IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC01-179
DCA NO. 3D99-549

ST. DAVID CATHOLIC CHURCH and THE ARCHDIOCESE OF MIAMI,

Petitioners,

-vs-

JANE DOE I and JANE DOE II,

Respondents.
_____/

**ACADEMY OF FLORIDA TRIAL LAWYERS'**
**AMENDED AMICUS BRIEF ON BEHALF OF RESPONDENTS**
On Appeal from the Third District Court of Appeal of the State of Florida

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## PREFACE

The Academy of Florida Trial Lawyers is a state-wide voluntary association of more than 3,000 attorneys, whose practices emphasize litigation for the protection of personal and property rights of individuals. The Academy has requested leave to appear as Amicus Curiae in this case to address issues involved in this Court's consideration.

## SUMMARY OF ARGUMENT

Claims against religious entities arising from sexual misconduct which involve theories of negligent hiring, retention, and supervision can be litigated without infringing any First Amendment rights. Such claims involve neutral principles of tort law, which can be analyzed and applied without infringing or involving any issue of church doctrine or belief. Such claims involve the duty of a person to exercise reasonable care not to expose a third party to known dangers, and those concerns can be implemented regardless of the religious beliefs or structures of a defendant. There is no reason to apply a "reasonable bishop" standard, but simply a "reasonable person" standard, which is done as a matter of course in the legal system. Such claims focus on the defendant's knowledge of a danger to third parties caused by one of its employees, and whether reasonable steps were taken to control that danger. Such cases are easily distinguishable from disputes involving the terms of a priest's employment or factional disputes within a religious organization. Those disputes often involve matters of doctrinal disputes which a court of law is ill equipped and unauthorized to determine. That is not the case with negligence claims which constitute purely secular disputes between third parties and a religious defendant.

Additionally, it needs to be emphasized that the Court has a compelling interest in the protection of minors, which must prevail over any First Amendment defense,

even assuming arguendo such a defense applies in these types of cases. The United States Supreme Court has held on numerous occasions that the state's interest in protecting children is of such significance that it supersedes a person's right to act in accordance with their religious beliefs. Additionally, it has been held that direct regulation of a religious organization is justified when it involves the welfare of children. Therefore, even assuming arguendo that the Defendants have a valid First Amendment defense to these claims, that defense cannot prevail over the state's interest in protecting children. Put another way, while a religious organization is entitled to select its spiritual leaders, it cannot avoid its societal obligation to exercise reasonable care in protecting minors from a known sexual predator. Therefore, this Court should affirm the ruling of the Third District.

## ARGUMENT

## POINT I

THIS CASE CAN AND SHOULD BE RESOLVED UTILIZING NEUTRAL PRINCIPLES OF TORT LAW

**Negligent Hiring, Retention and Supervision Claim**

Claims for negligent hiring and retention were initially recognized in MALLORY v. O'NEIL, 69 So.2d 313 (Fla. 1954). There, this Court held that the plaintiff had adequately stated a cause of action because the defendant had knowingly kept a dangerous employee on the premises when he knew, or should have known, that he was likely to cause harm to the tenants. This Court specifically adopted the elements of the tort as codified in Restatement of Torts, §317.[1] As provided in the current version of that treatise, claims for negligent hiring and retention address damage caused by a servant acting outside the scope of his or her employment, see Restatement (Second) Torts, §317 Comment a; see also, MALLORY v. O'NEIL, supra, 69 So.2d at 315.

It is also clear that liability for negligent hiring or retention extends to willful torts of the Defendant's employees, see WILLIAMS v. FEATHER SOUND, INC.,

[1]/This theory of liability is also addressed in Restatement (Second) of Agency, §213.

386 So.2d 1238 (Fla. 2d DCA 1980), rev. den., 392 So.2d 1374 (Fla. 1981). For example, Florida has specifically recognized a cause of action for negligent retention, training, supervision in a situation in which the defendant's employees engaged in sexual abuse of minors, see SUNSHINE BIRDS & SUPPLIES, INC. v. UNITED STATES FIDELITY AND GUARANTY CO., 696 So.2d 907 (Fla. 3d DCA 1997).

