

KRISTINE KOUNTAKOS *et al.*, * IN THE
Plaintiffs, * CIRCUIT COURT
v. * FOR
METROPOLITAN HERMAN, *et al.*, * HOWARD COUNTY
Defendants. * CASE NO. 13-C08-073089 OT

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM AND
ARGUMENT IN SUPPORT OF OPPOSITION TO
MOTIONS TO DISMISS ON BEHALF OF ALL DEFENDANTS
ON FIRST AMENDMENT GROUNDS

Now Come Kristine Koumentakos and Nicholas Koumentakos, Plaintiffs, by and through their attorneys Sloane L. Fish, and Gilman & Fish, L.L.C., pursuant to the leave granted by this Honorable Court¹, hereby submit this Supplemental Memorandum and Argument in Support of Opposition to Motions to Dismiss on Behalf of Defendants Father Raymond Velencia and the Orthodox Church of Saint Matthew,² and all other Defendants who rely upon the argument that this Honorable Court lacks subject matter jurisdiction due to the First Amendment, and in support thereof provide the following:

¹ This Honorable Court stated in open court during the first two days of hearings that it would accept further argument by counsel on Defendants' First Amendment issue prior to making its ruling in this case. (T. 2/12/09 at M2-204 & 205).

² Plaintiffs hereby incorporate fully by reference all previous Motions, Memoranda, evidence and argument regarding this Motion herein. This Memorandum is designed to supplement, not to supplant, all previous points raised previously by Plaintiffs.

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I. PLAINTIFFS' CLAIMS AND THIS HONORABLE COURT'S SUBJECT MATTER JURISDICTION OVER THIS CASE ARE NOT BARRED BY THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION OR ARTICLE 36 OF THE MARYLAND DECLARATION OF RIGHTS

During the hearing on Defendants' Motion to Dismiss, Defendants outlined three grounds for dismissal: (1) The Circuit Court for Howard County does not have subject matter jurisdiction because of the free exercise clause of the first amendment; (2) Maryland does not recognize a claim for clergy malpractice; and (3) Maryland does not recognize breach of fiduciary duty. (T. 2/11/09 at M1-17). This Honorable Court specifically reserved from adopting its tentative findings and rulings until after further argument by counsel on the First Amendment issue. (T. 2/11/09 at M1-99) (T. 2/12/09 M2-204 & 205). This Memorandum concentrates on the first of Defendants' arguments relating to the First Amendment.

Defendants concede that the gravaman of Plaintiffs' Complaint is the publishing of information contained within Defendant Velencia's letter of January 27, 2007, to 39 individuals that they refer to as "Bishops". (Defendants' Motion to Dismiss, pp.2, Section I "Overview", Para.1) (T. 2/11/09 at M1-19 & M1-38). Exhibit A-2 of Defendants' Motion to Dismiss/Summary Judgment, provides the following excerpt (apparently typed on a computer) from Defendant Velencia's letter:

[a]ccording to Kristi and her therapists this condition was precipitated by sexual abuse at the hands of her biological father,

(Defendant's Motion to Dismiss, Exhibit A-2 at 2) (emphasis supplied).

Section 11-207 of the Maryland Criminal Law Article provides that “[a] person may not … [u]se a computer to depict or describe a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct, [or] knowingly … distribute or possess with the intent to distribute any matter³ … that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct. MD. CODE ANN. CRIM. LAW § 11-207(a)(3) & (4) (emphasis supplied). Violation of this subsection is a felony in Maryland punishable by up to 10 years in prison, a fine up to \$25,000 or both for a first offense. MD. CODE ANN. CRIM. LAW § 11-207(b). The statute is a child pornography statute that requires registration as a sexual offender for anyone convicted under it. State v. Duran, (Court of Appeals Slip Opinion No. 73 Sept. Term 2008, 2009 WL 607420 (March 11, 2009)).

Although Defendants urge this Honorable Court to view this as an employment decision of the church involving church hierarchy and doctrine and, therefore, beyond the jurisdiction of civil courts, it is simply tortious conduct (which violates Maryland law) committed against Plaintiff while in the course of Defendant Velencia's duties within the church. It is Defendants' characterization of the dispute which is misleading as, in reality, Plaintiffs are not asking this Honorable Court to delve into matters of ecclesiastical doctrine as Defendants urge.

³ “Matter” means, a book, magazine, newspaper, or other printed or written material, a picture, drawing, photograph, motion picture, or other pictorial representation, a statue or other figure, a recording, transcription, or mechanical, chemical, or electrical reproduction, or any other article, equipment, machine or material. MD. CODE ANN. CRIM. LAW § 11-201(d) (emphasis supplied).

As early as 1878, the United States Supreme Court has held that one cannot invoke the First Amendment as a defense to “an overt act made criminal by the law of the land.” Reynolds v. United States, 98 U.S. 145, 162-68 (1878). See also Commonwealth v. Nissenbaum, 536 N.E.2d 592 (Mass. 1989) (“First Amendment does not protect the possession of controlled substances from the reach of criminal statutes”); State v. Phelps, 967 P.2d 304 (Kan. 1998) (First Amendment does not allow the commission of a crime and subsequent protection under religious auspices).

Since Reynolds, American courts have recognized, in a litany of cases, that “the First Amendment has *never been interpreted to mean* that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation.” Malicki v. Doe, 814 So.2d 347, 354 (emphasis supplied) (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990)). See also M.K. v. Archdiocese of Portland, 228 F.Supp.2d 1168 (D.Oregon 2002) (for determining respondeat superior liability, a simple review of a priest’s job description to determine if he was acting in the course of his employment was not violative of First Amendment).

In Malicki, the Florida Supreme Court reviewed the jurisdictions that have held this as follows:

Colorado: Bear Valley Church of Christ v. Debose, 928 P.2d 1315, 1323 (Colo.1996) (holding the First Amendment not a bar to child’s various tort claims against pastor and church for “pattern of inappropriate touching” that arose during counseling relationship); Moses v. Dioces of Colorado, 863 P.2d 310, 314-15 (Colo.1993) (holding First Amendment no bar to adult parishioner’s claims against bishop and diocese for breach of fiduciary duty and negligent hiring and supervision grounded on sexual relationship between parishioner and priest during the course of counseling); Destefano v. Grabrian, 763 P.2d 275, 283-88 (Colo. 1988) (same); **Illinois:** Amarato v. Greenquist, 287 Ill.App.3d 921, 223 Ill.Dec. 261, 679 N.E.2d 446, 450, 454 (1997) (Illinois does not recognize claim

