SUPREME COURT NO. 21-1275
POLK COUNTY DISTRICT COURT NO. LACL141344

IN THE SUPREME COURT OF IOWA

Phyllis Konchar,

Plaintiff-Appellant,

v.

Reverend Joseph Pins, St. Joseph's Church of Des Moines, and the Roman Catholic Diocese of Des Moines,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE SARAH CRANE
HONORABLE COLEMAN MCALLISTER

FINAL BRIEF OF APPELLANT

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3 *Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts* § 7:4, at 61 (4th ed. 2008).

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it presents a substantial question of law and substantial issues of first impression. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

A. Nature of the Case

In this appeal, the Court is asked to decide whether the trial court erred in allowing evidence regarding reputation for which proper foundation was not laid and which was unrelated to the character traits at issue. The Court is also asked to decide whether the district court properly granted summary judgment in favor of Defendants in regard to Plaintiff's defamation claim as it relates to the "two prior pastors'" statement and Plaintiff's contract claim. Finally, this Court is asked to decide whether the district court properly denied Plaintiff's motion to compel regarding Defendants' communications with their attorney Frank Harty.

B. Procedural History

Plaintiff Phyllis Konchar ("Konchar") was hired as the Principal of the St. Joseph's School in Pleasant Hill, Iowa on June 30, 1999 and was terminated on March 9, 2018. App. V.I 1702 (Day 2 Tr. 12:7-11); App. V.III 0013 (Ex. 1-a AMD). On May 29, 2018, Konchar sued her former employer,

Reverend Joseph Pins ("Rev. Pins"); St. Joseph's Church of Des Moines ("St. Joseph's"); and the Roman Catholic Diocese of Des Moines ("The Diocese"). (Petition). Konchar's claims were for defamation, breach of contract, and fraud. App. V.I 1365 (Petition).

During discovery, Konchar filed a motion to compel communications between Defendants and Frank Harty. App. V.I 0938 (Konchar Mot. to Compel). Defendants resisted Konchar's motion. App. V.I 0943 (Defendants' Resistance to Konchar's Mot. to Compel). The district court denied Konchar's motion on March 9, 2020. App. V.I 1023 (Ruling).

On September 19, 2019, Defendants filed a motion for summary judgment on all claims. App. V.I 0013. Konchar resisted Defendants' motion for summary judgment. App. V.I 0115. On February 3, 2020, the district court granted summary judgment on Konchar's breach of contract claim. App. V.I 0890. On March 22, 2021, Defendants filed a motion for summary judgment on Konchar's defamation claims. App. V.I 1030. Konchar resisted Defendants' motion for summary judgment. App. V.I 1376. On July 21, 2021, the district court dismissed Konchar's defamation claim as it relates to the "two prior pastors" statement. App. V.I 1560.

A jury trial on Konchar's defamation claim in regard to the "pattern of conduct" statement and the "serious irregularities in the school administration

under Konchar's direction" statement began on August 2, 2021. On August 13, 2021, the jury found in favor of Defendants on both statements. App. V.I. 2657

Konchar timely filed Notice of Appeal. App. V.I 2659 (Not. Of Appeal). Thus, this appeal presents the questions of whether the trial court erred in allowing evidence regarding reputation for which proper foundation was not laid and which was unrelated to the character traits at issue and whether the district court properly granted summary judgment in favor of Defendants in regard to Plaintiff's defamation claim as it relates to the "two prior pastors'" statement and Plaintiff's contract claim. This Court is also asked to decide whether the district court properly denied Plaintiff's motion to compel regarding Defendants' communications with their attorney Frank Harty.

STATEMENT OF THE FACTS

Konchar was hired as the Principal of St. Joseph's on June 30, 1999. App. V.I 1702 (Day 2 Tr. 12:7-11). In July 2017, Rev. Pins became the Pastor at St. Joseph's. App. V.I 1707 (Day 2 Tr. 17:3-20. On November 14, 2017, four months into his tenure, Rev. Pins had issued an improvement plan to Konchar, which is the first step in the termination of a principal. App. V.I 1795-1796, 1798-1799 (Day 2 Tr. 105:15-106:15, 108:18-109:1). He had

done so based on the unsubstantiated grumblings of three disgruntled employees, one of who was well known for his "whining." App. V.I 2032 (Day 4 Tr. 110:3-22); App. V.I 2119-2135 (Day 5 Tr. 174-190); App. V.I 2139-2145 (Day 6 Tr. 10-16). Konchar had responded to the threat of her termination by sending a message to the parents of children of the school and the staff asking them to come to the upcoming Board of Education meeting to show their support for her. App. V.I 1803 (Day 2 Tr. 113:2-114:19).

On December 6, 2017, the day before the Board of Education meeting, Richard Pates, the Bishop of the Diocese of Des Moines, held a meeting in his office with Rev. Pins and Konchar. App. V.I 1805 (Day 2 Tr. 115:5-23). Rev. Pins wanted Konchar gone because she had sent the parish wide message asking for support. App. V.I 0589 (10-23-19 Plf's MSJ Appx, Pins dep. 34-35). Pates met with Rev. Pins privately just before the meeting with Konchar and told him that he was going to terminate Konchar. App. V.I 0586 (Plf's 10-23-19 MSJ Appx, Pins dep. p. 24:16-5). At the meeting, Pates made it clear that Konchar should not have gone against the priest. App. V.I 1806 (Day 2 Tr. 116). Konchar asked if she could read a statement. App. V.I 1805-1806 (Day 2 Tr. 115:24-116:12). Pates granted her request and she provided a very compelling defense of her 20-year career as principal. App. V.I 1806 (Day 2 Tr. 116:11-12); App. V. III 0110 (Tr. Ex. 24). She described in detail why

Rev. Pin's improvement plan was unwarranted. App. V. III 0110 (Tr. Ex. 24). When Rev. Pins was asked to respond he said "that's exactly why she's not fit to be principal." App. V.I 1815 (Day 2 Tr. 125:6-17). Pates then asked both parties to participate in a mediation to resolve their differences. App. V.I 1815-1816 (Day 2 Tr. 125:20-126:1). They agreed but Rev. Pins made it known he was not happy. App. V.I 2531-2532 (Court Ex. 1-AMD, Bonday dep. p. 162-163).

The "firestorm" which arose from Konchar's email to the parents, was eerily similar to an uprising which had occurred three months earlier in Perry, Iowa, at St. Patrick's School where the pastor had terminated the principal and the parish rose up in arms. App. V.IV 0023 (Court Ex. 5, Pins dep. p. 70:8-25); App. V.I 2521-2522 (Court Ex. 1AMD, Bonday dep. p. 152:17-153:7); App. V.I 0553-0554 (Plf's 10-23-19 MSJ Appx, Pates dep. p. 10:14-15:18). In Perry, Bishop Pates had met with the parishioners, overturned the pastor's decision and reinstated the principal. App. V.I 2522 (Court. Ex. 1AMD, Bonday dep. p. 153:17-24); App. V.I 0553 (Plf's 10-23-19 MSJ Appx, Pates dep. p. 12:16-13:4); App. V.IV 0087 (Court Ex. 6, Pates dep. p. 14:15-23). The Superintendent of Schools, Tracy Bonday later made it known to the Diocesan staff that the Bishop's decision had undermined the authority of the priest. App. V.I 2524 (Court Ex. 1AMD, Bonday dep. p. 155:1-22).

