. and KAREN KUGLER, Esq., Attorneys at Law, appeared on behalf of the Plaintiff.

W.D. FLASKAMP, Esq. and LEATHA WOLTER, Esq., Attorneys at Law, appeared on behalf of Defendants Elk River Assembly of God Church and Assemblies of God Minnesota District Council.

DENNIS MILLER, Esq. and CANDACE ROBERTS, Esq., Attorneys at Law, appeared on behalf of Defendant James Hoogenboom.

1 (Whereupon, the following is a partial
2 transcript of the proceedings taken in the
3 above-entitled matter:)
4 THE COURT: The next one I have on my list is
5 what I would categorize in a more proper way as a
6 motion to dismiss the battery claim against the Elk
7 River Assembly of God Church on the theory that there
8 is no respondeat superior liability. So why don't we
9 have brief argument, first, from the moving party.
10 MS. WOLTER: Thank you, Your Honor.
11 THE COURT: Could you note your name again for
12 the record?
13 MS. WOLTER: It's Leatha Wolter. We have
14 briefed this extensively and also provided a Reply
15 Memorandum of Law which we would rely on. In short,
16 it's our position that any claim for battery is time
17 barred and, therefore, does not create a viable theory
18 in this case and we cannot be held vicariously liable
19 for it. Second, and, more importantly, 541.073 does
20 not recognize a vicarious liability against an employer
21 for the intentional tort of the employee.
22 THE COURT: I'm not clear on your first
23 argument. Is not the battery covered as against
24 defendant Hoogenboom under 541.073?
25 MS. WOLTER: Your Honor, it's our position it

1 is not, but rather there has to be a finding by the
2 jury that there is sexual abuse as to finding a
3 criminal code, a requisite requirement set forth in
4 541.073. The only viable theory she has for an
5 intentional tort is that of sexual abuse, not of
6 battery, that is time barred.
7 THE COURT: Why is not sexual abuse under
8 Section 609.344?
9 MS. WOLTER: Because there has to be a finding
10 that she was engaged in a psychotherapeutic
11 relationship and at the time of the sexual relationship
12 he was providing her with counseling as defined in the
13 criminal code and it does create a fact question.
14 THE COURT: But you would admit it creates a
15 fact question?
16 MS. WOLTER: In terms of that, yes, Your Honor.
17 As to battery, no, there is no fact question because
18 it's barred by the statute of limitations. If we are
19 going to the question of whether or not there is
20 criminal sexual abuse as defined by the code, we submit
21 that the evidence has shown there is not, but if the
22 Court disagrees, then we believe there would be a fact
23 question for the jury.
24 MR. FLASKAMP: I would like to add something if
25 I may, Your Honor. There is no testimony here about

1 any psychotherapist on the part of Hoogenboom. He's
2 referred to as a counselor, not a psychotherapist. A
3 psychotherapist is not a minister who is a counselor so
4 I don't think there's any fact question on the proof
5 you have in this case.
6 THE COURT: Well, there are definitions of
7 psychotherapists that do include clergy.
8 MR. FLASKAMP: That's in the original
9 definition but you have to have a little more than
10 that. Also that statute did not come in until what,
11 1986 or '87?
12 THE COURT: '86, I believe.
13 MR. FLASKAMP: It does not apply back before
14 then but I think there's no testimony here that he's a
15 psychotherapist. In other words, psychotherapy means
16 professional treatment, assessment or counseling of
17 mental or emotional illness.
18 THE COURT: Mr. Miller, do you have anything to
19 add to this one?
20 MR. MILLER: Just that I believe the testimony
21 of Dr. Gonsiorek, I believe, he stated specifically
22 that in his opinion, Mr. Hoogenboom is not a
23 psychotherapist, so their own expert confirms what we
24 are trying to say. We would join with the argument of
25 Mr. Flaskamp.

1 THE COURT: Mr. Anderson?

2 MR. ANDERSON: Your Honor, 541.073 does allow a
3 cause of action against Hoogenboom for battery.

4 THE COURT: It only does if there is a
5 predicate act that's covered by the definition and the
6 predicate act that's covered by the definition you
7 refer back to Chapter 609, do you not?

8 MR. ANDERSON: Yes.

9 THE COURT: What is the predicate act that
10 gives rise to 541.073?

11 MR. ANDERSON: That he is and was a person
12 performing counseling of a mental and/or emotional
13 illness, symptom or condition and by that reason meets
14 that description under 609.341, subdivision 18. Now
15 that is a definition of psychotherapy and while he is
16 not referred to as a psychotherapist, he was clearly
17 providing, and there is evidence at least, substantial
18 evidence that he was counseling the plaintiff for a
19 mental or emotional illness, symptom or condition.

20 THE COURT: You would agree then that the jury
21 will have to make a finding that that's true?

22 MR. ANDERSON: Yes.

23 THE COURT: All right. And I have not included
24 that in my special verdict form so I need to include
25 that, you would agree with that?

1 MR. ANDERSON: Yes.

2 MS. WOLTER: Your Honor, just for further
3 clarification, we would then object to any attempt by
4 the plaintiff to, on top of that, assert a battery
5 claim. We think the Statute 541.073 is very specific
6 as to what it recognizes as being a viable theory and
7 that is a claim for criminal sexual abuse.

8 THE COURT: I don't understand that -- there
9 isn't a request for both battery and criminal sexual
10 abuse so I think we're just mixing terms.

11 MS. WOLTER: I hope that's the case, but I
12 believe in their requested jury instructions they did
13 ask for both and I would just want to place on the
14 record an objection to that.

15 THE COURT: Mr. Anderson, my understanding is
16 is that you are referring to this as a battery, is that
17 correct?

18 MR. ANDERSON: It is.

19 MR. FLASKAMP: To get our position clear, Your
20 Honor.

21 THE COURT: No respondeat superior even if
22 it's under the statute.

23 MR. FLASKAMP: Well, that's true but the
24 battery claim is a two year statute of limitation and
25 so it is our position that in order to have any claim

1 here, you have to proceed under the sexual abuse
2 statute which was created in 1989. The battery statute
3 is gone, the sexual abuse statute created a cause of
4 action, that's not a limitation action, it's a creation
5 of a new cause of action.
6 THE COURT: What statute are you referring to?
7 MS. WOLTER: 541.073. So the question to the
8 jury would not be whether or not there was a battery
9 but whether there was sexual abuse and then they would
10 be referred to the definition as set forth in 609.
11 THE COURT: I don't know whether it matters in
12 terms of what it's called in the special verdict form
13 as long as the instructions require that they make the
14 requisite finding and I don't know if there is any
15 opposition from the plaintiff to calling it sexual
16 abuse as opposed to battery.
17 MR. ANDERSON: I don't care if we call it
18 sexual abuse or battery. I would only say that 541.073
19 does not create a new cause of action. It only changes
20 the statute of limitations for all causes of action
21 relating to sexual abuse but I don't care if we call it
22 sexual abuse or sexual battery. I think that's just
23 semantical.
24 MR. FLASKAMP: You can't have it both ways.
25 He's suing on battery not sexual abuse. That's what he

1 sued on in the complaint.

2 THE COURT: We're really talking about

3 semantics. The sexual abuse is a battery, it can be

4 described as a battery and as long as the jury is

5 advised and instructed that in order to find that there

6 was a battery, they would have to find that there was

7 the predicate act under 609.344. I don't think it

8 matters what you call it.

9 MR. FLASKAMP: That's our position.

10 MS. WOLTER: Simply that the term battery is

11 somewhat light as opposed to sexual abuse. You are

12 right, it is semantics, but it might have lightened the

13 definition somewhat by referring to it as battery.

14 THE COURT: Mr. Anderson, anything on the

15 question of respondeat superior?

16 MR. ANDERSON: Just that respondeat superior

17 liability arises by reason of Hoogenboom's battery in

18 the scope of employment. Whether it was in the scope

19 of employment and/or incidental to it, then it's a fact

20 question and one properly before the jury.

21 THE COURT: Anything further on that issue?

22 MS. WOLTER: Your Honor, simply we would add if

23 the legislature had intended that to be so, it would

24 have added that language. It did not. It made it very

25 clear it's only a negligence action and, for the

record, case law in Minnesota now prohibits a claim as to vicarious liability for intentional tort under the present facts.

THE COURT: In what case is that?

MS. WOLTER: The Semrad case.

THE COURT: Okay. I disagree with the defendants on this point. In the Court's view, Section 541.073, subdivision 3, while it does not specifically include vicarious liability claims, it does not exclude them either. Plaintiff's action falls clearly within the parameters of Section 541.073, subdivision 3, because that action is one for damages against an employee who caused plaintiff's personal injuries. By definition, under the common law, vicarious liability is imposed upon a person who did not engage in any intentional or negligent conduct but who the law concludes should bear the responsibility for another person's conduct because of the relationship with that person. By its term, Section 541.073, subdivision 3, does not preclude the imposition of vicarious liability, and under the canons of statutory construction, that statute which is simply a statute of limitations should not be interpreted to preclude the imposition of vicarious liability because such an interpretation would be in derogation of the common

law. I have read the Semrad case which is Semrad versus Edina Realty, 493 N.W.2d 528, the Minnesota Supreme Court 1992 case. In my view, that case does nothing to change the law as set forth in the cases of Edgewater Motels, Inc. versus Gatzke, 277 N.W.2d 11, Minnesota 1979, and Lange versus National Biscuit Company, 297 Minnesota 399, 1973 case. So I don't view Semrad as having any impact at all on the law of vicarious liability either for negligence or intentional torts.

MS. WOLTER: For the record, Your Honor, we would just like to state and bring your attention to the dissent in Semrad and it's our position that Justice Yetka would not have felt Marston was overruled if, indeed, the Court was giving no weight to Semrad as to vicarious liability.

THE COURT: I understand.

(Whereupon, the proceedings were concluded.)

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

Court File No.: PI 95-2182

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

AFFIDAVIT OF [redacted]

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

[redacted], first being duly sworn under oath, deposes and states as follows:

1. My name is [redacted]

2. I was born on [redacted] I was raised a Roman Catholic in a Roman Catholic family. I participated as an altar boy and parishioner at St. Kevin's Catholic Church in Minneapolis, Minnesota. I came to know Father Kapoun as a Catholic priest and altar boy supervisor of St. Kevin's Church. I also knew Father Kapoun through the intermural basketball program, which he established at St. Kevin's Church.

3. From approximately 1969 through 1970, when I was approximately 13 years of age, another youth and I accompanied Father Kapoun to his cabin in Cold Springs to help him mow his lawn and to water ski. On this occasion Father Kapoun sexually molested me by putting his hands down my pants.

4. On a number of occasions Father Kapoun took me to St. Paul Seminary under the guise of swimming. Once at the St. Paul Seminary, we spent time in the sauna, rather than swimming. While in the sauna, Father Kapoun and I would be nude while others, not accompanying us, were in the sauna with towels on.

5. During approximately the years 1969 through 1970, it was common knowledge amongst the male youth at St. Kevin's Church not to be alone in the shower with Father Kapoun.

6. The sexual molestation by Father Kapoun continued through approximately 1970 and included, in part, repeated fondling and attempted fondling.

FURTHER YOUR AFFIANT SAITH NAUGHT.

Subscribed and sworn to before me this
19 day of April, 1995.

Notary Public

KAREN NORTHCOTT
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31, 2000

42740

Sec. 2. [116.802] INCINERATION OF INFECTIOUS WASTE; ENVIRONMENTAL IMPACT.

Until the pollution control agency adopts revisions to its air emission rules for incinerators, a new or expanded facility for the incineration of infectious waste that is subject to the permit requirement in section 1 may not receive a permit until an environmental impact statement for the facility has been prepared and approved. The pollution control agency is the governmental unit responsible for preparation of an environmental impact statement required under this section.

Sec. 3. EFFECTIVE DATE.

Section 1 is effective March 1, 1991, and applies to construction begun on or after that date. Section 2 is effective the day following final enactment.

Presented to the governor May 24, 1991

Signed by the governor May 28, 1991, 10:38 a.m.

CHAPTER 232—H.F.No. 345

An act relating to sexual abuse; extending the statute of limitations for intentional torts involving sexual abuse; eliminating the statute of limitations in criminal sexual conduct cases involving a minor victim and in certain criminal sexual conduct cases involving an adult victim; amending Minnesota Statutes 1990, sections 541.073; 609.3461; and 628.26.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1990, section 541.073, is amended to read:

541.073 ACTIONS FOR DAMAGES DUE TO SEXUAL ABUSE; SPECIAL PROVISIONS.

Subdivision 1. DEFINITION. As used in this section, "sexual abuse" means conduct described in sections 609.342 to 609.345.

Subd. 2. LIMITATIONS PERIOD. (a) An action for damages based on personal injury caused by sexual abuse must be commenced~~, in the case of an intentional tort, within two years, or, in the case of an action for negligence,~~ within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.

(b) The plaintiff need not establish which act in a continuous series of sexual abuse acts by the defendant caused the injury.

(c) The knowledge of a parent or guardian may not be imputed to a minor.

(d) This section does not affect the suspension of the statute of limitations during a period of disability under section 541.15.

~~As used in this section, "sexual abuse" means conduct described in sections 609.342 to 609.345.~~

Subd. 3. APPLICABILITY. This section applies to an action for damages commenced against a person who caused the plaintiff's personal injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur.

Sec. 2. Minnesota Statutes 1990, section 609.3461, is amended to read:

609.3461 DNA ANALYSIS OF SEX OFFENDERS REQUIRED.

Subdivision 1. UPON SENTENCING. When a court sentences a person convicted of violating or attempting to violate section 609.342, 609.343, 609.344, or 609.345, or sentences a person as a patterned sex offender under section 609.1352, or the juvenile court adjudicates a person a delinquent child for violating or attempting to violate section 609.342, 609.343, 609.344, or 609.345, it shall order the person to provide a biological specimen for the purpose of DNA analysis as defined in section 299C.155. The biological specimen or the results of the analysis shall be maintained by the bureau of criminal apprehension as provided in section 299C.155.

Subd. 2. BEFORE RELEASE. If a person convicted of violating or attempting to violate section 609.342, 609.343, 609.344, or 609.345, or sentenced as a patterned sex offender under section 609.1352, and committed to the custody of the commissioner of corrections for a term of imprisonment, has not provided a biological specimen for the purpose of DNA analysis, the commissioner of corrections or local corrections authority shall order the person to provide a biological specimen for the purpose of DNA analysis before completion of the person's term of imprisonment. The commissioner of corrections or local corrections authority shall forward the sample to the bureau of criminal apprehension.

Sec. 3. Minnesota Statutes 1990, section 628.26, is amended to read:

628.26 LIMITATIONS.

(a) Indictments or complaints for murder may be found or made at any time after the death of the person killed.

(b) Indictments or complaints for violation of section 609.42, subdivision 1, clause (1) or (2), shall be found or made and filed in the proper court within six years after the commission of the offense.

(c) Indictments or complaints for violation of sections 609.342 to 609.345 if the victim was under the age of 18 years at the time the offense was committed, shall be found or made and filed in the proper court within seven years after the commission of the offense or, if the victim failed to report the offense within this

limitation period, within ~~two~~ three years after the offense was reported to law enforcement authorities~~; but in no event may an indictment or complaint be found or made after the victim attains the age of 25 years~~.

(d) Indictments or complaints for violation of sections 609.342 to 609.344 if the victim was 18 years old or older at the time the offense was committed, shall be found or made and filed in the proper court within seven years after the commission of the offense.

(e) Indictments or complaints for violation of sections 609.466 and 609.52, subdivision 2, clause (3)(c) shall be found or made and filed in the proper court within six years after the commission of the offense.

~~(c)~~ (f) Indictments or complaints for violation of section 609.52, subdivision 2, clause (3), items (a) and (b), (4), (15), or (16), 609.631, or 609.821, where the value of the property or services stolen is more than $35,000, shall be found or made and filed in the proper court within five years after the commission of the offense.

~~(f)~~ (g) Except for violations relating to false material statements, representations or omissions, indictments or complaints for violations of section 609.671 shall be found or made and filed in the proper court within five years after the commission of the offense.

~~(g)~~ (h) In all other cases, indictments or complaints shall be found or made and filed in the proper court within three years after the commission of the offense; but the time during which the defendant shall not be an inhabitant of, or usually resident within, this state, shall not constitute any part of the limitations imposed by this section.

Sec. 4. EFFECTIVE DATE.

Section 1 is effective the day following final enactment, and applies to actions pending on or commenced on or after that date. Section 3 is effective August 1, 1991, and applies to crimes committed on or after that date, and to crimes committed before that date if the limitations period for the crime under Minnesota Statutes 1990 did not expire before August 1, 1991.

Sec. 5. APPLICABILITY.

Notwithstanding any other provision of law, a plaintiff whose claim would otherwise be time-barred under Minnesota Statutes 1990 has until August 1, 1992, to commence a cause of action for damages based on personal injury caused by sexual abuse.

Presented to the governor May 24, 1991

Signed by the governor May 28, 1991, 10:40 a.m.

FILED

STATE OF MINNESOTA

COUNTY OF HENNEPIN

93 NOV -3 AM 10:42

DEPUTY

HENN. CO. DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

Albert C. Magnuson, personally and as Pastor for the Redeemer Covenant Church of Brooklyn Park; The Northwest Conference of the Evangelical Covenant Church of America and the Redeemer Covenant Church of Brooklyn Park,

Defendant.

ORDER

File No. PI 90-23829

The above-entitled matter came duly on for hearing before the undersigned, one of the Judges of the above-named Court, on the 27th day of July 1993.

Jeffrey R. Anderson, Esquire, Teresa K. Fett, Esquire, and Mark A. Wendorf, Esquire, appeared on behalf of Plaintiff. Candice Roberts, Esquire, appeared on behalf of Defendant Albert C. Magnuson. W.D. Flaskamp, Esquire, and Leatha G. Wolter, Esquire, appeared on behalf of Defendant Redeemer Covenant Church of America.

Based upon the arguments of counsel and upon all the files, records and proceedings herein, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED:

1. Defendant Redeemer Covenant Church of America's motion for amendment of the Court's June 2, 1993 Findings of Fact, Conclusions of Law and Order for Judgment to reflect a judgment in favor of Defendant

Redeemer Covenant Church of America is denied in all respects.

2. Defendant Redeemer Covenant Church of America's motion for a judgment notwithstanding the verdict, or, in the alternative, a new trial is denied in all respects.

3. Defendant Albert C. Magnuson's motion for amendment of the Court's June 2, 1993 Findings of Fact, Conclusions of Law and Order for Judgment to reflect a judgment in favor of Defendant Albert C. Magnuson is denied in all respects.

4. Defendant Albert C. Magnuson's motion for a judgment notwithstanding the verdict, or, in the alternative, a new trial is denied in all respects.

5. All other motions not specifically granted are denied.

6. That the attached Memorandum be part of this Order.

BY THE COURT:

Dated: 1 November 1993

Peter J. Lindberg
Judge of District Court

Memorandum

The above-entitled matter came on for trial on May 17, 1993. The jury returned a verdict on May 28, 1993. The jury found that Defendant Albert C. Magnuson (Magnuson) had committed a "sexual battery" against Plaintiff. The Special Verdict form reflected an attribution of thirty (30) percent negligence to Defendant Redeemer Covenant Church of America (Redeemer) and seventy (70) percent negligence to Defendant Northwest Conference of the Evangelical Covenant Church of America (Northwest). The jury found that Defendant Albert C. Magnuson (Magnuson) was acting in the course and scope of his employment with Redeemer when he committed a sexual battery against [redacted] Finally, the jury found that Plaintiff sustained a total of $893,250 in damages. The jury also awarded $200,000 in punitive damages against Defendant Magnuson. The Court issued Findings of Fact, Conclusions of Law and Order for Judgment on June 2, 1993. The Court concluded Plaintiff was entitled to judgment against Defendant Redeemer in the amount of $893,250 on a count of respondeat superior. The Court also concluded Plaintiff was entitled to judgment against Defendant Redeemer in the amount of $267,975 on a count of negligence, thirty (30) percent of Plaintiff's total damages.

Defendants Redeemer and Magnuson now bring motions to amend the Court's Findings of Fact, Conclusions of Law and Order for Judgment to reflect judgment in favor of Defendants. Defendants also bring motions for judgment notwithstanding the verdict, or, in the alternative, motions for a new trial. The Court denies these motions in all respects. The Court does not find it necessary to address each and every argument of Defendants. The principle issues before the

Court are the statute of limitations concerning sexual battery and abuse, the submission of the theory of respondeat superior to the jury, the total amount of damages Plaintiff is entitled to take from Defendant Redeemer and the apportionment of damages between Defendant Redeemer and Defendant Northwest.

The Court may grant judgment notwithstanding the verdict on any of the grounds enumerated in Minn. R. Civ. P. 59.01, including irregularities in the proceedings of the court and errors of law at trial. It is solely within the discretion of the trial court to grant or deny a new trial. Benson v. Rostad, 384 N.W.2d 190, 194 (Minn. Ct. App. 1986).

> A new trial should not be granted unless the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment.

Id. at 194. The Court denies both the motions for judgments notwithstanding the verdict and the motions for new trials.

An action for damages caused by sexual abuse must be commenced within six years of the time a plaintiff knew or had reason to know that an injury was caused by sexual abuse. See Minn. Stat. §541.073. The statute defines "sexual abuse" as "conduct described in sections 609.342 to 609.345." Defendant Redeemer claims that the versions of Minn. Stat. §§609.342 to 609.345 in effect at the time of the sexual abuse are the proper definitions of "sexual abuse" under Minn. Stat. §541.073. Defendant Redeemer claims the evidence adduced at trial will not support a finding of "sexual abuse" within those versions of Minn. Stat. §§609.342 to 609.345. Therefore, Defendant argues,

Plaintiff is limited to the normal two year statute of limitations for battery plus the amount of time for the expiration of Plaintiff's minority disability under Minn. Stat. §541.15. Under this theory, Plaintiff's cause of action would have expired in 1980 or 1981, eight or nine years before Plaintiff filed suit.

The Court finds no evidence to persuade it that the legislature intended to use a 1976 version of Minn. Stats. §§609.342 to 609.345 to define "sexual abuse" in the current version of Minn. Stat. §541.073, as it was enacted in 1987. The Court finds that the proper definition of "sexual abuse" for Minn. Stat. §541.073 is found in the current versions of Minn. Stat. §§609.342 to 609.345.

Defendants Redeemer and Magnuson both argue that the Court improperly instructed the jury on the definition of "sexual abuse" contained in Minn. Stat. §§609.342 to 609.345. Defendants argue that Plaintiff pled sexual battery in the complaint, and that the case was submitted to the jury on a theory of sexual battery. Therefore, Defendants argue, the Court's instructions were so confusing as to warrant a new trial. Defendants failed to object to the instructions on this basis, as required by Minn. R. Civ. P. 51, before the jury retired. Therefore, Defendants have waived their right to bring an objection now.