of breach of fiduciary duty based upon relationship between cleric and parishioner because religion is the foundation of the claim, but recognizing that negligent supervision claim may not be barred by First Amendment); Biven v. Wright, 275 Ill.Appp.3d 899, 212 Ill.Dec. 287, 656 N.E.2d 1121, 1124-25 (1995) (recognizing that claim brought by husband and wife against church alleging negligent supervision of minister who engaged in sexual relationship with wife during the course of marital counseling is not barred by First Amendment); **Indiana**: Konkle v. Henson, 672 N.E.2d 450, 456 (Ind.Ct.App.1996) (holding that child victim of sexual molestation could bring claim of negligent hiring and supervision against church); **Minnesota**: Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 812 (Minn.Ct.App.1992) (holding that First Amendment is not violated by the imposition of punitive damages against church based upon priest's sexual abuse of child); **New Jersey**: F.G. v. MacDonell, 150 N.J. 550, 696 A.2d 697, 702-03 (1997) (holding that First Amendment does not bar breach of fiduciary duty claim against priest who engaged in sexual relationship with adult parishioner during counseling); **New York**: Kenneth R. v. Roman Catholic Diocese, 229 A.D.2d 159, 654 N.Y.S.3d 791, 795-96 (1997) (holding that child's negligent supervision and retention claims against diocese not barred by First Amendment); but see Langford v. Roman Catholic Diocese, 271 A.D2d 494, 705 N.Y.S.2d 661, 662 (N.Y.App.Div.2000) (holding that parishioner's breach of fiduciary duty claim against member of the clergy in connection with sexual relationship during the course of spiritual counseling was tantamount to impermissible clergy malpractice claim); **North Carolina**: Smith v. Privette, 128 N.C.App. 490, 495 S.E.2d 395, 398 (1998) (holding adult's claim of negligent retention and supervision against church arising out of alleged "inappropriate, unwelcome, offensive and nonconsensual acts of a sexual nature" by minister not barred by First Amendment); **Ohio**: Byrd v. Faber, 57 Ohio St.3d 56, 565 N.E.2d 584, 589 (1991) (recognizing that negligent hiring claim may not violate First Amendment, but that complaint must plead the operative facts with particularity); **Oregon**: Erickson v. Christenson, 99 Or.App. 104, 781 P.2d 383, 386 (1989) (holding that First Amendment did not bar tort claims against church for actions of pastor who engaged in sexual relations with plaintiff during course of counseling relationship when plaintiff was a minor); **Texas**: Martinez v. Primera Asemblea de Dios, Inc., No. 05-96-01458, 1998 WL 242412, at *3 (Tex.Ct.App. May 15, 1998) (holding that First Amendment did not bar parishioner's negligence claims against church based upon allegations that church elder sexually assaulted her); but see Hawkins v. Trinity Baptist Church, 30 S.W.3d 446, 453 (Texas Ct.App.2000) (declining to recognize breach of fiduciary duty claim against pastor for sexual relationship with adult parishioner during the course of marital counseling because of "concerns towards treading upon the Free Exercise Clause"); **Washington**: C.J.C v. Corporation of the Catholic Bishop of Yakima, 138 Wash.2d 699, 985 P.2d 262, 277 (1999) (holding that First Amendment did not bar minor sexual abuse victim from bringing tort claims against priest and church). **Federal cases**: Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2d Cir. 1999) (holding Free Exercise Clause did not bar finding of fiduciary relationship between diocese and

parishioner for child sexual abuse by priest); Smith v. O'Connell, 986 F.Supp. 73, 80 (D.R.I.1997) (holding First Amendment did not bar minor's claim of sexual molestation against priest and church for negligent supervision); Doe v. Hartz, 970 F.Supp. 1375, 1431-32 (N.D.Iowa 1997) (holding negligent supervision claim brought by adult who claimed improper sexual contact by priest not barred by First Amendment; however, First Amendment did bar negligent hiring claim), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998); Sanders v. Cases View Baptist Church, 898 F.Supp. 1169, 1175 (n.D.Tex 1995) (holding First Amendment no bar to claims of professional negligence and breach of fiduciary duty brought by church employee who had counseling relationship with minister), aff'd, 134 F.3d 331 (5th Cir. 1998); Nutt v. Norwich Roman Catholic Diocese, 921 F.Supp. 66 (D.Conn.1995) (holding Free Exercise Clause does not bar claim for negligent employment based upon alleged sexual abuse of altar boys by priest); Isely v. Capuchin Province, 880 F.Supp. 1138, 1151 (E.D.Mich.1995) (holding no First Amendment bar to claim of negligent supervision by student sexual abuse victim, but First Amendment does bar claim of negligent hiring).

Malicki, 814 So.2d at 351 n.2. This legal principle was reiterated by the Court of Appeals in 2007 when it stated that “[t]he Free Exercise Clause, as embodied in the U.S. Constitution and Article 36 of the Maryland Declaration of Rights, does not provide a constitutional right to ignore neutral laws of general applicability, even when such laws have, as an incidental effect, the burdening of a particular religious activity.” Archdiocese of Washington, et al v. Moersen, 399 Md. 637, 640-41 (2007) (internal citations omitted) (internal quotations omitted) (holding that a church organist did not fall within the ministerial exception for Title VII purposes).

Defendants' counsel and this Honorable Court have both properly conceded that if the allegations against Defendant Velencia amounted to criminal activity, it would drastically change Defendants' argument and pull it out of the First Amendment analysis. This Honorable Court and Defendants' counsel discussed this topic as follows:

Court: I read something in the Wall Street Journal recently about the Catholic Church Roman Catholic Church and some cardinals having some problems, you know, not removing parish priests and just moving them around with the Diocese and that type of thing. The aspect of some code out there or, you know, standard by prelate to disclose misdeeds by

priests. Are you aware of any – I'm not trying to overly complicate this, but.

Attorney Bach: Judge, I think sexual abuse, which is apparently the gravamen of the article of the matter is known as a different animal completely from this.

Court: I was just – the legal mechanics of, you know, some code of conduct, you know, some particular legal standard.

Attorney Bach: I am aware of no case that – civil case, that's ever applied – and that's quite a broad statement, so there may be something somewhere, but I am aware of no case in which a court, a civil court has applied the church's code of conduct to impose a duty of care and negligence.

(T. 2/11/09 at m1-51 -53). Defense counsel also acknowledged this when he argued:

Attorney Bach: Absolutely (the psychological part and counseling part is still under the ecclesiastical umbrella) ... [u]nless you get into a sexual abuse, which is quite a different thing ... [a]nd is a criminal violation.

(T. 2/11/09 at M1-54). Further, when Plaintiffs' counsel began giving an example of a clergy member committing a crime, this Honorable Court interjected emphatically that the ecclesiastical doctrine did not apply:

Attorney Gilman: One analogy is ... Father Ray gets in his car after having a few drinks, and if the church had a policy that he wasn't allowed to have a few drinks and drive, but he has an accident on the way back to the church, does that become church doctrine and protected by the...

Court: I certainly don't have a problem with that one, Counsel. I've had a few of those in my day with clergy when I sat up in the District Court for 16 years and heard thousands of drunk driving cases. We had a few clergy. But I understand. I didn't apply the ecclesiastical doctrine I can assure you.

(T. 2/11/09 at M1-63-64).

It is clear that Defendant Velencia's conduct falls outside the umbrella of protections the First Amendment were intended to bestow upon religious entities. In the litany of cases listed above, in Plaintiffs' counsel's argument, in Defendants' argument,

and this Honorable Court have all recognized this. It is for these reasons that this Honorable Court should deny Defendants' Motion to Dismiss on First Amendment grounds.

