STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF BROWN **FIFTH JUDICIAL DISTRICT**

Doe 37 & 38,

Plaintiffs,

vs.

Diocese of New Ulm,

Defendants,

Former Priest #1 [FP #1],
Former Priest #2 [FP #2],

Intervening Defendants.

MEMORANDUM AND ORDER ON MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Court File No.: 08-CV-14-863

Doe 10,

Plaintiff,

vs.

Diocese of New Ulm and
Servants of the Paraclete,

Defendants,

Former Priest #1 [FP #1],
Former Priest #2 [FP #2],

Intervening Defendants.

MEMORANDUM AND ORDER ON MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Court File No.: 08-CV-13-1084

The above-entitled matters came on for a combined hearing before the undersigned Judge of District Court on January 20, 2015, at the Brown County Courthouse in New Ulm, Minnesota. Michael G. Finnegan and Annie Kopplin, Jeff Anderson & Associates, St. Paul, Minnesota, and

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota, appeared on behalf of Plaintiffs. Thomas B. Wieser, Meier, Kennedy & Quinn, Chartered, St. Paul, Minnesota, appeared on behalf of Defendant Diocese of New Ulm. Krista Pezewski, Murnane Brandt, St. Paul, Minnesota, appeared on behalf of Defendant Servants of the Paraclete. John W. Carey, Sieben, Grose, Von Holtum, Fairfax, Minnesota, appeared on behalf of Intervening Defendants Former Priests # 1 and 2.[1]

These matters came on pursuant to Defendant Diocese of New Ulm's motions to dismiss Counts I and II in File 08-CV-13-1084 and to dismiss Counts I-III in File 08-CV-14-863 on the identical grounds that Plaintiffs have failed to state a claim upon which relief can be granted. Defendant Servants of the Paraclete joined in Defendant Diocese of New Ulm's motion and challenges Counts V and VI of 08-CV-13-1084.[2] Plaintiff Doe 10 has moved to amend his Complaint to add pecuniary damage claims.

Based upon the arguments of counsel at the hearing and the contents of the files, including motion papers, affidavits, exhibits, and memoranda, the Court makes the following:

ORDER

1. Defendants Diocese of New Ulm's motion to dismiss Count I of the Complaint, private nuisance, in file 08-CV-14-863 is GRANTED IN PART and DENIED IN PART. It is GRANTED insofar as Plaintiffs' claims in private nuisance is DISMISSED with prejudice. It is DENIED insofar as Plaintiffs' claims in public nuisance may go forward.

2. Defendants Diocese of New Ulm's motion to dismiss Count II of the Complaint, public nuisance, in file 08-CV-14-863 is DENIED.

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[1] Intervening Defendants Former Priests # 1 and 2 appeared at the hearing to be heard on a motion for protective order. They have taken no position on the issues addressed in this Order and Memorandum.

[2] Defendant Servants of the Paraclete ("Servants") initially filed a combined Rule 12(b) and (e) motion to dismiss all Counts of the Complaint against it. Servants then notified the Court that it was joining in the 12(e) motion filed by the Diocese of New Ulm. Servants' 12(b) motion to dismiss all Counts against it for lack of personal jurisdiction is pending before this Court, as jurisdictional discovery has not been completed. Based on all of these moving papers, this Court assumes that Servants is not challenging Counts VII or VIII, negligent supervision and negligent retention, under Rule 12(e).

3. Defendants Diocese of New Ulm's motion to dismiss Count III of the Complaint, negligence, in file 08-CV-14-863 is GRANTED.

4. Defendants Diocese of New Ulm's motion to dismiss Count I of the Complaint in file 08-CV-13-1084 is GRANTED IN PART and DENIED IN PART. It is GRANTED insofar as Plaintiff's claim in private nuisance is DISMISSED with prejudice. It is DENIED insofar as Plaintiff's claim in public nuisance may go forward.

5. Defendant Diocese of New Ulm's motion to dismiss Count II of the Complaint, negligence, in file 08-CV-13-1084 is GRANTED.

