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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Evangelical Lutheran Church in America, Eastern North Dakota Synod of the Evangelical Lutheran Church in America, Norman Evangelical Lutheran Congregation of Kindred, Pastor Aanen Gjovik, Eric Berg and Jen Swenson, Petitioners, -vs- The Honorable Frank L. Racek, Judge of the District Court, East Central Judicial District, Raymond Grabanski and Joan Grabanski, Respondents.	Supreme Court No. 20160154 Cass Co. Civil No. 09-2015-CV-03149

BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

[¶1] Under N.D.Const. art. VI, §2 and N.D.C.C. §27-02-04, this court may invoke supervisory authority to examine a trial court decision. State, ex rel. Harris v. Lee, 2010 ND 88, ¶6, 782 N.W.2d 626.

STATEMENT OF THE ISSUES

[¶2] The issues as determined by Respondents, Ray and Joan Grabanski, are as follows:

[¶3] I. Whether the First Amendment provides an absolute shield to religious institutions from liability when they use tortuous or criminal means to resolve disputes.

[¶4] II. Whether the Trial Court abused its discretion by denying the Petitioners' Motion to Dismiss.

[¶5] III. Whether the Request for Supervisory Writ should be denied.

STATEMENT OF THE CASE

[¶6] This is a Petition for Supervisory Writ from the Trial Court's Order Denying Defendants' Motion to Dismiss, Granting Plaintiffs' Motion to Amend Complaint and Lifting Discovery Stay dated April 14, 2016. App. p. 247.

STATEMENT OF FACTS

[¶7] Respondents, Raymond and Joan Grabanski, (collectively "Grabanskis"), commenced an action alleging four claims and specifically (1) slander/defamation; (2) respondeat superior; (3) negligent supervision; and (4) intentional infliction of emotional distress on or about November 18, 2015 against Evangelical Lutheran Church in America and Eastern North Dakota Synod of the Evangelical Lutheran Church in America, (collectively "Synod") and Norman Evangelical Lutheran Congregation of Kindred, Pastor Aanen Gjovik, Eric Berg and Jen Swenson, (collectively "Norman Lutheran"). App. p. 007.

[¶8] No internal disciplinary process was commenced by Norman Lutheran against Grabanskis to remove them from the church. App. p 240, ll. 1-7; p 241, ll. 19-25; p. 242, ll. 1-3.

[¶9] On or about December 8, 2015, Norman Lutheran moved to dismiss Grabanskis' Complaint. App. p. 021. The Synod joined in the Motion on or about December 22, 2015. App. p. 043.

[¶10] Amongst Grabanskis' claims are the following:

* They were described as a "cancer upon the church," and as "troublemakers." App. p. 010, ¶18 and ¶19.

* They were subjected to and exposed to continuous and ongoing public ridicule, scorn, intimidation, isolation, and demeaning treatment, resulting in lost business to Grabanskis. App. p. 009, ¶13.

* Joan Grabanski was forced to resign her position as a Sunday school teacher, even though she has never brought the issue of homosexuality into any of her classes. App. p. 009, ¶14.

* Grabanskis were threatened that if they did not leave Norman Lutheran Church they will be forced to do so. App. p. 010, ¶15.

* Norman Lutheran removed posts by Grabanskis on the public church bulletin consisting of several theological articles, statements, and Bible excerpts relating to homosexuality and clergy in same-sex relationships, for the stated reason that this post was not approved by the church council, even though approval by the church council has never been required for church posts in the past. App. p. 010, ¶16; p. 146, ¶14.

* Grabanskis were described as "too conservative" for the church. App. p. 149, ¶25. During oral arguments it was argued that labeling in the midst of current harsh and heated political climate can result in damaging consequences. App. p. 234, ll. 18-20.

* Grabanskis and their children were barred from church property and church activities. App. p. 148, ¶23.

* Norman Lutheran involved the media in affairs of Grabanskis and a church meeting. App. p.148, ¶22.

* Norman Lutheran disseminated Grabanskis private emails to the entire congregation. App. p. 147, ¶14.

[¶11] On or about December 30, 2015, Norman Lutheran moved for protective relief prohibiting discovery pending the outcome of the Motion to Dismiss. App. p. 049. Protective relief was granted on March 11, 2016. App. p.198.

