IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,450

JANE DOE

Petitioner,

v.

WILLIAM DUNBAR EVANS, III, et al.,

Respondents.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Initial Brief is Times New Roman 14 Pt.

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PREFACE

This petition for discretionary review challenges the Fourth District Court's affirmance of a circuit court order dismissing claims against hierarchal church defendants, arising out of the alleged sexual misconduct of a minister during marital counseling. Petitioner, Jane Doe, was the appellant in the Fourth District Court and the plaintiff in the circuit court. Respondents, Church of the Holy Redeemer, Inc., the Diocese of South Florida, Inc., and Calvin O. Schofield, Jr., were the appellees in the district court and the defendants in the circuit court. Respondents will collectively be referred to as the "Church Defendants". Otherwise, the parties will be referred to by name. The following symbol will be used:

(R.) -- Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The circuit court granted the Church Defendants' motion to dismiss Doe's Second Amended Complaint with prejudice on the ground that Doe's claims were barred by the First Amendment to the United States Constitution (R.125-126). That Second Amended Complaint alleged the following pertinent facts.

Jane Doe is a former parishioner at the Church of the Holy Redeemer, Inc., an Episcopal church located in Lake Worth, Florida (R. 91-920. William Dunbar Evans, III, was employed as the minister at Holy Redeemer (R.91-92). Calvin O. Schofield, Jr., is a bishop of the Diocese of South Florida, which includes Holy Redeemer (R.92).

Bishop Schofield and the Diocese have control over the hiring, firing, compensation and discipline of priests and the manner in which priests conduct their daily activities (R.94). As such, the Diocese and Schofield had control over Evans (R.94). Within the hierarchical structure of the Episcopal Church, the local diocese and the bishop have the right to exercise control over a sexually exploitive pastoral counselor and have, in fact, exercised such control in the past (R.94).

As part of Evans' duties as pastor at Holy Redeemer, he provided counseling and spiritual advice to parishioners having marital difficulties (R.92). The Diocese, Schofield, and Holy Redeemer (hereinafter collectively the "Church Defendants") were aware of prior incidents involving sexual misconduct during counseling by

Evans at another Church within the Diocese of South Florida and also while at Holy Redeemer (R.93). Despite this knowledge, nothing was done by the Church Defendants to rectify the situation (R.94).

Evans approached Doe, who was having difficulties with her marriage, and asked if he could assist her with counseling (R.92). Doe had faith and confidence in Evans (R.93). The pastoral counselor-counselee relationship between Evans and Doe began on or about December 27, 1991, and continued into mid-February 1992 (R.95). During that time, Evans became romantically involved with Doe in a way which made it impossible for him to adequately keep Doe's interests paramount (R.95).

The Church Defendants were aware of the pastoral counseling relationship between Doe and Evans and understood that they had placed Evans in a position of interaction with third parties in a counseling situation which had a potential for harm to such third parties, including Doe (R.93).

The Church Defendants were made aware early in the counseling process that Evans was abusing his position of trust (R.95). Upon learning of Evans inappropriate behavior and counseling relationship with Doe, the Church Defendants failed to act to protect Doe by creating a situation in which Doe wrongfully believed that the guilt and shame were hers and further created a situation in which Doe was held up to ridicule and embarrassment from the other members of the Church (R.94). The

Church Defendants attempted to manipulate Doe into silence or ignored her (R.94).

The conduct of the Defendants was not motivated by any sincerely held religious belief (R.94). Each of the Defendants breached fiduciary duties owed to Doe (R.95). The Church Defendants were also negligent in the hiring, supervision and/or retention of Evans, in that they failed to protect against reasonably foreseeable harm (R.96).

Knowing Doe was peculiarly susceptible to emotional distress as a result of the marital turmoil for which she sought counseling, the Defendants engaged in a series of acts which were outrageous in character and extreme in degree, which they knew would result in serious damage to Doe (R.97).

As a result of the actions and inactions of the Defendants, Plaintiff Doe suffered injury resulting in pain and suffering, disability, mental anguish, loss of capacity for the enjoyment of life, expenses of hospitalization, medical and nursing care and treatment, loss of earnings, loss of ability to earn money, and aggravation of previously existing conditions (R.98). Further, Doe has suffered loss of her church and her faith and has suffered ridicule and embarrassment from other church members (R.98).

Doe's Second Amended Complaint alleged causes of action for breach of fiduciary duty and outrage against all Defendants and negligent hiring, retention and

supervision against the Church Defendants (R. 95-98). The Church Defendants jointly moved to dismiss Doe's Second Amended Complaint on the ground that her claims were barred by the First Amendment to the United States Constitution (R.100-113).

On February 11, 1997, the Honorable Moses Baker, Jr., Circuit Court Judge, entered an order granting the Church Defendants' motion to dismiss the Second Amended Complaint with prejudice, explaining his ruling in a single line:

> In short, Plaintiff's claims are barred by the First Amended (sic) to the Constitution of the United States of America.

