

OREGON LAW UPDATE

Respondeat Superior: Does it Require Reasonable Foreseeability? No...

case in point...

From the desk of Jeff Eberhard: The case we are discussing this week involves a legal malpractice lawsuit against an attorney— who had previously represented the plaintiff in a sexual abuse lawsuit against the Archdiocese – the attorney was alleged to have failed to properly investigate and discover relevant “grooming” evidence resulting in the plaintiff’s case being dismissed at summary judgment. The attorney, in defending himself against the legal malpractice allegations, argued that even if the evidence that the plaintiff contends was overlooked had been presented, it would not have been enough to hold the church liable. If the attorney wins, he will make it hard to pursue sex abuse claims against the church. If he loses, he may set out “good law” for other plaintiffs – but the suit against him will continue.

Claims Pointer: Direct causation, rather than reasonable foreseeability, is the essential element of *respondeat superior* liability. In a sex abuse case, the issue is not whether a jury could find that sexual assault is a “natural risk inherent in the job of a priest,” but, rather, whether a priest’s prior relationship with the plaintiff and his family was developed while the priest was acting within the course and scope of his employment.

Schmidt v. Slader, 100303770, 2014 WL 2421327 (Or. Ct. App. May 29, 2014)

In 2002, plaintiff Schmidt hired attorney David Slader to represent him in a suit against the Archdiocese based on Schmidt’s allegations that in the early 1950s, a priest, Father Frank, had sexually assaulted him when he was seven or eight years old. Suit was filed against the Archdiocese alleging that it was vicariously liable for that assault because Frank had “groomed” Schmidt (i.e. used his ongoing relationship as a priest to seduce him) before the sexual assault occurred.

The Archdiocese filed a summary judgment motion arguing that Frank was not within the scope of employment when the alleged sexual abuse occurred because there was no evidence that Frank had “groomed” Schmidt. The motion was granted by the trial court and affirmed by the Court of Appeals.

Schmidt then filed a legal malpractice claim against Slader alleging that, if it wasn’t for Slader’s negligence in failing to properly investigate and discover additional evidence, the Archdiocese would not have prevailed on summary judgment.

Slader moved for summary judgment, arguing that any alleged negligence could not have caused the plaintiff damage because even if he had gathered all of the evidence that Schmidt now says should have been presented, that evidence would have been insufficient to impose vicarious liability on the Archdiocese, and the Archdiocese still would have

been awarded summary judgment.

In response, Schmidt obtained declarations from three of his sisters stating that for several years *before* the sexual assault, Frank had been in the church’s community and had developed a close relationship with Schmidt and his family. Specifically, the declarations stated that Father Frank frequently visited Schmidt’s family home; that he spent time alone with Schmidt and his siblings; that he frequently walked alone with Schmidt; that he spent more time with Schmidt’s family than did other priests; and that Schmidt, at six or seven years old, had served as an altar boy under Frank’s supervision. Schmidt contended that this additional evidence would have supported the conclusion that Frank had performed pastoral duties as a precursor to the sexual misconduct, thereby “grooming” him, and the trial court would not have granted summary judgment to the Archdiocese.

The trial court granted Slader’s motion for summary judgment and Schmidt appealed. On appeal, the Court analyzed the causation element of Schmidt’s legal malpractice claim. Specifically, in order to obtain summary judgment, the Court noted that Slader was required to show that even if he had presented the additional evidence on Schmidt’s behalf in the underlying case, the trial court would have granted summary judgment to the Archdiocese.

This question of law reviewed under the doctrine of *respondeat superior*. Generally, under that doctrine, an employer [here, the Archdiocese] is vicariously



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liable for the tortious acts of an employee [here, Frank] only when those acts are committed within the course and scope of his authorized job duties. It is not sufficient to show that the employment merely “brought the tortfeasor and the victim together in time and place and, therefore, gave the tortfeasor the ‘opportunity’ to commit the assault.” Slader argued that Schmidt’s additional evidence still did not meet the “necessary precursor” test because a sexual assault is not a natural risk inherent in the job of a priest performing his ordinary pastoral duties.

The Court was not persuaded, stating that ‘direct causation, not ‘reasonable foreseeability’ is the *sine qua non* (essential element) of *respondeat superior* liability. The issue is not whether a jury could find that sexual assault is a “natural risk inherent in the job of a priest,” but, rather, whether Frank’s prior relationship with the plaintiff and his family was developed while Frank was acting within the course and scope of his employment and whether that prior relationship was a “necessary precursor to” or “resulted in” the plaintiff’s injuries.

The Court found that if Slader had presented the evidence to establish that there had been a prior relationship between the priest and Schmidt, a reasonable jury could infer that the later sexual misconduct arose within the scope of the priest’s employment by the Archdiocese. The decision of the trial court was overturned.



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