IN THE SUPREME COURT OF FLORIDA

CASE NO: 01-179

ST. DAVID CATHOLIC CHURCH and THE ARCHDIOCESE OF MIAMI,

Petitioners,

vs.

JANE DOE I and JANE DOE II,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

RESPONDENTS' AMENDED BRIEF ON THE MERITS

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INTRODUCTION

The Petitioners, St. David Catholic Church and The Archdiocese of Miami, were the appellants in the Third District Court of Appeal and the defendants in the trial court, the Circuit Court of the Eleventh Judicial Circuit, In and For Miami-Dade County, Florida. The Respondents herein, Jane Doe I and Jane Doe II, were the appellees in the District Court of Appeal and the plaintiffs in the trial court. Although the Petitioners are referring to the Respondents collectively as "Parishioners" [please see page 1 of the Petitioners' Brief on the Merits] they were also employees of the Petitioners. The symbol "R" will be used to refer to the Record on Appeal. The symbol "T" will be used to refer to the transcript contained in the record on appeal.

STATEMENT OF THE CASE AND FACTS

The Respondents accept the Statement of the Case and Facts in the Petitioners' Brief on the Merits as generally accurate with the following additions and corrections.

On July 31, 1998 the Appellants/Plaintiffs, Jane Doe I and Jane Doe II filed an eight count Complaint and Demand for Jury Trial against the Appellees/Defendants, Father Jan Malicki, St. David Catholic Church and The Archdiocese of Miami. (R. 1-35). The Complaint included the following Counts:

As to Jane Doe I, a minor at the time of the incidents sued upon:

Count I: Negligence Against St. David Catholic Church and The Archdiocese of Miami. (R. 4-9). In Count I, in addition to those allegations contained in the Petitioners' Statement of the Case and Facts, Jane Doe I, alleged the following: that she was an employee of St. David Catholic Church, who was under the direct supervision and control of the Appellees, Father Jan Malicki, St. David Catholic Church and The Archdiocese of Miami. (R. 4). Jane Doe I was a student at St. Thomas Catholic High School and that in order for Jane Doe I to attend St. Thomas, the Appellee/Defendants agreed to pay Jane Doe I's tuition in exchange for her employment at St. David Catholic Church. (R. 5). That at all times material, Father Jan Malicki was acting in the course and scope of his employment with the Appellees/Defendants, St. David Catholic Church and The Archdiocese of Miami. (R. 5). On numerous occasions during the time that Jane Doe I was working and was a parishioner at St. David

Catholic Church, Father Malicki unlawfully fondled, molested, touched, abused, sexually assaulted and/or battered Jane Doe I, while Father Malicki was an Associate Pastor at St. David Catholic Church, and on the premises of St. David Catholic Church. (R. 5). Additionally, on numerous occasions during the time that Jane Doe I was a minor and was working at St. David Catholic Church, Father Malicki unlawfully served alcohol to her. (R. 5).

St. David Catholic Church and The Archdiocese of Miami owed a duty to Jane Doe I (and others of tender years) (as its employee and parishioner) to hire persons reasonably suited for teaching, counselling, spiritually guiding, supervising and leading employees and parishioners of St. David Catholic Church. (R. 6).

St. David Catholic Church and the Archdiocese of Miami breached their duty owed to Jane Doe I by hiring Father Malicki who they knew or in the exercise of reasonable care, should have known, was unsuited for teaching, counselling, spiritually guiding, supervising and leading employees and parishioners. (R. 6). St. David Catholic Church and the Archdiocese of Miami also breached their duty by failing to make inquiries into Father Malicki's background, or if it did make inquiries, by doing so in an incomplete and negligent manner, or by failing to act on the information it was provided in a prudent manner. (R. 6-7). Further, the Appellants St. David Catholic Church and The Archdiocese of Miami were negligent in placing Jane Doe I under the supervision of Father Malicki where they knew or should have known of Father Malicki's propensities to commit acts of sexual assault

and/or batteries, and/or molestation and/or indecent conduct upon other persons, and especially the young, and had done so in the past. (R. 7-8). The Archdiocese of Miami and St. David Catholic Church negligently failed to immediately report one or more prior incidents of suspected child abuse and/or sexual assault to the Department of Youth and Family Services in violation of Section 415.504, Fla. Stat., and instead of reporting same, permitted Father Malicki to continue to lead its employees and parishioners. (R. 8).

As a direct and proximate result of the negligence of the Appellees/Defendants Archdiocese of Miami and St. David Catholic Church, Jane Doe I was unlawfully fondled, molested, touched, abused, sexually assaulted and/or battered and has suffered mental pain, anguish, suffering as well as deep psychological fear. (R. 9). Jane Doe I's psychological, religious and social development has been permanently impaired as is her ability to lead and enjoy a normal life. (R. 10). She has had to incur sums of money for the psychological treatment related to the injuries sustained by her. (R. 10).

