DEFENDING A RELIGIOUS INSTITUTION USING THE CHARITABLE IMMUNITY AND ECCLESIASTICAL DOCTRINE DEFENSES TO TORT LIABILITY

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Defense attorneys in Arkansas are, not infrequently, called upon to defend religious institutions from tort suits brought against them for a variety of reasons. Such claims may arise out of a motor vehicle accident involving a church bus, a slip and fall accident on church premises, a claim of sexual molestation on the part of a church employee, or another type of claim. In defending claims against religious institutions, it is imperative that the defense of charitable immunity and, where applicable, the Ecclesiastical doctrine, be raised in the first responsive pleading to the Complaint, be that an Answer and/or a Motion to Dismiss. As such, defense counsel should plead in the Answer, among other affirmative defenses, Arkansas Rule of Civil Procedure 12(b)(1) lack of subject matter jurisdiction and Rule 12(b)(6) failure to state a claim sufficient to form the basis for relief. He or she should also affirmatively plead the client's not-for-profit entity status, citing its Internal Revenue Service 501(c)(3) designation. Furthermore, defense counsel should raise the defense that the claim violates the First Amendment to the United States Constitution and the separation of church and state doctrine.[1] Essentially, this argument is that a secular civil court

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1. *See* Belin v. West, 315 Ark. 61, 864 S.W.2d 838 (1993); Gipson v. Brown, 295 Ark. 371, 749 S.W.2d 297 (1988); Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson, 344 Ark. 332, 40 S.W.3d 301 (2001).

lacks subject matter jurisdiction to determine and/or interpret church doctrine.

Under Arkansas law, charitable not-for-profit organizations are immune from tort liability under the well-established doctrine of charitable immunity.[2] The purpose of the "charitable-immunity doctrine is that organizations such as agencies and trusts created and maintained exclusively for charity may not have their assets diminished by execution in favor of one injured by acts of persons charged with duties under the agency or trust."[3] In *Low v. Insurance Co. of N. Am.*, the Arkansas Supreme Court held that based upon the express language of the direct-action statute, codified at Ark. Code Ann. § 23-79-210, a charitable organization is immune from both tort liability and suit against it.[4] Arkansas courts have consistently interpreted the statutory language, "immunity from liability in tort," to constitute immunity from suit.[5]

Typically, a Motion for Summary Judgment is needed in order to prove to the court that the client is a not-for-profit or religious institution and is therefore entitled to immunity from both tort liability and suit. In order to obtain a dismissal, exhibits will be necessary to prove the same. In determining whether an entity is charitable and, therefore, entitled to charitable immunity, Arkansas courts consider several factors, including:

> (1) whether the organization's charter limits it to charitable or eleemosynary purposes; (2) whether the organization's charter contains a "not-for-profit" limitation; (3) whether the organization's goal is to break even; (4) whether the organization earned a profit; (5) whether any profit or surplus [the entity earns] must be used for charitable or eleemosynary purposes; (6) whether the organization depends on contributions and donations for its existence; (7) whether the organization provides its service[s] free of charge to those unable to pay; and (8) whether the directors

2. *See* Jackson v. Sparks Reg'l Med. Ctr., 375 Ark. 533, 294 S.W.3d 1 (2009).

3. Davis Nursing Ass'n v. Neal, 2019 Ark. 91, at 5, 570 S.W.3d 457, 460.

4. 364 Ark. 427, 220 S.W.3d 670 (2005).

5. *See* Ramsey v. Am. Auto. Ins. Co., 234 Ark. 1031, 356 S.W.2d 236 (1962); Williams v. Jefferson Hosp. Ass'n, 246 Ark. 1231, 442 S.W.2d 243 (1969); Harvill v. Cmty. Methodist Hosp. Ass'n, 302 Ark. 39, 786 S.W.2d 577 (1990); Jarboe v. Shelter Ins. Co., 317 Ark. 395, 877 S.W.2d 930 (1994); George v. Jefferson Hosp. Ass'n, 337 Ark. 206, 987 S.W.2d 710 (1999); Smith v. Rogers Grp., Inc., 348 Ark. 241, 72 S.W.3d 450 (2002).