The mediation was conducted by Tom Green over several joint and individual sessions. App. V.I 1818, 1820 (Day 2 Tr. 128:15-22, 130:17-19). During one of the individual sessions, Mr. Green conveyed that Rev. Pins had told him he wanted to help Konchar "reach her retirement plans on her terms." App. V.I 1822-1823 (Day 2 Tr. 132:13-133:6). That statement was made part of a document called "Our Agreements," which was signed by both Fr. Pins and Konchar on February 22, 2018. App. V.III 0115 (Tr. Ex. 48). The agreement also contained a requirement that the parties keep confidential any issues that may arise between them, a concern that Rev. Pins had articulated repeatedly. App. V.III 0115 (Tr. Ex. 48); App. V.I 0589, 0631 (Plf's 10-23-19 MSJ Appx, Pins dep. p. 34-35, 205).

At the same time that the mediation was occurring, the Diocese was conducting an investigation of the issues raised by the three employees of the school. App. V.I 1825 (Day 2 Tr. 135:17-18); App. V.I 2085-2086 (Day 5 Tr. 118-119). The part-time band teacher, Jenny Gervais, had left when she was unable to hold joint band practices with another school. App. V.I 1752, 1754-1758 (Day 2 Tr. 62:6-8, 64:8-68:18). Music and instruments could not be found and Konchar had a called Traci Bonday, the School Superintendent, who also happens to have a law degree and asked for advice. App. V.I 1759-1760 (Day 2 Tr. 69:3-70:5, 70:19-2); App. V.I 2392 (Court Ex. 1AMD,

Bonday dep. p. 12:15-25). Bonday had instructed Konchar to hold the band teacher's check until the items could be located. App. V.I 1760 (Day 2 Tr. 70:6-18). When Gervais came to pick up her check, Rev. Pins had the staff provide it to her. App. V.I 1935-1937 (Day 3 Tr. 154:18-156:8). A secretary, Tanya Dunn, had also quit when she was not allowed to go on her daughter's field trip. App. V.I 1765-1766, 1768, 1774-1776 (Day 2 Tr. 75:20-76:4, 78:3-7, 84:15-85:5, 86:5-18). The other secretary in the office had scheduled a day off to take her child to the doctor for an appointment. App. V.I 1774-1775 (Day 2 Tr. 84:15-85:5). Had both been allowed to leave there would have been no staff to cover the phones. App. V.I 1774-1775 (Day 2 Tr. 84:15-85:5). The third staff member, Brent Bender, was the gym teacher who had become abusive to two boys and shamed them in an angry exchange. App. V.I 1776, 1783-1784 (Day 2 Tr. 86:19-21, 93:9-94:3). After Konchar had investigated the matter, she proposed a two-day, unpaid suspension which Rev. Pins approved. App. V.I 1784-1787, 1789 (Day 2 Tr. 94:11-96:8, 97:5-24, 99:4-6). Bender initially accepted the suspension but then filed a written complaint claiming different treatment and wanted the suspension paid rather than unpaid. App. Vol.I 1789-1790 (Day 2 Tr. 99:9-100:2); App. V.III 0515 (Tr. Ex. O-35).

The investigation the Diocese conducted was nothing less than a sham. Eileen Valdez, the Human Resources Director, interviewed the three employees. App. V.I 2105 (Day 5 Tr. 138:9-16). Valdez never interviewed Konchar. App. V.I 2103 (Day 5 Tr.136:10-11). When she was asked to explain why she would not do so she said it had not been her experience with investigations. App. V.I 2100 (Day 5 Tr. 133:23-9). In fact, in the one other investigation she had conducted, she had interviewed both the victim and the alleged harasser in a harassment complaint. App. V.I 2100 (Day 5 Tr. 133:21-24). The Konchar investigation was completed by late January 2018. App. V.I 2086 (Day 5 Tr. 119:10-12). Konchar never had an opportunity to explain her side of the events that Ms. Valdez investigated. App. V.I 2103, 2105 (Day 5 Tr. 136:10-11, 138:17-23).

On March 9, 2018, Rev. Pins asked Konchar to meet with him on the Friday that Spring break started, when the students and staff were no longer in school. App. V.I 1830 (Day 2 Tr. 140:6-20). She was presented with a letter from the Diocese explaining that the investigation had been completed and, although there was no determination that any illegal conduct had occurred, there were allegations of Iowa Blacklisting Law and the Iowa Wage Payment Collection Act. App. V.I 1831 (Day 2 Tr. 141:13-16); App. V.III 0013 (Tr. Ex. 1-A AMD). For those reasons, her contract was not going to be renewed.

App. V.I 1834 (Day 2 Tr. 144:7-11). She was also told that if she did not disclose the non-renewal of her contract she could stay until the end of the school year. App. V.I 1834 (Day 2 Tr. 144:12-16). If she did disclose the non-renewal, she would be terminated immediately. App. V.I 1834 (Day 2 Tr. 144:12-16).

That afternoon, Konchar decided that she could not simply be quiet, so she sent a message to the parents and staff simply telling them that Rev. Pins had not been renewed her contract. App. V.I 1836-1837 (Day 2 Tr. 146:14-20, 147:2-3); App. V.III 0366 (Tr. Ex. D-2). Many parents responded with support and a petition was started. App. V.I 1838 (Day 2 Tr. 148:9-14). Rev. Pins drafted a public statement but the Diocese, including counsel Frank Harty, re-wrote the statement. App. V.I 0600 (Plf's 10-23-19 MSJ Appx, Pins dep. p. 79:22-80:24). He then sent out the statement in an email to the entire parish. App. V.III 0113 (Tr. Ex. 37-A) That statement claimed that an investigation revealed "a pattern of conduct that warranted choosing not to renew Konchar's contract." App. V.III 0113 (Tr. Ex. 37-A). It also claimed that the two prior pastors had been consulted and implied that they had approved the termination. App. V.III 0113 (Tr. Ex. 37-A). In fact, neither of the two pastors was even asked whether they would approve of such an action. App. V.I 0375 (Plf's 10-23-19 MSJ Appx, Hurley depo. 34-35); App. V.I

0540 (Plf's 10-23-19 MSJ Appx, Parker depo. 19, 21). Konchar had never seen a public response by St. Joseph's to a termination before and it was her understanding that St. Joseph's did not respond publicly to termination decisions because those were confidential issues. App. V.I 1843-1844 (Day 2 Tr.153:16-21, 154:7-14). The next day, Konchar issued a response using the school-wide message system. App. V.I 1845 (Day 2 Tr. 155:12-17); App. V.III 0366 (Tr. Ex. D-2). In response, the Diocese issued a public press release in which it claimed that its investigation had revealed "serious irregularities in school administration" under Konchar's direction. App. V.III 0515 (Tr. Ex. P-11).

Throughout the investigation conducted by the Diocese, Fr. Pins did not participate. App. V.I 2133 (Day 5 Tr. 188:16-24); App. V.I 0592-0593 (Plf's 10-23-19 MSJ Appx, Pins dep. p. 49:2-50:8). He was only informed of its basic conclusions. App. V.I 0592-0593 (Plf's 10-23-19 MSJ Appx, Pins dep. p. 49-53). He did not sit on any of the interviews at all and did not speak with the legal counsel for the Diocese, Frank Harty. Pins Depo. App. V.I 0592-0593 (Plf's 10-23-19 MSJ Appx, Pins dep. p. 49-53).