Count III: Respondeat Superior against St. David Catholic Church and The Archdiocese of Miami. (R. 16). In Count III, Jane Doe I alleged the following in addition to those allegations contained in the Petitioners' Brief on the Merits: That on numerous occasions, the Defendant, Father Jan Malicki, an employee in the course and scope of his employment with the Appellees/Defendants Archdiocese of Miami and St. David Catholic

Church unlawfully, violently, maliciously and in a grossly negligent manner, and without justification, sexually assaulted, molested, fondled, abused and battered the then minor Appellant/Plaintiff, Jane Doe I. (R. 16). That on numerous occasions, the Defendant, Father Jan Malicki, as an employee in the course and scope of his employment with the Appellees/Defendants Archdiocese of Miami and St. David Catholic Church unlawfully served alcohol to the then minor Plaintiff, Jane Doe I. (R. 16).

The molestations and other acts occurred in the office and in the rectory of the Appellee/Defendant, St. David Catholic Church, while Father Malicki was performing his duties as a priest and while he was supervising other employees/ parishioners of St. David Catholic Church and The Archdiocese of Miami, who were entrusted to his care and control, and were performed in furtherance and during the course of the daily operation of the church itself. (R. 16). At the time of the molestations and other acts by Father Malicki, Jane Doe I, was in the care, control and custody of Father Malicki, the Archdiocese of Miami and St. David Catholic Church, who had undertaken to spiritually guide, counsel, instruct, supervise and safeguard the then minor Jane Doe I. (R. 17). Father Malicki's conduct was perpetrated under the guise of better serving the Appellees/Defendants St. David Catholic Church and The Archdiocese of Miami. (R. 17).

Jane Doe I had entrusted her bodily safety to the care and control of the Appellants/Defendants, and she could not freely or independently walk away from their control. (R. 17). That due to

the forgoing, the Appellees/Defendants Archdiocese of Miami and St. David Catholic Church were under a special duty to protect the then-minor Appellant/Plaintiff, Jane Doe I. (R. 17-18). Father Malicki purported to act on behalf of his principals, the Appellees/Defendants Archdiocese of Miami and St. David Catholic Church, upon whose apparent authority Jane Doe I relied. (R. 18). Father Malicki was aided in the commission of his tortious conduct by the existence of his agency relationship with the Appellees/Defendants St. David Catholic Church and The Archdiocese of Miami. (R. 18). St. David Catholic Church and The Archdiocese of Miami knew or should have known that Father Malicki, their employee, was a threat to others, including Jane Doe I. (R. 18).

The tortious conduct was committed by Father Malicki, during the course and scope of his employment, on the property owned, operated and managed by the Appellees/Defendants The Archdiocese of Miami and St. David Catholic Church. (R. 18). These acts occurred in the office and rectory of St. David Catholic Church. (R.18-19). The Defendant Father Malicki, represented to the then-minor Jane Doe I, that his conduct and behavior was part of God's intended plan and that his conduct in "touching" Jane Doe I, was essential to and part of his functioning as an effective and better priest. (R. 19). Jane Doe I was unlawfully sexually assaulted, battered, molested, and fondled, by Father Malicki, between September 1, 1994 and June 12, 1997, while she was still a minor, and under the care, custody and control of St. David Catholic Church and The Archdiocese of Miami. (R. 19-20). As a result, St. David Catholic

Church and The Archdiocese of Miami are vicariously liable for the torts committed by their employee, Father Malicki. (R. 19).

Count V: Implied contract Against St. David Catholic Church and The Archdiocese of Miami. (R. 25). In addition to those allegations recited in the Petitioners' Brief on the Merits, the following allegations were made: Jane Doe I realleges the unlawful fondling, sexual assault and battery, and unlawful serving of alcohol to the then minor Plaintiff, Jane Doe I, by Father Malicki, while during the course and scope of his employment with The Archdiocese of Miami and St. David Catholic Church. (R. 25-26). St. David Catholic Church and The Archdiocese of Miami paid the registration and/or tuition fees for Jane Doe I to attend St. Thomas Catholic High School, and in exchange therefor, Jane Doe I was contractually bound to work for St. David Catholic Church and The Archdiocese of Miami. (R. 26). As a result of this contract, St. David Catholic Church and The Archdiocese of Miami were contractually obligated and responsible for Jane Doe I's welfare and safety while she was working for them and to provide a work environment free of physical assault, battery or obscene invasion of Jane Doe I's person. (R. 27).