[¶12] On or about February 23, 2016 Grabanskis moved to amend their Complaint. App. p. 131. Grabanskis sought to add a count for Breach of Contract and a count for Libel/Defamation. App. p. 131, ¶¶ 2 and 3.

[¶13] Grabanskis also sought as part of their Motion to Amend Complaint seek to add the following factual statements:

a. Norman Lutheran and Synod have waived any actual or implied qualified immunity for the actions of its clergy and church leadership by involving the media and by the Synod's Bishop engaging the media. App. p. 131, ¶5.

b. On or about December 2, 2015, Norman Lutheran barred Grabanskis and Grabanskis' children from church property and church activities. App. p. 131, ¶6.

c. Adding the following clarifying language to Paragraph 16 of the Complaint: "contrary to the stated policy up to that time which was that any member could post anything on the church bulletin with no approval required." App. p. 132, ¶14.

d. Adding the following clarifying language to Paragraph 24 of the Complaint as follows: "even though the Grabanskis remain voting members of the church and as such are entitled to vote at the meetings and participate in the activities of the church." App. p. 131-132, ¶6.

[¶14] Oral argument was heard on April 11, 2016 on Norman Lutheran's and Synod's Motion to Dismiss and Grabanskis' Motion to Amend Complaint. App. p. 221-245.

[¶15] An Order was entered on April 14, 2016 denying the Motion to Dismiss and granting the Motion to Amend Complaint and lifting the discovery stay. App. p. 247.

STATEMENT OF STANDARD OF REVIEW

[¶16] This Court exercises its authority to issue supervisory writs "rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists". State ex rel. Harris v. Lee, 2010 ND at ¶6. As this Court has stated, "[o]ur authority to issue a supervisory writ is "'purely discretionary"' . . . and we determine whether to exercise supervisory jurisdiction on a case-by-case basis, considering the unique circumstances of each case. . . " Id. (Citations Omitted). The Trial Court weighed Norman Lutheran's and Synod's Rule 12(b) motion to dismiss on whether it appeared beyond doubt that Grabanskis could not prove no set of facts to support their claims. See Livingood v. Meece, 477 N.W.2d 183, 188 (N.D. 1991) (Citation Omitted). The Trial Court was required to review Grabanskis' contentions in a light most favorable to Grabanskis and taken as true; which it did. Id. By its ruling the Trial Court concluded that Norman Lutheran and the Synod could not establish a

"certainty of impossibility" of Grabanskis proving a claim upon which relief can be granted. See Williams v. State, 405 N.W.2d 615 (N.D. 1987).

LAW AND ARGUMENT

I. The First Amendment does not provide an absolute shield to religious institutions when they use tortuous or criminal means to resolve disputes.

[¶17] The Petition for Supervisory Writ does little but rehash the same cases and arguments that were briefed, argued, and thoroughly considered by the Trial Court. As they did before the Trial Court, Norman Lutheran and Synod continue to characterize this dispute as a purely theological controversy within the Norman Lutheran Church. But as the facts clearly demonstrate, Norman Lutheran and Synod have taken the dispute far outside the church. They have allowed television media to be present and participate at a church meeting. App. p. 148, ¶22. They have repeatedly contacted local law enforcement including the Cass County Sheriff even though there was no threat of a breach of the peace, and they have communicated with other persons outside the church about this dispute. App. p. 148, ¶23. Norman Lutheran barred Grabanskis from entering the church property even though the church constitution clearly says this may be done only when church discipline is invoked, despite the fact that the church has commenced no disciplinary action against Grabanskis. App. p. 148, ¶23. Grabanskis believe discovery will disclose that Norman Lutheran and Synod have extended this dispute outside the church in many other ways.

[¶18] By way of illustration, if two co-pastors of a church argued over an issue such as the effect of baptism, that would be a theological dispute that, because of the First Amendment, is outside the jurisdiction of the civil courts. But if one co-pastor tried to resolve the dispute by shooting the other co-pastor, the civil courts clearly would have jurisdiction over such a case,

even if the shooting took place inside the church sanctuary and was motivated by religious beliefs.