6. Defendant Servants of the Paraclete's motion to dismiss Count V of the Complaint in file 08-CV-13-1084 is GRANTED IN PART and DENIED IN PART. It is GRANTED insofar as Plaintiff's claim in private nuisance is DISMISSED with prejudice. It is DENIED insofar as Plaintiff's claim in public nuisance may go forward.

7. Defendant Servants of the Paraclete's motion to dismiss Count VI of the Complaint, negligence, in file 08-CV-13-1084 is GRANTED.

8. Plaintiff Doe 10's motion to amend his Complaint to add claims of economic or pecuniary loss is GRANTED.

9. The following MEMORANDUM is incorporated herein by reference.

Dated: March 27, 2015

Robert A. Docherty
Judge of District Court

MEMORANDUM

I. FACTS

For the purposes of this motion, the Court must take the facts alleged in the Complaint as true and make all inferences in favor of the Plaintiffs. In re Individual 35W Bridge Litig., 806 N.W.2d 811, 815 (Minn. 2011). When Plaintiffs Doe 37 and 38 were minor children, they attended and served as altar boys for St. Joseph's church in Silver Lake, Minnesota. St. Joseph's was operated by the Diocese of New Ulm ("the Diocese"). Father Michael Skoblik, a priest

working for the Diocese and assigned to St. Joseph's, engaged in sexual contact with Doe 37 at various times from 1967 until 1970 and with Doe 38 at various times from 1968 until 1972. The Diocese knew or should have known about Fr. Skoblik having had sexual contact with other children prior to his abuse of Doe 37 and 38. The Diocese did not report such conduct to police. Instead, the Diocese continued to provide Fr. Skoblik unlimited access to children in his work and consistently held Fr. Skoblik out as a safe caretaker of children.[3]

When Doe 10 was a minor child, he attended the Church of St. Andrew in Granite Falls, Minnesota. This church was also operated by the Diocese. In 1982, at a time relevant to Doe 10's negligence claims, Fr. Francis Markey was working at the Church of St. Andrew employed or under the supervision of both the Diocese of New Ulm and the Servants of the Paraclete. Father Markey had originally been a part of the Diocese of Clogher ("Clogher") in Ireland. He had been accused of sexual contact with a number of children in Ireland, and Clogher had sent him for sexual offender treatment at four different treatment facilities. In 1981, Fr. Markey was sent for treatment at the Servants of the Paraclete's treatment center in Jemez Springs, New Mexico. He was transferred from there to a Clinical Pastoral Education Program at Willmar State Hospital in Minnesota. Father Markey engaged in sexual contact with Doe 10 while working in the Church of St. Andrew. The Diocese and the Servants knew or should have known about Fr. Markey having had sexual contact with other children prior to his abuse of Doe 10. They did not report such conduct to police. Instead, they continued to provide Fr. Markey unlimited access to children in his work and held Fr. Markey out as a safe caretaker of children.

In 2003, the Diocese assembled a list of twelve of its current and former priests who had at some time been accused of child sexual abuse. The Diocese has never released this list of names or alleged conduct to the public. Plaintiffs allege that by protecting Fr. Skoblik, Fr.

[3] Doe 37 and 38 have no claims against Servants of the Paraclete.

Markey, and other accused priests, by failing to report alleged conduct to the police, and by failing to release the names of those accused priests to the public, the neighborhoods served by the Diocese as well as other neighborhoods where those priests are presently located are exposed to an unhealthy, unsafe, and indecent atmosphere, and the children served by the Diocese are at an elevated risk of being sexually abused.

Does 37, 38, and 10 suffer emotional distress, depression, anxiety and anger stemming from their sexual abuse as children. They also experience these harms due to the shock of learning that the Diocese continues to withhold information about abusers, which leads to an inability to reach out to warn possible future victims of priest sexual abuse or counsel and aid other former victims of such abuse. Also due to the Diocese's concealment of child sexual abuse at the hands of its priests, they were not able to receive timely medical treatment for their mental and emotional distress. In addition, Doe 37 and 38 suffered lost wages, and Doe 37 also incurred costs for medical and psychological care. Doe 10 has moved to amend his Complaint to add claims of similar economic harms.

For the purposes of these motions, Plaintiffs Doe 37 and 38 and Doe 10 will be referred to together as "Plaintiffs" unless otherwise noted.

