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' Reply 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), were the Appellees in the Third District Court of Appeal and Defendants in the Trial Court.[1] Respondents, Jane Doe I and Jane Doe II, were the Appellants in the Third District Court of Appeal and Plaintiffs in the Trial Court.

[1]The introduction in Respondents' Brief on the Merits mistakenly refers to the Petitioners as the "Appellants." In fact, however, it was the Respondents that appealed Judge Tobin's trial court Order granting with prejudice the Archdiocese of Miami and St. David Catholic Church's Motion to Dismiss.

STATEMENT OF THE CASE AND THE FACTS

Petitioners dispute Respondents' Statement of the Case and Facts to the extent that Respondents set forth numerous blanket conclusions of law. Although factual allegations are accepted as true for purposes of a Motion to Dismiss, the Court need not accept conclusions of law. W.R. Townsend Contracting v. Jensen Civil Construction, 728 So.2d 297 (Fla. 1st DCA 1999).

SUMMARY OF ARGUMENT

The United States Constitution, Florida Constitution, and applicable Florida law prohibit this Court from adjudicating Respondents' claims in that the procedures for the ordination, retention, training, and supervision of a Catholic priest are rooted in Church doctrine and theological evaluation. A determination whether these procedures were "reasonably" performed would require an impermissible and unconstitutional entanglement with Church polity. Based on the foregoing, Petitioners urge this Court to reverse the Third District Court of Appeals' denial of Petitioners' Motion to Dismiss.

ARGUMENT AND LEGAL ANALYSIS

I. THE APPELLATE COURT ERRED IN DENYING ARCHDIOCESE OF MIAMI AND ST. DAVID CATHOLIC CHURCH'S MOTION TO DISMISS IN THAT IT WOULD BE UNCONSTITUTIONAL TO DETERMINE THE REASONABLENESS OF DECISIONS RELATING TO THE ORDINATION, TRAINING, SUPERVISION, AND RETENTION OF A CATHOLIC PRIEST

Respondents assert in a conclusory manner that the adjudication of this action would neither inhibit religion nor foster government entanglement in religion. Respondents also question whether the Archdiocese's alleged conduct "was in fact, religious" in nature. These issues have been well-settled, however, since the United States Supreme Court 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 Diocese v. Milivojebich, 426 U.S. 696, 714 (1976).

The Constitutional right of religious autonomy protects churches from the exercise of governmental power in areas of traditional religious authority. The First Amendment specifically 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).

A judicial determination whether the Archdiocese's ordination, hiring, retention, and supervision of Father Malicki was "reasonable" would necessarily cause government entanglement in the core religious decisions of the church. Further, the threat of a determination that the Church's decision was "unreasonable" would cause an unconstitutional "chilling effect" on church affairs and the exercise of religious freedoms.

The adoption of neutral tort principles also creates practical problems that extend beyond constitutional doctrine. If this Court were to apply the "knew or should have known" standard set forth by the lower court, it would be necessary to formulate a "reasonable cleric standard, which would vary depending on the cleric involved, i.e., reasonable Presbyterian pastor standard, reasonable Catholic archbishop standard, and so on." L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1995). For instance,

some religious organizations, including the Roman Catholic Church, have internal disciplinary procedures that are influenced by religious concepts of reconciliation and mercy. Due to this strong belief in redemption, a bishop my determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. If a court were subsequently asked to review the bishop's conduct to determine whether the bishop should have taken some other action, the Court would be required to evaluate the religious concepts of faith, responsibility, and obedience. Moreover, the potential exists for a religious institution to be second-guessed by a Court that is unfamiliar with the responsibilities of a clergyman in a particular religious faith. As the Wisconsin Supreme Court explained, "[o]ur pluralistic society dislikes having its neutral jurists place themselves in the role of a 'reasonable chief rabbi,' 'reasonable bishop,' etc. because the degree of involvement that must accompany such decisional framework for the civil tort judge." Id. at 442.

Respondents erroneously assert that the dismissal of their claims against the Archdiocese of Miami and St. David Catholic Church would deprive Petitioners of their right to seek redress in a civil court. The issue before this Court involves only the question of whether an action may be brought against a religious institution. Petitioners' Brief does not dispute that an individual clergy member may be held liable for his own intentional misconduct. In fact, Respondents' claim against Father

Malicki remains pending in the trial court.

Respondents cite Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998) for the proposition that the First Amendment does not bar their claims against the Archdiocese. The large excerpt of the Sanders opinion that is quoted in Respondents' Brief, however, did not relate to the potential liability of the church, but the liability of the individual minister in Sanders who allegedly committed sexual misconduct. Moreover, contrary to Respondents' reading of the Sanders opinion, the Court dismissed Plaintiffs' claim against their Church in their entirety. 134 F.3d at 338-40.

Similarly, contrary to Respondents' recitation of the holding in F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997), the Court's denial of the First Amendment defense related only to the clergyman who allegedly committed sexual misconduct. The appellate opinion in F.G. did not address whether a claim could be brought against the parishioner's religious institution arising from such misconduct. Therefore, the instant case is easily distinguishable in that the adjudication of Respondents' claim would require an examination of relationships between the parishioners and the religious institution, and relationships within the religious institution.

