No. COA14-1396 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

JOHN DOE 200, Plaintiff-Appellee, vs. DIOCESE OF RALEIGH, MICHAEL F. BURBIDGE, BISHOP OF THE DIOCESE OF RALEIGH, Defendant-Appellants and EDGAR SEPULVEDA, Defendant.	)	From Wake County 13-CVS-015133

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BRIEF OF THE PLAINTIFF-APPELLEE

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Counter-Statement of Issues on Appeal

1. Does *Smith v. Privette*, 495 S.E.2d 395, 397 (N.C. App. 1998) remain good law?

2. Are the Bishop's claimed limits to his complete authority relevant?

Counter-Statement of Facts

Appellants' statement of facts misstate the allegations of the Complaint.

The Complaint arises from the conduct of a cleric and the conduct of the Appellants, who placed the cleric among children when the cleric was known to be dangerous to children. Then through actions and inactions the Appellants harmed the Plaintiff after his assault was known. E.g., Complaint at ¶ 15, R. App. p. 6:

> This complaint concerns actions and inactions by the Defendants within the course and scope of their respective roles within Wake County and, as to Sepulveda, within both Wake and Brunswick Counties, as agents for both the Bishop and the Diocese. The actions and inaction of the Defendants violated North Carolina law and resulted in the sexual abuse of the Plaintiff.

The Complaint alleged three liability grounds as to the Appellants, through the First, Second and Fifth causes of action, none of which involves religious doctrine or belief. The Complaint specifically alleges, "The allegations of the complaint do not involve religious belief," and requests as relief ***not*** that the Court interpret or alter in any way the appellants' practices or beliefs but "assess their ***actions and inactions*** against the requirements of North Carolina law, and to enjoin conduct which fails to comply with North Carolina law." Complaint ¶ 16,

R. App. p. 6, emphasis added. By its own allegations, the Complaint explicitly excludes from consideration any protected First Amendment activity.

The trial court dismissed part of the First, and all of the Fifth causes of action, Order at 1, R. App. 24, leaving as to the Appellants those parts of the First Cause of Action for Negligence based on Appellants' conduct in (a) negligently supervising Sepulveda; and (c) refusing to require Sepulveda to undergo testing for sexually transmitted diseases and to provide Plaintiff with that health information. The trial court's order also left standing all the allegations of the Second Cause of Action, for Negligent Infliction of Emotional Distress, based on Appellants' conduct in (a) placing Sepulveda in unsupervised contact with children, and conduct by Appellants after Sepulveda's assaults were known in (b) retaliating against the Plaintiff for reporting Sepulveda (Complaint ¶¶ 41 and 43) and (c) not demanding that Sepulveda submit to testing for sexually transmitted disease (Complaint ¶ 66).

Contrary to the facts the Appellants contend underlie this appeal, the Appellants' liability from their own conduct and that of their cleric is alleged to rest on the "repeated sexual assaults by Sepulveda" (Complaint at ¶ 67, R. App. 13), and the "actions and inactions" of the Appellants as to that conduct by Sepulveda. (Complaint at ¶ 15 R. App. p. 6).

The actions of Appellants include their misrepresenting Sepulveda as "a person that parishioners could rely on to be trustworthy around children, when the Bishop and Diocese knew, or should have known, that Sepulveda had not been screened and assessed sufficiently to be placed in a position of trust and authority." Complaint ¶ 25, R. App. p. 7. See also, Complaint ¶ 48, R. App. p. 10: "The Bishop and Diocese were required to protect the Plaintiff from known dangers and to warn him of hidden dangers." The Complaint rests on what the Appellants knew about Sepulveda before the Plaintiff was assaulted. The Complaint specifically and overtly calls for no scrutiny of the sufficiency of the process or procedures by which Sepulveda was made a priest.

Sepulveda is alleged to have used "the authority granted him by the Bishop" (Complaint at ¶ 31, R. App. p. 8) to make his first assault on the Plaintiff, and the Plaintiff's parents' "misplaced reliance on the Bishop's representation of Sepulveda as a person worthy of trust" (Complaint ¶ 34, R. App. p. 8) to commit his second assault on the Plaintiff. The Second cause of action alleged against the Appellants incorporates these allegations. Complaint ¶¶ 62, R. App. at p. 12.

