ROSS & RUBINO, LLP
Attorneys at Law
216 Haddon Avenue
Suite 100
Westmont, NJ 08108
(609) 365-0500

HERBERT D. FRIEDMAN, ESQUIRE
265 Franklin Street, 16th Floor
Boston, MA 02110
(617) 261-6000

Attorneys for Plaintiff, F.G.

F.G., Plaintiffs vs. ALEX MacDONELL, et al, Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-3542-95 CIVIL ACTION

PLAINTIFF'S ***ELMORA*** HEARING BRIEF

On the brief:
Stephen C. Rubino, Esquire
Herbert D. Friedman, Esquire

TABLE OF CONTENTS

TABLE OF CASES

Civil courts can and do address secular legal questions grounded in religious doctrine, so long as they do not intrude into determination of issues of dogma or of church polity. This is accomplished by application of neutral principles of law. Elmora Hebrew Center v. Fishman, 125 N.J. 404 (1991).

> "The question remains whether, without becoming entangled in religious doctrine, a court can adjudicate Harper's alleged breach of the fiduciary duty to F.G. If the trial court can make such a determination by reference to neutral principles, F.G. may maintain her action against Harper." F.G. v. MacDonell, 150 N.J. 550, 566-557 (1997).

"*I think that the personal behavior of priests are bound by the law of the society as much as any other citizens are. The difficulty for me gets to be how, how you would define that activity, and that's the court's job*."

-- John J. Spong, Bishop of Newark [6/9/98 dep., T. 27:10-14, (Exhibit D)].

INTRODUCTION

Plaintiff raises causes of action against defendants Harper and Spong, *inter alia* for breach of fiduciary duty, invasion of privacy, defamation and negligent infliction of emotional distress arising from the publication of a certain letter and sermon, both containing inaccurate, misleading and confidential information. The disclosure was not authorized by the informed

consent of the plaintiff and resulted in emotional and other harms.[1]

The letter and sermon addressed sexual misconduct by defendant MacDonell in connection with his counseling of plaintiff F.G. In addition to containing false and misleading information about the plaintiff, both documents publicly identified her by name, without her consent.

The letter was written by defendant Harper. Harper sought input in its preparation from Spong, who gave certain advice and approval of its content.

Plaintiff specifically alleges that she was the beneficiary of direct confidential and fiduciary relationships with both Harper and Spong. The Supreme Court has already determined that a cause of action for breach of a fiduciary duty may be raised against a clergyman.

However, defendants Harper and Spong allege that this Court's consideration of breaches of the same sort of fiduciary duty would somehow result in excessive entanglement, inconsistent with the First Amendment. Defendants also argue that imposition of ordinary tort obligations upon them for defamation, emotional distress, *etc.* would also entail excessive entanglement.

In an Elmora hearing Spong and Harper bear the burden of proof. Corsie v. Campanalonga, 317 N.J. Super. 177, 185 (App.Div. 1998). They must prove, *inter alia* not

[1]The letter, dated April 14, 1994 was sent to parishioners of the two 'yoked' parishes, of which plaintiff was a member. The sermon was delivered on April 17, 1994. Copies are attached as Exhibits A and B, respectively.

only that the inquiry would entangle the civil courts with religion, but also that such entanglement would be *excessive*. S. Jersey Catholic School Teachers v. St. Teresa, 150 N.J. 575, 591 (1997). Alternatively, they must prove that the entanglement would have a *coercive effect* upon their practice of religion. Corsie, *supra*, quoting F.G. 150 N.J. at 559.

In order to meet their burden, it is anticipated that Harper and Spong will rely upon their own testimony and that of their experts. The depositions of these two defendants makes it abundantly clear that the knew they had a fiduciary relationship which required them not to publicly humiliate plaintiff. They did so for reasons not directly related to Church doctrine or dogma, but rather for 'concern' for their congregation with respect to the possibility of *civil* liability.

Defendant's experts, Whittaker and Tennis, offer a variety of net opinions with respect to the purported religious content of the letter and the sermon, but nowhere do they [nor anyone else] directly suggest that the Court will somehow be called upon to interpret Church doctrine or choose among competing dogma. To a very material degree, the reports of Whittaker and Tennis are inconsistent with the actual state of the law, with the actual testimony of the defendants and with each other.

In fact, to a large degree, defendants' expert reports and the testimony confirm *plaintiff's* expert opinions and reports reflecting the existence of fiduciary relationships running from both Spong and Harper to F.G. The expert reports and testimony proffered by defendants confirm the breach; they confirm that there is no entanglement, certainly no *excessive* entanglement and just as certainly no coercive effect. The defense experts,

especially Bishop Tennis [along with Bishop Spong himself], actually confirm that the defendants are civilly liable for their tortious conduct, notwithstanding that it happened to have occurred in a religious environment.

THE LAW

The First Amendment does not bar inquiry into matters of contract or tort merely because they arise in the context of matters religious.

> "Our Supreme Court has held that the First Amendment does not protect a member of the clergy from actions arising out of sexual misconduct that occur during a time when a clergy member is providing counseling to a parishioner."

Corsie v. Campanalonga, 317 N.J. Super. 177, 185 (App.Div. 1998), citing F.G.

> "If the First Amendment does not shield the clergy from state action involving alleged sexual misconduct, it follows that it does not protect against application of judicial discovery rules to uncover relevant material in personnel files related to that sexual misconduct." *Id.*

By the same token, the First Amendment does not shield the defendants here for conduct which would be tortious if committed by individuals other than clergymen, merely because of their status *as* clergymen. See, *e.g.*, Welter v. Seton Hall Univ., 128 N.J. 279, 294 (1992). Civil courts can and do address secular legal questions grounded in religious doctrine. This is accomplished by application of neutral principles of law. Elmora, *supra.* To be sure, this approach is more easily applied to litigation grounded in contract or property rights; it may nevertheless be applicable where tortious acts are committed in activities which have both secular and religious characteristics. F.G., *supra.*

The principal standard is best summarized as the Lemon test. [Lemon v. Kurtzman, 403

U.S. 602, 91 S.Ct. 2105 (1971)]. Under this three-pronged analysis, the inquiry must: (a) have a secular purpose; (b) its principal or primary effect must be one which neither advances, nor inhibits religion; and (c) it must not *excessively* entangle the government with religion. Ran-Dav's County Kosher v. State, 129 N.J. 141, 153 (1992).

a. *Secular Purpose.*

This litigation has a clear secular purpose. It involves plaintiff's claims for the torts of defamation, negligent infliction of emotional distress, *etc.* It also involves claim arising from a breach of fiduciary duty; this is a cause of action already approved by the Supreme Court *sub judice.* The only reason the Court is presented with the Elmora hearing today is due to the appearance of the tortious disclosures in a letter and subsequent sermon to the yoked parishes [this goes to entanglement, not purpose]. This litigation meets the first criterion and thus does not run afoul of the First Amendment.[2]

b. *Neither Advances Nor Inhibits Religion.*

The Lemon test proscribes only such state action which has as its *principal or primary* effect the advancement or inhibition of religion.

Further, defendants bear the burden to "'establish that the action produced a *coercive effect* on the practice of religion.'" Corsie, *supra*, 317 N.J.Super. at 185. Defendants can make absolutely no showing of any coercive effect. At most, the impact of this litigation is to reaffirm that clergy must maintain factual accuracy as to significant matters in their

[2]Curiously, both Bishop Spong and his expert, Bishop Tennis appear to agree. See discussion, *infra.*

communications with their parishes or congregants insofar as the privacy and reputation of their congregants are concerned and that they must not use a fiduciary relationship with a congregant to act contrary to the congregant's best interests.

Further, defendants offer no suggestion as to how resolution *sub judice* has such a *principal or primary* effect of advancing or inhibiting religion. No competent evidence has been adduced to date which shows either the inhibition or advancement of religion in this litigation, certainly not as a *principal* or *primary* effect.

The Supreme Court has already ruled that a fiduciary relationship can exist in a religious environment and ruled further that a civil cause of action exists for a breach. The Supreme Court has also ruled that plaintiff may pursue her cause of action for negligent infliction of emotional distress. 150 N.J. at 566. It is thus difficult to see how holding these defendants accountable for the civil tort of defamation and negligent infliction of emotional distress either advances or inhibits religion.

c. *Does Not Foster Excessive Entanglement.*

Plaintiff's experts find that the letter and the sermon are substantially devoid of religious content. Defendants' expert, Rev. Whittaker goes to great lengths to engraft doctrine and dogma onto the sermon where none even appear in the text.[3]

---

[3]This is just one peculiar facet of a peculiarly net opinion. Rev. Whittaker seems intent upon showing entanglement by demonstrating that the largely secular text [containing the tortious misrepresentations of fact and disclosing plaintiff's name] is somehow bound up with Church doctrine. Nevertheless, nowhere does she indicate how the inquiry would invoke any interpretation of such doctrine by the court. Nor does she suggest that resolution would require (continued...)

In an apparent contradiction, defendant's other expert, Bishop Tennis holds that defendants *are* civilly liable for secular torts committed in the course of their religious duties.

The excessive entanglement prong of the test essentially divides into two parts. In the first, it must be determined if the Court will be called upon to *apply* or *interpret* religious doctrine or to choose between competing doctrines. None of the witnesses show that the Court will be called upon to interpret, apply or endorse Church doctrine.

> "The entanglement test... forbids government adoption and enforcement of religious law. That test also forbids government resolution of religious disputes. The government may not lend its power to one side or the other in controversies over religious authority or dogma."