II. BOURNE IS INAPPOSITE TO PLAINTIFFS' CASE AS IS THE ECCLESIASTICAL ABSTENTION DOCTRINE⁴ BECAUSE THE INQUIRY MUST FOCUS ON THE FACTS OF THE LAWSUIT AND NOT THE IDENTITY OF THE PARTIES INVOLVED

Defendants rely exclusively on Bourne for their entire argument that the First Amendment forbids this Court's intrusion on church decisions and erroneously assert that Bourne is dispositive in this case. (T. 2/11/09 at M1-20 & 22). In Bourne, a pastor for the Church of the Nazarene ("Church") sued in civil court in an effort to challenge the decision of the Church to transfer him to another area. Bourne v. Center on Children, Inc., et al., 154 Md. App. 42, 45 (2003). The issue was "whether the circuit court maintained the power to decide appellant's contract and tort claims, even if they were intertwined with appellees' right to First Amendment religious freedom." Id. at 52. The

⁴ The Ecclesiastical Abstention Doctrine, which is argued by Defendants as a separate ground for dismissal in their written Motion to Dismiss appeared to be abandoned during the oral argument, as far as Plaintiffs' counsel can determine. The term has never been applied under that title by the United States Supreme Court, or the Maryland Appellate Courts and only appears in one reported decision of the federal Circuit Courts. It appears to be a rarely used term of art that originated out of the Supreme Court's analysis in Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) ("where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them"). Ecclesiastical abstention is a limited doctrine which "provides that civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity ... [r]ather, we must accept as a given whatever the entity decides" Paul v. Watchtower Bible and Tract Society of New York, Inc., 819 F.2d 875, 878 n.1 (9th Cir. 1987).

Although Defendants' separate this argument from their primary First Amendment Argument in their written Motion to Dismiss as a distinct theory and an additional ground for dismissal, it is in fact the subject matter of the Bourne First Amendment analysis and is not a separate theory upon which this court can dismiss this case. Defendants appeared to recognize this during the argument on their Motion to Dismiss. The Bourne decision was based, in large part, on the case of Downs v. Roman Catholic Archbishop of Baltimore, 111 Md. App. 616 (1996), which used the Milivojevich opinion and rationale as a basis for its decision.

Bourne Court explained the focus of the inquiry as follows: “*the inquiry as to whether subject matter exists ... does not depend on the identity of the party, but rather focuses on the facts of the lawsuit* and whether the claims asserted are purely secular or not.” Id. at 57 (emphasis supplied). The Court of Special Appeals decided it did not have subject matter jurisdiction because to evaluate Bourne’s performance would require delving into a non-secular area protected by the First Amendment. Id. at 55-57. More significantly, the Bourne Court held that the tort claims, including defamation against him, *were related to his performance* as a minister in the church and, therefore, were outside the jurisdiction of the courts. Id.

Bourne (and, therefore, the Ecclesiastical Abstention Doctrine) is inapposite in Plaintiffs’ case before this Honorable Court. Defendants, in an effort to squeeze the facts of Plaintiffs’ case into Bourne, grossly mischaracterize Plaintiffs’ claims as an “an appeal from the church rulings” and allege that Plaintiffs are “asking this Court to second guess what the church did.” (T. 2/11/09 at M1-19 & M1-36). Plaintiffs’ do not seek to challenge any *decision* of the church in their lawsuit or use this Honorable Court as an appellate tribunal from the church. The fact remains that whether a decision was even made by the church (or what that decision was) has no bearing on Plaintiffs’ claims in this case. Also, the defamatory and malicious information distributed around Plaintiffs’ community in this case was not at all related to Plaintiffs’, Kristine or Nicholas Koumentakos’, performance as ministers in the church. The information Plaintiffs complain about was not even related to any position within the church. It was defamatory material about her childhood and personal life which had nothing to do with Plaintiffs’ complaints to the church regarding Defendant Velencia. To be sure, in the

context of Defendant Velencia's letter itself, the defamatory material was completely non-responsive to the actual complaints. It simply constituted an effort on Defendant Velencia's part to discredit Plaintiff and to besmirch Plaintiff's reputation in the community. More importantly, the e-mail "blast" to 39 individuals that Defendant Velencia executed was not related to any official investigation. This Honorable Court's tentative finding that because the dispute originated with a complaint and investigation it is off-limits to civil courts is merely the beginning of the inquiry. (T. 2/11/09 at M1-95). This Honorable Court stated,

But at any rate I would find that by virtue of the Plaintiff's having asked for this investigation in the church hierarchy, and my tentative finding that that's where it stays and we can't, the civil courts, cannot get into that, you know, his response since they brought that would be analogous to an absolute privilege⁵ such as we see in many situations in judicial proceedings it's basically an absolute privilege [i]n other words, if this was a shouting match between the Plaintiff and the Father on the street or what have you, let's say he was a psychologist or something⁶, whatever. He just decides to publish this. That would perhaps be a different ballgame.

(T. 2/11/09 at M1-95-96). The first time Defendant Velencia sent the information to the church leadership, it could be *argued* that this was an issue of church polity, but when he sent this information to 39 members of the community who were not investigating him or had any decision-making authority over him, this argument dissolves into First Amendment rhetoric.

⁵ Defendants conceded, contrary to this Honorable Court's tentative findings, that there is no absolute privilege in the context of defamation. (T. 2/11/09 at M1-40). See Independent Newspapers, Inc. v. Brodie, Slip Opinion Court of Appeals No. 63 Sept. Term 2008 at 22 (February 27, 2009) (qualified privileges do exist to protect oneself from defamatory statements but those privileges "are lost when the speaker acts with malice or intent to harm").

⁶ This Honorable Court's finding that the identity of the Defendant Velencia as a Priest is a dispositive factor runs contrary to Bourne. The Court of Special Appeals stated that subject matter jurisdiction "does not depend on the identity of the party, but rather focuses on the facts of the lawsuit." Bourne, 154 Md. App. at 57.

Another fatal error with Defendants' analysis, in urging that Bourne is dispositive in this case, is that they place Defendant Velencia in Pastor Bourne's shoes when analyzing Plaintiffs' case under Bourne. (See Defendants Motion to Dismiss at 14 & 15). This is precisely why and how Defendants have mischaracterized Plaintiffs' case to apply it to Bourne. To properly apply Bourne to Plaintiffs' case, the proper substitution to analyze the case is to replace Pastor Bourne with Kristine Koumentakos. By doing the analysis properly, it demonstrates how inapposite the Bourne case really is to Plaintiffs' case.