St. David Catholic Church and The Archdiocese of Miami breached this duty when they hired and subsequently retained, and failed to properly monitor, Father Malicki, despite the fact that his prior employment record indicated that his character, demeanor, background and temperament would be and were detrimental to the safety and welfare of the parishioners and employees of St. David

Catholic Church. (R. 27-28).

As a result of this breach of implied contract, Jane Doe I, while a minor, was unlawfully fondled, touched, abused, sexually assaulted and/or molested by Father Malicki. (R. 28). The damages are then pled as in the previous counts. (R. 28).

As to Jane Doe II, who was of majority age at the time of the incidents sued upon:

Similar counts of Negligence (Count II) (R. 10), Respondeat Superior (Count IV) (R. 21), and Implied Contract (Count VI) (R. 29) were filed against St. David Catholic Church and The Archdiocese of Miami. With respect to the Implied Contract count, on behalf of Jane Doe II, it was alleged that Jane Doe II worked for St. David Catholic Church and the Archdiocese of Miami in exchange for her yearly "contribution" to fulfill her membership requirement so that her children could attend St. David Catholic School, and as a result, Jane Doe II's children were enrolled and attending St. David Catholic School. (R. 30). The complaint does not alleges that she was working as a "volunteer" as stated by the Petitioners. As a result of this contract, St. David Catholic Church and The Archdiocese of Miami were contractually obligated and responsible for Jane Doe II's welfare and safety while she was working for them and to provide a work environment free of physical assault, battery or obscene invasion of Jane Doe I's person. (R. 30).

There is a reservation for punitive damages and a demand for jury trial on all counts contained in the Complaint. (R. 34).

A hearing on the Appellees/Defendants/ Motions to Dismiss was

held on March 1, 1999. (T. 1-36). At that hearing the Court said:

> THE COURT: Separation of church and state precludes the court from getting involved in the workings of the church--that's what I read, it seems to boil down to. (T. 4).

Counsel for The Archdiocese of Miami and St. David Catholic Church told the court at T. 13-14:

> --if you're on the fence, it would be a more practical resolution of this to grant our motion, let the Third--
>
> THE COURT: I'm not on the fence in case you're interested after reading--
>
> MR. GILBRIDE: Okay. Well--
>
> THE COURT: I'm going to let you all make your oral argument. I'm not on the fence. I know what you're going to say practically, to grant your motions and let the Third decide. If I ruled that way, I don't think I would be fulfilling my responsibility that I took the oath on, which is that I follow the law no matter how it goes.

Later, in the hearing the Court ruled:

> THE COURT: Okay. As to the church, I'm granting the motion with prejudice, so you can go up immediately to the Third District. I think the most cogent argument I have before me, with all the argument and cases is simply separation of church and state. I don't think the judicial system can get into the workings of the Catholic Church or any religious organization.
>
> If I'm wrong, Third District will reverse me. I'll welcome you back with open arms and we'll proceed on that basis.
>
> And I think, if you want to, I don't know about the case against Mr. Milicki [sic], Father Milicki [sic], you want to proceed on your discovery, that you can certainly do so. However, it may make more sense to wait until Third rules on this before you even go forward. Depends what you all want to do. (T. 21).

Thereafter, the court stayed the proceedings pending appeal. (T. 35). A written order dismissing with prejudice, those counts of

the complaint as they related to the defendants, The Archdiocese of Miami and St. David Catholic Church, on the sole basis of the First Amendment, was signed by the court. (R. 131).

SUMMARY OF THE ARGUMENT

The issues and causes of action raised in the complaint, filed by Jane Doe I and Jane Doe II, do not involve the interpretation of religious doctrine or practices of the Catholic Church. Further, they are not violative of the First Amendment's Establishment Clause or Free Exercise Clause, as it is unnecessary to interpret religious doctrine and/or practices in determining whether liability exists for these secular causes of action. The Catholic Church must not be permitted to hide behind claims of First Amendment protection in order to shield themselves from criminal and civil liability for the sexual misconduct of their employees of which they knew or should have known.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DISMISSING ALL COUNTS OF THE COMPLAINT WITH PREJUDICE AGAINST THE ARCHDIOCESE OF MIAMI AND ST. DAVID CATHOLIC CHURCH BASED UPON THE FIRST AMENDMENT, AND THEREBY ALLOWING A RELIGIOUS INSTITUTION TO PERMIT SEXUAL BATTERIES TO BE PERPETRATED UPON EMPLOYEES BY ANOTHER SUPERVISING EMPLOYEE, WHEN IT KNEW OR SHOULD HAVE KNOWN THAT SUCH MISCONDUCT WAS OCCURRING IN ITS OFFICE AND ON ITS PREMISES. (respectfully restated).

