No. COA 17-1054 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

Kathleen Bourque, Ann Bourque and Peter Bourque, Plaintiffs, v. Roman Catholic Diocese of Charlotte, NC, Bishop Peter J. Jugis, and John Brian Kaup, Defendants.	)	From Mecklenburg County No. CVS 2059

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PLAINTIFFS-APPELLEES' BRIEF

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INTRODUCTION

The complaint arises from the sexual misconduct of defendant John Brian Kaup ("Kaup"), an employee of the appellants, and the conduct of the appellants in placing Kaup in a position of authority over children and assigning him to counsel the plaintiff daughter whom he later assaulted. The appellants Diocese of Charlotte and Bishop of the Diocese are alleged to have had information from which they knew or should have known that Kaup had a sexual interest in children and was dangerous to children before he was assigned. R p 92 ¶¶ 79 - 80. They are alleged to have negligently supervised him after he was assigned. R p 91 ¶ 75.

The appellants' statement of facts omits those important allegations. The employee's status as a seminarian while he held his job is meaningless to the appeal; his status as an employee is what is important.

Nothing about the allegations puts "on trial" the religious beliefs of the Diocese or Bishop. Nothing in the complaint challenges the selection of Kaup as an employee or the process by which he was hired. The complaint alleges only that the Diocese and Bishop had information

about Kaup that placed them on notice that Kaup was not a proper person to permit to be unsupervised around children, that he was assigned by the Diocese and Bishop to work around children without proper supervision, and the Diocese and Bishop were negligent in supervising him. R p 91 ¶ 75; R p 92 ¶ 80.

The important factual allegations of the complaint are set forth in the body of the argument.

ARGUMENT

I. The Superior Court correctly followed the precedent set by *Smith v. Privette* and *Doe v. Diocese.*

The Diocese and Bishop claim that this case presents "an ecclesiastical controversy," (Appellants' Brief at 4) and that the complaint alleges breach of "religious authority." (Appellants' Brief at 13). In fact, it does not. This appeal presents the same issue that was presented, and decided, in *Doe v. Diocese of Raleigh*, 242 N.C. App. 42, 775 S.E.2d 29 (2015), and *Smith v. Privette*, 128 N.C. App. 490, 495, S.E.2d 395 (1998). In each of these cases, the plaintiffs alleged that a person working for a religious organization committed acts of sexual misconduct. In each case, the organization was alleged to have placed the assailant in the presence of others, and in a position of authority,

after the organization knew or had reason to know that he presented a danger to others, and to have failed to supervise him. At issue is the appellants' own conduct, and appellants' own negligence. As this court stated in *Doe v. Diocese of Raleigh*,

> Our Supreme Court has recognized that with regard to such claims, the employer's liability for the injury caused by his employee is "entirely independent of the employer's liability under the doctrine of *respondeat superior*." *Braswell v. Braswell,* 330 N.C. 363, 373, 410 S.E.2d 897, 903 (1991) (citation omitted).

242 N.C. App. at 50, 776 S.E.2d at 36. That the organization is a church does not preclude the application of neutral principles of law to what the Diocese knew about Kaup's sexual attraction to minors. As also put in *Doe v. Diocese of Raleigh*,

> Neutral principles of law allow a civil court to adjudicate Plaintiff's claim that the Diocese Defendants knew or should have known of the danger posed by [the employee] to Plaintiff because of his sexual attraction to minors.

242 N.C. App. at 55, 776 S.E.2d at 39.

In deciding *Doe v. Diocese of Raleigh* the court of appeals permitted claims of negligent supervision and negligent infliction of emotional distress to go forward because "determining whether the church defendants knew or had reason to know of its employee's

proclivities for sexual wrongdoing required only the application of neutral principles of tort law." 242 N.C. App. At 53, 776 S.E.2d at 38.

Doe v. Diocese of Raleigh does not permit claims against a church for negligent hiring or for negligent infliction of emotional distress based on failure to compel the priest at issue to undergo STD testing. The complaint in this action states no claim for either. The only practical difference between this case and *Doe* is that the employee-assailant here was at most relevant times a seminarian rather than a priest. It is a distinction without a difference.

A. Plaintiffs' claims can and should be reviewed under neutral principles of law, and do not require the interpretation of religious doctrine.