Defendants argue in the alternative there was no evidence by which the jury could have concluded that Plaintiff was subjected to "sexual abuse" as defined even by Minn. Stat. §§609.342 to 609.345, and therefore Defendants are entitled to a judgment notwithstanding the verdict. Defendants argue the evidence only supports a finding that Defendant Magnuson kissed Plaintiff without permission. Minn.

Stat. §§609.342 to 609.345 arguably requires something more to constitute "sexual abuse." An unpermitted kissing would constitute common law battery and not "sexual abuse" under Minn. Stat. §§609.342 to 609.345. Therefore, Defendants argue, Plaintiff only gets the benefit of the statute of limitations for battery, not the statute of limitations for sexual abuse. However, evidence clearly supports a finding by the jury that Defendant Magnuson not only kissed Plaintiff without his consent but touched Plaintiff's genital area. Therefore, Defendant's behavior falls within the conduct described in Minn. Stat. §§609.342 to 609.345, and Minn. Stat. §541.073 was the correct statute of limitations to apply to that conduct. The term "sexual battery" was defined in the context of sexual abuse in the Court's instructions.

Defendant Redeemer argues that there was no evidence to support the finding by the jury that Defendant Magnuson was acting in the course and scope of his employment with Redeemer when he committed a sexual battery against [redacted] Moreover, Defendant Redeemer argues the Court announced the law of the case in its order of December 30, 1992. The Court denied Plaintiff's motion to amend the complaint to add a claim for punitive damages against Defendant Redeemer. The Court's memorandum was grounded on the basis that Magnuson was not acting in the "scope of employment" when he allegedly abused Plaintiff. The Court made this determination based on the holding of the Minnesota Supreme Court in Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306 (Minn. 1983). The Supreme Court held that a psychotherapist could be deemed to be acting in the scope

of employment if the abuse he perpetrated was "a well known hazard and thus, to a degree, foreseeable and a risk of employment." Id. at 311.

This Court's ruling on the punitive damage issue does not represent the law of the case concerning a respondeat superior cause of action against Defendant Redeemer. The Court made its punitive damages ruling based upon the affidavits of the parties submitted in the course of a summary judgment motion. Additional evidence was developed in the course of trial indicating that Defendant Redeemer was either placed on constructive or actual notice of Defendant Magnuson's tendencies prior to the abuse of Plaintiff.

Evidence was submitted to the jury that Defendant Magnuson had discussed with a member of the church board complaints by the [redacted] family about Defendant Magnuson's inappropriate counseling of their son. In addition, the church "secretary" was also present at a meeting with the parents, the child, the Board member and Defendant Magnuson.

The jury also heard evidence indicating that representatives of the church were aware that Defendant Magnuson was intimately involved in counseling young people about sexual activities. The evidence adduced at trial was adequate to support a finding by the jury that Defendant Magnuson was acting in the course of his employment when he abused Plaintiff.

Finally, Defendant Redeemer argues damages awarded under the claim of respondeat superior should be apportioned between Defendant Northwest and Defendant Redeemer pursuant to the Pierringer release and the theory of joint and several liability. The Special Verdict form reflected an attribution of thirty (30) percent negligence to

Defendant Redeemer and seventy (70) percent negligence to Defendant Northwest. Defendant Redeemer argues that it is liable for only thirty (30) percent of the $893,250 in damages for respondeat superior liability. The Court disagrees.

Defendant Redeemer is correct that it is entitled to contribution from the settling tortfeasor, Defendant Northwest, for the percentage of fault in negligence attributed to Defendant Northwest. The Court's Findings of Fact, Conclusions of Law and Order for Judgment already reflect this attribution. However, Defendant's right of contribution depends on comparative fault principles, which in turn apply to causes of action in negligence where there is a joint tortfeasor. See Florenzano v. Olson, 387 N.W.2d 168, 176. The right of contribution does not apply to the intentional tort of a single tort tortfeasor. Defendant Redeemer was found vicariously liable for Defendant Magnuson's intentional acts. Defendant Magnuson, and therefore Defendant Redeemer, is liable for one hundred (100) percent of the damages resulting from those intentionally tortious acts. Plaintiff may elect to take from Defendant Redeemer either the $267,975 in damages attributed Defendant Redeemer for its negligence, or the entire $893,250 in damages vicariously attributed to Defendant Redeemer through Defendant Magnuson's intentional acts.

PJL

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

95 JUN -2 AM 10:

BY A. McKenzie DEPUTY
COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

Robert Kapoun, personally and
The Catholic Archdiocese of
St. Paul and Minneapolis,

Defendant.

File No: PI 95-2183

SUPPLEMENTAL AFFIDAVIT OF DAN T. RYERSON

STATE OF MINNESOTA)
:ss
COUNTY OF HENNEPIN)

Dan T. Ryerson, being first duly sworn upon oath, states as follows:

I.

That your affiant is an attorney at law duly licensed to practice in the State of Minnesota, and one of the legal counsel for defendant Archdiocese in this case.

II.

Attached hereto as Exhibit A is the Certificate of Reading and Signing of plaintiff [redacted] making certain corrections to his deposition testimony herein, dated 4/20/95.

III.

Attached hereto as Exhibit B is a copy of the Minnesota Court of Appeals decision Doe v. Redeemer Lutheran Church, Finance and Commerce, May 26, 1995, pages 25-27.

FURTHER AFFIANT SAITH NOT.

Dan T. Ryerson

Subscribed and sworn to before me
this 1st day of June, 1995.

Kim M. Sorensen
Notary Public

KIM M. SORENSEN
NOTARY PUBLIC-MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan. 31, 2000

CERTIFICATE OF READING AND SIGNING

I, [redacted] have read the foregoing transcript of my deposition, taken by Daniel W. McMahon, Court Reporter, and believe the same to be true and correct (or except as follows listing the page and line number and the reason):

Page/Line	Delete	"Correct Answer" and/or Explanation
15/20;28	"ninth and/or tenth"	"seventh and/or eighth"
17/16	"Yes."	"No." Didn't want to be a priest at that time because I felt guilty and shameful when I thought about the priesthood based upon my interaction with Kapoun.
19/19		No it occurred in summer before 8th grade.
31/23	"You could..."	"You could not..." Mother disciplined me in the manner that I testified to in the deposition. My mother didn't beat me up.
45/7	"Yes."	"No." See page 17/16.
48/30	"1967"	"1968"
54/12	"Right"	"Wrong..." the sexual abuse occurred to best of my recollection in summer 1968.
55/7	"used"	"shameful"
56/29	"There was."	"No." The incidents all happened to the best of my knowledge after the 7th grade.
57/6	"Yes."	"No." The incidents occurred during summer 1968.
58/13		That's correct, but the year was 1968.
58/23		Yes, in the summer of 1968.
60/30		I don't recall [redacted] using the word molest.

Ex. A.

Page/Line	Delete	"Correct Answer" and/or Explanation
64/7	"that that cabin"	"all incidents". In fact to the best of my recollection all three incidents occurred in the summer, 1968.
65/3	"Yes."	"No." All the incidents occurred during the summer of 1968.
73/7		The only thing I recall Father Kapoun saying was that this isn't right. I do not recall him ever apologizing or saying it would never happen again.
73/13		Same as 73/7
73/27		Same as 73/7
76/28		Yes, I understand that looking back on the incidents in 1991, but I did not see it that way at the time.
77/2		Same as 76/28
77/5	"Yes."	"No." See 17/16.
77/12		I now believe that Kapoun's conduct caused this negative attitude. At the time, I did not understand why it was that way.
78/17		I may have thought that because I had sexual contact with a man that I may be homosexual, though I did not think his conduct caused me to be homosexual.
82/19	"my training problems..."	delete: "my training problems." I don't know what that means.
85/17		I did not feel anger at Father Kapoun at that time, but I now feel anger at him.

Dated: 4/20/95

[redacted]

appellants were not the victims of intentional discrimination. I cannot agree. Although the trial court did find that appellants were subjected to derogatory comments, at various times by co-employees, the trial court still concluded their discharge was for legitimate reasons. The trial court is entitled to deference on a factual finding. The majority asserts the trial court reached its conclusion because it found respondent also had a non-discriminatory reason for discharging appellants. Like the trial court, I conclude the only reason for appellants' discharge was the legitimate one, and that discrimination was not a co-reason.

Discrimination by co-employees in the workplace does not, per se, satisfy the third part of McDonnell Douglas for a "discriminatory discharge" claim. Discrimination must be the causative factor in the discharge. See Hicks, — U.S. at —, 113 S.Ct. at 2752 (holding must show discrimination was real reason for discharge); Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 711 (Minn. 1992) (plaintiff failed to prove her age was real reason for termination).

If employees are required to show only that they suffered some discrimination at the hands of co-employees during their employment, employers will be prevented from ever discharging an employee who has ever experienced discrimination. Unless the employee is required to tie the discharge to the discrimination, simply pointing out past discrimination would always satisfy a discriminatory discharge claim.

The trial court determined the fighting incident and appellants' attempt to lie about it were bona fide reasons for termination. I find the trial court's conclusion is supported by the record.

I would affirm.

STATE OF MINNESOTA
IN COURT OF APPEALS
C9-94-1786, C3-94-1797

St. Louis County — Schumacher, Judge
District Court File No. C891602147

John W. Doe, Respondent, v. Redeemer Lutheran Church, Appellant (C3-94-1797), Respondent (C9-94-1786),	Jeffrey R. Anderson Mark A. Wendorf Barbara J. Felt Reinhardt and Anderson E-1000 First National Bank Bldg. 332 Minnesota Street St. Paul, MN 55101 Richard L. Pemberton, Jr. Christopher J. Schulte William D. Flaskamp Meagher & Geer, P.L.L.P. 4200 Multifoods Tower 33 South Sixth Street Minneapolis, MN 55402
Minnesota North District of the Lutheran Church - Missouri Synod, et al., Defendants,	
Pastor Daniel Reeb, Appellant (C9-94-1786), Respondent (C3-94-1797).	Kenneth F. Daniels 4727 Olson Memorial Highway Golden Valley, MN 55422

Filed: May 23, 1995
Office of Appellate Courts

SYLLABUS

1. Jury's finding that a reasonable person in victim's circumstances would not have known that victim's injuries were caused by the abuse until the year in which victim underwent extensive therapy was supported by the evidence.

2. Where the jury received a general negligence instruction, jury's finding that the church was negligent in permitting abuse by its pastor to occur was supported by the evidence where church trustees heard rumors of pastor's sexual improprieties and one trustee witnessed pastor engaging in suspect behavior.

Affirmed.

Considered and decided by Parker, Presiding Judge, Schumacher, Judge, and Mulally, Judge.*

*Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION

SCHUMACHER, Judge (Hon. John T. Oswald, District Court Trial Judge)

Redeemer Lutheran Church (Redeemer) and Pastor Daniel Reeb appeal the judgment and order denying their post-trial motions. Redeemer and Reeb contend that respondent John W. Doe's claim was time-barred. Redeemer also argues that the jury's finding that it was negligent is not supported by the evidence and the delayed discovery statute does not apply to a respondeat superior claim. We affirm.

FACTS

In May 1991, Doe sued Pastor Reeb for sexual battery, clergy malpractice, and breach of fiduciary duty. He sued Redeemer and Minnesota North District of the Lutheran Church-Missouri Synod and Lutheran Church-Missouri Synod under a theory of respondeat superior, and negligent hiring, retention, and/or supervision. He also sued Redeemer under a general negligence theory.

From 1961 until 1979, Pastor Reeb was a minister and youth program teacher at Redeemer. He lived in a third floor apartment at the church's teen center. Doe attended confirmation classes at Redeemer, and Pastor Reeb was his instructor. Doe testified that he so admired Pastor Reeb that he wanted to be a minister. Doe often went with Pastor Reeb to make calls or visit other churches. He also attended church camp during the summer and at times stayed overnight at Pastor Reeb's apartment. Between the years 1967 and 1969, when Doe was 13 to 16 years old, Doe and Pastor Reeb engaged in mutual masturbation. Pastor Reeb admitted to engaging in the acts.

Prior to his abuse, Doe was a good student and athlete. After the abuse, his grades dropped and he quit playing team sports. During his late teens, he was hospitalized as a result of an attempted suicide. He was married in 1973, and during the marriage he

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Ex. B

abused alcohol and suffered from social phobia.

Because of these problems, Doe sought therapy. In about 1975, he saw Dr. Marcus Desmonde for his panic attacks. In 1987, he entered an inpatient treatment program for alcohol abuse. During treatment, the therapist noted that Doe "owned his fears * * * 2 experiences of child abuse as child/then as an adolescent," but the issue was not pursued. Doe was unable to maintain his sobriety. He went into therapy with psychotherapist, Dr. Shirley Levine, and began working on shame issues. In November 1990, Doe told Dr. Levine about the sexual abuse. Doe never discussed the details of the abuse until he spoke with Dr. Levine, although he admitted he always knew something sexual happened.

Dr. Levine testified the abuse was causally related to Doe's depression, phobic behavior, and shame. Dr. Faris Keeling, who continued therapy with Doe after Dr. Levine's retirement, also testified that the sexual abuse was a contributing factor to his depression, social phobia, chemical dependence, and post-traumatic stress disorder.

During the period of Doe's abuse, James R. Elling was a member and trustee at Redeemer. Elling had a daughter who attended the confirmation class. Elling testified that one day he went to the youth center gymnasium. Children were running "helter-skelter," and there was no sign of Pastor Reeb. When Elling finally found Pastor Reeb, he was either kissing a young boy or "burp[ing] in his mouth." Pastor Reeb turned and, seeing Elling, blushed and ran back to his quarters. Elling informed Ralph Tostrup, a council member and elder, Larry Hubbard, a council member, and Chuck Jantzen, a trustee, about the incident. Apparently, no action was taken.

Graeme Wick, another Redeemer trustee, testified that he was approached by Sam Solon, a local teacher. Salon asked Wick if Pastor Reeb was a child molester. Wick replied no. Wick's uncle told Wick that he heard something went on at a cabin at Chub Lake and asked if Reeb was "straight." Wick said yes. Wick also recounted an incident where his son had to make up some work for confirmation classes on a Monday morning before school. When he came home, he told his father that Pastor Reeb wanted him to get under the sheets. Wick asked his son, "You didn't, did you?" His son replied no.

Cheryl Ballentine, a student in the confirmation class, testified that during a class at Redeemer she thought she saw Pastor Reeb masturbating behind the podium. She told her parents and never went back to Redeemer. Betty Dannenburg, an intern at Redeemer, testified she stopped by the Ballentine home and asked why they no longer attended Redeemer. Ballentine's mother told Dannenburg about what her daughter had witnessed. Another member of the confirmation class, Lee Hinnenkamp, testified he told Dannenburg that Pastor Reeb put his arm around him all of the time and showered with the boys. Dannenburg further testified she asked Professor Schmidt, her supervisor at Concordia College in Illinois, for advice. She said Professor Schmidt told her he would handle the problem and get back to her, but he never did. Professor Schmidt testified that he remembered that Dannenburg was having difficulty during her internship, but did not recall hearing about any sexual improprieties.

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The jury found the abuse by Pastor Reeb was a direct cause of the injury or harm to Doe; Redeemer was negligent in permitting or allowing the sexual abuse to occur; Redeemer's negligence was the direct cause of Doe's injury; Doe was not negligent; and the Northern District and the Missouri Synod were not negligent in permitting the abuse to occur. The jury also found

> a reasonable person, in the same or similar circumstances as [Doe] [knew] or should such person have known, that he was sexually abused and harmed by Defendant Daniel Reeb: Year 1990.

Finally, the jury found that Pastor Reeb was acting within the scope and course of his employment when he committed the acts of sexual abuse.

Judgment was entered against Redeemer and Pastor Reeb in the amount of $643,808. Redeemer moved for judgment notwithstanding the verdict (JNOV), amended findings, and a new trial. The district court denied the motion. Redeemer and Pastor Reeb appeal.

ISSUES

1. Was the jury's finding that a reasonable person in Doe's circumstances would not know until 1990 that Doe's injuries were caused by the abuse supported by the record?

2. Was the jury's finding that Redeemer was negligent in allowing the sexual abuse of Doe to occur supported by the record?

ANALYSIS

1. The statute of limitations for civil damages caused by sexual abuse, known as the delayed discovery rule, provides:

> An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.
>
> Minn. Stat. §541.073, subd. 2(a) (1992).[1]

[1]The defendant bears the burden of production on an affirmative defense. **Thiele v. Stich**, 425 N.W.2d 580, 583 (Minn. 1988). The plaintiff, however, bears the burden to show that the statute has tolled. **Bougie v. Sibley Manor, Inc.**, 504 N.W.2d 493, 497 (Minn. App. 1993).

Redeemer and Pastor Reeb contend that the court should have granted the motion for JNOV because Doe did not bring his claim within the time limits provided by the delayed discovery rule. They contend that Doe knew or should have known that his injuries were caused by sexual abuse at a point in time that was more than six years before the commencement of suit. We disagree.

In an appeal of the denial of a motion for JNOV, appellate court will affirm if there is any competent evidence reasonably sustaining the verdict. **Rettman v. City of Litchfield**, 354 N.W.2d 426, 429 (Minn. 198 The delayed discovery statute is viewed under an objective standard. **ABC v. Archdiocese of St. Paul Minneapolis**, 513 N.W.2d 482, 486 (Minn. App. 195 It requires a two-part inquiry: (1) when would a reasonable person in the complainant's position be aware that the sexual contact or relationship was abusive; and when would a reasonable person in the complainant's position be aware that the sexual abuse caused his or injuries. See **Blackowiak v. Kemp**, 528 N.W.2d 2 251 (Minn. App. 1995), **pet. for rev. granted** (Mi April 27, 1995). If a reasonable person under similar circumstances would not be aware that the sexual con was abusive or that the abuse caused injury until so time during the six-year period prior to the commencement of the lawsuit, the claim is not time-barred.

Here, the abuse occurred between 1967 and 1969.

served his complaint in 1991. Therefore, the query is: would a reasonable person in Doe's position know or have reason to know before 1985 that his injuries were caused by sexual abuse? The jury found that a reasonable person in Doe's position would know "that he was sexually abused and harmed by" Pastor Reeb in 1990.

Redeemer and Pastor Reeb contend that **ABC and Roe v. Archdiocese of St. Paul & Minneapolis**, 518 N.W.2d 629 (Minn. App. 1994), **pet. for rev. denied** (Minn. Aug. 24, 1994), control this case. They argue that the jury verdict is not supported by the evidence and that the statute of limitations question should have been decided as a matter of law. We disagree.

In both **ABC** and **Roe**, teenage girls had sexual relationships with priests. **Roe**, 518 N.W.2d at 630; **ABC**, 513 N.W.2d at 483-84. The cases primarily focused on when the victims knew the relationships were abusive. **Roe**, 518 N.W.2d at 632; **ABC**, 513 N.W.2d at 486; **see also Blackowiak**, 528 N.W.2d at 251. Where the relationship is inherently abusive, as in the case before us, the focus is on when the victim became aware that the abuse caused the injuries. **Blackowiak**, 528 N.W.2d at 251. This issue is normally one of fact. **Id.** at 253.

In **ABC**, the court found that the question could be decided as a matter of law. In that case, the victim became pregnant and suffered a miscarriage during the relationship. **ABC**, 513 N.W.2d at 486. The court reasoned that a reasonable person would have known she was injured as a result of the abuse at the time of her pregnancy and subsequent miscarriage. **Id.** at 488. In **Roe**, the victim tried to commit suicide about one year after the relationship ended when she thought that the perpetrator had abandoned her. **Roe**, 518 N.W.2d at 632. In the case at bar, however, Doe's injuries did not occur during the course of the abuse.

Doe's situation is more akin to **Blackowiak** where the victim suffered from less tangible injuries, such as alcoholism, low self-worth, and depression, which were less easily traced to the abuse. **Blackowiak**, 528 N.W.2d at 252. Blackowiak testified that he tried not to think about the abuse until 1991 when he met with another victim who was abused by the same man. **Id.** at 250. The court held that when Blackowiak knew or should have known that his injuries were caused by sexual abuse involved a factual determination; therefore, summary judgment was improper. **Id.** at 253.

Here, Doe suffered from less tangible injuries of alcoholism, social phobia, panic attacks, and depression. Despite undergoing various forms of therapy since about 1975, he did not fully discuss the abuse with anyone until he entered therapy with Dr. Levine in 1990. Thus, the causation issue was properly presented to the jury, and their finding is supported by the evidence.

2. Redeemer argues the jury's finding that Redeemer was negligent is contrary to the evidence. The standard of review for denial of a motion for JNOV is set forth above. The decision to grant a new trial lies within the discretion of the trial court and will not be disturbed absent an abuse of discretion. **Halla Nursery v. Baumann-Furrie & Co.**, 454 N.W.2d 905, 910 (Minn. 1990). The jury was instructed that

> negligence is the failure to use reasonable care. Reasonable care is that care which a reasonable person would use under like circumstances. Negligence is the doing of something which a reasonable person would not do or the failure to do something which a reasonable person would do under like circumstances.

The jurors found, "Defendant Redeemer Lutheran Church [was] negligent in permitting or allowing the sexual abuse of [Doe] to occur."

Redeemer argues that this finding is unsupported by the evidence because Dannenburg's knowledge cannot be imputed to it because Dannenburg was not a Redeemer employee. In their briefs, Redeemer discusses the legal theory of imputation and Doe discusses the legal theories of negligent retention and supervision. The jury received no instructions on these theories. The general negligence instruction was not objected to at trial nor was it assigned as error in the new trial motion, and it thus became the law of the case. See **Duchene v. Wolstan**, 258 N.W.2d 601, 606 (Minn. 1977); see also Minn. R. Civ. P. 51 (unintentional misstatements and verbal errors or omissions must be objected to before assigned as error; error with respect to controlling principle or fundamental law may be assigned as error in new trial motion even if not objected to at trial). Whether evidence is sufficient to sustain the verdict is determined by examining the evidence in light of the law as presented in the trial court's instructions. **Jacoboski v. Prax**, 290 Minn. 218, 224, 187 N.W.2d 125, 129 (1971).[2]

[2] If the error is one of fundamental law, it may be possible for the court to order a new trial. **Fallin v. Maplewood-North St. Paul Dist. No. 622**, 362 N.W.2d 318, 322 (Minn. 1985). The supreme court held, however, where a jury was given a general instruction on negligence, but the plaintiff presented its case based on four specific theories of negligence, there was no fundamental error of law and no reversible error. **Id.**

Regardless of whether Dannenburg's knowledge may be imputed to Redeemer, Redeemer's own council members and trustees were aware that Pastor Reeb had been engaging in sexual improprieties, but they turned a blind eye and did nothing to address the problem. The jury clearly could have found that Redeemer should have taken action and failure to do so amounted to negligence.

Because we conclude that Redeemer was negligent, we need not reach the issue of whether the delayed discovery rule applies to Doe's respondeat superior claim.

