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No. 123521

IN THE SUPREME COURT OF ILLINOIS

JANE DOE, a minor by her mother and next friend, JANE A. DOE, and by her father and next friend, JOHN DOE; JANE A. DOE, individually; JOHN DOE, individually, Plaintiffs-Appellees, v. CHAD COE, as an individual, FOX VALLEY ASSOCIATION ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, an Illinois Not-for-Profit Corporation, ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, an Illinois Not-for-Profit Corporation, THE UNITED CHURCH OF CHRIST, THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, THE UNITED CHURCH OF CHRIST BOARD, an Ohio Not-for-Profit Corporation, Defendants, and FIRST CONGREGATIONAL CHURCH OF DUNDEE ILLINOIS, an Illinois Not-For-Profit Corporation, PASTOR AARON JAMES, as an individual, Defendants-Appellants.	) On Leave to Appeal from the Illinois Appellate Court, Second Judicial District Docket No. 2-17-0435) There Heard on Appeal from the Circuit Court of Kane County, Illinois, Case No. 2015-L-216) The Honorable James R. Murphy, Judge Presiding

AMICUS BRIEF OF ILLINOIS TRIAL LAWYERS ASSOCIATION

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POINTS AND AUTHORITIES

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ARGUMENT

All of the Illinois Trial Lawyers Association members practice in litigation. The Association therefore has an intense interest in the rules of pleading and development of the law in this field and accordingly, desires to make known its views in this case. The ITLA necessarily has to approach a discussion of this case from a somewhat broader perspective, having not been involved in the case in the lower courts.

PLAINTIFFS' ALLEGATIONS OF FACT MUST BE CONSTRUED MOST FAVORABLY TO PLAINTIFFS

In reviewing the opinion below, we would emphasize the broad and fundamental requirements a court should use as a framework in analyzing any plaintiff's pleading.

Initially, it seems most fundamental that "Pleadings shall be liberally construed with a view to doing substantial justice between the parties." 755 ILCS 5/2-603(c). Further, one

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of the basic and fundamental guides for assessing a plaintiff's pleading is that "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet. " 735 ILCS 5/2-612(b).

Sometimes, courts become so entangled in the complicated analysis of the legal elements of a particular cause of action that the "liberal" construction to be placed on a Plaintiffs pleading is lost in the shuffle.

We respectfully suggest that in certain of the analyses, that is what happened below.

The Supreme Court has not had a lot of occasion to remark on the meaning of these principles.

The most recent reference we find by the Supreme Court to 603(c) is in ***Superior Bank Fsb, F/k/a Lyons Federal Trust and Savings Bank, v. Golding***, 605 N.E.2d 514, 517, 152 Ill.2d 480, 488, 178 Ill.Dec. 720, 723(1992), the Court, in a case involving a statute of limitations problem pointed out that, 2-603(c) " . . . provides that pleadings shall be liberally construed so that disputes may be determined on their merits and not summarily dismissed. (Ill.Rev.Stat.1989, ch. 110, par. 2-603(c).) . In ***Lyons Federal***, the court there pointed out that ". . . the purpose of the Code of Civil Procedure is to encourage the trial of cases on their merits and to avoid premature summary dismissals which would frustrate the search for truth. See Ill.Rev.Stat.1989, ch. 110, par. 1-106" citing ***Schultz v. Continental Casualty Co.*** (1979), 79 Ill.App.3d 1035 1038, 34 Ill.Dec. 945, 398 N.E.2d 936.

Granted, *Lyons* was a statute of limitations problem, but the case stands for the broad principles applicable under liberal pleading.

