IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JEFFREY WOODARD and CAROL GLOAD,	CASE NO. SC05-1986 4TH DCA NO. 4DO4-3531

Petitioners,

v.

JUPITER CHRISTIAN
SCHOOL and TODD
BELLHORN,

Respondents.

_____________________________/

ON APPEAL FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENTS' REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

The Statement of Facts contained in the Petitioners' Initial Brief correctly recites those portions of the Amended Complaint and Exhibits referred to. The Petitioners' Statement of Facts correctly recites the certified question. However, the Statement of Facts does not contain a complete recitation of the procedural history of the case and the basis of the trial court's dismissal.

This case began when the Petitioners Jeffrey Woodard ("Woodard") and Carol Gload ("Gload") filed a Complaint against Jupiter Christian School ("JCS") in October 2003. [R.1-91].

An Amended Complaint was served on February 24, 2004. [R.68-78]. The Amended Complaint added the Respondent Todd Bellhorn ("Bellhorn") as a Defendant and included a claim for "*negligent infliction of emotional distress – Chaplain/counselor's Breach Of Fiduciary Duty Of Confidentiality.*" [R.68-78]

The Amended Complaint was dismissed without prejudice on April 23, 2004. [R.101].

A Second Amended Complaint was filed. [R.102-171]. This Second Amended Complaint contained a virtually identical claim for negligent

infliction of emotional distress.

In the Second Amended Complaint, the Petitioners made the following allegations of fact that have been omitted from the Petitioners' Statement of Facts before this Court. These additional facts were as follows:

1. JCS is a Florida non-profit corporation in Jupiter, Florida. [R.102, Second Amended Complaint, Paragraph 2].
2. JCS *"was not formally or informally connected with any established church."* [R.102, Second Amended Complaint, Paragraph 7].
3. Bellhorn was an employee of JCS, employed as a *"secondary teacher-high school bible/chaplain."* [R.102, Second Amended Complaint, Paragraph 3].
4. As an employee of JCS, and *"at the express direction of JCS' administration"* Bellhorn was asked to meet with Woodard to ask him about his sexual orientation. [R.102, Second Amended Complaint, Paragraphs 3-15].
5. Following the directions of the unnamed administrators, Bellhorn then asked Woodard to tell him about Woodard's sexual orientation. [R.102, Second Amended Complaint, Paragraph 52].
6. Bellhorn disclosed Woodard's conversation to one or more JCS'

administrators. [R.102, Second Amended Complaint, Paragraph 16].

7. As a result of Bellhorn's disclosure to JCS' president Rich Grimm and/or Dean of Students Rachel Sanders, Woodard was expelled from the school and other consequences occurred. [R.102, Second Amended Complaint, Paragraph 60].

There are no allegations in the Second Amended Complaint that Bellhorn was a priest, rabbi, practitioner of Christian Science or minister. There is no allegation in the Second Amended Complaint that Bellhorn worked for or was a cleric of a religious organization or denomination usually referred to as a church. There is no allegation that JCS was a religious organization usually referred to as a church or a denomination usually referred to as a church. Further, there is no allegation that Bellhorn disclosed the conversation to anyone other than JCS' president and Dean of Students.

The Respondents' filed a Motion to Dismiss the Second Amended Complaint. [R.181-197]. The Motion to Dismiss alleged multiple grounds for dismissal. Among other grounds, the Motion to Dismiss raised the following issues:

1. The Supreme Court decision of Boy Scouts of America v. Dale, 530 U.S. 640 (2000) affirmed the First Amendment right of organizations such as JCS to exclude homosexuals.

2. The Plaintiffs failed to state a legally recognized claim because the Plaintiffs were asking the Court to " . . . *involve itself in a purely ecclesiastical matter in violation of the establishment clause of the First Amendment of the United States Constitution."*

3. The impact rule.

The trial court agreed with the Defendants' position as to the claim for emotional distress. [R.219-222]. The trial court dismissed the negligent infliction of emotional distress claim. The order of dismissal contains, among other matters, the following findings:

> 1. "*There is no allegation that the communications made between the Plaintiff and the Defendant, Todd Bellhorn (the clergy), were ever communicated to anyone other than Bellhorn's employer, the Defendant Jupiter Christian School.*"
>
> 2. " . . . *the Complaint does not allege any stand alone tort such as tortious interference with parental relationship nor the violation of a confidentiality statute which gives rise to a*

private cause of action for a violation."

