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IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

298<sup>th</sup> JUDICIAL DISTRICTC. BROWN,  
Plaintiff

VS.

TOMMY GILMORE a/k/a  
THOMAS E. GILMORE,  
Defendant.§  
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§**PLAINTIFF'S RESPONSE TO DEFENDANT'S SPECIAL EXCEPTIONS**

TO THE HONORABLE JUDGE:

Plaintiff, C. BROWN, files this Response to Defendant's Special Exceptions, urging that the exceptions are not valid and should be denied.

**I.**

**Texas Law Allows for a Breach of Fiduciary Duty Claim  
Founded on a Minister's Sexual Abuse.**

In *Sanders v. Casa View Baptist Church*, 898 F.Supp. 1169, 1176 (N.D. Tex. 1995), the federal district court applied Texas law so as to allow a breach of fiduciary duty claim against a minister who was alleged to have sexually abused church women whom he was counseling. Like the defendant in this case, the defendant minister in *Sanders* expressly argued that "Texas does not recognize a fiduciary relationship between a minister and a member of the congregation." *Id.* The district court expressly rejected that argument and allowed the breach of fiduciary duty claims to proceed to trial. *Id.* at 1176-77. At trial, the jury found in favor of the plaintiffs and awarded punitive damages. *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 333-34 (5<sup>th</sup> Cir. 1998)(affirming district court's judgment and summarizing the history of the case).

On appeal to the Fifth Circuit, the minister again argued that, as a matter of law, he could not be liable for breach of fiduciary duty. *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335 (5<sup>th</sup> Cir. 1998).

Cir. 1998). However, the Fifth Circuit also rejected this argument. In affirming the district court's judgment, the Fifth Circuit explained that, in order for a minister to invoke the protection of the First Amendment, he would have to assert that the specific conduct allegedly constituting a breach of fiduciary duty was conduct "rooted in religious beliefs." *Id.* at 337-38. The Fifth Circuit then pointed out "the obvious truth" that the sexual misconduct complained of by the plaintiffs was not part of "religious beliefs and practices" and that the minister was "not so brazen as to now contend otherwise." *Id.* at 338. On this basis, the Fifth Circuit upheld the judgment for plaintiffs on their breach of fiduciary duty claims asserted under Texas law. *Id.* at 338, 340.

After these opinions in the *Sanders* case, the Tyler Court of Appeals considered a claim for breach of fiduciary duty brought against a minister by an adult member of the congregation. *Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446 (Tex. App. – Tyler 2000, no pet.). The court of appeals stated that, based on its First Amendment concerns, "we decline to determine that the pastor-member relationship *in this case* established a fiduciary duty."<sup>1</sup> *Id.* at 453. Thus, the court expressly limited its holding to the particular case before it and did not broadly set forth a blanket rejection of fiduciary duty claims against ministers. Moreover, the court's reasoning is not entirely clear. Although the factual portion of the opinion discusses the minister's work as a counselor, the fiduciary duty discussion makes no mention of it and instead speaks only to the "pastor-member relationship."

The *Hawkins* case is the only case cited by Defendant in support of his special exceptions, and as noted in footnote 1, Defendant did not even quote the opinion accurately. Plaintiffs urge that

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<sup>1</sup>Note that this quoted language does not match up with the broader language that Defendant attributes to the *Hawkins* opinion. At paragraph III of his special exceptions, Defendant quotes the *Hawkins* opinion as stating that "Texas does not recognize a cause action for breach of fiduciary duty in the pastor-member relationship." On examination of the opinion, however, Plaintiff is unable to find this broad language in it. Instead, the court of appeals merely stated that it was declining to determine that the pastor-member relationship "*in this case*" established a fiduciary duty. *Hawkins*, 30 S.W.3d at 453.

this single opinion does not support a blanket rejection of a fiduciary duty claim against a minister/counselor at the pleadings stage of the proceedings. Particularly in light of the fact that *Hawkins* was a “no petition” decision and in light of the case law before and after it, this single unreviewed opinion of the Tyler court cannot be afforded so much weight.

