

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-001818-MR

CHARLES ANTHONY PAYNE

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 96-CI-000583

KEVIN OSBORNE; AND  
ROMAN CATHOLIC DIOCESE OF  
OWENSBORO, KENTUCKY

APPELLEES

OPINION  
AFFIRMING IN PART; REVERSING IN PART AND REMANDING  
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BEFORE: GUIDUGLI, KNOFF AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Charles Anthony Payne (Payne) has appealed from the judgment of the Daviess Circuit Court entered on July 1, 1997, which summarily dismissed his complaint against Kevin Osborne (Osborne) and the Roman Catholic Diocese of Owensboro, Kentucky (the Diocese). We affirm the dismissal of the Diocese, however, we reverse the judgment in favor of Osborne and remand this matter for further proceedings.

In his complaint filed May 22, 1996, Payne alleged that in May and June of 1995, he and his wife, Brenda Payne (Brenda), were having marital difficulties, and sought and received marriage counseling from Osborne, their parish priest. Payne further alleged that on or about June 16, 1995, he discovered that Brenda and Osborne were having a sexual affair. Payne further claims that after he discovered the sexual affair,

Osborne and Brenda left the state together. His complaint further asserted as follows:

8. That the conduct of the Defendant, Kevin Osborne . . . was extreme and outrageous and a deviation from all reasonable bounds of decency and was such that would shock the conscious of ordinary and reasonable people. Furthermore, the Defendant, Kevin Osborne, occupied a special relationship of trust with the Plaintiff and his wife, Brenda Payne, as the Defendant was a priest who had been counseling them for two months.

9. The Defendant, Kevin Osborne, was aware of the Plaintiff's particular vulnerability and sensitivity and took advantage of that sensitivity or condition knowing that his conduct would cause the Plaintiff emotional distress. Furthermore, the Defendant, Kevin Osborne, knew or should have known that Plaintiff would return to his home and find him with the Plaintiff's wife and reasonably anticipated the severe emotional distress such outrageous conduct would cause the Plaintiff.

In his complaint, Payne also claimed that as Osborne's employer, the Diocese was vicariously liable for Osborne's actions under an agency theory or respondeat superior. He also alleged independent acts of negligence by the Diocese claiming that it breached its "duty to adequately screen, train and supervise its employees" and that "it failed to use ordinary care to detect or prevent the conduct" of Osborne which the Diocese "either knew or should have known was likely to result."

The depositions of both Payne and Osborne were taken. Payne testified that he and Brenda were married in 1983. At the time of Payne's deposition, an action to dissolve his marriage to Brenda was pending. As far as the counseling from Osborne was concerned, Payne testified as follows:

Q. Have you ever been married other than to Brenda?

A. No.

Q. Has Brenda ever been married other than to you?

A. No.

Q. Now, are you of the Catholic faith?

A. I was.

Q. In your Complaint you make some allegations with respect to Kevin [Osborne]. Particularly, I believe with respect to some counseling you and Brenda may have got[ten] from him. Is that correct, sir?

A. That sounds right.

Q. How many phases did you go to Kevin Osborne for some counseling [sic]? . . . Would it have been more than once?

A. Yes.

Q. Was it more than twice?

A. Sure.

Q. You personally went to see him more than twice?

A. He was at my house all of the days and the night.

Q. I am talking now with respect to counseling.

A. He was always at my home.

Q. How many times were you there when he was there?

A. Three or four times.

. . . .

Q. Tell me what [Osborne] did.

A. He took the position of a man of the cloth and he belittled [sic]. He took advantage of and he used the faith that people put in him against me.

Payne further testified that as a result of discovering his wife's affair with their priest, he suffered a nervous breakdown.

Q. You mentioned several things that have had an effect [sic] on you. You lost your job. What other effects [sic] has it had on you?

A. I lost my religion. I can't step a foot inside there. I can't stand the sight of a priest anymore, not after the way I was done by him. Are you a Catholic?

Q. I am not here to answer questions. Now the address that you live at now is not the address where you lived at the time?

