

31 S.W.3d 911
Supreme Court of Kentucky.

Kevin OSBORNE, Appellant,
v.
Charles Anthony PAYNE and the Roman
Catholic Diocese of Owensboro, Ky., Appellees.
and

Charles Anthony Payne, Appellant,
v.
Kevin Osborne and the Roman Catholic
Diocese of Owensboro, Ky., Appellees.

Nos. 1999-SC-0616-DG, 1999-
SC-0621-DG. | Nov. 22, 2000.

Former husband brought action against priest and church alleging outrageous conduct and vicarious liability for allegedly negligent training, screening, and supervision of priest, seeking damages arising out of priest's affair with former wife, which former husband claimed precipitated divorce from former wife. The Daviess Circuit Court summarily dismissed complaint. Former husband appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Appeal was taken. The Supreme Court, Wintersheimer, J., held that: (1) genuine issue of material fact as to whether former husband had **special relationship** with priest as marriage counselor, and whether that **special relationship** was violated in outrageous fashion when priest had affair with former wife, precluded summary judgment for priest; (2) diocese could not be vicariously liable for allegedly outrageous action of priest in engaging in affair; and (3) failure to argue before Court of Appeals that summary judgment was improper as to diocese was tantamount to waiver of claim against diocese.

Court of Appeals affirmed.

Graves, J., concurred in result only.

Keller, J., concurred with statement.

West Headnotes (15)

[1] Damages

Elements in general

In order to establish a claim of outrageous conduct or intentional infliction of emotional distress, the plaintiff must prove the following elements: the wrongdoer's conduct must be intentional or reckless, the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality, there must be a causal connection between the wrongdoer's conduct and the emotional distress, and the distress suffered must be severe.

25 Cases that cite this headnote

[2] Damages

Nature of conduct

Damages

Humiliation, insults, and indignities

Tort of outrageous conduct or intentional infliction of emotional distress is not available for petty insults, unkind words, and minor indignities, nor is it to compensate for behavior that is cold, callus, and lacking in sensitivity, but rather it is intended to redress behavior that is truly outrageous, intolerable, and which results in bringing one to his knees.

25 Cases that cite this headnote

[3] Judgment

Tort cases in general

Genuine issue of material fact as to whether former husband had **special relationship** with priest, who was acting as marriage counselor, and whether that **special relationship** was violated in outrageous fashion when priest had affair with former wife, which former husband claimed precipitated divorce from former wife, so as to cause him severe emotional distress, precluded summary judgment for priest on claim of outrageous conduct. Rules Civ.Proc., Rule 56.03.

11 Cases that cite this headnote

[4] Damages

Nature of conduct

Damages

⇒ Presumptions and Burden of Proof

Establishment of the existence of a **special relationship** between the parties can make conduct outrageous, and in doing so, the **relationship** itself cannot be used to give rise to presumption of outrageousness, but rather the **relationship** between the parties is an aid in determining whether the conduct itself is outrageous.

3 Cases that cite this headnote

[5] **Damages**

⇒ Nature of conduct

Apparent increase in number of claims against clergy for sexual misconduct does not make the behavior any less outrageous or disgraceful or otherwise actionable.

3 Cases that cite this headnote

[6] **Action**

⇒ Nature of remedy by action

Plaintiff will not be able to mask an abolished action behind a common law label, but if the essence of the complaint is directed to a cause of action other than one which has been abolished, that claim is legally cognizable.

Cases that cite this headnote

[7] **Damages**

⇒ Intentional or Reckless Infliction of Emotional Distress; Outrage

Religious Societies

⇒ Contracts and indebtedness

Damages

⇒ Clergy and religious societies

Claims for breach of contract and intentional infliction of emotional distress must be approached on a case-by-case basis, and there is no blanket or automatic imposition of a cause of action in the clergy/counselor **relationship**.

2 Cases that cite this headnote

[8] **Damages**

⇒ Clergy and religious societies

Diocese could not be vicariously liable for allegedly outrageous action of priest in engaging in affair with former wife, who came with former husband to priest for marriage counseling, which former husband alleged precipitated divorce, even though marriage counseling was activity sanctioned by diocese and ordinarily performed by priest, where scope of priest's employment did not include adultery, and such abuse by priest of position exceeded scope of employment, priest was not advancing any cause of diocese or engaging in behavior appropriate to normal scope of employment, and no evidence indicated that priest had history of sexual misconduct involving parishioners or that diocese had any knowledge that priest might conceivably engage in such misconduct.

