IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,450

JANE DOE

Petitioner,

v.

WILLIAM DUNBAR EVANS, III, et al.,

Respondents.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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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 Respondents have chosen to ignore the United States Supreme Court's decision in Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L. Ed. 2d 391 (1997), Amici Curiae, Archbishop John C. Favalora, et. al., correctly recognize in their brief that Agostini has virtually eliminated "excessive entanglement" as an independent prong of the Lemon test. See Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Agostini achieved this long-anticipated rejection of Lemon, by treating the vestigial third prong as just an "aspect" of the effects inquiry (i.e., whether the law in question has the effect of either advancing or inhibiting religion). Agostini, 521 U.S. at 233, 117 S.Ct. at 2015.

Since it is undisputed that application of the subject tort principles do not advance religion in any fashion (the true basis for the Establishment Clause), the Establishment Clause issue becomes indistinguishable from Free Exercise, asking only whether tort liability excessively inhibits religion. Of course, it is precisely because neutral tort liability does not substantially inhibit the Free Exercise of

religion, that Church Defendants were forced to resort to vague "excessive entanglement" concepts to begin with. Put simply, Agostini's evisceration of "excessive entanglement" has effectively destroyed the central conception at the core of the cases relied upon by the Church Defendants.

B. The Church Property Cases

The Supreme Court's use of the "neutrality" concept in both Establishment and Free Exercise cases is fundamentally congruent. The "neutral principles of law" approach approved in the Establishment Clause church property cases, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658 (1969); Jones v. Wolf, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed. 2d 775 (1979), is nearly identical in effect to the Free Exercise principle that neutral laws of general application do not violate the First Amendment, notwithstanding incidental burdens on a particular religious practice. City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 2161, 138 L.Ed. 2d 624 (1997).

In both contexts, the Court has approved the neutral application of generally applicable laws to religious actors. This principle is perfectly suited to resolving claims arising from clergy sexual misconduct in a counseling relationship. See, Bivin v. Wright, 656 N.E. 2d 1121, 1124 (Ill. App. 1995); F.G. v. MacDonell, 696 A.2d 697(N.J. 1997); and see, Villiers, *Clergy Malpractice Revisited: Liability for Sexual*

Misconduct in the Counseling Relationship, 74 Denv. U. L. Rev. 1, 59-60 (1996).

C. Negligent Hiring/Supervision

Neither Respondents nor their amici contest the central premise of this sub-point, that the Courts which have actually undertaken application of the subject tort principles have shown by experience that doctrinal entanglements are rare, if not entirely missing. See Martinelli v. Bridgeport Roman Catholic Diocesan, Inc., 10 F. Supp. 2d 138 (D. Conn. 1998); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993). Whereas, it is only those Courts which have attempted to decide the question as a pure matter of theory at the pleading stage that have ever reached the contrary result. In adjudging "entanglement" questions, in particular, it is important for a court to adopt a "wait and see" approach. Drevlow v. Lutheran Church, 991 F.2d 468, 471 (8th Cir. 1993); Doe v. Hartz, 52 F. Supp.2d 1027, 1079 (N.D. Iowa 1999).

Respondents rely on the decision in Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997) and Amici Favalora's relies upon the decision in Heroux v. Carpentier, 1998 W.L. 388298 (R.I. Super. 1998). While the latter is simply a Rhode Island Superior Court (rather than Supreme Court decision, as erroneously claimed), both decisions are intriguing for the distinction they draw. While both decisions purport to adopt blanket negligence immunity for religious authorities in the hiring and supervision of their ministers (irrespective of the nature of the misconduct), both draw a distinction

as to so- called "intentional" misconduct of the supervisory authorities, defining such actionable misconduct to include hierarchical defendants who knowingly place dangerous priests in positions where victims might encounter that known danger. The amended complaint at bar makes precisely those actionable allegations – that the Episcopal church knowingly placed a dangerous pastor in a position where an innocent parishioner/counselee might encounter that known danger (R. 93).

While Respondents raise the "specter" that churches may respond to the existence of potential tort liability by altering their hiring and supervision practices (as if that's a bad thing), such attenuated, consequential concerns can hardly be deemed Constitutionally controlling. If the Congress can criminalize a practice so central to a religious faith as polygamy was to the Mormons and can now put public teachers into parochial schools without violating the "barrier" between church and state, that same barrier surely cannot be breached by the mere potential, consequential effect that churches may now be motivated to exercise added caution in the hiring and/or supervision of its clerics.

D. Breach of Fiduciary Duty

Doe is plainly not asserting the violation of any tenets of the Episcopal faith as the basis for her breach of fiduciary duty cause of action. The difference between the instant scenario and one adult "friend" seducing another rests not in Episcopal

doctrine, but in the inequality of the counseling relationship. While friends may seek each other out for informal advice on important matters, that is a far cry from formal marital counseling which, by its very nature, presupposes the sort of superiority/dependence which is paradigmatic of fiduciary relations.