[¶19] Likewise, if, as in this case, Norman Lutheran and Synod have attempted to resolve this dispute by involving outside authorities, breaking their own rules, and conducting a campaign of defamation against Grabanskis, those actions clearly place this case within the Trial Court's jurisdiction. Grabanskis make clear allegations, supported by facts and claims on the record, to establish that Norman Lutheran and Synod had engaged in this kind of conduct. The Trial Court concluded that Grabanskis had alleged a set of facts which, if proven, would establish a cause of action that would be within the court's jurisdiction. The Trial Court did not abuse its discretion in making this finding.

[¶20] The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment, and it contains two clauses concerning religion: The Clause Establishment Clause and The Free Exercise. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). However, the Supreme Court has explained that the Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell, at 303-04.

[¶21] Historically, the Supreme Court has made rulings pertaining to the Free Exercise Clause in a way that distinguishes between how people conceptualize their religious beliefs, and how their actions, based on those beliefs, impact those around them. "Although the freedom to hold religious beliefs is absolute, the freedom to act, even if the action is in accord with religious convictions, is not totally free from legislative restrictions." State v. Rivinius, 328 N.W.2d 220,

223 (ND 1982) (referencing Sherbert v. Verner, 374 U.S. 398 (1963)). See also: Kendroff v. St. Nicholas Cathedral of Russian Orthodox Church of North America, 344 U.S. 94, 109 (1952). ("Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense.")

[¶22] One of the cases Norman Lutheran and Synod cite is C.L. Westbrook, Jr. v. Penley, 231 S.W.3d, 394 (Tex. 2007), stating that "Government action may burden the free exercise of religion in two quite different ways: by interfering with an individual's observance or practice of a particular faith, and by encroaching on the church's ability to manage its internal affairs." Westbrook itself cites Tilton v. Marshall, which states

> "the free exercise of religion does not go so far as to be inclusive of actions which are in violation of social duties or subversive of good order. Although freedom to believe may be said to be absolute, freedom of conduct is not and conduct even under religious guise remains subject to regulation for the protection of society."

925 S.W.2d 672, 677 (1996).

[¶23] This case neither involves internal affairs, no disciplinary action has been initiated, nor does it relate to specific religious beliefs.

[¶24] Grabanskis distinguish the line of church autonomy cases offered by Norman Lutheran and Synod. App. 098-101, ¶¶29-39.

[¶25] One of the cases relied upon by Grabanskis is Guinn v. Church of Christ of Collinsville, Oklahoma, 775 P.2d 766 (1989). The Elders confronted Ms. Guinn, a member of their church, about a sexual relationship which the church considered immoral. After Ms. Guinn refused to terminate the relationship, the Elders advised her that they intended to announce to the congregation that her membership in the church was being withdrawn because of her sexual sin. The Elders did so, and Ms. Guinn sued them and the church, claiming the torts of outrage and invasion of privacy. The court upheld her claim and awarded her damages, and the Supreme

Court of Oklahoma approved. The Oklahoma Supreme Court ruled that "[b]ecause the controversy in the instant case is concerned with the allegedly tortuous nature of religiously-motivated acts and not with their orthodoxy *vis-a-vis* established church doctrine, the justification for judicial abstention is nonexistent and the theory does not apply." Guinn, at 773. App. 15.[1]

[¶26] Norman Lutheran and Synod rely upon Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession of Worthington, No. A14-0605, 2016 WL 1358029 (Minn. Apr. 6, 2016). The decision is based on a different set of facts. In Pfeil, all of the statements which the Pfeils claimed to be defamatory were made in the course of church disciplinary proceedings, which consisted of a letter signed by the church pastors addressed the Pfeils, a "special voters' meeting" at which the pastor described certain statements and actions of the Pfeils which he considered to be contrary to Christian teaching, and an appellate hearing before the Synod in which the pastor claimed that the Pfeils had falsely accused him of stealing from the church. There is no indication that any of these statements had been communicated outside the church and the Synod. By contrast, Norman Lutheran officials communicated their allegations about the Grabanskis to many persons outside the church, including a local television station that was allowed to televise its meeting and a reporter who was allowed to ask questions at the meeting, and law enforcement who was contacted presumably to intimidate and defame the Grabanskis rather than because there was any genuine concern for public safety. Furthermore, in Pfeil all of the statements and actions were (in the opinion of the Court majority)

