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

ADDITIONAL BRIEF OF PLAINTIFFS-APPELLEES CROSS-RELIEF REQUESTED

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

This case involves the rape of a child by a 31-year-old Director of Youth Ministries, Chad Coe ("Coe"), on a couch in the church's youth ministry room during Vacation Bible School ("VBS"). At the heart of this case is the manner in which Coe was permitted to groom and engage in sexual behavior with youths in the care of the church, including Jane Doe, who was 13-years-old when Coe's grooming started and had just turned 15-years-old when Coe raped her. In addition to causes of action against Coe, Plaintiffs brought actions for negligent supervision, retention, and hiring against United Church of Christ ("UCC"), Illinois Conference of the UCC ("ICUCC"), Fox Valley Association ICUCC ("FVA"), General Synod of the UCC ("General Synod"), and UCC Board ("UCC Board") (collectively, the "UCC and ICUCC"). The Circuit Court dismissed the UCC and ICUCC with prejudice on September 22, 2016. The Second District reversed that dismissal on August 17, 2017. *See Doe v. Coe et al.*, 2017 IL (2d) 160875. Plaintiffs also brought actions for negligent supervision and retention, willful and wanton failure to protect, and willful and wanton retention and failure to supervise, against First Congregational Church of Dundee ("FCC") and FCC Senior Pastor Aaron James ("James"), and negligent hiring against FCC. The Circuit Court also granted James and FCC's joint §2-615 Motion to Dismiss, finding that the facts alleged in the Plaintiffs' Second Amended Complaint are insufficient to survive a §2-615 dismissal. On appeal, the Second District (1) reversed the dismissal of (a) the negligent supervision counts against James and FCC and (b) the willful and wanton counts to the extent that they overlap with the negligent supervision counts, (2) reversed the dismissal of the negligent hiring count against FCC, (3) affirmed the dismissal of (a) the negligent retention counts against James and FCC and (b) the willful and wanton counts insofar as they overlap with the negligent retention counts, and, (4)

affirmed the Circuit Court's decision to strike portions of the Plaintiffs' First Amended Complaint. The questions raised are on the pleadings.

ISSUES FOR REVIEW

1. Whether the Second District Appellate Court correctly found that the Second Amended Complaint states a cause of action for (a) negligent supervision against James and FCC and (b) willful and wanton failure to protect, and willful and wanton failure to supervise to the extent those counts overlap with the negligent supervision count.
2. Whether the Second District Appellate Court correctly found that the Second Amended Complaint states a cause of action for negligent hiring against FCC.

CROSS RELIEF ISSUES FOR REVIEW

3. Whether the Second District Appellate Court erred in finding that the Second Amended Complaint does not state a cause of action for (a) negligent retention against James and FCC and (b) willful and wanton failure to protect, and willful and wanton retention to the extent those counts overlap with the negligent retention count.
4. Whether the Second District Appellate Court erred in striking portions of the Plaintiffs' First Amended Complaint.

JURISDICTIONAL STATEMENT

On May 21, 2015, Plaintiffs filed a Complaint in the Circuit Court of Kane County. (C198-259). After the grant of James and FCC's first §2-615 Motion to Dismiss, Plaintiffs filed their Amended Complaint on February 10, 2016. (C756-839). James and FCC filed a joint §2-615 Motion to Dismiss the First Amended Complaint and a Motion to Strike on March 8, 2016 (C840-59), which were granted on May 16, 2016 (C1393). The Circuit Court's May 16, 2016 Order (i) dismissed James with prejudice and FCC without

prejudice, (ii) granted the Motion to Strike, and (iii) found certain allegations immaterial to the Plaintiffs' causes of action. (C1393). On June 15, 2016, Plaintiffs filed timely Motions for Reconsideration of the Circuit Court's May 16, 2016 Order dismissing the First Amended Complaint. (C1427-71). On September 22, 2016, the Circuit Court reconsidered only its dismissal with prejudice of James and allowed Plaintiffs to file a Second Amended Complaint against James and FCC (C1611-13); but the Circuit Court refused to reconsider its other rulings, such as its finding of post-rape allegations as being immaterial, and further refused Plaintiffs' request for 304(a) language. *Id*. On December 12, 2016, Plaintiffs filed their Second Amended Complaint, preserving their rights to challenge the dismissal of the willful and wanton counts and the striking of material allegations (C1626-95). On January 27, 2017, James and FCC filed a joint §2-615 Motion to Dismiss Plaintiffs' Second Amended Complaint (C1703-13), which was granted on May 11, 2017 (C1900). The Circuit Court's May 11, 2017 Order entered findings pursuant to Rule 304(a) that there is no just reason for delaying an appeal regarding the dismissal of all counts against James and FCC. *Id*. Plaintiffs timely filed their Notice of Appeal on June 9, 2017 pursuant to Rule 304(a) (C1900-02). The Second District heard oral argument on March 6, 2018, and rendered its decision on March 30, 2018 (the "Opinion"). On May 2, 2018, James and FCC timely filed their Illinois Supreme Court Rule 315 Petition for Leave to Appeal from the Opinion, which was granted on September 26, 2018. In addition to responding to the arguments set forth in James and FCC's Additional Brief, the instant brief seeks cross-relief pursuant to Rule 318(a).

STATEMENT OF FACTS

The Rape of Jane Doe. In late 2011 and early 2012, Jane Doe, age 13, was a middle-school student participating in the FCC Youth Group and was a member of the

confirmation class. (C1643-44). Coe, in a calculated fashion, used his position of trust and authority to groom, isolate, and to lay the groundwork for Jane Doe to accept increasingly intimate and, eventually, sexual contact with Coe. *Id.* On June 14, 2013, during Normal Working Hours of VBS, Coe raped Jane Doe on a couch in the basement middle-school classroom of the FCC church. (C1648). Jane Doe had just turned 15-years-old, and Coe was 31-years-old. (C1648).

ANCRA, SCP & Training. At all relevant times, the Abused and Neglected Child Reporting Act, 325 ILCS 5/1 ("ANCRA") was in effect, under which James is a mandatory reporter. (C1629; C1650). The Circuit Court dismissed the Complaint, deeming the term "inappropriate" as vague. Plaintiffs therefore used the defined capitalized term, "Inappropriate," in the Amended Complaint (C768) and Second Amended Complaint (C1634-35), incorporating both Illinois law and the UCC policies and materials. "Inappropriate" includes "Inappropriate Content," "Inappropriate Displays of Affection," "Sexual Harassment," "Sexual Exploitation," "Grooming," "Sex Offenses," "Harmful to Minors," "Obscene," "Adult Obscenity" or "Child Pornography Internet Site." (C1629-35). Section D, "Inappropriate Conduct and Sexual Abuse at FCC Dundee," sets forth ultimate facts of Coe's grooming, violation of Illinois law, safe church policies and Internet Safety Guidelines, as well as Coe's brazen Inappropriate conduct. (C1637-43).

The UCC and ICUCC established policies to prevent abuse of minors within their organization. (C1630). On August 21, 2006, the UCC Insurance Board provided expectations and recommendations regarding the adoption of safe church policies at UCC Local Churches, including FCC, which contained information regarding complimentary online abuse prevention training, background checks upon hiring and on a periodic basis

thereafter for employees supervising youth, and internet safety guidelines. (C1631). Following the August 21, 2006 communication, UCC's counsel sent correspondence to the Local Churches, including FCC, regarding compliance with the Insurance Board's recommendations for a comprehensive safe church policy. (C1632). Included in the UCC counsel's letter was a comprehensive sample safe church policy prepared by UCC's counsel pursuant to the Insurance Board's recommendation that required at least two adults be present to supervise youth ("SCP"). (C1632-33). On November 18, 2006, the ICUCC approved and adopted an SCP, which was based, in whole or in part, on the comprehensive policy provided by UCC's counsel. *Id*. The ICUCC requires the SCP to be read and followed by all employees and volunteers. (C1633; C767). The UCC and ICUCC are composed of James and FCC. (C1628, C760-62). The SCP requires that (i) at least two adults be present to supervise any youth or child activities, (ii) incidents of child abuse observed by employees or volunteers be reported to the Illinois Department of Children and Family Services ("DCFS") and, (iii) all employees and volunteers undergo background investigations prior to working with youths, and periodically thereafter. (C1633, C767).

James was ordained and trained by the UCC in 2007 under the Iowa Conference's two-adult safe church policy, which was verbatim to the SCP, to recognize minor-to-adult interactions that created dangerous situations for youth members. (C1635; C1651). Plaintiffs allege Coe's father held a senior position with the FVA and Coe was hired shortly before James (28 years old) was voted by the FVA as Senior Pastor in 2009. (C1636). Coe was employed as the Director of Youth Ministries under the direct supervision, employ, agency, or control of James and FCC. *Id*. Plaintiffs' Second Amended Complaint alleges,

upon information and belief, that FCC did not perform background investigations into Coe and that James and FCC did not perform periodic investigations on Coe. (C1636-37).

Coe's Grooming: Violations of Safe Church Policies. FCC provides youth programming in the form of VBS, confirmation classes, and middle and high-school ministry groups, which occurred at the FCC church and at off-site locations. (C1637). While working as the Director of Youth Ministries, Coe habitually used various applications, such as Facetime, Skype, and Snapchat, to develop relationships, send pictures and videos, and discuss romantic or sexual relationships with underage members. (C1638-39). Coe also maintained online profiles under his own name and the username "bluesgod88" on which he "friended" employees, volunteers and members of FCC, including Youth Group members. (C1639-40). A basic, cursory Google search into the online presence of Coe would have revealed Coe's activity on numerous pornographic adult obscenity and child pornography sites, such as, "newbienudes," "motherless," "wouldyouhitthis," "ratemymelons," "ratemybody," and "datehookup," among many others. *Id*. Coe also possessed pornographic images of children whom he knew or reasonably should have known were under 18, including Inappropriate or pornographic images of Jane Doe and members of the Youth Group. *Id.*

As early as the 2011 Confirmation event, Coe allowed underage girls to sit on his lap and engaged in Inappropriate bodily contact (C1643); and adults later complained about that conduct (C1662) (the "2011 Confirmation Incident"). While working as the Director of Youth Ministries, Coe habitually engaged in acts of sexual innuendo and other forms of Inappropriate physical and sexually charged conduct with Jane Doe, which were explicitly prohibited by the SCP. (C1642-43). While inside the Church, Coe also commonly showed

the Youth Group members movies, videos, or internet sites containing Inappropriate sexual content, including viewed with the lights turned off, while Coe was the only adult present. *Id*. On one such occasion, Coe showed the minors a video that detailed a "rainbow party," wherein a group of high school girls performed successive fellatio on a male while wearing a variety of lipstick colors so as to create a rainbow on the man's penis. *Id*. Coe was habitually alone with Jane Doe in the audio-visual booth, the sanctuary of the church, Coe's office, and classrooms designated for youth activities. (C1643).

