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IN THE SUPREME COURT OF FLORIDA

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JANE DOE,

Petitioner,

vs.

CASE NO. 94,450

WILLIAM DUNBAR EVANS, III, et al.,

Respondents.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONSii
STATEMENT OF SIZE AND STYLE OF THE BRIEF	1
STATEMENT OF JURISDICTION	1
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE AND FACTS	2
ISSUE AS TO JURISDICTION	4

I.

WHETHER THIS COURT SHOULD EXERCISE ITS
DISCRETIONARY JURISDICTION TO REVIEW A
DECISION WHICH HOLDS THAT COMMON LAW ACTIONS
AGAINST CHURCH AUTHORITIES FOR THE SEXUAL
MISCONDUCT OF MINISTERS ARE BARRED BY THE
FIRST AMENDMENT.

CONCLUSION.	8
CERTIFICATE OF SERVICE9

TABLE OF CITATIONS

CASES

PAGE

Ogle v. Pepin,
273 So.2nd 391 (Fla. 1973)

4

STATUTES

PAGE

Fla. Stat. Sec. 491.0112 (1994)

7

Fla. Stat. Sec. 491.014 (3) (1994)

7

OTHER

PAGE

Fla. Const. Art. V Sec. 3 (B) (3)

4

G. Kogan & R. Waters,
The Operation and Jurisdiction of the Florida
Supreme Court, 18 Nova L. Rev. 1151 (1994)

5

STATEMENT OF SIZE AND STYLE OF TYPE

It is certified that the size and style of type used in this brief is 12 point Courier New, a font that is not proportionately spaced.

STATEMENT RE JURISDICTION

This is a jurisdictional brief regarding this Court's discretionary jurisdiction to review a decision of the Fourth District Court which expressly construed a provision of the federal constitution.

SUMMARY OF THE ARGUMENT

The Fourth District Court's decision below expressly applied the First Amendment of the U.S. Constitution, holding that common law negligence, breach of fiduciary duty and outrage actions against churches and church officials are barred by that constitutional provision. The relative novelty and difficulty of the constitutional questions posed is demonstrated by the Fourth District Court's eight page opinion and near-exclusive reliance therein upon the sharply divided First Amendment case law of other states.

The Fourth District Court held that churches and their

supervisory officials are constitutionally immune from common law civil actions arising from non-criminal misconduct. This Court should exercise its unique role of resolving constitutional doubt on a statewide basis, by accepting jurisdiction over this important question which affects the safety of all Floridians.

STATEMENT OF THE CASE AND FACTS

All of the facts in the description of proceedings below are taken from the opinion of the Fourth District Court of Appeal rendered on September 9, 1998.

Petitioner, Jane Doe, is a former parishioner of Respondent, the Church of the Holy Redeemer (the Church). Doe's pastor was the Reverend William Dunbar Evans III. Doe sued the Church and Rev. Evans in the instant action, while joining Respondents, the Diocese of Southeast Florida, Inc., (the Diocese) and Bishop Calvin O. Schofield, Jr.

Doe alleged that while she was a parishioner at the Church, Reverend Evans approached her and asked to assist her with marital counseling, creating a counselor/counselee relationship with her from December 27, 1991 to February 1992. Doe alleged that during the course of this marital counseling, Evans became romantically involved with her, contrary to his responsibilities. Doe alleged

that the Church, Bishop Scholfield, and the Diocese were made aware early in the counseling process that Evans was abusing his position of trust and that they were also aware of prior incidents involving sexual misconduct during counseling by Reverend Evans, both in another church within the Diocese and at the Church. Despite the fact that Schofield and the Diocese had control over hiring, firing, compensation and discipline of priests such as Evans, Doe alleged that nothing was done to rectify the situation.

Doe sued the Church, the Diocese and Schofield for negligent hiring, supervision and/or retention, breach of fiduciary duty and "outrage." The Church, Diocese, and Bishop Schofield moved to dismiss Doe's Second Amended Complaint on the basis that the causes of action brought against these church defendants involved practices and procedures beyond the purview of secular courts and would result in excessive entanglement with religious beliefs contrary to the First Amendment to the U.S. Constitution. The circuit court granted the motion to dismiss with prejudice, stating that Doe's claims were barred by the First Amendment.

