

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 REPLY BRIEF OF APPELLANT

Mark D. Sherinian
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave.
Suite 212
Des Moines, IA 50309
Telephone 515-224-2079
Facsimile 515-224-2321
E-mail: sherinianlaw@msn.com

Emily E. Wilson
SHERINIAN & HASSO LAW FIRM

111 E. Grand Ave.
Suite 212
Des Moines, IA 50309
Telephone 515-224-2079
Facsimile 515-224-2321
E-mail: ewilson@sherinianlaw.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES4

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW5

FACTUAL SUMMARY7

ARGUMENT.....7

I. THE TRIAL COURT ERRED IN ALLOWING REPUTATION EVIDENCE FOR WHICH PROPER FOUNDATION HAD NOT BEEN LAID AND WHICH WAS UNRELATED TO THE CHARACTER TRAITS AT ISSUE8

II. KONCHAR WAS ENTITLED TO A JURY TRIAL ON THE MERITS OF HER DEFAMATION CLAIM AS IT RELATES TO THE “TWO PRIOR PASTORS” STATEMENT13

III. KONCHAR WAS ENTITLED TO A JURY TRIAL ON THE METRITS OF HER CONTRACT CLAIM14

IV. THE CRIME FRAUD EXCEPTION APPLIES TO THE COMMUNICATIONS BETWEEN FRANK HARTY AND DEFENDANTS.....17

CONCLUSION.....18

COST CERTIFICATE20

CERTIFICATE OF COMPLIANCE20

TABLE OF AUTHORITIES

Iowa Supreme Court Cases

<i>Anderson v. Douglas & Lomason Co.</i> , 540 N.W.2d 277 (Iowa 1995).....	15, 16
<i>Kristerin Dev. Co. v. Granson, Inc.</i> , 394 N. W. 2d. 325 (Iowa 1986)	15, 16
<i>McGuire v. Kenefick</i> , 82 N.W. 485 (Iowa 1900).....	11
<i>State v. Buckner</i> , 214 N.W.2d 164 (Iowa 1974).....	12
<i>State v Hobbs</i> , 172 N.W. 2d 164 (Iowa 1974).....	9, 10
<i>State v. Martinez</i> , 679 N.W.2d 620 (Iowa 2004).....	12

Other Cases

<i>Das v. Rio Tinto PLC</i> , 332 F. Supp. 3d 786 (S.D.N.Y. 2018).....	16
<i>Gobin v. Globe Pub. Co</i> , 229 Kan 1 (Kan. 1980).....	12
<i>Kindig v Newman</i> , 966 N.W.2d 310 (Iowa Ct. App. 2021).....	12
<i>Pierson v. Robert Griffin Investigations</i> , 92 Nev. 605 (Nev. 1976).....	11
<i>Schiro v. Cemex</i> , 396 F. Supp. 3d 283 (S.D.N.Y. 2019)	16
<i>Shirley v. Freunscht</i> , 303 Or. 234 (Or. 1987).....	12

Court Rules

Iowa R. Evid. 5.405	12
Fed. R. Evid. 405	12

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- 1. 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.**

Authorities

State v Hobbs, 172 N.W. 2d 164 (Iowa 1974)

State v. Buckner, 214 N.W.2d 164 (Iowa 1974)

McGuire v. Kenefick, 82 N.W. 485 (Iowa 1900)

Pierson v. Robert Griffin Investigations, 92 Nev. 605 (Nev. 1976)

Kindig v Newman, 966 N.W.2d 310 (Iowa Ct. App. 2021)

Shirley v. Freunscht, 303 Or. 234 (Or. 1987)

Gobin v. Globe Pub. Co, 229 Kan 1 (Kan. 1980).

State v. Martinez, 679 N.W.2d 620 (Iowa 2004)

Iowa R. Evid. 5.405

Fed. R. Evid. 405

- 2. 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.**

3. **Whether the district court properly granted summary judgment in favor of Defendants in regard to Plaintiff's contract claim.**

Authorities

Anderson v. Douglas & Lomason Co., 540 N.W.2d 277 (Iowa 1995)

Kristerin Dev. Co. v. Granson, Inc., 394 N. W. 2d. 325 (Iowa 1986)

Das v. Rio Tinto PLC, 332 F. Supp. 3d 786 (S.D.N.Y. 2018)

Schiro v. Cemex, 396 F. Supp. 3d 283 (S.D.N.Y. 2019).

