

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,450

JANE DOE,

PETITIONER,

VS.

WILLIAM DUNBAR EVANS, III, CHURCH OF THE HOLY REDEEMER, INC.,  
THE DIOCESE OF SOUTHEAST FLORIDA, INC.  
AND CALVIN O. SCHOFIELD, JR.

RESPONDENTS.

**AMENDED BRIEF OF AMICUS CURIAE BY**  
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**PREFACE**

This is an appeal from a Final Judgment entered by the Circuit Court and affirmed by the District Court of Appeal of Florida. The parties will be referred to by their proper names or as they appeared below.

**CERTIFICATE OF FONT AND TYPE SIZE**

Undersigned counsel for Jane Doe I and Jane Doe II certifies that this brief was typed using 12 point proportionately spaced Courier.

### SUMMARY OF THE ARGUMENT

The First Amendment should not be used to shield employers who knew or should have known that the employee they hired and placed in a position of trust was both capable of and in fact did commit wrongful criminal acts upon other employee/parishioners of the employer. A negligent retention, hiring or supervision claim does not require an inquiry into the religious practices of an employer, nor does it impinge upon the religious beliefs of that employer. Rather, it requires a look at religious-neutral criteria such as: did the employer properly investigate the employee's background; were there other instances of such misconduct of which the employer knew or should have known upon reasonable investigation; did the employer properly supervise that employee during the course and scope of the employee's employment; did that employer retain the employee after acquiring knowledge of the employee's misconduct, thereby permitting it to continue, The First Amendment should not be used to relieve a religious institution of liability, where any other employer in this state would have liability, simply because it is a religious institution.

## ARGUMENT

**THE TRIAL COURT ERRED IN RULING THAT THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BARS A TORT CLAIM FOR NEGLIGENT HIRING AND/OR RETENTION AGAINST A CLERGYMAN WHERE THE WRONGFUL CONDUCT ALLEGED AGAINST THE EMPLOYEE WAS CRIMINAL IN NATURE.**

The trial court ruled in its Final Judgment that the First Amendment of the United States Constitution barred a tort claim for negligent hiring or retention against a priest and the religious institution by whom he was employed. It is respectfully submitted that the proper application of the First Amendment principles to the facts of this case must also take into consideration similar situations where the conduct alleged against the employee was criminal in nature.

This case has nothing to do with religion or the religious practices of religious institution being sued. However, the trial court, by dismissing this action under the guise of the First Amendment has permitted a religious institution to escape civil liability that any employer would have to any employee, regardless of religious belief or affiliation. It should be noted that any decision involving the First Amendment in a negligent hiring and/or retention case will impact on those situations wherein the misconduct by the pastor, priest, or bishop is criminal in nature. Certainly, religious institutions do not condone sexual battery and lewd and lascivious acts being perpetrated upon its parishioner/employees by its pastors and/or priests. Religious freedom is being used as a subterfuge herein.



The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Article I, Section 3, of the Florida Constitution is substantially the same. It provides:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof.

The Establishment Clause was intended to afford protection against sponsorship, financial support, and active involvement of the sovereign in religious activities. Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed. 2d 749, 755 (1971).

The Supreme Court of the United States, in Lemon, developed a three prong test to determine whether a statute violates the Establishment Clause. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the statute must not foster excessive government entanglement with religion. *Id.* at 612-613, 91 S.Ct. at 2111, 29 L.Ed 2d at 755. While the case at bar does not concern a particular statute, the same analysis can be used to demonstrate that First Amendment principals are not being violated by the subject matter of this case or the ability of the court to hear such a case.

The matter to be addressed, in the case at bar, is the redress for injuries suffered by an individual as a result of the negligence of the religious institution in preventing its parishioner from having sexual misconduct perpetrated upon her by

a minister during pastoral counseling. These acts have no bearing whatsoever on the religious practices of the religious entity involved.

In Bear Valley Church v. DeBose, 928 P.2d 1315 (Colo. 1996) (En Banc) reh. den. 1997, a child sued the church and a minister alleging inappropriate touching of the child by the minister during counseling sessions. The Supreme Court of Colorado held that the Free Exercise Clause of the First Amendment was not a defense to the minister, nor did it protect the church from liability. The Supreme Court of Colorado in Bear Valley cited Destefano v. Grabrian, 763 P.2d 275, 283 (Colo. 1988) (citing Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct., 1526, 32 L.Ed. 2d 15 (1972), noting that in Destefano the court held that when a defendant raises the First Amendment as a defense, the threshold question is "whether the conduct of the defendant is religious." Bear Valley Church at 1320. Applying that threshold question to the case at bar, the answer is a resounding "no."