The Fourth District Court's eight page opinion dated September 9, 1998, reviewed the sharply divided First Amendment case law from other jurisdictions, but agreed with the Circuit Court that the causes of action alleged were barred by the First Amendment. In

the Fourth District Court's view, to impose civil liability for the negligent hiring/retention/ supervision of a minister (and breaches of fiduciary duties arising therefrom) would excessively entangle the state in religious matters where the ministerial conduct in question is not criminal in character.

ISSUE AS TO JURISDICTION

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW A DECISION WHICH HOLDS THAT COMMON LAW ACTIONS AGAINST CHURCH AUTHORITIES ARISING FROM THE SEXUAL MISCONDUCT OF MINISTERS ARE BARRED BY THE FIRST AMENDMENT.

This Court has discretionary jurisdiction to review decisions of the District Courts of Appeal which expressly construe a provision of the state or federal constitution. Fla. Const. Art. V Sec. 3 (B) (3). The decision under review must explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. Ogle v. Pepin, 273 So.2nd 391, 392 (Fla. 1973).

The eight page decision of the Fourth District Court below surveyed at length the sharply divided case law from other jurisdictions on the critical First Amendment questions posed by each of Doe's claims, placing its ruling squarely upon First Amendment grounds. It is difficult to imagine a District Court

opinion which more fully satisfies the "constitutional construction" ground for this Court's review.

The policy ground which underlies this Court's discretionary review in this class of cases is at its zenith. Only this Court can resolve legal doubts on a statewide basis. Resolving constitutional doubts, in particular, is a highly important function of this Court because it results in more predictable organic law. This Court's function is thus to say whether an evolution in constitutional law developed by the lower appellate courts is proper. See, G. Kogan & R. Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151 (1994).

The Fourth District Court's opinion holds that negligent hiring/retention/supervision and breach of fiduciary duty claims against church authorities excessively entangle the government with religion so as to bar such claims under First Amendment principles. This decision necessarily creates statewide doubts regarding the ability of courts to decide civil disputes involving the misconduct of churches and ecclesiastical officials. The "carte blanche" which the Fourth District grants to churches and their supervisory officials to ignore misconduct by their agent's, represents a unique immunity for the inevitable injuries which will arise from

otherwise actionable conduct. Florida citizens who have been injured in ways that would be cognizable in the courts but for the religious status of their perpetrators should know that the law either permits or does not permit redress for those wrongs on a statewide basis.

The instant decision rests upon the "fulcrum" of a specious distinction; that the criminality of the church agent's conduct controls as to whether or not the First Amendment will bar civil redress against the church's supervisory authorities. The Fourth District clearly reached for this limit on its "carte blanche", so that the hiring and supervision of pedophiles would not be Constitutionally protected. This concern is understandable, given the very public history of sexual assaults on children by priests, ministers and other church employees. However, not only does this "criminality" distinction have no basis in any federal decision applying the First Amendment, that distinction was expressly repudiated by Respondents at oral argument before the Fourth District Court, wherein they claimed that their First Amendment immunity extended even to cases involving the sexual abuse of children.

To allow the scope of the First Amendment immunity to turn upon whether the conduct in question is "criminal" overlooks the

fact that criminality is decided by state legislators who are governed by the Constitution (rather than the other way around). The instant case perfectly crystalizes the absurdity of this supposed "criminality" distinction, since under Florida law even consensual sexual relations are criminal when engaged in by a marital counselor (at least where that counselor wears no ministerial collar). See, Fla. Stat. Sec. 491.0112 (1994); Fla. Stat. Sec. 491.014 (3) (1994). The notion that the United States Supreme Court will ultimately allow the contours of the First Amendment to be dictated by the technical contours of the criminal codes of the fifty states, plainly misconceives the function of the federal constitution, representing a clear departure from any constitutional doctrine yet forged by either the U.S. Supreme Court or this Court.

Clearly, the instant decision raises important, manifest doubts which this Court should undertake to excise from the organic law of this State.

