STATE OF MICHIGAN

COURT OF APPEALS

PAUL DANIEL PACHULSKI,

Plaintiff-Appellant,

v

THE ROMAN CATHOLIC DIOCESE OF GRAND RAPIDS and SACRED HEART CATHOLIC CHURCH OF GRAND RAPIDS,

Defendants-Appellees,

and

FATHER JOSEPH KENSHOL,

Defendant.

UNPUBLISHED
June 18, 1999

No. 205293
Kent Circuit Court
LC No. 95-5497-NM

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition as to defendants Roman Catholic Diocese of Grand Rapids ("diocese") and Sacred Heart Catholic Church of Grand Rapids ("church") pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff's claim arises from an incident which occurred in the spring or summer of 1993, when defendant Father Joseph Kenshol ("Kenshol") allegedly gave the seventeen-year-old plaintiff a haircut and "full body massage" during which, according to plaintiff, Kenshol touched plaintiff's buttocks. Plaintiff filed suit against defendants diocese, church and Kenshol, alleging that defendants committed various torts including clerical negligence; professional malpractice; gross negligence; negligent, intentional or reckless infliction of emotional distress; breach of a priest's fiduciary relationship; assault and battery; and willful, egregious and malicious behavior. Plaintiff also alleged that defendants church and diocese were responsible for Kenshol's actions under theories of respondeat superior, vicarious responsibility and agency, and that defendant diocese was liable for the negligent supervision of

Kenshol. The trial court granted defendant Kenshol's motions for summary disposition as to the clerical malpractice, breach of fiduciary relationship and assault and battery claims. The trial court also granted motions for summary disposition filed by defendants diocese and church as to all claims pursuant to MCR 2.116(C)(10).

Plaintiff raises three issues on appeal, all of which relate to his claim that defendant diocese negligently supervised Kenshol. Because plaintiff failed to brief any issues which relate to his claims against defendant church, he has abandoned his appeal as to that defendant. See *Dresden v Detroit Macomb Hospital Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

In his first issue, plaintiff contends that the trial court erred in granting defendants' motion for summary disposition on the basis that defendant diocese's bishop had no actual knowledge of Kenshol's tortious conduct or propensity for such conduct. We disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A motion may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). All inferences are to be drawn in favor of the nonmovant, who has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994); *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In order for plaintiff to establish a prima facie case of negligence, he must prove four elements: that defendant diocese owed a duty to plaintiff; that defendant breached the duty; that defendant's breach of duty was a proximate cause of plaintiff's damages; and that plaintiff suffered damages. *Chivas v Koehler*, 182 Mich App 467, 475; 453 NW2d 264 (1990). "Generally, an individual has no duty to protect another who is endangered by a third person's conduct." *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997). However, an employer has a duty to protect an individual from harm by an employee under certain circumstances. *Id.* at 53-55. See also *Romeo v Van Otterloo*, 117 Mich App 333, 342-343; 323 NW2d 693 (1982), rev'd in part by *Millross v Plum Hollow Golf Club*, 429 Mich 178, 195-196; 413 NW2d 17 (1987). Whether a duty exists is a question of law for the court to decide. *Murdock, supra* at 54.

In the present case, plaintiff has failed to establish that defendant diocese owed him a duty to supervise defendant Kenshol. Plaintiff assumes that defendant diocese owed him a duty as Kenshol's employer. Although defendants contend that defendant Kenshol was an independent contractor, they accept plaintiff's characterization of Kenshol as an employee for purposes of this appeal. However, even if defendant diocese employed defendant Kenshol, defendant diocese did not owe a duty to plaintiff for Kenshol's alleged acts if it did not know, or have reason to know, of Kenshol's alleged

propensity to engage in inappropriate behavior with minors. See, e.g., *Bradley v Stevens*, 329 Mich 556, 563; 46 NW2d 382 (1951); *Tyus v Booth*, 64 Mich App 88, 90-91; 235 NW2d 69 (1975).

