

FIRST AMENDMENT - FREE EXERCISE CLAUSE - CLERIC WHO ENGAGED IN SEXUAL ACTS WHILE PROVIDING PASTORAL COUNSELING TO A PARISHIONER CAN BE HELD LIABLE FOR BREACH OF FIDUCIARY DUTY - *F.G. v. MacDonell*, 150 N.J. 550, 696 A.2d 697 (1997).

The Supreme Court of New Jersey recently held that a claim of breach of a fiduciary duty could be maintained against a cleric for sexual misconduct during the course of counseling a parishioner. *See F.G. v. MacDonell*, 150 N.J. 550, 696 A.2d 697 (1997). In so holding, the court reasoned that First Amendment protection does not extend to the inappropriate actions of clergymen entrusted with the counseling of parishioners. *See id.* at 561, 696 A.2d at 702-03. The court concluded that a fiduciary duty, instead of a claim for clergy malpractice, could be established without entangling the state in the free exercise of religion. *See id.* at 563, 696 A.2d at 703. The court's holding enables parishioners to seek redress against their clergymen who violate this relationship.

The plaintiff, F.G., was a parishioner at All Saints Episcopal Church in Bergenfield, New Jersey. *See id.* at 556, 696 A.2d at 700. In April of 1992, F.G. sought counseling from the defendant, Reverend Alex MacDonell. *See id.* Defendant MacDonell was the rector at All Saints Church and St. Luke's Episcopal Church in Haworth, New Jersey. ("St. Luke's"). *See id.* Reverend Fletcher Harper, the assistant rector at both of these churches, was also named as a defendant. *See id.* F.G. alleged that during the course of a counseling session, the married Reverend MacDonell preyed upon her vulnerability and seduced her into a sexual relationship. *See id.* Allegedly, this affair lasted until the end of 1993. *See id.* Although plaintiff's complaint did not divulge explicit details regarding their affair, it apparently did not include sexual intercourse. *See id.*

On March 31, 1994, F.G. met with Harper to discuss what had transpired between her and MacDonell. *See id.* at 557, 696 A.2d at 700-01. Harper was aware that F.G. was receiving treatment from a psychiatric hospital and had tried to commit suicide only five days before meeting Harper. *See id.* at 557, 696 A.2d at 701. Without F.G.'s consent, Harper revealed F.G.'s identity and her inappropriate sexual relationship with MacDonell in a sermon delivered at Saint Luke's on April 17, 1994. *See id.* In her complaint, F.G. alleged that Harper painted an untrue picture of the nature of the relationship and twisted several of the facts to the detriment of F.G.'s reputation. *See id.* at 558, 696 A.2d at 701.

Plaintiff brought suit against both MacDonell and Harper alleging several causes of action. *See id.* at 556-57, 696 A.2d at 700-01. In her complaint, F.G. sought recovery for "clergy malpractice." *See id.* Further, F.G. alleged that by engaging in a sexual relationship, Reverend MacDonell had violated

their “special relationship” and that he “failed to exercise the degree of skill, care and diligence which is exercised by the average qualified pastoral counselor provider.” *Id.* at 556-57, 696 A.2d at 700.

In addition, F.G. sought recovery from MacDonell for claims for negligent infliction of emotional distress and a breach of fiduciary duty. *See id.* F.G. also claimed that Harper breached a duty of care by revealing her identity and the details surrounding her relationship with MacDonell. *See id.* at 557, 696 A.2d at 700. Similarly, plaintiff sued Harper for a breach of her privacy, negligent misrepresentation, negligent infliction of emotional distress, defamation, and depiction in a false light, and for the breach of a fiduciary duty which he owed her. *See id.* at 557-58, 696 A.2d at 700-01.

F.G. brought suit in the Superior Court of New Jersey. *See id.* at 550, 696 A.2d at 697. The Superior Court dismissed all of the claims against MacDonell as well as F.G.’s claim of clergy malpractice and breach of fiduciary duty against Harper. *See id.* at 555, 696 A.2d at 700.