> and officers of the organization receive compensation [for their services to the organization].[6]

However, this list is "illustrative, not exhaustive, and no single factor is dispositive of charitable status."[7]

In examining the first and second factors of the eight-factor test, one must look at the charitable entity's Charter and/or Articles of Incorporation. Typically, such documents contain language limiting the organization to act only for charitable purposes or include a not-for-profit limitation on its actions, or both.[8] Some also include language to the effect that the organization is organized for "purposes that qualify as tax exempt under current sections of the Internal Revenue Code."[9] Others provide that the organization is limited "exclusively for charitable, civic, social, cultural, and educational purposes."[10] All such language is sufficient to satisfy factors one and two. However, some language allows the organization to "engage in all purposes . . . permitted by applicable law."[11] This is not a fatal flaw, as the Arkansas Supreme Court has explained, "[t]he first and second [factors] are perhaps the easiest of the

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6. *Neal*, 2019 Ark. 91, at 5, 570 S.W.3d at 460-61 (quoting Masterson v. Stambuck, 321 Ark. 391, 401, 902 S.W.2d 803, 809 (1995)).

7. *Neal*, 2019 Ark. 91, at 6, 570 S.W.3d at 461 (citing *Masterson*, 321 Ark. at 401, 902 S.W.2d at 810).

8. INTERNAL REVENUE SERVICE, *Suggested Language for Corporations and Associations (per publication 557)*, IRS (Feb. 2, 2021), [https://perma.cc/93FW-CCRP]; *see, e.g.*, Neal v. Davis Nursing Ass'n, 2015 Ark. App. 478, at 4, 470 S.W.3d 281, 283 (holding that it was "undisputed that Davis satisfies factors 1, 2, and 8" because "Davis's charter limits its operation to charitable purposes and contains a not-for-profit limitation"); *see also* Progressive Eldercare Services-Saline, Inc. v. Krauss, 2014 Ark. App. 265, at 3, 2014 WL 1758914, at *2 (holding that "[s]ome factors presented to the court would favor entitlement to charitable immunity" because "Progressive's charter limits it to charitable or eleemosynary purposes, the charter contains a 'not-for-profit' limitation, and its directors and officers do not receive compensation").

9. *See, e.g.*, Gain, Inc. v. Martin, 2016 Ark. App. 157, at 4, 485 S.W.3d 729, 732 (holding that "[t]he first and second factors [were] established by Gain's articles of incorporation, which provide that Gain is a public-benefit corporation under the Arkansas Nonprofit Act of 1993" and declaring that Gain uses "any funds 'for charitable and educational purposes as a nonprofit corporation'").

10. *See* St. Bernard's Cmty. Hosp. Corp. v. Chaney, 2021 Ark. App. 236, at 9, 2021 WL 1900046, at *5 (stating that "CrossRidge's articles of incorporation provide that CrossRidge is a corporation organized 'exclusively for charitable, religious, scientific, and educational purposes'").

11. *See* Rohrscheib v. Barton-Lexa Water Ass'n, 246 Ark. 145, 148, 437 S.W.2d 230, 232 (1969) (opining that the language of ARK. STAT. ANN. § 64—1904 "provides that these non-profit corporations may be organized under the act for any lawful purpose or purposes").

factors to demonstrate as they are merely a matter of possessing corporate documentation reflecting nonprofit and charitable character."[12] In other words, as long as the documents establish the organization was created for not-for-profit and/or charitable pursuits, it will pass muster, notwithstanding language allowing it to engage in other endeavors.

Such documentation should be obtainable from the client itself. However, if for some reason the client is unable to provide the documents, they are easily obtainable from the Arkansas Secretary of State's office, as the organization would have had to file the documents when it was established.[13] If the organization's purposes have changed over the years, there may be more than one Charter and/or Articles of Incorporation, and all must be reviewed to ascertain if, in fact, the appropriate language is still in place and the organization's primary purpose at the time of the accident or incident giving rise to the cause of action was for charitable endeavors.