Ran-Dav's County Kosher, *supra*, 129 N.J. at 158 [citation omitted].

"The First Amendment 'forbids civil courts from *deciding* issues of religious doctrine or ecclesiastical policy.'" Corsie, *supra*, at 185, quoting Elmora, 125 N.J. at 413 [emphasis supplied]. However, it does not prevent a court from adjudicating issues which are related to, but not dependent upon such doctrine or polity. "Only when the underlying dispute *turns on* doctrine or polity should courts abdicate their duty to enforce secular rights." Welter, *supra*, 128 N.J. at 293 [emphasis supplied].

Defendants have obtained a report which suggests that in making the tortious disclosure they were acting in accordance with some religious principle. However, a careful reading of the actual testimony indicates that defendants did what they did based on their general duties

---

[3](...continued)
the court to choose one church doctrine over another. See discussion, *infra*.

as they perceived it at the time and *not* on the basis of any particular religious doctrine or purpose.

Similar close reading of the testimony also indicates that the improper disclosures and the published misleading statements about F.G. were not made for any religious purposes at all. Rather, defendants Harper and Spong blamed the victim as at least partially responsible for MacDonell's downfall. By casting some of the blame on F.G,. they hoped to assure their more deserving congregants that they would be insulated from *civil* liability after plaintiff allegedly threatened a lawsuit.

None of the expert reports, indeed, none of the fact witnesses demonstrate any dispute which *turns on* church doctrine or polity. Thus, to the extent that any dispute exists, it can be determined by neutral principles of law, *i.e.* those previously laid out by the Supreme Court in this litigation.

The second part of the entanglement test is a determination as to whether such entanglement as exists is *excessive* in nature.

> "Lemon proscribes only '*excessive* government entanglement with religion,'[...] it does not erect an impenetrable wall of separation."
>
> "Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be '*excessive*' before it runs afoul of the Establishment Clause."

S. Jersey Catholic School Teachers v. St. Teresa, 150 N.J. 575, 591 (1997) [emphasis supplied, citations omitted].

The Constitution permits the resolution of contract disputes involving religious

institutions. [Welter; S. Jersey Catholic School Teachers; Elmora]. The Constitution permits tort actions against clergymen who commit civil torts in the course of their clerical duties. [F.G.; Corsie, (App.Div.)].[4]

In F.G., the Supreme Court defined the secular elements of a breach of fiduciary duty by a clergyman. In the absence of excessive entanglement, it therefore follows logically and legally that if plaintiff has a cause of action for breach of such duty, the First Amendment will be no impediment *ipso jure*, provided only that the court does not have to interpret or choose among competing dogmas.[5]

The issue is even clearer with respect to the defamation and negligent infliction of emotional distress counts. No First Amendment issue actually appears there at all, unless of course, defendants wish to claim that the commission of such torts has anything to do with the First Amendment, just because they are clerics. Permitting defendants to raise the hallowed

---

[4]Observe the Supreme Court's citation with approval of other states' holdings permitting causes of action against clergymen for breach of fiduciary duty and infliction of emotional distress, even where the clergymen were also carrying out their clerical duties. See especially, Moses v. Diocese of Colorado, 863 P.2d 310, 323 (Colo. 1993), *cert. denied*, 511 U.S. 1137, 114 S.Ct. 2153 (1994); cited at 150 N.J. at 560.

[5]The Supreme Court identified the *secular* nature of the fiduciary duty, irrespective of its religious flavor in this context. Even Bishop Spong apparently agrees that such fiduciary duties are not dependent upon church doctrine:

> "There is no 'fiduciary duty' defined by the Episcopal Faith." [Spong report, 4/2/98, page 4, Exhibit C].

Further, Bishop Spong confirms that no doctrine or dogma would have required Harper to publicly identify F.G. as a participant in the scandal. [Spong Dep. 6/9/98, T. 60:10-21 Exhibit D].

principle in that context would be no different than permitting Rev. Harper or Bishop Spong to shout 'fire' in a crowded theater as part of a religious exercise.

The First Amendment does not, under any authoritative view, immunize the commission of torts merely because they happen to occur during a religious service. Indeed, the April 14, 1994 letter was not even part of such a service. As exemplified by the discussion of the testimony and expert reports below, the First Amendment does not operate as a bar to this litigation. Defendants cannot meet their burden to show *any* of the three prongs of the Lemon test.

THE EVIDENCE AS IT RELATES TO THE LEGAL ISSUES

A. *EXISTENCE* OF FIDUCIARY DUTIES.

(i). Defendant Harper.

Following the termination of F.G.'s pastoral and counseling relationship with defendant MacDonell's retirement in December 1993, defendant Harper, as successor rector, reached out to F.G., who was still a parish member in good standing although she fled to Washington, DC in January 1994. He initiated multiple telephone contacts, as well as in-person contacts when F.G. returned to her New Jersey home on occasional visits. He spoke with her by telephone when she underwent psychiatric hospitalization in Washington, DC in February and March 1994. He counseled her regarding the traumatic events involving defendant MacDonell which prompted her departure, the issues related to her complaint against MacDonell filed with the Standing Commission on Clergy Ethics, and how and what to inform the yoked parishes with regard to same. Harper thereby undertook a fiduciary relationship

with plaintiff as defined by the Supreme Court.

> "The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another within the scope of their relationship. [citations omitted] The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care [...] Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship."
>
> "Trust and confidence are vital to the counseling relationship between parishioner and pastor. By accepting a parishioner for counseling, a pastor also accepts the responsibility of a fiduciary. Often, parishioners who seek pastoral counseling are troubled and vulnerable. Sometimes, they turn to their pastor in the belief that their religion is the most likely source to sustain them in their time of trouble. The pastor knows, or should know of the parishioner's trust and the pastor's dominant position."
>
> F.G. v. MacDonell, 150 N.J. 550, 563-564 (1997).
>
> "Establishing a fiduciary duty essentially requires proof that a parishioner trusted and sought counseling from the pastor. A violation of that trust constitutes a breach of that duty." *id.* at 565.

Plaintiff's expert, Dr. Schoener found at length that "Defendant Rev. Fletcher Harper *undertook a fiduciary duty* to the Plaintiff F.G. *in that he was her pastor* following Rev. MacDonell's departure, and in that he undertook the handling of her complaint against Rev. MacDonell, *including counseling of her with regard to those incidents* and serving as the administrator who processed the complaint within the church." [Report of G.R. Schoener, psychologist, dated 9/8/97, p. 4 (emphasis supplied), Exhibit E].

Accordingly, there was in fact a fiduciary relationship between plaintiff and her rector, Harper. "By accepting a parishioner for counseling, a pastor also accepts the responsibility of

a fiduciary." F.G., at 564.

Bishop Spong evidently concurs. See below when he was questioned about MacDonell:

"Q. Do you believe, Bishop Spong, that a rector has a fiduciary duty to act in the best interest of the members of his or her parish?"

"A. Of course." [Spong Dep., 12/12/95, T. 27:19-22, (Exhibit F)].

"A. I regard a priest's relationship with a member of the congregation to be a professional relationship, and I think if you move across the boundary, then you're into dangerous waters. *And that is particularly true if the person involved, the member of the congregation involved, is vulnerable for other psychological reasons.* It is the job for the priest to protect that person, not to invade that person's privacy." [discussion of sexual misconduct omitted]

"A. *It's the job of the priest to assist that person with that problem, not to become a part of that problem.*"

[*Id.,* T. 42:23-25; 43:1-25; 44:1-8].

When defendant Harper was called upon to describe MacDonell's misconduct in the context of fiduciary duty, he also effectively acknowledged his own fiduciary relationship to F.G. Specifically, Harper believed that plaintiff was less culpable than MacDonell.

"Q. Why is that?"

"A. *Because of the structure of the relationship between a priest and a parishioner in which the priest has a specifically designated position of authority.*"

"Q. Was that a responsibility-- that would apply wouldn't it *to any priest with any parishioner*?"

"A. *Yes*." [Harper Dep., 11/7/95, T. 186:1-8, Exhibit G].

Accordingly, the defendants themselves with the Supreme Court's analysis of what

constitutes a fiduciary relationship. That fiduciary relationship existed between F.G. and MacDonell. By his own testimony, the same fiduciary relationship existed between Harper and F.G.

(ii). Defendant Spong.

Defendant Spong was also in a fiduciary relationship. The fiduciary duties incumbent to that relationship spring from the several hats worn by this defendant.

In particular, Bishop Spong sees his own liability framed solely in terms of his status as *Bishop*-- a role which he hopes will attract sufficient First Amendment attention as to raise the specter of excessive entanglement.

In fact, Bishop Spong's fiduciary responsibility [and liability] arises from several sources, only one of which is even related to his status as a bishop. For one, Spong himself undertook to provide F.G. with counseling. Second, he personally assisted and advised Harper in the preparation of the offending letter. Third [and the only aspect even remotely related to First Amendment issues], he failed administratively in the handling of F.G.'s complaints both by not providing her with available counseling by proper professionals, and by not supervising the presentation of appropriate and relevant aspects of this matter to the yoked parishes in such a way as to assist the parishes in dealing with same without sacrificing F.G.'s privacy and reputation.

a. Spong had a direct fiduciary duty to the plaintiff as her counselor in the same manner as Harper and MacDonell, not merely due to his status as Bishop.