(R.125-126).

After timely filing a notice of appeal directed to this order, Doe moved for and received a relinquishment of jurisdiction for entry of a final order of dismissal (R.127-130). The April 29, 1997, final order added no further explanation of the Court's ruling, merely making clear the finality of the Court's actions as to the Church Defendants (R.127-130). The claims against Evans remain pending in the circuit court and are unaffected by the subject final order.

The final order of the circuit court was affirmed by written opinion of the Fourth District Court of Appeals, dated September 9, 1998. After denial of a timely motion to certify, Doe timely invoked this Court's discretionary to review decisions

which expressly construe provisions of the state or federal constitution.

SUMMARY OF THE ARGUMENT

The Establishment Clause of the First Amendment protects both against the establishment of a state church and against incremental steps which might lead to the creation of such a church. While interaction between church and state is inevitable, excessive entanglements must be avoided.

Negligent hiring, negligent supervision and breach of fiduciary duty actions present questions which are fundamentally neutral toward religious actors. Even at the theoretical level, "church doctrine" would be injected into such trials solely by church defendants' defensive claims that compliance with common law duties might require deviation from church doctrine. Not only have conflicts between church doctrine and common law principles proved nonexistent in the cases that have actually been tried in this area (after all, what church doctrinally requires carelessness of its officials?), such a conflicting doctrinal requirement would be legally irrelevant, in any event, avoiding even the possibility of judicial "entanglement."

Churches are bound by neutral laws of general application, even in the selection and supervision of their clergy. Application of such laws requires no compelling state interest and, in fact, the neutral application of such laws to church actors may be required by the Establishment Clause, itself. The absolutist interpretation of the Free Exercise clause which the Church Defendants seek, would place them in a preferred

position over the rest of society. While it is understandable that the Church Defendants would wish such an unique immunity from duties of due care and fiduciary obligation, such favored treatment would place us much farther along the road to the "establishment of religion" than any risks posed by the supposed entanglement of courts in mythical church doctrines of carelessness.

The selection and supervision of clergy pose equally "entangling" doctrinal questions regardless of the age and/or competency of the minister's victim (i.e., the "criminality" of the minister's conduct). Moreover, the contours of the First Amendment to the federal Constitution do not depend upon the fine criminality distinctions which state legislatures may choose to draw. For these reasons, no court outside the district courts of Florida has ever drawn the specious "criminality" distinction suggested below.

Thus, not only is the foregoing constitutional analysis doctrinally sound, it is necessary to avoid placing society's most vulnerable members at the mercy of careless church officials who, for whatever reason, would chose to place known sexual predators in positions of authority, while claiming immunity from the damages which naturally result from such foreseeably careless behavior.

LEGAL ARGUMENT

Point On Appeal

CHURCHES AND CHURCH OFFICIALS ENJOY NO IMMUNITY FROM THE NEUTRAL APPLICATION OF COMMON LAW TORT PRINCIPLES IN THE HIRING AND SUPERVISION OF THEIR CLERICS.

A. Excessive Entanglement

While the "Establishment Clause" of the First Amendment to the U.S. Constitution is centrally concerned with prohibiting establishment of a state church or state religion, its language goes further, commanding that there be "no law respecting an establishment of religion." A law "respecting" the establishment of religion need not actually establish a state church or religion, it is enough that it constitutes "a step that could lead to such establishment and hence offend the First Amendment." Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971).

The three main evils against which the Establishment Clause was intended to afford protection are the sponsorship, financial support, and active involvement of the sovereign in religious activity. Id. In Lemon the Court announced a three-prong Establishment Clause test: 1) a statute must have a secular legislative purpose; 2) its principle or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster an excessive government entanglement with religion.

The "excessive entanglement" prong arises from Walz v. Tax Commission, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970), where the Court cautioned that while religion-neutral administrative burdens are typically not suspect, a law's administrative apparatus may not be allowed to reach the sort of totalitarian proportions which would subject a church to "official and continuing surveillance leading to an impermissible degree of entanglement". Walz, 397 U.S. at 674-675, 90 S.Ct at 1414-1415.

In Lemon, supra, the Court explained, however, that its prior holdings do not call for total separation between church and state, as "total separation is not possible in an absolute sense." Lemon, supra at 614, 91 S.Ct. at 2112. The Court pointed to fire inspections, building and zoning regulations and state requirements under compulsory school attendance laws as examples of "necessary and permissible contacts," concluding that:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

Id.

In Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990), the church challenged application of

California's sales tax to religious materials sold in California. In analyzing application of the Lemon test to the sales tax, the court stated:

> At the outset , it is undeniable that a generally applicable tax has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief. Thus, whatever the precise contours of the Establishment Clause, see County of Allegheny v. American Civil Liberties Union of Pittsburgh, 492 U.S. 573, 589-594, 109 S.Ct. 3086, 3099-3101, 106 L.Ed.2d 472 (1989) (tracing evolution of Establishment Clause doctrine); cf. Bowen v. Kendrick, 487 U.S. 589, 615-618, 108 S.Ct.2562, 101 L.Ed.2d 520 (1988) (applying but noting criticism of the entanglement prong of the Lemon test), its undisputed core values are not even remotely called into question by the generally applicable tax in this case.

Jimmy Swaggart, supra at 394, 110 S.Ct. 688.

Having made clear that the first two prongs of the Lemon test describe its "core values", the Court then stated almost as an afterthought that, "even applying the 'excessive entanglement' prong of the Lemon test," the tax would pass muster. Id. The court explained:

> Contrary to appellant's contentions, the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations. There is no "official and continuing surveillance," Walz, supra, 397 U.S., at 675, 90 S.Ct., at 1414, by government auditors. The sorts of government entanglements that we have found to violate the

> Establishment Clause have been far more invasive than the level of contact created by the administration of neutral tax laws. Cf. Aguilar v. Felton, 473 U.S. 402, 414, 105 S.Ct. 3232, 3238, 87 L.Ed.2d 290 (1985); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126-127, 103 S.Ct. 505, 511-512, 74 L.Ed.2d 297 (1982).

Jimmy Swaggart, 493 U.S. at 395-396, 110 S.Ct. 688.

Aguilar v. Felton, 473 U.S. 402, 414, 105 S.Ct. 3232, 3238, 87 L.Ed.2d 290 (1985), barred sending public school teachers into parochial schools to provide remedial education. The Swaggart Court's citation of Aguilar as an example of what it meant by excessive entanglement is telling as to the modern vitality of that concept, inasmuch as Aguilar was recently reversed in Agostini vs Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

Agostini holds that sending public school teachers into parochial schools is now not an excessive level of church-state entanglement. Agostini demonstrates the current Court's continuing skepticism of the much-maligned "excessive entanglement" prong, as well as the continuing erosion of that requirement. As the Court explained, it is the advancement or inhibition of religion with which the First Amendment is primarily concerned, meaning that only truly "excessive" entanglements independently violate the Establishment Clause. See Agostini, 521 U.S. at 232-233, 117 S.Ct. At 2015.

B. The Church Property Cases

Probably the closest the U.S. Supreme Court has come to deciding the current issue are its opinions defining the extent to which state courts may apply common law principles in resolving church property disputes. In Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), the Court considered a property dispute which arose when two local churches withdrew from a hierarchical general church organization. The Georgia courts had resolved the dispute based upon the "departure-from-doctrine" element of the implied trust theory. That legal theory required the court to first decide whether the challenged actions of the general church departed substantially from prior church doctrine and, if so, whether the doctrinal issue on which the general church had departed held such a place of importance in the traditional theology as to require that the trust be terminated. That legal theory thus required the Georgia court to assess the relative significance to the Presbyterian religion of the tenants from which departure was found. The Supreme Court held that this "departure-from-doctrine"element of the implied trust theory violated the First Amendment, which forbids civil courts from deciding ecclesiastical questions. The Court was careful to point out, however, that:

> Civil courts do not inhibit free exercise of religion merely

> by opening their doors to disputes involving church property. And there are neutral principles of law developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.

Presbyterian Church, 393 U.S. at 449, 89 S.Ct. at 606 (emphasis added).

This principle was amply demonstrated in Jones v. Wolf, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979), wherein the Court took the opportunity to revisit Georgia law as it had developed in response to its Presbyterian Church decision. Georgia had, in the interim, adopted the "neutral principles of law" approach to resolving church property disputes foreshadowed in the Presbyterian Church opinion. Specifically, that doctrine called for resolution of factional church property disputes by examination of the deeds conveying the property, the state statutes dealing with implied trusts, the corporate charter of the church, and the provisions of the constitution of the general church concerning ownership and control of property. The Court approved this "neutral principles" approach, notwithstanding the fact that an ecclesiastical Presbyterian tribunal existed which, at least arguably, was the appropriate forum for deciding the ownership question.

The Court explained the application of the neutral principles method, as follows:

> The neutral-principles method, at least as it has evolved in

> Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body. Serbian Orthodox Diocese, 426 U.S., at 709, 96 S.Ct., at 2380.
>
> On balance, however, the promise of non-entanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application.

Jones, 443 U.S. at 604, 99 S.Ct. at 3026. Thus, ultimately, in this context, the "excessive entanglement" query asks whether application of a given law will, more than occasionally, embroil the courts in fundamentally religious controversies akin to the doctrinal questions of faith placed "out of bounds" in Presbyterian Church .

