[Cite as *Clifford v. Licking Baptist Church*, 2010-Ohio-1464.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
JACQUIN CLIFFORD, et al.,	:	William B. Hoffman, P.J.
	:	Julie A. Edwards, J.
Plaintiffs-Appellants	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CA 0082
	:	
	:	
LICKING BAPTIST CHURCH, et al.,	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Licking County Court of Common Pleas Case No. 2007 CV 00589
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 26, 2010

APPEARANCES:

For Plaintiffs-Appellants

BEVERLY J. FARLOW, ESQ.
ROSS A. GILLESPIE, ESQ.
CHRIS L. TROLINGER, ESQ.
Farlow & Associates, LLC
270 Bradenton Ave., Ste. 100
Dublin, Ohio 43017

For Appellee Columbus Baptist Association

W. PRENTICE SNOW, ESQ.
Morrow & Erhard Co., L.P.A.
Ten West Locust Street
Newark, Ohio 43058

For Appellee Lonny Aleshire, Sr.

RICK E. MARSH, ESQ.
Lane, Alton & Horst
2 Miranova Place, Ste. 500
Columbus, Ohio 43215

For Appellees Licking Baptist Church, Rev. Robert Cassady and Rev. Dr. Lawrence Swain

JAMES J. BRUDNY, ESQ.
LISA HOUSE, ESQ.
Reminger & Reminger
65 E. State St., 4th Floor
Columbus, Ohio 43215-5657

For Lonny Aleshire, Jr.

AL A. MOKHRARI, ESQ.
Plunkett & Cooney, P.C.
300 East Broad Street, Ste. 590
Columbus, Ohio 43215

Edwards, J.

{¶1} Defendants-appellants, J.C., S.C., Joanna Cottrell and Thomas Cottrell, appeal from the September 17, 2008, and March 2, 2009, Judgment Entries of the Licking County Court of Common Pleas granting summary judgment in favor of appellees Reverend Dr. Swain, Reverend Robert Cassady, Columbus Baptist Association, Licking Baptist Church, American Baptist Church of Ohio, and Lonny Aleshire, Sr.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellants Thomas Cottrell and Joanna Cottrell are the parents of appellants J.C. and S.C. All were members of appellee Licking Baptist Church between February of 1999 and May of 2004.

{¶3} Appellee Licking Baptist Church is affiliated with appellee Columbus Baptist Association ("CBA") and appellee American Baptist Church of Ohio ("ABCO"). CBA is a regional society comprised of local churches. Appellee Reverend Dr. Lawrence Swain is the Executive Minister for ABCO, and appellee Reverend Robert Cassady is the Minister of Congregational Development for ABCO. Neither has the power or authority to hire or ordain or to give directions to local churches.

{¶4} Baptist churches are organized so that local congregations such as appellee Licking Baptist Church have complete legal autonomy. Such churches are governed by the local congregation or by a separate, autonomous independent board of directors. Local churches hire and ordain their own pastors. Appellees ABCO and CBA have no power or authority to hire or ordain pastors.

{¶5} Appellee Lonny Aleshire, Sr. was employed as the pastor of appellee Licking Baptist Church. Appellee Lonny Aleshire, Sr. is the father of appellee Lonny Aleshire, Jr. who held volunteer positions in appellee Licking Baptist Church, including volunteer music or choir director. He also was appointed associate pastor of appellee Licking Baptist Church so that he could perform pastoral duties if his father, for health reasons, was unable to do so. Appellee Lonny Aleshire, Jr., who was never ordained as a pastor, was not an employee of appellee Licking Baptist Church and did not receive any salary or wages.

{¶6} In June of 2004, appellee Lonny Aleshire, Jr. raped appellant J.C. inside the premises of appellee Licking Baptist Church. In addition, from early 2003 until late 2004, appellee Lonny Aleshire, Jr. engaged in sexual acts with appellant S.C., some of which occurred on church premises. In 2005, appellee Lonny Aleshire, Jr. pleaded guilty and was convicted of rape, six counts of unlawful sexual conduct with a minor and three counts of sexual imposition.

{¶7} Appellants filed a complaint against Lonny Aleshire, Sr., Lonny Aleshire, Jr., Licking County Baptist Church, Reverend Dr. Swain, Reverend Cassady, ABCO, CBA and American Baptist Churches of U.S.A.[1] With respect to appellee ABCO and appellee Licking Baptist Church, appellants set forth claims for intentional infliction of emotional distress, defamation, civil conspiracy, negligent supervision and retention, negligence, violation of Ohio Corrupt Activities Act and loss of consortium. With respect to appellees Reverend Cassady and Reverend Dr. Swain, appellants alleged the same causes of action, with the exception of negligent supervision and retention. With respect

[1] American Baptist Churches of U.S.A., pursuant to a Judgment Entry filed on September of 2008, was granted summary judgment. No appeal from such entry has been filed.

to appellee CBA, appellants set forth causes of action for respondeat superior, intentional infliction of emotional distress, defamation, civil conspiracy, negligence, violation of the Ohio Corrupt Activities Act and loss of consortium. Finally, appellants asserted causes of action against appellee Lonny Aleshire, Sr. for intentional infliction of emotional distress, civil conspiracy, negligent supervision and retention, violation of the Ohio Corrupt Activities Act, respondeat superior and loss of consortium.