"The Bishop breached his fiduciary duty to the Plaintiff F.G. *in the*

> *context of providing pastoral consultation and counseling to the Plaintiff* as a parishioner in his diocese. He provided this as part of a process for handling her grievance, but the undertaking was in fact faulty and based on faulty assumptions on his part."

[Schoener report 9/8/97, p. 6 (emphasis supplied)].

Defendant Spong essentially agrees with Dr. Schoener. Spong had a variety of contacts with F.G. in connection with this relationship; nevertheless, he concedes facts confirming its fiduciary nature under the Supreme Court's definition of such a fiduciary relationship.

> "It is very difficult to do the pastoral activities when the victim lives in Washington, D.C. and is only available to me on the telephone. *Although F.G. did come up and spend time with me on-- I can't tell you how many occasions, at least two, maybe more than two*."

[Spong dep., 12/12/95, T. 38:5-10, (Exhibit F)].

Spong had these contacts with the plaintiff not merely as a bishop, but as her *counselor*, and thus in the same context as had MacDonell and Harper.[6] Accordingly, Spong's liability for breach of fiduciary duty is not materially different from that of Harper and MacDonell.

b. Although Spong was plaintiff's fiduciary and owed her a fiduciary duty, he nevertheless participated in the preparation and modification of the offending letter, including its public disclosure of plaintiff's name and also including the defamatory and false light portions.

Rev. Harper testified that prior to drafting the offending letter, he sought and obtained

---

[6]Plaintiff related to Dr. Hufford, that "After [the 4/14/94 letter], Spong called me at least weekly *to provide pastoral counseling*." [Report of Dayl H. Hufford, D.Min., Certified Pastoral Counselor, dated 9/9/97, Exhibit H].

Bishop Spong's input. Specifically, Harper proposed sending a letter to the parishes.

Spong approved of sending such a letter and requested an advance copy for his review.

"A. *He thought that made sense. He said he'd like to see any letter that I sent out*."

"Q. In advance?"

"A. *In advance, yes*. [...]" [Harper dep., 11/7/95, T. 229:21-25, (Exhibit G)].

"A. I told him that I had figured that a way of doing or informing people was through a combination of a letter and a sermon *and he suggested sending the letter out* on a Thursday so that parishioners would receive it either on a Friday or a Sunday and not have a lot of time to sit and think about it before they would come to church on a Sunday."

[*Id.*, T. 230:18-25].

Harper read the letter to Bishop Spong prior to sending out a draft.

"A. I believe I had read the letter to Mr. Winter, to Bishop Spong, to Bishop McKelvey and to Reverend MacDonell." .

[*Id.*, T. 214:24-25]

Harper faxed the draft letter to Bishop Spong and followed up with a telephone conference about its terms. [*Id.*, T. 240:24-25; 241:1-4]. In that conversation, Spong suggested a specific change in the text, *specifically including one of the sentences giving rise to plaintiff's causes of action.*

"Q. What change did you make? [...]

"A. It was a change that I made subsequent to conversation which I had with Bishop Spong. My first draft of the letter had read that I have learned of an alleged romantic affair that took place during 1993. The alleged affair

involved no sexual contact-- no excuse me. I believe the first draft said an alleged romantic affair that took place during 1993 between Reverend MacDonell and F.G. *And Bishop Spong suggested at the inclusion of a sentence which reads, the alleged affair involves sexual contact that did not include sexual intercourse.* I believe I had in my first draft of the letter that the alleged affair had happened in the context of a long-term counseling relationship."

"Q. So Bishop Spong suggested a sentence which you added to your draft letter?"

"A. *Yes*."

"Q. Did you delete anything from the draft letter?"

"A. No." [*Id.*, T. 240:3-23].[7]

Accordingly, Spong had direct participation in the preparation of the letter found by plaintiff's expert to be a breach of fiduciary duty.

c. The third, independent source of Bishop Spong's fiduciary duty may be found in the exercise of fiduciary functions for which he may be responsible as Bishop, but which are *administrative* in nature, rather than religious.

"Bishop Spong and Rev. Harper failed to continue the intent of these earlier actions and interventions thus failing to fulfill their fiduciary duty to F.G. when they neglected to avail her of the services, resources and protection due her

---

[7]Bishop Spong's testimony essentially confirms this version of events with respect to the letter, but leaves open the question with respect to the offending sermon. After some consideration, Spong indicated that he did not recall having any input in the sermon. However, some of the mischief found its way into the sermon anyway.

'My sole contribution to the letter, not the sermon, I don't recall having any contribution to the sermon and when I read it, *I read that first paragraph* [of the sermon] *which reflects the conversation that Fletcher* [Harper] *and I had had about the letter*." [Spong Dep. 6/9/98, T.74-76:1-18; quoted portion: T. 76:10-16 (Exhibit D)]

as a parishioner and complainant."

> "Rev. Spong, in his role as chief administrator of the diocese, got the report he needed to proceed with action against Rev. MacDonell and then failed to provide F.G. with appropriate pastoral support. He not only denied her the fair and responsible managing of her complaint *that he had assured her*, he allowed the withholding of the decisions and actions taken against Rev. MacDonell in the sermon, letter and post-service discussion. [...]
>
> By allowing the release of incomplete and incorrect information, combined with failing to protect her privacy by allowing the release of F.G.'s name, he invaded her privacy and intensified the trauma to her. [...] *He failed in his fiduciary duty to protect her as a member of one of his parishes* who had been grievously harmed by one of his priests."

[Hufford report, 9/9/97, p. 23 (emphasis supplied), Exhibit H].

> "Defendant Bishop John Shelby Spong had a fiduciary duty to the Plaintiff F.G. as a parishioner in his diocese *when his assistance was sought* and *he explicitly agreed to assist F.G.* to insure a fair process for resolving her complaint against Defendant MacDonell."

[Schoener report 9/8/97, p. 6 (emphasis supplied)].

Defendant Spong undertook to provide plaintiff with administrative assistance in navigating the complaint process against MacDonell. He failed in that administrative duty.

There is thus ample evidence of a fiduciary duty extending from Bishop Spong to F.G. As a matter of law, consistent the Supreme Court opinion, such a fiduciary relationship exists when the requisite elements appear, *irrespective* of other religious characteristics.

A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another within the scope of their relationship. The fiduciary's obligation to the dependent party includes a duty of loyalty and a duty to exercise

reasonable skill and care. None of that is dependent upon issues of religion,[8] rather it is determined by the degree of trust and reliance reposed in the fiduciary.

B. BREACH OF FIDUCIARY DUTY; NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; DEFAMATION; ETC.

The breaches of fiduciary duty, negligent infliction of emotional distress, defamation and invasion of privacy counts against defendants Harper and Spong are found in Counts IV-XII of the Fourth Amended Complaint. [Exhibit L].

The principal factual predicates of these counts with respect to the breach of fiduciary duty, negligent infliction and privacy allegations arise from the unwarranted public disclosure of plaintiff's name (as well as the existence of a long-term counseling relationship) in the April 14, 1994 letter and the sermon which followed it. Other aspects which relate to breach of fiduciary duty, negligent infliction, defamation and privacy arise from false and misleading

---

[8] Spong himself does not find religious import necessary to the existence of such a fiduciary relationship.

"There is no 'fiduciary duty' defined by the Episcopal Faith." [Spong report, 4/2/98, page 4, Exhibit C]. Further, defendants' expert, Bishop Cabell Tennis is of the view that such fiduciary duties can in fact flow from bishop to parishioner.

> "Q. In your examination of the F.G. opinions, as an attorney and as a Bishop, do you accept the proposition that there can be a fiduciary responsibility to a parishioner from a priest or a Bishop?"
>
> "A. Yes." [Tennis dep., 4/7/99, T. 34:10-15, (Exhibit I)].

Reading Tennis' point of view *in pari materia* with that of Bishop Spong, it follows logically that whatever fiduciary duty exists between bishop and parishioner must be defined not by reference to Episcopal or religious concepts, but rather by reference to the *secular* concepts arising from confidence and trust and the imbalance of power as described by the Supreme Court.

statements contained in those published statements. This is especially the case with respect to those portions which suggested that the relationship was consensual on plaintiff's part; suggesting that plaintiff had 'confessed' to some wrongdoing or that she had in some fashion 'seduced' MacDonell when she was in fact the victim.

The fundament of the causes of action against Harper lie in his public disclosure of her private matters without her consent and/or without informed consent. Further, Harper-- just as MacDonell before him - purported to act on plaintiff's behalf while lacking the training and experience required for the task. There is also the matter of a conflict of interest in carrying out fiduciary duties, ostensibly providing for the best [but competing] interests of both F.G. and the yoked parishes, principally by ascertaining that the parishes' insurance coverage would protect them from civil liability. Additionally, defendant Harper felt some loyalty and duty to his former superior, defendant MacDonell, and tried to provide him with advance warning as to his actions.[9]

The causes of action against defendant Spong involve the same breaches of privacy, contributing [literally] to Harper's wrongful and false disclosures and failing to account for similar conflicts of interest. Although neither defendant may have intended to breach their

---

[9]Defendant Harper told defendant MacDonell he would be sending a letter to the yoked parishes informing them of MacDonell's relationship with F.G. and suggested that he notify his friends in the parishes that this letter was coming. MacDonell subsequently wrote to nine (9) state parish leaders informing them of same. See letter dated April 6, 1994 from MacDonell to Harper (MacDonell deposition exhibit 13C. [Exhibit Q]). Harper's counsel later argued that Harper's actions in naming F.G. in his letter and sermon were justified, in part because F.G.'s identity as the person with whom MacDonell had had a relationship was widely known. See Memorandum of Law in Support of Defendant Harper's Motion for Summary Judgment, pp. 4-5.

fiduciary duties, they were negligent or reckless in carrying them out, with the result that plaintiff suffered.