Prior to *Hawkins*, the *Sanders* opinions expressly concluded that Texas law allowed for breach of fiduciary duty claims against ministers. *Sanders*, 898 F.Supp. 1169, *aff’d*, 134 F.3d 331. After *Hawkins*, the Dallas Court of Appeals allowed for tort claims alleging sexual misconduct by a church elder in *Martinez v. Primera Asamblea de Dios, Inc.*, No. 05-96-01458-CV, 1998 WL 242412 (Tex. App. – Dallas 1998, no pet.)(not designated for publication). In reaching this conclusion, the Dallas Court of Appeals considered First Amendment arguments similar to those asserted by the defendant in *Hawkins*. The Dallas court explained that the proper analysis of the issue is whether the redress of the claims “would result in the civil courts interfering in purely ecclesiastical or administrative affairs of the church.” *Id.* at \*3. Because it concluded that the plaintiff’s pursuit of the tort claims “will not entangle the trial court in the ecclesiastical affairs of the church,” the Dallas Court of Appeals allowed the claims to proceed, stating that “the Free Exercise clause has never immunized clergy or churches from all causes of action alleging tortious conduct.” *Id.* at \*3.

This analysis of the Dallas Court of Appeals is the sort of analysis that should apply here. The plaintiff’s tort claims for breach of fiduciary duty arising out of a minister and counselor’s sexual assaults are claims that will not in any way entangle the court in the ecclesiastical affairs of the church. As in the *Sanders* case, this defendant is surely not “so brazen” as to contend that sexual assaults on a minor are part of the church’s “religious beliefs and practices.” *Sanders*, 134 F.3d at 338. Therefore, there is no First Amendment basis for precluding these tort claims at the pleadings stage.

**The Majority of Jurisdictions Allow for a Breach of Fiduciary Claim  
Founded on a Minister's Sexual Abuse.**

In a recent opinion, the Florida Supreme Court surveyed the law in this area and concluded that “the First Amendment does not provide a shield behind which a church may avoid liability for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy.” *Malicki v. Doe*, 814 So.2d 347, 351 (Fla. 2002). The court then stated that Florida was joining “the majority of both state and federal jurisdictions that have found no First Amendment bar under similar circumstances.” *Id.*

In reaching this conclusion about what the majority of state and federal jurisdictions do when confronted with claims founded on a minister's sexual assault, the Florida Supreme Court set forth extensive footnotes showing what particular state and federal courts have done with a wide range of tort claims, including claims for breach of fiduciary duty. *Malicki*, 814 So.2d at 351 n.2, at 358 nn.8 & 10. With citation to *Sanders* and *Martinez*, the Florida Supreme Court lists Texas among the majority of states that have allowed such claims.<sup>2</sup> *Malicki*, 814 So.2d at 351 n.2.

A recent law review article reached the same conclusion. Jeffrey R. Andersen, et al., *The First Amendment: Churches Seeking Sanctuary for the Sins of the Fathers*, 31 FORDHAM URB. L. J. 617, 618 (2004). It listed breach of fiduciary duty as among the claims that are typically alleged in clergy sex abuse cases, and then concluded that “most state courts have held that the First Amendment does not provide any protection from these claims.” By footnote, the authors listed

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<sup>2</sup>The Florida Supreme Court was not oblivious to the *Hawkins* decision, but cited it as a mere “but see” case. *Malicki*, 814 So.2d at 351 n.2. Thus, the Florida Supreme Court recognized that *Hawkins* was the exception and that the weight of authority applying Texas law placed Texas among the majority of jurisdictions that have refused to bar such claims.

L.J. at 618 n.5.