CONCLUSION

Constitutional review jurisdiction exists. This Court should accept that jurisdiction to decide the very serious First Amendment issues posed by the Fourth District Court's opinion, which unnecessarily endangers the public by granting carte blanche immunity to churches and ecclesiastical officials.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1998

JANE DOE,

Appellant,

v.

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

Appellees.

CASE NO. 97-0879

Opinion filed September 9, 1998

Appeal from the Circuit Court for the Fifteenth
Judicial Circuit, Palm Beach County; Moses Baker,
Jr., Judge; L.T. Case No. CL 95-10365 AD.

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Diocese of Southeast Florida, Inc., and Calvin O.
Schofield, Jr.

POLEN, J.

Jane Doe, a former parishioner at the Church of the
Holy Redeemer (Holy Redeemer), appeals the
dismissal of her second amended complaint as
against Holy Redeemer, the Diocese of Southeast
Florida, Inc., (the Diocese), and Bishop Calvin O.
Schofield, Jr. (Schofield) (collectively "church
defendants"). Another defendant, Reverend William
Dunbar Evans, III, did not join in the church
defendants' motion to dismiss, and Doe's claims
against Evans remain pending in the lower court.
We have before us only the dismissal of Does'

claims against the church defendants. We affirm the
trial court's dismissal of those claims.

FACTS

In Doe's second amended complaint against the
several defendants, Doe alleged she was a former
parishioner at Holy Redeemer where Evans was
employed as a pastor responsible for providing
counseling and spiritual advice to parishioners
having marital difficulties. Doe alleged Evans
approached her and asked to assist her with
counseling, spawning a pastoral counselor-
counselee relationship that endured from December
27, 1991, to February of 1992.

Doe alleged the Diocese, Schofield, and Holy
Redeemer were aware of prior incidents involving
sexual misconduct during counseling by Evans at
another church, within the Diocese, and at Holy
Redeemer. Despite this knowledge, nothing was
done to rectify the situation. Doe alleged Schofield
and the Diocese had control over hiring, firing,
compensation, and discipline of priests including
Evans.

Doe alleged a cause of action for breach of
fiduciary duty against all defendants, asserting
Evans breached the duty owed to Doe by becoming
romantically involved with her in a manner that
made it impossible for Evans to adequately keep
Doe's interests paramount. Doe alleged Holy
Redeemer, Schofield, and the Diocese were made
aware early in the counseling process that Evans
was abusing his position of trust. She asserted
Evan's alleged conduct was not motivated by any
sincerely held religious belief, further alleging the
church defendants owed her a fiduciary duty,
(apparently premised on Doe having informed the
church defendants of Evan's conduct), which the
church defendants breached, causing Doe
embarrassment, guilt, and ridicule.

Additionally, Doe alleged a cause of action
against Holy Redeemer, the Diocese, and Schofield
for negligent hiring and/or supervision and/or
retention, as well as a cause of action against all

defendants for "outrage."

The church defendants moved to dismiss Doe's second amended complaint on the basis the causes of action brought against these church defendants involved practices and procedures beyond the purview of secular courts. They argued the adjudication of these claims would result in the court's excessive entanglement with religious beliefs contrary to the First Amendment of the United States Constitution. The church defendants argued the claim of breach of fiduciary duty was essentially a claim of clergy malpractice, which they alleged had been uniformly rejected by states considering the claim. This claim, they argued, was barred by both the Establishment Clause and the Free Exercise Clause of the First Amendment.

The church defendants also argued the first amendment barred the claim of negligent hiring, supervision, and retention, because those claims required a determination of what makes one competent to serve as a priest, which in turn requires interpretation of church canons and internal policies and practices -- determinations beyond the court's scope of review.

As to Doe's claim for outrageous conduct, the defendants argued this cause of action was not recognized by Florida courts. Alternatively, the church defendants argued if Doe's claim was read as a claim for intentional infliction of emotional distress, her allegations did not rise to the level of "outrageousness" required by Florida courts. Finally, the church defendants argued the adjudication of this claim was beyond the secular court's scope of review.