Harper was [at least] negligent in making the disclosure of plaintiff's identity, negligent in making statements suggesting that plaintiff was something other than a victim and negligent in his efforts to meet his fiduciary duty to look out for F.G.'s best interests. Spong was negligent in making his contributions to Harper's publications, in failing to understand that Harper lacked the requisite training and experience to be relied upon and negligent in permitting plaintiff to be harmed thereby.

"The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." F.G., 150 N.J. at 564.

(i). Privacy and Preventing Harm.

Implicit in the fiduciary relationship is the duty of loyalty, including keeping private plaintiff's emotional and personal problems. The harmful consequences of failing to keep such confidences are obvious.

From no less an authority than Bishop Spong himself:

> "Q. Do you believe, Bishop Spong, that a rector has a fiduciary duty to act in the best interest of the members of his or her parish?"
>
> "A. Of course." [Spong Dep., 12/12/95, T. 27:19-22, (Exhibit F)].
>
> "A. I regard a priest's relationship with a member of the congregation to be a professional relationship, and I think if you move across the boundary, then you're into dangerous waters. And that is particularly true if the person involved, the member of the congregation involved, is vulnerable for other psychological reasons. *It is the job for the priest to protect that person, not to invade that person's privacy*."

"A. *It's the job of the priest to assist that person with that problem, not to become a part of that problem.*"

[*Id.,* T. 42:23-25; 43:1-25; 44:1-8].

Perhaps a lesser authority [but a more important actor] places confidentiality squarely within the Supreme Court's definition of a fiduciary duty. This is so, not because it is a religious concept, but rather because it is a function inherent in the trust, confidence and dominant position of the defendants. Defendant Harper himself correctly identifies the elements of his fiduciary duty to F.G. and her cause of action against him for his breach.

"Q. Do you think that the concept of confidentiality between a priest and someone being ministered to by a priest is an important part of a priest's ability to function?"

"A. It's an important part of the relationship between, and an important part of the structure of the relationship between the priest and the person to whom the priest is ministering." [...]

"Q. Do you think the concept of confidentiality is an important one in the relationship which a Episcopal minister attempts to develop with persons to whom that minister ministers?"

"A. I have indicated that I think that the *confidentiality is an important part of the structure of the relationship between a clergy person and the person to whom the clergy person ministers in certain circumstances*."

"Q. And why is that?"

"A. *Because there are certain things which people come to members of the clergy for which are very personal in nature and which need to be dealt with the protection and the care which confidentiality provides*."

"Q. Why is that?"

"A. *Because it is in the best interests of the person who is telling and talking about and discussing that sensitive and often difficult information to have that*

> *protection*, to have a protected area in which they can get that information, that part of their lives out on the table, discuss it, figure it through, go through the emotional process in relation to it they need to *and hopefully come to a resolution of the issue in a way that's helpful to them*."

[Harper, 11/7/95, dep. T. 15:14-21; 16:12-25; 17:1-10, Exhibit G].

Both Harper and Spong accordingly recognized their fiduciary duty to keep plaintiff's confidences and privacy-- to protect her from harm-- without reference to any particular religious doctrine or dogma. All of this is entirely consistent with the findings of plaintiff's experts, who assess breaches of these secular fiduciary duties equally unfettered by consideration of any particular religious doctrine. These may be summarized as follows:

> "*Universally, codes of ethical conduct and standards of practice hold the professional accountable for establishing and maintaining appropriate boundaries*. This is interpreted to mean that the professional retains all responsibilities for keeping the professional relationship safe from the perils of sexualized behavior, financial irresponsibilities, and otherwise using the relationship for the personal gain of the professional.
>
> When the additional dynamics of religious leadership are part of the overlay that measures the fiduciary duty of clergy, the ramifications are indeed daunting. There are, however, some very important areas of pastoral fiduciary duty which are not matters of theological or scriptural interpretation. These include the respect for *confidentiality*, establishing and maintaining trustworthy boundaries and *not causing harm to a congregant*."

[Hufford report, 9/9/97, p. 17, Exhibit H].

The damage was caused not just by Harper's improper release of information, but also by propounding harmfully inaccurate information concerning the nature of MacDonell's relationship with plaintiff. "*Confidentiality of parties which may be concerned and accurate representation of facts are central to the exercise of this fiduciary duty*." [*Id.* at p. 20].

> "Her subsequent pastor, Fletcher Harper failed her not only betraying her confidentiality but by invading her privacy with his ignorant and abusive release of information which was not only untrue, it was damaging to F.G's reputation, emotional health, and spiritual well-being. After telling her that she could trust the system if and when she reported, that very system, and the authorities who represented it betrayed and violated F.G." [*Id.* at p. 19].

Truth-telling is an integral part of the fiduciary duty, *i.e.*, the duty of loyalty as described by the Supreme Court.

> "Rev. Harper produced a letter (dated14 April 1994) which conveyed a different meaning and presented the Plaintiff in a far more negative light than what he had initially promised... .
>
> "Rev. Harper's talk from the pulpit on 17 April 1994 repeated the same negative perspective as his letter. In addition, its text expanded on the letter by indicating that both parties had 'confessed' and noting that pastors need to be strong enough 'not to be seduced,' both of which suggested wrongdoing by the victim, Plaintiff F.G. This was a breach of the fiduciary duty in that it did not meet the standard of care for 'truthtelling' to the congregation which is deemed to be a key element in promoting healing... ."

[Schoener report, p. 5].

The breach of the duty of confidentiality and 'truthtelling' extended to Bishop Spong as well.

> "Defendant Bishop John Shelby Spong had a fiduciary duty to the Plaintiff F.G. as a parishioner in his diocese *when his assistance was sought* and *he explicitly agreed to assist F.G.* to insure a fair process for resolving her complaint against Defendant MacDonell." [*Id*., p. 6 (emphasis supplied)].
>
> "Defendant Bishop John Shelby Spong further breached his fiduciary duty to F.G. by failing in his duty to appropriately advise Rev. Fletcher Harper, by whom he was consulted... ."
>
> "He reviewed, revised and approved a draft of Rev. Harper's April 14, 1994 letter to the two parishes. Rev. Harper's letter, which labeled the relationship 'alleged' and 'romantic' and did not inform the parishes that Rev.

> MacDonell had been disciplined for his gross boundary violations caused the Plaintiff F.G. to feel ashamed. With proper consultation and structuring, the parishes could have been informed in an accurate fashion which would have been supportive of F.G. and contributed to her healing and her reintegration into her home parish." [*Id.*, at p 7].

Defendants were evidently aware of their fiduciary duties to the plaintiff[10]. However, Harper and Spong apparently made other choices which resulted in the wrongful disclosures which were without plaintiff's consent and/or without her informed consent. All of this was a manifest breach of the secular fiduciary duties recognized by the Supreme Court.

C. DEFAMATION AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS APART FROM FIDUCIARY DUTY.

The torts of defamation and negligent infliction of emotional distress are discrete torts apart from considerations of fiduciary duty. They are governed by the civil law.

A cause of action for negligent infliction of emotional distress exists where "a person who is the direct object of a tortfeasor's negligence experiences severe emotional trauma as a result of the tortfeasor's negligent act or omission." Gendek v. Poblete, 139 N.J. 291, 296 (1995).

---

[10]Indeed, Harper is aware of the parishioner's right of confidentiality and freely exercises it when he chooses to do so.

> "A. I think that's as far as I can go in terms of not breaking a confidence of the parishioner."
> "Q. Are you saying that a parishioner who you do not wish to identify spoke with you at a point about an oral contact between that parishioner and Reverend MacDonell?"
> "A. I don't want to be obstructionist but I can't answer that question because I feel to do so would violate the confidence of my parishioner." [Harper dep., 11/7/95, T. 182:1-9, (Exhibit G)].

In order to make out a claim for negligent infliction of emotional distress, plaintiff must show that defendant owed her a duty, defendant negligently breached the duty and that she suffered severe emotional distress as a result of the breach. Strachan v. JFK Memorial Hosp., 109 N.J. 523 (1988). Stated differently, the tort of negligent infliction of emotional distress consists of "negligent conduct that is the proximate cause of emotional distress in a person to whom the actor owes a legal duty to exercise reasonable care." Decker v. Princeton Packet, 116 N.J. 418, 429 (1989).[11]

"A defamatory statement is one that 'asserts or implies a statement of fact which is damaging to reputation.'" Sedore v. Recorder Pub. Co., 315 N.J.Super. 137, 145 (App.Div.1998) [citation omitted].

Both the sermon and the letter at the heart of Counts IV-XII have been amply demonstrated to have violated these civil tort concepts. How then, do these concepts relate to any claimed immunity afforded by the First Amendment?

In an attempt to avoid the consequences of these *secular* duties, defendants will argue that the negligent choices they made were somehow imbued with religious doctrine and therefore immune to review by the civil courts. As demonstrated above, no matter that the breaches happened to have a religious context, they are fundamentally no different [except

[11]"While the foreseeability of injurious consequences is a constituent element in a tort action, foreseeability of injury is particularly important in the tort of negligent infliction of emotional harm. [...] In these situations, there must be '*an especial likelihood of genuine and serious mental distress, arising from special circumstances*, which serves as a guarantee that the claim is not spurious.'" *Id.*, 116 N.J. at 429-430 [citation omitted; emphasis supplied].

perhaps in degree] from the breach of fiduciary duty committed by defendant MacDonell.