{¶8} Pursuant to a Judgment Entry filed on September 17, 2008, the trial court granted appellee Lonny Aleshire, Sr.'s Motion for Summary Judgment. Pursuant to Judgment Entries filed on March 2, 2009, the trial court granted the Motions for Summary Judgment filed by appellee Licking Baptist Church, appellee CBA, and appellees ABCO, Reverend Dr. Swain and Reverend Cassady.

{¶9} Thereafter, on June 11, 2009, appellants filed a Notice of Dismissal of their claims against Lonny Aleshire, Jr. without prejudice pursuant to Civ.R. 41(A)(a).

{¶10} Appellants now raise the following assignments of error on appeal:

{¶11} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WERE NO QUESTIONS OF MATERIAL FACT REGARDING THE PLAINTIFF'S CLAIM OF NEGLIGENCE AGAINST DEFENDANT LONNIE[2] ALESHIRE, SR. IN FAILING TO HAVE A CHURCH POLICY IN PLACE TO PROTECT CHILDREN AGAINST MISCONDUCT OF ADULT CHURCH OFFICIALS.

{¶12} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WERE NO QUESTIONS OF MATERIAL FACT REGARDING THE PLAINTIFFS' CLAIM OF NEGLIGENCE AGAINST DEFENDANT LICKING BAPTIST

[2] Based on the briefs filed, the correct spelling is "Lonny."

CHURCH IN FAILING TO HAVE A CHURCH POLICY IN PLACE TO PROTECT CHILDREN AGAINST MISCONDUCT OF ADULT CHURCH OFFICIALS.

{¶13} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY INCORRECTLY APPLYING AND/OR USING THE WRONG LEGAL STANDARD IN FINDING THAT LICKING BAPTIST CHURCH OWED NO DUTY TO PLAINTIFFS TO HAVE A CHURCH POLICY IN PLACE TO PROTECT CHILDREN AGAINST MISCONDUCT OF ADULT CHURCH OFFICIALS.

{¶14} "IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WERE NO QUESTIONS OF MATERIAL FACT REGARDING THE PLAINTIFFS' CLAIM OF NEGLIGENT SUPERVISION AND RETENTION AGAINST DEFENDANT LONNIE ALESHIRE, SR. AND IN FINDING AS A MATTER OF LAW THAT LONNIE ALESHIRE, SR. WAS NOT VICARIOUSLY LIABLE FOR THE HARM CAUSE BY THE CONDUCT OF LONNIE ALESHIRE, JR.

{¶15} "V. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WERE NO QUESTIONS OF MATERIAL FACT REGARDING THE PLAINTIFFS' CLAIM OF NEGLIGENT SUPERVISION AND RETENTION AGAINST DEFENDANT LICKING BAPTIST CHURCH AND IN FINDING THAT LICKING BAPTIST CHURCH WAS NOT VICARIOUSLY LIABLE FOR THE HARM CAUSED BY THE CONDUCT OF LONNIE ALESHIRE, JR.

{¶16} "VI. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WERE NO QUESTIONS OF MATERIAL FACT REGARDING THE PLAINTIFFS' CLAIM OF NEGLIGENCE AGAINST DEFENDANT AMERICAN BAPTIST CHURCH OF OHIO AND IN FINDING AS A MATTER OF LAW THAT THE AMERICAN

BAPTIST CHURCH OF OHIO WAS NOT VICARIOUSLY LIABLE FOR THE HARM CAUSED BY THE CONDUCT OF LONNIE ALESHIRE, JR.

{¶17} "VII. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WERE NO QUESTIONS OF MATERIAL FACT REGARDING THE PLAINTIFFS' CLAIM OF NEGLIGENCE AGAINST DEFENDANT REVEREND DR. LARRY SWAIN.

{¶18} "VIII. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WERE NO QUESTIONS OF MATERIAL FACT REGARDING THE PLAINTIFFS' CLAIM OF NEGLIGENCE AGAINST DEFENDANT REVEREND ROBERT CASSADY.

{¶19} "IX. THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT COLUMBUS BAPTIST ASSOCIATION WAS NOT NEGLIGENT AND IN FINDING AS A MATTER OF LAW THAT THE COLUMBUS BAPTIST ASSOCIATION WAS NOT VICARIOUSLY LIABLE FOR THE HARM CAUSE BY THE CONDUCT OF LONNIE ALESHIRE, JR.

