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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93,832

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

RABBI ROBERT A. GOODMAN,

Petitioner,

vs.

TEMPLE SHIR AMI, INC.,
a Florida non-profit
corporation, and
RICHARD ASHENOFF,

Respondents.

On Appeal From the Third District Court of Appeal of
the State of Florida

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner Robert Goodman is a Rabbi. [TB:18]¹ Respondent Temple Shir Ami is a reform synagogue which is congregational in structure - it is an entirely autonomous and independent congregation, without affiliation to any national religious organization². [R:475;494] It is simply governed by its own by-laws. Temple Shir Ami has no tribunal, court or other judicial body for resolving its disputes. [A:664] Respondent Ashenoff is a professional, private investigator. [R:651] [TB:93] At all times material to this case, Ashenoff was on the board of directors of Temple Shir Ami (the "Board of Directors") and on its executive committee (the "Executive Committee"). [R:654-55]

In April 1991, Rabbi Goodman entered into a written employment contract (the "First Contract") with Temple Shir Ami to serve as its Rabbi for an initial term of two years ending on June 30, 1993. [TB:19; ExA] The First Contract provided that Rabbi Goodman could only be terminated for cause and included an automatic extension

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All references to the record on appeal will be cited as [R:]. All references to the transcripts of the hearings held on October 30, 1996, January 23, 1997, and February 13, 1997 will be cited as [TA:], [TB:], [TC:] respectively. All references to the Exhibits will be cited as [Ex], and to Petitioners' Appendix to the Initial Brief as [A:].

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Courts have drawn a distinction between religious entities that are congregational versus hierarchical. Whereas hierarchical organizations have institutions established for resolving disputes within the organization, congregational organizations do not.

provision of one additional year beginning on July 1, 1993, unless notice of termination was given by either party. [ExA:1] The First Contract made no provision for venue or choice of law and did not indicate how disputes between the parties would be resolved. [ExA] It did however include a covenant not to compete which prohibited Rabbi Goodman from becoming employed by another Temple within twenty-five miles of Temple Shir Ami after his employment with Temple Shir Ami ended. [ExA:6]

Sometime prior to the end of the initial two year term of the First Contract, certain members of the Executive Committee had a meeting and decided to recommend to the Board of Directors that it opt not to extend the First Contract and instead terminate Rabbi Goodman's employment with Temple Shir Ami.³ [TB:20-21] Word of the decision of the Executive Committee and the impending Board of Directors meeting to consider the recommendation reached the general members of the congregation. [TB:22] As a result, the vast majority of the congregation attended the Board of Directors meeting to voice their support for Rabbi Goodman. [TB:22] At the meeting, at which there were allegations that Rabbi Goodman had breached the confidence of one of the congregants, the Board of Directors, with the full support of approximately one hundred and seventy-five general members of the congregation in attendance,

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Article VII(E) of the By-Laws vests responsibility for employment decisions with the Executive Committee subject to ratification by the Board of Directors. [ExE: 10].

voted to go forward with the automatic one-year extension. [TB:22] Brian Mirson, who later became the President of Temple Shir Ami, voted against retaining Rabbi Goodman at that meeting. [TA:65] The term of the First Contract was automatically extended until June 30, 1994. [ExA:1]

In December 1993, approximately six months before the First Contract was to expire, the Board authorized Mirson, then President of Temple Shir Ami, to negotiate a new contract with Rabbi Goodman with the term commencing on July 1, 1994. [TB:27] After several meetings, Mirson and Rabbi Goodman agreed on the material terms of the new contract which would extend for three years after the First Contract expired, with an option for two additional years (the "Second Contract"). [TB:28-30] Mirson prepared a memorandum outlining the material terms of the Second Contract (the "Memorandum"). [TB:30]

The Memorandum was presented to the Board of Directors at a board meeting held on February 9, 1994. [ExC:3] The Board of Directors approved and agreed to the terms of the Second Contract as set forth in the Memorandum. [ExC:3] The minutes of the meeting expressly and clearly state that the Board of Directors approved the Second Contract. [ExC:3] The minutes were duly signed by the secretary of Temple Shir Ami. [ExC:3] Although Rabbi Goodman did not attend the Board of Directors meeting, soon thereafter, members of the Board of Directors, including Ashenoff

and Mirson, advised him that the Board had approved the Second Contract and Temple Shir Ami had entered into a new contract with him for three years with a two year extension. [TB:36]