A. No, I've lost my house; I've lost my religion; I've lost my job; I've lost my wife. I've got a son that hasn't had it decent since this. . . .

Osborne testified that after his sexual affair with Brenda, he had "resigned from the ministry" and was no longer employed as a priest. At the time of the deposition, he was working as a youth counselor at an afternoon school program at a Catholic church in Memphis, Tennessee. He stated that prior to his relationship with the Paynes, he had counseled somewhere between 100 and 500 couples for marital problems. He acknowledged that he began counseling the Paynes in "mid to late February [1995]" and that he commenced a sexual relationship with Brenda beginning in June of that year which lasted for a total of 45 days.

Osborne moved the trial court for summary judgment and argued that Payne's claim was essentially one for interference with marital relations, a tort no longer actionable in Kentucky. See Hoyer v. Hoyer, Ky., 824 S.W.2d 422 (1992). The Diocese also moved the trial court for summary judgment and argued that it could not be held vicariously liable for Osborne's actions since Osborne's sexual misconduct with Brenda was neither "a reasonably contemplated act," nor "calculated to advance the cause of" the Diocese as required by Hennis v. B. F. Goodrich Company, Ky., 349 S.W.2d 680 (1961). The trial court agreed with Osborne and dismissed the complaint.

The standard for summary judgment in Kentucky is set forth in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). It is settled that we are not permitted

to sanction the summary dismissal of a case unless "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Id. at 483, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Having reviewed this record, we are convinced that the trial court improvidently granted judgment in favor of Osborne and that Payne should be allowed to proceed with his action against Osborne.

Kentucky first recognized the tort of intentional infliction of emotional distress in Craft v. Rice, Ky., 671 S.W.2d 247 (1984). To establish such a claim, the plaintiff must prove the following elements: (1) the wrongdoer's conduct must be "intentional or reckless"; (2) the conduct must be "outrageous and intolerable in that it offends against the generally accepted standards of decency and morality"; (3) there must be a "causal connection between the wrongdoer's conduct and the emotional distress"; and (4) the distress suffered by the plaintiff must be "severe." Id. at 249. These elements essentially echo those set forth in the Restatement (Second) of Torts § 46 (1965). Clearly, the tort is not available to assuage "petty insults, unkind words and minor indignities," The Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61, 65 (1996), or to compensate one for enduring behavior that is "cold, callous, and lacking sensitivity," Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1, 4 (1990), but is designed to redress behavior that is truly outrageous, intolerable and which results in bringing one "to his knees." Willgruber, supra at 67.

The trial court dismissed Payne's claim for failing to allege misconduct by Osborne that is sufficient to satisfy the "outrageous" element of the tort.<sup>1</sup> In so doing, it relied on this Court's holding in Whittington v. Whittington, Ky.App., 766 S.W.2d 73 (1989), a case involving a wife's claim against her estranged husband for the intentional infliction of emotional distress predicated on the husband's fraudulent behavior with regard to marital assets and his adulterous relationship with another woman. Mrs. Whittington's complaint was dismissed pursuant to Kentucky Rules of Civil Procedure 12.02 for failure to state a claim upon which relief can be granted. In that case, the trial court reasoned that "ordinary fraud and adultery can never reach the status of outrageous conduct." Id. at 74. In affirming the dismissal in Whittington, this Court stated:

While we cannot condone or excuse Mr. Whittington's reprehensible actions, assuming the allegations were true, we do not see them as rising to the level of outrageousness necessary for tortious liability. The emotional and financial distress caused by a spouse's fraud and adultery may be very painful and difficult but does not necessarily implicate the tort of outrage. Suitable relief is available under Kentucky's domestic relations laws.

Id. at 74-75.