C. Negligent Hiring/Supervision

Those courts that have actually undertaken application of the subject common law tort principles to the alleged failings of hierarchical church officials have empirically established that this endeavor does not require the resolution of religious

controversies. These authorities stand in stark contrast to the contrary decisions, which (as here) almost universally arise at the motion to dismiss stage and thus posit the existence of such doctrinal problems as a matter of "theory," often amounting to little more than a judicial "article of faith." Experience shows that such doctrinal entanglements are rare, if not entirely mythical.

In Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 10 F.Supp.2d 138 (D. Conn. 1998), the court refused to set aside a jury verdict in a suit brought by a former parishioner against the local diocese. The jury had awarded compensation based upon a theory of breach of fiduciary duty in a case involving a diocesan priest's sexual abuse of a child. After examining the above Supreme Court authorities, the District Court explained the practical application of those principles to the "doctrinal" matters allegedly presented at trial, as follows:

> . . . a court is not prohibited from considering such [uncontroverted religious doctrine or canon law], so long as such consideration does not involve interpreting, questioning, or weighing such ecclesiastical concerns. In fact, this court used this principle as a guideline in its evidentiary rulings throughout the trial. Official church documents, such as excerpts from canon law, were admitted only if there was no challenge as to their meaning or applicability. No area of church doctrine was subject to interpretation or question by the Court or jury. A secular standard of fiduciary duty could thus be used to evaluate behavior by the diocesan officials . . . .

Id. at 148. The court went on to explain that while evidence of "shepherd-flock" symbols and teachings were used at trial to illustrate the source and justification for the trust reposed in and fostered by the bishop, "they represent an undisputed, fundamental precept of Church hierarchy." Id.

In Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), the court upheld a jury verdict against an Episcopal diocese and bishop for injuries sustained as a result of a priest's sexual relations with a parishioner during counseling. As alleged in the instant case, the evidence there showed that when the organization was confronted with the misdeeds of the priest, the bishop took control of the matter and inflicted further injury on the vulnerable individual. The Colorado Supreme Court rejected claims that the trial court had become impermissibly embroiled in doctrinal matters, as follows:

> Our decision does not require a reading of the Constitution and Canons of the Protestant Episcopal Church or any other documents of church governance. Because the facts of this case do not require interpreting or weighing church doctrine and neutral principles of law can be applied, the First Amendment is not a defense . . . .

Id. at 321.

In Bivin v. Wright, 656 N.E.2d 1121 (Ill. App. 1995), a married couple brought an action for damages alleging that a church was negligent in supervision of a minister

who initiated and continued a sexual relationship with the wife during the course of marital counseling. The court there concluded that while the neutral principles of law approach is usually applied to disputes over church property:

> We cannot conclude from plaintiffs' complaint that the instant cause cannot be decided using neutral principles of negligence law, developed for use in all negligence disputes, without interpretation of religious doctrine or church law, just as would a secular dispute in a negligence case. Resolution of the instant dispute may not involve any searching inquiry into religious matters in violation of the first amendment.

Id. at 1124.

In Smith v. O'Connell, 986 F.Supp. 73 (D. R.I. 1997), the court denied a motion to dismiss a complaint raising a multitude of state tort law claims against the hierarchy defendants. Included were claims of negligent supervision and breach of fiduciary duty, both arising out of the priest's alleged sexual assaults upon minors. The motion to dismiss was premised upon affidavits of diocesan officials claiming inevitable doctrinal entanglements. The court denied the motion to dismiss the complaint. While the court noted that arguably there might be some circumstances under which it could be difficult to determine the tort liability of church officials for the sexual misconduct of clergy without first deciding questions of religious doctrine (i.e., when a fiduciary duty claim requires examination of church doctrine to ascertain

the nature of any fiduciary relationship between the church official and the victim), the court held that the "core claim" of negligent failure to supervise did not require interpretation of religious doctrine, as whether the hierarchy defendants exercised reasonable care in supervising the priests subject to their authority can be made solely in accordance with well- established tort law principles. Id. at 81.

In examining a hiring decision, courts do not inquire into the employer's broad reasons for choosing a particular employee for a position, but instead look 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. Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1323 (Colo. 1996).

In Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991), the court imposed a "pleading with particularity" requirement to claims of negligent hiring against church defendants, requiring that the plaintiff allege facts indicating that the religious institution "knew or should have known of the employee's criminal or tortious propensities". Id. at 590. However, assuming such specific facts are alleged, the Ohio Supreme Court stated that ". . .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 . . . .” Id. See also Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806 (Minn. App. 1992) (church conceded that examination of the reasonableness of its actions regarding the placement and discipline of priest was constitutionally allowable).

Some courts have expressed reluctance to examine ministerial “hiring,” with abstract reference to concepts such as a minister’s “sacred calling” and non-secular concepts of “ordination.” However, the heart of the tort is plainly not the conferral of a ministerial collar, per se. Rather, whether it is called hiring, assignment, or any other name, it is the hierarchical decision to place a cleric with an unreasonably dangerous history of sexual predation in intimate interaction with vulnerable parishioners, which comprises the essence of the tort. Churches can ordain and assign as many known sexual predators as they wish to rustic monasteries and Vatican libraries, it is when they place them in charge of altar boys and/or marital counseling that they must answer to civil authority for the consequences of their carelessness.