3. The Florida Evidence Code, Florida Statute 90.505

" . . . cannot be construed to give rise to a private cause of action for breach."

4. Finally, the trial court stated that the Plaintiff was *"unable to state a cause of action as a result of the impact rule . . ."*

Based upon these holdings, the trial court dismissed the count with prejudice. The decision was then appealed.

SUMMARY OF ARGUMENT

The facts of this case present a unique pattern that is unlikely to occur frequently, if ever. The facts alleged are that a private Christian school "chaplain" violated an evidence code privilege by revealing a conversation with a student, resulting in the negligent infliction of emotional distress. Because of the unique factual situation, there is no great public importance and this Court should decline to review the decision below.

The trial court correctly found there was no cause of action for the alleged negligent disclosure of a communication by a high school student to a school counselor alleged to be a member of the clergy.

In dismissing the negligent infliction of emotional distress count of the amended complaint, the trial court correctly found there were no allegations that the communication between Woodard and Bellhorn was disclosed by Bellhorn to anyone other than Bellhorn's employer, JCS.

The trial court also correctly found the Amended Complaint did not allege any stand-alone tort. All torts require the existence of a duty and a breach of that duty. No recognized duty existed in this case so there could be no tort.

Because of the ecclesiastical doctrine and the attendant First

Amendment issues, a court cannot determine whether a clergy person has a duty to disclose or not disclose communications that might be privileged by a secular evidence code. The existence and extent of the duty would require a secular court to interpret religious law. A trial of this type of issue would require expert testimony by competing experts as to the nature of the duty under some applicable religious law standard. Secular courts are prohibited from inquiring into matters that are governed by religious rule, custom and law.

The trial court correctly found no private cause of action exists for purely emotional distress as a result of the alleged violation of the clergy privilege found in the Florida Evidence Code. Evidence code privileges apply only to testimony in a legal proceeding. These privileges do not create some new cause of action. However, the question of whether such a cause of action could exist should not be addressed because, as the concurring opinion of the district court correctly found, Bellhorn did not qualify as a clergy person. If Bellhorn was not a clergy person, there is no other possible privilege that could apply.

Finally, if there was some stand-alone tort in this case, and if the inquiry is not barred by the ecclesiastical doctrine, the trial court correctly

found the impact rule would bar such a claim.

Based upon the allegations in this case, the Court should find no duty of confidentiality existed. Alternatively, and if this Court determines that a duty did exist under the facts as alleged, this Court should rule that the impact rule is applicable.

If this Court exercises its power of discretionary review, the lower court's order should be affirmed.

ARGUMENT

The Respondents agree with the Petitioners that the standard of review in this case is de novo. The order under review is the trial court's order dismissing the claim for negligent infliction of emotion distress. When reviewing an order granting a motion to dismiss, the appellate court must determine whether a complaint states a cause of action. This is purely an issue of law. Sobi v. Fairfield Resorts, Inc. 846 So. 2d 1204 (Fla. 5th DCA 2003).

As a preliminary issue, this Court must decide whether to exercise its power of discretionary review. The underlying case involves unique facts that are unlikely to occur frequently, if ever. The claim is that a private Christian school "chaplain" violated an evidence code privilege by revealing a conversation with a student, resulting in the negligent infliction of emotional distress. The likelihood of a similar fact pattern emerging in another case is extremely small; there does not appear to be another reported case in which a high school student has claimed a non-ordained private school chaplain or counselor qualified as a clergy person under the evidence code. These facts present an esoteric situation that would have no particular relevance in other cases. The Respondents suggest this Court should decline to hear this case because of the unique and unusual fact pattern.

