IN THE UTAH SUPREME COURT

RIA WILLIAMS, Plaintiff/Appellant/Petitioner, vs. KINGDOM HALL OF JEHOVAH'S WITNESSES, ROY, UTAH; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; HARRY DIAMANTI; ERIC STOCKER; RAULON HICKS; AND DAN HARPER, Defendants/Appellees/Respondents.	Case No. 20190422-SC Ct. App. Case No. 20170783-CA Dist. Ct. Case No. 160906025

On Writ of Certiorari to the Utah Court of Appeals

BRIEF OF RESPONDENTS / APPELLEES

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The Petitioner/Appellant/Plaintiff is Ria Williams ["Appellant"]. "Appellant" is represented by Robert Friedman, Amy L. Marshak, and Mary B. McCord of the Institute for Constitutional Advocacy and Protection; Irwin M. Zalkin and Alexander S. Zalkin of The Zalkin Law Firm, P.C., and Mathew G. Koyle and John M. Webster of Bartlett & Webster.

The Respondents/Defendants/Appellees are English Congregation of Jehovah's Witnesses, Roy, Utah, an unincorporated association (incorrectly named as Kingdom Hall of Jehovah's Witnesses, Roy Utah); Watchtower Bible and Tract Society of New York, Inc.; Harry Diamanti; Eric Stocker; Raulon Hicks; and Dan Harper ["Appellees" or "Congregation Defendants."]. Appellees are represented by Karra J. Porter, George W. Burbidge, and Kristen C. Kiburtz of Christensen & Jensen, P.C.

Defendant Colin Williams is not a party to the appeal but was listed as a defendant in the District Court. A default judgment was entered against Mr. Williams, and he has not appealed that judgment. (R.248.) Mr. Williams never made an appearance in the District Court or in the court of appeals and has not been represented by any counsel in this case. (Record *Passim*.)

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INTRODUCTION

Appellant asks the Court to review the procedures of a religious congregation's "judicial committee" of elders that convened to determine whether Appellant had committed serious sin, and whether she met the spiritual qualifications to remain a member of the congregation. Below, Appellant argued that the elders' conduct during the hearing she and her parents voluntarily attended amounted to intentional infliction of emotional distress (IIED). Appellant and her parents were free to leave the hearing at any time. However, they decided to stay and have the issues concerning Appellant's alleged sin(s) ecclesiastically adjudicated.

Nearly eight years later, Appellant sued the four elders she met with, the local congregation she attended, and a corporation that supports the work of Jehovah's Witnesses (collectively referred to herein as the "Congregation Defendants") claiming, among other things, that the questions asked, length of, and evidence presented during the religious hearing caused her severe emotional distress.

The Congregation Defendants filed a 12(b)(6) motion to dismiss on grounds that the Establishment Clause of the United States Constitution prohibited a civil court from evaluating the conduct of a congregational judicial committee without entangling the court in ecclesiastical policies, practices, and beliefs of Jehovah's Witnesses. The District Court agreed and dismissed Appellant's claims of intentional infliction of emotional distress (IIED). The Utah Court of Appeals affirmed. This Court should affirm because adjudication of Appellant's IIED claims would require the Court to examine the beliefs, practices, and doctrines of Jehovah's Witnesses. Moreover, the church autonomy

doctrine, rooted in both the Establishment and Free Exercise Clauses, also dictates against review of a religious organization's disciplinary proceedings and membership decisions.

This Court can also affirm the Court of Appeals' ruling on any of three alternative bases. First, Appellant's IIED claim is precluded by the Free Exercise Clause of the United States Constitution because adjudication of her claims would unnecessarily burden the faith of Jehovah's Witnesses by infringing upon the congregation's arrangement for handling allegations of sinful conduct, any interest the State has in regulating these proceedings is not compelling, and civil emotional distress claims are not narrowly tailored to meet any State interest.

Second, Appellant's claims are also precluded by the Free Exercise and Establishment Clauses of the Utah Constitution because this civil claim does not meet the strict scrutiny test under our State's constitution.

Third, the conduct pled is not sufficient to constitute an IIED claim as a matter of law.

STATEMENT OF ISSUES

Issue 1: Whether the Court of Appeals erred in affirming the District Court's dismissal of Petitioner's complaint on the ground that it was precluded by the Establishment Clause of the First Amendment to the United States Constitution?

Standard of Review: The interpretation of a constitutional provision is a matter of law that is reviewed for correctness. *State v. Holms*, 2006 UT 31, ¶ 10, 137 P.3d 726.

Preservation: This issue was addressed by the panel at *Williams v. Kingdom Hall of Jehovah's Witnesses*, 2019 UT App 40, ¶¶ 16-18, 430 P.3d 820.

Issue 2: Whether the Free Exercise Clause precludes Appellant's intentional emotional distress claims?

Standard of Review: Interpretation of a constitutional provision is a matter of law that is reviewed for correctness. *Holms*, 2006 UT 31, ¶ 10.

Preservation: This issue was preserved at R.104-106 and Ct.App. Br., pp. 30-36.

Issue 3: Whether Appellant's intentional emotional distress claims are precluded under the Free Exercise and Establishment Clauses of the Utah Constitution?

Preservation: This issue was preserved at R.107-112 and Ct.App.Br., pp. 36-40.

Standard of Review: Interpretation of a constitutional provision is a matter of law that is reviewed for correctness. *Holms*, 2006 UT 31, ¶ 10.

Issue 4: Whether the conduct alleged in the Complaint is insufficient to set forth a claim for intentional infliction of emotional distress?

Standard of Review: The threshold determination of whether conduct is extreme and outrageous enough to constitute the intentional infliction of emotional distress is reviewed for correctness. *S.S. v. IHC Health Servs.*, 2018 UT 13, ¶ 10, —P.3d— citing *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 38, 56 P.3d 524; *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 975 (Utah 1993).

Preservation: This issue was preserved at R.112-117 and Ct.App. Br., 40-43.

STATEMENT OF THE CASE

Relevant Facts[1]

Appellant's Membership in the faith of Jehovah's Witnesses

Appellant Williams was "raised in a Jehovah's Witness family," and "belonged to the Roy Congregation of Jehovah's Witnesses." (R.79, ¶ 36.) "At the local level members of the Church are divided into Congregations." (R.76, ¶ 22.) "Congregations are run on a daily basis by a Body of Elders." (*Id*.) "Elders are responsible for the daily operations and governance of the local church" and are the "highest authority at the congregational level." (*Id*., ¶ 23.) Appellant alleges that the elders also "determine the guilt, repentance and punishment of church members who commit serious sin." (*Id*.) "[W]hen a Congregant commits an act of wrongdoing . . . that matter may be brought to an Elder to be resolved." (R.77, ¶ 29.) "Jehovah's Witness policy requires Elders to investigate such a claim." (*Id*.)

Elders convene a "judicial committee" to "determine the guilt, repentance and punishment of church members who commit serious sin." (R.76, ¶ 23.) "One wrongdoing from (sic) which a judicial committee would be convened is [Porneia]."[2] (R.78, ¶ 32.) Appellant alleges that porneia is "[u]nclean sexual conduct that is contrary to 'normal' behavior," and "includes sexual conduct between individuals who are not married to each

[1] Since this appeal concerns a motion to dismiss, the facts contained herein are taken from Appellant's First Amended Complaint (R.71-89) and are assumed true solely for purposes of the motion to dismiss. The Respondents dispute Appellant's factual allegations and deny that they mistreated her in any manner.

[2] The Greek term "porneia" is a general term denoting all sexual activity that contravenes Bible standards.

other." (*Id*.) If a judicial committee is convened, three elders "hear the case and impose punishment on the wrongdoer." (R.77-78, ¶ 30.)

The Judicial Committee Regarding Appellant's Alleged Porneia

Appellant met Colin Williams in 2007. (R.79.) Colin was also one of Jehovah's Witnesses and "a member of the Layton Congregation." (R.72, ¶ 4.) Appellant and Colin began to see each other socially beginning in Spring of 2007. (R.79-80.) Beginning in September 2007 until January 2008, Appellant and Colin had at least eight sexual encounters. She alleges that she consented to none of them. (R.80-83.)

In Spring, 2008, Congregation elders "accused [Appellant] of engaging in porneia" with Colin. (R.83, ¶ 49.) "After some initial investigation, a judicial committee was formed on April 27, 2008 in order to determine if [Appellant] had engaged in [porneia] and if so, if she was sufficiently repentant for doing so." (R.83, ¶ 50.)

Appellant attended the judicial committee meeting with her mother and step-father. (R.84, ¶ 52.) "The judicial committee was presided over by Defendant Diamanti, Defendant Stocker, Defendant Harper, and Defendant Hicks." (R.83, ¶ 51.) She alleges that the elders "questioned [her] for approximately 45 minutes about her sexual involvement with Colin." (R.84, ¶ 53.) Appellant contended that the conduct between her and Colin was non-consensual. (R.83-84.) Colin had given the elders an audio recording of one encounter with Appellant to refute her claim that the sexual behavior was nonconsensual. (*Id*.) The elders presented her and her parents with this audio recording and, based on the recording, "accused [Appellant] of engaging in porneia." (*Id*.) She alleges that the elders played the "audio recording for 4 to 5 hours, repeatedly

stopping and starting the audio tape, questioning [her] about what was happening at specific points in time on the audio recording and suggesting that she consented to sexual behavior on the audio recording being played back to her." (*R. 84*, ¶¶ 54, 55.) "While the Elder Defendants were playing the audio tape and questioning [her]," Appellant alleges she was "crying and physically quivering from the severe emotional distress she was experiencing" in having to relive the recorded events. (*Id*., ¶ 56.)[3]

Procedural History and Disposition Below

Appellant filed a First Amended Complaint against, among others, the English Congregation of Jehovah's Witnesses, Roy, Utah (misnamed by Appellant "Kingdom Hall of Jehovah's Witnesses, Roy, Utah") and a corporation that supports Jehovah's Witnesses ("Watchtower Bible and Tract Society of New York, Inc."). (R.71-89.) She also sued the elders who conducted the judicial committee meeting (Harry Diamanti, Eric Stocker, Raulon Hicks, and Dan Harper). (*Id*.)

Appellant alleged that the Congregation Defendants' conduct in "accus[ing] [her] of engaging in porneia," "suggesting that she consented to [wrongful] sexual behavior," and presenting her with an audio recording of one of her encounters with Colin amounted

[3] The Congregation Defendants filed the audio recording with the District Court because it was referenced in Appellant's Complaint. (*See* Ct. App. Order Granting Motion to Supplement the Record, dated June 21, 2018.) The tape is only six minutes long and does not contain any materials that would establish an intentional/negligent infliction of emotional distress claim as a matter of law. *See Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 13, 104 P.3d 1226 (holding that document referenced in a complaint may be considered on a motion to dismiss).

to either the intentional or negligent infliction of emotional distress.[4] (R.83-84, ¶¶ 49, 53, 55.)

The Congregation Defendants filed a motion to dismiss under Utah Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. (R.96-120.) They argued that Appellant's negligent and intentional infliction of emotional distress claims are barred by the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution ("Religion Clauses"), the church autonomy doctrine which is rooted in both Religion Clauses, and the Establishment and Free Exercise Clauses of the Utah Constitution. (R.107-112.) Additionally, the Congregation Defendants argued that Appellant's emotional distress claims should be dismissed because the conduct alleged in the Complaint was not outrageous or sufficient to constitute a claim for either negligent or intentional infliction of emotional distress under Utah law. (R.112-117.)

The District Court concluded that Appellant's claims would excessively entangle the court in "laws, policies, or practices" of the Jehovah's Witnesses faith. (R.260.) It granted the Congregation Defendants' motion to dismiss under the Establishment Clause of the United States Constitution. Appellant appealed. (R.264; R.266; Ruling and Order, attached as addendum A.)

The Utah Court of Appeals affirmed, holding that Appellant's negligence and intentional infliction of emotional distress claims would involve excessive government

[4] Appellant also named Colin as a Defendant in this case. Colin never made an appearance in the case and a default judgment was entered against him. (R.248-249.) As noted *supra* p. iii, Colin is not a party to this appeal.

entanglement with the Congregation Defendants "religious operations, the interpretation of its teachings, and the governance of its affairs." *Williams*, 2019 UT App 40, ¶ 15, attached as Addendum B. The court ruled that the claims were precluded under the Establishment Clause because they required the factfinder to evaluate the "outrageousness" of the Congregation Defendants' practices and beliefs. Appellant petitioned this Court for Certiorari review on her IIED clam only. The petition was granted on the issue of whether the Court of Appeals erred in affirming the District Court's ruling based on the Establishment Clause of the United States Constitution.

SUMMARY OF ARGUMENT

The Court of Appeals did not err in affirming the District Court's dismissal of Appellant's Complaint under Utah Rule of Civil Procedure 12(b)(6) because her IIED claim is precluded by the Establishment Clause of the United States Constitution. The Establishment Clause bars civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices. Appellant's emotional distress claim impermissibly does just that—the claim requests that this Court review the policies, practices, and beliefs associated with the Jehovah's Witnesses' judicial committee to determine whether these practices/policies are either reasonable and/or outrageous as compared to secular standards. Both this Court and the United States Supreme Court have stated that the Establishment Clause precludes courts from analyzing and interpreting religious practices and beliefs to determine compliance with secular standards. Additionally, other jurisdictions have addressed this issue as relates to religious tribunals and have concluded that such claims are precluded under the church

autonomy doctrine, which is based on both the Establishment Clause and the Free Exercise Clause of the United States Constitution. Under this doctrine, churches are to establish their own rules and regulations for internal discipline and government and to create tribunals for adjudicating disputes over these matters free from state interference.

None of Appellant's challenges to the Court of Appeals' holding has merit. Contrary to Appellant's argument, the Court of Appeals did not hold that courts can never regulate religiously motivated conduct under the First Amendment. Rather, consistent with this Court's holding in *Franco*, the Court of Appeals held that Appellant's intentional infliction of emotional distress claim was precluded by the Establishment Clause because the resolution of the elements of that claim could not be determined without both impermissibly interpreting the beliefs and practices of the Jehovah's Witnesses' faith and impermissibly challenging the underlying determination made by Congregation Defendant's judicial committee.

This Court can also affirm the Court of Appeals' holding on three alternative bases. First, the Court can affirm on the grounds that Appellant's claims are precluded by the Free Exercise Clause of the United States Constitution. The Free Exercise Clause precludes claims that directly burden a religion. Civil claims that involve discretion on the part of the factfinder are strictly scrutinized and must meet a compelling interest and be narrowly tailored to meet that interest. Appellant's claims do not meet that burden. There is no compelling interest in this case because the conduct alleged is no different than that which would occur in any adjudicative proceeding. Moreover, even if there were a compelling State interest, the claims that Appellant brings in this case—that

religious tribunals not engage in any religious proceeding that intentionally cause its members to experience emotional distress—is not narrowly tailored to meet that interest.

This Court can also affirm the Court of Appeals' holding on the grounds that Appellant's claims are precluded by the Utah Constitution. The Free Exercise and Establishment Clauses of the Utah Constitution analyze state action under a stricter standard of review than that required by the United States Constitution. Under this strict scrutiny test, only criminal claims generally will pass constitutional muster. In this case, Appellant is not bringing any criminal claims or any criminal claims.

Finally, this Court can affirm the Court of Appeals' holding on the grounds that Appellant does not meet the threshold requirements for an intentional infliction of emotional distress claim. The conduct alleged by Appellant is not outrageous and would not ordinarily cause severe unmanageable mental distress as a matter of law.