In DiCOSALA v. KAY, 450 A.2d 508 (N.J. 1982), the New Jersey Supreme Court approved a cause of action for negligent hiring or retention, noting that the majority of jurisdictions that had considered the issue had also done so, 450 A.2d at 514. The court explained the policy behind the tort, and how it differed from liability based on the doctrine of respondeat superior (450 A.2d at 515):

> Thus, the tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual, while the doctrine of respondeat superior is based on the theory that the employee is the agent or is acting for the employer. Therefore the scope of employment limitation on liability which is a part of the respondeat superior doctrine is not implicit in the wrong of negligent hiring.

The court in DiCOSALA noted that there are two fundamental elements of the tort, the first being the knowledge of the employer of the dangerous tendencies of the employee (and that it created a foreseeable risk of harm to third persons), and the second being that the employee's dangerous characteristics proximately caused the

plaintiff's injury, 450 A.2d at 516, see also, WATSON v. CITY OF HIALEAH, 552 So.2d 1146 (Fla. 3d DCA 1989).

In GARCIA v. DUFFY, 492 So.2d 435 (Fla. 2d DCA 1986), the court addressed negligent hiring and retention, and noted that the difference between the two is the time when the employer is charged with knowledge of the employee's unfitness. While negligent hiring occurs based on an employer's knowledge prior to the actual employment of the dangerous individual, the court described negligent retention as follows (492 So.2d at 438-39):

> Negligent retention, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment.

It is important to emphasize that negligent retention does not necessarily require discharge of the employee, but rather permits other reasonable alternatives such as reassignment or supervision, 492 So.2d at 439-41, TALLAHASSEE FURNITURE CO., INC. v. HARRISON, 583 So.2d 744, 753 (Fla. 1st DCA 1991).

**Claims of Negligent Hiring, Retention and Supervision Against Religious Entities Arising from Sexual Misconduct**

Claims such as those raised in the case sub judice can be determined utilizing neutral principles of tort law, without infringing on any First Amendment rights. For example, in KONKLE v. HENSON, 672 N.E.2d 450 (Ind. App. 1996), a girl who claimed she had been sexually molested by a minister, brought tort claims against him and the various church organizations in authority over him. The trial court granted summary judgment for the church defendants, concluding that the First Amendment barred judicial intervention in ecclesiastical affairs. The appellate court reversed, determining that the First Amendment did not grant the church defendants immunity from the plaintiff's claims. The court stated (672 N.E.2d at 456):

> Here, review of Konkle's claims does not require any inquiry into religious doctrine or practice. Henson's actions were not religiously motivated. Instead, 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.

Similarly, in SMITH v. PRIVETTE, 495 S.E.2d 395, 398 (N.C.App. 1998), the Court rejected a church's claim of First Amendment immunity in this context, stating:

> We acknowledge that the decision to hire or discharge a minister is inextricable from religious doctrine

> and protected by the First Amendment from judicial inquiry. We do not accept, however, that resolution of the Plaintiffs' negligent retention and supervision claim requires the trial court to inquire into the Church Defendants' reasons for choosing Privette to serve as a minister. The Plaintiffs' claim, construed in the light most favorable to them, instead presents the issue of whether the Church Defendants knew or had reason to know of Privette's propensity to engage in sexual misconduct, *see Bear Valley Church of Christ v. Depose*, 928 P.2d 1315, 1323 (Colo.Sup.Ct. 1996), *cert. denied*, 520 U.S. 1241, 117 S.Ct. 1846, 137 L.Ed.2d 1049 (1997), conduct that the Church Defendants do not claim is part of the tenets or practices of the Methodist Church. Thus, there is no necessity for the court to interpret or weigh church doctrine in its adjudication of the Plaintiffs' claim for negligent retention and supervision. It follows that the First Amendment is not implicated and does not bar the Plaintiffs' claim against the Church Defendants.

See also, DOE v. REDEEMER LUTHERAN CHURCH, 531 N.W.2d 897 (Minn. 1995).

The standard for common law negligence has always been what a reasonable and prudent person would have done under the circumstances, see De WALD v. QUARNSTROM, 60 So.2d 919 (Fla. 1952); SCHWARTZ v. AMERICAN HOME ASSURANCE CO., 360 So.2d 383 (Fla. 1978). Put another way, the risk reasonably to be perceived defines the duty to be obeyed, see PALSGRAFF v. LONG ISLAND RAILROAD CO., 162 N.E. 99 (N.Y. 1928); MEMORIAL PARK, INC. v. SPONELLI, 342 So.2d 829 (Fla. 2d DCA 1977); FIRESTONE TIRE & RUBBER

CO., INC. v. LIPPINCOTT, 383 So.2d 1181 (Fla. 5th DCA 1980). These principles can be applied to religious organizations as easily as to any other organization or person, and do not require the court to become entangled in church doctrine.

