In the Supreme Court of Florida

Case no. 94,450

Jane Doe,

Petitioner,

vs.

Church of the Holy Redeemer, Inc.,
The Diocese of Southeast Florida,
and **Calvin O. Schofield, Jr.**

Respondents.

Supplemental Amicus Brief of Miami Shores Presbyterian Church

---

On discretionary review from the
Fourth District Court of Appeal

Peter A. Miller, Esq.
Conroy, Simberg & Ganon, P.A.
2600 Douglas Road
Suite 311
Coral Gables, FL 33134
(305) 648-2501

Law Office of Robert S. Glazier
The Ingraham Building
25 S.E. Second Avenue
Suite 1020
Miami, FL 33131
(305) 372-5900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other authorities cited

INTEREST OF AMICUS

Miami Shores Presbyterian Church is a church in Miami-Dade County. The Court previously granted leave for the church to file an amicus brief in this case.

STATEMENT OF THE CASE AND FACTS

According to the Second Amended Complaint, Jane Doe and William Evans had a "pastoral counselor-counsellee relationship." (¶¶ 7, 8, 5). Ms. Doe alleges that during this pastoral counselor-counsellee relationship, Evans became "involved with her in a romantic manner." (¶ 20).

Based on this relationship, the Second Amended Complaint contains claims for breach of fiduciary duty and "outrageous conduct." (¶¶ 17-25, 30-33). The complaint also contains a claim against the church Defendants for negligent hiring/supervision/retention, which relies upon the other claims. (¶ 26-29). There is no claim for assault or any allegation that the relationship was the result of physical force.

Following oral argument, this Court ordered supplemental briefing on legal authorities "in support of the same alleged causes of action in the Second Amended Complaint but against defendants who are not religious entities."

SUMMARY OF THE ARGUMENT

The causes of action alleged in the second amended complaint would not be actionable against defendants who are not religious entities. Florida long ago ceased to recognize consensual sexual relationship between adults as tortious conduct.

While psychotherapists can be held liable in tort for sexual relationships with patients, this does not save the Plaintiff's complaint. Psychotherapeutic relations are based on the "transference phenomenon." When a therapist mishandles this, and a sexual relationships results, the therapist can be held liable for malpractice. But in relationships in which

transference is not a basic tool, the usual principle—no liability for consensual sexual relationships—applies. Courts have accordingly refused to impose liability on clergy for consensual sexual relationships with parishioners, even if the relationship grew out of pastoral counseling.

Furthermore, the Florida Legislature has refused to equate pastoral counseling with psychotherapy. The Legislature has made it a criminal offense for a psychotherapist to engage in sexual misconduct with a patient, but the statutes specifically exclude clergy.

ARGUMENT

The causes of action alleged in the Second Amended Complaint could not be asserted against defendants who are not religious entities

Florida courts at one time might have imposed liability upon a man who had sexual relations with a woman, if the man had a particular influence over the woman. But that time has long past. Courts now do not intervene in the consensual romantic relationships of adults. "[G]iven current community standards, sexual intercourse between two consenting adults cannot be regarded as atrocious and utterly intolerable in a civilized community." *Harrington v. Pages*, 440 So. 2d 521, 522 (Fla. 4th DCA 1983). The only exception to this general rule does not apply to the facts of this case.

I. Florida does not generally impose tort liability for consensual romantic relationships

At early common law, a "seduced woman" could under limited circumstances bring a legal action against her seducer. While the general rule was that "a seduced woman has no cause of action against her seducer since she is a party to the wrongful act," there was an exception. *Kirkpatrick v. Parker*, 187 So. 620 (Fla. 1939). A seduced woman could sue for the "tort of seduction" under "peculiar" circumstances—where there was "force, duress, or overpowering control or influence successfully used to seduce." *Id.* at 626.

But government has receded from regulating sexual torts. Over a half century ago the Florida Legislature abolished the doctrine that a woman could sue a man for

the tort of seduction or similar torts involving private consensual sexual matters: "The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are hereby abolished." § 771.01, Fla. Stat. Therefore, while the state has retained its authority to punish criminal conduct (such as child molestation), the state will not intervene in the sex lives of consenting adults. *See Roppolo v. Moore*, 644 So. 2d 206, 208 (La. Ct. App. 1994).