In the case sub judice, the trial court concluded that this Court's holding in "Whittington applies with equal weight to the partner of an adulterous spouse." However, in so concluding, the trial court ignored a critical distinction

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<sup>1</sup>Osborne and the Diocese have not claimed that Payne has failed to establish the existence of genuine issues of material fact regarding the other three elements of the tort.

between the allegations of wrongdoing by Mr. Whittington and the allegations of wrongdoing by Osborne. Osborne is alleged to have abused a confidential, counseling relationship. Osborne was not "the milkman, the mailman, or the guy next door"; he was the Paynes' priest and marriage counselor. Figueiredo-Torres v. Nickel, 321 Md. 642, 654, 584 A.2d 69, 75 (1991), ("jury may find extreme and outrageous conduct where a psychologist who is retained to improve a marital relationship implements a course of extreme conduct which is injurious to the patient and designed to facilitate a romantic, sexual relationship between the therapist and the patient's spouse"). Accordingly, we are convinced that Whittington does not resolve the legal issue of whether or not Osborne's conduct was sufficiently outrageous to sustain Payne's action.

Claims alleging sexual improprieties committed by therapists and counselors are not uncommon. It is "generally recognized" that "sexual intimacy with a patient, induced by a marriage or other counselor, is a form of malpractice permitting recovery of damages for emotional distress and other harm resulting from the malpractice." Weaver v. Union Carbide Corporation, 180 W.Va. 556, 378 S.E.2d 105, 106 (1989). In recent years, there have been increasing numbers of claims against members of the clergy predicated on sexual misconduct in the context of counseling and against their respective church hierarchies for vicarious liability or actions for negligent

hiring or supervision.<sup>2</sup> However, unlike other professionals who hold themselves out as counselors, members of the clergy are usually not susceptible to suit for malpractice. See Destefano v. Grabrian, 763 P.2d 275, 285 (Colo.1988) (en banc) (claim for "clergy malpractice" not "supported by precedent" and "raises serious first amendment issues"). To our knowledge, Kentucky has never recognized a claim based on clergy malpractice.

Nevertheless, because members of the clergy are liable for damages resulting from their intentional tortious conduct, several plaintiffs similarly situated to Payne, have been successful in bringing suits predicated on a theory that the cleric's conduct constituted the intentional infliction of emotional distress. Id. at 284 (couple who received counseling from parish priest who engaged in sexual relationship with wife allowed to proceed with claim of intentional infliction of emotional distress as priest "had a duty, given the nature of the counseling relationship, to engage in conduct designed to improve the Destefanos' marital relationship" and "was obligated not to engage in conduct which might harm the Destefanos' relationship"); see also Erickson v. Christenson, 99 Or.App. 104, 108, 781 P.2d 383, 386 (1989) (plaintiff, seduced by pastor in

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<sup>2</sup>See e.g., Randall K. Hanson, Clergy Malpractice: Suing Ministers, Pastors, and Priests for Ungodly Counseling, 39 Drake L.Rev. 597 (1989-90); David V. White, When the Wolf Tends the Flock: Clergy Misconduct and Marital Counseling, 82 Ill.B.J. 194 (1994); Arthur Gross Schaefer and Darren Levine, No Sanctuary from the Law: Legal Issues Facing Clergy, 30 Loy.L.A.L.Rev. 177 (1996); Janice D. Villiers, Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship, 74 Denv.U.L.Rev. 1 (1996); Joseph B. Conder, Liability of Church or Religious Society for Sexual Misconduct of Clergy, 5 A.L.R. 5<sup>th</sup> 530 (1992).



counseling relationship allowed to proceed against pastor for intentional infliction of emotional distress because she "alleged a confidential relationship" which would allow a jury to "infer that [the pastor's] actions exceeded the limits of social toleration" and "were done with the knowledge that they would cause her grave distress"); Amato v. Greenquist, 287 Ill.App.3d 921, 679 N.E.2d 446, 455, 223 Ill.Dec. 261, 270 (1997) (pastor "acted in an extreme and outrageous manner" by counseling husband while romantically involved with wife and "by counseling in a manner designed to 'covertly undermine' the couple's marriage").<sup>3</sup>

Some jurisdictions have denied plaintiffs relief under a theory of intentional infliction of emotional distress after concluding that claims brought under this theory were merely attempts to bring amatory actions which were no longer viable actions.<sup>4</sup> This argument is relied upon heavily by Osborne in