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The Court cites ***Schultz*** with approval. In Schultz, defendant claimed that plaintiff's allegation that he was a member of the organization of his employer and that he had been sued as agent and servant of his employer were legally insufficient and that plaintiff's complaint consists entirely of plaintiff's arguments and conclusions of fact and law. We find the First District indicating "The Civil Practice Act is designed and intended to permit controversies to be determined according to substantial justice between the parties and not according to the technicalities or niceties of pleading." The Court found the plaintiff's rather succinct allegations adequate. ***Schultz***, Ill.App.3d at 1038, Ill.Dec. at, 947, N.E.2d at, 938.

From an approach of a liberal construction of the allegations in Plaintiffs' claims, we need to emphasize inferences. To infer is to deduce or reach a conclusion about an allegation by reasoning. This Court has indicated that in ". . . ruling on a section 2-615 motion to dismiss, the court must accept as true all well-pleaded facts in the complaint and all reasonable inferences which can be drawn therefrom. ***Feltmeier V. Feltmeier***, 798 N.E.2d 75,70, 207 Ill.2d 263, 278 Ill.Dec. 228 (2003), further indicating that ". . . in making this determination, the court is to interpret the allegations of the complaint in the light most favorable to the plaintiff. ***Kolegas***, 154 Ill.2d at 9, 180 Ill.Dec. 307, 607 N.E.2d 201; McGrath, 126 Ill.2d at 90, 127 Ill.Dec. 724, 533 N.E.2d 806."

Plaintiffs' claims must be read, giving Plaintiffs all reasonable inferences and in the light most favorable to plaintiffs' claim.

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PLAINTIFFS' ALLEGATIONS ARE SUFFICIENT IN ALL RESPECTS

In this analysis, we will concentrate on the "should have" aspect that the defendants should have known, they should have checked, they should have researched Coe's back ground, they should have detected and so on.

For example in paragraph 85 of the second amended complaint, Plaintiffs' allege: "85. At all times relevant herein, Coe was employed as the Director of Youth Ministries under the direct supervision, employ, agency, or control of Rev. James." This allegation does not appear to be a legal conclusion. Had Plaintiff wanted to allege a legal conclusion, they would have just stated that James was Coe's supervisor. Instead the factual elements are that Coe was under the supervision and control of James. Is it too simplistic to urge that this allegation creates a proper issue of fact for Defendants to deny. Either he was or wasn't subject to James control. Perhaps Defendants can claim in their answer that Coe was of equal authority with James. Or perhaps Coe worked under the direct supervision of the church board, of even his father, but this is for trial. The allegation should be sufficient.

Plaintiffs' allege in paragraphs 95-102 that Defendants did not perform background investigations prior to hiring not only Coe, but on any employees or volunteers working with minor youth, and no periodic investigations on anyone. What possible reason could we have for not taking these allegations as true or interpreting them in a light most favorable to Plaintiffs.

What are the inferences from these facts? Defendants were providing services to children and were taking no steps to screen their employees and volunteers. No one was minding the store.

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In paragraphs 117-129 of Plaintiffs' second amended complaint, Plaintiffs allege that Coe was maintaining relationships with the youth unrelated to the administration or programming of the Youth Group. He was communicating with them about their romantic and sexual relationships. We would suggest that the inferences from these allegations are that Coe was grooming them by going far beyond his administrative assignment. That is the light most favorable to Plaintiffs.

In paragraphs 130-146 Plaintiffs complain of Coe's use of porn sites posting obscene pornographic images of himself, children under 18 years of age, current and former members of the Church youth group and he used Church computer equipment to do it.

In 147-159 it is alleged that Coe was showing the children materials with adult themes, including fellatio, the children touching him and his touching of the children, his revealing and retelling of detailed sexual acts, such as fellatio and intercourse, performed by members of the Youth Group, performed on members of the Youth Group, and performed on and by Coe. These allegations are sufficiently informative that no light of liberal interpretation is needed to understand them. It should especially be noted that in paragraph 153, Plaintiffs explicitly set forth the nature of the conduct incorporated into their allegations of "inappropriate conduct".

