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.

Amicus Brief of Miami Shores Presbyterian Church

On discretionary review from the
Fourth District Court of Appeal

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INTEREST OF AMICUS

Miami Shores Presbyterian Church is a church in Miami-Dade County. The issue in this case concerns a religious institution's right to select its religious leader without governmental interference. This issue, effecting the constitutional rights of all religious institutions, is of importance to Miami Shores Presbyterian Church.

STATEMENT OF THE CASE AND FACTS

As amicus, we part rely upon the facts as stated in the opinion of the district court, as well as the brief filed by the Respondents.

SUMMARY OF THE ARGUMENT

The district court correctly held that the Plaintiff's claim is barred by the Constitution.

The courts have long held that religious institutions have the right to choose their clergy. A lawsuit which claims that a religious institution negligently selected its clergy violates the Constitution. The lawsuit either improperly imposes secular standards for the selection of religious leaders, or else requires the review of religious doctrines. Either alternative is impermissible.

The only issue squarely presented by this case is whether an adult who was the subject of noncriminal sexual misconduct by clergy may sue a religious institution for negligent hiring or retention of the clergy? This question should be answered in the negative.

The Plaintiff's own complaint demonstrate that consideration of her lawsuit will intrude into constitutionally-protected areas.

ARGUMENT

The courts are constitutionally barred from deciding whether a church was negligent in hiring its spiritual leader, where the plaintiff was an adult at the time of the claimed tortious conduct and the conduct was noncriminal

The decision of the district court should be affirmed. The district court properly held that the Plaintiff's claim—a clergy negligent hiring claim against a church, brought by an adult based on the noncriminal conduct of a pastor—is barred by the church's constitutional right to autonomy concerning the selection and retention of clergy.

A. A church has a right to autonomy on internal matters, including the selection of clergy

In the United States, the courts have held that a distance between government and religion is especially important in regard to a religious institution's relationship with its clergy. In a long line of cases, the United States Supreme Court has made clear that it is the function of church/synagogue authorities to decide their internal affairs. As early as 1929 the United States Supreme Court held that it is the function of church authorities to determine the essential qualifications of clergy, and whether a candidate possesses them. *Gonzalez v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1, 16 (1929). More recently, the Supreme Court stated that "[f]reedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). *See Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976).

Following these Supreme Court decisions, courts have in recent years been careful to avoid

deciding cases which may have the effect of second-guessing the qualification of clergy. For example, one court stated that "personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts." *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, 929 F.2d 360, 363 (8th Cir. 1991). Another court agreed that "civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are *in themselves* an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment." *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (emphasis in original).

Applying this principle that courts will not review the qualifications of clergy, courts refuse to consider a clergy member's claim that he or she was fired, even if the person claims that the firing was in violation of federal civil rights laws. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985). Similarly, courts refuse to consider a discharged clergy member's claim that his former employer breached his employment contract, violated the institution's internal by-laws, and defamed him. *Goodman v. Temple Shir Ami*, 712 So. 2d 775 (Fla. 3d DCA 1998), *review granted*, 727 So. 2d 905 (Fla. 1998), *appeal dismissed as improvidently granted*, 1999 WL 459752 (Fla. July 8, 1999).

Where the lawsuit is against a religious institution and concerns the relationship between the religious institution and its clergy, the First Amendment requires a policy of "ecclesiastical abstention." This policy of non-involvement exists even where the plaintiff argues that the claim is based on non-religious grounds; where the selection of clergy is involved, *any* government entanglement is unacceptable. "The interaction between a church and its pastor is not only an integral part of church government, but also all matters touching this relationship are of ecclesiastical concern. It makes no difference when the ecclesiastical dispute fails to touch on church or religious doctrine." *Yaggie v. Indiana-Kentucky Synod*, 64 F.3d 664 (6th Cir. 1995) (unpublished decision, available on Westlaw, 1995 WL 499468).

The Plaintiff and her amici incorrectly claim that this case is controlled by the principles governing ordinary Free Exercise cases—that "the right of free exercise does not relieve an

individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). But in cases involving the selection of clergy, courts apply the church autonomy precedents, which provided far greater protection for the internal workings of churches. *See Combs v. Central Texas Annual Conference*, 173 F.3d 343, 349 (5th Cir. 1999); *Equal Employment Opportunity Commission v. Catholic University*, 83 F.3d 455, 460-63 (D.C. Cir. 1996); *Van Osdol v. Vogt*, 908 P.2d 1122, 1130 n.13 (Colo. 1996). The Plaintiff also relies on the "neutral principles" doctrine, which provides that some types of church *property* disputes can be resolved by the civil courts through the application of "neutral principles." However, "[t]he 'neutral principles' doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be." *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). *See also Brazaukas v. Fort-Wayne Bend Diocese*, 1999 Ind. App. Lexis 1072 (Ind. Ct. App. June 30, 1999); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 811 (Md. Ct. App. 1996); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 611 (Minn. Ct. App. 1996). *See generally Townsend v. Teagle*, 467 So. 2d 772, 775 (Fla. 1st DCA 1985). This case is governed by the special line of cases which protect the autonomy of churches.

