SUPREME COURT OF NEW JERSEY

Docket No. 51,840

CHRISTOPHER J. McKELVEY, Plaintiff- Petitioner vs. REV. WILLIAM C. PIERCE, Individually; REV. JOHN T. FREY, Individually, REV. WILLIAM P. BRENNAN, Individually; REV. ANTHONY J. MANUPPELLA, Individually; ESTATE OF REV. MSGR. WILLIAM J. BUCHLER, Individually; DIOCESE OF CAMDEN, a religious corporation; and JOHN DOES 1-10 (a fictitious name for persons and/or entities whose identity or culpability is not presently known), Defendants- Respondents	CIVIL ACTION ***ON PETITION FOR CERTIFICATION FROM:*** SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-006660-99T2 Sat Below: Judges King, Coburn and Axelrad

BRIEF AND APPENDIX OF PLAINTIFF-PETITIONER

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INTRODUCTION

Plaintiff Christopher J. McKelvey was a seminary student in defendant Diocese of Camden. While a seminarian, and during various internship programs required by the defendant Diocese of Camden, plaintiff was repeatedly sexually harassed by his teachers, mentors, and supervisors – all of whom were ordained priests in the Diocese of Camden. Plaintiff reported the misconduct to his supervisors on numerous occasions, but the misconduct continued. Ten years after his acceptance in the priest formation program – just months prior to his ordination – plaintiff withdrew from the program because of the intolerable sexual misconduct and misrepresentations by defendant Diocese of Camden. As a result of the many years as student in the priest formation program, plaintiff incurred a student loan debt.

Four years after plaintiff's withdrawal, he filed a complaint alleging breach of contract, breach of an implied covenant of good faith and fair dealing, intentional infliction of emotional distress resulting from the breach, and misrepresentation.

Defendants filed a motion to dismiss for lack of subject matter jurisdiction, which was converted into a motion for summary judgment. The motion judge, without conducting an

Elmora hearing,[1] concluded that plaintiff's allegations of breach of contract violate the First Amendment's Religion Clauses and granted defendants' motion. (Pa24-28).

Plaintiff appealed. Plaintiff argued that the motion judge erroneously dismissed plaintiff's complaint for lack of subject matter jurisdiction (Point I); erred by failing to conduct an Elmora hearing (Point II); prematurely ended discovery (Point III).

Plaintiffs also submitted a supplementary letter brief following oral argument at the request of the Appellate Division.

The Appellate Division (Judges King, Coburn, and Axelrad) affirmed the motion judge's dismissal of plaintiff's complaint in an opinion authored by Judge King. McKelvey v. Pierce et al., __ N.J. Super. __ (App. Div. 2001) (Pa29-52).

QUESTION PRESENTED

The question presented on appeal to the Supreme Court is whether the resolution of plaintiff's breach of contract claim would excessively entangle the courts in religious matters, specifically, the operation of defendants' seminary program.

ARGUMENT IN SUPPORT OF CERTIFICATION

Certification should be granted in this matter because of the faulty legal conclusion of the courts below with regard to

[1] Elmora Hebrew Center v. Fishman, 125 N.J. 404 (1991).

the entanglement issue, and because of the public policy that prohibits sexual misconduct.

In its opinion below, the Appellate Division noted that the legal basis for plaintiff's claim (breach of contract rather than sexual harassment under the Law Against Discrimination) was "non-traditional and unprecedented" which made the case "difficult." McKelvey, supra, __ N.J. Super. at __ (slip op. at 17). The court correctly pointed out that plaintiff did not sue under the LAD "perhaps because of the two-year bar of the statute of limitations." Ibid.

The Appellate Division below held that, although plaintiff's contract dispute would not entangle the courts with religious doctrine, it would entangle the courts with the polity and administration of the Diocese of Camden. Id. at __ (slip op. at 22).

