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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

<p>JOHN DOES 1-16 and JOHN DOES 17-100; and JANE DOES 1-29 and JANE DOES 30-100,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>URSULINE SISTERS OF THE WESTERN PROVINCE, a nonprofit corporation, aka URSULINE WESTERN PROVINCE; THE ROMAN CATHOLIC DIOCESE OF HELENA, a non-profit corporation, aka HELENA DIOCESE OF THE ROMAN CATHOLIC CHURCH; ABC Corporation 1-10, Defendants John Doe A-M, and Defendants Jane Doe N-Z,</p> <p>Defendants.</p>	<p>NO. ADV 2011-936</p> <p>DEFENDANT ROMAN CATHOLIC BISHOP OF HELENA, MONTANA'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' VICARIOUS LIABILITY AND BREACH OF FIDUCIARY DUTIES CLAIMS</p>
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I. RELIEF REQUESTED

Defendant the Roman Catholic Bishop of Helena, Montana, a Montana religious corporation sole (“Diocese of Helena”) hereby moves under Montana Rule of Civil Procedure 12(b)(6) to dismiss Plaintiffs’ claims for vicarious liability under a theory of *respondeat superior* and breach of fiduciary duty. As each of these are claims for relief which cannot be granted, Defendant Diocese of Helena respectfully requests that the Court grant its motion and dismiss all Plaintiffs’ claims for *respondeat superior*/vicarious liability and breach of fiduciary duty, *with prejudice*, from Plaintiffs’ Complaint.

II. STATEMENT OF FACTS

On or about October 11, 2011, Plaintiffs filed a Complaint with this Court seeking monetary and equitable damages for alleged damages sustained as a result of Defendant Diocese of Helena’s alleged wrongful conduct.

In the Complaint of October 11, 2011, Plaintiffs allege that “at all times relevant hereto, the perpetrators and Defendants had an employment relationship and such relationship existed when the Plaintiffs were abused.” Complaint at ¶ 9.2. In making this vicarious liability claim, Plaintiffs simply state that the alleged perpetrators were “acting within the scope of their employment with the Diocese and the Ursuline Sisters.” *See* Complaint ¶ 9.4. Plaintiffs provide no further details proving that the perpetrators’ alleged wrongful, intentional conduct was indeed within the scope of their employment. Plaintiffs go on to boldly assert that the Diocese is “vicariously liable for the acts and omissions of the perpetrators described herein.” Complaint ¶ 9.5.

Plaintiffs also allege that Defendant Diocese of Helena breached its fiduciary duty to Plaintiffs. Complaint ¶¶ 7.1-7.6. In their Complaint, Plaintiffs conclusively allege that “The Diocese voluntarily assumed custody of children who attended the St. Mary’s Catholic School. As such, there existed a special relationship between the Diocese of Helena and/or the Ursuline Sisters, and the children, including Plaintiffs, entrusted to Defendants. This special relationship created fiduciary duties for the Diocese. . . .” Complaint at ¶ 7.2. Plaintiffs claim that the

Diocese of Helena expressly undertook fiduciary duties by assuming custody and control of the congregations' children, including Plaintiffs. Complaint at ¶ 7.3. The Plaintiffs allege that the Diocese breached their fiduciary duties by failing to protect Plaintiffs. Complaint at ¶ 7.4.

None of the individuals alleged to have engaged in the sexual misconduct have been named as a defendant. *See* Complaint. The priests and Ursuline sisters alleged to have engaged in sexual misconduct are alleged to be the "Diocese's agents." Complaint ¶¶ 5.5. Plaintiffs allege three bases for the Diocese of Helena's liability: negligence, vicarious liability under the doctrine of *respondeat superior*, and breach of fiduciary duty. Complaint ¶¶ 6.1-6.7, 7.1-7.6, 9.1-9.5. This motion is limited to the issues of vicarious liability and breach of fiduciary duty.

III. STATEMENT OF THE ISSUES

1. Should the Court grant Defendant Diocese of Helena's motion to dismiss Plaintiffs' claims for damages based on *respondeat superior* liability when Montana law does not allow a defendant organization to be held vicariously liable for the intentional sexual and physical acts of an employee, agent, or other individual?
2. Should the Court grant Defendant Diocese of Helena's motion to dismiss Plaintiffs' breach of fiduciary duty cause of action when it is not supported by Montana law?

IV. EVIDENCE RELIED UPON

Plaintiffs' Complaint for Damages.