I. THE TRIAL COURT CORRECTLY RULED THAT THERE WAS NO "STAND ALONE" TORT

The trial court correctly ruled that there was no allegation of a stand-alone tort in the dismissed claim. Emotional damages are a potential element of tort damages in certain cases, but like any element of damages, emotional damages must be based upon some recognized tort cause of action. There is no action for the negligent infliction of emotional damages without the existence of an underlying tort.

A preliminary question in this case is whether any tort was alleged that could support a claim for the negligent infliction of emotional damages. There is no judicially recognized tort action arising out of a cleric's out of court disclosure of a confidential privileged communication. Because of the ecclesiastical doctrine, a secular court cannot pass on the question of whether a cleric may or may not disclose a confidential communication. To do so would require an improper determination of a cleric's responsibilities under religious law. This Court has consistently held such claims are forbidden because they require a court to interpret ecclesiastical doctrine. Malicki v. Doe, 814 So. 2d. 347 (Fla. 2002); Doe v. Evans, 814 So.2d 370 (Fla. 2002).

The First Amendment to the United States Constitution states:

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

The Fourteenth Amendment makes the guarantee of the First Amendment applicable to the states. Malicki v. Doe, supra.

Ecclesiastical principles and the First Amendment prohibit secular courts from considering whether a cleric might or might not have a religious duty to disclose information otherwise protected by an evidence code. The determination of whether a cleric had a religious duty would run afoul of these basic principles of religious freedom.

In the present case, there was no duty of confidentiality whether Bellhorn was or was not a cleric. If Bellhorn were a cleric, the claim would be nothing more than a forbidden clergy malpractice claim barred by the First Amendment. If Bellhorn was not a cleric, there was no privileged communication.

As discussed below in this brief, the allegations of the dismissed claim

fall far short of establishing that Bellhorn was a cleric as defined by the Florida Evidence Code. However, if Bellhorn did qualify as a cleric, there is no actionable duty of confidentiality owed.

The identical issue was considered by the Court of Appeals in New York in 2001 in the case of Lightman v. Flaum, 97 NY 2d 128, 761 NE 2d 1027 (NY 2001); cert. denied, 535 U.S. 1096, 122 S.Ct. 2292 (2002). In the Lightman case, the Court was faced with the question of whether the New York Evidence Code created a cause of action for intentional disclosure of an otherwise privileged communication by a cleric. The question addressed by the Lightman Court was as follows:

> *"In this Appeal, we must decide whether CPLR 4505 imposes a fiduciary duty of confidentiality upon members of the clergy that subjects them to civil liability for the disclosure of confidential communications. We hold that it does not."* Id. at 131.

After Lightman was decided, a Petition for Writ of Certiorari was filed with the United States Supreme Court. The United States Supreme Court denied the Petition.

Lightman involved the admitted disclosure of an embarrassing and confidential communication made by a penitent to rabbis. The disclosure was made by a wife and involved a confession that the wife was violating

Jewish Law and that she was "*seeing a man in a social setting*". The rabbis disclosed the communications to the husband. The wife/penitent then sued the rabbis for breach of fiduciary duty for violation of New York's clergy-penitent privilege and for intentional infliction of emotional damages.

Lightman contains a well-reasoned analysis of why there cannot be a cause of action against a cleric for disclosing an allegedly confidential communication. The opinion points out the distinction between confidential information under the rules and regulations that govern secular professions and information protected "*by an evidentiary privilege*" under the Evidence Code. The opinion also highlights the significant difference between professional confidentiality obligations owed by state regulated professionals and the obligations of clergy. State statutes and licensing requirements regulate doctors, lawyers, psychotherapists, accountants and other secular professionals. Clerics are not and cannot be licensed or regulated by secular statutes and/or regulations. Clerics are free to engage in religious activities without the State's permission and are not subject to State mandated rules or regulations.

As noted by the Lightman Court, the prospect of conducting a trial to determine whether a cleric's disclosure is in accordance with religious law has troubling constitutional implications. A court would be faced with the

unconstitutional prospect of having differing experts offer different interpretations or applications of religious law. It would be impossible for a court to instruct a jury on the nature of the duty without impermissibly interpreting the religious laws that concern the duty.