ARGUMENT

Appellant's IIED claim against the Congregation Defendants is barred by the Establishment Clause and the religious autonomy doctrine that is based on both the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. These clauses preclude courts from interfering in religious tribunals to allow churches to establish their own rules and regulations for internal discipline and governance and to create tribunals for adjudicating disputes over these matters, free from state interference. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976)

I. THE COURT OF APPEALS CORRECTLY HELD THAT APPELLANT'S IIED CLAIM IS BARRED BY THE ESTABLISHMENT CLAUSE.

A. The Court of Appeals' ruling is correct under Utah case law interpreting the Establishment Clause.

Appellant concedes that the First Amendment precludes a court from inquiring into the propriety of the decision to convene a religious disciplinary hearing and from second-guessing the discipline or punishment implemented by the elders after the hearing. (Pet., pp. 33-34.) She argues that the Court of Appeals erred because determining whether the Congregation Defendants conducted a religious tribunal (hearing before elders) in a manner that is considered "outrageous" compared to societal norms allegedly does not require a court to "review and interpret church law, policies, or practices." (Pet., pp. 10-11.) She claims a court can review and analyze the "outrageousness" of the elders' conduct in their religious membership decisions and proceedings without reviewing and interpreting church policies, practices, and beliefs. (Pet., pp. 31-36.) However, she asserts that the First Amendment permits state entanglement in what evidence a religious tribunal may consider in adjudicating sinful conduct. (Pet., p. 33.) That contention is untenable under the Establishment Clause.

The Establishment Clause prohibits all forms of governmental action respecting an establishment of religion, including "court action through civil lawsuits." *Franco v. Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 12, 21 P.3d 198[5], citing *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam). "[I]t is well settled that civil tort claims against clerics that require the courts to ***review*** and interpret

[5] *Franco* is attached as addendum C.

church law, ***policies, or practices*** in the determination of the claims are barred by the First Amendment under the entanglement doctrine." *Id.* at ¶ 15 (emphasis added). As this Court and the United States Supreme Court have recognized, "churches must have 'power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* at ¶ 15, *quoting Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

In *Franco v. Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, the Court held that claims that require the court to determine the manner and method in which a church performs its religious functions are precluded by the Establishment Clause. In *Franco*, a seven-year old girl was allegedly sexually abused by a boy in her congregation. The parents and child went to the church for religious counseling. *Id.* at ¶ 3. The plaintiffs claimed that the church intentionally gave them bad advice to protect the church and the boy from potential liability or embarrassment. The girl and her parents later sued the church and the leaders of the congregation for, among other things, emotional distress. They argued that their claims were not barred by the Establishment Clause because they were only challenging how the counseling services were performed and, therefore, their claims "did not require an inquiry into the LDS Church's religious doctrines, practices, or beliefs." *Id.*, ¶ 6. The Utah Supreme Court disagreed: To impose a standard of care on pastoral counselors in the performance of their ecclesiastical duties "*would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity*". *Id.*, ¶ 18 (emphasis in original). Such a ruling would constitute "an excessive government entanglement with

religion in violation of the Establishment Clause" because the court would be "establishing the training, skill and standards applicable to clergy" in the performance of their ecclesiastical duties. *Id*. at ¶ 23.

Likewise, in *Gulbraa v. Corp. of the Pres. of the Church of Jesus Christ of Latter-day Saints*, 2007 UT App 126, 159 P.3d 392, the Court of Appeals affirmed the dismissal of tort claims that challenged how LDS church performed certain priesthood ordinances.

The Court of Appeals affirmed the dismissal of the tort claims. The Court of Appeals reasoned that, under the Establishment Clause, those claims involved religious functions of the church and therefore implicated "key religious questions, including the nature of the priesthood ordinances, the eligibility of persons to perform those ordinances, and the eligibility of persons to be ordained." *Id*., ¶ 18. Resolution of those claims would therefore improperly "inject" the court "into substantive ecclesiastical matters." *Id*., ¶ 19.

In the instant case, Appellant asks this Court to do exactly what this Court refused to do in *Franco* and the Court of Appeals refused to do in *Gulbraa*—establish the standards by which a church must perform one of its religious functions. Appellant asks this Court to decide whether the judicial committee conducted was outrageous as compared to the nonexistent standard of care that would apply to all churches. The adjudication of this question would require a court to create a standard of care applicable to religious organizations' conduct in training, investigating, and questioning congregant members regarding biblical sin, and in encouraging congregant members to repent for their sins. Indeed, the Amended Complaint is rife with allegations pertaining to the

Congregation Defendants' alleged policies and procedures (or lack thereof) concerning how to conduct religious adjudications, or how to determine whether sexual encounters constitute porneia. (*See, e.g.*, R.74, ¶ 17 ("Watchtower has published a series of handbooks . . . [that provide] specific instruction regarding how to respond to allegations of wrongdoing, when to convene a judicial committee and how to handle the procedure."); *see also* (R.74-78 ¶¶ 17-20, 24, 28-31, 33.)

The Amended Complaint alleges that the policies and procedures of Appellant's former faith failed to satisfy a secular standard of care. For instance, she alleges that the elders were wrong in accusing her of porneia, a serious sin, because she "could not consent to any of the sexual conduct," presumably because she was a minor when the sexual conduct occurred. (R.83, ¶ 49.) This allegation invites the Court to impermissibly use a secular, age-of-consent standard to measure the reasonableness of the elders' ecclesiastical decisions regarding; (i) whether to investigate instances of sinful conduct, (ii) what evidence may be used in reaching an ecclesiastical adjudication, and (iii) its assessment of repentance or lack thereof and the effect on the wrongdoer's continued membership in the congregation.

This is not the only allegation in the Amended Complaint which belies an intent to measure the Congregation Defendants' alleged religious practices against a secular standard of care. *See also* R.78, ¶ 34 ("Watchtower does not provide any education or training to the individual Elders about how to conduct a proper interview of a victim of child sexual abuse."); R.84, ¶ 55 (The elders "suggest[ed]" Appellant's conduct was consensual and she should repent for her sins).

Appellant's allegations implicate key religious questions, including what questions can be asked by religious organizations about in membership-related proceedings, the reasonable duration of such a proceeding, at what age a member of a religious organization can commit sinful conduct or be questioned about such conduct, and what evidence or materials can be used by a religious organization to question members regarding sinful conduct. If this Court were to find review of religious tribunal practices constitutional, it would have far-reaching consequences. Applied to the LDS religion, Appellant's theory would permit courts to dictate the manner and method by which LDS church leaders may question members about sinful conduct in proceedings to obtain a temple recommend or at a disciplinary counsel. The court could also now determine what discussions are off limits in the confessional box in the Catholic church. Such a result would impermissibly entangle the courts in religion. Here, as in *Franco*, the Court is neither permitted to attempt, nor capable of, disentangling any alleged "non-religious" conduct from the church's internal processes for investigating and disciplining the sinful acts of church members. This is true even if, as Appellant argues, judicial investigations occur in non-religious contexts—just as the sort of counseling at issue in *Franco* occurs in non-religious contexts. Even if that were so, the Establishment Clause forbids judicial review of such conduct when it occurs as part of religious "policies or practices." *Franco*, 2001 UT 25, ¶ 15. This Court should affirm the Court of Appeals.

B. Claims challenging the manner and method of a religious tribunal violate both the Establishment and Free Exercise Clause.

While Utah courts have not specifically addressed the Religion (Establishment and Free Exercise) Clauses collectively as they relate to claims challenging the manner and method in which a religious adjudicative proceeding is performed, other courts have held that such claims violate both Religion Clauses of the First Amendment under the church autonomy doctrine. The church autonomy doctrine is rooted in the Establishment and Free Exercise Clauses and "deals with a church's First Amendment right to autonomy in 'making decisions regarding [its] own internal affairs,' including matters of faith, doctrine, and internal governance." *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286, 293 (Ind. 2003) (alteration in original) (quoting *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002)).

Pursuant to the church autonomy doctrine, churches have the right "to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters," free from state interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 187 (2012) (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976)) (internal quotation marks omitted). The church autonomy doctrine eschews the prospect of civil courts examining "with minuteness and care" not only the "subject of doctrinal theology," but also "the usages and customs, the written laws, and fundamental organization of every religious denomination. . . ." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

In her brief, Appellant argues that she simply seeks to enforce the neutral and generally applicable tort laws of intentional infliction of emotional distress. However, the U.S. Supreme Court has ruled that neutral laws of general applicability are also invalidated by the First Amendment when such laws violate multiple constitutional protections, such as the church autonomy doctrine which is rooted in both the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution. *See Hosanna-Tabor*, 565 U.S. at 189-190, and *Employment Div. v. Smith,* 494 U.S. 872, 881 (1990).

Courts applying the church autonomy doctrine have barred tort claims arising from conduct that occurred in connection with internal church proceedings or affairs, including internal disciplinary proceedings. *E.g., Stepek v. Doe*, 910 N.E.2d 655, 669 (Ill. Ct. App. 2009) (barring claims for defamation and infliction of emotional distress arising from allegedly false statements made "solely within the context of the Church's internal disciplinary proceeding"); *Celnik v. Congregation B'nai Israel*, 131 P.3d 102, 107–08 (N.M. Ct. App. 2006) (barring rabbi's prima facie tort claim against congregation which alleged that congregation and members intentionally disseminated one-sided, negative information about the rabbi with intent to sway congregation members against the rabbi, and to compel the rabbi to lose employment); *In re Godwin*, 293 S.W.3d 742, 749 (Tex. Ct. App. 2009) ("[I]t is well settled that intangible, psychological injury, without more, cannot ordinarily serve as a basis for maintaining a tort cause of action against a church or its members for its religious practices.") (citation and internal quotation marks omitted); *Collins v. African Methodist Episcopal Zion Church*, C.A. No.

04C-02-121, 2006 Del. Super. LEXIS 549, 2006 WL 1579828 (Del. Super. Ct. Mar. 29, 2006).

In *Collins,* the plaintiff claimed that a pastor sexually harassed her. She reported the harassment to a bishop, the pastor's supervisor, who initiated an investigation and church disciplinary proceeding against the pastor. Dissatisfied with both "the manner and the outcome of the investigatory and disciplinary procedures," *id*. at *24, the plaintiff sued the bishop and church for intentional infliction of emotional distress, which was dismissed on summary judgment.

The *Collins* court explained that "the nature of the dispute . . . would implicate a secular examination into 'intra-church' policies, practices, process and procedure" and, therefore, "would necessarily involve an inquiry into the propriety of the decisions of church authorities on matters of discipline, internal organization, ecclesiastical rule, custom, and law[,]" …"exactly the inquiry that the First Amendment prohibits." *Id*. at *25-26 (citation and internal quotation marks omitted). The *Collins* court also expressed unwillingness to inquire into the reasonableness of the church's "internal processing and handling of [the plaintiff's] claims," as such inquiry "would involve, by necessity, discovery and examination by litigation of the church's disciplinary procedures and subsequent responses." *Id*. at *30. Finally, the court concluded that "[a]ny award of damages would have a chilling effect, leading indirectly to state control over the future conduct of affairs of a religious denomination" and, therefore, was constitutionally impermissible. *Id*. at *32.

Appellant wants this Court to engage in the same sort of inquiry that courts have widely held to violate the autonomy doctrine. Inquiry into the policies and procedures of the Congregation Defendants would require this Court to entangle itself in questions of ecclesiastical "'discipline, faith, internal organization, or ecclesiastical rule, custom or law.'" *Bryce*, 289 F.3d at 657 (quoting *Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997). Moreover, any award of damages in this case would curtail the ability of any religion to use tribunals to adjudicate their interpretations of serious sin, help their parishioners repent, and determine worthiness of continued membership. This is constitutionally impermissible. It interferes with legitimate, religiously-based practices concerning internal church discipline and order. *See Hosanna-Tabor*, 565 U.S. at 187. The District Court correctly ruled that it could not inject itself into such an analysis.

C. Appellant's Establishment Clause arguments are meritless.

Appellant challenges the Court of Appeals' holding regarding the Establishment Clause on two bases. First, she contends that her IIED "claims do not run afoul of the Establishment Clause" because a claim for IIED "depends on neutral principles of law" and allegedly involves "no inquiry into religious doctrine." (Pet., pp. 17-40.) Second, she suggests that the Court of Appeals' opinion improperly immunizes all religious conduct from liability and sets dangerous precedent. As described below, none of these arguments have merit.

1. Appellant's IIED claim entangles the court into substantively ecclesiastical matters.

Appellant asks this Court to hold that "[a]s a general matter, intentional torts are neutral principles of law, and claims based on them yield no excessive entanglement." (Pet. Br. 25.) But as the Court of Appeals rightfully held that is not the correct analysis. The question is not whether the tort is based on neutral principles. If that were the test, the negligence claims in *Franco*, also based on neutral principles, would not have "yield[ed] excessive entanglement." (*Id*.) Rather, the correct analysis is whether the neutrally-applicable law is being used to "evaluate a religious practice or belief." *Williams*, 2019 UT App. 40, ¶ 16 (citing *Franco*, 2001 UT 25, ¶ 15). This court in *Franco*, made clear that regardless of the tort alleged, a "claim will not survive constitutional scrutiny if an adjudication of the claim would foster an excessive governmental entanglement with religion in violation of the Establishment Clause." *Franco* at ¶ 21.

Thus, in *Franco*, the Court did not simply decide as a matter of law that all negligence claims are barred by the entanglement doctrine or *vice versa*. Instead, the court reviewed whether the application of a negligence claim to the issue—i.e., whether the LDS. Church negligently provided counseling services to plaintiff—would require the court to determine how a church should perform religious counseling services. The court held that the "reasonableness" element of a negligence claim resulted in entanglement because that element requires a court to dictate how a church performs religious counseling, a core religious function.

Other courts employ the same analysis and determine entanglement by analyzing whether the application of the specific tort elements result in the interpretation of religious practices and beliefs. *See e.g., Anderson v. Watchtower Bible and Tract Soc'y Of New York, Inc.,* No. M2004-01066-COA-R9CV, 2007 WL 161035 (Tenn. Ct. App. 2007) (analyzing application of elements of intentional interference with business relations and intentional infliction of emotional distress to disfellowship proceeding); *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F.Supp.2d 732 (D. N.J. 1999) (citing *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78 (3d Cir. 1996) ("To determine whether the Establishment Clause prohibits this court from exercising jurisdiction over this matter, this court must consider the specific elements of the plaintiffs' claim.); *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 261-66 (Min.Ct.App. 2003) (considering elements of IIED claim to determine whether resolution of elements would entangle court in church's decision to announce congregant's name during a religious service in relation to minister's resignation for sexual misconduct); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) ("We look to the substance and effect of plaintiffs' complaint, not its emblemata.").

Here, the Court of Appeals correctly found that Appellant's IIED claim violates the Establishment Clause because it entangles the court in the doctrines, beliefs, and practices associated with the Congregation Defendants' religious membership decisions and proceedings, which are core religious functions.

i. Procedures to decide membership are a core religious function that are protected under the First Amendment.

Appellant's IIED claim implicates the First Amendment because she seeks to regulate the Congregation Defendants' procedure used to make membership decisions. Courts have uniformly held that membership decisions and the proceedings associated with such decisions are protected under the First Amendment. *See, e.g.*, *Anderson*, 2007 WL 161035 (holding that disfellowship decision and actions linked to that decision are protected under the First Amendment); *Abrams v. Watchtower Bible & Tract Soc'y of New York, Inc*., 715 N.E.2d 798, 803 (Ill. App. Ct. 1999) (review of manner and method of disfellowship proceeding amounted to a "review of matters of ecclesiastical administration and government, which could produce by its coercive effect, only the very opposite of that contemplated by the First Amendment); *Paul v. Watchtower Bible & Tract Soc'y of New York*, 819 F.2d 875 (9th Cir. 1987) (punishment associated with disfellowship proceeding is protected activity under First Amendment); *Rasmussen v. Bennett*, 741 P.2d 755 (Mont. 1987) (conduct occurring during membership proceeding was protected under First Amendment); *Ex Parte Bole*, 103 So.3d 40 (Ala. 2012) (although defamation claims are generally applicable and neutral law, the application of that law to an internal church discipline proceeding entangled the court in ecclesiastical matters).

There is no dispute that Appellant's IIED claim arose in the context of a religious adjudicative proceeding that was called to determine whether she had committed serious sin, if so, the extent of her repentance, and its effect on her continuing as one of

Jehovah's Witnesses. She concedes that this Court is precluded from challenging the religious decision made by the elders during this proceeding and from interpreting any religious beliefs, policies, or practices upon which the decision and proceeding is based. Yet, that is exactly what her IIED claim would require a court to do.

ii. Application of the elements of an IIED claim result in entanglement with the Congregation Defendants' membership practices.

