IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

SPENCER ONDRISEK and
SETH CALAGNA
Plaintiffs

v.

BERNIE LAZAR HOFFMAN aka
TONY ALAMO and JOHN E. KOLBEK
Defendants

No. 08-4113

**DEFENDANT HOFFMAN /ALAMO'S
MOTION TO DISMISS OR STRIKE REFERENCES TO RELIGION AND
MOTION TO DISMISS COUNT THREE ON TORT OF OUTRAGE
AND MEMORANDUM IN SUPPORT**

Defendant Hoffman /Alamo moves to strike references to religion in the complaint as a basis for proof anything and to dismiss Count 3 in part as tort of outrage, both pursuant to F.R.C.P. 12(b)(6).

I. Motion to Dismiss or Strike Religion under Free Exercise Clause of the First Amendment

1. All references in the complaint which create a possibility of litigating the truth or validity of religious doctrine violate the free exercise clause of the First Amendment. This fails to state a claim upon which relief can be granted. F.R.C.P. 12(b)(6). It can either be stricken or dismissed.

2. Complaint ¶ VI, sentences 2-4, states: "Alamo's theology is known for its virulent paranoia and anti-Catholicism views. Alamo claims the Vatican controls the American White House, the United Nations and the media. His views have led TACM to be named as a 'hate

group' by Southern Poverty Law Center."[1] Aside from the subjective views of the SPLC as explained on its website, who decides? How is SPLC the final arbiter of this? Paid contributions to draw this conclusion? How will plaintiffs prove the immutable hearsay, prejudice, and confusion of the issues (F.R.E. 403) of this proposition? What kind of trial within a trial will this require?

3. Complaint ¶ IX, after the first clause,[2] "Alamo has engaged in and directed the use of a number of practices designed to control, punish, intimidate and injure church members, including minors. Specifically, minor children, including Plaintiffs herein, were regularly, repeatedly, and systematically exposed to the following:

- Prolonged withholding of food, known as "fasting";
- Alamo's version of "marriage," which included sexual abuse of church members as young as eight;
- Severe physical beatings; and
- Verbal abuse."

Defendant submits that all of these fall within the ambit of defendant's religious beliefs that will have to be tried in the plaintiffs' case in chief.

4. Complaint ¶ X alleges that Kolbeck, "at Alamo's direction, inflicts the beatings on church members, including children."

5. Plaintiff Ondirsek alleges "beatings" in Complaint ¶s XI-XIV and Calagna in ¶s XV-XVII which they omit to state were observed by, and done with, the consent of their parents.

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[1] This also is the subject of Doc. 2, defendants Hoffman /Alamo's motion to strike for other reasons.

[2] *See* note 1, *supra.*

6. They were spankings of unruly children, not "beatings."[3]

7. Spanking is required by the Bible. Prov. 13:24, 19:18, 22:15, 23:13-14, 29:15, 29:17; 1 Cor. 4:21; Deut. 25:1-3 ("forty stripes"); 2 Samuel 7:4-17. While we argue over whether they are "spankings" or "beatings," this defendant believes church doctrine and parental consent will be called into play. Ondirsek's own mother says he was "spanked" only three times, never beaten. Calagna's parent observed one and trusted the second to be reasonable, which it was. Even Arkansas schools permit paddling children, as long as it is not excessive or cruel or unreasonable.[4] Reasonableness, of course, would be a fact question for the jury.

8. Prolonged fasting appears throughout the Bible. 2 Samuel 12:15-25; 2 Chron. 20:3; Jonah 3:3-10; Luke 5:35; 2 Thes. 3:10. It has physical and spiritual benefits. Isaiah 58:3-13. Jesus said that fasting should be done in private. Matthew 6:16-18.

9. Fasting occurs in every religion as a way to gain greater spirituality, and lengthy fasts are not uncommon. For example: Moses fasted for forty days and forty nights while he was on the mountain with God. Exodus 34:28. Jesus fasted for forty days and forty nights while in the desert, prior to the three temptations. Matt. 4:2; Luke 4:2. Observant Jews fast individually and as a group to achieve atonement. Esther 4:3, 4:16; Jonah 3:7. In Islam, fasting occurs throughout the month of Ramadan during day light hours. Navaratri is a Hindu religious festival where people fast for nine days. Fasting, of course, is also nonreligious because people do it for health reasons.

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[3] This is quibbling over the facts, of course, is not at issue a motion to dismiss.
Nevertheless, in ¶ XII, Ondirsek says "he sprayed water from a bottle towards another child." It was caustic cleaning solution, and it was in the other child's face, putting the other child at risk.