As Respondents set forth in their Brief on the Merits, it is a felony of the third

degree in the State of Florida for a psychotherapist to terminate a professional relationship primarily for the purpose of engaging in sexual conduct. See §491.0112(1), Florida Statutes. Contrary to Respondents' Brief, this statute does not expressly or impliedly include clergyman who provide "counseling of mental or emotional illness, symptom, or condition. In fact, clergyman of all religious denominations are specifically excluded from the prohibitions of Chapter 491 by §491.014(3), Florida Statutes, which states the following:

> No provision of this chapter shall be construed to limit the performance of activities of a rabbi, priest, minister, or clergyman of any religious denomination or sect, or use of the terms "Christian counselor" or "Christian clinical counselor" when the activities are within the scope of the performance of his regular or specialized ministerial duties and no compensation is received by him, or when such activities are performed, with or without compensation, by a person for or under the auspices or sponsorship, individually or in conjunction, by a person for or under the auspices or sponsorship, individually or in conjunction with others, of an established and legally cognizable church, denomination, or sect, and when the person rendering service remains accountable to the established authority thereof.

The express exclusion of clergymen from the ambit of Chapter 491's prohibition on sexual relations appears to reflect the Florida legislature's recognition that such a prohibition would be unconstitutional.

II. THE RESPONDEAT SUPERIOR CLAIMS MUST BE DISMISSED IN THAT COMMON SENSE DICTATES THAT A CATHOLIC PRIEST IS NOT HIRED TO ENGAGE IN SEXUAL ACTS WITH PARISHIONERS

With respect to the respondeat superior claims, the Third District Court of Appeal recently addressed an identical claim Elders v. United Methodist Church, 2001 WL 805467 (Fla. 3d DCA July 18, 2001). The Court revisited and appeared to recede from its own decision in Malicki in holding that a Church, Church Conference, and Church supervisors could not be held vicariously liable as a matter of law under the doctrine of respondeat superior for the sexual misconduct of a pastor. Id. at *2. The Elders Court also observed that "the Doe v. Malicki decision can be read impliedly to reject the respondeat superior theory..." on non-constitutional principles. Id. at *2, n.1. In Elders, the Court dismissed the respondeat superior claim in stating, "[a]s a matter of common sense, having sexual relations with a counselee is not part of the job responsibilities of a minister. See id. at *2 *citing* Iglesia Cristiana La Casa Del Senor v. L.M., 783 So.2d 353, 356-57 (Fla. 3d DCA 2001). Accordingly, even if the respondeat superior claims were not barred by the First Amendment, the respondent superior claims must be dismissed under principles of tort law in that a priest's sexual relations do not advance the interests of the Catholic Church.

Respondents cannot evade the essential elements of a respondeat superior claim

by asserting that Father Malicki led Jane Doe I and Jane Doe II to believe that his actions were intended to serve St. David Catholic Church and the Archdiocese of Miami. The interests and purposes of the employer are not affixed by the employee, but by the employer. In the instant case, the interests and purposes of the Catholic Church are dictated by centuries-old Church doctrine and dogma, which prohibits priests from having sexual relations with parishioners. If one were to accept Respondents' theory, a respondeat superior claim would arise whenever an employee justifies his misconduct by falsely attributing such actions to his employers' interests.

Respondents also make an ill-fated attempt to distinguish the recent decision in Iglesia Cristiana La Casa Del Senor v. L.M., 783 So.2d 353, 356-57 (Fla. 3d DCA 2000), wherein the Court held that a church may not be liable to a victim of a pastor's sexual assault under theories of respondeat superior or negligent supervision. According to Respondents, the instant case differs from Iglesia Cristiana in that the Complaint in this case contains allegations that Father Malicki's action were committed at his place of employment and during the course of his employment. The Court's ruling in Iglesia Cristiana was not based solely on the time and place of the pastor's misconduct, but the fact that his criminal act was not "the kind of conduct [the pastor] was employed to perform." Id. at 357.

Respondents also purport to distinguish the recent decision 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) by noting that Carnesi involved "lay employees of a church making decisions about lay employees" whereas the instant case arises from employment decisions with respect to a member of the clergy. Unlike the personnel decisions involving the church's lay employees, it is beyond dispute that the training, hiring, retention, and supervision of a priest is guided by church doctrine. Therefore, the application of the First Amendment in this case is even more compelling than in Carnesi, which involved a church volunteer.

As early as 1929 the United States Supreme Court held that it is the function of church authorities to determine what the essential qualifications of a clergy person are and whether the candidate possesses them. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929). More recently, the United States Supreme Court has stated, "freedom 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. 96 (1952); see also Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1167-68 (4th Cir. 1985) (the right to choose clergy without government restriction underlies the well-being of the religious community).

Lastly, Petitioners take exception to Respondents' flippant references to the

freedoms afforded by the First Amendment. For instance, Respondents repeatedly refer to the First Amendment as a "guise" and "cloak" that the Catholic Church is attempting to use as a shield. In Public Health Trust of Dade County v. Wons, 541 So.2d 96, 97-98 (Fla. 1989), this Court commented on the religious protections guaranteed by the First Amendment by stating, "[i]t is difficult to overstate this right because it is, without exaggeration, the very bedrock on which this country was founded." It is by no means a coincidence that our forefathers deemed religious freedom to be the "First" of our liberties.

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 Third District Court of Appeal's denial of The Archdiocese of Miami and St. David Catholic Church's Motion to Dismiss.

Respectfully submitted on this _____ day of July, 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, Kislak National 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, 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 and Philip Burlington, Esq., Caruso, Burlington, Bohn & Compiani, P.A., Barristers Building, Suite 3A, 1615 Forum Place, West Palm Beach, Florida 33401 on this _____ day of July, 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 Florida Rule of Appellate Procedure 9.210 and that the font used is 14-point Times New Roman.

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