4. **Whether the district court properly denied Plaintiff's motion to compel regarding communications with Frank Harty.**

FACTUAL SUMMARY

In their Factual Summary, the Defendants have made a significant misstatement of the events and have miscited the record. At page 24 of the Defendants' Brief they contend that on March 9, 2018, Konchar "used the school's electronic communications system to publicize the details of her contract non-renewal and level accusations against Fr. Pins." (Appellee's Brief p. 24). The Defendants cite Ex D-02. In fact, the email which Ms. Konchar sent on the evening of March 9, 2018, only informed the St. Joseph's School community that she had been terminated. App. V.III 0369-0370 (Ex. D-2, p.4-5). It did not contain any accusations against Fr. Pins. Only after Fr. Pins had sent his email to the entire parish disclosing the defamatory reasons for the termination, did she send another communication responding to his accusations of inappropriate conduct. App. V.III 0366-0368 (Ex. D-2, p. 1-3).

ARGUMENT

The Defendants have painted Ms. Konchar's reputation with a broad brush using the same unsubstantiated opinions which the District Court failed to exclude without exacting disciplined foundation and without establishing critical relevance. They have downplayed the destructive opinion testimony that was admitted without justifying their lack of foundational discipline in eliciting those opinions. Most

importantly, they have not once offered any evidence to create a causal link between the old incidents of conduct with the reputation they have painted.

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.

Without critical citations to the record, the Defendants have contended that Plaintiff failed to object to the lack foundation for the reputational opinions they offered. When they have recognized that foundation objections were made, they have misrepresented the severity of those opinions which were admitted.

Defendants acknowledged that Konchar made the appropriate foundation to Richard Carpenter's reputation opinion, but claimed that he only said that "her reputation was not good at all with the faculty," (Appellee's brief 28)¹ In fact, Mr. Carpenter testified as follows:

Q. Any other opinions you formed about Mrs. Konchar's reputation?

....

A. About her reputation? Her reputation was not good at all with the faculty, and it was pretty obvious to me, when they started coming and trying to get out. Look at how many we hired from St. Joe, good quality

¹ The objection to "lack of foundation and relevance" is found in Plaintiff's Objections p. 3 and references page 29, lines 1-8 and 13-25 of Carpenter's deposition. App. V.I 1633.

people, and kind of the dictatorship, and retaliation was a factor, and scared to -- scared of administration, morale was low. And that's some of the things repeated to me not by one, but several and -- in my dealings and reference checks on these other people, and they're still there today, and I thought, you know what, they're pretty good people. And that's why we brought them to DMACC.

App. V.I 2364 (Ct Ex. 2AMD) (29:7-25). The Defendants have effectively argued that Mr. Carpenter should be able to espouse the opinion that Ms. Konchar had a reputation for creating a dictatorship, where retaliation was a factor, the staff was scared of administration and morale was low without once disclosing who heard that reputation from, how many times heard it, when and for how long he heard it or any of the specific requirements delineated in *State v Hobbs*, 172 N.W. 2d 164, 167 (Iowa 1974).

Likewise, Defendants claimed that Konchar made only a limited objections to the opinions by Autumn O'Connor, that they carried over to 2017. (Appellee's Brief p.29) In fact, when asked whether she had any opinions Konchar objected on the basis of "lack personal knowledge, foundation, speculation." Konchar also objected to the opinions which would have occurred up until 2013 because there was "no foundation that she knew of Mrs. Konchar's reputation in 2017 or that her perception carried over to that period." App. V.I 1640 (Plaintiff's objections p.10). Once again,

there was no testimony offered meeting the specific requirements of *State v Hobbs*, supra.

The Defendants also assert that Konchar opened the door regarding the reputational opinions offered by Tanya Dunn and Genny Gervais. In fact, Konchar's counsel first asked Ms. Dunn about a statement which she had made during the Diocese's investigation to Ms. Valdez. App. V.I 1988-1991 (Tr. Day 4, pp. 41-4) That testimony was elicited to show that she had expressed opinions which she could not substantiate and which the Diocese had relied upon without proper investigation. App. V.I 1989-1990 (Tr. Day 4, pp. 42-43). Ultimately, Ms Dunn admitted that her statement was based upon only one other employee. App. V.I 1989-1990 (Id.)

In regard to Ms. Gervais, the Defendants have seriously misrepresented the record. When Defendants attempted to elicit her opinion regarding Konchar's reputation during their cross examination, Plaintiff objected on foundational grounds and the District Court sustained the objection initially. App. V.I 1942-1943 (Tr. Day 3, pp171-2) Counsel then elicited testimony from Ms. Dunn claiming that she had heard about Konchar's reputation from "50% of the faculty". App. V.I 1943 (Id at 172) Despite the lack of any of the specifics required by *State v Hobbs*, the Court allowed Ms. Gervais to testify that "if you were on Konchar's bad list, she wouldn't make your life very happy." App. V.I 1944 (Id. at 173) Only after the opinion was admitted, over the foundation objection, did Kochar's counsel elicit the specific

names of the two faculty members who had supposedly made the comments. Those names included Natalie Bradley and Autumn O'Connor who had only taught at the years earlier. App. V.I 1947 (Tr. Day 3, 176-7)