The Petitioners are seeking blanket immunity for religious institutions to protect them from liability in situations in which any other employer in the United States of America would be liable. When an employer knows or should have known that a child employee (or any employee for that matter) is the victim of sexual abuse by her/his supervisor, in its own offices, on its own premises, while the child (or other employee) is at work, that employer, whether a religious institution or not, should not be able to hide behind the First Amendment.

Article I, Section 21 of the Florida Constitution provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The trial court, by its dismissal with prejudice of THE ARCHDIOCESE OF MIAMI and ST. DAVID CATHOLIC CHURCH has, in fact, deprived JANE DOE I and JANE DOE II of their constitutionally protected right to seek redress in a court of law for civil damages for negligence, implied contract and respondeat superior. This case has nothing to do with religion or the religious practices of THE ARCHDIOCESE OF MIAMI or ST. DAVID CATHOLIC CHURCH. However, the trial court, by

dismissing this action against THE ARCHDIOCESE OF MIAMI and ST. DAVID CATHOLIC CHURCH, under the guise of the First Amendment has permitted a religious institution to escape civil liability that any employer would have to any employee, regardless of religious belief. Certainly, the Catholic Church does not condone sexual battery and lewd and lascivious acts being perpetrated upon its parishioner/employees by its priests. Religious freedom is being used as a subterfuge herein.

The First Amendment to the United States Constitution provides:

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

Article I, Section 3, of the Florida Constitution is substantially the same. It provides:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof.

The Establishment Clause was intended to afford protection against sponsorship, financial support, and active involvement of the sovereign in religious activities. Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed. 2d 749, 755 (1971). The Supreme Court of the United States, in Lemon, developed a three prong test to determine whether a statute violates the Establishment Clause. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the statute must not foster excessive government entanglement with religion. Id. at 612-613, 91 S.Ct. at 2111, 29 L.Ed 2d at 755.

While the case at bar does not concern a particular statute, the same analysis can be used to demonstrate that First Amendment principals are not being violated by the subject matter of this case or the ability of the court to hear such a case.

The matter to be addressed, in the case at bar, is the redress for injuries suffered by two individuals as a result of the negligence of THE ARCHDIOCESE OF MIAMI and ST. DAVID CATHOLIC CHURCH in preventing two of their parishioner/employees, one of whom was a minor, from having sexual batteries and lewd and lascivious acts perpetrated upon them by a priest, during their employment by these entities under the priest's direct supervision, and which occurred on church property. These unlawful acts have no bearing whatsoever on the religious practices of the Catholic Church.

In Bear Valley Church v. DeBose, 928 P.2d 1315 (Colo. 1996)(En Banc) reh. den. 1997, a child sued the church and a minister alleging inappropriate touching of the child by the minister during counseling sessions. The Supreme Court of Colorado held that the Free Exercise Clause of the First Amendment was not a defense to the minister, nor did it protect the church from liability. The Supreme Court of Colorado in Bear Valley cited Destefano v. Grabrian, 763 P.2d 275, 283 (Colo. 1988) (citing Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct., 1526, 32 L.Ed. 2d 15 (1972), noting that in Destefano the court held that when a defendant raises the First Amendment as a defense, the threshold question is "whether the conduct of the defendant is religious." Bear Valley Church at

1320. Applying that threshold question to the case at bar, the answer is a resounding "no."

Destefano involved a Catholic priest who was providing marital counseling to a woman with whom he engaged in an adulterous relationship. The Supreme Court of Colorado in Destefano stated at page 284 (and cited in Bear Valley Church at page 1321):

> We recognized that the Catholic Church requires its priests to take a vow of celibacy, a principle the defendants acknowledged in their brief by agreeing that "sexual activity by a priest is fundamentally antithetical to Catholic doctrine."

Also, in the Bear Valley Church case, the Supreme Court of Colorado noted at page 1323:

> In Van Osdol v. Voght, 908 P. 2d 1122, 1128 (Colo. 1996) we held that "[t]he decision to hire or discharge a minister is itself inextricable from religious doctrine." However, we took care to distinguish internal hiring disputes within religious organizations from general negligence claims filed by injured third parties:
>
> > "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 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. See Moses v. Diocese of Colorado, 863 P. 310, 320-321 (Colo. 1993)(holding that although courts must not become embroiled in church doctrine, a claim of negligent hiring of a minister is actionable because it does not require such interpretation or weighing of religious belief but instead is merely application of a secular standard to secular conduct.) cert. denied --U.S.--. 114 S.Ct. 2153, 128 L.Ed. 2d 880 (1994)." Van Osdol 908 P.2d at 1132-33, n. 17. As we noted in Van Osdol, Id. Courts may review an injured third party's claim that a religious institution negligently hired, supervised or failed to discharge one of its employees without implicating or running afoul of the First Amendment. See e.g. Moses, 863 P.2d at 321, 329-31.