A few weeks after the February 9 board meeting, some of the same members of the Executive Committee who had opposed the extension of the First Contract, including Ashenoff and Mirson, discussed the possibility of repudiating the Second Contract. [R:575-580, 582] These discussions culminated in a telephone conference meeting of the Executive Committee held on Thursday, March 24, 1994. [R:595] During the meeting, the Executive Committee decided to reopen the issue of the Second Contract and to attempt to cancel the Temple's approval of it. [R:595] Although the By-Laws of Temple Shir Ami clearly provide that any individual whose continued employment is being considered by the Executive Committee "shall have an opportunity to make a presentation on [his/her] own behalf," By-Laws, Article VII(E) (5) [ExE:11], Rabbi Goodman was not advised that the meeting was going to take place, was not invited to attend the meeting, and was not able to address or respond to any of the allegations which were made against him at that meeting.⁴ [TB:45-46]

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Temple Shir Ami has refused to produce a tape recording of the meeting which it admits exists.

On the evening of Monday, March 28, 1994, Mirson called Rabbi Goodman into a meeting in his office at which Richard Ashenoff was present. [TB:41] Mirson presented Rabbi Goodman with two letters. [TB:42] One was a letter of resignation; the other a letter of termination. [TB:42] Mirson advised Rabbi Goodman that unless he signed the letter of resignation, the Executive Committee would recommend his termination. [TB:44] Rabbi Goodman was shocked. [TB:45] He asked Mirson why the Executive Committee had decided to recommend his termination, to which Mirson replied: "We don't like your style." [TB:45] Rabbi Goodman has never been given any other explanation for Temple Shir Ami's action. [TB:48-49] Rabbi Goodman refused to sign the letter of resignation. [TB:45]

Immediately after the meeting, members of the Executive Committee began calling members of the Board of Directors to advise them that an emergency meeting to discuss Rabbi Goodman would be held the very next evening. [TB:46] Temple Shir Ami's By-laws require that Board Members be given notice of a special meeting "at least three (3) days, or as soon as practical, prior to the Special Meeting." (Emphasis Added.) By-laws Article (V) (k). [ExE:8] No notice was given to members of the general congregation. [R:598] The board members were not advised that the meeting was to consider repudiating the Second Contract. [TB:92] Other than the board members who received notice few, if any, congregants attended the emergency meeting the next day. [TA:79]

At the emergency meeting, Ashenoff, the private investigator, told the Board that he had undertaken an investigation of Rabbi Goodman and had learned that Rabbi Goodman had viciously attacked another Rabbi at the temple where he had been employed prior to coming to work for Temple Shir Ami. [TB:93-94] The Executive Committee advised the Board that based on this new information, it recommended that Temple Shir Ami cancel the Second Contract set to begin on July 1, 1994. [TB:93] The Board then conducted a secret ballot and voted to oust Rabbi Goodman. [TB:96] Rabbi Goodman has properly alleged that (1) the statements made by Ashenoff were completely false and made with malice in an attempt to sway the Board of Directors to unfairly and unlawfully repudiate the Second Contract; and (2) Ashenoff was aware that his statements were false at the time he made them. [R:93] While Temple Shir Ami claimed at the hearing that a number of other issues were raised at the emergency meeting with regard to Rabbi Goodman, they appear to be the same issues that had been raised and rejected at the Board of Directors meeting a year before.⁵ [TB:95-96] The issue leading to the Board of Director's decision to terminate Rabbi Goodman was Ashenoff's fabrication concerning Rabbi Goodman's attack on his superior at his prior employment. [TB:93]

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In addition, since the trial court precluded Rabbi Goodman from conducting any discovery into the discussions held at meetings of Temple Shir Ami, including the emergency meeting, the Respondents' claims as to what issues were discussed and contributed to its decision should be ignored.

Rabbi Goodman was told he would be permitted to address the Board of Directors at the emergency meeting, but was not permitted to attend the entire meeting. [TB:46-47] Instead, Rabbi Goodman was told to wait outside and was only called into the meeting for a few minutes after the Board of Directors had already voted to oust him. [TB:48] Although he was allowed to make a short statement to the Board of Directors, he was never advised as to the accusations that had been made against him. [TB:48-49]

The next day, Mirson delivered a letter (the "President's Letter") to the members of the congregation of Temple Shir Ami stating, in relevant part:

While meeting to discuss details of the Rabbi's contract, circumstances regarding the Rabbi's continued inappropriate conduct surfaced. Although no one action constituted reason for censure, the multitude of issues, along with the pattern of previous concerns, forced the Executive Committee to re-evaluate its position [T]he time has come for Rabbi Goodman and Temple Shir Ami to part company. (Emphasis added). [ExD:1]

The Board of Directors authorized and instructed its members and other representatives to call the congregants individually and advise them of the decision to repudiate the Second Contract. [R:82] The First Amended Complaint alleges that during those conversations, in order to justify their decision, numerous false

statements were made to the congregants that Rabbi Goodman had not only committed a crime amounting to aggravated battery upon another human being but had also violated the confidences of congregants.