Bishop Spong and his expert, Bishop Tennis seem to agree that Episcopal priests are subject to the same civil law as other citizens, notwithstanding their clerical titles. Bishop Spong testified:

> "A. *I think that the personal behavior of priests are bound by the law of the society as much as any other citizens are.* The difficulty for me gets to be how, how you would define that activity, *and that's the court's job*."

[Spong, dep., 6/9/98, T. 27:10-14, (Exhibit D)].

Compare Bishop Spong's cogent observation with those of his expert colleague reputed to be an expert on the relationship of civil law to Episcopal religious issues:

> "Q. So you reject the concept that there can be any secular duties between a pastor and a parishioner?"
>
> "A. Oh no. There certainly can be. I mean there are criminal issues. There are also some civil issues that can come into play in those relationships."
>
> "Q. So my question to you is, again, do you accept the proposition that there can be secular duties between a pastor and a parishioner?"
>
> "A. *Yes*." [Tennis dep., 4/7/99, T. 33:15-25, (Exhibit I)].
>
> "Q. Do you accept as a general proposition the fact that a court of civil jurisdiction can command the secular duties emanating between a pastor and a parishioner?"
>
> "A. *Certainly*." [...]
>
> "Q. In your examination of the F.G. opinions, as an attorney and as a Bishop, do you accept the proposition that there can be a fiduciary responsibility to a parishioner from a priest or a Bishop?"
>
> "A. *Yes.*" [...] [T.34:1-15].

"Q. Can pastoral practice ever dwell on or relate to issues that are wholly secular?"

"A. Sometimes the activity lies at the intersection of pastoral practice and what somebody might consider secular."

"Q. Could somebody have reasonable understanding, an objectively found reasonable understanding that it's a secular topic?"

"A. With respect to what?"

"Q. Well, you indicated in your testimony that the secular duty was at the intersection between secular and doctrine." [T. 36:1-21].

[Discussion continues with respect to civil liability for assault and battery committed by a clergyman on the pulpit. Bishop Tennis would find civil liability for such conduct, under the neutral principles' approach.]

"A. *I would conditionally say yes in those instances where there is a civil tort or a criminal act that a secular court would be interested in and have jurisdiction over,* but only in those instances." [...] [T. 38:11-15].

"Q. Let's go one step further, what about defamation during the process of religious practice? During the process of, as you defined it, pastoral practice? Can a court look at that and decide a defamatory statement?

"A. As in slander, for instance, is that— ."

"Q. As in slander. Any form of defamation."

"A. *Could be an action for slander and the court will deal with it as an act of slander as distinguished for looking at or reviewing the religious or pastoral practice of the church* in dealing with the– "

"Q. In order for the court to do that, it would basically ignore the pastoral practice and determine whether or not it can eyeball the defamation and decide that it's defamatory or not?"

"A. *The action would have be on the civil tort of slander*. In your example, that's as clear as I can get." [...] [T. 42:19-25; 43:1-14].

[Bishop Tennis goes on to reach the opposite conclusion with respect to the sermon and the letter, ostensibly on the ground that the documents are part of liturgical practice, therefore not subject to court analysis under fiduciary principles, *but* subject to such analysis on 'neutral principles.']

> "A. Let me do my best with that. I can conceive of lots of conversations about the incident that could occur in people's living rooms, could occur in a whole variety of ways including our conversation here today and *if an action were brought by her for slander, it could be something that a court would deal with.*" [T. 47:12-18].

[At this point Tennis again attempts to distinguish the facts at bar on the ostensible ground that the offending remarks occurred during the course of pastoral duties.]

> "A. [...] *If this suit were being brought for slander or liable* [sic], *it would be over here and subject to evaluation and judgment. It's not. As I understand it, this particular issue is being raised as is a part of the pastoral practice of the church.*" [T. 48:18-23].

[Tennis goes on to express his understanding that this litigation is premised solely on breach of fiduciary duty, rather than other tort concepts.]

> "Q. Can you make the distinction on defamatory statements in the preaching?"
>
> "A. For defamation?"
>
> "Q. Yes."
>
> "A. *I suppose that defamation could occur in a sermon, you know, if the action sought, if it was framed in that way and not framed as a failure to address the fiduciary relationship in the general terms*."
>
> "Q. As an expert, how do you distinguish between invasion of privacy, breach of fiduciary duty and defamation as it relates to pastoral practice? Those three?"

"A. I don't think I'm removal [*sic*] from pastoral practice. Again that begs the question of two different worlds. I'm talking about that I can certainly distinguish between certain actions that a priest may commit that offend and violate rights and breach of duty to some person could occur during the pastoral relationship. Sexual abuse of a child is obviously one. Sexual misconduct is another. A person with a physical tort would be one. **A vicious campaign of defamation would be another**. Those things focused on as torts directly or criminal actions directly. *I can only say that they would be actionable*." [...]. [T. 54:11-19; 55:1-13].

Once again, Bishop Spong finds himself in close agreement with his expert:

"Q. *If F. was called a whore during the sermon, would that be inappropriate*?" [...]

"A. *Yes, I think that would be inappropriate*."

"Q. Could that be a situation where a court, a civil court could inquire as to its appropriateness?" [...]

" A. It occurs to me that a hypothetical question like that would not need my answer, but the court's action. **If a person felt that they had been personally diminished or insulted, they could seek legal redress and the court would have to decide whether that was an appropriate use of a sermon or not**." [Spong dep., 6/9/98, T. 33:2-20, (Exhibit D)].

Bishop Tennis argues his point both ways. While holding that clergy might be liable for torts committed in the course of religious duties, he objects to the suggestion of the Supreme Court that it might define the fiduciary duty in secular terms. He opines that civil courts may not consider any issues of fiduciary duty solely on the ground that any actions taken by defendants were accomplished in the course of the religious functions of the church. While Bishop Tennis asserts that the First Amendment forbids any look into fiduciary duty, this view is inconsistent on its face with the Supreme Court's opinion in F.G.

The fiduciary relationship and the duties attendant to it are *secular* in nature, which happen to arise from religious context. The Supreme Court has already resolved that particular issue *contra* to Bishop Tennis' view. Thus, the issue is not *whether* the court can consider the issue; rather, it is whether it can do so according to neutral principles.

Further, as observed by Dr. Hufford: "There are, however, some very important areas of pastoral fiduciary duty *which are not matters of theological or scriptural interpretation*. These include the respect for confidentiality, establishing and maintaining trustworthy boundaries and not causing harm to a congregant." [Hufford report, p. 17, Exhibit H].

More importantly, Bishop Tennis does not see the First Amendment as an impediment to a clergyman's civil liability for civil *torts* committed on the pulpit. In fact, Bishop Tennis makes an express finding that a clergyman may be liable for precisely the type of defamation which is alleged here. [T. 54:11-19; 55:1-13, (Exhibit I)]. Interestingly, Bishop Spong agrees with this analysis as well. [Spong dep., 6/9/98, T. 33:2-20, (Exhibit D)].

Notwithstanding any argument to the contrary, it thus appears that all of the parties [but not perhaps, all their counsel] *agree* that civil torts committed by a clergyman in the course of his clerical duties are not insulated from review by the courts.

D. REV. WHITTAKER'S NET OPINION; RELIGIOUS CONTENT OF THE LETTER AND SERMON

(i). There is No *Evidence* to Meet the Lemon Criteria.

Defendants bear the burden to show a First Amendment bar to consideration of Counts IV-XII. They have some options. They could attempt to show that the litigation would somehow involve interpreting and enforcing religious doctrine in violation of the Establishment Clause [Ran-Dav's County Kosher]. They could attempt to show *excessive* entanglement, having the principal effect of coercing religious belief in violation of the Free Exercise Clause [Corsie; S. Jersey Catholic School Teachers]. They could attempt to show that resolution of the litigation *turns on* some interpretation of church doctrine or polity [Welter].

There is absolutely no evidence to suggest that this litigation involves any interpretation or enforcement of religious doctrine. Defendant's resort to an vaguely defined mix of excessive entanglement by way of interpretation. Such a view is supported by neither the law, nor by the facts.

The letter and sermon at issue are devoid of any but passing reference to religious concepts. Defendants' experts would leave the court with the view that it cannot even read the report or sermon to determine whether or not there is religious content.

However, the text is there for all to see. Words evincing doctrinal opinions or positions scarcely jump out at the reader.

Yet the court need not rely solely upon its own review of the documents [although

perhaps it should]. Plaintiff propounds the reports of Rev. Dr. Thomas E. Breidenthal, Associate Professor of the General Theological Seminary of the Episcopal Church.

In his mercifully brief report of April 1, 1998 [Exhibit M], Dr. Breidenthal indicates that he reviewed the April 14, 1994 letter and the April 17, 1994 sermon. He observed:

> **"I do not find any specifically theological or doctrinal content in either document, beyond general reference to priestly vocation and a Christian congregation's duty to witness to God. It is notable that the sermon contains no reference to Scripture or to the content of Christian belief."** [*Id.*]

In his follow up report of April 26, 1998 [Exhibit N], Dr. Breidenthal elaborates, observing:

> "**I find no doctrinal or theological content in either document.** I base this opinion on the fact that, beyond passing references to priestly vocation (not treated) and a Christian congregation's duty to witness to God (also not treated), neither document makes reference to or provides any treatment of the subject matter normally associated with Christian doctrine or theology."

