UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DENNIS C. O'BRIEN, Appellant v. ARCHABBOT DOUGLAS NOWICKI; JACK PERRY; SAINT VINCENT ARCHABBEY, An unincorporated association, Appellees	Case No. 12-2025 APPELLANT'S INFORMAL BRIEF

INTRODUCTION

In accordance with the Rules of this Court, Appellant Dennis O'Brien hereby files this Informal Brief, with attachments, and a Motion to Proceed on the Original Record. Appellant is a retired attorney who is appearing pro se. He has attempted to be as clear and concise as possible and requests that the Court read the brief entirely and analyze the issues fully before rendering its decision. This case involves the essential role of the civil government when protecting the people from harm by a religious organization, and the people deserve clear and considered direction from the Court.

JURISDICTION

Appellant is appealing the Order of the United States District Court, Western District of Pennsylvania, of March 14, 2012 (Attachment One), dismissing Appellant's

Complaint, along with the Report and Recommendation of January 27, 2012 (Attachment Two), also dismissing the Complaint, which that Order confirmed.

The Notice of Appeal was filed April 9, 2012 (Attachment Three). See also Docket Entries (Attachment Four).

STATEMENT OF THE CASE

Appellant, the Plaintiff in the underlying action, is a citizen of the United States and a resident of the State of California. In March 2011 he filed a diversity action in the Northern District of California, San Francisco division, against the Appellees, the Defendants in the underlying action, who are residents of or located in Pennsylvania.

The Complaint, with exhibits (see Original Record), claims that the Appellees harmed the Appellant negligently, intentionally, and maliciously while he was a participant in a program that they had undertaken to respond to allegations of child sexual abuse committed by members of Saint Vincent Archabbey. It seeks compensatory and punitive damages sufficient to satisfy the jurisdictional requirement for a diversity case. It also seeks injunctive relief that would require Appellees to stop their harmful practices.*

The Appellees responded by filing a Motion to Dismiss and a Motion to Strike. The District Court in San Francisco ruled that it did not have personal jurisdiction and transferred the case to the Western District of Pennsylvania, Pittsburgh division. After additional briefing, the District Court in Pittsburgh granted Appellees' motion and dismissed the case. Appellant filed a timely appeal.

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* In light of recent Supreme Court decisions, Appellant has stipulated to the dismissal of a prayer for relief that sought pastoral care in the form of continuing education. (Attachment Five)

STATEMENT OF RELATED CASES

Appellant is not aware of any cases in civil court that are related to this appeal.

THE PARTIES

APPELLANT: Dennis O'Brien, the Plaintiff in the underlying action, is a natural person who resides in California. Although appearing pro se, he was a member of the California bar from 1986 through 2010 and admitted to practice in the Northern District of California. He has never practiced law in Pennsylvania.

APPELLEES: Appellant named three defendants in his Complaint. One is identified as "Saint Vincent Archabbey, an unincorporated association". In their initial filing with the lower court, the Appellees asserted that Saint Vincent Archabbey is actually The Benedictine Society ("Society"), a Pennsylvania corporation. They submitted a copy of the original document of incorporation, an 1853 Act of the Pennsylvania General Assembly, which reads, in part:

> An Act
>
> To incorporate the Benedictine Society in Westmoreland County.
>
> Section 1.
> . . .
> They hereby are constituted a body politic and corporate by the name style and title of "THE BENEDICTINE SOCIETY" . . . and to make such bylaws for their government and for admission of members into the corporation as they shall deem necessary and proper; PROVIDED that *such bylaws shall not be repugnant to or inconsistent with the constitution and laws of the United States or of this state* AND PROVIDED that no person shall be or remain a corporator, except regular members of said religious society living in community and governed by the laws thereof.
> . . .

- Exhibit A, Declaration of Douglas Nowicki in support of Defendants' Motion to Dismiss, May 16, 2011 (see Attachment Six) (emphasis added)

The Appellees asserted that Saint Vincent Archabbey, Saint Vincent Scholasticate (which it operated until 1971), and the subject abuse response program were and are operated by The Benedictine Society. For purposes of this appeal, Appellees' declarations are binding admissions that:

1) The Benedictine Society is a corporation created by the Commonwealth of Pennsylvania;

2) The Society, its officers, and its employees are subject to the laws of Pennsylvania and of the United States; and

3) It is a proper defendant in the underlying action.