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<sup>3</sup>The tort has been successfully utilized in actions against counselors other than clerics. See Scamardo v. Dunaway, 650 So.2d 417, 421 (La.Ct.App. 1995) (husband, who sued doctor treating couple for infertility for engaging in adulterous affair with wife, allowed to amend complaint to assert a cause of action for negligent or intentional infliction of emotional distress); Figueriedo-Torres v. Nickel, *supra* (court upheld a claim for intentional infliction of emotional distress by a plaintiff whose psychologist was having sexual relations with plaintiff's wife); Spieß v. Johnson, 89 Or.App. 289, 748 P.2d 1020 (1988) (husband allowed to pursue claim of outrage against psychiatrist who, while treating wife for marital problems, had an affair with wife and encouraged her to obtain divorce from plaintiff).

<sup>4</sup>See Strock v. Pressnell, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988) (court ignored plaintiff's allegation that his pastor took advantage of trust relationship and held his injury resembled a claim for alienation of affections or criminal conversation, torts abolished in Ohio); Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789, 790 (Ok.1993) (husband's claim alleging intentional infliction of emotional distress against pastor who "initiated and consummated an adulterous affair with the wife"

(continued...)

this appeal. However, we are persuaded by the reasoning in those cases which rejected any superficial comparison of the causes of action. For example, in Destefano, supra, the Court reasoned:

[A] plaintiff will not be able to mask one of the abolished actions [alienation of affections, criminal conversation, seduction, breach of contract to marry] behind a common law label. However, if the essence of the complaint is directed to a cause of action other than one which has been abolished, that claim is legally cognizable.

763 P.2d at 282. As the Court noted in Figueiredo-Torres v. Nickel, 321 Md. at 657, 584 A.2d at 77,

The gravamen of Torres' claim for intentional infliction of emotional distress is not merely the sexual act or the alienation of his wife's affections. It is the entire course of conduct engaged in by his therapist, with whom he enjoyed a special relationship. This conduct constitutes more than the abolished amatory causes of action.

Similarly, in Erickson v. Christenson, supra, the Court in addressing the pastor's argument that the plaintiff's claim was essentially one for seduction which had been abolished, reasoned as follows:

The tort of seduction provided recovery for damage to character and reputation, as well as for mental anguish and pecuniary losses. By contrast, plaintiff's claim alleges that Christenson misused his position as pastor and counselor to abuse her sexually, causing her not only emotional distress but also "loss of ability to trust other adults, to trust authority, and \* \* \* in her ability to deal with religion and her faith in God." Accepting the allegations as

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<sup>4</sup>(...continued)

while providing counseling to the husband was based on conduct which amounted to an alienation of affections suit and failed to state a cognizable claim—wife's claim was determined to comprise one for seduction, an action abolished in Oklahoma).

true, the harm to plaintiff stemmed from Christenson's misuse of his position of trust, not from the seduction as such. . . .

In her second claim against Christenson, plaintiff has claimed losses due to intentionally inflicted severe emotional distress, as opposed to losses related to character or reputation. The mere fact that sexual intimacy was the means of inflicting that distress does not convert her claim into one for seduction. Moreover, the character of Christenson's relationship with plaintiff is relevant both to the degree of culpability required to impose liability and to whether his conduct was so offensive as to be outrageous.

99 Or.App. at 107-108, 781 P.2d at 385-386 (citations omitted).

Recently our Supreme Court in Gilbert v. Barkes, Ky., \_\_\_ S.W.2d \_\_\_ (March 25, 1999) (WL 163403), held that "the action for Breach of Promise to Marry is no longer a valid cause of action before the courts of the Commonwealth." The Court noted specifically that by removing the cause of action for breach of promise to marry from the common law of the Commonwealth that "[t]his Court wishes to make clear that it in no way prohibits other remedies, such as claims for breach of contract and intentional infliction of emotional distress, should a party be able to make such a case." Id.