During the summer of 2012, Coe's grooming escalated as to Jane Doe, who had just turned 14 years old. (C1644). Coe used his office and other areas in the church and FCC equipment to send Inappropriate and sexually explicit pictures or videos to Jane Doe. (C1645). On one occasion during Normal Working Hours, Coe sent Jane Doe a picture of his erect penis with the caption "How's that??," with the door to his office fully open to the adjacent offices. *Id*. On other occasions, Coe sent Jane Doe pictures of his erect penis with captions such as "That ok for ya?," "Night;)," "Whatcha got?;)," "Thinkin of you ;)," and "Try this angle with fingers in your pussy." *Id*. Jane Doe was routinely left alone with Coe at FCC for lengths of time of over an hour, particularly during Normal Working Hours. (C1646). When Jane Doe visited Coe in his office during Normal Working Hours and with his office door open, and during Youth Group or FCC events in late 2012 and 2013, Coe routinely stroked her legs, breasts, buttocks, crotch, and kissed Jane Doe. *Id*. Coe isolated Jane Doe in areas of the church building, such as the downstairs classrooms, the sacristy, and the audio-visual booth, where Coe kissed Jane Doe and touched her in a sexual manner. (C1646-47). Coe routinely made suggestive comments about Jane Doe's body, particularly her buttocks, and developed a pet name for her genitalia, which he openly used in front of

other youths. *Id.* During an overnight retreat in late 2012, Coe had his sleeping area in the same area as underage female Youth Group members, allowing the females, including Jane Doe, in or on his sleeping bag. *Id.* During that retreat, Coe isolated Jane Doe and told her he wanted to "have sex," i.e. rape her. *Id.* During an FCC benefit dinner, Coe told Jane Doe that she was the "hottest" Youth Group girl there and that he would not care if he was arrested after losing control and kissing her in front of the crowd. (C1648). During at least one movie viewing, Coe sat in the back of the church room with the lights turned off with Youth Group participants sitting directly in front of Coe, while Coe fondled Jane Doe. *Id.*

James and FCC employees, members, or volunteers were present during Normal Working Hours at FCC and for its Youth Group functions to witness Coe's Inappropriate interactions with youth, including Jane Doe. (C1651; C1655). Multiple adult employees, volunteers, or members witnessed Coe's behavior toward females in the Youth Group that those adults found unsettling and Inappropriate; and multiple adults received information from the minors of FCC regarding Coe's Inappropriate behavior toward females in the Youth Group that made the minors feel uncomfortable, weird, isolated or frustrated. (C1658). Multiple adult FCC employees, volunteers, or members witnessed Coe alone, in the church sanctuary and in his office, with female members of the Youth Group, including Jane Doe; and multiple adults reported or discussed among themselves the Inappropriate attentiveness, behavior, or physical contact by Coe with Youth Group members, including Jane Doe. *Id*. For example, in March 2013, one employee observed Coe alone in the audio-visual booth with Jane Doe with the lights out. (C1659). At least one of FCC's employees, volunteers, or members confronted Coe regarding his Inappropriate behavior. *Id.* None of

the FCC employees, volunteers or members who witnessed Coe's Inappropriate behavior complied with Illinois law or the SCP by making a report to DCFS. *Id*.

Specifically as to James, Coe's Inappropriate attentiveness, behavior, or physical contact with Jane Doe also was reported to and observed by James during late 2012 and 2013. *Id*. On at least 3 separate occasions, James walked into Coe's office when Coe was alone with Jane Doe, with Jane Doe either lying on a couch or sitting on Coe's desk. (C1659-60). James continually allowed Coe to be alone in the church with Jane Doe. (C1660). At no point after observing Coe's behavior first-hand did James remove Coe as Director of Youth Ministries or otherwise restrict his access to minors, or report the behavior to DCFS or other authorities for investigation. *Id*. James did not notify Jane Doe's parents of Coe's Inappropriate behavior or attention paid to Jane Doe. *Id*.

The mandated reporter volunteering at FCC's June 2013 VBS recognized the interaction between Coe and Jane Doe as Inappropriate or dangerous after just two days of seeing Coe with Jane Doe. *Id*. Thus, prior to the rape, an FCC mandated reporter volunteer saw Inappropriate conduct between Coe and Jane Doe and decided to tell James but not the DCFS. (C1660-61). At no point after the volunteer reported the Inappropriate conduct to James did James fulfill his own mandatory reporting obligation by reporting Coe to DCFS, removing Coe as Director of Youth Ministries or otherwise restricting Coe's access to minors. (C1661; C797). In fact, even after receiving the report from its volunteer, James permitted Coe to continue in his position without any restrictions and permitted Coe to take 34 youths to Costa Rica. *Id*.

Post-Rape Material Facts[1]. After the rape, Jane Doe's friend, Sally shared Coe's inappropriate text messages with Sally's parents. (C1649). Sally's father engaged Coe in a confrontation at the church and suddenly pulled both Sally and her brother out of the Costa Rica trip. (C1649, C1661) James conducted no inquiry or investigation and permitted Coe to retain his position and travel to Costa Rica with 34 youths. (C1661, C797). After being contacted by Sally's parents, Jane A. Doe and John Doe attempted to contact James and FCC, who ignored them and did not investigate the conduct of Coe, or report the conduct of Coe to DCFS or suspend, terminate, or otherwise limit Coe's access to youth at FCC. (C1661-62, C797). On July 3, 2013, the day of Coe's arrest, James conducted an open meeting with the employees, volunteers, members and non-member parents of Youth Group participants at FCC. (C1662). FCC sent a group email to FCC members regarding Coe's arrest and the meeting, which was intentionally not sent to Jane A. Doe and John Doe who regularly received such emails. (C797). During that meeting, James stated that a safety plan was in place that had been in development for many years and could be viewed on the FCC website; but no such safety plan could be viewed on the FCC website. (C1662). On August 19, 2013, the DCFS informed James it had found credible evidence of child abuse or neglect. (C1663). On or about August 25, 2013, James conducted a subsequent meeting for the parents of Youth Group participants. *Id*. During that meeting, James did not inform the members of FCC of the "indicated" report or that Coe was prohibited from having unsupervised contact with minors. *Id*. Instead, James encouraged FCC members to support Coe and posted a sign-up sheet at FCC for attendance at Coe's upcoming criminal

[1] See Section V regarding the materiality of these post-rape facts.

hearings. *Id*. James represented that a "new" safety plan was in place that would require at least two adult supervisors in the presence of any child or youth. *Id*. Coe continued to be employed as the Director of Youth Ministries until November 12, 2013. (C1664).

Procedural History. On May 21, 2015, Plaintiffs filed their Complaint against Coe, James, FCC, and the UCC and ICUCC alleging negligent supervision, retention, and hiring, as well as willful and wanton failure to protect and willful and wanton retention and failure to supervise. (C198-259). On January 6, 2016, the Plaintiffs' Complaint was dismissed per James and FCC's §2-615 Motion to Dismiss. (C741). On February 10, 2016, Plaintiffs filed their Amended Complaint alleging the same causes of action against all of the Defendants, except for negligent hiring against James. (C756-839). On May 16, 2016, the Circuit Court granted James and FCC's §2-615 Motion to Dismiss the Amended Complaint and entered an order dismissing the negligence causes of action against FCC without prejudice, the negligence causes of action against James with prejudice, and the willful and wanton causes of action against both FCC and James with prejudice. (R174-202). Regarding the Motion to Strike, the Circuit Court stated that the "Costa Rica trip, sometime after this incident, is not part of the cause of action... And then the other paragraphs will be stricken as well." (R189). Despite Plaintiffs counsel's request for identification of stricken paragraphs, the Circuit Court did not identify the specifically stricken paragraphs. (R64; R189; C1393). At that same hearing, the Circuit Court refused to grant Plaintiffs' Motion for Prevention of Abuse in Discovery (C1044-61; C1379-90; R189-90), which was filed "to stop the ongoing wrongful interference with the discovery process, suppression of evidence, and prevent further abuses of discovery in this case" (C1049), and which the Circuit Court found "moot" or "premature." (R189-190).

On June 15, 2016, Plaintiffs timely filed motions for reconsideration of all of the dismissals and to vacate the dismissal orders in relation to the First Amended Complaint, including James and FCC's §2-615 Motion to Dismiss and Motion to Strike. (C1427-71). In its September 22, 2016 Order, the Circuit Court reconsidered its dismissal of James, accepting that an individual could be held liable, and allowed the Plaintiffs to replead their negligence counts against James. (C1611-13). But the Circuit Court refused to reconsider its dismissal with prejudice of the willful and wanton counts against James and FCC and denied Plaintiffs' request for Rule 304 (a) language on the Motion to Strike. (C1612-13).

On December 12, 2016, Plaintiffs filed the instant Second Amended Complaint alleging negligent supervision and retention against James and FCC, and negligent hiring against FCC, preserving the willful and wanton counts. (C1626-95). Because the Circuit Court did not identify which specific allegations it was striking from the Amended Complaint (C1611-13), Plaintiffs realleged the willful and wanton counts and reserved numerous allegations in the Second Amended Complaint (C1626-95), which was dismissed by the Circuit Court on May 11, 2017 pursuant to James and FCC's Motion to Dismiss Plaintiffs' Second Amended Complaint pursuant to §2-615 (C1703-13; R264-311; C1900). The Circuit Court expressly found that there was no just reason for delaying the appeal regarding the dismissal of James and FCC pursuant to Supreme Court Rule 304(a). (C1900). Plaintiffs timely filed their Notice of Appeal on June 9, 2017. (C1901-02).

The Second District heard argument on March 6, 2018 and rendered its Opinion on March 30, 2018. On April 2, 2018, more than four years after his indictment, Defendant Coe pled guilty and was sentenced to seven (7) years. The Opinion was published online on April 6, 2018. The Opinion (1) reversed the dismissal of (a) the negligent supervision

counts against James and FCC and (b) the willful and wanton counts to the extent that they overlap with the negligent supervision counts, (2) reversed the dismissal of the negligent hiring count against FCC, (3) affirmed the dismissal of (a) the negligent retention counts against James and FCC and (b) the willful and wanton counts insofar as they overlap with the negligent retention counts, and, (4) affirmed the Circuit Court's decision to strike portions of the Plaintiffs' First Amended Complaint.

STANDARDS OF REVIEW

Motions Pursuant to 735 ILCS 5/2-615. A motion to dismiss under §2-615 challenges the legal sufficiency of a complaint based on defects apparent on its face. *Jane Doe-3 v. McLean County Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 15 (Ill. Sup. Ct. 2012). When the legal sufficiency of a complaint is challenged by a §2-615 motion to strike or dismiss, all well-pleaded facts in the attacked portions of the complaint are to be taken as true. *Board of Library Trustees of Village of Westmont v. Cinco Construction, Inc*., 276 Ill. App. 3d 417, 424 (1st Dist. 1995). Review of a motion under §2-615 is *de novo*. *Id. See also Doe v. Dimovski*, 336 Ill. App. 3d 292, 295 (2nd Dist. 2003).