Appellee Archabbot Douglas Nowicki ("Nowicki") is a natural person who resides in Pennsylvania. He is the leader of Saint Vincent Archabbey. Based on Appellees' assertions, he is simultaneously the chief executive officer of The Benedictine Society.

Appellee Jack Perry ("Perry") is a natural person who resides in Pennsylvania. He was employed by The Benedictine Society as an investigator of allegations of child sexual abuse throughout the time that Appellant participated in Appellees' abuse response program. He was identified in that program as the "Delegate for Child Protection". He asserts that he has received special training in such matters, though he apparently has no certificates.

STATEMENT OF FACTS

This summary is drawn from the Complaint, including exhibits, plus the assertions, declarations, and exhibits submitted by the Appellees as part of their motions to dismiss and strike.

In August 1966, Dennis O'Brien, the Plaintiff and Appellant, began attending Saint Vincent Scholasticate, a live-in high school for priesthood students operated by Appellee The Benedictine Society. At the time he was 14 years old. The events that were the subject of his later allegations occurred during his freshman year. See Exhibit D, Declaration of Dennis O'Brien, Opposition to Motion to Dismiss, July 1, 2011 (Attachment Seven).

The Appellant completed his studies at Saint Vincent Scholasticate and graduated in 1970. The following year the Scholasticate was shut down by The Benedictine Society and has not operated since.

In 1991, The Benedictine Society, as Saint Vincent Archabbey, undertook a program to respond to allegations of child sexual abuse involving members of the Society. The program's policies and procedures were regularly reviewed an updated. The version in effect at the time of Appellant's allegations is Exhibit C of the Complaint.

In March 2010, Appellant contacted that program via a letter sent to Appellees Nowicki and Perry. The letter began, "I am writing today to seek your help with some demons that have plagued me for years." (Attachment Seven)

Appellees responded by admitting Appellant into their abuse response program. They repeatedly requested that Appellant agree to an interview with their investigator/delegate, Appellee Jack Perry, and offered therapy in the form of telephone counseling with the therapist they regularly used in Pennsylvania. Appellant expressed doubts about the process, especially its failure to include his appearance before the Allegation Review Board. In order to convince Appellant to open up to the process and be interviewed by him, Appellee Perry assured Appellant that he would be told the

results of the investigation, though not its details. Based on this assurance, Appellant agreed to the interview.

Appellant also expressed doubts that telephone therapy would have any value in such circumstances, so Appellees agreed to provide him a therapist in California. This process was delayed until Appellee Nowicki became personally involved with associates in California who were helping to find a therapist. Ultimately Appellant was given a choice of three therapists who met Appellees' criteria. Appellees paid for the Appellant's sessions (six) with one of those therapists.

The details of those sessions are currently confidential. The Complaint alleges that Appellees' refusal to allow Appellant to choose his own therapist created a conflict of interest, resulting in a failure of rapport and confidence, which made the therapy more harmful than helpful. Though this assertion may need additional evidence before accepted by a trier of fact, it is a plausible assertion and must be accepted by the Court in any review of a motion to dismiss.

Appellant was never allowed to appear before the Allegation Review Board. He was never permitted to choose his own therapist. On July 20, 2010, he received a letter from Appellee Nowicki, stating that the Allegation Review Board had made its recommendations, but that the final decision would never be revealed to Appellant. (Complaint, Exhibit E; Attachment Eight)

A week later, Appellant had his last session with the Appellee-approved therapist. He continued to request that the same resources be made available for a therapist of his own choosing, but was denied. He continued to request access to the Allegation Review

Board so he could be heard, and to be informed of the final decision so he could be acknowledged. Those requests were also denied.

Based on these facts, and receiving no relief after repeated requests, Appellant filed the underlying Complaint in March 2011.