Public policy in New Jersey has, until now, disfavored sexual misconduct by employers and educational institutions. By way of example, the LAD includes the following proclamation:

> The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of ... age [and] sex ... are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State....

[N.J.S.A. 10:5-3.]

Moreover, this Court has noted that "[t]he elimination of discrimination in educational institutions is particularly critical." Frank v. Ivy Club, 120 N.J. 73, 110 (1990), cert. denied sub nom. Tiger Inn v. Frank, 498 U.S. 1073, 111 S.Ct. 799, 112 L.Ed.2d 860 (1991).

The holding of the Appellate Division below appears inconsistent with the stated policy in New Jersey to eliminate sexual discrimination and sexual misconduct. In fact, the opinion contradicts an earlier opinion in Gallo v. Salesian Society, 290 N.J. Super. 616 (App. Div. 1996). In Gallo, plaintiff was a female teacher in a private Catholic all-boys high school. Plaintiff's employment at the school was terminated, and she sued for damages resulting from age and sex discrimination. A jury awarded plaintiff economic damages. Id. at 622.

The Appellate Division in Gallo held, in an opinion also written by Judge King, that the application of the Law Against Discrimination would not violate the First Amendment. Judge King wrote that "the State's interest in abolishing age and gender discrimination is compelling" and that "enforcement of that interest does not constitute a substantial burden on religion in the circumstance of a high school lay teacher of English and history under the present facts." Id. at 643-44. Judge King wrote that there was a "simple factual issue:

whether defendants discriminated against plaintiff on the basis of sex and age. Neither the resolution of this issue nor the inquiry into it impinged on defendants' religious freedom. No inquiry into faith, morals or religious polity was required." Id. at 645.

The inquiry in the instant matter is no more religious in nature than the inquiry in Gallo. "No inquiry into faith, morals or religious polity was required" there, ibid., and no such inquiry is required here.

In the instant matter, the Appellate Division feared the "legal monitoring of religious aspirants' and their peers and superiors' sexual proclivities." McKelvey, supra, __ N.J. Super. at __ (slip op. at 18). The resolution of this breach of contract dispute would not require that the court monitor a "religious aspirants' . . . sexual proclivities." Ibid. Plaintiff's sexual proclivities are not at issue, and thus will not be subject to monitoring by the courts.

The sexual proclivities of plaintiff's superiors are similarly irrelevant. Plaintiff's claim does not require that this Court or any other court enforce the Roman Catholic canons of mandatory celibacy for its priests. What priests choose to do in private with consenting adults is of no concern to the plaintiff or the courts. However, the sexual misconduct – quite distinct from sexual proclivities – directed at plaintiff is relevant to the breach of contract.

Accordingly, plaintiff merely requests an inquiry in to the acts that constitute the breach of contract.

Plaintiff argues that Beukas v. Board of Trustees of Farleigh Dickinson Univ., 255 N.J. Super. 552 (Law Div. 1991), aff'd o.b., 255 N.J. Super. 420 (App. Div. 1992), establishes precedent for the existence of a quasi-contract for education. In Beukas, the university terminated the ongoing dentistry program before a group of students completed the degree. The court in Beukas held that the contract between a university and a student is one of mutual obligations implied by law, for reasons of justice, without regard to expressions of mutual assent. Id. at 566. The court below noted that plaintiff seeks the same inquiry as the Beukas plaintiffs:

> Plaintiff argues that he seeks the same inquiry into defendants' conduct in the manner in which defendants ran the educational program for seminarians. He asserts that his right to be free of sexual harassment and unwanted sexual advances is a right which can be implied by law into his agreement with the seminary to pay tuition and attend the program in exchange for his right to be educated to become a priest. He also asserts that the court would not have to engage in any interpretation of religious policy in adjudicating this cause of action, because the right to be free from sexual harassment is a purely secular right which has nothing to do with Church polity. ***This is all quite true, but a suit against a private university does not intrude into the operation of a seminary program, training aspirants for the priesthood, and presents no Religion***

Clause implications.