The elements of an intentional emotional distress claim are: (a) conduct that is "outrageous and intolerable in that it offends . . . generally accepted standards of decency and morality"; (b) "the defendant intended to cause, or acted in reckless disregard of the likelihood of causing, emotional distress"; (c) "the conduct proximately caused emotional distress." *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 37, 56 P.3d 524. The application of any one of these elements to the Elder's conduct during the Judicial Committee would entangle a court in the Congregation Defendants' membership decision, practices, and beliefs.

a. The "outrageousness" prong of Appellant's IIED claim asks this Court to review and interpret the Congregation Defendants' religious practices and beliefs.

Appellant argues that there is no entanglement here because "resolving [her] claims will not force a civil court to decide between two competing interpretations of religious doctrine or to craft a religion-specific standard of care." (Pet., p. 36.) That is incorrect. Claims involving intentional (or negligent) infliction of emotional distress unnecessarily burden the First Amendment because they almost "inevitably entail an evaluation by the fact finder of the truth or veracity of th[e] religious beliefs espoused."

Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996); *see also Anderson v. Watchtower*, 2007 WL 161035 (precluding claims of fraud and emotional distress associated with disfellowship procedure because such claims would undermine decision of religious tribunal by determining whether disfellowship of member was based on a fraudulent pretext or based on religious beliefs).

In *Anderson*, 2007 WL 161035, the Tennessee Court of Appeals analyzed whether a plaintiff's intentional tort claim concerning conduct in a religious membership proceeding would impermissibly entangle the court in an analysis of that organization's religious practices and beliefs. The plaintiffs recited eight claims, all related to or resulting from actions the organization took against them, including allegations of intentional infliction of emotional distress, fraud, and defamation. The plaintiffs acknowledged that the ecclesiastical abstention doctrine limits a court's power to adjudicate intra-church disputes over membership but alleged that they "carefully worded the allegations in their complaint to avoid application of the doctrine." *Id.*, *11. It was the plaintiffs' position that the congregation disfellowshipped them for purely secular reasons that had nothing to do with the practices and religious beliefs of the organization and therefore their fraud claims could be decided based on neutral principles.

That court disagreed: If the harm alleged is the direct result of a religious practice or decision that courts cannot examine, there is no remedy in the courts for such harm. Additionally, the court noted that plaintiff's fraud claim was essentially "another way of claiming that the expulsion was wrongful" because it would require the court to analyze/review whether the tribunal's decision was based on a fraudulent pretext or based

on the religion's doctrines and beliefs. *Id.*, *17. That decision in turn would require the court to determine the entity's religious doctrines and beliefs, a process which would be prohibited by the establishment clause.

Like *Anderson,* Appellant's IIED claim necessarily requires the court to determine the appropriateness of religious doctrines and practices under the elements of her claim. She alleges that the Congregation Defendants' subjection of "a 15-year-old to a recording of her [alleged] rape, in the face of her serious distress" is "outrageous" as compared to societal norms. (Pet., p. 3.) Notably, she does not discuss the societal norm of having her parents present and being free to leave at any time in the context of her IIED claim. (Pet., p. 6.) Ultimately, Appellant's claim cannot be untangled from the context in which it occurred. The reason Appellant attended the judicial committee was to participate in a Bible-based process of determining whether she had committed serious sin and to be confronted with evidence.[6] According to Appellant, the elders believed that the information on the audio recording evidenced consensual serious sin for which she needed to repent. Although she claims she only challenges their conduct, Appellant's IIED claim necessarily implicates the Congregation Defendants' beliefs. Analyzing the elders' conduct under the "outrageousness prong" would require the fact-finder to consider the veracity of the elders' religious beliefs and their decision that the evidence on the tape demonstrated consensual and thus sinful conduct.[7]

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[6] *See* 2 Kings 17:16, 21; Isaiah 1:4; Matthew 18:15-17; 1 Corinthians 6:16-18; Galatians 6:1; James 5:14, 15; and 1 John 3:4

[7] A copy of the audio recording has been provided to this Court. Although the Congregation Defendants are limited by the allegations of the complaint, no reasonable

The risk of entanglement is heightened by the nature of Appellant's claim. A claim for intentional emotional distress is of such a general and indefinite characterization that it gives wide discretion in its application and therefore puts courts in the position of unduly entangling themselves in religion in the guise of conserving societal norms. *See Paul*, 819 F.2d 875, 883 (IIED claims do not ordinarily serve as bases for imposing liability against a church because the claim is not sufficiently "definite and tangible" to justify the invasion of First Amendment protections (internal quotation marks omitted)); *Cantwell v. Connecticut*, 310 US 296, 308 (1940) (discussing problem of applying common law that has general and undefined terms because it gives the judicial branch "too wide a discretion in its application").

As one commentator noted, the indefinite character of the "outrageousness" prong of an IIED claim is especially dangerous to First Amendment religious protections because it necessarily results in the punishment of religious teachings, practices, and beliefs that are considered unpopular.

> In some sense, the emotional distress tort is even more dangerous to constitutional values. … Juries can impose liability on almost any act they find sufficiently outrageous. … within the religious context, the effects have been extreme. A series of cases imposed enormous damages on unpopular minority groups, usually Scientologists and Hare Krishna's, for what juries claimed were improper methods of religious indoctrination. …
>
> Many religions teach and do things that outsiders find outrageous. Every day acts of church discipline, for example, seem outrageous to

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person would consider the conduct alleged on the tape to amount to sexual contact at all, let alone rape. Notably, Williams's counsel, although acknowledging that he has never listened to the audio recording, disputed in the District Court that the recording produced by the Congregation Defendants was the actual recording that was used during the proceeding. *See* Appellant's Opposition to Motion to Supplement Record on Appeal, p.3 & Ex. 1, filed in Utah Ct. App. 6/11/2018.

> outsiders. … But juries will not be inclined to see religious discipline as an attempt to maintain social and doctrinal unity in an increasing secular world. … They will ask why the church did not have better procedures to determine wrongdoing, why the scriptural text or church teaching should necessarily be read that particular way, why certain immoral acts get treated differently than others, and why religious groups that are supposed to be about forgiveness somehow cannot forgive.

Lund, Christopher C., Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor, 108 Nw. U. L. Rev. 1183, 1213 (Nov. 2014); *see also* Hayden, Paul T. Religiously Motivated "Outrageous" conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other" People's Faiths, 34 Wm. & Mary L. Rev. 579, 615-622 (1993) (discussing that IIED claims impermissibly burden First Amendment protections).

b. The resolution of the issue of whether the Congregation Defendants intended to cause Appellant emotional distress entangles a court in a religious question.

The resolution of the second element—whether the Congregation Defendants intended to cause or acted in reckless disregard of the likelihood of causing, emotional distress—also entangles the Court in the beliefs of the Congregation Defendants.

In *Ex parte Bole*, 103 So3d 40, the Alabama Supreme Court considered an IIED claim in the context of a church's decision whether its minister was fit for his position. The minister alleged that the church falsely accused him of misappropriating funds during the church's proceeding to terminate his position as minister. The court refused to consider the IIED claim because any determination that the church acted recklessly or with intent to cause severe emotional distress would necessarily require the court to determine whether the church's basis for its choice of a religious leader was based upon religious principles or for the purpose of causing emotional distress.

In *Thibodeau v. American Baptist Churches*, 994 A.2d 212 (Conn. Ct. App. 2010), a Connecticut court considered a negligent infliction of emotional distress claim in connection with a church's decision regarding the fitness of a minister. The minister alleged that during its investigation into his fitness, the church told his wife that he was "affiliated with a cult" and would never be a minister in the church. *Id*., 225. He alleged that this conduct amounted to negligent infliction of emotional distress. He contended that his emotional distress claim did not run afoul of the First Amendment because it only sought to regulate the church's conduct under neutral principles of law. The court disagreed. The emotional distress claim required the court to determine "whether informing a church member that another is involved in a cult would cause an unreasonable risk of emotional harm." *Id*., 226. The court held that this determination could not be separated from the context in which the statement was made. The statement was made in determining the individual's fitness for ministry and would necessarily require the court to determine what a "cult" is and whether the minister's membership in such cult affected his fitness for the church's ministry.

Here, as in *Bole* and *Thibodeau*, the determination of whether the Congregation Defendants intended to cause or recklessly caused emotional distress would entangle the court in the religious decisions that were made in the proceeding to determine Appellant's continued membership as one of Jehovah's Witnesses. Determining whether the Congregation Defendants intended to cause or recklessly caused Appellant emotional distress necessarily would require the court to consider Appellant's claim that the elders intended to "psychologically tortur[e] [her] to extract a confession" (Pet., p. 2) and the

Congregation Defendants' intent to determine Appellant's repentance for the serious sin and her continued membership. Such a determination would require the court to consider whether the Congregation Defendants believed the conduct recorded on the tape amounted to serious sin and whether that sin called into question Appellant's continuing as one of Jehovah's Witnesses. The answer to these questions impermissibly entangles the court in ecclesiastical matters.

c. The determination of whether "the conduct proximately caused emotional distress" also entangles the court in religion.

The analysis of whether the audio recording proximately caused emotional distress entangles the court in determining the beliefs, practices, and teachings of the Congregation Defendants.

In *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1 (Tex. 2008), the Texas Supreme Court was asked to determine whether the analysis of an intentional infliction of emotional distress claim and other intentional torts were barred by the Establishment Clause. Schubert filed intentional tort claims over the manner and method by which a religious organization performed an exorcism. The court held that it could not untangle the determination of whether her psychological injuries were caused by the religion's teaching and beliefs that she was possessed by a demon versus the distress caused by the alleged tortious conduct associated with the exorcism.

Likewise, it would be difficult if not impossible for a jury to untangle whether Appellant's emotional distress was proximately caused by listening to the audio recording or by the fact that she faced being disfellowshipped and was accused of and

asked to repent for serious sin. Nor would it be possible to untangle what amount of her distress was caused by the Bible-based process of repentance itself. Indeed, the court would first need to determine what is meant by "repentance" and whether the process of achieving it is an internal mental process that naturally would result in severe emotional distress due to the sin in question and the religious beliefs overlaying the punishment for that sin. The resolution of these issues would improperly entangle the court in the religious practices and beliefs of Jehovah's Witnesses. The Court of Appeals correctly ruled that Appellant's IIED claim was precluded by the Establishment Clause because the resolution of this and any of the other elements of her IIED claim would impermissibly entangle the court in a religious determination.

d. Appellant's claims are precluded by the Establishment Clause because she consented to have her sins adjudicated.

Application of Appellant's IIED claims are especially problematic under the First Amendment because she *voluntarily participated* in the religious adjudicative proceeding. She attended *with her parents* and was *free to leave at any time*. For her to now complain that the way the elders confronted her with the evidence they presented during the hearing was "outrageous" indirectly challenges the decision that she voluntarily asked that tribunal to make under the Congregation Defendants' religious beliefs and doctrines. Indeed, courts refuse to consider IIED and other torts associated with a church's religious proceedings when the plaintiff voluntarily participated in those proceedings. *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Ok. 1989); *Smith*, 614 N.W.2d 590 (no intentional tort claim is available when plaintiff consented to

participate in discipline proceeding); *Bryce*, 289 F.3d 648 (no intentional tort claim for conduct occurring during religious proceeding when the non-member plaintiff voluntarily participated in the proceeding); *see also Watson*, 80 U.S. (13 Wall) 679, 729 ("All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.")

The rationale is that a dissatisfied former member of a religious organization should not be able to use the courts to force a religion to change its beliefs and practices. *Id*. To the extent that Appellant believed that the practices, beliefs, and teachings of the Congregation Defendants are "outrageous," she had a choice. She and her parents could have left at any time during the hearing. She was not forced to remain a member of that faith. *See Guinn*, 775 P.2d 766 (treating non-members differently than members for purposes of determining applicability of First Amendment protections).

2. Appellant's arguments that the Court of Appeals' decision regarding the Establishment Clause will result in "disruptive and practical consequences" is not supportable.

Appellant argues that, based on the Court of Appeals' ruling, religiously motivated conduct could never be scrutinized under neutral tort law principles. She claims that it's "not just tort law that would be unenforceable under the court of appeals' rule but contract, property, regulatory, and even criminal law too that would be unenforceable." (Pet., p. 38.) To the contrary, the Court of Appeals' ruling does not create absolute immunity for conduct engaged in by religious organizations. Rather, it recognizes that civil courts cannot "review and interpret church law, policies, or practices in the determination of the claims." *Franco*, 2001 UT 25, ¶ 15. Indeed, the United States

Supreme Court has stated that a court cannot interfere with a church's disciplinary proceeding of its own members because such proceedings are "strictly and purely ecclesiastical . . . over which the civil courts exercise no jurisdiction." *Watson*, 80 U.S. 679, 733; *Serbian E. Orthodox Diocese*, 426 U.S. 696, 713-714.

Tellingly, Appellant has cited no case law in support of her position that shielding religious leaders and organizations from IIED liability for their actions in the course of a church disciplinary proceeding would violate the Establishment Clause. Moreover, her argument ignores the U.S. Supreme Court's decision in *Hosanna-Tabor*, 132 S.Ct. 694. In *Hosanna-Tabor*, the court broadly exempted religious organizations from federal anti-discrimination law in the context of ministerial appointments based on the First Amendment. It is difficult to comprehend how an exemption from tort liability in this case involving a religious adjudicative proceeding would not equally be subject to the protections of the Establishment Clause. *See, e.g., Franco*, 2001 UT 25 (a church is exempt from malpractice claims for performance of religious functions); *Gulbraa*, 2007 UT App 126 (a church is exempt from tort liability associated with performance of religious functions); *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002) (neutrally applicable law did not apply to non-member in association with statements made during a religious proceeding that non-member voluntarily attended). *See also Lund*, Free Exercise Reconceived, pp. 1199-1200, 1214-1216 (noting that the Supreme Court's decision in *Hosanna-Tabor* suggests that there is a difference between neutrally applicable law asserted by the public in association with a religious entity's conduct

versus neutrally applicable tort law asserted by a disgruntled former member whose lawsuit impermissibly challenges a religion's teachings, beliefs, and practices).

Amicus claims that the court of appeals did not adequately consider the harm to the Appellant. (Amicus Br., p. 5-7). That is not true, the court did consider Appellant's alleged harm but determined that it could not resolve her intentional emotional distress claim without entangling itself in the beliefs and practices of the Jehovah's Witness faith.

The District Court's statement that it would have made a different decision if the "conduct had occurred in a secular setting," is perfectly in keeping with the considerations courts are to make when determining whether a claim fosters excessive government entanglement with religion. Appellant essentially equates "secular" with "non-religious," and in so doing misunderstands the First Amendment's prohibition against preferring religion over non-religion. That prohibition requires only that the state "be a neutral in its relationships with groups of religious believers and non-believers," *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 18 (1947), not that courts refuse to acknowledge when conduct occurs within a religious context and make the same decisions irrespective of whether religious settings are involved.

None of the cases Appellant cites demonstrate that precluding her IIED claims would result in "religious exemptions from civic obligations of almost every conceivable kind." (Pet., 38.) Many of her cited cases relate to criminal statutes or property disputes. The other cases she cites involve corporal punishment. (Pet., pp. 45-47.) None seek a declaration from the court that would require a factual determination whether a religious belief or practice is "outrageous." None include a disgruntled former member of a

religion seeking to collect damages for emotional distress associated with her voluntary participation in a religious proceeding, especially when accompanied by her parents. None are church-discipline cases.

The cases cited by Appellant are therefore easily distinguishable. Historically, this Court has been skeptical of intentional emotional distress claims because they are easy to feign and difficult to defend. *Franco*, ¶ 25. Unlike a case involving physical injuries which can be tied to a physical act, the intangible nature of an emotional distress claim carries significant risks that religious entities will be punished for beliefs that are considered unpopular or for the membership decision itself. For this reason, some courts suggest that intentional infliction of emotional distress claims should never be allowed in the context of a religious proceeding. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996); *Paul*, 819 F.2d 883. Other courts do not allow claims for IIED associated with religious proceedings the plaintiff has consented to attend. *Supra* discussion, pp. 30-31.

