

No. 18-1441

In the
Supreme Court of the United States

PRESBYTERIAN CHURCH U.S.A.,
Petitioner,

v.

BRIAN EDWARDS, JUDGE,
JEFFERSON CIRCUIT COURT, *et al.,*
Respondents.

**On Petition for Writ of Certiorari to the
Supreme Court of Kentucky**

**BRIEF IN OPPOSITION FOR
RESPONDENT REVEREND ERIC HOEY**

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COUNTER-STATEMENT OF THE CASE

A. Factual background

The Presbyterian Mission Agency (“PMA”) hired Reverend Eric Hoey “(Hoey) as Director of Evangelism and Church Growth in 2007. There was then a broad evangelical growth initiative that was set forth through the Presbyterian Church. The Church’s initiative was to expeditiously plant new churches throughout the United States. In 2013, Appellee and others incorporated an entity separate and apart from the Church called Presbyterian Centers for New Church Innovation, Inc. (“PCNCI”). The purpose of this was to expedite money to fund churches, most immediately in California. There has been no allegation or proof that Hoey benefited in any fashion or diverted funds. This was simply a mechanism that was started to expedite the funds for the planting of churches.

The Church issued a written warning to Hoey in 2014 in that: (1) he failed to properly manage ministers under his supervision; (2) he failed to timely inform his supervisors that he and his staff had incorporated PCNCI without authorization; and (3) he contributed to a culture of non-compliance with PMA and church policies. He was terminated on or about June 1, 2015. The Presbyterian Church (U.S.A.) (“the Church”) then through their organization and related organizations published defamatory statements concerning Hoey, said defamatory statements published via written publications and over the internet. The notification to Hoey made it clear, however, that Hoey never intended to personally benefit from the funds and that all grand funds were returned.

The subject complaint filed in the Jefferson Circuit Court alleged that he had “committed ethical violations.” The Presbyterian Church misstates that the church did not provide any information to third parties outside the denomination. This information was put on the internet and sent out in newsletters via internet and other media outlets such that would cause this to be seen and available to third parties outside the denomination.

B. Proceedings below

1. Hoey files a Complaint in the Jefferson County, Kentucky Circuit Court in response to the Church’s actions.

Hoey filed a Complaint against the Church on or about June 16, 2015 and was assigned to the Honorable Brian Edwards alleging defamation and other causes of action. The case was consolidated with that of *Roger Dermody v. Presbyterian Church U.S.A.* which was filed in Judge Judith McDonald-Burkman’s Jefferson Circuit Court. These cases were consolidated for discovery and Judge Edwards stayed litigation in the Hoey matter. The Church filed a Motion for Summary Judgment in violation of the Court’s Stay Order on or about September 1, 2015. A Motion to Lift the Stay was filed by Hoey and a time set for responsive pleadings. Written discovery requests were served and the answers received were non-responsive with only objections given. On March 17, 2016, the Court ruled and allowed litigation to proceed by ordering the discovery requests to be answered, and an additional period of time for Hoey to respond to Summary Judgment.

2. The Church appeals to the Kentucky Court of Appeals via writ of mandamus and/or prohibition.

On April 5, 2016, the Church filed a Motion for Interlocutory Relief from the Circuit Court Order. On the same date, the Church filed a Petition for Writ of Prohibition seeking relief from the Circuit Court Order. The Kentucky Court of Appeals dismissed the Appeal as premature, denied the Motion for Interlocutory Relief and the Petition for Writ of Prohibition was granted in part in that the Court of Appeals found that discovery tendered by Hoey was too broad and should be more limited in nature. The Court of Appeals ruled that limited discovery is permitted on the issue of immunity. *Rowan County v. Slogs*, 201 S.W.3d 469 (Ky. 2006). (Appendix 25).

