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IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

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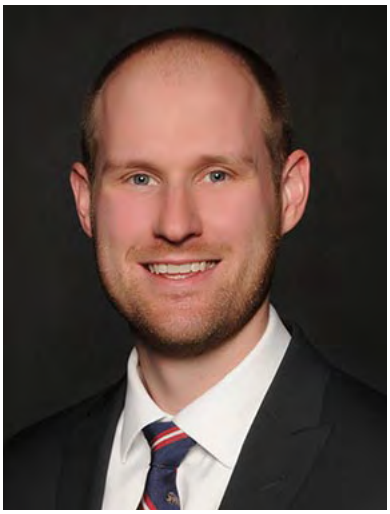
Bass v. Congregation Chemed of Nitra, Et Al.

By Nick Petersen



Nick Petersen

A July 4, 2023 summary judgment order dismissing claims using the "ministerial exception" to employment laws under the Religion Clauses of the First Amendment of the U.S. Constitution details an affirmative defense available to attorneys counseling religious institutions in Iowa. *See Bass v. Congregation Chemed of Nitra et al.*, Iowa District Court for Allamakee County No. LACV026809, Order (July 4, 2023) (Heavens, J.).

The Order followed an April 2023 concurrence authored by Justice Waterman and joined by Justice McDermott that called for the Iowa Supreme Court to follow their federal counterparts adopting the "ministerial exception." *See Konchar v. Pins*, 989 N.W.2d 150, 163 (Iowa 2023) (Waterman, J., concurring).

This affirmative defense protects the autonomy of religious institutions when they select or remove individuals who play key roles "that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

The defense is notable for attorneys who advise religious institutions because, when its conditions are met, it bypasses a potential factual morass related to an employer's motive for

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WHAT'S INSIDE

IDCA President's Letter

Amanda Richards
IDCA President

On January 10, 2024, Chief Justice Susan Christensen rendered the State of the Judiciary outlining the Court's vision and goals in 2024. Justice Christensen unveiled her theme for the judiciary for 2024: **Connections**. Justice Christensen provided a powerful message regarding the importance of connections in our judiciary.

Justice Christensen advised that the Court was placing "connections" at the forefront of the mission and values of the judiciary. The Court has enacted programs to connect the highest court to the citizens, practitioners, and legislators of our state. For example, the Court conducts "Court on the Road" with an intention to bring the Court into various Iowa communities to interact with adults, students, and local legislators about real cases on the docket. This year, Justice Christensen unveiled her new idea called, "Trial Court Show & Tell," inviting state legislators to visit a local courthouse when court is in session to observe the day-to-day life of the trial court.

Unfortunately, due to a large snowstorm, I was stuck in my office watching the address on a computer screen. Although I live-streamed the speech, Justice Christensen's message—that maintaining our connections in this virtual world is incredibly important—resonated with me. After all, our profession has become more virtual, and less face-to-face. It is now more common than ever to have virtual hearings and depositions. CLE obtained through a webinar is becoming favored over face-to-face attendance at seminars.

As I watched Justice Christensen address a join convention of the General Assembly on the judiciary's condition, I was grateful for the ease of the "virtual option" for situations like I had found myself in. That said, I couldn't help but nod my head in agreement at Justice Christensen's sentiment that perhaps now—more than ever—we need to value personal connection.

I can remember when I was a young lawyer how important it was to attend every cocktail party and every in-person event, as the value of meeting fellow defense attorneys and potential clients face-to-face was perhaps more important than the CLE. The virtual age has brought us ease and convenience but comes with some heavy "side effects". The virtual age has brought us ease and convenience, but it comes with some heavy "side effects." The less we connect, the more the ideals of civility, cooperation, and professional courtesy seem to fall by the wayside. The virtual age of our profession is a blessing and a curse all in one. However, we can point the needle more toward blessing by reminding ourselves to put in the work to continue to personally connect so our colleagues and opponents remain people, rather than simply names on an e-mail.

I am happy to report that we are well underway kicking off our Forum, which I hope will be the hub of our connection as an organization. Our hope is that a "rejuvenated online forum" can help by organizing information into relevant categories or topics to make it easy for members to find what they need. We foresee the forum as a space for our members to contribute valuable content, such as articles, case studies, or best practices as well as a platform for discussion on specific topics or challenges where members can ask questions, seek advice, and share solutions. Upon completion, the forum will serve as a comprehensive resource library that includes documents, templates, and tools that members can use in their work. Stay tuned for details as we roll this out in the upcoming weeks!