Plaintiff then appealed the dismissals to the appellate division, which reversed and remanded the matter to the law division so that the plaintiff could attempt to prove her claims against the defendants. *See id.* (citing *F.G. v. MacDonell*, 291 N.J. Super. 262, 677 A.2d 258 (1996)). From this decision, MacDonell and Harper filed a motion for leave to appeal, which the Supreme Court of New Jersey granted. *See id.* (citing *F.G. v. MacDonell*, 146 N.J. 562, 683 A.2d 1159 (1996)).

On appeal, the Supreme Court of New Jersey found that the facts of the case presented a viable argument for breach of fiduciary duty could be established against a member of the clergy without running afoul of the Free Exercise Clause of the First Amendment. *See id.*

Writing for the majority, Justice Pollock pronounced that the threshold matter was whether the Free Exercise Clause of the United States Constitution protects a cleric from civil liability for a claim of sexual misconduct with a parishioner who has consulted him for counseling. *See id.* at 558, 696 A.2d at 701. The majority determined that the Constitution prohibited courts from becoming involved in questions surrounding the policies and doctrines of a certain religion, but did not prohibit courts from adjudicating religious disputes. *See id.* at 559, 696 A.2d at 701. As such, the majority opined that a court may not make a determination as to the validity of a religious belief, *see id.* at 559, 696 A.2d at 702 (citing *United States v. Ballard*, 322 U.S. 78 (1944)), but may apply neutral principles of law to a dispute, so long as that dispute is not based on religious doctrine. *See id.* at 559, 696 A.2d at 702 (quoting *Elmora Hebrew Ctr. Inc. v. Fishman*, 125 N.J. 404, 413, 414-15, 593 A.2d 725, 725 (1991) and *Welter v. Seton Hall Univ.*, 128 N.J. 279, 293, 608 A.2d 606 (1992)).

The majority then reviewed other state court decisions which had permitted a civil suit against a clergyman for the effects of purely secular conduct as re-

lating to a third party, including intentional torts. *See id.* at 560, 696 A.2d at 701 (citations omitted). The majority distinguished a cleric's purely secular behavior from that which arises from ecclesiastical matters, finding that a claim could be sustained based on the former. *See id.* (citations omitted). Justice Pollock also reviewed several decisions where a cleric was sued for intentional torts, like fraud, sexual assault, and defamation. *See id.* (citations omitted). After reviewing those decisions, Justice Pollock concluded that courts have the jurisdiction to resolve claims against clerics for "sexually inappropriate conduct in the course of pastoral counseling," without implicating the First Amendment. *Id.* at 561, 696 A.2d at 703.

Turning to the facts presented on the record, the court noted that both MacDonell and Harper testified that Episcopal teachings did not condone a sexual relationship between a married pastor and an unmarried parishioner. *See id.* at 560-61, 696 A.2d at 702. The court also noted that two other Episcopal officials, Bishop John Spong of the Episcopal Archdiocese of Newark, and Reverend Franklin Vilas, the chairperson of the Standard Commission on Clergy Ethics of the Diocese of Newark, supported the defendants' testimony that the Episcopal church does not sanction improper sexual conduct by its rectors. *See id.* at 561, 696 A.2d at 702. Additionally, the court proffered that MacDonell's conduct was not an expression of a sincerely held Episcopalian belief, but instead was an "egregious violation of the trust and confidence that F.G. reposed in him." *Id.* Therefore, the court held that the First Amendment could not act as a shield for members of the clergy who have committed sexual misconduct in the course of counseling a parishioner. *See id.* at 561, 696 A.2d at 702-03.

Next, Justice Pollock addressed the concern that permitting suits against clergymen would impermissibly entangle church and state in violation of the Free Exercise Clause. *See id.* at 561, 696 A.2d at 703. The majority explained that the facts of the present case and the issues surrounding it were matters of first impression in New Jersey. *See id.* Furthermore, the court noted that the tort of clergy malpractice had not yet been recognized in any court in the United States. *See id.* The majority commented that a claim of clergy malpractice required the courts to define a standard of care. *See id.* The majority opined that this would lead to haphazard results considering the wide array of diverse religions and beliefs. *See id.* (citing *Strock v. Pressnell*, 527 N.E.2d 1235, 1239 (Ohio 1988)). The court warned that this would mandate courts to define the beliefs of a certain religion and determine whether the cleric at issue acted in accordance with these court-determined beliefs. *See id.* (citations omitted). However, the court concluded that recognizing the plaintiff's claim for breach of fiduciary duty, instead of clergy malpractice, would not violate the Free Exercise Clause. *See id.* at 563, 696 A.2d at 703.