III. DEFENDANTS ACKNOWLEDGE THAT DEFENDANT VELENCIA HAS DISTRIBUTED THE DEFAMATORY MATERIAL TO THIRD PARTIES OUTSIDE THE CHURCH HIERARCHY WHICH UNDERMINES ANY ARGUMENT THAT THE SUBJECT MATTER IS A MATTER OF CHURCH POLITY AND MARYLAND COURTS LACK SUBJECT MATTER JURISDICTION

Even if this court finds Defendants' characterization of the dispute and accompanying rationale compelling, it cannot escape the fact that Defendant Velencia published this information to more than just the required church leadership or investigators. His own words indicate that he has published this material to other persons that have nothing to do with the operation of the church. Moreover, Defendant Velencia himself recognized that this was not strictly an internal church matter *when he went to the very court system he is now attempting to stay out of to seek a protective order* against one of the Plaintiffs.

A. The Protective Order

On February 9, 2007, Defendant Velencia sought a protective order against Plaintiff, Kristine Koumentakos, before the District Court of Maryland sitting in Howard County. During that hearing for a temporary protective order, which was based on an

alleged telephone threat from Plaintiff, Defendant Velencia talked about their relationship over the past 15 years, discussed a threat from 1997 allegedly made by Plaintiff, Kristine Koumentakos, discussed the long history as an employee and parishioner, informed the court that Plaintiff Kristine Koumentakos had a history of

. (See
CD of Protective Order Hearing February 9, 2007, 2:17 p.m. – 2:30 p.m.). Defendant Velencia also brought up the 31 page letter regarding pastoral misconduct regarding unlawful termination that was allegedly sent by Plaintiff Kristine Koumentakos, and discussed Plaintiffs' marriage, divorce and remarriage with the court. (See CD of Protective Order Hearing February 9, 2007, 2:17 p.m. – 2:30 p.m.). Defendant Velencia also indicated potential civil action on his part against Plaintiffs and indicated that he already had a civil attorney in addition to his corporate counsel. (See CD of Protective Order Hearing February 9, 2007, 2:17 p.m. – 2:30 p.m.). The temporary protective order was denied because the court found that there were no reasonable grounds to issue the order. (See CD of Protective Order Hearing February 9, 2007, 3:01 p.m.).

For Defendant Velencia to now make the daft assertion that these subject matters are strictly internal to the church and protected by the First Amendment is absurd. He has published the subject matter of these materials to Maryland Courts when there stood some benefit for him but now attempts to bar the courts from considering the same subject matter when there may be some detriment to him. Defendants improperly attempt to use the First Amendment as both a sword and a shield which is untenable.

B. “Bishops and Bloggers”

Also undermining the defense argument that this issue is one of church polity and protected by the First Amendment is the fact that Defendant has distributed the malicious and defamatory material to others who are unrelated to the church hierarchy. Defendants concede that Defendant Velencia sent the letter outside church channels into the mainstream to a blogger. (T. 2/11/09 at M1-41). Defendants, in an attempt to neutralize this bad fact against them, make the floundering argument that (1) this individual’s name was “hidden” among the names on Plaintiff’s e-mail list (T. 2/11/09 at M1-43). Defendants later make a necessary but completely unsupportable fall-back argument that “[t]he incidental publication of this to a third person doesn’t “transmogrify” this into a secular matter.” (T. 2/11/09 at M1-53). The facts are the facts no matter how Defendants wish to spin them in their attempt give a blogger, who runs a world-wide on-line news organization, First Amendment religious protections.

In Defendants’ Motion to Dismiss and accompanying attachments, they provide that Defendant Velencia himself indicated that he has potentially transmitted this information to at least five individuals as follows: (1) His Beatitude, The Most Blessed Herman, (2) his wife, (3) Fr. Duane, (4) Archpriest Alexey Y Karlgut, and/or (5) parish member Jim Davidoff. (See Motion to Dismiss App.2 at 1, 6, 8 & 9). More importantly, Defendants’ counsel has conceded that Defendant Velencia also sent this document to another 39 individuals that Defendants baldly assert are “Bishops”. (See Defendant’s Motion to Dismiss/Summary Judgment at 3 & Exhibit # 3 of Motion to Dismiss) (T. 2/1/09 at M1-28 & 33).

Bach: “Judge, I’m saying that a publication within the context of a response to church officials from the complaint by a parishioner falls

squarely within the First Amendment. In fact, when you see Exhibit 2, you'll see that there's a list of 39 bishops in that e-mail list which are also – although, I can't point it out right now, but my associate found it, includes the e-mail address of this blogger who is a church contrarian, if you will. Father Ray simply sent it to the same people. The letter was an e-mail to the same people that that Plaintiff had sent it to. But the fact that the plaintiff initiated it is important but not, you know, in and of itself demonstrates its ecclesiastical nature. And the mere fact that the publication occurred to one other person on this list doesn't change under the teachings of Bourne and the other Maryland cases the fact that it is a matter of First Amendment protection – matter of First Amendment protection." (T. 2/11/09 at M1-28).

Bach: "...All of these invasion of privacy false lights off of or the revelation by Father Ray of matters obtained in his official capacity in publishing his defense to these 39 bishops, and the – and that one blogger who is part of her mailing list, that are matter responding to complaints about him and his – and his pastoral practice, which come under the cases that I've cited within the First Amendment protection." (T. 2/11/09 at M1-33).

This Honorable Court made a tentative finding, based on bald assertions by Defendants' counsel that 38 of the individuals were "Bishops" and the blogger was "a member or related to the church." Plaintiffs aver that the 39 people that Defendant Velencia sent his letter to were not "Bishops" and the blogger was, in Defendants' counsel's own words, "a church *contrarian*" (or a person who takes a contrary position or attitude) which puts this material fact in dispute and not proper for this Honorable Court to resolve in this Motion. (T. 2/11/09 at M1-28). Defendants' counsel's own concessions establish that at least one of the individuals he apparently includes under the label "Bishop" was actually a blogger who ran a world-wide information network. (T. 2/11/09 at M1-28 & 33).

In order to grant Defendants' Motion to Dismiss, this Honorable Court would have to resolve whether each one of the above-listed 39 or more individuals were in the

church decision-making hierarchy and had decision making authority in this case. It would be inappropriate to resolve this issue based on mere proffers and bald statements from Defendants' counsel. If this Honorable Court cannot make that determination - which it cannot - Defendants' First Amendment argument simply fails. It would be wholly inappropriate at this stage of the proceedings to resolve these material and factual issues that are in dispute.

CONCLUSION

It is for the above-stated reasons that Defendants' Motions to Dismiss and/or for Summary Judgment based on First Amendment grounds should be denied.

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CERTIFICATE OF SERVICE

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TRANSCRIPT EXCERPTS
2/11/09

IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND

KRISTINE P. KOUNTAKOS, et al.,

Plaintiffs

Civil Docket

vs.

Case No. 13-C-08-073089

METROPOLITAN HERMAN, et al.,

Defendants

OFFICIAL TRANSCRIPT OF PROCEEDINGS

MOTIONS

VOLUME I

Ellicott City, Maryland
Wednesday, February 11, 2009

BEFORE: THE HONORABLE LOUIS A. BECKER III

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Ellicott City, Maryland 21043
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1 his capacity as president of SMH.

