FILED
Amy Hunley
CLERK, SUPERIOR COURT
02/08/2022 1:40PM
BY: RPORTER
DEPUTY

Joel P. Borowiec, 014129
BOROWIEC & BOROWIEC, P.C.
1723 S. Highway 92
Sierra Vista, AZ 85635
(520) 417-0221
courtdocs@borowieclaw.com
info@borowieclaw.com

William J. Maledon, 003670
Travis C. Hunt, 035491
OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9000
wmaledon@omlaw.com
thunt@omlaw.com

Peter C. Schofield, *pro hac vice*
KIRTON McCONKIE, P.C.
4600 W. Executive Pkwy, Suite 400
Lehi, UT 84043
(801) 426-2100
pschofield@kmclaw.com

Attorneys for Defendants the Church, Herrod (except Counts 5-6), and Mauzy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

JANE DOE I; JANE DOE II; JOHN DOE, by and through (their parents to be named, or if not named, the conservator),

Plaintiffs,

v.

THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation sole; DR. JOHN HERROD AND SHERRIE FARNSWORTH HERROD, individually and as a jointly married couple; ROBERT KIM MAUZY AND MICHELLE MORGAN MAUZY, individually and as a jointly married couple; SHAUNICE WARR AND JOHN ROE WARR, individually and as a jointly married couple; JOHN ROE I-X; JANE ROE I-X; ROE CORPORATIONS IX;

Defendants.

No. S0200CV202000599

CHURCH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Assigned to the Honorable Laura Cardinal)

(ORAL ARGUMENT REQUESTED)

Defendants The Church of Jesus Christ of Latter-day Saints, a Utah corporation sole, f/k/a Corporation of the President of The Church of Jesus Christ of Latter-day Saints (the "Church"), John and Sherrie Herrod (except as to Counts 5 and 6), and Kim and Michelle Morgan Mauzy (collectively "the Church Defendants") hereby move, pursuant to Rule 56 of the Arizona Rules of Civil Procedure, for summary judgment as to all of the claims of Plaintiffs' Complaint against the Church Defendants.[1]

INTRODUCTION

This case hinges ***entirely*** on whether Arizona's child abuse reporting statute, A.R.S. 13-3620, required two Church Bishops, Defendants John Herrod and Kim Mauzy, to report to authorities confidential confessions made to them by Plaintiffs' father. If it does not, then Plaintiffs' claims fail because Plaintiffs have no basis to contend that the Church Defendants otherwise owed them a duty. And "the existence of a duty to the plaintiff is a prerequisite to tort liability." *Noble v. Nat'l Am. Life Ins. Co.*, 128 Ariz. 188, 191 (1981). Whether a duty exists is a question of law for the Court. *Gipson v. Kasey*, 214 Ariz. 141, 145, ¶¶ 19-21 (2007).

The Arizona reporting statute requires certain defined "persons" to report child abuse. But it contains an explicit exception for clergy who learn of abuse from "a confidential communication or a confession" if "the member of the clergy . . . determines [it] is reasonable and necessary within the concepts of the religion" to keep the communication confidential. A.R.S. 13-3620(A). Thus, ***clergy do not have to breach their religious duty of confidentiality.*** Here, it is undisputed that, whatever Paul Adams confessed to these two Church Bishops, he

[1] Plaintiffs have asserted essentially three tort claims against the Church Defendants: negligence (Count One), negligent and intentional infliction of emotional distress (Counts Two and Three), and breach of fiduciary duty (Count Four). Plaintiffs also assert "claims" for ratification (Count Seven) and punitive damages (Count Nine), but neither of those "claims" are stand-alone causes of action. Ratification is a legal principal usually applied in the contract context, not an independent claim upon which relief can be granted. Similarly, "punitive damages" is merely a damage element that applies under certain circumstances, not a separate cause of action. *See, e.g., Tucker v. Marcus*, 418 N.W.2d 818, 821 (Wis. 1988) ("[A] claim for punitive damages alone is not sufficient to support a cause of action."). Finally, Plaintiffs have asserted a Civil Conspiracy claim (Count Eight), but that claim requires (among other things) that there be a valid underlying tort claim to which the conspiracy is directed (even assuming that an institution such as a church can legally conspire with its "agents"). For the reasons stated herein, there is no valid underlying tort claim, and thus the conspiracy claim fails as a matter of law when, as shown herein, the underlying tort claims fail.

did so in confidence. It is also undisputed that both Bishops had no other information about the abuse, and that both determined those confessions had to remain confidential "within the concepts of the[ir] religion." (*See* Declarations of John Herrod and Kim Mauzy attached hereto as **Exhibits 1** and **2**.) As a matter of law, Plaintiffs cannot second-guess that religious determination by these clergy members, nor can they ask this Court or a jury to do so. Thus, the Church Defendants are entitled to summary judgment as to all of Plaintiffs' claims.

MEMORANDUM OF POINTS AND AUTHORITIES

The Church is a worldwide religious organization with more than 16 million members. The Church is organized on a local basis into geographic congregations known as "wards." Several wards in the same area are organized into a "stake." Each stake is led by a Stake President and each ward by a Bishop selected by the Stake President. Bishops and Stake Presidents are the Church's clergy. They hear confessions and provide religious guidance and counsel to Church members. Church doctrine imposes upon them a sacred duty to keep confessions and counseling strictly confidential.

