IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 12-0010

THE NORTHERN CHEYENNE TRIBE, a Sovereign Indian Tribe of the United States and as a Nation of People, both Individually and Collectively,

Plaintiff and Appellant,

vs.

THE ROMAN CATHOLIC CHURCH, by and through its Corporate and other Business Entities, to include, but not limited to, THE DIOCESES OF GREAT FALLS/BILLINGS, ST. LABRE INDIAN SCHOOL EDUCATIONAL ASSOCIATION, INC., ST. LABRE HOME FOR INDIAN CHILDREN AND YOUTH, INC., and JOHN DOES I-X,

Defendants and Appellees.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Most offensive within St. Labre's entire responsive brief is the statement found on page 25: "[T]he Tribe has never provided any evidence that St. Labre has said, or did, something that obligates it to give the money it raises to the Tribe." The following are but a few of the hundreds of examples contained in a stack of over fifty years of fundraising solicitations, provided by the NCT as evidence,

> "Some 15 years ago we made a determined effort to do something about the poverty of the Indians. As I look back, it is hard to believe some of the grim realities we faced then: -Indian families living in tents through a cold Montana winter; children suffering from malnutrition; the second highest tuberculosis rate in the United States; heads of families demoralized because no employment was available; mothers suffering at the sight of their neglected children whom they could not help... St. Labre started an industry in cooperation with the Tribe and Indian Bureau amid objections that it was a dream which would never succeed because the Indian was lazy...There has been a wonderful improvement in recent years. A people once called "The Race of Sorrows" by an historian, now call themselves "The Morning Star People."...The improvements achieved in the past are a monument to our generous friends. We need their continued help...Will you become our friend? Will you help us?"

NCT Opening Brief Appendix, at 148 (fundraising letter excerpt with "The Morning Star People" and "St. Labre Indian School" letterhead).

> "Rosie, a young Indian mother, was crying as she shared her story. Her four month-old baby was sleeping peacefully in her arms. Randy, her three year-old son watched his mother: tears came to his eyes and he cried with her. "I am ashamed and embarrassed," she said between sobs. "I never had to ask for help, but we are desperate and have nowhere else to go. Frank has been out of work for more than a year, we are two months behind on our house payments; we have no heat and now they are going to turn off our

> electricity."...I need your help to provide not only for the children, but for the many families with special needs. Please don't turn away; I am counting on your special sacrifice."

NCT Opening Brief Appendix, at 165 (fundraising letter excerpt, signed by Fr. Emmett Hoffman).

> "Randy didn't want me to write this letter. He doesn't want to draw attention to himself or his family...Randy was urged to go to Salt Lake City for cancer therapy. Randy came to us for help. He needed $300.00 to get to Salt Lake City. We were able to help, because you care...Randy is one of the many children we help in so many different ways. I remember a very similar case a year ago. Another young man was dying from cancer. We helped his parents to make many trips to Salt Lake City to be with their son during those last months....Today he [Randy] faces a battle for his life. He needs our prayers and our help. Your continued generosity helps me to provide for Randy and all the needy children and their families..."

NCT Opening Brief Appendix, at 166-167 (fundraising letter excerpt, signed by Fr. Hoffman).

> "Unemployment on the reservation is near 80 percent. Families that could take care of their own basic needs in the past are finding it necessary to depend more on us to help care for the children. Millie is only one of the many people we help each month. It relieves some of the misery and poverty on the reservation...I need your help, to provide for the children and needy families..."

NCT Opening Brief Appendix, at 169 (fundraising letter excerpt, signed by Fr. Hoffman).

> "Each day, six, eight, sometimes more people come...for help to provide for their families.....A mother...is threatened with eviction...The children need food shoes and clothing...A father came for help...It's the first time he has ever had to beg for help; tears came to his eyes as he choked up with sorrow and despair. These are just two examples of what people all over the reservation are experiencing. Emergency funds quickly add up to more than

> $5,000.00 each month. Funds that were set aside for repairs and maintenance had to be used to provide for needy families...I need your help today to pay the repair bills and to provide for the children and their families..."