B. The right to church autonomy bars a negligent hiring claim against a church arising from conduct by a clergyman

Based upon the well-established principle which bars the civil courts from interfering in a religious institution's choice of its own clergy, the district court properly held that Florida's courts could not second-guess the Church of the Holy Redeemer's decision about who would serve as its religious leader.

A claim for negligent hiring and supervision attempts to impose secular standards for the selection of an employee. This is entirely proper for secular employees. But it is not proper for clergy, whose central responsibilities are religious. Contrary to the Plaintiff's assertions, it is not possible to consider nonreligious standards for selection of clergy, since the job itself is by definition religious.

There is no way to avoid this problem. If—as the Plaintiff suggests—the court applies

secular standards to the church's selection of clergy, then the Constitution is violated, since religious institutions are entitled to select their own standards for selecting clergy.

On the other hand, if the court considers religious doctrines in reviewing the church's selection of clergy, then the court will be doing precisely what it is barred from doing: reviewing religious doctrines.

It is this bind which has led courts to decide, sometimes reluctantly but of necessity, that civil courts may not decide claims against religious institutions for negligent hiring and supervision of clergy. The courts have recognized that the hiring of clergy is "a 'quintessentially religious' matter, 'whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church.'" *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (citations omitted).

Review of a religious institution's selection of clergy will inevitably require the consideration of religious doctrine. The Wisconsin Supreme Court has held that the Constitution prevents the courts from determining what makes one competent to serve as clergy, since such a determination would require interpretation of church canons and internal church policies and practices. *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wisc. 1995). "Examining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms." *Id.* (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 47 (1994)). The Missouri Supreme Court has held that "Questions of hiring, ordaining, and retaining clergy. . . necessarily involve interpretation of religious doctrine, policy, and administration. Such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment." *Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. 1997). *See also Swanson v. Roman Catholic Bishop*, 692 A.2d 441 (Maine 1997).

A religious institution's standards for selecting clergy may be far different than the standards imposed by a civil court claim for negligent hiring. The tort of negligent hiring, as administered by a jury, counsels great caution in hiring employees who have misbehaved. But a religious institution may consider other factors which are based in faith. "'Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices.'" *L.L.N. v. Clauder*, 563 N.W.2d 434, 441 (Wisc. 1997) (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 47 (1994)).

If a religious institution is forced to defend a claim for negligent hiring or retention of clergy, then it may assert a defense based on its own religious beliefs, such as the importance of forgiveness and mercy. The sincerity and wisdom of such considerations will then be at issue. "Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender." *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wisc. 1995) (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issue*s, 7 St. Thomas L. Rev. 31, 47 (1994)).

The specter of lawsuits which second-guess the selection and retention of clergy will have a chilling effect on religious freedom. Churches, under the threat of potentially crippling damage awards, will have no choice but to institute hiring standards with an eye toward possible future lawsuits. Merely the threat of litigation will thus have the constitutionally impermissible effect of having the government set the standards for selection of clergy. *See Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991); *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 F. Supp. 1194, 1199 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995).

It is these concerns which have led a majority of appellate courts and federal courts addressing the issue to conclude that negligent hiring claims against religious institutions which are based

on sexual misconduct by clergy are barred by the Constitution. Among the states, the appellate courts of six states have found that such claims are barred,[1] while only four have ruled for the plaintiffs.[2] Among federal district courts, three have ruled that claims are barred,[3] while two have ruled for plaintiffs.[4] State trial courts have ruled for plaintiffs.[5]

We submit that the cases which allow negligent selection of clergy suits against religious institutions "have failed to maintain the appropriate degree of neutrality required" by the United States and Florida Constitutions. *Swanson v. Roman Catholic Bishop*, 692 A.2d 441, 445 (Maine 1997). The decision of the Fourth District should be affirmed.