V. LEGAL AUTHORITY

Under Montana Rule of Civil Procedure 12(b)(6), the Court may dismiss any of Plaintiffs' claims for the failure to state a claim upon which relief can be granted. *See* Mont. R. Civ. Proc. R. 12(b)(6). A dismissal for failure to state a claim is appropriate under this rule where "it appears beyond doubt that the plaintiff can prove no set of facts," consistent with the Complaint, in support of the claim which would entitle the plaintiff to relief. *Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, ¶ 10, 89 P.3d 6, ¶ 10. The Court must construe the Complaint in the light most favorable to the Plaintiffs, however, "the Court has no obligation ... to take as true legal conclusions or allegations that lack factual basis." *Western Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 55, 359 Mont. 34, ¶ 55, 249 P.3d 35, ¶ 55.

Plaintiffs have failed to raise allegations in their First Amended Complaint which would allow them to recover under a claim for vicarious liability based upon the doctrine of *respondeat superior*. Moreover, Plaintiffs have failed to allege sufficient facts, nor could they reasonably allege additional facts, to establish that the Diocese had a fiduciary relationship with the Plaintiffs. As a result, Plaintiffs' claims for vicarious liability and breach of fiduciary duty must be dismissed *with prejudice*.

A. Plaintiffs' Vicarious Liability Claims Must be Dismissed as Montana Law Does Not Recognize the Doctrine of *Respondeat Superior* as a Form of Liability in These Circumstances.

Plaintiffs contend that Defendant Diocese of Helena is vicariously liable under the doctrine of *respondeat superior* for the conduct of the individual Jesuit members who perpetrated the alleged abuse: "The Diocese is vicariously liable for the acts and omissions of the perpetrators described herein." Complaint ¶ 9.5. *Respondeat superior*, or vicarious liability, is based on the principle that when the servant acts, it is as if the master were acting. *Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 8, 180 P.2d 252, 256 (1947). Under Montana law, *respondeat superior* imposes liability on an employer for the wrongful acts of an employee only when such acts are committed within the scope of his employment. *Maguire v. Montana*, 254 Mont. 178, 182, 835 P.2d 755, 758 (1992). "[T]he employer's liability is derivative from the negligent acts of the employee acting within the scope of employment." *Id.* at 183, 835 P.2d at 758. Whether an employer is vicariously liable under the doctrine of *respondeat superior* is a matter of law and thus, this motion is proper. *See Gentry v. Douglas Hereford Ranch, Inc.*, 1998 MT 182, ¶ 24, 290 Mont. 126, ¶ 24, 962 P.2d 1205, ¶ 24.

In *Maguire*, the plaintiff, Mary Margretta Glover, was a severely retarded patient of the Montana Developmental Center. *Maguire*, 254 Mont at 183, 835 P.2d at 758. The Center assigned its employee, Lloyd Drummond, to care for Ms. Glover, including bathing and dressing her. *Id.* Mr. Drummond assaulted and raped Ms. Glover, impregnating her. *Id.* The District Court granted partial summary judgment and directed a verdict in favor of the plaintiff on the issue of liability. *Id.* at 182. The Supreme Court of Montana reversed the District

Court's decision holding that the rape was clearly outside the scope of the employee's employment and, thus, under Montana law, the employer could not be found liable under a theory of *respondeat superior*. *Id.* at 183 & 185. While the Court noted that there were a number of reasons for extending the liability of the employer, when an intentional tort is committed only because of or by virtue of the employment situation, it held that such a change to the *respondeat superior* doctrine is best left to the legislature. *Id.* at 184-85.

Here, Plaintiffs' allegations that the alleged perpetrators were acting within the scope of the duties owed to Defendant Diocese of Helena when the alleged intentional wrongful conduct occurred is without a factual basis and, accordingly, for purposes of this motion, the Court is not obligated to accept the allegation as true. *Western Sec. Bank*, 2010 MT 291, ¶ 55; *see also* Complaint ¶ 9.4. Even assuming that the alleged perpetrators were in an "employment relationship" with the Diocese, which the Diocese disputes, the alleged perpetrators, like in *Maguire*, could not have been "acting within the scope of their employment" when they committed the intentional acts of sexual abuse.

Simply stating that the alleged perpetrators were acting "within the scope of their duties" (the formulaic requirements of a vicarious liability claim) is not sufficient to overcome Defendant Diocese of Helena's motion to dismiss. In Montana, any liability of a principal/employer for sexual misconduct of an employee/agent must be based on the principal's own alleged negligence, not on the basis of vicarious liability. As such, and because the Complaint is silent as to any factual allegations which plausibly support claims that the alleged perpetrators intentional wrongful conduct was "within the scope of their employment," Plaintiffs' vicarious liability claims must be dismissed *with prejudice*.

