IN THE SUPREME COURT OF THE STATE OF NEVADA

THERESSA "ZISSA" JANETTA RAMANAI, individually and as the natural mother and guardian of MARIO SAMUEL RAHMANI, a minor,

Appellant,

vs.

SHOSHANA SEGELSTEIN, an individual; CHABAD OF SOUTHERN NEVADA, INC., a Nevada nonprofit corporation; YEHOSHUA HARLIG a/k/a SHEA HARLIG, and DINA HARLIG a/k/a DEBORAH HARLIG, husband and wife; CHABAD OF SUMMERLIN, INC., a Nevada nonprofit corporation; and YISROEL SCHANOWITZ, an individual,

Respondents.

Case No. 49341

JOINDER OF THE ROMAN CATHOLIC BISHOP OF LAS VEGAS AND OF THE ROMAN CATHOLIC BISHOP OF RENO

The Roman Catholic Bishop of Las Vegas and His Successors, a corporation sole, and the Roman Catholic Bishop of Reno and His Successors, a corporation sole ("Roman Catholic Dioceses") join in the amicus brief submitted on behalf of the Church of Jesus Christ of the Latter-Day Saints ("LDS Church"). In this appeal, this Court has raised important issues concerning both the United States and Nevada Constitutions. The Roman Catholic Dioceses agree with the positions taken by the LDS church in its brief, and emphasize a few additional points.

I.

ALLOWING SUIT FOR A PASTOR'S BREACH OF FIDUCIARY DUTY WOULD BE AS IMPOSSIBLE AS IT WOULD BE UNCONSTITUTIONAL

This Court should not impose a civil-law fiduciary duty on religious leaders, or a cause of action for 'clergy malpractice.' As both respondents' answering brief and the LDS Church's amicus brief ably demonstrate, it would be constitutionally

impossible to define what the 'standard of care' ought to be in a case involving a claim for breach of fiduciary duty.

Any cause of action for breach of fiduciary duty would require this Court to fashion or devise a 'standard of care' along with the elements necessary to sustain such a cause of action. Essentially, the recognition of a claim for breach of fiduciary duty:

> would require courts to define and express the standard of care followed by reasonable clergy of the particular faith involved, which in turn would require the court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible.

H.R.B. V. J.L.G. 913 S.W.2d 92 (Mo. App. 1995) (*citing Schmidt v. Bishop*, 779 F. Supp. 321, 325-326 (S.D.N.Y. 1991).

The analysis of "[s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity." *Nally v. Grace Community Church*, 763 P.2d 948, 960 (Cal. 1988).[1] Defining that standard could embroil courts in establishing the training, skill and standards applicable for members of the clergy in a variety of religions with widely varying beliefs. On the other hand, imposition of a single clergy standard of care on all churches would create a potential violation of the "free exercise" and establishment clauses. *Id.*

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[1] For example, in order to determine whether a religious leader could be liable for breaching his own religion's particular standard (e.g., that a rabbi improperly practiced Judaism, that a priest incorrectly applied Catholicism, or that a pastor poorly implemented Methodist teachings), Nevada courts (and juries) would excessively entangle themselves with the specific religion in each case to determine the appropriate standard and whether that standard was met. *E.g., Doe v. Evans*, 718 So.2d 286, 293 (Fla. App. 1998) ("When a secular court interprets church law, policies and practices it becomes excessively entangled in religion."); *see also Teadt*

(continued)

Simply put, "to permit claims for clergy malpractice would require courts to establish a standard of reasonable care [either specific, or general] for religious practitioners practicing their respective faiths, which necessarily involves the interpretation of doctrine." *Amato v. Greenquist*, 679 N.E.2d 446, 450 (Ill. App. 1997). "There is no such thing in the law as clerical malpractice." *Richelle L. v. Roman Catholic Archbishop*, 130 Cal.Rptr.2d 601, 607 (Cal. App. 2003).[2]

II.

