

IN THE SUPREME COURT OF FLORIDA

Case No. SC01-179

JAN MALICKI, ET AL.

Petitioners,

vs.

JANE DOE I, ET AL.

Respondents.

On Discretionary Review
from the Third District Court of Appeal

Petitioners' Brief on the Merits

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INTRODUCTION

Petitioners, St. David Catholic Church and the Archdiocese of Miami (collectively referred to as the “Archdiocese” in this Brief), are Defendants in this action. Respondents, Jane Doe I and Jane Doe II (collectively referred to as “Parishioners” in this Brief), are Plaintiffs in this action.

The symbol “(R.)” is used in this brief to refer to the Record on Appeal. The Complaint (R. 1-35) is specifically referred to as “(Complaint, ¶)”, indicating the relevant paragraph number in the Complaint.

STATEMENT OF THE CASE AND THE FACTS

Jane Doe I and Jane Doe II (“Parishioners”) jointly filed an eight-count Complaint against the Archdiocese of Miami, St. David Catholic Church, and Father Jan Malicki. (R. 1-35, Complaint). Their Complaint purports to state causes of action against The Archdiocese of Miami and St. David Catholic Church (“the Archdiocese”) for negligent hiring, retention and/or supervision, respondeat superior, and breach of an implied contract.¹

Each Jane Doe made similar allegations against the Archdiocese, except as indicated below. Jane Doe I and Jane Doe II are parishioners of St. David Catholic Church. (Complaint, ¶¶3,5). The Archdiocese is alleged to be “an ecclesiastical nomenclature which designates those members of the Roman Catholic Church who reside in” various counties including Broward County. (Complaint, ¶6). It is also alleged that Father Jan Malicki was an Associate Pastor, a religious leader, at the time of the alleged incidents. (Complaint, ¶9). The Complaint is fraught with references to spirituality, religious duties, and procedures of the Archdiocese.

Jane Doe I’s action against the Archdiocese arises from alleged misconduct involving Father Malicki and Jane Doe I between 1994 and 1997. (Complaint, ¶50).

¹The actions brought against Father Jan Malicki for alleged assault and battery (Counts VII and VIII) remain pending in the trial court and are not before this Court.

Jane Doe II's action against the Archdiocese arises from alleged misconduct involving Father Malicki and Jane Doe II between 1996 and 1997. (Complaint, ¶73).

In Counts I and II, Parishioners assert that the Archdiocese was negligent in hiring, retaining, and/or supervising Father Malicki, an Associate Pastor, whom they allege unlawfully fondled, molested, touched, abused, sexually assaulted and/or battered them. (Complaint, ¶17,27). Parishioners allege that the Archdiocese's negligence included the failure to follow its internal "procedures", also known as the Canons of the Roman Catholic Church. (Complaint, ¶¶20,29). Jane Doe I further alleges that Father Malicki unlawfully served her alcohol. (Complaint, ¶18). Parishioners assert that Father Malicki's misconduct was a direct and proximate result of the Archdiocese's breach of their duty in hiring and placing Father Malicki in St. David parish as a spiritual guide and leader. (Complaint, ¶¶19,21,28,31).

In Counts III and IV, Parishioners seek to impose vicarious liability against the Archdiocese under a theory of respondeat superior. Parishioners assert that Father Malicki's misconduct occurred during the period that he "had undertaken to spiritually guide, counsel, instruct, supervise, and safeguard" them. (Complaint, ¶¶37,60). It is further alleged that Father Malicki's misconduct occurred while he was "performing his duties as a priest" and was done "in furtherance and during the course of the daily operation of the church itself." (Complaint, ¶¶35,58). Father Malicki allegedly

implied or expressed that his conduct and behavior “was part of God’s intended plan” and that his alleged touching of Parishioners “was essential to, and part of, his functioning as an effective and better priest.” (Complaint, ¶¶49,72). Both Parishioners claim they were incapable of freely or independently walking away or reporting this misconduct, but do not allege facts as to why they were unable to do so. (Complaint, ¶¶40,63).

In Counts V and VI, Parishioners assert breach of implied contract actions. Jane Doe I alleges that in exchange for working at St. David Catholic Church, the Archdiocese paid her tuition at St. Thomas High School. (Complaint, ¶85). St. Thomas is not a party to this action. Jane Doe II alleges that her annual contribution to the Archdiocese, as required by the laws of the Roman Catholic Church, consisted of volunteer work at St. David Church. (Complaint, ¶100). She alleges that based on this work, the Archdiocese allowed her children to attend St. David Catholic School. (Complaint, ¶28). The implied contract was allegedly breached by the same conduct underlying the negligence claim – namely, the “hiring”, “monitoring”, supervision, evaluation, and retention of Father Malicki. (Complaint, ¶¶88-91,101-103). The damages allegedly caused by this breach are identical to those sought to be recovered in the other Counts -- grievous mental pain, anguish, and suffering, as well as deep psychological fear; mental, psychological, religious, and social development has been

permanently marred; the ability to lead and enjoy a normal life has and will continue to be impaired. (Complaint, ¶¶93, 110). Parishioners do not claim to have experienced any physical injury.