12 Cases that cite this headnote

[9] **Labor and Employment**

⇒ Scope of Employment

Principal and Agent

⇒ Rights and liabilities of principal

Critical analysis of whether a principal or employer is vicariously liable for the actions of an agent or employee is whether the agent of employee was acting within the scope of his employment at the time of his tortious act.

6 Cases that cite this headnote

[10] **Labor and Employment**

⇒ Implied authority

For an action to be within the scope of employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized.

4 Cases that cite this headnote

[11] **Labor and Employment**

⇒ Scope of Employment

Principal and Agent

⇒ Rights and liabilities of principal

Principal is not liable under the doctrine of respondeat superior unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment.

15 Cases that cite this headnote

[12] **Religious Societies**

⇒ Torts

Independent negligence of a diocese, apart from vicarious liability for the actions of a priest, can be a valid claim under the proper circumstances.

1 Cases that cite this headnote

[13] **Appeal and Error**

⇒ Insufficient discussion of objections

Failure to argue before Court of Appeals that summary judgment was improper as to diocese was tantamount to waiver of claim against diocese, and thus former husband failed to preserve claim against diocese for vicarious liability for outrageous conduct of priest, on appeal of summary judgment for priest and diocese, where civil appeal prehearing statement contained no issue regarding diocese, and argument sections of brief in Court of Appeals referred only to ruling of circuit court regarding conduct of priest. Rules Civ.Proc., Rule 76.03(8).

8 Cases that cite this headnote

[14] **Appeal and Error**

⇒ Affirmance

Any part of a judgment appealed from that is not briefed is affirmed as being confessed.

7 Cases that cite this headnote

[15] **Damages**

⇒ Nature of conduct

Members of the clergy can be liable for damages resulting from their intentional tortious conduct, under what is commonly called the tort of outrage, when it constitutes the intentional infliction of emotional distress, and it is a

combination of **relationship** and conduct that distinguishes this kind of behavior from adultery which has been effectively abolished as a tort claim in Kentucky.

9 Cases that cite this headnote

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Opinion

WINTERSHEIMER, Justice.

This appeal is from an opinion of the Court of Appeals which affirmed in part, reversed in part and remanded a judgment of the circuit court which had summarily dismissed the complaint of the husband against a former priest and the Roman Catholic Diocese of Owensboro.

The questions presented are whether the Court of Appeals was in error when it determined that Osborne was not acting within the scope of his employment as a priest when he engaged in an adulterous sexual **relationship** with the wife; whether the catholic diocese should be held vicariously liable for his actions and whether the husband abandoned his claim that the diocese was negligent. The broader issue is whether the action for intentional infliction of emotional distress or outrage may be brought against a clergyman when the clergyman was sought out for marital counseling but the result was an interference with the marriage because of an illicit sexual **relationship**.

Payne and his wife were experiencing marital difficulties and went to Osborne, their parish priest, for counseling. Ultimately, Payne and his wife were divorced following his discovery of a 45-day adulterous **relationship** between his wife and Osborne. Apparently, the **relationship** did not continue and Osborne left the priesthood. Payne sued the former priest for the tort of outrageous conduct and the

Diocese of Owensboro under a vicarious liability theory for its alleged negligent training, screening and supervision of Osborne.

The circuit court gave summary judgment to both defendants on the grounds that adultery can never reach the stage of outrageous conduct and that the claim of outrage was actually a claim for interference with marital relations or alienation of spousal affection which had previously been abolished by this Court in *Hoye v. Hoye*, Ky., 824 S.W.2d 422 (1992). The Court of Appeals affirmed the dismissal of the diocese but reversed the summary judgment in favor of Osborne because there was a **special relationship** which distinguished the conduct of the former priest from that of a traditional adulterer, and that a jury question was presented as to whether his behavior was outrageous conduct. This Court accepted discretionary review.

I. Osborne

During the summary judgment proceedings, the depositions of both Charles Payne and Kevin Osborne were taken. Payne testified that as a result of discovering the adulterous affair, he suffered a nervous breakdown, lost his religion, lost his house and lost his job as well as his wife. Osborne testified that after the sexual affair, he had resigned from the ministry and was no longer employed as a priest and had moved to Tennessee.