In the Defendant's Fourth Motion for Summary Judgment, they argued for the second time that the statement "two former priests were consulted" was protected by the Free Exercise Clause because their determination would

require the court to interpret or decide questions of religious doctrine. The Trial Court agreed despite the presence of a genuine issue of material fact and the non-secular nature of whether the two priests were in fact consulted and whether they had in fact had approved the non-renewal of Konchar's contract. The evidence before the Trial Court demonstrated that neither one had been asked during the Diocesan investigation whether they would approve the non-renewal of Konchar's contract. App. V.I 0375 (Plf's 10-23-19 MSJ Appx, Hurley depo. 34-35); App. V.I 0540 (Plf's 10-23-19 MSJ Appx, Parker depo. 19, 21).

REPUTATION EVIDENCE

At trial the Defendants offered testimony from several former employees (Dotson, O'Connor and Carpenter) who had not lived in Des Moines or been a part of the St. Joseph's community for many years. One had left in 2007, another in 2009 and another in 2013. These, and other witnesses, were allowed to provide opinions of Ms. Konchar's reputation without any foundation evidence regarding the basis for those opinions. There was no testimony regarding what comments were actually said, how many times they had heard the comments or when the comments were made. In addition, the opinions they did provide were not related to the defamatory statement regarding "serious irregularities in school administration" but instead referred

to her "honesty", her "willingness to change" or her "management style." Several witnesses opined that Konchar had a reputation for treating some employees favorably but others would have an "X" on their back. In response to questions asking for Konchar's reputation, the witnesses would often describe instances of conduct unrelated to the question asked. Objections to this testimony on the basis of lack of foundation, relevance and reputation testimony unrelated to the character trait at issue were all overruled.

Jill Dotson. Ms. Dotson was a preschool teacher who left her position in 2007. App. V.I 2206 (Ct Ex. 3, p.10)[1] Thereafter, she had lived in Milford, Iowa and Vermillion, South Dakota since 2010 and had only kept in contact with Ms. Battani, another teacher who had left St. Joseph's in 2016. App. V.I 2218-2221 (Ct, Ex 3, p. 22—25). Ms. Dotson was asked about her knowledge of Ms. Konchar's reputation and she testified that she had "the opportunity" to discuss Ms. Konchar with other staff and members of the St. Joseph's community but was not asked how many people she had talked with, what comments were made and their frequency. She was then asked what her opinion was of Ms. Konchar's "irregularities in her management style." App. V.I 2204 (Ct, Ex 3, p. 8) Defendants did not ever explain what "management

[1] The transcript erroneously described her tenure as between 2005 and 2017 App. V.I 2202 (Ct, Ex 3, p. 6) but she later clarified that she had worked at St. Joseph's for two years, ending in 2007. App. V.I 2218, 2229 (Ct. Ex. 3 pp, 22,33).

style" had to do with "serious irregularities in school administration." When asked what those "irregularities" were, she responded that "She was a bully, she lied to staff members, lied to parents, You never know what she got—getting even with, passive aggressive." App. V.I 2205 (Id. p 9). She later was allowed to make general character statements that "…You never knew what she was going to do to get even, or what you did to upset her, or how nasty she was going to be." App. V.I 2207 (Id. p.11). She was later asked what Ms. Konchar's reputation for being dishonest and she replied bluntly "Dishonest." App. V.I 2208 (Id. p.12) In explanation, she did not describe what others had said but only specific instances of conduct which would have occurred at least ten years earlier without any evidence that those incidents were well known in the community. App. V.I 2208-2210 (Id. pp12-14) Ms. Dotson was asked whether she had an opinion regarding whether Ms. Konchar had a reputation for "blacklisting employees." App. V.I 2211 (Id. 15) No testimony was offered to substantiate that opinion. App. V.I 2211-2213 (Id. 15-17). This testimony was specifically objected to on the basis that there was insufficient foundation, that the opinions were unrelated to the character trait at issue, that the testimony was a voluntary statement and inadmissible as character evidence. App. V.I 1643-1644 (P's Objections to Defendant's Deposition Designations pp13-14); App. V.I 1686-1688 (Day 1 Tr. 4:23-6:18).

Autumn O'Connor. Ms. O'Connor was a 2nd grade teacher who taught between 2011 and 2013. App. V.I 2246 (Ct Ex 4AMD p. 8) She then moved to Alaska where she has lived ever since. App. V.I 2243 (Ct Ex 4AMD p.5, 7) She was asked whether she was aware of Konchar's reputation as principal. Her long rambling answer did not describe her reputation but instead described her speculations from their first encounters. App. V.I 2250-2252 (Ct Ex 4AMD pp. 12-14) Plaintiff's objection to the answer as not responsive, a voluntary statement and speculation was overruled. App. V.I 1639 (P's Obs p. 9); App. V.I 1678 (AMD Ruling on Depo. p.1) She was asked for "any contentious interactions" to which she responded with speculation. App. V.I 2253 (Ct. Ex. 4 p. 15) Plaintiff's objections to relevance and speculation were overruled. App. V.I 1640 (P's Obs p. 10); App. V.I 1678 (AMD Ruling on Depo. p.1) She was asked to describe any "professional differences" to which she responded with a description a conversation in which Konchar had proposed making St. Joseph's a "charter school" and someone who carried around a tape recorder to record Konchar's changed positions. App. V.I 2254-2255 (Ct. Ex. 4 pp. 16-17) Plaintiff's objections based on relevance, and Rule 405 were overruled. App. V.I 1640 (P's Obs p. 10); App. V.I 1678 (AMD Ruling on Depo. p.1) O'Connor was asked her opinion of Konchar's reputation to which responded with a statement "…[A]s

the years unfolded I became more aware of different situations that were happening that were oppressive." App. V.I 2256 (Ct. Ex. 4 p.18) Plaintiff's objections on the basis of voluntary statement, not responsive, relevance, Rule 405 and lack of foundation were overruled. App. V.I 1640 (P's Objs p. 10); App. V.I 1678 (AMD Ruling on Depo. p.1) The Plaintiff specifically pointed out that the witness's opinion was not relevant to the time period, that there was no foundation regarding her reputation at the time of the defamatory statements and that the fears supposedly expressed by others was speculation. App. V.I 1640 (P's Objs p. 10) Those objections were also overruled. App. V.I 1678 (AMD Ruling p.1) O"Connor also volunteered that several people were afraid or intimidated, did not want to speak up and were living in constant fear, anxiety and manipulation. App. V.I 2257-2258 (Ct. Ex. 4 p.19-20) These statements were not stated in the form a reputation but rather speculation by her of the state of mind of other teachers. Plaintiff's objections as to speculation were overruled. App. V.I 1640 (P's Objs. P10); App. V.I 1678 (AMD Rul. p. 1) O'Connor's testimony as to others just going along with what she said for fear of repercussions was similarly objected to and partially overruled. App. V.I 1640-1641 (P's Objs. p. 10-11); App. V.I 1678 (AMD Rul. p. 1) Ms. O'Connor was also allowed to describe the non-renewal of her contract in 2013 which was not relevant to the issues in this case

