

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

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S.F.,

Plaintiff,

COMPLAINT

-against-

DIOCESE OF BUFFALO; MOST REV. RICHARD J. MALONE, Index No. _____
as Bishop and Corporate Sole of the DIOCESE OF BUFFALO, and
ST. ANNE'S CATHOLIC CHURCH a/k/a ST. ANNE'S PARISH,

Defendants.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Plaintiff, S.F., by and through undersigned counsel, respectfully shows to this Court and alleges as follows:

Introduction

This is a revival action brought pursuant to the New York Child Victims Act, CPLR § 214-g. The Plaintiff, when he was a minor, was sexually assaulted by Fr. Roy Herberger, a Priest of the Diocese of Buffalo, when he was approximately 8 years old.

Parties, Jurisdiction and Venue

1. Plaintiff, S.F., is a citizen and resident of the State of New York. Plaintiff brings this Complaint using his initials because of the sensitive nature of the allegations of child sexual abuse in the Complaint, which is a matter of the utmost intimacy. Plaintiff fears embarrassment and further psychological damage if his identity as a victim of child sexual abuse were to become publicly known. His identity will be made known to Defendant, at the latest, upon service of the Summons and Complaint.

2. Defendant, Diocese of Buffalo, and Most Rev. Richard J. Malone, as Bishop and Corporate Sole of the Diocese of Buffalo (hereafter, the “Diocese” or the “Diocese of Buffalo”), is a religious institution and organization with principal offices located at 795 Main St., Buffalo, NY, 14203. The Diocese of Buffalo controls all Catholic religious, pastoral and educational functions in the counties of Erie, Niagara, Genesee, Orleans, Chautauqua, Wyoming, Cattaraugus, and Allegany, New York. The Diocese operates and controls approximately 166 parishes and 67 schools. The Diocese is a citizen and resident of the State of New York. Defendant Diocese controls all Catholic parishes and schools within its jurisdiction, including St. Anne’s parish where the sexual abuse occurred.

3. Defendant, St. Anne’s Parish is a Catholic parish and church located in Buffalo, New York (hereafter, “St. Anne’s Parish” or the “Church”). At all relevant times, St. Anne’s Parish was owned, controlled and operated by the Diocese of Buffalo.

4. Personal jurisdiction lies over Defendant Diocese as it is present and domiciled in the State of New York.

5. Venue of this action lies in Erie County as a substantial part of the events or omissions giving rise to the claim occurred in Erie County and the Defendant resides in Erie County.

Facts of Sexual Abuse

6. Plaintiff was sexually assaulted by Fr. Roy Herberger beginning in approximately 1985 when Plaintiff was approximately 8 years old.

7. Fr. Herberger is a Catholic priest employed by the Diocese of Buffalo. Fr. Herberger was a close friend of Plaintiff’s father who introduced Herberger to Plaintiff. Plaintiff attended Sunday school at St. Anne’s parish during the period of time the abuse occurred.

8. Fr. Herberger sexually assaulted Plaintiff on multiple occasions over an approximate three year period. The acts of sexual assault included sodomy and oral sex. The acts of sexual abuse took place in Fr. Herberger's home as well as inside St. Anne's parish in Buffalo, NY.

9. At all relevant times, the Diocese knew or in the exercise of reasonable care should have known that Fr. Herberger had a propensity for the conduct which caused injury to Plaintiff, in particular, that he had a propensity to engage in the sexual abuse of children.

10. At all relevant times, it was reasonably foreseeable to the Diocese that Fr. Herberger would commit acts of child sexual abuse or assault on a child.

11. At all relevant times, the Diocese knew or should have known that Fr. Herberger was unfit, dangerous, and a threat to the health, safety and welfare of the minors entrusted to his counsel, care and/or protection.

12. With such actual or constructive knowledge, the Diocese provided Fr. Herberger unfettered access to Plaintiff and gave him the opportunity to commit foreseeable acts of child sexual abuse or assault. Fr. Herberger continues in active ministry for the Diocese of Buffalo.

Diocese's Concealment of Acts of Sexual Abuse by Priests

13. The Bishop of the Diocese at all relevant times knew that Priests within the Diocese, under his supervision and control, were grooming and sexually molesting children with whom the Priests would have contact in their ministry and pastoral functions. At all relevant times, the Bishop knew that this was a widespread, ubiquitous and systemic problem in the Diocese, involving many Priests and numerous victims.

14. In or about November 2018, the Diocese released a list of 132 of its clergy, acknowledging what it deemed credible allegations of child sexual abuse that had been made

against the listed clergymen. These clergymen are acknowledged to have abused children within the Diocese over decades.

15. Despite receiving credible allegations of child sexual abuse against clergy, the Diocese acted to conceal these allegations in an effort to avoid scandal and accountability.

