

IN THE SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA

JEFFREY WOODARD and  
CAROL GLOAD,

CASE NO.: SC05-1986  
4TH DCA CASE NO.: 4D04-3531

Petitioners,

v.

JUPITER CHRISTIAN  
SCHOOL, INC. and TODD  
BELLHORN,

Respondents.

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ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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PETITIONERS' REPLY BRIEF ON THE MERITS

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## ARGUMENT

Petitioners are foreclosed resolution to their claim if this Court does not accept jurisdiction. The law concerning the application of the impact rule has consistently been reaffirmed by this Court. See, e.g. Rowell v. Holt, 850 So. 2d 474, 478 (Fla. 2003). The Fourth District Court of Appeal's application of stare decisis resulted in its holding that it could not "ignore the impact rule to which our Supreme Court rightfully continues to adhere." Woodard v. Jupiter Christian School, Inc., 913 So.2d 1188, 2005 Fla. App. LEXIS 16261, \*8 (Fla. 4th DCA 2005). Since the creation of an exception would have "far-reaching consequences", the Fourth District declined to create an exception and certified the impact rule question for resolution. Id. Likewise, the trial judge interpreted impact rule law similarly by holding that the Legislature or the Appellate Courts are the one's to determine an exception to the impact rule. [R222]. Thus, resolution by this Court is necessary.

Respondents claim the facts are unique and as a result not of any importance. This case involves the unauthorized disclosure of a confidence gained by a clergyman from a lay individual. Our Legislature has deemed communications by and between these individuals worthy of protection. § 90.505, Fla. Stat. (2005). By enacting this statute, the Legislature has

acknowledged the import of these communications and the frequency in which they occur. Therefore, the matter is one of great public importance and this Court should accept jurisdiction.

Respondents assert that the action was properly dismissed claiming Petitioners have not pled a stand alone tort. Petitioners pled a count for "negligent infliction of emotional distress-chaplain/counselor's breach of fiduciary duty of confidentiality." [R114]. The allegations establishing the duty of confidentiality owed and its subsequent breach pled two sources for the duty--the established fiduciary relationship and section 90.505, Florida Statutes. [R116]. The issue of whether a statutory evidentiary privilege establishes a cause of action is not dispositive to the resolution of this case since Petitioners' cause of action for negligent infliction of emotional distress also rests on the fiduciary relationship established between Woodard and Bellhorn. [R116].

"The elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages." Gracey v. Eaker, 837 So. 2d 348, 353 (Fla. 2002). A fiduciary relationship "'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation.'" Doe

v. Evans, 814 So.2d 370, 374 (Fla. 2002); Gracey, 837 So. 2d at 353. Such a "relationship may be implied by law" through a consideration of "'the specific factual situation surrounding the transaction and the relationship of the parties.'" Doe, 814 So. 2d at 374. "'The relation and duties involved need not be legal; [but] may be moral, social, domestic or personal.'" Id. Therefore, a fiduciary relationship can encompass a broad set of circumstances. Inherent in a counseling fiduciary relationship is the fiduciary duty not to disclose confidential personal information. Gracey, 837 So. 2d at 354. A breach of the fiduciary duty of confidentiality gives rise to a cause of action sounding in tort for which one will be responsible for the harm flowing from the breach imposed by the relationship. Id. at 353.

The allegations and the reasonable inferences arising therefrom sufficiently establish the stand alone tort of breach of fiduciary duty. The allegations supporting the existence of a fiduciary relationship and duty include paragraphs 3, 6, 7, 15, and 50-56. [R102,103,105,114-116]. Allegations supporting the breach of that duty include paragraphs 16 and 57-59. [R105,116]. Finally, the allegations of damages proximately caused by the breach include paragraphs 60 and 61. [R116-117]. Taking these allegations in the light most favorable to Petitioners, a breach of fiduciary duty claim was alleged.

Respondents' characterization of the relationship between Bellhorn and Woodard as that of teacher/student ignores the facts pled. Further, the suggestion that a breach of fiduciary duty can only flow from the wrongful disclosure of confidential communications protected by statute disregards this Court's holdings in Gracey and Doe as to the creation of a fiduciary relationship. Gracey, 837 So. 2d at 353; Doe, 814 So. 2d at 374.

Respondents try to defeat the clergyman/lay individual relationship by arguing that Bellhorn cannot be a clergyman as JCS is not a church. This proposition ignores the holding in Doe which instructs that the origin of a fiduciary relationship is immaterial. See id.

Respondents contend that Bellhorn could not breach his duty of confidentiality as he only revealed the confidential communication to JCS and to no one else. However, Bellhorn promised Woodard he would not reveal the disclosure to anyone. [R115]. When he informed JCS of the communication, he violated the trust established with Woodard making the disclosure actionable as a breach of fiduciary duty.