In addition to the facts as pled, the Court must also accept those inferences most favorable to the plaintiff in considering a motion to dismiss. In this case, that inference is not pretty. The Benedictine Society, as Saint Vincent Archabbey, undertook a program to respond to allegations of sexual abuse whose primary purpose was to protect the reputation of the Archabbey and its members, even if that meant causing further harm to the person alleging abuse. They did this by refusing access to the Allegation Review Board; by refusing to disclose the results of their investigation, even after assuring the person alleging abuse that they would; and by providing a therapist who would put their interests ahead of her patient's. They were aware of the likelihood that their actions would cause additional harm, but deliberately disregarded it. They maliciously manipulated the Appellant, convincing him through false promises to open up and become even more vulnerable, and then harmed him grievously.

Appellees' actions, and failures to act, caused Appellant physical, mental, and emotional harm. They did so negligently, intentionally, and maliciously. To the extent these are legal conclusions, they cannot be adopted by the Court. But to the extent they are allegations of what occurred, including the Appellees' state of mind, they must be accepted by the Court in reviewing a Motion to Dismiss.

ISSUES

1. Do Appellees' have a duty of care in the operation of their abuse response program that does not interfere with the free exercise of their religion?
2. If Appellees have no duty of care, does the Complaint nevertheless state a claim for an intentional tort?
3. If Appellees have no duty of care, does the Complaint nevertheless state a claim for fraud?

Note: In her Report and Recommendation, the Magistrate of the District Court stated that, because there was no duty of care, the claims for an intentional tort and fraud must also be dismissed. This is an obvious error; duty of care has never been an element of such claims. Appellees did not even assert that point. Intentional torts and fraud existed as causes of action long before the concepts of negligence and duty of care entered jurisprudence. However, the Magistrate later used a footnote to confirm her dismissal of those two counts, so this brief will also address those comments.

STANDARD OF REVIEW

Review by the Court of Appeals is not a trial de novo. Appellant must demonstrate that the lower court decision was an obvious error, a misapplication of the law, and/or an abuse of discretion. Here, in addition to the obvious error noted supra, Appellant argues that the magistrate judge misapplied the law and abused her discretion in making findings of fact and improperly exempting Appellees from the laws that would apply to any other corporation.

SUMMARY OF ARGUMENT

Appellant's Complaint states a claim in negligence, intentional tort, and fraud. Concerning the negligence claim, the lower court improperly made findings of fact, misapplied the law, and abused its discretion in determining that Appellees have no duty of care. It then compounded the error by concluding that an absence of a duty of care also invalidates a claim for relief from an intentional tort or from fraud. But neither of these requires a duty of care. And both are well supported by the facts as alleged the Complaint.

On the policy level, the lower court concludes: "The Federal Court is, however, not an appropriate forum or vehicle for which to lobby for policy and procedural changes within a religious organization." (Report, p.8) But the Federal Court *is* a proper forum for seeking relief when a domestic corporation and its officers and employees harm someone, be it negligently, intentionally, or fraudulently. The acts complained of, and the relief sought (after stipulation), have nothing to do with, nor will they impede, the Appellees' free exercise of their religion.

Nor will liability for such harmful practices chill such abuse response programs. Making the program consistent with the law will provide confidence both for the program's administrators and those making use of it. Conversely, a finding that Appellees have no liability for their wrongful acts will chill participation by those who are most in need of help. Any organization that purports to provide care to others must, in the first instance, do no harm.

I. APPELLEES OWE A DUTY OF CARE TO A FORMER CHILD IN THEIR CARE WHO PARTICIPATES IN A PROGRAM THEY UNDERTAKE TO RESPOND TO ALLEGATIONS OF CHILD ABUSE

Appellant's negligence claim (but not the others) requires that Defendants have a duty of care that the Courts can enforce.

The Magistrate Judge's Report and Recommendation finds that there is no duty of care concerning the events underlying the allegation of possible child sexual abuse because they occurred beyond the statute of limitations. Appellant agrees. Appellant has not claimed relief from those events. Appellant's Complaint states a claim for relief from Appellees' acts of 2010, and continuing, in the operation of their abuse response program.