B. Plaintiffs' Breach of Fiduciary Duty Claims Must be Dismissed as Plaintiffs Have Not Alleged Facts Sufficient to Establish the Diocese Owed a Fiduciary Duty to Them Under Montana Law.

Under Montana law, a plaintiff alleging breach of fiduciary duties must first establish that the defendant actually owed the plaintiff a fiduciary duty. *See Deist v. Wachholz*, 208 Mont. 207, 215-216, 678 P.2d 188, 192-93 (1984). Whether a fiduciary duty exists between

two parties is a question of law. *Gliko v. Permann*, 2006 MT 30, ¶ 16, 331 Mont. 112, ¶ 16, 130 P.3d 155, ¶ 16.

In the Complaint, Plaintiffs allege that Defendant Diocese of Helena and Plaintiffs had a “special relationship” which gave rise to the imposition of fiduciary duties upon the Diocese. Complaint ¶ 7.2. However, Plaintiffs fail to allege any facts that support the legal conclusion that a special relationship existed giving rise to a fiduciary duty under Montana law, nor can they.

Montana law does not recognize a special relationship between a church and its parishioners or a school and its students for purposes of imposing a fiduciary duty. In *Deist v. Wachholz*, the Montana Supreme Court held that the existence of a fiduciary duty to a loan customer depends upon satisfactory proof of a special relationship. *Deist*, 208 Mont. 207, 217, 678 P.2d 188, 192-93 (1984). “Whether a ‘special relationship’ exists such as would give rise to a fiduciary duty is also a question of law, not fact, ‘for the relationship and the duty are two sides of the same coin.’” *Gliko*, 2006 MT 30, ¶ 24. Montana courts have primarily analyzed whether a special relationship exists giving rise to a fiduciary duty in cases involving banks and/or financial relationships. *See, e.g., Pulse v. North American Land Title Co.*, 218 Mont. 275, 707 P.2d 1105 (1985) (holding that in a case involving a land purchase, the bank financing the mortgage did not owe a fiduciary duty to the land sellers absent special circumstances indicating exclusive and repeated dealings with the bank); *Deist v. Wachholz*, 208 Mont. 207, *Simmons v. Jenkins*, 230 Mont. 429, 750 P.2d 1067 (1988) (holding that the facts did not support the existence of a fiduciary duty owed by the bank where the relationship between the bank and Simmons was tenuous); *Estate of Donald v. Kalispell Regional Med. Ct.*, 2011 MT 166, 361 Mont. 179, 258 P.3d 395 (where a patient brought action against a hospital and medical advocacy company regarding the patient’s responsibility to pay bills for treatment at the hospital, the Court held no special relationship existed warranting a fiduciary duty); *McCoy v. First Citizens Bank*, 2006 MT 307, 335 Mont. 1, 148 P.3d 677 (holding that the bank’s actions did not elevate relationship with borrowers beyond that of a creditor and debtor, as would give rise to a fiduciary duty); *Davis v. Church of Jesus Christ of Latter Day Saints*, 258

Mont. 286, 852 P.2d 640 (1993) (in a dispute between church member and church regarding the church's payment of the church member's medical bills where the church member sued for negligent misrepresentation, fraud, negligence, intentional infliction of emotional distress and breach of fiduciary duty, the Court held that whether a fiduciary duty exists between the parties is a question of fact and not a question of law), *overruled by Gliko*, 331 Mont. at ¶¶ 17-24 (holding that "whether a fiduciary duty exists between two parties is a question of law, not fact").

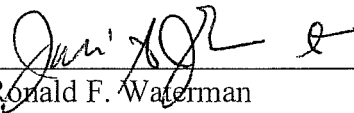
There is no precedent in Montana to support Plaintiffs' allegation that a special relationship giving rise to a fiduciary duty exists between a church and the children of the church or a school and the students of the school. Accordingly, the Court should dismiss Plaintiffs' breach of fiduciary duties claims as a matter of law, *with prejudice*, because Plaintiff has not, and cannot, allege facts to establish that Defendant Diocese of Helena owed Plaintiffs a fiduciary duty.

V. CONCLUSION

For the foregoing reasons, Defendant Diocese of Helena respectfully requests that the Court grant its motion to dismiss Plaintiffs' claims for vicarious liability and breach of fiduciary duty pursuant to Mont. R. Civ. P. 12(b)(6).

Respectfully submitted this 10th day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November 2011, the foregoing was duly served upon the following by first class mail, postage prepaid, addressed as follows:

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