More recently, in Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998), parishioners who were also church employees, as in the case at bar, brought an action for malpractice and breach of fiduciary duty against a minister and negligence against the church and Title VII violations, where a minister was engaged in sexual relations with the plaintiffs during the course of marital counseling. The Fifth Circuit held that these claims were not barred by the First Amendment. In so holding the court stated at page 335:

> The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protections to the secular components of these relationships. Although Baucum's contention that the Free Exercise Clause prohibits the judiciary from reviewing the conduct of those involved in relationships that are not purely secular in nature might, if adopted, foster the development of some important spiritual relationships by eliminating the possibility of civil or criminal liability for participating members of the clergy, the constitutional guarantee of religious freedom cannot be construed to protect secular beliefs and behavior, even when they comprise a part of an otherwise religious relationship between a minister and a member of his or

> her congregation. To hold otherwise would impermissible place a religious leader in a preferred position in our society. Cf. County of Allegheny v. ACLU, 492 U.S. 573, 593-94, 109 S.Ct. 3086, 3101, 106 L.Ed. 2d 472 (1989) (interpreting the First Amendment to preclude the state from favoring religion over non-religion). (Emphasis, theirs.)

The Supreme Court of New Jersey has also recently ruled on this issue. In F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997), the Supreme Court of New Jersey held that the free exercise of religion does not permit members of the clergy to engage in inappropriate sexual conduct with parishioners who seek pastoral counseling. Id. at page 701. It noted that "a clergyman should not be permitted to victimize a parishioner whose vulnerability has led the parishioner to seek refuge in pastoral counseling." Id. at 705. The Supreme Court of New Jersey also rejected the Catholic Diocese of Camden's claims that the First Amendment prohibited lay teachers in church-operated elementary schools to engage in collective bargaining respecting secular terms and conditions of employment in South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School, 696 A.2d 709, 712 (N.J. 1977). In the aforementioned case, the Supreme Court of New Jersey noted that:

> A major crack occurred in the "wall of separation" on June 23, 1997 when the United States Supreme Court decided Agostini v. Felton, --U.S. --, 117 S.Ct. 1997, 138 L.Ed. 391 (1997). The Court overruled Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed. 2d 290 (1985), and held the New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged students pursuant to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C.A. secs. 6301-6514, did not involve an excessive entanglement of church and state and therefore was not violative of the Establishment Clause. Id. at

715.

See also Smith v. O'Connell et al., 986 F. Supp. 73 (Rhode Island Dist. 1997) for a comprehensive discussion about neutral tort law principles of general application without the need to interpret religious doctrine.

Any institution, regardless of religious affiliation, practices, or beliefs, that permits sexual batteries to be perpetrated in its own offices and on its own property, by an employee whom they knew or should have known had such deviant propensities, is responsible for such acts. In Tallahassee Furniture v. Harrison, 583 So. 2d 744 (Fla. 1st DCA, 1991) the First District Court of Appeal held at page 753:

> Negligent retention of an employee occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate his unfitness, but the employer fails to take further action, such as investigation, discharge or reassignment.

Similarly, in the case at bar, JANE DOE I and JANE DOE II, allege that THE ARCHDIOCESE OF MIAMI and ST. DAVID CATHOLIC CHURCH, knew or should have known that Father Jan Malicki was unsuited for teaching, counselling, spiritually guiding, supervising and leading employees and parishioners.(R. 6). It was further alleged that ST. DAVID CATHOLIC CHURCH and THE ARCHDIOCESE OF MIAMI were negligent in placing JANE DOE I and JANE DOE II under the supervision of Father Jan Malicki where they knew or should have known of Father Malicki's propensities to commit acts of sexual assault and/or batteries, and/or molestation and/or indecent conduct upon other persons, especially the young, and had done so in the past.(R. 7).

It was also alleged, as to JANE DOE I, that ST. DAVID CATHOLIC CHURCH and THE ARCHDIOCESE OF MIAMI failed to immediately report one or more prior incidents of suspected child abuse and/or sexual assault to the Department of Youth and Family Services in violation of Section 415.504, Fla. Stat., and instead of reporting same permitted Father Malicki to continue to lead its employees and parishioners. (R. 8).