DECISION

The district court correctly concluded that the statute of limitations did not bar Doe's claim as a matter of law and that the jury's finding that a reasonable person in Doe's circumstances would not have known that his injuries were caused by the abuse until 1990 is supported by the evidence. The district court did not abuse its discretion in denying the motion for a new trial and its refusal to grant JNOV was proper where the evidence supported the jury's finding of Redeemer's negligence.

Affirmed.

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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

[redacted]

Plaintiff,

vs.

Robert Kapoun personally and
The Catholic Archdiocese of
St. Paul and Minneapolis,

Defendants.

ORDER
Court File 95-2183

The above-entitled action came on for hearing before the Honorable Gary Larson, Judge of District Court, on June 5, 1995 on Defendant's Archdiocese of St. Paul and Minneapolis motion for Summary Judgment.

David S. Burleson, Esq., appeared on behalf of Plaintiff.

James T. Martin, Esq., and Andrew Eisenzimmer, Esq., appeared on behalf of Defendant Archdiocese of St. Paul and Minneapolis.

Fredrick Brown, Esq., appeared on behalf of Defendant Robert Kapoun.

Now, therefore, based on the arguments of counsel, and all the files, records and proceedings herein;

IT IS HEREBY ORDERED:

1. That Defendants' motion for summary judgment are hereby **GRANTED.**

2. That Plaintiff's claims against Defendant Archdiocese of St. Paul and Minneapolis are hereby dismissed. Leave space

BY THE COURT:

Dated: June 13, 1995

Gary Larson
Judge of District Court

MEMORANDUM

I. Defendant's Summary Judgment Motion

Defendant Archdiocese brings this motion for summary judgment arguing that Plaintiff's claim of respondeat superior must be dismissed as a matter of law as it is barred by the statute of limitations. It also argues that as Plaintiff has failed to show forseeability for any of the alleged acts, there is no basis for claiming negligent hiring and supervision.

Very recently, this Court had the opportunity to address these identical issues, involving the same Defendant, on summary judgment in T.M. v. Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota and Father Robert Kapoun, Court File No.: PI 95-2181.

1. Respondeat Superior

In Oelschlager v. Magnuson, 528 N.W.2d 895 (Minn. Ct. App. 1995), rev. den. Apr 27, 1995, the Court held that the delayed discovery statute does not apply to claims based on respondeat superior. This is the law in Minnesota and the decision is binding on this court. Accordingly, as this Court held in T.M., Defendant's motion is granted.

2. Negligent Hiring And Supervision

To establish a supportable claim for negligent hiring and supervision, Plaintiff must provide the Court with specific facts showing that Father Kapoun posed a foreseeable harm to others in discharge of his employment duties. Minn R.Civ. Pro. 56.05; Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 (Minn. 1983). As in T.M., Plaintiff here has failed to present any specific

facts showing that the Archdiocese knew, should have known or discovered that Father Kapoun committed the alleged acts.

The Court rejects Plaintiff's principal argument that the Catholic Church's general knowledge of the problem of sexual abuse amongst a <u>few</u> members of the clergy, should have put the Archdiocese of St. Paul and Minneapolis on notice that <u>all</u> its priests should be suspect as potential child abusers.

GL

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Plaintiff

-vs-

ROBERT KPOUN personally and
THE CATHOLIC ARCHDIOCESE of
ST. PAUL and MINNEAPOLIS,

Defendant

JUDGMENT

DATE: Oct. 18, 1995

JUDGMENT ROLL

File No. 95-2183

This cause having been regularly placed upon the calendar of the above named Court, came on for hearing on the 5th day of June, 1995, upon motion of Defendants Archdiocese of St. Paul and Minneapolis for Summary Judgment, and the Court, after hearing the arguments of counsel and being advised in the premises, did, on the 13th day of June, 1995, duly make and file its order granting said motion and for judgment herein.

Now, pursuant to said order and on motion of James T. Martin, Esq., Attorney for the Defendants,

IT IS HEREBY ADJUDGED:

1. That Defendants' motion for summary judgment are hereby **GRANTED.**

2. That Plaintiff's claims against Defendant Archdiocese of St. Paul and Minneapolis are hereby dismissed.

3. That judgment is entered in favor of The Catholic Archdiocese of St. Paul and Minneapolis and against Plaintiff for the sum of _____

_____

Dollars for costs.

BY THE COURT
DISTRICT COURT ADMINISTRATOR

BY _____
DEPUTY

STATE OF MINNESOTA

COUNTY OF HENNEPIN

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95 FEB -7 AM 10:23

BY DEPUTY

HENNEPIN CO. DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota and Father Robert Kapoun,

Defendants.

SUMMONS

95-02182

Court Fi[redacted]

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff's attorney an Answer to the Complaint which is herewith served upon you within twenty (20) days after service of this Summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated: 9/15/93

REINHARDT AND ANDERSON

By: Jeffrey R. Anderson, #2057
Karen Kugler, #220462
David S. Burleson, #215776
Attorneys for Plaintiff
E-1400 First Natl Bank Bldg.
332 Minnesota Street
St. Paul, Minnesota 55101
(612) 227-9990

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

ACCEPTANCE OF SERVICE

95-02182

Court File No.: _____

The undersigned, on behalf of Defendant Archdiocese of St. Paul and Minneapolis, hereby admits service of a copy of the Summons and Complaint in the above entitled matter.

Dated: 9/29/95

Andrew J. Eisenzimmer, Esq.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

ACCEPTANCE OF SERVICE

95-02182

Court File No.: _____

The undersigned, on behalf of Defendant Church of St. Raphael in Crystal, Minnesota, hereby admits service of a copy of the Summons and Complaint in the above entitled matter.

Dated: 9/29/93

Andrew D Eisenzimmer, Esq.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
and Father Robert E. Kapoun,

Defendants.

27CV-95-02182

ADMISSION OF SERVICE

THE UNDERSIGNED HEREBY ADMITS DUE SERVICE OF THE SUMMONS AND COMPLAINT IN THE ABOVE CAPTIONED CASE.

September 23, 1993

Robert Kapoun

Robert Kapoun

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M., | Court File No: PI 95-2182

Plaintiff,

vs. | **ORDER**

Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota, and Father Robert Kapoun,

Defendants.

The above-entitled matter came duly on for hearing before the Honorable Gary Larson at the Hennepin County Courthouse in the City of Minneapolis, State of Minnesota, on May 1, 1995, on the Archdiocese' motion for summary judgment. Daniel A. Haws appeared on behalf of the Archdiocese; David Burleson appeared on behalf of Plaintiff.

NOW, THEREFORE, based upon the memoranda of law submitted by the parties, the oral argument made at the hearing on the motion, and upon all of the files, records and proceedings herein,

IT IS HEREBY ORDERED:

The Archdiocese' motion for summary judgment dismissing Plaintiff's claims against it as a matter of law is hereby granted and Plaintiff's claims will be dismissed as a matter of law and on the merits.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

THE HONORABLE GARY LARSON
JUDGE OF DISTRICT COURT

STATE OF MINNESOTA | FILED | DISTRICT COURT

COUNTY OF HENNEPIN | 95 MAR 31 AM 9:53 HENN CO. DISTRICT COURT ADMINISTRATOR | FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota, and Father Robert Kapoun,

Defendants.

Court File No: PI 95-2182

NOTICE OF MOTION AND MOTION

NOTICE OF MOTION

PLEASE TAKE NOTICE, that the undersigned will bring the within motion on for hearing at the Hennepin County Courthouse in the City of Minneapolis, State of Minnesota, before the Honorable Gary Larson, on the 1st day of May, 1995, at 1:30 p.m., or as soon thereafter as counsel can be heard.

MOTION

Pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, Defendant, the Archdiocese, will move the court for summary judgment in its favor on the grounds that Plaintiff's claims based upon respondeat superior must be dismissed as a matter of law on the grounds his claims are barred by the statute of limitations.

Said motion will be made upon all of the files, records and proceedings herein, and upon the Memorandum of Law submitted herewith.

DATED: March 30, 1995.

MURNANE, CONLIN, WHITE & BRANDT
PROFESSIONAL ASSOCIATION

By: _____

Daniel A. Haws #193501
Attorneys for Archdiocese
1800 Piper Jaffray Plaza
444 Cedar Street
St. Paul, MN 55101
(612) 227-9411

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE BY UNITED STATES MAIL

Victoria E. Bauer, being first duly sworn, deposes and states that on the 30th day of March, 1995, she served the attached Notice of Motion and Motion, Archdiocese' Memorandum of Law in Support of Summary Judgment, Affidavit of Daniel A. Haws, and proposed Order upon:

DAVID S BURLESON ESQ
E-1400 FIRST NATIONAL BANK BLDG
332 MINNESOTA STREET
ST PAUL MN 55101

JOSEPH M STOCCO ESQ
STICH & ANGELL
250 SECOND AVENUE S
SUITE 120
MINNEAPOLIS MN 55401

FREDERICK C BROWN ESQ
POPHAIM HAIK
SUITE 3300
222 SOUTH NINTH STREET
MINNEAPOLIS MN 55402

by depositing true and correct copies thereof in the United States Mail with postage prepaid thereon.

Victoria E. Bauer

Victoria E. Bauer

On this 30th day of March, 1995, before me a Notary Public within and for said County, personally appeared Victoria E. Bauer, to me known to be the person described in and who executed the foregoing affidavit of service and acknowledged that she executed the same as her free act and deed.

Brenda E. Snyder

Notary Public

BRENDA E. SNYDER
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Jan. 31, 2000

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

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HENN. CO. DISTRICT COURT
COURT ADMINISTRATOR

BY DEPUTY

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota, and Father Robert Kapoun,

Defendants.

Court File No: PI 95-2182

AFFIDAVIT OF DANIEL A. HAWS

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

Daniel A. Haws, being first duly sworn, states as follows:

1. That he is one of the attorneys representing the Archdiocese in this matter.

2. That attached hereto as Exhibit A are the pertinent pages of the deposition of the plaintiff, [redacted]

3. That attached hereto as Exhibit B is a copy of the Complaint of the Plaintiff which is dated September 15, 1993, and alleges sexual abuse of the plaintiff in June and July of 1973.

FURTHER YOUR AFFIANT SAYETH NOT.

Daniel A. Haws

Subscribed and sworn to before me this 30th day of March, 1995.

Notary Public

VICTORIA E. BAUER
NOTARY PUBLIC-MINNESOTA
DAKOTA COUNTY
My Comm. Expires Jan. 31, 2000

1 P R O C E E D I N G S

2 [redacted]

3 called as a witness, being first duly sworn,

4 was examined and testified as follows:

5 * * *

6 CROSS-EXAMINATION

7 BY MR. HAWS:

8 Q. Could you please state your full name and spell

9 the last name for the record, sir?

10 A. [redacted]

11 Q. How old are you, Mr. [redacted]

12 A. Thirty-five.

13 Q. Date of birth?

14 A. [redacted]

15 Q. And your current address?

16 A. [redacted]

17 Q. Is that a home?

18 A. [redacted]

19 Q.

20 A.

21 Q.

22 A.

23 Q.

24 A.

25 Q.

1 A. I don't remember what I talked to him
2 specifically about. I know he was -- he was
3 aware of it, but in detail, I don't know.
4 Q. You don't know if you told him everything?
5 A. No, sir.
6 Q. How about [redacted] have you told him all of
7 the contacts that you had with Father Kapoun?
8 A. That I can recall, yes.
9 Q. And those are the only two counselors that
10 you've talked to?
11 A. That woman I brought up from the counseling
12 clinic.
13 Q. When these incidents occurred with Father
14 Kapoun, you were 15 years of age, were you?
15 A. Yes, sir.
16 Q. What grade were you in in school?
17 A. Seventh grade, I believe. That's a guess. I'm
18 trying to figure it out.
19 Q. Had you had any sexual contacts with either any
20 males or females prior to --
21 A. No, sir.
22 Q. -- these contacts with Father Kapoun?
23 A. No, sir.
24 Q. None whatsoever?
25 A. No.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

COMPLAINT

Court File No.: _____

Plaintiff, for his cause of action against Defendants alleges that:

PARTIES

1. Plaintiff T.M. is an adult male resident of the State of Minnesota whose identity is made known to Defendants by separate cover letter. Plaintiff T.M. was a minor at the time of all sexual abuse and sexual exploitation alleged herein.

2. At all times material, Defendant Archdiocese of St. Paul and Minneapolis (hereinafter "Archdiocese") was and continues to be a Minnesota non-profit religious corporation, authorized to conduct business and conducting business in the State of Minnesota with its principal place of business at 226 Summit Avenue, St. Paul, Minnesota.

3. At all times material, Defendant Church of St. Raphael (hereinafter "St. Raphael's Parish") was and continues to be a non-profit religious organization authorized to conduct business and conducting business in the State of Minnesota with its principal place of business at 7301 Bass Lake Road, Crystal, Minnesota.

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EXHIBIT B

4. At all times material, Defendant Father Robert E. Kapoun (hereinafter "Father Kapoun") was an adult at the time of the sexual abuse and sexual exploitation alleged herein.

FACTS

5. At all times material, Defendant St. Raphael's Parish was and continues to be under the direct authority, control and province of Defendant Archdiocese.

6. At all times material, Defendant Father Kapoun was a Roman Catholic priest, educated, trained, ordained, and employed by, and remaining under the direct supervision and control of Defendant Archdiocese.

7. At all times material, Defendant Kapoun was contemporaneously employed as an associate pastor, religious instructor, and altar boy supervisor at Defendant St. Raphael's Parish.

8. At all times material, Defendant Father Kapoun's employment duties with Defendants Archdiocese and St. Raphael's Parish included, in part, providing for the spiritual and emotional needs of, and religious instruction for, parishioners.

9. Plaintiff T.M. was raised in a devout Roman Catholic family, was baptized, confirmed, and regularly celebrated mass and received the sacraments through the Roman Catholic Church. As a result, Plaintiff developed great admiration, trust, reverence, and respect for, and obedience to, Roman Catholic priests.

10. From approximately 1966 through 1973, Plaintiff T.M. was an active parishioner at St. Raphael's Parish.

11. In January 1973, Plaintiff's father, a devout Roman Catholic parishioner of St. Raphael's Parish, passed away. Beginning in approximately March 1973, Defendant Father Kapoun befriended the minor Plaintiff in an effort to comfort him due to the loss of his father. Defendant Father Kapoun became a father figure and role model to the minor Plaintiff. Through

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his membership and participation at St. Raphael's Parish, Plaintiff came to know, admire, trust, revere and respect Defendant Father Kapoun, his Catholic priest, mentor and spiritual advisor.

12. From approximately June 1973 through July 1973, when the Plaintiff was a minor, Defendant Father Kapoun sexually molested Plaintiff T.M. while he was entrusted to the care, custody, and control of Defendant Father Kapoun. The sexual abuse was accomplished, in part, because Defendant Father Kapoun befriended the minor parishioner, as his Catholic priest, and requested that he participate in, and perform, in part, fondling and mutual masturbation.

13. The sexual abuse of Plaintiff T.M. and the circumstances under which it occurred caused Plaintiff to develop various psychological coping mechanisms and symptoms of psychological distress, including great shame, guilt, self-blame, depression, repression and disassociation from his experiences. As a result, Plaintiff T.M. was unable to perceive or know the existence or nature of his psychological and emotional injuries and/or their connection to the sexual abuse perpetrated upon him by Defendant Father Kapoun. Only within six years prior to the service of this Complaint has Plaintiff begun to know or have reason to know that Defendant Father Kapoun's wrongful acts caused his injuries. Plaintiff's action is therefore timely pursuant to Minn. Stat. §541.073.

14. As a direct result of the sexual abuse and sexual exploitation, Plaintiff T.M. has suffered and continues to suffer severe and permanent emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, humiliation and psychological injuries, was prevented and will continue to be prevented from performing his normal daily activities and obtaining the full enjoyment of life, and has incurred and will continue to incur expenses for medical and psychological treatment, therapy and counseling.

COUNT I: DEFENDANT FATHER KAPOUN - SEXUAL BATTERY

Plaintiff, for his first cause of action against Defendant Father Kapoun, alleges as follows:

Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

15. From approximately June 1973 through July 1973, when the Plaintiff was a minor, Defendant Father Kapoun engaged in unpermitted, harmful and offensive sexual contact upon the person of the Plaintiff T.M.

16. As a direct result of the sexual battery, Plaintiff has suffered the injuries and damages described herein.

COUNT II: DEFENDANT FATHER KAPOUN - BREACH OF FIDUCIARY DUTY

Plaintiff, for his second cause of action against Defendant Father Kapoun, alleges as follows:

Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

17. By holding himself out as a qualified Roman Catholic priest, religious instructor and counselor, and by undertaking the religious instruction and spiritual and emotional counseling of the Plaintiff T.M., Defendant Father Kapoun entered into a fiduciary relationship with the minor Plaintiff T.M. Defendant Father Kapoun breached his fiduciary duty to the Plaintiff by engaging in the wrongful conduct described herein.

18. As a direct result of Defendant's breach of his fiduciary duties, Plaintiff has suffered the injuries and damages described herein.

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COUNT III: DEFENDANT ARCHDIOCESE - VICARIOUS LIABILITY

Plaintiff, for his first cause of action against Defendant Archdiocese, alleges as follows:

Plaintiff incorporates all paragraphs of this complaint as if fully set forth under this count and further alleges that:

19. At all times material, Defendant Father Kapoun was employed by Defendant Archdiocese. Defendant Father Kapoun was under Defendant's direct supervision and control when he committed the wrongful acts described herein. Defendant Father Kapoun engaged in this conduct while in the course and scope of his employment with Defendant Archdiocese and/or accomplished the sexual abuse by virtue of his job-created authority and therefore, this Defendant is liable for the wrongful conduct of Defendant Father Kapoun under the law of vicarious liability, including the doctrine of respondeat superior.

COUNT IV: DEFENDANT ST. RAPHAEL'S PARISH - VICARIOUS LIABILITY

Plaintiff, for his first cause of action against Defendant St. Raphael's Parish, alleges as follows:

Plaintiff incorporates all paragraphs of this complaint as if fully set forth under this count and further alleges that:

20. At all times material, Defendant Father Kapoun was employed by Defendant St. Raphael's Parish. Defendant Father Kapoun was under Defendant's direct supervision and control when he committed the wrongful acts described herein. Defendant Father Kapoun engaged in this conduct while in the course and scope of his employment with Defendant St. Raphael's Parish and/or accomplished the sexual abuse by virtue of his job-created authority and therefore, this Defendant is liable for the wrongful conduct of Defendant Father Kapoun under the law of vicarious liability, including the doctrine of respondeat superior.

OCT 04 1993

WHEREFORE, Plaintiff demands judgement against Defendants individually, jointly and severally in an amount in excess of $50,000 plus costs, disbursements, reasonable attorneys fees, interest, and whatever other relief the Court deems just and equitable.

Dated: 9/15/93

REINHARDT AND ANDERSON

By: Jeffrey R. Anderson, #2057
Karen Kugler, #220462
David S. Burleson, #215776
Attorneys for Plaintiff
E-1400 First Natl Bank Bldg.
332 Minnesota Street
St. Paul, Minnesota 55101
(612) 227-9990

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.21, subdivision 2, to the party against whom the allegations in this pleading are asserted.

Jeffrey R. Anderson, Esq.

OCT 0 1 1993

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

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HENN CO. DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota, and Father Robert Kapoun,

Defendants.

Court File No: PI 95-2182

ARCHDIOCESE' MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

Defendant, the Archdiocese of St. Paul and Minneapolis ("Archdiocese"), submits this memorandum in support of its motion for summary judgment. This cause of action arises out of a claim by T.M. ("Plaintiff") that he was sexually abused by Fr. Robert Kapoun some time during the summer of 1973. Plaintiff alleges the Archdiocese and St. Raphael's parish are liable to him based upon claims of vicarious liability and respondeat superior. (See Plaintiff's Complaint). The Summons and Complaint is dated September 15, 1993.

The Minnesota Court of Appeals has determined that a plaintiff's claims based upon vicarious liability are not tolled by the delayed discovery statute set forth in Minn. Stat. § 541.073. Accordingly, Plaintiff's causes of action accrued on or about the summer of 1973. The statute of limitations for Plaintiff's personal injury claims expired in either 1975 or 1979. Accordingly, the Archdiocese respectfully requests that the court

grant summary judgment dismissing Plaintiff's claims on the grounds that they are barred by the statute of limitations.

FACTS

The Plaintiff is currently 36 years old. (See Plaintiff's Depo. p. 4, attached to the Affidavit of Counsel as Exhibit A). He alleges he was sexually abused by Fr. Robert Kapoun between June and July of 1973. (See Plaintiff's Complaint). Plaintiff would have been 15 years old at the time that these alleged incidents occurred. (See Plaintiff's depo. p. 108). Plaintiff did not commence this lawsuit until after September 15, 1993, the date of his Summons and Complaint. (See Plaintiff's Summons and Complaint).

In addition to his claims against Fr. Robert Kapoun, plaintiff alleges that the Archdiocese and St. Raphael are liable to him based upon theories of vicarious liability. (See Plaintiff's Complaint). There are no other allegations made against the Archdiocese. (Id).

ISSUES

I. **WHETHER THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.**

II. **WHETHER PLAINTIFF'S CLAIMS SHOULD BE DISMISSED ON THE GROUNDS THAT PLAINTIFF'S CLAIMS BASED UPON VICARIOUS LIABILITY OR RESPONDEAT SUPERIOR ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.**

DISCUSSION

I. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.

There are no material fact issues which must be determined in resolving the issues which are pertinent to this motion. The court need only to make a determination of the applicable laws that will

resolve the controversy. Where there is no genuine issue of material fact, and a determination of the applicable law will resolve the controversy, summary judgment is appropriate. Gasperd v. Washington County Planning Commission, 252 N.W.2d 590 (Minn. 1977); Minn. R. Civ. P. 56.03.

Minnesota has adopted the United States Supreme Court standard that summary judgment is appropriate if:

> "After adequate time for discovery and upon motion, against the party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of that file. In such a situation, there can be 'no genuine issue as to any material fact,' since the complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts and material."

Carlisle v. City of Minneapolis, 437 N.W.2d 712 (Minn. Ct. App. 1989), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In the present case, the Plaintiff must offer "significant probative evidence intending to support his complaint, discredited testimony is not normally considered a sufficient basis for drawing a contrary conclusion". Carlisle, 437 N.W.2d App. 715. The Plaintiff must show more than "some metaphysical doubt" as to the material fact in issue. Id. "It is incumbent the party opposing a summary judgment motion made on depositions or affidavits to counter with specific facts to raise a jury question." Lundgren v. Eustermann, 370 N.W.2d 877, 881 (Minn. 1985).

In the present case, there is no evidence in dispute for Plaintiff to allege that his claims against the Archdiocese based upon respondeat superior were made within the statute of

limitations. Therefore, summary judgment is appropriate in the present case.

II. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED ON THE GROUNDS THAT PLAINTIFF'S CLAIMS BASED UPON VICARIOUS LIABILITY OR RESPONDEAT SUPERIOR ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

The alleged sexual abuse of Plaintiff occurred in the summer of 1973 when the Plaintiff was 15 years old. Plaintiff did not commence this suite until over 20 years after the alleged abuse ended. (See Plaintiff's Summons and Complaint).