The Restatement (Second) of Agency § 213 (1958), provides that a person conducting an activity through servants or other agents is subject to liability for harm resulting from misconduct if he is negligent or reckless in the supervision of the activity. Comment D to the Restatement notes that a principal may be negligent because he has reason to know that the servant or other agent, because of his qualities,

is likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the agent then causes harm, the principle may be liable under the rule that one initiating conduct having undue tendency to cause harm is liable therefore.

Negligent supervision claims have been repeatedly upheld in the context of ministerial sexual misconduct. See e.g. Moses, supra; Doe v. Hartford Roman Catholic Diocesan Corp., 716 A.2d 960 (Conn. Super. 1998). In fact, at least one court has concluded that while a negligent hiring theory offends the First Amendment, a negligent supervision claim does not. See Isely v. Capuchin Province, 880 F.Supp. 1138, 1151 (E.D. Mich.1995).

Florida law recognizes that an employer may be held liable for the willful torts of employees committed against third persons if the employer knew or should have known that the employee posed a threat to others. Island City Flying Service v. General Electric Credit Corp, 585 So.2d 274, 276 (Fla. 1991); quoting, Williams v. Feather Sound, Inc, 386 So.2d 1238 (Fla. 2d DCA 1980). The ultimate questions 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. Id.

Negligent hiring occurs when prior to the time the employee is actually hired, the employer knew or should have known of the unfitness and the issue of liability

primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. Garcia v. Duffy, 492 So.2d 435, 438-439 (Fla. 2d DCA 1986). Negligent retention, on the other hand occurs when during the course of employment the employer becomes aware or should have become aware of the problems with an employee that indicates his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment. Id.

In this case Doe alleged that the defendants had actual knowledge of Evan's prior sexual misconduct both at other churches within the Diocese and at the current church, but that despite such knowledge and despite their right to control Evan's actions under the hierarchical structure of the Episcopal church (a right of control they had previously exercised in other cases involving other ministers) they did nothing to rectify the situation and protect Doe from Evans sexual exploitation. Are the Church Defendants seriously going to contend that these allegations will require a searching evaluation of Episcopal doctrine ?

D. Breach of Fiduciary Duty

Numerous courts have held that application of pre-existing secular standards of fiduciary duty to hierarchical church officials is a proper application of the "neutral principles" approach. See Martinelli, supra ,at 146-148; F.G. v MacDonell, 696 A.2d 697 (N.J. 1997); Moses, supra.

In Moses, supra, the court held that the existence of a fiduciary relationship is a question of fact for the jury based upon a neutral law consideration of the inequality of position between the bishop and the parishioner, together with the bishop's assumption of fiduciary duty to act in the parishioner's best interest. Id. at 322-323. The jury was charged that if they found the existence of a fiduciary relationship, they should then determine whether the neutral principles of fiduciary duty, including the duty to act "with utmost good faith and solely for the benefit" of the dependent party, had been breached. Id. at 323. The court found that the facts of record supported the jury's finding of such a breach – evidence which echoes Doe's allegations at bar. Id. at 1323.

In Martinelli, supra, the jury was given the opportunity to examine undisputed ecclesiastical materials in order to decide whether there was a factual basis for deducing the existence and breach of a fiduciary duty. The court emphasized, however, that this examination was no different than the examination of deeds of trust or church constitutions previously approved in the property dispute cases. Martinelli, at 149-150.

Under Florida law, the term "fiduciary or confidential relation" is very broad. It exists, and relief is granted, in all cases in which influence has been acquired and abused and in which confidence has been reposed and betrayed. The origin of the

confidence is immaterial. The rule embraces both technical fiduciary relations and informal relations that exist wherever one person trusts and relies upon another. Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927); Atlantic National Bank of Florida v. Vest, 480 So.2d 1328 (Fla. 2d DCA 1985). There is simply no reason to believe that church doctrine would play any role in assessing either the existence of such a fiduciary relationship or the breach of those fiduciary obligations.

E. The "Church Doctrine Conflict" Defense

Plaintiffs are not required to inject religious, doctrinal disputes into the trial of their claims and, in the reported cases, have not even sought to do so. To the contrary, the subjects which the defendants invariably posit as impermissibly "entangling," are issues of purported conflict between tort law and church doctrine which they would like to inject into the lawsuit by way of defense. The claim that church defendants may theoretically be required by church doctrine to respond differently than other employers is, at its heart, the source of all serious entanglement arguments and was, in fact, the heart of the Fourth District Court's opinion below. See Doe v. Evans, 718 So.2d 286, 293 (Fla. 4th DCA 1998) (church policies undoubtedly differ from rules of other employer and when secular court interprets church law it becomes excessively entangled in religion); see also e.g., L.L.N. v.