It is well established in Florida, that upon the filing of a Motion to Dismiss a Complaint, the trial court must confine itself to the four corners of that complaint and view all allegations as true and in a light most favorable to the plaintiff. Similar complaints with the same causes of action as in the case at bar, have withstood motions to dismiss on numerous occasions. See McEvoy v. Union Oil Company, 552 So. 2d 1169 (Fla. 3d DCA, 1989); Gonpere Corporation v. Reboll, 440 So. 2d 1307 (Fla. 3d DCA, 1983); Hennagen v. Department of Highway Safety and Motor Vehicles, 467 So. 2d 748 (Fla. 1st DCA, 1985); Dye v. Richard, 183 So. 2d 83 (Fla. 4th DCA, 1966). Moreover, in Doe v. Fort Lauderdale Medical Center Management, Inc., 522 So. 2d 80 (Fla. 4th DCA, 1988), the doctrine of respondeat superior in a sexual battery case has been specifically recognized.

The Appellants herein, JANE DOE I and JANE DOE II, should not be deprived of the protection afforded them by such case law and the Florida Constitution to seek redress for such injuries simply because the Defendants/Appellants herein happen to be religious institutions. The bringing of such an action neither advances nor

inhibits religion, nor fosters any government entanglement with religion. There would be no question of liability of these entities if they were not religious organizations, especially where the priest who committed these heinous acts was their direct supervisor at work. An employer in the State of Florida may be held liable for the wilful torts of its employees committed against third persons if the employer knew or should have know that the employee posed a threat to others. Island City Flying Services vs. General Electric Credit Corp., 585 So. 2d 274, 276 (Fla. 1991) quoting Williams vs. Feather Sound, Inc., 386 So. 2d 1238 (Fla. 2nd DCA, 1980). The relevant inquiry in such cases is whether it was reasonable to permit the employee to perform the job in light of the information about the employee which the employer should have known.

In Hemphill v. Zion Hope Primitive Baptist Church of Pensacola, Inc., 447 So. 2d 976, 977 (Fla. 1st DCA, 1984), the First District Court of Appeal held that where no interpretation of church doctrine was required to effect a judicial construction of contractual provisions pertaining to the discharge of corporate employees, the trial court's acceptance of jurisdiction did not violate the constitutional requirement of separation of church and state. Likewise, there is no interpretation of church doctrine required for a court to determine whether THE ARCHDIOCESE OF MIAMI and ST. DAVID CATHOLIC CHURCH were negligent in the case at bar. The liability of religious institutions for their tortious conduct in civil actions has long been beyond issue. Heath v. First

Baptist Church, 341 So. 2d 265 (Fla. 2d DCA, 1977)(trip and fall at church).

It is firmly established in Florida that sexual misconduct by persons in any profession or occupation will not be tolerated. Sexual misconduct is prohibited if the perpetrator is a psychologist as stated in Section 490.009(2)(k), Fla. Stat. (1998). An emergency medical technician or paramedic faces disciplinary action if engaging in "sexual misconduct with a patient, including inducing or attempting to induce the patient to engage, or engaging or attempting to engage the patient, in sexual activity. Section 401.411, Fla. Stat. (1998). In fact, sexual misconduct is prohibited in the practice of osteopathic medicine pursuant to Section 459.0141, Fla. Stat. (1989); in the practice of the dentist-patient relationship pursuant to Section 466.027; Fla. Stat., (1981); in the physician-patient relationship pursuant to Section 458.329, Fla. Stat. (1981); in the talent agent-artist relationship pursuant to Section 468.415, Fla. Stat. (1989); in the athletic trainer-athlete relationship pursuant to Section 468.717, Fla. Stat., (1995)--all because these relationships are founded on mutual trust. It is a felony of the third degree for a psychotherapist who commits sexual misconduct with a client, or former client, when the professional relationship was terminated primarily for the purpose of engaging in sexual conduct. Section 491.0112(1), Fla. Stat. 1990. This statute expressly includes clergymen who provide (or purport to provide) "counseling of mental or emotional illness, symptom, or condition." See Section

491.0112(4)(a); 491.014(3),(6), Fla. Stat. (1998). Additionally, Section 491.0112(2), Fla. Stat. (1990), provides that it is a felony of the second degree for a psychotherapist to violate Section 491.0112(1) by means of therapeutic deception. It should be noted that pursuant to Section 491.0112(3), Fla. Stat., (1990), the giving of consent by the client to any such act shall not be a defense to these offenses. The Appellants herein deserve no less protection merely because they were employed by the Catholic Church.

Where public health, safety or welfare is at issue, the State and its political subdivisions have been permitted to pass certain laws which do not violate First Amendment concerns. For example, this Honorable Court, in Moore v. Draper, 57 So. 2d 648 (Fla. 1952), upheld a law which authorized commitment in a state sanitarium and compulsory isolation and hospitalization of persons with tuberculosis. The statute was attacked on the basis that it discriminated against all persons other than those of a certain religious faith and belief. Id at 648. This Court held at page 650:

> Religious freedom cannot be used as a cloak for any person with a contagious or infectious disease to spread such disease because of his religion.