The reasoning of the Lightman decision is applicable to the present case. For a tort claim to exist, there must be a duty. Clay Elec. Co-op., Inc. v. Johnson, 873 So.2d 1182 (Fla. 2003). The existence of a duty is a legal question. See Sobi, supra. A secular court would have to interpret religious law to determine whether a cleric has or does not have a religious duty to disclose a communication. Even worse, the secular court would have to instruct a jury on the elements of the duty. A court would have to adjudicate questions of religious law. This would run afoul of the ecclesiastical doctrine. Malicki v. Doe, supra.

The ecclesiastical doctrine precludes civil courts from inquiring into matters governed by religious rule, custom and law. Southeastern Conference Association of Seventh-Day Adventists, Inc., v. Dennis, 862 So. 2d 842 (Fla. 4th DCA 2003). The ecclesiastical doctrine arises out of First Amendment concerns. Id. Religious rule, custom and law govern the question of whether an out of court disclosure of a communication by a cleric is permissible. It is a question that cannot be considered by a court.

Those who confide in a cleric to whom they turn for religious guidance could do so only within the framework of the religious faith or doctrine that the cleric follows. A Catholic who confesses to a priest would not expect the priest to apply principles of Jewish law to the relationship. A Jewish congregant who confides in a rabbi would not expect or want the rabbi to apply principles of Catholic law. Catholics want their clergy to apply Catholic law and Jews want their clergy to apply Jewish law. The very reason one consults a cleric as opposed to a state licensed mental health practitioner is to have the cleric apply religious principles.

It would defeat the very purpose of the cleric-penitent relationship if the cleric were prohibited from following religious law. For a court to even inquire into the principles of the religious law would be inconsistent with the fundamental religious nature of the relationship between the cleric and the penitent. Could a Catholic judge hold a rabbi to Catholic principles or Catholic doctrine when determining the applicable duties of the rabbi? Conversely, could a Jewish judge hold a priest or protestant pastor to principles of Jewish law when determining the existence of a duty?

If Bellhorn was a cleric, the Petitioners are trying to impose on a clergy person an obligation of confidentiality that would require a judicial

inquiry into questions of religious law and faith. No secular court can make that determination.

If Bellhorn was not a cleric, there is no other privilege that would apply to make the communication privileged. Section 90.501 of the Florida Statutes establishes that no privileges exist "*except as otherwise provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida.*" There is no privilege anywhere in the law that would apply to a high school teacher/student communication.

Although the trial court in its order did not specifically mention the ecclesiastical doctrine and the First Amendment, these issues were raised by the Respondents in the Motion to Dismiss. [R.181-197]. Because of this Court's clear pronouncements that prohibit trial courts and intermediate appellate courts from creating new exceptions to the impact rule, there was no need for the trial court or the Fourth District courts to address the ecclesiastical doctrine and the First Amendment. However, since these issues were raised in the record, the ecclesiastical doctrine and the First Amendment can be considered at this level under the "tipsy coachman" rule. Robertson v. State, 829 So. 2d 901 (Fla. 2002).

II. EVIDENCE CODE PRIVILEGES DO NOT CREATE PRIVATE CAUSES OF ACTION.

The trial court in the present case also correctly ruled the clergy privilege found in the Florida Evidence Code can not be construed to give rise to a private cause of action for its breach.

Evidence Code privileges protect certain communications, but only in "*a legal proceeding*." Section 90.501, Florida Statutes. The privilege is a testimonial privilege that applies to sworn testimony in a legal proceeding. Testimonial privileges are strictly construed in part because they contravene the fundamental principal of law that the public has a right to every man's evidence. Trammel v. United States, 445 U.S. 40, 100 S. Ct. 906 (1980). Statutory privileges are also strictly construed because they are in derogation of common law. Cox v. Miller, 296 Fed. 3[d] 89 (2d Cir. 2002). The concept of an Evidence Code privilege simply does not apply to an out of court setting.