[4] *Wise v. Pea Ridge School Dist.*, 855 F.2d 560, 564-65 (8th Cir. 1988), citing *Berry v. Arnold School District,* 199 Ark. 1118, 1124, 137 S.W.2d 256, 259 (1940) (corporal punishment existed at common law and is permissible if reasonable).

10. The Tony Alamo Christian Ministry believes in marriage rather than fornication because fornication will send the person directly to hell. Mark 7:21-23; 1 Cor. 6:9-18, 7:9; Galatians 5:19-21; Jude 1:7; Hebrews 13:4 ("Marriage is honourable in all, and the bed undefiled: but whoremongers and adulterers God will judge"); 1Tim. 5:14 (let "the younger women marry"); Book of Jasher 24:40-45 (referred to in Joshua and 2 Samuel) refers to the marriage of "Rebecca [who] was ten years old in those days" and her husband Isaac was forty. As to marriage of minors, this church holds that their parents have to agree, just as Arkansas law requires.

11. As to verbal abuse, that is extremely hard to show is a cause action, even the person it was directed to seldom can make a claim. *Hollomon v. Keadle,* 326 Ark. 168, 170, 175, 931 S.W.2d 413, 414, 417 (1996) ("'white nigger,' 'slut,' 'whore,' and 'the ignorance of Glenwood, Arkansas.' . . . 'women should be at home, not working, and if they are out there working they are whores and prostitutes . . . only whores and prostitutes work'" not actionable). Here, there is no specific claim of verbal abuse made by the plaintiffs.

12. To the extent that this court is asked to adjudicate or determine or even argue over theology or the doctrine of the Bible or Tony Alamo Christian Ministry, it is barred by the free exercise clause of the First Amendment. *See, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 110 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929); *Watson v. Jones,* 13 Wall. (80 U.S.) 679 (1872).

13. In *Presbyterian Church,* 393 U.S. at 449, the Court held, in the context of a property dispute:

If civil courts undertake to resolve such controversies in order to adjudicate the

> property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes, *Abington School District v. Schempp,* 374 U.S. 203 (1963); the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.

14. This case will involve inquiring into religious doctrine in determining whether this was a "spanking" or a "beating" and whether the plaintiffs or their parents consented to them. One of the spankings came when Ondrisek threatened to punch defendant Alamo, over 70 years old at the time. Seems justified to the defendant.

15. For example, even being anti-Catholic is a matter of church opinion and doctrine shared by others, including Republican Presidential Candidate Sen. John McCain's spiritual advisor in the 2008 Presidential election.[5] To even put it in the complaint violates the free exercise clause because, if plaintiffs try to prove it, how can the court possibly instruct a jury on this without excessive religious entanglements? What will be the scope of defendant's rebuttal to try that issue? What kind of trial will this devolve into?

16. To ask the question is to answer it. It cannot be done, and that is why the courts cannot get into those issues.

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[5] *See, e.g.,* Sen. John McCain's spiritual advisor in the 2008 Presidential election, John Hagee, who is also described by others as anti-Catholic. Hagee is the founder and senior pastor of Cornerstone Church in San Antonio, Texas, a non-denominational charismatic church with more than 19,000 active members. He is CEO of Global Evangelism Television (GETV). His ministry website is www.jhm.org. Trinity Broadcasting is on DirecTV 372 and Dish Network 260 and Victory Television Network in Arkansas, http://www.vtntv.com/links.html, all over Arkansas on the air, cable (http://www.vtntv.com/watch_cable.html), and satellite at 4:00 and 9:30 p.m. weekdays.

II. Tort of Outrage

17. Defendant Alamo submits that the complaint fails to state a claim as to tort of outrage. As defendant reads the complaint, it could be presented here two ways: Third party tort of outrage and direct tort of outrage.

18. The tort of outrage in Arkansas derives from RESTATEMENT (SECOND) TORTS § 46:

§ 46. Outrageous Conduct Causing Severe Emotional Distress

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

Comment *l* deals with third party tort of outrage.

19. The elements of the tort in Arkansas are summarized in *McQuay v. Guntharp,* 331 Ark. 466, 470-71, 963 S.W.2d 583, 586 (1998):

> To establish an outrage claim, a plaintiff must demonstrate the following elements: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was "extreme and outrageous," was "beyond all possible bounds of decency," and was "utterly intolerable in a civilized community"; (3) the actions of the defendant were the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Angle v. Alexander,* 328 Ark. 714, 945 S.W.2d 933 (1997). The type of conduct that meets the standard for outrage must be determined on a case-by-case basis. *Hollomon v. Keadle,* 326 Ark. 168, 931 S.W.2d 413 (1996). This court gives a narrow view to the tort of outrage, and requires clear-cut proof to establish the elements in outrage cases. *Croom v. Younts,* 323 Ark. 95, 913 S.W.2d 283 (1996). Merely describing the conduct as outrageous does not make it so. *Renfro v. Adkins,* 323 Ark. 288, 914 S.W.2d 306 (1996). Clear-cut proof, however, does not mean proof greater than a preponderance of the evidence. *Croom,* 323 Ark. 95, 913 S.W.2d 283.