II. STANDARD FOR MOTION TO DISMISS

Defendant has made a motion to dismiss for failure to state a claim pursuant to Minn. R. Civ. P. 12.02(e). The Court must determine "whether the complaint sets forth a legally sufficient claim for relief." In re Individual 35W Bridge Litig., 806 N.W.2d at 815. "[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." N. States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963). The Court must accept all pleaded material facts as

true, and all inferences must be made in favor of the non-moving party, in this case the Plaintiffs. In re Individual 35W Bridge Litig., 806 N.W.2d at 815.

III. ANALYSIS

A. Nuisance

Plaintiffs have claimed that the Defendants created a nuisance by concealing the identities of priests accused of child sexual abuse and refusing to release the names of priests known to be so accused or the conduct alleged. The Defendants argue that Plaintiffs have failed to make a legally adequate claim for nuisance.

1. Private nuisance.

There are two types of nuisance, public and private. As an initial matter, Defendants argue that Plaintiffs have failed to plead an essential element of private nuisance, an affected interest in property. It is undisputed that none of the Plaintiffs has claimed an affected real property interest.

Private nuisance is defined by statute as follows:

> Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Minn. Stat. § 561.01.

An individual may bring a claim in private nuisance pursuant to the following language of the nuisance statute: "An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance..." Minn. Stat. § 561.01. Plaintiffs urge the Court to read the statute as follows: "An action may be brought by any person

[...] whose personal enjoyment is lessened by the nuisance..." Minn. Stat. § 561.01. By this reading, the statute would not require a property interest in every case.

Private nuisance has been generally defined as an interference with the use and enjoyment of land. Anderson v. State Dep't of Natural Res., 693 N.W.2d 181, 192 (Minn. 2005); see also Johnson v. Paynesville Farmers Union Coop. Oil Co., 817 N.W.2d 693, 706 (Minn. 2012); Restatement (Second) of Torts § 821E, comment a (1979). In Anderson, 693 N.W.2d at 192, beekeepers could not bring a private nuisance claim against tree farms using pesticides that harmed their foraging bees, because the beekeepers had no property interest in the land on which their hives were located. See also N. Star Legal Found. v. Honeywell Project, 355 N.W.2d 186, 189 (Minn. Ct. App. 1984) ("Appellants do not allege any interest in the affected property. Therefore, they do not have a cause of action under section 561.01."). Plaintiffs attempt to distinguish Anderson by arguing that the case was essentially about property, i.e., bees from certain land being harmed by pesticides used on certain neighboring land. However, the Minnesota Supreme Court did not give any indication that this was a factor in its decision. The Court set forth the rule as a basic prerequisite of a private nuisance claim.

In Am. Computer Trust Leasing v. Jack Farrell Implement Co., 763 F.Supp. 1473, 1494 (D. Minn. 1991) aff'd, Am. Computer Trust Leasing v. Boerboom Int'l, Inc., 967 F.2d 1208 (8th Cir. 1992), a federal court interpreting Minnesota law came to the same conclusion. That court held that a company had no private nuisance claim for a disruption in computing services, because a property interest in a computer system did not meet the nuisance statute's requirement of an affected interest in real property. Id.

Plaintiffs rely heavily on Randall v. Vill. of Excelsior, 103 N.W.2d 131 (Minn. 1960), to support the theory that private nuisance claims do not have to be grounded in affected property.

In Randall, the Court recognized that a legal nuisance can be an interference with personal rights and privileges independent of property interests. Id. at 134. In this statement, however, the Court was discussing the general fundamentals of nuisance, without distinguishing between private or public nuisance, in order to compare it to negligence. Id. The Randall court came to the conclusion that the plaintiff was essentially alleging negligence rather than nuisance, and as a result, could not bar the defendant from claiming contributory negligence as a defense. Id. at 134-35. That Court cited Sweet v. State, 89 N.Y.S.2d 506, 514 (N.Y. Ct. Cl. 1949), a public nuisance case that also discussed the relationship between negligence and nuisance. Id. at n.4. As discussed above, a private nuisance claim under Minn. Stat. § 561.01 does require an affected property interest. N. Star Legal Found., 355 N.W.2d at 189.