{¶20} "X. THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT THERE WERE NO REMAINING CLAIMS, AND THE DEFENDANTS COLUMBUS BAPTIST ASSOCIATION, LICKING BAPTIST CHURCH, AMERICAN BAPTIST CHURCHES OF OHIO, REV. LONNY ALESHIRE, SR., REV. ROBERT CASSADY, AND DR. LAWRENCE SWAIN WERE ENTITLED TO SUMMARY JUDGMENT ON THE LOSS OF CONSORTIUM CLAIMS."

Summary Judgment Standard

{¶21} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. Civ.R. 56(C) provides, in pertinent part:

{¶22} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶23} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of

material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶24} It is based upon this standard that we review appellants' assignments of error.

I, II, III

{¶25} Appellants, in their first three assignments of error, argue that the trial court erred in granting summary judgment in favor of appellees Lonny Aleshire, Sr. and Licking Baptist Church on appellants' claim that such appellees were negligent in failing to have a church policy in place to protect children against misconduct of adult church officials such as Lonny Aleshire, Jr. Appellants specifically maintain that appellees Lonny Aleshire, Sr., and Licking Baptist Church "owed [a]ppellants a duty to protect them from the criminal acts of Aleshire, Jr…. [and] breached that duty by failing to have in place a policy regarding the protection of children from sexual misconduct of church officials." Such policy, appellants allege, should have prohibited adults from being alone with children.

{¶26} In a negligence case, a plaintiff must prove that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the plaintiff suffered harm; and (4) the harm was proximately caused by defendant's breach of duty. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. Whether a duty exists is a question of law for the court. *Id.* at 318. There is no common law duty to foresee the criminal acts of others. *Fed'l. Steel & Wire Corp. v. Runlin Const. Co.* (1989), 45 Ohio St.3d 171, 174, 543 N.E.2d 769.

{¶27} As noted by the court in *Wallace v. Ohio Dept. of Commerce* 96 Ohio St.3d 266, 2002-Ohio- 4210, 773 N.E.2d 1018, "'Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.' *Commerce & Industry Ins. Co.,* 45 Ohio St.3d at 98, 543 N.E.2d 1188; see, also, *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217, 556 N.E.2d 505. This Court has often stated that the existence of a duty depends upon the foreseeability of harm: if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 271; *Commerce & Industry,* 45 Ohio St.3d at 98, 543 N.E.2d 1188; *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 15 OBR 179, 472 N.E.2d 707. In addition, we have also stated that the duty element of negligence may be established by common law, by legislative enactment, or by the particular circumstances of a given case. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198; *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440, paragraph one of the syllabus." Id at paragraph 23.

{¶28} Appellants, in support of their contention that appellees Lonny Aleshire, Sr. and Licking Baptist Church had a duty to have a policy or protective measures in place to protect the church's youth members, note that Danny Waddle, who was on the board of appellee Licking Baptist Church, testified during his deposition that, sometime in 2005, the church had received notice from its insurance company "and they wanted us to implement a sexual harassment and a - - something to safeguard the children

from inappropriate behavior." Deposition of Danny Waddle at 49. Appellants also note that Pastor Brian Harkness of the New Life Community United Methodist Church, in an affidavit attached to appellants' response to appellee Licking Baptist Church's Motion for Summary Judgment, stated that his church had a policy regarding contact between adults and children in his parish, that one of the purposes of the policy was to protect the children, and that he believed that it was "common practice" to have such a policy in place. The policy states, in relevant part that "[t]wo adults should be present during any activity involving youth or children."

{¶29} Appellants further note that at the February 23, 2003, church business meeting at appellee Licking Baptist Church, the minutes of which are attached to appellants' response to appellee Licking Baptist Church's Motion for Summary Judgment, appellee Reverend Dr. Swain, who was in attendance, indicated that no person should ever drive an underage child or young person home and that no one person should ever be in the home of another person alone. Finally, appellants also point out that Reverend Robert Cassady, during his deposition, testified that he recommended that churches have in place a policy addressing the danger of contact between minor children and members of the church and that Reverend Lloyd Hamblin of South Baptist Church in Parkersburg, West Virginia testified during his deposition that his church has a policy of reporting suspected child abuse.

{¶30} However, despite the foregoing, we concur with the trial court that appellants have failed to cite any authority for the proposition that appellees Licking Baptist Church and Lonny Aleshire, Sr. had a duty to have a policy in place to protect the children of the church. While it may well be advisable to have such a policy in

place, appellants have not provided this Court with any authority mandating that churches adopt such a policy and/or that it was a common standard of care and practice among churches to have such a policy. Nor is this Court aware of any such authority. While appellants note that some churches have implemented such a policy, there is no evidence that such churches are not the exceptions rather than the rule. There is no evidence in the record as to the percentage of churches that have this type of policy. Moreover, there was no testimony from anyone in this case that such a policy was required by law.