The Diocese and Bishop maintain that, because the employee in question, Kaup, was a seminarian, the issues raised in this case are more analogous to the "internal church governance dispute" at issue in *Harris v. Matthews*, 361 N.C. 265, 643 S.E.2d 566, 567 (2007), where the Supreme Court declined to assert jurisdiction because it found that neutral principles of law could not be applied to adjudicate matters of internal church governance. Following this precedent, in *Doe v. Diocese of Raleigh*, *supra,* the court of appeals permitted the plaintiff's negligent

supervision and negligent infliction of emotional distress claims to go forward, but did not permit the plaintiff to proceed with a negligent hiring claim or with his allegations about "insufficient guidelines in effect within the Diocese to define the proper boundaries between priests of the Diocese and its parishioners," which the court determined related to "ecclesiastical matters." *Id.* at 55, 776 S.E.2d at 39.

This case is about a secular matter -- the negligent supervision of an agent or employee with a tendency to engage in sexual misconduct that was known, or should have been known, by the appellants, claims recognized in *Diocese of Raleigh* and *Privette*. To try to convince the court instead that this is an internal "religious dispute," (Appellants' Brief p. 11), the Diocese and Bishop contend that the "negligence claim is thoroughly grounded in the religious relationship between Kaup" and the Diocese, and that what is at issue is the church's internal classifications for priests and seminarians and Kaup's "status under church law." (Appellants' Brief at 5 – 6, 13). (Kaup, the assailant, was for part of the timeframe of the complaint a seminarian, but then abruptly left the seminary while, according to the complaint, he

continued his work for the parish attended by the plaintiffs.) R p 78 ¶ 14 ("former seminary student.").

At page 16 of their brief the Diocese and Bishop contend that the "propriety and scope" of religious teaching is at issue. At page 17 the Diocese and Bishop contend that Kaup's admission to seminary is at issue. At page18 they contend that they have no liability for the criminal acts of third parties, a type of *respondeat superior* claim not present in the case, and at pages 20-22 they argue the church has no "special relationship" with parishioners. Each argument completely ignores plaintiffs' allegations regarding the responsibility the Diocese has for supervising persons it elects to assign to positions of authority over children, and in not placing them so as to be dangerous to children when they know, or have reason to know, the employee has a sexual interest in children.

The appellants' contentions about the necessity of the court interpreting religious doctrine are specious. Kaup's "status under church law," (Appellant's Brief at 5), is irrelevant to the allegations of the complaint. It is irrelevant whether or not he is a seminarian, or ever becomes a priest. What matters is what the Diocese and Bishop knew,

or should have known, about Kaup before they assigned him to positions of authority around children, thereby creating a danger to them.

Specifically, plaintiffs contend, R p 92 ¶¶ 79 - 80, that the Diocese had sufficient information about Kaup from which it was reasonably foreseeable that he "had a sexual interest in children," and that the Bishop and Diocese knew or should have known that children needed to be protected from Kaup. R p 92 ¶ 79 The complaint explains the church context in which Kaup's manipulation and the negligent acts of the Diocese arose, not because ecclesiastical law applies but to show that the Diocese had the authority and ability to monitor and to control Kaup once the Diocese decided to place him in a position of authority over children, and that the Bishop is a party necessary for complete relief due to his complete authority within the Diocese.[1]

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[1] Monsignor West in his affidavit claims that under "Church law," (meaning as an ecclesiastical matter), the Bishop has "no authority" to command a seminarian's obedience. (R Exhibit 1, p 7 ¶ 21) However, elsewhere he notes that the sexual misconduct policy of the Diocese "applies to priests, deacons, religious, seminarians, lay employees and volunteers." (R Exhibit 1, p 39) Ecclesiastical law applies differently than does North Carolina law, and this dichotomy highlighted by Rev. West shows the difference. The limits of ecclesiastical Church law are irrelevant to the claims in this case. But like any other employer operating under North Carolina law, the Diocese has authority to assert control over the people it hires to work for it, and how they are assigned, including seminarians, paid employees, and lay volunteers. The Diocese also has authority under North Carolina law to assert

