No. 84998-6

CHAMBERS, J. (dissenting in part/concurring in part) — I agree with the lead opinion in result but on different grounds. Angela Erdman submitted her claims to a tribunal of a hierarchal church. She is now bound by its decision. However, I cannot agree with the lead opinion that the ministerial exception doctrine plays any role here.

Since the beginning of our republic, our courts have strived to protect both the rights of religious institutions to be free of unwarranted governmental interference and the rights of individuals to the protection of the laws. Different courts have adopted different approaches in different cases. The United States Supreme Court has never held that the First Amendment demands only one approach so long as the approach taken avoids judicial resolution of questions of faith and excessive entanglement with religion. But the First Amendment does not vest churches with immunity from criminal or tort liability. While churches have a right to be free from state interference in matters of religious doctrine or faith, no exercise of religious faith condones the sexual exploitation of children.

I

Taking her allegations as true as we must at this point, Erdman, in her capacity as the Chapel Hill Presbyterian Church's chief financial officer, questioned whether Pastor Mark J. Toone was entitled to be reimbursed out of church funds for

a complementary plane ticket to Ireland. Ultimately, this question led to her being fired. Pastor Toone had accepted the ticket from a tour company he worked with guiding tours of religiously significant sites around the world. He was compensated by that tour company for his time. As she investigated, Erdman became concerned that Pastor Toone was jeopardizing the church's tax exempt status by using church resources to advertise this paid outside work. She brought her concerns to Pastor Toone who instructed her not to investigate any further and to turn her files over to him. When she would not drop the matter, Pastor Toone came into her office, "angrily told me that I was insubordinate," yelled, shook his finger in her face, was physically intimidating, "got extremely cruel and nasty," told her his tours were none of her business and ended the conversation by storming out of her office and slamming the door. Clerk's Papers (CP) at 322-23. He left her shaken and in tears.

Pastor Toone appointed a small "session committee" of Chapel Hill church members to investigate the conflict between him and Erdman. That session committee recommended Pastor Toone fire Erdman, which he did promptly. Meanwhile, Erdman filed a complaint against Pastor Toone with the regional organization of their church. Among other things, she charged that Pastor Toone had sought reimbursement for expenses he had not incurred, harassed and retaliated against her when she questioned him, and violated a large number of enumerated scriptures and church doctrines. In response, the Presbytery of Olympia convened an "investigatory committee," which concluded Erdman's charges of "misuse of church possessions, negligence, and abuse of responsibilities of a minister

[including] theft and bearing false witness . . . could not be reasonably proved," effectively rejecting her complaint. CP at 137, 848. This suit followed.

II

The lead opinion states that "a civil court violates both religion clauses when it allows claims of negligent retention and negligent supervision of ministers to go forward." Lead opinion at 27. This statement is breathtaking: it implies that *no* claim of negligent retention or supervision, no matter how appalling the conduct, could ever go forward against a church based on the misconduct of its clergy. The case the lead opinion relies upon the most, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, __ U.S. ___, 132 S. Ct. 694, __ L. Ed. 2d __ (2012), neither considers that proposition nor supports that conclusion. The United States Supreme Court's flat rejection of the suggestion that courts lack jurisdiction to consider claims against churches suggests to me that the Court, had it considered that proposition, would have rejected it. *Id.* at 709 n.4.

A. Ministerial Exception Doctrine

It troubles me that we are considering this issue at all. The church did *not* argue below that due to Pastor Toone's status as a minister, Erdman's claims should be dismissed. Instead, the church argued that *Erdman* was a minister and that because of *her* status, the ministerial exception doctrine barred her claims. The church may be correct. But then-Pierce County Superior Court Judge Worswick denied the church's motion for summary judgment on this issue merely because she did not "have enough facts to determine that [Erdman] is a minister." Verbatim

Transcript of Proceedings at 24. The church renewed its argument that Erdman's status as a minister barred the claim on appeal, contending that "[b]ecause the Executive for Stewardship position served the Church's spiritual and pastoral mission, the ministerial exception applies to *Ms. Erdman*'s job [and] secular courts lack subject matter jurisdiction over *Ms. Erdman*'s claims." Br. of Resp'ts at 38 (emphasis added).[1] The Court of Appeals, properly, affirmed Judge Worswick's conclusion that there was not enough evidence on the record to decide the question. *Erdman v. Chapel Hill Presbyterian Church*, 156 Wn. App. 827, 837 n.8, 234 P.3d 299 (2010). My review of the record persuades me that conclusion is correct.