NCT Opening Brief Appendix, at 170-171 (fundraising letter excerpt, signed by Fr. Hoffman). St. Labre said and did plenty to obligate it to give donations to the Tribe.

A wrong was committed here. A half century of fundraising letters and an endowment holding more than $70 million dollars in donations claimed by the Diocese, raised on the back of the NCT, is evidence enough of that wrong.

St. Labre and the Diocese could close shop tomorrow and walk away with $90 million in assets gained marketing the NCT, and the NCT would get nothing. Neither law nor equity should allow such an injustice.

ARGUMENT

A. THE DISTRICT COURT ERRED BY GRANTING JUDGMENT ON THE PLEADINGS ON THE NCT'S CONSTITUTIONAL CLAIMS.

Appellees' briefing should not persuade this Court that private individuals are free to violate the rights afforded by Article II, Sections 3, 4 and 10 of the Montana Constitution. The Constitutional framers clearly intended that Article II rights be self-executing. "All persons" have an affirmative duty to refrain from infringing upon those inalienable rights created by Article II, Section 3 of the Montana Constitution. See also, *Constitutional Convention*, Vol. 5, p. 1645

("What we have added to Section 3 is, in my judgment, self-executing with respect to an individual who personally is affected with respect to his health and to his property."). Article II, Section 4 specifically provides for a private right of action. *State v. Long* (1985), 215 Mont. 65, 700 P.2d 153. A direct right of action exists against "fellow citizens" for violation of Article II, Section 10. *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil* (2006), 334 Mont. 311, ¶56, 147 P.3d 200, ¶56. Further, this Court held Art. II, Section 10 is "self-executing," and there are "sound reasons for applying a cause of action for money damages" when a party violates Art. II, Section 10. *Dorwart v. Caraway* (2002), 312 Mont. 1, ¶¶44-48, 58 P.3d 128, ¶¶44-48.

St. Labre improperly suggests a new argument on appeal, implying the Constitutional rights afforded by Article II, Section 3, 4 and 10 do not apply to the NCT. *Kellogg v. Dearborn* (2005), 328 Mont. 83, ¶15, 119 P.3d 20 ¶15 (party may not raise new argument or change his legal theory on appeal). The NCT's status, relationship, and representation of its individual members were not previously at issue. The NCT is unlike a typical business or political entity, and nothing prohibits an entity from representing the rights of individuals. The NCT sued as "a Sovereign Indian Tribe of the United States and as a Nation of People, both Individually and Collectively." Dkt. 38, caption. Count VIII of the Amended Complaint repeatedly refers to the rights of the individual members of the tribe and

the "Northern Cheyenne people." Dkt. 38, at 10 (e.g. ¶26, Defendants "...violated the Tribal members' Constitutional fundamental and inalienable rights..."). The NCT is litigating violations of the individual Constitutional rights of its members, and seeks damages for the "Northern Cheyenne people." Dkt. 38, at 11. It would be impractical to pursue the claim another way, as thousands of individuals were affected by the violations.

St. Labre also argues that Constitutional claims cannot be maintained because adequate statutory and common law remedies exist. It asserts the NCT is asking this Court to create "new Constitutional torts." *St. Labre's Brief*, at 11. The NCT's Amended Complaint specifically alleges Defendants destroyed their culture, imposed their religion upon them, and deprived them of their right to pursue life's basic necessities, seek health, safety and happiness, freedom of religion, and right to privacy, due process, and individual dignity. Dkt. 38, at 9-10. If statutory and common law remedies adequately addressed these wrongs, it is difficult to conceive of a case where violations of Article II, Sections 3, 4 and 10 could exist. These fundamental rights would become "but a collection of elegant words without substance; ...a shield made of little more than aspiration and hopes." *Dorwart*, at ¶97 (Nelson, J., specially concurring).