The Appellants are alleged to have failed to protect the Plaintiff "from the dangers each [Appellant] knew were presented by Sepulveda." Complaint ¶ 58, R. App. p. 11. The Appellants parse this carefully, contending (e.g., brief at 12) there is no allegation of "actual knowledge based on any specific reason to know" of the

danger Sepulveda posed. But that too is simply incorrect. The Complaint alleges that it was "reasonably foreseeable to the Bishop and Diocese that Sepulveda had, and continues to have, a sexual interest in children." Complaint ¶ 49, R. App. p. 10. And that each appellant "knew, or should have known, that children needed to be protected from Sepulveda by supervising his activities." Complaint ¶ 50, R. App. p. 10. And that each Defendant "needed to warn the Plaintiff of the danger Sepulveda presented." Complaint ¶ 51, R. App. p. 10.

In short, the Complaint alleges that the Appellants had information about Sepulveda, specific information in the vernacular of the Appellants, which gave them "reason to know" that Sepulveda was not a safe person to have alone and unsupervised around children. These are not allegations that even touch on, let alone infringe in any way on, the religious beliefs of the Appellants, unless they contend that their religious beliefs require that children be sexually abused, or that for doctrinal reasons the priests they know to be dangerous to children need to be permitted to have unsupervised access to children so they can sexually abuse those children. Not surprisingly, the Appellants do not make that contention.

Nor do the allegations put "on trial" the religious beliefs of the Appellants. Nothing about the Complaint challenges why the Appellants selected Sepulveda or the process by which he was ordained. The Complaint alleges only that the Appellants had information about Sepulveda that placed Appellants on notice that

Sepulveda was not a proper person to permit to be unsupervised around children, and that Sepulveda was assigned by Appellants to be around children without proper supervision.

Plaintiff's Second cause of action, which the trial court did not dismiss, includes multiple grounds for the allegation of negligent infliction of emotional distress. Appellants address just one of these grounds for relief, the refusal to require Sepulveda to submit to testing. Appellants make no argument opposing, hence apparently concede (N.C. R. App. 28(b)[6]), the ruling below refusing to dismiss the allegations, in, for example, ¶ 67 of the Complaint, contending that liability exists for the Appellants because it was "reasonably foreseeable" that failing to protect the Plaintiff from Sepulveda would cause emotional distress to the Plaintiff "from the repeated sexual assaults Sepulveda inflicted on the Plaintiff." And no appeal is taken from the portions of the trial court's order denying the motion to dismiss on other grounds. Appellants' brief at p. 11, n. 6. A motion to dismiss the appeal is pending.

The only portion of Appellants' brief which concerns contested matter from the Second cause of action is one of the three independent bases of liability about medical testing of Sepulveda. Appellants contest that independent basis of liability in three short paragraphs on pages 31-32 of the Appellant's brief.

After Sepulveda assaulted the Plaintiff, the Complaint alleges that the Bishop "refused to require Sepulveda to submit to testing" so the Plaintiff could know if he had been exposed to a sexually transmitted disease. The Appellants agree that under the Code of Canon law, meaning under their internal operating procedures, the Bishop has "all ordinary, proper, and immediate power," (Burbridge Aff. at ¶ 10), which includes (as the Complaint alleges in ¶ 64), all "legislative, executive, and judicial powers" (Burbridge Aff. at ¶ 12), which of course includes authority to govern, assign, and discipline priests, (Burbridge Affidavit at ¶ 9). Appellants contend (brief at p. 30) that the Bishop's complete power over a priest gives him no authority to compel a priest who is known to have assaulted a child, in this instance Sepulveda, to submit to medical testing. E.g., Burbidge affidavit at ¶ 3 (he is bound by the Code), and ¶ 13 (his authority to discipline is circumscribed by the Code), and ¶ 18 (although priests "promise obedience to their bishop," they "have rights defined by canon law.")