Focusing on this distinction, the majority stated that a fiduciary duty arises when one party places trust and confidence with another who is in a superior

position. *See id.* at 563, 696 A.2d at 703-04. The majority perceived that a fiduciary relationship arises when “one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship.” *Id.*, 696 A.2d at 704 (citations omitted). Therefore, the court added, a fiduciary owes to the dependant party a duty of care and a duty to exercise reasonable skill. *See id.* at 564, 696 A.2d at 704 (citing RESTATEMENT (SECOND) OF TRUSTS sections 170, 174 (1959)). As such, the justice asserted that any fiduciary is liable for a breach of the duties which are inherent in the fiduciary relationship. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 874 (1979)).

Justice Pollock then focused on the delicate nature of the relationship between a parishioner and a pastor. *See id.* The justice stressed that parishioners often find comfort in their religious beliefs, and seek counseling from their pastors in times of need. *See id.* The court reasoned that a pastor who undertakes the responsibility of counseling a parishioner realizes that he undertakes a fiduciary duty to his parishioner under these circumstances. *See id.* As such, the court determined that a clergyman knows or should know of the trust given by the parishioner and of his dominant position to the parishioner. *See id.* In support of this, the court offered several cases from other state courts which have held that a clergyman can be held liable for breach of a fiduciary duty without violating the First Amendment. *See id.* at 564-65, 696 A.2d at 704 (citations omitted). Further, the majority held that a claim for a breach of fiduciary duty, as compared to a claim of clergy malpractice, does not require the court to define a relevant standard of care and a breach thereof. *See id.* at 565, 696 A.2d at 704. Justice Pollock articulated that to establish a fiduciary duty, a plaintiff need only prove that she trusted the pastor from whom she sought counseling. *See id.* The majority commented that their holding sought only to protect the defenseless by offering them a source of recovery and redress. *See id.*, 696 A.2d at 705. On the coattails of this analysis, the court permitted F.G.’s claim against MacDonell for negligent infliction of emotional distress. *See id.* at 566, 696 A.2d at 705.

Next, the court addressed the plaintiff’s claims against Harper. *See id.* The majority commented that the plaintiff’s allegations were based upon the public disclosure of the information which she had entrusted to Harper. *See id.* The court expressed concern that evaluating Harper’s letters and sermons at issue would impermissibly entangle the courts in religious doctrine. *See id.* at 567, 696 A.2d at 705. The majority, however, suggested that if the trial court could determine, in accordance with neutral principles, whether or not these materials constituted a breach Harper’s fiduciary duty to F.G., then F.G.’s suit against Harper could proceed. *See id.* at 566-67, 696 A.2d at 705 (citing *Elmora Hebrew Ctr. v. Fishman*, 125 N.J. 404, 414 (1991)). The court thereby instructed the trial court to conduct a hearing to determine this particular factual issue. *See id.* at 567, 696 A.2d at 705.

In conclusion, the court held that F.G. could maintain her causes of action

against MacDonell for breach of fiduciary duty and negligent infliction of emotional distress. *See id.* Additionally, the court held that plaintiff's claim against Harper could continue depending on the trial court's determination at the end of the *Elmora* hearing. *See id.*

Justice O'Hern, joined by Justice Garibaldi, dissented from the opinion. *See id.* at 567, 696 A.2d at 705 (O'Hern, J., dissenting). Justice O'Hern believed that the majority had misapplied First Amendment principles in permitting F.G. to sue a cleric for breach of a fiduciary duty. *See id.* The dissent refuted the idea that F.G. should be allowed to sue MacDonell for conduct that would not be tortious if he had been a layperson. *See id.* at 567, 696 A.2d at 706 (O'Hern, J., dissenting). Although Justice O'Hern emphasized that a religious cloak would not protect ministers, rabbis or priests that commit criminal offenses, the dissent believed that clergymen should only be held liable when their conduct would be an offense for everyone in our society. *See id.* at 568, 696 A.2d at 706 (O'Hern, J., dissenting). Therefore, the dissent criticized the majority's determination that, although MacDonell's conduct would have been neither a crime nor a tort had MacDonell been a neighbor in whom F.G. sought comfort, MacDonell nonetheless could be liable for a breach of duty. *See id.*