Plaintiffs also cite to Schmidt v. Vill. of Mapleview, 196 N.W.2d 626, 628 (Minn. 1972). Although the quote used by Plaintiffs appears to support the position that a property interest is not required for a private nuisance claim, when the quote is taken in context, Plaintiffs' argument falls short. In Schmidt, the plaintiffs complained of a reduced enjoyment in their real property, because the location of the Village's utility pole and fire hydrant made it difficult to drive a car into their property's garage. Id. The quote in full reads: "the term 'nuisance' denotes an infringement or interference with the free use of property or the comfortable enjoyment of life, and thus it necessarily follows that an unlawful denial of reasonable access to property may constitute a nuisance." Id. The Schmidt case clearly falls within the bounds of private nuisance as a claim available only to those with an interest in real property.

Plaintiffs' claimed economic losses in the form of lost wages and medical treatment costs do not meet the pleading requirements for private nuisance. Anderson, N. Star Legal Found., and Am. Computer Trust Leasing make it clear that only harm to a real property interest will

meet the pleading requirement. Because Plaintiffs have no real property interests affected by the alleged nuisance, they fail to state valid claims for private nuisance.

2. Public nuisance

Plaintiffs claim that by refusing to release the names and alleged conduct of known accused priests, the Diocese and the Servants endanger the public health and interfere with the public enjoyment of life.

a. Whether Plaintiffs have alleged the elements of a public nuisance

Criminal public nuisance is defined by separate statute:

> Whoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:
>
> (1) maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public; or
>
> (2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public; or
>
> (3) is guilty of any other act or omission declared by law to be a public nuisance and for which no sentence is specifically provided.

Minn. Stat. § 609.74. A nuisance may be both public and private. Hill v. Stokely-Van Camp, Inc., 109 N.W.2d 749, 753 (Minn. 1961). The difference is predominantly in the remedy. Id. For these reasons, in the case of a private party bringing a public nuisance claim, Minn. Stat. § 609.74 and Minn. Stat. § 561.01 should be read together. Plaintiffs set forth separate public nuisance claims pursuant to sections 609.74 and 561.01, but there is no need to address them as separate claims.

The alleged interference with the public right "must be a material and substantial one in order that a nuisance exist entitling the party to relief, and the degree of the discomfort is

measured, not by the standards of persons of delicate sensibilities and fastidious habits, but by the standards of ordinary people having regard to the character of the area in which they reside." Fish v. Hanna Coal & Ore Corp., 164 F. Supp. 870, 872 (D. Minn. 1958); see also Jedneak v. Minneapolis Gen. Elec. Co., 4 N.W.2d 326, 328 (Minn. 1942) (internal citations omitted).

> In Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, Mr. Justice Harlan remarked that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and in State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951, 52 L. R. A. (N. S.) 932, Ann. Cas. 1915D, 549, this court, quoting the remark, said "that no vested right * * * exists to use property for purposes injurious to either public health or morals."

Brede v. Minnesota Crushed Stone Co., 173 N.W. 805, 808 (Minn. 1919).

Most frequently, nuisance claims have focused on interferences with rights of way, Aldrich v. City of Minneapolis, 53 N.W. 1072, 1074 (Minn. 1893), or with air quality, noise, or environmental issues. See Reserve Mining Co. v Envtl. Prot. Agency, 514 F.2d 492 (8th Cir. 1975) (air pollution). Across the country, the last century has seen the theory of nuisance expanded to encompass broader public safety issues. There was some success with using nuisance claims to address gun violence in cities, Ileto v. Glock, Inc., 349 F.3d 1191 (9th Cir. 2003) (claims by victims of gun violence), but this tactic was subsequently preempted by Federal legislation. See 15 U.S.C.A. §§ 7901 to 7903. A California court permitted the use of nuisance law to address gang activity that was causing neighborhood blight. People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal. 1997), cert den., Gonzalez v. Gallo, 521 U.S. 1121 (1997). A Minnesota Court found that rowdy youth from a local horseback riding academy created a nuisance by repeatedly disturbing the neighborhood. Robinson v. Westman, 29 N.W.2d 1 (Minn. 1947).