At paragraphs 160-224, Plaintiffs assert allegations of Grooming, sexual abuse and rape of Jane Doe. It should be noted that these allegations are a continuing course of "inappropriate" and egregious conduct, culminating in rape. The claims of Plaintiffs are not just about rape but include a long litany of bad conduct leading up to the rape.

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We would read the complaint to indicate that this list of conduct in paragraphs 168-184 occurred during the summer of 2012. The title of Section E. Of the complaint is "Grooming, Sexual Abuse, and Rape of Jane Doe from 2011 through 2013", so the section is set in a particular time.

At paragraphs 160-224, Plaintiffs clearly allege that in the late summer of 2011 and in 2012, Jane Doe participated in a confirmation class and Coe engaged in communication with Jane to alienate her from her parents. During the alleged time period he sent explicitly sexual pictures of his genitalia with comments, cautioned Jane about secrecy of their relationship, encouraged her to visit him in his office and that during 2012 and 2013 he made inappropriate physical contact kissing her and touching her in a sexual manner. The allegations include that he stroked her legs, breasts, buttocks and crotch and routinely leered and smirked at her in a sexually suggestive manner. This included telling her that he wanted to have sex with her, ultimately leading to rape of Jane on June 14, 2013. Plaintiffs' complaint alleges that following the rape, Coe enlisted the help of two members of the youth group to help him move the couch that had been used and substitute a different couch. After Jane's friend "Sally" had informed her parents of what had been going on Coe instructed Jane to destroy photographs and text messages. Coe was charged by the police with several counts of criminal sexual matters in July of 2013 and with possession of child pornography between September 2011 and August 2013, discovered on a computer that had been used at or by the church.

The factual allegations of negligence in paragraphs 225 to 271 are set out succinctly and clearly. The allegations claim that James was the direct supervisor of all employees, that

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he is a mandatory reporter under the act, that he was aware or should have been aware of the policies of the church, that he either did or did not possess knowledge and training, that he was present at the church at least during working hours, and other clear straightforward allegations including allegations regarding the apparent failures of the church. The impact or upshot of all of these claims is that based on the conduct of Coe over a substantial period of time James and the church "should have" known what was happening with Coe. At this stage of the pleadings, it is entirely possible that the truth is that he did know and he did nothing. In section F., the Plaintiffs urge their allegations again, succinctly and clearly, claiming that the conduct was intentional by the church and Coe and include allegations of what amounts to a cover-up.

A PROPER CONSTRUCTION OF PLAINTIFFS' COMPLAINT SHOULD FIND IT SUFFICIENT IN ALL RESPECTS

The principles of pleading which we have cited above are virtually routine and standard. They have been applied in numerous cases. For example: "Appellant's pleading is to be given a liberal construction with all reasonable inferences made in her favor." (Ill.Rev.Stat.1975, ch. 110, par. 33(3); ***First National Bank v. City of Aurora*** (1978), 71 Ill.2d 1, 8, 373 N.E.2d 1326, 1330; ***Jiminez v. Jiminez***, 386 N.E.2d 647, 649, 68 Ill.App.3d 651, 654 (Ill. App., 1979)

As we know the pleading of a claim in Illinois is to be allegations of fact. Typically the pleader does not explain the legal claims in a pleading and is not required to. We submit that this concept is routine and well recognized in the cases such as ***Doctors Convalescent Center*** where the Court reasoned that "Ordinarily, where specific facts are set out in a pleading, the pleader need not state the legal conclusions to be drawn from such

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facts. In other words, it is sufficient if the pleader states the facts and leaves the court to find the law. (71 C.J.S. 38 Pleading § 15.) This doctrine is the backbone of our Civil Practice Act which calls for liberal construction of pleadings. 'Pleadings shall be liberally construed with a view to doing substantial justice between the parties.' (Ill.Rev.Stat., Ch. 110, Sec. 33(3).) 'No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he is called upon to meet.' (Ill.Rev.Stat., Ch. 110, Sec. 42(2).) Liberal construction of pleadings has been the policy of this court." In ***Doctors Convalescent Center, Inc. v. East Shore Newspapers, Inc.***, 244 N.E.2d 373, 380, 104 Ill.App.2d 271,283 (Ill. App., 1968)" This has been true for decades.