[McKelvey, supra, __ N.J. Super. at __ (slip op. at 19) (emphasis added).]

The court below appears to have determined that the mere fact that plaintiff was a student in a religious program, rather than a private university, prevents the court from resolving the breach of contract dispute. The Appellate Division is wrong. Resolving plaintiff's breach of contract dispute would require that the courts intrude into the operation of the seminary program only to the extent that the Diocese would be required to refrain from doing that which common law, and now the LAD, already prohibits.

The Appellate Division below found guidance in F.G. v. MacDonell, 150 N.J. 550 (1997). F.G. is a peculiar case to guide the court below, especially because it held that the courts may resolve a dispute involving clergy sexual misconduct sounding in negligence without violating the First Amendment. While this Court in F.G. declined to recognize a cause of action for general clergy malpractice, the Court recognized a cause of action for breach of fiduciary duty when a cleric engaged in sexual misconduct with a parishioner during the course of pastoral counseling. This Court held that the duty owed by a cleric to a parishioner was one that courts in New Jersey could define without excessively entanglement with religious doctrine or polity:

> Unlike an action for clergy malpractice, an action for breach of fiduciary duty does not require establishing a standard of care and its breach. 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 the duty.
>
> [Id. at 565 (citations omitted).]

This Court determined in F.G. that neither the inquiry into whether a plaintiff trusted a pastor nor the inquiry into whether a plaintiff sought counseling from a pastor violates the First Amendment. Moreover, inquiry into the behavior that allegedly constitutes a violation of that trust is not excessive entanglement. Id. at 565.

This Court noted in F.G. that "[i]n the sanctuary of the church, however, troubled parishioners should be able to seek pastoral counseling free from the fear that the counselors will sexually abuse them." Ibid. Plaintiff in the instant matter similarly contends that, in the sanctuary of a seminary, students should be able to seek an education free from the fear that their teachers and mentors will sexually harass them. F.G. supports plaintiff's argument that courts may resolve disputes involving sexual misconduct in a religious setting without violating the First Amendment; it does not support the court's conclusion below that a court may not impose a quasi-contact to a diocese-seminary relationship because of excessive entanglement.

Moreover, this Court in F.G. remanded the matter for an Elmora hearing pursuant to Elmora Hebrew Ctr. Inc. v. Fishman, 125 N.J. 404, 414 (1991), to determine whether the court could resolve allegations against one of the defendants. Plaintiff in F.G. alleged that defendant Rev. Harper committed slander when he, from the pulpit during a sermon, identified her as a participant in a romantic affair with the pastor, Rev. McDonnell, when in fact she was the victim of clergy sexual misconduct. This Court, in remanding for the Elmora hearing, reasoned:

> Our review of [plaintiff's] allegations begins with the realization that Harper's alleged breaches occurred in sermons and letters to the congregations. Evaluating those sermons and letters might entangle a court in religious doctrine. The question remains whether, without becoming entangled in religious doctrine, a court can adjudicate Harper's alleged breach of his 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. We conclude that the trial court should conduct a hearing to determine whether it can decide F.G.'s allegations by reference to such principles. Elmora, supra, 125 N.J. at 414. If so, F.G. may proceed with her action against Harper.
>
> [Id. at 566-67.]

In F.G., this Court acknowledged that it is impossible to determine whether the principles of the First Amendment will

be violated without an Elmora hearing.[2] In the instant matter, plaintiff's second point on appeal was that the motion judged erred by determining, ***without conducting an Elmora hearing***, that the First Amendment barred judicial resolution of the claims. Plaintiff argued that plaintiff's claims were unfairly and prematurely dismissed following a motion to dismiss (converted to a summary judgment motion) without the opportunity to conduct full discovery. Unfortunately, the Appellate Division never addressed plaintiff's point and thus neglected to justify its holding in light of this Court's remand in F.G. for an Elmora hearing.