[1] When the Collinsville Church of Christ elders told Guinn that under the church rules they were required to announce her sin and discipline from the church pulpit, Guinn responded by saying she was withdrawing from membership in the church. The elders respond that under the church rules which Guinn understood and agreed to when she joined the church, she could not unilaterally withdraw her church membership; rather, the church had to withdraw from her by revoking her membership. The court held that that rule constituted an invalid or unconscionable contract, and therefore the court treated the church's announcement of Guinn's sin as invading the

inseparable from church doctrine; in this case repeated statements by the church pastor such as that the Plaintiffs are a "cancer upon the church" are separable from church doctrine and can be considered defamation under neutral principles of law.

[¶27] Pfeil does not stand for the proposition that the First Amendment gives religious institutions an absolute shield against civil actions. As the Minnesota Supreme Court stated:

> But the autonomy granted to religious institutions by the First Amendment is not boundless. The U.S. Supreme Court has repeatedly emphasized that certain situations allow courts to use "neutral principles of law" to resolve controversies involving religious institutions and their parishioners. (p. 8)
>
> All of the statements on which the Pfeils base their claims occurred during church disciplinary proceedings, and *Mains* prohibits civil courts from inquiring into any statements made during the course of a church disciplinary proceeding. (pp. 13-14)
>
> [In *Connor v. Archdiocese of Philadelphia,* 975 A.2d 1084 (Pa. 2009)] [t]he *Connor* court ruled that a student who was expelled from a religious school cold maintain an action for defamation based on statements made during the course of his expulsion. *Id.* at 1113. In reaching that ruling, the *Connor* court announced a broader rule to govern ecclesiastical abstention cases. According to *Connor,* a court confronted with an ecclesiastical abstention issue should evaluate each individual claim brought by the plaintiffs and determine whether it is "reasonably likely" that the plaintiffs could prove each element without intruding on the "sacred precincts." *Id.* (pp. 16-17)
>
> We would of course be troubled by any case in which statements were made with the intent of abusing the ecclesiastical abstention doctrine and avoiding liability, *particularly if the statements were disseminated to individuals outside of the religious organization.* (emphasis added) See, e.g., Kliebenstein v. Iowa Conference of United Methodist Church, 663 N.W.2d 404, 408 (Iowa 2003) (concluding that a statement made as part of a church disciplinary proceeding, but also disseminated outside the church and carrying at least some secular meaning, was not immune from liability). But those facts are not before us and we leave the resolution of such a case for another day. (p. 22)
>
> We hold that the First Amendment prohibits holding an individual or organization liable for statements made in the context of a religious disciplinary proceeding when those statements are disseminated only to members of the church congregation or the organization's membership or hierarchy. (p. 25)

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privacy of an outside person. Far from taking an "hands off" approach to church discipline, the court intervened by invalidating the church's long-established rules of discipline.

[¶28] The dissent in the Pfeil case is worthy of notice. It is acknowledged that "It is black-letter law that we may not decide controverted questions of religious faith," (D-1), but adds that "we may decide a case involving a religious organization when the dispute can be resolved using 'neutral principles of law.'" (D-2). They quote State v. Wenthe, 839 N.W.2d 83, 90 (Minn. 2014):

> No entanglement problem exists ... when civil courts use neutral principles of law -- rules or standards that have been developed and are applied without particular regard to religious institutions or doctrines -- to resolve disputes even though those disputes involve religious institutions or actors.