The Defendants claim that evidence of Ms. Konchar's reputation is relevant regardless of when that reputation was known, citing *McGuire v. Kenefick*, 82 N.W. 485,486 (1900) (Appellee's Brief pp.33-34). Despite the quote which Defendants extracted from the McGuire opinion, that reputation "is based on all the years," the Court applied a much more nuanced standard. The Court held that the plaintiff's reputation from a community where he had not lived for seven years was inadmissible. The Court recognized the discretionary nature of the admissibility but excluded the evidence because of a lack of any connection the reputation "near the time of trial." Id. ²

Here the Trial Court made no such determination. The testimony of Dotson, O'Connor, Carpenter, all of which was objected to on foundation and relevance grounds, was admitted even though there was no testimony that anyone within the community was aware of that same reputation near the time that the defamatory

² The Defendants also cite to *Pierson v. Robert Griffin Investigations*, 92 Nev. 605, 606, 555 P.2d 843, 843 (1976) for the proposition that conduct ten years prior to the event was admissible in an action for libel. (Appellee's Brief p.38) The opinion in that case is a total of only three paragraphs, contains no description of the underlying facts and no reasoning for the court's conclusions.

statements were made. These witnesses had not been part of the St. Joseph's community for ten years.

Likewise, the Defendants have made no attempt to justify how the specific instances of conduct, which they elicited from various witnesses, were known by the community in 2018. There was no testimony that the instances of conduct testified to by Dotson, O'Connor, Carpenter and others were known to the St. Joseph's community and would have impacted her reputation. See *Kindig v Newman*, 966 N.W.2d 310, 317-18. (admission of prior instances of conduct were allowed where known by the Defendant) See also *Shirley v. Freunsch*, 303 Or. 234, 239, 735 P.2d 600, 603 (1987) ("Specific instances of plaintiff's prior business misconduct have no relevance to his reputation unless they were generally known in the business community.") Citing *See Gobin v. Globe Pub. Co*, 229 Kan 1, 620 P2d 1163 (1980).

The Defendants also argue in their brief, without citing any relevant legal authority, that the strict foundation requirements of Rule 405 should only apply to criminal prosecutions. (Appellee's Brief 39-40). Neither *State v. Buckner*, 214 N.W.2d 164, 166 (Iowa 1974) nor *State v. Martinez*, 679 N.W.2d 620, 624 (Iowa 2004) hold that such a rule applies in criminal cases because a criminal defendant is entitled to heightened protections under the Constitution. Neither Iowa Rule 5.405 nor the corresponding Rule 405 F.R.E. make such a distinction.

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

For the purpose of arguing that Konchar’s claim of defamation regarding the “two pastors were consulted” which was excluded by the District Court, the Defendants have conflated two issues—1) whether Hurley and Parker were consulted at all and 2) why they would have approved or not approved the non-renewal of Konchar’s contract. The Plaintiff does contend that the context of the statement implied that they approved of the decision to not renew her contract. But that implication is false because they were not consulted at all. That factual and legal issue did not require any entanglement with religious doctrine or decision-making.

However, the Defendants distract from this factual issue and imply that when either Father Hurley or Father Parker spoke to Ms. Valdez during their investigation they conveyed opinions consistent with the decision to not renew the contract. In fact, Fr. Hurley did not convey any such opinion according to his deposition testimony. In fact, he did not even understand that Konchar was being investigated.

Q. You didn't understand that this was an investigation of Phyllis as well?

A. I don't recall that.

Q. Did she [Valdez] ask for your opinion as to whether Phyllis should be renewed or her contract should be renewed?

A. I don't recall that.

Q. Did you provide an opinion as to whether or not Phyllis' contract should be renewed?

A. I don't recall. I don't think I did, but I don't recall.

App. V.I 0375 (Hurley depo. 34:22-35:7)

Judge McAllister agreed with the understanding that the statement was a secular determination but Judge Crane later held otherwise. She reasoned that the jury would have to determine whether the two pastors in fact approved the non-renewal decision. Given the facts of the case, there was no such jury issue presented. The only issue was whether the two priests were consulted at all.

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

The Defendants continue to rely upon Thomas Green's contradicted assertion that he did not intend the agreement to be a contract, even though he was not a party to the agreement himself and that he told the parties this. In doing so, they rely on an affidavit which they drafted and which directly contradicted Green's own sworn testimony. In his deposition, Green ultimately admitted, although reluctantly, that he had never told anyone that the Building Agreements was not a contract. His testimony, which was cited to the Court in Plaintiff's Statement of Facts ¶130 , was as follows:

Q. Did you ever tell any of the parties that this was not a legally binding document?

A. No.

Q. Did you ever tell them it wasn't a contract?

A. Did I tell them it wasn't?

Q. Yeah.

A. Did I tell them?

Q. And I'll make sure that the question is very clear. Did you tell either Father Pins or Phyllis Konchar that the agreements they were signing were not a legally binding contract?