Rather than remanding for an Elmora hearing, the court below merely concluded that, if the courts entertained plaintiff's claims, then the courts "would have to imply the contractual terms relating to sexual advances by other seminarians and supervising priests because no such terms are explicit in the parties' undertaking." McKelvey, supra, __ N.J. Super. at __ (slip op. at 21). The Appellate Division

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[2] Plaintiff's counsel was retained by F.G. on remand for the Elmora hearing. The hearing consisted of several days of expert testimony which examined the seminal act of preaching from the pulpit and whether those words and acts can be parsed by way of neutral principals in order to support a cause of action that was not excessively entangling. Judge Lawrence Smith in Bergen County determined that the resolution of F.G.'s claims against Rev. Harper would not excessively entangle the court with religion. Thereafter, the case settled.

specifically noted:

> A court would have to evaluate the truth and gravity of plaintiff's claims and the diocese's defenses and decide whether or not the established facts constitute a substantial breach of contract in the seminary training, college and parish-internship context. If liability is found, a court would have to readjust the economic relationships between the parties, presumably a cost-benefit analysis placed on the value of plaintiff's educational gains versus his lost opportunities and out-of-pocket costs, a daunting task and an essentially entangling one.
>
> [Id. at __ (slip op. at 21-22).]

Plaintiff contends that nothing in the Appellate Division's prediction of what the court would be required to do in this case violates the First Amendment. Evaluating the truth and gravity of plaintiff's allegations or defendants' defenses, or whether a breach resulted, presents no entanglement problem. Courts routinely examine this type of conduct, and, with regard to the instant matter, the examination can be accomplished without reference to any church tenet or element of dogma.

Similarly, readjusting the economic relationship between the parties presents no problem with entanglement. Plaintiff would retain an economic expert to evaluate the monetary value of plaintiff's anticipated yearly salary as a priest, which is standard practice in both contract and tort litigation. The Appellate Division declared that the task of economic

evaluation was "daunting" and "essentially entangling." Id. at __ (slip op. at 22). The court should not prevent plaintiff's claim simply because the evaluation of damages is "daunting." Moreover, the standard for entanglement, as set forth in the seminal case Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), is "excessive entanglement." The court's conclusion and reasoning therefor that the courts can not entertain plaintiff's claim simply does not satisfy the clear standard in Lemon and thus is erroneous.

The Appellate Division below limited its conclusion, stating that the present dispute "does not entangle the court with the doctrines of the Roman Catholic Church but certainly does entangle us with respect to the polity and administration of the Church." McKelvey, supra, __ N.J. Super. at __ (slip op. at 22). This is the essence of the Appellate Division opinion. The Appellate Division feared entanglement with the operation of the seminary program. The Appellate Division wrongfully concluded that plaintiff's contract dispute would improperly entangle the courts with the operation of a religious education program.

Citing as authority a dissenting opinion from a rehearing petition in the Ninth Circuit in Bollard v. California Province of Society of Jesus, 211 F.3d 1331 (9th Cir. 2000), the Appellate Division concluded that, in resolving plaintiff's claims, the courts would be required to "delve

into religious matters outside [its] province," such as

- the conditions of plaintiff's association with the Diocese
- its disciplinary and supervisory decisions
- whether plaintiff would have otherwise been ordained into the priesthood
- the extent to which plaintiff could be made whole from the loss of a life of spiritual service, and the proper measure of compensation for the emotional pain he suffers from this deprivation

[McKelvey, supra, __ N.J. Super. at __ (slip op. at 23).]

To the contrary, the court may, and in fact should, delve into the instant matter because of the nature of the misconduct.

The conditions of plaintiff's associations with the Diocese is within the court's province. Plaintiff was a seminary student being educated and trained for his chosen profession in the priesthood, like the students at the dental school in Beukas, supra, 225 N.J. Super. 552. The issue is whether that association with the Diocese included an understanding that the association would be free from sexual misconduct. If the courts make a determination as to the conditions of plaintiff's association with the Diocese, that determination does not impact the polity and administration of the church. Instead, it merely defines the terms of the contract following the precedent set in Beukas.