Likewise, in the case at bar, THE ARCHDIOCESE OF MIAMI and ST. DAVID CATHOLIC CHURCH cannot hide behind the cloak of religious freedom to escape civil liability for the injuries its employee inflicted upon JANE DOE I and JANE DOE II.

This Court has also held, in Town vs. State of Florida ex rel.

Reno, 377 So. 2d 648, 651 (Fla. 1979), reh. den. 1980, that the right to free religious expression did not permit the petitioner therein to use residential property as a church for a religion in which the use of cannabis was an essential portion of the religious practice.

Finally, this issue has come before a Florida District Court of Appeal in the case of Doe v. Dorsey, 683 So. 2d 614 (Fla. 5th DCA, 1996). Although the Fifth District Court of Appeal ruled that the Plaintiff's claim therein was barred by the statute of limitations, the court noted at page 617:

> In any event, we are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur. We recognize that the State's interest must be compelling indeed in order to interfere in the church's selection, training and assignment of it clerics. We would draw the line at criminal conduct. (Emphasis added).

The Appellants are not unmindful of the Fourth District Court of Appeal's recent decision in Doe v. Evans, 718 So. 2d 286 (Fla. 4th DCA, 1998) reh. den. 1998, review granted on June 23, 1999 by this Court in Doe v. Evans, et al., Case no. 94,450 (and wherein both parties hereto filed Amicus Curiae Briefs). In Doe v. Evans the Fourth District Court of Appeal dismissed with prejudice, a complaint alleging a consensual sexual relationship between a priest and a parishioner whom he was seeing for marital counselling. Doe v. Evans is factually distinguishable from the instant case, as JANE DOE I and JANE DOE II alleged that the sexual misconduct (including fondling, sexual battery) was non-consensual,

and because of the fact that both JANE DOE I and JANE DOE II were parishioners and employees under the direct control and supervision of Father Malicki. Further, Father Malicki had been counselling both JANE DOE I and JANE DOE II and occupied a position of trust and confidence.

Likewise, the case of Carnesi v. Ferry Pass United Methodist Church, 770 So. 2d 1286 (Fla. 5th DCA, 2000) rev. granted, No. SC00-2579 (Fla. Mar. 29, 2001) is not factually on point with the case at bar. Neither Doe v. Evans nor Carnesi deals with sexual abuse of a minor, nor criminal sexual battery committed against an adult by the religious institution's clergyman/employee against another of the religious institution's employees. Doe v. Evans deals with a consensual relationship between a non-employee parishioner and pastor; and Carnesi v. Ferry Pass et al involves the alleged sexual harassment of Carnesi, a church secretary, by a **church volunteer** who served as the chairman of a committee staffed by volunteers, who hired Carnesi. Carnesi involves lay employees of a church making decisions about lay employees.

The Third District Court of Appeal below, correctly noted in Doe v. Malicki, 771 So. 2d 545 (Fla. 3d DCA, 2000) that:

> The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Beginning early in First Amendment jurisprudence, however, the courts recognized that although the freedom of religious beliefs guaranteed by the First Amendment is absolute, conduct based on said beliefs is nevertheless subject to regulation for the protection of society. Reynolds v. United States, 98 U.S. 145 (1878). (emphasis, theirs).

Our courts are not prohibited from all involvement in religious disputes, but merely those which involve a determination of underlying questions of religious doctrine and practices. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church 393 U.S. 440, 449, 89 S. Ct. 601, 606, 21 L. Ed. 2d 658, 665 (1969). In the case at bar, the suit by JANE DOE I and JANE DOE II is directed at conduct rather than belief, has a secular purpose and effect, and is justified by governmental interests in public health, safety and welfare. See Department of Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 89 S. Ct. 876 (1990); State v. Jackson, 576 So. 2d 866 (Fla. 3d DCA, 1991).

The case of Iglesia Cristina La Casa Del Senor, Inc. vs. L.M., 783 So. 2d 353 (Fla. 3d DCA, 2001) is distinguishable. In the case at bar, the Plaintiffs below did plead that the acts of the Defendant Father Malicki were committed during the course of the employment and to further a purpose or interest of the employer. Further, the Plaintiffs did plead that the acts occurred in the church rectory, in the church office and on church property, where the Defendant Father Malicki was performing his duties as a priest and while he was supervising other employees/parishioners, who were entrusted to his care and control and were performed in furtherance and during the daily operation of the church itself. (R. 16). It was further alleged that these acts were perpetrated under the guise of better serving the Employers/Petitioners herein. This was not the same factual case as proven at trial in the Iglesia Cristina case.