The trial court properly relied on the unrebutted affidavit of Robert J. Rose, defendant diocese's bishop, in finding that defendant diocese had no knowledge of Kenshol's propensity to give massages or engage in the alleged improper activities. "The fact that the Diocese may control some activities of its priests does not, of itself, impose a legal duty to protect the plaintiff absent some sort of notice that [the offending priest] might engage in the volitional … acts at issue." *Kennedy v Roman Catholic Diocese of Burlington*, 921 F Supp 231, 234 (DC Vt, 1996).

We disagree with plaintiff's contention that the issue of what an employer knew or should have known about an employee's dangerous propensities is a question of fact for the jury. Plaintiff relies on *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 415; 189 NW2d 286 (1971), in which the defendant employer hired an employee with full knowledge of the employee's manslaughter conviction. *Id.* at 411-412.[1] The employee subsequently assaulted a customer. *Id*. Under these facts, our Supreme Court held that whether the employer acted reasonably in hiring an employee with such vicious propensities was a question of fact for the jury. *Id.* at 415. Unlike the employee in *Hersh*, defendant Kenshol had no criminal conviction to alert defendant diocese of his alleged propensity to engage in improper behavior. Therefore, our Supreme Court's ruling in *Hersh* did not preclude the trial court from determining as a matter of law that there was no factual basis to alert defendant diocese of Kenshol's propensity to engage in improper behavior. Accordingly, we hold that the trial court properly granted defendants' motion for summary disposition.

Next, plaintiff contends that defendant diocese had imputed or constructive knowledge of Kenshol's improper behavior, because a priest and a school principal at defendant church knew that Kenshol gave haircuts and massages to parishioners. The issue of imputed knowledge was not preserved for appeal, because plaintiff did not raise it in the trial court. See *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997).[2]

Finally, plaintiff contends that a genuine issue of material fact exists as to whether defendant diocese negligently supervised Kenshol, based upon the deposition testimony of defendant church's school principal that Kenshol had repeated contact with plaintiff after he reported the incident. We disagree.

Although defendant Kenshol had contact with plaintiff after the incident was reported in September 1993, there is no evidence that plaintiff suffered any damages from these brief contacts.[3] Because plaintiff suffered no damages from the contacts, he cannot establish the necessary elements for a cause of action for negligence. See *Chivas, supra* at 475. Accordingly, we hold that the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Michael J. Kelly
/s/ Roman S. Gribbs
/s/ E. Thomas Fitzgerald

[1] We note that plaintiff's appeal is limited to the claim of negligent supervision. Although the *Hersh* case was primarily a case of negligent hiring, rather than negligent supervision, we find our Supreme Court's analysis of the employer's knowledge to be analogous to the present case.

[2] While the question of whether a claim of negligent supervision by a church's hierarchy is barred by the First Amendment is one of first impression in Michigan, there is some support for this type of claim so long as the issue can be decided without determining questions of church law and policy. See *Serbian E Orthodox Diocese v Milivojevich*, 426 US 696; 96 S Ct 2372; 49 L Ed 2d 151 (1976); *Isley v Capuchin Province*, 880 F Supp 1138 (ED Mich 1995). However, in light of the lack of factual support for plaintiff's claim and its unpreserved nature, we decline to consider this issue. In fact, the record indicates, through deposition testimony, that while Fr. Zink, Kenshol's supervisor, knew he gave haircuts to some of the men and boys of the parish, Zink was unaware of massaging incidents between Kenshol and any boys in the parish.

[3] Plaintiff alleged Kenshol came into contact with him on five separate occasions between September 1993 and January 1994. This was after Bishop Rose moved Kenshol to another parish and required that he undergo psychiatric treatment. Of the five incidents, only two involved Kenshol attempting to speak with plaintiff. On both occasions plaintiff rebuffed Kenshol. The three other incidents involved plaintiff seeing Kenshol on parish property with no direct contact evolving from these events. Plaintiff admitted that all five incidents were very brief encounters. Further, plaintiff admitted that he did not sustain any damages resulting from these incidents.