Clauder, 563 N.W.2d 434, 441 (Wisc. 1997). However, a careful examination of such claims, shows them to be factually insupportable in the vast majority of cases and legally irrelevant in all cases.

As the court put it in the most well-reasoned opinion in this area yet decided:

> In this case, the hierarchy defendants argue, in essence, that subjecting them to potential tort liability would infringe on their free exercise rights because conforming to the standard of conduct that tort law demands of employers would require them to deviate from "church doctrine." That argument rests on two premises. The first is that the standards to which an employer must adhere to avoid tort liability for the acts of an employee conflict with the duties imposed on the hierarchy defendants by Roman Catholic doctrine. The second premise is that, to the extent the hierarchy defendant's conduct was religiously motivated, the free exercise clause insulates them from civil liability. Neither of these premises withstands scrutiny.

Smith v. O'Connell, supra at 77-78.

The factual speciousness of such claims has been demonstrated in the reported cases that have actually tried these issues. It is only those courts who, like the courts below, "projected" at the motion to dismiss stage what theoretically might be entangling issues, that have reached a contrary conclusion. For the most part, tort law simply requires people to act with reasonable prudence. Assertions that church doctrine may require officials to act imprudently is so facially bizarre that it is actually shocking that so many courts have accepted this argument at face value, without

requiring concrete demonstrations of its reality.

In fact, the case law shows that the negligence on the part of church officials which has been discovered so far, stems not from some deviant canons of church doctrine, but rather from all-too prosaic failings of institutional sloth, stonewalling, and the like. Far from theorized requirements of institutional "mercy," the court in Martinelli, supra, found that the inaction, evasion, and intended deception of the diocese had no basis in religious precepts which could even arguably entangle it. Martinelli, supra. at 148; see also Moses, supra.

Further concrete examples abound. In Smith v. O'Connell, supra, the court discussed several affidavits submitted by the church defendants describing limitations that canon law placed upon their authority to discipline priests. As a factual matter, however, the court concluded:

> . . . Nothing in those affidavits suggest that canon law precludes hierarchical officials from taking appropriate action to prevent priests, who are known pedophiles, from sexually abusing children. The affidavits make no reference to any limitation on the Bishop's power to determine a priest's assignment or to closely monitor and supervise the priest's activities. On the contrary, the affidavit of Father Morrissey states that, when appropriate proof of sexual abuse is obtained, "the Bishop may. . . [temporarily] restrict [a priest's] right to function as a priest so as to protect the common good. . . . In addition, the affidavit states that the Bishop is empowered to "issue a specific directive to the cleric suspected of misconduct to

> avoid particularly described circumstances, such as participating in group activities with children. . . ."
>
> The affidavits also refer to the belief in redemption and the forgiveness of sin as fundamental precepts of the Catholic faith that prohibit church officials from summarily taking action to punish priests who sexually abuse children. However, once again, there is nothing to indicate that these principles preclude action that would prevent such abuse.

Id. at 78.

In Nutt v. Norwich Roman Catholic Diocese, 921 F.Supp. 66, 74 (D. Conn. 1995), the court refused to dismiss or enter summary judgment on negligent supervision claims arising from pedophilic activity, pointing out that such claims "would not prejudice or impose upon any of the religious tenants or practices of Catholicism. Rather, such a determination would involve an examination of the defendant's possible role in allowing one of its employees to engage in conduct which they, as employers, as well as society in general expressly prohibit."

In Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 795 (1997), the court affirmed negligent supervision and retention claims against a diocese which had notice of a priest's propensity to sexually abuse children, stating that ". . . there is no indication that requiring increased supervision of Jimenez or the termination of his employment by the appellant based upon Jimenez's conduct would violate any religious doctrine or inhibit any religious practice . . ." (Citations omitted).

There is no reason to suspect that resolution of Doe's claims would require examination of any church doctrine placing the hierarchical defendants at odds with common law principles of care and fiduciary obligation. Doe credibly and specifically alleges both the Church Defendant's actual knowledge of Evans' history of sexual predation and their right to exercise control over a sexually exploitive pastoral counselor (a right that they have, in fact, exercised in the past) (R.94). What specific doctrines do the Church Defendants maintain would "entangle" the court in considering those claims?

More importantly, even assuming that such a conflicting doctrine existed (i.e., that the Episcopal Church for some reason doctrinally requires carelessness in the hiring and/or supervision of its clerics), such a policy would be no defense, legally irrelevant, and hence non-entangling, in any event. Potentially conflicting ecclesiastical standards are irrelevant because they must give way to neutral legal standards of general applicability. See Employment Division Department of Human Resources v. Smith, 494 U.S. 872, 879, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990). As the United States Supreme Court put it in Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972):

> A way of life, however virtuous and admirable, may not be imposed as a barrier to a reasonable state regulation . . . if it is based on purely secular considerations.