The trial court granted the church defendants' motion to dismiss with prejudice stating Doe's claims were barred by the First Amendment.

OVERVIEW OF FIRST AMENDMENT PRINCIPLES

The First Amendment to the United States Constitution provides in pertinent part: "Congress

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." This phrase is broken down into two clauses: the first is referred to as the Establishment Clause, and the second as the Free Exercise Clause. "The entanglement doctrine, which prohibits excessive governmental entanglement with religion, springs from the Establishment Clause." L.L.N. v. Clauder, 563 N.W.2d 434, 440 (Wis. 1997).

An explanation of the excessive entanglement doctrine applicable to the instant First Amendment issue is contained in the court's opinion in Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996):

The First Amendment . . . contains two freedoms with respect to religion: the freedom to believe and the freedom to act. The freedom to believe is absolute, while the freedom to act is subject to regulation for the protection of society. However, any regulation must meet a three-part test:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

* * * *

Excessive entanglement occurs when the courts begin to review and interpret a church's constitution, laws, and regulations. The First Amendment prohibits courts from resolving doctrinal disputes or determining whether a religious organization acted in accordance with its canons and bylaws.

Konkle, 672 N.E.2d at 454 (quoting Lemon v. Kurtzman, 403 U.S. 602 (1971)) (additional citations omitted).

As to excessive governmental entanglement with religion, the court in L.L.N. noted:

It is well-settled that excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices; therefore, the First Amendment prohibits such an inquiry. However, it is equally well-settled that a court may hear an action if it will involve the consideration of neutral principles

of law.
L.L.N., 563 N.W.2d at 440 (citations omitted).

Applying these basic principles to Doe's claims against the church defendants, we must examine whether the determination of her claims necessarily implicates an excessive governmental entanglement with religion. If the court is required to interpret church law, policies, or practices, the First Amendment prohibits such an inquiry. Examination of case law from other jurisdictions reveals a split of authority on this question as to each of Doe's claims.

NEGLIGENT HIRING, RETENTION, AND SUPERVISION

To prevail on claims of negligent hiring, supervision, and retention, the plaintiff must establish the employer owes a duty to the plaintiff, the breach of which is the proximate cause of the plaintiff's injuries. See Watson v. City of Hialeah, 552 So. 2d 1146 (Fla. 3d DCA 1989).

Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. 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 indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment.

Garcia v. Duffy, 492 So. 2d 435, 438-439 (Fla. 2d DCA 1986) (citations omitted).

Doe contends Doe v. Dorsey, 683 So. 2d 614 (Fla. 5th DCA 1996), rev. denied, 695 So. 2d 699 (Fla. 1997) controls and holds civil damages may be assessed against a church for proven claims of negligent hiring, supervision, and retention. We disagree, and believe Dorsey actually supports affirmance.

In Dorsey, a former altar boy alleged a priest exerted undue influence, dominion, and control over the plaintiff to participate in an ongoing sexual relationship beginning when the boy was thirteen and continuing long after the young man reached majority. Id. at 615. The court concluded allegations of abuse occurring while the plaintiff was a minor were time-barred. Id. at 617. In addressing a potential First Amendment bar, the court stated it would limit the circumstances under which it would allow civil liability for negligent retention to criminal conduct:

Although the Academy of Florida Trial Lawyers makes a convincing case that the First Amendment does not protect the church when the acts of the clergy involve children and are criminal in nature, because we hold that the action against the church and the bishop in this case for the negligent retention of the priest, insofar as the abuse of plaintiff which occurred while he was a minor is concerned, is time-barred, the issue of whether the First Amendment protects the church when its clergy commits criminal acts is not before us. In any event, we are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur. We recognize that the State's interest must be compelling indeed in order to interfere in the church's selection, training and assignment of its clerics. We would draw the line at criminal conduct.

Id. (emphasis added).

The surviving allegations of the plaintiff's complaint in Dorsey involved neither pedophilia nor illegal adult sexual behavior. Id. As in the instant case, the plaintiff did not contend he did not consent to the relationship. Id. at 617-618. The court concluded it did not believe a sexual battery was committed when a person of normal intelligence submitted to a sexual relationship due to an emotional attachment to another person. Id. at 618. Thus, Dorsey actually supports the church

defendants' position here because the plaintiff's allegations of a "sexual relationship" in the instant case fall short of alleging criminal conduct.