The Complaint demands judgement in the amount of \$25 million in compensatory damages and reserves the right to amend for punitive damages on all counts in the complaint. (R. 34).²

The Archdiocese of Miami and St. David Catholic Church filed Motions to Dismiss as to Jane Doe I and Jane Doe II on various grounds and submitted thorough memoranda of law on all of these grounds. (R. 36-41, 42-45, 46-50, 51-54, 55-89, 90-128). After hearing oral argument, the trial court ruled that the “most cogent argument . . . with all the argument and cases is simply separation of church and state. I don’t think the judicial system can get into the working of the Catholic Church or any religious organization.” (R. 188). The trial court entered an Order granting the Motion to Dismiss the Complaint with prejudice as to all counts against St. David Catholic Church and the Archdiocese of Miami. (R. 131).

Jane Doe I and Jane Doe II filed a timely notice of appeal in the Third District

²It is unclear whether each Plaintiff is separately seeking \$25 million or whether \$25 million is sought for both Plaintiffs together. Furthermore, it is unclear whether \$25 million is sought for each count against the Archdiocese and Father Malicki or for a total of all counts.

and supplemented the Record on Appeal with their Memorandum in opposition to Defendants' Motions to Dismiss. (R. 129).

On July 26, 2000, the Third District Court of Appeal reversed the trial court in ruling that the claims against the Archdiocese of Miami and St. David Catholic Church were not barred by the First Amendment. (R. 205-16). In a split decision with Chief Judge Schwartz dissenting, the Appellate Court held that Jane Doe I and Jane Doe II's claims are not constitutionally barred in that their determination is "governed by tort law and does not require inquiry into the religious doctrines and practices of the Catholic church." (R. 211). The Archdiocese of Miami and St. David Catholic Church subsequently filed Motions for Rehearing, Rehearing En Banc, and Certification, which were each denied by the Third District Court of Appeal on December 7, 2000. (R. 217).

On January 5, 2001, the Archdiocese of Miami and St. David Catholic Church served their Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida based upon an express and direct conflict between the Third District Court of Appeal's decision and two other Florida District Courts of Appeal on the same question of law. Compare Doe v. Malicki, 771 So.2d 545 (Fla. 3d DCA 2000) *with* Doe v. Evans, 718 So.2d 286 (Fla. 4th DCA 1998), rev. granted, 735 So.2d 1284 (Fla. 1999) and Carnesi v. Ferry Pass United Methodist Church, 770 So.2d 1286 (Fla. 5th

DCA 2000), rev. granted, No. SC00-2579 (Fla. Mar. 29, 2001).

The Archdiocese of Miami and St. David Catholic Church filed Petitioners' Brief on Jurisdiction on January 16, 2001. The Supreme Court of Florida accepted certiorari review on May 21, 2001 and dispensed with oral argument.

SUMMARY OF ARGUMENT

The United States Constitution and the Florida Constitution prohibit this Court from adjudicating disputes that would necessarily require an interpretation or application of religious doctrine for their resolution. A judicial determination of Parishioners' negligent hiring, retention and supervision claims would be unconstitutional in that the claims require inquiry into the manner in which the Archdiocese ordains, supervises, places, and disciplines its clergy and whether this procedure is reasonable. Similarly, Parishioners' respondeat superior and implied contract claims require an impermissible examination of the relationships between parishioners and their clergy, as well as relationships within the religious institution.

As Thomas Jefferson wrote in 1808, the Government is "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline or exercises."³ This freedom from judicial scrutiny, the concept of "religious autonomy," acts not only as a barrier between governmental meddling in internal church disputes, but also extends to prevent courts from evaluating religious doctrine and principles in the context of tort law as is alleged in this case.

The Complaint in this action sounds in the law of ordinary negligence, implied

³James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 37 (1994).

contract, and agency concepts, but their reach is far more insidious. Parishioners would have a civil court assess the reasonableness of a religious institution's ecclesiastical relationship with its priest and demands that the institution be held liable for civil damages for failures of religious leaders in that capacity. The nature of the relationship between parishioner and clergy and the nature of the relationships formed within a religious community are such that secular terminology, especially legal terminology, is inapposite.

It is the function of church authorities to determine the essential qualifications of the clergy person and whether a particular candidate or minister possesses such qualifications. The process for selection, seminary training, rigorous formation by spiritual standards, ordination for a lifetime commitment of service, assessment of suitability for assignment, and ongoing formation in relations to spiritual direction are directed by the tenets of each individual faith. This process is central to a religious institution because the cleric (whether priest, rabbi, shaman, guru, or minister) is the person responsible for the transmission of the faith and evangelization of his or her religious community. Moreover, the ongoing ecclesiastical relationship between a religious institution and its clergy is rooted in the church's view of the functions of its ministry. Discipline reflects concepts of penance, admonition, and reconciliation. This is not the same as secular employment and this Court should reverse the appellate

court's creation of a legal fiction that it could be evaluated as such.

Based on the principle of religious autonomy, courts throughout the United States have been sensitive to avoid the reflexive use of secular employment and negligence concepts to describe these relationships. It would be both inappropriate and unconstitutional for a court to determine, after the fact, that ecclesiastical authorities negligently supervised or retained a member of the clergy. To permit such an intrusion would have a chilling effect on the prospective actions of religious institutions as to a core religious function, the preparation and ongoing formation of ministers, by grafting secular employment concepts foreign to the ecclesiastical relationship. Once begun, religious leaders would be forced to advert to these concepts, deferring to state control of the internal affairs of religious denominations, a result violative of the text and history of our Constitutions.

Parishioners also seek to impose an implied "contractual" duty on the church and establish a special duty of care based on the religious tenets of their faith. Church doctrine and dogma are inevitably implicated by an evaluation of the obligations arising from relationships between Parishioners and their clergy and religious institution. Moreover, a judicial inquiry on this subject may lead to an impermissible finding that certain denominations are "more reasonable" than others.