[*Id.*, p.1, emphasis supplied].[12]

> "In neither the letter to the parish or the text of the sermon is any reference made to Holy Scripture, the Creeds, the sacraments, the ordinal, or the catechism."

> "With regard to the *theological* content of the parish letter and the sermon, I would say, first of all, that Christian theology is primarily reflection on Christian doctrine, since as the word itself indicates, theology is a discourse about God, and the God about whom Christians discourse is the God whose nature and works are articulated in Christian doctrine. If there is no treatment of doctrine in the letter or the sermon, then, *a fortiori*, they have no theological content." [*Id.*, p.2, emphasis in original].

---

[12]Dr. Breidenthal explained that by using the term "not treated" he meant that the references in the sermon to priestly vocation and congregational duty were merely mentioned in passing. [Breidenthal dep., 5/28/98, T. 25:18-25; 26:1-25, Exhibit J)].

> "It may be argued that the parish letter and the sermon constitute application, yet in the absence of any reference in them to doctrine, the history of Christian thought or contemporary theological discourse, it is impossible to show that what we have here is the application of theological principles and/or reflection. **In short, the is no content here which requires familiarity with Christian doctrine or theology in order to be understood**."

[*Id.*, p.2, emphasis supplied].

Lacking any *factual* support for theological content [after all, the documents speak for themselves], defendants propound the report of Rev. Christine Whittaker, dated October 15, 1998 [Exhibit O]. Rev. Whittaker undertakes a substantial theological tour, reading in all manner of theological sub-text, where *in fact, none exists.*

She infers that the sermon "is based on theological and ecclesiastical beliefs expressed in the prayer book and Canons of the Church." [*Id.*, p. 5]. However, the words simply aren't there.

It is axiomatic that an expert's bare conclusions, unsupported b factual evidence, are inadmissible as a net opinion. Buckelew v. Grossbard, 87 N.J. 512 (1981).

Even assuming that there was some doctrinal content, Rev. Whittaker does not give any clear explanation how the mere existence of such content will have the *primary* or *principal* effect of advancing or inhibiting religion; nor does she show any *coercive* result. However, that is the test.

In any event, Rev. Whittaker's conclusion seems in this regard to be inconsistent with the testimony of her colleague, Bishop Tennis, who opined that a clergyman could indeed be civilly liable for "a vicious campaign of defamation" committed in a sermon. [Tennis dep. T.

54:11-19; 55:1-13, (Exhibit I)]. It is also inconsistent with the conclusions of Bishop Spong himself, who is, after all, a Bishop and who was also previously proffered as an expert on the subject. [Spong dep., 6/9/98, T. 33:2-20, (Exhibit D)].

(ii). Whittaker's Report is a Net Opinion, Not Supported by the Evidence.

Failing to identify any actual doctrinal content in the letter and sermon, Rev. Whittaker reaches a variety of conclusions which are internally inconsistent and/or inconsistent with the actual state of the record.

For example, in attempting to exculpate defendant Harper, she raises on his behalf a Nuremberg defense which he himself has not raised:

> "In responding to the fact of the former rector's sexual misconduct, Mr. Harper consulted the Bishop of Newark. Mr. Harper's action was consistent with the polity of the Episcopal Church, which organizes parishes, under the authority of a Rector, into dioceses, under the authority of a Bishop. The Canons of the Church specify that the Rector's jurisdiction over a parish is subject to the 'pastoral direction of the Bishop.' [...] Mr. Harper followed the recommendations of his Bishop, as he had promised at his ordination to do. (At ordination, a priest promises to 'conform to the doctrine, discipline, and worship of The Episcopal Church' and to 'obey the Bishop and other ministers who may have authority over' the priest. [...] The priest also promises to 'respect and be guided by the pastoral direction and leadership' of the bishop."

This is argument is very nice [even assuming it is at all relevant]. Unfortunately, it is simply not supported by the record.

Assuming *arguendo* that it is a viable defense that Harper was only following orders, Rev. Whittaker's view is not consistent with the *facts*.

For one thing, both Harper and Spong deny that it happened that way. And then, Bishop Tennis contradicts Rev. Whittaker.

Harper testified that the letter was his idea. [Harper dep., 11/7/95, T. 229:10-20, (Exhibit G)]. According to Spong, he only made a 'suggestion.' Harper confirms this. [*Id.*, T. 240:3-23]. Spong denies any input in the sermon. "The sermon was his creation. I do not read sermons of clergy either before or after they're preached normally." [Spong Dep. 6/9/98, T. 76:10-17, (Exhibit D)].

> "Q. ... is it your understanding that if you had indicated to Reverend Harper that you felt, for example, that it was not a good idea to send any letter whatsoever for a variety of reasons which you might give to him that he would have followed your recommendation?
>
> "A. I don't operate that way with my clergy. *I do not believe that it's my responsibility to tell them what's the best way to proceed in any crisis*." [Spong Dep. 12/12/95, T. 71:9-17, (Exhibit F)].
>
> "Q. Why did you not recommend or require that the April 14th letter state this [that MacDonell had breached his fiduciary duty]?"
>
> "A. *Well, it's not my business to require that a priest say something to his congregation*."

[Spong dep., 1/16/96, T. 20:9-12, (Exhibit K)].

Once again, Bishop Spong finds himself in close agreement with his expert, Bishop Tennis, this time directly *contra* Rev. Whittaker's expert opinion:

> "*Bishops in the Episcopal Church do not have command authority over the clergy in their dioceses*. They are pastors too. Only in the case of canonical offenses or directives does the bishop have authority and responsibility to require a priest to take a specific action. In my opinion, *Bishop Spong did not have authority to override the rector's plan to minister to the congregation nor would the bishop's counsel to him be subject to review as though he had such authority*."

[Tennis Report, 10/14/98, p. 4, Exhibit P].

The net opinion rule bars an expert's bare conclusions, unsupported by the evidence.

Buckelew, *supra*, 87 N.J. at 524. Whittaker's opinions in this regard are thus of precious little value to the issue *sub judice*.

Her views exculpating Harper and surrounding him with the protective cloak of church polity so as to insulate him from court review are contradicted by the testimony of the defendants themselves and by Bishop Tennis. *Her testimony is not admissible*.

(iii). Religious Context Alone, Does Not Meet the Lemon Test.

Defendants' fundamental premise, as expressed by Rev. Whittaker, is that the First Amendment somehow prevents review merely because the actions of Spong and Harper were taken in pursuit of their religious roles. Once again, Rev. Whittaker's report fails on the facts and on the law.

Rev. Whittaker expends a great deal of effort to show that the choices made by Harper and Spong were consistent with or controlled by prevailing concepts of church doctrine or polity. As viewed by Whittaker, Harper's improper disclosures and misstatement of facts are protected from review merely *because* they were made in a sermon. As viewed by Whittaker, Spong's concurrence, aid and assistance in the improper disclosures are protected merely *because* they were consistent with her view of church polity.

Both of these arguments miss the point entirely. Neither argument comes close to any of the Lemon requirements. Nowhere does she explain *how* holding Harper liable for a breach of fiduciary duty (already deemed to be secular in nature, if religious in flavor) has a *coercive effect* or has as its *primary* or *principal* effect the advancement or inhibition of religion.

Insofar as a secular fiduciary duty exists, and further to the extent that it might give rise to some degree of entanglement, none of the witnesses addresses exactly how that might be *excessive.*

"Entanglement must be '*excessive*' before it runs afoul of the Establishment Clause." S. Jersey Catholic School Teachers v. St. Teresa, 150 N.J. 575, 591 (1997)[emphasis supplied, citations omitted].

No one is asking the court to *interpret* church doctrine or enforce church polity. See Corsie, *supra.* The First Amendment does not shield the defendants for conduct which would be tortious if committed by individuals other than clergymen, merely because of their status *as* clergymen. See, *e.g.,* Welter v. Seton Hall Univ., 128 N.J. 279, 294 (1992). Civil courts can and do address secular legal questions grounded in religious doctrine. This is accomplished by application of neutral principles of law. Elmora, *supra.*

Even the defendants themselves concede that they might be called to account in the civil courts for tortious misconduct committed in the course of their religious duties. They had no reasonable expectation otherwise. The mere fact that the letter was drafted on Church stationery and address to the congregants [as was the sermon] does not change its tortious character one iota.

(iv). The Litigation Can Be Resolved According to Neutral Principles of Law.

In F.G., the Supreme Court found that MacDonell's conduct could be adjudicated by reference to neutral principles of law. There was a lingering doubt with respect its application to Harper. Accordingly, the Court remanded for development of the record which will be the

subject of this proceeding with regard to both Harper and Spong.

The record thus developed reveals that, although the factual predicate of each relationship differed, Harper and Spong each had a fiduciary, *secular* duty to plaintiff for the same reasons MacDonell had such a relationship.

Harper seems to agree. When defendant Harper was called upon to describe MacDonell's misconduct in the context of fiduciary duty, he also effectively acknowledged his own fiduciary relationship to F.G.

"Q. Why is that?"

"A. *Because of the structure of the relationship between a priest and a parishioner in which the priest has a specifically designated position of authority.*"

"Q. Was that a responsibility-- that would apply wouldn't it *to any priest with any parishioner*?"

"A. *Yes.*" [Harper Dep., 11/7/95, T. 186:1-8, (Exhibit G)].