16. This concealment was in accordance with a policy of the Diocese, as agent, and the Holy See, as principal. In 1922, the Holy See released a confidential document to its Bishops and other officials of Catholic organizations regarding the handling of cases of solicitation of sex in the confessional. This document mandated a specific procedure for Holy See's agents, including the Bishop of the Diocese, to use when a cleric abused children using the confessional. This document required strict secrecy. The 1922 document showed that the Holy See and its agents were fully aware that there was a systemic problem of clergy sexually molesting children using the confessional.

17. In 1962, the Holy See released the confidential document, *Instruction on The Manner of Proceeding in Cases of Solicitation* (The Vatican Press, 1962) (hereinafter referred to as "*Crimen Sollicitationis*"). The heading of the document states, "From the Supreme and Holy Congregation of the Holy Office To All Patriarchs, Archbishops, Bishops and Other Diocesan Ordinaries 'Even of the Oriental Rite,'" and contains specific instructions regarding the handling of child sex abuse by clergy. According to the document itself, it is an "instruction, ordering upon those to whom it pertains to keep and observe it in the minutest detail." *Crimen Sollicitationis* at paragraph 24.

18. The 1962 document reinforced that the Holy See and its agents to whom the documents was directed had knowledge that there was a systemic problem of Catholic clergy sexually molesting children using the confessional.

19. At the same time, the Holy See was involved in the formation of secret facilities in the United States where sexually offending clergy would be sent for short periods of time. In 1962-63, Fr. Gerald Fitzgerald reported to the Pope on the problem of abuse of children by clergy and expressed concerns if these priests were returned to active duty.

20. Fr. Fitzgerald's reports were kept secret under the Holy See's standing policy to avoid scandal at all costs. It's recommendation was ignored, however, and instead the Holy See made a choice to return known offending priests to active duty. At this point, it is clear that the Holy See and its agents, including the Diocese, knew they had a widespread problem of clergy sexually molesting minors, and they participated in the creation and the operation of facilities in the United States where sexually offending clergy could be sent before they were moved to another parish to work and potentially abuse again.

21. The Holy See's policy of secrecy under penalty of immediate removal from the organization (excommunication) for all involved in an accusation of child sexual abuse created a shroud of secrecy insulating Priests from consequence. Through this policy and others, the Holy See and its agents, including the Diocese, knowingly allowed, permitted and encouraged child sex abuse by the Diocese's Priests.

22. The Holy See mandates secrecy for all those involved, including agents and itself, in handling allegations of sexual abuse. Penalties for child sexual abuse include an order to move offending priests to other locations once they have been determined to be "delinquent." In response to allegations, the document mandates that supplementary penalties include: "As often as, in the prudent judgment of the Ordinary, it seems necessary for the amendment of the delinquent, for the removal of the near occasion [of soliciting in the future], or for the prevention of scandal or reparation for it, there should be added a prescription for a prohibition of remaining

in a certain place.” *Crimen Sollicitations* at paragraph 64. Under this policy of secrecy and transfers or reassignments, all involved are threatened with excommunication and, thus, damnation, if they do not comply.

23. The policy of secrecy and the severest of penalties for its violation were reiterated in documents issued by officials of the Holy See for the benefit of its agents, including the Bishop of the Diocese, in 1988 and 2001.

24. The policies and practices of the Diocese designed to conceal sexual abuse by clergy and protect it from scandal and liability included the following:

- (a) transfer and reassignment of clergy known or suspected to abuse minors to deflect attention from reports or allegations of child sexual abuse;
- (b) concealing from parishioners and even other clergy that a priest reassigned to their parish posed a danger of sexual abuse to children;
- (c) failing to alert parishioners from the Priest’s prior assignments that their children were exposed to a known or suspected child molester;
- (d) failing to report sexual abuse to criminal authorities; and
- (e) otherwise protecting and fostering the interests of abusive clergy to the detriment of the victims and the community, for the purpose of avoiding scandal and public scrutiny.

25. Indeed, the policy of secrecy and lack of consequences for the sexual abuse of children was perceived as a perquisite by clergy sex abusers. The Holy See and Diocese believed it to be perceived as a perquisite, which it condoned and used to its advantage in controlling Priests.

26. Plaintiff was in a zone of foreseeable harm as a child engaged in Catholic activities in close proximity to or with Catholic clergy.

27. The Diocese was in the best position to protect against the risk of harm as it knew of the systemic problem and foreseeable proclivities of its Priests to sexually abuse children.

28. At all relevant times, while the Diocese had special and unique knowledge of the risk of child sexual abuse by its Priests, such Priests who would prey on children were outside the reasonable contemplation of the Catholic community and families who trusted Priests to have access to their children.

29. Plaintiff and his parents had no opportunity to protect Plaintiff against a danger that was solely within the knowledge of the Diocese.