Plaintiffs and their parents were members of the Bisbee Ward, within the Sierra Vista Stake, during most of the relevant time period. Defendants John Herrod and Kim Mauzy served successively as Bishops of the Bisbee Ward during the relevant time period. Plaintiffs' father, Paul Adams, made a limited confession of abuse to Bishop Herrod in late 2011 and again to Bishop Mauzy in mid-2013. As required by Church doctrine, both Bishops maintained the confidentiality of his confession. Plaintiffs claim that these Church Bishops, and the Church itself, had a duty to protect them from sexual abuse by disclosing their father's confidential confessions to authorities. Plaintiffs are wrong – no such duty existed as a matter of law.

A. Absent a Duty under the Arizona Reporting Statute, There is No Other Duty or Legal Basis for the Claims Against The Church Defendants.

Duty is the linchpin of every tort claim. Moreover, "the plaintiff bears the burden of proving the existence of a duty." *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 563, ¶ 2 (2018). Plaintiffs cannot point to any duty that the Church Defendants owed them.

Indeed, nothing is more firmly established in the common law than the principle that

one who has not created a risk has no duty "to give aid to another, no matter how serious the peril to the other and no matter how trifling the burden of coming to the rescue." *La Raia v. Sup. Ct.*, 150 Ariz. 118, 121 (1986). *See also* Restatement (Third) of Torts § 37 (2012) ("An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38-44 is applicable."); Restatement (Second) of Torts § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). This is especially true where the danger is criminal misconduct by a third party. *Id.*

There is a narrow exception as to those persons who have a "special relationship" with either the perpetrator or the victim. *Bloxham v. Glock Inc.*, 203 Ariz. 271, 274 ¶ 7 (App. 2002). However, very few "special relationships" exist under the law, and they do not include friends, neighbors, co-workers, fellow church members, extended family, or a host of other ***close relationships*** that do not involve ***custody and control***. Arizona recognizes the traditional special relationships identified in the Restatement: "common carrier-passenger, landowner-invitee, custodian-ward, shopkeeper-business invitee, [and] employer-employee …." *Bogue v. Better-Bilt Aluminum Co.*, 179 Ariz. 22, 34 (App. 1994). Absent one of these categorical relationships, "no duty exists to take affirmative precaution for the aid or protection of another." *Id*. Thus, a person who happens upon a close friend, neighbor, or other person in danger has no duty to render aid, no matter how serious the danger or how easy it would be to help. Restatement (Second) of Torts § 314 *cmt*. a ("one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him . . . ."). A friend, neighbor, etc., who knows that a father abuses his child has no common law duty to intervene. "Knowledge of a risk of harm and the ability to take some action to ameliorate that risk do not alone impose a duty to act." *Collette v. Tollefson Unif. Sch. Dist.*, 203 Ariz. 359, 363, ¶ 13 (App. 2002).

The law is equally clear that a church and its clergy have no "special relationship" with church members. Victor Schwartz, the co-author of Prosser and Keeton on Torts, explains that churches cannot have a special relationship with parishioners because they have no secular

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

control over them:

> [R]eligious institutions have very limited, if any, practical control over a member. This creates a very real and practical difference from situations where courts have found a "special relationship." In all of the "special relationships" where an actor owes a duty of care to a third person for risks posed by another, the relationships are characterized by the significant degree of practical control that the actor has over the perpetrator or the victim. By contrast, while churches … may have religious influence over their members' religious practices and beliefs, they have little if any "control" over their day-to-day activities.

Victor E. Schwartz et al., *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required*, 74 U. Cin. L. Rev. 11, 30 (2005). "Religious affiliation is a matter of personal choice and preference, not control." *Id*. "Clearly, a religious institution does not have the qualitative or quantitative control over its members that" exists in the recognized special relationships. *Id*.

Indeed, ***every court*** to address this issue has held that a church and its clergy have no special relationship with church members by virtue of church membership. *Conti v. Watchtower Bible & Tract Soc'y*, 235 Cal.App.4th 1214, 1227 (2015) (There is "no authority" for imposing a "duty on … a church to prevent its members from harming each other."). In *Berry v. Watchtower Bible & Tract Soc'y*, 879 A.2d 1124 (N.H. 2005), a mother told Congregation elders that her husband was sexually abusing their children. She alleged that the elders "failed to report it to law enforcement authorities and improperly counseled [her] about how she should handle the alleged abuse." *Id*. at 1125. The court held that the Congregation did not have a duty to control the father or protect the children because no special relationship existed. "[T]he evidence is that the plaintiffs were at all times under the custody and protection of their parents." *Id*. at 1129. Imposing liability, the court said, would undermine the established rule that a person has no duty to prevent criminal misconduct by a third party. *Id*. at 1130. "Otherwise, the general rule which imposes no duty on citizens to prevent the criminal acts of third parties will be swallowed up and civil liability unreasonably extended." *Id*.[2]

---

[2] *See also Meyer v. Lindala*, 675 N.W.2d 635, 640-41 (Minn. App. 2004) (rejecting plaintiff's argument that a special relationship existed because the church's "doctrine … provides that members rely on congregation elders for all of their concerns" and requires "that members only associate with other Jehovah's Witnesses" which "amounts to significant control, which deprived [them] of normal opportunities for self-protection,"

Thus, many of Plaintiffs' allegations in the Complaint are meaningless surplusage because they are not the basis for any viable legal claim. *See e.g.*, Compl. ¶ 81 ("Despite knowing about the ongoing abuse … Defendants did nothing to protect them."); ¶ 82 ("Defendants did not offer these victims therapy, nor provide them with help of any kind."); ¶ 90 ("Defendants did nothing to stop the abuse."); ¶ 90(c) (Defendants "[f]ail[ed] to provide adequate guidance and counseling to Paul"); ¶ 90(d) (Defendants "[f]ail[ed] to provide any guidance, counseling, and support … to Plaintiffs").