The Appellants infer, but nowhere overtly state, that the Bishop's total authority excludes the power to compel a priest to submit to medical testing. It is undisputed that Sepulveda is now a former priest, having been laicized by the Bishop. So the Bishop contends his complete authority, which includes power to "discipline or remove a priest" (Burbridge Aff. at ¶ 21), does not include requiring Sepulveda to submit to medical testing. Set forth below are the two arguments as

to why the contention is irrelevant to the appeal. For purposes of the facts, the point is only that the Bishop does not overtly state that he lacks the power to compel a priest to submit to medical testing. Argued below is why the Bishop's claim does not divest the court of jurisdiction.

ARGUMENT

Standard of Review. The standard of review for an appeal over subject matter jurisdiction is *de novo*, with the plaintiff required to have invoked the court's jurisdiction in the complaint. *Harper v. City Of Asheville*, 585 S.E.2d 240, 244 (2003) (issue was "whether Mr. Harper's petition properly invoked the court's subject matter jurisdiction).

1. *Smith v. Privette*, 495 S.E.2d 395, 397 (N.C. App. 1998) remains good law.

The only proper issue in this appeal is whether *Smith v. Privette* remains good law. The Appellants do not contend otherwise, and no contention is made to overturn *Smith*. Instead, Appellants attempt to distinguish the case. The counter-statement of facts reflects that the case aligns closely with *Smith v. Privette*.

Appellants have placed into the record what purports to be the complaint in *Smith v. Privette*. R. App. pp. 143 – 152. That complaint alleges liability against the employers of Privette based on their "actual and constructive knowledge" of his inappropriate conduct from prior reports of misconduct. R. App. 150, ¶¶ 63 – 67. The contentions mirror the allegations in this Complaint that the Appellants

"knew, or should have known," that Sepulveda was a known danger to children. Complaint ¶ 25, R. App. p. 7; ¶ 48, R. App. p. 10.

The nearly identical claims in *Privette* were upheld by the Court of Appeals against the identical challenge: the argument that the church defendants were immune from suit under the First Amendment, because (it was contended) "the legal claim requires the court to interpret or weigh church doctrine." 495 S.E.2d at 398. The Court of Appeals acknowledged that decisions to hire and discharge a minister were "inextricable from religious doctrine and protected by the First Amendment." Id. But the *Privette* court overturned the trial court's dismissal and remanded the case, since the complaint "presents the issue of whether the Church Defendants knew or had reason to know of Privette's propensity to engage in sexual misconduct." Id. The claim in Privette is precisely the contention made in this action: that the Appellants knew or should have known that Sepulveda was a danger to children. The Appellants are not entitled to absolute immunity for their tortious conduct because "the First Amendment ... does not grant religious organizations absolute immunity from liability." *Smith v. Privette*, 495 S.E.2d 395, 397 (N.C. App. 1998). Religious organizations are liable for their torts. *Smith v. Privette*, 495 S.E.2d 395 (N.C. App. 1998); *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). *Accord*, *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993); *Erickson v. Christenson*, 781 P.2d

383 (Or. App. 1989); *Strock v. Pressnell*, 527 N.E.2d 1235, 1237-38 (Ohio 1988); *Geiger v. Simpson Methodist-Episcopal Church of Minneapolis*, 219 N.W. 463 (Minn. 1928).

Nor does this present any intrusion on the First Amendment's Free Exercise Clause, which embraces the absolute freedom to believe, and the freedom to act, which cannot be absolute. "Conduct remains subject to regulation for the protection of society." *Cantwell v. State of Connecticut*, 310 U.S. 296, 304, 60 S.Ct. 900, 903 (1940). Appellants are free to believe whatever they want. However, when either commits a tort, they are subject to the same laws as any other citizen. *Smith v. Privette*, 495 S.E.2d 395 (N.C. App. 1998). The Court is not required to interpret or weigh doctrine to establish whether the Diocese or Bishop Burbidge knew Sepulveda was dangerous when they placed him in a position to have unsupervised access to children and their families. The Court needs only weigh what the Appellants knew about Sepulveda before he was assigned to be unsupervised around children.