Existence of Duty. Whether a duty exists is a question of law, and the standard of review is *de novo*. *McLean County*, 2012 IL 112479 at ¶ 20.

ARGUMENT

As an initial matter, James and FCC first argue in their Additional Brief of Defendants-Appellants ("Brief") that because "plaintiffs elected to stand on their pleadings and not to seek leave to amend, their claims must stand or fall based on what was alleged in the second amended complaint." Brief, 14. James and FCC argue that further attempts to state a cause of action would not be successful because Plaintiffs did not seek leave to amend the Second Amended Complaint. Brief, 13. In its oral ruling on the Plaintiffs'

Second Amended Complaint, the Circuit Court found "there's been more than enough chances, so therefore…the motion is granted, the second amended complaint is dismissed with prejudice." (R291-92). Any requests for leave to amend clearly would have been rejected as made clear by the Circuit Court. For James and FCC to claim otherwise is disingenuous. Regardless, Plaintiffs did not need to amend the Second Amended Complaint, as it pleads negligent supervision, retention and hiring, as well as willful and wanton failure to protect and willful and wanton retention and failure to supervise.

I. The Second District Appellate Court Correctly Found That James And FCC Owed A Duty To Protect Jane Doe

As the Opinion correctly noted, "[t]he specific issue on appeal [was] whether plaintiffs sufficiently alleged that [FCC] and James owed Jane a duty to protect her from being raped by Coe." Opinion, ¶64. The imposition of duty is determined as a matter of law. *See Doe v. Goff*, 306 Ill. App. 3d 1131, 1134 (3rd Dist. 1999); *See also McLean County*, 2012 IL 112479 at ¶20. While Illinois law generally does not impose a duty to protect another from a criminal attack by a third person, there are exceptions where courts impose a duty to protect another from such attack. Three exceptions are applicable to James and FCC. First, such a duty can exist if (i) the attack was reasonably foreseeable and (ii) the parties stand in one of the following 'special relationships:' (1) common carrier and passenger; (2) innkeeper guest; (3) business invitor and invitee; and (4) voluntary custodian protectee. *See Hernandez v. Rapid Bus Co.*, 267 Ill. App. 3d 519 (1st Dist. 1994); *See also Goff*, 306 Ill. App. 3d at 1134; *Platson v. NSM, America, Inc.*, 322 Ill. App. 3d 138, 146 (2nd Dist. 2001). A second exception to the general duty rule falls under the master-servant relationship. *See Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 228-229 (2000). Finally, Illinois courts also recognize other exceptions to the general duty rule, including

voluntary undertaking. *Goff*, 306 Ill. App. 3d at 1136. This is especially true where the protection of children is at issue. *See McLean County*, 2012 IL 112479 at ¶ 36, 37, 38 (citing Illinois' strong public policy to protect minors that underlies the imposition of a duty upon defendants to protect them from criminal acts of another).

The Second District recognized that Plaintiffs were alleging the existence of two special relationships between James, FCC and Jane Doe, i.e. voluntary custodian-protectee and master-servant, as well as a voluntary undertaking by James and FCC. Opinion, ¶66. The Second District correctly found that the law imposed on FCC and James a standard of care and noted that FCC and James "do not appear to dispute the existence of the special relationships alleged by plaintiffs." Opinion, ¶98.

A. First Exception to the General Duty Rule: Custodial Caretaker

The Custodial Care Special Relationship Existed. A special relationship exists when one voluntarily takes custody of another so as to deprive the other of his normal opportunities for protection. *See Hernandez*, 267 Ill. App. 3d at 524, citing *Restatement (Second) of Torts*, §314A (1965). A voluntary custody special relationship exists where a defendant has actual or constructive possession of a minor. *Id.* The custodial care special relationship existed between James and FCC and Jane Doe because James and FCC had *actual* possession of Jane Doe. *See Platson*, 322 Ill. App. 3d at 146-149; *See also Goff*, 306 Ill. App. 3d at 1134-1135. In both *Platson* and *Goff*, the rape of the child occurred on company premises and on a Boy Scout camping trip, respectively, satisfying the actual possession requirement of the custodial-caretaker exception. *Platson*, 322 Ill. App. 3d at 149; *Goff*, 306 Ill. App. 3d at 1133-1134. FCC and James clearly had actual possession of Jane Doe at all relevant times. Jane Doe was in their custody and control while she was

participating in FCC events. (C1637-38; C1643; C1646-48). Coe secluded and raped Jane Doe in the middle-school basement classroom of the Church during the VBS program after more than a year of grooming and Inappropriate sexual conduct with Jane Doe and other female youths at the Church. (C1646-48).

The Rape of Jane Doe Was Reasonably Foreseeable. Contrary to the Defendants' arguments, and the Circuit Court's rulings, the rape of Jane Doe did not need to be reasonably foreseeable to James and FCC, but to a reasonably prudent person. The Illinois Supreme Court and all Illinois Appellate Courts have held "reasonably foreseeable" to a "reasonably prudent person" as the foreseeability standard for imposing a duty on a defendant to protect a third party from the criminal act of another. *McLean County*, 2012 IL 112479 at ¶ 31 ("an injury is not reasonably foreseeable where it results from freakish, bizarre, or fantastic circumstances"); *Hills*, 195 Ill. 2d at 238 ("foreseeability means that which is objectively reasonable to expect, not what might conceivably occur"); *Boy Scouts of America*, 2014 IL App (2d) 130121 at ¶45-46 (looking to whether any facts supported that it was reasonably foreseeable that former scout master would molest young boys after his termination and where BSA two-adult policy was not violated); *Hernandez*, 267 Ill. App. 3d at 525 ("it is not necessary that the defendants must have foreseen the precise harm that did in fact occur; it is sufficient if at the time of the defendant's action or inaction, a reasonably prudent person should have foreseen some harm to another"). Whether a criminal attack is reasonably foreseeable turns on the specific facts of each case and is typically not determined at the pleadings stage. *Dimovski*, 336 Ill. App. 3d at 299. A subjective standpoint is not used because defendants, like James and FCC, could simply turn a blind eye. This would promote a policy for caregivers and mandated reporters to

look the other way, which contradicts ANCRA, Illinois Criminal Code and the Illinois Supreme Court's ruling in *McLean*. *McLean County*, 2012 IL 112479 at ¶31.

The question before the Second District was whether Coe's rape of Jane Doe, on a couch in the middle-school classroom of the FCC church during Normal Working Hours of VBS on June 14, 2013, was something "reasonably foreseeable" to a reasonably prudent person and not a result of "freakish, bizarre, or fantastic circumstances." *See McLean County*, 2012 IL 112479 at ¶ 31. James and FCC disagree with the Second District's finding that "it is generally foreseeable that abuse will occur in programs providing adults with unsupervised access to children." Opinion, ¶99. Contrary to James and FCC's claim that the Second District relied upon only *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245 to support its finding, the Second District also relied upon this Court's findings in *McLean*, the Federal *Handbook for Working with Defendants and Offenders with Mental Disorders*, as well as the "statutes of this state." *Id*. *See also McLean County,* 2012 IL 112479 at ¶36. On this last point, Illinois statutes, such as the Illinois Criminal Code and ANCRA, support the Second District's finding that 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." Opinion, ¶99. If sexual abuse of minors was not reasonably foreseeable in churches, the Illinois legislature would not have amended ANCRA in 2002 to make clergy mandated reporters of sexually abused children. If sexual abuse of minors was not reasonably foreseeable in a boy-scout setting, the Boy Scouts would not have adopted a two-adult

policy.[2] And the same is true for FCC and James. The UCC and ICUCC adopted and implemented a SCP. James was trained under such a SCP. Thus, the rape of Jane Doe was not something freakish or bizarre.

Even under James and FCC's misinterpretation of the "objective standpoint" of duty, Jane Doe's rape was reasonably foreseeable to a reasonable prudent person in this case by the mere fact that a VBS volunteer and mandated reporter recognized the interactions between Jane Doe and Coe as Inappropriate after just two days of seeing Coe with Jane Doe and decided to report it to James. (C1660-61). Because the knowledge of this volunteer is imputed upon FCC, the rape of Jane Doe was reasonably foreseeable to FCC; therefore the rape of Jane Doe could not be freakish or bizarre to FCC and James.

Besides this salient point, the Second Amended Complaint is replete with other ultimate facts of grooming and Inappropriate behavior, i.e. violations of the SCP and Illinois law, that demonstrate this rape clearly was "reasonably foreseeable" to James and FCC, much less a reasonable prudent person. (C1637-43). The Second Amended Complaint actually alleges Coe's Inappropriate acts were reported to or witnessed by James and other FCC employees. (C1659-62) and were discussed among FCC employees, volunteers or members. (C1658-59). Moreover, numerous specific allegations of Coe's conduct, e.g. showing the Youth Group members movies, videos, or internet sites containing Inappropriate sexual content viewed with the lights turned off (C1642; C1648), demonstrate the complete and utter nonfeasance by James and FCC. And James and FCC's

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[2] While dicta, this does raise an important point. Between 1999 (*Doe v. Goff*) and 2014 (*Doe v. Boy Scouts of America*), the Boy Scouts adopted a two-deep leadership policy for the protection of boys in its local chapters. Adherence to a two-adult policy prevents the opportunity for grooming, and, ultimately, the rape of a minor.

post-rape actions confirm a church environment in which Coe would never be investigated much less admonished for his behavior; instead the status quo was to turn a blind eye. (C1660-64). Why James and FCC did not recognize any Inappropriate behavior between Coe and Jane Doe over a period of more than 18 months when a volunteer trained as a mandated reporter recognized it in just two days, is precisely why an objective standpoint is used in a duty analysis. Otherwise, people and organizations can simply turn a blind eye and claim they saw "nothing," when others would have recognized the red flags.

James and FCC successfully argued before the Circuit Court that if sitting on laps made rape reasonably foreseeable, then "there would be no Santa Claus at any mall." (C1709). James and FCC appear to believe that it was not only appropriate for Coe to have adolescent girls sit on his lap, but that it was a part of Coe's job description, even though such physical contact was prohibited by the SCP. James and FCC now argue that "Plaintiffs' argument would make virtually every assault reasonably foreseeable regardless of how harmless the alleged violation of an abuse-prevention policy may have been at the time." Brief, 25. In attempting to recharacterize the context and environment in which the rape of Jane Doe occurred, through the use of yet another analogy, James and FCC have doubled down on their understanding of what a safe church environment should look like. Conduct that may be "innocent" in one environment is considered to be an indicator of child abuse in another. It is irrelevant whether female Youth Group members sitting on Coe's lap was 'seemingly innocent' to James and FCC, for it was a violation of their own SCP, which was put in place to protect the youth in their care from sexual abuse. Had that SCP been implemented, followed, or monitored, Coe would not have been able to rape Jane Doe in the basement middle-school classroom of FCC during VBS. (C1648).