because it was not conduct upon which the Diocese or Fr. Pins based their statements. App. V.I 2260 (Ct. Ex. 4 pp.24-25); App. V.I 1641 (P's Objs. P11) The Trial Court overruled these objections as well. App. V.I 1679 (AMD Rul. p. 2) Over objections by the Plaintiff, Ms. O'Connor was also allowed to testify to hearsay statements made by Fr. Hurley. App. V.I 2264 (AMD Ct. Ex 4. p. 28); App. V.I 1641 (P's Objs. P11); App. V.I 1679 (AMD Rul. p. 2) She also testified to her personal opinion that she was just an "…off woman…not truthful and honest and she acted very jovial but was not really…and felt sadness for her…" App. V.I 2264-2265 (Ct. Ex. 4 pp.28-29) Plaintiff's objections as a voluntary statement, relevance and more prejudicial than probative were overruled. App. V.I 1641 (P's Objs. P11); App. V.I 1679 (AMD Rul. p. 2) O'Connor was also allowed to testify that she felt that Konchar "coddled" certain teachers. App. V.I 2266-2268 (Ct. Ex. 4 pp.30-32) Plaintiff's objections that the instances of conduct were not related to the character trait at issue were overruled. App. V.I 1641 (P's Objs. P11); App. V.I 1679 (AMD Rul. p. 2) Ms. O'Connor was also allowed to testify that Konchar had "very little regard for honesty and transparency…say one thing and do another." App. V.I 2269 (Ct. Ex 4. p. 33). Plaintiff's objections as to voluntary statement, Rule 405 and relevance were overruled. App. V.I 1641-1642 (P's Objs. p. 11-12); App. V.I 1679 (AMD Rul. p. 2) Despite Plaintiff's

objection of relevance, she was also allowed to testify that she felt "very attacked." App. V.I 2271 (Ct. Ex. 4 p.35); App. V.I 1642 (P's Objs. p.12); App. V.I 1679 (AMD Rul. p. 2) O'Connor was also allowed to testify to her impression of whether certain unnamed parents agreed with complaints that Konchar communicated to her. App. V.I 2272 (Ct. Ex 4 p. 36) Plaintiff's objections of hearsay and speculation were overruled. App. V.I 1642 (P's Objs. P12); App. V.I 1679 (AMD Rul. p. 2) O'Connor was allowed to testify to her opinion as to whether Konchar was honest and volunteered that she was also manipulative. App. V.I 2274 (Ct. Ex. 4 p. 38) Plaintiff's objections on the basis of Rule 405 and relevance were overruled. App. V.I 1642 (P's Objs. P12); App. V.I 1679 (AMD Rul. p. 2) Finally, O'Connor was allowed to give a long rambling commentary which ended with her comment that Konchar's leadership was "…kind of tyrrany…." App. V.I 2275-2276 (Ct. Ex 4, p. 39-40) Plaintiff's objections on the basis of a narrative, cumulative, speculation, Rule 403 and more prejudicial than probative were overruled. App. V.I 1642 (P's Objs. P12); App. V.I 1679 (AMD Rul. p. 2)

Richard Carpenter. Mr. Carpenter was a member of the St. Joseph's Board of Education for approximately two years until 2009. App. V.I 2374 (Ct. Ex 2 AMD p.39) His daughter was enrolled in the school until 2012. App. V.I 2369 (Ct. Ex 2 AMD p. 34) Mr. Carpenter moved to Kansas sometime in

2017. App. V.I 2375 (Ct. Ex 2 AMD p. 40) He testified to several former employees for whom Ms. Konchar gave references but some of those occurred in 2010-2011 and others he could not recall when they occurred. App. V.I 2354-2357, 2375-2377 (Ct. Ex 2 AMD p.19-22, 40-42). Plaintiff objected to the references as not relevant, not related to the character trait at issue especially because the witness was allowed to testify to the work performance of the employees after he hired them. App. V.I 1632 (P's Objs. p. 2); App. V.I 1679 (AMD Rul. p. 2) The references given had no relationship to any accusations of "irregularities in school administration" because these events were not known to the Defendants at the time the statements were made and did not prove that Konchar engaged in a pattern of blacklisting in 2018.

Mr. Carpenter was asked to describe Konchar's "style as an administrator when it came to the treatment of teachers." App. V.I 2362-2364 (Ct. Ex 2 AMD pp.27-29) Without any foundation required by *State v. Hobbs*, 172 N.W.2d 268, 276 (Iowa 1969) Carpenter (gave his vague speculation as to why some staff left including "dictatorship", "retaliation", "morale was low." App. V.I 2362-2364 (Ct. Ex 2 AMD pp.27-29) Plaintiff's objections on lack of foundation and relevance were overruled. App. V.I 1633 (P's Objs p. 3); App. V.I 1679 (AMD Ruling p.2) Here, Carpenter was allowed to provide a description of reputation that was not only years before Konchar's claim

arose but also without any foundation that would allow the jury to understand the basis for this opinion. Finally, he was asked what his observations of Konchar's reputation were and he responded by saying, "I think she led the school with intimidation and fear. That was her leadership style." The Plaintiff's objections on the basis of voluntary statement, not responsive to the question and relevance were overruled. App. V.I 1633 (P's Objs p. 3); App. V.I 1679 (AMD Ruling p.2)

Jenny Gervais. Ms, Gervais, the former music teacher who left in October 2017, was asked to describe Konchar's reputation. After Plaintiff's objection on lack of foundation, Gervais explained that her opinion was based upon comments from "probably about 50% of the faculty." App. V.I 1943 (Day 3 Tr. 172) Despite Plaintiff's renewed foundation objection, Gervais was allowed to testify to that "if she liked you, then things were great. But if—if you were on her bad list, she would really make your life happy there." App. V.I 1943-1944 (Day 3 Tr. 172-3) When questioned on cross examination, Gervais could only name one person who had made such a comment. App. V.I 1947 (Day 3 Tr. 176) The lack of foundation should have disallowed this testimony.

Natalie Bradley. Ms. Bradley was a teacher from 2010 to 2015 and was allowed to testify that her opinion of Ms. Konchar's reputation was for

"how she handled references of former employees." App. V.I 2567 (Day 9 Tr. 76.) Without providing any testimony consistent with the factors in Hobbs, Plaintiff's objection to lack of foundation was overruled. App. V.I 2567 (Id.)

Tanya Dunn. Ms. Dunn was allowed to testify that there was "a broad group of people who made comments about Ms. Konchar's reputation for putting "Xs" on people back, despite only being able to identify two individuals. App. V.I 1993 (Day 4 Tr. 49) Plaintiff's objections to lack of foundation and leading were overruled. App. V.I 1993-1994 (Day 4 Tr. 49-50)

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING REPUTATION EVIDENCE FOR WHICH A PROPER FOUNDATION HAD NOT BEEN LAID AND WHICH WAS UNRELATED TO THE CHARACTER TRAITS AT ISSUE.

A. Error Preservation

There was a substantial dispute as to the evidentiary question of reputation evidence which Konchar raised in her motion in limine, trial brief, and at the time of trial and which were discussed prior to submission. App. V.I 1496 (Konchar's Mot. in Limine); App. V.I 1646 (Plf's Trial Brief); App. V.I 1631 (Plaintiff's Objections to Deposition Designations); App. V.I 1686-

1688 (Tr. 4:23-6:18); App. V.I 1575 (07-23-21 Pre-Trial Hearing Transcript); App. V.I 1508 (07-21-21 Defs' Resistance to Plf's Motion in Limine).