On the few occasions Florida Courts have been faced with the issue, they have held that statements that might be privileged in a courtroom setting do not have the same protection outside the courtroom.

An early case dealing with this issue was State v. Sandini, 395 So. 2d 1178 (Fla. 4th DCA 1981). In Sandini, a Defendant sought to suppress evidence that was obtained as the result of an out of court disclosure by a

lawyer of otherwise privileged information. The Fourth District held that neither the exclusionary rule applicable to the attorney/client privilege nor any other principle prohibited law enforcement's reliance on information volunteered by an attorney even though the information would fall under the evidentiary attorney/client privilege. While acknowledging that the attorney could not have been called by the State as a witness against the client, the court found that the privilege did not warrant suppression of the evidence.

In a more recent case, the Second District Court of Appeal addressed the issue in the context of the husband/wife Evidence Code privilege. In State v. Grady, 811 So. 2d 829 (Fla. 2d DCA 2002) a wife was involved in an automobile accident being investigated by the Florida Highway Patrol. The wife's husband went to the highway patrol and voluntarily told a trooper information which resulted in the issuance of a search warrant which in turn led to the evidence harmful to the wife. The issue before the Court was stated as *"whether the husband's statements to the trooper violated the husband/wife privilege . . ."* Id. at 831.

In holding that the husband's statements to the trooper did not violate the husband and wife privilege, the court considered the question of whether the Evidence Code privilege applied only to testimony given at trial or

whether it should also apply to any information provided outside of a trial setting.

The Grady court found that while the husband and wife privilege may apply to exclude trial ***testimony*** as to confidential marital communications, the privilege did not require suppression of admissible evidence resulting from the out of court disclosure. Since the statement was made outside of court, no privilege issues were involved.

Even if a privilege issue were involved, disclosure by anyone other than the person holding the privilege would not waive the privilege. Georgetown Manor, Inc. v. Ethan Allen, Inc. 753 F. Supp 936 (S.D. Fla., 1991). If the alleged communication with Bellhorn had been privileged under the Florida Evidence Code, Woodard's evidentiary privilege could not have been waived by Bellhorn's disclosure. Assuming for purposes of this argument that a privilege existed that was not otherwise waived by Woodard, the Florida Evidence Code would prevent Bellhorn from testifying in court about the communication. If the statement ever was privileged, it is still privileged unless Woodard has waived the privilege.

If a clergy/penitent privilege was involved in the present case, the trial court correctly ruled that a breach of the privilege does not give rise to a cause of action for purely emotional damages.

III. **BELLHORN DID NOT MEET THE REQUIREMENTS TO BE A CLERGY PERSON UNDER THE FLORIDA EVIDENCE CODE.**

Section 90.505 of the Florida Statutes is very specific as to who qualifies as a clergy person for purposes of the privilege. The Evidence Code limits the privilege to *" . . . a priest, rabbi, practitioner of Christian Science, or minister of* ***any religious organization or denomination usually referred to as a church****, or an individual reasonably believed so to be by the person consulting him or her.*"(emphasis added) That definition does not include a "*chaplain*" of a private school when the private school is "*not formally or informally connected with any established church*", as alleged in the dismissed claim. [R.102, Second Amended Complaint, Paragraph 7] By definition, a teacher or chaplain of a private school that is definitively not a church cannot be a clergy person.

Judge Stone correctly opined in his concurring opinion that Bellhorn was not a member of the clergy for the purpose of applying Section 90.505 of the Florida Evidence Code.

The allegations of the dismissed claim fall far short of alleging that Bellhorn qualified as a cleric under Florida Evidence Code. The clergy privilege was not a privilege recognized as a rule of common law, either in

England or in the United States.[1] However, every state in the United States has enacted the cleric penitent privilege in some form or other. The statutes in the various states differ in three principal respects: the definition of clergy, the scope of the privilege and the question of to whom the privilege belongs. Cox v. Miller, 296 F. 3d 89 (2d Cir. 2002).