Further, THE ARCHDIOCESE OF MIAMI and ST. DAVID CATHOLIC CHURCH have not shown that the complained of state action has a coercive effect upon the practice of religion. Albington School District v. Schempp, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844, 858 (1963). The defendants herein have not shown that their conduct was in fact, religious and that by bringing this action, the courts of our state have a coercive effect upon the practice of their religion. See also Destefano v. Grabrian, 763 P. 2d 275, 283 (Colo. 1988) citing Wisconsin v. Yoder, 406 U.S. 205, 215-216, 92 S. Ct. 1526, 1533-1534, 32 L. Ed. 2d 15 (1972). Since the alleged sexual misconduct of the priest clearly falls outside of the protections afforded by the First Amendment, there cannot be protection afforded by the First Amendment for the priest's employers, who knew or should have known what he was doing in his supervisory capacity of other church employees and parishioners on church property. In Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D. Conn. 1995), it was held that a priest's pedophilic sexual abuse of alter boys was an abandonment of church tenets.

The Third District Court of Appeal determined that the resolution of this case does not turn on the resolution of theological or religious doctrinal questions. Doe v. Malicki, supra. See also, Moses v. Diocese of Colorado, 863 P.2d 310, 320 (Col. 1993). In Jones v. Wolf, the United States Supreme Court noted at 443 U.S. 595, 606, 99 S. Ct. 3020, 3027, 61 L. Ed. 2d 775 (1979):

> The neutral principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. (emphasis supplied).

The United States Supreme Court upheld the right of the State of California to require a religious institution to register as a seller of religious materials and report and pay sales and use tax on its in-state sales of such religious materials. Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990). In that case it was determined that the tax was neutral in nature and did not offend the excessive entanglement test.

The instant case deals with common law tort remedies which involve no state sponsorship or support of any particular religion--nor religion at all. Further, the determination by a court as to whether these remedies will be imposed has nothing to do with any entanglement between church and state. The state involvement herein is no different than that which arises from the Heath slip and fall case.

It should be noted that THE ARCHDIOCESE OF MIAMI has had no problem with "entanglement" of church and state in the action it filed as plaintiff (and which JANE DOE I and JANE DOE II in their memorandum requested the trial judge to take judicial notice of the court's own file) against Lloyds of London, Centennial Insurance Company and Cigna, in Case no. 95-19547, in the Circuit Court of the Eleventh Judicial Circuit In and For Miami-Dade County, Florida. A copy of the Fifth Amended Complaint was attached to

Plaintiff's Memorandum of Law in Opposition to Defendant Archdiocese and St. David's Motions to Dismiss, and is a part of the record on appeal herein. (R. 159). Ironically, that suit was filed by THE ARCHDIOCESE OF MIAMI to recover money from its insurance companies for funds it paid in settlement, to other victims of sexual batteries perpetrated by a teacher at Nativity School, which was owned and operated by THE ARCHDIOCESE OF MIAMI. How may our courts permit a religious institution to use the First Amendment when it sees fit, permitting it to sue on its own behalf, but not to be sued?

Blanket immunity under the guise of the First Amendment should not be provided to religious institutions merely because they are religious institutions. When they are operating within our state, and employing and purporting to spiritually guide our children (and others) as parishioners, they should have to abide by the same laws that apply to all employers in the State of Florida and in the United States.

CONCLUSION

For the foregoing reasons and authorities, the decision of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Amended Brief on the Merits was furnished via U.S. Mail to James F. Gilbride, Esq., Gilbride, Heller & Brown, P.A., One Biscayne Tower, Suite 1570, 2 South Biscayne Boulevard, Miami, Florida 33131, J. Patrick Fitzgerald, Esq., 110 Merrick Way, Suite 3-B, Coral Gables, Florida 33134, Peter A. Miller, Esq., Conroy, Simberg & Ganon, P.A., 2600 Douglas Road, Suite 311, Coral Gables, Florida 33134, Robert S. Glazier, Esq., 25 S.E. Second Avenue, Suite 1020, Miami, Florida 33131, Philip M. Burlington, Esq., Caruso, Burlington, Bohn & Compiani, P.A., Barristers Building, Suite 3A, 1615 Forum Place, West Palm Beach, Florida 33401 and to Douglas M. McIntocsh, Esq., McIntosh, Sawran, Peltz and Cartaya, 1776 E. Sunrise Boulevard, Fort Lauderdale, Florida 33304 this 23rd day of July, 2001.

CERTIFICATION OF SIZE AND STYLE OF TYPE

It is hereby certified that the size and style of type used in this brief is 12 point proportionately spaced Courier New.