C. A clergy negligent hiring claim brought by an adult against a church, based on noncriminal conduct, is barred by the Constitution

As stated above, our position is that *any* negligent hiring of clergy claim against a religious institution is constitutionally-barred. But to resolve this case the Court

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[1] *Doe v. Evans*, 718 So. 2d 286 (Fla. 4th DCA 1998); *Doe v. Dorsey*, 683 So. 2d 614 (Fla. 5th DCA 1996); *Roppolo v. Moore*, 644 So. 2d 206 (La. Ct. App. 1994); *Swanson v. Roman Catholic Bishop*, 692 A.2d 441 (Ma. 1997); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997); *Germain v. Pullman Baptist Church*, 1999 Wash. App. Lexis 1384 (Wash. Ct. App. July 27, 1999); *L.L.N. v. Clauder*, 573 N.W.2d 434 (Wisc. 1997); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wisc. 1995); *Miriam T. v. Church Mutual Insurance Co.*, 578 N.W.2d 208 (Wisc. Ct. App. 1998) (text available on Westlaw).

[2] *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *Konkle v. Henson*, 672 N.E.2d 450 (Ind. Ct. App. 1996); *Kenneth R. v. Roman Catholic Diocese*, 654 N.Y.S.2d 791 (App. Div. 1997); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Mirick v. McClellan*, 1994 Ohio App. Lexis 1816 (Ohio Ct. App. April 27, 1994).

[3] *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995); *Dausch v. Rykse*, 1993 U.S. Dist. Lexis 1448 (E.D. Ill. Feb. 10, 1993), *affirmed in part, reversed in part on other grounds*, 52 F.3d 1425 (7th Cir. 1994); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991).

[4] *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66 (D. Conn. 1995); *Smith v. O'Connell*, 986 F. Supp. 73 (D. R.I. 1997).

[5] *Doe v. Hartford Roman Catholic Diocesan Corp.*, 716 A.2d 960 (Conn. Super. Ct. 1998); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967 (Conn. Super. Ct. 1998); *Reynolds v. Zizka*, 1998 Conn. Super. Lexis 619 (Conn. Super. Ct. March 5, 1998); *Petho v. Fuleki*, 1993 Conn. Super. Lexis 2804 (Conn. Super. Ct. Oct. 18, 1993); *Gagne v. O'Donoghue*, 1996 Mass. Super. Lexis 481 (Mass. Super. Ct. June 26, 1996); *Jones v. Trane*, 591 N.Y.S.2d 927 (Sup. Ct. 1992).

need not address this issue. This case presents a more narrow question: Whether an adult who was the subject of noncriminal sexual misconduct by clergy may sue a religious institution for negligent hiring or retention of the clergy?

Two of Florida's district courts have addressed this precise issue, and have ruled that such claims are barred by the Constitution. *Doe v. Evans*, 718 So. 2d 286 (Fla. 4th DCA 1998); *Doe v. Dorsey*, 683 So. 2d 614 (Fla. 5th DCA 1996). If the plaintiff was a minor at the time of the incident and the conduct was criminal, then the plaintiff might be able to sue the religious institution. If the plaintiff was an adult, and the conduct was not criminal, then the law suit is barred.

The Plaintiff in this case finds the distinction drawn by two of our district courts of appeal to be irrational. While we believe that all clergy negligent hiring and retention claims against religious institutions are constitutionally barred, we also submit that the distinction made by the two district courts provides a proper basis for affirming the dismissal of the Plaintiff's lawsuit.

The societal interest in protecting children is far more compelling than the interest in protecting adults. The United States Supreme Court has frequently held that religious freedoms can be outweighed by the compelling societal interest in protecting children. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The societal interest in protecting adults is not sufficient to override the church's constitutionally protected right to select its clergy. The question of whether the interest in protecting children is compelling enough to override the church's constitutional right to select clergy can be left for another day, when the issue is squarely presented.

There is another significant difference between claims brought by adults and those brought by children. Generally speaking, consensual sexual acts between two adults are not illegal, and will not give rise to liability of an employer of a participant. *See Doe v. Dorsey*, 683 So. 2d 614, 617-18 (Fla. 5th DCA 1996) ("We do not believe that a sexual battery has been committed when a person of normal intelligence submits to a sexual relationship."). For example, if a customer at a

department store meets a salesperson at the store, becomes entranced, and has a sexual relationship, there is no criminal wrong, and there is no civil wrong. And since the affair itself is not actionable, the employee's employer cannot be held liable.

Because consensual relationships between adults are not wrong in the eyes of the law, a relationship between a church member and a clergyman is not actionable, unless there is some greater duty owed by a church and clergy. But the courts may not impose a greater duty on churches, merely because they are churches.

The Wisconsin Supreme Court explained this point: "[S]exual acts committed by single consenting adults are not legally wrong, but instead become wrong only under church doctrine. Accordingly, [the plaintiff] is essentially arguing that the [church] owes a heavier duty to her than a non-secular employer would because of a religious doctrine." *L.L.N. v. Clauder*, 563 N.W.2d 434, 444 (Wisc. 1997) (citations omitted). Similarly, a claim against a church for breach of fiduciary duty—such as the Plaintiff's claim here—is based on a higher duty which is impermissibly based on a higher standard of care for churches.