In his dissent in DOE v. MALICKI, supra, Judge Schwartz stated that permitting claims such as these would unconstitutionally require a jury to apply a "reasonable bishop" standard to the conduct, or require the jury to treat the church as a "reasonable businessman." While the statement is catchy, it is misguided. It is effectively rebutted by the Supreme Court of Colorado in VAN OSDOL v. VOGHT, 908 P.2d 1122, 1128 (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. The claim of negligent hiring is brought after an employee has harmed a third person through his or her office of employment. An employer is found liable for negligent hiring, if at the time of the hiring, the employer had reason to believe that hiring this person would create an undue risk of harm to others. Connes v. Molalla Transp. System, Inc. 831 P.2d 1316, 1321 (Colo. 1992). Restatement (Second) of Agency Sec. 213 cmt. d (1958). Hence, the court does not inquire into the employers 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. [Citations omitted.]

In fact, the Third District recently applied such neutral principles in evaluating the liability of certain church defendants in a case arising from sexual misconduct by a priest, IGLESIA CHRISTIANA LA CASA DEL SEÑOR, INC. v. L.M., 783 So.2d 353 (Fla. 3d DCA 2001). The court did not find it necessary to utilize a "reasonable bishop" standard to resolve that case.

The Petitioners make vague assertions that entanglement will necessarily ensue from such claims, because that they are entitled to rely on concepts of forgiveness, reconciliation, and redemption in treating deviant priests, and a jury should not be entitled to evaluate those decisions. However, those concepts relate to the churches' spiritual response to the clergy's misconduct, and do not relate to the tort claims at issue. The essence of the tort claims involved are that the Defendants had knowledge that the particular priest was a danger to women or children, and the issue is what they did to protect those people from that known threat. Whether the church has chosen to forgive the minister is really irrelevant to the issue of whether the unsuspecting women and children were exposed by the church Defendants to a known danger over which they had control. The evaluation of the churches' response to the danger created by its clergy is what is to be evaluated in the tort action, not whether they believe that he is entitled to forgiveness or redemption.

Petitioners rely on cases involving internal disputes within churches where the courts have found that the First Amendment barred judicial interference, e.g., SERBIAN EASTERN ORTHODOX DIOCESE v. MILIVOJEVICH, 426 U.S. 696 (1976). Petitioner's attempt to extend those holdings to tort actions by third parties against religious organizations does not find support in the case law, as specifically noted by Justice Rehnquist in GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF UNITED METHODIST CHURCH v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, 439 U.S. 1369 (1978). In that case, the plaintiffs brought claims against, inter alia, church defendants, alleging claims of breach of contract, fraud and violations of state security laws. The church defendants sought a stay of the state court action in the United States Supreme Court, arguing that the proceedings were barred by the First Amendment (as applied to the states through the Fourteenth Amendment), relying on inter alia, SERBIAN EASTERN ORTHODOX DIOCESE v. MILIVOJEVICH, supra. Justice Rehnquist, acting as circuit justice, denied the stay, stating (439 U.S. at 1372-73):

> In my view, applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine

> matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. See Serbian Eastern Orthodox Diocese v. Milivojevich. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, Serbian Eastern Orthodox Diocese and the other cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. 426 U.S., at 709-710, 96 S.Ct., at 2380-2381. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged. [Emphasis supplied.]

The case sub judice does not involve an internal church matter that requires resolution of theological questions. Put another way, the church's alleged conduct in unreasonably exposing a woman and a child to a sexual predator is not a matter of internal church governance. The court in SMITH v. O'CONNELL, 986 F.Supp. 73, 77 (D.R.I. 1997), cogently rejected such a contention:

> In this case, the matter at issue is not an *internal* church matter. What is alleged is that church officials conducted themselves in a manner that allowed several minors to be sexually abused. The dispute is not one between factions within the church or between the church and its clergy or employees. Rather, it is a dispute between church officials and third persons who allege that they were seriously injured by the negligence of the church officials. Such a dispute hardly can be characterized as a dispute involving an *internal* church matter.