The duty of care in the operation of such undertakings is based in common law, and has already been recognized by the Pennsylvania Supreme Court in adopting the Restatement of Torts:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts, Section 323 (1965) (see Plaintiff's Opposition to Motion to Dismiss, Nov. 25, 2011, p. 5-13, for supporting case law)

Initially, Appellant must clarify a mistaken assertion by Appellees, repeated in the Report, concerning the nature of the harm done to Appellant. It *does* include physical harm, as detailed in the Complaint and Exhibits and later summarized (see Appendix, Plaintiff's Opposition to Defendants' Motion to Dismiss, November 25, 2011)

(Attachment Nine). This is *not* a list of *potential* harm from such improper acts. It is a list of *actual* harm experienced by Appellant as a result of Appellees' acts, or failures to act, from 2010 to the present. The Pennsylvania courts have been quite willing to accept physical harm that is attendant to psychological harm as satisfying any legal requirement for physical harm under the Restatement:

> Initially, physical injury had to be accompanied by some kind of *physical impact* no matter how minor, and did not include conditions manifested only as "transitory, non-recurring" mental or emotional problems. However, under controlling case law, a plaintiff who can show such problems as "long continued nausea or headaches, repeated hysterical attacks or mental aberration" has demonstrated adequate physical injury sufficient to sustain a cause of action. Id. *[Armstrong v. Paoli memorial Hospital,* 430 Pa. Super. 36, 633 A.2d 605, 609 (Pa. Super. 1993)*]* Relying on *Comment c to Section 436A*, the eminent Justice Frank Montemuro, now retired, writing for a panel of this Court, previously held that "symptoms of severe depression, nightmares, stress and anxiety, requiring psychological treatment, and . . . ongoing mental, physical and emotional harm" sufficiently state physical manifestations of emotional suffering to sustain a cause of action. *Love v. Cramer,* 414 Pa. Super. 231, 606 A.2d 1175. 1179 (Pa. Super. 1992), appeal denied, 533 Pa. 634, 621 A.2d 580 (1992).
>
> *Toney v. Chester County Hospital,* 961 A.2d 192, 200 (Pa. Super. Ct. 2008)

It is at least a question of fact as to whether Appellees' acts caused such harm. It is an improper finding of fact and an abuse of discretion to dismiss the case due to the absence of physical harm.

The Court should also consider the relationship between Appellant and Appellees. Appellant was a minor child in their care. (Note: This is not the *sole* basis of duty of care, as argued by Appellees, but an *essential* one for involvement in Appellees' abuse response program). Appellees' program was designed to help those who alleged harm at the hands of one of their members. Appellee Perry is identified as a "child protection delegate" with special training for dealing with such matters. He interviewed Appellant in detail about the underlying abuse. Appellees provided professional counseling. They

were aware of Appellant's vulnerable condition and the effects of their actions. The relationship is as strong as with any other entity offering care.

Most of the Report and Recommendation is a factual analysis as to whether Appellees' program is such an undertaking. It looks at four specific acts by Appellees as alleged in the Complaint:

1) Refusing to make the program's policies and procedures available to the public;

2) Refusing to allow Appellant to speak to the Allegation Review Board, the entity that makes findings and recommendations to the Archabbot:

3) Refusing to tell Appellant the Archabbot's final decision;

4) Refusing to allow Appellant to choose his own therapist.

Refusal to Make Policies and Procedures Public. The Report finds that harm from such a refusal is not foreseeable ("no reason to anticipate – and should not be charged with an expectation . . ." (p.7)). Yet such harm was actually foreseen by the United States Conference of Catholic Bishops, whose standards, which Appellees have sworn they abide by, require the publication of said policies and procedures:

> **ARTICLE 1.** Dioceses/eparchies are to reach out to victims/survivors and their families and demonstrate a sincere commitment to their spiritual and emotional well-being. The first obligation of the Church with regard to the victims is for healing and reconciliation. Each diocese/eparchy is to continue its outreach to every person who has been the victim of sexual abuse as a minor by anyone in church service, whether the abuse was recent or occurred many years in the past. This outreach may include provision of counseling, spiritual assistance, support groups, and other social services agreed upon by the victim and the diocese/eparchy. . . .
>
> **ARTICLE 2.** Dioceses/eparchies are to have policies and procedures in place to respond promptly to any allegation where there is reason to believe that sexual abuse of a minor has occurred. Dioceses/eparchies are to have a competent person or persons to coordinate assistance for the immediate pastoral care of persons who report having been sexually abused as minors by clergy or other church personnel. The procedures for those making a complaint are to be readily available in printed