Whether Pastor Toone's status as a minister would bar these claims was raised for the first time in Chapel Hill's petition for review to this court in the context of whether grounds for review under RAP 13.4(b) were present. *See* Pet. for Review at 13-14. While we certainly have the power to resolve issues the parties did not properly present or preserve, we generally do not, and we do not for very good reasons. *See* RAP 2.5(a). Among those reasons: this court is designed to decide arguments properly presented and developed by disputing parties. In this case, neither party has. It would be wise to leave it for another day when it has been vigorously, and actually, litigated.

But given that the lead opinion has chosen to go down this path, I will follow it part way. I completely agree that courts have no business interfering with a church's choice of ministers. *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th

[1] Again, the United States Supreme Court firmly rejected the notion that the ministerial exception doctrine was a jurisdictional doctrine. *Hosanna-Tabor*, 132 S. Ct. at 709 n.4.

Cir. 2008) (citing *Petruska v. Gannon Univ.*, 462 F.3d 294, 302-08 (3d Cir. 2006)). But it is a far cry from saying that courts have no business interfering with a church's choice of ministers to holding that a church is effectively immune from the consequences of its choices. True, some courts have so held. But many of these courts based their rulings on the principle, since discredited by the United States Supreme Court, that the *court* lacked subject matter jurisdiction. *See, e.g.*, *Fontana v. Diocese of Yakima*, 138 Wn. App. 421, 427, 157 P.3d 443 (2007) (dismissing plaintiff's constructive discharge claim for "lack of subject matter jurisdiction"); *Gates v. Catholic Archdiocese of Seattle*, 103 Wn. App. 160, 169, 10 P.3d 435 (2000) (dismissing employment contract claim for "lack of jurisdiction"). The reasoning in these cases has been rejected by *Hosanna-Tabor*, 132 S. Ct. at 709 n.4.

While the lead opinion cites many cases, it cites only five (out of only three courts) that have found that negligent supervision or negligent retention claims against churches for the conduct of ministers should be dismissed on First Amendment grounds. None of these cases mention the "ministerial exception doctrine" pleaded here, and, not surprisingly given that they go to a theory the parties did not present, none of these cases are mentioned in the parties' briefing.

I can certainly see why the church did not cite these cases: in all five cases, the courts dismissed negligent supervision and retention claims against churches for clergy sexual misconduct. Given that we have already allowed cases against churches involving clergy sexual misconduct to go forward, *see, e.g.*, *C.J.C. v.*

Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 728, 985 P.2d 262 (1999), I can see why the church might think we would not find them persuasive. In *Pritzlaff*, the Wisconsin Supreme Court, over vigorous dissents, dismissed Pritzlaff's claims that when she was a high school student, a priest used his position as a priest and counselor to groom her for a sexually exploitive relationship. *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 307, 533 N.W.2d 780 (1995). The court dismissed the case on the statute of limitations, but none the less went on to consider her specific claims. The Wisconsin Supreme Court also relied on *Pritzlaff* in dismissing another clergy sexual abuse case cited by the majority, *L.L.N. v. Clauder*, 209 Wis. 2d 674, 685, 563 N.W.2d 434 (1997), which again drew a vigorous dissent.

The lead opinion also relies on an opinion of the Missouri Supreme Court, *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997). There, allegedly, a priest, invited a child to spend the night and sexually molested him. *Id.* at 243. The parents confronted the diocese about the priest's conduct and were told that '"this happens to young men all the time' and that [their son] 'would get over it."' *Id.* "After hearing of similar incidents between [the priest] and other young boys," the parents filed a nine count complaint against the pastor and the church, including claims of negligent retention and supervision. *Id.* The Missouri Supreme Court affirmed dismissal of all the claims, reasoning that merely considering the claims constituted "excessive entanglement between church and state [and] has the effect of inhibiting religion, in violation of the First Amendment." *Id.* at 246-47.

Finally, the lead opinion cites two cases out of the Southern District of New York that dismissed negligent supervision and retention-like claims, *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991) and *Ehrens v. Lutheran Church-Missouri Synod*, 269 F. Supp. 2d 328, 332 (S.D.N.Y. 2003). In *Schmidt*, a woman alleged she was sexually abused by a priest when she was 12 years old. The lead opinion discusses language out of *Schmidt*, the court used in discussing a "clergy malpractice" claim not present here.[2] Lead opinion at 15. The New York District Court relied upon this dicta to dismiss claims of negligent hiring, supervision, and retention in a subsequent case of alleged clergy abuse of a child in *Ehrens*, 267 F. Supp. 2d at 332.