This principle was applied in *Harrington v. Pages*, 440 So. 2d 521 (Fla. 4th DCA 1983). In that case, a physician had a sexual relationship with a patient, in violation of a statute which prohibits "sexual misconduct" between a physician and patient. § 458.329, Fla. Stat. The patient's husband subsequently sued the doctor for intentional infliction of emotional distress. The Fourth DCA (Anstead, Hersey and Dell, JJ.) found that the claim was improper, even though the defendant's conduct was prohibited by statute, because the plaintiff "essentially seeks to allege, under the guise of 'intentional infliction of emotional distress,' a cause of action which has been expressly barred by Section 771.01." 440 So. 2d at 522.

Florida's move away from sexual torts was part of a larger national trend. There is a "trend for the courts not to be judgmental about the sex lives of consenting adults." *Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573, 579 (Iowa Ct. App. 1987) (concurring opinion) (relationship between dentist and patient). Accordingly,

"[s]exual intercourse between consenting adults is generally not tortious conduct." *Hertel v. Sullivan*, 633 N.E.2d 36, 39 (Ill. Ct. App. 1994) (priest providing counseling to parishioner).

II. The Plaintiff improperly requests that clergy be treated as psychotherapists to impose tort liability for consensual sexual relations

Since the general rule is that sexual relations between consenting adults are not tortious, the Plaintiff must locate an exception to the general rule to impose liability based on her "romantic relationship" with Defendant Evans.

The Plaintiff suggests that an exception to the general rule of no liability is proper because there was a "pastoral counselor-counsellee relationship" between the two. According to the Plaintiff, this relationship should be treated like a secular relationship between a psychotherapist and patient, for which there might be liability.

The Plaintiff's argument should be rejected. First, it ignores the unique clinical nature of a psychotherapeutic relationship, and the reason why sex within such a relationship is considered to be tortious. Second, it ignores the nature of pastoral counseling. Third, the Plaintiff's request that pastoral counseling be treated as psychotherapy has already been rejected by the Florida Legislature.

A. The basis for holding psychotherapists liable for sexual relations with patients does not support holding clergy liable for consensual sexual relationships with parishioner counsellees

The Plaintiff without analysis relies on cases involving psychotherapists—psychiatrists, psychologists, and other counselors. We acknowledge that such persons are generally not protected from liability by the principle that consenting adults may not sue their sexual partners based on the sexual relationship. But there are specific reasons why such professionals are held liable when they have sexual relations with their patients, and those reasons do not support imposing tort liability on clergy for consensual sexual relationships.

At the heart of a psychotherapist's liability for sexual conduct with patients is the "transference phenomenon," which is "a patient's emotional reaction to a therapist and is 'generally applied to the projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past.'" *Simmons v. United States*, 805 F.2d 1363, 1364 (9th Cir. 1986). In the transference phenomenon, "the patient transfers feelings toward everyone else to the doctor, who then must react with a proper response, the countertransference, in order to avoid emotional involvement and assist the patient in overcoming problems." *Horak v. Biris*, 474 N.E.2d 13, 18 (Ill. Ct. App. 1985).

Transference is a key component of psychotherapy, and the mishandling of it will "generally result[] in sexual relations or involvement between the psychiatrist or therapist and the patient." *Id.* Such a relationship has "uniformly been considered as malpractice or gross negligence in other jurisdictions, whether the sexual relations were prescribed by the doctor as part of the therapy, or occurred outside the scope of

treatment." *Id.* As one court explained, "[I]t is the mishandling of transference, and not the resulting sexual conduct, which gives rise to the alleged malpractice." *St. Paul Fire Marine Insurance Co. v. Love*, 447 N.W.2d 5, 13 (Minn. Ct. App. 1989), *affirmed*, 459 N.W.2d 698 (Minn. 1990).

Indeed, in the one Florida case involving liability for a psychotherapist's improper relationship with a patient, the court noted that "Each and every one of the expert witnesses testified that the 'acting out' of the psychiatrist's feelings toward appellee's wife (known as countertransference) was conduct below the acceptable psychiatric and medical standards." *Anclote Manor Foundation v. Wilkinson*, 263 So. 2d 256, 257 (Fla. 2d DCA 1972).