Likewise, the allegations against JCS are actionable. This Court has explained that "the necessary inquiry in the claim against the Church Defendants is...whether the Church Defendants had reason to know of the tortious conduct and did nothing to

prevent reasonably foreseeable harm from being inflicted upon the plaintiffs." Malicki v. Doe, 814 So. 2d 347, 364 (Fla. 2002). Petitioners allege that JCS sent Bellhorn to question and counsel Woodard. [R114]. Thus, JCS was bound by Bellhorn's actions. Accepting the disclosure of the confidential communication from Bellhorn despite Bellhorn's abuse of Woodard's trust, as well as revealing it to others, makes JCS liable for breach of the fiduciary duty of confidentiality.

Respondents submit that the element of breach of duty has not occurred because Woodard has not waived the evidentiary privilege. However, the breach of the fiduciary duty arose when the confidential information obtained in, and as a result of, the fiduciary relationship was disclosed to others. Thus, the allegations state a cause of action.

Respondents also assert that one conversation does not constitute a fiduciary relationship. Ultimately, this a fact to be considered by a jury in determining whether a fiduciary relationship existed and when it was established. A communication is protected if the fiduciary relationship existed when the communication occurred. Doe, 814 So. 2d at 374; Gracey, 837 So. 2d at 353. Petitioners' allegations show the fiduciary relationship was created before, and existed when, Woodard disclosed his secret.

Respondents argue that this Court cannot consider whether Bellhorn owed a duty to Woodard as doing so implicates ecclesiastical principles in violation of the First Amendment to the United States Constitution. Respondents failed to preserve their First Amendment argument raised in their Answer Brief. In order for this Court to consider Respondent's argument, the trial court had to first decide the argument. Miller v. Miller, 709 So. 2d 644, 645 (Fla. 2d DCA 1998). Here, Respondents presented the argument to the trial court, but never obtained a decision from the trial court. [R219-222]. Further, Respondents did not raise the issue at all before the Fourth District thereby removing any opportunity for that court to consider the issue. See Woodard, 913 So.2d 1188, 2005 Fla. App. LEXIS 16261. Thus, the issue is not preserved for review.

Respondents argue that the tipsy coachman rule allows this Court to consider the First Amendment issue. This would be so if the trial court had passed on the First Amendment issue correctly, but for the wrong reasons. Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002). Here, the trial court did not rule on this issue. Thus, the tipsy coachman rule provides no relief to the Respondents.

Nevertheless, should this Court decide to consider the issue, this Court's decision in Doe resolves the issue in Petitioners' favor. In Doe, this Court addressed whether the

First Amendment barred a cause of action for negligent hiring and supervision and for breach of fiduciary duty. 814 So. 2d at 371. This Court held "the evaluation of whether a fiduciary relationship arose and whether a religious organization breached this duty does not require an adjudication of religious doctrine or beliefs" as "Doe's breach of fiduciary duty claim is governed by neutral tort law principles of general application." Id. at 376. "The imposition of liability based on a breach of fiduciary duty has a secular purpose and the primary effect of imposing liability under the circumstances of this case neither advances nor inhibits religion." Id. As the fiduciary duty to hold confidential communications private is not rooted in religious belief, but rather in tort, id., the First Amendment does not bar Petitioners' cause of action.

Respondents suggest that if Bellhorn is a clergyman, then an action against him would be for clergy malpractice. Petitioners' count does not implicate a standard of care held by all clergy. Rather, it alleges a relationship of trust giving rise to the fiduciary duty. No religious standard of care is implicated thereby allowing the court's consideration of the allegations. See Doe, 814 So. 2d 376; F.G. v. MacDonell, 150 N.J. 550, 565, 696 A.2d 697 (N.J. 1997).

In conclusion, Petitioners allegations do not implicate the impact rule as the injuries suffered were only emotional or

psychological in nature. See Rowell v. Holt, 850 So. 2d 474, 478-79 (Fla. 2003); Gracey v. Eaker, 837 So. 2d 348, 356 (Fla. 2002); Tanner v. Hartog, 696 So. 2d 705, 708 (Fla. 1997); Kush v. Lloyd, 616 So. 2d 415, 422 (Fla. 1992). Further, the resulting emotional damages were foreseeable and flowed from the breach especially due to the conflict that Woodard needed to reconcile between his religious convictions and his sexual orientation. Lastly, the facts in Woodard's case are so similar to those in Gracey that to hold the impact rule applicable would place the viability of the Gracey decision at issue. Consequently, this Court should answer the certified question in the negative.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded this \_\_\_\_ day of January, 2006 to W. Trent Steele, Esq., 2897 S.E. Ocean Blvd., Stuart, FL 34996; and

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CERTIFICATE OF FONT COMPLIANCE

The undersigneds certify that this Reply Brief on the  
Merits complies with the font requirements of Rule 9.210(a)(2),  
Florida Rules of Appellate Procedure.

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