> form in the principal languages in which the liturgy is celebrated in the diocese/eparchy and be the subject of public announcements at least annually.
>
> *Charter for the Protection of Children and Young People*, p.9-10, United States Conference of Catholic Bishops, June 2005 (see Complaint, Exhibit F)

Note: Quotations from church documents are *not* offered to establish a duty of care. That is the role of civil law. Nor is the Court being asked to review or modify any religious belief or practice. The quotations are offered only to establish the *foreseeability* that Appellees' actions, and failures to act, would likely result in harm to Appellant.

The Appellees were fully aware of the importance of posting their policies and procedures, but chose not to do so. It is a question of fact as to how much that act harmed Appellant. These determinations cannot be disposed of in a motion to dismiss.

Note: Appellant has stipulated to the dismissal, mostly as moot, of the prayer for relief that required the publication of the policies and procedures (see Attachment Five). The claim for damages remains.

Refusal To Be Heard by Board and Told the Final Decision. Since the legal and policy considerations concerning these acts are similar, they will be discussed together.

The Report and Recommendation finds that Appellees have no duty of care concerning the operation of their program that responds to allegations of child sexual abuse. It first notes that the program is gratuitous, even though gratuitousness does not invalidate duty (*supra*). Even the gratuitousness is a question of fact. The inference most favorable to Appellant is that Appellees' abuse response program was established to stop the reduced attendance and financial support that the Church was experiencing as a result of the sexual abuse scandals of recent decades. A judge or justice may not

want to believe that Appellees had such pecuniary motives, but that is the most favorable inference, and it is an abuse of discretion not to accept that inference in reviewing a motion to dismiss. To dismiss the case on the issue of gratuitousness is either a misapplication of the law (because gratuitousness does not matter) or an improper finding of fact (that Appellees' program is gratuitous).

The Report and Recommendation also makes an unsupported assertion that private organizations have no general duty to involve "third parties" in their investigations. But Appellant is not a third party; he is the aggrieved party. The relationship is between him and the Appellees, between the alleged wrongdoers and the alleged victim. An entity that investigates itself does not thereby create a third party. Nor does it remove itself from the rule of law.

The Report and Recommendation also finds that "Defendants would have no reason to anticipate – and should not be charged with the expectation" that their acts could endanger Appellant. But Appellees were specifically aware of the foreseeable harm that would result if Appellant was not heard, or if the effects of abuse were not acknowledged. As stated by the United States Conference of Catholic Bishops:

> "**Feeling heard leads toward healing**. Relief from hurt and anger often comes when one feels heard, when one's pain and concerns are taken seriously, and a victim/survivor's appropriate sense of rage and indignation are acknowledged. Not being acknowledged contributes to a victim's sense of being invisible, unimportant and unworthy; they are in some way 'revictimized.'"
>
> United States Conference of Catholic Bishops, Office of Children and Youth Programs (http://www.usccb.org/ocyp/), as quoted in Complaint.

Appellees have declared that they are in conformance with USCCB policies. They were aware of Appellant's condition. They constantly encouraged him to engage in counseling. Appellee Perry has declared that he is trained to deal with such situations.

They not only should have known; they actually did know that denying Appellant the opportunity to be heard and acknowledged would be harmful. It is an improper finding of fact and an abuse of discretion to dismiss the Complaint for lack of foreseeability of harm.

Refusal to Allow Plaintiff to Choose His Own Therapist. Appellant must first correct an improper finding of fact in the Report and Recommendation. Appellant did not seek a therapist to establish Appellees' "legal liability" (Report, p. 2). The pleadings allege that Appellant sought therapy in a desperate attempt to heal, to deal with the demons that had plagued him for years. It is an improper finding of fact and an abuse of discretion to cast such aspersions on Appellant's intent.