Put differently, neutral laws of general application do not violate the First Amendment simply because they have the incidental effect of burdening a particular religious practice. City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 2161, 138 L.Ed.2d 624 (1997); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S.Ct. 2217, 2226, 124 L.Ed.2d 472 (1993).

This principle extends back over more than a century to at least Reynolds v. United States, 98 U.S. 145, 25 L.Ed.2d 244 (1879), where the Court upheld criminal laws against polygamy, stating:

> Can a man excuse his practices to the contrary because of his religious belief? To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto themselves.

Id. at 166-67; quoted in, Nutt, supra at 73.

Application of these general principles to the current context is fairly obvious, but succinctly stated in Konkle v. Henson, 672 N.E.2d 450, 455 (Ind. App. 1996), wherein the court indicated that:

> . . . review only requires the court to determine if the Church Defendants knew of Henson's inappropriate conduct, yet failed to protect third parties from him. The court is simply applying secular standards to secular conduct which is permissible under First Amendment standards . . . . The protection of society requires that religious organizations be held accountable for injuries they

cause to third persons.

See also, Bivin v. Wright, supra at 1124 (applying neutral tort law in context of sexual misconduct during marital counseling); Moses, supra at 320 (same); Gallas v. Greek Orthodox Archdiocese, 587 N.Y.S.2d 82, 86 (N.Y. Sup. 1991) (plaintiff's claims against the Bishop for intentional misconduct, and against the Archbishop and the church for condoning such conduct and for alleged coercion and duress in attempted "cover-up" are not exempt from secular inquiry by the courts).

While much is made of the freedom to select clergy (as it pertains to the negligent hiring claim), the United States Supreme Court has consistently recognized that even this freedom must comply with generally applicable legal principles. In the early case of Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16, 50 S.Ct. 5, 74 L.Ed.2d 131 (1929), the Court defined the civil courts' role in the matter of priestly appointments, as follows:

> In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.

(emphasis added).

In Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94,

115, 73 S.Ct. 143, 154, 97 L.Ed.2d 120 (1952), the Court restated this caveat as follows:

> Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.

(emphasis added). Most recently, in Jones v. Wolf, supra, the Court again made clear that "neutral principles" analysis will apply in this context, stating:

> 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.

Jones v. Wolfe, 443 U.S. at 606, 99 S.Ct. at 3027(emphasis added).

Florida's courts have applied this principle in deciding whether a minister's discharge was accomplished in accordance with a corporate charter so as to enjoin the defrocked pastor, holding that such a limited inquiry does not bring ecclesiastical matters "into play". See Hemphill v Zion Hope Primitive Baptist Church of Pensacola, Inc., 447 So.2d 976 (Fla. 1st DCA 1984).

To construe the Church Defendant's conduct as beyond secular law would be an unacceptable "anomaly in the law, a constitutional right to ignore neutral laws of general applicability." Boerne, 521 U.S. at 507, 117 S.Ct. at 2161, citing Smith, 494 U.S. at 887, 110 S.Ct. at 1604; Smith v. O'Connell, supra at 80. It is, in fact, a

measure of the competing "razor's edge" demands of the two religion clauses of the First Amendment that such "absolutist" interpretations of the Free Exercise clause risk being "viewed as the kind of official recognition of a religion that is prohibited by the establishment clause." Smith v. O'Connell, supra at 80, citing Boerne, 521 U.S. 507, 117 S.Ct. at 2172 (Stephens, J., concurring).

Put simply, the First Amendment precludes the sort of state favoritism of religion over non-religion as would result from granting church defendants the unique immunity to act carelessly in carrying out their hiring and supervision activities. As the Fifth Circuit Court explained the point in Sanders v. Casa View Baptist Church, 134 F.3d 331, 335-36 (5th Cir. 1998):

> Although Baucom's contention . . . 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 part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissibly 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 nonreligion).

(emphasis added).

The First Amendment is not a grant of absolute tort immunity to religious organizations. Religious entities have a duty to prevent the infliction of injury by persons in their employ whom they may have reason to believe will engage in injurious conduct. Such accountability is required for the protection of society. See Kenneth R., supra at 795; Konkle, supra,at 456.

F. The Criminality Distinction

Florida's district courts have recognized (at least in dicta), the need for accountability of church officials for the negligent retention of pedophilic priests. Doe v. Dorsey, 683 So.2d 614, 617 (Fla. 5th DCA 1996):

> 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.

Unfortunately, the Dorsey Court then immediately undermined this correct statement of law with the following:

> 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.

This latter proposition, without citation to authority, is an incorrect statement of law, as the U. S. Supreme Court has repeatedly held that neutral application of laws of

general applicability requires no compelling interest justification. See, Church of Lukumi Babalu, 508 U.S. at 531, 113 S.Ct. at 2226, 124 L.Ed.2d 472(neutral laws of general applicability need not be justified by any compelling governmental interest) ; Employment Division v. Smith, 494 U.S. at 885, 110 S.Ct. at 160(same); see also, Gonzalez, supra; Kedroff, supra; Jones, supra.