One commentator has identified six factors creating an imbalance of power between the parties in the context of clergy counseling:

> ... the counselee's initial vulnerability; the counselor's control of the environment; the confidentiality of the relationship; the leverage gained from unilateral self-revelation; the spiritual superiority or worthiness associated with the clergy; and finally, the counselee's desire to achieve salvation.

Villiers, *Clergy Malpractice Revisited etc.,* at 46. The first four of these enumerated factors exist irrespective of the clerical nature of the counselor. If the latter two factors were the only basis for the alleged misconduct, as might occur in the seduction of an adult parishioner outside the counseling context (e.g., sparks flyin' over the potluck supper), a different almost certainly non-actionable situation would be presented. See, Doe v. Hartz, supra at 1065 (explaining importance of counseling relationship to fiduciary duty claim). However, the possible incidental presence of those same factors in a counseling relationship which is already fundamentally unequal for the first four reasons expressed above cannot be allowed to "wag the dog"

and insulate otherwise actionable conduct.

Clearly, the inequality of position at the heart of the instant fiduciary relation has some religious roots, but that inequality is in no way uniquely religious. The same fundamental cause of action would be alleged were the defendant a professional association employing known sexual predators as psychotherapists or divorce attorneys (to name just two potentially exploitable fiduciary relationships). The suggestion that there would be no cause of action if Father Evans were not a priest or the hierarchical defendants not religious entities, is simply wrong.

E. The "Church Doctrine Conflict" Defense

Much of the constitutional analysis in the cases relied upon by the Church Defendants derives from the fundamentally specious reasoning of an oft-cited *St. Thomas Law Review* article, co-authored by a former elected member of the Ohio Bishop's Advisory Council and a former chair of the Pastoral Counsel of the Archdiocese of Cincinnati. See O'Reilly, & Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liabilities Issues*, 7 St. Thomas L.Rev. 31, fn. a (Fall 1994). The central premise of that article, and the cases which have relied upon it, is the following specious distinction:

> The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimand or three day suspension without pay for misconduct.

> Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices.

Id. at 45-46, quoted in L.L.N. v. Clauder, 563 N.W. 2d 434, 440 (Wis. 1997) (and, derivatively, at pages 11-12 of Respondent's Initial Brief). This claim that a bishop has a greater "Constitutional" right to show mercy and forgiveness to a subordinate than a devout bank president is facially astounding.

Clearly, a court no more entangles itself in the religious doctrines of faith, responsibility, and obedience when reviewing bishop conduct than it does when reviewing that of devout bank presidents or devout psychiatric supervisors. As one commentator put the matter:

> The First Amendment does not apply exclusively to clergy. Theoretically, in cases against psychologists, psychiatrists, or therapists – where the courts clearly have jurisdiction – the defendants could also hide under the Free Exercise umbrella by asserting that the sex furthered a "sincerely held religious belief." Exempting clergy as a class without examining whether the "contested conduct is in fact religious in character" addresses the problem with a sword, when a scalpel would be adequate. The First Amendment requires the identical standard for secular counselors and clergy engaging counseling. The emphasis should be on the behavior, not the religious or secular status of the offender.

Villiers, *Clergy Malpractice Revisited etc*, 74 Denv. U. L. Rev. at 58 (footnotes

omitted in all quotes).

The assertion that "mercy and forgiveness of sin" are interwoven in church norms and practices is just a watered expression of the "church doctrine conflict defense." That reasoning was thoroughly and irrefutably exposed as fallacy by the opinion in Smith v. O'Connell, 986 F.Supp. 73 (D. R.I. 1997), which demonstrated both that there is no conflict and that, even if there were, it would be legally irrelevant. Neither Respondents nor their amici come to grips with the analysis of this critical decision, which has so perfectly crystallizes the error of the Church Defendants and the authorities they rely upon.

The Fourth District Court's opinion also rests on just such reasoning, stating as its core premise that:

> In a church defendant's determination to hire or retain a minister, or in its capacity is a supervisor of that minister, a church defendant's conduct is guided by religious doctrine and/or practice.

Doe v. Evans, 718 So.2d 286, 291 (Fla. 4th DCA 1998) . Says who? Maybe the Church Defendant's conduct is guided by doctrine and practice, maybe it's guided by the fact that the bishop and priest are "fishing buddies," or some other political or bureaucratic failure to which institutions and individuals fall prey.

Moreover, even if the church proves to have some dogmatic policy precluding

the examination of a cleric's history of sexual misconduct, church dogma is no defense. Such dogma would have no more relevance than the Mormon dogma regarding polygamy had in Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 2d 244 (1878). The principle that dogma is no defense inheres in the long line of neutral application cases which stretches from Reynolds' polygamy to Smith's peyote (and beyond), yet Church Defendants and their protectors continually claim that some ambigous, ephemeral dogma would impermisssibly entangle us.

