IN THE SUPREME COURT
STATE OF FLORIDA

YOLANDA G. MIÑAGORRI,

Petitioner,

vs.

ARCHDIOCESE OF MIAMI, INC.

Respondent.
_____/

Sup. Ct. Case No: SC07-1171
D.C.A. Case No: 3D06-3015
Cir. Ct. Case No: 00-293-CA

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

On Appeal from the District Court of Appeal, Third District.

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGES

FLORIDA AUTHORITIES:

FEDERAL AUTHORITIES:

OUT OF STATE AUTHORITIES:

UNITED STATES CONSTITUTION:

FLORIDA CONSTITUTION:

FLORIDA STATUTES:

RULES OF PROCEDURE:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

The Petitioner, YOLANDA G. MIÑAGORRI, will be referred to herein as the "EMPLOYEE". The Respondent, ARCHDIOCESE OF MIAMI, INC., will be referred to herein as the "ARCHDIOCESE". The appendix to this brief will be cited by page number as follows: (Appendix at ____). The District Court's opinion below will be cited using its Southern Reporter page number citation as follows: *Miñagorri*, at _____.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the district court's decision reported at *Archdiocese of Miami, Inc. v. Miñagorri,* 954 So.2d 640 (Fla. 3d DCA 2007). (Appendix at 1-5) In *Miñagorri,* the district court issued a writ of prohibition[1] which prohibited the circuit court from proceeding with a Private Sector Whistle Blower Claim filed by the EMPLOYEE against the ARCHDIOCESE.

The EMPLOYEE was previously employed by the ACHDIOCESE, as the principal of St. Kevin Catholic School. *Miñagorri*, at 641. The EMPLOYEE asserts that she was assaulted and battered by the Priest, who was her immediate supervisor. *Miñagorri*, at 641. The EMPLOYEE further asserts that when she complained of the alleged assault to the ARCHDIOCESE, she was terminated. *Miñagorri*, at 641. As a result the EMPLOYEE filed a multi count complaint in the circuit court asserting, among other causes of action, a Private Sector Whistleblower Act claim under § 448.102(3), Fla.Stat. *Miñagorri,* at 641.

The ARCHDIOCESE petitioned the district court for a writ of prohibition to

[1]The district court withheld the formal issuance of the writ out of courtesy to the trial court. *Miñagorri*, at 641 and 644. However, as the district court granted relief requested by the ARCHDIOCESE in its petition for a writ of prohibition, this brief will be argued as if the writ

prohibit the circuit court from entertaining the Private Sector Whistleblower Act claim. *Miñagorri*, at 641. Although the ARCHDIOCESE proffered no religious justification for the events underlying the EMPLOYEE's claims, the district court found that the First Amendment to the United States Constitution barred civil courts from even considering employment disputes between religious institutions and ministerial employees, *Miñagorri*, at 641-642, and issued its writ of prohibition to the circuit court prohibiting the consideration of the EMPLOYEE's Private Sector Whistle Blower Act claim. *Miñagorri*, at 641 and 644.

While this matter was pending before the district court, the EMPLOYEE timely filed a motion for appellate attorneys fees based on the prevailing party attorneys fees provision of the Private Sector Whistle Blower's Act. (Appendix at 6-7) The ARCHDIOCESE timely filed a response to such motion for attorneys fees. (Appendix at 8-9) After the district court ruled against the EMPLOYEE on the merits of the action, it entered its order denying the EMPLOYEE's motion for appellate attorneys fees without giving any explanation for its ruling. (Appendix at 10)

The EMPLOYEE then timely filed a Notice to Invoke Discretionary Jurisdiction to this court and on November 29, 2007, this court granted review.

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was issued.