James and FCC also argue that "the internal two-adult policy did not create a legal duty to protect against a particular sexual assault that was not reasonably foreseeable." Brief, 19. Citing to the Second District's holding on negligent retention, James and FCC continue to conflate the "reasonably foreseeability" of the duty element with the proximate cause elements of the negligence actions, arguing that "negligent retention and negligent supervision both require notice of a particular unfitness." Brief, 19. By conflating "reasonably foreseeable" of duty with the "knowledge" requirements of the retention cause of action, Defendants hope to raise the standard for imposing a duty on a defendant. If the SPC was violated and Coe shot Jane Doe with a gun, the existence of this sexual abuse prevention policy would not make the shooting of Jane Doe reasonably foreseeable to a reasonably prudent person because the purpose of the two-adult policy was not gun control. The SPC was in place to protect the FCC youth from sexual assault by FCC's employees and volunteers. Thus, it is reasonably foreseeable, to a reasonably prudent person, that when a SPC is violated, the sexual abuse of a minor is not something freakish or bizarre.

Along these lines, James and FCC also rely upon Restatement (Second) of Torts §302B Comment d to argue that "it is generally reasonable for one to assume that a person will not violate the criminal law." Brief, 21. James and FCC's reliance on Section 302B is inapplicable and favors Plaintiffs. The illustration to Comment d states:

> A leaves his automobile unlocked, with the key in the ignition switch, while he steps into a drugstore to put a pack of cigarettes. **The time is noon**, **the neighborhood peaceable and respectable**, **and no suspicious persons are about**. B, a thief, steals the car while A is in the drugstore, and in his haste to get away drives it in a negligent manner and injures C. A is not negligent toward C. Restatement (Second) of Torts §302B, Comment d [emphasis added].

In Comment d, there are no circumstances which would make the car theft reasonably foreseeable: (1) it was the middle of the day; (2) the car was in a good neighborhood; and,

(3) there were no suspicious persons around. Therefore, A, or a reasonably prudent person, would not have expected the car to be stolen. Comment c is more illustrative here:

> A leaves dynamite caps in an open box next to a playground in which small children are playing. B, a child too young to understand the risk involved, finds the caps, hammers one of them with a rock, and is injured by the explosion. Restatement (Second) of Torts §302B, Comment c.

Just as thieves are drawn to darkness and dangerous neighborhoods, pedophiles are drawn to children. This is why Illinois law, e.g. ANCRA, seeks to prevent such situations from arising by requiring mandated reporter training, as well as why organizations such as the UCC and ICUCC implement sexual abuse prevention policies in support thereof.

Here, James and FCC left Coe unsupervised and allowed him to interact with minors without any oversight. It is entirely reasonably foreseeable, to a reasonably prudent person, that an adult who exhibited the behaviors Coe did, from his online presence on child pornography sites, to teenage girls sitting on his lap, and to showing minors pornographic movies inside the church, would abuse or rape a child if he was given unfettered and unsupervised access to such a child. The fact that Coe showed pornography involving high school girls in the church shows a complete lack of supervision, not to mention the lack of technology restraints that would prevent it from occurring in a church. Coe had such free reign and was so comfortable with his own actions that, while he waited for a colleague to arrive and with the door to his office fully open to the adjacent offices, Coe sent Jane Doe a picture of his erect penis with the caption "How's that??" (C1645). None of the foregoing would happen in a church run by a reasonably prudent pastor or church. As the Second District found, 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." Opinion, ¶99.

James and FCC also argue that Illinois case law does not "view predators and non-predators as equally suspect." Brief, 21. If this was true, Illinois would not have updated ANCRA in 2002 to include clergy as mandated reporters of sexually abused children. 325 ILCS 5/4. ANCRA requires a credible report of suspected child abuse be turned over to the DCFS, and it is the DCFS who has the discretion or authority to substantiate the accuracy of all reports of known or suspected child abuse or neglect. *Id.* at 7.3. There is no "discretion" on the part of the reporter to determine whether a report should be made, and Illinois law clearly views "predators and non-predators as equally suspect" when it comes to protecting children from sexual abuse. As the Second District found in *Doe v. Dimovski*,

> once school personnel suspect or should suspect that a child may be sexually abused, they are divested of any discretion to determine what constitutes reasonable cause to believe or whether such abuse actually occurred. If school personnel were allowed to determine whether reasonable cause existed or whether such abuse actually occurred before reporting the matter to DCFS, the goal of protecting children from sexual abuse would be undermined. *Dimovski,* 336 Ill.App. 3d at 296.

Notwithstanding Illinois statutes, such as ANCRA, James and FCC then propose that "what is 'generally foreseeable' does not satisfy the fact pleading requirement for showing that a particular assault was reasonably foreseeable." Brief, 21. In support of this argument, James and FCC cite to *Mieher v. Brown*, 54 Ill. 2d 539 (Ill. Sup. Ct. 1973) for the proposition that "in retrospect almost nothing is entirely unforeseeable." *Id*. The citation to *Mieher*, a car accident case, comes shortly after the Defendants criticized the Second District for its reliance on *Bruntjen*, a car accident case. Not only is *Mieher* not a sexual assault of a child case, it actually supports the Plaintiffs' proposition. *Mieher* held that "[t]here is a duty if the court says there is a duty," which "often reflects the policy and social requirements of the time and community." *Id.* at 545. In determining the imposition of a duty, this Court in *Mieher* stated that "liability must stop somewhere short of the

freakish and the fantastic." *Id*. Thirty-nine years later, this Court applied the same principle in *McLean*, a sexual abuse of a minor case, clearly setting forth this state's public policy in the protection of minors. *McLean County*, 2012 IL 112479 at ¶ 31, 37 ("an injury is not reasonably foreseeable where it results from freakish, bizarre, or fantastic circumstances").

In light of this state's policy, the Illinois Criminal Code, and this Court's rulings in *McLean*, when Coe secluded Jane Doe in the middle-school basement classroom of the Church and raped her on a couch on June 14, 2013 during VBS, the rape of Jane Doe was very much reasonably foreseeable to a reasonably prudent person and not something freakish, bizarre, or fantastical. Therefore, because the custodial caretaker Special Relationship existed between James, FCC and Jane Doe, and the rape of Jane Doe was reasonably foreseeable, the Second District correctly found that James and FCC owed a duty to Jane Doe to protect her from the criminal attack by Coe and, therefore, the reversal of the Second District's findings is not warranted. Opinion, ¶98.

B. Second Exception to General Duty Rule: Master-Servant

In addition to a custodial caretaker special relationship exception, Illinois courts will impose a duty on a defendant for the criminal acts of a third party under the master-servant exception to the general duty rule. Under this exception, the master is under a duty to exercise reasonable care to control his servant while acting outside the scope of his employment. *See Hills*, 195 Ill. 2d at 229-243; *Platson* 322 Ill. App. 3d at 145, citing *Restatement (Second) of Torts*, §317 (1965). Just as in *Platson*, *Dimovski*, and *Doe By and Through Doe v. Montessori School of Lake Forest*, the same facts used to support a finding of a custodial care special relationship exception can be used to establish a master-servant relationship exception to impose a duty on James and FCC to protect Jane Doe from the

criminal attack by Coe. *See Platson v. NSM, America, Inc.*, 322 Ill. App. 3d 138 (2nd Dist. 2001); *Doe v. Dimovski*, 336 Ill. App. 3d 292 (2nd Dist. 2003); *Doe By and Through Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289 (2nd Dist. 1997). The master-servant relationship exception was most recently analyzed by this Court in *Hills*. *Hills*, 195 Ill. 2d 210 (2000). Most important to the Circuit Court's premature dismissal of Plaintiffs' causes of action under §2-615, this Court held that the master-servant relationship is "not one capable of exact definition and it is generally left to the trier of fact to determine whether the relationship exists." *Id*. at 235. The Circuit Court did not address the master-servant exception but implicitly found that it did not apply as a matter of law. Plaintiffs argued that FCC is under a duty to control its servants, i.e. James and Coe; and, similarly, James, as Senior Pastor of FCC, is under a duty to control his servants, including Coe.

This Court in *Hills* disagreed with the little league association's contention that one of its board members "must have been aware of the need to control" an assistant coach, who battered the plaintiff, an opposing coach, during a baseball game, for the master-servant relationship to apply. *Hills*, 195 Ill. 2d at 232. This Court held that the little league association could be held liable for the head coach's failure to control his two assistant coaches, as the head coach had general supervisory authority over his players and coaches and may be considered the "master" for establishing the notice and ability to control requirements of the master-servant relationship. *Id*. at 233. This Court found the assistant coaches to be agents or servants of the association. *Id*. at 236. Although the association could be imputed with liability through the master, i.e. the head coach, this Court held that the "control" requirement of the master-servant relationship could not be met because the assistant coaches were unpaid volunteers. *Id*. at 237-242. Unlike paid employees who can

be controlled by the inherent economic control by their masters, the master of a volunteer has no inherent economic leverage or control over that volunteer; and, therefore, no duty under the master-servant relationship could be imposed on the association. *Id*. at 240-241.

Most important to James's duty, this Court in *Hills* found that the "term 'agent' is broader than either 'servant' or 'employee'" and that "one may be an agent although he is neither servant nor employee." *Id*. at 235. Therefore, even if Coe is not James's employee or servant, James is still under a duty to control Coe, who is his agent. Like in *Hills*, Plaintiffs alleged that FCC could be liable for its failure to supervise James and Coe. Unlike in *Hills*, James and Coe are paid employees, and, therefore, the control requirement of the master-servant relationship is met in this case to warrant an imposition of duty on FCC and James. In terms of Plaintiffs' factual allegations, all Counts against James and FCC incorporate most of the first 355 allegations of the Second Amended Complaint. These facts allege not only that Jane Doe was in the custody and care of James and FCC but also that Coe was under the control of James and FCC at the time Coe groomed, molested, and raped Jane Doe in the Church. (C1626-65). Coe clearly was under the control of FCC, as Coe was employed by the FCC as the Director of Youth Ministries. (C1636). Similarly, as FCC Senior Pastor, James was the master and direct supervisor of all FCC employees and volunteers, including Coe. (C1651). Because James also is an employee of FCC, James was under the direct supervision, employ, agency, or control of FCC. *Id*. Thus, FCC also could be held liable for James's failure to implement, adhere to or enforce any safe church policy or supervise and control Coe, i.e., the servant who groomed and then raped a girl.