{¶31} Appellants maintain that appellees Licking Baptist Church and Lonny Aleshire, Sr. were "put on notice" of the need for a policy designed to protect young church members "several years before Aleshire, Jr. committed his criminal conduct." Appellants note that Lonny Aleshire, Jr. informed appellee Licking Baptist Church and his father that he was being investigated by the Ohio Department of Youth Services, his employer, based on an allegation that pornography was found on Lonny Aleshire, Jr.'s work computer.

{¶32} However, the testimony in the record indicates that Lonny Aleshire, Jr. was never disciplined after such investigation and that he continued working for the Ohio Department of Youth Services until right before his arrest related to this case. Moreover, we find that the same did not put appellees "on notice" that Lonny Aleshire, Jr. would commit a tortious sexual act. Even if Lonny Aleshire, Jr. possessed pornography on his work computer, it is not reasonably foreseeable that he would sexually abuse a child.

{¶33} We find that, appellants have not presented any evidence that either of such appellees either knew or should have anticipated Lonny Aleshire's sexual misconduct. We concur with the trial court that a reasonably prudent person would not anticipate that a child would be sexually assaulted whenever left alone with an adult. There is no evidence that any similar acts were committed by Lonny Aleshire, Jr. in the past. Moreover, as is discussed further below, both appellants Thomas Cottrell and Joanne Cottrell, during their depositions, testified that they believed Lonny Aleshire, Jr. was a good person and had no reason to believe that he was a threat to their daughters. During the time while they were members of appellee Licking Baptist Church, they never complained to anyone at the church about Lonny Aleshire, Jr. or alleged to anyone at the church that he had engaged in inappropriate conduct with their daughters. During their depositions, both appellant Thomas Cottrell and appellant Joanna Cottrell testified that prior to leaving the church, they thought Lonny Aleshire, Jr. was a trustworthy person. In short, we find that appellants failed to present evidence that appellees Licking Baptist Church or Lonny Aleshire, Sr. should have foreseen that Lonny Aleshire, Jr. would sexually assault anyone.

{¶34} Based on the foregoing, we find, therefore, that the trial court did not err in granting such appellees summary judgment on the negligence claims against them.

{¶35} Appellants' first, second and third assignments of error are, therefore, overruled.

IV, V

{¶36} Appellants, in their fourth and fifth assignments of error, argue that the trial court erred in granting summary judgment to appellees Lonny Aleshire, Sr. and

Licking Baptist Church on appellants' negligent supervision and retention and respondeat superior claims.

{¶37} In order to prove a claim for negligent supervision and retention, appellants must show the following: "(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing plaintiff's injuries; and (5) the employer's negligence in * * * retaining the employee as the proximate cause of plaintiff's injuries." *Steppe v. Kmart Stores* (1999), 136 Ohio App.3d 454, 465, 737 N.E.2d 58. A plaintiff must also show that the employee's act was reasonably foreseeable. See *Peters v. Ashtabula Metro. Housing Auth*.(1993), 89 Ohio App.3d 458, 624 N.E.2d 1088. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result form the performance or non-performance of an act. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707.

{¶38} Appellants maintain that Lonny Aleshire, Jr. was an employee of appellee Licking Baptist Church and note that appellant Lonny Aleshire, Sr. provided his son with access to the church.

{¶39} However, we note that Lonny Aleshire, Sr., in his deposition, testified that his son was a volunteer and had never received compensation in any form from the church. Moreover, assuming, arguendo, that Lonny Aleshire, Jr. was an employee, we find that the trial court did not err in granting summary judgment to appellees Licking Baptist Church and Lonny Aleshire, Sr. on such claims because there is no evidence establishing that they knew or should have known of or anticipated the alleged sexual

assault committed by Lonny Aleshire, Jr. Appellant Joanna Cottrell, during her deposition, testified that she never voiced any complaints about Lonny Aleshire, Jr. and that, up through 2004, she believed that he was a good person who would not hurt her child. When asked during her deposition if, prior to 2005, she was aware of anyone in the community who thought that he was not a good person and was the type of person who would sexually or physically abuse a child, she testified that she was "not aware of anybody that thought that." Deposition of Joanna Cottrell at 180. Appellant Joanna Cottrell further testified that, prior to 2005, Lonny Aleshire, Jr. had a good reputation in the community.

{¶40} Appellant Joanna Cottrell further testified that, prior to 2005, she never told Lonny Aleshire, Jr. or anyone else that she did not want him interacting or spending time with her children. She further testified that she never told S.C., her daughter, that she could not be alone with Lonny Aleshire, Jr.