The same arguments accepted in Dorsey have been accepted by many courts and rejected by others. Those courts that find no First Amendment bar to claims of negligent hiring, retention, and supervision generally do so in the context of allegations involving sexual assault on a child.¹ As we have noted, the instant case presents a less compelling factual scenario.

We are persuaded by the reasoning expressed in Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997), where the court noted the split of authority on this issue and determined to side with those jurisdictions finding a bar to such claims. Id. at 443-444. In Swanson, the court began by recognizing that by dictating neutrality on the part of the courts, "our constitutions ensure that religious organizations remain free from 'secular control or manipulation' and retain 'power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" Id. at 443 (quoting Kedroff v. St. Nicholas Cathedral of Russian Oorthodox Church, 344 U.S. 94 (1952)). The court rejected the plaintiffs' contention their negligent supervision claim could be resolved by the application of neutral tort principles. Id. It reasoned 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. at 444.

¹ The First Amendment concerns that arise when considering these claims, arguments raised in the several cases to decide this issue, and arguments raised by the parties to the instant appeal are well-summarized in James T. O'Reilly and JoAnn M. Strasser, Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues, 7 St. Thomas L. Rev. 47 (1994).

The court concluded 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. Id. 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. Id. at 445. The court cited Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995), cert. denied, 516 U.S. 1116 (1996) (holding torts of negligent hiring, retention, and supervision as against church barred by First Amendment due to problems of excessive entanglement and chilling effect of award of damages, in context of adult sexual relationship), and Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991) (finding time bar to claim for negligent hiring, retention, and supervision, yet stating First Amendment bars such action because pastor of Presbyterian Church is not analogous to common law employee and question of church's supervision involves entanglement in intricate principles of church governance), concluding as did the latter court that any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination. Id. The Swanson court concluded "[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.

Along with Swanson, additional case law exists supporting our conclusion Doe's claim of negligent hiring, retention, and supervision is barred by the First Amendment. In Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997), when considering allegations of child sexual abuse, the court held claims against a diocese of negligent hiring, ordination, and retention, necessarily involved

interpretation of religious doctrine, policy, and administration. Id. at 246-247. The court concluded judicial inquiry into the hiring, ordaining, and retaining of clergy would result in an endorsement of religion "by approving one model for church hiring, ordination, and retention of clergy." Id. at 247. Quoting Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the court concluded "[o]rdination of a priest is a 'quintessentially religious' matter, 'whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church.'" Gibson, 952 S.W.2d at 247.

The court similarly concluded a claim for negligent failure to supervise clergy was barred by the First Amendment because it implicated the duty of a master to control conduct of a servant. Id. "Adjudicating the reasonableness of a church's supervision of a cleric -- what the church 'should know' -- requires inquiry into religious doctrine." Id. Such an inquiry would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision. Id.

We recognize there also exists authority finding no bar to a claim for negligent hiring, retention, and supervision; however, we note this result most often appears in the context of criminal sexual conduct. See Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D.Conn. 1995) (rejecting Seventh Circuit's reasoning in Dausch, supra, in context of sexual abuse perpetrated by priest); Kenneth R. V. Roman Catholic Diocese, 654 N.Y.S.2d 791 (App. Div.), cert. denied, 118 S. Ct. 413 (1997) (allowing negligent supervision and retention claims against church defendants where priest accused of pedophilia); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996) (allowing negligent hiring, retention, and supervision claims against church defendants where minister was accused of sexual molestation); Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989) (allowing claim for negligent supervision without discussing impact of First Amendment); Gallas v. Greek Orthodox Archdiocese of N & S Am., 587 N.Y.S.2d 82 (Sup.