THE PROSPECT OF LIABILITY EXPOSURE COULD THREATEN THE FEASIBILITY OF CHURCHES' VOLUNTEER EFFORTS

Consistent with their mission, the Roman Catholic Dioceses provide significant social services to persons in need. These good works are imparted regardless of religious affiliation. Most importantly, they are impossible to provide without the assistance of our indispensable volunteer base. Imposition of liability on charitable organizations for the intentional torts of volunteers could hinder the Dioceses' ability to continue to serve people in need.

A. The Ability of Charities to Provide Important Social Services May Be Impeded by the Imposition of Vicarious Liability for the Misconduct of Volunteers

Charities that already operate on fixed budgets and are viable only because volunteers donate their labor, could fold if burdened with the expense of litigation and liability for the random, intentional torts of volunteers.[3] "From a public policy standpoint, the volunteer exclusion serves the common good by protecting against the

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v. Lutheran Church Missouri Synod, 603 N.W.2d 816, 822 (Mich. App. 1999) ("such a claim requires definition of the relevant standard of care").

[2] "The reason is set forth in [*Nally*] . . . that the legislative exemption of clergy from licensing requirements applicable to other counselors acknowledges 'that access to the clergy for counseling should be free from state imposed counseling standards,' and that 'the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations.'" *Id.*

[3] Normally, "[a]bsent an employment relationship, the doctrine of vicarious liability does not apply." *Alms v. Baum,* 796 N.E.2d 1123, 1129 (Ill. App. 2003); *Raglin v.*

(continued)

serious drain on limited funds that would result if vicarious liability were permitted to be imposed for the alleged torts of unpaid volunteers." *Munoz v. City of Palmdale*, 89 Cal.Rptr.2d 229, 232 (Cal. App. 1999).

The Roman Catholic Dioceses, for instance, run several charitable operations on limited budgets that rely heavily upon volunteered labor, which likely would not withstand the financial strain of being subject to liability for a volunteer's intentional tortious misconduct. For example, more than 3,600 people benefit monthly from the Catholic Community Service of Northern Nevada's Emergency Assistance Program, which assists individuals and families in emergency situations caused by loss of job, family crisis, illness, or other personal situations. The program has provided clothing, bus and prescription vouchers, limited rental assistance, short-term family housing, baby supplies, work permits, phone calls, toiletries, and referral to other local service agencies for specialized or additional assistance—all services being offered free of charge.

Similarly, Catholic Charities of Southern Nevada has been in operation for 68 years and encompasses diverse programs that provide a wide range of social services. Without the aid of volunteers, it would not be able to provide (through just one of its programs):

(a) more than 1,800 meals a day in the Las Vegas-based St. Vincent Lied Dining Facility,
(b) more than 140 bags of groceries to individuals and families; or
(c) more than 1,100 seniors with delivered sets of 7 frozen meals and supplements each week.

Catholic Community Services of Northern Nevada also runs a dining room for those in need that serves 500 to 600 free meals per day. It provides groceries to the needy from its food pantry. These services and other charitable efforts might be impeded were there a risk of liability for catastrophic judgments.

HMO Illinois, Inc., 595 N.E.2d 153 (Ill. App. 1992).

B. There Cannot be Vicarious Liability for Intentional Conduct of Volunteers

First and foremost, the Roman Catholic Dioceses, consistent with the position of the LDS Church, condemns abuse and exploitation of any kind. As a matter of law, any such conduct is outside the course and scope of any agent's duties – employee or volunteer. As stated repeatedly by many courts, and as succinctly put by a California appellate court:

> [T]he only inference to be drawn from the facts as pleaded is that real party's assailant was not acting in the course and scope of his employment at the time of the sexual assaults. His wrongful conduct was so divorced from his duties and work that, ***as a matter of law***, it was outside the scope of his employment. He was hired to teach dance, not to molest, abuse, or threaten minors. Sexual abuse simply is not typical of or broadly incident to the enterprise undertaken by petitioner.

Debbie Reynolds Prof. Rehearsal Studios v. Superior Court, 30 Cal. Rptr. 2d 514, 516 (Cal. App. 1994) (emphasis added).