{¶41} Appellant Thomas Cottrell, during his deposition, testified that prior to leaving appellant Licking Baptist Church in May of 2004, neither he nor anyone in his family had any complaints about the church relating to Lonny Aleshire, Jr. or his father relating to the case sub judice. He further testified that, prior to his daughters coming forward to talk about the misconduct, neither he nor anyone in his family had any reason not to trust Lonny Aleshire, Jr. Appellant Thomas Cottrell further testified that, prior to such time, he had never heard of anyone coming forward to say that they suspected Lonny Aleshire, Jr. of being a child molester. Appellant Thomas Cottrell, during his deposition, also testified that he never approached any of appellees at any time with any concerns relating to Lonny Aleshire, Jr.

{¶42} During his deposition, appellant Lonny Aleshire, Sr. testified that his son never told him or anyone else that he was guilty of the charges.

{¶43} The following is an excerpt from appellant J.C.'s deposition:

{¶44} "Q. Okay. And did you ever hear your father or anyone else actually forbid Mr. Aleshire, Jr., from interacting with [S.C.] prior to 2005?

{¶45} "A. Not that I recall.

{¶46} "Q. Okay. And you understand what I'm saying? I mean, I understand that your father said, hey, when you call the house, you should ask for me or my wife rather than my daughter directly. But that's a little different than saying I don't' want you talking with my daughter or interacting with my daughter or spending time with my daughter. Do you understand?

{¶47} "A. Yes.

{¶48} "Q. Okay. All right. Did you ever hear anyone prior to 2005 express any concerns that Mr. Aleshire, Jr., was engaging in any physical or sexual abuse with regard to you or your sister or anyone else.?

{¶49} "A. What was the question?

{¶50} "Q. Did you ever hear anyone prior to 2005 express any concerns that Mr. Aleshire, Jr., was engaging in any physical or sexual abuse with regard to you, your sister or anyone else?

{¶51} "A. Not that I recall.

{¶52} "Q. Okay. Did you ever personally hear anybody prior to 2005 express any concerns to any of the defendants, other than my client, prior to 2005 about his interaction with yourself, your sister or anybody else?

{¶53} "A. Not that I recall.

{¶54} "Q. Okay. So to the best of your observations, prior to 2005, the only complaint that anybody made to any of the defendants other than my client [Lonny Aleshire, Jr.] was that he was not properly disciplining his children because they were unruly; is that accurate?

{¶55} "A. What was the question?

{¶56} "Q. Sure. To the best of what you observed personally, prior to 2005, the only complaint that anybody made to any of the defendants, other than my client, about Lonnie Aleshire, Jr., related to his lack of discipline over his children; is that accurate?

{¶57} "A. I believe so.

{¶58} "Q. Okay. Other than the event described in the complaint relating to you and the lack of discipline with regard to his children, did you have any reservations prior to the event described in the complaint relating to you about Mr. Aleshire, Jr.?

{¶59} "A. Not that I recall." Deposition of J.C. at 78-80.

{¶60} In short, upon our review of the record, we find that appellants have failed to present any evidence that appellees Lonny Aleshire, Sr. and Licking Baptist Church either knew of or should have anticipated Lonny Aleshire, Jr.'s criminal sexual acts. As noted by the trial court, the record indicates that appellants Thomas and Joanna Cottrell had greater knowledge of their daughter's interaction with Lonny Aleshire, Jr. than anyone connected with the church did.

{¶61} Appellants, in their brief, maintain that appellees Lonny Aleshire, Sr. and Licking Baptist Church should have foreseen Lonny Aleshire, Jr.'s criminal activity because, several years before the incidents in this case, Lonny Aleshire, Jr. informed

appellee Licking Baptist Church of the pending investigation by the Ohio Department of Youth Services. However, as is discussed above, we find that the same did not put appellees on notice that Lonny Aleshire, Jr. would commit sexual assaults on young church members.

{¶62} Appellants further argue that the trial court erred in failing to find appellees Lonny Aleshire, Sr. and Licking Baptist Church vicariously liable for the conduct of Lonny Aleshire, Jr. under the theory of respondeat superior.

{¶63} In determining whether an employee's act is within the scope of employment, the Ohio Supreme Court set the following rationale in *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58, 59, 565 N.E.2d 584: “It is well-established that in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment. Moreover, where the tort is intentional, as in the case at bar, the behavior giving rise to the tort must be ‘calculated to facilitate or promote the business for which the servant was employed * * *.’ *Little Miami RR. Co. v. Wetmore* (1869), 19 Ohio St. 110, 132; *Taylor v. Doctor's Hosp.* (1985), 21 Ohio App.3d 154, 21 OBR 165, 486 N.E.2d 1249. For example, an employer might be liable for an intentional tort if an employee injures a patron when removing her from the employer's business premises or blocking her entry. The removal of patrons, who may be unruly, underage, or otherwise ineligible to enter, is calculated to facilitate the peaceful and lawful operation of the business. Consequently, an employer might be liable for an injury inflicted by an employee in the course of removal of a patron. See, e.g., *Stewart v. Napuche* (1952), 334 Mich. 76, 53 N.W.2d 676; *Kent v.. Bradley* (Tex.Civ.App.1972), 480 S.W.2d 55.