The dissent warned that assigning a different code of conduct for clergymen would impermissibly entangle church and state in violation of the First Amendment. *See id.* at 569, 696 A.2d at 706 (O'Hern, J., dissenting). Justice O'Hern suggested that the majority's decision was erroneous because the holding created civil liability based solely on Episcopalian tenets. *See id.* Furthermore, the justice stressed that creating the tort of clergy malpractice would impose liability for conduct that is "outside the scope of other torts." *Id.* at 570, 696 A.2d at 707 (O'Hern, J., dissenting) (citing *Strock v. Pressnell*, 527 N.E.2d 1235, 1239 (Ohio 1988)).

Justice O'Hern also disputed the alleged difference between a claim for clergy malpractice and a breach of fiduciary duty. *See id.* at 571, 696 A.2d at 708 (O'Hern, J., dissenting). The justice interpreted a breach of fiduciary duty to be "simply an elliptical way to state a clergy malpractice claim." *Id.* (quoting *Dausch v. Rykse*, 52 F.3d 1425, 1428 (7th Cir. 1994)). The dissent asserted that even holding clerics to a fiduciary duty would invariably permit courts to define a standard of care dependent on the faith of the accused. *See id.* at 572, 696 A.2d at 708 (quoting *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995)).

Next, Justice O'Hern discussed traditional notions of the separation of church and state. *See id.* at 572-73, 696 A.2d at 708 (O'Hern, J., dissenting). The dissent noted the significance attached to this separation by the Founders of our nation as a result of the Reformation. *See id.* at 572, 696 A.2d at 708 (O'Hern, J., dissenting). The justice further articulated that from Roger Williams, the "Founders learned that state control of religion corrupted faith." *Id.*

at 573, 696 A.2d at 708 (quoting Arlin M. Adams and Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1562 (1989)). The justice then posited that the behavior at issue was so bad that it caused the court to mistakenly arrive at its decision. *See id.*

Justice O'Hern also analogized the majority's holding to the current debate concerning a public official's sexual conduct. *See id.* By allowing this claim to proceed against the defendants, the dissent warned that the majority's holding would fly in the face of long standing legal traditions upon which our country was built. *See id.*, 696 A.2d at 708-09 (O'Hern, J., dissenting). Finally, Justice O'Hern concluded by voicing his concern that the majority's holding would create a "slippery slope" eroding the protections afforded by the Free Exercise Clause of the First Amendment. *See id.* at 574, 696 A.2d at 709.

Analysis

In *F.G. v. MacDonell*, the New Jersey Supreme Court permitted a parishioner to sue her clergyman who induced her into a sexual relationship during the course of pastoral counseling. *See id.* at 566, 696 A.2d at 705. The court declined to create the tort of clergy malpractice, fearing that it would impermissibly entangle the state and the courts in a manner that would violate the Free Exercise Clause. *See id.* at 562-63, 696 A.2d at 703. However, by permitting the plaintiff to sue the cleric for a breach of a fiduciary duty, the court devised an avenue for redress to parishioners who have been taken victimized.

The dissent, however, argued that it would be unfair to allow a clergyman to be sued for acts which would not be tortious if he or she were a layperson. *See id.* at 574, 696 A.2d at 709. Unfortunately, the dissent failed to perceive the tangible reality that clergymen are always held to a higher standard in our society. They are afforded greater respect, honor, and reverence because they are, in fact, men of faith. As men representing their respective religious beliefs, their parishioners often turn to them in times of great need. To condone the abuse of this privilege and permit clerics to prey upon the weak and defenseless would be unconscionable.

The First Amendment's Free Exercise Clause should not shield clergymen for their sexual indiscretions. Trust is an inherent part of the clergyman's relationship with his parishioner. Parishioners need to be able to seek help, comfort and support from their cleric without the fear that they will become a victim. The New Jersey Supreme Court's holding sends a clear message to clergymen across the state - religious cloth will not shield clergy from the reach of the law. No longer will clergymen be able to hide behind the Free Exercise Clause; instead, clergymen will be held accountable for their actions which violate the sacred trust between a cleric and his parishioner.

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