Bishop Spong also agrees that neutral principles can be effectively applied to civil torts committed by clergy in the course of their clerical duties.[13] Defendants' other expert Bishop

---

[13]"Q. *If F. was called a whore during the sermon, would that be inappropriate*?" [...]

"A. *Yes, I think that would be inappropriate*."

"Q. Could that be a situation where a court, a civil court could inquire as to its appropriateness?" [...]

" A. It occurs to me that a hypothetical question like that would not need my answer, but the court's action. **If a person felt that they had been personally diminished or insulted, they could seek legal redress and the court would have to decide whether that was an appropriate use**

(continued...)

Tennis, while not caring much for fiduciary duty, nevertheless holds defendants liable for such civil torts.[14]

No specifically religious doctrine is materially implicated. Rev. Harper views the duty of confidentiality to be implicit in the relationship, not commanded by any particular church doctrine or canon.

> "Q. Are you aware of any teachings of the Episcopal Church which sets forth the concept of confidentiality and the importance of protecting private information which someone may give to an Episcopal priest?"
>
> "A. *Not in relation to the Episcopal Church in particular*, but the Episcopal Church does not have a sort of rule book of sort [*sic*] of detailed explanations about all of those things." [Harper dep. 17:11-19].

Once again, Bishop Spong agrees:

> "A. I regard a priest's relationship with a member of the congregation to be a professional relationship, and I think if you move across the boundary, then you're into dangerous waters. And that is particularly true if the person involved, the member of the congregation involved, is vulnerable for other psychological reasons. *It is the job for the priest to protect that person, not to invade that person's privacy*."

[Spong dep. 12/12/95, T. 42:23-25; 43:1-6, (Exhibit F)].

Interestingly, Bishop Spong observed that: "There is no 'fiduciary duty' defined by the

---

[13](...continued)
of a sermon or not." [Spong dep., 6/9/98, T. 33:2-20, (Exhibit D)].

[14]"*I would conditionally say yes in those instances where there is a civil tort or a criminal act that a secular court would be interested in and have jurisdiction over,* but only in those instances." [...] [T. 38:11-15].

Episcopal Faith."[15] Since it is conceded that such fiduciary duties *exist*, if they are not defined by reference to church doctrine, they must *a priori* be defined by the civil law. This is precisely what the Supreme Court has already confirmed in F.G.

Such fiduciary duties are therefore related to, but not dependent upon church doctrine. And the litigation therefore does not *turn on* any religious doctrine. "Only when the underlying dispute *turns on* doctrine or polity should courts abdicate their duty to enforce secular rights." Welter, *supra*, 128 N.J. at 293 [emphasis supplied].

Thus, the First Amendment does not operate as a bar to consideration according to neutral principles of law.

The neutral principles approach is well suited to the proper resolution of plaintiff's causes of action. She was in a fiduciary relationship with Harper and with Spong. That fiduciary relationship included the secular duties of confidentiality, loyalty and protection from harm. The court will not be called upon to decide any issue of religious doctrine or polity.

(v). The Tortious Conduct Was Not Motivated by Religious Considerations.

Both of defendants' expert witnesses appear to premise their First Amendment church doctrine and polity conclusions on the good faith performance by Spong and Harper of their religious duties. They suggest that since each of the defendants had some ecclesiastical duty to their parishioners as a whole, the First Amendment is somehow implicated by means of entanglement.

---

[15]Spong report, 4/2/98, page 4, Exhibit C.

Once again, the facts and law fail the defendants. The assertions by Bishop Tennis and Rev. Whittaker of this collective fiduciary duty is unsupported by the facts, irrelevant to a First Amendment analysis and illustrative of defendants' conflicts of interest in carrying out their secular fiduciary duties.

Bishop Tennis views Harper's fiduciary duties to the congregation as the predominant concern.

> "In this case, the Reverend Fletcher Harper, as rector, was responsible for the care of the two congregations. His was the authority to gather, lead, and care for the people in light of his pastoral practice resting upon the Doctrine, Discipline and Worship of the Episcopal Church." [Tennis report, 10/14/98, p. 3, Exhibit P].

Similarly, Rev. Whittaker observed:

> "Thus, when Mr. Harper learned of the sexual misconduct of the former rector, his responsibility as Rector was to do whatever he believed would be best for the entire community, including plaintiff and also all the other parishioners, both those who already knew of the misconduct and those who did not." [Whittaker report, p. 3, Exhibit O].

> "In conclusion, review of the actions of Mr. Harper, including his letter of April 14, 1994 and sermon of April 17, 1994, and the actions of Bishop Spong demonstrates that their actions were controlled by and conformed to the doctrine and discipline of the Episcopal Church... ." [*Id.*, p. 7].

This position is unavailing in First Amendment terms for three principal reasons.

In the first instance, whether or not defendants may have also owed some generalized fiduciary duty to the congregation as a whole, there is no evidence of a special fiduciary duty to the congregation which cannot also be defined along the same secular elements of trust and reliance set out by the Supreme Court in F.G.

Further, defendants' experts are critical of the citation by plaintiff's experts to defendants' failure to properly assist and protect F.G. in the processing of her misconduct complaint against MacDonell. These were administrative matters of the complaint resolution procedure in place in the Church.

This, Rev. Whittaker suggests, is a matter of doctrine or polity and the failure of the defendants to live up to their individual fiduciary duties to plaintiff in assisting her in pursuing that complaint procedure [and failure to maintain her confidentiality in connection with it] would therefore be beyond the purview of the courts.

However, the important distinction is that the complaint procedures in place were *administrative* in nature.[16] The First Amendment does not prevent civil courts from determining whether a religious organization followed established procedures with respect to its members. Baugh v. Thomas, 56 N.J. 203, 208 (1970).

It is evident that Harper and Spong breached well understood *secular* principles of fiduciary duty in their improper and misleading disclosures. Rev. Whittaker adamantly insists that since these disclosures were made within the confines of a religious polity, they cannot be

---

[16]"Q. So what you're saying is that at least since1992 there's been *administrative structure developed to deal in a more formal way with issues of sexual misconduct*."

"A. Yes." [Spong dep. 12/12/95, T. 33:6-10, (Exhibit F)]

"Q. What is the Standing Commission on Clergy Ethics of the Diocese of Newark?"

"A. It's a body of people appointed to assist the bishop in dealing with any charges of sexual impropriety." [*Id.*, T. 46:3-7]. See also, Spong dep. 12/12/95, T. 15-18; 46, Exhibit F.

reviewed by the Court.[17] This of course, presupposes that Harper and Spong were *in fact* intending to carry out the doctrinal goals of their religion when they made their disclosures.

The facts are otherwise.

The tortious disclosures were *not* required by any doctrine of the Episcopal Church. According to Bishop Spong himself, there is no doctrine which required it.

> "Q. *Would you agree with me that there are no canons, no constitutional provisions and no policies in the Episcopal Diocese which required public identification in a sermon*?
>
> "A. *I think that's correct*. We don't usually get into making canons and constitutional things about that or many other things, I might add."

[Spong dep., 6/9/98, T. 60:15-21, (Exhibit D)].

Further, the *facts* suggest that the improper disclosures were not motivated by any adherence to issues of church doctrine or polity. Rather, defendants Harper and Spong were principally concerned about the possibility that plaintiff would file a civil law suit. A civil suit would also lead to unwanted media attention.[18]

---

[17]Rev. Whittaker testified at her deposition that she could think of no set of facts, including adding to the April 14th letter and the April 17th sermon a paragraph, known by defendants Harper and Spong to be false, that F.G. was an evil woman who had killed ten people with an ax, which would allow a civil court to examine F.G.'s claim of breach of fiduciary duty against those defendants. [Whittaker dep., 3/10/99, T.86:12- 88:24, 98:20-99:5 (Exhibit R)].

[18]As a subsidiary issue, there is also the matter of secular conflicts of interest in breach of secular fiduciary duties. In addition to their admitted fiduciary duties to F.G., it also appears that Harper and Spong carried the banner for MacDonell, blaming F.G. for his downfall. "I hold my priests primarily responsible for that impropriety, *but I do not hold F.G. guiltless in that relationship.*" [Spong dep., 1/16/96, T. 26:1-3, (Exhibit K)].

(continued...)

In the very first paragraph of the April 14, 1994 letter, Harper made the following observation:

> "*I have been told by an attorney representing the Church Insurance Company* (CIC), which insures our diocese and its parishes, **to expect legal action to issue from this situation**. With the support of Bishop Spong, Bishop McKelvey and the CIC attorney, *I am telling you this news so that you do not find out about it from the news media, lawyers,* or any source except your rector."

---

[18](...continued)

With respect to the secular torts of negligent infliction, defamation, *etc.* Harper admits to negligence in failing to obtain properly informed consent for the unauthorized disclosures. Such negligence also breaches the *secular duty* described by the Supreme Court in F.G. to use reasonable care in carrying out the fiduciary relationship.

> "Q. Did you explicitly ask F.G. for permission to reveal the nature and extent of the relationship based on anything F.G. told you?"
>
> "A. At the meeting on the 31st *I did not say the words, do I have your explicit permission to talk with these people*. [...]. [Harper dep., T. 232:18-23, (Exhibit G)].
>
> "Q. Did F.G. say, yes to your describing the nature and extent of physical contact?"
>
> "A. I don't believe it got that detailed in terms of my asking her about it... ." [*Id.*, T. 233:4-7].
>
> Harper read the letter to the Vestry before sending it out.
>
> "Q. So at that meeting you read the proposed letter that you were going to send to the parishes, isn't that true?"
>
> "A. Yes."
>
> "Q. *Okay, and at that time you had not received any permission from F.G. to read the proposed letter... .*"
>
> "A. *No*." [*Id.*, T. 237:13-25; 238:1-2]

The sentence immediately following those strictly secular concerns indicates the paramount intention of avoiding financial responsibility:

> "*Legally and financially, the CIC lawyer assures me that neither St. Luke's nor All Saints' will suffer any consequences for this situation*."