Having notice that any person poses a danger to children, or has a sexual interest in children, is a secular standard applicable to any person the Diocese employs or authorizes to be around children. That person's "status under church law," high or low, is irrelevant. It would apply to from the Bishop to the newest lay volunteer, if as to either the Diocese should have known either was a danger when it placed the person in a position of authority and implicitly represented him to be a person appropriate to be around children. R p 91 ¶ 75 What is relevant is that the Diocese had sufficient information about Kaup that the Diocese should have known of his sexual interest in children R p 92 ¶ 79, and, once it chose to place him, should have protected children by supervising him accordingly. R p 92 ¶ 80

Nor does the complaint allege "failure to exercise, or alleged misuse of, religious authority," as the Diocese contends. (Appellants' Brief at 12). The complaint alleges civil standards pertinent to supervision of an agent or employee the Diocese knew, or should have known, had a sexual interest in children. The complaint alleges that for

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control over its own facilities, even though it lacks ecclesiastical control over seminarians, lay employees, and volunteers.

three years Kaup groomed the plaintiff daughter when she was between ages 14 to 17 (and Kaup was 27 – 30) to remove her personal and sexual boundaries, interject sexual conversation, get her accustomed to conversations with him about sexual topics, R pp 81 ¶ 32 - 89 ¶ 61, and get her accustomed to keeping secrets from her family. (*e.g.,* R p 86 ¶ 53; R p 87 ¶ 54; R p 89 ¶ 63)

Nothing about being a seminarian, or a priest, requires that the person involved work around children. Many religious employees can serve in capacities that have no contact with children. It is the decision by the Diocese to assign Kaup to a position of authority around children which invokes the negligent supervision issues, given what the Diocese knew or should have known about Kaup. This involves ecclesiastical matters only if the Diocese maintains that its religious tenets require that it expose children to sexual assault or the risk of sexual assault, which obviously is not the case.

The court is not required to interpret or weigh doctrine to establish whether officials of the Diocese knew or should have known that Kaup was dangerous before placing him in a position to have unsupervised access to children and the plaintiff daughter. The Court

needs to weigh only what the complaint alleges the appellants knew about Kaup before they assigned him, and then how they supervised him after that assignment and after assigning him to counsel the plaintiff daughter. This case seeks simply to apply to the appellants the same secular standards of care, and in the same manner, as are applied to everyone with regard to conduct involving an employee they know or should know to be dangerous to children.

Nor is there any intrusion to the Establishment Clause, as *Privette* and *Doe v. Diocese of Raleigh* make clear. State action does not violate the Establishment clause if the action (1) has a secular purpose; (2) has a primary effect which neither advances nor inhibits religion; and (3) does not foster excessive state entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2015, 2111 (1971). What the appellants knew about Kaup's danger to children neither advances nor inhibits religious belief, the inquiry has nothing to do with religious belief, and questions pose no entanglement issues, as *Privette* determined. This is a single inquiry, using neutral principles of law, into what appellants knew or should have known about a person with a sexual interest in minors, and how they acted on what they knew.

Nothing about the inquiry into appellants' knowledge about Kaup treats the Diocese any differently than any other litigant to whom neutral principles of civil law are applied. Immunizing the Diocese and Bishop from the inquiry would place them in a position not enjoyed by secular employers, and contradicts the holding of both *Doe v. Diocese of Raleigh*, *supra*, and *Smith v. Privette*, *supra*. *See also*, *In re Williams*, 152 S.E.2d 317, 325 (N.C. 1967) (religious freedom applies to all citizens, not only clergymen, and no lay citizen is immune from tort liability).

Appellants are asking this court to carve out an exception to the *Privette* and *Doe* doctrines for employees who happen also to be enrolled in religious studies. Aside from being doctrinally suspect, such an exception would be impossible to apply with consistency or certainty. Taken as a rule, it would mean that any employee in contact with children could have his conduct shielded from the application of common-law negligence rules by simply enrolling in a course of religious study. This court should refuse to adopt such an exception.

B. The claims are based on appellants' own conduct, governed by secular rules.

The complaint alleges, R p 92 ¶ 86, that the Diocese "knew or should have known" that Kaup presented a danger to the plaintiff daughter, from which the Bishop and Diocese failed to protect her. The complaint alleges negligent supervision, not liability for the criminal acts of third parties (as the Diocese argues in its brief starting at p.18). At issue is liability for the appellants' own failures, not *respondeat superior* liability. Kaup interacted with the plaintiff daughter only because the Diocese arranged for it to be the case, when it hired Kaup, assigned him to roles with children, and then specifically assigned him to counsel the plaintiff daughter. R pp 81-82 ¶ 32

It is well known that the Catholic Church engages in extensive screening and assessment of candidates for the priesthood. The same is true for seminarians: they are tested, and reviewed, and assessed. As an employer, the Diocese knows far more about its seminarian and priest employees than does a typical employer.