30. Upon information and belief, after Plaintiff was abused, the Diocese engaged in a plan and scheme pursuant to the Holy See's secrecy policies and practices to avoid discovery of Fr. Herberger's child sexual abuse and the Diocese's wrongful conduct which facilitated the sexual abuse of young children.

Nature of Conduct Alleged

31. This action alleges physical, psychological and emotional injuries suffered as a result of conduct which would constitute a sexual offense on a minor as defined in Article 130 of the New York Penal Law, including without limitation, conduct constituting rape (consisting of sexual intercourse) (N.Y. Penal Law §§ 130.25 – 130.35); criminal sexual act (consisting of oral or anal sexual conduct) (N.Y. Penal Law §§ 130.40 – 130.53), and/or sexual abuse (consisting of sexual contact) (N.Y. Penal Law §§ 130.55 – 130.77).

32. The limitation of liability set forth in CPLR Art. 16 is not applicable to the claim of personal injury alleged herein, by reason of one or more of the exemptions provided in CPLR § 1602, including without limitation, that Defendant acted with reckless disregard for the safety of

others, including Plaintiff, or knowingly or intentionally, in concert with Fr. Herberger, to retain Fr. Herberger in ministry with unfettered access to children.

COUNT I
NEGLIGENCE
(against Diocese)

33. Plaintiff repeats and realleges Paragraphs 1 through 32 above.

34. At all material times the Diocese, as principal, and St. Ann's parish, as agent, were in an agency relationship, such that the parish acted on the Diocese's behalf, in accordance with the Diocese's instructions and directions on all matters, including those relating to clergy personnel. The acts and omissions of the parish were subject to the Diocese's plenary control, and the parish consented to act subject to the Diocese's control.

35. At all material times, the Diocese and Plaintiff were in a special relationship of church – parishoner, in which the Diocese owed Plaintiff a duty of reasonable care.

36. At all material times, the Diocese and Fr. Herberger were in a special relationship of employer – employee, in which the Diocese owed a duty to control the acts and conduct of Fr. Herberger to prevent foreseeable harm.

37. The Diocese owed a duty to Plaintiff to use reasonable care to protect the safety, care, well-being and health of the Plaintiff while he was under the care, custody or in the presence of the Diocese. The Diocese's duties encompassed the retention and supervision of Fr. Herberger and otherwise providing a safe environment for Plaintiff.

38. The Diocese breached these duties by failing to protect the minor S.F. from sexual assault and lewd and lascivious acts committed by an agent and employee of the Diocese.

39. At all relevant times, the Diocese created an environment which fostered child sexual abuse against children it had a duty to protect, including Plaintiff.

40. At all relevant times, the Diocese had inadequate policies and procedures to protect children it was entrusted to care for and protect, including Plaintiff.

41. As a direct and proximate result of the Diocese's negligence, Plaintiff has suffered and continues to suffer severe and permanent psychological, emotional and physical injuries, shame, humiliation and the inability to lead a normal life.

42. The Diocese's acts and conduct shows a reckless or willful disregard for the safety and well-being of S.F.

WHEREFORE, Plaintiff demands judgment against the Diocese for compensatory damages, punitive damages, costs and such other and further relief as this Court deems proper.

COUNT II
NEGLIGENCE

(against St. Anne's Parish)

43. Plaintiff repeats and realleges Paragraphs 1 through 32 above.

44. At all material times, St. Anne's Parish and Plaintiff were in a special relationship of church – parishioner, in which St. Anne's Parish owed Plaintiff a duty of reasonable care.

45. At all material times, St. Anne's Parish and Fr. Herberger were in a special relationship of employer – employee, in which St. Anne's Parish owed a duty to control the acts and conduct of Fr. Herberger to prevent foreseeable harm.

46. The Church owed a duty to Plaintiff to use reasonable care to protect the safety, care, well-being and health of the Plaintiff while he was under the care, custody or in the presence of St. Anne's Parish. The Church's duties encompassed the retention and supervision of Fr. Herberger and otherwise providing a safe environment for Plaintiff.

47. St. Anne's Parish breached these duties by failing to protect the minor S.F. from

sexual assault and lewd and lascivious acts committed by an agent and employee of the Church.

48. At all relevant times, the Church created an environment which fostered child sexual abuse against children it had a duty to protect, including Plaintiff.

49. At all relevant times, the Church had inadequate policies and procedures to protect children it was entrusted to care for and protect, including Plaintiff.

50. As a direct and proximate result of St. Anne's Parish's negligence, Plaintiff has suffered and continues to suffer severe and permanent psychological, emotional and physical injuries, shame, humiliation and the inability to lead a normal life.

51. The Church's acts and conduct shows a reckless or willful disregard for the safety and well-being of S.F.

WHEREFORE, Plaintiff demands judgment against the Church for compensatory damages, punitive damages, costs and such other and further relief as this Court deems proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial in this action.

Dated: New York, New York
August 14, 2019

Respectfully submitted,

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