Ct. 1991) (holding plaintiff's claims against bishop for intentional misconduct and against Archbishop and church for condoning such conduct and for alleged coercion and duress in attempted "cover-up" are not exempt from secular inquiry by the courts); Jones v. Trane, 591 N.Y.S.2d 927 (Sup. Ct. 1992) (allowing negligent hiring and supervision claim in context of sexual abuse against child, relying on opinion in Destafano v. Grabrian, 763 P.2d 275 (Colo. 1988) (allowing claim for negligent supervision in context of adult sexual relationship begun during marriage counseling on basis Free Exercise clause speaks to beliefs, not conduct)); and Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806 (Minn. Ct. App. 1992) (stating church conceded an examination of the reasonableness of its actions and the bases for its decisions regarding placement and discipline of child molesting priest was constitutionally allowable for purposes of determining negligence and compensatory damages).

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.

BREACH OF FIDUCIARY DUTY

Initially we reject the church defendants' suggestion Doe's breach of fiduciary duty claim is

a disguised "clergy malpractice" claim. Each court to consider the viability of a clergy malpractice claim has concluded the First Amendment bars claims for clergy malpractice because such a claim requires a court to determine "whether the adherent of a particular faith has properly interpreted the tenets of that faith." Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994) (citing Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981)). Our examination of Doe's complaint reveals she alleged the elements of a breach of fiduciary duty claim, not a clergy malpractice claim.

Doe relies primarily on two cases: F.G. v. MacDonnell, 696 A.2d 697 (N.J. 1997); and Sanders v. Casa View Baptist Church, 898 F. Supp. 1169 (N.D. Tex. 1995) (Sanders I). F.G. is distinguishable as concerning claims brought against an individual priest and not church defendants. Sanders would support Doe's arguments; however, we believe the better reasoned cases hold contrary to the implicit holding in Sanders.

In F.G., a majority of the supreme court of New Jersey concluded a parishioner, F.G., could proceed with her claims for breach of fiduciary duty and negligent infliction of emotional distress against an Episcopal priest who allegedly assumed a counselor/counselee relationship with F.G. and subsequently induced her to engage in an inappropriate sexual relationship. F.G., 696 A.2d at 700. In the context of a claim against the offending priest only (as opposed to other church defendants as is the case here), the court distinguished clergy malpractice from breach of fiduciary duty on the basis the latter did not require definition of the relevant standard of care; a question that embroils courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs. Id. at 703.

Significantly, the court also considered whether F.G. could proceed with a breach of fiduciary duty claim against another priest, Reverend Harper, who allegedly wrote a letter and delivered a sermon to the

congregation concerning the offending priest's relationship with F.G. Id. at 700. F.G. alleged Harper breached his fiduciary duty by exploiting her trust and confidence through his mischaracterization of the offending priest's conduct and the nature of her relationship with that priest. Id. at 705. The court noted F.G.'s ability to maintain her action against this second priest depended on whether a court was able to adjudicate F.G.'s claims without becoming entangled in church doctrine, and remanded for determination of that issue. Id.

The dissent in F.G. argued the plaintiff's claims against both priests should be dismissed, asserting the conduct of the offending priest was allegedly tortious because the defendant priest was religious. In other words, had the priest been a neighbor, co-worker, or friend seeking to comfort F.G., no secular law would make his extramarital affair a tort or crime: "no law makes it a tort or crime for consenting adults to engage in sexual relationships." Id. at 706. The dissent concluded that to base a tort action on a breach of religious doctrine constituted an establishment of religion in violation of the First Amendment. Id. at 709.

Doe also relies on Sanders, in which the court considered motions for summary judgment filed in a case where two female plaintiffs alleged they sought marital counseling from a Baptist minister, Shelby Baucum, who subsequently, and simultaneously, began sexual relationships with them. Sanders, 898 F. Supp. at 1173. The court cited Schmidt v. Bishop, 779 F. Supp. 321, 327 (S.D.N.Y. 1991) for the proposition "'tort claims for behavior by a cleric that [do] not require the examination of religious doctrine are cognizable.'" Sanders, 898 F. Supp. at 1174. It concluded Baucum's alleged conduct was not subject to First Amendment protection because that conduct was not part of the beliefs and practices of Baucum's church, Casa View Baptist Church (Casa View). Id. at 1175.