3. The matter is appealed to the Kentucky Supreme Court who upholds the Kentucky Court of Appeals decision.

The Church appealed to the Kentucky Supreme Court which affirmed the Kentucky Court of Appeals order allowing discovery in a 4-3 vote. The Supreme Court held that the ecclesiastical abstention doctrine operates like other affirmative defenses recognized in the Commonwealth of Kentucky. The Court drew an analogy to the most commonly encountered defense of confession and avoidance, qualified governmental immunity, and aver that the ecclesiastical abstention defense is to be applied in a manner that is procedurally consistent with the application of qualified governmental immunity. *St. Joe Catholic Orphan Society v. Edwards*, 449 S.W.3d 727 (Ky. 2014).

(Appendix 6). The Court held that the trial court's continuation with discovery regarding the church's immunity would neither amount to a substantial miscarriage of justice nor fly in the face of orderly judicial administration. (Appendix 7). The Court further found that the trial court will be in the best position to control the flow of discovery. (Appendix 7). The Court acknowledged that "excessive entanglement (with church doctrine) may be a real possibility during the litigation but . . . the trial judge has adequate discretion to control discovery and the flow of evidence so that if ecclesiastical matters overtake the litigation, the case can be stopped on summary judgment or simply dismissed. *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014). (Appendix 7-8). Further the Court noted that once a trial court rules on the Church's immunity, that the order is immediately appealable. *Breathitt City Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009). (Appendix 9).

REASONS TO DENY THE PETITION

There is no compelling reason to grant the Petition as sought by the Church. The Kentucky Supreme Court and the Court of Appeals both made an appropriate finding that limited discovery may happen before a determination is made as to whether or not any claims are barred by the ecclesiastical abstention doctrine. There has been no ruling on the ecclesiastical abstention doctrine and the affirmative defense of this doctrine is still available to the Church. When there is a determination by the Jefferson Circuit Court on the ecclesiastical abstention doctrine, either party has an immediate right of appeal. Inasmuch as this is a

defamation case that falls outside of church doctrine, discovery is appropriate and there is no compelling constitutional or legal reason for this Court to review the matter.

I. The Court should deny certiorari as there is no requirement that courts immediately dismiss suits once the defendant raises the ecclesiastical abstention doctrine.

A. The opinion from the Kentucky Supreme Court is not unconstitutional as the current matter concerns more than religious doctrine.

The ecclesiastical abstention doctrine serves to prevent secular courts from becoming excessively entangled in religious affairs. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 181 (2012). The Kentucky Supreme Court properly found that Hoey's defamation claim does not foreclose all discovery in this matter. A differentiating factor to many cases cited by the Petitioner are unrelated to the present action, which is a defamation action involving published and distributed defamatory statements to the public beyond the scope of the church's congregation. The Kentucky Supreme Court acknowledged that the trial court is in the best position to control the flow of discovery, that the immunity issue is before the trial court, and discovery pertaining to that issue would not hinder a party's access to that defense. The trial judge has adequate discretion to control discovery and the flow of evidence so that if ecclesiastical matters overtake the litigation, the case

can be stopped on summary judgment or simply dismissed. Treating the ecclesiastical abstention doctrine in a manner procedurally consistent with the application of qualified governmental immunity does not violate any constitutional principles. The defamation allegations in this case do not entwine church policy in a manner that the court cannot exercise subject matter jurisdiction appropriately. Courts have jurisdiction to hear and resolve employment disputes, contract claims, tort claims and other similar matters. *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014). In *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir 1990), a former pastor's claim of a breach of an oral contract could proceed against his former church. The court acknowledged excessive entanglement may be a real possibility during the litigation but countered that the trial court has adequate discretion to control discovery and the flow of evidence so that if an ecclesiastical matter overtakes the litigation the case can be stopped on summary judgment or simply dismissed. The court found that in attempting to prove his case the Appellant in that matter would be forced to inquire into matters of ecclesiastical policy even as to his contract claim. *Minker* at 1360.

The Sixth Circuit has found that if a plaintiff has not alleged facts outside the scope of the qualified immunity such failure may preclude a plaintiff from proceeding further. *Kennedy v. Cleveland*, 797 F.2d 297 (6th Cir. 1986). The present matter involves tort claims outside of the immunity defenses discussed. There is no contradiction in the decision of the

Kentucky Supreme Court with *Bryce v. Episcopal Church in the Diocese of Colorado*, 280 F.3d 648 (10th Cir. 2002). While *Bryce* requires the question of a religious defendant's immunity be resolved at the earliest possible opportunity. The present case is in its earliest stages.