Certain disciplinary and supervisory decision of the diocese are already inside the court's province, and are regulated by civil law under the Law Against Discrimination, as Judge King himself determined in Gallo v. Salesian Society, supra, 90 N.J. Super. 616. However, plaintiff was clear in his brief to the Appellate Division that the issue here does not turn on the propriety of the Diocese of Camden's disciplinary or supervisory decisions. Regardless of whether defendants' disciplinary conduct followed the regulations of the LAD, the conduct itself – the sexual misconduct and the failure to stop the sexual misconduct – constituted a breach of contract that forced plaintiff to withdraw from the seminary prior to ordination. Plaintiff does not ask this Court or any other court to improperly delve into the disciplinary decision-making process of the Diocese of Camden regarding complaints of sexual misconduct. Rather, plaintiff asks this Court to determine whether, in the context of the agreement between the parties, the act of ignoring plaintiff's complaints of sexual misconduct constituted a breach of contract. Plaintiff request a simple, secular, limited inquiry that will not require any court to improperly delve into or monitor church discipline.

The problem with asking the court to delve into disciplinary decision making by a religious institution is that it interferes with the religious institution's "choices

regarding who may propagate the faith." Welter v. Seton Hall, 128 N.J. 279, 295 (1992). Accordingly, the ministerial exception to the LAD allows employers to discriminate on the basis of religion to protect its autonomy. In cases involving the ministerial exception, there are competing interests: the employee's right to employment versus the religious employer's right to determine who may propagate the faith. Those competing interests are absent from plaintiff's contract dispute. Instead, the only interest at stake here is a seminarian's right to the benefit of the bargain. The Diocese, a religious institution with extraordinary bargaining power, has the right to enter into a contract or not; it does not have the right to misrepresent its seminary education program and then escape contract liability through the First Amendment.

Allowing plaintiff's claim will not jeopardize defendants' ability to autonomously operate the seminary formation program. The administration of the seminary does not require the commission or tolerance of sexual misconduct. Delving into the question of whether defendants ignored plaintiff's reports of sexual misconduct will not compromise the Diocese's autonomy and will not affect the polity and administration of the Diocese of Camden.

This Court may delve into whether plaintiff would have otherwise been ordained into the priesthood without violating

the First Amendment. Plaintiff's seminary record shows no sign that his ordination was in question, and the Bishop had accepted plaintiff as a candidate for ordination. Under these circumstances, where plaintiff had substantially complied with all requirements for ordination, and his seminary records reveal nothing that would likely prevent his ordination, the question of whether plaintiff would have been ordained is a simple question of fact, one that has no bearing on the operation of the seminary program. The instant dispute examines the conduct between the parties during the process of his education. Plaintiff is not requesting that he be reinstated in the seminary or that he be ordained; he seeks only monetary damages.

Lastly, the courts may delve into the extent to which plaintiff could be made whole from the loss of his career as a priest and the concomitant obligations previously incurred as well as the emotional pain he suffers from this deprivation. Again, this issue is a question of fact for an economic expert to determine. Just as a jury can determine the pain and suffering caused by the wrongful death of a family member, a jury can measure proper compensation for the loss of one's chosen career in the priesthood without affecting the polity and administration of the church.

Accordingly, the Appellate Division's concerns, adopted from the dissent in Bollard, supra, 211 F.3d 1331, upon which

it based its conclusion, are without merit.