In any event, courts repeatedly refuse to allow IIED claims and other intentional tort claims to proceed when those claims are intertwined with either the decisions made or the beliefs asserted in a membership proceeding. *See, e.g.*, *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197 (N.J. Superior Ct. 2009) (dismissing intentional infliction of emotional distress claim in manner that religious divorce proceeding was conducted because claim was intertwined in a particular religion's practice and beliefs); *Bryce v. Episcopal Church*, 289 F.3d 648, 659 (dismissing sexual harassment claims against non-member who voluntarily participated in a church religious proceeding in which statements were made as part of internal church dialogue that "homosexuals are

promiscuous, suffer odious diseases, are engaged in sin, and are unfit to work with children" on the basis that an analysis of those claims would violate the church autonomy doctrine); *Ex Parte Bole*, 103 So. 3d 40 (holding that although defamation and intentional infliction of emotional distress claims are generally applicable and neutral law, the application of that law to an internal church discipline proceeding entangled the court in ecclesiastical matters); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Ok. 1989) (dismissing intentional infliction of emotional distress claims associated with church disciplinary proceeding because plaintiff consented to the proceeding.); *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Min. Ct. App. 2003) (affirming dismissal of intentional infliction of emotional distress claim because such a claim would require review of the motivations of the church's doctrine and governance); *Purdum v. Purdum*, 301 P.3d 718 (Kan. Ct. App. 2013) (affirming dismissal of defamation made in the context of a religious disciplinary proceeding involving a member because regulation of how the proceeding was conducted and what was said during the meeting could chill the church's autonomy in conducting such proceedings); *Smith v. Calvary Christian Church*, 614 N.W.2d 590 (Mich. 2000) (no intentional tort claim available when plaintiff consented to participate in discipline proceeding); *Thibodeau*, 994 A.2d 212 (affirming dismissal of intentional infliction of emotional distress claim because review of internal religious proceeding to determine motivations of actors would entangle the courts).

II. ALLOWING APPELLANT'S EMOTIONAL DISTRESS CLAIM TO PROCEED WOULD ALSO VIOLATE THE FREE EXERCISE CLAUSE.

This Court may also affirm the Court of Appeals ruling on the alternate ground that Appellant's emotional distress claim is precluded by the Free Exercise Clause. "It is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory . . . was not considered or passed on by the lower court." *Bailey v. Bayles*, 2002 UT 58, ¶¶ 10-13, 52 P.3d 1158.

The First Amendment to the United States Constitution offers broad protection for the free exercise of religious beliefs. More than a century ago, the United States Supreme Court declared: "The right to organize voluntary religious associations . . . to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned." *Watson*, 80 U.S. 679, 728-29. "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." *Id*. at 729.

The First and Fourteenth Amendments to the United States Constitution give religious organizations the right to establish their own rules and regulations for internal discipline and to create tribunals for adjudicating disputes over these matters. *Serbian E. Orthodox Diocese*, 426 U.S. 696, 725. In contrast, civil courts have no jurisdiction over

"church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson*, 80 U.S. at 733.

"Churches are afforded great latitude when they impose discipline on members or former members." *Paul v. Watchtower Bible & Tract Society of New York, Inc*., 819 F.2d 875, 883 (9th Cir. 1987). In *Paul*, after the plaintiff withdrew her membership in a congregation, her former friends refused to speak with her in compliance with congregation rules regarding "shunning." The plaintiff sued Watchtower, alleging common law torts of defamation, invasion of privacy, fraud, and outrageous conduct. The Ninth Circuit affirmed summary judgment on the grounds that the defendants' alleged practice of shunning was protected by the Free Exercise Clause. "[P]ermitting prosecution of a cause of action in tort, while not criminalizing the conduct at issue, would make shunning an 'unlawful act,'" the court reasoned. *Id*. at 881, quoting *Langford v. United States*, 101 U.S. (11 Otto) 341, 345 (1879) ("The very essence of a tort is that it is an unlawful act."). The court found that a state tort law prohibition against shunning would directly restrict the free exercise of a church's religious faith because a church and its members would risk substantial damages every time a former church member was shunned.

In *Westbrook v. Penley*, 231 S.W.3d 389 (Texas 2007), a pastor followed church disciplinary rules by disclosing to his congregation that Penley, a parishioner, engaged in a "biblically inappropriate" relationship. Penley sued the pastor, church and church elders alleging various torts, including intentional infliction of emotional distress. The Texas Supreme Court held that court interference with the church's disciplinary process

through the imposition of tort liability would infringe upon matters of church governance in violation of the First Amendment, and therefore dismissed the case for want of jurisdiction. The *Westbrook* court noted that "a church's decision to discipline members for conduct considered outside of the church's moral code is an inherently religious function with which civil courts should not generally interfere." *Id*. at 399. The court emphasized: "While it might be theoretically true that a court could decide whether [a defendant] breached a secular duty [potentially giving rise to a tort claim claim] without having to resolve a theological question, that doesn't answer whether its doing so would unconstitutionally impede the church's authority to manage its own affairs. Churches have a fundamental right 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* at 397 (*citing Kedroff*, 344 U.S. at 116). Subjecting a church's pastor "to tort liability for engaging in the disciplinary process that the church requires would clearly have a 'chilling effect' on churches' ability to discipline members, and deprive churches of their right to construe and administer church laws." *Id*. at 400 (citations omitted).

The same is true here. Allowing Appellant to maintain her claim against the Congregation Defendants for a religious disciplinary process in which she and her parents voluntarily participated would restrict the ability of Jehovah's Witnesses to freely exercise their faith. Going forward, the Congregation Defendants and all other religious organizations would have their right to administer their ecclesiastical beliefs and to discipline their members sharply restricted by the risk of future claims for substantial

damages by members alleging that church practices and discipline were outrageous and caused them intentional emotional distress.

Cases that involve an "individualized assessment" and discretion regarding whether a particular religious practice should be regulated are subject to strict scrutiny. *Employment Div. v. Smith*, 494 U.S. at 884 (abrogated in part by statute as recognized in *Holt v. Hobbs*, 135 S. Ct. 853 (2015)). *See, e.g., Westbrook*, 231 S.W.3d 389 (strictly scrutinizing common law claims under First Amendment); *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1 (Tex. 2008) (refusing to grant emotional distress damages to minor related to emotional distress she suffered as a result of a religious proceeding); *Paul*, 819 F.2d at 883; *Cantwell*, 310 U.S. 296, 305.

Under the strict scrutiny test, the State must have a compelling interest in regulating the conduct at issue, and the law must be narrowly defined to reach that State interest. *Paul*, 819 F.2d 875, 882 n. 6, quoting *Hobbie v. Unemployment Comm'n*, 480 U.S. 136 (1987). The claims here do not meet this standard.

The elders formed the judicial committee to review, and give Appellant an opportunity to respond to evidence that she had engaged in consensual sex outside the bounds of marriage. (R.83-85.) During the judicial committee meeting, the elders questioned Appellant about her alleged involvement in the sin, and presented her with evidence of that sin. (*Id*.)

None of this alleged conduct falls outside the ambit of what typically occurs in an adjudicatory proceeding, whether the proceeding is religious or civil in nature. Appellant has alleged that her sexual encounters with Colin Williams were not consensual. Because

she has made these allegations in a civil case, the defendants will have the right to take her deposition and cross-examine her at trial. The Congregation Defendants in this case would have the right to play the audio recording at her deposition and at trial and question her about it. Though doing so could cause Appellant emotional distress, but she and her parents consented to exposing her to the distress by electing to adjudicate her claims in an adversarial proceeding.

Similarly, the elders' conduct during the religious tribunal was adjudicatory in nature – their alleged wrongs consisted of addressing evidence of serious sin by Appellant, a congregation member, presenting evidence relevant to the alleged serious sin, and questioning her about the evidence to determine if she had engaged in serious sin and was repentant. Contrary to Appellant's position, any freedom to convene a religious adjudication or tribunal would be illusory if that freedom does not include the right to examine witnesses and present evidence without fear that the state may intervene by measuring the adjudicatory process against secular standards to determine if it is outrageous, and then applying those secular standards to decide that the questions were too tough, the proceeding too long, or the subject matter too sensitive.

Even if a compelling interest could be shown, Appellant's claims are not narrowly tailored to protect that interest. She asks this Court to announce a burden that is incredibly broad. She asks the Court to hold that the only burden placed on religion would be the requirement not to engage in outrageous and intolerable conduct that causes severe emotional distress while exercising their religious practices. On its face, such an analysis unconstitutionally burdens the free exercise of religion. *See, e.g., Tilton v.*

Marshall, 925 S.W.2d 672, 681 (Tex. 1996) (holding that claims involving intentional or negligent infliction of emotional distress unnecessarily burden the free exercise of religion because they almost "inevitably entail an evaluation by the fact finder of the truth or veracity of th[e] religious beliefs espoused"); *Paul*, 819 F.2d 883 ("Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members.") The Court therefore can also affirm the District Court's decision based on the Free Exercise Clause.

III. THE DISMISSAL OF APPELLANT'S EMOTIONAL DISTRESS CLAIM CAN BE AFFIRMED BASED ON THE UTAH CONSTITUTION.

This Court can affirm the Court of Appeals' holding under the Utah Constitution. The Utah Constitution contains multiple provisions which expressly protect religious freedom. Article I, § 1 states that all citizens have the "inherent and inalienable right . . . to worship according to the dictates of their consciences." Utah's religious liberty clause, in Article I, § 4, begins: "The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof …" Article III reads in relevant part: "First: -- Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited." These provisions, when read together, are designed to protect religious exercise and freedom of conscience in general. *Society of Separationists v. Whitehead*, 870 P.2d 916, 935 (Utah 1993).

The formational history of the Utah Constitution supports broad protections of religious freedom. Relatively little history is available regarding adoption of the 1895 Utah Constitution, and particularly the Declaration of Rights. *Id*. at 929 ("There was little discussion or controversy regarding any of the provisions of the Declaration of Rights"). Those rights were so fundamental, so uncontroversial, that there was nothing to debate. However, Utah history provides insight into the perspectives the delegates to the constitutional convention had on the issue of religion. Mormon delegates had "experienced the attempted control and suppression of their religious beliefs and practices by the federal government," while "non-Mormon delegates had lived under social, economic, and political domination by the Mormon Church." *Id*. at 935. Both Mormon and non-Mormon delegates could claim that some form of governmental authority "had denied them freedom of conscience, and both were acutely aware of the threat government power presented to that freedom." *Id*. at 935. The Utah Constitution's religion and conscience clauses, viewed in light of the framers' history, show the delegates' intent to distance government from involvement with religion. *Id*. at 936.

Consistent with the delegates' intent, the Utah Supreme Court has repeatedly stated that the federal Constitution sets the floor, but not the ceiling, of constitutional protections for Utah residents. *See, e.g., Society of Separationists*, 870 P.2d at 940; *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 17, 108 P.3d 701; *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994).

The Court has not yet determined whether the Free Exercise Clause of Article I, § 4, and other related clauses of the Utah Constitution provide greater protection than that

provided by the United States Constitution. However, a number of justices and former justices on the Court have indicated that the Utah Constitution does provide greater protection than its Federal counterpart. *See State v. Green*, 2004 UT 76, ¶ 70, 99 P.3d 820 (Durrant, J., concurring) (suggesting that the Utah Constitution requires strict scrutiny of laws that burden religiously motivated conduct); *State v. Holms*, 2006 UT 31, ¶ 157, 137 P.3d 726 (stating that the Utah Constitution likely requires higher scrutiny than that applied by the Federal Constitution).

In analyzing our state constitution, the United States Supreme Court's opinion in *Reynolds v. United States*, 98 U.S. 145 (1879) is instructive. *See Holms*, at ¶ 158 (Durham, J., dissenting). *Reynolds* was issued in 1879, seventeen years before the 1896 ratification of our state constitution. It originated in Utah. The *Reynolds* court held that the Free Exercise Clause did not preclude the legislature from regulating actions "which were in violation of social duties subversive of good order." 98 U.S. at 162. Examples of conduct considered "subversive of social duties and good order" included "human sacrifice" and "self-immolation," which had been criminalized by federal or state statutes. *Id*. at 166-67. Consistent with *Reynolds*, many states adopted constitutional provisions which construed religious freedoms as not excusing "practices inconsistent with the peace and safety of the state." *Holms*, ¶ 160-163. When the Utah Constitution was adopted "breach of the peace" was understood to mean violation of a criminal statute. *Id.*

As Justice Durham noted in her dissenting opinion in *Holms*, this history supports the position that Utah's constitution likely requires that laws that burden religious

freedoms be subject to heightened strict scrutiny and require compelling justifications. The types of laws that would meet such scrutiny would generally be criminal in nature, since by enacting a criminal statute the "legislature has signaled its judgment that [the conduct criminalized] does harm to society or individuals to a degree that warrants criminal punishment." *Id*. In contrast, tort law implies not injury to the state or public peace, but rather injury to an individual.

As already discussed above, Appellant's claims do not meet the scrutiny required under the federal constitution, let alone the heightened scrutiny required under our state's constitution. *Supra*, 39-40. The present action does not include any criminal claims. Nor has Appellant brought any claims pursuant to statute or state regulation. Instead, she brings a civil law tort claim that is designed to redress her individualized injury. Such a claim is precluded under the Utah Constitution when directed at a religious organization for that organization's religious practices.

IV. THIS COURT CAN AFFIRM ON THE ALTERNATIVE BASIS THAT THE CONGREGATION DEFENDANTS' CONDUCT WAS NOT OUTRAGEOUS UNDER UTAH LAW.

In order to state a claim for intentional emotional distress ("IIED"),

> a plaintiff must plead facts that demonstrate that the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; *and* his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, ¶ 58, 70 P.3d 17 (internal quotation marks omitted).

"Due to the highly subjective and volatile nature of emotional distress and the variability of its causations, the courts have historically been wary of dangers in opening the door to recovery therefor." *Franco*, 2001 UT 25, ¶ 25 (*quoting Samms v. Eccles*, 358 P.2d 344 (1961)). Courts are charged with screening IIED claims "to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 38, 56 P.3d 524 (citations omitted). "If the trial court determines that a defendant's conduct was not outrageous as a matter of law, then the plaintiff's claim fails, and a court may properly grant the defendant summary judgment on an intentional infliction of emotional distress claim." *Id*.

The conduct Appellant alleges as the basis for her IIED claim does not fall within the legal parameters of outrageousness.[8] "To be considered outrageous, the conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind, or unfair." *Franco*, 2001 UT 25, ¶ 28 (citation and internal quotation marks omitted). Recovery for IIED is permitted "only where the conduct complained of has been so extreme in degree as to go beyond all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized society." *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 53, 194 P.3d 956, quoting 45 Am. Jur. 2d Proof of Facts 261 (1986).

The allegations in the Amended Complaint do not meet that burden. Appellant acknowledges that the Congregation Defendants had a legitimate, proper purpose in

[8] Allegations forming the basis for Appellant's IIED claim are at ¶¶ 49-63 of her First Amended Complaint. (R.71-89.)

forming the judicial committee, and that both she and her parents chose to participate in the proceeding. Significantly, Appellant does not allege that the elders physically harmed her, deprived her of food, water, rest, or parental guidance. She could leave the meeting at any time, and her parents could have taken her out of the meeting if they thought the elders' actions were outrageous or were causing their daughter distress. It is significant to this Court's determination of "outrageousness" that neither Appellant nor her parents chose to end the meeting. They exercised their prerogative to stay while the evidence was reviewed and Appellant was questioned. When a teenager and her parents knowingly attend a meeting with congregation elders that is called to investigate whether the teen committed serious sin, which the teen denies, and the teen is questioned about her actions and presented with evidence, some discomfort is unavoidable.

In *Meroni v. Holy Spirit Ass'n. for Unification of World Christianity*, for example, the decedent's estate brought claims for IIED against a church on grounds that the church "brainwash[ed]" the decedent by subjecting him to behavioral control techniques, such as "fasting, chanting, physical exercises, cloistered living, confessions, lectures, and a highly structured work and study schedule." 506 N.Y.S.2d 174, 177 (N.Y. App. Div. 1986). The court dismissed the claims on grounds that the activities to which the church subjected the decedent were "common and accepted proselytizing practices" and, therefore, were not extreme or outrageous. *Id*. The court further reasoned that the fact that the decedent "had the personal and individual right to determine for himself whether to associate with the defendant church" and "chose to subject himself to the church's discipline" militated against a finding of extreme or outrageous conduct. *Id*. at 178.