Although our Forum will provide an opportunity to better connect online, I will also continue to promote IDCA's 60th Annual Meeting & Seminar, which will give our members the benefit of face-to-face interactions during a two-day event. I invite you to join me as IDCA answers the Iowa Supreme Court's call to connect. I intend to lead our organization to follow the lead of Justice Christensen and place connection at the height of our values.

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selection or removal of an employee. Proof that an employment decision was motivated by a discriminatory or otherwise illegal purpose is an essential element of many state and federal employment laws, and disputes over whether a valid reason existed or was instead pretextual can be protracted. The ministerial exception is important because it safeguards the absolute autonomy of a religious organization to fill certain key roles by prohibiting any review of the entity's motivations for selection or retention.

Absent such autonomy, state interference mandating compulsory employment of such individuals would violate both the Establishment and Free Exercise Clauses. "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184 (2012).

Constitutional supremacy requires courts to safeguard a religious institution's autonomy under the Religion Clauses notwithstanding competing interests served by statutory employment laws. *See Bass*, Allamakee County No. LACV026809, Order at 4-5 ("The key distinction between protections for religion and protections for whistleblowers and people harmed by tortious conduct such as defamation is that the former is protected by the United States Constitution while the latter is protected only by statutes and common law. The Constitution is the supreme law. The protections in it have superiority over protections from any other source.").

The doctrine applies to claims for compensatory damages and not merely requests for reinstatement because an award of damages "would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* 565 U.S. at 194.

Bass illustrates the scope of the doctrine in several significant respects. The plaintiff was a kosher meat inspector for a religious congregation. *Bass*, Allamakee County No. LACV026809, Order at 1. He was responsible for inspecting the intestines of chicken carcasses and removing chickens that should not be certified as kosher. *Id.* He claimed that his termination was a violation of public policy (retaliation for alleged whistleblowing) and that individual defendants defamed him related to his job performance. *Id.*

The ruling in *Bass* is notable because it applied the ministerial exception to a position that did not involve a traditionally pastoral role, consistent with U.S. Supreme Court's precedent acknowledging the breadth of the defense. "What matters, at bottom, is what an employee does." *Morrissey-Berru,* 140 S. Ct. at 2064. Whereas *Morrissey-Berru* and *Hosanna-Tabor* both addressed protections for selection and retention of religious educators, *Bass* observed that part of the central mission of Judaism is compliance with kosher law, and the plaintiff's job was a key role essential to that mission:

> There is a body of Jewish dietary laws called kashrut. Obeying these laws is an important part of practicing the Jewish faith as eating non-kosher food is considered by some as eating poison. Like many secular laws, kashrut is subject to multiple applications and interpretations. People who live the Jewish faith must rely on a mashgiach to certify that they are following the law. A mashgiach then serves in a profoundly religious role—helping followers of the Jewish faith avoid sin. That is exactly the type of job that the ministerial exception was designed to protect.

Order at 4.

Additionally, *Bass* applied a corollary to the ministerial exception by extending the defense to aiding and abetting and defamation claims that the plaintiff brought against individual defendants that arose out of the decision to terminate the plaintiff's employment. *See* Order at 4-5; *see also Konchar,* 989 N.W.2d at 164 (Waterman, J., concurring) ("The corollary of this rule is that the ministerial exception extends to all issues arising out of the employment of the minister and not just to the hiring or firing itself. This includes tort claims—such as Konchar's defamation claim—arising out of the termination of a minister's employment."). "The key is that the claim must be 'part and parcel' of the employment decision to fall within the ministerial exception." *Konchar,* 989 N.W.2d at 164 (Waterman, J., concurring).

Finally, *Bass* highlighted the significance of the timing of a ministerial exception challenge by taking the issue up on summary judgment, prior to a protracted trial. *See Konchar,* 989 N.W.2d at 166 (Waterman, J., concurring) (recognizing that the ministerial exception should be addressed "without protracted litigation" and allowing a case "to proceed to trial defeats the purpose of the ministerial exception"). To that end, a developing body of law exists on limitations on the extent of discovery available prior to resolving the ministerial exception affirmative defense.