[¶29] They note that the recent U.S. Supreme Court case cited by the majority, Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. ___, 132 S.Ct. 694 (2012), was limited to the issue of anti-discrimination employment law as applied to ministerial employees, and they note that "the opinion of the court took care not to express a view on other types of suits, including tort claims that might be brought by an employee against a religious employer. Id. at ___, 132 S.Ct. at 710." (D-3)

[¶30] The dissent agrees that statements like those claiming the Pfeils have publicly engaged in "sinful behavior" would lead to entanglement because the court would have to determine what is "sinful behavior." But they add,

> But there are clear instances in which we can apply neutral principles of state defamation law to adjudicate defamation claims without excessive entanglement. Imagine a religious disciplinary proceeding in which a member has been charged with teaching false doctrine in the Sunday school. Plainly, we could not adjudicate any dispute regarding "false doctrine." But, assume that, in response, the member says, maliciously and without a shred of truth: "The charge that I'm harming the Sunday school is ironic, given that the minister regularly sexually assaults the kids in the class." As is true of many vicious accusations, inevitably such a defamatory statement would spread like wildfire through the religious organization and into the community, causing great injury. Applying the *Odenthal* framework, a district court could likely use neutral principles of state

> defamation law to adjudicate the minister's defamation claim without excessive entanglement. (D-5)

[¶31] The dissent further notes that "Absolute privilege is not lightly granted," citing Zutz v. Nelson, 788 N.w.2d 58, 62 (Minn. 2010), and notes further that "the court concedes that there is 'merit' to concerns about injustice to defamation victims." (D-6). The dissent argues that "A qualified privilege, rather than an absolute privilege, would strike a much better balance between a defamation victim's right to a remedy and a religious organization's right to discipline."

[¶32] In each of the cases cited above, and each of the cases cited by Noman Lutheran and Synod, the facts were different from the facts of this case. They involved matters of church discipline, matters of church employment, or matters handled entirely inside the church. The case at hand involves none of these; the evidence clearly shows that Norman Lutheran and Synod extended the controversy far beyond their local church or even their synod or denomination. Norman Lutheran and Synod themselves characterize their argument as that "the district court lacks jurisdiction to hear and decide a dispute which is purely theological in nature." But the evidence clearly shows that this dispute is not "purely" theological in nature; it involves Norman Lutheran's and Synod's efforts to isolate and ostracize Grabanskis by means that constitute tortuous conduct and breaches of their own rules.

[¶33] Norman Lutheran and Synod are in error when they say the Trial Court "gave no indication of considering the fundamental jurisdictional issue raised by Defendants." The issue was thoroughly briefed and argued by both sides and the Trial Court's interaction with counsel clearly demonstrated that the Trial Court fully understood the issue. The Trial Court carefully considered the arguments, the case law, the constitutional issues, and the allegations of both sides, and concluded that Grabanskis had alleged a set of facts which, if proven, could demonstrate that the case was not a "purely" theological dispute and involved conduct which was

outside the protection of the First Amendment, subject to adjudication according to neutral principles of law, and therefore within the Trial Court's jurisdiction. The Trial Court did not abuse its discretion in reaching this conclusion.

[¶34] Ironically, the Nebraska Supreme Court recently ruled in a case in which the roles were reversed from the case at hand. Bethel Lutheran Church of Holdrege, Nebraska, had twice voted to withdraw from the Evangelical Lutheran Church of America (ELCA), but a minority within the church wanted to keep their affiliation with ELCA and sued to preserve that affiliation and keep title to the church building. The trial court had dismissed for lack of jurisdiction, but in Aldrich v. Nelson, 290 Neb. 167, ___ N.W.2d ___ (2015), the Nebraska Supreme Court reversed and remanded the case for further proceedings. As the Court stated,

> Bethel is a nonprofit corporation organized under Nebraska law, and relevant statutes are applicable. And the issue presented by this litigation can be decided by examining state statutes and church governance and other relevant documents and using neutral principles of law.

[¶35] The irony is that the pro-ELCA faction in the case at hand argues that an absolute First Amendment shield protects the church, while the pro-ELCA faction Aldrich argued the opposite. Both Norman Lutheran and Synod are non-profits in North Dakota.

II. The Trial Court Judge did not Abuse his Discretion in Denying the Motion to Dismiss.

[¶36] The applicable standard of review if abuse of discretion. State v. Linghor, 2004 ND 224, ¶21, 690 NB.W.2d 201.

[¶37] "A court has subject matter jurisdiction over an action if the constitution and the laws authorize that court to hear the type of cases to which the particular action belongs." Reliable, Inc. v. Stutsman County Commission, 409 N.W.2d 632, 634 (N.D. 1987).