But only in psychotherapy is the management of the transference effect so critical. *Benavidez v. United States*, 177 F.3d 927, 930 (10th Cir. 1999). "No other professional relationship offers a course of treatment and counseling predicated upon handling the transference phenomenon." *Id.* Its legal consequences do not apply to other relationships, even if those relationships may be founded on the same degree of trust as exists in the psychotherapeutic relationship.

Accordingly, where the professional relationship does not revolve around the transference phenomenon, a sexual relationship will not give rise to legal liability. "[P]rofessionals who do not use the transference mechanism are not subject to the same claim of counseling malpractice arising from the consensual sexual conduct of adults unless the conduct violates some other professional standard of conduct."

Bladen v. First Presbyterian Church, 857 P.2d 789, 794 (Okla. 1993). A federal court of appeals explained this point which distinguishes the psychotherapeutic relationship from other relationships (including minister-parishioner):

> The crucial factor in the therapist-patient relationship which leads to the imposition of legal liability for conduct which arguably is no more exploitive than sexual involvement of a lawyer with a client, a priest or minister with a parishioner, or a gynecologist with a patient is that lawyers, ministers and gynecologists do not offer a course of treatment and counseling predicated upon handling the transference phenomenon.

Simmons v. United States, 805 F.2d 1363, 1365 (9th Cir. 1986). In short, where transference is not a feature of the professional's training and the relationship, there will be no liability.

B. Courts have not treated clergy like psychotherapists for purposes of imposing liability for consensual sexual relations

Based on these principles, courts have generally rejected suggestions—such as that made by the Plaintiff here—that clergy should be treated as psychotherapists for the purpose of imposing liability for consensual sexual relations.

One court flatly stated that "We reject plaintiff's suggestion that the duties of a priest to his parishioner or of a minister to his congregation should be equated with the duties of a psychologist to his patient. A priest or minister is not required to possess and apply the knowledge and use the skill and care ordinarily used by a reasonably well-qualified psychologist." *Hertel v. Sullivan*, 633 N.E.2d 36, 39 (Ill. Ct.

App. 1994). To the contrary, "pastoral counseling is clearly and directly centered on matters of religion, and claims of negligence are not cognizable in the civil courts." *Dausch v. Rykse*, 52 F.3d 1425, 1433 (7th Cir. 1994) (for two judges). *See also Bladen v. First Presbyterian Church*, 857 P.2d 789, 797 (Okla. 1993).

At oral argument, counsel for the Plaintiff suggested that there should be liability for consensual sexual relationships arising from *formal* counseling by clergy, but that there should be no liability for sexual relationships arising from *informal* counseling. (OA tape, at 15:15 - 16:00). This is an untenable distinction. Liability should not turn on whether the counseling was preplanned or spontaneous. The distinction also ignores the fact that all advice provided by clergy is pastoral—that is, religious. Finally, the determination of whether pastoral counseling was "formal" or "informal" would require the courts to become entangled in religious matters.

Because of consideration such as these, courts have refused to recognize claims such as the Plaintiff's—claims against a clergyman for breach of fiduciary duty and intentional infliction of emotional distress, based on a consensual sexual relationship.

Courts have held that a claim against clergy for breach of fiduciary duty is in essence a claim for clergy malpractice, which has been universally rejected by the courts. *Teadt v. St. John's Evangelical Lutheran Church*, 603 N.W.2d 816 (Mich. Ct. App. 1999); *Dausch v. Rykse*, 52 F.3d 1425, 1429 (7th Cir. 1994); *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907, 912 (Neb. 1993). As one court explained, the plaintiff "cannot establish why she would repose trust in [the defendant] without resorting to the fact

that [he] was her pastor. In other words, 'religion is not merely incidental to . . . plaintiff's relationship with . . . defendant, it is the foundation for it.'" *Teadt v. St. John's Evangelical Lutheran Church*, 603 N.W.2d 816. While some courts have upheld claims against clergy based on consensual sexual relations, *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997), the better view finds no liability. *See Teadt v. St. Johns Evangelical Lutheran Church*, 603 N.W.2d 816.