The point is driven home by St. Labre's example of the common law remedy, presented for the first time on appeal, that the NCT "could have" claimed

"invasion of privacy." *St. Labre's Brief*, at 13. If the requirement was the existence of any claim that included an enumerated right, there would *never* be a case for an Article II, Section 10 violation. If every Plaintiff claiming a privacy violation could sue for "invasion of privacy," Article II, Section 10 would be of no substance. The remedy, not the claim, matters.

St. Labre takes issue with the NCT's request for money damages. *St. Labre's Brief*, at 12-13, 15-16. Money damages are an appropriate remedy for Constitutional violations. *Dorwart*, ¶¶44-48, 84 (Nelson, J., specially concurring). Article II, Section 16 of the Montana Constitution provides, in part, "[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." See also, Mont. Code Ann. §27-1-202. Notably, the NCT also prays for an "equitable redistribution of monies," and "all such further relief as might be found Just and Fair..." Dkt. 38, at 11.

Finally, St. Labre argues the NCT wrongfully attempts to shift its burden of proof by stating, "[n]either the District Court nor St. Labre pointed to a single statutory or common law that would remedy the NCT's loss of liberty and happiness from the destruction of its culture and religious freedom or its loss of dignity" See *St. Labre Brief*, at 14. St. Labre adds, "the Tribe has not even attempted to meet its burden..." *Id.*, at 14-15. St. Labre forgets this claim was dismissed at the pleading stage. Therefore, the **movant** must prove if the pleadings

are construed in the light most favorable to the nonmoving party, whose allegations are taken as true, the movant is entitled to judgment as a matter of law. *Paulson v. Flathead Conservation Dist.,* 2004 MT 136, ¶17, 321 Mont. 364, ¶17, 91 P.3d 569, ¶17.

St. Labre and the Diocese failed to meet their burden to prove the NCT had adequate statutory and common law remedies available in the District Court. In their effort to do so on appeal, neither explains how the NCT's loss of their right to pursue life's basic necessities, seek their health, safety and happiness, freedom of religion, right to dignity, or right to privacy can be remedied. St. Labre argues the NCT was required to prove no adequate statutory or common law remedies existed. The NCT cannot prove a negative. Short of creating a list of every statutory and common law remedy in existence and describing why it does not work, there is no way to accomplish the task. The NCT can only state none exist. St. Labre was to prove otherwise.

No state action was required to maintain Count VIII of the NCT's Amended Complaint. The claim met the requirements of Rule 8, M.R.Civ.P, and its dismissal was clear error.

B. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT ON THE NCT'S BREACH OF CONTRACT CLAIM.

The District Court's Order and St. Labre's discussion regarding land ownership and the Allotment Act is misguided. The Amended Complaint makes

clear the contract was created when the NCT acquiesced to St. Labre's use of the NCT's land, symbols, culture, faces, stories, plights and needs, in exchange for St. Labre's promise it would operate for the benefit of the NCT, and provide education and "substantial equitable financial assistance" to the NCT. Dkt. 38, at ¶¶14, 15.

Contrary to St. Labre's assertion, the NCT never abandoned its position that those promises were both oral and implied by conduct. *St. Labre's Brief,* at 21; *NCT's Brief*, at 18. The NCT provided evidence of St. Labre's written and verbal representations, including fundraising appeals, letters, testimony, and St. Labre admissions that state, imply and confirm those promises. e. g. *Appendix to NCT's Opening Brief*, 125-191; Dkt. 131, at 4-5 and Ex. A-K. For example, Fr. Emmett Hoffman testified regarding an oral contract between he and Leo Dohn, acknowledging the NCT became beneficiaries of 75% of the fundraising donations. *NCT's Opening Brief Appendix*, 188; Eugene Little Coyote and Matthew Two Moons testified regarding oral promises made to tribal elders. *NCT's Opening Brief Appendix*, 203:178; 208-209:12-15. The fundraising letters confirm oral promises to give the NCT donations. *NCT's Opening Brief Appendix,* 125-185.