The plaintiff declined to appeal. The ministerial exception defense should prove useful for religious institutions seeking an early end to claims brought by plaintiffs whose job duties are, in whole or in part, essential to a religious institution's central mission.

Case Law Update

By Stephanie Koltookian

Stephanie Koltookian

ESTATE OF FAHRMANN BY FAHRMANN V. ABCM CORPORATION, __ N.W.2D __, 2023 WL 8853037 (IOWA 2023)

FACTUAL BACKGROUND

In 2019, Deanna Dee Fahrmann was living at a nursing home. In September 2019, Ms. Fahrmann's family alerted the nursing home staff that they were concerned about Ms. Fahrmann falling from a remote-control operated chair. On October 5, 2019, Ms. Fahrmann fell from that chair and suffered severe injuries. She died one month later.

PROCEDURAL BACKGROUND

Ms. Fahrmann's family filed a wrongful-death lawsuit against the nursing home and two nursing home employees arising from their care and treatment of Ms. Fahrmann. Defendants answered, which started the sixty-day deadline for plaintiffs to serve certificate of merit affidavits. Plaintiffs did not ask the defendants for an extension of that deadline, move to extend the deadline, or serve the certificate of merit within the deadline. However, they did serve initial disclosures signed by counsel that identified a doctor who was expected to provide expert testimony and opinions about the cause of Ms. Fahrmann's injuries, the appropriate standard of care, damages, and violations of rules, standards, and obligations.

The defendants moved to dismiss under Iowa Code section 147.140(6) based on the plaintiffs' failure to serve a certificate of merit signed by a qualified expert. The plaintiffs served a certificate of merit signed under oath by the expert identified in their initial disclosures the next day, and timely resisted the motion to dismiss.

The district court dismissed the entire action with prejudice. The plaintiffs unsuccessfully moved to reconsider before filing an appeal.

ISSUE

Did the plaintiffs' service of initial disclosures that identified a standard-of-care expert, but were signed only by counsel and identified anticipated topics of testimony in generalized terms, substantially comply with Iowa Code section 147.140?

HOLDINGS

The plaintiffs' disclosure of their standard-of-care expert did not substantially comply with the requirements of Iowa Code section 147.140 because (1) the disclosures were not signed by the expert under oath; and (2) the disclosures did not comply with the specificity requirements of the statute. The late-served certificate of merit also was not substantially compliant with the statute due to its untimeliness, and defendants did not need to demonstrate prejudice to secure a dismissal under the statute.

First, the Court noted that the initial disclosures, which were not signed by the expert, was not sufficient to substantially comply with Iowa Code section 147.140. The certificate of merit statute is intended to give the defending health professional a chance to challenge a baseless action early if there is no qualified standard-of-care expert willing to certify that the defendant breached the standard of care. Signatures from laypersons, including from counsel or from the plaintiffs, do not further the objectives of the statute.

Second, the Court found that the initial disclosures did not substantially comply with Iowa Code section 147.140(1)'s specificity requirements because the disclosures did not (1) include an opinion that the standard of care was breached by any named defendant; (2) it did not state the expert's familiarity with the applicable standard of care; and (3) it did not opine that each defendant violated the standard of care.

Finally, the late-served certificate of merit (filed after the defendants moved to dismiss) did not salvage the plaintiffs' case. The purpose of the statute is early dismissal of malpractice actions that are not supported by the requisite expert certification. There is no statutory requirement that the defendants show prejudice, and the court declined to add a prejudice requirement.

WHY IT MATTERS

Fahrmann provides additional clarification to litigants about the importance of a certificate of merit in professional malpractice actions. Defense counsel should be ready to pursue dismissals under Iowa Code section 147.140(6) if the certificate of merit

is untimely, not signed by the disclosed expert, signed by an unqualified expert, or the disclosure lacks the requisite specificity.

DOUBLE K TILING, LLC V. VEACH, NO. 22-1459, 2024 WL 259717 (IOWA CT. APP. JAN. 24, 2024)

FACTUAL BACKGROUND

Veach, a tenant farmer, hired Double K Tiling, LLC ("Double K") to install drainage tiles on two tracts of land. Veach met with Double K's owner, Keith Koppes, and discussed the project in the context of a National Resources Conservation Service (NRCS) reimbursement plan. Consistent with practices in the industry, the parties did not enter into a written agreement regarding the scope of work. Double K, consistent with its normal business practice, performed tiling work beyond the anticipated NRCS reimbursement. Koppes invited Veach to inspect the work while it was underway and immediately after completion, but Veach declined.