My own research (again, unaided by the parties as this is not their theory of the case) shows that many courts (including, implicitly, this court in *C.J.C*, 138 Wn.2d at 728) have disagreed with Wisconsin, Missouri, and the Southern District of New York courts and *have* allowed negligent supervision and retention claims to go forward. In yet another sexual misconduct case, one much closer to home, the Colorado Supreme Court concluded that "[t]he First Amendment to the United States Constitution does not grant religious organizations absolute immunity from tort liability. Liability can attach for breach of a fiduciary duty, negligent hiring and supervision." *Moses v. Diocese of Colo.*, 863 P.2d 310, 319 (Colo. 1993) (citing *Destefano v. Grabrian*, 763 P.2d 275, 284, 286–87 (Colo. 1988)). Specifically

[2] The lead opinion does not discuss the *Schmidt* court's most memorable line: "It may be argued that it requires no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children." *Schmidt*¸ 779 F. Supp. at 328. I completely agree and regret the federal court did not follow the wisdom of its insight.

adopting the "neutral principles" approach long approved in the property conflicts arena (but rejected by the lead opinion for reasons I do not find persuasive), the Colorado court observed that "[c]ivil actions against clergy members and their superiors that involve claims of a breach of fiduciary duty, negligent hiring and supervision, and vicarious liability are actionable if they are supported by competent evidence in the record." *Id.* at 321 (citing *Destefano*, 763 P.2d at 284, 286–87).

Similarly, in another clergy sexual abuse of a child case, the Florida Supreme Court rejected the argument the First Amendment barred negligent hiring and supervision claims against a church. It reasoned that

> the Free Exercise Clause is not implicated in this case because the conduct sought to be regulated; that is, the Church Defendants' alleged negligence in hiring and supervision is not rooted in religious belief. Moreover, even assuming an "incidental effect of burdening a particular religious practice," the parishioners' cause of action for negligent hiring and supervision is not barred because it is based on neutral application of principles of tort law.

Malicki v. Doe, 814 So. 2d 347, 360-61 (Fla. 2002) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). This makes good sense to me, and I believe we should follow it.

Many other courts have. I have not canvassed the country, that is for parties and law reviews. But limited research shows that the state courts of Florida, New York, Colorado, Maine, Mississippi, Minnesota, North Carolina, and Oregon have all found that judicial consideration of claims of negligent supervision and retention (or similar causes) against churches does not violate the First Amendment. *Vione v.*

Tewell, 12 Misc. 3d 973, 979-80, 820 N.Y.S.2d 682 (Sup. Ct. 2006); *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶¶ 49-54, 871 A.2d 1208; *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213 (Miss. 2005); *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 45 Conn. Supp. 397, 716 A.2d 967 (Super. Ct. 1998) (negligent retention not pleaded; found negligent supervision case not barred by First Amendment); *Smith v. Privette*, 128 N.C. App. 490, 495 S.E.2d 395 (1998); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791 (1997); *Erickson v. Christenson*, 99 Or. App. 104, 781 P.2d 383 (1989); *accord Bollard v. Cal. Province of Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999) (First Amendment no bar to a novice priest's claim of sexual harassment during training).

The lead opinion seems to suggest that its conclusion follows from *Hosanna-Tabor*. Lead opinion at 10-13. But *Hosanna-Tabor* considered whether the ministerial exception doctrine applied to bar a petitioner's claims because *she herself* was a minister; not because, as here, someone else was. It did not purport to consider whether a *tortfeasor's* ministerial status was relevant to whether a civil claim may be pursued against a church for negligent retention and supervision.

As this court ruled not so long ago, "[t]he First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles." *C.J.C.*,

138 Wn.2d at 728 (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998)); *accord Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (stating that even religiously motivated conduct is not immune from neutral laws of general applicability). Today, this court errs by retreating from this well grounded holding. While there certainly may be negligent supervision and retention claims that *would* involve interpretation of matters of faith, at least at this point, this is not one of them. We should let the parties make that argument on a case by case basis.