While the plaintiff alleged negligence in this case, the gravamen of plaintiff's complaint is battery and other intentional misconduct. The case of *Scottsdale Jaycees v. Superior Court of Maricopa County*,[4] together with the existing case law of this state in *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (1995), suggest that a charitable organization should not be vicariously liable for the intentional misconduct of a volunteer, such as that in this case.[5]

Specifically, the *Scottsdale Jaycees* court found that the "employment" of such a volunteer existed only during the actual course of the charitable work for which the volunteer has chosen to act. *See Scottsdale Jaycees*, 499 P.2d at 189. Moreover, as "sexual assault [is] an independent venture outside the course and scope," vicarious

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[4] 499 P.2d 185 (Ariz. App. 1972).

[5] In *Scottsdale Jaycees*, another case of negligence, the course and scope issue was also evaluated. However, in *Scottsdale Jaycees*, the court held that a volunteer who was the servant of a charity was not acting within the scope of his "employment" while driving to attend a statewide meeting of the charitable organization.

liability cannot be imposed on the charity. *See Wood v. Safeway, Inc.*, 121 Nev. at 739, 121 P.3d at 1036; *see also* NRS 41.745 (2007).

This conclusion is reiterated in another case cited in this Court's November, 3 2008 order. In the case of *Rita M. v. Roman Catholic Archbishop*, the California Court of Appeals stated with respect to vicarious liability for intentional torts that:

> mere foreseeability [i]s not enough. The foreseeable event must be characteristic of the activities of the enterprise. . . It would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church.

232 Cal. Rptr. 685, 690 (Cal. App. 1986) (*citing Alma W. v. Oakland Unified School Dist.*, 176 Cal.Rptr. 287 (Cal. App. 1981)).

Where vicarious liability of a servant is implicated, even where the servant is a volunteer, course and scope does not "extend to cases in which the servant has stepped aside from his [agency,] to commit a tort which the master neither directed in fact, nor could be supposed from the nature of the [agency] to have authorized or expected the servant to do." *See City of Green Cove Springs v. Donaldson,* 348 F.2d 197, 202 (5th Cir. 1965) (a case addressing vicarious liability against municipality for the sexual assault of an employee, on-duty police officer).

The California Court of Appeals in *Alma M. v. Oakland Unified School District*,[6] had no difficulty concluding that a janitor's acts (sexual assault), even if broadly foreseeable, were not in any way characteristic of the school district's enterprise. Similarly, such conduct would never be related to the duties that the Roman Catholic Dioceses would assign to a volunteer or an employee.

The Roman Catholic Dioceses are particularly concerned about the disincentives for charitable efforts that may ensue if churches and other charities were vicariously liable for the type of intentional misconduct at issue in this case. Clearly, where an agent is in the course and scope of his or her assigned tasks and is

inadvertently negligent, a different situation is presented; an actual analysis of course and scope may be required.

DATED this 27 day of October, 2009.

LEWIS AND ROCA LLP

BY: Jill Garcia

DANIEL F. POLSENBERG
Nevada Bar No. 2376
JILL GARCIA
Nevada Bar No. 7805
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorney for The Roman Catholic Bishop of Las Vegas, and His Successors and The Roman Catholic Bishop of Reno, and His Successor

[6] 176 Cal.Rptr. 287 (Cal. App. 1981).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day October, 2009, I served the foregoing "Joinder of the Roman Catholic Bishop of Las Vegas and of The Roman Catholic Bishop of Reno" by United States mail, postage prepaid to the following:

MICHAEL L. REITZELL
DUANE MORRIS LLP
1114 Brockway Road, Suite 100
Truckee, CA 96161-2213

SAMUEL S. LIONEL
DAVID N. FREDERICK
LIONEL SAWYER & COLLINS
300 South Fourth Street
Las Vegas, NV 89101

MARK A. SOLOMON
SOLOMON DWIGGINS & FREER, LTD.
7881 W. Charleston Boulevard, Suite 240
Las Vegas, NV 89117

RYAN L. DENNETT
DENNETT WINSPEAR LLP
3321 N. Buffalo Drive, Suite 100
Las Vegas, NV 89129

ROGER P. CROTEAU
ROGER P. CROTEAU & ASSOCIATES, LTD.
720 South Fourth Street, Suite 202
Las Vegas, NV 89101

An Employee of LEWIS AND ROCA LLP

LEWIS AND ROCA LLP LAWYERS