2 Your Honor, if I may, SMH is St. Matthew's House.
3 We use that as the term for the entity. But I represent him
4 only in the parish capacity, as a priest, and the parish,
5 which is the Orthodox Church of St. Matthews. And can I call
6 them collectively the St. Matthews Defendants so we'll sort
7 of understand what I'm getting at.

8 There are a lot of players in the case. I'll let
9 Mr. Shea and Mr. McAuliffe when he gets here explain the
10 hierarchy. Suffice to say, each and every Defendant is in
11 fact a church entity or a church official, be it the Orthodox
12 Church of America, Metropolitan Herman, the Deanery, the
13 Orthodox Church of St. Matthews, all are church entities.

14 Now, I filed a motion to dismiss and I argue three
15 grounds essentially. One, that this Court does not have
16 subject matter jurisdiction by virtue of the free exercise of
17 religion clause of the First Amendment at Article 36 of the
18 Maryland Declaration of Rights. I submit that both rest
19 jurisdiction over each and every cause of action asserted
20 against my clients in the capacities that I've indicated.
21 Secondly, I argue that Maryland does not as a matter of law
22 recognize a claim for clergy malpractice, which is, I will
23 argue, the gravamen of the Plaintiffs' claim against both
24 Father Ray and the parish. Nor does Maryland recognize a
25 cause of action for breach of fiduciary duty, particularly

1 you look at exhibit -- I'm sorry. Let's be clear. My
2 client's letter, Father Ray wrote a letter in June -- in
3 January of 2006. That letter went to Metropolitan Herman
4 during the course of an exa -- an investigation of the
5 Plaintiff's complaints. So my letter is first insofar as the
6 publication to Metropolitan Herman.

7 In October of 2007, the Plaintiffs sent a letter --
8 e-mail to 39 bishops still complaining, even though the
9 investigation found that there was no sufficient basis for her
10 -- for finding a transgression. After she wrote, the
11 Plaintiff wrote to these 39 bishops by e-mail, my client sent
12 -- using the same e-mail, replied to these same -- forwarded
13 to these same people that she had written to a copy of the
14 letter he had written to Metropolitan Herman.

15 And it is the publication of that letter to the 39
16 bishops and the people to whom the Plaintiff had sent her plea
17 for disciplinary action that's the gravamen in this case. And
18 that's what we're talking about here. The Plaintiff in fact
19 is attempting to use this Court as an appeal from the church
20 rulings on her efforts to met out -- have the church met out
21 punishment. She's asking this Court to second guess what the
22 church did and to rule against both Father Ray and the parish
23 that, insofar as Father Ray is concerned, he committed a whole
24 laundry list of torts in connection with his publication to
25 the church and to the church people and to the people she

1 published it to his defense of her claims.

2 And I think it is important, Judge, to look at my --
3 I don't know if you've gotten my memo yet, because I think
4 it's helpful as I go through this --

5 THE COURT: My -- she's xeroxing it. I instructed
6 her to get it out here as soon as she finishes, so I should
7 have it in a couple of minutes.

8 MR. BACH: Okay. Well, you have Bourne there I
9 assume.

10 THE COURT: Yes, I do.

11 MR. BACH: If you look at 154 Md. 32. I don't know
12 if you have the Atlantic --

13 THE COURT: No, I have the Maryland.

14 MR. BACH: Yes, you've got it.

15 THE COURT: Yes. In fact, that's basically the last
16 thing I read before I came out is Jim Eyler's decision --

17 MR. BACH: Bourne?

18 THE COURT: -- in Bourne.

19 MR. BACH: Well, Bourne, to me, Your Honor, is so
20 very, very close to this case and, I submit, dispositive. But
21 generally, I'm looking at page 42, and I'm citing the First
22 Amend -- I'm just reading some of this quote that I have: "In
23 the First Amendment religious clauses are applicable to the
24 states through the Fourteenth Amendment." Your Honor is well
25 aware of that.

1 be not second-guessed by the civil court. The church can self
2 govern beyond the reach of judicial power."

3 (The Court confers with law clerk, not typed.)

4 MR. BACH: I'm reading that because of course that's
5 the basis of my entire argument, Your Honor. If we look at
6 the Plaintiffs' allegations. Judge, if I may present to you,
7 this is an exhibit.

8 If I may approach?

9 THE COURT: Sure.

10 MR. BACH: This is Exhibit 1 to my complaint.

11 May I approach?

12 THE COURT: Yes.

13 MR. BACH: In which I summarize the various claims

14

15 MR. SHEA: Is it attached to your motion?

16 MR. BACH: Excuse me?

17 MR. SHEA: Is it the one to your motion?

18 MR. BACH: Yes, it's attached to my motion, Judge.

19 (Counsel conferring; the Court confers with law
20 clerk, not typed.)

21 MR. BACH: Mr. Gilman points out that I meant
22 motion, not complaint.

23 THE COURT: I was going to point that out too. Hang
24 on.

25 MR. BACH: (Inaudible three words.)

1 MR. BACH: Judge, I'm saying that a publication
2 within the context of a response to church officials from the
3 complaint by a parishioner falls squarely within the First
4 Amendment. In fact, when you see Exhibit 2, you'll see that
5 there's a list of 39 bishops in that e-mail list which are
6 also -- although, I can't point it out right now, but my
7 associate found it, includes the e-mail address of this
8 blogger who is a church contrarian, if you will. Father Ray
9 simply sent it to the same people. The letter was an e-mail
10 to the same people that that Plaintiff had sent it to. But
11 the fact that the Plaintiff initiated it is important but not,
12 you know, in and of itself demonstrates its ecclesiastical
13 nature. And the mere fact that the publication occurred to
14 one other person on this list doesn't change under the
15 teachings of Bourne and the other Maryland cases the fact that
16 it is a matter of First Amendment protection -- matter for
17 First Amendment protection.

18 If we look, Judge, at the negligence count, Father
19 Ray negligently released information shared within a
20 confidence during priestly confessions and counseling
21 sessions, the priestly -- the duties of the priest, the
22 confidentiality, are all matters of church governance, church
23 theology and the like, which this Court and the civil courts
24 under the teachings of the First Amendment cases cannot
25 substitute its judgment for. It isn't for the common law to

1 Koumentakos' allegations and in doing so subverted
2 Koumentakos' efforts to seek assistance through normal church
3 channels. I mean, *res ipsa loquitur* as far as I'm concerned,
4 Your Honor. This -- if this isn't First Amendment -- well,
5 that's hyperbole, but it really clearly is First Amendment
6 matters that are -- deal with ecclesiastical issues that are
7 sacrosanct, Your Honor.

8 Fourteen -- fifteen, invasion of privacy. All of
9 these invasion of privacy false lights off of -- or the
10 revelation by Father Ray of matters obtained in his official
11 capacity in publishing his defense to these 39 bishops, and
12 the -- and that one blogger who is part of her mailing list,
13 that are matter responding to complaints about him and his --
14 and his pastoral practice, which come under the cases that
15 I've cited within the First Amendment protection.

16 As far as breach of fiduciary duties is concerned,
17 Judge, I just discussed 14 -- excuse me, 15 through 18, right?
18 That was the false light. They all arise out of the same
19 claims.