Like the alleged wrongful conduct in *Meroni*, the alleged conduct in this case is a common and accepted religious practice. The elders confronted Appellant about her alleged misconduct that scripturally constituted serious sin, questioned her about her involvement in the alleged serious sin, and presented her with evidence relevant to the religious question of whether she willfully engaged in serious sin. Appellant voluntarily associated with the religious organization and chose to participate in the judicial tribunal with her parents. There is no allegation in the Amended Complaint that the elders falsely imprisoned her or otherwise physically restrained her from leaving. To the contrary, she admits that she voluntarily participated in the meeting because she did not want to be disfellowshipped or excluded from associating with other members. With her parents' approval and support, she chose to participate in the judicial committee because of her desire to continue to be a congregation member. The fact that she and her parents were free to leave the judicial committee meeting at any time but chose not to do so reflects that they did not consider the events of the judicial committee meeting to be so extreme or outrageous that it merited their departure. If it was not extreme or outrageous enough to merit their departure, then how can it be considered so in this Court's analysis, 8 years after the meeting? *See also Nelson v. Target Corp.*, 2014 UT App 205, ¶ 21, 334 P.3d 1010 (IIED claim fails where plaintiff who was suspected of store theft, interrogated "at length" by security guard, and accused of being dishonest presented "no evidence that [interrogator] was verbally abusive or unprofessional," such that the conduct could not be considered outrageous).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals.

DATED this 23rd day of December 2019.

CHRISTENSEN & JENSEN, P.C.

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CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of December, 2019, a copy of the foregoing **BRIEF OF RESPONDENTS / APPELLEEES** was emailed to the following and then two true and correct copies were mailed, first-class postage prepaid, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(g), Counsel for Respondents hereby certifies that the foregoing brief contains a proportionally spaced 13-point typeface and contains 12,622 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.

Pursuant to U.R.A.P. 21(g), Counsel for Respondents hereby certifies that the foregoing brief contains no non-public information.

/s/ Karra J. Porter
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ADDENDUM A

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT

RIA WILLIAMS,

Plaintiff,

vs.

KINGDOM HALL OF JEHOVAH'S WITNESSES, ROY, UTAH, an unincorporated association, et al.,

Defendants.

RULING AND ORDER ON DEFENDANT'S MOTION TO DISMISS

Case No. 160906025

Judge Mark R. DeCaria

This matter came before the Court on Defendants Kingdom Hall of Jehovah's Witnesses, Roy, Utah; Watchtower Bible and Tract Society of New York, Inc.; Harry Diamanti; Eric Stocker; Raulon Hicks; and Dan Harper's (collectively referred to as Defendants) motion to dismiss filed February 13, 2017. Plaintiff filed a memorandum in opposition on March 2, 2017. Defendants filed a reply memorandum on March 24, 2017. Oral arguments were held on July 10, 2017. The Court has carefully reviewed the pleadings and briefs on this matter and is now prepared to enter its ruling. The Court hereby grants Defendants motion to dismiss.

ANALYSIS

This case arises from actions taken by Mr. Diamanti, Mr. Stocker, Mr. Hicks, and Mr. Harper[1] in the course of a religious judicial committee.[2] At the time of the judicial committee,

[1] Kingdom Hall of Jehovah's Witnesses, Roy, Utah and Watchtower Bible and Tract Society of New York, Inc. are alleged to be responsible for the training of the named defendants.
[2] Because this is a motion to dismiss under rule 12(b)(6), this Court will accept the allegations in the complaint as true for purposes of this motion and consider all reasonable inferences in favor of Plaintiff. Prows v. State, 822 P.2d 764, 766.

Plaintiff was fifteen years old.[3] However, at the time of the conduct which led to the judicial committee, Plaintiff was only fourteen years old.[4] This judicial committee was convened to determine if Plaintiff had engaged in pornea, defined by Jehovah's Witnesses as serious sexual sin.[5] At this committee, Plaintiff was subjected to intense scrutiny and harsh questioning for several hours.[6] As part of their interrogation of Plaintiff, the members of the judicial committee played an audio tape[7] which had been given to them by Defendant Williams.[8] [9] This audio tape contained a recording of Defendant Williams allegedly raping Plaintiff.[10] Members of the committee forced Plaintiff to listen to the tape, stopping it at different times and requiring Plaintiff to describe what was happening and repeatedly accusing her of consenting to the conduct.[11] [12]

Defendants argue that the question of whether or not their conduct was outrageous and intolerable in civil society cannot be reached because the conduct occurred in an ecclesiastical judicial committee and is thus protected by the First Amendment to the U.S. Constitution.[13] Defendants argue that allowing this case to go forward would require the Court to look at the law, policies, or practices of a religious institution. Such a review would, Defendants argue, violate the First Amendment.

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[3] Pl.'s Mem. 20.
[4] Def.'s Reply, Ex. 1, p. 4. Note that Plaintiff's age is listed only as fifteen in Plaintiff's memorandum in opposition.
[5] Am. Compl. 13, ¶ 50.
[6] Id. 14, ¶ 52 – 54.
[7] While the Court is aware that the legal definition of child pornography would not cover an audio recording without any visual aspect, it is still disturbing to this Court that Defendants apparently had no qualms with not only possessing but listening to the contents of an audio recording that included sexual conduct by a fourteen year old girl.
[8] Defendant Williams is not a party to this motion.
[9] Am. Compl. 13, ¶ 54.
[10] Id.
[11] Id. ¶ 55.
[12] It is worth noting that Defendant Williams was eighteen at the time the sexual conduct occurred. If Plaintiff was indeed only fourteen when the conduct heard on the tape occurred, she was legally unable to consent to have any sexual relations with the male who recorded the encounter.
[13] Defendants also argue that the Utah Constitution requires dismissal. Because this Court determines that dismissal is required under the federal constitution, it does not reach the state constitution question.

The First Amendment prohibits Congress from making any law "respecting an establishment of religion." U.S. Const. amend. I. Courts have interpreted this clause as applying to not only statutory law but also court action through civil lawsuits. Franco v. The Church of Jesus Christ of Latter-Day Saints, 2001 UT 25, ¶ 12, citing Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960). In Lemon v. Kurtzman, the Supreme Court articulated a test to determine when governmental action constituted a "law respecting an establishment of religion." 403 U.S. 602 (1971). In order for governmental action to comport with the establishment clause of the First Amendment, the action: (1) must have a "secular legislative purpose"; (2) cannot advance or inhibit religion; and (3) "must not foster 'an excessive government entanglement with religion.'" Id. at 612 – 13. "In addressing the tort liability of clergy under the Establishment Clause, courts have focused on the "third prong" of the Lemon test, 'excessive government entanglement.'" Franco at ¶ 13.

The excessive entanglement doctrine does not forbid all governmental contact with religion. For instance, it does not forbid lawsuits involving clergy misconduct unrelated to the religious efforts of a cleric. Id. at ¶ 14. However, the law is well settled that the entanglement doctrine forbids tort claims requiring the court to "review and interpret church law, policies, or practices in the determination of the claims." Id. at ¶ 15. Accordingly, when a tort claim is brought against a religion, "the central inquiry involved is whether the causes of action alleged expressly implicate religious teachings, doctrines, and practices." Gulbraa v. Corp. of the Pres. of the Church of Jesus Christ of Latter Day Saints, 2007 UT App 126, ¶ 16.

As noted, not all governmental contact is forbidden. While religions are guaranteed nearly absolute freedom, they are not given carte blanche to engage in conduct that would pose a serious threat to public safety, health or welfare. Guinn v. Church of Christ of Collinsville, 775

P.2d 766 (Okla. 1989). Indeed, it is well settled that while the freedom to believe is absolute, the freedom to act is not. Cantwell v. Connecticut, 310 U.S. 296, 303. This is particularly true when children are involved. Where actions constitute a clear and present danger to the child, a state can intervene. Prince v. Massachusetts, 321 U.S. 158, 167. "Although one is free to believe what one will, religious freedom ends when one's conduct offends the law by . . . endangering a child's life." Lundman v. McKown, 530 N.W.2d 807, 817 (Minn. 1995). In that vein, a religious belief cannot justify actions that imperil children including withholding lifesaving medical care,[14] engaging child labor,[15] or failing to report child abuse.[16] [17]

Here, Plaintiff has alleged that Defendants caused her emotional distress by their actions during a religious judicial committee convened to determine if Plaintiff had engaged in sin. Plaintiff's claims expressly implicate key religious questions regarding religious rules, standards, and discipline, most prominently how a religion conducts its ecclesiastical disciplinary hearings. While the allegations are certainly disturbing, this Court is unable to disentangle Defendants conduct from the setting and context in which they took place. Further, nothing in the pleadings indicates Defendants conduct subjected Plaintiff to a clear and present danger. Though forcing a minor to listen to an audio recording of her alleged rape is nothing less than reprehensible, there is no showing that it endangered Plaintiff's life.

This case was a close call given the seriousness of the allegations. Indeed, if this conduct had occurred in a secular setting, the Court would have no hesitation in sending this claim to the jury. However, if we as jurists allow ourselves to abdicate our duty to protect freedom when we find the actions to be distasteful or even repugnant, we fail in our sacred duty to uphold and

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[14] Lundman at 817.
[15] Prince at 170.
[16] People v. Hodges, 13 Cal.Rptr.2d 412 (Cal. App. Dep't Super. Ct. 1992).
[17] Note that Utah's mandatory reporting requirement includes an exception for clergy if certain conditions are met. Utah Code Ann. §62A-4a-403.

protect the Constitution upon which this nation was founded. Despite this Court's revulsion at the allegations, it cannot hear this case without excessively entangling itself in religion, and thus declines to do so.

ORDER

On the basis of the forgoing ruling, Defendants' motion to dismiss is granted.

This order constitutes the final order of the court in this matter, and no further documentation of this order is necessary.

Dated this 10th day of August, 2017.

Mark R. DeCaria
District Court Judge

ADDENDUM B

THE UTAH COURT OF APPEALS

RIA WILLIAMS,
Appellant,
v.
KINGDOM HALL OF JEHOVAH'S WITNESSES, ROY UTAH;
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK INC;
HARRY DIAMANTI; ERIC STOCKER; RAULON HICKS; AND
DAN HARPER,
Appellees.

Opinion
No. 20170783-CA
Filed March 21, 2019

Second District Court, Ogden Department
The Honorable Mark R. DeCaria
No. 160906025

John M. Webster and Matthew G. Koyle, Attorneys
for Appellant

Karra J. Porter and Kristen C. Kiburtz, Attorneys
for Appellees

JUDGE KATE APPLEBY authored this Opinion, in which
JUDGES JILL M. POHLMAN and DIANA HAGEN concurred.

APPLEBY, Judge:

¶1 Ria Williams appeals the district court's dismissal of her tort claims for negligent infliction of emotional distress and intentional infliction of emotional distress against defendants Kingdom Hall of Jehovah's Witnesses, Roy Utah; Watchtower Bible and Tract Society of New York Inc.; Harry Diamanti; Eric Stocker; Raulon Hicks; and Dan Harper (collectively, the Church). We affirm.

BACKGROUND

¶2 Williams and her family attended the Roy Congregation of Jehovah's Witnesses.[1] In the summer of 2007, Williams met another Jehovah's Witnesses congregant ("Church Member"). Williams and Church Member began seeing each other socially, but the relationship quickly changed and throughout the rest of the year Church Member physically and sexually assaulted Williams, who was a minor.

¶3 In early 2008 the Church began investigating Williams to determine whether she engaged in "porneia," a serious sin defined by Jehovah's Witnesses as "[u]nclean sexual conduct that is contrary to 'normal' behavior." Porneia includes "sexual conduct between individuals who are not married to each other." The Church convened a "judicial committee" to "determine if [Williams] had in fact engaged in porneia and if so, if was she sufficiently repentant for doing so." A group of three elders (the Elders)[2] presided over the judicial committee. Williams voluntarily attended the judicial committee with her mother and step-father. The Elders questioned Williams for forty-five minutes regarding her sexual conduct with Church Member.[3]

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1. "Because this is an appeal from a motion to dismiss under rule 12(b)(6) of the Utah Rules of Civil Procedure, we review only the facts alleged in the complaint." *Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 2, 21 P.3d 198 (quotation simplified).

2. Elders are leaders of local congregations and are responsible for the daily operations and governance of their congregations.

3. Williams alleged in her complaint that although church policy requires elders to conduct judicial committees to investigate (continued…)

¶4 After questioning Williams about her sexual conduct, the Elders played an audio recording of Church Member raping Williams. Church Member recorded this incident and gave it to the Elders during their investigation of Williams. The recording was "several hours" in length. Williams cried and protested as the Elders replayed the recording. The Elders played the recording for "four to five hours" stopping and starting it to ask Williams whether she consented to the sexual acts. During the meeting Williams was "crying and physically quivering." Williams conceded she was able to leave but risked being disfellowshipped if she did.[4]

¶5 Williams continues to experience distress as a result of her meeting with the Elders. Her symptoms include "embarrassment, loss of self-esteem, disgrace, humiliation, loss of enjoyment of life," and spiritual suffering. Williams filed a complaint against the Church for negligence, negligent supervision, failure to warn, and intentional infliction of emotional distress (IIED).

¶6 In response to her complaint, the Church filed a motion to dismiss under rule 12(b)(6) of the Utah Rules of Civil Procedure. Williams filed an amended complaint dropping her negligence claims and adding a claim for negligent infliction of emotional distress (NIED) to the IIED claim. The Church filed a second motion to dismiss under rule 12(b)(6). The motion argued the

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(…continued)
claims of sexual abuse, the Church does not train them on how to interview children who are victims of sexual abuse.

4. Disfellowship is expulsion from the congregation. When someone is disfellowshipped, an announcement is made to the congregation that the member is no longer a member of the Jehovah's Witnesses, but no details are given regarding the nature of the perceived wrongdoing.

United States and Utah constitutions barred Williams's claims for IIED and NIED.[5]

¶7 After considering the motions and hearing argument the district court dismissed Williams's amended complaint. It ruled that the First Amendment to the United States Constitution bars Williams's claims for NIED and IIED. The court ruled that Williams's claims "expressly implicate key religious questions regarding religious rules, standards, . . . discipline, [and] most prominently how a religion conducts its ecclesiastical disciplinary hearings." Although the allegations in the complaint were "disturbing" to the court, it ruled that the conduct was protected by the First Amendment and adjudicating Williams's claims would create unconstitutional entanglement with religious doctrine and practices. Williams appeals.

ISSUES AND STANDARDS OF REVIEW

¶8 Williams argues the district court erred in dismissing her amended complaint. When reviewing appeals from a motion to dismiss, we "review only the facts alleged in the complaint." *Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 2, 21 P.3d 198 (quotation simplified). We "accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff." *Id.* (quotation simplified). We will affirm a district court's dismissal if "it is apparent that as a matter of law, the plaintiff could not recover under the facts alleged." *Id.* ¶ 10 (quotation simplified). "Because we consider only the legal sufficiency of the complaint, we grant the trial court's ruling no

5. The Church also argued Williams's claim for IIED failed because the conduct was not "outrageous" as a matter of law and her claim for NIED failed because Williams did not allege sufficient facts to support it.

deference" and review it for correctness. *Id.* (quotation simplified).

ANALYSIS

¶9 Williams argues the First Amendment to the United States Constitution does not bar her claim for IIED.[6] Specifically, she contends the Elders' conduct was not religiously prescribed and therefore adjudicating her claims does not violate the Establishment Clause.[7]

¶10 The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

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6. Arguments under both the Utah and United States constitutions were presented to the district court. But the court determined dismissal was required under the federal constitution and did not reach the state constitutional analysis. Williams focuses her arguments on appeal on the federal constitution and does not argue the district court erred in failing to consider the Utah Constitution. As a result we likewise focus our analysis on the federal constitution. *See State v. Worwood*, 2007 UT 47, ¶ 18, 164 P.3d 397 ("When parties fail to direct their argument to the state constitutional issue, our ability to formulate an independent body of state constitutional law is compromised."); *see also State v. Sosa*, 2018 UT App 97, ¶ 7 n.2, 427 P.3d 448 (stating that although arguments under both the state and federal constitutions were made to the district court, we will not consider both constitutions when the appellant only makes arguments under the federal constitution).