St. Labre claims there is no evidence of a contractual obligation to give the donations to the Tribe, citing *Blome v. First Nat. Bank of Miles City* (1989), 238 Mont. 181, 776 P.2d 525. In *Blome*, the Court found that despite a past course of lending to the Blomes, the bank was not obligated to continue lending to the

Blomes. *Id.*, at 528. However, in *Blome,* the bank did not continue to get a benefit from the Blomes, and was not holding property belonging to the Blomes. Here, St. Labre continued to benefit from the NCT, and held donations belonging to the NCT. For over a half century, St. Labre marketed and used the NCT land, name, symbols, stories, faces, plights and needs. The NCT acquiesced, because St. Labre promised it was fundraising for them. As long as St. Labre received donations marketing the NCT, it was obligated to hold and distribute donations to the NCT.

St. Labre argues to maintain an implied contract, "the Tribe must show 'some element of misconduct or fault of some sort on the part of defendant, or that [the Tribe] was in some way taken advantage of.'" *St. Labre's Brief*, at 24. However, the jury could find the fundraising letters raised money for the NCT, and St. Labre's and the Diocese's retention of those funds is misconduct. It is also for the jury to decide whether the NCT relied on St. Labre's representations when it allowed the use of its land, name, symbols, stories, faces, plights and needs to go unchallenged. See examples at *NCT's Opening Brief Appendix*, at 191, 225-239.

If reasonable minds can draw different inferences from the evidence, a question of fact remains for the jury. *Weinberg v. Farmers State Bank of Worden* (1988), 231 Mont. 10, 25, 752 P.2d 719, at ¶27. The District Court erred by failing to draw all reasonable inferences in favor of the NCT, so dismissal of the contract claim was error.

C. THE DISTRICT COURT ERRED BY ENTERING SUMMARY JUDGMENT ON THE NCT'S WRONGFUL CONVERSION, NEGLIGENT MISREPRESENTATION, FRAUD AND FORENSIC ACCOUNTING CLAIMS (COUNTS II, V, VI, IX).

St. Labre avoids the NCT's argument and cases regarding the District Court's erroneous shifting of St. Labre's burden of proof. Instead, St. Labre offers semantics—the moving party has the burden of "showing," and the nonmoving must "prove." Neither semantics nor the particular facts "*in this case*"[1] change the burden of proof set forth in Rule 56, M.R.Civ.P.

St. Labre argues its tactic of alleging the NCT had "absolutely no evidence" of its claims (impermissibly shifting its burden to the NCT), was acceptable because the NCT somehow "waived" St. Labre's burden of proof by providing evidence to the District Court. *St. Labre's Brief*, at 31. One cannot waive placing the burden of proof on the proper party. *Currie v. Langston* (1932), 92 Mont. 570, 16 P.2d 708, 711.

St. Labre's *Celotex*[2] and waiver argument places litigants in a technical trap. The non-moving party could stand on its pleadings and risk that the District Court will determine "*in this case*" the moving party can use *Celotex* to say "there is no evidence." Because he presented no evidence, the non-moving party then loses. Alternatively, the non-moving party places evidence before the District Court and

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[1] *St. Labre Brief*, at 34.

[2] *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 106 S.Ct. 2548.

"waives" the moving party's burden of proof. The law does not support such a Hobson's choice.

The District Court should have, as a threshold matter, determined whether St. Labre satisfied its burden of proof. *Brinkman and Lenon, Architects and Engineers v. P & D Land Enterprises* (1994), 263 Mont. 238, 242-243, 867 P.2d 1112, 1115-1116 (statements of counsel do not meet the evidentiary basis required to support a motion for summary judgment); *Adickes v. S.H. Kress & Co.* (1970), 398 U.S. 144, 159, 90 S.Ct. 1598, 1609 ("Merely stating that the non-moving party cannot meet its burden at trial is not sufficient."); *Anderson v. Radisson* (1993), 834 F.Supp. 1364, 1367 ("A party must first *identify* the record that they believe demonstrates an absence of evidence.").