Erickson also addresses Osborne's argument that to allow Payne to proceed "would create a blanket cause of action against any clergyman who engages in an affair with a married partner." "[P]laintiff's claim for outrageous conduct is not premised on the mere fact that Christenson is a pastor, but on the fact that, because he was plaintiff's pastor and counselor, a special relationship of trust and confidence developed." 99

Or.App. at 108, 781 P.2d at 386. Had Osborne not been providing the Paynes with counseling, ostensibly with the purpose of mending their marriage, we would agree that his sexual affair with Brenda would not be actionable.

In analyzing Payne's complaint and his deposition testimony, it is clear that the "essence" of his complaint is that he was injured as a result of the misuse of Osborne's special relationship as Payne's priest and counselor and by Osborne's alleged exploitation of that relationship at a time the priest was aware that Payne's marriage was most vulnerable. In Seitz, supra, the plaintiff made a similar claim, that is that a "special relation," that of nurse/patient, elevated the nurse's insensitive conduct to the status of outrageous conduct. Our Supreme Court did not believe the "so-called special relationship of patient-nurse was violated" and therefore left for "another day" a decision as to whether "such 'special relationships' are part and parcel of the tort of outrageous conduct." 796 S.W.2d at 4.

As the cases from other jurisdictions that we have discussed demonstrate, the existence of a special relationship between the parties may make otherwise non-egregious conduct outrageous. It is precisely the betrayal or abuse of the trusted, confidential relationship between Payne and his priest that is the core of Payne's action. In this case, unlike Seitz, Payne has clearly presented evidence from which a jury could determine that he did have a special relationship with his priest/marriage counselor and that this special relationship was

outrageously violated causing him severe emotional distress. It is this special relationship aspect of Payne's claim that removes it from this Court's holding in Whittington and which, we conclude, allows him to proceed with his claim.

In its summary judgment, the trial court did not state its reason for dismissing the Diocese. However, having dismissed the claim against Osborne, the vicarious liability claims against the Diocese were moot. The trial court did not address Payne's claim that the Diocese was independently negligent. Since we have determined that the summary disposition of Payne's claim against Osborne must be reversed, it is necessary for us to address the propriety of the dismissal of the claims against the Diocese.

Payne has not, in this appeal, addressed his claim that the Diocese was independently negligent in hiring and/or supervising Osborne. While such a claim has been recognized in Kentucky, see Roman Catholic Diocese of Covington v. Secter, Ky.App., 966 S.W.2d 286 (1998), Payne's abandonment of the claim, coupled with the lack of any evidence in the record that Osborne had any history of sexual misconduct involving parishioners, or that the Diocese had any knowledge that Osborne might engage in such misconduct, cause us to necessarily conclude that the trial court's summary dismissal for any claim of independent negligence by the Diocese was appropriate.

Payne would, however, have this Court to hold that the Diocese can be held vicariously liable for Osborne's conduct.

Certainly, employers can be held liable for the intentional torts of their employees.

[U]nder modern theories of allocation of the risk of the servant's misbehavior, it has been recognized . . . that even intentional torts may be so reasonably connected with the employment as to fall within the scope of it. The present tendency is to extend the employer's responsibility for such conduct.

Frederick v. Collins, Ky., 378 S.W.2d 617, 619 (1964).

Nevertheless, it remains essential to determine whether the employee "was acting within the scope of his employment at the time of his tortious act." Wood v. Southeastern Greyhound Lines, 302 Ky. 110, 113, 194 S.W.2d 81, 82 (1946); see also Ellis v. Jordan, Ky.App., 571 S.W.2d 635, 638 (1978). "To be within the scope of an employment, conduct must be of the same general nature as that authorized or incidental to the conduct authorized." Wood, 302 Ky. at 114, 194 S.W.2d at 83. A principal is not liable under the doctrine of respondeat superior unless its agent's intentional wrongs were "calculated to advance the cause" of the principal, or were "appropriate to the normal scope of the operator's employment." Hennis v. B.F. Goodrich Company, Inc., 349 S.W.2d at 682.