From the facts alleged in the Complaint, the inference most advantageous to Appellant is that the Appellees needed to pre-approve a therapist so they could control the therapy; that the therapist, at crucial moments, was more likely to blame any harm on Appellant's psychological condition rather than on any of Appellees' acts; and that such betrayal would cause severe and long-lasting harm.

Appellant understands that this is an allegation and inference of the most outrageous behavior, the trading of someone's physical, mental, and emotional health for the reputation of an institution and its leaders. No one wants to believe that those who are entrusted with morality would do such things. But such hesitance is not enough to support dismissal. In ruling on a motion to dismiss, it is an abuse of discretion not to accept those inferences that are most favorable to the plaintiff. This Court must set aside any personal feelings about this church, or any church, and apply the law fairly and objectively to the Appellees: a corporation, its officer, and its employee.

Pennsylvania law has long recognized the duty of care when an entity undertakes a program of care as envisioned by the Restatements. The only question is whether there is anything about the religious nature of the Appellees that prohibits the courts from enforcing that duty. This issue will be discussed further infra.

II. THE COMPLAINT STATES A CLAIM FOR RELIEF FROM AN INTENTIONAL TORT

Other than the wrongful application of duty of care, the Report's only analysis of the claim of intentional wrongdoing is in a footnote, finding an absence of an independent claim for recklessness under Pennsylvania law (Report, p.8, f.12).

A complaint filed in federal court, even a diversity complaint that states a claim for relief under state law, does not need to meet the procedural pleading requirements of that state. Civil procedure in federal courts is governed by the Federal Rules of Civil Procedure (FRCP Rule 1), in which there is only one cause of action, the civil action (FRCP Rule 2), which is commenced by the filing of a complaint (FRCP Rule 3). Under federal "notice" pleading, it is enough if the complaint sets forth sufficient plausible facts that allow the Court to draw a reasonable inference that Defendants are liable for the misconduct alleged; "Pleadings must be construed so as to do justice." (FRCP Rule 8(e)). Complex forms of pleading are discouraged: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." (FRCP Rule 83)

Under Pennsylvania substantive law, the facts as pled would support a claim for the intentional infliction of emotional distress, for which recklessness is sufficient intent.

See sample Pennsylvania pleading, Plaintiff's Declaration in Opposition to Motion to Dismiss, July 1, 2011, Exhibit A (Attachment 10). The Appellees were aware of Appellant's fragile emotional state. They knew that, by making decisions that protected their own reputation, there was a real danger that Appellant would be further harmed. They chose to do so anyway, in reckless indifference. Harm resulted.

These are the facts as pled, and the inferences most favorable to Appellant. The Court must accept them. It is an abuse of discretion not to do so and thereby dismiss the Complaint.

Should the Court determine that a more definite statement of the cause of action for intentional wrongdoing is required, it can order Appellant to produce one under FRCP Rule 12(e). That remedy would be preferred, as dismissal of a case without consideration on the merits is disfavored. To dismiss this case without leave to amend is unsupported by law, an abuse of discretion, and clearly erroneous.

III. THE COMPLAINT ALLEGES SUFFICIENT PLAUSIBLE FACTS TO SUPPORT A CLAIM FOR FRAUD

Aside from the clearly erroneous dismissal of the fraud claim due to no duty of care (which is not required), the Report addresses Appellant's fraud claim only in a footnote, referring to "the absence from the Complaint of any factual support sufficient to any plausible fraud claim." (Report, p.8, f.12).

The standard, as noted above, is *not* that the Complaint must state a plausible claim. That is an impermissible finding of fact. Rather, the Complaint must assert plausible facts that would support a claim that Appellees were liable for fraud.

In accordance with FRCP Rule 9(b), the Complaint states with particularity the circumstances constituting fraud. The facts as pled are not only plausible, they are documented. No one has challenged them. Appellees assured Appellant he would be told the outcome of the investigation. They knew he was concerned about proceeding without that assurance, and he relied upon it before opening himself up to the process, to his detriment. At the end of the investigation, he was told that the findings and recommendations would forever be confidential, to Appellees' benefit. Appellees' fraudulent state of mind was generally pled.