Plaintiffs contend that the "Adams family had a special relationship with the Church and its leaders" because they "regularly attended Church functions" (Compl. ¶ 23); because the Church provided "guidance" to Plaintiffs (*id.* ¶ 102); because of the Church's "institutional power over the Adams' family" (*id.* ¶ 103); and because of Church teachings about obedience and forgiveness and Leizza's desire "as a faithful member of the … Church" to "follow[ ] these instructions" (*id.* ¶ 23). That is not how tort duty works or "special relationships" arise.

As noted above, no court has ever found a "special relationship" between a church and its members. It is "categorical relationships" that "give rise to a duty," not fact-specific associations. *Gipson*, 214 Ariz. 141, 145, ¶ 19. Arizona courts do not conduct a "fact-specific analysis of the relationship between the parties" to determine whether a special relationship exists. *Id.* ¶ 21. "The issue of duty is not a factual matter; it is a legal matter to be determined

---

because the church "did not have custody or control over [plaintiffs] at the time of the alleged misconduct" and "[p]roviding faith-based advice or instruction, without more, does not create a special relationship"); *Bryan R. v. Watchtower Bible & Tract Soc'y*, 738 A.2d 839, 847 (Me. 1999) ("The creation of an amorphous common law duty on the part of a church or other voluntary organization requiring it to protect its members from each other would give rise to both unlimited liability and liability out of all proportion to culpability."); *Roman Catholic Bishop v. Sup. Ct.*, 42 Cal.App.4th 1556 (1996) (no special relationship exists "based on a priest/parishioner relationship"); *Doe v. Corp. of the President of The Church of Jesus Christ of Latter-day Saints*, 98 P.3d 429, 432 (Utah App. 2004) ("[W]e also reject Plaintiffs' argument that [church] membership alone was sufficient to establish a special relationship between [the church] and Plaintiffs that created a duty on [the church's] part to warn Plaintiffs about Tilson."); *Williams v. United Pentecostal Church Intern.*, 115 S.W.3d 612, 615 (Tex. App. 2003) (holding that churches and child members do not stand in a special relationship); *Bouchard v. New York Archdiocese*, 2006 WL 1375232, * 6 (S.D.N.Y. May 18, 2006) ("Plaintiff's allegations do not make out the existence of any sort of special relationship between the Church Defendants and Plaintiff beyond that general relationship between a church or religious body and a congregant. That general relationship is insufficient in law to support the finding of a fiduciary duty.").

before the case-specific facts are considered." *Id*. Foreseeability is also "not a factor to be considered by courts when making determinations of duty." *Id*. at 144 ¶ 15. There are simply "categories" of relationships where "no duty exists" and liability cannot be imposed "no matter how unreasonable their conduct" or how foreseeable the harm. *Id*. at ¶ 11.

Moreover, it would be unconstitutional for a court to impose and define what duties a church or its clergy owe to church members. That relationship is defined by scripture and doctrine, not secular expectations. And the First Amendment to the United States Constitution and the Arizona Constitution protect a church's right to define that religious relationship for itself. Ariz. Const. art. 20, §1 ("Perfect toleration of religious sentiment shall be secured to every inhabitant of this state . . ."). Defining a secular duty would "require courts to become entangled in disputes over religious doctrines or to interfere in the internal ecclesiastical affairs of religious institutions." Schwartz, *supra* at 12-13. Various plaintiffs have argued that

> a special protective relationship exists between a religious organization and its members based on one or more of the following factors: membership; doctrines, ecclesiastical canons, and teachings regarding pastoral care, member ministry, and the discipline of members for sin; mental, emotional, or spiritual reliance on the institution, its clergy, or its doctrines, policies, or procedures; and express or implied representations by the religious organization about the spiritual worthiness or morality of particular members.

Schwartz, *supra* at 46. Such factors "cannot be used" as a basis for imposing a duty on churches because the First Amendment "bars the very judicial inquiry into church doctrine, teachings, polity, ecclesiastical policies, and practices that would be necessary to establish the truth and legal significance of such factors in a particular case." Schwartz, *supra* at 46. *See Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450-52 (1969) (civil courts cannot "engage in the forbidden process of interpreting and weighing church doctrine"; such process "can play ***no role*** in any … judicial proceedings" because it unconstitutionally "inject[s] the civil courts into substantive ecclesiastical matters"). (Emphasis added.)