20 Count 19 is breach of fiduciary duty against
21 everybody, and says all Defendant were accounted of
22 Koumentakos and breached their fiduciary duty and/or
23 confidential relationship to them. All of these duties arise
24 out of the church-parishioner relationship, duties that the
25 church defines, not common law defines. And that's what

1 noted that questions of truth, falsity and malice often take
2 on a different hue when examined in the light of the religious
3 -- of religious precepts and procedures, when allegedly
4 defamatory statements are made during the process of
5 determining fitness for religion -- I just read this, Judge,
6 but I won't repeat it.

7 "Appellant's tort claims of defamation and false
8 light are based upon the same operative facts concerning his
9 employment, his ordination, and his relocation. The only
10 specific instance of defamation ..." is a "... letter sent by
11 Reverend Allison to various Church members regarding
12 appellant's behavior" as pastor. Okay? This was a
13 complainant that somebody in the church hierarchy wrote a
14 letter to the parishioners. "Appellant claims that the
15 defamatory statements were made in an effort to force him to
16 leave ... Even if," Judge Eyler says, "Reverend Allison made
17 defamatory statements in this letter and placed appellant in
18 a false light, this Court may not consider the issue because
19 it relates to appellant's employment with the church. Clearly
20 any statements made by appellees with regard to appellant's
21 performance as a minister are protected by the case law."

22 Judge, this is what the Plaintiffs are doing here;
23 they're attempting to engraft an appellant procedure on what
24 the church did, matters that were singularly within the
25 church's province. And Judge you have no jurisdiction to do

1 any questions the Court might have.

2 THE COURT: All right. Just hang on for a minute.

3 (Pause)

4 THE COURT: The letters involved again are found --

5 did you say Exhibits 2 and 3 to?

6 MR. BACH: My motion. Two, three and four, Your
7 Honor, I think. Two and four are the -- do you have that,
8 Judge? Two and four Are the --

9 THE COURT: Not yet.

10 MR. BACH: Okay. I know you're going through an
11 incredibly large file.

12 (The Court confers with law clerk, not typed.)

13 THE COURT: In your Exhibit 2, which is Mrs.
14 Koumentakos' letter or e-mail if you will of October 24 of
15 '07, do you indicate -- I'm just scanning it here -- that she
16 enclosed any information from the church with this?

17 MR. BACH: This is to the church.

18 THE COURT: It's to the church, all right.

19 MR. BACH: To the 39 bishops.

20 THE COURT: Your Exhibit 3 is --

21 MR. BACH: Three is really --

22 THE COURT: Your client, the priest -- no, I'm
23 sorry. Excuse me.

24 MR. BACH: This is her complaint about Exhibit 4 to
25 the church, to demonstrate --

1 would clearly fall within an investigation, there is a
2 qualified privilege.

3 THE COURT: You don't have the cite on that by any
4 chance, do you?

5 MR. BACH: Cite for Marcazi?

6 THE COURT: I've seen it. I just did a --

7 MR. BACH: Judge, I hate to tell you how long ago
8 it was.

9 THE COURT: Time-wise it would have been about?

10 MR. BACH: Ah, seventies.

11 THE COURT: Court of Appeals?

12 MR. BACH: Court of Appeals. That was a social
13 worker --

14 THE COURT: I've seen it. I just did a couple of
15 memos on defamation. I've seen it. I just don't -- I don't
16 have it.

17 MR. BACH: Yes. I would like to argue that it's --

18 THE COURT: That's all right.

19 MR. BACH: -- absolutely privileged, but I don't
20 think I can. So I won't waste your time. I do think it is
21 a qualified privilege.

22 THE COURT: (Inaudible word.)

23 MR. BACH: But the qualified privilege has to show
24 that -- that -- where you can defeat the qualified privilege.

25 THE COURT: I guess the other question I have, kind

1 of factually, is the letter to Metropolitan Herman of January
2 27 of '07 --

3 MR. BACH: '06.

4 THE COURT: 06? I thought it was '07.

5 MR. BACH: I think it is -- Exhibit 4. Oh, right.

6 It is '07. I'm sorry.

7 THE COURT: That ends up -- the letter itself, that
8 ends up getting out, caught into the mainstream? I mean, out
9 of the church channels?

10 MR. BACH: No.

11 THE COURT: Never does?

12 MR. BACH: Well, it gets to a blogger, yes.

13 THE COURT: But that --

14 MR. BACH: Who was one of the people --

15 THE COURT: Well, that's -- . How mechanically
16 does that letter get to the blogger, do you know?

17 MR. BACH: Yes.

18 THE COURT: Is it a last name?

19 MR. BACH: Father Ray forwards this e-mail to every
20 recipient on the -- on the -- of the e-mail, but e-mail.

21 THE COURT: When you say "this e-mail" you're
22 referring to what?

23 MR. BACH: I'm referring to Exhibit 2. There's a
24 whole list of people, the Plaintiffs sent --

25 THE COURT: Okay. All right. Let me just track the

1 MR. BACH: The answer is no she did not.

2 THE COURT: Okay. The next communication is her e-
3 mail of November 5 of '07 to a lot of people. I haven't
4 matched it up whether it is the same 39.

5 MR. BACH: No, Judge. That's --

6 THE COURT: Then she says: "I've been advised this
7 evening that you have received a communication from Father Ray
8 Valencia." Okay. So --

9 MR. BACH: That's not the next communication.

10 THE COURT: Well --

11 MR. BACH: It goes Exhibit 2. Okay? Father Ray
12 hits reply to all these people on this and attaches Exhibit
13 4 to those same people that she sent this to, the 39 bishops
14 plus a blogger that was hidden -- hidden, the names on this
15 list.

16 THE COURT: Well, is his reply, you know, his actual
17 reply an exhibit?

18 MR. BACH: His actual reply is this -- attaching this
19 letter.

20 THE COURT: Well, okay. Well, maybe we're making
21 this more complicated than (inaudible word). I'm just going
22 off of your exhibit to that motion.

23 MR. BACH: Right.

24 THE COURT: You know, her -- first, Exhibit 2 is her
25 e-mail of October 24th. Okay. With that is not attached

1 in the course of pastoral counseling, whatever that means.
2 But assuming -- I -- I -- I do not understand, and I'm not the
3 final arbiter of this, that that would be a violation of
4 church law or procedures, particularly since Father -- I think
5 Father Karlgut made have ruled on that within the church in
6 his investigation. That was one of the complaints. That was
7 the primary complaint in his investigation, Father Karlgut,
8 was that he was sharing matters that he shouldn't have, and
9 he found there was no evidence to support any transgression.
10 Hence, I guess I could say without fear of contradiction that
11 the church's position is that was okay.

12 THE COURT: Okay. Five and six is basically --

13 MR. BACH: You're talking about the counts of the
14 third amended complaint?

15 THE COURT: Yes. Now -- that was in the
16 investigation while hiring and retention, sort of the
17 retention after the investigation of the complaint: Removal
18 of individuals violating the church's code. That aspect, any
19 comment on this aspect of violating the church's code?