SUMMARY OF ARGUMENT

Point I – The district court erred in prohibiting the trial court's consideration of the EMPLOYEE's Private Sector Whistle Blower Act claim. The First Amendment to the United States Constitution does not create an absolute bar to civil court jurisdiction over employment disputes between religious institutions and their ministerial employees. Rather the courts must, on a claim by claim basis, examine each claim and its elements and determine whether the court will be required to interpret religious doctrine or whether excessive entanglement is likely to result. If the court finds that it will not be required to interpret religious doctrine and that excessive entanglement is not likely to result, the court must consider the claim. When no assertion of religious doctrine or belief is implicated, a religious institution is subject to the legal process to the same extent as any other litigant. To hold otherwise, the court would grant religious institutions an advantage not enjoyed by secular employers where such advantage is not required by the free exercise clause of the First Amendment. This would amount to a promotion of religion in violation of the establishment clause of the First Amendment.

Point II - Regardless of the merits of the ARCHDIOCESE's First

Amendment argument, the First Amendment does not deprive the trial court of subject matter jurisdiction to hear the dispute. As writs of prohibition are only issued to prohibit an inferior tribunal from acting in excess of its jurisdiction, it was error for the district court to issue the writ.

ARGUMENT

IT WAS ERROR FOR THE DISTRICT COURT TO ISSUE ITS WRIT OF PROHIBITION BECAUSE THE FIRST AMENDMENT DOES NOT CREATE AN ABSOLUTE BAR TO A CIVIL COURT'S CONSIDERATION OF AN EMPLOYMENT ACTION BETWEEN A CHURCH AND ITS MINISTERIAL EMPLOYEES, RATHER THE COURT SHOULD EVALUATE WHETHER A PARTICULAR CLAIM WOULD RESULT IN EXCESSIVE ENTANGLEMENT WITH THE CHURCH ON A CLAIM BY CLAIM BASIS

A. Jurisdiction

This court has jurisdiction to review the decision below because it expressly construes a provision of the State or Federal constitution. Art. V, § 3(b)(3), Fla.Const.; Fla.R.App.P. 9.030(a)(2)(A)(ii) This court also has jurisdiction to review a decision below because it expressly and directly conflicts with the a decision of the supreme court or another district court of appeal on the same point of law. Art. V, § 3(b)(3), Fla.Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv)

B. Standard of Review

As there is no factual dispute in the record, this First Amendment claim should be reviewed *de novo*. *Post-Newsweek Stations Orlando, Inc. v. Guetzloe,* 968 So.2d 608, 610 (Fla. 5th DCA 2007) ("[W]e need only address ... whether the

injunction imposes an unconstitutional prior restraint on the press in violation of the First Amendment. ... The trial judge's ruling was expressly based entirely on the application of the law to ... undisputed facts; thus, our review is de novo.") This is in accord with the general rule that the Supreme Court reviews purely legal issues under a de novo standard of review. *White v. State*, 964 So.2d 1278, 1285 (Fla. 2007) ("We review the legal issues under a de novo standard of review.")

C. Argument on the Merits

The district court determined that the circuit court lacked jurisdiction to consider the EMPLOYEE's private sector whistleblower claim under the ministerial exception of the First Amendment of the United States Constitution. *Miñagorri*, at 641-642.

The district court did not consider whether the EMPLOYEE had stated a claim under the Private Sector Whistle Blower Act. *Miñagorri*, at Footnote 1, page 644. Rather the district court concluded that civil courts simply "may not consider employment disputes between a religious organization and its clergy because such matters necessarily involve questions of internal church discipline, faith, and organization that are governed by ecclesiastical rule, custom, and law. *Miñagorri*, at 641-642. Conspicuously absent from the district court's opinion is any determination as to whether the dispute was one rooted in religious belief or

whether any question of religious doctrine would have to be adjudicated by the trial court. The district court found that once it was established that the dispute was between a religious institution and a ministerial employee, then no further inquiry was necessary. "Thus, where, as here, a claim challenges a religious institution's employment decision, the inquiry is whether the employee is a member of the clergy or serves a ministerial function. *(Citations omitted.)* If so, secular review is generally precluded." *Miñagorri*, at 642.