In this case, the District Court should not have reached the NCT's briefing, because St. Labre did not satisfy its burden—it did not even present a statement of undisputed facts. This Court should not allow such abuse of the summary judgment procedure. The burden of proof must remain on the moving party until that burden is met.

1. A QUESTION OF FACT REMAINS REGARDING THE NCT'S CONVERSION CLAIM.

St. Labre argues the NCT "failed to point the District Court to any portion of the 'fundraising material, financial statements and affidavits'..." that supported its conversion claim. *St. Labre's Brief*, at 27. However, there is not a lone sentence

that leads to such a conclusion. It is the evidence as a whole that shows the NCT's right to donations. The fundraising letters, read in their entirety, provide evidence the NCT was the intended beneficiary of the donations raised, which comes with the attendant right to receive those funds.

"A trier of fact could reasonably infer that the individual donors, in response to defendants' solicitations, donated funds with a manifest intention that their donations be ultimately distributed by defendants..." to those named/described in the solicitations. *Jackson v. Callan Publishing, Inc.* (Ill. 2005), 356 Ill.App.3d 326, 333. The *Jackson* Court also noted that it was the intent of the donors and not that of the would-be trustee that is controlling. *Id.*, at 333. In this case, the District Court determined that "the intent of Defendants' donors could be reasonably inferred based upon the Defendants' fundraising materials." *NCT's Opening Brief Appendix*, at 123; 9-11. Therefore, the fundraising letters alone can lead to the inference that the NCT has a right to receive and is the owner of the donations held in the endowment account. This evidence, recognized by the District Court as leading to factual inferences (*NCT's Opening Brief Appendix*, at 123), should have precluded summary judgment.

2. QUESTIONS OF FACT REMAIN REGARDING THE NCT'S NEGLIGENT MISREPRESENTATION AND FRAUD CLAIMS.

St. Labre argues summarily that the District Court was correct in finding the NCT has not identified any misrepresentation by St. Labre or any reliance by the

NCT on statements made by St. Labre to support claims for negligent misrepresentation and fraud. However, St. Labre failed to support its argument. Again, the NCT provided examples of its evidence from which these factual inferences can be drawn. e.g. *NCT's Opening Brief Appendix*, 125-191, 224-239.

The District Court failed to draw all reasonable inferences from this evidence in favor of the NCT. Summary judgment should have been denied.

3. AN ACCOUNTING IS A VIABLE CAUSE OF ACTION.

St. Labre argues that the NCT "has never put forward any legal analysis as to why the Court should adopt a "forensic accounting" claim. That is not the case. See Dkt. 154, at 12-13. The District Court determined the fundraising material could arguably establish a constructive trust, so a fiduciary relationship could also exist between the parties. *NCT's Opening Brief Appendix,* 066-068. A fiduciary or trust relationship can give rise to an equitable action for accounting. *1 Am. Jur. 2d Accounts and Accounting,* §55 (2005). Contrary to St. Labre's argument, the Court did not have to conduct legal research or analysis to find an accounting cause of action exists, it could cite *American Jurisprudence.* See also, *1 Am. Jur. 2d Accounts and Accounting*, §52 (2005) ("An action for an accounting may be a suit in equity or it may be a particular remedy sought in conjunction with another cause of action."); See also, Mont. Code Ann. §1-1-107.

D. THE DISTRICT COURT ERRED BY ENTERING PARTIAL SUMMARY JUDGMENT ON THE NCT'S CONSTRUCTIVE TRUST AND UNJUST ENRICHMENT CLAIMS, BASED UPON THE STATUTE OF LIMITATIONS (COUNTS I, III, AND VII).

St. Labre alleges the NCT cannot postpone the period of limitations because it did not know the "extent" of its injuries, or lacked knowledge of the claim or cause of action or its accrual, citing Mont. Code Ann. §27-2-102(2). *St. Labre's Brief*, at 37. However, the facts constituting the NCT's claims were not discovered by the NCT, so the period of limitation did not begin. Mont. Code Ann. §27-2-102(3).