Likewise, a recent California court of appeals also surveyed the law and placed Texas among those jurisdictions that allow breach of fiduciary duty claims against clergy. *Richelle L. v. Roman Catholic Archbishop of San Francisco*, 106 Cal. Rptr.2d 601, 612 (Cal. Ct. App. 2003)(citing the *Sanders* case for interpretation of Texas law). The court explained that proof of a breach of fiduciary duty claim is not rooted in religious belief and further stated as follows:

Few would have the hardihood to claim First Amendment immunity in defense of a suit charging a rabbi, priest or pastor with sexual improprieties involving others connected with the church. These cases fall into one of two patterns: either a minister is alleged to have taken sexual advantage of a woman he is counseling, or a cleric is said to have sodomized young children placed under his charge. *Because no credible argument can be made that such conduct is even 'arguably religious' or caused by the promptings of spiritual duty, these torts are not shielded by protestations of religious liberty.*

*Richelle L.*, 130 Cal.Rptr.2d at 612. In the case at hand, Plaintiff Brown's claim fits *both* patterns in that she was both a child and a person being counseled. "No credible argument can be made" that a minister-counselor's sexual assaults on a minor constitute conduct that is religious in nature. Therefore, the claim is not precluded.

Similarly, the Florida Supreme Court summarized the reasoning of the majority of jurisdictions that have allowed such claims by explaining as follows:

[T]he right to religious freedom and autonomy protected by the First Amendment is not violated by permitting the courts to adjudicate tort liability against a religious institution based on a claim that a clergy member engaged in tortious conduct such as sexual assault and battery in the course of his or her relationship with a parishioner. These courts conclude that there is no impermissible interpretation of religious doctrine because the courts are applying a neutral principle of generally applicable tort law. This is especially so where the religious institution does not allege that the conduct was undertaken

in furtherance of a sincerely held religious belief....[T]he free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused the plaintiff's distress was in fact 'part of the belief and practices' of the religious group.

*Malicki*, 814 So.2d at 358. As in *Sanders*, Defendant Gilmore is surely “not so brazen” as to now contend that sexual assaults and batteries were “part of the belief and practices of the religious group.” *Sanders*, 134 F.3d at 338. Therefore, like the majority of jurisdictions across the country, Texas law does not preclude the tort claims for breach of fiduciary duty.

### III.

#### **This Breach of Fiduciary Duty Claim Is Founded on More than a Mere Pastor-Member Relationship**

Even if one looks no further than *Hawkins* for the proposition that the “pastor-member relationship” does not give rise to a fiduciary duty, and even if one ignores the contrary Texas law precedents of the *Sanders* opinions and the *Martinez* opinion, the facts as pled in this case show that there was more than a mere “pastor-member relationship” so as to make the relationship fiduciary in nature. The Plaintiff was not merely a “pew-sitter” who formed part of the general membership of the church. As set forth in her original petition, she was devout, deeply religious and very active in the church. She had been raised in the church. Such prolonged and extensive involvement on the part of a minor may give rise to a fiduciary relationship even in jurisdictions that do not always recognize a fiduciary relationship as between a minister and the general membership of a church. See *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1220 (Me. 2005). As the Supreme Court of Maine recognized, “at its very core” such a relationship is “marked by the great disparity of position and influence between the parties that is a hallmark of a fiduciary relationship.” *Id.*

Moreover, as set forth in Plaintiff's Original Petition, the Plaintiff was receiving counseling from Defendant, who himself instituted the counseling after learning that the Plaintiff was having

family difficulties. These additional facts support the existence of a fiduciary relationship. See *Fortin*, 871 A.2d at 1219 (fact that defendant clergy knew the minor's family was having difficulties was additional fact that supported the existence of a fiduciary relationship). As with other sorts of counselors, Texas law makes clergy subject to felony prosecution when they exploit the counseling relationship for sexual purposes. TEX. PENAL CODE § 22.011(c)(4)(E). This, too, constitutes an implicit recognition in Texas law that such a relationship is a serious relationship of trust that is worthy of the law's protection.