Application of the First Amendment to Legal Actions against a Church. Malicki v. Doe

The district court's interpretation of the religious protections granted by the First Amendment of the United States Constitution is at odds with this court's interpretation of such protections as set out in *Malicki v. Doe*, 814 So.2d 247 (Fla. 2002) In *Malicki,* this court ruled that the First Amendment did not bar third parties from suing the church in tort for negligent hiring and retention of a priest who had allegedly sexually molested and assaulted parishioners. *Malicki,* at 365. In determining whether the First Amendment presented a bar to such actions, this court reasoned that since the First Amendment was intended to protect religious freedom, the threshold inquiry is whether the conduct at issue is "rooted in religious belief."

> Importantly, before the constitutional right to free exercise of religion is implicated, the threshold inquiry is whether the conduct sought to be regulated was "rooted in religious belief." *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *see Sanders v. Casa View Baptist Church,* 134 F.3d 331, 337-38 (5th Cir.1998); *Destefano v. Grabrian,* 763 P.2d 275, 283-84 (Colo.1988). Further, in order to launch a free exercise challenge, it is necessary "to show the coercive effect of the enactment as it operates against [the individual] in the practice of his religion." *School Dist. v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).
>
> If it is demonstrated that the conduct at issue was rooted in religious beliefs, then the court must determine whether the law regulating that conduct is neutral both on its face and in its purpose. *See Lukumi Babalu,* 508 U.S. at 531, 113 S.Ct. 2217. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533, 113 S.Ct. 2217 (citation omitted).
>
> The State may, however, regulate conduct through neutral laws of general applicability. *See id.* at 531, 113 S.Ct. 2217. Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531, 113 S.Ct. 2217.

Malicki, at 354. (Emphasis supplied)

This court then found that civil courts could adjudicate the tort claims concerning negligent hiring and retention because the free exercise clause was not implicated. This court held:

> A law establishing standards of conduct does not implicate the Free Exercise Clause unless adherence to those standards interferes

> with religious belief or activity. *See Lukumi Babalu Aye,* 508 U.S. at 532, 113 S.Ct. 2217. Thus, the "threshold inquiry is whether there is a conflict between conduct that is required by law and conduct that is prohibited by religious principles." *Smith v. O'Connell,* 986 F.Supp. at 78.
>
> In this case, the Church Defendants do not claim that the underlying acts of its priest in committing sexual assault and battery was governed by sincerely held religious beliefs or practices. Nor do they claim that the reason they failed to exercise control over Malicki was because of sincerely held religious beliefs or practices. Therefore, it appears that the Free Exercise Clause is not implicated in this case because the conduct sought to be regulated; that is, the Church Defendants' alleged negligence in hiring and supervision is not rooted in religious belief. Moreover, even assuming an "incidental effect of burdening a particular religious practice," the parishioners' cause of action for negligent hiring and supervision is not barred because it is based on neutral application of principles of tort law. *See Lukumi Babalu Aye,* 508 U.S. at 531, 113 S.Ct. 2217.
>
> Through neutral application of principles of tort law, we thus give no greater or lesser deference to tortious conduct committed on third parties by religious organizations than we do to tortious conduct committed on third parties by non-religious entities.

Malicki, at 360-361. (Emphasis supplied)

In the instant case the ARCHDIOCESE has not claimed that its actions were motivated or even affected by sincerely held religious beliefs or practices. Therefore, as in *Malicki, supra,* the Free Exercise Clause is not implicated in the instant case because the conduct sought to be regulated is not rooted in religious belief.

Further this court explicitly rejected the same type of broad stroke bar to civil actions based on the First Amendment where it held:

> In its reasoning in *Evans*[2], the Fourth District appears to have assumed that a First Amendment violation will occur any time a court may be required to either review or interpret church doctrine and that the only basis for a court to interfere in a church-related dispute is if the State's interest is compelling. However, the United States Supreme Court has not extended the religious autonomy principle as articulated in *Kedroff*[3] and *Serbian E. Orthodox Diocese*[4] to disputes beyond **strictly ecclesiastical intrachurch disputes that have been resolved through an ecclesiastical tribunal**. In addition, resolution of the dispute would have to involve "extensive inquiry" into religious law and polity before the First Amendment would bar a secular court from adjudicating a civil dispute.