Respondents place great reliance upon the line of federal cases that have immunized church personnel decisions from federal anti-discrimination statutes. The fundamental distinction between those cases and the case at bar appears on the face of those decisions. Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) is a perfect example. In that case the Court recognized as binding authority Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 717, 96 S.Ct. 2372, 2384, 49 L.Ed. 2d 151 (1976) and Watson v. Jones, 80 U.S. 679, 13 WALL. 679, 20 L.Ed. 666 (1872). Those decisions are then recognized as premised upon the primacy of church tribunals in deciding internal church disputes:

> Civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization,

or ecclesiastical rule, custom, or law.

Id. at 186, quoting Milivojevich, 426 U.S. at 713, 96 S.Ct. at 2382. Of course, the notion that Florida courts must abstain from the instant case because a church tribunal could try Doe's claims and award her compensatory damages (against itself and/or its officers) is a facial absurdity which, itself, fundamentally demonstrates the distinction.

This is without even considering the very different issues which are posed by the two classes of cases. As the Colorado Supreme Court explained the distinction in Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1323 (Colo. 1996):

> While claims for illegal hiring or discharge of a minister inevitably involve religious doctrine, that is not the case for a claim of negligent hiring of a minister....[T]he court does not inquire into the employer's broad reasons for choosing this particular employee for the position, but instead looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs.

Id. at 1323.

It is ironic that Amicus Miami Shores cites Van Osdol v. Vogt, 908 P.2d 1122, 1130 n.13 (Colo. 1996), in the line of so-called "church autonomy precedents," given the Colorado Supreme Court's expression of the above distinction for the very

purpose of distinguishing its own Van Osdol decision. See Bear Valley, supra at 1323. The decision in Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986) is similarly distinguishable as involving a mere employment dispute between a minister and his church over his forced retirement under church disciplinary rules.

While Amici Archbishop Favalora, et al, suggests that the "very process of inquiry" would violate Constitutional principles, the decision in National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed. 2d 533 (1978), upon which it relies was not decided on Constitutional grounds and even its dicta is expressed in the context of the Court's very different understanding of the three-prong Lemon test which existed during that era. Moreover, to simply raise these concerns in the abstract is to essentially argue for blanket tort immunity for all religious actors and employees, since, in theory, virtually any misconduct by a church employee may implicate judicial examination of internal church policies and procedures (of "mercy," or otherwise).

F. The Criminality Distinction

Respondents again take the absolutist position that any interference with clerical supervision is precluded, even in cases of child sexual abuse.

The cases Respondents cite in support of Florida's unique "criminality" distinction say no such thing. In fact, the only case even marginally analogous,

Gibson v. Brewer, supra, "drew the line" not based upon the age or competency of the victim, but rather based upon whether the conduct of the church hierarchy was intentional or negligent.

Respondents and their amici clearly do not like the United States Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed. 2d 876 (1990), given its elimination of strict scrutiny to laws which are facially neutral and generally applicable (See, e.g. Amici Archbishop Favalora Brief at 13, "amici here disagree with that conclusion as unsound"). Thus, they have offered numerous novel approaches in an attempt to circumvent Smith and thus "resurrect" the strict scrutiny standard.

First, Amici Favalora, et al novelly suggest that tort law must always survive strict scrutiny when applied to religious actors, because by the "very nature of the tort system" individualized assessments must be made. The first decision upon which they rely, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed. 2d 472 (1993), suggests no such principle. Rather, at most, Church of the Lukumi holds that facially neutral laws pretextually targeted at specific religious conduct must meet the higher standard. Clearly, Florida's tort laws were not pretextually adopted to target deviant church canons. Amici Favalora's argument also patently misreads Employment Division v. Smith, 494 U.S. at 884, 110 S.Ct. at 1603.

In fact, to read Smith in the fashion suggested would prove entirely too much, necessarily resulting in precisely the blanket tort immunity which the Respondents have disavowed.

Alternatively, Amici Favalora, et al raise (for the first time in these proceedings), Fla. Stat. §761.03, the "Florida Religious Freedom Restoration Act of 1998." In making this argument, Amici fail to point out that the federal act upon which this provision is patterned, the Religious Freedom Restoration Act of 1993 (42 USC §2000bb et. seq.) was held to be unconstitutional in City of Boerne v. Flores, 521 U.S. 507, 536 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), on grounds that the act violated, inter alia, the separation of powers between Congress and judiciary -- specifically the reserved judicial power to interpret the Constitution. City of Boerne, 521 U.S. at 523-524, 117 S.Ct. at 2166, 2171. Clearly, the Florida Legislature has no more right than the Congress to prescribe rules of decision governing interpretation of the Constitution. In any event, even were the statute not unconstitutional, this statute was never asserted as a "defense in [this] judicial proceeding". See Fla. Stat. §761.03(2)(1999). Finally, even had it been raised, since the assertion of jurisdiction over this matter would not substantially burden any person's "exercise of religion," the statute would not apply for that reason, as well.

In the end, Smith both survives and applies. Strict scrutiny simply has no

application to the neutral tort principles which support this action.

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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