The third through eighth factors are typically proven by affidavit of the organization's chief executive or chief financial officer and will need to include testimony that the organization seeks simply to "break even and not to earn a profit."[14] The affiant should also attest that if there is a profit, "all proceeds received in excess of its operating costs" are invested back into the organization for further, future charitable purposes.[15]

The same analysis applies to the fifth factor about "whether any profit or surplus must be used for charitable or eleemosynary purposes."[16] This "factor examines what an entity that does produce a surplus actually does with it."[17] Thus, a charitable organization can earn a profit, "so long as the money thus received is devoted altogether to the charitable object which the institution is intended to further."[18]

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12. George v. Jefferson Hosp. Ass'n, 337 Ark. 206, 212, 987 S.W.2d 710, 713 (1999).

13. *See* ARKANSAS SECRETARY OF STATE, *Doing Business in Arkansas* 8 (2019), [https://perma.cc/FV6H-K88H].

14. *See generally George*, 337 Ark. at 213, 987 S.W.2d at 713.

15. *See, e.g.*, *id.* at 213, 987 S.W.2d at 713-14.

16. Davis Nursing Ass'n v. Neal, 2019 Ark. 91, at 5, 570 S.W.3d at 461 (quoting Masterson v. Stambuck, 321 Ark. 391, 401, 902 S.W.2d 803, 809 (1995)).

17. *George*, 337 Ark. at 213, 987 S.W.2d at 714.

18. *Id.* at 214, 987 S.W.2d at 714.

Most modern not-for-profit organizations do not rely entirely on contributions and donations, which Arkansas law has recognized in examining factor six. As explained by *George v. Jefferson Hosp. Ass'n*, while depending only on donations would make "an even clearer case of charitable immunity," the proof of an organization's "organizational structure as presented do[es] not negate its overriding charitable purpose."[19] In further explanation, the Arkansas Supreme Court has held:

> In considering the sixth factor, we note that Sparks does not depend solely on contributions and donations for its existence. Most of its operating funds are provided through Medicare, Medicaid, and individual patients or their private insurers. While the nonprofit hospital in *George* only received donations totaling approximately 6% of its financial obligations, **this court stated that "a modern hospital, with rare exception, would find it extremely difficult to operate wholly or predominately on charitable donations."** As was the case in *George*, **the fact that Sparks receives most of its funding through sources other than contributions or donations does not "negate its overriding charitable purpose."**[20]

The client may well primarily rely upon federal grants, state grants, Medicare payments, and/or private insurance payments for services rendered. However, such contributions or donations are likely tax-deductible and, therefore, do not jeopardize the organization's charitable status.[21] Thus, it is vital to secure an affidavit attesting to the overriding charitable purpose of the organization and how contributions or donations to it are implemented for those purposes. The affiant should be an individual with knowledge of the organization's activities. For instance, testimony in the affidavit that any proceeds received in excess of the organization's "operating costs are returned to the organization to acquire, renovate, and operate its organization and further its charitable purposes" covers all the bases.[22]

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19. *Id*. at 214, 987 S.W.2d at 714.

20. Jackson v. Sparks Reg'l Med. Ctr., 375 Ark. 533, 541, 294 S.W.3d 1, 5-6 (2009) (emphasis added) (citing *George*, 337 Ark. at 214, 987 S.W.2d at 710).

21. *See Jackson*, 375 Ark. at 541, 294 S.W.3d at 6.

22. *See* Neal v. Davis Nursing Ass'n, 2015 Ark. App. 478, at 5, 470 S.W.3d 281, 284 (stating that "Davis's bylaws require that its board members and officers serve without pay"

Finally, regarding factor eight, which is "whether the directors and officers receive compensation," the Arkansas Supreme Court has ruled "it is *not necessary* for a charitable organization to have entirely volunteer staff and management."[23] Instead, Arkansas law permits a not-for-profit organization's executives to earn a salary so as to attract well-qualified individuals to these offices.[24] Arkansas courts have explained for factor eight:

> [I]t is *not necessary* for charitable organizations to have entirely volunteer staff and management. [The hospital's] size and complexity make knowledgeable, well-qualified personnel essential. Such persons do not readily volunteer their services or serve at rates of compensation markedly lower than market rates.[25]

In *George*, although the charitable entity's chief executive officer and chief financial officer both received a yearly salary of $225,000 and $170,000, respectively, and had a potential bonus compensation available to them, the court held that these facts did "not put the hospital in the position of being maintained for the private gain, profit, or advantage of its organizers."[26] A Motion for Summary Judgment, supported by the organization's Charter and/or Articles of Incorporation, and an affidavit from a chief executive of the organization addressing each of the above-referenced eight factors, should position the client well for a speedy dismissal based upon the charitable immunity doctrine.