{¶64} "However, the employer would not be liable if an employee physically assaulted a patron without provocation. As we held in *Vrabel v. Acri* (1952), 156 Ohio St. 467, 474, 46 O.O. 387, 390, 103 N.E.2d 564, 568, 'an intentional and willful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his principal or employer is not responsible therefor.' See, also, *Schulman v. Cleveland* (1972), 30 Ohio St.2d 196, 59 O.O.2d 196, 283 N.E.2d 175. In other words, an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business."

{¶65} Assuming arguendo, that Lonny Aleshire, Jr. was an employee and/or servant of Licking Baptist Church, we find that the trial court did not err in granting summary judgment to appellees Licking Baptist Church and Lonny Aleshire, Sr. on the negligent supervision and retention claim. There is no evidence that Lonny Aleshire, Jr.'s criminal intentional self-serving acts facilitated or promoted the business of either appellee Lonny Aleshire, Sr. or appellee Licking Baptist Church. We concur with the trial court that he was not acting within the scope of his employment with the church, if any, when he engaged in sexual acts with minor congregants. There is absolutely no evidence in the record that appellee Licking Baptist Church encouraged or promoted the sexual conduct or that appellee Licking Baptist Church hired Lonny Aleshire, Jr. to rape or sexually molest church members. *Bryd,* supra at 58.

{¶66} Appellants further assert that appellees Lonny Aleshire, Sr. and Licking Baptist Church are vicariously liable because they ratified the conduct of Lonny Aleshire, Jr. If an employee's act is outside the scope of employment, a plaintiff must

demonstrate that the defendant-employer ratified the willful and malicious conduct by the employee. *Fulwiler v Schneider,* (1995), 104 Ohio App.3d 398, 406, 662 N.E.2d 82. Ratification generally occurs when the employer with full knowledge of the facts, acts in a manner that manifests an intention to approve the unauthorized act of the agent-employee. See *Bailey v. Midwestern Ent., Inc.* (1995), 103 Ohio App.3d 181, 185, 658 N.e.2d 1120.

{¶67} Appellants, in contending that such appellees ratified the conduct of Lonny Aleshire, Jr., note that appellees Lonny Aleshire, Sr. and Licking Baptist Church held a candlelight vigil at the jail where Lonny Aleshire, Jr. was being held in early 2005. They note that members of the congregation arrived at the jail on appellee Licking Baptist Church bus and that Lonny Aleshire, Jr. was permitted to conduct a sermon from his jail cell. The subject of the sermon was the power of forgiveness and love.

{¶68} However, assuming that Lonny Aleshire, Jr. was an employee, we cannot say that, by doing so, such appellees "approve[d] the unauthorized act[s]" of Lonny Aleshire, Jr. At such point in time, Lonny Aleshire, Jr. had not been convicted and the evidence in the record shows that his father, Lonny Aleshire, Sr., as well as some other members of the congregation, believed that he was innocent. Moreover, as noted by the trial court in its March 2, 2009, Judgment Entry, "[t]here is no evidence that sexual assault and battery was condoned at either of these events….Further, the acts did not result in any benefit to Aleshire, Sr. or the business of the church that he could accept and explicitly or implicitly ratify."

{¶69} Appellants' fourth and fifth assignments of error are, therefore, overruled.

VI, VII

{¶70} Appellants, in their sixth assignment of error, argue that the trial court erred in granting summary judgment to appellees ABCO and Reverend Dr. Swain with respect to appellants' claims of negligence and on the issue of vicarious liability.

{¶71} Appellants, in their brief, argue that appellees ABCO and Reverend Dr. Swain were negligent in "failing to mandate and provide policies and procedures regarding contact between adults and children." However, as is stated above, in our discussion of appellant's first three assignments of error, appellants have failed to cite any authority for the proposition that such appellees had a duty to require churches to implement such a policy.

{¶72} Moreover, appellants have failed to present any evidence that appellees ABCO and Reverend Dr. Swain either knew of or should have known of or anticipated that Lonny Aleshire, Jr. would engage in the intentional sexual acts that he did. There is no evidence in the record that Lonny Aleshire, Jr. committed any similar acts in the past. Appellants have presented no evidence that such appellees knew or, in the exercise of reasonable diligence, should have known of or anticipated a criminal sexual assault by Lonny Aleshire, Jr. upon another. See, for example, *Bender v. First Church of the Nazarene* (1989), 59 Ohio App.3d 68, 571 N.E.2d 475.

{¶73} Appellants argue that, based on occurrences of sexual misconduct between a church official and young congregation members that have been reported in the media since the 1980's, appellees could have foreseen in the case sub judice that such misconduct could occur. We concur with appellees that the same is not evidence. Moreover, there is no evidence that appellees had any reason to foresee the sexual

misconduct that occurred in this case. As is stated above, there is no evidence that Lonny Aleshire, Jr. committed similar acts in the past.