Destefano, like the case under consideration herein, involved a Catholic priest who was providing marital counseling to a woman with whom he engaged in an adulterous relationship. The Supreme Court of Colorado in Destefano stated at page 284 (and cited in Bear Valley Church at page 1321):

We recognized that the Catholic Church requires its priests to take a vow of celibacy, a principle the defendants acknowledged in their brief by agreeing that "sexual activity by a priest is fundamentally antithetical to Catholic doctrine."

Also, in the Bear Valley Church case, the Supreme Court of Colorado

noted at page 1323:

In Van Osdol v. Voght, 908 P. 2d 1122, 1128 (Colo. 1996) we held that "[t]he decision to hire or discharge a minister is itself inextricable from religious doctrine." However, we took care to distinguish internal hiring disputes within religious organizations from general negligence claims filed by injured third parties:

"While claims for illegal hiring or discharge of a minister inevitably involve religious doctrine, that is not the case for a claim of negligent hiring of a minister. The claim of negligent hiring is brought after an employee has harmed a third person through his or her office of employment. An employer is found liable for negligent hiring, if at the time of hiring, the employer had reason to believe that hiring this person would create an undue risk of harm to others. Connes v. Molalla Transp. System, Inc. 831 P. 2d 1316, 1321 (Colo. 1992) Restatement (Second) of Agency Sec. 213 cmt. d (1958). Hence, the court does not inquire into the employers broad reasons for choosing this particular employee for the position, but instead looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs. See Moses v. Diocese of Colorado, 863 P. 310, 320-321 (Colo. 1993)(holding that although courts must not become embroiled in church doctrine, a claim of negligent hiring of a minister is actionable because it does not require such interpretation or weighing of religious belief but instead is merely application of a secular standard to secular conduct.) cert. denied --U.S.--. 114 S.Ct. 2153, 128 L.Ed. 2d 880 (1994)." Van Osdol 908 P.2d at 1132-33, n. 17. As we noted in Van Osdol, Id. Courts may review an injured third party's claim that a religious institution negligently hired, supervised or failed to discharge one of its employees without implicating or running afoul of the First Amendment. See e.g. Moses, 863 P.2d at 321, 329-31.

More recently, in Sanders v. Casa View Baptist Church, 134

F.3d 331 (5th Cir. 1998), another case similar factually to the case at bar, parishioners who were also church employees brought an action for malpractice and breach of fiduciary duty against a minister and negligence against the church and Title VII violations, where a minister was engaged in sexual relations with the plaintiffs during the course of marital counseling. The Fifth Circuit held that these claims were not barred by the First Amendment. In so holding the court stated at page 335:

The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protections to the secular components of these relationships. Although Baucum's contention that the Free Exercise Clause prohibits the judiciary from reviewing the conduct of those involved in relationships that are not purely secular in nature might, if adopted, foster the development of some important spiritual relationships by eliminating the possibility of civil or criminal liability for participating members of the clergy, the constitutional guarantee of religious freedom cannot be construed to protect secular beliefs and behavior, even when they comprise a part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissible place a religious leader in a preferred position in our society. Cf. County of Allegheny v. ACLU, 492 U.S. 573, 593-94, 109 S.Ct. 3086, 3101, 106 L.Ed. 2d 472 (1989) (interpreting the First Amendment to preclude the state from favoring religion over non-religion). (Emphasis, theirs.)

The Supreme Court of New Jersey has also recently ruled on this issue. In F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997), the Supreme Court of New Jersey held that the free exercise of religion does not permit members of the clergy to engage in inappropriate sexual conduct with parishioners who seek pastoral counseling. *Id.* at page 701. It noted that "a clergyman should not be permitted to victimize a parishioner whose vulnerability has led the parishioner

to seek refuge in pastoral counseling." Id. at 705. The Supreme Court of New Jersey also rejected the Catholic Diocese of Camden's claims that the First Amendment prohibited lay teachers in church-operated elementary schools to engage in collective bargaining respecting secular terms and conditions of employment in South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School, 696 A.2d 709, 712 (N.J. 1977). In the aforementioned case, the Supreme Court of New Jersey noted that:

A major crack occurred in the "wall of separation" on June 23, 1997 when the United States Supreme Court decided Agostini v. Felton, --U.S. --, 117 S.Ct. 1997, 138 L.Ed. 391 (1997). The Court overruled Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed. 2d 290 (1985), and held the New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged students pursuant to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C.A. secs. 6301-6514, did not involve an excessive entanglement of church and state and therefore was not violative of the Establishment Clause. Id. at 715.