Petitioner relies on cases involving employment disputes between clergy and their church organizations arising from discharges or failures to promote. Those cases obviously involve different policy considerations than the case sub judice, since they do not involve the welfare of minors or harm to innocent third parties. Most of those cases simply hold that church organizations are permitted by the First Amendment to make employment decisions regarding clergy based on their own criteria, SCHARON v. ST. LUKE'S EPISCOPAL PRESBYTERIAN HOSPITALS, 929 F.2d 360 (8th Cir. 1991) (clergy's action for age and sex discrimination following her discharge barred by First Amendment); HUTCHISON v. THOMAS, 789 F.2d 392 (6th Cir. 1986) (priest challenged his forced retirement); GONZALEZ v. ROMAN CATHOLIC ARCHBISHOP OF MANILA, 280 U.S. 1 (1929) (priest claimed entitlement to be appointed chaplain); MINKER v. BALTIMORE ANNUAL CONFERENCE OF UNITED METHODIST CHURCH, 894 F.2d 1354 (D.C. Cir. 1990) (minister's claim of age discrimination against church organizations). Those rulings are consistent with the principle that courts will not interfere in internal church disputes which necessarily implicate church doctrine and internal governance. However, that principle does not apply when innocent third parties are injured as the result of tortious conduct by clergy and religious organizations. Even in disputes regarding the discharge of clergy, Florida courts have exercised their jurisdiction when the dispute involves strictly legal

issues, see COVINGTON v. BOWERS, 442 So.2d 1068 (Fla. 1st DCA 1983); HEMPHILL v. ZION HOPE PRIMITIVE BAPTIST CHURCH, 447 So.2d 976 (Fla. 1st DCA 1984), see also GOODMAN v. TEMPLE SHIR AMI, INC., 712 So.2d 775 (Fla. 3d DCA 1998), rev. granted, 727 So.2d 905 (Fla. 1998), appeal dismissed as improvidently granted, 737 So.2d 1077 (Fla. 199), cert. den., 102 S.Ct. 789 (2000) (court had authority to resolve contractual issue of compensation and reimbursement of expenses); HOUSEMAN v. SUMMIT CHRISTIAN SCHOOL, 762 So.2d 979 (Fla. 4th DCA 2000) (court had authority to resolve breach of contract claim). Thus, the cases involving internal disputes within church organizations are not persuasive in the context of this case.

The case sub judice does not involve a conflict between factions of a religious organization, a dispute over church property, nor a claim by clergy that employment decisions were illegally made. This case involves significant injuries to innocent third parties, and should be governed by neutral principles of tort law. There is no need for the courts to resolve any issue of church doctrine in order to determine this case. Therefore, the Petitioners' reliance on the First Amendment is unfounded and should be rejected, as a matter of law.

## POINT II

THIS COURT HAS A COMPELLING INTEREST IN THE PROTECTION OF MINORS, WHICH MUST PREVAIL OVER ANY FIRST AMENDMENT DEFENSE.

The state clearly has a compelling interest in regulating the treatment of children. In NEW YORK v. FERBER, 458 U.S. 747, 756-57 (1982), the United States Supreme Court stated:

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." GLOBE NEWSPAPER CO. v. SUPERIOR COURT, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." PRINCE v. MASSACHUSETTS, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In PRINCE v. MASSACHUSETTS, supra, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In GINSBERG v. NEW YORK, supra, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. FCC v. PACIFICA

> FOUNDATION, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. [Emphasis supplied.]

The state's interest in protecting children supersedes one's right to act in accordance with religious beliefs. In PRINCE v. MASSACHUSETTS, 321 U.S. 158, 64 S.Ct. 784 (1944), the United States Supreme Court upheld a Massachusetts child labor law against a challenge that it violated the free exercise clause of the First Amendment. In that case, the aunt and custodian of a nine year old child contended that a state law prohibiting child labor could not be enforced to prevent her child from selling religious literature, since proselytizing was considered a duty by their sect, the Jehovah's Witnesses. The Supreme Court rejected that contention, holding that the right to freedom of religion does not preclude the government's regulation of family conduct in the interest of a child's well-being.

In WISCONSIN v. YODER, 406 U.S. 205, 92 S.Ct. 1526 (1972), the Court held that the First Amendment prevented the State of Wisconsin from compelling Amish people to have their children attend formal high school until the age of sixteen. The Court specifically stated that the record showed that foregoing one or two years of compulsory education would not impair the physical or mental health of the children, or otherwise "detract from the welfare of society," 406 U.S. at 234, 92 S.Ct.

at 1542. However, the Court noted that if the record indicated to the contrary, the state regulation might be enforceable, despite the significant countervailing individual rights (406 U.S. at 233-34, 92 S.Ct. at 1542):

> To be sure, the power of the parent, even when linked to a free exercise [of religion] claim, may be subject to limitation under PRINCE if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

It necessarily follows that decisions of a religious organization that jeopardize the health or safety of children must also be subject to state regulation.