The complaint states that the Bishop and Diocese knew or should have known that Kaup had been discharged from the Air Force by court

martial. R p 92 ¶ 81. Through the West Affidavit, R Exhibit 1, the Diocese has placed into the record some of the extensive information known about Kaup before he was assigned to work around children, and before he assaulted the plaintiff daughter. Unfortunately, the West Affidavit's 412 pages are not all numbered, making reference a challenge. At p. 148 of 412 begins the "Program of Priestly Formation," which outlines the categories of information the Diocese had about Kaup. That information includes for every seminarian "a thorough screening process," by which the Diocese means:

- Standardized tests and psychological evaluations, (item 47 on p. 179 of 412)
- Psychological assessments (item 52 on p. 180 of 412)
- Assessments of psychosexual development (item 54 on p. 181 of 412)
- Any evidence of "criminal activity with a minor or an inclination toward such activity," which would be disqualifying (item 55 on p. 181 of 412)
- "the requisite skills for living chastely" (p. 190 of 412)
- "Any credible evidence in the candidate of sexual attraction to children," (item 96, p. 196 of 412), which requires "immediate dismissal from the seminary." *Id.*

The complaint alleges that not later than May 2013, Kaup began exhibiting his sexual interest in the plaintiff daughter, then a minor, and began communicating with her in overtly sexual ways. R p 82, ¶ 38. This went on for seven months before the first assault. Kaup's conduct

with the plaintiff daughter openly violated multiple provisions of the Code of Ethics, which the Diocese knew or should have known. For example:

- Page 60 of 412, item 2.2: "Church Personnel are not to engage in sexually oriented conversations with minor children...." And "Church personnel are never to discuss their own sexual activities with minor children." Kaup did both.
- Page 61 of 412, items 2.12 and 2.13 prohibited Kaup from isolating himself with the plaintiff daughter, yet he did this routinely.
- Page 62 of 412, Section 3 prohibited most physical contact and all sexual contact. Kaup did both.
- Page 63 of 412, Section 4 prohibited counselors from "sexual intimacies with anyone they counsel." Kaup breached this.
- Page 64 of 412, item 4.8 mandated boundaries for counselors, and item 5.1 prohibits sexual harassment, both of which Kaup violated.

West Affidavit, R Exhibit 1, at Ex. D. The supervision of Kaup was such that the Diocese failed to detect any of Kaup's plain violations. The first assault occurred in December, 2013, then was repeated multiple times in 2014. It is undisputed that Kaup "abruptly left" the seminary in 2014. R p 79 ¶ 19.

Whether Kaup should have been or remained a seminarian is not at issue in the case, despite the Diocese attempt to claim it is (e.g., Appellants' Brief at 17). Plaintiffs' point is only that the Diocese had

sufficient information about Kaup to have known he was not a proper person to place around children or to place in a position of authority over children. It is entirely up to the Diocese whether it wants Kaup or others like Kaup to be seminarians, or priests. Only when the Diocese places such persons in positions of authority over children, and extends to them the imprimatur of the Diocese, is there an issue about what the Diocese knows, or should know, about the person they choose to assign to children. Only after they place such a person around children is there an issue of how they are supervised, given what the Diocese knows or should know.[2]

C. Plaintiffs allege multiple breaches of duty by the Diocese and Bishop.

The Diocese is alleged to have had, and to have breached, various duties to the plaintiffs. For example:

R 91 ¶ 75 (negligently supervised Kaup);

R 91 ¶ 78 (duty to protect the plaintiffs from known dangers and warn of hidden dangers);

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[2] The cases from other jurisdictions that appellants cite to support their contention that plaintiffs failed to allege sufficiently a "special relationship" between themselves and the Diocese are inapposite. *See, e.g.,* Appellants' Brief at pp. 20-21. All of these cases were decided on motions for summary judgment following a period of discovery.