B. Neutral Principles of Law

I also strongly disagree with the lead opinion that we should reject the "neutral principles of law" approach approved by the United States Supreme Court in *Jones v. Wolf*, 443 U.S. 595, 603, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979) and *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969) (*Mem'l Presbyterian Church*). More to the point, I think we already have. In *Church of Christ at Centerville v. Carder*, 105 Wn.2d 204, 207-08, 713 P.2d 101 (1986), we approved of the "neutral principles" approach specifically in cases where no hierarchal body rendered a decision. *Id*. Also, while we did not use the term "neutral principles of law" in *C.J.C.*, we held that "churches (and other religious organizations) [are] subject to the same duties of reasonable care as would be imposed on any person or entity in selecting and supervising their workers, or protecting vulnerable persons within their custody, so as to prevent reasonably foreseeable harm." *C.J.C.*, 138

Wn.2d at 722. This is substantially similar to the "neutral principles" language used in *Jones*. *See also Hoffman v. Tieton View Cmty. Methodist Episcopal Church*, 33 Wn.2d 716, 207 P.2d 699 (1949) (court will examine church governance materials to determine the nature of a property conveyance). We also firmly rejected the idea that a church was immune from tort liability under article I, section 11 of our constitution. *C.J.C.*, 138 Wn.2d at 727-28.

The lead opinion also suggests that the United States Supreme Court rejected the neutral principles approach in *Hosanna-Tabor*, 132 S. Ct. 694. Lead opinion at 20-21.[3] That is a remarkable reading of the text. *Hosanna-Tabor* never mentions "neutral principles." It does not discuss the leading neutral principles cases, *Jones*, 443 U.S. 595 and *Mem'l Presbyterian Church*, 393 U.S. 440. Nor did it have any reason too. *Hosanna-Tabor* was *not* about the approach the court should take to adjudicating disputes: *Hosanna-Tabor* was about the categorization of a particular

---

[3] The lead opinion states:

> Among other things, the EEOC and the teacher suggested that the asserted reason for firing the teacher was pretextual. The Court responded by saying that this suggestion misses the significance of the ministerial exception, which "is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead insures that *the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical—is the church's alone." Hosanna-Tabor*, 132 S. Ct. at 709.
>
> As this analysis instructs, there is no room for the "neutral principles of law" approach in the case of civil tort claims brought against a church involving its authority to hire and control its ministers.

Lead opinion at 20-21 (footnote omitted). In my view, the analysis instructs no such thing, and if the United States Supreme Court were to make such a breathtaking holding, I am certain it would do so explicitly.

teacher at a particular sectarian school. In the words of Chief Justice Roberts, "[t]he question presented is whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's *ministers*." *Hosanna-Tabor*, 132 S. Ct. at 699 (emphasis added). Certainly, *Hosanna-Tabor* may be relevant to whether *Erdman* is a minister, a question the parties should be able to litigate on remand. But I find nothing in it that suggests the Court overruled *Jones*, 443 U.S. 595 and *Mem'l Presbyterian Church*, 393 U.S. 440.

I believe the neutral principles of law approach is the best way to protect churches from judicial interference and individuals from the categorical deprivation of their rights based on the sectarian nature of the tortfeasors.

C. Ecclesiastical Abstention Doctrine

I absolutely agree with the lead opinion that courts have no business considering questions of religious "discipline, or of faith, or ecclesiastical rule, custom, or law." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727, 20 L. Ed. 666 (1871). I agree that once a church member has submitted a claim to an ecclesiastical tribunal, and that tribunal has rendered a decision on religious "discipline, or of faith, or ecclesiastical rule, custom, or law," courts "must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* The trial judge concluded that is what happened here, and I find no reason to disturb her judgment.

I concur with the lead opinion that the Title VII claims should be remanded,

and I agree with the Court of Appeals that Erdman's claim for negligent infliction of emotional distress against Pastor Toone, based on the record before us, should go forward. *Erdman*, 156 Wn. App. at 843. I agree with the lead opinion that the ecclesiastical abstention doctrine bars Erdman's negligent supervision and abstention claims. But because I would not decide this case based on issues not raised by the parties; because I do not believe Pastor Toone's status as a minister is relevant to the arguments properly before us; and because I believe the neutral principles of law approach is the best way to respect both the rights of churches and individuals; I respectfully dissent in part.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Debra L. Stephens

Marlin J. Appelwick, Justice Pro Tem.