Malicki, at 363. (Emphasis supplied)

Determination of whether the court may inquire into religious motivations for Church actions. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.

It is anticipated that the ARCHDIOCESE will argue that the First Amendment prohibits civil courts from looking into the reasons behind the ARCHDIOCESE's employment actions. However, this argument has been specifically rejected by the U.S. Supreme Court in *Ohio Civil Rights Comm'n v.*

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[2] *Doe v. Evans,* 718 So.2d 286 (Fla. 4th DCA 1998) which was reversed by this court on the above stated grounds in *Doe v. Evans,* 814 So.2d 370 (Fla. 2002).

[3] *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952) (Supreme Court held unconstitutional a New York state statute passed specifically to address as intrachurch property dispute.)

[4] *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976) (Supreme Court held that the Illinois Supreme Court erred in rejecting the decisions of the highest ecclesiastical

Dayton Christian Sch., Inc., 477 U.S. 619 (1986).

In *Dayton*, the U. S. Supreme Court reviewed the decision of the Court of Appeals for the Sixth Circuit requiring that an injunction be entered against the Ohio Civil Rights Commission enjoining the commission from taking any action with regards to a discrimination complaint brought by a teacher who had been discharged by a religious school. *Dayton*, at 621-622. In *Dayton*, the subject teacher had involved an attorney in an employment dispute with the school. *Dayton*, at 623. The School then allegedly terminated the teacher because the school interpreted the Bible as prohibiting one Christian from taking another Christian into civil courts. *Dayton*, at 622-623. In an attempt to terminate the Ohio Civil Rights Commission's investigation, the school filed an action in the Federal District Court seeking to permanently enjoin the Commission from continuing with its investigation on the grounds that review of the school's hiring practices would violate the First Amendment. *Dayton*, at 624. The Federal District Court denied such request. *Dayton*, at 625. However, the Court of Appeals for the Sixth Circuit held that the exercise of jurisdiction by the Ohio Civil Rights Commission would violate the Free Exercise and Establishment Clauses of the First Amendment and ordered that the Commission be enjoined. *Dayton v.*

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tribunals of a hierarchical church upon the issue of a priest's defrockment by the mother church.)

Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985). *Dayton,* at 625.

The U.S. Supreme Court reversed and held:

> Dayton contends that the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights.
>
> * * *
>
> Even religious schools cannot claim to be wholly free from some state regulation. *Wisconsin v. Yoder,* 406 U.S. 205, 213, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1972). We therefore think that however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.

Dayton, at 628. (Emphasis supplied)

Therefore, in *Dayton,* the U.S. Supreme Court invited the State of Ohio to do exactly what the ARCHDIOCESE asserts is prohibited by the First Amendment, and that is investigate the employment dispute to determine if a "religious-based" reason is at the root.

McKelvey v. Pierce

Finally, the decision of the New Jersey Supreme Court in the case of *McKelvey v. Pierce,* 800 A.2d 840 (N.J. 2002) is particularly instructive. In *McKelvey,* the court ruled that the First Amendment would not bar a seminary student's claims for sexual harassment by his superiors at seminary. *McKelvy,* at

845-846. After reviewing the relevant case law the court held:

> Although the church autonomy doctrine provides a shield against excessive government incursion on internal church management, it clearly cannot be applied blindly to all disputes involving church conduct or decisions. *Bryce, supra,* 289 *F.*3d at 657. The doctrine is implicated only in those situations where "the alleged misconduct is 'rooted in religious belief.' " *Ibid.* quoting *Wisconsin v. Yoder,* 406 *U.S.* 205, 215, 92 *S.Ct.* 1526, 1533, 32 *L.Ed.*2d 15, 25 (1972)); *see, e.g., Malicki v. Doe,* 814 *So.*2d 347, 361 (Fla.2002)[5] (holding that First Amendment does not protect church against negligent hiring and supervision claim in connection with alleged sexual assaults by priest because alleged negligence "not rooted in religious belief"). "Of course churches are not-and should not be-above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts." *Rayburn, supra,* 772 *F.*2d at 1171. Thus, the threshold inquiry is whether the underlying dispute is a secular one, capable of review by a civil court, or an ecclesiastical one about "discipline, faith, internal organization, or ecclesiastical rule, custom or law." *Bell v. Presbyterian Church (U.S.A.),* 126 *F.*3d 328, 331 (4th Cir.1997) (citing *Milivojevich, supra,* 426 *U.S.* at 713, 96 *S.Ct.* at 2382, 49 *L.Ed.*2d at 165).

McKelvey, at 851. (Emphasis supplied)

However, the New Jersey Supreme Court goes further and describes the process the court should go through to evaluate First amendment defenses. The court reasons:

> The principles of First Amendment jurisprudence distilled from our review of the relevant case law are as follows: Before barring a specific cause of action, a court first must analyze each element of every claim and determine whether adjudication would require the

[5]Like the EMPLOYEE, the New Jersey Supreme Court believes that this court's reasoning in *Malicki, supra,* is applicable to employment claims of ministerial employees.

> court to choose between "competing religious visions," or cause interference with a church's administrative prerogatives, including its core right to select, and govern the duties of, its ministers. In so doing, a court may "interpret provisions of religious documents involving property rights and other nondoctrinal matters as long as the analysis can be done in purely secular terms." *Minker, supra,* 894 *F.*2d at 1358 (citing *Jones, supra,* 443 *U.S.* at 600-01, 99 *S.Ct.* at 3024, 61 *L.Ed.*2d at 783). The court must next examine the remedies sought by the plaintiff and decide whether enforcement of a judgment would require excessive procedural or substantive interference with church operations.
>
> If the answer to either of those inquiries is in the affirmative, then the dispute *is* truly of a *religious nature,* rather than theoretically and tangentially touching upon religion, and the claim is barred from secular court review. If, however, the dispute can be resolved by the application of purely neutral principles of law and without impermissible government intrusion (e.g., **where the church offers no religious-based justification for its actions and points to no internal governance rights that would actually be affected**), there is no First Amendment shield to litigation.

McKelvey, at 856. (Emphasis supplied)

Finally, the *McKelvey,* court opines that should the courts not engage in the above approach and simply bar all employment claims concerning ministers, the court would run afoul of the Establishment Clause of the First Amendment.

> To sweep away all of a minister's or seminarian's claims against the church out of fear of encroaching upon the First Amendment not only neglects, but actually may intrude upon, the two overarching purposes for which the Religion Clauses stand: (1) preventing "sponsorship, financial support, and active involvement of the sovereign in religious activity," *(Citations omitted)* and (2) promoting the freedom of an individual "to believe and profess whatever religious doctrine [he or

she] desires,"

* * *

The Fifth Circuit has made the point concisely:

> The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships.... [T]he constitutional guarantee of *religious* freedom cannot be construed to protect *secular* beliefs and behavior, *even when they comprise part of an otherwise religious relationship*.... To hold otherwise would impermissibly place a religious leader in a preferred position in our society.

[*Sanders, supra,* 134 *F.*3d at 335-36 (third emphasis added).]