Double K billed Veach $52,377.65. Veach had anticipated the bill to be around $12,000, the amount of the NRCS reimbursement plan. Veach did not pay Double K's full bill.

PROCEDURAL BACKGROUND

Double K first attempted to foreclose mechanic's liens on the property at issue. The district court dismissed the foreclosure action because the contract was not entered into by the property owner.

A month later, Double K sued Veach for breach of contract and unjust enrichment. Veach moved for summary judgment, arguing that Double K's breach-of-contract claim was precluded because it was not filed in the foreclosure action. The district court held a reported hearing and entered a one-sentence written order: "For the reasons stated on the record and further set forth in Plaintiff's Resistance, Defendant's Motion for Summary judgment is denied." Veach sought interlocutory appeal, and it was denied. Veach never ordered the transcript of this hearing.

The case proceeded to a bench trial, and the district court found in Double K's favor because it found that Koppe's testimony was believable and Veach's was not trustworthy. The trial court found Veach liable for $52,377.65 in damages. Veach appealed.

ISSUES

Did Veach waive error on the summary judgment issue by not ordering the transcript of the hearing?

Did substantial evidence support the district court's verdict on the breach-of-contract action?

HOLDINGS

The Court refused to consider the merits of the summary judgment ruling because Veach failed to order the transcript of the summary-judgment hearing. The Court emphasized that it was the appellant's duty to provide the record on appeal that "affirmatively disclos[es] the alleged error relied upon" and that the appellate courts should not exercise appellate review without the benefit of the lower courts' proceedings. *In re F.W.S.*, 698 N.W.2d 134, 135 (Iowa 2005). Veach had not ordered the summary judgment transcript, so the court of appeals did not review the alleged error.

The Court also quickly dispatched of the breach-of-contract claimed error based on the district court's credibility analysis. The parties gave different versions of the terms of the contract, and the district court was in the best position to assess credibility. Therefore, the Court let the bench verdict stand.

WHY IT MATTERS

This case is a helpful reminder of the importance of the record on appeal. One-sentence orders, particularly on interlocutory matters, are common. Counsel should generally order transcripts of all hearings that result in an order being appealed, even if counsel recalls the hearing being short or without substantive discussion.

Finally, this case is yet another reminder that credibility determinations are almost always decided at the district court. It's a tall order to get an appellate court to re-weigh the credibility determinations made contemporaneously at trial.

IOWA JUDICIARY ADOPTS REMOTE PROCEDURE RULES EFFECTIVE JANUARY 1, 2024, WITH LEGISLATIVE FOLLOW-UP

By Susan M. Hess

Susan M. Hess

When the COVID-19 Pandemic unexpectedly struck in 2020, we were forced to find new ways of conducting the practice of law. Not only were most offices closed to the public, so were, for a period, Iowa Courts. However, even a Pandemic cannot topple the scales of justice. The Pandemic forced our courts to provide virtual options to afford litigants consistent access to court services when in-person proceedings were not considered safe. As normalcy returned, the Iowa Judicial Branch recognized that we needed to put in place a set of rules to govern the use of remote, online, or virtual proceedings. One of the most significant challenges in this regard was the importance of creating a record. Simply put: Rules needed to be put in place that would permit a uniform and predictable mechanism to conduct remote proceedings.

In February, 2023, Chief Justice Christensen put out the call looking for individuals willing to serve on a Remote Proceedings Task Force. The Iowa Supreme Court recognized that the various areas of law utilizing remote proceedings did not all look alike; therefore, they broke the Task Force framework into work groups consisting of three focus areas: criminal, civil, and family/juvenile law. The Task Force was chaired by the Chief Justice and was charged with providing a series of recommendations for court rules or policies governing remote proceedings and referenced the National Center for State Courts Remote Proceedings Toolkit as guidance. The Task Force formed on March 10, 2023, and kicked off less than a month later on April 4, moving quickly to achieve its objectives. By July 10, draft rules were put out for public comment. The Task Force examined the realities of what remote proceedings held on a regular basis would look like, the challenges of participants using virtual platforms to participate in Court, as well as the importance of ensuring that court reporters are not overly taxed by the process and able to produce an accurate record through court reporting outside the presence of the participants. Later that same year, on September 7, the Iowa Supreme Court adopted Chapter 15, on Iowa Rules of Remote Procedure governing the use of remote proceedings in District Court. The Rules officially went into effect on January 1, 2024. Practitioners in Iowa will need to familiarize themselves with these Rules, as any party can motion the court to seek a proceeding be held remote, in person, or hybrid (combined remote and in-person proceeding).