The existence of a nuisance is a question of fact. Hill, 109 N.W.2d at 753; see also Shepstedt v. Hayes, 21 N.W.2d 199, 203 (Minn. 1945) (the question of whether a public nuisance existed was properly submitted to the jury).

In 2003, the Diocese assembled a list of the names and alleged conduct of twelve priests credibly accused of child sexual abuse, for the purpose participation in a nationwide study on sexual abuse perpetrated by priests, known as the John Jay Study. The John Jay Study was confidential, and the Diocese has not released the full list to the public, although it has released the names of four of the listed priests. Plaintiffs claim that the Diocese's 1) repeated refusals to release the list of these twelve priests, 2) protection of these priests from criminal prosecution, and 3) attack of the credibility of those claiming child sexual abuse by these priests over the years, causes a continuing public nuisance. These acts or omissions are alleged to have created a public nuisance consisting of exposing the children of the communities served by the Diocese to an increased danger of molestation which affects people's enjoyment of life and endangers the safety, health, and morals of the public. The allegations in the Complaint are sufficient to meet the bare requirements of a public nuisance.

b. Whether Plaintiffs have a private right of action for public nuisance

Defendant's primary argument against the public nuisance claims is that the Plaintiffs may not take the place of a public prosecutor to bring a claim of public nuisance. Unlike private nuisance, the criminal nuisance statute does not require an interest in property, as it is intended for the protection of the entire community, not only adjacent property owners. Because it is intended for the protection of the community, generally only a public prosecutor may bring a public nuisance claim. Hill, 109 N.W.2d at 753. Plaintiffs are private citizens, not public prosecutors.

Courts have permitted individuals to bring private actions under nuisance and other public protection statutes only when there is "some damage or injury to the individual bringing the action which is special or peculiar and different from damage or injury sustained by the general public." Channel 10, Inc. v. Indep. Sch. Dist. No. 709, St. Louis County, 215 N.W.2d 814, 820 (Minn. 1974); see also N. Star Legal Found., 355 N.W.2d at 189 (public nuisance). In the area of public nuisance, this rule has been clearly established for well over one-hundred years. Thelen v. Farmer, 30 N.W. 670 (Minn. 1886). It is not sufficient for the damage to be greater in degree to the plaintiff than to the general public; the damage must be in some way different. Id. at 670-71. This is to avoid duplicative lawsuits. Swanson v. Mississippi & Rum River Boom Co., 44 N.W. 986, 987 (Minn. 1890).

Frequently, the public nuisance plaintiff has some business interest or property interest directly affected by the nuisance. See Viebahn v. Board of County Comm'rs, 104 N.W. 1089 (Minn. 1905) (bridge blocking waterway constituted a public nuisance that prevented plaintiffs from carrying on their established steamboat business); Aldrich v. City of Minneapolis, 53 N.W. 1072, 1074 (Minn. 1893) (obstruction partially blocked access to plaintiff's barber shop business and deterred customers); Robinson v Westman, 29 N.W.2d 1 (Minn. 1947) (riding academy disturbed personal and property rights of residents nearby). In addition, a person has a private action for public nuisance when the individual suffered damage to personal property as a result of the public nuisance. See Hanson v. Hall, 279 N.W. 227, 229 (Minn. 1938). In Hanson v Hall, when union protesters caused a public nuisance by interfering with the public right of way on a road, the owner of the truck that sustained damage when swerving to avoid them had a private action for public nuisance. Id. The underlying rule is that a pecuniary interest is property subject

to damage by the public nuisance, and when it is damaged, the individual has a private right of action. Aldrich, 53 N.W. at 1074.

In the instant case, each of the Plaintiffs claim to have been the victim of sexual abuse at the hands of Father Skoblik or Father Markey during periods between 1967 and 1981. There have been similar accusations by other children against these and other priests working in the Diocese.