In another case, ***Griffis*** the Court indicated:

> ". . . a motion to dismiss for failure to state a cause of action should be affirmed on appeal only where no set of facts can be proven under the pleadings which will entitle the plaintiff to relief. Citing (Huebner v. Hunter Packing Co. (1978), 59 Ill.App.3d 563, 16 Ill.Dec. 766, 375 N.E.2d 873; Dinn Oil Co. v. Hanover Insurance Co. (1967),87 Ill.App.2d 206, 230 N.E.2d 702.) The Civil Practice Act provides that "(p)leadings shall be liberally construed with a view to doing substantial justice between the parties." (Ill.Rev.Stat.1975, ch. 110, par. 33(3).) Liberal construction of a pleading requires that " '(n)o pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim.' " citing Crosby v. Weil (1943), 382 Ill. 538, 48 N.E.2d 386. Accord, Bohacs v. Reid (1978),63 Ill.App.3d 477, 20 Ill.Dec. 304, 379

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N.E.2d 1372; Herman v. Prudence Mutual Casualty Co. (1968), 92 Ill.App.2d 222, 235 N.E.2d 346. ***Griffis v. Board of Ed., Dist. 122, Oak Lawn***, 391 N.E.2d 451, 454, 72 Ill.App.3d 784, 787, 29 Ill.Dec. 188, 191 (Ill. App., 1979)

In Illinois a pleader is not required to set forth his evidence. To the contrary, a pleading is only required to allege ultimate facts and not the evidentiary facts tending to prove such ultimate facts. ***Board of Education v. Kankakee Federation of Teachers*** (1970), 46 Ill.2d 439, 446, 264 N.E.2d 18, 22.)

In ***People ex rel. Fahner v. Carriage Way West*** (1982), 88 Ill.2d 300, 307-08, 58 Ill.Dec. 754, 757, 430 N.E.2d 1005, 1008 the Illinois Supreme Court stated:

> "The purpose of pleadings is to present, define, and narrow issues and to limit the proof needed at trial. Pleadings are not intended to erect barriers to a trial on the merits but instead to remove them and facilitate trial. The object of pleadings is to produce an issue asserted by one side and denied by the other so that a trial may determine the actual truth."

When considering a motion to dismiss all well pleaded facts and all reasonable inferences which can be fairly drawn from the facts alleged must be considered as true. ***Wilczynski v. Goodman*** (1979), 73 Ill.App.3d 51, 29 Ill.Dec. 216, 391 N.E.2d 479.) There the Court said, "It is error to dismiss a cause of action on the pleadings unless it clearly appears that plaintiff cannot recover under any set of facts which can be proved true under the pleadings." ***Wilczynski*** at Ill.App.3d 51, 29 Ill.Dec. 216, N.E.2d 479, citing Kaplan v. Keith (1978), 60 Ill.App.3d 804, 806-07, 18 Ill.Dec. 126, 377 N.E.2d 279.

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Admittedly, the line between ultimate facts and conclusions of law is not always easily drawn. (Van Dekerkhov v. City of Herrin (1972), 51 Ill.2d 374, 282 N.E.2d 723.) However, based upon the aforementioned established procedural rules and the following facts we must find that the plaintiffs alleged sufficient facts to withstand a section 2-615 motion to dismiss and reverse the trial judge and remand for a hearing on the merits of plaintiffs' charges." ***Zeitz v. Village of Glenview***, 592 N.E.2d 384, 387, 227 Ill.App.3d 891, 896 (Ill. App., 1992)

The allegations in Plaintiffs' claims must be analyzed, in the view of the pleading concepts we have reviewed, requires construing them in a manner most favorable to Plaintiffs.