20. Arkansas addresses the tort of outrage in a cautious manner. *McQuay,* 331 Ark. at 477, 963 S.W.2d at 588 (Newbern, J., dissenting). "We have also stated that we take a strict approach and give a narrow view to the tort of outrage." *Travelers Insurance*, 338 Ark. at 89, 991 S.W.2d at 595. It has an extremely narrow test, and it is reserved for the most heinous conduct. *Forrest City Mach. Works, Inc. v. Mosbacher,* 312 Ark. 578, 585, 851 S.W.2d 443, 447 (1993).

21. "Merely describing the conduct as outrageous does not make it so." That is all that plaintiffs do.

A. Third Party Tort of Outrage

22. Plaintiffs allege knowledge of what happened to others, but proving it will be another matter. And, even if they can, it does not state a claim upon which relief can be granted because neither of them allege they stand in position of any third person to make a claim under RESTATEMENT § 46 and Arkansas law.

23. One Arkansas case on third party victims stating a claim is *Rogers v. Williard,* 144 Ark. 587, 223 S.W. 15, 11 A.L.R. 1115 (1920), where plaintiff was frightened by defendant "flourish[ing] a pistol" in a quarrel that caused her to faint and suffer a miscarriage. Also, an insurance company's refusal to permit plaintiff's husband to be embalmed for days delaying his funeral stated a claim in *Travelers Insurance Co. v. Smith,* 338 Ark. 81, 991 S.W.2d 591 (1999).

24. Plaintiffs here have no and allege no relationship with those this defendant is accused of having sex to sustain a cause of action for that. The one case involving sex was with the plaintiff. There, a 51 year old man having sex with a 15 year old was sufficient. *Croom v. Younts,* 323 Ark. 95, 913 S.W.2d 283 (1997). That the 15 year old could state a cause of action hardly means that plaintiffs could state a cause of action for lack of standing or harm to them. They are not within the zone of protection of the tort.

25. Here, in Complaint ¶ IX, as stated in ¶ 3 of this motion, *supra,* plaintiffs allege "Specifically, minor children, including Plaintiffs herein, were regularly, repeatedly, and systematically exposed to the following: . . . ."

26. Count 3, the outrage claim, re-alleges everything that came before (Complaint ¶ XXII), appears to include third party tort of outrage. Complaint ¶ XXIII is not limited to what happened to the plaintiffs. To the extent that it could apply to any third party tort of outrage that these plaintiffs allegedly suffered mental anguish as a result of what happened to others, it should be dismissed. Plaintiffs conclusorily allege that they suffered emotional distress from what others allegedly endured and they somehow suffered from that. Without being in the zone of protection required by the tort of outrage, they cannot prevail.

B. Direct Tort of Outrage

27. As stated above, in ¶ 19, Arkansas addresses the tort of outrage in a cautious manner with a "strict approach and giv[ing] a narrow view," reserving it for the most heinous conduct.

28. The claims of the plaintiff can be presented and evaluated as battery and false imprisonment claims, however disputed they are. The false imprisonment claim is part and parcel of the battery claim, so they rise and fall together. In the complaint, the false imprisonment occurred to facilitate the battery.

29. The defense to both claims will be consent of their parents (RESTATEMENT (SECOND) OF TORTS 46 cmt. g) and that it was reasonable under the circumstances. This, of course, is for trial and not cognizable in a 12(b)(6) motion.

30. Both battery and false imprisonment are intentional torts. The tort of outrage adds nothing to the claim. If plaintiffs cannot prevail on battery and false imprisonment, they will not

prevail on tort of outrage because, as a practical matter, failure of the former defeats the latter.

CONCLUSION

The motion to dismiss (I) references to religious and (II) Count 3 in whole or in part should be granted for failing to state claims upon which relief can be granted.

Respectfully submitted,

/s/ John Wesley Hall, Jr.

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CERTIFICATE OF SERVICE

I certify that a copy was served by CM/ECF on W. David Carter on December 23, 2008.

/s/ John Wesley Hall, Jr.
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ANSWER

Defendant Hoffman /Alamo, as to that which has not been already addressed by a motion to dismiss, without waiving the motions to dismiss (Doc. 3 & 4), generally denies the complaint.

Respectfully submitted,

/s/ John Wesley Hall, Jr.

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CERTIFICATE OF SERVICE

I certify that a copy was served by CM/ECF on W. David Carter on December 24, 2008.

/s/ John Wesley Hall, Jr.
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