R 92 ¶ 80 (duty to protect children from Kaup);

R 92 ¶ 81 (duty to warn of the danger Kaup presented);

R 92 ¶ 86 (duty to protect from Kaup); and

R 93 ¶ 91 (duty to exercise ordinary care and avoid imposing emotional distress).[3]

Kaup was negligently represented by the Diocese to be a person appropriate to be around children, R p 91 ¶ 75, and he was negligently placed in "a position of authority without adequate supervision." R p 91 ¶ 75. As to the "customers" of the Diocese, the Bishop and Diocese failed to instruct children using its programs and facilities what to do if an agent or employee violated proper boundaries with them. R p 91 ¶ 75.

Unlike the complaint in *Doe v. Diocese of Raleigh, supra,* which alleged insufficient boundary guidelines as to priests and parishioners, and the court found ecclesiastical, (776 S.E.2d at 39), this complaint alleges the following:

> The Bishop was grossly negligent in having insufficient guidelines in effect within the Diocese to define the proper boundaries between *seminarian students and staff of the Diocese and its parishioners*, and in failing to monitor staff to make sure they were maintaining sufficient boundaries,

[3] The Diocese contends, incorrectly (Appellants' Brief at 9, 18, and 28), that there is only one duty alleged.

> particularly as they interacted with minor youth who were invited and encouraged to participate in church programs.

R p 81 ¶ 31. (emphasis added) By eliminating priests from the guideline allegations, and by modifying the allegation to relate to the supervisory act of monitoring staff as to boundaries, appellants sought in their complaint to stay within the limits of *Doe.* The allegation can be eliminated with no injury to the causes of action if the court regards that allegation as an ecclesiastical matter, although for two reasons we contend it is not.

First, the complaint specifically alleges that it excludes matters of religious belief, and alleges only matters as to North Carolina law. R p 79 ¶ 17. *See also* R p 83 ¶ 40 (complaint not directed to religious teaching or beliefs). No ecclesiastical matter is intended to be alleged, and none needs to be alleged, to address under civil law standards the failure to properly warn and protect children from Kaup, given what the Diocese knew or should have known about him.

Second, the focus of the allegation is on seminarians, staff and parishioners, over whom the Diocese has no ecclesiastical control, as admitted as to seminarians in the West affidavit. R Exhibit 1, p 7 ¶ 21. The Diocese has control of seminarians and staff only as a civil

employer has control, and has a duty to parishioners who are invited to the premises and programs of the Diocese, to warn of known dangers.[4]

Instead, Kaup was hired and assigned to many activities involving children. R p 80 ¶ 22, R 82 ¶ 34. Kaup was specifically assigned by Father Putnam to counsel the plaintiff daughter, and it is alleged that Putnam "encouraged Plaintiff to consider Kaup a trusted advisor and counselor who could help her in times of emotional need and spiritual guidance." R pp 81-82 ¶ 32. At the same time, no guidance was given to the plaintiff daughter about what to do if Kaup, or any other adult, took actions which made her uncomfortable. R p 85 ¶ 46.

Contrary to the claims of the Diocese that sexual assault took place "on two occasions," (Appellants' Brief p 6) Kaup sexually assaulted

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[4] In its brief the Diocese refers to its "teachings on subjects of education" involving sexual misconduct (the Essential Norms, Charter, Sexual Misconduct Policy and Code of Ethics), and argues the complaint requires the court review their "propriety and scope." Appellants' Brief p 16. Those documents govern the operations of the Diocese, apply to the ecclesiastical hierarchy, and do not address the subject of this complaint: alerting parishioners to persons the Diocese knows, or should know, are dangerous to the children that are invited to its premises and programs. There is no need for the court to review or assess how the Church chooses to govern itself, only how it complies with North Carolina law in how it handles those it knows or should know are dangerous. Put another way, the Diocese is free to set for itself standards low enough to enable children to be molested, but that would not prevent North Carolina law from applying.

the plaintiff daughter many times in 2014 after his first assault on Christmas, 2013. R p 90 ¶ 70.[5]

D. The complaint properly states a claim of negligent supervision of Diocesan employee Kaup.

Negligent supervision is not, as the Diocese tries to shift it to being, liability for the criminal acts of third persons. Liability for the criminal acts of third persons is a form of *respondeat superior*. Negligent supervision concerns the acts and omissions of Diocese officials who fail to utilize due care.