It is our understanding, from Plaintiffs brief that an action for negligent retention of an employee requires the plaintiff to plead and prove that (1) the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) such particular unfitness was known or should have been known at the time of the employee's retention; and (3) this particular unfitness proximately caused the plaintiff's injury.

Reading Plaintiffs' allegations in the liberal manner which is required, we fail to see how it could be concluded that Plaintiff does not meet the "should have known" requirement of this tort of negligent retention. Reminding the court that the entire course of conduct occurred over a substantial period of time prior to the ultimate act of sexual intercourse or rape, one wonders how this could have been possible. Either James simply wasn't doing his job or he harbored a callous disregard of the many indicators of what was happening. It is

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unimaginable that this could happen in a religious setting without the Pastor knowing. We see no doubt that Plaintiffs satisfies the elements of negligent retention against James and the church. The Courts below have diced the technical niceties rather than applying pleading principles.

Further, as the Court below indicated, it is generally foreseeable that abuse will occur in programs providing adults with unsupervised access to children, for it is well known that pedophiles are drawn to such opportunities, in churches and elsewhere. The Court below cited: Federal Judicial Center, Handbook for Working with Defendants and Offenders with Mental Disorders, 80 (3rd ed., 2003) stating that "Pedophiles will seek employment and volunteer work that gives them access to children. Examples are teacher, clergyman, police officer, coach, scout leader, Big Brother, or foster parent. The pedophile will also find ways to get the child into a situation where other adults are absent."

As we know, a duty exists to children as a part of public policy in Illinois and the protection of children from sex offenders.

In cases of this nature, it is typically impossible for the plaintiffs to have knowledge of actual specific facts about what a supervisor had knowledge of regarding an offending employee or subordinate. The difficulty that this conduct is typically done in secret and the propensity of the institution to want to cover up the problem renders pleading difficult. Not unlike a will contest alleging undue influence, pleading knowledge of an institution or supervisor has to necessarily be to a great extent by pleading circumstance and in Doe, plaintiffs' complaint does just that.

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Taking the complaint as a whole, based on the circumstances alleged, applying proper pleading principles, shining the light most favorable to the child, how could a reasonably prudent person not conclude that they "should have known". The church as an institution and James as the Pastor "should have known. Based on the allegations the sensible conclusion is that they must have known. Otherwise, an institution or a supervisor, doing an inadequate job or intentionally closing his eyes could never be found liable. That cannot be the policy in Illinois. This is particularly true when children are involved. In negligent retention and negligent hiring, where knowledge is required, at the pleading stage, a plaintiff necessarily does not have evidence to plead. This is particularly true when a cover up begins. The "should have known" element must be applied based on a reasonable person approach.

Given that we are in the electronic age, Coe's propensities sould have been visible prior to hiring, and most certainly after hiring and retention. The enormity of the failures of James and the church is amplified

CONCLUSION

For the reasons stated herein, the Illinois Trial Lawyers Association respectfully prays that the Court consider the views of the Association in this matter and adopt the reasoning presented herein.

Respectfully submitted,

Stanley L. Tucker

Carissa A. Bryant

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341(c)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 12 pages.

Stanley J. Tucker

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341(c)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 17 pages.

Stanley L. Tucker

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NOTICE OF FILING

To: All Parties

You are hereby notified that the Illinois Trial Lawyers Association has **electronically** filed in the above entitled cause, its AMICUS BRIEF, attached to this notice.

Illinois Trial Lawyers Association

By _____
Stanley L. Tucker

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Certificate of Service

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure I hereby certify that the statements set forth in this Notice are true and correct and that on December 5, 2018 I caused true and correct copies of the foregoing Notice and Amicus Brief of the Illinois Trial Lawyers Association to be served by the following methods upon:

One Copy by Email:

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