There is no dispute that a parishioner may seek to hold an individual clergy

member liable for his own misconduct. In the instant case, the claims against Father Malicki for assault and battery remain pending and are not before this Court. In fact, not only does the Archdiocese condemn abuse in whatever form it takes, but such activity is antithetical to the very principles of love of God and one's neighbor upon which the Archdiocese is founded.

Based on the foregoing, Petitioners urge this court to reverse the Third District Court of Appeals' denial of their Motion to Dismiss. Parishioners' claims are not actionable in that they violate the Florida Constitution and the Free Exercise and Establishment Clause of the First Amendment to the United States Constitution.

ARGUMENT AND LEGAL ANALYSIS

I. The United States Constitution and Florida Constitution Prohibit Secular Courts From Exercising Jurisdiction Over The Claims Asserted by Parishioners in this Case

The Complaint in this action implicates and involves core religious issues: (1) How should a church choose, train, and supervise its clergy?; (2) What is the nature of the relationship between clergy and church member?; and (3) What is the nature of the relationship between a religious institution and its clergy?

Parishioners seek to impose liability on the Archdiocese based on duties arising from and performed pursuant to religious doctrine. Parishioners' expectations of the Archdiocese do not arise from secular concepts, but rather from their religious beliefs and the doctrine of their church.

The constitutional principle of religious autonomy protects churches from the exercise of governmental power in areas of traditional religious authority. It operates as a bar to judicial inquiry into matters that necessarily involve the assessment (as a basis for decision), application, and interpretation of religious doctrine or policy. See e.g., Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997) (holding that Constitution prohibits inquiry into the reasonableness of an ecclesiastical relationship); Dausch v. Ryske, 52 F.3d 1425 (7th Cir. 1994) (holding that inquiry into whether church owed reasonable duty to parishioner would be invalid under the Free

Exercise Clause); Schmidt v. Bishop, 779 F.Supp. 321 (S.D.N.Y. 1991) (finding any inquiry into the policies and practices of the Presbyterian Church in hiring or supervising the clergy raised First Amendment dilemmas of entanglement).

The First Amendment has two distinct but complementary protections for religious liberty -- the Establishment Clause and the Free Exercise Clause. The first clause is prophylactic in nature in that it bars governmental intrusion or entanglement into religious matters. Lemon v. Kurtzman, 403 U.S. 602 (1971) (principal objective of the Establishment Clause is to prevent “as far as possible, the intrusion of either [religion or government] into the precincts of the other”). It acts as a structural restraint on the government, including the courts, from scrutinizing the internal affairs of religious bodies.

The second clause guarantees that each individual may practice his or her faith freely, without governmental intrusion or scrutiny. Serbian Eastern Orthodox Diocese v. Milivojebich, 426 U.S. 696, 711 (1976). Cf. Hadnot v. Shaw, 826 P.2d 978 (Okl. 1992) (“The First Amendment will protect and shield the religious body from liability for the activities carried on pursuant to the exercise of church discipline. Within the context of ecclesiastical discipline, churches enjoy an absolute privilege from scrutiny by the secular authority.”). Based on these fundamental freedoms, civil courts must take every precaution so that they do not tread on these responsibilities at the behest

of civil litigants.

In direct conflict with the appellate court's decision in this case to allow Parishioners to proceed with their claims against the Archdiocese, two Florida District Courts of Appeal reached the opposite conclusion on the same question of law. In Doe v. Evans, 718 So. 2d 286, 293 (Fla. 4th DCA 1998), rev. granted, 735 So.2d 1284 (Fla. 1999), a parishioner sued her church, diocese, and bishop, alleging breach of fiduciary duty, negligent hiring, supervision, and retention, based on her sexual relationship with her pastor. The Fourth District Court of Appeal concluded that all of the claims were barred by the excessive entanglement doctrine of the First Amendment because the determination of the plaintiff's claims would require a secular court to interpret church law, policies, and practices.⁴

Similarly, in Carnesi v. Ferry Pass United Methodist Church, 770 So.2d 1286 (Fla. 5th DCA 2000), rev. granted, No. SC00-2579 (Fla. Mar. 29, 2001), a church secretary brought action against her church and church conference, arising from the alleged sexual harassment, assault, battery, and false imprisonment committed by a church volunteer. The Court held that a determination of the Plaintiff's claims would require an unconstitutional inquiry of agency relationships within the Church.

⁴The parties in this action have submitted Amicus Briefs to this Court in Doe v. Evans. The Archdiocese submitted its Amicus Brief with J. Lloyd Knox, Presiding Bishop of The Florida Annual Conference of the United Methodist Church.

The Complaint in this action similarly invites the Court to violate constitutional protections of religious freedom. This Court should decline the invitation.

The procedures regulating the standards for formation, selection, and supervision of clergy and the relationship between parishioners, clergy, religious leaders, and their church are set forth by the ecclesiastical tenets of that individual church. Indeed, the formation, selection, and supervision of clergy is central to the mission of every religious body. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16-17 (1929). The United States Supreme Court has stated, “[f]reedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.” Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952). Therefore, any judicial determination of the reasonableness of these procedures within the Archdiocese violates the Florida Constitution and the First Amendment of the Federal Constitution.⁵

⁵ The religious freedom clause in the Florida Constitution provides as follows:

Religious freedom

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

If this Court were to allow Parishioners to proceed on these claims, “any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious domination, a result violative of the text and history of the establishment clause.” Schmidt v. Bishop, 779 F.Supp. 321, 331 (S.D.N.Y. 1991). Accordingly, Counts I and II should be dismissed as a matter of constitutional law.