{¶74} Appellants, in their brief, note that appellant Joanna Cottrell, in her affidavit, stated, in relevant part, as follows:

{¶75} "8. In 2004 I became concerned after my daughter [S.C.] disappeared several times with Defendant Aleshire, Jr.

{¶76} "9. As a result of my concerns, I met with and informed Defendant Robert Cassady of my concerns and Defendant Aleshire, Jr.'s conduct.

{¶77} "10. Defendant Cassady met with me and indicated to me that 'he would get to the bottom of it.' Defendant Cassady appeared to take Ms. Cottrell's concerns seriously.

{¶78} "11. I, on behalf of myself and my family requested a meeting with American Baptist Churches of Ohio and the congregation of Licking Baptist Church.

{¶79} "12. We were never granted such meeting. In fact, Defendant Cassady ignored and took absolutely no action regarding my request.

{¶80} "13. Thereafter, despite the fact that he appeared to take my concerns seriously, Defendant Cassady failed to file any formal reports, conduct any investigations, or take any appropriate actions regarding Joanna Cottrell's concerns.

{¶81} "14. In fact, when asked why he did not follow up or do anything with Ms. Cottrell's concerns, Defendant Cassady indicated it was because 'she never put anything in writing.'

{¶82} "15. Defendant Cassady did not indicate or state that he had no authority or responsibility to follow up and/or investigate Ms. Cottrell's concerns, he only indicated that the sole reason he did not was because 'she [I] never put it in writing.'

{¶83} "16. The only person(s) Defendant Cassady discussed my concerns with were the perpetrator, Defendant Aleshire, Jr., and his father, Defendant Aleshire, Sr. This conduct is not only highly questionable, negligent, and/or irresponsible, but also is in conscious disregard for the Plaintiffs' safety and rights."

{¶84} However, as is discussed above, appellant Joanna Cottrell testified that, prior to 2005, which is after she spoke with appellee Reverend Robert Cassady, she thought that Lonny Aleshire, Jr. was trustworthy and that she never told him or anyone else that she did not want him interacting with or spending time with her children. She further testified that, prior to 2005, Lonny Aleshire, Jr. had a good reputation in the community. In addition, when questioned by appellee Reverend Cassady about the unaccounted time, Lonny Aleshire, Jr. stated that nothing improper had occurred.

{¶85} Appellants further contend that the trial court erred in granting appellees summary judgment on their claim that appellees ABCO and Reverend Dr. Swain were vicariously liable for the actions of Lonny Aleshire, Jr. under the theory of respondeat superior.

{¶86} However, as is stated above, in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment and, where the tort is intentional, the behavior giving rise to the tort must be calculated to facilitate or promote the business for which the servant was employed.

{¶87} The evidence in the record establishes that appellee ABCO has no authority to hire or fire church employees and that hiring and firing was done by the local churches. In addition, appellee ABCO did not hire or compensate Lonny Aleshire, Jr. in any way. While appellants maintain that Lonny Aleshire, Jr. was acting in his capacity as an associate pastor at the time of the sexual assaults, the record is clear that he was not ordained by appellee ABCO. In short, we find that Lonny Aleshire, Jr. was not an employee of appellee ABCO.

{¶88} Moreover, assuming arguendo that he was employed as an associate pastor as appellants allege, we concur with the trial court that the intentional sexual acts that he committed were not "calculated to facilitate or promote the business for which the servant was employed." It is inconceivable how sexually assaulting young congregants promotes or facilitates the business of either the church itself or of appellee ABCO.

{¶89} Based on the foregoing, we find that the trial court did not err in granting summary judgment to appellees ABCO and Reverend Dr. Swain on appellants' claims of negligence and on the issue of vicarious liability.

{¶90} Appellants' sixth and seventh assignments of error are, therefore, overruled.

VIII

{¶91} Appellants, in their eighth assignment of error, argue that the trial court erred in granting summary judgment to appellee Reverend Cassady, the Minister of Congregational Development for ABCO, appellee on their claim for negligence.

{¶92} Appellants argue that appellee Reverend Cassady was negligent because, as is discussed above, after receiving a complaint from appellant Joanna Cottrell in 2004 about concerns she had regarding incidents during which her daughter had gone missing for several hours at a time with Lonny Aleshire, Jr., Cassady failed to file any reports, conduct any investigation or take any other actions. Lonny Aleshire, Jr., when questioned about the same, denied that anything improper had taken place.

{¶93} However, as is stated above, appellant Joanna Cottrell testified that, prior to 2005, she believed Lonny Aleshire, Jr., was a good person who she thought would not hurt her child and that he had a good reputation in the community. She further testified that she never told Lonny Aleshire, Jr. or any one else that she did not want him spending time with her children. Moreover, she never indicated to any of the other appellees that she had any suspicions that Lonny Aleshire, Jr. was engaging in inappropriate behavior with her daughters. In addition, the concerns that she voiced to appellee Reverend Cassady were vague at best. Based on the foregoing, we concur with the trial court that there was no evidence that appellee Dr. Cassady either knew or should have known of or anticipated a sexual assault by Lonny Aleshire, Jr. on appellants J.C. and S.C.