With regard to religious institutions, the United States Supreme Court has repeatedly held that civil courts do not have jurisdiction to interpret or implement church doctrine.[27] The Arkansas Supreme Court agrees.[28] In *Gipson v. Brown*, the court

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and "Davis contends that any profits earned would be held and reinvested in its continued operation").

23. *See George*, 337 Ark. at 214, 987 S.W.2d at 714 (emphasis added).

24. *Id.* at 214, 987 S.W.2d at 714; Scamardo v. Sparks Reg'l Med. Ctr., 375 Ark. 300, 308, 289 S.W.3d 903, 908 (2008) (finding compensation permissible when the top three executives earned more than $230,000 per year and the chief executive officer earned $350,000 per year).

25. *George*, 337 Ark. at 214, 987 S.W.2d at 714 (emphasis added).

26. *Id.* at 214, 987 S.W.2d at 714.

27. *See* Serbian E. Orthodox Diocese for the U.S. & Can. v Milivojevich, 426 U.S. 694 (1976).

28. *See* Ark. Presbytery of Cumberland Presbyterian Church v. Hudson, 344 Ark. 332, 40 S.W.3d 301 (2001).

noted the Ecclesiastical doctrine's intent and purpose and found, absent fraud or collusion, the United States Supreme Court has held since 1872:

> that when civil courts get involved in matters of church discipline or ecclesiastical government, it requires looking into the customs, usages, written laws, and the fundamental organization of religious denominations, which deprives these bodies of the right to interpret their own church laws and opens the door to all sorts of evils.[29]

The court in *Gipson* went on to state "deference [must be given] to decisions of ecclesiastical bodies on matters of internal church governance."[30]

In the *Gonzalez v. Roman Cath. Archbishop* decision, Justice Brandeis, writing for the majority, stated, "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular court as conclusive."[31] Similarly, in *Jones v. Wolf*, the Supreme Court held that when religious institutions establish rules for internal governance, "the Constitution *requires* that civil courts accept their decisions as binding upon them."[32] Further, the Supreme Court has held religious freedom encompasses the power of religious bodies to "decide for themselves, free from state interference, matters of church governnment as well as those of faith and doctrine."[33]

In many instances, for a circuit court to find a duty owed by and/or liability on the part of a religious institution, it would, necessarily, first need to interpret, and thereby pass judgment upon, the structure and organization of the entity's internal faith and doctrine. This is especially true in cases involving alleged misconduct of a church employee and even more so if there are allegations of negligent hiring, supervision, and/or retention of an employee. It is clear from the above holdings that to do so would

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29. Gipson v. Brown, 295 Ark. 371, 376, 749 S.W.2d 297, 299 (1988) (citing Watson v. Jones, 80 U.S. 679 (1872)).

30. *Gipson*, 295 Ark. at 376, 749 S.W.2d at 299 (citing Gonzalez v. Roman Cath. Archbishop, 280 U.S. 1, 16 (1929)).

31. *Gonzalez*, 280 U.S. at 16.

32. Jones v. Wolf, 443 U.S. 595, 619 (1979) (citing *Milivojevich*, 426 U.S. at 724-25) (emphasis added).

33. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

be contrary to constitutional law. However, an early-filed Motion to Dismiss asserting the Ecclesiastical doctrine should lead to a dismissal of the suit in its entirety, or at least those causes of action requiring interpretation of church structure and management.

In conclusion, the charitable immunity and Ecclesiastical doctrine defenses are useful tools in a defense counsel's arsenal when defending a religious institution client. When plead promptly and supported by the proper documentation and affidavit evidence, either or both should result in a dismissal of the entity without protracted litigation or costs being incurred.