The Plaintiffs claim that each of them has suffered special and different injuries than the general public as a result of this nuisance. First, each of them has been molested by a priest of the Diocese and suffers the mental and emotional scars of such abuse and has not been able to obtain timely medical treatment for those effects. Second, he or she feels a special need to protect other children from such abuse and counsel other victims, and his or her efforts are frustrated by the Diocese's concealment of relevant information. Third, depression, anxiety and anger have resulted from all of these effects. Fourth, they have incurred medical expenses and loss of wages due to the nuisance. It is worth noting that the claims of economic harm are different from prior similar claims made by other plaintiffs in prior priest child sexual abuse nuisance lawsuits considered by this and other courts.

Being victims of child sexual abuse by priests of the Diocese and suffering the mental and emotional effects thereof are injuries essentially the same as those set forth as public nuisance. If the public nuisance created by the Diocese is an increased risk that children will be molested, and Plaintiffs were molested as children due to this increased risk, the alleged harm is the same. This does not establish the special damages required for a private claim of public nuisance.

Plaintiffs' feelings of a particular need to prevent further child abuse and to counsel other victims are also not special or different. This is a greater degree of the same harm experienced by the general public. Other members of the public also seek to protect children against priest sexual abuse and to counsel victims of such abuse. The Plaintiffs may feel more strongly than non-victims about these frustrations, but they have not made any allegations of special diagnoses unique to victims of child sexual abuse that would set their damages aside from the general public. Again, counseling other victims of abuse is an interest of the community felt, perhaps, more strongly as a victim of the abuse.

For these reasons, Doe 10's Complaint, if not amended, fails to set forth an actionable claim for nuisance. Doe 10 has moved to amend his Complaint to add economic harms.

Doe 37 and Doe 38's nuisance claims go further and set forth economic harms as well. Specifically, both Doe 37 and Doe 38 claim the economic harm of loss of income and/or earning capacity. Doe 37 also claims the cost of medical and psychological treatment, therapy and counseling. These damages are special and different from that suffered by the regular community.

To prevail on their theory of nuisance, Plaintiffs will have the burden to prove that the economic harms arose from the nuisance, i.e. each individual Plaintiff's discovery of the Diocese's or the Servant's negligence, deception and/or concealment of knowledge that its employed priests were a danger to children. This will no doubt be a difficult evidentiary burden. But it does not appear certain that no facts exist to support the relief sought. The claim for public nuisance is adequate at the Rule 12 stage. Doe 10's motion to amend his Complaint to allege the special and different damages caused by the public nuisance is granted to allow Doe 10 an opportunity to prove this claim.

B. Negligence

Defendants challenge the various counts of the Complaints alleging direct negligence. These lawsuits have been brought pursuant to the "Child Victims Act." Minn. Stat. § 541.073. The Child Victims Act permits persons to bring previously time-barred claims of the type alleged in these cases, but it expressly excludes "claim[s] for vicarious liability or liability under the doctrine of respondeat superior." Id. For this reason, only direct negligence claims can go forward.

Generally, negligent hiring, negligent retention, and negligent supervision are the only direct causes of action "where a claimant sues an employer in negligence for injuries caused by one of its employees." M.L. v. Magnuson, 531 N.W.2d 849, 856 (Minn. Ct. App. 1995).[4]

> These negligent employment theories are distinct from the doctrine of respondeat superior. Respondeat superior imposes vicarious liability on an employer for all acts of its employees that occur within the scope of their employment, regardless of the employer's fault. Negligent employment imposes direct liability on the employer only where the claimant's injuries are the result of the employer's failure to take reasonable precautions to protect the claimant from the misconduct of its employees.

Id. (citing Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 n. 5 (Minn. 1983); Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993).

Plaintiffs argue that in these cases, the Defendants are liable for negligence based on four other theories: the existence of a special relationship to the plaintiff; the existence of a special relationship to the offending priest; Defendants' creation of a foreseeable harm by active misfeasance; and traditional premises liability.

The basic elements of a negligence claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury. Schmanski v. Church of St. Casimir of Wells, 67 N.W.2d 644, 646 (1954). In these cases, whether a duty existed is the critical issue.

[4] In this motion, Defendants do not challenge any claims brought by Plaintiffs based on these theories.

"The existence of a duty of care is a threshold question because a defendant cannot breach a nonexistent duty." Doe 169 v. Brandon, 845 N.W.2d 177 (Minn. 2014).