The second requirement of the master-servant relationship, that the master "knows or should know of the necessity and opportunity for exercising such control," is easily met

here by virtue of the same facts and the existence of the SCP. Importantly, the Second District found that it is generally foreseeable abuse will occur in programs providing adults with unsupervised access to children, as it is well known that pedophiles are drawn to such opportunities in churches. Opinion, ¶99. Citing to Federal Judicial Center, *Handbook for Working with Defendants and Offenders with Mental Disorders*, 80 (3rd ed., 2003), the Second District reasoned that pedophiles will not only seek employment and volunteer work that gives them access to children, such teacher, clergyman, police officer, coach, scout leader, Big Brother, or foster parent, but also find ways to get the child into a situation where other adults are absent. *Id.* Because it is common knowledge that pedophiles are drawn to where they will be given access to children, FCC and James' knowledge of the necessity and opportunity for exercising control are met. James was trained under a two-adult SCP and a comprehensive anti-sex abuse program was implemented, disseminated and adopted by the UCC and ICUCC, who are composed of James and FCC, which require employees and volunteers to read and abide by the SCP. (C1628-36; C760-72). Moreover, again, the fact that a FCC mandatory reporter who witnessed and recognized the interaction between Coe and Jane Doe at the church as Inappropriate after two days of seeing them together further demonstrates the necessity and opportunity for exercising control over Coe, not to mention FCC's knowledge and James and FCC's utter nonfeasance. (C1660-61). Because Plaintiffs sufficiently allege that the master-servant exception applies to James and FCC, James and FCC owed a legal duty to supervise Coe and protect Jane Doe from Coe's Inappropriate conduct, grooming, abuse, and rape.

C. Third Exception to General Duty Rule: Voluntary Undertaking

James and FCC also owe a duty to protect Jane Doe against the criminal acts of Coe by virtue of a voluntary undertaking, another well-recognized exception to the general duty rule. The Second District properly recognized that "plaintiffs alleged that [FCC] and James voluntarily undertook a duty to protect Jane." Opinion, ¶91. Both *Restatement (Second) of Torts* §323 and §324A apply to impose a duty on James and FCC.

James and FCC certainly voluntarily undertook a duty to protect Jane Doe under §323 because of the services they provided. James and FCC offered programs such as confirmation, Youth Group, and VBS to members. (C1637). FCC and James voluntarily undertook to protect Jane Doe while she participated in these programs. *See* §323. Even without considering the UCC and ICUCC SCP, James told members of FCC that a safety plan was in place that had been in development for many years and could be viewed on the FCC website. (C1662). No safety plan could be viewed on the FCC website. *Id*. No safety plan was in place on or prior to the rape of Jane Doe or prior to July 3, 2013 and there should have been. Any plan that was in place was either not adhered to or inadequate to protect Jane Doe. *Id*. Later, during a subsequent August 25, 2013 meeting, James represented that a "new" safety plan was in place that would require two adult supervisors in the presence of any child or minor youth. (C1663). FCC, its employees and volunteers, and James merely had to comply with their own policies, the SCP, Illinois Criminal Code, and ANCRA to protect Jane Doe and prevent the abuse, grooming and rape of Jane Doe.

In addition to voluntarily undertaking a duty under §323, James and FCC also assumed the duty owed to Jane Doe by the UCC and ICUCC under §324A. In *Hernandez*, 267 Ill. App. 3d at 524, the Court cited *Restatement (Second) of Torts* §324A. The

Hernandez Court found that the school Board owed a duty to supervise the special education students being transported in Rapid's bus and to escort them from the bus to the door of the school. *Id*. at 525. Applying §324A, the *Hernandez* Court found that Rapid assumed the Board's duty when Rapid voluntarily undertook to transport and escort the students to the school's doors during the time period when the Board's regular supervisor left the special education children in Rapid's care. *Id*. at 525.

Like Rapid, the bus company in *Hernandez*, FCC and James voluntarily undertook the duties owed to Jane Doe by the UCC and ICUCC, by providing UCC programs such as the confirmation program and the youth group program to FCC members. (C1637). While the UCC and ICUCC would like to claim a separate and distinct structure, confirmands participating in the confirmation program are confirmed as members of the United Church of Christ religion; they are not confirmed as belonging to the FCC religion. The UCC and ICUCC have implemented, disseminated and adopted policies and practices to create a safe church environment and to prevent abuse of minors. (C1629-35). The ICUCC requires all of its employees and volunteers to abide by the terms of these policies. (C767; C1629-35). For example, the SCP adopted by the ICUCC requires that two adults be present to supervise any child activities and requires incidents of child abuse observed by employees or volunteers to be reported to the DCFS. *Id*. FCC, its employees and volunteers, and James merely had to comply with the SCP, Internet Safety Guidelines, and Illinois law to protect Jane Doe and prevent the abuse, grooming and rape of Jane Doe. Thus, just as in *Hernandez*, James and FCC are subject to liability for their failure to protect Jane Doe by virtue of their voluntary undertaking of the UCC and ICUCC's duties.

Regardless of whether the voluntary undertaking exception arises under §324A or §323, after voluntarily undertaking to protect Jane Doe, James and FCC altogether failed to exercise reasonable care in the performance of their undertaking by failing to adopt, implement and abide by the SCP, or any safe church policy, adhere to their training, or even supervise Coe in any way. James and FCC's failure created an environment where Coe had such free reign and was so comfortable that he, as one example, showed pornographic films to Youth Group members in the Church. (C1641-42). For the foregoing reasons, §323 is met because James and FCC voluntarily undertook the duty to protect Jane Doe while providing Youth Group, confirmation, and VBS programs and failed to exercise reasonable care in the performance of that undertaking. §324A also is met because FCC and James undertook the duty owed to Jane Doe by the UCC and ICUCC, who implemented, disseminated, and adopted the SCP, and failed to exercise reasonable care in the performance of that undertaking. Their failure to exercise reasonable care not only increased the risk of harm to Jane Doe but also the harm was suffered because of the Plaintiffs' reliance upon James and FCC's undertaking.

The Second District correctly noted that "[FCC] and James do not appear to contest the existence of the special relationships alleged by plaintiffs. What they argue, first, is that plaintiffs' allegations did not establish that FCCD and James voluntarily undertook to protect Jane or other youths through the SCP." Opinion, ¶95. James and FCC argue that "violations of self-imposed rules or internal guidelines do not give rise to a legal duty or constitute evidence of negligence," relying on *Doe v. Bridgeforth*, 2018 IL App (1st) 170182. Brief, 22. But, *Bridgeforth* is distinguishable from the instant case on several grounds. First, *Bridgeforth* was appealed after a trial where plaintiff sought a motion for

judgment notwithstanding the verdict. Second, the *Bridgeforth* plaintiff presented insufficient evidence to prove her claims. At issue in the instant case is whether the Second Amended Complaint sufficiently pleads causes of action against James and FCC. "A plaintiff is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate facts." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351 (Ill. Sup. Ct. 2004). Third, the transportation policy in *Bridgeforth* did "not say its purpose is to prevent sexual assault. It does not actually mention or refer to sexual assault at all." *Bridgeforth*, 2018 IL App (1st) at ¶48. Unlike the transportation policy in *Bridgeforth*, the two-adult policy in the instant case was specifically aimed at preventing the sexual abuse of children.

Furthermore, "permitting a teacher to transport a student to and from athletic team practices and games in his private vehicle" was not "generally associated with the risk of serious injuries," i.e., teacher-on student sexual assault. *Id*. at ¶47-53. Unlike the *Bridgeforth* court, the Second District here explicitly found that 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." Opinion, ¶99. In fact, permitting Coe to show the minors in the Youth Group a video which detailed a "rainbow party," wherein a group of high school girls performed successive fellatio on a male while wearing a variety of lipstick colors so as to create a rainbow on the man's penis, is generally associated with a risk of serious injuries, i.e. sexual assault of a minor. (C1642).

Finally, the evidence at trial in *Bridgeforth* showed no one "had any reason whatsoever to suspect the J.E. was not safe with Bridgeforth." *Bridgeforth*, 2018 IL App

(1st) at ¶55. "Bridgeforth's behavior did not display any red flags that could have 'disclosed to any reasonable man' the danger which J.E. was facing." *Id*. "There was nothing about Bridgeforth that stood out as something [Rippy] 'should have caught in hindsight.'" *Id*. In contrast, the facts alleged in the instant case, which must be construed in the light most favorable to the Plaintiffs at a 2-615 motion to dismiss stage, contain numerous red flag facts that would have made the danger Jane Doe was in reasonably foreseeable to a prudent person. This Court need go no further than the fact that a mandatory reporter, who was volunteering at FCC's June 2013 VBS program recognized the interaction between Coe and Jane Doe as Inappropriate or dangerous after just two days of seeing Coe with Jane Doe. (C1660). This fact alone demonstrates that Jane Doe was under an impending danger of sexual assault by Coe. The VBS volunteer recognized the interaction between Jane Doe and Coe as dangerous within just two days and decided to report that behavior to James. Notably, instead of at least being shocked and surprised, like the teachers in *Bridgeforth*, James sent Coe to Costa Rica with 34 youths. (C1660; C797).

In addition to *Bridgeforth*, James and FCC also cite to case law involving a voluntary undertaking to care for a minor after she became unconscious (*Wakulich*), and voluntary undertaking to assist an intoxicated commuter found in the railroad's warming house (*Rhodes*). Brief, 22. None of these cases involve a voluntary undertaking of the protection of a minor from sexual abuse while in the care of an organization such as the FCC. In *Rhodes*, the Court found, as a matter of public policy, that it was not appropriate to hold that "a party voluntarily undertakes a legal duty to rescue an injured stranger by simply calling the police." *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill. 2d 213, 240 (1996). James and FCC's reliance on *Rhodes* is grossly misplaced in light of this State's public

policy of protecting its minors from sexual abuse, as clearly set forth by this Court in *McLean*. *See McLean County*, 2012 IL 112479 at ¶36-38. The Second District's analysis correctly noted that there was no special relationship upon which to base a duty of care in *Rhodes* and *Blankenship*, and therefore the defendants' internal policies did not of themselves give rise to a duty. Opinion, ¶98.

James and FCC also rely upon *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333 (1st Dist. 2008) and *O'Brien v. City of Chicago*, 285 Ill. App. 2d 864 (1st Dist. 1996) to support their argument that "violations of self-imposed rules or internal guidelines do not give rise to a legal duty or constitute evidence of negligence." Brief, 22. *Calderon* was decided at summary judgment and the contractor's liability was based upon §414 of the Restatement (Second) of Torts. Based on these facts alone, *Calderon* is thus inapplicable to instant case. Furthermore, while the First District did state that "penalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety," the First District also found that "a safety program or manual must sufficiently affect a contractor's means and methods of doing its work to bring the defendant within the ambit of the retained control exception." *Calderon*, 381 Ill. App. 3d at 343-344. If anything, the First District's findings in *Calderon* actually support the arguments made by the Plaintiffs because the SCP was in place to sufficiently affect the means and methods of the work done by FCC and its employees and volunteers.