7. "[B]ecause the Establishment Clause is dispositive of the issues before us, we do not address the Free Exercise Clause." *Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 11 n.8, 21 P.3d 198.

thereof." U.S. Const. amend. I. These provisions are known as the Establishment Clause and the Free Exercise Clause and they apply to the states through the Fourteenth Amendment. *Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 11, 21 P.3d 198 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

¶11 In *Franco*, the Utah Supreme Court applied what is known as the *Lemon* test to determine "whether government activity constitutes a law respecting an establishment of religion" under the Establishment Clause. *Id.* ¶ 13 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). This test requires the government action "(1) must have a secular legislative purpose, (2) must neither advance nor inhibit religion, and (3) must not foster an excessive government entanglement with religion." *Id.* (quotation simplified).

¶12 Courts focus on the third prong of the test, "excessive government entanglement," when looking to determine clergy liability for tortious conduct. *Id.* Entanglement "is, by necessity, one of degree" because not all government contact with religion is forbidden. *Id.* ¶ 14. "[T]he entanglement doctrine does not bar tort claims against clergy for misconduct not within the purview of the First Amendment, because the claims are unrelated to the religious efforts of a cleric." *Id.* But tort claims "that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred" by the entanglement doctrine. *Id.* ¶ 15.

¶13 Some tort claims do not run afoul of the Establishment Clause because they do not require any inquiry into church practices or beliefs. *Id.* ¶ 14. For example, "slip and fall" tort claims against churches have been upheld because the tortious conduct was "unrelated to the religious efforts of a cleric." *Id.* (citing *Heath v. First Baptist Church*, 341 So. 2d 265 (Fla. Dist. Ct. App. 1977)); *see also Fintak v. Catholic Bishop of Chi.*, 366 N.E.2d 480 (Ill. App. Ct. 1977); *Bass v. Aetna Ins. Co.*, 370 So. 2d 511 (La. 1979).

¶14 But the Utah Supreme Court has rejected tort claims against church entities for "clergy malpractice" as well as other negligence-based torts that implicate policies or beliefs of a religion. *Franco*, 2001 UT 25, ¶¶ 16–19. "[I]t is well settled that civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine." *Id.* ¶ 15. It is important that churches "have power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* (quotation simplified).

¶15 Allowing Williams's claims in this case to be litigated would require the district court to unconstitutionally inject itself into substantive ecclesiastical matters. Williams argues she is not challenging the Church's ability to determine what constitutes "sinful behavior," its ability to convene a judicial committee to investigate whether a member has engaged in "sinful behavior," or its ability to punish members based on a finding of "sinful behavior." But Williams asks the factfinder to assess the manner in which the Church conducted a religious judicial committee, which requires it to assess religiously prescribed conduct. *See, e.g.*, *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) (holding that a plaintiff's sexual harassment lawsuit was properly dismissed because the statements were "not purely secular disputes with third parties, but were part of an internal ecclesiastical dispute and dialogue protected by the First Amendment"); *Stepek v. Doe*, 910 N.E.2d 655, 668 (Ill. App. Ct. 2009) (holding that "resolving this [defamation] dispute would involve the secular court interfering with the Church's internal disciplinary proceedings" where the plaintiff's claim is based on the statements made in a disciplinary setting); *In re Goodwin*, 293 S.W.3d 742, 749 (Tex. App. 2009) (dismissing a claim for IIED against a church for the method in which it punished a member because it would "require an inquiry into the truth or falsity of religious beliefs" (quotation simplified)). Adjudicating Williams's claims would involve excessive government entanglement with the Church's

"religious operations, the interpretation of its teachings" and "the governance of its affairs." *Gulbraa v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 2007 UT App 126, ¶ 25, 159 P.3d 392. This subjects the Church to "judicial oversight in violation of the Establishment Clause of the United States Constitution." *Id.*

¶16 Williams argues the factfinder need not consider ecclesiastical matters to adjudicate her claim for IIED and that she merely seeks to utilize generally applicable tort law. But the issue is not whether the tort law itself is neutral and generally applicable. The issue is whether the tort law being applied is used to evaluate religious activity in violation of the Establishment Clause. In this case, Williams asks the factfinder to interpret the "outrageousness" of the Church's conduct in investigating her alleged sins. *See Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992) (noting the elements of IIED include intentional conduct by the defendant toward the plaintiff that is "outrageous and intolerable in that it offends generally accepted standards of decency and morality"). Because Williams's IIED claim asks the factfinder to assess the "outrageousness" of a religious practice, this violates the Establishment Clause. *See Franco*, 2001 UT 25, ¶ 15 (holding that claims that require courts to interpret religious practices or beliefs are barred by the Establishment Clause).

¶17 This case is distinguishable from *Gulbraa*, in which this court allowed the plaintiff's IIED claim against a religious entity to proceed. 2007 UT App 126, ¶ 22. In *Gulbraa* the plaintiff claimed emotional distress as a result of the church's conduct in concealing the location of his children. *Id.* This court held this allegation involved "secular activity potentially amounting to a violation of generally applicable civil law" and therefore was not barred by the Establishment Clause. *Id.* (quotation simplified). Unlike the IIED claim in *Gulbraa*, Williams's IIED claim directly implicates religious activity not secular activity. And although Williams claims distress under a generally applicable law, the distress she experienced arose out of the manner in which the

Church conducted a religiously prescribed judicial committee to investigate her alleged sins.

¶18 We conclude Williams's claim for IIED requires an inquiry into the appropriateness of the Church's conduct in applying a religious practice and therefore violates the Establishment Clause of the First Amendment.[8]

CONCLUSION

¶19 The district court did not err in dismissing Williams's complaint as violating the Establishment Clause of the First Amendment. We affirm.

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8. Williams's claim for NIED also violates the Establishment Clause of the First Amendment. She alleges that the Elders were not properly trained on how to conduct interviews of "minor victim[s] of rape," and argues the Church "should have realized [this] conduct involved an unreasonable risk of emotional, psychological, and physical damage to [Williams]." But these claims implicate the entanglement doctrine of the Establishment Clause in the same way her IIED claim does. *See Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 23, 21 P.3d 198 (dismissing a claim for NIED because the plaintiff's claim that the church "generally mishandled their ecclesiastical counseling duties" required the court to establish a standard of care "to be followed by other reasonable clerics in the performance of their ecclesiastical counseling duties" which "would embroil the courts in establishing the training, skill, and standards applicable for members of the clergy in this state" and therefore violates the First Amendment). Accordingly, we determine the district court did not err in dismissing it.

ADDENDUM C

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Doe v. Liberatore, M.D.Pa., March 19, 2007

21 P.3d 198
Supreme Court of Utah.

Lynette Earl FRANCO, Ralph Earl, and Janice Earl, Plaintiffs and Appellants,
v.
THE CHURCH OF JESUS CHRIST OF LATTER–DAY SAINTS, Dennis Casaday, David Christensen, Dennis Strong, Marian Strong, Paul Browning, Craig Berthold, and Bountiful Health Center, Defendants and Appellees.

No. 981873.
|
March 9, 2001.

Synopsis
Former church member and her parents brought action against church and its leaders for clerical malpractice, gross negligence, negligent infliction of emotional distress, breach of fiduciary duty, intentional infliction of emotional distress, and fraud, resulting from members of church allegedly ostracizing and denigrating member with acquiescence of church leaders after she reported incidents of sexual abuse to the police. The District Court, Salt Lake Department, J. Dennis Frederick, J., dismissed plaintiffs' claims. Plaintiffs appealed. The Supreme Court, Russon, Associate Chief Justice, held that: (1) claims for gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty were barred by First Amendment; (2) member failed to establish cause of action for intentional infliction of emotional distress; and (3) member failed to establish fraud claim against church and its leaders.

Affirmed.

Durrant, J., filed concurring opinion, in which Wilkins, J., joined.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (17)

[1] **Appeal and Error**
Failure to State Claim, and Dismissal Therefor
Appeal and Error
Failure to state claim, and dismissal therefor

On appeal from a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, Supreme Court reviews only the facts alleged in the complaint; in so doing, Court accepts the factual allegations in the complaint as true and considers all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff. Rules Civ.Proc., Rule 12(b)(6).

3 Cases that cite this headnote

[2] **Pretrial Procedure**
Availability of relief under any state of facts provable

A motion to dismiss a complaint for failure to state a claim upon which relief can be granted is proper only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim. Rules Civ.Proc., Rule 12(b)(6).

2 Cases that cite this headnote

[3] **Appeal and Error**
Deference given to lower court in general
Appeal and Error
Review for correctness or error

Supreme Court will affirm the trial court's grant of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted only if it is apparent that as a matter of law, the plaintiff could not recover under the facts alleged; because the Court considers only the legal sufficiency of the complaint, the Court grants the trial court's ruling no deference, reviewing it for correctness. Rules Civ.Proc.,

Rule 12(b)(6).

4 Cases that cite this headnote

[4] **Constitutional Law**
Establishment of Religion

For governmental action not to be a law respecting an establishment of religion, the action: (1) must have a secular legislative purpose, (2) must neither advance nor inhibit religion, and (3) must not foster an excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] **Constitutional Law**
Clergy; Ministers

The entanglement doctrine does not bar tort claims against clergy for misconduct not within the purview of the First Amendment, because the claims are unrelated to the religious efforts of a cleric. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[6] **Constitutional Law**
Clergy; Ministers

Civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[7] **Constitutional Law**
Tort claims by members against organization or other members
Constitutional Law
Sexual misconduct by clergy
Damages
Clergy and religious societies
Religious Societies
Torts

Former church member's claims against church and its leaders for gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty, based on allegations that, while member was receiving ecclesiastical counseling, church and its leaders breached duty owed to her by advising her to "forgive, forget, and seek Atonement," rather than to report sexual abuse member had suffered to police, and by referring her to unlicensed therapist, were barred by First Amendment; defining duty would embroil courts in establishing training, skill, and standards applicable for clergy members, which constituted excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[8] **Damages**
Particular Cases

Former church member failed to establish cause of action for intentional infliction of emotional distress, based on her allegation that church and its leaders referred her to unlicensed therapist for purposes of protecting person who sexually abused member and the church, which caused her severe emotional distress; member's complaint contained no allegations that church or its leaders referred her to therapist for purpose of inflicting emotional distress, and complaint alleged no action by church or its leaders that could be considered outrageous and intolerable in that it offended against generally accepted standards of decency and morality.

24 Cases that cite this headnote

[9] **Damages**
Elements in general

To state a claim for intentional infliction of emotional distress, a plaintiff must allege that the defendant intentionally engaged in some conduct toward the plaintiff, with the purpose of inflicting emotional distress, or, where any reasonable person would have known that such would result, and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

33 Cases that cite this headnote

[10] **Pleading**
Characterization of acts or conduct and stating result thereof in general

Sufficiency of pleadings must be determined by the facts pleaded rather than the conclusions stated.

8 Cases that cite this headnote

[11] **Damages**
Nature of conduct

For purposes of a claim of intentional infliction of emotional distress, to be considered outrageous, the conduct must evoke outrage or revulsion, it must be more than unreasonable, unkind, or unfair, and furthermore, an act is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it would give rise to punitive damages, or because it is illegal.

31 Cases that cite this headnote

[12] **Religious Societies**
Torts

Former church member failed to establish fraud claim against church and its leaders, based on allegation that church and its leaders falsely represented to her that therapist, to whom church had referred member, had doctorate in counseling or psychology or was a licensed psychiatrist; member presented exhibit that therapist had doctorate degree in counseling, establishing that church did not make representation concerning presently existing material fact which was false, and member's complaint was devoid of allegations that church represented to member that therapist was licensed, knowing that he was unlicensed.

5 Cases that cite this headnote

[13] **Appeal and Error**
Failure to State Claim, and Dismissal Therefor

Supreme Court would treat church's and church leaders' motion to dismiss former church member's fraud claim for failure to state a claim upon which relief can be granted as one for summary judgment, as matters outside pleadings had been presented with regard to member's fraud claim that were not excluded by trial court. Rules Civ.Proc., Rules 12(b)(6), 56.

[14] **Appeal and Error**
Deference given to lower court in general
Appeal and Error
Review for correctness or error

Because Supreme Court resolves only legal issues in reviewing a summary judgment, the Court gives no deference to the trial court's view of the law; Court reviews it for correctness. Rules Civ.Proc., Rule 56.

[15] **Fraud**
Elements of Actual Fraud
Fraud
Weight and Sufficiency

To establish fraud, a party must prove by clear and convincing evidence each of the following elements: (1) that a representation was made, (2) concerning a presently existing material fact, (3) which was false, (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it, (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it, (8) and was thereby induced to act, (9) to his injury and damage.

8 Cases that cite this headnote

[16] **Fraud**
Knowledge of defendant
Fraud
Statements recklessly made; negligent misrepresentation

To state a claim for fraud, a plaintiff must plead not only that the defendant made a material representation that was false, but also that the defendant either knew the representation to be false or made the representation recklessly, knowing that he had insufficient knowledge upon which to base such a representation.

8 Cases that cite this headnote

[17] **Judgment**
Presumptions and burden of proof

Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude summary judgment. Rules Civ.Proc., Rule 56.

7 Cases that cite this headnote

Attorneys and Law Firms

***200** Edward R. Montgomery, Salt Lake City, for appellants.

Paul H. Matthews, Randy T. Austin, Alexander Dushku, Amy S. Thomas, Salt Lake City, for appellees.

Opinion

RUSSON, Associate Chief Justice:

¶ 1 Plaintiffs Lynette Earl Franco ("Franco") and her parents Ralph and Janice Earl appeal the district court's dismissal of their tort claims against defendants The Church of Jesus Christ of Latter-day Saints (the "LDS Church"), Dennis Casaday, an LDS Church ward[1] bishop,[2] and David Christensen, an LDS Church stake[3] president[4] (collectively, "the LDS Church Defendants"). Franco sued the LDS Church Defendants for injuries she allegedly suffered as a result of advice she received during ecclesiastical counseling. We affirm.

BACKGROUND

[1] ¶ 2 Because this is an appeal from a motion to dismiss under rule 12(b)(6) of the Utah Rules of Civil Procedure,[5] "we review only the facts alleged in the complaint." *Educators Mut. Ins. Ass'n v. Allied Property & Cas. Ins. Co.*, 890 P.2d 1029, 1029 (Utah 1995). "In so doing, we 'accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff.' " *Id.* at 1029–30 (quoting *Prows v. State*, 822 P.2d 764, 766 (Utah 1991)); *see also* *Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669 (Utah 1989).

¶ 3 Applying this standard, the complaint alleged the following operative facts: Beginning in July 1986, seven-year-old Lynette Earl Franco was sexually abused by fourteen-year-old Jason Strong ("Strong"). At the time the abuse occurred, both Franco and Strong were members of the same local ward of the LDS Church. The sexual abuse perpetrated against Franco was so extreme

that she repressed the memory of the abuse until 1992, when she was fourteen years old. Upon recalling these incidents, Franco and her parents sought ecclesiastical counseling from the bishop of their local LDS Church ward, Dennis Casaday ("Casaday"), and from their LDS Church stake president, David ***201** Christensen ("Christensen"). During these ecclesiastical counseling sessions, Casaday and Christensen advised Franco to "forgive, forget, and seek Atonement." Moreover, at some point in the process of the ecclesiastical counseling, Franco determined that she needed additional help and therefore asked Casaday and Christensen to refer her to a licensed mental health professional. In accordance with this request, Casaday and Christensen referred Franco and her parents to Dr. Paul Browning ("Browning"), allegedly stating that Browning was "well qualified to help them." Browning was employed by the Bountiful Mental Health Center, where he worked under Craig Berthold ("Berthold"), a licensed clinical social worker. On his business card, Browning held himself out as practicing "Individual, Marital, and Family Counseling," under the heading of "General Psychiatry." However, Browning was not a licensed mental health professional in the state of Utah. Upon receiving the referral from Casaday and Christensen, Browning counseled with Franco and her parents at the Bountiful Mental Health Center, advising Franco to forgive Strong and forget the incidents of sexual abuse rather than to inform the police. Finding Browning's advice unsatisfactory, Franco and her parents sought advice from another secular counselor, who then reported the incidents of sexual abuse to the police. After the incidents of sexual abuse were reported to the police, Franco alleged that she was "ostracized and denigrated" by the members of her local LDS Church ward, with the acquiescence of Casaday and Christensen, and therefore withdrew from the LDS Church.