20 I read something in The Wall Street Journal recently
21 about the Catholic Church Roman Catholic Church and some
22 cardinals having some problems, you know, not removing parish
23 priests and just moving them around with the Diocese and that
24 type of thing. The aspect of some code out there or, you
25 know, standard by prelate to disclose misdeeds by priests.

1 Are you aware of any -- I'm not trying to overly complicate
2 this, but.

3 MR. BACH: Judge, I think sexual abuse, which is
4 apparently the gravamen of the article or the matter is known
5 as a different animal completely from this.

6 THE COURT: I was just -- the legal mechanics of,
7 you know, some code of conduct, you know, some particular
8 legal standard.

9 MR. BACH: I am aware of no case that -- civil case,
10 that's ever applied -- and that's quite a broad statement, so
11 there may be something somewhere, but I am aware of no case
12 in which a court, a civil court has applied the church's code
13 of conduct to impose a duty of care and negligence. And I
14 would rely on the First Amendment for that.

15 THE COURT: Okay.

16 MR. BACH: But as the cases say, it's for the church
17 to promulgate and enforce it's tenets of its religion.

18 THE COURT: Yes. Nine -- let's see, eleven and
19 twelve deal with the failure to follow the rules and conduct
20 of the church. Your argument there is essentially again by
21 definition that's a church matter and even assuming it's true
22 and can be proved, a civil court can't get into that?

23 MR. BACH: Exactly.

24 THE COURT: And your argument is -- I'm looking at
25 13 and 14, your defamation counts against your clients, the

1 argument being that he being dishonest, unprofessional and a
2 thief,

3 that those are false interrogatory (sic) and, you know, that
4 the -- sending these letters to 39 -- 38 individuals being
5 members of the Metropolitan counsel, and then this -- this
6 editor of AOC (sic) News, a private worldwide web organization
7 not (inaudible word) supported; it was defamatory and
8 intentional.

9 Your legal argument is even assuming that that's the
10 case, that this is still an ecclesiastical matter, again, and
11 a civil court couldn't get in it?

12 MR. BACH: Exactly.

13 THE COURT: Okay.

14 MR. BACH: The incidental publication of this to a
15 third person doesn't transmogrify this into a secular matter.

16 THE COURT: Transmogrify? Is that a -- that's an
17 interesting verb.

18 MR. BACH: That's sort of like muckety-muck, Judge.
19 Within the same dictionary that I use.

20 THE COURT: Not a Black's Law Dictionary?

21 MR. BACH: No, it's not that. (Laughter)

22 THE COURT: All right.

23 MR. BACH: Mad-libs.

24 THE COURT: I'm getting there. I just want to --
25 15 and 16, again, are reasonable complicity about private

1 life. Same arguments basically?

2 MR. BACH: Yes.

3 THE COURT: Church -- church matters. And again she
4 initiated the, you know, the communication about this so he's
5 got some right to respond?

6 MR. BACH: Well, primarily the first. But the
7 second I'd throw in. Yes, Your Honor. But when I throw in,
8 I don't mean I don't embrace it. But if you look at 144, it
9 violated the sacrament of confession as well as the pastoral
10 counseling relationship.

11 THE COURT: As to the pastoral counseling, your
12 argument is even if that's more in the psychological realm
13 than the spiritual realm, that that still would be part of
14 ministerial type duties, even though one might label the
15 functions as I just did? You're still saying the
16 psychological part, the counseling part, is still under the
17 ecclesiastical umbrella?

18 MR. BACH: Absolutely. Unless -- unless you get into
19 a sexual abuse, which is quite a different thing.

20 THE COURT: And lastly, the point --

21 MR. BACH: And is a criminal violation.

22 THE COURT: Lastly, you know, as far as the
23 fiduciary -- breach of fiduciary duties, my understanding is,
24 you know, that simply doesn't stand as a separate count under
25 -- what is it, however you pronounce it, Vigerito (ph.) I'm

1 refused to sign this release, Your Honor. I think the release
2 brings up several issues, Your Honor. If the church was, one,
3 so convinced that they were -- this action was protected by
4 the ecclesiastical abstention doctrine, why have a release
5 prepared, Your Honor? Offering the parishioner to sign this
6 release and then we'll resolve it. Your Honor, I think that
7 -- you know, in any argument --

8 THE COURT: I would suspect the reason might be to
9 avoid what we're doing here and the cost of it, but be that
10 as it may, I understand. I understand your argument. Your
11 Honor, it's a typical civil-like looking (sic) release.

12 MR. GILMAN: Well, there you go, Your Honor. It's
13 a civil-type looking (sic) release because I think that when
14 there is pastoral misconduct of this nature, Your Honor, where
15 it's not intra-church, the people who are the victims of that
16 misconduct are certainly entitled to seek relief from the
17 civil court, Your Honor. And the ecclesiastical abstention
18 doctrine and the case law that comes along with it, doesn't
19 protect the church, Your Honor. I mean, I've come up with a
20 few analogies in my mind, Your Honor. One analogy is Mrs.
21 Koumen -- Father Ray gets in his car after having a few
22 drinks, and if the church had a policy that he wasn't allowed
23 to have a few drinks and drive, but he has an accident on the
24 way back to the church, does that become church doctrine and
25 protected by the --

1 THE COURT: I certainly don't have a problem with
2 that one, Counsel. I've had a few of those in my day with
3 clergy when I sat up in the District Court for 16 years and
4 heard thousands of drunk driving cases. We had a few clergy.
5 But I understand. I didn't apply the ecclesiastical doctrine
6 I can assure you.

7 MR. GILMAN: And Your Honor that's my point. I
8 mean, in part this case, again, going back to the facts, is --
9 there's multiple layers to Mrs. Koumentakos, the Plaintiff and
10 Father Ray. It's not simply his conduct as a priest, Your
11 Honor. And to excuse what he did because in part he's a
12 priest is not what the ecclesiastical abstention doctrine was
13 put in place for, Your Honor. Father Ray disclosed
14 information similar to what he disclosed in this letter to the
15 board of directors of the St. Matthew House, Your Honor.
16 Again, he's Father Ray when he's there because that's his
17 title. But that certainly I don't believe, Your Honor, in any
18 way, shape or form, through any of our discovery we find, I
19 don't think anybody's going to produce anything that shows
20 while he's running St. Matthew House he's entitled to the
21 benefits of and protections of priesthood. He can go ahead
22 and say and do whatever he wants and then hide behind the
23 church's policies and procedure. I just don't think it's
24 that simple, Your Honor.