Any institution, regardless of religious affiliation, practices, or beliefs, that permits sexual batteries to be perpetrated in its own offices and on its own property, by an employee whom they knew or should have known had such deviant propensities, is responsible for such acts. In Tallahassee Furniture v. Harrison, 583 So. 2d 744 (Fla. 1st DCA, 1991) the First District Court of Appeal held at page 753:

Negligent retention of an employee occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate his unfitness, but the employer fails to take further action, such as investigation, discharge or reassignment.

The Amicus' herein, JANE DOE I and JANE DOE II, should not be deprived of the protection afforded them by such case law and the Florida Constitution to seek redress for such injuries simply because the Defendants happen to be religious institutions. The bringing of such an action neither advances nor inhibits religion, nor fosters any government entanglement with religion. There would be no question of liability of these entities if they were not religious organizations, especially in situations where the clergyman who committed these heinous acts was their direct supervisor at work. An employer in the State of Florida may be held liable for the wilful torts of its employees committed against third persons if the employer knew or should have know that the employee posed a threat to others. Island City Flying Services vs. General Electric Credit Corp., 585 So. 2d 274, 276 (Fla. 1991) quoting Williams vs. Feather Sound, Inc., 386 So. 2d 1238 (Fla. 2nd DCA, 1980). The relevant inquiry in such cases is whether it was reasonable to permit the employee to perform the job in light of the information about the employee which the employer should have known.

In Hemphill v. Zion Hope Primitive Baptist Church of Pensacola, Inc., 447 So. 2d 976, 977 (Fla. 1st DCA, 1984), the First District Court of Appeal held that where no interpretation of church doctrine was required to effect a judicial construction of contractual provisions pertaining to the discharge of corporate employees, the trial court's acceptance of jurisdiction did not violate the constitutional requirement of separation of church and

state. Likewise, there is no interpretation of church doctrine required for a court to determine whether the religious institution was negligent in the case at bar. The liability of religious institutions for their tortious conduct in civil actions has long been beyond issue. Heath v. First Baptist Church, 341 So. 2d 265 (Fla. 2d DCA, 1977)(trip and fall at church).

It is firmly established in Florida that sexual misconduct by persons in any profession or occupation will not be tolerated. Sexual misconduct is prohibited if the perpetrator is a psychologist as stated in Section 490.009(2)(k), Fla. Stat. (1998). An emergency medical technician or paramedic faces disciplinary action if engaging in "sexual misconduct with a patient, including inducing or attempting to induce the patient to engage, or engaging or attempting to engage the patient, in sexual activity. Section 401.411, Fla. Stat. (1998). In fact, sexual misconduct is prohibited in the practice of osteopathic medicine pursuant to Section 459.0141, Fla. Stat. (1989), in the practice of the dentist-patient relationship pursuant to Section 466.027, Fla. Stat., (1981), in the physician-patient relationship pursuant to Section 458.329, Fla. Stat. (1981), in the talent agent-artist relationship pursuant to Section 468.415, Fla. Stat. (1989), in the athletic trainer-athlete relationship pursuant to Section 468.717, Fla. Stat., (1995)--all because these relationships are founded on mutual trust. It is a felony of the third degree for a psychotherapist who commits sexual misconduct with a client, or former client, when the professional relationship was terminated

primarily for the purpose of engaging in sexual conduct. Section 491.0112(1), Fla. Stat. 1990. This statute expressly includes clergymen who provide (or purport to provide) "counseling of mental or emotional illness, symptom, or condition." See Section 491.0112(4)(a); 491.014(3),(6), Fla. Stat. (1998). Additionally, Section 491.0112(2), Fla. Stat. (1990), provides that it is a felony of the second degree for a psychotherapist to violate Section 491.0112(1) by means of therapeutic deception. It should be noted that pursuant to Section 491.0112(3), Fla. Stat., (1990), the giving of consent by the client to any such act shall not be a defense to these offenses. The Amicus' herein, JANE DOE I and JANE DOE II, deserve no less protection merely because they were employed by a religious institution.