The only claims Plaintiff has made against the Archdiocese are based upon its vicarious liability for the alleged intentional acts and conduct of Fr. Robert Kapoun. In Minnesota, the statute of limitations for intentional acts is set forth in Minn. Stat. § 541.07 subd. 1. This statute requires claims for intentional acts to be brought within two years. See Minn. Stat. § 541.07. However, in sexual abuse claims, the legislature enacted the "delayed discovery" statute of limitations in 1989.

The delayed discovery statute of limitations tolls the running of the statute until such time as the plaintiff "knew or had reason to know that the injury was caused by the sexual abuse." Minn. Stat. § 541.073. This statute specifically applies to:

> "a person who caused the plaintiff's personal injury either by (1) committing a sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur."

Id. (Supp. 1991). There are no claims against the Archdiocese that it either committed sexual abuse or that it was negligent in permitting the sexual abuse against the Plaintiff.

A. The Delayed Discovery Statute of Limitations Does Not Apply to Claims Based Upon Vicarious Liability.

The Minnesota Court of Appeals recently held that the delayed discovery statute of limitations set forth in Minn. Stat. § 541.073 does not apply to claims based upon respondeat superior or vicarious liability. Oelschlager v. Magnuson, ____ N.W.2d ___ (Minn. Ct. App. 1995). In Oelschlager, plaintiff alleged he was sexually abused by a pastor. In a trial, plaintiff received an award of damages for the damages he claimed were caused by the abuse. In post-trial motions, the church argued it was not liable to plaintiff for damages under the theory of respondeat superior. Id. The trial court denied the church's post-trial motion and held the church was liable to plaintiff for damages based upon the theory of respondeat superior. Id. The Court of Appeals reversed the trial court and ruled that the church was not liable to plaintiff for the vicarious liability claims. Id. It states specifically:

> The structure and language of Minn. Stat. § 541.073 expressly limit the persons to whom the statute applies, and designates application to only one variety of actor who has not committed abuse, leaving all others outside its scope. We cannot alter the statute to accommodate the ordinary rule.
>
> Because Appellant's respondeat superior claim is not covered by the delayed discovery statute, the normal limitation period applies and that period expired by the time Appellant commenced his suit against Redeemer [the church]. The trial court was obligated under the law to grant Redeemer's motion for judgment notwithstanding the verdict and to dismiss Appellant's respondeat superior claim.

Id. (emphasis added).

In the present case, the only claims against the Archdiocese

are based upon respondeat superior. Since the Archdiocese can only be liable for the underlying intentional acts of Fr. Robert Kapoun, the "normal limitation period" is either the two-year or six-year statute of limitations set forth in Minn. Stat. §§ 541.05 and 541.07. Both statutes begin running when Plaintiff's cause of action accrues. Id. A cause of action for personal injury accrues when there is "some damage" suffered by the plaintiff. Klempka v. G. D. Searle and Co., 963 F.2d 168 (Eighth Cir. 1992) (interpreting Minnesota law).

In the present case, Plaintiff's cause of action accrued in July of 1973 when he could have maintained a lawsuit. Yet, Plain 2tiff failed to commence this action until over 20 years later, long after the normal statute of limitations expired. Accordingly, this court should dismiss Plaintiff's claims against the Archdiocese in their entirety as a matter of law on the grounds they are time barred by the statute of limitations.

CONCLUSION

Plaintiff's claims against the Archdiocese based upon respondeat superior should be dismissed as a matter of law on the grounds that a delayed discovery statute of limitations in sexual abuse claims does not apply to Plaintiff's claims based upon respondeat superior. Plaintiff's alleged sexual abuse occurred in the summer of 1973. He did not file these claims until over 20 years after the alleged abuse occurred. This is well outside the statute of limitations allowed pursuant to Minn. Stat. §§ 541.05 and 541.07.

DATED: March 30, 1995.

MURNANE, CONLIN, WHITE & BRANDT
PROFESSIONAL ASSOCIATION

By: _____

Daniel A. Haws #193501
Attorneys for Archdiocese
1800 Piper Jaffray Plaza
444 Cedar Street
St. Paul, MN 55101
(612) 227-9411

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

Court File No.: PI 95-2182

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

AFFIDAVIT OF DAVIS S. BURLESON

FILED
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HENNEPIN COUNTY
COURT ADMINISTRATOR

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

DAVID S. BURLESON, ESQ., under oath, deposes and states as follows:

1. I am one of the attorneys representing Plaintiff T.M. in the above-captioned matter and I make this Affidavit in support of Plaintiff's Memorandum in Support of its Motion to Amend the Complaint.

2. Attached and incorporated herein as Exhibit 1 is a true and correct copy of selected pages of the Plaintiff's Deposition in the above-captioned matter.

3. Attached and incorporated herein as Exhibit 2 is a true and correct of copy of the Complaint in the above-captioned matter.

4. Attached and incorporated herein as Exhibit 3 is a true and correct copy of handwritten letters from the parents of two youths to Monsignor Gilligan and to "Your Excellency."

incidents. Please attach copies of all bills or statements to support the claimed medical expenses.

Answer: None

13. If you claim that you have lost any time from work as a result for you injuries, and if you claim that you have suffered wage loss or income loss because of your injuries, please state:

(a) The name and address of your employer;

(b) All dates you were off work;

(c) Your wage rate at that time;

(d) The total amount of wages or income loss claimed by you, and how you compute same.

Answer: For each of A-D None.

14. Set forth the names, addresses, and occupations of any experts that you intend to call as a witness at the time of trial and with respect to each such expert, set forth the following:

(a) A Summary of the opinions and conclusions to which such expert is to testify;

(b) A detailed statement of the factual bases for all such opinions and conclusions;

(c) Whether you have received a written report from such expert and, if so, attach a copy of such report to your answers to these Interrogatories.

Answer: None at this time will supplement.

15. State whether you have been arrested or convicted of any crimes or misdemeanor. If so, state:

(a) The county of each such arrest and conviction;

(b) The date of each such arrest and conviction;

(c) The name under which you were charged;

(d) The nature of the crime of which you were charged or convicted.

[redacted]

16. At any time prior to the date or dates of the incidents involved herein, had you been treated by a doctor, psychiatrist, psychologist, counsellor, or other healthcare professional or facility? If so:

(a) Identify each doctor, psychiatrist, psychologist, counsellor, or other healthcare professional or facility where you were treated or by whom you were treated;

(b) The nature of the injury, or other reason for the treatment received;

(c) Identify all doctors or healthcare professionals or facilities who have treated you for such aggravated condition.

Answer: No

17. Identify by name, address, and dates of enrollment all schools that you have attended, and also:

(a) Identify by name, address, and grade all teachers you believe that you had in class during each year of school;

(b) Describe all school records or documents you possess or attach copies of all such school records or documents.

[redacted]

Answer: 17B None

18. List the names, address, and dates of attendance of all churches, synagogues, or places of worship which you have regularly attended, have been a member at, or are a member, and:

(a) Identify the head pastor, priest, rabbi, etc., of each such place of worship'

(b) The time period in which you were a member or regularly attended such place of worship.

Answer: 18 Saint Kevin's Catholic Church, Richfield Minnesota, Father Kapoun, Pastor, worshiped at said church until age 21,

[redacted]

19. List all activities (i.e., Sunday school, youth group, altar service, Bible study, religious schooling or training, etc.) in which you have participated at the place identified in Interrogatory No. 18, and identify the church, the date of involvement, the nature of involvement, and the church staff member or volunteer who supervised such activity.

Answer: Altar Boy 5th-8th grade, at St. Kevin's Catholic Church,

volunteer unknown, Richfield Minnesota.

20. Describe in detail all social, religious, or educational contact you ha e had with Father Kapoun:

(a) Prior to any of the alleged incidents or sexual abuse;

(b) During the time period of the alleged sexual abuse;

(c) After the last act of alleged sexual abuse.

Answer: 20A Defendant took Plaintiff to movies, Plaintiff serve mass with Defendant and Defendant was a friend of Plaintiff's family.

Answer: 20B See 20A

Answer: 20C See 20A

21. Describe the nature and extent of religious training and counselling provided by Father Kapoun to Plaintiff, along with dates of such training and counselling.

Answer: Defendant was Plaintiff's parish priest.

22. Identify all schools or community social clubs, service clubs, or athletic organizations in which you participated or were a member from grade school up until the present time.

23. Identify each person that you, your agents, representatives, or attorneys have contacted, or have been contacted by, who have provided information about alleged inappropriate sexual

contact or behavior by Father Kapoun, either before the dates of the incidents involved herein, or since. As to each such person, state the substance of the facts or information obtained.

Answer: None

24. State whether you, your agents, representatives, or attorneys have obtained statements form any person or persons concerning alleged inappropriate sexual contact or behavior on the part of Father Kapoun or relating to any other issues which are the subject of this litigation. If so, please state:

(a) the name of each person form whom a statement has been obtained;

(b) The name of the person obtaining such statement;

(c) The date of such statement;

(d) The name of the person currently having possession of such statement or a copy thereof.

Answer: None

25. Identify all persons that you have reason to believe are sexual abuse victims of Father Kapoun, including:

(a) The last known name, address, and telephone number of each such victim and his/her guardian;

(b) The approximate dates on which each such victim was allegedly abused;

(c) The places at which each such victim was allegedly

abused;

(d) The name and address of each known witness to such alleged abuse.

[redacted]

26. State the name and address of all persons known to you or your attorneys who have either reported sexual abuse or have received direct reports of sexual abuse by Father Kapoun including:

(a) Name, address, and telephone number of each such persons and his/her guardian;

(b) The dates on which each such information was reported or received'

(c) The dates of which the sexual abuse allegedly occurred;

(d) The places in which the sexual abuse allegedly occurred;

(e) The nature of each sexual abuse alleged.

Answer: None

27. State in chronological order all addresses where you have lived during the past 20 years.

[redacted]

28. Describe by date, location, and the persons involved, all instruction or direction received (prior to or during the time period of the alleged sexual abuse) from family, church, school, or friends on reproduction, sexual activity, or sexual intercourse.

Answer: None

29. Describe the extent or nature of all sexual activity, whether homosexual or heterosexual, and whether initiated by yourself or someone else, you have experienced:

(a) Prior to any social contact with Father Kapoun;

(b) After being acquainted with Father Kapoun, but prior to any alleged sexual abuse by Father Kapoun;

(c) During the time period of sexual abuse by Father Kapoun;

(d) After the alleged sexual abuse by Father Kapoun to the present.

[redacted]

30. Set forth in detail an itemized list of all payments related to the injury or disability in question made to the Plaintiff, or on the Plaintiff's behalf by or pursuant to any health insurance or disability insurance carrier.

Answer: None

31. With regard to the payments referred to in your answers to the preceding Interrogatory, set forth a list of all such payments for which a subrogation right has been asserted.

Answer: None

32. Identify each and every exhibit which you intend to introduce at the time of trial.

Answer: None at this time, will supplement.

33. Have you previously made claims against any other persons in which you have alleged that you were sexually or physically abused or exploited? If so, set forth the following:

(a) Whether such claims were included in any lawsuit and, if so, the venue of such action, the names of the parties to such action, and the date of commencement of such action and the names and addresses of the attorneys representing all parties in said action and the outcome of such action.

Answer: No

34. Describe your employment history from the time which you last attended high school or college up through the present and, in connection with each such employment position, state the following:

(a) The period of employment;

(b) The name and address of the employer;

(c) The name and address of your supervisor;

(d) The reason or reasons for terminating such employment.

[redacted]

9/25/94
Date

[redacted]

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3

4 - - - - - - - - - - - - -

5 D.M.,

6 Plaintiff,

7 vs. File No.

8 FATHER ROBERT KAPOUN, CHURCH OF
ST. RAPHAEL in Crystal, Minnesota,
9 and THE ARCHDIOCESE OF ST. PAUL
AND MINNEAPOLIS,

10 Defendants.

11

12 - - - - - - - - - - - - -

13

14 Deposition of FATHER ROBERT KAPOUN, taken

15 pursuant to Notice of Taking Deposition, and taken

16 before Gary W. Hermes, a Notary Public in and for the

17 County of Ramsey, State of Minnesota, on the 25th day

18 of July, 1989, at E-1400 First National Bank St.

19 Paul, Minnesota commencing at approximately 9:10

20 o'clock a.m.

21

22

23

24 AFFILIATED COURT REPORTERS
743 NORWEST BANK MIDLAND
25 MINNEAPOLIS, MN 338-4348

COPY

1 A. Yes.
2 Q. What was the reason for those meetings?
3 A. To discuss an assignment.
4 Q. Did Archbishop Roach ever ask you about the T.M.
5 situation?
6 A. Never.
7 Q. Did he ever make reference to what's been identified
8 as Exhibit 1, the statement of T.M. taken by
9 Monsignor Srnec?
10 A. Never.
11 Q. Did he ever give you any indication he had ever
12 received a report alleging sexual misconduct by you?
13 MR. BROWN: Again, we're talking about the
14 timeframe concluding on March 31, 1975, is that
15 correct?
16 MR. ANDERSON: Yes.
17 A. Never.
18 Q. (By Mr. Anderson) Okay. And you had no knowledge
19 then prior to March 31st, 1975, that Monsignor had
20 reported this to Archbishop Roach, isn't that
21 correct?
22 A. That's right.
23 Q. Did Monsignor Srnec ever give you any indication that
24 he had received a report about you prior to March
25 31st, 1975, concerning sexual misconduct?

1 A. Never.
2 Q. You agree, do you not, having read Exhibit 1, that
3 this is a report of sexual misconduct, true or not?
4 It is a report, is it not?
5 A. Yes.
6 Q. Now, Monsignor Srnec has testified that in or around
7 the first week in September of '73 he brought this to
8 Archbishop Roach and he took the statement August
9 30th. Let me ask this question. Do you remember
10 what you were doing in late August, early September
11 of 1973?
12 A. No.
13 Q. You weren't on vacation, were you?
14 A. Not -- I don't know.
15 Q. Now, do you have any recollection of Monsignor Srnec
16 in any way changing his attitude or his demeanor
17 towards you in the fall of 1973?
18 A. No.
19 Q. How did you get along with him?
20 A. Fine.
21 Q. How about Father Wajda, how did you get along with
22 him?
23 A. Fine.
24 Q. Did Monsignor Srnec in any way ever make any attempt
25 after August 31st of 1973, attempt to restrict you in

1 your contact with youth?
2 A. Never.
3 Q. Has anybody ever?
4 MR. BROWN: Objection. Up till March 31,
5 1975, I'll permit him to answer, but anything beyond
6 that is irrelevant and immaterial.
7 MR. HAWS: Join in the objection.
8 Q. (By Mr. Anderson) My first question remains, has
9 anybody ever restricted you in your pastoral duties
10 and responsibilities in your contact with youth?
11 MR. BROWN: Objection as previously stated,
12 irrelevant and immaterial for anything beyond March
13 31, 1975.
14 Q. (By Mr. Anderson) And then prior to March 31st, 1975,
15 had anybody at any time ever restricted you or
16 limited you in your contact with youth in any
17 context?
18 A. Never.
19 Q. Did you ever talk on any occasion with D.M. about
20 Father Wajda?
21 A. Never.
22 Q. When did you learn that D.M. had made a claim that
23 Father Wajda at some point engaged him in sexual
24 misconduct?
25 MR. BROWN: I'm going to object to the

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3

4 - - - - - - - - - - - -

5 D.M.,

6 Plaintiff,

7 vs. File No.

8 FATHER ROBERT KAPOUN,
CHURCH OF ST. RAPHAEL
9 in Crystal, Minnesota,
and the ARCHDIOCESE OF
10 ST. PAUL AND MINNEAPOLIS,

11 Defendants.

12 - - - - - - - - - - - -

13

14 Deposition of MONSIGNOR STANLEY J. SRNEC,

15 taken pursuant to Notice of Taking Deposition, and

16 taken before Gary W. Hermes, a Notary Public in and

17 for the County of Ramsey, State of Minnesota, on the

18 7th day of July, 1989, at E-1400 First National Bank,

19 St. Paul, Minnesota, commencing at approximately 9:40

20 o'clock a.m.

21

22

23

24 AFFILIATED COURT REPORTERS
743 NORWEST BANK MIDLAND
25 MINNEAPOLIS, MN 338-4348

COPY

1 I don't recall it for certain.
2 Q. When you talked to T.M. on the occasion that you took
3 this statement, how was T.M.'s demeanor? Did he
4 cry? How would you describe his demeanor?
5 A. He was composed. It was obviously a difficult matter
6 for him to discuss, but he didn't seem to block at
7 any point when I asked questions.
8 Q. Okay.
9 A. I felt asking questions was easier for me to get
10 information than simply to have him volunteer
11 something. I wanted details.
12 Q. Looking at the last paragraph, Father, it states, "I
13 told this to Father Srnec Thursday afternoon, August
14 30th, 1973." Would that then be the date that you
15 talked to him and he gave you this statement?
16 A. Yes, August 30th.
17 Q. Father, the copy that I have before me, if I can draw
18 your attention to the first page, is not very good,
19 and if you look at the last line, can you read that
20 first couple words?
21 A. No. No. I can't read that either. "Went in
22 with" --
23 MR. EISENZIMMER: Without suits?
24 A. -- "without suits."
25 Q. (By Mr. Anderson) Now, before you received the

1 then Bishop Roach because he was the head of
2 personnel and, therefore, in your judgment at least
3 at that time, the proper person to receive this
4 information?
5 A. Yes, I felt that as head of personnel that he would
6 be the one who would have to make some kind of
7 inquiry, if he decided to do so.
8 Q. So how soon after you left the T.R. home after you
9 received this information from T.M. did you make the
10 appointment with Bishop Roach?
11 A. I think it might have been within two weeks, but I'm
12 not sure, I didn't keep a log.
13 Q. Did you meet with Bishop Roach?
14 A. I met with Bishop Roach.
15 Q. Where?
16 A. In his office at the Chancery.
17 Q. And that's the same Chancery that -- is it now on
18 Summit Avenue?
19 A. That's the same Chancery building.
20 Q. Before you met with then Bishop Roach, did you
21 discuss this matter with anybody else?
22 A. No, I did not discuss this with anybody before or
23 after I met with Bishop Roach.
24 Q. Before you met with Bishop Roach, you kept your own
25 counsel on this and didn't discuss it with anybody

1 Q. Could you tell me in your own words what happened
2 when you went there?
3 A. I presented him with this transcript, he read it and
4 said, "Well, it might be true and then maybe again it
5 isn't." And I felt I had done my work, I didn't
6 pursue the matter any farther.
7 Q. Did you tell Bishop Roach that in fact you had known
8 or had had some contact with this T.M. before you
9 took the statement?
10 A. Oh, I don't remember that coming up and I don't think
11 that I said that.
12 Q. Did Bishop Roach ask you if you believed T.M. or not?
13 A. No, he did not.
14 Q. Did Bishop Roach ask you if you had any other
15 information of a similar nature regarding Father
16 Kapoun?
17 A. No, he did not.
18 Q. Monsignor, when Bishop Roach said, "This may be true
19 or it may not be" after reading the statement, did he
20 ask you any other questions about the circumstance or
21 the statement?
22 A. I don't remember his asking any questions about it.
23 Q. Monsignor, before you went to Bishop Roach with this
24 information and this statement, do you have any
25 recollection of telling T.M. that you intended to go

1 to the Chancery with it?
2 A. I don't have any recollection of what I told him.
3 I'd have to conjecture that I probably said very
4 little about that because I felt he was a boy and
5 that wouldn't be the kind of person to say that to.
6 But that's conjecture now, I don't remember saying
7 it.
8 Q. At the time that you brought this to Bishop Roach and
9 had the meeting with him in his office in the
10 Chancery, did he ask you if T.M. was having any
11 problems because of this?
12 A. No, Bishop Roach never asked any question like that.
13 Q. Did Bishop Roach during that meeting and as a result
14 of the information you gave him, give you some
15 instruction as to what to do?
16 A. He gave me no instructions.
17 Q. Did he give you any information that he intended to
18 do anything?
19 A. He didn't indicate anything.
20 Q. Did you feel that once you had brought this
21 information to the proper authority; that being then
22 Bishop Roach, that it was then the Chancery's and his
23 responsibility to take further action?
24 A. Yes, I felt that I had done my part and when he said,
25 "Maybe it isn't true," that made me feel that maybe I

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

Court File No.: PI 95-2182

T.M.,

Plaintiff,

vs.

ORDER

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

The above-entitled matter came on for hearing before the Honorable Gary Larson on May 1, 1995, upon Plaintiff's Motion to Amend Complaint. Jeffrey R. Anderson, Esq. and David S. Burleson, Esq. appeared on behalf of Plaintiff; Daniel A. Haws, Esq. appeared on behalf of Defendant Archdiocese of St Paul and Minneapolis; Frederick C. Brown, Esq., appeared on behalf of Defendant Father Robert E. Kapoun; and Joseph M. Stocco, Esq., appeared on behalf of Defendant Church of St. Raphael in Crystal, Minnesota.

Now, therefore, upon the files, records, proceedings and arguments of counsel:

IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion to amend his complaint is granted.

Dated this _____ day of _____, 1995.

The Honorable Gary Larson
Judge of District Court

FILED
APR 17 1995
JACK M. PROVO
DIST. CT. HENN. CO.

FAXED

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

Court File No.: PI 95-2182

PROPOSED
FIRST AMENDED COMPLAINT

Plaintiff, for his cause of action against Defendants alleges that:

PARTIES

1. Plaintiff T.M. is an adult male resident of the State of Minnesota whose identity is made known to Defendants by separate cover letter. Plaintiff T.M. was a minor at the time of all sexual abuse and sexual exploitation alleged herein.

2. At all times material, Defendant Archdiocese of St. Paul and Minneapolis (hereinafter "Archdiocese") was and continues to be a Minnesota non-profit religious corporation, authorized to conduct business and conducting business in the State of Minnesota with its principal place of business at 226 Summit Avenue, St. Paul, Minnesota.

3. At all times material, Defendant Church of St. Raphael (hereinafter "St. Raphael's Parish") was and continues to be a non-profit religious organization authorized to conduct business and conducting business in the State of Minnesota with its principal place of business at 7301 Bass Lake Road, Crystal, Minnesota.

4. At all times material, Defendant Father Robert E. Kapoun (hereinafter "Father Kapoun") was an adult at the time of the sexual abuse and sexual exploitation alleged herein.

FACTS

5. In 1969, the Defendant Archdiocese received reports concerning the sexual molestation of parish youth by one of its parish priests, namely Father Jerome Kern. The reports included, in part, written correspondence specifically addressed to the Archbishop of Defendant Archdiocese. These written reports stressed concern for the welfare of the children who were molested. Specifically, they indicated to Defendant Archdiocese that the children have been harmed as a result of the sexual molestation by Father Kern and therefore the Defendant Archdiocese should give the matter immediate attention.