Accepting the facts as pled and making the inferences most favorable to Appellant, the Court must conclude that Appellant has at least raised a question of fact concerning Appellees' fraudulent behavior. It is an improper finding of fact and an abuse of discretion to dismiss the case for failure to state a claim for fraud. It is an obvious error to dismiss it for absence of a duty of care.

IV. DEFENDANTS' WILL NOT BE OVERBURDENED BY THE RELIEF SOUGHT IN THE COMPLAINT

Confidentiality. Appellees have raised the concern, and the Magistrate Judge agreed, that the relief sought by Plaintiff would jeopardize the confidentiality necessary to carry out abuse investigations. This conclusion is contradicted by the information supplied by the Appellees.

In their Motion to Dismiss of July 2011, the only confidentiality concern raised by Appellees was "to protect the identity of witnesses and to provide members of the Review Board with information to determine the credibility of the allegations." Nowicki

Declaration, May 16, 2011 (see Attachment 11). But Appellant is not asking to be present during the entire proceeding, only to be heard. Nor do the findings and recommendations that are released to him need to reveal such confidential information. Plaintiff has already accepted that the investigator's full report would not be released for that reason. Being heard and being acknowledged do not require the pathology of an investigation.

As for the findings concerning the alleged abuser, they would either exonerate him, which would do no harm if released, or find that he acted wrongfully, in which case the information is in the public interest. The norms of the Conference of Catholic Bishops, which Appellees assert they follow, agree with that policy; the privilege of confidentiality lies with the victim, not the institution:

> **ARTICLE 3.** Dioceses/eparchies are not to enter into settlements which bind the parties to confidentiality unless the victim/survivor requests confidentiality and this request is noted in the text of the agreement.
>
> *Charter for the Protection of Children and Young People*, p.10, United States Conference of Catholic Bishops, June 2005 (see Complaint, Exhibit F)

It is a misapplication of the law and an abuse of discretion for the lower court to extend the protections of confidentiality to Appellees beyond what is necessary for the free exercise of their religion. Nothing in this case merits such an extension.

Liability. The Report and Recommendation raises the concern that imposing liability on those who provide services, as envisioned by the Restatements and recognized by Pennsylvania courts, would deter them from providing those services.

The Commonwealth of Pennsylvania has already made that decision. It has confirmed that the cited Restatement applies to all actors in the Commonwealth,

including corporations. The only question is whether Appellees' religious status somehow exempts them from such liability.

Appellees' motivations for establishing and maintaining their abuse response program are far stronger than any chill caused by fear of liability. They reap much benefit from it by maintaining their reputation and providing some method for redress, even if a fig leaf. Not to do so would drive away their congregation and reduce financial support.

Appellees are a domestic corporation, an officer, and an employee, who are responsible for the consequences of their actions just like everyone else. To exempt them from liability for their actions as alleged would mark the end of the rule of law. Conversely, a finding of liability would extend the protection of the law to the very people, the injured and vulnerable, who are most in need of such protection. It would in no way interfere with Appellees' free exercise of their religion.

V. DETERMINING LIABILITY FOR THE HARMFUL ACTIVITIES OF A RELIGIOUS ORGANIZATION IS A PROPER ROLE OF THE COURT

The Report and Recommendation concludes: "The Federal Court is, however, not an appropriate forum or vehicle for which to lobby for policy and procedural changes within a religious organization." (Report, p.8)

Neither Appellees, nor the Report, cite a single authority for the proposition that a civil court does not have the authority to determine liability for, and possibly enjoin, the harmful acts of a corporation and its officers and employees. None of the acts

complained of have anything to do with the free exercise of religion as protected by the First Amendment.

Concerning injunctive relief, Appellant is aware of any court's reluctance to be involved in the ongoing operation of any other entity. The preference is to restrict the use of injunctive powers to ordering someone to stop harmful practices.