II. The Appellate Court Erred in Applying the “Neutral Principles of Law” Test to Parishioners Claims

The Appellate Court improperly relied on Jones v. Wolf, 443 U.S. 595 (1979) in holding that the application of “neutral principles of law” to adjudicate Parishioners’ claim would not violate the First Amendment. The “neutral principles of law” doctrine cited by the Third District Court of Appeal does not apply to clergy hiring cases.

In Jones v. Wolf, 443 U.S. 595, 611 (1979), the Supreme Court held that “[t]here are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.” The

Art. I, § 3, Fla. Const.

The First Amendment of the U.S. Constitution states in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

limited application of the “neutral principles” doctrine to church property disputes was recognized in Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986), wherein the Court stated, “the ‘neutral principles’ exception to the usual rule of deference applies only to cases involving disputes over church property.” The Court further stated:

The “neutral principles” doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be. The claim here relates to appellant’s status and employment as a minister of the church. It therefore concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.

In Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606, 611 (Minn. Ct. App. 1996), the Court reached the same conclusion in stating, “[t]he present case does not involve a property dispute or a membership dispute. As a result, the neutral principles of law analysis is inappropriate.” As the allegations in this case implicate church government, order, and discipline, the appellate court misapplied the “neutral principles” test.

In Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the United States Supreme Court addressed the constitutionality of an unambiguous statutory prohibition on the possession of a specific controlled substance, peyote, which conflicted with its use as a religious sacrament. The Court held that laws that impede an individual’s exercise of religion are no longer entitled

to strict scrutiny when they are neutral on their face and generally applicable. In Smith, however, the Supreme Court was not asked to address the general tort liability theories alleged in the instant case.⁶ Such theories do not lend themselves to the category of “valid and neutral law[s] of general applicability” described by the Smith Court. Unlike the enforcement of an actual written contract, statutory prohibition, or general application of tax, which may be applied objectively, the very nature of Parishioners’ claims require substantial subjective scrutiny into the reasonableness of a religious establishment’s conduct.

The claims brought by parishioners implicate religious doctrine by the very nature of the tort system, whereby the particular conduct of a religious institution would need to be assessed as to its reasonableness compared to other conduct.

Moreover, even if the First Amendment does not bar Parishioners’ claim, it is clear that Florida’s Religious Freedom Restoration Act, §761.03, Florida Statutes dictates the use of strict scrutiny to evaluate this case. This Act clarifies the test requiring a compelling state interest for governmental entanglement or burden on religion.

761.03. Free exercise of religion protected

⁶In fact, the Smith Court carefully distinguished the principle of church autonomy and cited with approval the line of cases that control here.

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a **compelling governmental interest**; and

(b) Is the **least restrictive** means of furthering that compelling governmental interest.

(2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

(emphasis supplied).

A simple assertion of an interest is insufficient to make it compelling. As the U.S. Supreme Court stated in Cantwell v. Connecticut, a compelling interest should be “narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state....” 310 U.S. 296, 311 (1940). Any interest in providing a particular cause of action for the Parishioners against the Archdiocese does not overcome the entanglement and effect on religious liberties. Moreover, Parishioners have adequate remedies – i.e., claims for monetary damages against the individual who directly caused the alleged harm.

This Court has previously refused to allow interference with the free practice of religion absent a compelling interest, even in life and death situations. In Public

Health Trust of Dade County v. Wons, 541 So.2d 96 (Fla. 1989), the government sought to compel a mother to receive a necessary blood transfusion even though such a procedure was contrary to her religious beliefs. The government argued it had an interest in protecting the rights of the mother's children who could be orphaned if the mother was not required to take the transfusion. This Court noted:

[We are faced with] the difficult decision of when a **compelling state interest** may override the basic constitutional rights of privacy and religious freedom. . . . It is difficult to overstate this right because it is, without exaggeration, the very bedrock on which this country was founded.

Id. at 97-98 (emphasis supplied). This Court concluded that the burden of the state's interest in maintaining life was not compelling enough to interfere with the right to practice religion. See id.

The state also does not have a compelling interest in awarding damages in a civil context to those allegedly wronged by a religious decision. Goodman v. Temple Shri Ami, 712 So.2d 775 (Fla. 3d DCA 1998), appeal dismissed as improvidently granted, 737 So.2d 1077 (Fla. 1999). In Goodman, the Third District Court of Appeal held that a claim for damages arising out of an "employment" dispute did not rise to the necessary level of a compelling interest. The Court affirmed the dismissal of a Rabbi's claims against a Temple for its decision to terminate him as his religious

leader because of disputes over the way he observed tradition and his religious style. The Third District agreed with the trial court that the rabbi's employment and common-law tort claims were constitutionally barred. The Court stated:

We conclude that the trial court correctly dismissed the claims. . . . In order for the trial court to have resolved these disputes, it would have had to immerse itself in religious doctrines and concepts and "determine" whether the religious disagreements were a "valid" basis for termination of Rabbi Goodman's services. . . . Inquiring into the adequacy of the religious reasoning behind the dismissal of a spiritual leader is not a proper task for a civil court.