Nor can the Diocese credibly claim, as it does at p. 23 of its brief, that negligent supervision is not alleged. The complaint alleges a cause of action for negligence, and throughout the complaint the negligent supervision of Kaup is among the elements explicitly alleged to constitute that negligence,[6] an allegation overtly repeated in the

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[5] The Diocese contradicts itself and gets it right at page 7, conceding that the complaint alleges Kaup "repeatedly sexually assaulted Bourque during the summer of 2014."

[6] The present complaint begins at p. 76 of the Record on Appeal. Negligent supervision of Kaup by the Diocese or Bishop is overtly alleged at paragraphs: 31, 75, 82, and 87, and it is specified as one of the ways in which the Diocese and Bishop were negligent, based on Kaup's sexual interest in children about which it knew or should have known. The Diocese apparently claims it is not on notice that its supervision of Kaup is at issue, yet it somehow was aware of the need to argue the issue. N.C.R. Civ. P. 8(a)(1) is satisfied by the complaint.

negligence cause of action at R p 93 ¶ 87, based on the information the Diocese knew or should have known. R p 92 ¶ 86.

It is not Kaup's status as a seminarian that matters legally as the appellants claim. First because Kaup continued to work for the Diocese even after he left the seminary in 2014, and repeatedly assaulted the plaintiff daughter in 2014 (*e.g.,* R p 90 ¶ 70). What also matters for purposes of appellants' motion is that the Diocese assigned Kaup to a position of authority around children, did so when they knew or should have known he had a sexual interest in children, and assigned Kaup specifically to counsel the plaintiff daughter, all of which led to Kaup's access, manipulation, and eventual sexual assaults.[7]

E. The elements of negligent infliction of emotional distress are, in fact, alleged.

Contrary to the argument of the Diocese, (Appellants' Brief p 28), the elements of an emotional distress claim are present.

To sustain a claim for negligent infliction of emotional distress, "a plaintiff must allege that (1) the defendant negligently engaged in

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[7] At p 27 of its brief, the Diocese misstates the facts alleged in arguing that Kaup was invited to the plaintiffs' home on Christmas, 2013, the day of the first assault, ignoring that it was only Putnam who was invited, and "Putnam asked if he could bring Kaup." R p 88 ¶ 59.

conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress..., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 395 S.E.2d 85, 97 (1990). Ordinary negligence is sufficient to state such a claim. *Id.* "Severe emotional distress" has been defined by the Supreme Court of North Carolina to mean:

> any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Id. As with ordinary negligence, "[q]uestions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Id.* at 305, 395 S.E.2d at 98.

Doe v. Diocese of Raleigh, supra, allowed a cause of action for negligent infliction of emotional distress derived from negligent supervision which led to sexual assault. 242 N.C. App. at 57, 776 S.E.2d at 41. The facts alleged in the complaint, which are incorporated into the cause of action (R p 93 ¶ 90) allege that the Bishop and Diocese

were negligent in assigning Kaup and supervising Kaup, because each knew or should have known of his sexual interest in children. The elements of negligent infliction of emotional distress are all present in those allegations as well as the allegations at R pp 93-94:

- The Bishop had a duty to protect the plaintiff daughter from known dangers, R p 91 ¶ 75-78, was grossly negligent in failing to protect the plaintiff daughter from Kaup, R p 91 ¶ 73, and assigned Kaup to have contact with her.
- The Bishop and Diocese knew or should have known that children needed protection from Kaup, and supervised him accordingly, R p 92 ¶ 80, as it was foreseeable to the Bishop and Diocese that Kaup had a sexual interest in children and was dangerous to the plaintiff daughter. R p 92 ¶ 79.
- The Bishop and Diocese negligently supervised Kaup, placed him in a position of authority without adequate supervision. R p 91 ¶ 75. As a result, the plaintiff daughter was sexually assaulted. R p 91 ¶ 76, was damaged by the sexual assaults. R p 92 ¶ 83, and the assaults caused emotional distress and attending effects for the plaintiff daughter. R p 91 ¶ 72.

In short, appellants invited the plaintiff daughter to their premises and into her contact with Kaup. In doing so, they owed the plaintiff a duty of reasonable care. The defendants breached their duty when they acted unreasonably by, among other things, allowing Kaup to operate in the Diocese, giving him positions of trust and authority and representing him to the public as safe and trustworthy around

children, when in fact they knew, or should have known, that Kaup was a danger. As a result, the plaintiff daughter was assaulted by Kaup.