1. Special relationship with the plaintiff

Generally, a person does not owe a duty of care to another if the harm is caused by a third party's conduct. Id.; Bjerke v. Johnson, 742 N.W.2d 660, 665 (Minn. 2007). "A duty to protect will be found, however, if (1) there is a special relationship between the parties; and (2) the risk is foreseeable." Id. (internal citations omitted). [5] Plaintiffs claim that a special relationship exists pursuant to the following scenario, as set forth in Bjerke: "when an individual, whether voluntarily or as required by law, has custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection." Id. (internal quotation omitted).[6]

Minnesota Courts have set a high bar for this type of special relationship. In Bjerke, a special relationship was created when the defendant accepted a significant level of care and protection over a teenage girl: she accepted the girl into her household for two summers, for the purpose of riding and showing horses. Id. That Court found it critical that the child could only reach her parents by telephone when in the defendant's care, and the parents did not have the opportunity to notice anything amiss. Id.; see also H.B. by & through Clark v. Whittemore, 552 N.W.2d 705, 709 (Minn. 1996) (no special relationship when parents remained in control of the children's daily welfare). This type of special relationship is also created between a hospital and

[5] Plaintiff relies on Doe 169 for support of this argument. However, in Doe 169, the plaintiff conceded that there was no special relationship between the defendant, an organization involved in renewal of ministerial credentials, and himself. Doe 169, 845 N.W.2d at 178.

[6] This clearly does not create a duty as to Servants, because even if Fr. Markey was an employee of Servants at the time of the conduct, it cannot be said based on the allegations of the Complaint that Servants had custody of Doe 10 at any time.

a patient admitted to its care. Sylvester v. Northwestern Hosp. of Minneapolis, 53 N.W. 2d 17, 19 (Minn. 1952).

Doe 37 and 38's relationships with the Diocese as members of the church and as altar boys do not create a special relationship creating a duty of care. Although the church had the care of the children for brief periods, the parents maintained control of the children's daily welfare.

2. Special relationship with the dangerous person

According to Plaintiffs' second direct negligence theory, a special relationship existed between the Defendants and the offending priests, such that they owed a duty to warn or protect potential victims. Under this very narrow theory of liability, when person A is aware that person B is dangerous, person A has control over person B, and person A can foresee the harm, a duty arises in person A to protect foreseeable victims from the harm committed by person B. Lundgren v. Fultz, 354 N.W.2d 25, 27 (Minn. 1984). In Lundgren, Mr. Fultz was under the long-term psychiatric care of Dr. Cline for treatment of paranoid schizophrenia. Id. at 27. One of the issues addressed in therapy was Mr. Fultz's "fixation" with his handguns, which had been confiscated by law enforcement after he had brandished one at a demonstration. Id. at 26-28. At one point, Dr. Cline wrote a letter to law enforcement stating his opinion, over the objection of local police, that Mr. Fultz had recovered from his mental illness, and the guns could be returned to him. Id. at 27. More than a year later, Mr. Fultz informed Dr. Cline that he had stopped taking his medications, and he cancelled appointments with Dr. Cline. Id. Shortly thereafter, Mr. Fultz shot and killed the victim. Id.

In that case, Dr. Cline had not merely been treating the shooter for mental illness related to the harm, but actually attested to the police that the shooter's guns could be returned to him. He then learned that his patient stopped using his medications and refused to continue therapy

appointments. Under these very unusual circumstances, a factfinder could conclude that Dr. Cline had a special relationship with Mr. Fultz creating a duty to protect the shooting victim. Id. at 27-28. In contrast, a court found that there was no duty to warn even those most frequently in contact with a juvenile, when a defendant psychiatric hospital was generally aware of a juvenile's history of setting fires. Cairl v. State, 323 N.W.2d 20, n. 9 (Minn. 1982). The Complaints in the instant matters do not set forth the extremely close relationship and, more importantly, the unusual amount of direct control required under Lundgren. No such legal special relationship existed, and no duty arose.