In *Meyer v. Lindala*, 675 N.W.2d 635 (Minn. App. 2004), the two plaintiffs were abused by another congregation member. They sued the congregation, contending that a "special relationship" existed because Jehovah's Witnesses doctrine "provides that members rely on

congregation elders for all their concerns" and imposes a "duty to investigate allegations of wrongdoing and protect congregants from future wrongful acts." *Id*. at 640-41. The court held that religious doctrine does not create secular duties, and that by teaching and practicing their doctrine, the church defendants "acted within their constitutional right to religious freedom …." *Id*. at 641. *See also Roman Catholic Bishop v. Super Ct.*, 50 Cal.Rptr.2d 399, 406 (Cal. App. 1996) (a church "ha[s] no greater civil duty based upon its religious tenets"); *Roppolo v. Moore*, 644 So. 2d 206, 208 (La. App. 1994) (courts have "no authority to determine or enforce standards of religious conduct and duty").

In short, every court to consider the issue has concluded that a "special relationship" ***does not exist*** between a church or its clergy and their church members. Notwithstanding Plaintiffs' unjustified attack against the Church in their pleadings, the invitation by Plaintiffs for this Court to create such a duty where none exists would be contrary to all established law and would violate the First Amendment and the Arizona Constitution.[3]

Because Plaintiffs know that the "clergy exception" to Arizona's child abuse reporting statute (A.R.S. 13-3620) eviscerates their tort claims, they are trying to mislead the Court by attacking the Church generally and claiming – falsely – that the Church condones sexual abuse and seeks to cover it up. But those claims, in addition to being false, are utterly irrelevant to the legal question whether a tort duty exists here. No court has allowed a claim against a church or its clergy based on a father abusing his own children. *Cf. Doe v. Corp. of Catholic Bishop of Yakima*, 957 F. Supp.2d 1225, 1233 (E.D. Wash. 2013) ("no liability could be imposed on the church because the stepfather's abuse essentially had nothing to do with the church"). Thus, Plaintiffs' allegations and arguments about duties owed them by the Church Defendants are without merit as a matter of law. There is no special relationship between Plaintiffs and the Church Defendants and thus no general tort duty to rescue exists.

---

[3] This does not mean churches are absolutely immune from liability for sexual abuse. A duty may exist where the abuse is committed by church clergy or a church employee (as was the case in many Catholic church cases), or when the victim is in the church's custody at the time of the abuse, as in a church-run day care. But no court has allowed a church to be held liable for a parent's abuse of his own child simply because the child was a member of the church and the "church" allegedly had knowledge of the abuse.

B. The Church's Clergy Had No Statutory Duty to Report the Abuse.

A duty to protect or rescue can arise as a matter of "public policy" from a public safety statute such as A.R.S. § 13-3620. *See Quiroz v. Alcoa Inc.*, 243 Ariz. 560, 565, ¶¶ 14-15 (2018). By distorting the plain language of the Arizona statute, Plaintiffs contend that the Arizona reporting statute imposed a duty on Church clergy to report their father's abuse to authorities. But Plaintiffs are simply wrong about the application of the statute. The reporting statute adopted by the Arizona Legislature protects religious freedom and promotes voluntary confession by broadly exempting "confessions" and "confidential communications" with clergy. Plaintiffs and their attorneys may not agree with the public policy behind the "clergy exception" (and have recently testified against it at the State Legislature), but understanding why Arizona would decline to require clergy to disclose confidential communications reveals why there was no duty to report in this case.

"The history of the nation has shown a uniform respect for the character of sacramental confession as inviolable by government agents interested in securing evidence of crime from the lips of a criminal." *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997). In 1812, Daniel Phillips confessed to his priest that he had received stolen goods. The priest, Father Kohlmann, insisted that he return them. Phillips gave them to Father Kohlmann who delivered them to their owner, James Keating. Keating told the authorities, who subpoenaed Father Kohlmann to appear before a grand jury to identify the thief. Father Kohlmann refused to reveal the requested information:

> [I]f called upon to testify in quality of a minister of a sacrament, in which my God himself has enjoined on me a perpetual and inviolable secrecy, I must declare to this honorable Court, that I cannot, I must not answer any question that has a bearing upon the restitution in question; and that it would be my duty to prefer instantaneous death or any temporal misfortune, rather than disclose the name of the penitent in question. For, were I to act otherwise, I should become a traitor to my church, to my sacred ministry and to my God. In fine, I should render myself guilty of eternal damnation.

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1411 (1990) (quoting *People v. Phillips*, N.Y. Ct. Gen. Sess. (1813)). The court held that compelling Father Kohlmann to testify would violate the First

Amendment right to the "free exercise of religion."

The clergy-communicant privilege largely grew out of *Phillips*. All 50 states have adopted some form of the privilege.[4]

Reporting laws without exemptions for confidential clergy communications turn the confessional into a law enforcement listening device and may, in fact, do more harm than good. As stated by one commentator, "those who advocate abrogation of the clergy-penitent privilege imply that policy-makers must choose either to uphold the clergy-penitent privilege or effectively combat child abuse." Shawn P. Bailey, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege through a Comparison with the Attorney-Client Privilege*, 2002 BYU L. Rev. 489, 490-91 (2002). The truth is that protecting clergy confidentiality "may effectively combat child abuse." *Id*. *See also* Mary Hartell Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723, 812 (1987) ("By discouraging persons from seeking private help, reporting requirements may preclude some troubled people from seeking any help at all.").