Plaintiff simply seeks to apply to the Appellants, in the same manner as they are applied to everyone, the same secular standards of care with regard to conduct involving employees known to be dangerous to children.

Nor is there any intrusion to the Establishment Clause, as *Privette* makes clear. State action does not violate the Establishment clause if the action (1) has a

secular purpose; (2) has a primary effect which neither advances nor inhibits religion; and (3) does not foster excessive state entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2015, 2111 (1971). What the Appellants knew about Sepulveda's danger to children neither advances nor inhibits religious belief, and the inquiry has nothing to do with religious belief, and poses no entanglement issues, as *Privette* determined. This is a single inquiry, using neutral principles of law, into what Appellants knew or should have known about a priest with dangerous propensities to sexually abuse minors. Nothing about the inquiry into Appellants' knowledge about Sepulveda treats them any differently than any other litigant to whom neutral principles of civil law are applied. And immunizing the Appellants would place them in a position not enjoyed by secular employers, and contradicts the holding in *Smith v. Privette*, 495 S.E.2d 395 (N.C. App. 1998). *See also*, *In re Williams*, 152 S.E.2d 317, 325 (N.C. 1967) (religious freedom applies to all citizens, not only clergymen, and no lay citizen is immune from tort liability).

To sustain a claim for negligent infliction of emotional distress, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress..., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*,

395 S.E.2d 85, 97 (N.C. 1990). Ordinary negligence is sufficient to state such a claim. Id. "Severe emotional distress" has been defined by the Supreme Court of North Carolina to mean:

> any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Ruark Obstetrics, 395 S.E.2d at 97. As with ordinary negligence, "[q]uestions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury. Id at 305; 98.

Appellants invited the Plaintiff to their premises and into his contact with Fr. Sepulveda. (Complaint ¶ 47). In doing so, they owed the Plaintiff a duty of reasonable care. The Complaint alleges that the Defendants breached their duty owed him when they acted unreasonably by, among other things, allowing Fr. Sepulveda to operate in the Diocese of Raleigh and giving him positions of trust and authority and represented him to the public as safe and trustworthy around children when in fact they knew, or should have known, that Sepulveda was a danger. (Complaint ¶ 21, 25, 45). The Appellants knew or should have known that children needed to be protected from Sepulveda by supervising his activities, and that that children needed to be warned about the risk Sepulveda posed. (Complaint ¶ 50-51).

Nothing about the allegations put "on trial" the religious beliefs of the Appellants, and their contention to the contrary is simply false. The false contention is proffered for two purposes: (1) to focus the court on the case the Appellants wish had been brought rather than the one that has been brought, and (2) to keep the Appellants from having to disclose the information it in fact had about Sepulveda.

2. The Bishop's claimed limits to his complete authority are irrelevant.

Relevance issues are reviewed *de novo*. E.g., *State v. Adams*, 727 S.E.2d 577, 581 (N.C. App. 2012).

On pages 30-32, of their brief, Appellants claim the Bishop's complete authority over a priest is limited by the Code of Canon law, and that for that reason, they are immune from having their negligent conduct as to Sepulveda inquired into. Brief at pp. 30-32. For three reasons, none of the Bishop's claimed power limitations is relevant to this appeal.

First, as set forth above, the Complaint explicitly limits its request of the Court to not "involve itself in, or interpret, religious beliefs of the Roman Catholic Church, or any of the Defendants, but to assess their actions and inactions against the requirements of North Carolina law." Complaint at ¶ 16, R. App. p. 6. Any matter that is determined to involve religious belief or court interpretation is specifically excluded by the Complaint. The Plaintiff alleged several grounds for

relief independently in the Second Claim for Relief. The allegations of ¶ 67 stand as an independent ground of liability for the second cause of action, so if the complaint in other respects were found to intrude on First Amendment activity that would still leave two other independent (and unchallenged) bases for liability: retaliation for the Plaintiff having reported Sepulveda and the allegation that before the assaults Appellants knew or should have known that Sepulveda was dangerous to leave unsupervised around children. Whether the Bishop's claimed power limitation is or is not actual is irrelevant where these independent grounds of liability are alleged.