[1] [2] *Craft v. Rice*, Ky., 671 S.W.2d 247 (1984), is the seminal case involving the tort of intentional infliction of emotional distress or outrageous conduct in Kentucky. In order to establish such a claim, the plaintiff must prove the following elements: The wrongdoer's conduct must be intentional or reckless; the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; there must be a causal connection between the *914 wrongdoer's conduct and the emotional distress and the distress suffered must be severe. As noted in *Kroger Company v. Willgruber*, Ky., 920 S.W.2d 61 (1996), the tort is not available for "petty insults, unkind words and minor indignities." Nor is it to compensate for behavior that is "cold, callous and lacking sensitivity." *Humana of Ky., Inc. v. Seitz*, Ky., 796 S.W.2d 1 (1990). Rather, it is intended to redress behavior that is truly outrageous, intolerable and which results in bringing one to his knees. *Willgruber, supra*.

The circuit court summarily dismissed the claim against the former priest for failure to allege misconduct that was sufficient to satisfy the outrageous element of the tort, relying on *Whittington v. Whittington*, Ky.App., 766 S.W.2d 73 (1989). In that case, the claim of the wife was dismissed under CR 12.02 for failure to state a claim upon which relief can be granted; the circuit court concluded that ordinary fraud and adultery can never reach the status of outrageous conduct.

Here, the most important element of the complaint by Payne, as demonstrated by his deposition testimony, is that he was injured as a result of the misconduct of Osborne while in a **special relationship** as priest and counselor. Moreover, the alleged exploitation of that **relationship** occurred in a situation when the former priest was aware that the marriage partners were most vulnerable.

[3] [4] This Court in *Seitz, supra*, indicated that the **special relationship** of patient to nurse had not been violated, but left for "another day" a decision as to whether such **special relationships** are part of the tort of outrageous conduct. In this case, as distinguished from *Seitz*, Payne has presented sufficient evidence from which a jury could conclude that he had a **special relationship** with his priest or marriage counselor and that this **special relationship** was violated in an outrageous fashion so as to cause him severe emotional distress. It is the concept of **special relationship** that distinguishes this factual situation from *Whittington*. The establishment of the existence of a **special relationship** between the parties can make conduct outrageous. The use of a confidential **relationship** between Payne and his priest counselor is the heart of his lawsuit. The **relationship** itself cannot be used to give rise to a presumption of outrageousness, rather the **relationship** between the parties, is an aid in determining whether the conduct itself is outrageous.

For the purpose of summary judgment, it is evident that the former priest used his **relationship** with the husband and the wife to obtain a sexual affair with the wife. Conduct and **relationship** can form the basis for outrageous conduct. It must be remembered that pursuant to CR 56.03 the grounds for summary judgment are: 1) there is no genuine issue as to any material fact, and 2) the moving party is entitled to judgment as a matter of law. This Court has repeatedly announced that summary judgments are to be cautiously applied and not to be used as a substitute for trial. A movant must convince the court, based upon evidence in the record, of the nonexistence of a material fact issue, and a motion will

not be granted unless the right to summary judgment is shown with such clarity that there is no room left for controversy. Osborne has not satisfied that requirement and cannot seek refuge in summary dismissal. Reliance on *Whittington* does not solve the issue as to whether the conduct of Osborne was sufficiently outrageous to allow the matter to proceed to a jury verdict.

[5] [6] The mere fact that in recent years there has been apparently an increasing number of claims against clergy for sexual misconduct does not make the behavior any less outrageous or disgraceful or otherwise actionable. Some jurisdictions have denied relief under a theory of intentional infliction of emotional distress after concluding that the claims were merely an attempt to bring amatory actions which were no longer viable. See *915 *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988). However, we are persuaded by the reasoning used in the cases noted by the Court of Appeals including *Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo.1988), in which it was stated that: a plaintiff will not be able to mask one of the abolished actions ... behind a common law label. However, if the essence of the complaint is directed to a cause of action other than one which has been abolished, that claim is legally cognizable. See also *Figueiredo-Torres v. Nickel*, 321 Md. 642, 584 A.2d 69 (1991).

[7] We note that this Court abolished the action for breach of promise to marry in *Gilbert v. Barkes*, Ky., 987 S.W.2d 772 (1999), but stated that it in no way prohibited other remedies, such as claims for breach of contract and intentional infliction of emotional distress, should a party be able to make such a case. It should be emphasized that these claims must be approached on a case-by-case basis, and there is no blanket or automatic imposition of a cause of action in the clergy/counselor relationship.

