IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,450

JANE DOE

Petitioner,

v.

WILLIAM DUNBAR EVANS, III, et al.,

Respondents.
_____/

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The Respondents ignore their common law duty to use due care in the hiring and supervision of their agents. This duty to avoid public endangerment must extend to the hiring and supervision of ministers with a track record of sexually predatory conduct, especially where such individuals are permitted the unique powers and influences of a marital counselor.

The vulnerability and dependence of those seeking marital counseling is the critical factor creating liability and is identical whether the marital counselor is a psychiatrist, psychologist, social worker, or minister. The existence of the transference phenomenon is no less prevalent where the counselor wears a ministerial collar. Churches should not be able to escape liability for recklessly hiring and supervising known sexual predators on the ground that they are themselves "victims" of the transference phenomenon, untrained and incompetent to handle it.

In addition to the breach of fiduciary duty which a majority of courts would ascribe to the conduct of Father Evans, the Second Amended Complaint also pleads direct breaches of fiduciary duty on the part of Bishop Schofield and the hierarchical church defendants in their mishandling of Ms. Doe's complaints in the aftermath of Father Evans sexual exploitation. These allegations have been ignored by Respondents.

While Doe did abandon her direct claim of intentional infliction of emotional distress on the part of the hierarchical church defendants, Doe retains her intentional infliction of emotional distress claim against Father Evans. Clearly, Father Evans intentionally outrageous conduct would (along with the breach of fiduciary duty action) provide ample predicate for the negligent hiring and supervision claim against the Church Defendants which is the primary focus of this appeal.

The fact that Ms. Doe claim could possibly have stated an action for seduction at common law (a doubtful proposition, given that she is a married woman), would be legally irrelevant, in any event, according to most of the jurisdictions to have considered the question. Those cases focus on whether the causes of action are aimed at duties and interests substantially different from those which were the focus of the seduction action and have found no bar in the current context.

No reason is offered why this Court should defer, by analogy, to the Florida legislature's presumed constitutional analysis in exempting ministers from psychotherapeutic licensing and regulation. These same sorts of exemptions exist in most jurisdictions, yet have posed no bar to the evolving majority view that redress is available in tort for a minister's sexual violation of his role as marital counselor.

SUPPLEMENTAL POINT ON APPEAL

A MARRIAGE COUNSELOR'S SEXUAL EXPLOITATION OF A COUNSELEE IS ACTIONABLE.

Numerous authorities have held that liability exists for the negligent hiring and/or supervision of a marital counselor who poses a threat of injury to members of the public, even where the marital counselor was a priest or other cleric. See e.g., Destefano v. Grabrian, 763 P.2d 275, 288 (Colo. 1988); see also, Doe v. Hartz, 52 F.Supp.2d 1027, 1073 (M.D. Iowa 1999); and see generally; Malloy v. O'Neil, 697 So.2d 313, 315 (Fla. 1954);Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 Denv. U. L. Rev. 1, 49 (1996).

Almost invariably in such a negligent hiring or supervison claim the tort committed by the employee (for which the employer may be held liable) is an intentional tort committed outside the scope of employment. Moses v. Diocese of Colorado, 863 P.2d 310, 324, fn 16 (Colo. 1993). Respondents have avoided discussing their own duty of care in the selection and supervision of their clerics, instead exclusively seeking to defend Father Evans' underlying conduct. In arguing that such conduct was not tortious, the Respondents have staked out an extreme minority view.

To paraphrase a recent decision in this area, Father Evans was not "the

milkman, the mailman, or the guy next door;" he was Doe's priest and marriage counselor. See Payne v. Osborne, 1999 WL354495, at p. 3 (Ky. App. June 4, 1999). Yet Respondents challenge this common-sense observation, essentially arguing that ministers engaged in marital counseling should have the same right to "score" as anyone else.