6. Prior to 1973, it was common knowledge among the Roman Catholic community in general that the sexual molestation of parish youth by Roman Catholic priests results in serious harm to those youth. In 1969, a facility known for the treatment of wayward priests, the Servants of the Paracletes, located in St. Louis, Missouri, wrote to the Chancellor of the Diocese of Fall River, Massachusetts, stressing the serious harm Father Porter had inflicted upon parish youth. The correspondence further states that many of these sexually abused parish youth "may have suffered harm that will be with them the rest of their lives."

7. At all times material, Defendant Father Kapoun was a Roman Catholic priest, educated, trained, ordained, and employed by, and remaining under the direct supervision and control of Defendant Archdiocese.

8. In approximately 1967, the Archbishop of Defendant Archdiocese re-assigned Father Maday to serve as an associate pastor at St. Kevin's Church in Richfield, Minnesota.

42608

Defendant Father Kapoun's assignment at this parish continued through approximately the summer of 1971. On information and belief, Father Kapoun's employment responsibilities at this parish included, in part, performing masses, hearing confessions, granting absolution, training and supervising altar boys, and providing spiritual instruction and counseling to parishioners.

9. While employed at St. Kevin's Church, Defendant Father Kapoun sexually molested at least two parish youth of that parish. The sexual molestation occurred, in part, while these youth were entrusted to the care, custody, and control of Defendant Father Kapoun. The sexual abuse was accomplished, through Defendant Father Kapoun's role as a Roman Catholic priest, and as such, Defendant Father Kapoun utilized his position of authority to engage these youth in sexual misconduct. From approximately 1969 through 1970, it was common knowledge amongst the male youth at St. Kevin's Church not to be alone in the shower with Defendant Father Kapoun.

10. In approximately the summer of 1971, the Archbishop of Defendant Archdiocese re-assigned Defendant Father Kapoun to serve as an associate pastor at Defendant St. Raphael's Parish. Father Kapoun's assignment at this parish continued until approximately September 1974.

11. At all times material, Defendant St. Raphael's Parish was and continues to be under the direct authority, control and province of Defendant Archdiocese.

12. At all times material, Defendant Father Kapoun was contemporaneously employed as an associate pastor, religious instructor, and altar boy supervisor at Defendant St. Raphael's Parish.

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13. At all times material, Defendant Father Kapoun's employment duties with Defendants Archdiocese and St. Raphael's Parish included, in part, providing for the spiritual and emotional needs of, and religious instruction for, parishioners. This included, in part, caring for parishioner youth who have experienced the loss of a parent.

14. Plaintiff T.M. was raised in a devout Roman Catholic family, was baptized, confirmed, and regularly celebrated mass and received the sacraments through the Roman Catholic Church. As a result, Plaintiff developed great admiration, trust, reverence, and respect for, and obedience to, Roman Catholic priests.

15. From approximately 1966 through 1973, Plaintiff T.M. was an active parishioner at St. Raphael's Parish.

16. In January 1973, Plaintiff's father, a devout Roman Catholic parishioner of St. Raphael's Parish, passed away. Defendant Father Kapoun was the parish priest from Defendant St. Raphael's Parish who presided over the funeral services. Beginning in approximately March 1973, Defendant Father Kapoun befriended and comforted the minor Plaintiff in an effort to provide him with emotional support due to the loss of his father. Defendant Father Kapoun became a father figure and role model to the minor Plaintiff. Through his membership and participation at Defendant St. Raphael's Parish, Plaintiff came to know, admire, trust, revere and respect Defendant Father Kapoun, his Catholic priest, mentor and spiritual advisor.

17. From approximately June 1973 through July 1973, when the Plaintiff was a minor, Defendant Father Kapoun sexually molested Plaintiff T.M. while he was entrusted to the care, custody, and control of Defendant Father Kapoun. The sexual abuse was accomplished, through Defendant Father Kapoun's role as a Roman Catholic priest, and as such, Defendant

Father Kapoun utilized his position of authority to request and convince the minor Plaintiff to participate in, and perform, in part, fondling and mutual masturbation.

18. In August 1973, less than two months following the sexual molestation of the Plaintiff, Monsignor Srnec, pastor of Defendant St. Raphael's Parish, learned of the sexual molestation of Plaintiff by his associate pastor at the time Defendant Father Kapoun. At that time, Monsignor Srnec also learned that Plaintiff was allegedly troubled as result of Defendant Father Kapoun's misconduct. With this knowledge Monsignor Srnec met with then-Bishop Roach (presently Archbishop Roach), then head of personnel for the Archdiocese. Monsignor Srnec presented a statement, taken by Monsignor Srnec, from the Plaintiff to Archbishop Roach. After reading the statement, Archbishop Roach said "well, it might be true and then maybe it isn't." The Archbishop didn't otherwise act.

19. The sexual abuse of Plaintiff T.M. and the circumstances under which it occurred caused Plaintiff to develop various psychological coping mechanisms and symptoms of psychological distress, including great shame, guilt, self-blame, depression, repression and disassociation from his experiences. As a result, Plaintiff T.M. was unable to perceive or know the existence or nature of his psychological and emotional injuries and/or their connection to the sexual abuse perpetrated upon him by Defendant Father Kapoun and their connection to Defendants Archdiocese and St. Raphael's Parish failure to act reasonably toward the victimized Plaintiff/parishioner. Only within six years prior to the service of this Complaint has Plaintiff begun to know or have reason to know that Defendants wrongful acts caused his injuries. Plaintiff's action is therefore timely pursuant to Minn. Stat. §541.073.

20. As a direct result of the sexual abuse and the failure to reasonably act upon learning of the sexual abuse, Plaintiff T.M. has suffered and continues to suffer severe and permanent emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, humiliation and psychological injuries, was prevented and will continue to be prevented from performing his normal daily activities and obtaining the full enjoyment of life, and has incurred and will continue to incur expenses for medical and psychological treatment, therapy and counseling.

COUNT I: DEFENDANT FATHER KAPOUN - SEXUAL BATTERY

Plaintiff, for his first cause of action against Defendant Father Kapoun, alleges as follows:

Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

21. From approximately June 1973 through July 1973, when the Plaintiff was a minor, Defendant Father Kapoun engaged in unpermitted, harmful and offensive sexual contact upon the person of the Plaintiff T.M.

22. As a direct result of the sexual battery, Plaintiff has suffered the injuries and damages described herein.

COUNT II: DEFENDANT FATHER KAPOUN - BREACH OF FIDUCIARY DUTY

Plaintiff, for his second cause of action against Defendant Father Kapoun, alleges as follows:

Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

23. By holding himself out as a qualified Roman Catholic priest, religious instructor, and counselor, and by undertaking the religious instruction and spiritual and emotional counseling of the Plaintiff T.M., Defendant Father Kapoun entered into a fiduciary relationship with the minor Plaintiff T.M. Defendant Father Kapoun breached his fiduciary duty to the Plaintiff by engaging in the wrongful conduct described herein.

24. As a direct result of Defendant's breach of his fiduciary duties, Plaintiff has suffered the injuries and damages described herein.

COUNT III: DEFENDANT ARCHDIOCESE - VICARIOUS LIABILITY

Plaintiff, for his third cause of action against Defendant Archdiocese, alleges as follows:

Plaintiff incorporates all paragraphs of this complaint as if fully set forth under this count and further alleges that:

25. At all times material, Defendant Father Kapoun was employed by Defendant Archdiocese. Defendant Father Kapoun was under Defendant's direct supervision and control when he committed the wrongful acts described herein. Defendant Father Kapoun engaged in this conduct while in the course and scope of his employment with Defendant Archdiocese and/or accomplished the sexual abuse by virtue of his job-created authority and therefore, this

Defendant is liable for the wrongful conduct of Defendant Father Kapoun under the law of vicarious liability, including the doctrine of respondeat superior.

COUNT IV: DEFENDANT ST. RAPHAEL'S PARISH - VICARIOUS LIABILITY

Plaintiff, for his fourth cause of action against Defendant St. Raphael's Parish, alleges as follows:

Plaintiff incorporates all paragraphs of this complaint as if fully set forth under this count and further alleges that:

26. At all times material, Defendant Father Kapoun was employed by Defendant St. Raphael's Parish. Defendant Father Kapoun was under Defendant's direct supervision and control when he committed the wrongful acts described herein. Defendant Father Kapoun engaged in this conduct while in the course and scope of his employment with Defendant St. Raphael's Parish and/or accomplished the sexual abuse by virtue of his job-created authority and therefore, this Defendant is liable for the wrongful conduct of Defendant Father Kapoun under the law of vicarious liability, including the doctrine of respondeat superior.

COUNT V: DEFENDANT ARCHDIOCESE - NEGLIGENCE

Plaintiff, for his fifth cause of action against Defendant Archdiocese, alleges as follows:

Plaintiff incorporates all paragraphs of this complaint as if fully set forth under this count and further alleges that:

27. Defendant Archdiocese by and through their agents, servants and employees should reasonably have known of Defendant Father Kapoun's dangerous and exploitive propensities as a child sexual abuser and/or unfit agent, and despite such knowledge, Defendant Archdiocese negligently continued to employ Defendant Father Kapoun in the position of trust

and authority as a Roman Catholic Priest and associate pastor of St. Raphael's Parish, where he was able to commit the wrongful acts against the Plaintiff. Defendant Archdiocese failed to provide reasonable supervision of Defendant Father Kapoun and failed to provide adequate warning to parishioners, including Plaintiff and his family.

28. Defendant Archdiocese by and through their agents, servants and employees failed to act reasonably upon learning that one of its own parishioner, Plaintiff, was a victim of sexual molestation by one of its own priests, Defendant Father Kapoun. Despite having received direct knowledge of the sexual molestation within months after its occurrence, and despite having understood the harmful effects of this type of molestation, Defendant Archdiocese failed to take reasonable steps to: apprise the minor Plaintiff or his mother of the known harm that results from acts of sexual molestation by priests; provide some type of understanding to the minor Plaintiff or his mother that they should seek out assistance for the harmful effects of the sexual molestation; investigate the matter; restrict Defendant Father Kapoun's interaction with parish youth at Defendant St. Raphael's Parish; terminate Defendant Father Kapoun's assignment at Defendant St. Raphael's Parish; prevent further psychological harm to the parishioner/Plaintiff by the continued exposure of Plaintiff to Defendant Father Kapoun at Defendant St. Raphael's Parish.

29. As a direct result of Defendant Archdiocese's negligence, Plaintiff has suffered the injuries and damages described herein.

COUNT VI: DEFENDANT ST. RAPHAEL'S PARISH - NEGLIGENCE

Plaintiff, for his sixth cause of action against Defendant St. Raphael's Parish, alleges as follows:

Plaintiff incorporates all paragraphs of this complaint as if fully set forth under this count and further alleges that:

30. By establishing and operating a church, encouraging the membership of the minor Plaintiff in this church, and holding the church out to be a safe environment for learning and worship, Defendant St. Raphael's Parish entered into an express and/or implied duty to properly supervise the minor Plaintiff and provide a reasonably safe spiritual environment. Defendant St. Raphael's Parish further assumed this duty by holding Defendant Father Kapoun out to the public, including this minor Plaintiff, as a competent and trustworthy Roman Catholic Priest, religious instructor and counselor of high morals. Defendant St. Raphael's Parish breached this duty by exposing the minor Plaintiff to Defendant Father Kapoun when this Defendant should have known of Father Kapoun's propensity to engage parish youth in sexual misconduct.

31. Defendant St. Raphael's Parish, by and through their agents, servants and employees failed to act reasonably upon learning that one of its own parishioner, Plaintiff, was a victim of sexual molestation by its own associate pastor, Defendant Father Kapoun. Despite having received direct knowledge of the sexual molestation within months after its occurrence, and despite having understood the harmful effects of this type of molestation, Defendant St. Raphael's Parish failed to take reasonable steps to: apprise the minor Plaintiff or his mother of the known harm that results from acts of sexual molestation by priests; provide some type of understanding to the minor Plaintiff or his mother that they should seek out assistance for the

harmful effects of the sexual molestation; further investigate the matter; restrict Defendant Father Kapoun's interaction with parish youth at Defendant St. Raphael's Parish; prevent further psychological harm to the parishioner/Plaintiff by the continued exposure of Plaintiff to Defendant Father Kapoun at Defendant St. Raphael's Parish.

32. As a direct result of Defendants' negligent conduct, Plaintiff has suffered the injuries and damages described herein.

WHEREFORE, Plaintiff demands judgement against Defendants individually, jointly and severally in an amount in excess of $50,000 plus costs, disbursements, reasonable attorneys fees, interest, and whatever other relief the Court deems just and equitable.

Dated: _____ REINHARDT AND ANDERSON

_____
By: Jeffrey R. Anderson, #2057
Mark A. Wendorf, #1021674
David S. Burleson, #215776
Attorneys for Plaintiff
E-1000 First Natl Bank Bldg.
332 Minnesota Street
St. Paul, Minnesota 55101
(612) 227-9990

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.21, subdivision 2, to the party against whom the allegations in this pleading are asserted.

_____
Jeffrey R. Anderson, Esq.

42608

REINHARDT & ANDERSON

Attorneys at Law

E-1000 First National Bank Building
332 Minnesota Street, Saint Paul, Minnesota 55101
Office: 612/227-9990 Fax: 612/297-6543

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FAXED Larson

FILED
APR 17 1995
JACK M. PROVO
DIST. CT. HENN. CO.

April 17, 1995

Court Administrator
Hennepin County Courthouse
1251 Court Tower
Hennepin County Government Center
Minneapolis, Minnesota 55487

VIA FACSIMILE AND U.S. MAIL

Re: T.M. v. Archdiocese of St. Paul and Minneapolis, et al.
Court File No.: PI 95-2182

Dear Sir/Madam:

Enclosed for filing with Plaintiff's Motion to Amend his Complaint, previously filed on this date, is Plaintiff's Proposed Amended Complaint which was inadvertently omitted from the original filing.

By copy of this letter, defense counsel have been served with the same.

Very truly yours,

David S. Burleson

DSB:lrb
enc.
cc: The Honorable Gary Larson (w/enc. via facsimile and U.S. Mail)
Andrew J. Eisenzimmer, Esq. (w/enc. via facsimile and U.S. Mail)
Daniel A. Haws, Esq. (w/enc. via facsimile and U.S. Mail)
Joseph M. Stocco, Esq. (w/enc. via facsimile and U.S. Mail)
Frederick C. Brown, Esq. (w/enc. via facsimile and U.S. Mail)

† Diplomat, National Board of Civil Trial Advocacy
*Also admitted in Wisconsin **Also admitted in Washington, D.C. ††Also admitted in California and Colorado †††Also admitted in Missouri

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED
95 APR 21 PM 12:51
BY DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

Court File No.: PI 95-2182

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

AFFIDAVIT OF DAVIS S. BURLESON

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

DAVID S. BURLESON, ESQ., under oath, deposes and states as follows:

1. I am one of the attorneys representing Plaintiff T.M. in the above-captioned matter and I make this Affidavit in support of Plaintiff's Memorandum in Opposition to Defendants' Joint Motions for Summary Judgment.

2. Attached and incorporated herein as Exhibit A is a true and correct copy of pertinent portions of Defendant Father Kapoun's deposition, taken on 03/07/95.

3. Attached and incorporated herein as Exhibit B is a true and correct copy of pertinent portions of Monsignor Srnec's deposition, taken on 07/07/89.

4. Attached and incorporated herein as Exhibit C is a true and correct copy of Plaintiff's Answers to Defendant Archdiocese Interrogatories.

5. Attached and incorporated herein as Exhibit D is a true and correct copy of pertinent portions of Plaintiff T.M.'s deposition, taken on 05/20/94.

6. Attached and incorporated herein as Exhibit E is a true and correct copy of Plaintiff's Answers to Defendant St. Raphael's Parish Interrogatories.

7. Attached and incorporated herein as Exhibit F is a true and correct copy of Plaintiff's Statement to Monsignor Srnec.

8. Attached and incorporated herein as Exhibit G is a true and correct copy of the Complaint.

9. Attached and incorporated herein as Exhibit H is a true and correct copy of handwritten letters from the parents of two molested youths to Monsignor Gilligan and to "Your Excellency."

10. Attached and incorporated herein as Exhibit I is a true and correct copy of Answer of Defendant, Church of St. Raphael.

11. Attached and incorporated herein as Exhibit J is a true and correct copy of Answer of Defendant, the Archdiocese of St. Paul and Minneapolis.

12. Attached and incorporated herein as Exhibit K is a true and correct copy of Affidavit of Rev. Thomas P. Doyle, O.P.

FURTHER YOUR AFFIANT SAITH NAUGHT.

David S. Burleson, Esq.

Subscribed and sworn to before me
this 21st day of April, 1995.

Notary Public

LESLEY R. BROWN
NOTARY PUBLIC - MINNESOTA
DAKOTA COUNTY
My Commission Expires Jan. 31, 2000

42879

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3 - - - - - - - - - - - - - - - - -
S.M.,

4 Plaintiff,

5 vs.

6 ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS,
7 and FATHER ROBERT E. KAPOUN,

8 Defendants.
- - - - - - - - - - - - - - - - -
9 T.M.,

10 Plaintiff,

11 vs.

12 ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS,
CHURCH OF ST. RAPHAEL in Crystal,
13 Minnesota and FATHER ROBERT E. KAPOUN,

14 Defendants.
- - - - - - - - - - - - - - - - -
15 D.S.,

16 Plaintiff,

17 vs.

18 ARCHDIOCESE OF ST. PAUL AND MINNEAPOLIS,
ST. PATRICK'S CATHOLIC CHURCH,
19 and FATHER ROBERT E. KAPOUN,

20 Defendants.
- - - - - - - - - - - - - - - - -
21 Deposition of FATHER ROBERT E.
KAPOUN, taken pursuant to Notice, and taken
22 before Gary W. Hermes, a Notary Public in and
for the County of Ramsey, State of Minnesota,
23 on the 7th day of March, 1995, at E-1000 First
National Bank, St. Paul, Minnesota, commencing
24 at approximately 9:00 o'clock a.m.

AFFILIATED COURT REPORTERS
25 741 NORWEST BANK MIDLAND
MINNEAPOLIS, MN 338-4348

COPY

1 P R O C E E D I N G S

2 FATHER ROBERT E. KAPOUN,

3 called as a witness, being first duly sworn,

4 was examined and testified as follows:

5 * * *

6 CROSS-EXAMINATION

7 BY MR. ANDERSON:

8 Q. Father, would you please state your full name

9 for the record?

10 A. Robert Kapoun.

11 Q. As you know, my name is Jeff Anderson, I've had

12 occasion to have taken your deposition before?

13 A. Yes.

14 Q. And you understand that each of the questions

15 that I ask and the answers that you give are

16 being recorded?

17 A. Yes.

18 Q. If you don't understand any of the questions

19 that I do ask, just let me know --

20 A. Okay.

21 Q. -- and I'll clarify it for you.

22 Do you know the exact date of your

23 ordination?

24 A. It was February 22nd, 1964.

25 Q. And who presided at your ordination?

1 STATE OF MINNESOTA IN DISTRICT COURT

2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3

4 - - - - - - - - - - - -

5 D.M.,

6 Plaintiff,

7 vs. File No.

8 FATHER ROBERT KAPOUN,
CHURCH OF ST. RAPHAEL
9 in Crystal, Minnesota,
and the ARCHDIOCESE OF
10 ST. PAUL AND MINNEAPOLIS,

11 Defendants.

12 - - - - - - - - - - - -

13

14 Deposition of MONSIGNOR STANLEY J. SRNEC,
15 taken pursuant to Notice of Taking Deposition, and
16 taken before Gary W. Hermes, a Notary Public in and
17 for the County of Ramsey, State of Minnesota, on the
18 7th day of July, 1989, at E-1400 First National Bank,
19 St. Paul, Minnesota, commencing at approximately 9:40
20 o'clock a.m.

21

22

23

24 AFFILIATED COURT REPORTERS
743 NORWEST BANK MIDLAND
25 MINNEAPOLIS, MN 338-4348

COPY

1 A. There were several. There was Father Alexander. I
2 don't honestly remember because there were several of
3 them in that interval.
4 Q. Sure, I understand. In terms of the physical plant
5 at St. Raphael, has it pretty much been the same, the
6 church with the rectory?
7 A. It's been that since 1961.
8 Q. First I want to ask you some questions here this
9 morning, Monsignor, concerning Father Kapoun and his
10 arrival there. Do you know when it was he first
11 arrived at St. Raphael?
12 A. I went to look this up last night and as far as I can
13 tell, he reported to St. Raphael June 15th, 1971.
14 Q. Do you remember if that was one of his first pastoral
15 assignments?
16 A. That was not. That was his third pastoral
17 assignment.
18 Q. And do you have a recollection of where he served
19 immediately before he reported to St. Raphael's?
20 A. My recollection is that he was at the Church of St.
21 Kevin in Minneapolis.
22 Q. And he came there June the 15th, 1971, or thereabouts
23 as an associate pastor under you?
24 A. He came at that time.
25 Q. Do you remember if there were any other associates

1 A. I do not know.

2 Q. How long did Father Kapoun after August of 1973

3 remain an associate at St. Raphael?

4 A. I'm not sure. I think you can get that information

5 from the Chancery. My best guess is that he was

6 there to about September of '74, but I could be

7 mistaken.

8 Q. Did he continue after, let's say, August of 1973

9 through the rest of his tenure there, be it September

10 '74 or whatever, did he continue to have the usual

11 youth contact that the associate pastor would have at

12 St. Raphael?

13 A. Yes, I did not restrict him and I was not aware that

14 he was operating under any restrictions.

15 Q. So that would include working with servers?

16 A. Working with mass servers, working with kids in

17 school in the CCD program.

18 Q. And those are things that Father Kapoun had done

19 while at St. Raphael and continued to do through his

20 tenure there?

21 A. That was part of his responsibility.

22 Q. Okay. Do you know if Father Kapoun brought the youth

23 on any particular, for example servers, on retreats

24 or anything of that kind during his service at St.

25 Raphael?

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

ANSWERS TO INTERROGATORIES

Court File No.: _____

TO: Defendant Archdiocese of St. Paul and Minneapolis and its attorneys, Daniel A. Haws, 1800 Meritor Tower, 444 Cedar Street, St. Paul, MN 55101 and Andrew J. Eisenzimmer, Suite 2200, North Central Life Tower, 445 Minnesota Street, St. Paul, MN 55101

Plaintiff, for his answers to Defendant Archdiocese's Interrogatories, states under oath as follows:

1. State your full name, age, date of birth, weight, height, present residential address, marital status and Social security number.

ANSWER:

[redacted]

30559

2. State your business, occupation or vocation on the date of the incidents involved herein. Identify the employer and the date you started this employment.

ANSWER:

3. State your current business, occupation or vocation. Identify your present employer, the date you started this employment, and describe in detail the type of work that you do.