II. The Diocese

[8] Payne next argues that Osborne, as a priest, was engaging in an activity sanctioned by the church and ordinarily performed by a priest, that is, marriage counseling. He argues that it was because Osborne was a priest that he was called upon by them; that his help was sought and that he was invited into the home. Payne reasons that the diocese should be vicariously liable for the actions of Osborne. We cannot agree. To accept such a theory would in effect require the diocese to become an absolute insurer for the behavior

of anyone who was in the priesthood and would result in strict liability on the part of the diocese for any actionable wrong involving a parishioner. We must conclude that such an argument is absurd. Certainly, the scope of employment of a priest could include marriage counseling, but it clearly does not include adultery.

[9] [10] [11] The critical analysis is whether the employee or agent was acting within the scope of his employment at the time of his tortious act. *Wood v. Southeastern Greyhound Lines*, 302 Ky. 110, 194 S.W.2d 81 (1946), provides that for it to be within the scope of its employment, the conduct must be of the same general nature as that authorized or incidental to the conduct authorized. A principal is not liable under the doctrine of respondeat superior unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment. *Hennis v. B.F. Goodrich Co., Inc.*, Ky., 349 S.W.2d 680 (1961). In this situation, it is the abuse by the priest of his position that exceeds the scope of his employment. It is beyond question that Osborne was not advancing any cause of the diocese or engaging in behavior appropriate to the normal scope of his employment. There are a variety of cases from other jurisdictions that comport with our conclusion in this matter. See *Amato v. Greenquist*, 287 Ill.App.3d 921, 223 Ill.Dec. 261, 679 N.E.2d 446, 455 (1997); *L.L.N. v. Clauder*, 203 Wis.2d 570, 552 N.W.2d 879 (Ct.App.1995) (reversed on other grounds in *L.L.N. v. Clauder*, 209 Wis.2d 674, 563 N.W.2d 434 (1995)) *H.R.B. v. J.L.G.*, 913 S.W.2d 92 (Mo.Ct.App.1995); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo.1997).

[12] Here, Payne has failed to present any evidence in the record that Osborne had a history of sexual misconduct involving parishioners or that the diocese had any knowledge that Osborne might conceivably engage in such misconduct. Consequently, we must conclude that the summary judgment granted by the circuit court and affirmed by the Court of Appeals as to the diocese was correct. There was no basis to support a claim of independent negligence by the diocese so as to support a rejection of the motion for a summary judgment. We recognize that independent negligence can be a valid *916 claim under the proper circumstances as found in *Roman Catholic Diocese of Covington v. Sectar*, Ky.App., 966 S.W.2d 286 (1998).

[13] [14] We must also note that Payne has failed to preserve properly his claim against the diocese. Civil Rule

76.03(8), provides that a party shall be limited on appeal to the issues in the prehearing statement before the Court of Appeals. Here, the civil appeal prehearing statement contained no issue regarding the diocese. The argument sections of the brief of Payne in the Court of Appeals referred only to the ruling of the circuit court regarding the conduct of Osborne. The failure to argue before the Court of Appeals that summary judgment was improper as to the diocese is tantamount to a waiver. *Cf. Hall v. Kolb*, Ky., 374 S.W.2d 854 (1964). Any part of a judgment appealed from that is not briefed is affirmed as being confessed. *Cf. Stansbury v. Smith*, Ky., 424 S.W.2d 571 (1968).

[15] We conclude that members of the clergy can be liable for damages resulting for their intentional tortious conduct, commonly called the tort of outrage, when it constitutes the intentional infliction of emotional distress. It is a combination of **relationship** and conduct that distinguishes this kind of behavior from adultery which has been effectively abolished

as a tort claim in Kentucky. Thus, Payne is allowed to proceed with his claim in circuit court against Osborne. However, there is nothing to support a claim of vicarious liability for the conduct of the former priest against the diocese, and it cannot be held vicariously liable in this matter.

The judgment of the Court of Appeals is affirmed and this matter is remanded for proceedings consistent with this opinion.

LAMBERT, C.J., COOPER, JOHNSTONE, STUMBO and WINTERSHEIMER, JJ., concur.

GRAVES, J., concurs in result only.

KELLER, J., concurs but believes the issue as to the diocese was preserved.