The vulnerability and trusting dependence of a woman seeking marriage counseling is the identical foundation upon which claims of psychiatric malpractice and clerical breach of fiduciary duty claims are premised. Compare, L. L. v. Medical Protective Co., 362 N.W.2d 174 (Wis. App. 1984) (patient's development of extreme emotional dependence and trusting relationship with psychiatrist is broken if psychiatrist abandons the therapeutic role and instead uses the patient to gratify his own needs); F. G. v. MacDonald, 696 A.2d 697, 704 (N.J. 1997) (trust and confidence are vital to the counseling relationship between pastor and troubled, vulnerable parishioners, forming the foundation for breach of fiduciary relationship liability).

The disproportionate power relationship arising from such trust and dependence renders consent essentially illusory. See Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 Fla. S. U. L. R. 499, 502 (1991). It is this factor which fundamentally distinguishes the instant situation from cases brought against defendants who are non-counselors. See e.g.,

Harrington v. Pages, 440 So.2d 521 (Fla. 4th DCA 1983) (sexual misconduct by physician created no cause of action).

The vast majority of authorities to have considered the question have held that this dependency factor means that the liability of a minister undertaking formal counseling should be evaluated by analogy to the liability of mental health professionals, rather than to the non-liability of milkmen or next-door neighbors. While some cases have found such misconduct actionable as professional malpractice by a marriage counselor, see Sanders v. Casa View Baptist Church, 898 F.Supp. 1169, 1175 (M.D. Tex. 1995), and some have utilized an intentional infliction of emotional distress theory, see Payne, supra, the consensus view is that a clergyman's sexual misconduct with a parishioner during the course of counseling constitutes a breach of fiduciary duty. See, e.g., F. G., supra at 704; Sanders, supra at 1176; Destefano, supra at 284; Erickson v. Christenson, 781 P.2d 383, 386 (Or. App. 1989). In F. G., supra, the New Jersey Supreme Court was explicit in its analogy to the civil liability of psychotherapists:

> 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 705.

Both the Oregon Court in Erickson, supra, and most recently the Kentucky court in Payne, supra, have drawn exactly the same line which Doe has suggested in these proceedings. Specifically, in Erickson, the Court stated:

> Plaintiff's claim for outrageous conduct is not premised on the mere fact that Christenson is a pastor, but on the fact that, because he was plaintiff's pastor and counselor, a special relationship of trust and confidence developed.

Erickson, supra at 386 (emphasis added). The Kentucky Court in Payne, supra, quoted this passage with approval, adding:

> Had Osborne not been providing the Paynes with counseling, ostensibly with the purpose of mending their marriage, we would agree that his sexual affair with Brenda would not be actionable.

Payne, supra at 5.

Even the decision in Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907, 911 (Neb. 1993), which the Respondents have counted in their "column," recognized a distinction where the pastor holds himself out to be trained and capable

of conducting marital counseling. See Schieffer, supra at 911 (distinguishing Destefano and Erickson). See also, Doe v. Hartz, supra at 1065 (cases permitting a breach of fiduciary duty claim against a member of the clergy to go forward have required something more than a general priest-parishioner relationship).

Respondents rely upon a passage from Simmons v. United States, 805 F.2d 1363, 1366 (9th Cir. 1986), which suggest that the transference phenomenon renders the therapist-patient relationship unique and distinguishable from that of a minister and parishioner. Not only is the relied-upon statement offhanded obiter dictum, it begs the central question of whether a priest or minister acting as a therapist or counselor (as distinguished from one who has undertaken no such course of counseling) is more analogous to the liable therapist or the typically non-liable priest (e.g., who becomes smitten over a pot-luck supper).