25 THE COURT: Well, you certainly have a stronger

1 rate I would find that by virtue of the Plaintiff's having
2 asked for this investigation in the church hierarchy, and my
3 tentative finding that that's where it stays and we can't, the
4 civil courts, cannot get into that, you know, his response
5 since they brought that would be analogous to an absolute
6 privilege such as we see in many situations in judicial
7 proceedings. In other words, making the analogy in someone
8 filing criminal charges or parents making complaints, say, to
9 the school system. Where the back and forth of that, the
10 initiation of the original allegation, let's say, by a parent
11 in the school system situation, basically is an absolute
12 privilege. But on the other hand, let's say a teacher who is
13 a target of that, as I understand it, would have a privilege
14 back or in the context of that. You know, and it's basically
15 an absolute privilege. You know, there may be some qualified
16 privilege there, you know, et cetera. In other words, if this
17 was a shouting match between the Plaintiff and the Father on
18 the street or what have you -- you know, he wasn't a priest.
19 Let's say, I don't know, let's say he was a psychologist or
20 something, whatever. He just decides to publish this. That
21 would perhaps be a different ball game. But where the
22 Plaintiffs here initially are asking a church governing body
23 to make an adjudication of such sacred things as, you know,
24 confession and violation of confession and so forth, is a very
25 -- you know, in the course of Western and I suspect Eastern

1 history is looked at as a very sacred privilege, et cetera.
2 It's not something that one, generally speaking, would want
3 to encourage in any way or see violated, et cetera. But on
4 the other hand, if one launches allegations sayings the Father
5 did this in the course of his pastoral or counseling mission,
6 et cetera, and that, as I look at the facts that I have before
7 me in this case, and one is dissatisfied with what the church
8 governing body does, and one brings that to the attention of
9 some 39 people affiliated with the church, the Father takes
10 the same communication that was originally made within the
11 context of the church investigation, the initial church
12 investigation and communicates it back to the same 39 people
13 who are affiliated with the church after their allegations,
14 et cetera, it seems to me that that not only still within the
15 realm of church business and the determination as to whether
16 the priest violated his duties in confession, religious
17 duties, et cetera, but he -- there would be because that's the
18 tribunal. Religious it may be, but that's the tribunal that
19 the accuser, the initial accuser is using, that he has a
20 privilege to communicate back in order to defend himself.
21 Anyway, that would basically be my tentative ruling.

22 As to any aspects of this that deal with the
23 termination of employment, at this point I do not find that
24 and I would -- and I'm not sure that that's really the
25 gravamen of your complaint, of your motion to dismiss anyway.

1 is that insofar -- if I'm right, is as far as the counts
2 alleged -- counts against Father Ray in his capacity as a
3 parish priest and the parish, they are -- the motion is
4 granted?

5 THE COURT: I'm saying that on the record,
6 tentatively, that's what I'm saying. I am not adopting that
7 as a final decision. I may end up adopting it word for word
8 as my final decision. I'm going to wait to hear these other
9 arguments. And I may wait to see how discovery fleshes out
10 on the rest of this before I put my impermator, to use a
11 religious term, on what I just said here involving your
12 motion. But I want to get my thought -- I'm doing this
13 somewhat to capture my thoughts on the record at this point
14 having heard the first motion, et cetera. Okay. So.

15 MR. BACH: With respect, I haven't heard -- with
16 respect to the claims against the negligence claims, the
17 negligent retention, negligent hiring, negligent supervision,
18 you know, I submit they'd fall right within what you're
19 saying, but I haven't heard you address those, what your
20 position is on those.

21 THE COURT: Well, I'm going to -- well, let me ask
22 you. You're saying, if I understand it, there's the -- the
23 parish itself, having been involved in -- we're talking about
24 now, again, I'm trying to differentiate here from the housing
25 development and the executive directorship and so forth, which

TRANSCRIPT EXCERPTS

2/12/09

IN THE CIRCUIT COURT FOR HOWARD COUNTY, MARYLAND
KRISTINE P. KOUMENTAKOS, et al.,

Plaintiffs

Civil Docket

vs.

Case No. 13-C-08-073089

METROPOLITAN HERMAN, et al.,

Defendants

/

OFFICIAL TRANSCRIPT OF PROCEEDINGS

MOTIONS
VOLUME II

Ellicott City, Maryland
Thursday, February 12, 2009

BEFORE: THE HONORABLE LOUIS A. BECKER III

APPEARANCES:

For the Plaintiffs:

CHARLES GILMAN, ESQ.
SLOAN L. FISH, ESQ.

For the Defendants:

BARRY BACH, ESQ.
CHRISTINA BOLMARCICH, ESQ.
DANIEL BURKE, ESQ.
MICHAEL McAULIFFE, ESQ.
DANIEL SHEA, ESQ.

Reported by R. Bass and C. Cisse, Official Court Reporters

Transcribed from digital audio recording by:

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Official Court Reporter
Circuit Court for Howard County
Ellicott City, Maryland 21043
410-336-6553

1 that's -- that's going to overcome that as far as the priestly
2 counseling and spiritual aspects of all that. Okay? And I
3 didn't make that up. Our founding fathers made that up, and our
4 courts have been very, very strict about civil courts not
5 getting into that.

6 Now this whole employment thing is, you know, is a
7 vastly different thing in my judgment at this point. The other
8 question I have in trying to ferret it out somewhat, you know,
9 is perhaps is there some overlap, you know, vis a vis a mention
10 in -- well, I don't know. There was a mention in that let -- in
11 the letter of the Father, you know, about some mention of the
12 employment termination --

13 MR. BACH: There's no complaint --

14 THE COURT: -- in the letter back to the Metropolitan
15 and the investigation. And I just haven't looked at that, you
16 know. I haven't looked at that closely enough to see whether
17 that would that keep the ecclesiastical business open a little
18 bit, quite frankly. That's kind of where my thinking is on it.

19 I think the fairer thing to do, the way this is
20 heading this that pick up probably with Mrs. Koumentakos, you
21 know, at a later date, have me hear all of that. You guys can
22 take, you know, your last arguments on the ecclesiastical
23 motions to dismiss, and I either decide that at that point,
24 allow further discovery on that issue, not allow -- you know,
25 make a ruling on that, but then decide the, you know, the

1 employment aspects that we're dealing with here.

2 MR. BACH: Judge, I was thinking that the posture of
3 the case depends on -- the posture of the case, in large part,
4 depends on what you might do with this, it seems to me. And
5 I'll leave it at that.

6 THE COURT: Well, it may.

7 MR. BACH: I'm not arguing it.

8 THE COURT: I like to put things in context. You
9 know, the understanding was we're going to do this. We're
10 backed up on it. I think that, you know, it's late, we got
11 another witness here --

12 MR. BACH: We'll, I don't want to --

13 THE COURT: Well, I know. I understand. And I know
14 you guys have been tied up here, and I'm not sure. So I think
15 that's probably where we're heading, is that we'll do one more
16 witness. That's what I'm hearing. Then we'll have to pick up
17 with Mrs. Koumentakos. We'll come back and we'll, you know, you
18 can do some final argument on the ecclesiastical and where we
19 are, whether there's overlap from the employment that affects
20 the ecclesiastical side of this, and whether we do more
21 discovery, I grant the motion to dismiss, grant some summary
22 judgments or deny them, and, you know, or -- you know, do it by
23 written motion at that point, by written order or something at
24 that point.

25 MR. BACH: All right. Well, I'm going to sit down.