Second, and also as observed above, the Bishop's claim nowhere explicitly states that his complete power prohibited him from demanding that Sepulveda submit to medical testing as among his powers to discipline a priest reported to have sexually assaulted the Plaintiff.

Third, the Bishop's Affidavit reflects his contention only that his power to "discipline or remove" has limits imposed by the Code of Canon law. There is no contention that the Bishop had no power to have made the request of his priest; the Appellants infer only that the Bishop's total authority excludes power to compel the priest to perform. In other words, the Bishop raises the prospect that, despite his total authority, he might be able to show that he has a defense to the allegation that he made no demand of his priest. Documents may reflect that the Bishop

made a demand of his subordinate and that the priest with the duty of obedience to the Bishop refused to comply — none of which requires the Court to interpret or apply Canon law. If the Bishop made a demand for medical testing and was refused, the Bishop will have a defense to the alleged wrongdoing (Complaint ¶ 66) that he made no demand of his subordinate and in so doing ratified his employee's tortious conduct. *Denning-Boyles v. WCES, Inc.*, 473 S.E.2d 38, 41 (N.C. App. 1996) (intention to ratify employee act necessary for employer liability). *Accord*, *Fox v. Sara Lee Corp.*, 764 S.E.2d 624, 629 (N.C. App. 2014) (quoting Denning-Boyles on intent to ratify.)

For each of those reasons, the Bishop's actual authority under the Code of Canon law is unnecessary for the Court to assess in this action, and is not involved in this appeal.

CONCLUSION

If this appeal is not dismissed, for the various defects noted above, then *Smith v. Privette* controls its disposition. The Complaint alleges that Appellants knew or should have known of reasons that Sepulveda was dangerous to leave unsupervised around children, and that they had that information before assigning him to be unsupervised around children. As in *Smith v Privette*, the First Amendment does not bar the claim. Only secular principles are needed to assess

the Appellants' tortious behavior, and Appellants are not immune to engage in tortious conduct.

The case should be remanded for further proceedings.

Respectfully submitted, this 16th day of March, 2015.

Leto Copeley, #12624
Copeley Johnson Groninger PLLC
300 Blackwell Street, Suite 101
The Old Bull Building
Durham NC 27701
leto@cjglawfirm.com
919-240-4054

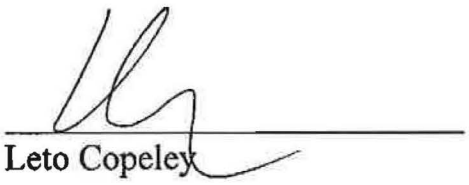
N.C.R. App. P. 33(b) Certification:
I certify that all the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

s/Gregg Meyers
Gregg Meyers, pro hac vice
Jeff Anderson & Associates, P.A.
366 Jackson Street, Suite 100
St. Paul, MN 55101
gregg@andersonadvocates.com
651-227-9990

Attorneys for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for the Plaintiff-Appellee certifies that the foregoing brief, which is prepare using a proportional font, is less than 8,750 words (excluding cover, indexes, table of authorities, certificates of service, this certificate of complaint and appendixes) as reported by the word-processing software.



Leto Copeley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this day a copy of the foregoing has been duly served by depositing a copy thereof in an envelope bearing sufficient postage in the U.S. Mail, addressed to the following persons at the following addresses which are the last addresses known to me:

Andrew H. Erteschik
Poyner Spruill LLP
P.O. Box 1801
Raleigh, NC 27602-1801
aerteschik@poynerspruill.com

The undersigned further certified that this day a copy of the foregoing has been duly serve by email and U.S. Mail to the following person at the following address which is the last address known to me:

Edgar Sepulveda
7746 Trap Way
Wilmington, NC 28412
edgarsepulveda@hotmail.com

That this 16th day of March, 2015.

Leto Copeley