There is some statistical evidence of this. A study of the effects of mandated clergy reporting concluded: "In states requiring clergy to report all or some of the time, there were lower report rates that were statistically significant for confirmed reports compared with states without this requirement." Frank E. Vandervort & Vincent J. Palusci, *Effects of Clergy Reporting Laws on Child Maltreatment Report Rates*, Univ. of Mich. Law School, APSAC Advisor 26, no. 1 (2014). "At least to some extent, admissions of wrongdoing … would not be made but for the belief of parishioners … that their confidences would not be disclosed." *Scott v. Hammock*, 870 P.2d 947, 955 (Utah 1994). It's safe to assume that Paul Adams would not have confessed if Bishop Herrod had been required to turn him in to the police. Indeed, Bishop Herrod's actions in having Paul Adams repeat his confession in front of his wife and offering

[4] The importance of confidentiality between clergy and parishioners has been repeatedly reaffirmed. *See Totten v. U.S.*, 92 U.S. 105, 107 (1875) ("suits cannot be maintained which would require a disclosure of the confidences of the confessional"); *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("The priest-penitent privilege recognizes the human need to disclosure to a spiritual counselor, *in total and absolute confidence* ….").

to send him to counseling were both designed to get the abuse reported to authorities even though Bishop Herrod himself could not do so.[5] The fact that Paul Adams and his wife did not follow the Bishop's advice to report what had happened was their failing, not the Bishop's.

To protect religious freedom and encourage perpetrators to seek help, a significant majority of states have, as a matter of public policy, decided to exempt confidential communications with clergy, or exempt clergy altogether, from mandatory reporting requirements. The largest group, 33 states (including Arizona), require clergy to report abuse if discovered other than in the course of a confidential confession or communication. In seven states, clergy are not mandatory reporters at all. Only 10 states require clergy to report abuse without any exception. Thus, 40 states do not require clergy to report confidential perpetrator confessions. F. Radal & A. Labbe, *The Clergy-Penitent Privilege: An Overview*, FDCC Quarterly (2015 as updated).[6]

Arizona's reporting statute is typical of the majority by exempting from reporting ***all*** confidential communications with clergy:

> A member of the clergy … who has received a confidential communication or a confession in that person's role as a member of the clergy … in the course of the discipline enjoined by the church to which the member of the clergy … belongs ***may withhold reporting of the communication or confession if the member of the clergy … determines that it is reasonable and necessary within the concepts of the religion***. This exemption applies only to the communication or confession and not to personal observations the member of the clergy … may otherwise make of the minor.

A.R.S. § 13-3620(A) (emphasis added). In fact, Arizona law (like most other states) maximizes religious freedom by letting each member of the clergy decide whether "it is reasonable and necessary within the concepts of the[ir] religion" to maintain the confidentiality of a

---

[5] Arizona law is clear that the "The privilege afforded by the statute belongs to the communicant; a clergyman may not disclose the communicant's confidences without the communicant's consent." *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24, 28, 764 P.2d 759, 763 (App. 1988) (construing the comparable clergy-penitent privilege statute in civil cases, A.R.S. 12-2233). No evidence exists that Paul Adams knowingly and intentionally waived the privilege here.

[6] In March of this year, when Plaintiffs and their counsel unsuccessfully sought to have the Arizona Legislature amend the Arizona reporting statute to delete the exemption for confidential communications with clergy, two Catholic members of the Senate Committee "described the bill as an attack on their faith" because "[i]n the Catholic Church, the confessional is sacrosanct." *Arizona Capitol Times*, p.2, March 23, 2021. Plaintiffs' attempt to change the statute is an admission that it applies here.

communication.

In *Nunez v. Watchtower Bible & Tract Soc'y*, 455 P.3d 829 (Mont. 2020), the Montana Supreme Court soundly criticized the trial court for allowing a case similar to this case to go forward. There, the plaintiff argued that abuse disclosures by two victims and the perpetrator to a committee of elders was not really "confidential" even though the clergy members deemed it to be confidential. Montana's reporting statute exempted clergy "if the communication is required to be confidential by canon law, church doctrine, or established practice." *Id*. at 832. The court said the purpose of this exemption was to "avoid interference with the practice of religion." *Id*. at 835. As the court explained, a third-party assessment of confidentiality or a legislatively imposed definition of "confidential" would "impermissibly discriminate between different religious beliefs and practices, protecting confidentiality of reports made in a confession from a parishioner to a priest, like the traditional Catholic practice, while offering no protection to a congregant's disclosures to a committee of elders using a process like that followed by the Jehovah's witnesses." *Id*. at 836. Based on the Montana statute, the *Nunez* court said that the action should have been summarily dismissed, just as this Court should do here. Plaintiffs can cite no case holding differently because there are none.