Because evidentiary privileges are in derogation of common law, they are strictly construed. Cox 296 F. 3d at 107. According to an article in the New York University Law Review in April 1998, 23 states share a definition of clergy as being as inclusive as possible. According to the same article, 12 other states do not define clergy at all but merely state that the clergy-penitent privilege applies to any clergyman or priest. The same article says that *"14 states have chosen a less flexible approach and restrict their definitions of clergy to members of bona fide established churches or religious organizations or a similar formulation."* One state, Georgia, apparently limits the privilege to Christian and Jewish clergy. See, Ronald

[1] The first American decision recognizing a clergy-penitent privilege in the United States appears to have been People v. Phillips, N.Y. Ct. Gen. Sess (1813). There is apparently no reported decision recording the Phillips case, but it was reported by a lawyer who participated in the case as amicus curiae and as reprinted in Privileged Communications To Clergymen, 1 Cath. Lawyer 199, 207 (1955). See, Mockaitis v. Harcleroad, 104 F 3d 1522, 1532 (9th Cir. 1997).

J. Colombo, 73 N.Y.U. L. REV. 225 (Apr. 1998) *Forgive Us Our Sins: The Inadequacies Of The Clergy-penitent Privilege.*

The Law Review article puts Florida in the category of the 14 states that have chosen the less flexible approach. Florida's definition is restrictive and applies only to *" . . . a priest, rabbi, practitioner of Christian Science, or minister of any* ***religious organization*** *or* ***denomination usually referred to as a church****, or an individual reasonably believed so to be by the person consulting him or her."* (emphasis added).

The restrictive definition has several requirements. First of all, the person must be a "*priest, rabbi, practitioner of Christian Science, or minister...*" Second, the person must be a priest, rabbi, practitioner or minister of a *"religious organization or denomination usually referred to as a church."*

Whether a private school chaplain qualifies as a *"priest, rabbi, practitioner of Christian Science, or minister"* does not matter unless the private school chaplain is the chaplain of a religious organization or denomination *"usually referred to as a church.*" The restrictive Florida definition requires the cleric to be a clergy person of a *religious organization or denomination usually referred to as a church.* This means something usually referred to as a church has to be involved.

The only Florida case to consider the definition of a clergy person in the Evidence Code is Nussbaumer v. State, 882 So. 2d 1067 (Fla. 2d DCA 2004). The Second District sets forth four requirements that must be met in order for the clergy privilege to apply. First, the communication must be made to a member of the clergy as defined in the statute. Second, the confider must make the communication for the purpose of seeking spiritual counseling and advice. Third, the clergy member must receive the communication in the usual course of his or her practice or discipline. Fourth, the communication must be made privately. Nussbaumer at 1074.

If the communication is made to someone who does not meet the statutory definition of a member of the clergy, the privilege inquiry is over. In the present case, the allegations specifically claim the school Defendant, Bellhorn's employer, is not formally or informally connected with a church.[2] If no religious organization or church or something referred to as a church is involved, the clergy privilege cannot apply because the statutory definition is

[2] If Woodard had alleged that Jupiter Christian was a church, issues arising out of the ecclesiastical doctrine and First Amendment issues might well have precluded the action in its entirety. However, the United States Supreme Court has consistently held that the First Amendment to the Constitution of the United States establishes a right of association that allows faith based institutions to exclude homosexuals from membership. Boy Scouts of America v. Dale, 530 U.S. 640 (2000). Because Jupiter Christian School has a First Amendment right to teach that the Bible treats homosexuality as a sin, no one has challenged the School's legal right to exclude homosexuals.

not met. Absent the involvement of a church, there can be no clergy person under the definition established by Section 90.505.

The *"reasonably believed"* language in Section 90.505 means the person must have a reasonable belief that the person alleged to be a cleric was a priest, rabbi, practitioner of Christian Science, or a minister of some *religious organization or denomination usually referred to as a church*. If the individual knows that no church is involved, there is no possibility of such a reasonable belief.