The court granted Casa View's motion for summary judgment as to the plaintiffs' claims for breach of fiduciary duty and negligent

hiring/retention/supervision on the bases the church conducted a reasonable search before hiring Baucum, and did not know, nor should it have known, that Baucum was counseling the plaintiffs and engaging in a sexual relationship with them. Id. at 1179.

Following the District Court's opinion, Baucum proceeded to trial and the jury returned a verdict in favor of the plaintiffs, which both sides appealed. Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998) (Sanders II). On appeal, the plaintiffs alleged error in the district court's grant of summary judgment in favor of Casa View. However, the Fifth Circuit approved of the summary judgment based on a failure of proof as to the plaintiffs' respondeat superior and negligent hiring/retention/supervision claims, among others. Id. at 339-340. The court in Sanders II did not address a First Amendment bar to claims brought against the church defendants.

Authority supporting affirmance of the instant order on appeal includes Amato v. Greenquist, 679 N.E.2d 446 (Ill. App. Ct. 1997), where the court accepted the reasoning of Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994) and held a claim for breach of fiduciary duty barred by the First Amendment because in order to determine the duty owed by a church, the court was required to define a reasonable duty standard and to evaluate the cleric's conduct against that standard, an inquiry "of doubtful validity under the Free Exercise Clause." Amato, 679 N.E.2d at 454. The court recognized contrary holdings in F.G. and Sanders, yet declined to follow those cases on the basis that when a parishioner lodges a claim of breach of fiduciary duty, religion is not merely incidental to the plaintiff's relationship with a defendant, but is the foundation for the claim. Id. The court noted the plaintiff's "fiduciary relationship is inescapably premised upon the cleric's status as an expert in theological and spiritual matters." Id. However, the court recognized the allegations of plaintiff's complaint made out a claim for intentional infliction of emotional distress because, unlike the circumstances of the instant case, the plaintiff alleged conduct so

outrageous as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civil community. Id. at 454-455.

L.C. v. R.P., 563 N.W.2d 799 (N.D. 1997), also supports affirmance. In the context of an allegation of adult sexual misconduct, the court in L.C. expressly avoided the First Amendment argument on the basis the plaintiff failed to establish the church owed a fiduciary duty to the plaintiff. Id. at 801. The court's reasoning makes plain the entanglement of church and state in determining whether a fiduciary duty has been established. Analyzing the issue as involving a procedural lack of support in the record, the court rejected the plaintiff's argument the "Book of Discipline of the United Methodist Church" formed the basis for a fiduciary duty, chiefly because the Book of Discipline was not made a part of the appellate record. Yet, the inquiry itself makes evident the fact that the secular court would have been called on to examine the church's doctrinal teachings to otherwise resolve the issue, an examination excessively entangling the secular courts in church doctrines and policy in violation of the First Amendment.

In H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995), the court aligned itself with those cases holding the First Amendment bars a claim for breach of fiduciary duty. Id. at 98-99. The court noted other causes of action were available for misconduct, (including intentional infliction of emotional distress), and concluded religion was not merely incidental to the plaintiff's relationship with the archbishop and the church, rather "it was the foundation for [the relationship]" Id. at 99. The court reasoned a breach of fiduciary duty claim would "inevitably require inquiry into the religious aspects of this relationship, that is, the duty owed by Catholic priests, parishes, and diocese to their parishioners," a sectarian question beyond the reach of the secular court. Id.

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.

INTENTIONAL INFLICTION
OF EMOTIONAL DISTRESS

We also affirm the trial court's dismissal of Doe's "outrageous conduct" claim against the church defendants, not only because the claim would similarly be barred by the First Amendment, but also due to the insufficiency of Doe's allegations to sustain a claim. Doe does not dispute the church defendants' assertion Florida does not recognize an action for "outrageous conduct." Nevertheless, a claim for intentional infliction of emotional distress may be asserted and liability will be imposed where conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277 (Fla. 1985). The allegations of Doe's complaint fall short of satisfying this test.

STONE, C.J., and GUNTHER, J., concur.

**NOT FINAL UNTIL THE DISPOSITION OF
ANY TIMELY FILED MOTION FOR
REHEARING.**