There has been no discovery taken, simply a Motion for Summary Judgment filed. As a result of their being claims other than those on strictly religious grounds and beyond that of the ministerial exception, the tort claims of Hoey require that there be discovery prior to a determination. The necessity of acquiring information and documents relative to the publication of the defamatory documents and documents and evidence relative to the truth of those matters must be determined before there can be an appropriate decision as to whether or not these completely fall within the confines of an ecclesiastical abstention doctrine. No constitutional question is raised.

The Kentucky Supreme Court fully considered the matter of *Dermody v. Presbyterian Church U.S.A.*, 530 S.W.3d 467 (Ky. Ap. 2017) and found that there is no unnecessary or irreparable harm if discovery is conducted before the trial court makes a decision regarding religious immunity. They found no conflict in the two cases. The Petitioner fails to show that there will be excessive entanglement and any constitutional harm to the church. The action was filed in 2015 and to date there has been no discovery as a result of the actions of the petitioner in this case by appealing to the Kentucky Court of Appeals, Kentucky

Supreme Court and now seeking certiorari with the United States Supreme Court.

B. Though other courts may treat the resolution of a religious defendant's immunity at the threshold there is no constitutional conflict.

The prevailing view in cases cited by the petitioner fail to show that there is a requirement that the constitution requires that the case be dismissed at its threshold. *Bryce*, 289 F.3d at 654 simply requires that the question of ecclesiastical abstention be resolved early in litigation to avoid excessive entanglement in church matters. The Kentucky Supreme Court properly allowed discovery to proceed as there are matters pled that are outside the ecclesiastical abstention doctrine.

The petitioner would advocate a simplistic approach to the question of when a religious organization's immunity is ripe for determination. They argue that once any matter related to church doctrine is raised that it would be then imperative that the religious organization's litigation be terminated without regard to the merit of underlying tort contract or other matters that exceed the affirmative defense. *Kennedy v. Cleveland*, 797 F.2d 297 (6th Cir. 1986) has a requirement that the plaintiff allege facts outside the scope of the defendant's immunity. This is the Hoey case. While the Petitioner would simply like to prevail on the pleadings only, this is a detriment and bar to the rights of plaintiffs who have secular matters that exceed the ecclesiastical abstention doctrine.

C. The Kentucky Supreme Court's opinion is not in conflict with the Sixth Circuit matter of *Conlon v. InterVarsity Christian Fellowship/USA*.

The Kentucky Supreme Court decision is not in conflict with *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir. 2015). *Conlon* deals with the ministerial exception and notes that a matter may be resolved at the threshold, and notes that it is an affirmative defense, as the Kentucky Supreme Court found the ecclesiastical abstention doctrine to be. Hoey has pled matters outside the religious defense immunity such that would not require any dismissal. The Kentucky Supreme Court has not adopted a rigid application of the ecclesiastical abstention doctrine, rather it has laid out the procedural guidelines by which a trial court must follow after discovery has had on the particular issues and how then the court is to act. There is no expectation for protracted litigation which the petitioner discusses. Rather the orderly approach to discovery, by the trial court, which is in the best position to evaluate evidence.

II. The question presented is not exceptionally important, and this case is not the vehicle for addressing it.

This is a state court discovery dispute that falls well below the importance of the United States Supreme Court. By having to engage in the discovery process with all available defenses and an immediate avenue of appeal after an adverse ruling, there is no prejudice to the Church, nor is there any appropriate constitutional

question. The Kentucky Supreme Court appropriately found that there was no irreparable harm or injury. The trial courts continued monitoring of discovery does not fly in the face of orderly judicial administration. The Jefferson Circuit Court is in the best position to control the flow of discovery and though there may be some entanglement with church doctrine, the court can grant summary judgment or dismiss the action.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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