[¶38] Grabanskis offered illustrations on how their case is unrelated to church doctrine. App. p. 093, ¶¶13-15.

[¶39] In the present case, Norman Lutheran and Synod are not seeking a redress of any questions of religious doctrine or practice, or any questions of church discipline. Rather, Norman Lutheran and Synod are pursuing neutral principles of law. Although the original complaint sufficiently alleged tortious conduct unrelated to theology, Grabanskis moved to amend their complaint to more carefully limit it to allegations and issues readily amenable to resolution by neutral principles of law. App. p. 144. Norman Lutheran and Synod strenuously opposed Grabanskis' motion to amend, even though the amendment was in response to Norman Lutheran's and Synod's argument concerning jurisdiction. App. p. 171. The Trial Court wisely granted Grabanskis' motion to amend and did not abuse its discretion in doing so. App. p. 247

III. The Request for Supervisory Writ Should Be Denied.

[¶40] This Court's authority to issue supervisory writs under N.D.Const. art. VI, § 2 and N.D.C.C. §27-02-4 is discretionary authority exercised on a case-by-case basis and cannot be invoked as a matter of right. State ex rel. Roseland v. Herauf, 2012 ND 151, ¶3, 819N.W.2d 546. Discretionary authority is rarely and cautiously exercised and only to rectify errors and prevent injustice in extraordinary cases in which no adequate alternative remedy exists. Id. This Court will decline to exercise supervisory jurisdiction if the property remedy is an appeal. Western Horizons Living Centers vs. Feland, 2014 N.D 175, ¶6, 853 N.W.2d 36.

[¶41] Western Horizons involved a trial court order compelling disclosure of discovery claimed to be protected by lawyer-client privilege. In determining that there was no other adequate remedy available under the facts presented in Western Horizons, this Court concluded that the only action available was to disclose the documents or face contempt and therefore it was an

issue appropriate for a supervisory writ. In this case, the Trial Court declined to enter an order of dismissal based upon a potential that the court may interfere with church autonomy. Norman Lutheran and Synod successfully stayed the commencement and furtherance of any discovery by Grabanskis leaving the Trial Court without reasonable grounds to determine whether Grabanskis' case can move forward without determining church doctrine, dogma or religious beliefs.

[¶42] "A motion to dismiss a complaint under N.D.R.Civ.P. 12(b) tests the legal sufficiency of the claim presented in the complaint. Ziegelmann v. DaimlerChrysler Corp., 2002 ND 134, ¶5, 649 N.W.2d 556. On appeal from a dismissal under N.D.R.Civ.P. 12(b)(vi), this Court construes the complaint in the light most favorable to the plaintiff and accept as true the well-pleaded allegations in the complaint. Ziegelmann, at ¶5. Under N.D.R.Civ.P. 12(b), a complaint should not be dismissed unless "it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." Ziegelmann, at ¶5 (quoting Lang v. Schafer, 2000 ND 2, ¶7, 603 N.W.2d 904). We will affirm a judgment dismissing a complaint for failure to state a claim if we cannot "discern a potential for proof to support it." Ziegelmann, at ¶5 (quoting Towne v. Dinius, 1997 ND 125, ¶7, 565 N.W.2d 762). Vandall v. Trinity Hospitals, 2004 ND 47, ¶5, 676 N.W.2d 88.

[¶43] Norman Lutheran and Synod had the burden of establishing with certainty the impossibility of Grabanskis' ability to prove their claims. They didn't carry that burden. [¶44]

In considering the Motion to Dismiss, the Trial Court had substantial briefing by the parties and considered oral arguments such that the Trial Court had a detailed understanding of the fundamental jurisdictional issue raised by Norman Lutheran and Synod. As argued by Grabanskis, their claims revolve around the manner of their treatment at the hands of Norman

Lutheran and Synod leadership from a secular standard that is at issue and that without the benefit of any discovery it is premature to ascertain whether the secular issues are separable. App. p. 231, ll. 3-21.

[¶45] Grabanskis argued, and the Trial Court agreed, that at this stage in the proceedings the claims of Grabanskis did not have such a religious undertone so as to make the claims inseparable from doctrinal beliefs. App. p. 232, ll. 7-15. More importantly, neither Norman Lutheran nor Synod have asserted the manner in which their actions toward Grabanskis are doctrinal or related to a religious belief.