The Diocese argued before the trial court that the nature of the alleged wrong, that is, the abuse of the priest's position and his exploitation of his special relationship with his parishioners, is what takes it outside the scope of his employment. We agree and conclude that Osborne was not advancing any "cause" of the Diocese, or engaging in behavior "appropriate

to the normal scope" of his employment. Again, the Court's observations in Destefano, supra, are pertinent:

An employee is acting within the scope of his employment if he is engaged in the work which has been assigned to him by his employer or he is doing what is necessarily incidental to the work which has been assigned to him or which is customary within the business in which the employee is engaged. A priest's violation of his vow of celibacy is contrary to the instructions and doctrines of the Catholic church. When a priest has sexual intercourse with a parishioner it is not part of the priest's duties nor customary within the business of the church. Such conduct is contrary to the principles of Catholicism and is not incidental to the tasks assigned a priest by the diocese. Under the facts of this case there is no basis for imputing vicarious liability to the diocese for the alleged conduct of Grabrian.

763 P.2d at 287 (citations omitted).<sup>5</sup>

Accordingly, the judgment of the Daviess Circuit Court is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

KNOPF, JUDGE, CONCURS.

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<sup>5</sup>Our research reveals this to be typical of the rulings on the issue of a church's liability under the doctrine of respondeat superior or its cleric's sexual misconduct. See Amato v. Greenquist, 287 Ill.App.3d at 270, 679 N.E.2d at 455 ("complaint fails to allege that the Pastor's actions in deceiving and otherwise counseling the plaintiff were for anything other than his own benefit"); L.L.N. v. Clauder, 203 Wis.2d 570, 589, 552 N.W.2d 879, 888 (1996) (reversed on other grounds in L.L.N. v. Clauder, 209 Wis.2d 674, 563 N.W.2d 434 (1997) (priest/counselor who initiated sexual contact with plaintiff was "acting outside the scope of his employment by the Diocese" as a matter of law); H.R.B. v. J.L.G., 913 S.W.2d 92, 97 (Mo.App. 1995) (sexual abuse of child not within scope of priest's duties, nor "intended to further any religious or educational interests of the Catholic Church"); Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. 1997) ("intentional sexual misconduct and intentional infliction of emotional distress are not within the scope of employment of a priest, and are in fact forbidden").

GUIDUGLI, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FURNISHES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur in part and dissent in part. I agree with the majority that based upon the facts of this case it may be time for our Supreme Court to review whether "such 'special relationships' are part and parcel of the tort of outrageous conduct" as stated in Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1, 4 (1990). However, I do not agree that the trial court's summary dismissal of any claim of independent negligence by the Diocese was appropriate. The majority agreed with the Diocese's argument that "the abuse of the priest's position and his exploitation of his special relationship with his parishioners, is what takes it (vicarious liability) outside the scope of his employment." Based upon the foregoing the majority concluded that "Osborne was not advancing any cause of the Diocese, or engaging in behavior appropriate to the normal scope of his employment." Of course, he was not when he engaged in a sexual relationship with Brenda Payne. However, the reason the conduct may be outrageous and Osborne personally liable is because of the "special relationship" of being a priest and counselor. It is because of his employment as a priest and all that it represents and Payne's education and training as a Catholic that makes this a "special relationship" that may transform Osborne's conduct to the level of outrageousness. The Diocese created this "special relationship" by training Osborne to be a priest and counselor and, as such, may be liable under



the theory of respondeat superior. Either there is a "special relationship" created by being a priest and/or counselor or there is not. If there is a "special relationship" created herein, then both Osborne and the Diocese may be liable. If there is not a "special relationship" created, then neither party is responsible for Payne's alleged injury. In either case it is a factual determination to be made by a jury. As such, summary judgment in favor of both Osborne and the Diocese was premature and improper. I would reverse and remand for further proceedings against both parties.

I concur with the majority opinion on all other matters addressed.

BRIEF FOR APPELLANT:

Hon. Albert W. Barber, III  
Owensboro, KY

BRIEF FOR APPELLEE, OSBORNE:

Hon. Stephen B. Lee  
Owensboro, KY

BRIEF FOR APPELLEE, THE  
DIOCESE:

Hon. Marvin P. Nunley  
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