Where public health, safety or welfare is at issue, the State and its political subdivisions have been permitted to pass certain laws which do not violate First Amendment concerns. For example, this court, in Moore v. Draper, 57 So. 2d 648 (Fla. 1952), upheld a law which authorized commitment in a state sanitarium and compulsory isolation and hospitalization of persons with tuberculosis. The statute was attacked on the basis that it discriminated against all persons other than those of a certain religious faith and belief. Id at 648. This court held that it did not.

In Town vs. State of Florida ex rel. Reno, 377 So. 2d 648, 651 (Fla. 1979), reh. den. 1980, this court held that the right to free religious expression did not permit the petitioner therein to use



residential property as a church for a religion in which the use of cannabis was an essential portion of the religious practice.

This issue has recently come before a Florida District Court of Appeal in the case of Doe v. Dorsey, 683 So. 2d 614 (Fla. 5th DCA, 1996). Although the Fifth District Court of Appeal ruled that the Plaintiff's claim therein was barred by the statute of limitations, the court noted at page 617:

In any event, we are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur. We recognize that the State's interest must be compelling indeed in order to interfere in the church's selection, training and assignment of its clerics. We would draw the line at criminal conduct. (Emphasis added).

Our courts are not prohibited from all involvement in religious disputes, but merely those which involve a determination of underlying questions of religious doctrine and practices. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church 393 U.S. 440, 449, 89 S. Ct. 601, 606, 21 L. Ed. 2d 658, 665 (1969). In the case at bar, the suit by JANE DOE is directed at conduct rather than belief, has a secular purpose and effect, and is justified by governmental interests in public health, safety and welfare. See Department of Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 89 S. Ct. 876 (1990); State v. Jackson, 576 So. 2d 866 (Fla. 3d DCA, 1991).

The Respondents herein have not shown that their conduct was in fact, religious and that by bringing this action, the courts of our state have a coercive effect upon the practice of their

religion. Albington School District v. Schempp, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844, 858 (1963). See also Destefano v. Grabrian, 763 P. 2d 275, 283 (Colo. 1988) citing Wisconsin v. Yoder, 406 U.S. 205, 215-216, 92 S. Ct. 1526, 1533-1534, 32 L. Ed. 2d 15 (1972). Since the alleged sexual misconduct of a priest clearly falls outside of the protections afforded by the First Amendment, there cannot be protection afforded by the First Amendment for the clergyman's employers, who knew or should have known what he was doing in his supervisory capacity of other church employees and parishioners on church property. In Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D. Conn. 1995), it was held that a priest's pedophilic sexual abuse of alter boys was an abandonment of church tenets.

The resolution of this case does not turn on the resolution of theological or religious doctrinal questions. See Moses v. Diocese of Colorado, 863 P.2d 310, 320 (Col. 1993). In Jones v. Wolf, the United States Supreme Court noted at 443 U.S. 595, 606, 99 S. Ct. 3020, 3027, 61 L. Ed. 2d 775 (1979):

The neutral principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. (emphasis supplied).

The instant case, as well as the case of the Amicus' herein, JANE DOE I and JANE DOE II currently pending in the Third District Court of Appeal, deals with common law tort remedies which involve no state sponsorship or support of any particular religion--nor religion at all. The determination by this court as to whether the

actions sued upon can be maintained has absolutely nothing to do with entanglement of church and state. This court should not permit religious institutions to escape liability for secular acts perpetrated by their employees, especially when such acts are criminal in nature, under the guise of "religion" or "religious freedom."

**CONCLUSION**

For the foregoing reasons and authorities, the trial court's determination that the Plaintiff's claim against the Defendants for negligent hiring, supervision and retention were barred by the First Amendment, which was affirmed by the Fourth District Court of Appeal, should be reversed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Amicus Curiae Brief of Jane Doe I and Jane Doe II was furnished via U.S. Mail to Edward Campbell, Esq., 1675 Palm Beach Lakes Boulevard, 7th Floor, West Palm Beach, Florida 33401, Thomas E. Ice, Esq., 999 Brickell Avenue, Suite 555, Miami, Florida 33131, Christopher Renzulli, Esq., Renzulli, Gainey & Rutherford, 16 West 46th Street, New York, New York 10036, William R. King, Esq, P.O. Box 12277, Lake Park, Florida 33403, James F. Gilbride, Esq.,

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May L. Cain