B. Standard of Review

A trial court's decision to admit relevant evidence is reviewed for an abuse of discretion. *See Mohammed v. Otoadese,* 738 N.W.2d 628, 631 (Iowa 2007). "An abuse of discretion occurs when 'the court exercise[s] [its] discretion on grounds for reasons clearly untenable or to an extent clearly unreasonable.'" *Graber v. City of Ankeny,* 616 N.W.2d 633, 638 (Iowa 2000) (*en banc*) (*quoting Waits v. United Fire & Cas. Co.,* 572 N.W.2d 565, 569 (Iowa 1997)). Grounds or reasons are clearly untenable if they are not supported by substantial evidence or if they are based on an erroneous application of law. *Id.* "A party may claim error in ruling to admit or exclude evidence only if the error affects a substantial right of the party…" Iowa R. Evid. 5.103(a)

C. Defendants failed to lay proper foundation for reputation evidence.

"A general reputation refers to what is said of a person or place generally in the community. It cannot be proven by the statement of one or two individuals, but must be such as is generally current in the community. It does not necessarily have to be a matter of discussion, because we have repeatedly held that the best evidence of good reputation is that nothing has

ever been said or heard in the community about such a person or place. 'The best reputation is the one least talked about.'" *State ex rel. Seeburger v. Pickett*, 202 Iowa 1321, 1325, 210 N.W. 782, 783 (1927) Quoted in *State v. Scalf*, 254 Iowa 983, 989, 119 N.W.2d 868, 871 (1963)

When introducing reputation evidence as a means of proving defendant's character, strict foundation requirements must be met. *State v. Hobbs,* 172 N.W.2d 268, 272 (Iowa 1969) Several evidentiary facts must be established before a witness may testify as to what he has heard concerning a party's reputation. These include: (1) The background, occupation, residence, etc., of the character witness, (2) His familiarity and ability to identify the party whose general reputation was the subject of comment, (3) Whether there have in fact been comments concerning the party's reputation for a given trait, (4) The exact place of these comments, (5) The generality of these comments, many or few in number, (6) Whether from a limited group or class as opposed to a general cross-section of the community, (7) When and how long a period of time the comments have been made. *State v. Hobbs*, 172 N.W.2d 268, 276 (Iowa 1969) *State v. Buckner*, 214 N.W.2d 164, 167 (Iowa 1974)

In *Hobbs*, supra, this Court upheld objections to reputation evidence where the foundation for those opinions was not properly laid. In doing so the Court summarized the evidence in regard to three specific examples of

testimony and, where the party did not lay sufficient foundation as to the knowledge of the reputation, the number of comments made etc., the Court held that there was insufficient foundation for the witnesses' testimony. *Id*. at 272-274.

At trial, the Defendants repeatedly failed to establish the foundation for the opinions offered regarding Ms. Konchar's reputation. There was little to no testimony regarding the number and source of comments made by members of the communities at issue. Most importantly, there were no opinions about the character trait at issue—Ms. Konchar's ability to properly administer the school. Instead, the Defendants solicited opinions about Ms. Konchar's "honesty", her "willingness to change" or her "management style." Often when the witnesses offered opinions, they did not offer opinions but instead described instances of conduct which are unrelated to the character trait at issue. More importantly, many of the witnesses did not have relevant knowledge of Konchar's reputation at the time the defamatory statements were made. Several had left the school and the community ten or more years before the publication of those statements.

In addition, the descriptions of specific conduct must be relevant to the character trait at issue. "Only when character or a trait or character is *an operative fact determining the parties' rights and liabilities* are specific

instances of conduct a proper method of proving character." *State v. Hebeler,* No. 1-017/00-0377, 2001 Iowa App. LEXIS 363, at *23 (Iowa Ct. App. June 13, 2001). Iowa Rule of Evidence 5.405 provides the methods that can be used to prove character:

> **a. By reputation or opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into *relevant specific* instances of the person's conduct.
> **b. By specific instances of conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by *relevant* specific instances of the person's conduct.

(emphasis added) The provision in the Federal Rules of Evidence for methods of proving character is identical. See Federal Rule of Evidence 405.

Konchar does not dispute that her character was at issue. However, this does not mean Defendants were allowed to present every single negative complaint or incident about Konchar throughout her nineteen year tenure as principal at St. Joseph's school.[2] Consistent with the opinions in *Hobbs* and *Hebeler, s*upra, the Eighth Circuit has set out requirements a party must meet before testimony about specific acts is allowed: "First, [the party] must demonstrate a good faith factual basis for the incidents raised during cross-

[2] As the Court in *Klaes v Scholl,* 375 N.W. 2d 671, 676 (Iowa 1985) noted, "…while evidence of specific instances of conduct is a convincing method of proof, 'it possesses the greatest capacity to arouse prejudice to arouse prejudice, to confuse, to suppress, and to consume time.'" (quoting Fed. R. Evid. 405)

examination of the witness. Secondly, the incidents inquired about must be relevant to the character traits at issue in the case." *United States v. Monteleone,* 77 F.3d 1086, 1089-90 (8th Cir. 1996) (internal citation omitted). "To be relevant, the specific instance must make the trait more likely to exist than if there were no such evidence." *State v. Edinburgh,* No. A10-421, 2011 Minn. App. Unpub. LEXIS 609, at *9 (Minn. Ct. App. June 27, 2011). See also, e.g., *United States v. Reich,* 420 F.Supp.2d 75, 89 (E.D. N.Y. 2006) ("before allowing the prosecution to attack a defendant's credibility by asking character witnesses on cross-examination about a specific instance of conduct, the trial court should ascertain that the prosecution has a good faith belief that the act occurred, and that the incident is relevant to the character trait at issue."); *United States v. Brown,* 503 F.Supp.2d 239, 245 (D.C. Cir. 2007) ("As the incidents subject to cross-examination must relate to the character evidence raised by Defendants, the Court notes that it shall carefully assess whether the incidents about which the Government seeks to cross-examine Defendants actually demonstrate the character traits that the Government alleges."). In *Meachum v. State,* No. CACR98-449, 1999 Ark. App. LEXIS 141 (Ark Ct. App. Feb. 24, 1999), Meachum shot and killed a man but claimed it was in self-defense. Meachum attempted to introduce evidence that the victim possessed drugs at the time of his death and argued it was relevant to

the victim's violent and aggressive propensity. *Meachum,* 1999 Ark. App. LEXIS at *2-3. The Court affirmed the trial court's decision to exclude the evidence. *Id.* at *5. The Court stated that "mere possession of drugs does not prove a tendency toward aggressiveness." *Id.*

The Court in *Monteleone* also held that a party wishing to introduce the evidence of specific acts must also "possess a good faith belief that the described events are of a type 'likely to have become a matter of general knowledge, currency or reputation in the community.'" *Monteleone,* 77 F.3d at 1090, citing *United States v. Duke,* 492 F.2d 693, 696 (5th Cir. 1974). "For, if the suggested occurrences were essentially private in nature and not likely to have been known in the community at large, then the questions cannot possibly be intended 'to test the accuracy, reliability, or credibility of the reputation witness's testimony.'" *Id.*, citing *Awkard v. United States,* 352 F.2d 641, 645 (D.C. Cir. 1965). See also *United States v. Curtis,* 644 F.2d 263, 268 (3d Cir. 1981) ("during cross-examination of a reputation witness, inquiry may be made about conduct, and even about charges, which may have come to the attention of the *relevant* community.") (emphasis added).

Because the foundation for the testimony was not properly laid, the testimony was irrelevant to the character traits or statements at issue, were not temporarily relevant and were speculative, the opinion testimony, instances

of conduct and speculations testified to by Dotson, O'Connor, Carpenter, Gervais, Bradley and Dunn should have been excluded in their entirety.