Arizona law goes even further than the statute in *Nunez* − maximizing religious freedom by letting each member of the clergy determine whether confidentiality is "reasonable and necessary within the concepts of the religion." A.R.S. § 13-3620(A). Contrary to what Plaintiffs have alleged, it is not the jury that determines whether confidentiality is "reasonable and necessary within the concepts of the religion." The statute gives that right to clergy members. They decide what their religion requires of them. Bishop Herrod and Bishop Mauzy both considered Mr. Adams' confessions to be confidential "within the concepts of the religion." (**Exh. 1** at ¶12; **Exh. 2** at ¶13.) Thus, both maintained the seal of the confessional. Public policy in Arizona protects such confidential communications, and neither Plaintiffs nor this Court can second-guess the Bishops' determination of their religious duties. Plaintiffs' attempt to distort the statute is completely without merit, and like in *Nunez*, seeks to lead this

Court down a path that will result in fundamental legal error if accepted.[7]

Although it addresses the clergy-communicant privilege and not the reporting statute, *State v. Archibeque*, 223 Ariz. 231, 221 P.3d 1045 (App. 2009), supports the Church Defendants' position. Manuel Archibeque confessed to his wife that he had molested his stepdaughter. She contacted their Bishop in The Church of Jesus Christ of Latter-day Saints and, with his wife present, Archibeque confessed again. *Id.* at 233-34. Based on other evidence, Archibeque was subsequently indicted on one count of sexual conduct with a minor and three counts of molesting a child. *Id.* at 234. Archibeque filed a motion to suppress after the State gave notice that it intended to seek the Bishop's testimony. *Id.* The Court of Appeals affirmed the trial court's conclusion that Archibeque's confession was privileged. The court recognized that Bishops are clergy, "that 'a basic tenet of being a Bishop' is not revealing discussions with members and statements made in confidence," that the Bishop had received the confession "in his 'role as the Bishop,'" and that "the confession was made in the course of discipline enjoined by the Church." *Id.* at 234-35.

The court also concluded that the presence of Archibeque's wife did not waive the privilege. *Id.* at 236. The purpose of the meeting was for the Bishop "to help in the repentance process and provide spiritual guidance for the family." *Id.* "Based upon the nature of the meeting and the relationships between the parties" the court concluded "that Archibeque believed the communications would remain confidential and that such a belief was reasonable." *Id.* What Plaintiffs seek to do here is completely contrary to the *Archibeque* holding.

The clergy exemption in the Arizona reporting statute is broader than the clergy-

---

[7] Indeed, although the Arizona reporting statute gives the clergy member the absolute right to determine whether confidentiality is "reasonable and necessary within the concepts of the religion," there can be no doubt that the Church requires its clergy to maintain confidentiality of such private communications by Church members. The Church's Handbook of Instructions for Church clergy states:

> Bishops, Stake Presidents and their counselors have a solemn duty to keep confidential all information that members give them in confessions and interviews. The same duty of confidentiality applies to all who take part in Church disciplinary councils. . . . Confidential information must not be shared with anyone except authorized ecclesiastical leaders.

Exh. 1 at ¶6; **Exh. 2** at ¶7.

communicant privilege. It depends solely on the ***clergyman's determination*** that he has a duty of confidentiality under the concepts of the religion. Thus, for example, if the court in *Archibeque* had determined that the communication was not privileged because Archibeque's wife was present, the Bishop would still have had no duty to report as long as he believed his religious duty required confidentiality.

Plaintiffs contend that Paul Adams waived the "privilege" when he "disseminated … videos and pictures" of abuse on the internet. Compl. ¶51. But it is undisputed that Bishop Herrod and Bishop Mauzy did not know these facts until ***after*** Adams' arrest in early 2017. (**Exh. 1** at ¶17; **Exh. 2** at ¶17.) Indeed, the record establishes that the first videos were posted by Mr. Adams in 2015 – years after his confessions to the Bishops and almost two years after he had been excommunicated from the Church. (*See* Federal Indictment of Paul Adams, May 25, 2017, **Exhibit 3** hereto, Count 14 of which indicates that videos were taken by Paul Adams between March 29, 2015 and August 22, 2016.) Thus, Adams' actions could not have affected the Bishops' determination about their obligation of confidentiality. Additionally, posting videos does not waive the privilege because it does not disclose the "substance" of the confidential communications between Adams and the Bishops. *Archibeque*, 223 Ariz. at 238 (No waiver of the clergy-penitent privilege occurred because Archibeque did not reveal to police "the substance of his conversations with the Bishop.").

Regardless of any disclosures of abuse by Paul Adams after his arrest, Bishop Herrod and Bishop Mauzy both had a duty under Church doctrine to maintain the confidentiality of his confessions, and they did so. Their belief regarding what Church doctrine required of them ***is not subject to challenge*** for two reasons: First, as noted, the reporting statute leaves that religious determination up to them. Second, the First Amendment and the Arizona Constitution prohibit courts from resolving doctrinal disputes. "[W]hen considering whether a communication would be considered confidential under the discipline or practice of a specific religion" the First Amendment requires courts "to accept the guidance provided by the clerical witness without embarking on a fact-finding mission." *People v. Bragg*, 824 N.W.2d 170, 185 (Mich. App. 2012). *See also Nunez*, 455 P.3d at 836 ("we decline to conduct further inquiry

into the validity of Jehovah's Witnesses' tenets and doctrines, including its canon and practice for adherence to a requirement of confidentiality in handling child abuse reports").

In sum, the Arizona reporting statute imposes ***no duty*** on clergy to report abuse learned of through confessions or confidential communications. That policy is based on important First Amendment principles and the recognition that society benefits from fostering relationships between parishioners and clergy so that clergy can help sinners "to abandon wrongful or harmful conduct, adopt higher standards of conduct, and reconcile themselves with others and God." *Scott*, 870 P.2d at 952. *See also Conti*, 235 Cal.App.4th at 1228-29 (requiring a report "would discourage wrongdoers from seeking potentially beneficial intervention, and contravene the public policy against disclosure of penitential communications"). Plaintiffs and their counsel may not like that public policy choice, but, as in *Nunez*, neither they nor this Court can question that legislative determination.