Because of the relationship between them, the NCT did not discover that St. Labre transferred ownership of all donations held in its account to itself and/or the Diocese, until the NCT requested a payout of its entire interest in the donations held in the endowment fund, and St. Labre refused. St. Labre historically held the NCT's donations in its endowment fund, and periodically distributed funds to them. The transfer of ownership to St. Labre and/or the Diocese could not be discovered until it actually occurred. St. Labre first implied it would no longer recognize the NCT's ownership interest in the endowment fund with its January 25, 2008 letter.

The distinction between the distribution of funds held by St. Labre and the actual ownership of the funds held by St. Labre is essential. For example, take the following hypothetical situation. A beneficiary of monies held in trust asks for a

distribution that will allow him to secure reliable transportation. The trustee fails to give the beneficiary enough money to purchase a car, but gives him enough money to ride the bus. If the beneficiary believes he received an inadequate distribution for his needs, the beneficiary can choose to bring an action based upon the inadequate distribution, or he can choose to believe the trustee is acting in his best interest. If he chooses to do nothing at that time, it does not mean the statute of limitations starts running. It does not mean that eight years later, after the statutes of limitations has run on everything from conversion to breach of contract, the trustee could take all of the trust money for himself, claiming, "You knew I was a bad trustee. You knew there was a problem—just not the extent of the problem. Now it is too late to sue me." A tribal president along the way questioning the amount of distributions to the Tribe does not equate to the accrual of an action related to the denial of NCT's **ownership** of the donations.

To give rise to the NCT's claims for constructive trust, unjust enrichment, breach of contract, conversion, negligent misrepresentation, fraud, and accounting, the NCT must have *discovered* it was deprived of its ownership interest in the donations held in the endowment fund. That fact could only be discovered after the NCT made demand for payout and notified St. Labre their relationship was over, and St. Labre unequivocally refused, with no alternate agreement resulting in a continued relationship. That did not occur until January 25, 2008, when years of

negotiations recognizing the NCT's ownership interest in donations hit an impasse that suggested St. Labre would not longer recognize the NCT's ownership interest. Dkt. 158, at Ex. V-W.

The question of whether an action is barred by the statute of limitations is decided by the jury when there is conflicting evidence as to when the cause of action accrued. *Hill v. Squibb & Sons* (1979), 181 Mont. 199, 592 P.2d 1383; *Werre v. David* (1996), 275 Mont. 376, 913 P.2d 625. Summary judgment was not appropriate here, since the date of discovery and accrual of the causes of action are disputed by the parties. *Estate of Watkins v. Hedman, Hileman & Lacosta* (2004), 321 Mont. 419, 91 P.3d 1264.

Even if the jury determined the NCT's claims accrued outside the period of limitations, the Court should use the doctrine of equitable estoppel to promote "justice, honesty, fair dealing and to prevent injustice." Dkt. 158, at 19-24. Neither St. Labre nor the Diocese ever simply advised the NCT that the NCT had absolutely no right to demand donations and no interest in the donations held in the endowment fund. Obviously, they did not want to risk losing donations if the Northern Cheyenne told the world that St. Labre was not giving their donations to the Northern Cheyenne people and was hoarding donations to the tune of over $70 million in an endowment fund.

Again, the District Court failed to draw all reasonable inferences in favor of the NCT. If reasonable minds can draw different inferences from the evidence, a question of fact remains for the jury. *Weinberg,* 27.

E. THE DISTRICT COURT ERRED BY ENTERING SUMMARY JUDGMENT ON THE NCT'S UNJUST ENRICHMENT CLAIM (COUNT III).

The NCT will not belabor its position here. St. Labre claims it had no obligation to give donations to the NCT and did not commit any wrongdoing. The NCT believes the fundraising letters and St. Labre's subsequent claim that St. Labre and the Diocese owns the $90 million in assets derived from donations brought in using those fundraising letters proves otherwise. "Unjust enrichment requires a factual examination of the circumstances and of the conduct of the parties, which is....**[a task] for the trier of fact.**" See *66 Am. Jur. Restitution and Implied Contracts,* §9; *Crowell v. Danforth* (1992), 222 Conn. 150, 609 A.2d 654. The District Court's dismissal of the NCT's unjust enrichment claim before factual issues were resolved by the jury was erroneous.