¶ 4 Based on the above-described allegations, Franco asserted six claims against the LDS Church Defendants,[6] all in tort: (1) clerical malpractice; (2) gross negligence; (3) negligent infliction of emotional distress; (4) breach of fiduciary duty; (5) intentional infliction of emotional distress; and (6) fraud. On April 18, 1997, Franco voluntarily dismissed her case, and she refiled it on April 4, 1998, asserting the same claims.

¶ 5 The LDS Church Defendants did not file an answer to Franco's complaint but moved to dismiss under rule 12(b)(6) of the Utah Rules of Civil Procedure. In their motion, the LDS Church Defendants argued that as a matter of law, Franco could not recover under any of her theories. Specifically, the LDS Church Defendants contended that a determination of Franco's claims would necessarily implicate an excessive governmental entanglement with religion because resolution of the claims would require the courts to impose a secular duty of care on pastoral counselors and therefore the claims were barred by the First Amendment to the United States Constitution. The LDS Church Defendants further contended that even if Franco's claims were not barred by the First Amendment, her fraud and emotional distress claims failed as a matter of Utah law.

¶ 6 In response, Franco argued that her tort claims did not require an inquiry into the LDS Church's religious doctrines, practices, or beliefs and therefore the First Amendment was inapplicable. Moreover, Franco argued that she had sufficiently stated claims for fraud and emotional distress under Utah law.

¶ 7 On October 13, 1998, the trial court issued a memorandum decision[7] dismissing Franco's tort claims against the LDS Church Defendants. The trial court held that each of Franco's tort claims was based on allegations that the LDS Church Defendants (1) counseled with Franco in an ecclesiastical setting and (2) recommended Browning as someone whom Franco might consult for further counseling and that, by doing so, the LDS Church Defendants departed from accepted ***202** practices in the services rendered. In light of these allegations, the trial court concluded that Franco's claims were essentially asking the court to impose a secular duty of care on pastoral counselors in the performance of their ecclesiastical counseling duties, which the trial court concluded was prohibited by the First Amendment to the United States Constitution. In addition, the trial court held that there were no allegations that the LDS Church Defendants "had any indication their conduct might cause bodily harm or that they engaged in conduct of such a nature as to be considered outrageous and intolerable" and therefore any claims for negligent or intentional infliction of emotional distress failed as a matter of law.

¶ 8 On December 23, 1998, Franco appealed to this court. Franco argues that the trial court erred in holding that her claims for gross negligence, negligent infliction of emotional distress, breach of fiduciary duty, intentional infliction of emotional distress, and fraud are barred by the First Amendment. Specifically, Franco argues that her tort claims do not require an inquiry into the LDS Church's practices or religious beliefs and therefore the First Amendment does not offer the LDS Church Defendants any protection from her claims. Franco does not argue on appeal, however, that the trial court erred in its determination that her claim for clerical malpractice was barred by the First Amendment.

¶ 9 In response, the LDS Church Defendants argue that

the essence of Franco's claims, like her clerical malpractice claim, was that the clergymen failed to properly perform their ecclesiastical counseling duties and that based on these allegations, the trial court correctly dismissed the claims under the First Amendment. Moreover, the LDS Church Defendants argue that Franco's claims for fraud, gross negligence, and negligent and intentional infliction of emotional distress fail as a matter of Utah law.

STANDARD OF REVIEW

[2] [3] ¶ 10 Under rule 12(b)(6) of the Utah Rules of Civil Procedure, a motion to dismiss is proper "only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim." *Prows v. State*, 822 P.2d 764, 766 (Utah 1991) (citing *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990)). Accordingly, we will affirm the trial court's dismissal " 'only if it is apparent that as a matter of law, the plaintiff could not recover under the facts alleged.' " *Educators Mut. Ins. Ass'n v. Allied Property & Cas. Ins. Co.*, 890 P.2d 1029, 1030 (Utah 1995) (quoting *Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669 (Utah 1989)). "Because we consider only the legal sufficiency of the complaint, we grant the trial court's ruling no deference"; we review it for correctness. *Id.*

ANALYSIS

I. OVERVIEW OF FIRST AMENDMENT PRINCIPLES

¶ 11 The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, *see* *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof...." These two clauses are known, respectively, as the Establishment Clause and the Free Exercise Clause. In this case, the LDS Church Defendants rely primarily on the Establishment Clause in making their constitutional argument that Franco's claims are barred by the First Amendment.[8]

***203** ¶ 12 In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the United States Supreme Court explained that the Establishment Clause does not merely prohibit the establishment of a state church or a state religion, but commands "that there should be 'no law *respecting* an establishment of religion.' " *Id.* at 612, 91 S.Ct. 2105 (quoting U.S. Const. amend. I). Accordingly, laws that do not establish a religion but that are "a step that could lead to such establishment" may violate the First Amendment. *Id.* Moreover, the United States Supreme Court has broadly interpreted the command to "make no law respecting an establishment of religion" as prohibiting all forms of governmental action, including both statutory law and court action through civil lawsuits. *See* *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960) (per curiam).

[4] ¶ 13 *Lemon* and subsequent cases have relied on a three-part test to determine whether governmental activity constitutes a "law respecting an establishment of religion." Specifically, for governmental action not to be a law respecting an establishment of religion, the action (1) must have a "secular legislative purpose," (2) must "neither advance[ ] nor inhibit [ ] religion," and (3) must not foster " 'an excessive government entanglement with religion.' " *Lemon*, 403 U.S. at 612–13, 91 S.Ct. 2105 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). In addressing the tort liability of clergy under the Establishment Clause, courts have focused on the "third prong" of the *Lemon* test, "excessive government entanglement." *See* *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir.1994) (Ripple, J., concurring in part and dissenting in part, joined by Coffey, J., concurring) (applying entanglement doctrine to tort claim against clergyman); *Schmidt v. Bishop*, 779 F.Supp. 321, 328 (S.D.N.Y.1991) (same); *Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948, 960 (1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989) (same); *Konkle v. Henson*, 672 N.E.2d 450, 454 (Ind.Ct.App.1996) (same); *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98–99 (Mo.Ct.App.1995) (same); *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877, 897 (Tex.App.2000) (same); *L.L.N. v. Clauder*, 209 Wis.2d 674, 563 N.W.2d 434, 440 (1997) (same).

[5] ¶ 14 The excessive entanglement test is, by necessity, one of degree. Indeed, separation of church and state cannot mean the absence of all governmental contact with religion, "since the complexities of modern life inevitably produce some contact." 16A Am.Jur.2d *Constitutional Law* § 422, at 405 (1998). In light of this reality, the entanglement doctrine does not bar tort claims against clergy for misconduct not within the purview of the First Amendment, because the claims are unrelated to the religious efforts of a cleric. *See, e.g., Heath v. First Baptist Church*, 341 So.2d 265 (Fla.Dist.Ct.App.), *cert. denied*, 348 So.2d 946 (Fla.1977) (holding that church may be held liable for slip and fall on the premises under negligence claim); *Fintak v. Catholic Bishop of Chicago*, 51 Ill.App.3d 191, 9 Ill.Dec. 223, 366 N.E.2d 480 (1977) (same); *Bass v. Aetna Ins. Co.*, 370 So.2d 511 (La.1979) (holding church liable for negligence of pastor who created an unreasonable risk of injury by not clearing aisles to make way for running "in the Spirit," a form of religious expression in that church).

[6] ¶ 15 However, it is well settled that civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709–10, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976); *Dausch*, 52 F.3d at 1432; *L.L.N.*, 563 N.W.2d at 440. For, as the Supreme Court stated in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952), churches must have "power to decide for themselves, free ***204** from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116, 73 S.Ct. 143.

II. CLAIMS FOR CLERGY MALPRACTICE

¶ 16 In light of the First Amendment principles discussed above, the question of whether courts can adjudicate a claim for clergy malpractice has become a frequently litigated issue in recent years. *See, e.g., Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948, 960 (1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989); *Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo.1988); *Hester v. Barnett*, 723 S.W.2d 544, 550 (Mo.Ct.App.1987); *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584, 586 (1991). Moreover, "[t]he issue has generated a growing body of scholarly commentary." *Schmidt v. Bishop*, 779 F.Supp. 321, 327 (S.D.N.Y.1991) (citing Samuel E. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 Val. U.L.Rev. 163 (1981); Michael J. Florillo, Comment, *Clergy Malpractice: Should Pennsylvania Recognize a Cause of Action for Improper Counseling by a Clergyman?*, 192 Dick. L.Rev. 223 (1987); G. Grace McCaffrey, Note, *Nally v. Grace Community Church of the Valley: Clergy Malpractice—A Threat to Both Liberty and Life*, 11 Pace L.Rev. 137 (1990)).

¶ 17 However, despite the apparent controversy, courts throughout the United States have uniformly rejected claims for clergy malpractice under the First Amendment. *See Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir.1994) (Ripple, J., concurring in part and dissenting in part, joined by Coffey, J., concurring) ("Indeed, a cause of action for clergy malpractice has been rejected uniformly by the states that have considered it."). These courts have generally held that a determination of such claims would necessarily entangle the courts in the examination of religious doctrine, practice, or church polity—an inquiry that we have already explained is prohibited by the Establishment Clause. *See, e.g., Destefano*, 763 P.2d at 285; *Amato v. Greenquist*, 287 Ill.App.3d 921, 223 Ill.Dec. 261, 679 N.E.2d 446, 453 (1997); *Baumgartner v. First Church of Christ, Scientist*, 141 Ill.App.3d 898, 96 Ill.Dec. 114, 490 N.E.2d 1319, 1324, *cert. denied*, 479 U.S. 915, 107 S.Ct. 317, 93 L.Ed.2d 290 (1986); *Schieffer v. Catholic Archdiocese*, 244 Neb. 715, 508 N.W.2d 907, 912 (1993).

¶ 18 For example, in *Nally*, like the case at hand, parishioners sued a clergyman for allegedly mishandling the pastoral counseling relationship. Specifically, the plaintiffs alleged that the clergyman was negligent in failing to warn them of the mental state of their son, whom the clergyman had counseled, but who ultimately committed suicide. *Nally*, 253 Cal.Rptr. 97, 763 P.2d at 952. In resolving the case, the California Supreme Court considered and rejected the clergy malpractice theory of liability, stating:

> Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would

> certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. *Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity.*

Id., 253 Cal.Rptr. 97, 763 P.2d at 960 (emphasis added).

¶ 19 Similarly, in *White v. Blackburn*, 787 P.2d 1315 (Utah Ct.App.1990), under strikingly similar facts to the case at hand, the Utah Court of Appeals also considered and rejected the clergy malpractice theory of liability. *See id.* at 1318–19. In *White*, parents asserted a claim for malpractice against a clergyman, not for negligently *referring* a parishioner to outside counseling-the factual allegations in the case at hand, but for negligently *failing* to refer their son "to trained professionals." *Id.* at 1318. In dismissing the clergy malpractice claim, the court of appeals stated:

> [A]ppellant wishes to impose a duty upon [clergy] to make further inquiry into the alleged family conflicts, and then, if beyond [their] expertise, refer [parishioners] to others who are qualified to treat such problems. Under the present circumstances, charging lay clergy with this duty of care goes too far because it approaches ***205** the same level of care imposed upon trained professionals in medicine and psychology.
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> ...
>
> > "Even assuming that workable standards of care could be established in the present case, ... [s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity."

Id. at 1318–19 (quoting *Nally*, 253 Cal.Rptr. 97, 763 P.2d at 960). We find the reasoning of the *Nally* and *White* courts to be sound.

III. FRANCO'S CLAIMS

A. Negligence–Based Claims

[7] ¶ 20 Franco's complaint pleads claims against the LDS Church Defendants for gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty ("negligence-based claims"). Franco argues that these claims are different from a clergy malpractice claim in substance and effect and therefore the First Amendment is inapplicable. The LDS Church Defendants argue, however, that despite Franco's "creative pleading," her claims are merely a roundabout way of alleging clergy malpractice and therefore the claims are barred by the First Amendment.

¶ 21 As an initial matter, we must emphasize that regardless of whether a claim against a cleric is one for malpractice, the claim will not survive constitutional scrutiny if an adjudication of the claim would foster an excessive governmental entanglement with religion in violation of the Establishment Clause. However, that said, we agree with the LDS Church Defendants that Franco's negligence-based claims are merely an elliptical way of alleging clergy malpractice.

¶ 22 An examination of Franco's complaint reveals that each of her negligence-based claims alleges that while counseling with Franco in the context of an ecclesiastical counseling relationship, the LDS Church Defendants breached a duty owed to Franco by advising her to "forgive, forget, and seek Atonement" or by advising her to seek outside help from Browning, an unlicensed therapist. Accordingly, like her clergy malpractice claim, which she abandoned on appeal, the essence of each of Franco's negligence-based claims is that the LDS Church Defendants generally mishandled the pastoral counseling relationship by giving bad advice—claims necessarily directed at the LDS Church Defendants' performance of their ecclesiastical counseling duties. Therefore, despite Franco's characterization of her negligence-based claims as gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty, we must deal with the real issue here—clergy malpractice. *See Dausch v. Rykse*, 52 F.3d 1425, 1438 (7th Cir.1994) (Ripple, J., concurring in part and dissenting in part, joined by Coffey, J., concurring) (stating that district court correctly determined that plaintiff's claim for breach of fiduciary duty was "simply an elliptical way of alleging clergy malpractice"); *Schmidt v. Bishop*, 779 F.Supp. 321, 327 (S.D.N.Y.1991) ("[A]s with her negligence claim, [plaintiff's] fiduciary duty claim is merely another way of

alleging that the [clergyman] grossly abused his pastoral role, that is, that he engaged in *malpractice*."); *Amato v. Greenquist*, 287 Ill.App.3d 921, 223 Ill.Dec. 261, 679 N.E.2d 446, 451 (1997) (stating that "we will not determine the justiciability of [plaintiff's] counts based upon the nomenclature used by the plaintiff in entitling the counts" in determining whether a negligence claim against a cleric is essentially a malpractice claim).

¶ 23 Because Franco's negligence-based claims allege that the LDS Church Defendants generally mishandled their ecclesiastical counseling duties, a determination of the claims, like the clergy malpractice claims asserted in *Nally* and *White*, could not be made without first ascertaining whether the LDS Church Defendants performed within the level of expertise expected of a similar professional, i.e., a reasonably prudent bishop, priest, rabbi, minister, or other cleric in this state. Indeed, malpractice is a theory of tort that would involve the courts in a determination of whether the cleric in a particular case—here an LDS Church bishop—breached the duty to act with that degree of "skill and knowledge normally possessed by members ***206** of that profession." Restatement (Second) of Torts § 299A (1965). Defining such a duty would necessarily require a court to express the standard of care to be followed by other reasonable clerics in the performance of their ecclesiastical counseling duties, which, by its very nature, would embroil the courts in establishing the training, skill, and standards applicable for members of the clergy in this state in a diversity of religions professing widely varying beliefs. This is as impossible as it is unconstitutional; to do so would foster an excessive government entanglement with religion in violation of the Establishment Clause. *See, e.g.*, *Dausch v. Rykse*, 52 F.3d at 1432 (Ripple, Circuit J., concurring in part and dissenting in part) (stating that an evaluation of a clergy malpractice claim would require courts to evaluate and investigate religious tenets and doctrines); *Hester v. Barnett*, 723 S.W.2d 544, 553 (Mo.Ct.App.1987) (stating that clergy malpractice would force courts to judge "competence, training, methods and content of the pastoral function"); *F.G. v. MacDonell*, 150 N.J. 550, 696 A.2d 697, 706 (1997) (O'Hern, J., dissenting) (stating that creating a tort of clergy malpractice would "establish an official religion of the state"); *Bladen v. First Presbyterian Church of Sallisaw*, 857 P.2d 789, 797 (Okla.1993) ("Once a court enters the realm of trying to define the nature of advice a minister should give a parishioner serious First Amendment issues are implicated.").