Goodman, 712 So. 2d at 777. This same reasoning is applicable to the claims set forth by Parishioners for damages arising from alleged negligence and a breach of implied contract. Parishioners cannot frame their claims in the terminology of tort law without reference to church "procedures", their status as "parishioners", "God", or a duty to "spiritually guide."

The Archdiocese respectfully requests for the reasons set forth herein that this Court reverse the Third District's ruling that Parishioners' claims are not barred by the First Amendment.

III. Parishioners' Negligent Hiring, Retention and Supervision Claims Are Constitutionally Barred In That Their Determination Would Require Excessive Entanglement With Core Religious Affairs

Counts I and II of the Complaint allege that the Archdiocese of Miami was

negligent in “hiring”, “failing to make inquiries into (Father Malicki’s) background”, “failing to have procedures for hiring its associate pastors”, “negligently placing”, and “negligently retaining the Defendant, Father Malicki, **as a priest**”. (Complaint, ¶¶19(e), 29(e)). The Appellate Court held that ordinary tort principles should determine whether the Archdiocese was negligent in the selection, retention and supervision claim of Father Malicki, an associate pastor and Roman Catholic priest. Malicki, 718 So.2d at 548. Such scrutiny violates the First Amendment of the U.S. Constitution.

The United States Supreme Court has held that the ordination of clergy is a "quintessentially religious" matter, "whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." Serbian Eastern Orthodox, 426 U.S. at 714.

In Doe v. Evans, when faced with the same issue as the instant case, the Fourth District Court of Appeal stated:

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 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.

Id. at 291 (emphasis supplied) (citations omitted); see also Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F. 2d 360 (8th Cir. 1991); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir.1990).

The resolution of these claims would inevitably require this Court to pass judgment on whether the procedures for selecting, retaining, and supervising clergy as prescribed by the Canons of the Catholic Church are adequate. As Chief Judge Schwartz of the Third District Court of Appeal stated in his dissenting opinion, "The Archdiocese could be held liable in this case only if the jury determines either that it did not act as a reasonable businessman or as a reasonable church. . . . the former process is inconceivable and the latter unconstitutional..." Malicki, 771 So.2d at 550.

The weight of authority from other state supreme courts supports the conclusion that civil trial courts cannot entertain negligent selection and supervision claims because this would entail passing judgment on the performance of duties imposed on a religious institution by ecclesiastical law.

The Wisconsin Supreme Court held in Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995) that the tort of negligent hiring and retention of a priest cannot be maintained against a religious governing body due to the concerns of excessive entanglement into the church's laws, practices, and policies. In Pritzlaff, the Court stated:

To establish a claim for negligent hiring or retention, Ms. Pritzlaff would have to establish that the Archdiocese was negligent in hiring or retaining Fr. Donovan because he was incompetent or otherwise unfit. But, we conclude that **the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices.** Therefore, Ms. Pritzlaff's claim against the Archdiocese is not capable of enforcement by the courts.

The rationale for this rule [is] as follows:
Examining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms. **Negligence requires the court to create a 'reasonable bishop' norm.** Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender. . . . If negligent selection of a potential pedophile for the religious office of priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far

shall the courts' qualitative entanglement with religious selectivity extend?

533 N.W.2d at 790 (citations and quotations omitted). See also Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1999); Heroux v. Roman Catholic Bishop of Providence, 1998 WL 388298 (R.I. 1998); Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997). These courts have specifically refused to entertain claims similar to those posed by Parishioners against a religious institution even when the underlying actions were based on improper sexual conduct.

In Heroux, the Rhode Island Supreme Court found that if it were to impose a standard of care on the regulation and supervision of Roman Catholic priests by their bishops, it would be exercising unconstitutional jurisdiction over the internal ecclesiastical decisions of the church. The plaintiffs in Heroux claimed that they were sexually molested as children and pleaded various counts framed in negligent selection, supervision, retention, and assignment; premise liability; breach of special duty; and intentional conduct. The well-reasoned Heroux Court answered the question of whether the First Amendment would be violated if the Court exercised its common law jurisdiction to impose a duty on hierarchical defendants (Roman Catholic bishops and others who allegedly had religious authority to exercise supervision over priests) in the following manner:

This Court is satisfied that in order for it to determine whether or not the relation between a bishop and his priests is sufficiently agent-like to give rise to a common law duty to exercise reasonable care in the exercise of whatever supervisory authority the bishop has the Court is required to examine and analyze the rules, policies and doctrine of the Roman Catholic Church. That examination and analysis is prohibited by the First Amendment. **The same prohibition will prevent this Court from analyzing those rules, doctrines and policies of the Roman Catholic religion to determine what the hierarchical defendants should have known, as distinguished from what they actually knew.**

* * *

This Court concludes from its analysis of the authorities. . . that this Court lacks jurisdiction to adjudicate claims that the hierarchical defendants negligently hired, retained, disciplined or counseled their subordinate priests. Inquiry into such matters would plainly take this Court into religious questions beyond its jurisdiction. **Claims arising out of allegations of negligent supervision based on what the hierarchical defendants should have known . . . require the same invasion into religious rules and policy. . . .** It does not matter whether the legal theory under which the claims are brought is ordinary negligence, premises liability, breach of fiduciary relations, misrepresentation by concealment, or breach of parental responsibility by one in loco parentis. So long as the asserted cause of the injury alleged to be compensable by damages is a failure merely to exercise reasonable care to control the conduct of a religious subordinate, this Court will lack jurisdiction to adjudicate the claim.

Heroux at *9 (emphasis supplied) (citations omitted).

In Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997), the Supreme Court of

Missouri affirmed a trial court's decision that the First Amendment barred claims for negligent hiring, ordination, retention, and supervision, as well as independent negligence of the church defendant based on allegations of child sexual abuse. The Court concluded that allowing such claims could result in an unconstitutional endorsement of religion by approving one model for a church's clerical decisions.

The Gibson Court did, however, exercise jurisdiction as to the Plaintiff's intentional tort claims, in holding "religious conduct intended or certain to cause harm need not be tolerated under the First Amendment." Id. at 247. The court ultimately dismissed the intentional tort claim because there was no allegation that the religious institution intended to harm the plaintiff. The court explained:

Intentional infliction of emotional distress requires not only intentional conduct, but conduct that is intended only to cause severe emotional harm. The Gibsons' allegations do not support the inference that the Diocese's sole purpose in its conduct was to invade the Gibsons' interest in freedom from emotional distress. The trial court did not err in dismissing the Gibsons' claim.

Id. at 249 (citations omitted). In the instant case, the allegations of intentional misconduct are directed only to Father Malicki and are not before this Court.

In Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997), the Supreme Court of Maine held that the First Amendment barred similar claims against the Roman Catholic Church and explained:

It would . . . be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant. . . . Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination. . . . Pastoral supervision is an ecclesiastical prerogative.

We conclude that, on the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its 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. at 445.

The Archdiocese urges this Court to adopt the approach in Pritzlaff that the claims against the Archdiocese, including those claims that the church defendant “should have known” about Father Malicki’s propensity for misconduct, are barred by the First Amendment.⁷ If this Court finds that such claims do not violate the First Amendment, however, it cannot allow Complaints that involve the guesswork inherent in determining what a church “should have known”. Rather, it should require specific

⁷The creation of any standard whatsoever would have to be applicable to all churches to avoid the charge that the standard itself was discriminatory. The application of any standard in a congregational setting is difficult to imagine. The result would not only cause interference with the operation of a church, but the rewriting of its policy. Indeed, a legitimate question would be the identify of a defendant in a case where the entire church membership is involved in “calling” or “ordaining” a minister.

facts demonstrating actual knowledge of the church defendant. For instance, the Ohio Supreme Court in Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991) held that in order to ensure that the exercise of jurisdiction was limited to the least restrictive means any claims against church defendants must be pled with specificity. Based on the overwhelming case law in this area, it is clear that any judicial inquiry into the policies and practices of the Archdiocese in hiring, training, supervising, and retaining their clergy is barred by the First Amendment. Accordingly, the Archdiocese's Motion to Dismiss should be granted.

IV. Parishioners' Respondeat Superior Claims Are Constitutionally Barred In That Secular Agency Principles Can Not Be Applied to Ecclesiastical Relationships

In Counts III and IV, Parishioners seek to hold the Archdiocese vicariously liable for the alleged misconduct of Father Malicki under a theory of respondeat superior. Under the doctrine of respondeat superior, an employer cannot be held liable for the tortious or criminal acts of an employee, unless the acts were committed during the course of the employment and to further a purpose or interest of the employer.

Even if the First Amendment were not to bar Parishioners' respondeat superior actions based on the above-referenced constitutional principles, the claims must be dismissed in that Parishioners cannot establish that Father Malicki's alleged actions were in accordance with the principles of the Archdiocese or in furtherance of the

Archdiocese's purpose. See Iglesia Cristiana v. L.M., 2001 WL 454698 (Fla. 3d DCA May 2, 2001) (holding that church was not vicariously liable under respondeat superior where a pastor committed sexual assault on a minor in that it was not the type of conduct the pastor was employed to perform and the assault was not motivated by a desire to serve the church).

Other state courts have refused to hold religious institutions vicariously liable for conduct of their clergy. For example, in Destefano v. Grabrian, 763 P.2d 275 (Colo. 1998), the Court refused to hold the diocese vicariously liable for the claims against a priest who engaged in a sexual relationship with a woman in the course of marital counseling. The Court explained:

A priest's violation of his vow of celibacy is contrary to the instructions and doctrines of the Catholic church When a priest has sexual intercourse with a parishioner it is not part of the priest's duties nor customary within the business of the church. Such conduct is contrary to the principles of Catholicism and is not incidental to the tasks assigned a priest by the diocese. Under the facts of this case there is no basis for imputing vicarious liability to the diocese for the alleged conduct...

Id. at 287.

In Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997), the Supreme Court of Maine addressed the issue of whether it could apply agency principles to relationships within a religious institution. The Swanson Court held that

the First Amendment barred a respondeat superior claim against the Catholic Church and explained:

When a civil court undertakes to compare a 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**. . . . to permit civil courts to probe deeply enough into the allocation of power within a church so as to decide . . . religious law . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.

Even assuming that the trial court could discern the existence of actual authority without determining questions of church doctrine or polity or could base the requisite agency relationship on apparent authority, constitutional obstacles remain. **The imposition of secular duties and liability on the church as a "principal" will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest.**

* * *

Because of the existence of these constitutionally protected beliefs governing ecclesiastical relationships, **clergy members cannot be treated in the law as though they were common law employees.** The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation. . . . **To import agency principles wholesale into church governance and to impose liability for any deviation from the secular standard is to impair the free exercise of religion and to control denominational governance.**

Swanson, 692 A.2d at 443-45 (emphasis supplied) (footnotes and citations omitted).

In Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997), the Court held that sexual misconduct is not within the scope of employment of a priest in that it is forbidden by the vows of a priest, and thus cannot support liability. See also Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998) (dismissing claims against church for vicarious liability, breach of fiduciary duty, and negligence claims arising from alleged sexual relations of a minister and a parishioner who sought marital counseling, because such conduct could not fall within the scope of minister's actual or apparent authority); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993) (holding Episcopal priest was not acting within the scope of his church duties when he engaged in sexual relations and thus there could be no vicarious liability imputed to the diocese or bishop); Nutt v. Norwich Roman Catholic Diocese, 921 F.Supp. 66 (D. Conn. 1995) (finding that priest's sexual abuse of minor children was not motivated by any purpose that would serve the Church).

The trial court would have to consider the following factors to determine whether Father Malicki's alleged conduct was within his duties as a spiritual leader:

- (1) Whether the alleged conduct was the kind the church or Archdiocese gave him authority to perform (i.e., religious in nature);

(2) Whether the alleged conduct occurred within the time and space limits of the clergy's canonical or religious duties; and

(3) Whether the alleged conduct was activated at least in part by a desire to serve the Archdiocese.

Sussman v. Florida East Coast Properties Inc., 557 So.2d 74, 75-76 (Fla. 3d DCA 1990). Problems of excessive entanglement are inevitable if a trial court is asked to determine whether a priest, minister, or rabbi was on or off duty when he engaged in conduct or whether that the conduct was against the laws of the religious denomination and beyond the scope of his employment. Pritzlaff, 533 N.W.2d at 791.

The doctrine of respondeat superior cannot be applied in this case without delving into the religious duties of the clergy and the canonical relationships between clergy and religious institutions. Therefore, any claims for vicarious liability of a religious institution for the independent misconduct of clergy must be constitutionally barred. Further, if this Court were to exercise jurisdiction as to these claims, there can be no vicarious liability in that sexual misconduct is outside the realm of clergy's religious duties.

V. Parishioners' Breach Of Implied Contract Claims Are Constitutionally Barred In That A Determination Of The Rights And Obligations Between Parishioners And Their Religious Institution Is Prohibited

Parishioners ask the Court in Counts V and VI to impose a duty based on an

implied contract between themselves and the Archdiocese, arising from their status as parishioners and the trust they placed in the church. In substance, however, these counts more closely resemble breach of special or fiduciary duty claims. Any obligations that the Archdiocese may owe Parishioners are inextricably intertwined with religious doctrine and relationships and cannot be addressed by a secular court.

Parishioners reject well-settled law in seeking to impose implied duties and obligations upon the Archdiocese. The Court cannot evaluate their relationship with the Archdiocese and the clergy without delving into religious matters, including any expectations arising from their status as parishioners.

The United States Supreme Court has long held that “[m]an’s relations to his God was made no concern of the State”. United States v. Ballard, 322 U.S. 78, 86 (1944).⁸ Numerous courts have refused to entertain civil claims against church defendants based on breach of implied, special or “fiduciary” duties. In H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995), the Court concluded that religion was not

⁸Courts have uniformly rejected claims by those alleging harm arising from violation of a religious duty. Roman Catholic Bishop of San Diego v. Superior Court, 50 Cal.Rptr.2d 399 (Cal. App. 1996) (rejecting claim alleging violation of religious duty of chastity); O’Conner v. Diocese of Honolulu, 885 P.2d 361 (Haw. 1994) (rejecting claim to overturn excommunication). The creation or recognition of a religious responsibility is an expression of a church’s own tradition, doctrine, and Scripture, particularly if that duty is set forth in church law. See EEOC v. Catholic University, 83 F.3d 455, 463-65 (D.C. Cir. 1996). Thus, civil litigants may not use the civil courts to enforce or seek relief from religious duties.

merely incidental to the plaintiff's relationship with defendant church, but rather that it was the foundation of the relationship. The Court held that any duty owed by Catholic priests and/or the diocese to its parishioners was a religious question beyond the jurisdiction of secular courts. In the instant case, because Parishioners have not and cannot allege that the Archdiocese owed them a duty without invoking religious beliefs, this Court must dismiss the breach of implied contract claims. See Schmidt v. Bishop, 779 F.Supp. 321 (S.D.N.Y. 1991).

In Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997), the Court refused to impose an implied duty because the plaintiff could not allege secular facts supporting her allegation that the diocese had a relationship with the plaintiffs "as recipients of services controlled, directed and/or monitored" by diocese, and that the diocese "held a fiduciary relationship of trust and confidence."

In Langford v. Roman Catholic Diocese of Brooklyn, 271 A.D.2d 494 (N.Y. 2000), the Court held that a parishioner could not maintain a civil action against the defendant for breach of a duty when a priest seduced her. The Court held that it could not evaluate claims framed in terms of implied duty without violating the First Amendment because:

[I]n order for plaintiff's cause of action to meet constitutional muster, the jury would have to be able to determine that a fiduciary relationship existed and premise

this finding on neutral facts. The in-surmountable difficulty facing plaintiff, this court holds, lies in the fact that **it is impossible to show the existence of a fiduciary relationship without resort to religious facts**. In order to consider the validity of plaintiff's claims of dependency and vulnerability, the jury would have to weigh and evaluate, inter alia, the legitimacy of plaintiff's beliefs, the tenets of the faith insofar as they reflect upon a priest's ability to act as God's emissary. . . .To instruct a jury on such matters is to venture into forbidden ecclesiastical terrain.

