IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, 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.
_____/

BRIEF OF AMICUS CURIAE BY THE ACADEMY OF FLORIDA TRIAL LAWYERS

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CERTIFICATE OF TYPE SIZE & STYLE

Appellant hereby certifies that the type size and style of the Initial Brief of Appellants is Times New Roman 14pt.

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PREFACE

The Academy of Florida Trial Lawyers is a state-wide voluntary association of more than 3,000 attorneys, whose practices emphasize litigation for the protection of personal and property rights of individuals. The Academy has requested leave to appear as Amicus Curiae in this case to address issues involved in this Court's consideration.

SUMMARY OF ARGUMENT

This Court should quash the decision of the Fourth District Court of Appeal in this case, and determine that the First Amendment does not bar a claim for negligent hiring, supervision, or retention against a religious organization that knew, or should have known, of an employee's dangerous propensity to engage in sexual misconduct. The state is permitted to regulate conduct of religious organizations, especially when there is a potential threat to the safety and welfare of the public. Many of these types of cases involve children, which justifies a higher level of regulation by the state. Civil actions for negligent hiring, supervision, or retention are designed to address the risk created by exposing members of the public to a potentially dangerous individual and, thus, are consistent with the state's authority to regulate the practice of religion in the interest of protecting the public. Permitting such actions to proceed does not involve any entanglement with the doctrine of the churches, because the focus of such cases is on the religious organization's knowledge of the dangerous propensity of the employee, and the steps taken to minimize or avoid that danger. This does not require any inquiry into doctrinal considerations, but only the health and welfare of the public, including children. For that reason, the First Amendment does not bar such actions. Additionally, as a policy consideration, granting total immunity to a religious

organization for the wrongful conduct of its employees would not be prudent, because it is in the best position to exercise control over this danger. For these reasons, this Court should quash the order of the Fourth District, and remand the action for further proceedings.

ARGUMENT

THE FOURTH DISTRICT ERRED IN RULING THAT THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BARS A TORT CLAIM FOR NEGLIGENT HIRING, SUPERVISION, OR RETENTION AGAINST A RELIGIOUS ORGANIZATION THAT KNEW, OR SHOULD HAVE KNOWN, OF ITS EMPLOYEE'S DANGEROUS PROPENSITY TO ENGAGE IN SEXUAL MISCONDUCT.

The Fourth District's decision determined that, as a matter of law, no claim for negligent hiring, supervision, or retention could be brought against a religious organization arising out of a priest's sexual misconduct. It is respectfully submitted that that ruling is in error, and creates a dangerous precedent by granting absolute immunity to organizations which are in the best position to control or eliminate this dangerous conduct that threatens children and other vulnerable persons. In addition to being an unwise policy decision, it represents an unjustified extension of the First Amendment.

Regulation of Religious Conduct in General:

The First Amendment to the United States Constitution states:[1]

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

The First Amendment incorporates two concepts relating to the freedom of religion: the freedom to believe, and the freedom to act in accordance with one's beliefs, see CANTWELL v. CONNECTICUT, 310 U.S. 296, 303-04, 60 S.Ct. 900, 903 (1940). The freedom to believe is absolute. However, the freedom to act cannot be absolute since, for the protection of the society, conduct must be subject to regulation (Ibid). Moreover, an individual's reliance on religious beliefs to justify conduct does not excuse compliance with otherwise valid and neutral laws prohibiting conduct that the government is entitled to regulate, EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES v. SMITH, 494 U.S. 877, 110 S.Ct. 1595, 1599 (1990).

A party challenging state action as being violative of the free exercise of religion must establish that the state action has a coercive effect on the practice of

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[1]/Article I §3 of the Florida Constitution states:

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

religion, ABINGTON SCHOOL DISTRICT v. SCHEMPP, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572. Once that burden is met, the determination whether state law violates the free exercise clause requires a balancing of the burden imposed on the exercise of the religious belief with the purpose and policy behind the regulation, see DOLE v. SHANANDOAH BAPTIST CHURCH, 899 F.2d 1389 (4th Cir. 1990). Even in the context of a civil liability imposed for tortious conduct, the proper analysis of the First Amendment requires a weighing process, which balances the importance of the interest vindicated by the lawsuit against the centrality to the religious organization of the allegedly tortious conduct, O'CONNOR HOSPITAL v. SUPERIOR COURT, 240 Cal.Rptr. 766 (6th Dist. 1987).

It has been held that the state has a compelling interest in the regulation of education and treatment of children which supersedes one's right to act in accordance with religious beliefs. In PRINCE v. MASSACHUSETTS, 321 U.S. 158, 64 S.Ct. 784 (1944), the United States Supreme Court upheld a Massachusetts child labor law against a challenge that it violated the free exercise clause of the First Amendment. In that case, the aunt and custodian of a nine year old child contended that a state law prohibiting child labor could not be enforced to prevent her child from selling religious literature, since proselytizing was considered a duty by Jehovah's Witnesses. The Supreme Court ruled against her, holding that the right to freedom of religion

does not preclude the government's regulation of family conduct in the interest of a child's well-being.

In WISCONSIN v. YODER, 406 U.S. 205, 92 S.Ct. 1526 (1972), the Court held that the First and Fourteenth Amendments prevented the State of Wisconsin from compelling Amish people to have their children attend formal high school until the age of sixteen. The Court specifically stated that the record showed that foregoing one or two years of compulsory education would not impair the physical or mental health of the children, or otherwise "detract from the welfare of society," 406 U.S. at 234, 92 S.Ct. at 1542. However, the Court noted that if the record indicated to the contrary, the state regulation might be enforceable despite the significant countervailing individual rights (406 U.S. at 233-34, 92 S.Ct. at 1542):

> To be sure, the power of the parent, even when linked to a free exercise [of religion] claim, may be subject to limitation under PRINCE if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Direct regulation of the religious organization itself may also be justified when it is in the children's interest. In STATE v. CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., 683 S.W.2d 692 (Tex. 1989), app. dism. 106 S.Ct. 32 (1985), the Court held that the state was entitled to enforce its licensing requirements for child care facilities against a child care center operated by a church. The Court held that the

state's compelling interest in protecting children from physical and mental harm outweighed the burden imposed on the religious organization by the regulations.

This Court has expressly applied that type of balancing test in determining the propriety of state regulation of religious conduct. In TOWN v. STATE EX REL RENO, 377 So.2d 648 (Fla. 1979), this Court upheld an injunction precluding the use of cannabis by the Ethiopian Zion Coptic Church. In that case, it was stipulated by the parties that the church was a religion within the meaning of the First Amendment, and that the use of cannabis was "an essential portion of the religious practice" (377 So.2d at 649). The trial court granted an injunction precluding the use of cannabis on property owned by the church (and one of its leaders), after balancing the state's interest in protecting the public health, welfare, safety and morals against the church's interest in the free exercise of religion. In upholding the injunction, this Court noted that the cannabis was being made available to children and non-members of the church, and that participants leaving the premises after using the cannabis posed a threat to public safety and welfare. Based thereon, this Court held that the injunction was properly entered, despite the fact that it enjoined an essential part of the church's religious practices.

This Court's holding in TOWN v. STATE, supra, is consistent with its recognition that, STATE v. BOARD OF INSTRUCTION, 190 So. 815, 816 (Fla. 1939):

> [F]reedom of religious practice is not an absolute right. As do all other constitutional guaranties, it has its limitations. Practices in the name of religion that are contrary to approved canons of morals or that are inimical to the public welfare, will not be permitted even though done in the name of religion.

Claims of Negligent Hiring, Supervision and Retention of Priests:

The short answer to the First Amendment issue regarding negligent hiring of priests was aptly stated by the Supreme Court of Ohio in BYRD v. FABER, 565 N.E.2d 584, 590 (1991):

> Even the most liberal construction of the First Amendment will not protect a religious organization's decision to hire someone who it knows is likely to commit criminal or tortious acts.

The same conclusion should be reached with respect to a religious organization that retains or fails to supervise someone who it knows is likely to engage in intentional misconduct, especially when it harms vulnerable members of the public such as children and people seeking counseling.

As noted by the New Jersey Supreme Court in Di COSALA v. KAY, 450 A.2d 508, 515 (N.J. 1982):

> The tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual....

See also RESTATEMENT (SECOND) OF AGENCY §213, Comment d. In almost every case where an issue is raised regarding negligent hiring, retention, or supervision, the tort committed by the employee/agent is an intentional tort committed outside the scope of employment, see CONNES v. MOLALLA TRANSPORT SYSTEM, INC., 831 P.2d 1316, 1321 (Colo. 1992). However, the opportunity for the tortious conduct is created by the employment, and the employer/principal's duty is to protect the unsuspecting public from a known danger that is within its control.

The state is entitled to ensure the public's welfare and safety through regulation, such as civil lawsuits, despite the possibility of indirect infringement on a religious practice, e.g., TOWN v. STATE, supra. Moreover, it appears clear that a court could properly resolve this type of tort claim without infringing on a church's doctrinal considerations regarding the hiring, supervision, and retention of employees. The focus in such cases is whether the dangerous characteristics of the individual were apparent to the employer/principal sufficient to create a duty to protect the public who would come in contact with that individual, see RESTATEMENT (SECOND) OF

AGENCY §213. Since there has never been any suggestion that sexual misconduct is a religious practice or is supported by the church, an analysis of whether its employee/agent exhibited such dangerous tendencies does not infringe any doctrinal considerations underlying hiring, supervision or retention. Therefore, a cause of action for that tort does not involve excessive entanglement sufficient to trigger First Amendment protection.

This was recognized by the Supreme Court of Colorado in VAN OSDOL v. VOGHT, 908 P.2d 1122, 1128 (Colo. 1996):

> 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 the 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.

The cases holding to the contrary never specify the precise entanglement with religious doctrine that would occur by holding religious organizations liable for dangerous individuals that they employ, retain, or fail to supervise. Instead, they rely on vague generalities regarding potential infringements to support total immunity for the hiring practices of religious organizations, despite the fact that those organizations are in the best position to control this significant public danger.[2]

There are two Florida appellate decisions addressing this issue. In DOE v. DORSEY, 683 So.2d 614, 617 (Fla. 5th DCA 1996), the court resolved a case involving sexual misconduct by a priest on statute of limitations grounds. However, in dicta it addressed the defendant's potential liability as follows:

> 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

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[2]/The frequency of cases involving sexual misconduct by religious leaders is apparent from the recent plethora of appellate decisions on this subject. Some of those decisions indicate that they are only the tip of the iceberg, e.g. MOSES v. DIOCESE OF COLORADO, 863 P.2d 310, 327 (Colo. 1993) (noting that the Bishop in that case had addressed seven cases of sexual misconduct by priests).

> (including should know) creates a situation in which such injuries are likely to occur.

The only other appellate dec8ision in Florida is the case presently before this Court in DOE v. EVANS, 718 So.2d 286 (Fla. 4th DCA 1998), rev. granted, June 23, 1999, Case No. 94,450. The Fourth District affirmed a summary judgment against a woman who claimed sexual misconduct by a priest from whom she had sought marital counselling. That opinion has a separate section addressing the claims of negligent hiring, retention, and supervision, DOE v. EVANS, supra, 718 So.2d at 289-291. The Fourth District concluded that the church was immune from any such claims because it would necessarily entangle the court in issues of religious law, practices, and policies. It is respectfully submitted that this conclusion is erroneous, and that the state has the right to regulate such conduct based on neutral principles of law, because the nature of the harm regulated is directly related to the public safety and would not impermissibly infringe on the practice of religion.

In DOE v. EVANS, the Fourth District cited two United States Supreme Court cases in support of its position on this issue, yet neither of those cases involved tort actions, but rather internal church disputes involving ecclesiastical authority. For example, in KEDROFF v. ST. NICHOLAS CATHEDRAL OF RUSSIAN ORTHODOX CHURCH, 344 U.S. 94, 73 S.Ct. 143 (1952) the state of New York had

enacted a statute that transferred control of the New York churches of the Russian Orthodox religion from the Russian Holy Synod (and Patriarch of Moscow) to the governing authorities of the Russian church in America. This determination by the state legislature of the appropriate authority for the church in the United States was deemed by the Supreme Court to be "strictly a matter of ecclesiastical government, and inappropriate for state regulation," 344 U.S. at 115, 73 S.Ct. at 154. That case bears no relevance to the considerations at issue here, which involve the application of neutral principles of law to regulate conduct that creates a danger to the public.

SERBIAN EASTERN ORTHODOX DIOCESE v. MILIVOJEVICH, 426 U.S. 696, 96 S.Ct. 2372 (1976) was also not a tort action. Instead, the issue addressed by the state court in that case involved the propriety of a bishop's defrockment, the division of a diocese into three new diocese, and the validity of certain amendments to the constitution of the dioceses. In rejecting the state's resolution of the controversy, the U.S. Supreme Court stated (426 U.S. at 709, 96 S.Ct. at 2361):

> This case essentially involves not a church property dispute, but a religious dispute the resolution of which under our case is for ecclesiastical and not civil tribunals.

Thus, that case also did not involve any issue of tort law, nor any issue involving public welfare or safety.

It is important to emphasize that the conduct at issue in this case, sexual misconduct with a parishioner, has not been alleged to be any religious practice of the Respondents, nor supported by any church doctrine. Many of these types of cases involve sexual misconduct with children, which is, indisputably, criminal conduct. Even if such conduct were an essential part of the religious practice, the state could obviously regulate it TOWN v. STATE, supra. Thus, Defendant's reliance on the free exercise clause of the First Amendment is limited to a claim that civil liability for the employment, retention, and supervision of dangerous employees engaging in such conduct somehow infringes on the church's practice of its religion. It is respectfully submitted that the objective enforcement of neutral principles of the common law, which are designed to protect the public, does not involve any entanglement with religious doctrine or internal church affairs, and therefore does not violate the First Amendment.

The neutral principles doctrine permits courts to decide issues related to the conduct or property of religious organization, when they do not implicate religious doctrine. That is all that is being sought in a tort action for negligent hiring, supervision, or retention. As the United States Supreme Court stated in JONES v. WOLF, 443 U.S. 595, 606, 99 S.Ct. 3020, 3027 (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.]

In view of the significant danger to the public welfare that is involved in these types of cases, granting total immunity to religious organizations under these circumstances is neither supported by the First Amendment, nor any valid public policy consideration.

CONCLUSION

For the reasons stated above, the trial court's determination that the Plaintiff's tort claim for negligent hiring, supervision or retention against a religious organization were barred by the First Amendment should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to THOMAS E. ICE, ESQ., 999 Brickell Ave., Ste. 555, Miami, FL 33131; WILLIAM R. KING, ESQ., P.O. Box 12277, Lake Park, FL 33403-0277; DAVID RUTHERFORD, ESQ., 16 W. 46th St., New York, NY 10036-4503; EDWARD CAMPBELL, ESQ., 1675 Palm Beach Lakes Blvd., 7th FL, West Palm Beach, FL 33401; and RANDY D. ELLISON, ESQ., 1645 Palm Beach Lakes Blvd., Ste. 350, West Palm Beach, FL 33401-2289, by mail, this 16th day of July, 1999.

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