Finally, Plaintiffs pleaded that Bishop Herrod and Bishop Mauzy had a duty to report based on "observational knowledge of the abuse …." Compl. ¶100. But there is no evidence that they observed Paul Adams abusing his children or doing anything that would have caused them to believe he was abusing his children. Moreover, neither of the Bishops saw any visible signs of abuse, even assuming that visible signs of sexual abuse would be possible. (**Exh. 1** at ¶14; **Exh. 2** at ¶16.) Plaintiffs cannot create an issue of fact by mere allegation alone. *Orme School v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990). At the summary judgment stage, "admissible" evidence showing the existence of a material issue of fact is required. *Id.*

C. The Separate Claim Against Shaunice Warr Does Not Preclude Summary Judgment for the Church Defendants.

Shaunice Warr was a member of the Bisbee Ward and a fellow Border Patrol Agent with Paul Adams. She was never a clergy member of the Church, and Plaintiffs seem to concede that. Compl. ¶9. Indeed, "whether a person is a clergyman of a particular religious organization should be determined by that organization's ecclesiastical rules, customs and laws." *Archibeque*, 223 Ariz. at 234. And Ms. Warr never held a clergy position within the Church. (**Exh. 1** at ¶33; **Exh. 2** at ¶30.)

Like most female Church members, Ms. Warr was a "visiting teacher" (now known as "ministering sisters") and was assigned to visit with Leizza Adams to assist with her spiritual and other needs. But so-called "visiting teachers" are not ordained members of clergy, nor are they "teachers" in the typical sense. They do not have priesthood authority. They do not receive confessions, conduct worthiness interviews, participate in disciplinary councils, or perform any of the traditional functions of clergy. The role of a "visiting teacher" or "ministering sister" is simply to be a Christian by offering encouragement, help, and love to other women. (**Exh. 1** at ¶27; **Exh. 2** at ¶23.)

Without any foundational basis, Plaintiffs allege that Ms. Warr was a Church "agent" and that the Church is liable for her alleged negligence in failing to report any knowledge she may have had of abuse of Plaintiffs by their father. But a mere allegation of "agency" is insufficient as a matter of law. The facts are undisputed that Warr's involvement with the Church was nothing other than as an ordinary Church member. (**Exh. 1** at ¶¶26-33; **Exh. 2** at ¶¶26-30.) Her role as a "visiting teacher" or "ministering sister" to other Church members did not transform her into a Church "agent" with resulting liability for the Church with respect to her conduct. To argue otherwise is patently frivolous as a matter of law. In any case, as discussed above, as a friend or as a fellow Church member, Ms. Warr had no legal duty to control Paul Adams or protect Plaintiffs from him.

Plaintiffs also contend that Warr had a statutory duty to report based on her own observations and her role as a Border Patrol Agent. Whether that is correct is irrelevant to the issue of the Church Defendants' entitlement to summary judgment. Simply put, the claims against Shaunice Warr have no bearing on this Motion by the Church Defendants. Whatever claims Plaintiffs may have against Ms. Warr, they cannot as a matter of law be attributed in any way to the Church Defendants.[8]

---

[8] In any event, the Church could not be vicariously liable for a breach of the Arizona reporting statute by Warr, the Bishops or anyone else. The reporting statute applies to certain defined individuals, not their employers or principals. Mandated reporters must report to avoid individual criminal sanctions, regardless of whether or not it advances their employer's or principal's interests. Accordingly, a third-party employer cannot be held vicariously liable for an employee's violation of the reporting statute. The Arkansas Supreme Court rejected vicarious liability based on an employee's reporting duty, holding

D. *All* Tort Claims Against the Church Defendants Must Be Dismissed.

As noted at the outset, Plaintiffs have asserted claims against the Church Defendants based on negligence, intentional and negligent infliction of emotional distress, and breach of fiduciary duty – all based on the Church Defendants' alleged failure to report the abuse of Plaintiffs by their father. But all of these tort claims require a legal "duty" on the part of the defendant. *LaRaia*, 150 Ariz. at 121. In the absence of a duty, inaction is not tortious no matter the label given to the claim. Here, no duty existed on the part of the Church Defendants because of the "clergy exception" contained in the Arizona statute.

As noted above, the attempt by Plaintiffs to plead a claim for breach of fiduciary duty is legally without merit. Churches and clergy do not have a fiduciary relationship with their parishioners. *See Bryan R.*, 738 A.2d at 846 ("[Plaintiff] has not provided any support for his assertion that a religious organization has a fiduciary relationship with its members …."). Imposing and defining such a duty would be unconstitutional because it would be "impossible to show the existence of a fiduciary relationship [in clergy-parishioner cases] without resort to religious facts." *Langford v. Roman Catholic Diocese of Brooklyn*, 677 N.Y.S.2d 436, 439 (N.Y. 1998). *See also Schmidt v. Bishop*, 779 F. Supp. 321, 326 (S.D.N.Y. 1991) ("[I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence."); *Maffei v. Roman Catholic Archbishop of Boston*, 867 N.E.2d 300, 314 (Mass. 2007) ("Such a conclusion [that a fiduciary relationship exists between church clergy and church members] would require a civil court to affirm questions of purely spiritual and doctrinal obligation."). In short, no such fiduciary duty exists as a matter of law, and every court to consider the issue has so held.