F. THE DISTRICT COURT ERRED BY ENTERING SUMMARY JUDGMENT AGAINST THE NCT AS TO ALL COUNTS OF ITS COMPLAINT AGAINST THE DIOCESE.

The Diocese spends seven pages discussing why it is a mystery that it has been named in this lawsuit, and makes the ridiculous argument that imposing liability upon the Diocese for acts of its clergy would interfere with religious

doctrine, violate the "ecclesiastical absentation doctrine" and infringe upon the First Amendment.

The Roman Catholic Church has mastered the ability to create confusion regarding which order its clergy belong to, how it operates, who is responsible for its clergy, and how, why and where its clergy are placed. In fact, as the Diocese puts it, "the traditional denominations each have their own intricate principles of governance." However, in this case, the bottom line is this: The Diocese has not and cannot claim the Roman Catholic Church had no clergy at St. Labre,[3] did not assign or remove its clergy from St. Labre, or had no authority over its clergy while at St. Labre. The Diocese has not and cannot say its clergy were not at St. Labre to advance the interests of the Roman Catholic Church. The Diocese has not and cannot say its clergy were there in their individual capacities or in a capacity for an entity unrelated to the Roman Catholic Church. Quite simply, the Diocese cannot deny responsibility for the acts of the St. Labre clergy.

While the Diocese claims the Courts cannot interfere with its fundraising, hierarchy or core mission to "proselytize the Gospel of Jesus Christ," there is nothing to support the proposition that Montana Courts are unable to impose

[3] Although it claims no Diocese employee played any role in the fundraising activities at St. Labre, that fact is in dispute, as Father Emmett Hoffman and other clergy/representatives of the Roman Catholic Church signed the bulk of the fundraising letters. See *Diocese's Brief,* at 6; *NCT's Opening Brief Appendix*, at 125-185.

liability against the Diocese for theft, breach of trust or contract, or for abuse committed by its clergy while at a religious post. If the St. Labre clergy had only provided education or engaged in fundraising, there would be no lawsuit.

If the Diocese's arguments are accepted, the result would be that the Diocese would not be responsible for the acts of its clergy provided the clergy are located in a school or similar legal entity, and as long as its clergy commit theft, abuse or other civil wrongs while proselytizing the gospel of Jesus Christ. The First Amendment was not designed to allow the religious to victimize others.

Moreover, the Diocese has never denied St. Labre's claim that the Diocese is ultimately the owner of the donations held in St. Labre's endowment fund, and the Diocese admits it received nearly $18 million in donations from St. Labre. *Diocese's Brief*, at 6-7. Whether or not the Diocese knew the funds belonged to the NCT and were to be used solely to benefit the NCT is a question of fact for the jury. Whether or not the Diocese conspired with St. Labre to deprive the NCT of donations is a question of fact for the jury. Clearly, the Diocese has an interest in the litigation and vicarious liability for the acts of its clergy is appropriate.

CONCLUSION

For every wrong, there is a remedy. A wrong was committed here.

The complete summary dismissal of the NCT's case was a miscarriage of justice. The NCT should get its day in court before a Montana jury. The NCT asks this Court to afford that justice.

RESPECTFULLY submitted this 25th day of June, 2012.

EDWARDS, FRICKLE & CULVER

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief of Appellant is double spaced; the document is proportionately spaced using Times New Roman font with 14 characters per inch; 4,947 words, excluding this Certificate of Compliance, Certificate of Service, the Table of Contents and Table of Authorities.

Dated this 25th day of June, 2012.

EDWARDS, FRICKLE & CULVER

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant has been duly served upon the attorneys listed below depositing same in the U.S. Mail, postage prepaid, on this 25th day of June, 2012.

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