The admission of this evidence was reversible error. Prejudice is presumed when error appears unless the contrary is affirmatively established. *Jones v. Iowa State Highway Commission*, 185 N.W.2d 746, 751 (Iowa 1971); *Bailey v. Chicago, Burlington & Quincy Railroad Co.*, 179 N.W.2d 560, 567 (Iowa 1970); *Bellew v. Iowa State Highway Commission*, 171 N.W.2d 284, 291 (Iowa 1969), and citations. *Vine St. Corp. v. Council Bluffs*, 220 N.W.2d 860, 863 (Iowa 1974) Here, the Plaintiff had to prove that the statement regarding serious irregularities was not true and the Defendant was offering evidence that it was. In addition, both parties were attempting to prove the reputation of the Plaintiff. Defendants were in part attempting to establish that Ms. Konchar had "blacklisted" former employees. The only basis for this contention that arose from the investigation was the unconfirmed statement by Tanya Dunn, who was not only impeached but even Fr. Pins described her as a person of "low trustworthiness." App. V.I 2123 (Day 5 Tr. 178) As a result, the Defendants were forced to prove a perception that Konchar would retaliate against employees by the unsubstantiated speculation and supposed reputation that extended back fifteen years. The cumulative effect of the testimony Dotson, O'Connor,

Carpenter in particular, as well as the others, was to destroy the Plaintiff's character in the eyes of the jury. None of that evidence should have been admitted and warrants a new trial for the Plaintiff.

II. KONCHAR WAS ENTITLED TO A JURY TRIAL ON THE MERITS OF HER DEFAMATION CLAIM AS IT RELATES TO THE "TWO PRIOR PASTORS" STATEMENT.

A. Error Preservation

Konchar preserved error on her defamation claim as it relates to the "two prior pastors" statement in her resistance to Defendants' motion for summary judgment, on which the district court ruled. App. V.I 1560 (07-21-21 Ruling).

B. Standard of Review

This Court reviews "a decision by the district court to grant summary judgment for correction of errors at law. Summary judgment is proper when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law. The burden is on the moving party to demonstrate that it is entitled to judgment as a matter of law." *Goodpaster v. Schwan's Home Serv., Inc.,* 849 N.W.2d 1, 6 (Iowa 2014) (quotations and citations omitted). In determining whether the moving party has met this burden, this Court "view[s] the record in the light most favorable to the nonmoving party. Even if facts are undisputed, summary judgment is not

proper if reasonable minds could draw from them different inferences and reach different conclusions." *Id.* (quotations and citations omitted). "The question is not a matter of weighing the credibility of the witnesses but whether the facts are sufficiently in dispute to warrant resolution by the trier fact." *Nath v. Pamida Stores Operating Co., LLC,* No. 16-0001, 2017 Iowa App. LEXIS 77, at *8 (Iowa Ct. App. Jan. 25, 2017), citing *Smidt v. Porter,* 695 N.W.2d 9, 15 (Iowa 2005).

C. The First Amendment does not prohibit Plaintiff's defamation claim as it relates to the "two prior pastors" statement.

The Court awarded the Defendants summary judgment on the Plaintiff's claim of defamation in regard to the statement that the "two prior pastors were consulted and Bishop Pates approved the decision." The Plaintiff took the position that given the context of the statement, it implied that they also approved her termination. The Court held that this portion of Plaintiffs defamation claim was barred by the Free Exercise Clause because their determination would require the court to interpret or decide questions of religious doctrine.

This Court, in *Bandstra v. Covenant Reformed Church,* 913 N.W.2d 19 (Iowa 2018) delineated the parameters of the First Amendment protections and distinguished between a negligent duty, which involved the examination of judgment calls by church elders in the exercise of their duties and those

which involved the foreseeability of their conduct which only involved a neutral principle of tort law.

Here, the District Court applied the principles in *Bandstra, but* erroneously concluded that there was no factual dispute as to whether Fr. Pins had consulted Frs. Hurley and Parker. App. V.I 1560 (07-21-21 Ruling on Defs' Mot. for Summ. J. re: defamation claim). The Court failed to distinguish between Fr. Pins' conversations with the two pastors in the fall of 2017 and the interviews held by the Diocese in January, 2018. However, in neither the conversations nor the interviews was there any evidence that the two priests approved of the non-renewal decision in 2018 nor that they were they even asked for their opinion. App. V.I 0375 (Plf's 10-23-19 MSJ Appx, Hurley depo. 34-35); App. V.I 0540 (Plf's 10-23-19 MSJ Appx, Parker depo. 18-19, 20-21); App. V.I 2033, (Day 4 Tr. 111, 176). Furthermore, neither pastor held the opinion that her contract should not have been renewed. App. V.I 0375 (Plf's 10-23-19 MSJ Appx, Hurley depo. 34-35); App. V.I 0540 (Plf's 10-23-19 MSJ Appx, Parker depo. 18-19, 20-21); App. V.I 2033, (Day 4 Tr. 111, 176).

The evidence before the District Court also established that Fr. Pins acted with actual malice had not participated in the investigation at all. He had no idea what any of the witnesses who had been interviewed had said.

Therefore, he could not have known whether Frs. Hurley and Parker had approved of the termination or not. This evidence was more than sufficient for a reasonable jury to find that Fr. Pins abused any qualified privilege because he acted with actual malice.

III. KONCHAR WAS ENTITLED TO A JURY TRIAL ON THE MERITS OF HER CONTRACT CLAIM.

A. Error Preservation

Konchar preserved error on her contract claim in her resistance to Defendants' motion for summary judgment, on which the district court ruled. App. V.I 0890 (02-03-20 Ruling).

B. Standard of Review

This Court reviews "a decision by the district court to grant summary judgment for correction of errors at law. See Brief Point II(B) above.

C. Mutual assent existed and the terms in the Building Agreements were sufficiently definite and/or certain.

In order to prevail on a breach of contract claim, a Plaintiff must show: (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach. *Iowa Mortgage Ctr.,*

L.L.C. v. Baccam, 841 N.W.2d 107, 110–11 (Iowa 2013) (quoting *Molo Oil Co. v. River City Ford Truck Sales, Inc.,* 578 N.W.2d 222, 224 (Iowa 1998)).

"For a contract to be valid, the parties must express mutual assent to the terms of the contract." *Royal Indem. Co. v. Factory Mut. Ins. Co.,* 786 N.W.2d 839, 846 (Iowa 2010). *"*[M]ode of assent is termed offer and acceptance." *Heartland Express, Inc. v. Terry,* 631 N.W.2d 260, 268 (Iowa 2001). "The test for an offer is whether it induces a reasonable belief in the recipient that the recipient can, by accepting, bind the sender." *Id.* at 268. (internal quotation marks omitted). An 'acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.'" *Heartland,* quoting Restatement (Second) of Contracts § 50. "When a court determines if the parties to a contract have expressed mutual assent to that contract the court looks to the "objective evidence" presented. *Ziskovsky v. Ziskovsky,* No. 3-1062/13-0360, 2014 Iowa App. LEXIS 17, at * 9 (Iowa Ct. App. Jan. 9, 2014), quoting *Schaer v. Webster City,* 644 N.W.2d 327, 338 (Iowa 2002).