The problem with an adult's attempt to sue a church based on a consensual, noncriminal relationship is that the only basis for finding liability is a higher standard for churches, based on the conclusion that the relationship is not the sort of thing which a clergy member should do. But the Constitution bars the government from setting standards for hiring clergy.

The attempt to hold a religious institution liable for hiring a clergyman who has a consensual sexual relationship with an adult church member is, in essence, at attempt to hold a church liable for betraying its own beliefs. This is precisely the kind of thing barred by the Constitution: government regulation based upon the content of the religious institution's own beliefs.[6]

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[6]The Plaintiff has drawn attention to the Florida statute which makes it illegal for therapists to have sexual relations with a patient. But as the Plaintiff appears to concede, the sexual relationship between the Plaintiff and Reverend Evans was not illegal under this statute, since the Legislature—obviously not wanting to intrude upon the autonomy of churches—specifically excluded clergyman from the scope of the statute. *See* § 491.014, Fla. Stat. Even without the exclusion, the statute would not necessarily apply to claims of sexual misconduct by clergy, since the misconduct might arise from the many parts of a clergy's job which are religious, rather

For these reasons, the district court properly concluded that a negligent hiring of clergy claim by an adult against a religious institution is constitutionally-barred. Indeed, almost all of the courts deciding the constitutional issue in cases brought by adults have ruled that the claims are barred by the Constitution.[7] Only a handful of courts have permitted the claims to proceed.[8]

The district court properly ordered the dismissal of the Plaintiff's claim—a claim brought by an adult, based on noncriminal conduct. The question of whether a claim brought by a minor is barred by the Constitution should be left for another day.

D. The Plaintiff's complaints demonstrate that the lawsuit will inevitably intrude into constitutionally-protected areas

On appeal, the Plaintiff has attempted to portray her lawsuit as not involving the consideration of any religious issues. But her own complaints belie this assertion.

The Plaintiff herself invoked the Constitution, when she sued the church for violation of her constitutional rights. (R.3). She also sought damages for her "spiritual loss" and her loss of "her church and her faith." (R. 5, 96). She acknowledged that Reverend Evans provided her with "spiritual advice." (R.21). She sued for violation of the internal rules of the church. (R.21).

Even with the limited record—the four corners of the Plaintiff's complaints—the evidence

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than the psychotherapy which is the subject of the statute.

[7] *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995) (but allows negligent supervision claim to proceed); *Dausch v. Rykse*, 1993 U.S. Dist. Lexis 1448 (E.D. Ill. Feb. 10, 1993); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *Doe v. Evans*, 718 So. 2d 286 (Fla. 4th DCA 1998); *Doe v. Dorsey*, 683 So. 2d 614, 617 (Fla. 5th DCA 1996); *Roppolo v. Moore*, 644 So. 2d 206 (La. Ct. App. 1994); *Swanson v. Roman Catholic Bishop*, 692 A.2d 441 (Ma. 1997); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997); *Germain v. Pullman Baptist Church*, 1999 Wash. App. Lexis 1384 (Wash. Ct. App. July 27, 1999) ; *L.L.N. v. Clauder*, 573 N.W.2d 434 (Wisc. 1997); *Miriam T. v. Church Mutual Insurance Co.*, 578 N.W.2d 208 (Wisc. Ct. App. 1998); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wisc. 1995).

[8] *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *Petho v. Fuleki*, 1993 Conn. Super. Lexis 2804 (Conn. Super. Ct. Oct. 18, 1993); *Byrd v. Faber*, 565 N.E.2d 56 (Ohio 1991).

demonstrates that the lawsuit will require the consideration of religious issues.

The Plaintiff appears to argue that the Court should allow the case to proceed, to see whether religious issues arise. But it is not enough to provide religious institutions with protection from liability. The Constitution prohibits any inquiry into the internal workings of religious institutions. *See Hadnot v. Shaw*, 826 P.2d 978, 989 (Okla. 1992). When precedent indicates that the lawsuit will intrude into constitutionally-protected areas, and the Plaintiff's own complaints confirm this, the prudent and constitutionally-mandated remedy is dismissal. The decision of the district court should be affirmed.

CONCLUSION

Based on the above, Miami Shores Presbyterian Church requests that the Court affirm the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT

WE HEREBY CERTIFY that true and correct copies of the foregoing were mailed this 2nd day of September, 1999, 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; and James F. Gilbride, Esq., Gilbride, Heller & Brown, P.A., One Biscayne Tower, Fifteenth Floor, 2 South Biscayne Boulevard, Miami, FL 33131.

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