{¶94} Appellants' eighth assignment of error is, therefore, overruled.

IX

{¶95} Appellants, in their ninth assignment of error, argue that the trial court erred in granting summary judgment to appellee CBA on their claims of negligence and on their respondeat superior claim.

{¶96} Appellants initially maintain that appellee CBA breached its duty to them by failing to have and/or requiring its member churches to have policies and procedures in place regarding contact between adults and children. Once again, as is discussed above, appellants cite no authority for the proposition a duty to have such a policy exists.

{¶97} Appellants further argue that the trial court erred in failing to find appellee CBA vicariously liable for Lonny Aleshire, Jr.'s conduct. As is stated above, to be vicariously liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment and, where the tort is intentional, the behavior giving rise to the tort must be 'calculated to facilitate or promote the business for which the servant was employed . See *Byrd,* supra.

{¶98} Contrary to appellants' assertion, the record reveals that Lonny Aleshire, Jr. was not an employee and/or servant of appellee CBA. CBA did not hire Lonny Aleshire, Jr. and had no authority to hire or fire any church employee. Moreover, it cannot be disputed that his intentional criminal acts in the case sub judice were not calculated to facilitate or promote CBA's business.

{¶99} Appellants' ninth assignment of error is, therefore, overruled.

X

{¶100} Appellants, in their tenth assignment of error, argue that the trial court erred in failing to grant summary judgment to them on their claims for loss of consortium.

{¶101} However, the claims for loss of consortium are derivative of appellants' tort claims and thus, must fail. *Bowen v. Kil-Kare, Inc.* (1992) 63 Ohio St.3d 84, 93, 585 N.E.2d 384.

{¶102} Appellants' tenth assignment of error is, therefore, overruled.

{¶103} Accordingly, the judgment of the Licking County Court of Common Pleas is affirmed.

By: Edwards, J.

Delaney, J., concurs

Hoffman, P.J., concurs in part

and dissents in part

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES

JAE/d1203

Hoffman, P.J., concurring in part and dissenting in part

{¶104} I concur in the majority's analysis and disposition of Appellants' Assignments of Error Nos. 4, 5, 6, 7, 8, 9 and part of 10, except as it relates to Lonnie Aleshire, Sr. and Licking Baptist Church. I respectfully dissent from the majority's disposition of Appellants' first, second and third assignments of error and, as a result, that portion of their tenth assignment of error as it relates to Lonnie Aleshire, Sr. and Licking Baptist Church.

{¶105} As noted by the majority, the duty element of negligence may be established a number of ways, including by the particular circumstances of a given case.[3] I believe the particular circumstances of this case warrant recognition a duty existed on the part of Lonnie Aleshire, Sr. and Licking Baptist Church toward J.C.

{¶106} While Appellants may have failed to cite any authority for the proposition Lonnie Aleshire, Sr. and Licking Baptist Church had a duty to have a policy in place to protect the children of the church, despite the majority's stated opinion it would have been advisable to do so[4], I believe it is time for this Court to establish common-law recognizing such a duty.

{¶107} While there may be no record evidence as to the percentage of churches that have such a policy in place, Pastor Harkness averred not only did his church have such a policy, but also he believed having a policy was common practice. The fact Licking Baptist Church received notice from its own insurance company requesting it implement a policy to safeguard children from inappropriate behavior is itself recognition

[3] Majority Opinion at ¶27.
[4] Majority Opinion at ¶30.

of the foreseeability of harm. The advisability of having such a policy in effect was specifically communicated to Licking Baptist Church during its church business meeting by Reverend Dr. Swain. Reverend Cassady also testified he recommended churches have such a policy in place.

{¶108} It is difficult to ignore the numerous reported admitted instances of sexual child abuse committed by members of the clergy toward members of their congregation. I suspect, indeed do not doubt, many other instances go unreported. Those members of the clergy and others the church place in positions of authority or supervision over the children in their church can easily and naturally develop a unique relationship of trust and dependency. In that sense, they are not unlike the intimate relationship that can develop between a teacher and student, or a coach and athlete. The record does reflect several members of the clergy and the church's insurance company have recognized the inherent risk. I believe this Court should also.

s/William B. Hoffman
HON. WILLIAM B. HOFFMAN

[Cite as *Clifford v. Licking Baptist Church*, 2010-Ohio-1464.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JACQUIN CLIFFORD, et al.,	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
LICKING BAPTIST CHURCH, et al.,	:	
Defendants-Appellees	:	CASE NO. 09 CA 0082

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellants.

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES