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, INC. and CALVIN O. SCHOFIELD, JR.,

Respondents.

RESPONDENTS' ANSWER BRIEF

On Discretionary Review from The Fourth District Court of Appeal

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STATEMENT OF SIZE AND STYLE OF TYPE

It is certified that the size and style of type used in this brief is 14 point proportionately spaced Times New Roman.

STATEMENT OF THE CASE AND FACTS

The Respondents hereby adopt the facts as outlined by The Fourth District in its opinion in this case. The Respondents further note, however, that the facts and damages alleged in Petitioner's various complaints in this matter belie the fundamental premise of her argument that a secular court can adjudicate her claims without implicating First Amendment protections. For example, Petitioner originally alleged, among other things, that: 1) Father Evans "received his calling" from Bishop Schofield; 2) the defendants "barred plaintiff's worship" at the Church "in violation of rights guaranteed to her by the Constitution of the United States"; 3) the Petitioner "suffered a spiritual loss and sense of betrayal;" 4) Father Evans, "as a minister and pastor, provided pastoral care, spiritual direction, and spiritual guidance, and received personal confession and confidential and privileged information which defendant Evans, used to his own gratification; and 5) Father Evans' "conduct involving a pastoral relationship...violated the standards of behavior." (R.1-6) (Complaint).

In addition, the Petitioner also alleged that: 1) as part of Father Evans' "duties" as pastor, "he provided counseling and spiritual advice to parishioners;" 2) "the relationship of a pastoral counselor-counselee arose between Fr. Evans and Petitioner;" 3) Father Evans "was in the position of superiority in the pastoral counselor-counselee relationship;" 4) the Diocese "published a manual for policy and

procedure"; 4) the Diocese "involved itself directly in the pastoral counselor-counselee relationship"; 5) the Diocese, Church and Bishop Schofield "failed to take action" as required under The Episcopal Manual; 6) Father Evans "breach[ed] [a] duty...to the plaintiff in the pastoral counselor-counselee relationship"; and 7) the Diocese, Church and Bishop Schofield "failed to follow the procedures outlined in the [Episcopal] Manual." (R.20-26)(Amended Complaint).

Finally, Petitioner alleges that: 1) Father Evans "provided counseling and spiritual advice to parishioners"; 2) "the relationship of a pastoral counselor-counselee arose"; 3) the pastoral counselor-counselee relationship was ongoing"; 4) Petitioner mentions the "hierarchical structure of The Episcopal Church" and the Diocese's and Bishop's "right and excuse control over a...pastoral counselor"; 5) Petitioner was "held up to ridicule and embarrassment from the other members of the church"; and 6) Petitioner was also "damaged in the loss of her Church and her faith." (R.91-99)(Second Amended Complaint).

The Petitioner's various complaints in this case clearly show the religious nature of her claims.

SUMMARY OF ARGUMENT

The Supreme Court of Florida should affirm the Fourth District Court of Appeal of Florida's dismissal of Petitioner's Complaint because the circuit court and appellate court correctly concluded that the adjudication of the Petitioner's claims against the Respondents[1] would result in the Court's excessive entanglement with religious beliefs contrary to the First Amendment to the United States Constitution. The practices and procedures central to the Petitioner's claims are beyond the purview of secular courts.

The Petitioner's claims arise out of alleged physical and emotional damages sustained by Petitioner after she became romantically involved with Father William Dunbar Evans while he was providing counseling and spiritual advice to her over a six-week period. (R. 91-95) The Petitioner, an adult, argues that the Respondents, a church, diocese and bishop, negligently hired, retained and/or supervised Father Evans and, as a result, breached a "fiduciary duty" to her. Under the facts alleged, however, the Respondents are entitled to First Amendment protection because the First Amendment prohibits secular courts from intervening in the internal affairs of churches or other religious organizations.

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[1] The claims made against the defendant, William Dunbar Evans, III, are not at issue in this appeal.

The Respondents do not maintain that religious organizations or their clerics are entitled to blanket immunity for any tortious conduct. However, subjecting the Respondents to potential tort liability for their alleged negligent hiring, retaining or supervising of Father Evans, including breaching any claimed "fiduciary duty" to her, would compromise the Respondents' free exercise rights and would constitute an excessive entanglement with religion. The Respondents would be forced to conform their conduct to what a secular court determines to be an appropriate "standard of conduct" which threatens to deviate from Episcopal tenets and doctrine. Contrary to the Petitioner's contentions, a court cannot simply apply "neutral laws" to determine whether the Respondents negligently hired, retained or supervised, or breached a "fiduciary duty" to the Petitioner. A court would necessarily be obligated to inquire into Episcopal church laws, practices and policies to make these determinations. Inquiries of this type are impermissible because they have a potential to foster excessive entanglement with religion.

This Court has not yet passed on these issues. While the Respondents acknowledge a split of authority throughout the nation from the courts that have addressed these issues, Respondents maintain that the conclusions drawn by the

Fourth District in this case and the jurisdictions it chose to follow are the better-reasoned conclusions and should be adopted by this Court.

ARGUMENT

I. First Amendment Principles

The First Amendment to the United States Constitution provides, in pertinent part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " U.S. CONST. Amend. I. The Establishment Clause of the First Amendment guarantees the separation of Church and State and prohibits secular courts from acting in areas which would result in excessive entanglement of secular attitudes with religious beliefs. Id. In applying this constitutional mandate, courts have recognized that issues involving internal church governance are beyond a secular court's scope of review. Embedded in the Establishment Clause is ". . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of Church government as well as those of faith and doctrine." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

It is well-established that the First Amendment prohibits secular courts from intervening in the internal affairs of churches by deciding what, essentially, are religious matters. See, e.g., Serbian E. Orthodox Diocese for the United States and

Canada v. Milivojevich, 426 U.S. 696, 708-10 (1976). The United States Supreme Court, in Milivojevich, found that:

> [C]ivil courts are bound to accept the decisions of the highest judiciaries of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.

Id. at 713; see also, Jones v. Wolf, 443 U.S. 595, 602 (1979) (First Amendment prohibits civil courts from resolving church disputes on the basis of religious doctrine and practice); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (underlying the Establishment Clause is "the objective...to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other").

The United States Supreme Court has also remarked that:

> When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being 'taint[ed]...with corrosive secularism.' The favored religion may be compromised as

> political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation.

Lee v. Weisman, 505 U.S. 577 (1992) (Blackmun, J., concurring) (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)); see also, Engle v. Vitale, 370 U.S. 421, 429 (1962) ("Anguish, hardship and bitter strife "result" when zealous religious groups struggl[e] with one another to obtain Government's stamp of approval.").

The Petitioner does not contest these principles. The Petitioner maintains, however, that a secular court can neutrally apply laws of general applicability to her claims without infringing upon the First Amendment, which, according to the Petitioner, "requires no compelling interest justification." See Petitioner's Initial Brief on the Merits ("Petitioner's Brief"), p.34 (emphasis in original) (citations omitted). Where a law that burdens religious practice is not "neutral" or not of "general applicability," however, it "must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993). More importantly, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406

U.S. 205, 220 (1972). With these principles in mind, it would not be possible for a secular court to neutrally apply laws of general application to the Petitioner's claims because the purported secular aspect of clergy counseling is illusory — it is always religious when a clergyman is involved.

Moreover, this "neutral principles" doctrine has been found to apply primarily to disputes over church property. See Jones v. Wolf, 443 U.S. 595 (1979); see also Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) ("The 'neutral principles' doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be"). Any extension of the "neutral principles" doctrine in this case would be constitutionally impermissible and is not warranted.

After reviewing these general constitutional principles and applying them to the Petitioner's Complaint in this matter, the Fourth District correctly concluded that a secular court cannot adjudicate the Petitioner's claims using neutral principles of law without infringing upon the Respondents' First Amendment protections.

II. This Court Should Affirm the Appellate Court's Dismissal Of Petitioner's Cause of Action For Negligent Hiring, Supervision and Retention Because An Adjudication Of These Claims Is Beyond A Secular Court's Scope of Review

The adjudication of the Petitioner's claims for negligent hiring, supervision and retention cannot be maintained because it would result in the court's excessive entanglement with religious beliefs contrary to the First Amendment to the United States Constitution.

The gravamen of the Petitioner's claims against the Church, Diocese and Bishop Schofield for the alleged negligent hiring, supervision and retention of Father Evans involves the assessment of Father Evans' qualifications to be a minister and the propriety of the Church, the Bishop and the Diocese's approval and supervision of Father Evans' "call" to the Church of the Holy Redeemer. In order for the Petitioner to obtain a judgment in negligence against Bishop Schofield, and the Church and the Diocese derivatively, the court and jury would be required to determine the following:

- What is the standard of care required of an Episcopal bishop in approving the "call" of a minister to a parish?
- Did Bishop Schofield breach that standard of care in approving the "call" of Father Evans to Church of the Holy Redeemer?

- Did Bishop Schofield have a "duty" to monitor or supervise Father Evans and, if so, did Bishop Schofield breach that duty by not sufficiently monitoring or supervising Father Evans to determine that he adequately pursued his "call"?

The inquiries by a civil court that would be necessary to answer these questions would require analyzing the policies and practices of the Respondents in hiring, supervising and retaining their clergy. These inquiries, however, are barred by the First Amendment because they might foster excessive state entanglement with religion. Schieffer v. Catholic Diocese of Omaha, 244 Neb. 715 (1993); see, also, Gibson v. Brewer, 952 S.W.2d 239, 247 (1997) ("Ordination of a priest is a quintessentially religious matter, whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church.") (internal quotations omitted).

The relationship between Father Evans and Bishop Schofield, and the Church and the Diocese derivatively, is unlike a typical employer-employee relationship that is defined by agency and contract principles. The relationship is defined by religious doctrine and practice. The religious standards governing the role of a bishop and the exercise of his authority, if any, over the hiring and supervision of a parish priest may conflict with that of a typical employer. For example:

> The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimand

> or three day suspension without pay for misconduct. 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.
>
> Therefore, due to this strong belief in redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly entangle itself in the religious doctrines of faith, responsibility, and obedience.

L.L.N. v. Clauder, 563 N.W.2d 434, 440 (Wis. 1997) (citation omitted). These basic concerns militate in favor of affirming the dismissal of the Petitioner's claims.

The Fourth District recognized the excessive entanglement that is certain to occur should a secular court be faced with adjudicating the Petitioner's claims in this case. The Fourth District initially acknowledged that case law from other jurisdictions reveals a "split of authority" as to whether the First Amendment bars a civil court's adjudication of the Petitioner's claims. Doe v. Evans, 718 So.2d 286, 288 (4th DCA 1998). The court concluded, however, that:

> Our examination of case law presenting both sides of this question leads us to conclude the reasoning of those courts holding the First Amendment bars a claim for negligent hiring, retention, and supervision is the more compelling. In a church defendant's determination to hire or retain a minister, or in its capacity as supervisor of that minister, a church defendant's conduct is guided by religious doctrine and/or practice. Thus, a court's determination regarding

> whether the church defendant's conduct was "reasonable" would necessarily entangle the court in issues of the church's religious law, practices, and policies. "Hiring" in a traditional sense does not occur in some religions, where a person is ordained into a particular position in the church, and assigned to one parish or another. A court faced with the task of determining a claim of negligent hiring, retention, and supervision would measure the church defendants' conduct against that of a reasonable employer; a proscribed comparison.

Id. at 291. The Fourth District was "persuaded" by the reasoning of the Supreme Judicial Court of Maine in Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997), wherein the court similarly recognized the split of authority and sided with those jurisdictions that found a bar to these claims. Doe v. Evans, 718 So.2d at 290. The Fourth District, quoting from Swanson, remarked that "[w]hen a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, secular duties are necessarily introduced into the ecclesiastical relationship and the risk of constitutional violation is evident." Id. (quoting Swanson, 692 A.2d at 444). Moreover, the Fourth District was persuaded by the Swanson Court's determination that:

> the question of the existence of an agency relationship would entail examination of church doctrine governing the church's authority over the subject priest, a query barred as necessitating interpretation of ambiguous religious law and usage. Beyond this initial inquiry, imposing liability and secular duties on the church as a "principle" would infringe on the church's right to determine the standards governing

> the relationship between the church, its bishop, and the parish priest.
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> * * *
>
> [p]astoral supervision is an ecclesiastical prerogative, and on the facts before it, imposing a secular duty of supervision on the church, enforced through civil liability, would restrict the church's freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedoms inhibited.

Id. (internal citations and quotations to Swanson omitted).

The Fourth District also cited, with approval, Pritzlaff v. Archdiocese of Milwaukee, 533 N.W. 2d 780, 194 Wis. 2d 302 (1995), wherein the Supreme Court of Wisconsin found that in attempting to establish a claim of negligent hiring, supervision or retention against the Archdiocese of Milwaukee, the plaintiff would invariably have to establish the Archdiocese's negligence in hiring, supervising or retaining an incompetent or otherwise unfit priest. The Court concluded, however, that "the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." Id. at 326. The Pritzlaff Court found that the plaintiff's claims failed to state a cause of action:

> We further hold that, assuming they exist at all, the tort of negligent hiring and retention may not be maintained against a religious governing body due to concerns of excessive entanglement, and that the tort of negligent training or supervision cannot be successfully asserted in this case because it would require an inquiry into church laws, practices and policies.

Id. at 330.

The Fourth District also cited, with approval, to Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991), wherein the district court found:

> [A]ny inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises . . . First Amendment problems . . . which might involve the court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs. . . . The traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation. Church governance is founded in scripture, modified by reformers over almost two millennia.
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> * * *
>
> It would therefore be inappropriate and unconstitutional for this court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Id. at 332 (cited in Doe v. Evans, 718 So.2d at 290); see also, Schieffer v. Catholic Archdiocese of Omaha, 244 Neb. 715 (1993) (Any inquiry into the policies and

practices of church defendants in hiring or supervising their clergy is barred by the First Amendment because it might foster excessive state entanglement with religion); Kedroff, 344 U.S. at 116 (freedom to select clergy protected against state interference as part of the free exercise of religion).

There is additional case law from throughout the country supportive of the Respondents' position in this case. For example, the Supreme Court of Wisconsin found that the First Amendment prohibited a negligent supervision claim against the Roman Catholic Church because such a claim could not be resolved on neutral principles. See L.L.N. v. Clauder, 563 N.W.2d 434 (1997). The court noted that:

> 'Our pluralistic society dislikes having neutral jurists place themselves in the role of a 'reasonable chief rabbi,' 'reasonable bishop,'etc., because of the degree of involvement that must accompany such decisional framework for the civil tort judge.' This further explains why this court held that negligent supervision claims are 'prohibited by the First Amendment under most if not all circumstances.'

Id. at 442 (quotations omitted). Additionally, in another case with facts closely analogous to the instant action, a plaintiff who had an affair with a Presbyterian minister brought an action against the minister and numerous other defendants. The U.S. District Court, in interpreting the Constitution, held:

> Finally, as church defendants request, any references to their negligent hiring, training and supervision of Rykse must be stricken from plaintiff's complaint. Any inquiry

> into the politics and practices of church defendants in hiring or supervising their clergy is barred by the First Amendment because it might foster excessive state entanglement with religion.

Dausch v. Rykse, et al., No. 92C3029, 1993 U. S. Dist. Lexis 1448 at *7 (N.D. Ill. Feb. 9, 1993); see also, Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994) ("civil court review of ecclesiastical 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").

The only Florida appellate court to address these issues, other than the Fourth District in the instant action, is the Fifth District Court of Appeal in Doe v. Dorsey, 683 So. 2d 614 (Fla. 5th DCA 1996). In Dorsey, the appellate court upheld the trial court's dismissal of the action on statute of limitations grounds, however, it also addressed the First Amendment issues which the trial court also relied upon when dismissing the action. See Doe v. Dorsey, 1995 WL 608281 (Fla. 9th Cir. Ct.) ("[t]he First Amendment to the United States Constitution bars a tort claim for negligent hiring and/or retention against the Bishop either in his capacity as a corporation sole

or in his capacity as a juridic person."). In reviewing the trial court's dismissal, the Court of Appeal noted that:

> [w]e 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 . . . . Insofar as the adult acts are concerned, we conclude that the sexual acts between the adult participants herein were not criminal. Plaintiff does not contend that he did not consent to the continued relationship. It is his position that his consent should be considered invalid because the priest 'deliberately and calculatingly caused a relationship whereby [he] was able to exert undue influence, dominion and control over the Plaintiff.' We do not believe that a sexual battery has been committed when a person of normal intelligence submits to a sexual relationship due to the "emotional attachment" to another person.

Id. at 617. The Court of Appeal concluded that the plaintiff's allegations did not rise to the level of compelling interest needed in order to interfere in the church's hiring of its clerics. Id. Similarly, the Petitioner's consensual sexual relationship with Father Evans does not rise to the level of compelling State interest needed in order to circumvent the First Amendment's bar to adjudicating these issues.[2] The Petitioner's consensual relationship with Evans is not the type of tortious conduct contemplated

[2]Moreover, as conceded by Petitioner, the Florida legislature grants special immunity for ministers from criminal prosecution for sexual relations during psychotherapy. See § 491.014, Fla. Stat. It can be inferred that the legislature recognized the potential for First Amendment conflict.

by the Fifth District Court of Appeal to be necessary to review the Respondents' relationship with the Petitioner.

Although the Petitioner maintains that the "criminality distinction" referenced in Doe v. Dorsey and "impliedly" adopted by the Fourth District in this case "lack[s] the smallest toehold in either the text of the First Amendment or any First Amendment decision of any court," see Petitioner's Brief, p.35, this Court does not have to pass on this issue at this time. This case does not involve any criminal conduct, therefore, the criminality distinction offered by the Fifth District need not be addressed in this appeal. Although the Respondents maintain that any interference in a religious organization's selection or supervision of a cleric is precluded by the First Amendment, this criminality distinction, most often found in cases of child sexual abuse, is a valid distinction which has been recognized by other courts. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158, 166-67 (right to practice religion freely does not include liberty to expose children to threats to their well-being); Gibson v. Brewer, 952 S.W.2d 239 (Mo.App. W.D. 1996) ("Society will not tolerate reckless, willful, or intentional conduct by an ecclesiastical entity that promotes criminal activity injurious to children"). These courts have found that protecting children is a compelling state interest justifying a burden on religious freedom. Furthermore, the majority of courts that have found no First Amendment

bar to claims of negligent hiring, retention or supervision against religious authorities are those that have addressed cases of criminal conduct, most often child sexual abuse. Doe v. Evans, 718 So.2d at 291.

An impermissible fusion of governmental and religious functions will occur in this case if the Petitioner is permitted to continue the litigation of her claims of negligent hiring, supervision and retention against the Respondents. In adjudicating these claims, the secular court would dictate to the Episcopal Church the manner in which its Canons are to be implemented. The Court cannot avoid becoming entangled or "fused" in church law or doctrine in the adjudication of this claim insofar as the Court must review, in detail, the information which the Diocese possessed with regard to Father Evans. Moreover, an adjudication of this claim must, necessarily, involve inquiry into the knowledge of the Church, Diocese and its Bishop regarding Father Evans at the time he was hired by the Church and during the time he was ministering at the Church. The Petitioner is, in effect, asking a secular court to determine the standard of care that should be observed by churches in their selection, supervision and retention of clergymen, and to assess damages against the Respondents for failure to comply with that standard. The First Amendment to the United States Constitution, however, prevents such a determination and the adjudication of the Petitioner's claims.

III. This Court Should Affirm the Appellate Court's Dismissal Of Petitioner's Cause of Action For Breach of Fiduciary Duty Because An Adjudication Of This Claim Is Also Beyond A Secular Court's Scope of Review

A secular court's adjudication of the Petitioner's claim for the breach of an alleged fiduciary duty owed to her by Bishop Schofield, the Diocese and the Church would require the establishment of a standard of care applicable to the Respondents' exercise of their authority under religious doctrine, thereby violating the entanglement clause of the First Amendment. Baumgartner v. First Church of Christ, 490 N.E. 2d 1319 (Ill. App. 1986), cert. denied, 497 U.S. 915 (1986) (First Amendment bars the judiciary from considering whether certain religious conduct conforms to the standards of a particular group). The essence of the Petitioner's Complaint revolves around the Respondents' alleged "duty" to the Petitioner. To the extent that this duty arises out of ecclesiastical standards, the violation of those standards is not actionable in a secular court.

The Supreme Court of Florida has not yet reviewed a claim made against a religious institution for an alleged "breach of fiduciary duty" by an adult who engaged in a consensual sexual relationship with a cleric. Moreover, the Florida courts have never recognized a cause of action for the breach of a pastoral duty against a religious denomination or any of its members. As with the negligent hiring, retention and supervision claims, however, there is conflicting case law from throughout the nation

concerning this issue. After reviewing this case law, the Fourth District concluded, in the instant case, that:

> Taking the allegations of Doe's complaint as true, Doe alleged the church defendants owed her a fiduciary duty, yet definition of that duty necessarily involves the secular court in church practices, doctrines, and belief. To establish a breach of the fiduciary duty allegedly owed to Doe by the church defendants, Doe would need to establish the church remained inactive in the face of her allegations against Evans. However, the church's policies undoubtedly differ from the rules of another employer, and may require the nonsecular employer to respond differently when faced with such allegations. When a secular court interprets church law, policies, and practices it becomes excessively entangled in religion. We align ourselves with those courts finding a First Amendment bar to a breach of fiduciary duty claim as against church defendants, concluding resolution of such a claim would necessarily require the secular court to review and interpret church law, policies, and practices.

Doe v. Evans, 718 So. 2d at 293.

The Fourth District cited, with approval, to Amato v. Greenquist, 679 N.E.2d 446, 287 Ill.App.3d 921 (1997) (in order to determine the scope of a fiduciary duty, the court would be required to define a reasonable duty standard and evaluate the cleric's conduct against that standard; an inquiry that is of "doubtful validity" under the Free Exercise Clause) and L.C. v. R.P., 563 N.W.2d 799 (N.D. 1997) (a secular court is required to examine a church's doctrinal teachings to determine whether the church owes a fiduciary duty to the plaintiff; an examination that would excessively

entangle the secular court in church doctrines and policy in violation of the First Amendment). Both of these cases support dismissal of Petitioner's claim for breach of fiduciary duty. Similarly, the Fourth District also cited to H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo.Ct.App. 1995), wherein the Missouri Court of Appeals reasoned that a breach of fiduciary duty claim would "inevitably require inquiry into the religious aspects of [the] relationship [between the plaintiff and the church entities], that is, the duty owed by Catholic priests, parishes, and dioceses to their parishioners" which is a sectarian question that cannot be posed by a secular court. Id. at 99 (cited in Doe v. Evans, 718 So.2d at 293). The Missouri Court of Appeals also found that:

> analyzing and defining the scope of fiduciary duty owed persons by their clergy (assuming pastoral relationships were "fiduciary") would require courts to define and express the standard of care followed by reasonable clergy of the particular faith involved, which in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.

Id. at 98 (citation omitted).

Various courts of other jurisdictions which have addressed this issue have similarly rejected these claims as beyond the scope of a secular court's review. For example, in a case with facts closely analogous to the instant action, a plaintiff brought an action against a church pastor and various ecclesiastical authorities

alleging that the pastor initiated sexual contact during a counseling relationship. Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991). The U.S. District Court opined that:

> in analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence. . . . [A]s with her negligence claim, [the plaintiff's] fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in malpractice.

Id. at 326.

Additionally, Petitioner's reliance upon F.G. v. MacDonell, 150 N.J. 550 (1997), as mentioned by the Fourth District in this case, is misplaced because F.G. involved a parishioner's claim of breach of fiduciary duty against the priest who counseled her, not the priest's employer. The Petitioner's claim of breach of fiduciary duty made against Father Evans, however, is not at issue in this appeal. Moreover, in F.G., the parishioner's claim of breach of fiduciary duty made against another Episcopal priest, Father Harper, was remanded to the trial court to determine "whether, without becoming entangled in religious doctrine, a court can adjudicate Harper's alleged breach of his fiduciary duty to F.G. . . . by reference to neutral principles. . . ." Id. at 566-567. The dissent pointed out, however, that it "surmise[d]

that the Court is temporizing by remanding the matter for further proceedings that can have but one result." Id. at 574 (O'Hern, J., dissenting). In addition, the dissent remarked:

> [T]o sum up, the First Amendment offers no defense to sexual crimes or abuse. Conversely, no principle of general civil law makes it a tort for competent adults to engage in consensual sexual conduct. The Court makes the pastor's conduct a tort because he is a cleric. Whatever we may think of the morality of the acts involved, a breach of the tenets of the Episcopal religion by one party to a relationship does not give rise to a tort action. To base a tort action on a breach of religious doctrine constitutes an establishment of religion in violation of the First Amendment.

Id.; see also, Smith v. O'Connell, 986 F.Supp. 73 (D. R.I 1997) ("when such a claim [for sexual misconduct of clergy] rests on a breach of fiduciary duty theory, an examination of church doctrine might be required in order to ascertain the nature of any fiduciary relationships between the church officials and the victim").

The Respondents do not maintain that the First Amendment is an absolute bar to finding a religious institution liable for its tortious conduct. See, Strock v. Pressnell, 527 N.E. 2d 1235, 1237 (Ohio 1988) ("It is well settled that clergy may be sued for the torts they commit. For example, religious leaders have been held liable for obtaining gifts and donations of money by fraud, ...for the kidnaping of a minor, ...for unlawful imprisonment, [and] for homosexual assault...."). The problem arises,

however, when causes of action brought against religious institutions are premised upon their status as a religious institution. Religion is clearly the foundation for the Petitioner's relationship with the Respondents; it is not "merely incidental" to it. Had Father Evans not been an Episcopal priest at the time he engaged in the alleged consensual sex with the Petitioner, the Petitioner could not maintain her present claims against the Respondents. The Petitioner maintains that the Respondents' conduct was tortious merely because they are religious entities. The issue is not whether the Respondents' conduct was "based in religious belief" as professed by the Petitioner, the issue is whether the Petitioner could maintain a claim for breach of fiduciary duty had the Respondents not been religious entities. As a consequence, the First Amendment is clearly implicated and the court cannot merely apply neutral tort principles to determine whether the Respondents' conduct was tortious. The Fourth District's determination that the Petitioner's claim for a breach of fiduciary duty by the Respondents is beyond the scope of a secular court's review should be upheld.

IV. Appellant Concedes That Her "Outrageous Conduct" Claim Should Be Dismissed

The Petitioner concedes, by her silence, that the dismissal of her novel claim labeled "outrageous conduct" should be affirmed. The Fourth District found that this claim is barred by the First Amendment and that the Petitioner's allegations in her

complaint are insufficient to sustain a claim for intentional infliction of emotional distress. Doe v. Evans, 718 So.2d at 293-94 (citing Metropolitan Life Insurance Company v. McCarson, 467 So. 2d 277 (1985)); see also, Schieffer, 244 Neb. at 719 ("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."). The dismissal of the Petitioner's claim for "outrageous conduct," therefore, should be affirmed.

CONCLUSION

WHEREFORE, the Respondents, Church of The Holy Redeemer, Inc., The Diocese of Southeast Florida, Inc., and Calvin O. Schofield, Jr., respectfully request that this Honorable Court affirm the Fourth District Court of Appeal's dismissal of this action on First Amendment grounds.

Dated: August 27, 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of _____, 1999 to: Randy D. Eillison, Esq., 1645 Palm Beach Lakes Blvd., Suite 350, W. Palm Beach, FL 33401-2289; Christopher Renzulli, Esq., Renzulli,& Rutherford, 300 E. 42 Street, 18th Floor, New York, NY 10017, Edward Campbell, Esq., 1675 Palm Beach Lakes Blvd., 7th Floor, P.O. Drawer 4178, W. Palm Beach, FL 33402; and William R. King, Esq., P.O. Box 12277, Lake Park, FL 33403-0277, James F. Gilbride, Gilbride, Heller & Brown, P.A., One Biscayne Tower, Suite 1570, Two South Biscayne Boulevard, Miami, FL 33131, J. Patrick Fitzgerald, Esq., 110 Merrick Way, Suite 3-B, Coral Gables, FL 33134, Philip M. Burlington, Caruso, Burlington, Bohn & Compiani, P.A., 1615 Forum Place, Suite 3A, West Palm Beach, FL 33401.

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