The Rules as adopted set forth definitions; requirements for remote proceedings and motions practice related to remote proceedings in three areas of focus: criminal, civil, and family/juvenile law. A party may request, by motion, to appear remotely at a proceeding or, alternatively, to appear in person at a previously ordered remote or hybrid proceeding. Any party may also request by motion that an entire proceeding be conducted remotely or that a previously ordered remote or hybrid proceeding be conducted in person. (Rule 15.302(1)). The Rules also set the requirements for the contents of the motions. (15.302(2)) and the possibility that the court may, on its own motion, order that one or more participants appear remotely or in person, (15.302(3)).

Based upon the new Rule, there are a number of factors that the court considers when presented with a motion, including: (1) The ability of participants to appear remotely and fully participate in the proceeding; (2) The timeliness of the motion and resistance, if any, including whether there is sufficient time to provide all parties with reasonable notice of the court's decision; (3) The case type and type of proceeding; (4) The Court's schedule; (5) The number and location of participants and anticipated length of the proceeding; (6) The complexity of legal and factual issues; (7) Whether the proceeding requires a formal record or whether any party has requested the proceeding to be reported; (8) The nature and amount of evidence to be submitted during the proceeding; (9) Agreement among or objection by parties; (10) Parties' and nonparty participants' English proficiency or need for interpreter or translator assistance; (11) Whether use of remote or hybrid technology will undermine the dignity, solemnity, decorum, integrity, fairness, or effectiveness of the proceeding; (12) A participant's previous abuse of a method of appearance; (13) Public access to the proceeding and potential increase in access to the courts; and (14) Any other factor or combination of factors that establish good cause to grant or deny the motion. Any Order issued by the court must identify the consideration of the factors, reasonable notice and a list of all participants permitted or directed to appear remotely.

The work of the Task Force and the new Rule were highlighted by Chief Justice Christensen during her State of the Judiciary address in the first week of the current legislative session. Hearing the Chief's message, the legislature has, as of this writing, responded in bipartisan fashion. In January, an Iowa Senate subcommittee voted unanimously to advance Senate Study Bill 3022 to the full Senate Judiciary Committee. In large part, the current legislation articulates both the spirit and detail of the newly adopted Rule. Most importantly, the bill amends the definition of "Open Court" in Iowa Code § 624.1 (Evidence in Ordinary Actions) to include the remote testimony of a witness by video conference or other remote means of communication if approved by the Court. IDCA is currently registered as "undecided" on this Bill.

Through the proactive work of the Supreme Court and the Task Force, Iowa practitioners will be well prepared to navigate the realities of remote proceedings as the use of technology, hopefully, makes our world less stressful. Who would object to that?

(The author, Susan M. Hess, was a participating member of the Civil Task Force).

New Member Profile

Elissa Holman

Attorney Elissa Holman is a highly successful and knowledgeable professional with nearly two decades of experience in Employment Law, Contract Law, Litigation, and Human Resources. At Dickinson Bradshaw, Elissa's practice is focused primarily on Employment Law and Civil Litigation. Her unique background helps her leverage her extensive business, HR and legal knowledge for her clients by helping them get in front of issues, in a proactive manner, to avoid costly litigation and headaches in the future.

Elissa has been named a "Rising Star of the Great Plains" for her work by Thomson Reuters from 2021 through 2023.

Prior to becoming an attorney, Elissa climbed the corporate ladder at Bank of America for 16 years where she held various roles as a Senior Vice President in the HR arena. Her predominant focus during her tenure was in leadership development, executive coaching, training and development, and assisting in the direction and execution of HR operational processes and services for more than 200,000 employees across the globe. She has also served as a consultant for Fortune 500 companies focusing on the customer and associate experience.

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IDCA Annual Meeting

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