It is only after the legal and financial concerns are addressed that any mention of prayer is made.

Before the letter was sent, before the improper disclosure and misstatements were made, before the sermon was given, Bishop Spong was concerned principally with the legal ramifications, rather than any doctrinal duties.

> "*My normal advice in that situation would be for him to run such a letter by his counsel*. I don't remember if I gave him that advice or not but that would be the normal thing."

[Spong dep. 12/12/95, T. 24:14-17, Exhibit F)].

> "... I suspect I read the letter. *If I did, I either told him to get advice by his counsel or I passed it by my counsel*. That's an aspect of ministry that we didn't do five years ago when litigation was not some of our daily bread but today there's very little that one does in the public arena without seeking advice." [*Id.*, T. 25:5-11].

> "... [I]t was our feeling that a clear violation had occurred and the F.G.'s life had been adversely affected by that violation, and *there was some responsibility to give her some assistance, and we had to hope that the Church Insurance Company would do that*." [*Id.*, T. 60:4-9].

> "A. [...] *Legal action had been threatened. I think that's why words like alleged were used because in* [sic] *was a response to the threat of a lawsuit*."

> "Q. And one of the purposes of the letter as you understood it was to alert the parish of the possibility of some legal action?"

> "A. *And to media attention*." [*Id.*, T. 89:25; 90:1-6].

In this context, Rev. Whittaker's assertion that the improper disclosures were addressed to some ecclesiastical function rings especially hollow. The April 14, 1994 letter contains barely a mention of any aspect of religion, of dogma or of anything other than financial/legal/media issues and the purportedly consensual nature of the relationship. Once again, the Whittaker findings are useless, irrelevant and inconsistent with the actual *facts*.

CONCLUSION

The Supreme Court clearly and thoughtfully laid out the definition of a fiduciary relationship. It also unambiguously described the elements of a cause of action for breach of the duties inherent in such relationships. The Court did so in a manner so as to enable this particular litigation to be determined upon entirely secular criteria, notwithstanding the religious context and nature of the relationship.

Defendants raise the applicability of the First Amendment to the causes of action against them. The Supreme Court did not decide whether or not such principles affected the case against Harper [and Spong]. The Court was understandably reluctant to squarely address the causes against Harper [and Spong] precisely because of those principles-- at least in the absence of an adequate record. That record has now been developed.

Each of the fiduciary duties undertaken by defendants Spong and Harper can be defined and analyzed by precisely the same secular analysis which the Supreme Court applied to defendant MacDonell. Each of the secular torts committed by these defendants can also be defined in the same secular manner. The only obvious difference between these defendants and MacDonell was the manner in which the breach was committed.

MacDonell was found to have breached a secular fiduciary duty while in the course of his religious duties. Defendants Harper and Spong have also committed a breach of a secular fiduciary duty while in the course of their religious duties. The latter breaches differ in degree, not in their amenability to judicial review pursuant to neutral principles of law.

All of the parties appear to be in essential agreement as to the facts and the law. All of

the experts save Rev. Whittaker appear to be in agreement that a clergyman is liable for torts committed in the course of religious affairs or at least that no precept of the Episcopal church is violated by such liability.[19]

Bishop Spong and Bishop Tennis both opined- consistent with plaintiff's experts-- that defamation and similar torts committed in a sermon are not within the doctrine or dogma of the Church and are not imbued with nor immunized by ecclesiastical considerations.

Spong and Harper agree with plaintiff's experts that they each undertook significant fiduciary duties to the plaintiff. They agree that the fiduciary duty included a duty of fidelity, to maintain plaintiff's confidences and privacy and to protect her from harm. They have both testified to facts constituting a breach of those duties.

Those breaches included improper disclosure without F.G.'s consent, without her informed consent; dissemination of material which they knew or should have known would cause plaintiff harm, including information which was manifestly false [*e.g.* blaming the victim and implying that the relationship was a consensual relationship between competent consenting adults]; acting according to conflicting interests and divided loyalties [*e.g.* protecting MacDonell, by blaming F.G. for 'seducing' him; acting to protect the congregation from lawsuits at plaintiff's expense].

But for the fact that these breaches were committed by defendants while they wore the

[19]Bishop Tennis agrees as well, but differs only insofar as he does not believe in the ability of the court to find *any* fiduciary duty. This view is obviously not shared by the Supreme Court, and is thus of no importance in that context.

raiments of office, there is no inherently religious consideration. The same breaches could have [and would have] occurred if defendants were secular practitioners of some other fiduciary occupation in a secular fraternal organization. How then, is the First Amendment implicated?

It is implicated only because the defendants happened to be wearing clerical garb at the time of their tortious conduct. That does not *ipso facto* create any impediment to consideration by the courts.

Defendants bear the burden of showing that the litigation runs afoul of the Lemon test. They need to prove that the litigation has no secular purpose, that it would have the *principal* or *primary* effect of inhibiting or encouraging religion or that it would result in *excessive* entanglement. In order to *prove* one or more of these criteria, it is axiomatic that there must be some *evidence* to support their contention.

Defendants can offer none. In fact, what evidence has been offered supports plaintiff's position that there is no First Amendment impediment.

Finding some impediment would require a showing that the court would be inevitably be called upon to *interpret* or apply some issue of church dogma or to choose between two or more competing religious concepts. No party is asking the court to do so here.

Simply put, there is absolutely no issue which turns on Church doctrine or polity. "Only when the underlying dispute *turns on* doctrine or polity should courts abdicate their duty to enforce secular rights." Welter, *supra*.

Each of the relationships *sub judice* can be fairly described as falling into the secular

fiduciary relationships described by the Supreme Court when it last looked at this matter.

Only Rev. Whittaker holds out against the predominance of the secular tide. Failing to find any *actual* evidence of doctrinal content in the sermon and letter, she creates it out of whole cloth. In an absurdly net opinion, Whittaker constructs an elaborate religious framework in a fruitless, futile effort to invoke the entanglement prong of the Lemon test.

Even if the facts permitted the dubious inference, Rev. Whittaker's point is constitutionally irrelevant and contradicted by the actual facts of the case. Finding that religion inheres in the offending letter and sermon does little to advance the First Amendment argument, since the *facts* are that any religious import was incidental to defendants' secular concerns with civil litigation and media exposure.

This is precisely the reason the First Amendment only prohibits inquiry which has a *principal* or *primary* effect on religion.[20] The Whittaker finding in this regard is thus contradicted by the fairly plain testimony of defendants Harper and Spong. It is a net opinion.

Rev. Whittaker attempts to exculpate Harper by asserting that he was only obeying the instructions of Bishop Spong. According to her, that would require the court to look into church polity. Indeed it might-- if the testimony actually suggested that this was what happened.

In fact, the letter and sermon were Harper's idea. He sought and received only guidance and advice from Spong. Thus, the factual predicate for the Whittaker conclusion is missing.

---

[20]There is of course, not even the suggestion of *coercion* as an element of the Lemon test.

There is absolutely no issue which *turns on* church polity. Whittaker observed that Harper was bound by church polity to obey Spong. Spong himself disagrees; so too does Bishop Tennis.

Both Spong and Harper agree that the former did not control or compel the latter. Yet another net opinion by Rev. Whittaker.

Rev. Whittaker suggests that the First Amendment might bar the action because the conduct of the defendants was consistent with church doctrine. Once again, Whittaker undertakes irrelevant pondering. The issue is not whether the improper disclosures were or were not consistent with some religious duty of the defendants.

Both Harper and Spong appear to agree that the fiduciary duties undertaken derived from the relationship of trust between priest and parishioner, not from any church doctrine or polity. Bishop Spong even observes that there is no fiduciary duty defined by any particular church doctrine.

Such duties inhere in the trust and distribution of power within the relationship [as described by the Supreme Court]. If they are not defined by reference to church doctrine, they must *a priori* be defined by the civil law. Yet more net opinion from Rev. Whittaker.

There is simply no evidence to support any claim of excessive entanglement, or of coercion created by this litigation. The litigation in all aspects, complies with each of the prongs of the Lemon test.

Any reticence which the Supreme Court might have had with respect to Harper [and Spong] has now been cured by a fully developed record. There is no application,

interpretation of doctrine or polity invoked. Nor is there any coercive effect with respect to the free exercise or establishment of religion.

Each defendant owed a *secular* fiduciary duty to the plaintiff. That duty can be defined according to secular, neutral principles of law in precisely the manner already approved by the Supreme Court against MacDonell.

There is no First Amendment issue.

Respectfully submitted,

F.G., Plaintiff
By her attorneys:

ROSS & RUBINO, LLP
Sentry Office Plaza, Suite 100
216 Haddon Avenue
Westmont, NJ 08108
(609) 365-0500

BY: _____
Stephen C. Rubino

HERBERT D. FRIEDMAN, ESQ.
265 Franklin Street, 16th Floor
Boston, MA 02110
(617) 261-6000

BY: _____
Herbert D. Friedman

DATED: August 3, 1999