"All contracts in writing, signed by the party to be bound or by his authorized agent or attorney, shall import a consideration." Iowa Code § 537A.2 (1981). This language establishes a presumption of consideration when the agreement sought to be enforced is in writing and signed by the party

to be bound. *Lovlie v. Plumb*, 250 N.W.2d 56, 61 (Iowa 1977) (application of Iowa Code § 537A.3 (1973) to a written and signed deed); *Sisson v. Janssen*, 244 Iowa 123, 130, 56 N.W.2d 30, 34 (1952) (application of Iowa Code § 537.2 (1950), now § 537A.2, [**8] to a sales contract); *Beh v. Van Ness*, 190 Iowa 151, 154, 180 N.W. 292, 293 (1920) (application of Iowa Code § 3069 (1920), now § 537A.2, to a promissory note). "The want or failure, in whole or part, of the consideration of a written contract may be shown as a defense. . . ." Iowa Code § 537A.3 (1981). In addition to providing the plaintiff with a presumption of consideration, the defendant who relies upon the defense of lack of consideration where there is a written contract has the burden of proving there is none. *Sisson v. Janssen*, 244 Iowa 123, 130, 56 N.W.2d 30, 34; Iowa R. App. P. 14(f)(5). *Ins. Agents, Inc. v. Abel*, 338 N.W.2d 531, 534 (Iowa Ct. App. 1983)

"Contracts that either expressly offer lifetime or permanent employment or those that a trier of fact has interpreted as offering such employment based on extrinsic evidence will be interpreted as indefinite and terminable at will *in the absence of some consideration in addition to the services to be rendered.* In addition, the question of what constitutes sufficient additional consideration must be determined on a case-by-case basis. *Kabe's Restaurant v. Kintner,* 538 N.W.2d 281, 283 (Iowa 1995) (emphasis added).

Either a benefit to a promisor or a detriment to a promisee constitutes consideration. *Doggett v. Heritage Concepts, Inc.*, 298 N.W.2d 310, 311 (Iowa 1980). *Ins. Agents, Inc. v. Abel*, 338 N.W.2d 531, 534 (Iowa Ct. App. 1983). Generally, the element of consideration ensures the promise sought to be enforced was bargained for and given in exchange for a reciprocal promise or an act. *Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 27 (Iowa 1997). *Margeson v. Artis*, 776 N.W.2d 652, 655-56 (Iowa 2009) Thus, a promise made by one party to a contract normally cannot be enforced by the other party to the contract unless the party to whom the promise was made provided some promise or performance in exchange for the promise sought to be enforced. In other words, if the promisor did not seek anything in exchange for the promise made or if the promisor sought something the law does not value as consideration, the promise made by the promisor is unenforceable due to the absence of consideration. In this way, a promise is supported by consideration, in one of two ways. First, consideration exists if the promisee, in exchange for a promise by the promisor, does or promises to do something the promisee has no legal obligation to do. See *Meincke v. Nw. Bank & Trust Co.,* 756 N.W.2d 223, 227-28 (Iowa 2008) (noting the rule that "[c]onsideration can be either a legal benefit to the promisor, or a legal detriment to promisee"). Second, consideration exists if the promisee refrains,

or promises to refrain, from doing something the promisee has a legal right to do. 3 *Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts* § 7:4, at 61 (4th ed. 2008).

"The determination that an agreement is sufficiently definite is favored. The courts will, if possible, so construe the agreement as to carry into effect the reasonable intention of the parties if that can be ascertained." 12 Am. Jur., Contracts, section 64, page 556. *Miller v. Hartford Fire Ins. Co*., 251 Iowa 665, 670, 102 N.W.2d 368, 372 (1960) A contract, to have any binding force or effect in law, must be sufficiently definite and certain in its terms to furnish a criterion whereby the damages recoverable for a breach thereof can be ascertained. *Faulkner v. Des Moines Drug Co.*, 117 Iowa 120, 122, 90 N.W. 585, 586 (1902) *Howard v. Railroad Co*., 91 Ala. 268 (8 So. 868). The terms and conditions are not sufficiently definite unless the court can determine therefrom the measure of damages in the case of a breach. *Lewis v. Minnesota Mut. Life Ins. Co.,* 240 Iowa 1249, 1258 (Iowa 1949)

Any uncertainty in the term is eliminated when the principles contained in the Restatement (Second) of Torts § 34 are considered:

> § 34 Certainty and Choice of Terms; Effect of Performance or Reliance
>
> (1) The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance.

(2) Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.

(3) Action in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed.

The term at issue in this matter is that portion of the Building Agreements which says that Rev. Pins will help Konchar "reach her plans for retirement on her terms." That term is sufficiently definite so that when it is compared to the conduct of Rev. Pins in terminating Konchar, knowing she intended to retire much later than the end of the 2017-2018 school year, it is clear that he breached the contract between them. In fact, Rev. Pins admitted that he did nothing to prevent the decision to terminate her and, in particular, said nothing to Bishop Pates to encourage him not to approve of the termination, nor did oppose it in any way. App. V.I 0591 (Plf's 10-23-19 MSJ Appx, Pins depo. 43,45) While the manner in which Rev. Pins might have helped Ms. Konchar reach her retirement plans was not specified, terminating her was clearly antithetical to helping her. By terminating Konchar, Pins undeniably breached his promise to help her reach her retirement plans on her terms.

The District Court also relied on the statement by Tom Green, the mediator, that parties did not consider the agreement a contract. App. V.I 0890

(02-03-20 Ruling on Defs' Mot for Summ J.). In doing so, the District Court looked beyond the four corners of the integrated agreement and inappropriately relied upon parole evidence. When an agreement is fully integrated, the parol-evidence rule forbids the use of extrinsic evidence introduced solely to vary, add to, or subtract from the agreement. *Whalen v. Connelly*, 545 N.W.2d 284, 290 (Iowa 1996); *Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430, 433 (Iowa 1984); *Montgomery Props. Corp. v. Econ. Forms Corp.*, 305 N.W.2d 470, 475—76 (Iowa 1981). When the parties adopt a writing or writings as the final and complete expression of their agreement, the agreement is fully integrated. *Whalen*, 545 N.W.2d at 290. Determining whether an agreement is fully integrated is a question of fact, to be determined from the totality of the evidence. *Id.* The presence of an integration clause is one factor we take into account in determining whether an agreement is fully integrated. Nevertheless, the parol-evidence rule does not prohibit the introduction of extrinsic evidence to show "the situation of the parties, . . . attendant circumstances, and the objects they were striving to attain." *Kroblin*, 347 N.W.2d at 433. See *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 85 (Iowa 2011).

For these reasons, the District Court should not have granted the Defendants summary judgment on the Plaintiff's claim for breach of contract.

IV. THE TRIAL COURT SHOULD HAVE REVIEWED *IN CAMERA* DOCUMENTS WHICH DEFENDANTS CLAIMED TO BE PRIVILEGED.

A. Error Preservation

Konchar preserved error on the issue of whether Defendants' communication to their attorney Frank Harty were discoverable in her motion to compel, on which the district court ruled. App. V.I 0938 (Motion to Compel (Corrected and Substituted); App. V.I 1023 (Mar. 9, 2020 Ruling).

B. Standard of Review

This Court reviews a ruling on a statutory evidentiary privilege for errors at law. *State v. Weeks,* No. 13-1231, 2014 Iowa App. LEXIS 993, at *5 (Iowa Ct. App. Oct. 15, 2014).

C. Konchar made a threshold showing that an *in camera* review of the documents might reveal evidence to establish the claim that the crime-fraud exception applies.