Fortunately, other authorities which are directly on point do answer this central question. In Moses, supra at 327, the Court stated:

> The duty is increased in this case because the Diocese placed Father Robinson in a position that required not only frequent contact with others, but induced reliance and trust through the counseling process. A parishioner in pastoral counseling may develop a deep emotional dependence on a priest. . . . The emotional dependence is called "transference" and is a typical reaction characterized by a patient unconsciously attributing repressed feelings to the counselor. Transference is one of the most significant

> concepts in therapy. See Noyles & Colb, Modern Clinical Psychiatry 505 (6th Ed. 1963), quoted in Simmons v. United States, 805 F.2d 1363, 1365 (9th Cir. 1986). A counselor must be capable of addressing these feelings, both loving and hostile. See Simmons, 805 F.2d at 1365 (noting the counselor should look for manifestations of the transference and be prepared to handle it as it develops).
>
> . . . . Father Robinson's struggle with his sexual identity and his problems with depression and low self-esteem put the Diocese on notice to inquire further whether Father Robinson was capable of counseling parishioners. These reports gave the Diocese a reason to believe Father Robinson should not be put in a position to counsel vulnerable individuals and that might be unable to handle the transference phenomenon. The failure to communicate this knowledge to the vestry and subsequent placement of Father Robinson in the role of counselor breached the Diocese's duty of care to Tenantry.

Moses, supra at 328-329; accord Villiers, supra at fn. 281 (duty is on priest/counselor to recognize the transference phenomenon, which occurs in every therapeutic relationship even if not affirmatively used as a psychoanalytic tool, and deal with it effectively); see also, Horak v. Biris, 474 N.E.2d 13, 18 (Ill. App. 1985) (proofs may well reveal that social worker possessed or should have possessed a basic knowledge of fundamental psychological principles which routinely come into play during marriage and family counseling).

The contention that the transference phenomenon renders only psychiatrists and psychologists liable for sexual relationships during counseling is refuted by numerous

authorities in addition to those above-cited . See e.g., Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W.Va. App. 1989) (corporate employment counselor and employment relationship specialist); Andrews v. United States, 732 F.2d 366 (4th Cir. 1984) (physician's assistant); Rowe v. Bennett, 514 A.2d 802 (Me. 1986) (social worker); Horak, supra (social worker); and see, Hoopes v. Hammargren, 725 P.2d 238 (Nev. 1986) (physician).

While Doe's complain is predominantly concerned with Father Evans' misconduct and the Church Defendants' failure to prevent it, nonetheless it must be recalled that Doe has also alleged a direct breach of fiduciary duty on the part of Bishop Schofield and the other hierarchical church defendants in their mishandling of the matter when Doe brought it to their attention (i.e., the allegation that the hierarchical defendants "failed to act to protect the plaintiff by creating a situation in which the plaintiff wrongful [sic] believed that the guilt and shame were hers, and further creating a situation in which the plaintiff was held up to ridicule and embarrassment by the other members of the church."; R. 94 at paragraph 14). Compare, Moses, supra at 322-323 (church defendants assumed fiduciary duties to parishioner when they acted to resolve the problems that were the result of the relationship between pastor and parishioner). The Respondents have entirely failed to address this separate aspect of their potential liability.

While Respondents correctly point out that Doe abandoned her outrage claim against the Church Defendants by choosing not to argue it in her Initial Brief in this Court, Respondents overlook the fact that Doe's outrage complaint against Father Evans remains pending in the Circuit Court. The distinction between the outrageousness of the cleric's sexual abuse of his role as marital counselor and the significantly lesser outrage involved in the hierarchical church defendants' failure to adequately screen or supervise that cleric (so as to justify a divergent result between the two), has been previously recognized. See Sanders, supra at 1181 (intentional infliction of emotional distress action allowed to go forward against pastor but not against church, "Casa View's conduct by itself, without taking into consideration Baucom's actions, falls far short of 'extreme or outrageous'" e.s.); see also generally, Payne, supra (permitting plaintiff to sue priest for intentional infliction of emotional distress arising from priest's sexual relationship with plaintiff's wife during marital counseling); Amato v. Greenquist, 679 N.E.2d 446, 454 (Ill. App. 1997) (accord). Thus, it is entirely appropriate for Doe to continue to reference intentional infliction of emotional distress to refute the idea that Father Evans acted non-tortiously and thus refute the Church's claim that it is somehow immune from the consequences of its negligent hiring/supervision because of the absence of any predicate wrongdoing by its servant.