II. Loss of services is a cause of action.

The Diocese contends that "loss of services," a cause of action which a parent can bring for injury to a child, is not a separate cause of action but only "a specific type of damages." (Appellants' brief at 29-30) They cite as authority a discussion of how the parent's claim and child's claim are distinct, which contradicts their proposition. The Diocese is incorrect, as Loss of Services has a long common law history and has long been recognized in North Carolina law.

Loss of services is mentioned in Blackstone, and traces its origin to at least 1653. *United States v. Standard Oil*, 332 U.S. 301, 312 n. 16 and 17; 67 S. Ct. 1604, 1610 n. 16 and 17 (1947) ("Extension of the action *per quod servitium amisit* [he who injures a servant] to domestic relations, upon a fictional basis, took place as early as 1653.") In other words, the cause of action began as a claim by an owner for injury to a servant, but at Common Law (in 1653 if not before) was adapted by legal fiction to redress injury to a parent when a child is injured. It is a separate cause of action for the parent.

Under that overt fiction for the loss of services cause of action, the injured child's lost "service" is presumed. E.g., *Tillotson v. Currin*, 176 N.C. 479, 481, 97 S.E. 395, 396 (1918) ("If the [child] is under 21 years of age, the loss of service is presumed, and no evidence of the fact need be offered; and, if over 21, the slightest service, such as handling a cup of tea, milking a cow, is sufficient at common law to support the action," *citing*, *Snider v. Newell*, 132 N.C. 614, 44 S.E. 354 (1903) ("the action could be maintained on the bare relation of parent and child alone."). *Accord*, *Briggs v. Evans*, 27 N.C. 16, 20 (1844) ("The actual damage, which he has sustained, in many, if not most cases, exists only in the humanity of the law, which seeks to vindicate his outraged feelings."). The cause of action includes as damages both actual expenses and intangible injury. The cause of action is explicitly recognized as a separate claim. *See, e.g., Flippin v Jarrell*, 301 N.C. 108, 120, 270 S.E.2d 482, 490 (1980) (divorced mother had standing to bring "a claim by the parent, ordinarily the father, for parental losses caused by (a) loss of services during the child's minority, and (b) medical expenses necessary reasonably necessary for treating the child's injuries.").

The claim was most recently discussed by the North Carolina Court of Appeals in a coverage action, *N. Carolina Farm Bureau Mut. Ins. Co., Inc. v. Phillips,* 805 S.E.2d 362, 366 (2017), in which the ancient common law history of the cause of action is noted.

The appellants are incorrect that loss of services is not a separate cause of action, and incorrect that the claim is limited to a child's minority. The claim should not be dismissed.

III. The form in which the claim for punitive damages is stated is not a bar to its remaining in the complaint.

Appellants contend that punitive damages are a form of relief, not a separate cause of action. (Appellants' Brief at pp 30-31). Plaintiffs do not disagree that punitive damages are a means of relief, but N.C.R. Civ. P. 9(k) requires that "a demand for punitive damages shall be specifically stated." The pleading merely attempts to comply with the pertinent statute and court rules.

CONCLUSION

Smith v. Privette and *Doe v. Diocese of Raleigh* control the disposition of this appeal, must be followed by this court, and should not be overturned. These cases require that Judge Lewis's order be affirmed

and the case be remanded for further proceedings. The complaint alleges that appellants knew or should have known of reasons that Kaup was dangerous to leave unsupervised around children, and that they had that information before assigning him to duties around children, and specifically to counsel the plaintiff daughter. As in *Smith v Privette* and *Doe v. Diocese of Raleigh*, the First Amendment does not bar the claim. Only secular principles are needed to assess the Appellants' tortious behavior, and Appellants are not immune from liability for engaging in tortious conduct.

Respectfully submitted, this 18th day of December, 2017.

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N.*C.R. App. P. 33(b) Certification:*
I certify that all the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

s/ Gregg Meyers
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for the Plaintiff-Appellee certifies that the foregoing brief, which is prepare using a proportional font, is less than 8,750 words (excluding cover, indexes, table of authorities, certificates of service, this certificate of complaint and appendixes) as reported by the word-processing software.

s/ Leto Copeley
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing Appellee's Brief was served upon the following counsel by facsimile:

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This the 18th day of December, 2017.

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