MS. HULETT: Compound.

A. I will do the best I can to answer the question.

Q. Certainly.

A. I would never tell them they were entering a legal agreement because I don't facilitate legal agreements.

Q. I understand. You told me that earlier; and what I'm trying to ask you is, did you ever articulate the words, and I'll give you the statement, this is not a contract? Did you ever say that to them?

A. No.

MS. HULETT: Asked and answered.

Q. Your answer is no?

A. I did not tell them it was not a legal contract.

App. V.I 0344 (Green depo. 44:12-45:15)

The Defendants also rely on *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 289 (Iowa 1995) and *Kristerin Dev. Co. v. Granson, Inc.*, 394 N. W.

2d. 325, 331 for the proposition that the issue of assent should be determined by not only the words of the document but by the conduct of the parties. Neither case is applicable here. *Anderson* involved a breach of contract claim arising out of a personnel policy which contained a disclaimer. The Court held that the disclaimer language was sufficiently clear as to negate any potential contract claim. In *Kristerin*, the Court only analyzed the defendant's conduct related to the issue of delivery. Here the document was signed by both parties and each was provided a copy. Those physical acts were not in dispute.

The Defendants also claim that the language of Building Agreements document was merely aspirational. They cite two cases which analyze claims of fraud in the context of securities litigation. *Das v. Rio Tinto PLC*, 332 F. Supp. 3d 786, 806 (S.D.N.Y. 2018); *Schiro v. Cemex*, 396 F. Supp. 3d 283, 297 (S.D.N.Y. 2019). In both cases, the courts held that statements about reputation, integrity, and compliance with ethical norms were inactionable 'puffery,' meaning that they are too general to cause a reasonable investor to rely upon them. *Id.* These opinions add nothing to the issues here because they analyze claims of fraud which are subject to a much higher degree of proof.

The Defendants also argue that the phrase "I want to help you reach your retirement plans on your own terms" was merely puffery. They focus on the term "I want" when the focus should be on the phrase "help you reach your retirement

plans.” That phrase, in the context of not renewing her contract, is sufficiently definite to allow a jury to determine whether the contract was breached. See Appellants Brief pp.48-49.

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

The Defendants contend that Konchar failed to identify specific documents which she believed demonstrated Mr. Harty’s involvement in the “fraud or other misconduct” which was the subject of her claims. In fact, Konchar submitted the Defendants privilege log which specifically identified the documents which contained communications between Mr. Harty, Fr. Pins, Bishop Pates and others. App. V.II 0053 (MTC Ex C) Thirty-one of those documents were authored by Mr. Harty and were sent between March 10 and 12, 2018, the time period when the press releases and statement were being drafted. App. V.II 0065-0073 (MTC Ex C pp. 13-21.)

The Defendants contend that Konchar failed to present sufficient evidence “warranting a reasonable belief that the client obtained legal advice to further the [illegal conduct].” Appellee’s Brief p. 65. In addition to the repeated admission by Fr. Pins that Mr. Harty had drafted the language contained in his statement to the parish App. V.I 0600, 0636 (Pins depo. 79-80, 223-4), the Plaintiff submitted the various emails which the Defendants had produced (although many were redacted)

which showed communications that were circulating among the parties when the statements were being drafted. Those emails which had draft statements attached included Mr. Harty as a recipient. App. V.II 0065-0073 (MTC Ex. C pp.13-21) However, because of the redactions, it was impossible to determine which emails he sent in response to the circulating statements

Finally, the Defendants, and the Court, have attempted to limit Konchar's argument only to the fraud claim. In her motion to compel, Plaintiff specifically requested that the Court review the documents *in camera* to "determine to what extent they do or do not constitute attorney-client communications and determine whether the Defendants were engaging their legal counsel for the purpose of committing a fraud or *other wrongful conduct*. App. V.I 0941 (MTC p. 4) (emphasis added)

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.

Respectfully submitted:

/s/ Mark D. Sherinian

Mark D. Sherinian, AT0007173
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave.
Suite 212
Des Moines, IA 50309
Telephone 515-224-2079
Facsimile 515-224-2321
E-mail: sherinianlaw@msn.com

/s/ Emily E. Wilson

Emily E. Wilson, AT0013860
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave.
Suite 212
Des Moines, IA 50309
Telephone 515-224-2079
Facsimile 515-224-2321
E-mail: ewilson@sherinianlaw.com

ATTORNEYS FOR APPELLANT

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/s/ Mark D. Sherinian

Mark D. Sherinian, AT0007173
SHERINIAN & HASSO LAW FIRM
111 E. Grand Ave., Suite 212
Des Moines, IA 50309