For the first time in these proceedings, Respondents have sought the protection of Fla. Stat. § 771.01, which abolished the common law amatory torts. The purpose of that act, as stated in its preamble, was to prevent the perpetration of frauds, exploitation and blackmail, for which unlawful purposes the remedies had been theretofore used by unscrupulous persons. See Liappas v. Augoustis, 47 So.2d 582 (Fla. 1950).

The rationale of the amatory torts was that one's affection was a property interest, the loss of which had a pecuniary value recoverable under tort law. Villiers, supra at 23. At early common law, a seduced female did not have a cause of action against her seducer because she was also engaged in the wrongful act and because loss of service was indispensable to the plaintiff's recovery, based as it was upon the relation of master to servant. Id. at 24. Later the seducee herself got the statutory right to sue for the seduction, although the action was limited to unmarried females. Id.

The vast majority of the courts to have considered the question have held that the abolition of these amatory causes of action do not bar claims against counselors who engage in sexual activities with counselees under the guise of therapy. See e.g., Cotton v. Kambly, 300 N.W.2d 627 (Mich. App. 1980); Gasper v. Lighthouse, Inc., 533 A.2d 1358 (Md. App. 1987); Richard H. v. Larry D., 198 Cal.App. 3d 591, 596,

243 Cal.Rptr. 807, 810 (1988); Van Meter v. Van Meter, 328 N.W.2d 497 (Iowa 1983); Roy v. Hartogs, 381 N.Y.S.2d 587 (1976); Destefano, supra at 281; Erickson, supra at 385-386; Teadt v. Lutheran Church Missouri Synod, 603 N.W.2d 816, 821 (Mich. App. 199). These cases universally rest upon the conceptual distinction between the modern cause of action alleged, which distinctly protect/prosecute interests and conduct discrete from those which were the focus of the seduction cause of action.

It should also be noted that in addition to this all but universally recognized conceptual difference, the narrow context currently under discussion is not nearly so fraught with the prospect of fraud/blackmail as the seduction action, which applied to milkmen, next-door neighbors, and the like. Not only do clergy already have the built-in advantage of credibility, clergy undertaking a course of counseling maintain inherent control over its logistics which, if prudently exercised, can thoroughly protect a pastor from even the rare prospect of a false accusation. See Villiers, supra, at fn. 111 (discussing priest who uses a corner booth at a local Denny's for counseling).

Amicus Miami Shores Presbyterian ridicules as untenable the "formal counseling" distinction suggested at oral argument. This precise objection was one of several practical objections which Professor Villiers has described as "smoke screens":

> Courts are well equipped to determine, on a case by case basis, whether a counseling relationship exists. If a clergyman hears a parishioners confession only, this would not qualify as counseling, because this is part of a liturgical function. Home visits could qualify if they were part of an ongoing attempt to provide assistance with a psychological problem. Bible study in the home would not be considered counseling.

Villiers, supra at fn. 306.

Finally, both Respondents and Amicus suggest that this Court should defer, by analogy, to the Florida legislature's presumed constitutional analysis, in exempting pastors from psychotherapeutic licensing and disciplinary statutes, again ignoring the developed law on this point in other jurisdictions. See Destefano, supra at 285 (reversing dismissal of fiduciary duty, intentional infliction of emotional distress and negligent supervision actions arising from priest's sexual relationship with wife during marital counseling, despite Colorado legislature's exemption of ministers from statute imposing liability for psychological malpractice); see also, Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994) (clergyman could be held liable for professional malpractice as a psychological counselor if he held himself out as such, notwithstanding Illinois legislature's explicit exclusion of spiritual or religious counseling in its Sexual Exploitation in Psychotherapy Act).

Pastors undertaking a course of formal marital counseling are more like

psychotherapists than mailmen or next-door neighbors. They should be treated as such, incurring liability for sexual exploitation of the counseling relationship. Their supervisors/employers should equally incur liability should it prove that they did not adequately screen or supervise known sexual predators, instead recklessly placing them in positions in which they could foreseeably injure others.

CONCLUSION

The second amended complaint would state a cause of action against defendants who are not religious entities.

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