E. Plaintiffs' Conspiracy Claim Fails as a Matter of Law.

Plaintiffs were permitted to amend their complaint to add a civil conspiracy claim in

---

that "it is individuals … who are listed as mandatory reporters, not institutions," and because reporting is done to avoid criminal liability, not to benefit an employer, it does not create vicarious liability. *Cooper Clinic, P.A. v. Barnes*, 237 S.W.3d 87, 92 (Ark. 2006).

which they contend that the Church conspired with its "agents" to prevent the abuse of Plaintiffs from being reported. Apart from the fact that an employer or other entity cannot as a matter of law conspire with its agents (*see Petroni v. Bd. of Regents*, 115 Ariz. 562, 567, (App. 1977) ("agents and employees of a corporation cannot conspire with their corporate principal"), the conspiracy claim fails as a matter of law for a further reason – if the Bishops were not required to report under the Arizona reporting statute, there is no underlying tort to which the conspiracy claim is directed. *See, e.g., William v. The AES Corp.*, 28 F. Supp. 3d 553, 574 (E.D. Va. 2014) ("Plaintiffs fail to state an actionable claim for any underlying tort other than ordinary negligence" which as a matter of law cannot support a conspiracy claim.) A viable conspiracy claim requires the existence of "an intentional tort requiring a specific intent to accomplish the contemplated wrong." 16 Am. Jur. 2d, Conspiracy, Sec.51. In short, because the undisputed facts demonstrate that the Defendant Bishops acted properly under the Arizona reporting statute, there is no basis for a conspiracy claim as a matter of law.

CONCLUSION

Plaintiffs suffered abhorrent abuse at the hands of their father. But the heinousness of the conduct does not give rise to a claim against the Church Defendants because the Church Defendants did not violate any legal duty to these Plaintiffs. Arizona's reporting statute broadly exempts confidential communications with clergy, as determined by the clergyman himself. Reasonable people can debate whether that is the best public policy choice. But that is not an issue for a jury or this Court. Bishops Herrod and Mauzy acted within the law. Plaintiffs have not, and cannot, demonstrate otherwise. As in *Nunez*, the Church Defendants are entitled to summary judgment on all of Plaintiffs' claims in the Complaint, and it would be fundamental error to accept Plaintiffs' contentions to the contrary.

DATED this 8th day of February, 2022.

OSBORN MALEDON, P.A.

By /s/ William J. Maledon

William J. Maledon
Travis C. Hunt
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BOROWIEC & BOROWIEC, P.C.
Joel P. Borowiec
1723 S. Highway 92
Sierra Vista, AZ 85635

KIRTON McCONKIE, P.C.
Peter C. Schofield, *pro hac vice*
4600 W. Executive Pkwy, Suite 400
Lehi, UT 84043

Attorneys for Defendants the Church, Herrod (except Counts 5-6), and Mauzy

ORIGINAL of the foregoing e-filed and a COPY e-mailed this 8th day of February, 2022, to:

Honorable Laura Cardinal
Cochise County Superior Court
jcarranza@courts.az.gov

COPY of the foregoing e-served via AZTurboCourt this 8th day of February, 2022, upon:

Lynne M. Cadigan
CADIGAN LAW FIRM, PLLC
504 S. Stone Avenue
Tucson, AZ 85701
lmcadigan@cadiganlawfirm.com
dbustamante@cadiganlawfirm.com
sabrina.swaim@live.com

John C. Manly
Ashley Taylor Rayfield, *pro hac vice*
Taylor Boren, *pro hac vice* pending
MANLY, STEWART & FINALDI
19100 Von Karman Avenue, Suite 800
Irvine, CA 92612
jmanly@manlystewart.com
trayfield@manlystewart.com
tboren@manlystewart.com
kfrederiksen@manlystewart.com
Attorneys for Plaintiffs

Joel P. Borowiec
BOROWIEC & BOROWIEC, P.C.
1723 S. Highway 92
Sierra Vista, AZ 85635
jborowiec@borowieclaw.com
courtdocs@borowieclaw.com

Peter C. Schofield, *pro hac vice*
KIRTON McCONKIE, P.C.
4600 W. Executive Pkwy, Suite 400
Lehi, UT 84043
(801) 426-2100
pschofield@kmclaw.com
ksanford@kmclaw.com
jhiggins@kmclaw.com
Co-Counsel for Defendants the Church, Herrod (except Counts 5-6), and Mauzy

DeeDee Armer Holden
Michael J. Ryan, Of Counsel
Nathan S. Ryan
HOLDEN & ARMER, P.C.
4505 E. Chandler Blvd., Suite 210
Phoenix, AZ 85048
dholden@holdenarmer.com
mryan@holdenarmer.com
nryan@holdenarmer.com
karmer@holdenarmer.com
kpenny@holdenarmer.com
Attorneys for Defendants Herrod and Lenzner (as to Counts 5-6 only)

Anne M. Chapman
Kathleen E. Brody
MITCHELL STEIN CAREY CHAPMAN, P.C.
One Renaissance Square
2 N. Central Avenue, Suite 1450
Phoenix, AZ 85004
anne@mscclaw.com
kathy@mscclaw.com
Attorneys for Defendant Shaunice Warr

s/ Jessica A. Lopez

9322430