The attorney-client privilege does not apply to communications involving a client who is seeking legal advice to aid in the commission of a crime or fraud. *Iowa Supreme Court Atty. Disciplinary Bd. v. Ouderkirk,* 845 N.W.2d 31, 50 (Iowa 2014). Because the attorney-client privilege benefits the client, it is the client's intent to further a crime or fraud that must be shown. *See e.g., In re Richard Roe, Inc.,* 68 F.3d 38, 40 (2d Cir. 1995).

Although this Court has not yet done so, several other courts have

included torts in the crime-fraud exception as "a reasonable extension of the already existing law on this topic." In *Lewis v. Delta Air Lines, Inc.,* Case No. 2:14-cv-01683, 2015 U.S. Dist. LEXIS 171797 (D.C. Nev. Dec. 23, 2015), the Court discussed *Koch v. Specialized Care Services, Inc.,* 437 F. Supp. 2d 362 (D. Md. 2005) in detail. In *Koch,* the Court collected cases where the crime fraud exception had been expanded. Upon review of these cases, both courts in *Koch* and *Lewis* court concluded that cases that expand the exception to include crimes and fraud are the "better view…in light of the principle and policy underlying both the privilege and exception." *Lewis,* 2015 U.S. Dist. LEXIS 171797, at *10. The cases discussed in *Koch,* and quoted in *Lewis,* included courts within the following circuits: Second Circuit, Fourth Circuit, Sixth Circuit, Seventh Circuit, and Ninth Circuit.

The court in *Safety Today, Inc. v. Roy,* No. 2:12-cv-510, 2013 U.S. Dist. LEXIS 147765 (S.D. Ohio Oct. 11, 2013) followed *Koch* as well explaining, "For essentially the same reasons set forth in *Koch,* this Court concludes that Ohio courts have, and will continue to, analyze wrongful conduct not strictly falling into the category of either crimes or frauds on a case-by-case basis to determine if the conduct involves similar elements of malicious or injurious intent and deliberate falsehood." *Safety Today, Inc.,* 2013 U.S. Dist. LEXIS 147765, at *16.

The court in *Rambus, Inc. v. Infineon Techs. AG,* 220 F.R.D. 264 (E.D. Va. Mar. 17, 2004) also collected cases in which the exception was applied beyond crime or fraud: "The term 'crime/fraud exception,' however, is a 'bit of a misnomer,' as many courts have applied the exception to situations falling well outside of the definitions of crime or fraud." *Rambus* at *55, citing *Blanchard v. Edgemark Fin. Corp.,* 192 F.R.D. 233, 241 (N.D. Ill. 2000).

The court in *In re Sealed Case,* 676 F.2d 793, 807 (D.C Cir. April 23, 1982) went even farther and states the "[e]xception comes into play when a privileged relationship is used to further a crime, fraud, *or other fundamental misconduct*." (emphasis added).

The court in *Gates Corp. v. Crp. Indus.,* No. 1:16-cv-01145, 2018 U.S. Dist. LEXIS 242903, at *20 (D.C. Colo. Aug. 10, 2018) stated "While some piercing cases do, in fact, hinge on actual crimes or the intentional *tort* of fraud, the courts have much expanded the doctrine into less dramatic 'wrongful conduct' arenas." The *Gates Corp.* court also pointed out that the United States Supreme Court in *United States v. Zolin,* 491 U.S. 554, 570, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) commented "favorably on a uniform state laws report that listed 'a crime or a tort' as triggering exclusion."

Given the growing number of courts that have adopted the exception to include conduct outside of traditional crimes and fraud, the Iowa Supreme Court should explicitly adopt this expansion as well.

The United States Supreme Court created a two-part procedure to determine whether the crime-fraud exception applies to a communication. *U.S. v. Zolin,* 491 U.S. 554, 572, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989). In *Zolin,* the Court held that the moving party must first make a threshold showing "that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Zolin,* 491 U.S. at 572. Then, the moving party "must make the ultimate showing that the crime-fraud exception actually applies and that the privilege should be overcome." *Triple Five of Minn. V. Simon,* 213 F.R.D 324, 326 (D. Minn. 2002), citing *Zolin,* 491 U.S. at 564, 568.

A party seeking discovery of privileged communications based upon the crime-fraud exception must make a threshold showing "that the legal advice was obtained in furtherance of the fraudulent activity and was closely related to it." *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 (8th Cir. 1984); see *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986). *In re BankAmerica Corp. Sec. Litig.,* 270 F.3d 639, 642 (8th Cir. 2001) A moving party does not satisfy this threshold burden merely by

alleging that a fraud occurred and asserting that disclosure of any privileged communications may help prove the fraud. There must be a specific showing that a particular document or communication was made in furtherance of the client's alleged crime or fraud. See *Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 566 (8th Cir. 1997); *United States v. Jacobs,* 117 F.3d 82, 88 (2d Cir. 1997). Because the attorney-client privilege benefits the client, it is the client's intent to further a crime or fraud that must be shown. See, e.g., *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995). Both the attorney's intent, and the attorney's knowledge or ignorance of the client's intent, are irrelevant. See *In re Grand Jury Proceedings,* 87 F.3d 377, 381 (9th Cir. 1996); cf. *In re Grand Jury Subpoena Duces Tecum,* 731 F.2d 1032, 1041 (2d Cir. 1984).

Frank Harty, counsel of record in this action, participated in critical aspects of the conduct which formed the basis of Plaintiff's lawsuit. He was involved in the original decision for a meeting between Bishop Pates, Fr. Pins and Phyllis Konchar. He participated in the investigation and specifically interviewed one of the complainants. (App. V.1 0142-3) He participated in the decision to terminate the Plaintiff and, most importantly, he drafted the statements which were issued by Father Pins and the Diocese. App. V.I 0600, 0636 (Pins depo.79-80, 223-224). In fact, when Fr. Pins was asked about the

choice of specific language in his statement to the parish, in particular the term "philosophical differences" not only did he have difficulty explaining what was meant but attributed that word choice to Mr. Harty. App. V.I 0600, 0636 (Id.)

In April 2021, Mr. Harty withdrew as counsel so that he could testify at trial. App. V.I 1403 (04-16-21 Motion to Withdraw). Konchar then served discovery requests and subpoenaed Mr. Harty for a deposition. Defendants objected to the discovery and on April 30, 2021, Mr. Harty reappeared as counsel.

Prior to Mr. Hardy's withdrawal, Plaintiff had moved to compel the production of certain documents which were withheld by the Defendants on the grounds of attorney-client privilege. The Plaintiff argued that Mr. Hardy's participation in the proceedings, in particular his choice of wording, if not drafting of the public statements, made the attorney-client privilege inapplicable under the crime fraud exception.

The evidence of Mr. Harty's involvement in the decisions to terminate Ms. Konchar after the successful mediation, his participation in the investigation and his drafting of the press releases was a sufficient prima facie showing upon which the District Court should, at a minimum, have reviewed the documents *in camera*.

CONCLUSION

For the forgoing reasons, Konchar respectfully requests an order reversing the jury verdict and the district court's decision awarding summary judgment to the Defendants on Konchar's defamation claim in regard to the "two prior pastors" statement and her contract claim and remanding for a new trial. Konchar also respectfully requests an order reversing the district court's decision on her motion to compel.

STATEMENT OF ORAL ARGUMENT

Appellant respectfully requests oral argument.

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I hereby certify that the cost of printing this application was $0.00 and that the amount has been paid in full by the undersigned.

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