In fact, direct regulation of a religious organization is justified when it involves the welfare of children. In STATE v. CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., 683 S.W.2d 692 (Tex. 1989), app. dism. 106 S.Ct. 32 (1985), the court held that the state was entitled to enforce its licensing requirements for child care facilities against a child care center operated by a church. The Court held that the state's compelling interest in protecting children from physical and mental harm outweighed the burden imposed on the religious organization by the regulations.

The Florida Supreme Court has expressly applied that type of balancing test in determining the propriety of state regulation of religious conduct. In TOWN v. STATE EX REL RENO, 377 So.2d 648 (Fla. 1979), the Court upheld an injunction precluding the use of cannabis by the Ethiopian Zion Coptic Church. The parties had

stipulated that the church was a religion within the meaning of the First Amendment, and that the use of cannabis was "an essential portion of the religious practice" (377 So.2d at 649). The trial court granted an injunction precluding the use of cannabis on property owned by the church (and one of its leaders), after balancing the state's interest in protecting the public health, welfare, safety and morals against the church's interest in the free exercise of religion. In upholding the injunction, the Court noted that the cannabis was being made available to children and non-members of the church, and that participants leaving the premises after using the cannabis posed a threat to public safety and welfare. Based thereon, the Court held that the injunction was properly entered, despite the fact that it enjoined an essential part of the church's religious practices.

Most of the cases that have rejected the First Amendment immunity argument of church Defendants in these type of cases have concluded that there is no entanglement resulting from the enforcement of civil liability for tortious conduct, e.g., KONKLE v. HENSON, supra; JONES v. TRANE, 591 N.Y.S.2d 927 (N.Y.Sup.Ct. 1992). However, even assuming arguendo that some entanglement would result, the compelling interest of the state in protecting children clearly justifies whatever incidental interference with the Defendants' religious conduct would result from civil liability. The state has an overwhelmingly compelling interest in the

welfare of children. That interest justifies the state's direct regulation of child care facilities operated by a religious organization, see STATE v. CORPUS CHRISTI PEOPLES BAPTIST CHURCH, supra. Clearly, if the state can directly regulate such conduct, it can also indirectly regulate it through the neutral application of secular standards defining tortious conduct.

The Defendants contend that the application of negligence principles in this context would result in state regulation of their selection of spiritual leaders. However, as discussed supra, Point I, claims of negligent hiring, retention and supervision do not necessarily require discharge (or the refusal to hire) as the only reasonable alternative, but consider other reasonable responses such as reassignment and supervision. More importantly, however, a religious organization's right to choose a child molester as a spiritual leader does not abrogate the state's right to require that the church act reasonably to protect children from that threat. That duty applies to any other person or organization and, therefore, does not violate the defendants' right to freedom of religion. To hold otherwise would create an "anomaly, in the law, a constitutional right to ignore neutral laws of general applicability," SMITH v. O'CONNELL, supra, 986 F.Supp. at 80, quoting from CITY OF BOERNE v. FLORES, 117 S.Ct. 2157, 2161 (1997). Therefore, the First

Amendment cannot provide the Petitioners complete immunity, as a matter of law, from the claims of tortious conduct alleged by the Plaintiffs in this case.

## CONCLUSION

For the reasons stated above, the decision of the Third District should be approved.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to JAMES F. GILFBRIDE, ESQ. and ADAM D. HOROWITZ, ESQ., One Biscayne Tower, Ste. 1570, Two South Biscayne Blvd., Miami, FL 33131; J. PATRICK FITZGERALD, ESQ., 110 Merrick Way, Ste. 3B, Coral Gables, FL 33134; MAY L. CAIN, ESQ. and WILLIAM J. SNIHUR, JR., ESQ., 1550 N.E. Miami Gardens Dr., Ste. 304, North Miami Beach, FL 33179, by mail, on March 14, 2002.

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## CERTIFICATE OF TYPE SIZE & STYLE

Appellants hereby certify that the type size and style of the Amicus Brief by The Academy of Florida Trial Lawyers on behalf of Respondents is Times New Roman 14pt.

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