[¶46] Grabanskis claim available and actionable tort and contract claims. But for the involvement of a church, the claims asserted by Grabanskis are no different than have been litigated time and again in our state. This Court has exercised its supervisory authority directing a trial court to vacate an order denying a Motion to Dismiss for lack of subject matter jurisdiction only in those limited circumstances when a claim for relief cannot be had. Such was the case in State v. Haskell, 2001 ND 14, 621 N.W.2d 358, where the Court determined that relief could not be granted based upon lack of subject matter jurisdiction because the plaintiff failed to file a mandatory notice of claim as required by the North Dakota Century Code. In the matter of Trinity Hospitals v. Mattson, 2006 ND 231, 723 N.W.2d 684, this Court concluded that defendant was immune from suit under the exclusive remedies of our state's workers' compensation law and therefore the trial court should have granted the pending motion for summary judgment. Id. at ¶21. Norman Lutheran and Synod attempt to color Grabanskis' claims in doctrine, dogma and religion does not deny the Trial Court jurisdiction to extrapolate doctrinal from secular claims.

[¶47] A petition to this Court is not the Norman Lutheran's or Synod's only available remedy. Nothing prevents Norman Lutheran or Synod from renewing their Motion to Dismiss should discovery disclose establish that the Court's continued jurisdiction would be an improper intervention into religious beliefs rather than secular tort claims. "Courts generally will not exercise supervisory jurisdiction 'where the proper remedy is an appeal merely because the appeal may involve an increase of expenses or an inconvenient delay.'" Roe v. Rothe-Seeger, 2000 ND 63, ¶5, 608 N.W.2d 289.

[¶48] Norman Lutheran and Synod cite Osborn v. U.S., 918 F.2d 724, 729 (8th Cir. 1981), for the proposition that judicial economy demands that jurisdictional issues should be decided at the outset of a case. But Osborn does not support Norman Lutheran's or Synod's position. This statement about judicial economy was dicta, not holding, because the Eighth Circuit reversed the District Court and held that the evidence did not clearly show that the complaints were aware of the damages at such a date as to be barred by the statute of limitations. The Eighth Circuit also held that in determining jurisdictional matters, the trial court may consider matters outside the pleadings.

[¶49] Likewise, Norman Lutheran and Synod citation of Trottier v. Bird, 2001 N.D. 177, 635 N.W.2d 157 (2001), bears little relationship to the petition at hand. Trottier involved a question whether the Standing Rock Sioux Tribe had granted the State of North Dakota jurisdiction over an accident involving a person from another tribe pursuant to North Dakota Century Code Ch. 27-19, a far cry from the issues of the case at hand.

[¶50] None of the cases cited by Norman Lutheran or Synod suggest that churches are immune from litigation. Determining whether Norman Lutheran and Synod defamed Grabanskis and caused emotional distress does not require the Trial Court to "wade shoulder-deep into church

theology and governance" as conjectured by Norman Lutheran and Synod. Nor does the "mere" threat of litigation result in a "chilling effect" to church members and leaders. The First Amendment does not insulate a church or its leaders from their secular and tortious acts.

[¶51] Norman Lutheran and Synod seek an extraordinary and drastic remedy to be issued through a writ. However, neither establishes grievous exigency. A writ is in practice a narrow function to provide direct control of a lower court that fails to fulfill a nondiscretionary duty, such as wading into a claim for relief when there is not relief to be had under law. Whether Grabanskis claims are secular is a question of fact for weighing by the Trial Court and not a question of law.

[¶52] Norman Lutheran and Synod have not demonstrated a clear right to the relief demanded. They have appeal rights. Moreover, they have not demonstrated that the duty sought to be enforced by the Trial Court is plain.