Declining to impose neutral and otherwise applicable tort or contract obligations on religious institutions and ministers may actually support the establishment of religion, because to do so effectively creates an *exception* for, and may thereby help *promote,* religion. Fenton, *supra,* 8 *Mich. J. Gender & L.* at 75; *see also Jones v. Trane,* 153 *Misc.*2d 822, 591 *N.Y.S.2d* 927, 932 (N.Y.Sup.Ct.1992) ("[A] contrary holding-that a religious body must be held free from any responsibility for wholly predictable and foreseeable injurious consequences of personnel decisions, although such decisions incorporate no theological or dogmatic tenets-would go beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded."); Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees,*74*Ind. L.J.*269, 284 (1998)("[L]ower courts ... have blindly applied the *Lemon* test, concentrating exclusively on the third prong, excessive entanglement, without considering the fact that an exemption [from neutral laws] may have the [effect] of advancing religion.... [B]y allowing religious organizations immunity from discrimination suits brought by their

> clergy, courts give them an advantage that no secular employer enjoys.").

McKelvey, at 856-857. (Emphasis supplied)

As the ARCHDIOCESE has offered no religious-based justification for its actions and has pointed to no internal governance rights that would actually be affected by the EMPLOYEE's claim, the claim should proceed until such time as the ARCHDIOCESE can show how the First Amendment would be invoked in this case.

II.

REGARDLESS OF THE MERITS OF THE ARCHDIOCESE'S FIRST AMENDMENT DEFENSE, THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO CONSIDER THE EMPLOYEE'S CLAIM, THEREFORE IT WAS ERROR FOR THE DISTRICT COURT TO ISSUE ITS WRIT OF PROHIBITION

A. Jurisdiction

This court has jurisdiction to review the decision below because it expressly construes a provision of the State or Federal constitution. Art. V, § 3(b)(3), Fla.Const.; Fla.R.App.P. 9.030(a)(2)(A)(ii) This court also has jurisdiction to review a decision below because it expressly and directly conflicts with the a decision of the supreme court or another district court of appeal on the same point of law. Art. V, § 3(b)(3), Fla.Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv)

B. Standard of Review

As there is no factual dispute in the record, this First Amendment claim should be reviewed *de novo*. *Post-Newsweek Stations Orlando, Inc. v. Guetzloe,* 968 So.2d 608, 610 (Fla. 5th DCA 2007) ("[W]e need only address ... whether the injunction imposes an unconstitutional prior restraint on the press in violation of the First Amendment. ... The trial judge's ruling was expressly based entirely on

the application of the law to ... undisputed facts; thus, our review is de novo.") This is in accord with the general rule that the Supreme Court reviews purely legal issues under a de novo standard of review. *White v. State,* 964 So.2d 1278, 1285 (Fla. 2007) ("We review the legal issues under a de novo standard of review.")

C. Argument on the Merits

The District Court determined that the circuit court lacked subject matter jurisdiction to consider the EMPLOYEE's claim pursuant to the "First Amendment's bar against secular court review of religious policy and administration." *Miñagorri,* at 641. In determining that the ministerial exception was a jurisdictional bar to the EMPLOYEE's claim and that prohibition was a proper remedy, the District Court erred.

> Prohibition is an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction. *Southern Records & Tape Serv. v. Goldman,* 502 So.2d 413, 414 (Fla.1986); *English v. McCrary,* 348 So.2d 293, 296 (Fla.1977); *State ex rel. B.F. Goodrich Co. v. Trammell,* 140 Fla. 500, 503-04, 192 So. 175 (1939). The writ is very narrow in scope and operation and must be employed with caution and utilized only in emergency cases to prevent an impending injury where there is no other appropriate and adequate legal remedy.
>
> As we noted in *English v. McCrary:*
>
> > Prohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous

> exercise of jurisdiction. In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be.