ANSWER:

4. Please describe in reasonable detail each incident of sexual contact alleged to have occurred between you and Father Robert Kapoun, including:

a) As accurately as possible, the date of each incident;

(b) Where each incident occurred;

(c) A description of the circumstances or events leading up to each incident;

(d) Whether any physical contact occurred, and if so, a description of same.

ANSWER:

a. Due to the amount of time that has passed since the sexual abuse occurred, Plaintiff is unable to recall the specific dates of abuse.

Plaintiff recalls that he was sexually abused from approximately the spring of 1973 through the summer of 1973 by Defendant Robert Kapoun.

b. The sexual abuse occurred at Father Kapoun's parent's house and at a Wisconsin lake home. Also see Plaintiff's statement to Monsignor Srnec dated August 30, 1973.

c. Plaintiff recalls the first incident of abuse occurring while Father Kapoun was supervising the minor Plaintiff in what was believed to be Father Kapoun's

parent's home. Father Kapoun and Plaintiff worked out in the gym and afterwards Father Kapoun encouraged Plaintiff to take a shower with him.

Another incident of abuse occurred while Defendant Father Kapoun was supervising the minor Plainitiff on a fishing trip. Father Kapoun invited the Plaintiff to accompany him on a fishing trip in Wisconsin. The lake home was very secluded. While at the lake, Plaintiff and Father Kapoun did not fish, rather Defendant Father Kapoun encouraged the Plaintiff to go skinny dipping with him in the lake.

Also there was an occasion of abuse which occurred while swimming at the pool located at St. Thomas, a description of which is provided in Plaintiff's statement to Monsignor Srnec dated August 30, 1973.

d. On the first incident of abuse, which occurred after the two had exercised, Father Kapoun suggested to Plaintiff that Plaintiff take a shower at which time Defendant Kapoun got into the shower with Plaintiff. Thereafter, Defendant Father Kapoun then began fondling the Plaintiff's genitals. Father Kapoun also took Plaintiff's hand and placed it on Defendant Father Kapoun's genitals.

Following the first incident of abuse, Defendant Father Kapoun continued to call Plaintiff requesting that he accompany him on various outings. On one of these occassions, Father Kapoun invited Plaintiff to go fishing with him in Wisconsin.

While swimming at the lake on the fishing trip, Defendant Father Kapoun repeatedly rubbed his body up against Plaintiff's, fondling Plaintiff's genitals and attempting to force Plaintiff to touch Father Kapoun's genitals.

Father Kapoun also fondled Plaintiff's genitals while swimming at St. Thomas, as previously described in Plaintiff's statement to Monsignor Srnec dated August 30, 1973.

5. Prior to the incidents described previously herein, did you have any evidence, awareness, knowledge, or suspicion of a propensity or tendency on the part of Father Robert Kapoun to engage in sexual contact with persons of either sex? If so, please describe the basis for your awareness, knowledge, or suspicion, and identify all persons who provided such information to you, or otherwise were a source of said information.

ANSWER:

None other than Plaintiff now recalls that Father Kapoun would often discuss with Plaintiff and his mother that priests should be permitted to marry.

30559

[redacted]

21. List the names, addresses and dates of attendance of all churches, synagogues or places of worship which you have regularly attended, have been a member, or are a member, and:

(a) Identify the head pastor, priest, rabbi, etc. of each such place of religious worship;

(b) The time period in which you were a member or regularly attended such place of worship.

ANSWER:

St. Raphael Church
7301 Bass Lake Road
Crystal, Minnesota
a. Father Srnec
b. Approximately 1966 through 1974

22. List all activities (i.e.. Sunday school, youth group, altar service, bible study, religious schooling or training, etc.) in which you have participated at the places identified in Interrogatory No. 19, and identify the church, the date of involvement, the nature of involvement and the church staff member or volunteer who supervised such activity.

ANSWER:

Plaintiff objects to this Interrogatory in that it refers to Interrogatory No. 19. Notwithstanding said objection, Plaintiff believes that Defendant meant to refer Plaintiff to Interrogatory No. 21, and in reponse, Plaintiff made his first communion and confirmation at St. Raphaels as well as attending weekly mass from approximately 1968

to 1973. Plaintiff also spent time with Father Kapoun, as Father Kapoun was Plaintiff's Catholic priest, spiritual advisor and mentor.

23. Describe in detail all social, religious and educational contact you had with Father Robert Kapoun:

(a) Prior to any of the alleged incidents or sexual abuse;

(b) During the time period of this alleged sexual abuse; and

(c) After the last act alleged sexual abuse.

ANSWER:

a. Plaintiff's parish priest.
b. After Plaintiff's father died, Father Kapoun, under the guise of assisting the Plaintiff to deal with his father's death, called Plaintiff on a weekly basis and took him bowling and swimming. On a couple of occasions Father Kapoun invited Plaintiff to stay overnight at his cottage. Father Kapoun also invited Plaintiff to accompany him, and Plaintiff did accompany him, on many other recreational outings. On these occasions, Defendant Father Kapoun would pick Plaintiff up at his home and some occasions would have coffee and visit with Plaintiff and his mother. Father Kapoun also counselled Plaintiff on various family issues, including sexual matters, and became a father figure to Plaintiff.
c. Plaintiff's parish priest.

24. Describe the nature and extent of the religious training and counseling provided by Father Kapoun to plaintiff, along with the dates of such training and counseling.

ANSWER:

In 1973, Father Kapoun counselled Plaintiff on how to deal with his father's death and counselled Plaintiff on sexual issues.

25. All school or community social clubs, service clubs or athletic organizations in which you participated or were a member from grade school up until the present time.

ANSWER:

None.

26. Identify each person that you, your agents, representatives, or attorneys have contacted, or have been contacted by, who have provided information about alleged inappropriate

1 STATE OF MINNESOTA IN DISTRICT COURT
2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
3
4 - - - - - - - - - - - - - - - - - -
5 T.M.,
6 Plaintiff,
7 vs.
8 ARCHDIOCESE OF SAINT PAUL
AND MINNEAPOLIS, and
9 FATHER ROBERT E. KAPOUN,
10 Defendants.
11 - - - - - - - - - - - - - - - - - -
12
13 Deposition of [redacted] taken
14 pursuant to Notice of Taking Deposition, and
15 taken before Gary W. Hermes, a Notary Public in
16 and for the County of Ramsey, State of
17 Minnesota, on the 20th day of May, 1994, at
18 1800 Piper Jaffray Plaza, St. Paul, Minnesota,
19 commencing at approximately 9:10 o'clock a.m.
20
21
22
23
24 AFFILIATED COURT REPORTERS
741 NORWEST BANK MIDLAND
25 MINNEAPOLIS, MN 338-4348

COPY

1 were concerned with, right?
2 A. Yes, sir.
3 Q. Do you know who taught your confirmation
4 classes?
5 A. No.
6 Q. Was it a priest?
7 A. I have no memory.
8 Q. Do you remember who the priests were at St.
9 Raphael's when you were attending with your
10 father and sister?
11 A. Other than Father Kapoun and Srnec, no, I do
12 not.
13 Q. But you do remember those two names?
14 A. Yes, sir.
15 Q. Did you ever have any one-on-one contact with a
16 priest before you met Father Kapoun?
17 A. Not to my knowledge.
18 Q. And what was your first one-on-one contact with
19 a priest?
20 A. To my recollection, it would have been with
21 Father Kapoun.
22 Q. Do you know what that circumstance was?
23 A. No, sir.
24 Q. Do you know when it was?
25 A. After January 13th, 1973, I would think.

1 Q. Had you ever gone to Father Kapoun for problems
2 or sought him out before your father's death?
3 A. Not that I can recall, no.
4 Q. And did you seek him out after your father's
5 death to talk with him?
6 A. He buried my father, and I don't know how it
7 occurred, but kinda like signed up or whatever
8 to volunteer to be like a big brother figure.
9 Q. So you didn't seek him out, somehow he made
10 contact with you after the death of your
11 father?
12 A. Yes, sir.
13 Q. Did you have any particular meetings or
14 anything like that at the time?
15 A. Possibly in my mom's house. I don't know
16 specifically.
17 Q. What things did you start doing with him on a
18 one-on-one basis? Social activities?
19 A. Yeah.
20 Q. I think I've read like bowling and swimming?
21 A. (Nods head.)
22 Q. (Indicating).
23 A. Yes.
24 Q. Had you had confirmation classes by that time?
25 A. I don't know chronologically where that

1 talking about now is [redacted]

2 THE WITNESS: [redacted]

3 MR. BROWN: [redacted]?

4 THE WITNESS: Yeah.

5 MR. BROWN: Off the record.

6 (Discussion off the record.)

7 MR. HAWS: Why don't we take just a

8 couple-minute break here and change gears.

9 MR. BURLESON: Sure.

10 (Recess taken.)

11 Q. (By Mr. Haws) Mr. [redacted], I want to ask you now

12 about some of the incidents with Father Kapoun,

13 and just to start off, I wanted to get clear

14 the first time that you met him. I think you

15 said that that was after he signed up to be a

16 big brother or something like that?

17 A. That's my conception.

18 Q. And then he started taking you on social

19 outings, like bowling and swimming, that kind

20 of thing, right?

21 A. Yes, sir.

22 Q. How long did you know him before there was any

23 kind of sexual contact?

24 A. I don't have a timeframe on that, other than I

25 can say it was within that six-month or

1 three-month period after my dad died.
2 Q. Do you know how many times you would have gone
3 out with him on social outings before the first
4 kind of sexual contact?
5 A. No.
6 Q. No?
7 A. I do not.
8 Q. Would he pick you up at your home to go on
9 those social events?
10 A. Yes.
11 Q. Before any kind of sexual contact, had you ever
12 gone into his office or anything like that?
13 A. It's possible. I don't recall.
14 Q. Don't remember those as you sit here today?
15 A. No.
16 Q. Can you describe for me then what was the first
17 incident where there was some kind of
18 impropriety that you would claim?
19 A. Again, the chronological order of the
20 incidents, I'm not -- I have no -- I believe
21 the first time was at a house, which I believe
22 to be a relative or a parent's in East St.
23 Paul.
24 Q. Of?
25 A. Father Kapoun's.

1 Q. Describe what happened.
2 A. I remember being in an exercise room with
3 different weight machines and running machines
4 and things like that, it was an impressive
5 place for me to see. We exercised, did
6 whatever, then he said we should take a
7 shower. And so I got down, you know, got
8 undressed and got in the shower. I remember
9 him coming into the same shower with me,
10 sitting in a bathtub or in a prone -- I just --
11 it's kind of vague, but I remember him during
12 one point during this contact, he took my hand
13 and put it on his penis. At some point tried
14 to put -- maybe even touched me, just by arm
15 contact, not necessarily hand. It's hard for
16 me to talk about this.
17 Q. I understand it's difficult to talk about, but
18 I'm going to have to ask you to do that.
19 A. I know, I'm giving my recollection.
20 Q. So let me just get clear here. You think that
21 he got into the shower with you?
22 A. Uh huh.
23 Q. (Indicating).
24 A. Yes, sir.
25 Q. And he took your hand and put it upon his

1 A. I can't say that for sure.
2 Q. Got out of the shower, what, dried off, put on
3 your clothes and then he took you home?
4 A. Yes, sir.
5 Q. Nothing happened after being in the shower at
6 that time then?
7 A. No.
8 Q. And you remember doing that, getting dressed
9 and going home right away?
10 A. Yeah.
11 Q. Did you say anything to Father Kapoun when this
12 happened?
13 A. No, sir.
14 Q. Did you say anything after you got out of the
15 shower?
16 A. To my recollection, no.
17 Q. Did he say anything to you?
18 A. Other than like nothing had happened, general
19 conversation, no.
20 Q. Do you remember what happened or when another
21 incident or a next incident occurred?
22 A. The only other thing I remember is a lake home
23 somewhere in Wisconsin.
24 Q. Whose lake home was that?
25 A. I do not know.

1 Q. Relative of his or someone that he took you to?
2 A. Yes.
3 Q. It wasn't any lake home that you were
4 affiliated with?
5 A. No.
6 Q. What happened there?
7 A. I don't remember being in the house. It could
8 have been that we were. I remember the -- the
9 -- we'd gone swimming and that's -- I had my
10 suit or something and he said, "You don't need
11 that here." You know, it was fairly secluded.
12 So I was out swimming around in the middle of
13 the lake and he kept coming up from behind me
14 and I kept trying to avoid him out in the
15 middle of the lake, treading water or
16 whatever. Again, the timeframe during this, I
17 don't know if we were out there for a half hour
18 or ten minutes, I don't know. But I just
19 remember that it -- that it happened then.
20 Q. So you went swimming, both of you were nude?
21 A. Yes.
22 Q. This was at a lake cabin in Wisconsin
23 somewhere?
24 A. Yes, sir.
25 Q. Do you know what town it was near?

1 A. I could not tell you.
2 Q. Was it like an hour drive from the cities or
3 more?
4 A. It probably was more. I -- I don't know. I do
5 not remember.
6 Q. In any event, you're swimming in the lake,
7 neither one of you, neither you nor Father
8 Kapoun, have any clothes on, right?
9 A. Yes, sir.
10 Q. And he would approach you and try to touch you
11 or what?
12 A. Like hug or whatever. Come -- come up from
13 behind me, and because we were naked I felt
14 uncomfortable about it.
15 Q. So did he touch you in any way when he would
16 come up behind you?
17 A. I remember some contact, touching me.
18 Q. With his body, with his hands, what?
19 A. Possibly with his hands and torso. It's hard
20 to think. I remember him coming up from behind
21 and I was -- didn't feel comfortable with that.
22 Q. Do you remember that he touched you anywhere?
23 Was there any sexual contact?
24 A. I believe that he was close enough behind me
25 that I could feel him from behind, his penis

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

ANSWERS TO INTERROGATORIES

Court File No.: _____

TO: Defendant Church of St. Raphael in Crystal, Minnesota and its attorney, Joseph M. Stocco, 2600 Eaganwoods Drive, #450, Eagan, MN 55121

Plaintiff, for his answers to Defendant Church of St. Raphael's Interrogatories states under oath as follows:

1. Please state your full name, date of birth, weight, height, present residential address, Social Security number, and what are, if any, other names you have used or by which you have been known?

ANSWER:

2. Please state your residential addresses for the past five years?

16. Please describe the nature and extent of each and every injury, whether physical or emotional, you claim to have sustained as a result of the incident which is the subject matter of this litigation. Describe any and all injuries you claim you are permanent as a result of the incident or incidents in this litigation, including the nature and extent of each.

ANSWER:

As a result of the sexual abuse by Defendant Father Robert Kapoun, Plaintiff suffers from severe emotional distress accompanied by extreme homophobia. In addition, Plaintiff suffers from shame, humiliation, embarrassment, self-blame, loss of self-esteem, loss of confidence and self worth. Plaintiff also has lost all faith in God and the Catholic Church as well as lost belief in trusting relationships and in people in general.

Plaintiff continues to have difficulty in maintaining relationships and has abstained from having sexual relations since his relationship with his ex-wife ended in approximately 1991. Plaintiff has difficulty in communicating with others resulting in the inability to maintain an intimate relationship.

Discovery is continuing.

17. State in detail what problems, whether physical or emotional, if any, from which you still suffer as a result of the alleged incident. State the names and addresses of anyone who has diagnosed such problems and when they were first diagnosed.

ANSWER:

18. State the name, current address and phone number of every employer for whom you have worked during the past 15 years, including dates of employment, together with appropriate job title and classifications, wage rates and reasons for termination.

ANSWER:

19. Set forth in detail for each incident of claimed sexual contact between Defendant Father Robert Kapoun and Plaintiff, the following:

a. The date and time of each incident;

b. The location;

c. A description of how each sexual contact came about and a complete description of the sexual contact;

d. Provide copies of all documentation containing information with respect to said incidents;

e. If alcohol or drugs were used or consumed by you or Defendant Father Robert Kapoun prior to or in connection with any of the incidents previously described herein, please describe the nature and circumstances of alcohol or drug use leading up to each incident;

f. State whether you were hospitalized as a result of your claimed alleged injuries; if so, state the name and address of the hospital and dates you were hospitalized. For each hospital stay, include the total bill to date for each of the hospitalizations. If you were hospitalized for out-patient care, or received treatment through out-patient hospitalization, include this information in your answer to this Interrogatory.

ANSWER:

a. Due to the amount of time that has passed since the sexual abuse occurred, Plaintiff is unable to recall the specific dates of abuse.

Plaintiff recalls that he was sexually abused from approximately the spring of 1973 through the summer of 1973 by Defendant Robert Kapoun.

b. The sexual abuse occurred at Father Kapoun's parent's house and at a Wisconsin lake home. Also see Plaintiff's statement to Monsignor Srnec dated August 30, 1973.

c. Plaintiff recalls the first incident of abuse occurring while Father Kapoun was supervising the minor Plaintiff in what was believed to be Father Kapoun's parent's home. Father Kapoun and Plaintiff worked out in the gym and afterwards Father Kapoun encouraged Plaintiff to take a shower with him.

Another incident of abuse occurred while Defendant Father Kapoun was supervising the minor Plaintiff on a fishing trip. Father Kapoun invited the Plaintiff to accompany him on a fishing trip in Wisconsin. The lake home was very secluded. While at the lake, Plaintiff and Father Kapoun did not fish, rather Defendant Father Kapoun encouraged the Plaintiff to go skinny dipping with him in the lake.

Also there was an occasion of abuse which occurred while swimming at the pool located at St. Thomas, a description of which is provided in Plaintiff's statement to Monsignor Srnec dated August 30, 1973.

On the first incident of abuse, which occurred after the two had exercised, Father Kapoun suggested to Plaintiff that Plaintiff take a shower at which time Defendant Kapoun got into the shower with Plaintiff. Thereafter, Defendant Father Kapoun then began fondling the Plaintiff's genitals. Father Kapoun also took Plaintiff's hand and placed it on Defendant Father Kapoun's genitals.

Following the first incident of abuse, Defendant Father Kapoun continued to call Plaintiff requesting that he accompany him on various outings. On one of these occasions, Father Kapoun invited Plaintiff to go fishing with him in Wisconsin.

While swimming at the lake on the fishing trip, Defendant Father Kapoun repeatedly rubbed his body up against Plaintiff's, fondling Plaintiff's genitals and attempting to force Plaintiff to touch Father Kapoun's genitals.

Father Kapoun also fondled Plaintiff's genitals while swimming at St. Thomas, as previously described in Plaintiff's statement to Monsignor Smec dated August 30, 1973.

d. See Plaintiff's statement to Monsignor Smec dated August 30, 1973.

e. Plaintiff did not use or consume any alcohol or drugs. Plaintiff is unaware of Father Kapoun's alcohol or drug use.

Discovery is continuing.

f. Please see Answer to Interrogatory No. 10.

20. List and describe all other expenses or losses incurred by you as a result of the alleged incident which is the subject matter of this litigation, not previously enumerated.

ANSWER:

Plaintiff has not yet calculated special damages resulting from the sexual abuse. Discovery is continuing and this Interrogatory will be supplemented prior to trial.

21. If you claim Defendant Church of St. Raphael in Crystal, Minnesota, knew or should have reasonably known of Defendant Father Robert Kapoun's alleged exploitive propensities as a child abuser and/or an unfit agent of the Church of St. Raphael in Crystal, Minnesota, describe in detail all of the facts and information upon which you rely in answering this Interrogatory and identify by name and address all persons having such knowledge or information.

ANSWER:

This Interrogatory is not applicable at this time. This interrogatory will be supplemented should Plaintiff amend complaint to allege such a count.

22. If you are currently married, please state your spouse's name and date of marriage.

ANSWER:

23. If you were previously married, please state the name or names of your spouse(s), their current address and the dates of your marriage. Please also state the names, birth dates and current addresses of all your children, if any.

30818

ANSWER:

[redacted]

24. If you claim the incidents described in your Complaint affected your marriage, please describe such effect in detail.

ANSWER:

Plaintiff now realizes that he suffered from a lack of trust, anger and inability to communicate resulting from the sexual abuse perpetrated on him in approximately 1973 by Defendant Father Robert Kapoun.

25. Referring to paragraph 13 of the Complaint, state with specificity the following:

a. Exactly (date and/or specific event) when Plaintiff claims he first realized or understood that Defendant Father Robert Kapoun had committed a wrongful act.

b. Name and address of every psychiatrist, psychologist, therapist, counselor or other such healthcare professional whom Plaintiff claims assisted him in any way to realize or understand that Defendant Father Robert Kapoun had committed a wrongful act, and/or who assisted Plaintiff to perceive or know the existence or nature of his psychological and emotional injuries and their connection to the wrongful conduct alleged of Defendant Father Robert Kapoun.

ANSWER:

a. Plaintiff objects to Defendant's use of the term "wrongful act," as vague and not relevant to the subject matter of this lawsuit. Notwithstanding this objection, and only in response as to when Plaintiff first realized that he suffered injuries as a result of the sexual contact by Father Kapoun, Plaintiff first made this realization while receiving counseling from Mr. John Brown in November of 1990 and this was in connection with [redacted]

26. At any time prior to or subsequent to the alleged sexual abuse by Defendant Father Robert Kapoun, state whether or not Plaintiff has engaged in any extramarital sexual relationships or activities, including any homosexual, heterosexual or bisexual activities or relationships and, if so, describe the frequency of such activities and state the names of the individuals involved and the dates of such activities.

ANSWER:

No.

Subscribed and sworn to before me this
1 day of February, 1994.

Sandra S. Mathes
Notary Public

30818

Dated: Feb 7th 1994

REINHARDT AND ANDERSON

By: Jeffrey R. Anderson, #2057
David S. Burleson, #215776
Attorneys for Plaintiff
E-1400 First National Bank Bldg.
332 Minnesota Street
St. Paul, Minnesota 55101
(612) 227-9990

30818

The following image(s) may be of poor quality due to the poor quality of the **original**.

DEPOSITION
EXHIBIT
Kapaun #1
7-25-

My father, [redacted] died [redacted]. I met Father Kapaun that day. About two months after this father took me to St. Paul Lanning to swim. Another time we went sip after Easter and swam and took a sauna.

One time, I think it was a Saturday father took me to his house to get his bowling ball. We exercised in the family room in our underwear -- suggested that. Then he told me to go a shower and he came in the shower. Then we dried off + lay down on the floor in the family room and started wrestling. He touched me on the per and took my hand and put it on penis - it was soft. I pulled away, put my shorts on. He dressed too a Then we went bowling. Then he b me home.

Another time we went to the sw and it was closed so we went to Thomas to the pool and went in

[illegible] Father

stopped by me, after we swam a few laps and he touched me. I pulled away and he chased me. He didn't say anything about it. We went home. This was in early June after school was out.

We did something together about twenty times, bowling, swimming, in the time from the middle of March to the middle of July.

In June one time during the week father took me to his place at the lake to pick weeds off the shore, in his day off. He said let's go swimming and I went to the house to get my suit. He said you don't need no suit. He didn't convince me but didn't leave much choice. We went skinny-dipping. I was ahead and he caught up with me and touched me a couple of times. I pulled away and we stopped and went in. He wanted me to stay overnight at his college a couple of times.