[¶53] The policy against writs is one of common sense. "Writ relief, if it were granted at the drop of a hat, would interfere with an orderly administration of justice at the trial and appellate levels . . . If the rule were otherwise, in every ordinary action a defendant whenever he chose could halt the proceeding in the trial court by applying for a writ of prohibition to stop the ordinary progress of the action toward a judgment until a reviewing tribunal passed upon an intermediate question that had arisen . . ." Omaha Indemnity Co. v. Superior Court, 209 Cal.App.3d 1266, 1272-1273 (1989). Norman Lutheran's and Synod's modus operandi up to this point had been a procedural effort to halt the proceedings at every level; avoid answering the complaint by seeking a dismissal, avoid discovery by seeking a stay, and, avoid trial by seeking a writ.

[¶54] This case should proceed with the facts ferreted out during the discovery process. Norman Lutheran's and Synod's fears may diminish in importance as the case proceeds toward trial. If not, and is appears that doctrinal issues cannot be separate from the underlying tort claims, the matter can be cured prior to trial.

[¶55] Norman Lutheran and Synod submit that the Trial Court failed to rule on their motion because it offered no elaborate findings. In a Rule 12(b) motion the court's only task is to determine whether the complaint contains sufficient allegations and such allegations must be accepted as true. Specific findings as to the strengths or weaknesses of the allegations are inappropriate at this stage of the proceedings. The Trial Court, however, did determine the following:

> THE COURT: So today the status of the proceedings, there has been no discovery. As a matter of fact, most of the discovery has been restricted by the Court. But under Rule 12, the motion to dismiss basically on the pleadings is whether the pleadings give rise to a cause of action, in other words, is there any possibility for the plaintiffs to prove a claim based on what's been pled in the case, and they had pled torts and they have pled causes of action that are actionable, and whether or not they'll prevail on those claims is an issue that needs to be resolved in the litigation of this case, but the pleadings on their face are causes of action and the motion to dismiss is denied. The motion to amend the complaint this early in the proceedings without any further discovery is to be liberally granted, and it is granted.

App. p. 244, ll. 20-25; p. 245, ll. 1-11.

CONCLUSION

[¶56] Norman Lutheran and Synod have incorrectly tried to characterize this dispute as a "purely" theological issue. It is not "purely" theological; it involves Norman Lutheran's and Synod's attempt to isolate and ostracize Grabanskis by tortuous defamation, breach of contract, and violation of Norman Lutheran's and Synod's own rules, actions obviously subject to

resolution according to neutral principles of law. The Trial Court understood that the case involved such issues and therefore wisely allowed Grabanskis to amend their complaint and go forward with discovery, and therefore denied Norman Lutheran's and Synod's motion to dismiss. The Trial Court did not abuse its discretion in so ruling.

[¶57] For the reasons as stated above and the reasons set forth in Respondent's Brief, Respondents respectfully request this Court deny Petitioners' Petition for Supervisory Writ.

Respectfully submitted this 17th day of May, 2016.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20160154

District Court No. 09-2015-CV-03149

Evangelical Lutheran Church in America, Eastern North Dakota Synod of the Evangelical Lutheran Church in America, Norman Evangelical Lutheran Congregation of Kindred, Pastor Aanen Gjovik, Eric Berg and Jen Swenson,	)	
Petitioners,	)	
-vs-	)	**AFFIDAVIT OF SERVICE BY MAIL AND ESERVICE**
The Honorable Frank L. Racek, Judge of the District Court, East Central Judicial District Court, East Central Judicial District, Raymond Grabanski and Joan Grabanski,	)	
Respondents.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

[¶1] **MELISSA HERMANN**, being first duly sworn upon oath, deposes and says that I am a citizen of the United States of America, of legal age, and not a party to nor interested in the above-entitled proceeding and that on 4th day of May, I served by deposit in the mailing department of the United States Post Office at Fargo, ND, a true and correct copy of the following documents:

BRIEF OF RESPONDENTS

[¶2] The copies of the foregoing were delivered by electronic notification as follows:

Hon. Frank L. Racek
FRacek@ndcourts.gov

Keith L. Miller
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Daniel M. Traynor
dantraynor@traynorlaw.com

/e/ Melissa Herrmann
MELISSA HERRMANN

Subscribed and sworn to before me this 17th day of May, 2016.

/e/ Timothy P. Hill
Notary Public
My Commission Expires: March 8, 2018

(SEAL)

TIMOTHY P. HILL
Notary Public
State of North Dakota
My Commission Expires Mar. 8, 2018