O'Brien also is inapplicable to the instant case. The plaintiff in *O'Brien* argued that "the City voluntarily agreed to protect others by maintaining the roads and studying traffic patterns." *O'Brien*, 285 Ill. App. 3d at 874. The First District disagreed, finding that "the

performance of minor repairs such as filling potholes and resurfacing roads cannot be considered a voluntary undertaking by the City to reconstruct the road completely." *Id.* Unlike the defendant in *O'Brien*, a municipality protected by a tort immunity statute that requires a showing of willful and wanton conduct, James and FCC voluntarily undertook to care for Jane Doe when Jane Doe participated in the programs offered. They oversaw minors in the confirmation, Youth Group, and VBS programs. And they had a SCP to protect the minors that were in their care from sexual abuse. (C1637). James and FCC had a duty to protect Jane Doe when they undertook her care, thus clearly subjecting themselves to the voluntary undertaking exception found in *Restatement* §323 and §324A.

Contrary to James and FCC's arguments before this Court, Plaintiffs do not claim, and the Opinion did not hold, that the SCP alone created a legal duty; but rather, by voluntarily undertaking to implement the SCP or when James and FCC voluntarily undertook to care for Jane Doe, e.g. VBS. *See Rhodes*, 172 Ill. 2d at 238-239. James and FCC's argument also is contrary to Illinois law involving the sexual abuse of minors. *See Big Brothers Big Sisters of America*, 359 Ill. App. 3d at 698 (policy that did not provide suggestions, recommendations, or even a skeletal framework for child abuse prevention was insufficient for voluntary undertaking). Clearly, by implementing and adopting a detailed SCP aimed at preventing sex abuse of minors who they took under their care and protection, James and FCC voluntarily undertook a duty. James and FCC's failure to comply with their own policies, the SCP, Illinois Criminal Code, ANCRA or even exercising reasonable care in the performance of their undertaking, allowed Jane Doe to be raped by Coe. James and FCC's failure to exercise reasonable care not only increased the

risk of harm to Jane Doe but the harm was ultimately suffered because of the Plaintiffs' reliance upon James and FCC's undertaking.

Finally, James and FCC argue that "even under a voluntary undertaking theory, the particular assault must be reasonably foreseeable to Pastor James and the [FCC]" and that "Plaintiffs could not avoid having to plead specific facts showing that the assault/rape was reasonably foreseeable merely by alleging that the [FCC] adopted a two-adult policy that was violated before the assault took place." Brief, 22-23. To the extent that reasonable foreseeability is part of the voluntary undertaking analysis, Coe's rape of Jane Doe was reasonably foreseeable to James and FCC, much less a reasonably prudent person.

II. The Second District Appellate Court Correctly Found That The Facts Pled Support The Elements of Negligent Supervision

A. Negligent Supervision is a separate cause of action.

None of the arguments raised in James and FCC's Brief warrant the reversal of the Second District's findings regarding negligent supervision. James and FCC argue that, until the Opinion, "appellate panels have not distinguished between negligent supervision and negligent retention with respect to the elements of the common law cause of action." Brief, 17. Not only have appellate panels distinguished between negligent supervision and negligent retention but this Court also has made such a distinction by setting forth the elements of a negligent supervision claim in *Vancurra*. *See Vancurra v. Katris*, 238 Ill. 2d 352, 375 (Ill. Sup. Ct. 2010); *see also Strickland v. Communications & Cable of Chicago, Inc.*, 304 Ill. App. 3d 679 (1st Dist. 1999); *McNerney v. Allamuradov,* 2017 IL App (1st) 153515 (1st Dist. 2017). James and FCC also rely upon *Zahl v. Krupa*, 399 Ill. App. 3d 993, 1018 (2nd Dist. 2010), for the proposition that this Court has "not distinguished between [negligent supervision and negligent retention] in employment context." *Zahl* was

decided on April 13, 2010. Less than six months later, this Court distinguished negligent supervision from negligent retention in the employment context in *Vancurra* on October 7, 2010. As all appellate districts must follow this Court's decisions, the reversal of the Second District's ruling is not warranted because the ruling follows this Court's decision.

B. Knowledge or Notice Are Not Necessary Elements of a Negligent Supervision Cause of Action

To state any claim of negligence, plaintiff must plead the existence of a duty, a breach of the duty, and an injury proximately caused by the breach. *Mueller v. Cmty. Consol. School Dist, 54*, 287 Ill. App. 3d 337, 342-343 (1st Dist. 1997). The Second District correctly found that "under Illinois law, neither negligent supervision nor the other causes of action alleged in counts VIII and XIII have as an essential element that the defendant have notice of the unfitness of the party that caused the harm." Opinion, ¶93. James and FCC's argue the Second District erred in holding an employer's knowledge of the employee's unfitness is not an element of a claim for negligent supervision. Relying on *Vancurra*, James and FCC argue this Court "had no occasion to consider whether notice of a particular unfitness was necessary to state a claim for negligent supervision in *Vancurra*" and "that plaintiff would have to present proof that the employer had some knowledge of the notary's misconduct." Brief, 17. James and FCC misstate *Vancurra*, where this Court explicitly stated that, as in any claim for negligent supervision, "a plaintiff must establish the existence of a duty, a breach of the duty, and an injury to the defendant that was proximately caused by the breach." *Vancurra*, 238 Ill. 2d at 375. The *only* reason this Court did not find the employer liable in *Vancurra* was because the language of the Notary Public Act explicitly provides that "an employer may be found liable for the acts of a notary only where 'the employer consented to the notary public's official misconduct.'" *Id*. at 378. This

Court then reasoned that "an employer cannot 'agree, approve, or grant permission' for an act or purpose of which the employer has no knowledge." *Id*. Also, this Court noted the Notary Public Act established a higher standard, one that required "the employer [to have] some minimum threshold of knowledge of the notary public's conduct." *Id*. at 378-379. This Court found this standard to be higher than the standard in direct liability claims where "the plaintiff may allege that the employer merely *should have known* of the employee's malfeasance." *Id.* [emphasis in original]. Thus, *Vancurra* supports the Plaintiffs. In reversing the Circuit Court's finding regarding the negligent supervision count, the Second District noted that James and FCC focus on their lack of notice that Coe had any particular unfitness. Opinion, ¶94. The Second District accordingly found James and FCC's liability to be based on a duty to supervise that existed independently of what was known or should have been known about Coe himself and was coextensive with the SCP. Opinion, ¶93, 98.

James and FCC argue that Illinois law governing child abuse should be modified because there is "no rational basis for the law to require" knowledge as an element of hiring and retention but not supervision. Brief, 18. Like negligent hiring, retention has a temporal aspect to it that is not present in supervision. *See Mueller*, 287 Ill. App. 3d 337. The employer's liability for retention is contingent upon the employer's failure to terminate the employee after 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. *See Boy Scouts of America*, 2014 IL App (2nd) 120121 at ¶39. The employer's liability for supervision, on the other hand, is based on the employer's failure to generally supervise the employee during employment. *See Mueller*, 287 Ill. App. 3d at 342-343; *see also Vancurra,* 238 Ill. 2d 352. While the facts of the current case lend themselves to both negligent supervision

and retention, there may be a factual scenario where one cause of action applies and the other does not (e.g. one may supervise an employee at all times and be present when the harm occurs but the supervisor should have known by employee's prior conduct that he would cause such harm). Thus, the distinction between negligent retention and supervision is rational in light of the temporal aspects and differing fact patterns.

Relying on *Norskog v. Pfiel*, 197 Ill. 2d 60 (Ill. Sup. Ct. 2001), James and FCC next argue that "when employment is not involved… knowledge of the perpetrator's dangerous propensities has been required." Brief, 18. Defendants reliance on *Norskog* is misplaced. The liability of the parents in *Norskog* was based upon Restatement (Second) of Torts §316, which is inapplicable to the instant case, for neither FCC nor James are Coe's parents. James and FCC argument that the Opinion created a conflict by holding that knowledge of an employee's unfitness is not required for negligent supervision is without merit. Brief, 18. As the Second District noted, James and FCC "do not appear to contest that James, as senior pastor, had a duty to supervise Coe during their time together at [FCC]." Opinion, ¶90. Thus, the negligent supervision causes of action pled against James or FCC survive.

James and FCC then resort to the argument that "removal of the notice requirement… would also expose employers to liability whenever an employee fails to follow an internal policy." Brief, 18-19. First, there can be no removal of a "notice" requirement because "notice" was never required. *See Vancurra*, 238 Ill. 2d 352. Second, as the Second District noted, James and FCC, as well as "any school church, youth group, athletics team or organization," already owe a duty to protect their youth from criminal attacks by third parties, regardless of whether such parties have any sex-abuse prevention policy, based upon their status as custodians, masters, and voluntary undertakers. Opinion,

¶98. *See generally Hernandez*, 267 Ill. App. 3d 519; *Hills*, 195 Ill. 2d 210. Along these lines, James and FCC's argue that Plaintiffs "failed to plead facts establishing that James and FCC knew or should have known that Coe had a particular unfitness for employment." Brief, 23. While not required by Illinois law, Plaintiffs easily satisfy even this "additional" knowledge requirement as set forth herein. However, because a common law negligent supervision claim does not require any knowledge by the employer, and Plaintiffs have sufficiently pled each of the elements of negligent supervision, the Second District's finding that Plaintiffs sufficiently set forth a negligent supervision cause of action must be upheld. *Mueller*, 287 Ill. App. 3d at 342-343; *Vancurra*, 238 Ill. 2d 352.

Finally, because Plaintiffs sufficiently alleged negligent supervision against James and FCC and the facts alleged support willful and wanton conduct, the willful and wanton counts, to the extent those counts arise out of the negligent supervision count, must also be upheld by this Court. *See McLean County*, 2012 IL 112479 at ¶19 (to allege willful and wanton conduct, "plaintiff must plead and prove the basic elements of a negligence claim"); *See also Doe v. Catholic Bishop of Chicago*, 2017 IL App (1st) 162388, ¶11 (1st Dist. 2017) (*citing Ziarko v. Soo Line Railroad Company*, 161 Ill. 2d 267, 275-76 (1994)). Indeed, Plaintiffs have alleged sufficient facts to support an utter indifference or a conscious disregard for the welfare of Jane Doe. (C1679-84; C1689-95).