¶ 24 Accordingly, we conclude that the trial court correctly determined that Franco's claims against the LDS Church Defendants for gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty are barred by the First Amendment to the United States Constitution.

B. Intentional Infliction of Emotional Distress

[8] [9] ¶ 25 In addition to her negligence-based claims, Franco also asserted a claim against the LDS Church Defendants for intentional infliction of emotional distress. In *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961), this court stated:

> Due to the highly subjective and volatile nature of emotional distress and the variability of its causations, the courts have historically been wary of dangers in opening the door to recovery therefor. This is partly because such claims may easily be fabricated: or as sometimes stated, are easy to assert and hard to defend against.

Samms, 11 Utah 2d at 291, 358 P.2d at 345. Accordingly, to state a claim for intentional infliction of emotional distress, a plaintiff must allege that the defendant

> "intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; *and* his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality."

Jackson v. Brown, 904 P.2d 685, 687–88 (Utah 1995)

(emphasis added) (quoting *Samms*, 11 Utah 2d at 293, 358 P.2d at 347).

[10] ¶ 26 The sufficiency of Franco's pleadings "must be determined by the facts pleaded rather than the conclusions stated." *Ellefsen v. Roberts*, 526 P.2d 912, 915 (Utah 1974). In light of this standard, Franco's claim under this cause of action pleads the following operative facts: that during ecclesiastical counseling, Franco asked the LDS Church Defendants to refer her to a licensed mental health professional; that in accordance with her request, the LDS Church Defendants referred Franco to Browning at the Bountiful Mental Health Center, allegedly stating that he was "well qualified to help"; and that despite this representation, Browning was not qualified to render the appropriate treatment. Franco alleges that the LDS Church Defendants referred her to Browning for the "purpose" of protecting Strong and the LDS Church and that these actions were made "in a reckless and intentional manner that was extreme and outrageous" and caused her severe emotional distress.

¶ 27 However, despite the above, Franco's complaint is devoid of allegations that the LDS Church Defendants referred her to Browning for the *purpose* of inflicting emotional distress. Rather, Franco merely alleges ***207** that the LDS Church Defendants referred her to Browning, not for the purpose of inflicting emotional distress, but to protect Strong and the LDS Church and that as a result of this conduct, she suffered severe emotional distress. This bare allegation, however, even assuming its truth, is insufficient to state a claim under the "purpose" test established by *Samms*. *See* *Samms*, 11 Utah 2d at 293, 358 P.2d at 347; *see also* 86 C.J.S. *Torts* § 72, at 728 (1997) (stating that "[i]t is not enough to establish a claim that defendant intentionally acted in a way that *causes* distress" (emphasis added)).

[11] ¶ 28 Moreover, Franco's complaint alleges no action by the LDS Church Defendants that can be "considered outrageous and intolerable in that [it] offend[s] against the generally accepted standards of decency and morality." *Samms*, 11 Utah 2d at 293, 358 P.2d at 347. To be considered outrageous, "[t]he conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind, or unfair." 86 C.J.S., *supra* ¶ 27, § 70, at 722. Furthermore, "[a]n act is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it would give rise to punitive damages, or because it is illegal." *Id.* at 722–23; *see also* Restatement (Second) of Torts § 46 cmt. d (1965).

¶ 29 In this case, at worst, the LDS Church Defendants' actions consisted of referring Franco to an unlicensed counselor. However, the complaint contains no allegations that the LDS Church Defendants knew Browning was unlicensed when they made the referral or that the LDS Church Defendants had any other indication their conduct in referring Franco to Browning might cause emotional distress. Absent such evidence or allegations, the LDS Church Defendants' actions cannot be considered outrageous and intolerable as a matter of law. To hold otherwise would leave every bishop, priest, rabbi, or minister of every church who seeks to help a parishioner having apparent psychiatric problems to receive outside secular counseling open to liability for intentional infliction of emotional distress.

¶ 30 Based on the above, we hold that the trial court did not err in dismissing Franco's claim against the LDS Church Defendants for intentional infliction of emotional distress. Because we have determined that this claim fails as a matter of law, we do not reach the constitutional issue. *See* *Hoyle v. Monson*, 606 P.2d 240, 242 (Utah 1980) (stating that it is a "fundamental rule" that constitutional questions should not be reached if the merits of the case can be determined on other than constitutional grounds).

C. Fraud

[12] [13] ¶ 31 Finally, we address Franco's claim against the LDS Church Defendants for fraud. As an initial matter, as noted in footnote 5 *supra*, matters outside the pleadings have been presented with regard to Franco's fraud claim that were not excluded by the trial court, and therefore, we treat the LDS Church Defendants' motion to dismiss this claim as one for summary judgment as provided for in rule 56 of the Utah Rules of Civil Procedure. *See* Utah R. Civ. P. 12(b); *Lind v. Lynch*, 665 P.2d 1276, 1278 (Utah 1983).

[14] ¶ 32 A grant of summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). On appeal from a summary judgment, "we accept the facts and inferences in the light most favorable to the losing party." *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991). Because we resolve only legal issues in reviewing a summary judgment, "we give no deference to the trial court's view of the law; we review it for correctness." *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d

1382, 1385 (Utah 1989).

[15] ¶ 33 To establish fraud under Utah law, a party must prove by clear and convincing evidence each of the following elements:

> "(1) That a representation was made; (2) concerning a presently existing material fact; (3) *which was false;* (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) ***208** that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage."

Mikkelson v. Quail Valley Realty, 641 P.2d 124, 126 (Utah 1982) (emphasis added) (quoting *Pace v. Parrish,* 122 Utah 141, 144–45, 247 P.2d 273, 274–75 (1952)).

¶ 34 In this case, in support of her fraud claim, Franco argues that the LDS Church Defendants "falsely" represented to her that Browning "had a Ph.D. in counseling or psychology *or* was a licensed psychiatrist." (Emphasis added.) However, in a letter from the Bountiful Mental Health Center to Franco, which *Franco* presented to the trial court as an exhibit, Craig Berthold, the director of the Bountiful Mental Health Center, stated: "Dr. Browning does have a doctorate degree in Counseling (Ph.D.), from the educational psychology department at the University of California at Los Angeles." Accordingly, Franco's own exhibit establishes that the LDS Church Defendants did not make a representation concerning a presently existing material fact "which was false," *Pace,* 122 Utah at 145, 247 P.2d at 275, and therefore, the LDS Church Defendants are entitled to a judgment as a matter of law on this count.

¶ 35 Moreover, even if we were to ignore the evidence that Browning had a Ph.D. in counseling or psychology, focusing solely on Franco's argument in this appeal that the LDS Church Defendants' false representation was that Browning was licensed, as Franco argues we should, her claim still fails as a matter of law because the complaint does not plead fraud with sufficient particularity to withstand summary judgment.

[16] [17] ¶ 36 To state a claim for fraud, a plaintiff must plead not only that the defendant made a material representation that was false, but also that the defendant either *knew* the representation to be false or made the representation recklessly, *knowing* that he or she had insufficient knowledge upon which to base such a representation. *See Mikkelson,* 641 P.2d at 126; *see also* 37 Am.Jur.2d *Fraud and Deceit* § 41, at 66 (1968) (stating that one of the "necessary elements" upon which to base an action in fraud is that a false representation was made "and known to be false by the party making it"). Moreover, because this is a claim for fraud, "the circumstances constituting fraud or mistake [must] be stated with particularity." Utah R. Civ. P. 9(b). "We have stressed, and continue to hold, that mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude ... summary judgment." *Chapman v. Primary Children's Hosp.,* 784 P.2d 1181, 1186 (Utah 1989) (citing *Norton v. Blackham,* 669 P.2d 857, 859 (Utah 1983); *Ellefsen v. Roberts,* 526 P.2d 912, 915 (Utah 1974)).

¶ 37 In this case, as we stated with regard to Franco's claim for intentional infliction of emotional distress, the complaint is devoid of allegations that the LDS Church Defendants represented to Franco that Browning was licensed, *knowing* that he was unlicensed, or *knowing* that they had insufficient knowledge upon which to base such a representation. Moreover, as part of her general allegations, Franco stated that the Bountiful Mental Health Center "held ... Browning out to [be] licensed or qualified to render the appropriate treatment" and that Browning held himself out on his business card as practicing "Individual, Marital, and Family Counseling," under the heading of "General Psychiatry." Therefore, even though we must consider all reasonable inferences to be drawn from the facts in a light most favorable to the plaintiff, the only reasonable inference that can be drawn from the facts alleged in this case, is that the LDS Church Defendants believed that Browning was licensed to provide the appropriate treatment when they made the referral.

¶ 38 Accordingly, because Franco has failed to establish the necessary elements of fraud, the LDS Church Defendants are entitled to a judgment as a matter of law on this count, and consequently, we do not address the constitutional issue.

CONCLUSION

¶ 39 We hold that the trial court correctly determined that Franco's claims against the LDS Church Defendants for gross negligence, ***209** negligent infliction of emotional distress, and breach of fiduciary duty are barred by the First Amendment to the United States Constitution. We further hold that Franco's claims for intentional infliction of emotional distress and fraud fail as a matter of law. Accordingly, we affirm the trial court's dismissal of Franco's tort claims against the LDS Church Defendants.

¶ 40 HOWE C.J., and DURHAM, J., concur in RUSSON's, A.C.J., opinion.

DURRANT, Justice, concurring:

¶ 41 I concur. The court's analysis is consistent with *Lemon* and its progeny. To permit a plaintiff to enlist the judicial system to press a claim for clergy malpractice would clearly result in the kind of governmental intrusion into religious practices that is prohibited by the entanglement prong of current Establishment Clause analysis. Further, in focusing exclusively on the Establishment Clause in its analysis, our opinion adopts the analytical approach commonly used by courts in assessing clergy malpractice claims. I write separately merely to note that I believe the plaintiff's claims are barred not only by the Establishment Clause, but by the Free Exercise Clause as well.[1]

¶ 42 In my view, judicial analyses of religious issues under the First Amendment have too often come to focus exclusively on the Establishment Clause. I think this unfortunate because a significant part of the genius of the two religion clauses is in their mutually reinforcing dynamic. One of the central means of promoting the free exercise of religious beliefs protected by the Free Exercise Clause is to guard against the establishment of a state church, as proscribed by the Establishment Clause. One of the central means of guarding against the establishment of a particular religion is to protect the free exercise rights of adherents of all religions. While the clauses are complementary in this sense, in another sense they are in dynamic tension. To allow a particular state benefit to a religious group may implicate the Establishment Clause, yet to deny it to that group may impinge upon free exercise rights. Yet, notwithstanding their at once complementary and contradictory nature, I believe that the ultimate end of both religion causes is the same—the protection of religious liberty.

¶ 43 However, as courts have expanded the reach of the Establishment Clause to include the prohibitions of state benefits to, or accommodations of, religion that in no realistic sense could lead to the establishment of a state church, they have tended to diminish the protections of the Free Exercise Clause. Or, they have made the Establishment Clause do the work of the Free Exercise Clause. For instance, the entanglement prong of the *Lemon* Establishment Clause analysis may actually be a better analytical fit with the Free Exercise Clause. The case before us illustrates this point. Under traditional Establishment Clause analysis, allowing clergy malpractice claims would clearly result in an excessive governmental entanglement with religion. The courts would be put in the position of overseeing, assessing, and passing judgment on a core activity of churches—the provision of ecclesiastical counseling. Clearly, this would be an unconstitutional governmental intrusion into religion. But on what basis is it unconstitutional? Is permitting this type of entanglement a step that is likely to lead to the establishment of religion? Does its constitutional infirmity lie in the fact that it benefits religion? I think that few religious denominations would view governmental intrusion into their core ecclesiastical functions as somehow benefitting them. The danger of such an intrusion is not so much that it could lead to the establishment of religion as that it directly impinges on the free exercise of religion. Yet, under the *Lemon* analytical framework, which places the entanglement assessment under the Establishment Clause, we are led to the Establishment Clause analysis upon which the court's opinion relies.

¶ 44 It might be asked what difference it makes whether a governmental intrusion into religion is analyzed under the Establishment ***210** Clause or the Free Exercise Clause. In either case, the intrusion is proscribed. I think it matters because to the extent we blur the analytical distinction between the Establishment and Free Exercise Clauses, to the extent we make the Establishment Clause do the work of both clauses, we sap some of the life from the Free Exercise Clause. Further, we lose the benefits that come from examining the clauses in tandem. I think we would be better served if, in the development of our religion clauses' jurisprudence, courts more often examined the full picture and conducted their analysis with reference to both clauses, taking into account both their mutually reinforcing aspects as well as the distinct rights they protect.

¶ 45 Accordingly, while I concur in the court's opinion, I would also affirm on the ground that the claims determined by the court to be barred by the Establishment Clause are also barred by the Free Exercise Clause. Recognizing a cause of action that is in essence one for clergy malpractice would amount to a secular judicial restraint upon one of the core functions of many religious denominations. Indeed, given the fact that actions for malpractice in other contexts have developed within fields of employment reserved for professionals whose practices are heavily regulated, a common law action for clergy malpractice would necessarily borrow its criteria from those contexts. The consequence would be tantamount to regulatory oversight by the judiciary of ecclesiastical counseling. Neither the Free Exercise Clause nor the Establishment Clause permits such a result.

¶ 46 WILKINS, J., concurs in DURRANT's, J., concurring opinion.

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Footnotes

1 A "ward" is an ecclesiastical division of the LDS Church, based upon geographical area.

2 A "bishop" is the ecclesiastical leader of a ward.

3 A "stake" is an ecclesiastical division of the LDS Church that consists of several wards.

4 A "stake president" is the ecclesiastical leader of a stake.

5 In its memorandum decision, the trial court stated that it had considered evidence outside of the parties' memoranda and therefore, although entitled a motion to dismiss, the LDS Church Defendants' motion was more appropriately treated as a motion for summary judgment under rule 56(c) of the Utah Rules of Civil Procedure. However, the only outside evidence presented by the parties related solely to Franco's claim for fraud. Therefore, we treat the LDS Church Defendants' motion to dismiss Franco's fraud claim as one for summary judgment as provided for in rule 56 of the Utah Rules of Civil Procedure. *See* part IIIC *infra.* However, with regard to Franco's remaining claims, we treat the LDS Church Defendants' motion as a motion to dismiss under rule 12(b)(6) of the Utah Rules of Civil Procedure.

6 In addition to asserting claims against the LDS Church Defendants, Franco also asserted claims against Dennis Strong and Marian Strong, Jason Strong's parents (collectively, the "Strongs") and Browning, Berthold, and the Bountiful Mental Health Center (collectively, the "Mental Health Defendants"). However, the Strongs and the Mental Health Defendants each filed separate motions to dismiss Franco's claims against them under rule 12(b)(6) of the Utah Rules of Civil Procedure, which the trial court granted. In this appeal, Franco does not argue that the trial court erred in dismissing her claims against the Strongs or the Mental Health Defendants.

7 The trial court's memorandum decision was contained in a minute entry.

8 Justice Durrant states in his concurring opinion that although he agrees with our analysis of the issues presented in this case under the Establishment Clause, he believes that the issues could also be analyzed under the Free Exercise Clause. However, as noted above, the LDS Church Defendants rely primarily on the Establishment Clause in making their constitutional argument. Specifically, the LDS Church Defendants argue, inter alia, that the First Amendment bars Franco's claims because an adjudication of the claims would foster an excessive governmental entanglement with religion. As we will discuss in greater detail *infra,* the analytical framework set forth by the United States Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), places the entanglement assessment under the Establishment Clause. Therefore, because the LDS Church Defendants relied primarily on the Establishment Clause in making their constitutional argument, and because the Establishment Clause is dispositive of the issues before us, we do not address the Free Exercise Clause in this case.

1 The LDS Church's brief on appeal presents arguments under the excessive entanglement prong of the Establishment Clause and under what it describes as the " 'church autonomy doctrine' ... [g]rounded in both religion clauses of the First Amendment."