In June I went up to our neighbors [illegible] while I was there I started

there again and thought some more. Before I went in August I told my mom about this. She didn't know what to do about it so she went to talk to Mike Leske about it. Mr. Leske told her to talk to Father Lemec. She thought it could be happening to somebody else.

About the last time I was with Father Kigoum was the end of July. After that he had a vacation, he came back Aug. 24 and he'd called or come to see me.

I don't know what I'll do if he comes again. If he wanted to go swimming I'd have to think up some excuse. He never talks about sex. I'm mostly scared and a little bit disgusted and puzzled.

I was born [redacted]

I told this to Father Lemec, this afternoon, Aug 30, 1973. He came to our house to ask, after Mom told him I was scared and wanted to tell him Father said this to me and swear that the statements are true [redacted]

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

COMPLAINT

Court File No.: _____

Plaintiff, for his cause of action against Defendants alleges that:

PARTIES

1. Plaintiff T.M. is an adult male resident of the State of Minnesota whose identity is made known to Defendants by separate cover letter. Plaintiff T.M. was a minor at the time of all sexual abuse and sexual exploitation alleged herein.

2. At all times material, Defendant Archdiocese of St. Paul and Minneapolis (hereinafter "Archdiocese") was and continues to be a Minnesota non-profit religious corporation, authorized to conduct business and conducting business in the State of Minnesota with its principal place of business at 226 Summit Avenue, St. Paul, Minnesota.

3. At all times material, Defendant Church of St. Raphael (hereinafter "St. Raphael's Parish") was and continues to be a non-profit religious organization authorized to conduct business and conducting business in the State of Minnesota with its principal place of business at 7301 Bass Lake Road, Crystal, Minnesota.

26328

4. At all times material, Defendant Father Robert E. Kapoun (hereinafter "Father Kapoun") was an adult at the time of the sexual abuse and sexual exploitation alleged herein.

FACTS

5. At all times material, Defendant St. Raphael's Parish was and continues to be under the direct authority, control and province of Defendant Archdiocese.

6. At all times material, Defendant Father Kapoun was a Roman Catholic priest, educated, trained, ordained, and employed by, and remaining under the direct supervision and control of Defendant Archdiocese.

7. At all times material, Defendant Kapoun was contemporaneously employed as an associate pastor, religious instructor, and altar boy supervisor at Defendant St. Raphael's Parish.

8. At all times material, Defendant Father Kapoun's employment duties with Defendants Archdiocese and St. Raphael's Parish included, in part, providing for the spiritual and emotional needs of, and religious instruction for, parishioners.

9. Plaintiff T.M. was raised in a devout Roman Catholic family, was baptized, confirmed, and regularly celebrated mass and received the sacraments through the Roman Catholic Church. As a result, Plaintiff developed great admiration, trust, reverence, and respect for, and obedience to, Roman Catholic priests.

10. From approximately 1966 through 1973, Plaintiff T.M. was an active parishioner at St. Raphael's Parish.

11. In January 1973, Plaintiff's father, a devout Roman Catholic parishioner of St. Raphael's Parish, passed away. Beginning in approximately March 1973, Defendant Father Kapoun befriended the minor Plaintiff in an effort to comfort him due to the loss of his father. Defendant Father Kapoun became a father figure and role model to the minor Plaintiff. Through

his membership and participation at St. Raphael's Parish, Plaintiff came to know, admire, trust, revere and respect Defendant Father Kapoun, his Catholic priest, mentor and spiritual advisor.

12. From approximately June 1973 through July 1973, when the Plaintiff was a minor, Defendant Father Kapoun sexually molested Plaintiff T.M. while he was entrusted to the care, custody, and control of Defendant Father Kapoun. The sexual abuse was accomplished, in part, because Defendant Father Kapoun befriended the minor parishioner, as his Catholic priest, and requested that he participate in, and perform, in part, fondling and mutual masturbation.

13. The sexual abuse of Plaintiff T.M. and the circumstances under which it occurred caused Plaintiff to develop various psychological coping mechanisms and symptoms of psychological distress, including great shame, guilt, self-blame, depression, repression and disassociation from his experiences. As a result, Plaintiff T.M. was unable to perceive or know the existence or nature of his psychological and emotional injuries and/or their connection to the sexual abuse perpetrated upon him by Defendant Father Kapoun. Only within six years prior to the service of this Complaint has Plaintiff begun to know or have reason to know that Defendant Father Kapoun's wrongful acts caused his injuries. Plaintiff's action is therefore timely pursuant to Minn. Stat. §541.073.

14. As a direct result of the sexual abuse and sexual exploitation, Plaintiff T.M. has suffered and continues to suffer severe and permanent emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, humiliation and psychological injuries, was prevented and will continue to be prevented from performing his normal daily activities and obtaining the full enjoyment of life, and has incurred and will continue to incur expenses for medical and psychological treatment, therapy and counseling.

COUNT I: DEFENDANT FATHER KAPOUN - SEXUAL BATTERY

Plaintiff, for his first cause of action against Defendant Father Kapoun, alleges as follows:

Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

15. From approximately June 1973 through July 1973, when the Plaintiff was a minor, Defendant Father Kapoun engaged in unpermitted, harmful and offensive sexual contact upon the person of the Plaintiff T.M.

16. As a direct result of the sexual battery, Plaintiff has suffered the injuries and damages described herein.

COUNT II: DEFENDANT FATHER KAPOUN - BREACH OF FIDUCIARY DUTY

Plaintiff, for his second cause of action against Defendant Father Kapoun, alleges as follows:

Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

17. By holding himself out as a qualified Roman Catholic priest, religious instructor and counselor, and by undertaking the religious instruction and spiritual and emotional counseling of the Plaintiff T.M., Defendant Father Kapoun entered into a fiduciary relationship with the minor Plaintiff T.M. Defendant Father Kapoun breached his fiduciary duty to the Plaintiff by engaging in the wrongful conduct described herein.

18. As a direct result of Defendant's breach of his fiduciary duties, Plaintiff has suffered the injuries and damages described herein.

COUNT III: DEFENDANT ARCHDIOCESE - VICARIOUS LIABILITY

Plaintiff, for his first cause of action against Defendant Archdiocese, alleges as follows:

Plaintiff incorporates all paragraphs of this complaint as if fully set forth under this count and further alleges that:

19. At all times material, Defendant Father Kapoun was employed by Defendant Archdiocese. Defendant Father Kapoun was under Defendant's direct supervision and control when he committed the wrongful acts described herein. Defendant Father Kapoun engaged in this conduct while in the course and scope of his employment with Defendant Archdiocese and/or accomplished the sexual abuse by virtue of his job-created authority and therefore, this Defendant is liable for the wrongful conduct of Defendant Father Kapoun under the law of vicarious liability, including the doctrine of respondeat superior.

COUNT IV: DEFENDANT ST. RAPHAEL'S PARISH - VICARIOUS LIABILITY

Plaintiff, for his first cause of action against Defendant St. Raphael's Parish, alleges as follows:

Plaintiff incorporates all paragraphs of this complaint as if fully set forth under this count and further alleges that:

20. At all times material, Defendant Father Kapoun was employed by Defendant St. Raphael's Parish. Defendant Father Kapoun was under Defendant's direct supervision and control when he committed the wrongful acts described herein. Defendant Father Kapoun engaged in this conduct while in the course and scope of his employment with Defendant St. Raphael's Parish and/or accomplished the sexual abuse by virtue of his job-created authority and therefore, this Defendant is liable for the wrongful conduct of Defendant Father Kapoun under the law of vicarious liability, including the doctrine of respondeat superior.

WHEREFORE, Plaintiff demands judgement against Defendants individually, jointly and severally in an amount in excess of $50,000 plus costs, disbursements, reasonable attorneys fees, interest, and whatever other relief the Court deems just and equitable.

Dated: 9/14/93

REINHARDT AND ANDERSON

By: Jeffrey R. Anderson, #2057
Karen Kugler, #220462
David S. Burleson, #215776
Attorneys for Plaintiff
E-1400 First Natl Bank Bldg.
332 Minnesota Street
St. Paul, Minnesota 55101
(612) 227-9990

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.21, subdivision 2, to the party against whom the allegations in this pleading are asserted.

Jeffrey R. Anderson, Esq.

26328

The following image(s) may be of poor quality due to the poor quality of the **original**.

(1)

Copy

Saturday Sept

Dear Mensigner Gilligan

Our life has not been an easy one the past 8 years but becaus we have had faith & prayer we have been able to count our blessings in spite of the loss of our husband & father. My four children have been comparative easy to raise — they had a good start from their father. I am very proud of each one of them & their father must be, too.

It has been most disconcert to me to have had a recent intrusion on our family life. I hope you can understand my feeling of incredulity. My instinct to protect my child has never been so challenged.

At the time (insert of the [redacted] related in Mr. & Mrs. [redacted]'s letter) our main thought was what was the best way to handle such a delicate

③
copy

him to.) The [redacted] & I fee
too much time has elapsed
because of circumstances &
we feel this matter must be se
as quickly as possible. It is
becoming increasingly diffic
to live with — I am concerne
for my son's safety as well a
the atmosphere at school ([redacted]
St. Mark's School, has been an
alter boy but has not retur
to those duties since the
incident with Fr. Kern in Ju
I have not influenced him
in any way but let him dec
with only the question, "When
the alter boy meeting?" & t
reply from [redacted], "I don't
know." & at church — if he
returns to the alter boy grou
he could be assigned to ser
Mass for (Fr. Kern) someone about whor
he surely has questions in h
mind — what then? Only one

(4)
copy

mind.

Out of respect to your positio
& experience I am writing for
the [redacted] & myself, to te
you that should you find the
task difficult we are ready
go to Bill Carlson or Roger Conw
where we know cautious but
hurried steps will be taken
to protect our church from
scandal & at the same time
basic worry of this whole
matter will be taken care o
in a most experienced &
discreet manner.

Realizing that the writte
word is easily misinterpreted
I am trusting such will not
the case with this letter. As
mother I am deeply concerne
for my son as well as for ot
vulnerable children.

May I please ask that you
let me know within a very fe
days your progress or lack

(5)

copy

my questions herein are to be
Sincerely
[redacted]

Your Excellency,
The foregoing is a copy of letter mailed to Monsignor Gilli (certified) about Sept. 15th It was writ one week after our initial meeti with Monsignor Gilligan concerni Fr. Kern. The [redacted] have written a letter to you in whi I concur just as they concur when I wrote the above to Ms Gilligan. We have met with Mons again on Sept. 29. He said he he contacted you & is waiting t hear from you. We respect Mons immensely. We told him we were going to contact you ourselve

(6)

in a difficult position by doing
so. He said we are free to do
as we think best & stressed th
fact, which we appreciate, of
your many obligations & duties
in these difficult times. To us
as parents, this is an urgent
matter & thus we have gone
ahead in this further attempt
to have it resolved quickly
We have grown weary at
waiting & trying to handle a
delicate matter so carefully &
are now begging for your
immediate consideration. With al
respect due to those who have
listened & been limited in th
ability to help, would that we
had gone to you at once. Ha
we anticipated the mental ang
brought on by delays, we sure
would have done so.

Respectfully & sincerel

[redacted]

Your Excellency:

It is late to be writing to you about an incident that happened in early July — but back then we never thought it would become necessary to go this length.

We are members of St. Mark's parish and have recounted the story to Monsignor Billigan, who expressed his regrets and said he would contact you in the matter, and has done so by now, but we want to expedite it by putting it to paper. We hope not to offend Monsignor in writing you, but feel such a sense of urgency about it that it must be done with it.

About the last week in June, we were visited by Father Jerome Kern of St. Mark's parish. The visit seemed routine enough — Father had met [redacted] + some of our children a few Sundays previous on the occasion of the beach. Take

tick to pieces. He did, and he hea
sarily, in bits & pieces, the Jakes
account of the afternoon:
Explaining that the 2 bea
with lifeguards were too crow
Father took them to a private
spot not marked for swimm
at Lake Tokomis. The two gir
were happily left to swim by
themselves, largely ignored —
and Father devoted most of t
attention to wrestling with the
girls. On land, he would atta
my son, dare him to "pin" him
But in the water, it was a kind
kind of wrestling — in the dee
water Father's hand slipped
under [redacted]'s suit and over w
genital area — after which t
boy spent most of his tim
trying to avoid him. There a
four other times, Father's h
slipped into the trunks on
the abdomen, but [redacted] so
he'd squirm away, as as he

away & pull it out. He pleaded & cai
& tried to rest on the beach &
Father would drag him by the
neck out into the water again,
or straddled on land. There was
one grab by Father on the outsi
of his trunks, but [redacted] says th
really could. Lane happened
accidentally so he thought the
was nothing ulterior in that
instance.

His friend, [redacted] - he had
one chance out in the water alo
to compare notes. [redacted] had
had the same thing happen
him - he's a husky little guy
and his clothes fit him tigh
- only [redacted] had on jeans,
cut-off, a belt and underpan
In the course of "wrestling".
Father's hand had slipped
inside & over [redacted] genita
organs. He is a stronger
swimmer & he spent all hi
time way out in deep water

So [redacted] who wasn't a strong swimmer, stayed on the beach with his "cold," said he couldn't look at Father's face anymore when he straddled him & thought seriously of gathering his young sister & her friend & just walk off.

His sister, who had to be told something after that day, can she said Father had said after this vacation he would take them again, cried out when we told her something of the problem, "Oh, mother, if only you'd see poor [redacted] trying to come in and Father take him by the neck and carry him off into the water again. She also said when [redacted] would lie on his towel & cover his eyes, Father would move his towel over next to him. She finally understood why, when they both came in the

off, when she said "Wasn't Father nice?!, he'd answered, "Oh, yeah!" So ended an afternoon's ordeal for our son and his friend.

After he'd poured it out to us - our ordeal began. The disillusionment, the delicacy of the matter, the position of the man in the Church, the need to be sure of what had happened that day - we proceeded cautiously.

What followed is too detailed to get into a letter. An insult to our intelligence - Father Kerris attempt to explain away the incident. He'd had a three week vacation by then; and though his know for his excellent memory, it failed him completely on the events of that day. Mrs. Turner and both of us, were rude to him, indignant and, I'm sure offensive. He never took umbrage, never expressed

rather that if we would allow ourselves to "get to know" him & what he thinks, let the boys go swimming again with him he could make us understand. He did not deny the incident. He is a very strange man. Before that evening, I think our hope was that he would be most regretful and offer to seek help for himself. In the three long months that followed, we carried the secret burden with us, to one priest, and another. We received regrets, advice, and, because of the type of incident, a reluctance to deal with it. It is a most unpleasant matter. We could leave him to Heaven, or call the civil authorities, and we seriously considered both.

Father Kern has, in spite of knowing our feelings, called us once to invite to join his Adult Education Class & sen

continues to behave as if our problem is insufficient knowledge of him. The truth is we have all the knowledge of him we want and more.

Our sensibilities are assaulted at the sight of him dispensing the Eucharist, we try to miss his arrogant sermons, his effrontery in badgering us to "get together" is becoming intolerable. Not the least consideration to our minds, is the welfare of the children of the parish — we would not wish them to experience what our son has.

We know there is no redress for our son - but your earliest possible attention to the matter would give us some small solace.

Sincerely,

[redacted]

STATE OF MINNESOTA

COUNTY OF HENNEPIN

IN DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: 11

T.M.,

Plaintiff,

-vs-

Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota, and Father Robert Kapoun,

Defendants.

Court File No. _____

ANSWER OF DEFENDANT, CHURCH OF ST. RAPHAEL, TO PLAINTIFF'S COMPLAINT

Defendant, Church of St. Raphael in Crystal, Minnesota, as and for its Answer to Plaintiff's Complaint, states and alleges as follows:

I.

That except as may be herein or hereinafter admitted, explained, or otherwise answered, this answering Defendant denies each and every matter, allegation, averment, and thing contained in said Complaint.

II.

This answering Defendant is without sufficient knowledge or information at this time to form a belief as to the truth of the allegations contained in paragraphs 1, 5, 6, 8, 9, 10, and 11 of said Complaint.

III.

This answering Defendant admits the allegations contained in paragraphs 2, 3, 4 and 7 of said Complaint.

IV.

This answering Defendant specifically denies the allegations contained in paragraphs 12, 13, 14 and 20 of said Complaint.

V.

As to Counts I, II and III of said Complaint, no response is required by this answering Defendant as said allegations are directed to the Co-Defendants in this action.

AFFIRMATIVE DEFENSES

I.

That as and for a First Affirmative Defense to the Complaint of the Plaintiff herein, this answering Defendant specifically denies that the alleged wrongful conduct of Defendant Kapoun was in the course and scope of his duties and employment as a Roman Catholic Priest assigned by the Archdiocese to the Church of St. Raphael.

II.

That as and for a Second Affirmative Defense to the Complaint of the Plaintiff herein, this answering Defendant states and alleges that the Plaintiff's Complaint fails to state a claim against this answering Defendant upon which relief may be granted.

III.

That as and for a Third Affirmative Defense to the Complaint of the Plaintiff herein, this answering Defendant states and alleges that Plaintiff's Complaint is barred, in whole or in

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
Case Type: 11

T.M., | Court File No:

Plaintiff,

vs. | **ANSWER**

Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota, and Father Robert Kapoun,

Defendants.

Defendant, the Archdiocese of St. Paul and Minneapolis, for its Answer to plaintiff's Complaint:

I.

Denies each and every allegation of the Complaint except as is hereinafter stated, qualified or admitted.

II.

Admits the allegations contained in Paragraphs 2 and 3 of plaintiff's Complaint.

III.

Alleges that it is without sufficient information to admit or deny the allegations contained in Paragraphs 1, 4, and 9 through 13, and therefore, denies same and demands plaintiff be put to his strict proof thereof.

IV.

Specifically denies Paragraphs 5, 6, 8 & 19 of plaintiff's Complaint.

V.

With respect to Paragraph No. 6 of plaintiff's Complaint, admit that Father Kapoun was a Roman Catholic priest, but specifically denies that he was under the direct employ, supervision and control of defendant Archdiocese at any time relevant herein.

VI.

Specifically denies that any sexual misconduct by a Catholic priest is in the course and scope of the duties and employment of a Roman Catholic priest ordained in the Archdiocese, and therefore, denies liability based upon respondeat superior.

VII.

Asserts that the allegations set forth in Counts I, II, and IV of plaintiff's Complaint do not apply to this answering defendant, and therefore it does not respond thereto except as to deny any of the allegations as they may apply to the Archdiocese of St. Paul/Minneapolis.

VIII.

Alleges that if plaintiff was injured or damaged as set forth in his Complaint, that such injuries were caused in whole or in part by his own wrongful conduct or fault, or in whole or in part by the wrongful, negligent or intentional conduct or fault of other persons or entities over whom this answering defendant had no control or right to control for whose conduct this defendant is not liable.

IX.

Alleges that it has insufficient knowledge or information to form a belief as to the nature and extent of any injury or damages suffered by the plaintiff, therefore denies same and places plaintiff to his strict proof thereof.

X.

Alleges that each and every claim made by plaintiff herein against this answering defendant is barred by the applicable statute of limitations set forth in Minn. Stat. § 541.073.

XI.

Alleges that plaintiff's claims and causes of action against this answering defendant are barred by the principle of laches and estoppel.

XII.

Alleges that plaintiff's Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, this answering defendant prays that plaintiff take nothing by his Complaint, that the same be dismissed with prejudice, and that this answering defendant recover costs and disbursements.

Dated this 22nd day of November, 1993.

MURNANE, CONLIN, WHITE & BRANDT
A PROFESSIONAL ASSOCIATION

DANIEL A. HAWS #193501
Attorneys for Archdiocese
1800 Piper Jaffray Plaza
444 Cedar Street
St. Paul, MN 55101
(612) 227-9411

and

MEIER, KENNEDY & QUINN CHARTERED

Andrew J. Eisenzimmer, #26244
Attorneys for Archdiocese
2200 North Central Life Tower
445 Minnesota Street
St. Paul, MN 55101
(612) 223-5483

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.21, Subd. 2, to the party against whom the allegations in this pleading are asserted.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Case Type: 11

A.M.	)	
	)	
Plaintiff	)	
	)	
vs.	)	AFFIDAVIT OF
	)	REV. THOMAS P. DOYLE, O.P.
ARCHDIOCESE OF ST. PAUL	)	
IMMACULATE HEART OF MARY	)	
CHURCH IN MINNETONKA and	)	
FATHER JEROME C. KERN	)	
	)	
Defendants	)	

I, Rev. Thomas P. Doyle, O.P., J.C.D., being first duly sworn, do hereby depose and say:

1. I am a Roman Catholic priest and a member of the Dominican Order. I was ordained a priest in 1970. At the present time I am on active duty with the United States Air Force serving as a chaplain. I am presently Catholic Chaplain at Hurlburt Field, Florida. I reside at 10 Hume Drive, Hurlburt Field, Florida.

2. I hold the following degrees: MA in philosophy, MA in theology, MA in Political Science, MChA in Church Administration, MA in Canon Law and JCD or Doctor of Canon Law. I have held a wide variety of positions in Church Administration, including serving as a judge in the Tribunals of several dioceses and archdioceses and as Secretary-Canonist for the Vatican Embassy, Washington DC. My curriculum Vitae is attached.

3. Since October, 1984 I have been involved in the issue of sexual abuse of persons, especially young people, by Catholic clergy. I have functioned as a Canon Lawyer, presenting workshops and seminars to priests groups on the issue of sexual abuse around the country since 1985. I have had extensive contact with victims of sexual abuse and

their families since 1985. I have had extensive contact with priests accused of sexual abuse as well. I have published articles on this subject and have prepared or assisted in the preparation of policies and guidelines for several Catholic dioceses and religious orders on the subject of dealing with accusations of sexual abuse of children by the clergy. I have also served as a court expert in numerous civil cases involving sexual abuse by the clergy. A list of these cases is attached to my curriculum vitae.

4. The Catholic Church is governed by its own system of law known as Canon Law. The fundamental body of Canon Law is contained in a book known as the Code of Canon Law. Other legislation not contained in the Code but nevertheless binding on either the entire Church or certain parts of the Church is contained in various and sundry official Church publications.

5. The laws of the Catholic Church were first codified in 1917 in the first Code of Canon Law. This version was in force until November 27, 1983 upon which date the second, revised version of the Code of Canon Law went into effect. Events which took place prior to the above mentioned date in 1983 are covered by the canons of the 1917 Code. Action on events which took place prior to Nov. 27, 1983 but which was itself initiated after that date, is covered by the canons of the 1983 Code.

6. In preparation for this affidavit I have used the 1917 Code of Canon Law and the present Code of Canon Law. I have reviewed the following documents pertinent to this case: "Amended Complaint" and "Memorandum of Law in Support of Defendant's Motion for Summary Judgment."

7. I do not know the plaintiff(s) nor the defendants in this case nor have I had any direct or indirect contact with any of them with regard to this case.