One decision that has addressed the reasonable belief requirement is State v. Boobar, 637 A.2d 1162 (Me. 1994). The court was interpreting a clergy privilege that defined a clergy person as *"a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him."* The court in that case explained that the purpose of the *"reasonably believed"* language was to create a privilege for disclosures made to imposters or persons otherwise misrepresenting themselves as members of the clergy. In the Boobar case, the witness performed some of the same functions at a jail that a member of the clergy might engage in, but this was not sufficient to create a reasonable belief that he was actually

functioning as a member of the clergy. As in the present case, no church or anything similar was involved.

In the present case, Woodard alleged Bellhorn was the employee of a non-profit school which was not connected formally or informally with any organized or established church [R.103 Paragraphs 3, 7]. Further, Woodard alleged the disclosure was made when Bellhorn was acting *"in the usual course of Bellhorn's practice or discipline as JCS' Chaplain"* [R.102, Second Amended Complaint, Paragraph 4]. Since JCS was specifically alleged not to be a religious organization or connected with anything usually referred to as a church, the privilege definition would not apply. These allegations defeat the claim that Bellhorn was a clergy person under the Florida Evidence Code definition.

The allegations of the present case did not and cannot establish that Bellhorn met the requirements of a clergy person under Florida law. The concurring opinion below is correct on that point of law.

Even if the strict requirements of the Evidence Code concerning who is and who is not a clergy are ignored, the Evidence Code clergy privilege does not create a private cause of action for either negligent infliction of emotional distress or a general breach of confidentiality. <u>See</u> <u>Lightman</u>, <u>supra</u> and the discussion above.

The trial court's dismissal should be affirmed because Bellhorn was not a clergy person.

IV. REGARDLESS OF THE CAUSE OF ACTION, THE IMPACT RULE WOULD BAR A NEGLIGENCE CLAIM FOR PURELY EMOTIONAL DAMAGES RESULTING FROM DISCLOSURE OF A CONVERSATION.

Even if all of the problems the Petitioners face with pleading a cause of action could be overcome, the impact rule would still bar a claim for negligently inflicted emotional damages.

With limited exceptions, this Court has consistently held that "*before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact*." Southern Baptist Hospital of Florida, Inc. v. Welker, 908 So. 2d 317 (Fla. 2005). This Court has made it abundantly clear that the impact rule continues to be viable. Id.; see also, Gracey v. Eaker, 837 So.2d 348 (Fla. 2002) and Rowell v. Holt, 850 So.2d 474 (Fla. 2003). In all of these cases, this Court has reaffirmed the role of the impact rule as safeguard against unduly speculative claims.[3]

[3] This Court, however, has the case of State of Florida Department of Corrections v. Abril, SC04-1747 under consideration. Abril involves an issue of whether a penal statute could create a cause of action for disclosing an HIV test result. The Respondents in that case argued that emotional damages should be recoverable as an exception to the impact rule because

It is difficult to imagine a more speculative claim than one claiming purely emotional damages resulting from the negligence of a high school teacher repeating something said by a student.

The impact rule has been under attack in cases brought before this Court. At least until the present date, this Court has continued to assert the continued viability of the rule.

Gracey is not analogous to the present case. In Gracey a state licensed psychotherapist had a state law obligation of confidentiality. This Court's holding in Gracey was based on the statutory confidential relationship created under Section 491.0147 of the Florida Statutes. It was not based upon the Florida Evidence Code. There is no corresponding statutory duty of confidentiality in the present case. Gracey was specifically limited by this Court to the facts of that case.

Rowell was based upon a *" . . . special, professional and independent duty to exercise the degree of reasonable knowledge and skill which lawyers of ordinary ability and skill possess and exercise."* While there was no specific statutory duty involved in Rowell, lawyers, like psychotherapist, are

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the damages resulted from a breach of the "prevailing standards of care in part regarding the confidentiality of HIV test results." As of the date this brief is filed, the Court has not rendered a decision in Abril.

licensed and heavily regulated by the State and by this Court. Once again, this Court limited Rowell to the facts.