Langford, 677 N.Y.S.2d at 901.

In Smith v. O'Connell, 986 F.Supp. 73 (D. R.I. 1997), the Court distinguished a breach of fiduciary claim in this context from other claims. The Smith court held that when a claim rests on a breach of fiduciary duty theory, an impermissible examination of church doctrine would be required to ascertain the nature of any fiduciary relationship between the church officials and the victim. Id. at 81.

The existence of an implied duty or special trust awarded to the clergy, if any, is derived from the parishioners' religious beliefs. Absent this religious relationship, these claims would be no different than one against a friend or neighbor with whom they had such a relationship. See Langford v. Roman Catholic Diocese of Brooklyn, 271 A.2d 494 (N.Y. 2000) (noting that once the religious aspect of the Complaint was stripped away, plaintiff's only claim would be for seduction which is not actionable in the state).

In Doe v. Dorsey, 683 So.2d 614 (Fla. 5th DCA 1996), the Court held that similar allegations of sexual misconduct were not actionable simply because the conduct occurred between an adult parishioner and priest. The court noted:

It is [Plaintiff's] position that his consent should be considered invalid because the priest "deliberately and calculatingly caused a relationship whereby [the priest] was able to exert undue influence, dominion and control over the Plaintiff." We do not believe that [a crime] has been committed when a person of normal intelligence submits to a sexual relationship due to the "emotional attachment" to another person.

683 So.2d at 617-18. Likewise, no breach of implied contract can arise when a person of normal intelligence submits to such a relationship, even if it is with a member of the clergy.

In the instant case, Parishioners have tried to circumvent the jurisprudence establishing that there can be no judicial imposition of a fiduciary duty owed by a religious institution by couching these counts in terms of "implied contract". Even if the implied contract claims were not barred by the First Amendment, it is clear that Parishioners cannot set forth a claim under secular law. In order to plead a claim for breach of contract, they must allege facts to establish offer, acceptance, consideration, specific contractual terms, breach of the contract, and damages. See generally Mettler, Inc. v. Ellen Tracy, Inc., 648 So.2d 253 (Fla. 2d DCA 1994). Generally, actions for

breach of implied contracts involve unjust enrichment. Rite-Way Painting & Plastering, Inc. v. Tetor, 582 So.2d 15, 17 (Fla. 2d DCA 1991). Implied contracts have been explained as follows:

[O]bligations imposed by law to prevent unjust enrichment. The essential elements for an action under this theory are a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.

Id. at 17. Parishioners cannot allege that the Archdiocese unduly benefitted from their work at the church or by their membership in the parish. Rather they attempt to impose a contractual duty on the Archdiocese for their safety. Even if an implied contract did arise from Jane Doe I's services in exchange for tuition or Jane Doe II's religious contribution to the parish so that her children could attend the parochial school, the measure of damages would be limited to the value of those services as contemplated by the parties. Standard Fish Co. v. 7337 Douglas Enterprises, Inc., 673 So.2d 503, 505 (Fla. 3d DCA 1996).

Under Florida law, sexual relationships between professionals and their clients are not breaches of "mutual trust" except where provided by statute.⁹ Clergy are

⁹ For example, §459.0141, Florida Statutes, prohibits sexual conduct between an osteopathic physician and client. Similar prohibitions have been enacted for dentists, Section 466.027, Florida Statutes; paramedics, Section 401.411, Florida Statutes;

specifically exempt from §491.0112, Florida Statutes, which prohibits sexual misconduct between a psychotherapist and client. See §491.014, Florida Statutes. The absence of analogous legislation governing sexual relations between clergy and parishioner appears to reflect the Florida legislature’s recognition that an enactment imposing a trust or “fiduciary relationship” between priest and parishioner would not withstand constitutional scrutiny.

According to Parishioners’ own allegations, the purported implied contract arose from their religious relationship. For instance, the yearly “contribution” described by Jane Doe II in her complaint (R. 30) is a religious imposition by the church on all members of the Roman Catholic faith who want to enroll their children in the Archdiocesan Catholic school system. This relationship cannot be scrutinized without also examining church doctrine and Parishioners’ expectations regarding the church. As such, any claims for breach of implied contract or fiduciary duty are barred by the First Amendment.

doctors and others practicing medicine, Section 458.329, Florida Statutes; and talent agents, Section 468.415 Florida Statutes.

CONCLUSION

The Third District Court of Appeal erred in holding that the claims set forth by Jane Doe I and Jane Doe II can be decided based on neutral principles of law without evaluating church law and policies. Based on the United States Constitution, Florida Constitution, and the above-cited case law, this Court should reverse the Appellate Court by granting The Archdiocese of Miami and St. David Catholic Church's Motion to Dismiss.

Respectfully submitted on this _____ day of June, 2001.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to May Cain and William J. Snihur, Jr., CAIN & SNIHUR, Skylake State Bank Building, 1550 N.E. Miami Gardens Drive, Suite 304, North Miami Beach, Florida 33179, and Doug McIntosh, Esq., McIntosh, Sawran, Peltz & Cartaya, P.A., 1776 East Sunrise Boulevard, P.O. Box 7990, Ft. Lauderdale, Florida 33338-7990 on this ____ day of June, 2001.

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**CERTIFICATE OF COMPLIANCE WITH FONT
REQUIREMENTS OF RULE 9.210(2)**

We hereby certify that this brief complies with the font requirements of Rule 9.210 and that the font used is Times New Roman 14-point.

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