Courts have similarly refused to recognize a claim for intentional infliction of emotional distress based on a clergy's sexual relationship with a parishioner. "A sexual relationship between two consenting adults is not outrageous conduct such as to give rise to a claim for intentional infliction of emotional distress." *Schieffer v. Catholic Archdiocese*, 508 N.W.2d at 911. Another court held that stripped of religious overtones, a plaintiff's claim was simply that a person pursued the plaintiff when she was vulnerable, gained her trust, and had a sexual relationship. *Teadt v. St. John's Evangelical Lutheran Church*, 603 N.W.2d 816. This too did not support a claim for the "tort of outrage."

C. The Florida Legislature has specifically refused to equate pastoral counseling with psychotherapy

The crucial difference between pastoral counseling and psychotherapy has been explicitly recognized by the Florida Legislature.

Chapter 491 of the Florida Statutes is entitled "Clinical, counseling, and psychotherapy services." It contains numerous requirements for therapists, and

specifically states that sexual misconduct is prohibited and punishable as a felony. §§ 491.0111, 491.0112, Fla. Stat. But the chapter provides that its provisions do not apply to clergy providing pastoral counseling: "no provision of this chapter shall be construed to limit the performance of activities of a rabbi, priest, minister, or member of the clergy of any religious denomination . . . . when such activities are performed . . . by a person for or under the auspices . . . of an established and legally cognizable church, . . . and when the person rendering service remains accountable to the established authority thereof."

This exclusion is consistent with the principle that "the secular state [is] not equipped to ascertain the competency of counseling when performed by those affiliated with religious organizations." *Roppolo v. Moore*, 644 So. 2d 206, 209 (La. Ct. App. 1994).

The Legislature has thus concluded—contrary to the Plaintiff's request—that clergy providing pastoral counseling are not to be treated the same as therapists who provide psychotherapy.

CONCLUSION

Because consensual sexual relations between two adults are not generally actionable in tort, and because the Plaintiff has not stated any principle that removes her relationship with Defendant Evans from this general rule, the Court should affirm the dismissal of the Plaintiff's complaint.

Respectfully submitted,

PETER A. MILLER, ESQ.
CONROY, SIMBERG & GANON, P.A.
2600 Douglas Road
Suite 311
Coral Gables, FL 33134
—and—
LAW OFFICE OF ROBERT S. GLAZIER
Ingraham Building, Suite 1020
25 S.E. Second Avenue
Miami, FL 33131
(305) 372-5900

Attorneys for Miami Shores Presbyterian Church

By:_____
Robert S. Glazier
Florida Bar No. 0724289

CERTIFICATE OF SERVICE AND FONT

WE HEREBY CERTIFY that true and correct copies of the foregoing were mailed this 21st day of February, 2000, to: Edward Campbell, Esq., Roberts & Sojka, P.A., 1675 Palm Beach Lakes Boulevard, 7th Floor, West Palm Beach, FL 33401; Randy D. Ellison, Esq., 1645 Palm Beach Lakes Boulevard, Suite 350, West Palm Beach, FL 33401-2289; Renzulli, Gainey & Rutherford, 300 East 42nd Street, New York, NY 10017; Thomas Ice, Esq., Barwick, Dillian, Lambert & Ice, P.A., 999 Brickell Avenue, Suite 555, Miami, FL 33131; William R. King, Esq., P.O. Box 12277, Lake Park, FL 33403-0277; Philip M. Burlington, Esq., Caruso, Burlington, Bohn & Compiani, P.A., Suite 3A, Barristers Building, 1615 Forum Place, West Palm Beach,

FL 33401; Cain & Snihur, Skylake State Bank Building, 1550 N.E. Miami Gardens Drive, Suite 304, North Miami Beach, FL 33179; James F. Gilbride, Esq., Gilbride, Heller & Brown, P.A., One Biscayne Tower, Fifteenth Floor, 2 South Biscayne Boulevard, Miami, FL 33131; and George N. Meros, Jr., Rumberger, Kirk & Caldwell, P.A., P.O. Box 10507, Tallahassee, FL 32302.

This brief is in 14 point proportionally-spaced Adobe Caslon.