Doe v. Evans, 814 So.2d 370 (Fla. 2002) is not an impact rule case. Doe involved sexual misconduct by a cleric with a parishioner in the course of an established marital counselor relationship. This Court held that the First Amendment did not provide a shield behind which a church could avoid liability for harm caused to a third party arising from sexual misconduct by a cleric during the course of an established marital counseling relationship. This Court stressed that the liability in the Doe case rested on the assertion of *"an abuse of a marital counselor relationship through an inappropriate sexual relationship."* The Court was not called upon to interpret ecclesiastical doctrine or religious law. The dispute was over a sexual relationship and did not depend on an inquiry by civil courts into religious law.

The impact rule is not mentioned in this Court's decision in Doe v. Evans. One would assume none of the parties raised that issue because the allegations of sexual misconduct would necessarily involve a claim of some physical contact. Further, sexual exploitation would by its very nature be an intentional act and outside the impact rule.

The holding in Doe v. Evans makes it clear that a fiduciary relationship can arise between a cleric and a parishioner under certain circumstances. Doe was based on misconduct "… *in the course of an established marital counseling relationship.*" Id. at 371. If there is an established counseling relationship, this Court has held that a fiduciary relation can arise. When an intentional breach of that fiduciary duty arising out of sexual misconduct occurs, there are no First Amendment or impact rule implications. However, if the alleged violation of the duty is the intentional or negligent disclosure of a communication, the Ecclesiastical Doctrine and the First Amendment Clause are involved. Religious law may require a cleric to disclose privileged communications. For instance, in Lightman, both rabbis believed Jewish law obliged them to relay the privileged information to the Plaintiff's husband in order to prevent the husband from violating the Torah. The rabbis, in making the disclosure, were carrying out their religious obligations, as they understood the religious law. Regardless of the subject of the disclosure, the duty to disclose is an ecclesiastical matter not subject to judicial scrutiny.

In the present case, there is no basis for creating an additional exception to the impact rule. No disclosure was made in the course of an established counseling relationship, as occurred in Doe; in the present case,

one conversation took place, initiated by Bellhorn for the specific purpose of asking Woodard a question.

The Respondents' position is that this Court does not have to address the impact rule because of the other issues involved. This Court should decline to exercise its discretionary jurisdiction because the limited facts of this case would have no significance to other litigants. If this Court decides to exercise its discretionary jurisdiction, this Court should agree with the concurring opinion below in finding that Bellhorn was not a cleric. If this Court chooses to assume for purposes of the appeal that Bellhorn was a clergy person, this Court should restate the certified question as follows:

> *Does the Florida Evidence Code impose a fiduciary duty of confidentiality upon members of the clergy that subjects them to civil liability for the disclosure of confidential communications?*

The Court should answer that question in the negative and the Order below should be affirmed.

CONCLUSION

The present case is a thinly veiled attempt to restrict the right of all religious based organizations to exercise their First Amendment Freedom of Religion rights and Freedom of Association rights. The United States Supreme Court has held that a private organization cannot be compelled to accept homosexuals where such acceptance would derogate from the organization's expressive message. Boy Scouts of America v. Dale, supra.

This Court does not have to accept widely held Christian views that homosexuality is a sin, nor does this Court have to accept activist views that homosexuality is not a sin. Whether this Court believes that one view or the other is popular or unpopular, the First Amendment protects the right to express either view. If faith based organizations, Christian Churches, Temples or other religious organizations can be forced under threat of emotional distress damages to accept persons who disagree with interpretations of religious issues, the First Amendment and religious freedom will cease to exist in America.

If this Court decides to exercise its power of discretionary review, the

Order of Dismissal with Prejudice should be affirmed.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Has been furnished by U.S. mail to: Michelle Hankey, Esq., William Booth, Esq., Legal Aid Society of Palm Beach County, Inc., 423 Fern Street, Suite 200, West Palm Beach, Florida 33401 and W. Trent Steele, Esq., 2897 S.E. Ocean Boulevard, Stuart, Florida 34996 on this __ day of December, 2005.

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CERTIFICATE OF FONT COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2); 9.100(1), the undersigned counsel hereby certifies that the pleading is in compliance with the font requirements and attests that this document is in TIMES NEW ROMAN 14 POINT.

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