3. Defendants' creation of a foreseeable harm by active misfeasance

Plaintiffs' third direct negligence theory relies heavily on a recent case, Doe 169 v. Brandon, 845 N.W.2d 174 (Minn. 2014). That case presented a complex fact pattern involving a bureaucratic entity responsible for issuing ministerial credentials and a volunteer minister working in a position that did not require those credentials. Id. In Doe 169, the plaintiff was not able to claim any employer negligence theories, because the defendant was not the employer of the sexually abusive minister. Id.

A duty of care exists when "the defendant's *own conduct* creates a *foreseeable risk* of injury to a *foreseeable plaintiff*." Doe 169, 845 N.W.2d at 178 (emphasis in original) (quoting Domagala v. Rolland, 805 N.W.2d 14, 23 (Minn. 2011)). The court must find two separate elements. One is whether the defendant committed misfeasance, meaning "active misconduct working positive injury to others." Doe 169, 845 N.W.2d at 178 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56 (5th ed.1984)). Minnesota courts have also described this element as the defendant having increased the danger by its own conduct.

Domagala, 805 N.W. 2d at 26. The other element is whether that conduct created a foreseeable risk to a foreseeable plaintiff. Id.

In the present cases, neither the Servants nor the Diocese increased the danger posed by priests with histories of perpetrating child sexual abuse. The Diocese allegedly failed to warn, failed to monitor, and failed to otherwise implement protections for children in its programs. However, these are all passive acts that allowed a third party's harmful conduct to occur. This passive inaction is not sufficient to impose liability on Servants or the Diocese. See id., 805 N.W.2d at 22. Allegations that the Diocese solicited children for participation in its youth programs despite knowledge of past criminal acts of one or more of its employees also does not rise to the level of misfeasance.

This finding may, at first, appear inconsistent with the earlier determination that the Complaints sufficiently plead nuisance (provided that Doe 10 amends his Complaint). Nuisance does not require the active misfeasance necessary to maintain a negligence claim. Wendinger v. Forst Farms, Inc., 662 N.W.2d 546, 551 (Minn. Ct. App. 2003).

The rule also requires a risk of foreseeable harm to a foreseeable plaintiff. It appears that Plaintiffs have read the Doe 169 case broadly to open up foreseeability to children involved in church programs staffed by persons with known histories of child sexual abuse. See Doe 169, 845 N.W. at 179. However, applying policy considerations expressed in Cairl, 323 N.W.2d at 26, Doe 37, Doe 38 and Doe 10 were not foreseeable plaintiffs. That court held that there must be a specific threat to the foreseeable victim. Id. The Court observed that imposing a duty to warn when no specific threat had been made would "produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public." Id. (quoting

Thompson v. County of Alameda, 614 P.2d 728, 753-54 (Cal. 1980)). There was no specific threat to Doe 37, Doe 38, or Doe 10. Therefore, they were not foreseeable victims.

Because the Complaints do not allege misfeasance on the part of the Diocese or the Servants to support the direct negligence claims, and they do not allege foreseeable harm to foreseeable plaintiffs, these claims fail.

4. Traditional premises liability

A landowner has a duty to use reasonable care for the safety of all entrants onto the land. Louis v. Louis, 636 N.W.2d 314, 318 (Minn. 2001). In making this argument, Plaintiffs did not cite any cases presenting a similar fact pattern to the cases before this Court. To the contrary, "[a] criminal act such as murder or armed robbery committed by a person or persons unknown is not an activity of the owner and does not constitute a condition of the land." Pietila v. Congdon, 362 N.W.2d 328, 333 (Minn. 1985). Special theories of negligence imposing such a duty under special circumstances have been discussed above. See also Sylvester v. Northwestern Hosp. of Minneapolis, 53 N.W. 2d 17, 19 (Minn. 1952) (special duty owed by hospital to inpatient). For these reasons, Plaintiffs fail to state a claim for direct negligence based on premises liability.

IV. Conclusion

Because Plaintiffs failed to allege the property element of a private nuisance claim, the private nuisance claims will be dismissed. Plaintiffs Doe 37 and Doe 38 have met the pleading requirements for public nuisance. Plaintiff Doe 10 has not met the pleading requirements for public nuisance, but he may amend his pleading to meet the requirements for public nuisance as set forth in this memorandum.

Plaintiffs have not met the pleading requirements for a regular negligence cause of action.

RAD

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