[J-56-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MICHAEL S. HUTCHISON, JR., BY MARY J. HUTCHISON, PARENT AND NATURAL GUARDIAN,	:	No. 56 W.D. Appeal Docket 1997
Appellants	:	Appeal from the Order of the Superior Court entered September 4, 1996 at No. 1305PGH94 vacating the Judgment of the Court of Common Pleas of Blair County, Civil Division, entered June 28, 1994 at No. 1175CP1987
v.	:	
FATHER FRANCIS LUDDY, ST. THERESE'S CATHOLIC CHURCH, BISHOP JAMES HOGAN AND DIOCESE OF ALTOONA-JOHNSTOWN,	:	ARGUED: March 9, 1998
Appellees	:	

CONCURRING OPINION

MR. JUSTICE CAPPY **DECIDED: NOVEMBER 24, 1999**

I concur in the result reached by the majority. I write separately to elaborate as to why I believe that vacating the order of the Superior Court, in part, is appropriate and to disassociate myself from that part of the majority opinion that criticizes the Superior Court for focusing on Restatement (Second) of Torts §317 as the sole basis for recovery.

The Superior Court entered, in essence, a judgment n.o.v. in favor of Bishop James Hogan, the Diocese of Altoona-Johnstown, and St. Therese's Catholic Church. Critical to the resolution of this case is our court's standard of review.

A judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Atkins v. Urban Redevelopment Authority of

Pittsburgh, 414 A.2d 100, 103 (Pa. 1980). We must view the evidence in the light most favorable to Michael Hutchison as verdict winner, giving him the benefit of every reasonable inference of fact arising therefrom. Any conflict in the evidence must be resolved in his favor. Broxie v. Household Finance Company, 372 A.2d 741, 745 (Pa. 1977). It is important to note that a reviewing judge's, or justice's, "appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations." Brown v. Shirks Motor Express, 143 A.2d 374, 379 (Pa. 1958); Moure v. Raeuchle, 604 A.2d 1003, 1007 (Pa. 1992). It is the application of these legal tenets that, in this case, requires vacation rather than affirmance of the Superior Court's order.

Section 317 of the Restatement (Second) of Torts imposes upon a master a duty to control his servant while acting outside of the scope of the servant's employment in order to protect others from harm. To establish liability under section 317, a plaintiff must establish, inter alia, that the servant "is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant." Restatement (Second) of Torts §317 (a)(i).

The case sub judice was tried before a jury. The jury was specifically charged only with the elements of section 317 with respect to Bishop Hogan and the Diocese's potential liability. The jury rendered a verdict against all Appellees. As we presume that the jury has followed the instructions, Commonwealth v. Baker, 614 A.2d 663, 672 (Pa. 1992), the jury's finding of liability on the part of Bishop Hogan and the Diocese necessarily was based on a determination that Father Luddy was privileged to enter the motel room solely due to his priestly status. The narrow issue before us is whether Michael Hutchinson proved liability

on the part of Bishop Hogan and the Diocese[1] by establishing that Father Luddy was privileged to enter the premises of the motel room only because of his priestly status.

Review of the record discloses why this issue is so difficult to resolve. Hutchison testified as to what seemed to be a number of reasons why he sought to meet with Father Luddy in the motel room in 1982 and 1984.[2] Thus, rather than one, straightforward reason for Father Luddy's entry into the motel room for our review, we are confronted with numerous, and arguably inconsistent, reasons for Father Luddy's presence.

Yet, simply because a number of reasons, or even inconsistent reasons, were offered by Hutchison as to why Father Luddy was privileged to enter the motel room does not necessarily preclude a finding of liability. This is because the jury, as the finder of fact, is permitted to believe all, part, or none of the evidence. Even parts of the testimony from a single witness may be embraced or discarded by the jury. Martin v. Evans, 711 A.2d 458, 463 (Pa. 1998); Commonwealth v. London, 337 A.2d 549, 552 (Pa. 1975); Juchniewicz v. Hawthorne, 44 A.2d 301, 303 (Pa. Super. 1945). Thus, even to the extent the testimony can be viewed as contradictory, the jury was free to accept certain aspects of Hutchison's testimony and reject others. Since the jury could have accepted, and relied upon, those

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[1] I agree with the majority that St. Therese's Catholic Church cannot be held liable. Father Luddy was reassigned from St. Therese's Church to St. Mary's Church in 1980, two years prior to the incidents at issue in this case. Thus, Father Luddy was not serving as a priest at St. Therese's Church at the time of the incidents in question and had not done so for at least two years. Moreover, decisions regarding placement, discipline, and transfer of priests were not made at the parish level. Under these circumstances I do not believe that St. Therese's Church can be held liable.

[2] As noted by the majority and the dissent, Hutchison testified on direct and on cross-examination that the reasons he sought to meet with Father Luddy in 1982 and 1984 were: (1) he missed Father Luddy; (2) Father Luddy could help him with his depression; (3) Father Luddy was a good listener; (4) Father Luddy was a kind, nice person; (5) he had love in his heart for Father Luddy; and (5) he believed that Father Luddy might assist him financially. Additionally, Hutchison testified that he still looked upon Father Luddy as his priest.

parts of Hutchison's testimony which established that Hutchison sought Father Luddy for counseling for personal problems and at all times viewed Father Luddy as his priest, the jury could have found a causal link between Father Luddy's status as a priest and his entry into the motel room. Therefore, based upon our limited standard of review, I believe that we are compelled to uphold the jury's finding of liability against Bishop Hogan and the Diocese.

The dissent takes a different tack to reach its conclusion. Specifically, the dissent finds that none of the reasons offered by Hutchison satisfies the requirements of section 317. In doing so, the dissent takes a very narrow view of what constitutes priestly duties; in essence, the dissent confines priestly duties to the performance of church ritual. Dissenting Opinion, page 4. I believe that this interpretation is too circumscribed. Rather, I believe that counseling one on personal problems is part of the varied duties of a clergyperson. While the dissent is correct that those who do not don the robes of a priest might counsel individuals on personal matters, the fact remains that Father Luddy was a priest, whose duties included personal counseling, at the time Hutchinson sought his presence. Just because other professions might perform similar services does not make these services any less a part of a priest's duties. Thus, I believe that the dissent's position, while supportable, is one that I cannot join.

While I cannot join the dissent as to the ultimate disposition of this appeal, I do join the dissent with respect to its discussion of the propriety of the Superior Court's exclusive focus on section 317. Dissenting Opinion, page 2, footnote 2. Specifically, I expressly disassociate myself from that part of the majority opinion which faults the Superior Court for failing to review theories of liability on which the jury was not charged. The jury was instructed on liability solely pursuant to section 317. Other similar or potential causes of action were not presented to the jury. While an appellate court may affirm the decision of the court below on an alternative basis, E.J. McAleer & Co., Inc. v. Iceland Products, Inc.,

381 A.2d 441, 443, n. 4 (Pa. 1977), I do not believe that it is jurisprudentially sound for a reviewing court to inject new theories of recovery into the proceedings at the appellate stage, especially when those theories were never brought to the attention of the jury.

For the above-stated reasons, I concur in the result reached by the majority.