III. The Second District Appellate Court Correctly Found That The Facts Pled Support The Elements of Negligent Hiring

The Second District correctly held that FCC is liable for harm resulting from the negligent hiring of Coe. Opinion, ¶68-73. *See Boy Scouts of America*, 2014 IL App (2nd) 120121 at ¶39; *See also Van Horne v. Muller*, 185 Ill. 2d 299 (1998) (prior conduct by an employee which will be sufficient to put an employer on notice that the employee is unfit

for a particular position will differ in every case). Plaintiffs' theory of negligent hiring rests on two propositions. First, a person who habitually engages in consuming child pornography is unfit to serve as a Director of Youth Ministries, as such activity indicates he will engage in the exploitation of minors including child rape. Defendants previously relied upon *Fallon v. Indian Trial School* in their arguments before the Second District. In *Fallon*, the plaintiff alleged only that "the school district carelessly and negligently failed to investigate the teachers' credentials and teaching abilities." *Fallon v. Indian Trial School*, 148 Ill. App. 3d 931, 935 (2nd Dist. 1986). The Second District found those allegations to be "legally insufficient to support a cause of action for negligent hiring." *Id*. In *Giraldi by Giraldi v. Cmty. Consol. School Dist. No. 62*, 279 Ill. App. 3d 679 (1st Dist. 1996), the only fact the employer knew about its employee was that he had a tendency to be late, and the First District concluded that "there is no factual or logical relationship between that knowledge and the attack on [plaintiff]." *Giraldi* at 692. Similarly, in *Van Horne*, there was no logical relationship between the disk jockey's on-air pranks and the defamatory statements later made about the plaintiff, just as there was no logical relationship between driving under the influence and the sexual molestation of young boys in *Boy Scouts of America*. *See Van Horne*, 185 Ill. 2d 299; *see also. Boy Scouts of America*, 2014 IL App (2d) 130121. In stark contrast, in the instant case, there is a logical relationship between Coe's habitual consumption of child pornography and his rape of Jane Doe.

Plaintiffs' second proposition is that habitually engaging in consuming child pornography violates any church policy, including the SCP. FCC knew or should have known about Coe's propensity to engage in Inappropriate conduct with minors because the SCP dictated that investigations be performed as to the background and fitness of any

person employed to supervise children at the time of hiring. (C1629-35; C1684). As noted by the Second District, "[t]here is no dispute on appeal that [FCC] should have conducted a reasonable background check on Coe before hiring him." Opinion, ¶69. This is consistent with Illinois law and directly on point with those rulinga of other courts on this issue. See e.g. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 735 (Ky. Sup. Ct. 2009). As the Second District found, because Coe was hired as the director of youth ministries, FCC was required to at least conduct a reasonable inquiry into Coe's background to determine whether Coe would constitute a risk of injury to the minors in his care. Opinion, ¶69.

James and FCC argue that "the inference that a Google search of someone's name, without more, can reveal that person's history of visiting pornographic websites is implausible on its face," citing to *Leekha v. Wentcher*, 224 Ill. App. 3d 342 (1st Dist. 1991). Brief, 27. In *Leekha*, the First District dismissed plaintiffs' claims because "[t]he facts, construed most favorably in plaintiffs' favor, nevertheless reveal that the parties were in the negotiating phase of the transaction" and, therefore, defendants' actions did not fall within the Consumer Fraud Act. *Leekha*, 224 Ill. App. 3d at 352. Unlike plaintiffs in *Leekha*, Plaintiffs alleged that, had anyone performed even a basic Google search on Coe, the inquiry would have revealed Coe's "bluesgod88" handle and his activities on numerous pornographic websites, including child pornography sites, and those depicting pornographic images of Coe himself. (C1639-40; C1684-85). Plaintiffs allege no background check on Coe was conducted prior to his hiring. (C1636-37; C1685). Plaintiffs further allege, upon information and belief, that no such background check was performed as Coe was recommended for hire by his father, a member of the Elder Counsel for the ICUCC. *Id*. The failure to perform any background investigation of a person hired to care

for children was in violation of SCP. (C1630-36; C1684-85). Had FCC complied with the SCP by conducting a background investigation, or a simple Google search, the pre-hire online conduct of Coe on child pornography sites would have revealed his particular unfitness as Director of Youth Ministries that created a danger of harm to FCC youth. (C1684-85). Besides the fact that Illinois law requires all reasonable inferences to be drawn in favor of Plaintiffs, the inferences made by the Second District as to the negligent hiring count were not unreasonable or unwarranted in light of the facts alleged. *See Dimovski*, 336 Ill. App. 3d at 299.

IV. CROSS RELIEF REQUESTED: The Second District Appellate Court Erred in Upholding the Dismissal of Negligent Retention Against James and FCC

Like negligent hiring, retention has a temporal aspect not present in supervision. *See Mueller*, 287 Ill. App. 3d at 342-343. The issue here is whether the Second Amended Complaint adequately pled that (1) James and FCC knew or should have known that Coe had a particular unfitness for the position so as to create a danger of harm to third persons, and (2) Coe's particular unfitness was known or should have been known at the time of Coe's retention. *See Boy Scouts of America*, 2014 IL App (2nd) 120121 at ¶39.

A. Negligent Retention Against James

In upholding the dismissal of the negligent retention count against James, the Second District erred by finding that, as James was not Coe's employer, Plaintiffs could not state a cause of action for retention against him. Opinion, ¶76. In making this determination, the Second District relied upon *Boy Scouts of America* to declare James was not Coe's employer and an employment relationship did not exist, such that James had no ability to retain or terminate Coe's employment. *Id*. However, the Second District failed to

consider James' duty under the master-servant exception, as well as the relevant factors that determine whether an employment relationship exists. *See Boy Scouts of America*, 2014 IL App (2d) 130121 at ¶40. "The question of whether one is an agent or employee is generally a question of fact that may be decided as a matter of law where the relationship is so clear as to be indisputable." *Doe v. Brouillette*, 389 Ill. App. 3d 595 (1st Dist. 2009).

In *Hills*, this Court held that the master-servant relationship is "not one capable of exact definition and it is generally left to the trier of fact to determine whether the relationship exists." *Hills*, 195 Ill. 2d at 235. "While no single factor is determinative, the right to control the work is considered to be the predominant factor." *Id*. As further evidenced by this Court's ruling in *McLean County*, an employee can be sued individually even for the criminal acts of a third party against another if the facts alleged establish that the individual owed a duty to the plaintiff where no special relationship exists. *McLean*, 2012 IL 112479, ¶36-38. Plaintiffs note that this Court's analysis and rulings in *Hills* and *McLean* are consistent with personal liability in the corporate context relied upon by James and FCC, wherein officers and directors can be personally liable for their action or inaction in negligent hiring, retention and supervision of an employee whose conduct damaged another. *See Zahl v. Krupa*, 399 Ill. App. 3d 993 (2nd Dist. 2010). And this is not inconsistent within the context of other Illinois employment laws. *See* Wage Payment and Collection Act, 820 ILCS 115/13 (where officer or agent of company is deemed to be an employer and therefore personally liable for acts or omissions if he knowingly permits the company to violate the Act); *See also* Whistleblower Act, 740 ILCS 174/5 ("Employer").

The Second Amended Complaint alleges that Coe was employed as the Director of Youth Ministries under the direct supervision, employ, agency, or control of James and

FCC. ¶ 85, 86 (C1636). "As the FCC Dundee Senior Pastor, Rev. James was the master and direct supervisor of Coe beginning in the Spring of 2009." ¶ 231 (C1651). Plaintiffs also alleged that James was a custodian of a minor, master, or voluntary undertaker of Jane Doe and owed a duty to retain only qualified employees who were not pedophiles and did not engage in Inappropriate conduct, Grooming, sexual abuse, or rape. ¶434 (C1678). By failing to engage in any analysis as to whether an employment relationship existed between James and Coe, the Second District erred in upholding the dismissal of negligent retention against James. Therefore, this Court should reverse the Second District's holding and find that the Second Amended Complaint sufficiently alleges negligent retention against James.

B. Negligent Retention Against FCC

The Second District erred by finding that Plaintiffs failed to plead facts establishing FCC learned that Coe had a particular unfitness for the position of youth director during his tenure. Opinion, ¶77. The Second District concluded that Plaintiffs failed to allege specific misconduct that was observed by FCC's agents and was of a nature that placed FCC on notice of Coe's particular unfitness for being a youth director. Opinion, ¶87. The Circuit Court and the Second District erroneously ruled that Plaintiffs are required to plead detailed evidence of "notice." As a threshold matter, Illinois law does not require Plaintiffs to prove FCC's knowledge at this stage of the litigation. Plaintiffs are required to plead the ultimate facts to be proved, not the evidentiary facts tending to prove such ultimate facts. *See City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351 (Ill. Sup. Ct. 2004) ("despite the requirement that the complaint must contain allegations of fact bringing the case within the cause of action, the plaintiff is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate

facts"). In *Vancurra*, this Court held that, in a direct liability claim, "the plaintiff may allege that the employer merely *should have known* of the employee's malfeasance." *Vancurra*, 238 Ill. 2d at 378-379 [emphasis in original]. If Illinois law required plaintiffs to plead evidentiary facts to sufficiently plead "knowledge" prongs of a negligence cause of action, Plaintiffs would have to possess evidence before drafting their pleadings, which would raise the bar and benefit defendants who "circle the wagons." *See Doner v. Phoenix Joint Stock Land Bank of Kansas City*, 381 Ill. 106 (Ill. Sup. Ct. 1942); *see also Marshall v. David's Food Store*, 161 Ill. App. 3d 499 (1st Dist. 1987). In *Marshall v. David's Food Store*, the plaintiff, who was abducted from the store's parking lot and sexually assaulted, brought a cause of action against the store and its security service, alleging "both defendants 'knew or should have known' that it was reasonably foreseeable that a customer might be attacked in the parking lot" and that "one or both of the defendants had actual or constructive notice of potential danger in the parking lot, that they knew or should have known of a likelihood of harm being done to an invitee there." *Id.* at 500-501. The First District found that the trial court erred in ruling that "plaintiff had to set forth detailed evidence of notice in her complaint." *Id*. In overruling the circuit court, the First District held that a plaintiff is not required to allege facts "which, to much greater degree of exactitude, are more within the knowledge of the defendant." *Id.* As the First District found in *Marshall*, the defendants in the instant case are clearly in the best position to know what prior criminal activity occurred in or around the church. (¶241 (C1652), ¶263 (C1655), (¶242 (C1652), ¶264 (C1655-56). The foregoing allegations alone are sufficient under *Donor*, *Beretta*, and *Marshall*. But, Plaintiffs also specifically alleged that James and FCC

"knew or should have known." (¶243[3], ¶265; C1652-53; C1656-57). These additional allegations as to James and FCC's knowledge are ultimate facts sufficient for pleading negligent retention. S*ee Beretta U.S.A. Corp.*, 213 Ill. 2d 351.