The Fifth District Court went on in Dorsey to state, "[w]e would draw the line at criminal conduct," while utilizing the criminal "consent" statute, Fla. Stat. § 794.011, to define the contours of First Amendment immunity.

The Fourth District Court adopted this same approach, at least implicitly, by its approving references to the Doe v. Dorsey decision, as well as its repeated attempts to distinguish cases involving "criminal sexual conduct." See Doe v. Evans, supra at 290-91.

With the exception of one state court dissenting opinion, Florida's district courts are alone in attempting to draw this "criminality" distinction – a distinction alien to any known form of First Amendment constitutional analysis, lacking the smallest toehold in either the text of the First Amendment or any First Amendment decision of any court (let alone the United States Supreme Court).

The most glaring problem with the district courts' "criminality" distinction , is that it permits the Florida legislature to define the contours of the Establishment

Clause of the First Amendment to the United States Constitution. However the United States Supreme Court ultimately decides this issue, one can be certain that it will not be by parsing the Florida Legislature's definition of criminal "coercion" (as the Dorsey court expressly did), nor by reference to ministers' special immunity from criminal prosecution, which the Florida Legislature has carved out of the felony statute governing sexual relations during psychotherapy (an implicit premise of the Fourth District decision below). See Fla. Stat. § 491.0112; Fla. Stat. § 491.014(3).

Although one might object that "criminality" is just a "bright line" method of describing a degree of harm, such an argument also fails to withstand scrutiny, since a marital counselor's sexual exploitation of even an adult "counselee" is, in fact, deemed sufficiently harmful of societal interests to warrant criminal sanction (at least when perpetrated by any therapist but a minister). Fla. Stat. § 491.0112(4)(a); 491.014(3), (6). Certainly, whatever the Legislature's motives for the minesterial exemption, the degree of harm is no less (and in fact may be more) when such sexual abuse is inflicted by a pastor/counselor.

Finally, even if a pastor's abuse of a marital "counsellee" is somehow significantly less compelling than the abuse of a child, once again, that is constitutionally irrelevant, given that no compelling interest need be shown to warrant application of neutral laws of general application. See, Church of Lukumi Babalu, 508

U.S. at 531, 113 S.Ct. at 2226, 124 L.Ed.2d 472 (neutral laws of general applicability need not be justified by any compelling governmental interest) ; Employment Division v. Smith, 494 U.S. at 885, 110 S.Ct. at 160 (same)

The inability to rationally distinguish cases involving pedophilia, is one point upon which both parties have agreed. When pointedly asked at oral argument before the Fourth District Court, the Church Defendants' counsel was unequivocal in claiming that the Church's supposed First Amendment immunity extends to cases where a minister has sexually abused children.

This view was also the basis of Schmidt v. Bishop, 779 F.Supp. 321 (S.D. N.Y. 1991), a case cited with approval by the Fourth District decision below. The Schmidt court rejected all civil remedies for alleged pedophilia, stating:

> It may be argued that it requires no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children . . . . This places us clearly on a slippery slope and it is an unnecessary venture, since existing laws against battery, and the criminal statute against sexual abuse if timely invoked, provide adequate protection for society's interest. Where could we stop?

Schmidt supra at 328.

The only non-Florida opinion which research discloses as urging the "criminality" distinction of Florida's district courts, is the dissent in F.G. v. McDonell,

supra, also a case involving abuse during counseling. The F.G. majority refuted the dissent's claimed "criminality" distinction on policy grounds, as follows:

> The dissent acknowledges that a member of the clergy could be liable if the parishioner "was legally unable to give consent to sexual relations,". . . or if the petitioner was a child . . . The dissent, nonetheless, would permit a clergyman to victimize a parishioner whose vulnerability has led the parishioner to seek refuge in pastoral counseling. In the final analysis, the dissent simply refuses to accept that pastoral counselors, like psychotherapists... may be liable for breach of a fiduciary relationship with the parishioner.
>
> Ordinarily, consenting adults must bear the consequences of their conduct, including sexual conduct. In the sanctuary of the church, however, troubled parishioners should be able to seek pastoral counseling free from the fear that the counselors will sexually abuse them. Our decision does no more than extend to the defenseless the same protection that the dissent would extend to infants and incompetents.

F.G., supra at 565.

The lack of entanglement is identical whether the pastor's victim is an adult or a child. In either case, we would be far closer to making a law "respecting an establishment of religion" by granting church hierarchical officials special immunity from tort principles than by holding them to the same secular standards of care which govern society at large.

CONCLUSION

This Court should reverse, declaring that the First Amendment to the United States Constitution is no bar to common law negligence and breach of fiduciary claims against church hierarchical officials arising from ministerial sexual misconduct.

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