8. The alleged incident upon which this case is based is said to have taken place in 1977. Therefore, the pertinent church law is the Code of 1917. Hence, citations to canons

of the Code of Canon Law will be in reference to the canons of the 1917 Code unless otherwise noted.

9. The defendant is a Roman Catholic priest. As such he is always bound by the obligation of chastity which entails refraining from any and all sexual activity with anyone (c. 132). In addition to this, it is correct to say that the calling of a priest is not an employment but a way of life. As such, a prist is never "off duty". He may have specific duties which he fulfills as a priest, such as celebrating religious ceremonies, counseling, teaching etc. But his fundamental obligation as a priest is one that is always with him, whether he is fulfilling specific duties, on vacation or a day off or away from the church or other church institution to which he is assigned. Canon 124 refers to the priest's obligation to lead and teach by example:

> Clerics must live both interiorly and exteriorly a holier life than lay people, and must excel the, in giving the example of virtue and good deeds.

Of this it is said in a noted commentary on Canon law (Canon Law: A Text and Commentary, Bouscaren and Ellis, 1966):

> This is the primary and fundamental obligation of clerics and especially of priests. Their example will be more powerful than their preaching....It would be impossible to list all the documents by which the Apostles and the Supreme Pontiffs [popes] have urged this obligation. p. 108

10. The Ad Altare Dei is an award given by the Boy Scouts of America to Roman Catholic members of the Boy Scouts. It requires that candidates for the award participate in a program of learning and practical application of Roman Catholic principles. The award also requires the involvement of the candidates with a priest to a certain extent. Although a candidate may be a member of a Boy Scout Troop that is not sponsored by a Roman Catholic institution, the candidate nevertheless must seek out a priest to assist him in fulfilling the requirements. In assisting Boy Scouts with regard to this program, a priest is most certainly fulfilling duties that are directly related to his role as a priest. If the Boy Scout Troop is not affiliated with a Catholic parish or other Catholic Institution, it is common for a candidate for the award find a priest to help in a nearby parish or at least

in another parish that is available to him.

11. The subjects of a parish priest include not only those who have domicile or residence within the geographic territory of the parish but also those who come into the parish for some reason such as seeking pastoral or ministerial care (c. 94). Roman Catholic parishes are ordinarily territorial in that they include as their parishioners those who live within the geographic boundaries. The authority or jurisdiction of the pastor and the assistant pastors of the parish includes those who are actually living within the parish or who come to it for some special reason. A priest is responsible for fulfilling his obligations of chastity and giving good example to all who come to him for assistance of whatever kind, whether they are formal members of his parish or not. If a person is seeking the assistance or guidance of a Catholic priest, it has been and continues to be the common custom to first contact a parish since priests are, in the minds of the lay persons, associated with parishes. It is very common for priests in parishes to be sought out for pastoral help by persons who are not technically members of the parish. They are still responsible for maintaining the standards of proper conduct expected of the priesthood no matter where the people are from.

12. In general, pastors and assistant pastors are obliged to what is known in Canon Law and Catholic theology as the "care of souls" in regards to the laity. This term, though poetic sounding, is actually somewhat technical in that it includes all that would enhance or strengthen the spiritual welfare of the lay persons. (canons 464 and 476). By reason of both ordination to the priesthood as well as appointment as a pastor or assistant, a priest has a duty towards all those who are subject to him. This includes those who are properly members of a parish but it also includes all others. There are no hours, specific work locations nor other factors which determine when or where a priest is to fulfill his duties of the "care of souls." This is a long standing tradition in the Catholic Church and is spoken to in countless Church documents. The Vatican Council II spoke of this overall and fundamental obligation in its decree on the "Ministry and Life of Priests," (Dec. 7, 1965):

> And in the building up of the Church priests ought to treat everyone with the greatest kindness after the model of our Lord. They should act towards people not according to what may please men but according to the demands of Christian doctrine and life....Although priests owe service to everybody, the poor and the weaker ones have been committed to their care in a special way...Priests will look after young people with special diligence. (n. 6)

12. Canon Law requires that only qualified men be ordained to the priesthood. The bishop must be certain that the candidates for ordination possess the requisite intellectual and moral qualifications to fulfill their duties and live up to all of the obligations of the priesthood, including and especially the obligation of celibacy. Part of the bishop's duties in his diocese include vigilance over the priests to determine that they are living up to their obligations. Assistant pastors are to be monitored by their pastors so that they fulfill their duties properly and live up to their obligations. In this regard, the pastor is required to send each year a report to the bishop. (c. 476, par. 5-8)

13. The bishop of a diocese or archdiocese has the primary and fundamental authority over all that takes place in his diocese and over all who fulfill any ministerial duties in the diocese. A diocese is not a democratic structure. Power and authority are vested in persons who hold office and not in various and sundry boards or other collegiate bodies. In this regard, the bishop has an obligation towards all in his diocese, priests and laity alike.

> He [the bishop] must watch over the integrity of faith and morals and must see that the people (especially the children and the illiterate are properly instructed in Christian doctrine ... (c. 336)

Instruction in Christian doctrine is understood in its broadest sense, that is, it is not limited to classroom instruction but to a total nurture or formation in Christian doctrine in any setting, formal or informal, in a church or out of a church building. Again, a priest preaches and teaches first and foremost by his example.

14. The bishop of a diocese has almost total control over the priests. He alone can ordain a priest. The bishop alone appoints a priest to a position and removes him.

Because the bishop has total executive, judicial and legislative as well as pastoral authority in a diocese over all of the lay persons, the priests function as extensions of the bishop and act on his authority and not on their own. Thus a bishop is ultimately responsible for the actions of priests in his diocese.

15. Sexual contact with persons in any way is forbidden by reason of a priest's obligation of celibacy. Offenses against this obligation are taken most seriously in Canon Law, especially if these offenses involve young people. In demonstration of this, Canon Law names sexual contact by a priest with a minor under the age of sixteen as a specific ecclesiastical crime (c. 2359. 2). Such an offense can be severely punished with penalties found in Canon Law, including dismissal from the priesthood.

16. In light of the forgoing and within the context of the documentation provided concerning this case, it is my opinion that the alleged act of sexual abuse did in fact occur within the work related duties of Fr. Kern, contrary to the representations in the "Memorandum in Support of Defendant's Motion." Fr. Kern was engaged in the "practice of the priesthood" when the event occurred. There are no specific limitations on when or where a priest is a priest or when he is obligated to fulfill his duties to the faithful. It is clear that Fr. Kern was sought out to help with this particular Ad Altare Dei program because he was a priest serving at Immaculate Heart of Mary Church in Minnetonka.

Thomas P. Doyle O.P. J.C.D.

Thomas P. Doyle, O.P., J.C.D.

STATE OF FLORIDA
COUNTY OF OKALOOSA

The foregoing instrument was acknowledged before me this 12th day of July, 1994 by Thomas P. Doyle ~~who is personally known to me~~ ~~or~~ who has produced Military I. D. as identification and who did not take an oath.

Marianne Mosier

This certificate must be attached to the document described as: Plaintiff Affidavit of Rev Thomas P. Doyle, O.P.

containing 6 page(s).

MARIANNE MOSIER
Notary Public - State of Florida
My Comm. Expires June 3, 1995
Commission # CC 114627

Notary Stamp

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

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HENNEPIN COUNTY DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

Court File No.: PI 95-2182

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

AFFIDAVIT OF DAVID S. BURLESON

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

David S. Burleson, first being duly sworn on oath, deposes and states as follows:

1. I am one of the attorneys representing Plaintiff in the above captioned action and I make this Affidavit in support of Plaintiff's Motion to Amend his Complaint.

2. Attached hereto is a true and correct copy of a letter addressed to Plaintiff's counsel dated February 13, 1995 from another victim of Father Kapoun. Plaintiff's counsel received this letter in approximately the later part of February 1995. Up until the present, Plaintiff has attempted to investigate the subject matter of this correspondence. Specifically, Plaintiff seeks information regarding the reports which were made by this victim in 1972 to at least two individuals: a Roman Catholic brother of the Crosier Seminary, and the victim's mother. If validated, these reports would have been made prior to the molestation of the Plaintiff. Investigation is ongoing.

FURTHER YOUR AFFIANT SAITH NAUGHT.

David S. Burleson, Esq.

Subscribed and sworn to before me this
1st day of May, 1995.

Notary Public

LESLEY R. BROWN
NOTARY PUBLIC - MINNESOTA
DAKOTA COUNTY
My Commission Expires Jan. 31, 2000

2-13-'95

Jeffery R. Anderson
Attorney-at-Law
1400 E. First Nat'l Bank Bld.
St. Paul, MN 55101

[redacted]

In Re: Civil Action against
Rev. Robert Kapoun

Dear Mr. Anderson,

I write this letter to inform you of an incident involving myself & Fr. Kapoun which may be of interest to you.

In the Fall semester of 1972, I was a Freshman at Crosier Seminary in Onamia, MN. My Family, (Parents: [redacted] resided in New Hope MN, & were Members of St Raphael's parish.

During Christmas break in '72, Fr Kapoun invited several of the

Seminary students in St. Raphael's to a swimming party at St. Paul Seminary. At this outing, Fr. Kapoun sexually molested me.

I understand the seriousness & implications of what I write. You would have reason to question the truthfulness of what I say. Therefore, should you desire to use this information in your case, I am willing to submit to a polygraph or any other such examination as you might deem proper under the circumstances.

You may wonder about my motivations in writing this. It is really quite simple. I am a Father now. I could not imagine my own child (or any other) experiencing what I did. Several months after the fact, I told my mother & a good friend (a Cresier Brother) what happened.

They would not listen.

I believe the Catholic church has, in order to protect it's Image, refused to deal with Priests with problems.

I trusted & liked Fr. Kapoun. I was used in the worst possible way. Perhaps you can get the Church to listen.

Most Sincerely [redacted]

P.S. I ask your confidence in this matter. It is not something I am particularly proud of. Should you desire to discuss this matter further, please contact me. I write this in my own hand so you will know the words are my own.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

95 MAY -1 PM 1:23

HENRY C. WILLIAMS JR.
COURT ADMINISTRATOR

DEPUTY

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
CASE Type 11
Court File No.: PI 95 2182

T.M.,

Plaintiff

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal.
Minnesota and Father Robert Kapoun

Defendants

AFFIDAVIT OF [redacted]

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

I, [redacted] being duly sworn under oath, deposes and states as follows:

1. My name is [redacted] I live at [redacted]

2. I was born in [redacted]

[redacted]

4. Father Robert Kapoun was Assistant Pastor during some of my years at St. Kevins.

5. Father Kapoun taught Religion Class. During this class he would invariably turn religous topics

into sexual topics. I vividly recall his interpretation of Communion. He told us that "Communion was the same as having intercourse with Christ." When he told us this he graphically illustrated his point with hand gestures. He would form a circle with the thumb and index finger of one hand.He would insert the index finger of his other hand through the circle. His finger would go in and out of the circle, in and out. Over and over. His speech would speed up, his breathing would grow harder, his nostrils would flare. He would come close to snorting. This made a terrible and long lasting impression on me. It made me anxious and uncomfortable.

6. To this day when I hear Father Kapoun's name, the images of his gestures and his behavior come to mind.

7. I remember talking with my girlfriends about this and how awful it made us feel.

8. Father Kapoun also wanted us to ask him questions about sexual matters. He would get mad if we didn't have any questions.

9. Our male classmates told us that Father Kapoun would watch them take showers and grab their testicles while they were swimming.

10.My brother [redacted] told me that Father Kapoun would have them write down their questions about sex on a piece of paper and then turn that paper over to him.

11. When I was thirteen years old I cleaned the Rectory on Saturdays. One Saturday while cleaning his room I opened the drawer to a bedside table. I saw pieces of scratch paper with questions regarding sexual matters on them. I saw approximately 15 or 20 pieces of paper with questions. I remember one piece of paper had written in a child's handwriting, "What is a wet dream?" I went home and told my Father what I had found. I was disturbed by what I had found.

FURTHER AFFIANT SAYETH NAUGHT

[redacted]

Subscribed and sworn to before me this
30 day of April 1995

Karen Northcott
Notary Public

KAREN NORTHCOTT
NOTARY PUBLIC MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31, 2000

FAX

FILED
MAY 1 1995
JACK M. PROVO
DIST. CT. HENN. CO.

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
CASE Type 11
Court File No.: PI 95 2182

T.M.,

Plaintiff

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal.
Minnesota and Father Robert Kapoun

Defendants

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)ss
COUNTY OF HENNEPIN)

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FAXED

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED
MAY 1 - 1995
PROVO
JAC... DIST. ... HENN. CO.

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type: 11

Court File No.: PI 95-2182

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis,
Church of St. Raphael in Crystal,
Minnesota and Father Robert Kapoun,

Defendants.

AFFIDAVIT OF DAVID S. BURLESON

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

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Notary Public

LESLEY R. BROWN
NOTARY PUBLIC - MINNESOTA
DAKOTA COUNTY
My Commission Expires Jan. 31, 2000

2-13-'9

Jeffery R. Anderson
Attorney-at-Law
1400 E. First Nat'l Bank Bld.
St. Paul, MN 55101

[redacted]

In Re: Civil Action against
Rev. Robert Kapoun

Dear Mr. Anderson,

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Attorneys at Law

E-1000 First National Bank Building
332 Minnesota Street, Saint Paul, Minnesota 55101
Office: 612/227-9990 Fax: 612/297-6543

Jeffrey R. Anderson*†
Mark Reinhardt**
Mark A. Wendorf*
Thomas C. Racette
Joanne Jirik Mullen
Teresa Kimker†††
Karen A. Kagler
Teresa K. Parton††
Harvey H. Eckart
David S. Burleson
Barbara J. Felt
Gavin S. Wilkinson
Amy Divine Boley
Jack Fugina
Jonathan F. Drage

May 1, 1995

Court Administrator
Hennepin County Courthouse
1251 Court Tower
Hennepin County Government Center
Minneapolis, Minnesota 55487

VIA FACSIMILE AND HAND DELIVERED

Re: T.M. v. Archdiocese of St. Paul and Minneapolis, et al.
Court File No.: PI 95-2182

Dear Sir/Madam:

Enclosed are two supplemental affidavits to be filed with Plaintiff's Motion to Amend to his Complaint, the hearing of which is to be held on today's date at 1:30 p.m. before The Honorable Gary Larson.

Plaintiff recognizes the untimely submittal of these materials, however, Plaintiff has timely produced the facts as they have become available through ongoing investigation.

Very truly yours,

David S. Burleson

DSB:lrb
enc.
cc: The Honorable Gary Larson (w/enc. via facsimile)
Andrew J. Eisenzimmer, Esq. (w/enc. via facsimile)
Daniel A. Haws, Esq. (w/enc. via facsimile)
Joseph M. Stocco, Esq. (w/enc. via facsimile)
Frederick C. Brown, Esq. (w/enc. via facsimile)

† Diplomat, National Board of Civil Trial Advocacy
*Also admitted in Wisconsin **Also admitted in Washington, D.C. ††Also admitted in California and Colorado †††Also admitted in Missouri

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

95 JUN 1 PM 2:06

HENN CO. DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

T.M.,

Plaintiff,

vs.

Archdiocese of St. Paul and Minneapolis, Church of St. Raphael in Crystal, Minnesota and Father Robert Kapoun,

Defendants.

ORDER

Court File 95-2182

The above-entitled action came on for hearing before the Honorable Gary Larson, Judge of District Court, on the 1st day of May, 1995 on Defendants' Archdiocese of St. Paul and Minneapolis and Church of St. Raphael in Crystal motions for Summary Judgment and Plaintiff's motion to amend his complaint.

David S. Burleson, Esq., appeared on behalf of Plaintiff.

Daniel A. Haws, Esq., appeared on behalf of Defendant Archdiocese of St. Paul and Minneapolis.

Joseph M. Stocco, Esq., appeared on behalf of Defendant Church of St. Raphael in Crystal.

Now, therefore, based on the arguments of counsel, and all the files, records and proceedings herein;

IT IS HEREBY ORDERED:

1. That Defendants' motions for summary judgment are hereby **GRANTED.**

2. That Plaintiff's motion to amend his complaint is hereby **DENIED.**

3. That Plaintiff's claims against Defendants Archdiocese of St. Paul and Minneapolis and Church of St. Raphael in Crystal are hereby dismissed.

BY THE COURT:

DATED: 6/9/95, 1995.

Gary Larson
Judge of District Court

MEMORANDUM

I. Defendants' Summary Judgment Motion

Defendants Archdiocese and St. Raphael brought this motion for summary judgment claiming that Plaintiff's claims based on vicarious liability and respondeat superior must be dismissed as a matter of law as they are barred by the statute of limitations.

In Minnesota, claims for intentional acts must be brought within two years. See Minn. Stat. §541.07. However, under Minn. Stat. §541.073, the "delayed discovery" statute, the two year limitation is tolled until the plaintiff "knew or had reason to know that the injury was caused by sexual abuse." Id. Recently, however, the Minnesota Court of Appeals held that the delayed discovery statute does not apply to claims based on respondeat superior or vicarious liability. Oelschlager v. Magnuson, C5-94-1252 (Minn. Ct. App. Feb. 28, 1995). When the present motion was filed this decision was being appealed to the Minnesota Supreme Court.

When the parties appeared for the present motion they informed the Court that the issue appealed in Oelschlager had been had denied certiorari by the Supreme Court. Plaintiff subsequently dropped his opposition to Defendants' motion and, accordingly, the motion is granted.

II. Plaintiff's Motion to Amend his Complaint

Plaintiff has moved to amend his complaint to include a claim of negligent supervision. It is within the discretion of the trial court to permit a party to add a new claim. Copeland

v. Hubbard Broadcasting, Inc., d/b/a KSTP-TV, 526 N.W.2d 402, 405 (Minn. Ct. App. 1995). If the movant fails to establish evidence to support its claim the trial court may deny a motion to amend. Id. Bib Auido-Video Products v. Herold Mktg. Assocs., Inc., 517 N.W.2d 68, 73 (Minn. Ct. App. 1994).

Central to Plaintiff's claim of negligent supervision is the assertion that Defendant Archdiocese and Church should have known or discovered Father Kapoun's sexual misconduct. See Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 (Minn. 1983). Plaintiff contends that several factors weigh in favor of making Father Kapoun's actions foreseeable. First, that the Archdiocese was not unfamiliar with the issue of sexual molestation of parish youth by priests. Second, that the Archdiocese had received, in particular, specific reports regarding sexual molestation by Father Kern and Father Porter. Third, that placing youth under the supervision and guidance of a priest created an inherent risk of sexual molestation. Finally, that prior to Plaintiff's abuse, there existed widespread rumors among the male parish youth not be alone with Father Kapoun in the shower.

While these factors show that priest sexual abuse may exist to some unknown extent in the Diocese of Minnesota, and that the boys at St. Raphael's talked amongst themselves about their priest's shower activities, they do not impute knowledge or an affirmative duty on the archdiocese to investigate specifically the activities of Father Kapoun. To establish a supportable claim Plaintiff must provide the Court with express facts that

show the Archdiocese knew or should have known or discovered Father Kapoun posed a threat to Plaintiff.

The Court reserves its final decision on this issue until June 1, 1995 pending an affirmative showing by Plaintiff's counsel of any facts to support their motion for amendment.

GL

Larson

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

FILED 96 MAR 22 AM 10:00 HENN. CO. DISTRICT COURT ADMINISTRATOR

Case Type: 11

T.M.,

Court File No.: 95-2182

Plaintiff,

vs.

STIPULATION OF DISMISSAL WITH PREJUDICE

Archdiocese of Saint Paul and Minneapolis,
Church of St. Raphael in Crystal, Minnesota,
and Father Robert Kapoun,

Defendants.

The above-entitled action, having been fully compromised and settled,

IT IS HEREBY STIPULATED by and between the parties hereto, through their undersigned attorneys, that the same may be, and it hereby is, dismissed on its merits and with prejudice, but without costs or disbursements to any of the parties.

IT IS FURTHER STIPULATED, that without further notice a judgment of dismissal with prejudice, upon the merits and without costs or disbursements to any of the parties, may be entered herein.

Dated this 31 day of January, 1996.

REINHARDT & ANDERSON

Jeffrey R. Anderson, #2057
Mark A. Wendorf, #173484
Attorneys for Plaintiff
E-1000 First National Bank Building
332 Minnesota Street
St. Paul, Minnesota 55101
(612) 227-9990

STICH, ANGELL, KREIDLER & MUTH, P.A.

~~Joseph M. Stocco, #105727~~ 168488
Attorneys for Defendant Church of St. Raphael in Crystal, Minnesota
The Crossings, Suite 120
250 Second Avenue South
Minneapolis, Minnesota 55401-2122
(612) 333-6251

POPHAM, HAIK, SCHNOBRICH & KAUFMAN

Frederick C. Brown, #12221
Attorneys for Defendant Robert Kapoun
3300 Piper Jaffray Tower
222 Ninth Street South
Minneapolis, Minnesota 55402
(612) 333-4800

MURNANE, CONLIN, WHITE & BRANDT

Daniel A. Haws, #193501
Attorneys for Archdiocese of Saint Paul and Minneapolis
1800 Piper Jaffray Plaza
444 Cedar Street
St. Paul, Minnesota 55101
(612) 227-9411

ORDER

IT IS ORDERED that judgment be entered in accordance with the foregoing Stipulation.

Dated: 3/21/96

District Court Judge

I hereby certify that the order of Dismissal contained in this document shall constitute the Judgment of this Court.

APR 1 1996

District Court Administrator

By _____ Deputy

MEIER, KENNEDY & QUINN
CHARTERED
ATTORNEYS AT LAW

ANDREW J. EISENZIMMER
LEO H. DEHLER
THOMAS B. WIESER
JOHN C. GUNDERSON
CHARLES M. BICHLER

SUITE 2200, NORTH CENTRAL LIFE TOWER
445 MINNESOTA STREET
SAINT PAUL, MINNESOTA 55101-2100
TELEPHONE (612) 228-1911
FACSIMILE (612) 223-5483

WILLIAM C. MEIER
(1920-1981)
TIMOTHY P. QUINN
(1921-1991)
ALOIS D. KENNEDY, JR.
(RETIRED)

March 20, 1996

District Court Administrator
Hennepin County Government Center
1251 Court Tower
300 South Sixth Street
Minneapolis, MN 55487

Re: T.M. (Mark Tuma) v. Archdiocese of Saint Paul and Minneapolis, et al.
Court File No. 95-2182
Our File No.: 3842.597

Dear Sir or Madam:

Enclosed for filing in connection with the above-referenced matter please find the Stipulation of Dismissal with Prejudice.

Thank you.

Best regards,

MEIER, KENNEDY & QUINN, CHARTERED

Andrew J. Eisenzimmer

Andrew J. Eisenzimmer

AJE:dmb
Enclosure
cc: Mr. Jeffrey R. Anderson
Mr. Jeffrey A. Magnus
Mr. Daniel A. Haws
Mr. Frederick Brown