Mandico v. Taos, 605 So.2d 850, 853-854 (Fla. 1992)

Federal courts of appeals have held that a motion to dismiss based on the "ministerial exception" is a challenge for failure to state a claim upon which relief can be granted rather than a challenge for lack of jurisdiction over the subject matter[6]. *See, e.g., Petruska v. Gannon Univ.,* 462 F.3d 294, 302 (3rd Cir.2006); *Elvig v. Calvin Presbyterian Church,* 375 F.3d 951, 955 (9th Cir.2004); *Bryce v. Episcopal Church in the Diocese of Colorado,* 289 F.3d 648, 654 (10th Cir.2002); *Bollard v. California Province of the Soc'y of Jesus,* 196 F.3d 940 (9th Cir.1999). In *Petruska,* the Court noted "[i]n this case, the question does not concern the court's power to hear the case--it is beyond cavil that a federal district court has the authority to review claims arising under federal law--but rather whether the First Amendment bars Petruska's claims." *Petruska,* at 303. The *Petruska* Court concluded that "[t]he [ministerial] exception may serve as a barrier to the success of a plaintiff's claims, but it does not affect the court's authority to consider them." *Id.* Similarly, the Indiana Supreme Court has also ruled that the assertion of a First

[6]"Because the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the rules." *Wilson v. Clark,* 414 So. 2d 526, 531 (Fla. 1st DCA

Amendment defense does not affect the trial court's jurisdiction:

> A court with general authority to hear matters like employment disputes is not ousted of subject matter or personal jurisdiction because the defendant pleads a religious defense. Rather, pleading an affirmative defense like the Free Exercise Clause may under certain facts entitle a party to summary judgment.

Brazauskas v. Fort Wayne-S. Bend Diocese, 796 N.E.2d 286, 290 (Ind. 2003)

In accordance with the foregoing, the ARCHDIOCESE was not entitled to a writ of prohibition as the circuit court's jurisdiction to hear the EMPLOYEE's claim is beyond question. By incorrectly interpreting the ministerial exception as a jurisdictional bar, the district court erred and its issuance of the writ of prohibition should be quashed.

1982).

III.

SHOULD THIS COURT QUASH THE WRIT OF PROHIBITION ISSUED BY THE DISTRICT COURT IT SHOULD ALSO REVERSE THE DISTRICT COURT'S DENIAL OF THE EMPLOYEE'S MOTION FOR ATTORNEY'S FEES FOR WORK DONE BEFORE THE DISTRICT COURT.

A. Argument on the Merits

In the proceedings before the district court, the EMPLOYEE made a timely motion that she be awarded her appellate attorneys fees for the work done by her attorneys before the district court. (Appendix at 6) The request was made pursuant to the prevailing party attorneys fees provision contained within the Private Sector Whistle Blower's Act. § 448.104, Fla.Stat. Of course the above statute must be interpreted to also provide for an award of fees to the prevailing party on appeal. § 59.46, Fla.Stat.

The ARCHDIOCESE filed a response to the EMPLOYEE's motion for attorneys fees which requested that the court exercise its discretion and deny the EMPLOYEE's motion for attorneys fees incurred in the proceedings before the district court. (Appendix at 8-9) The ARCHDIOCESE's response does not assert

any grounds for the denial of fees except the fact that under the statute a grant of attorneys fees is discretionary. (Appendix at 8-9) By not raising any other arguments against the award of attorneys fees, the ARCHDIOCESE has waived all such arguments. *Ferrara v. Community Developers, Ltd.,* 917 So.2d 907, 909 (Fla. 3d DCA 2005)

After ruling for the ARCHDIOCESE on March 14, 2007, (Appendix at 1) the district court entered its order denying the EMPLOYEE's motion for attorneys fees without giving any explanation for such denial. (Appendix at 10) As no reason is given by the district court for its denial of the EMPLOYEE's motion for attorneys fees, the EMPLOYEE can only assume that the reason was because the EMPLOYEE was not the prevailing party on the appeal.

Should the EMPLOYEE prevail before this court and this court quash the writ of prohibition issued by the district court, the EMPLOYEE's position below would be vindicated and she would in fact be the "prevailing party" before the district court. Therefore, should the EMPLOYEE prevail herein, the district court's denial of the EMPLOYEE's motion for attorneys fees should be reversed.

CONCLUSION

This court should quash the writ of prohibition issued by the district court and remand this action back to the district court with instructions to enter its order awarding the EMPLOYEE her reasonable attorney's fees for work done before the district court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2).

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