James and FCC also claim that Plaintiffs "never alleged what James or other [FCC] agents, employees and volunteers witnessed or heard about [Coe's] grooming or other misconduct at any time leading up to the assault/rape." Brief, 14. This is simply not true. For example, see Paragraphs 237-240, 250-262, 272-283, 286-293, 297-303 of the Second Amended Complaint. (C1651-61). James and FCC also argue that "[t]he record shows that plaintiffs had access to a DCFS report concerning Jane and statements made by Pastor James, as well as materials obtained through discovery from Kane County State's Attorney Office's criminal file for Coe pursuant to protective orders." Brief, 13-14. Despite not being true or accurate, the fact that Plaintiffs were forced to file a Motion for Prevention of Abuse in Discovery at the recommendation of the Circuit Court speaks volumes in this regard. As argued by Plaintiffs in that Motion, and just as in *Marshall*, many of the facts regarding who saw what, when and where are within the knowledge of James and FCC. (C1044-61; C1379-90). Defendants circled the wagons and Plaintiffs' counsel was not permitted to speak with witnesses who were not protected (C1044-61; C1379-90; R19) but the Circuit Court found the Motion to be "moot" or "premature" after granting the §2-615 motion to dismiss. (R189-190). Illinois law does not require the Plaintiffs to set out their evidence or plead the evidentiary facts that Plaintiffs will use to prove James and FCC's knowledge for this very reason. *Marshall*, 161 Ill. App. 3d at 501.

[3] Paragraph 243 was stricken by the Circuit Court as immaterial and upheld by the Second District.

Besides meeting the "knowledge" threshold pleading requirements, Plaintiffs' allegations pertaining to what James and FCC "knew or should have known" are indeed supported with specific allegations showing examples of what James and FCC actually *knew*. (C1686-87). Moreover, given (i) the discussions, the witnessing, and the reporting (C1658-61), and (ii) the training, policies and procedures in place (C1629-37), James and FCC, at the very least, *should have known* what Inappropriate behavior looks like and *should have known* that such grooming and Inappropriate behavior was an indicator of child molestation. The Second District held that the foregoing allegations "failed for lack of specificity as to what conduct was actually witnessed" and deemed "Inappropriate" conduct to be an improper conclusion of fact unsupported by specific allegations. Opinion, ¶79. But Plaintiffs' allegations, construed in a light most favorable, sufficiently support what conduct was witnessed, reported, or discussed. *See Doner*, 381 Ill. at 115; *see also Beretta U.S.A. Corp.*, 213 Ill. 2d 351; *Marshall v. David's Food Store*, 161 Ill. App. 3d 499; *Marshall v. Burger King Corp.*, 222 Ill. 2d 422 (Ill. Sup. Ct. 2006).

Finally, as to the factual allegations, the Second District erroneously reasoned that "none of the incidents is sinister on its face, noting that Coe and Jane "were not alone together in just any darkened room, but an audio-visual booth where low light or darkness could not have been unusual during, say, a production." Opinion, ¶84. The Second District noted that "Jane's posture inside Coe's office suggests at most a sense of ease or familiarity" may have violated the SCP but do not "suggest that Coe took an improper interest in Jane or other underage female members of the youth group." *Id.* Such innocent construction of allegations was explicitly rejected by the Second District Court in *Platson*. 322 Ill. App. 3d at 142-145. And such innocent construction must be rejected here.

Plaintiffs allege that a mandatory reporter, who volunteered at FCC's June 2013 VBS program, recognized the interaction between Coe and Jane as Inappropriate or dangerous after just two days of seeing Coe with Jane Doe; and that mandatory reporter contacted only James, who himself, did nothing (C1660-61). Thus, prior to the rape, an FCC mandatory reporter saw Inappropriate conduct between Coe and Jane Doe and decided to tell James but not DCFS. *Id*. At no point after the volunteer reported the Inappropriate conduct to James did James fulfill his own mandatory reporting obligation by reporting Coe to DCFS, removing Coe as Director of Youth Ministries, or otherwise restricting Coe's access to minors. (C1661; C797). Construing Plaintiffs' facts as 'innocent acts' in favor of James and FCC does not follow the well-settled law that facts are to be construed in the light most favorable to the non-movant, much less promote the protection of children. *See McLean County*, 2012 IL 11247; *see also Marshall v. Burger King Corp.*, 222 Ill. 2d 422. This is why such acts are illegal and presumably why FCC's SCP prohibit such Inappropriate conduct between adults and minors. Preventing the grooming that led to Coe's rape of Jane Doe is precisely why Illinois enacted ANCRA. Had the SCP been followed or periodic background searches conducted, James and FCC *should have known* of Coe's unfitness. Beyond this, the Second Amended Complaint supports a pattern of behavior by James and FCC to ignore Inappropriate conduct or engage in utter nonfeasance when faced with Inappropriate conduct, molestation, and rape of Jane Doe. (C1650-64; C797-98). And, given the post-rape facts, it is difficult to imagine a set of facts that would have led to Coe's termination before the rape.

Thus, the Second District's upholding of the dismissal of negligent retention against James and FCC must be reversed in light of Illinois law governing knowledge requirements

and all the allegations within the Second Amended Complaint. Opinion, ¶87. *See Beretta U.S.A. Corp.*, 213 Ill. 2d 351. As with negligent supervision, because Plaintiffs sufficiently alleged negligent retention against James and FCC, the willful and wanton counts alleged against James and FCC, to the extent those counts arise out of the negligent retention count, must also be reinstated by this Court. *See McLean County*, 2012 IL 112479 at ¶19.

V. CROSS RELIEF REQUESTED: The Second District Erred in Upholding the Striking of Allegations from the First Amended Complaint as Immaterial

Plaintiffs' Motion to Reconsider Defendants James and FCC's Motion to Strike challenged the striking of all allegations. (C1459-60). The Second District found that, even if the Circuit Court denied the motion to strike, it "would still have considered the allegations irrelevant to whether the complaint stated a cause of action for willful and wanton conduct." Opinion, ¶58. While Plaintiffs are concerned only with properly pleading causes of action at this stage of the litigation, Plaintiffs also are cognizant of the fact that they will need to plead and prove facts that warrant the imposition of punitive damages for Defendants' willful and wanton conduct. Accordingly, Plaintiffs seek reversal of the blanket striking of allegations in the Amended Complaint, including the post-rape allegations, to the extent this Court determines that those allegations may be material to the Plaintiffs' causes of action against James and FCC. The Second District noted that "the parties seem to have forgotten the breadth of the motion and rely on some allegations as if they were not stricken." Opinion, ¶56. Based upon the Second District's analysis, the stricken paragraphs would be: ¶¶1-3, 23-35, 48-54, 74-83, 168-203, 208-224, 304-345, and, 243. James and FCC claimed that ¶243, directed at James (C787-89), contained "duplicative and cumulative allegations" (C842); but they did not challenge ¶265, which contained allegations regarding what FCC "knew or should have known." (C791-92).The

Second District later cited stricken ¶243 in its analysis of the Plaintiffs' negligent retention cause of action to find no cause of action existed, further calling into question what actually was deemed stricken by the Circuit Court. Opinion, ¶80.

Because it is for the jury to determine whether the misconduct amounted to simple negligence or rose a matter of degrees to the level of willful and wanton misconduct, Plaintiffs argue that the post-rape facts are exactly the "degree" facts that support their intentional tort claims, for they demonstrate James and FCC's understanding, or lack thereof, of the training, policies and procedures in place to prevent the Inappropriate behavior that Coe was allowed to engage in. (C1661-64). *Doe v. Catholic Bishop of Chicago*, 2017 IL App (1st) 162388 at ¶12,13.

The Second District interpreted post-rape facts to portray FCC and James "as mistaken that [FCC] had a safety policy in force, as hesitant to accept Jane's accusations against Coe and, as unwilling to immediately remove Coe from contact with youth." Opinion, ¶58. The Second District further found that "[t]he alleged actions of [FCC and James] following Jane's accusations and Coe's arrest are simply *neutral* on the question of whether those parties acted culpably prior to the alleged rape." *Id*. [emphasis added]. Plaintiffs disagree with the Second District's innocent construction of the post-rape allegations. First, Plaintiffs' allegations cannot be "neutral" because Illinois law requires the allegations to be construed in a light most favorable to the Plaintiffs at the §2-615 stage. *See Marshall v. Burger King Corp.*, 222 Ill. 2d 422 (Ill. Sup. Ct. 2006). Second, as noted above, ANCRA requires that all reporters with "reasonable cause to believe a child ... may be an abused child" shall immediately report or cause a report to be made to the DCFS. 325 ILCS 5/4. The Second District's innocent construction of the post-rape allegations

appears to grant James and FCC discretion in complying with their mandatory reporter obligations under ANCRA regarding the "accusations against Coe." Opinion, ¶58. The post-rape allegations help establish that James and FCC were either: (i) already aware of Coe's Inappropriate conduct with Jane Doe and had decided not to take action, i.e., turned a blind eye; or (ii) so completely and utterly unqualified or unprepared to recognize and appropriately respond to reports of Inappropriate conduct with a minor. In either case, these post-rape facts may be material to whether James and FCC were sufficiently trained to recognize and respond to reports of Coe's particular unfitness, much less capable of supervising and determining whether to retain Coe. These facts not only support a pattern of behavior by James and FCC to willfully ignore Inappropriate conduct but also help demonstrate an ongoing conscious disregard for Jane Doe's welfare, which is a requirement for alleging willful and wanton conduct. *See McLean County*, 2012 IL 112479 at ¶19.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully ask this Court to reverse the Circuit Court's grant of James and FCC's joint §2-615 Motion to Dismiss and Motion to Strike, and remand this case to the Circuit Court for further proceedings.

Dated: December 5, 2018

Respectfully submitted,

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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 50 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2018 I caused true and correct copies of the foregoing *Plaintiffs-Appellees' Additional Brief Cross-Relief Requested* to be filed and served by electronic means with the Clerk's Office and served by the following methods upon:

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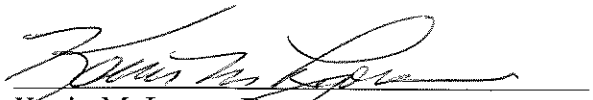
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.



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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

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TO: All Counsel of Record
See attached service list

PLEASE BE ADVISED that on this 5th day of December, 2018, we caused to be electronically filed with the Clerk of the Illinois Supreme Court, the attached Additional Brief of Plaintiffs-Appellees Cross-Relief Requested, copies of which, along with this notice of filing with affidavit of service, are herewith served upon all attorneys of record.

Respectfully submitted,

By: _____
One of the Attorneys for Plaintiffs-Appellees in 123521

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STATE OF ILLINOIS)
) SS
COUNTY OF DUPAGE)

AFFIDAVIT OF SERVICE

I hereby certify that I served this notice via electronic mail to the attorneys listed on the attached Service List at their email address on December 5, 2018.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

_____
Kevin M. Lyons
One of the Attorneys for Plaintiffs-Appellees in 123521

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12/5/2018 12:00 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

SUPREME COURT CASE No. 123521

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