That is precisely what Appellant is seeking in his prayer for injunctive relief. Stop blocking access to the Allegation Review Board. Stop hiding the final decision. Stop requiring pre-approval of therapists. Such an injunction would stop the continuing harm that Appellant is experiencing every day. It is not overly burdensome. And it is well within the power of this court to stop the continuing harmful acts of any defendant brought within its jurisdiction.

There was a time in history when governments deferred to ecclesiastical courts, including the legal traditions that evolved into our own. Indeed, there are still countries in the world where civil law and religious law are one. But the United States has rejected that model of jurisprudence since its founding. Though we have sometimes struggled with the details, we have found a way to preserve the essentials of religious freedom while still enforcing civil responsibility.

This case again requires the Court to examine that relationship. The Appellees, and the Report and Recommendation, raise the fear that if the civil government interferes in a case of alleged wrongdoing by a religious organization, it will be party to the destruction of that organization.

Such an assertion is an insult, not only to civil government, but to religion. Taking responsibility for wrongful acts will not destroy a religion; it will only help it find

fulfillment. Those who worry about a church's standing in the community should consider how that standing would be raised if it took responsibility and treated those alleging abuse with the same respect that the rest of our society affords to victims of wrongdoing. And those who worry about the legitimate functions of civil government should consider what would happen if it forfeited its responsibility to protect its citizens.

If the Court has any doubt as to whether the people of the Commonwealth of Pennsylvania have an interest in holding institutions and individuals accountable for how they deal with allegations of abuse, it should take judicial notice of similar cases currently proceeding in state courts in Philadelphia and State College.

CONCLUSION

A duty of care for those who undertake a program that provides care is well established under Pennsylvania law. Appellees undertook a program that responded to allegations of child sexual abuse to address concerns about clergy abuse that were affecting both attendance and financial support. Even if the program was purely gratuitous, Appellees would still owe a duty of care to a former child in their care who participated.

Appellant sought help from the program, starting with a letter that alleged possible child sexual abuse. The Appellees refused to publish their policies and procedures, refused to allow him to speak to the board that makes findings and recommendations, refused to tell him the outcome of the process after assuring him that they would, and forced him to use a therapist of their own choosing. As a result of Appellees' wrongful acts, Appellant suffered physical, mental, and emotional harm.

Duty of care cannot be dismissed as a matter of law. The nature of the risk of the alleged wrongful acts and the likelihood of harm were not only foreseeable, they were actually foreseen by Appellees. The burden on Appellees of such a duty of care will be no greater than on any other organization that purports to help people. Revealing the findings and recommendations that are adopted by the Archabbot would not affect any asserted or recognized need for confidentiality. The utility of Appellees program would not be reduced. And the overall public interest in assisting those who have been victims of child sexual abuse would be served.

Appellees acted with deliberate disregard for the harmful effects of their acts, and acted fraudulently. Liability for such acts does not require a duty of care. If the Court determines that a more definite statement is needed for the intentional tort, it can order one under FRCP Rule 12(e). The facts supporting the fraud claim are not only plausible, they are documented. The inference most favorable to Appellant is that Appellees acted intentionally and fraudulently in order to protect their reputation. In reviewing a motion to dismiss, the Court must accept the most favorable inference.

Appellees' acts, and failures to act, are not protected by the free exercise clause of the First Amendment. This Court is well positioned to rule on the applicability of the United States Constitution on state law. If the First Amendment does not apply in this case, then the policy considerations of the Magistrate Judge's Report and Recommendation fail.

Appellant's Complaint states a claim for relief. There is nothing about Appellees' status that removes them from the jurisdiction of the Court. The Court has the power to

provide relief for wrongful acts, and to stop such acts if they continue to harm. Such jurisdiction will in no way impede Appellees' practice of their religion.

APPELLANT THEREBY PETITIONS THIS COURT to overturn the Order to Dismiss and allow this case to proceed on its merits. Appellant also petitions this Court, if necessary, to allow an amendment to the Complaint under FRCP Rule 12(e) which would use the language of Pennsylvania substantive law in describing the claim for an intentional tort.

Respectfully Submitted,

Date: April 4, 2012

By: _____
Dennis O'Brien, Appellant