Under Texas law, a fiduciary relationship may arise whenever a high degree of trust, influence or confidence has been acquired.<sup>3</sup> *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). Its existence is ordinarily a question of fact. *Id.* A fiduciary relationship may arise regardless of whether the relationship is moral, social, domestic, or purely personal in nature. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997). It may arise either as a result of dominance on the part of one or weakness on the part of the other. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 918 S.W.2d 580, 596 (Tex. App. – Corpus Christi 1996), *aff'd in relevant part*, 964 S.W.2d 276 (Tex. 1998). As set forth in the pleadings, Plaintiff was a devout young girl who was raised in the church and raised to trust the ministers. She was receiving counseling from the Defendant minister Gilmore during a time when her family was having difficulties. By contrast, Defendant Gilmore was not only a trusted minister and counselor but he was also a married adult who far surpassed the Plaintiff in both age and experience. Under these circumstances, Defendant Gilmore was in a position of dominance and the adolescent Plaintiff was

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<sup>3</sup>One recent commentator stated: "Clergy members fall within these definitions [of fiduciary] because they set themselves apart as counselors and confidants to their parishioners, instilling a deep sense of trust and security.... [T]he fiduciary relationship and subsequent duty seem apparent...." Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish?* 57 OKLA. L. REV. 183, 194 (2004).

in a vulnerable position of weakness. Consistent with Texas law, and with the law as reflected in the majority of jurisdictions across the country, these circumstances support the recognition of a fiduciary relationship.

#### IV.

##### **Concerns for Judicial Efficiency Dictate That This Claim Should Not Be Stricken Prematurely.**

The law applicable to clergy sexual abuse has been developing rapidly in recent years as more and more cases present themselves.<sup>4</sup> Even if the *Hawkins* opinion stood alone, a single “no petition” Tyler Court of Appeals opinion does not the law of Texas make. And when that opinion is placed alongside the two *Sanders* opinions, the Dallas Court of Appeals’ opinion in *Martinez*, and the majority of opinions from other jurisdictions, it is apparent that it would be premature to preclude this claim at the pleadings stage. Striking of the fiduciary duty claim at this early pleadings stage of the case would make little sense, both in terms of the law and in terms of judicial efficiency.

The breach of fiduciary duty claim should proceed to trial along with the other claims to which no special exception has been made. Defendant Gilmore will have additional post-verdict opportunities to assert his contention that there is no fiduciary relationship as a matter of law. And at that time, that legal contention can be reviewed based on a full factual record and it can then be sent up to the appellate courts for their determination along with whatever other appellate issues may arise during the trial.

#### V.

##### **No General Demurrer Is Allowed.**

Defendant has made the very general assertion that “Plaintiff’s Original Petition fails to state

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<sup>4</sup>The scope of the clergy sex abuse problem is extraordinary. For example, a 2002 survey found that 70% of Southern Baptist ministers knew of other ministers who had sexual contact with a member of the congregation. Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish?* 57 OKLA. L. REV. 183 (2004).



a cause of action on its face upon which relief can be granted.” (Def. Special Exceptions at ¶ I) This assertion constitutes a general demurrer and is prohibited under Texas Rule of Civil Procedure 90. *Martin v. Hunter*, 233 S.W.2d 354, 355 (Tex. App. – San Antonio 1950, writ ref’d n.r.e.). A special exception is required to point out “with particularity” the asserted defect in the pleading. TEX. R. CIV. P. 91; *Muecke v. Hallstead*, 25 S.W.3d 221, 224 (Tex. App. – San Antonio 2000, no pet.). When a special exception is not specific, it should be overruled. *Spillman v. Simkins*, 757 S.W.2d 166, 168 (Tex. App. – San Antonio 1988, no writ).

The only part of Plaintiff’s Original Petition to which Defendant makes a specific objection is the breach of fiduciary duty claim. As set forth in paragraphs I-IV above, Plaintiff has addressed the reasons for why that special exception should be denied. To the extent Defendant may be attempting to make any other sort of special exception, it should be denied because it constitutes a general demurrer and is too vague and general to meet the requirements of the Rules.

## VI.

### Prayer

For all of the above reasons, Plaintiff prays that the Defendant’s special exceptions will be denied.


Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

## CERTIFICATE OF SERVICE

This is to certify that, on the 21<sup>st</sup> day of October 2005, a true and correct copy of the Plaintiff's Response to Defendant's Special Exceptions was served on Defendant's counsel of record, shown below, via facsimile transmission.

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