The Appellate Division's final comment is surprising. After determining that the court could not resolve plaintiff's dispute because it would affect the polity and administration of a religious institution, the court admitted "fear of encroachment on church administration and polity in a sensitive matter of considerable contemporary concern." McKelvey, supra, __ N.J. Super. at __ (slip op. at 23-24). The court cited Garry Wills' book Papal Sin, which neither plaintiff nor defendants cited as authority in the briefs. The cited chapter in Papal Sin is entitled "A Gay Priesthood." Gary Wills, Papal Sin 192-203 (Doubleday 2000)(Pa53-66). Wills notes in this chapter that "most observers find that seminaries have become more gay than they used to be." Id. at 193. Wills attempts to answer the question, "How do gays currently in the priesthood, when there is supposed to be a law of celibacy, reconcile their vow of celibacy and their active sex life?" Id. at 195. Wills concludes:

> [Gay priests] may claim that they are "celibate" by their own private definition of that word. But they took a public vow of celibacy, and the aim of any oath is communicative, is a *contractual* commitment. Both sides of the contract must agree on its terms. Gay priests are living a lie. It may be imposed on them by a senseless rule. Yet they uphold the resulting structure of deceit. People are fooled by them. One reason pedophiles have been given access to children is that

> Catholic parents were under the misunderstanding that priests refrain from all sex.
>
> [Id. at 200.]

Gary Wills' conclusion from the chapter cited by the Appellate Division does not support the court's opinion that the courts must refrain from resolving plaintiff's contract dispute. To the contrary, as noted by the Appellate Division, this "sensitive matter of considerable contemporary concern," McKelvey, supra, __ N.J. Super. at __ (slip op. at 24), requires court involvement because of the misrepresentation that priests are celibate which results in a "structure of deceit." Wills, supra, at 200. The "structure of deceit" in the Diocese of Camden fooled plaintiff, and as a result he entered the seminary with reasonable expectations that he would be educated and trained in an environment free from sexual misconduct by his superiors. Plaintiff was duped and brings this action to recover contract damages to compensate for his loss of the benefit of the bargain.

Garry Wills' book supports plaintiff's contention that his complaint presents a dispute which can and should be resolved in civil courts. The defendants deceived plaintiff, entered a contract for education with plaintiff, breached that contract, and now seek shelter from judicial scrutiny in the First Amendment. The First Amendment must not be invoked to shield sexual misconduct in a religious institution in the

context of a contractual dispute.

Moreover, the result rendered by the Appellate Division is manifestly unjust. The opinion below essentially holds that religious educational institutions may continue to sexually harass seminary students without any legal ramifications in contract.

The precedent established by the Appellate Division may prevent future claims by seminarians or others similarly situated. The Appellate Division suggests that a religious institution may establish a policy of tolerance of sexual misconduct because the courts will not interfere with the administration of such an intolerable policy.

On July 6, 2001, the day following the publication of the Appellate Division decision, two articles appeared in two influential newspapers, *The Newark Star-Ledger* and *The Philadelphia Inquirer*, reporting the outcome of plaintiff's appeal. (Pa67-68). Both articles reported that the New Jersey court of appeals refused to intervene into plaintiff's claim alleging "unwanted homosexual advances" because of the First Amendment clause requiring the separation between church and state. (Pa67-68). Although both articles noted that plaintiff's claim sounded in breach of contract, that notation was addressed towards the middle or end of each article. (Pa67-68).

The articles in the *Inquirer* and the *Star-Ledger* reacted to the proposition that the New Jersey courts would not hear plaintiff's complaints that his teachers and mentors acted sexually improperly while he was a seminarian, regardless of what legal theory plaintiff argued. To the public, the effect of the ruling suggest that seminarians have no legal recourse to redress claims of sexual harassment.

As noted above, New Jersey has upheld a strong public policy in favor of eradicating sexual misconduct, particularly in the field of education. Plaintiff deserves nothing less than protection from sexual misconduct in a seminary.

CONCLUSION

For the reasons stated above, plaintiff respectfully requests that this Court grant plaintiff's petition for certification for review of the Appellate Division decision.

Respectfully submitted,

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DATED: August 1, 2001