[R:82]

Rabbi Goodman continued to work for Temple Shir Ami until the First Contract expired on June 30, 1994. [TB:53] Although he was ready, willing and able to perform the Second Contract, Temple Shir Ami breached the Second Contract by repudiating it. [TB:53] In addition, Temple Shir Ami failed to pay Rabbi Goodman his final paycheck and refused to reimburse him for work-related expenses.

[TB:53-54]

Rabbi Goodman filed this action in September 1994. [R:1] Rabbi Goodman sued Ashenoff for damages for defamation and tortious interference with an advantageous business relationship and/or tortious interference with the Second Contract. [R:77-97] Rabbi Goodman sued Temple Shir Ami for breach of the First Contract⁶ and the Second Contract, wrongful termination, and defamation. [R:77-97] The "wrongful termination" claim against Temple Shir Ami is based on the fact that Temple Shir Ami's "termination" of Rabbi Goodman was in direct violation of its By-laws. [R:86-90] In pertinent part, the By-laws provide:

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Because it withheld Rabbi Goodman's paychecks and other payments due under the First Contract, Rabbi Goodman sued Temple Shir Ami for breach of the First Contract for withheld salary payments for work performed.

- (a) The Executive Committee shall have responsibility for all personnel decisions subject to ratification by the entire Board.... The Committee shall [h]ave the authority to initiate action to evaluate, terminate or change the job status or conditions of employment of all employees. By-laws, Article VII(E) and Article VII(E)(2). (Emphasis added).
- (b) The individual being considered [during the Executive Committee Meeting] shall have an opportunity to make a presentation on [his/her] own behalf. By-laws, Article VII(E)(5). (Emphasis added).
- (c) All personnel recommendations of the Executive Committee shall be referred to the Board for action.... Special Meetings of the Board may be called by the President.... The notice of the meeting shall include the item(s) to be discussed.... The President shall cause notice to be issued to all Board members, at least three (3) days, or as soon as practical, prior to the Special Meeting. By-laws, Article VII(E)(4) and Article V(K). (Emphasis added). [ExE:10;118]

In all of his claims against Temple Shir Ami, Rabbi Goodman seeks only damages. [TB:54]

In response to the Complaint, both Temple Shir Ami and Ashenoff filed motions to dismiss based on the First Amendment, U.S. Const. amend I. [R:55-58, 130-134] The trial court denied the Motions to Dismiss and the Respondents filed a Petition for Writ of Prohibition in the Third District Court of Appeal seeking to prohibit the trial court from even considering the Petitioner's

action. The district court ordered Respondent to file a response to the Writ and after hearing oral argument, denied the Petition stating:

Because appropriate principles of appellate review suggest that the issues involved in this case are better decided upon a more complete development of the underlying facts and after an initial determination by the trial court, see Mendes v. Dowelanco Indus., LTDA., 651 So. 2d 776 (Fla. 3d DCA 1995), the petition for writ of prohibition herein is dismissed wholly without prejudice to consideration and determination below and subsequent review in this court.

On remand, Temple Shir Ami filed a Motion for Protective Order seeking to limit the scope of the depositions of Temple Shir Ami's corporate representative and Ashenoff. [R:302-307; 308-313] During the course of the hearing on the Motion for Protective Order, the trial court determined that it was required to decide the issue of jurisdiction before it could consider the merits of the case. The trial court, therefore, set the issue of jurisdiction for hearing on October 30, 1996. [R:367-368] In addition, the court ruled that only limited discovery could be undertaken. [R:367-368] In the Order setting the hearing, the court stated:

Discovery may proceed on the constitutional jurisdictional issue. Discovery on issues other than the constitutional jurisdictional issue is stayed until after the Court determines the jurisdictional issue. Statements concerning the choice of a Rabbi made at board meetings of the synagogue are not discoverable. (Emphasis added.) [R:367-368]

Thereafter Rabbi Goodman attempted to conduct discovery by taking the depositions of the corporate representative of Temple Shir Ami and of Ashenoff and by propounding Requests for Production and Interrogatories. [R:343-344] Throughout their depositions however Mirson and Ashenoff refused to answer questions concerning any statements made during any meeting of the Board of Directors including the one at which the defamatory statements were made or at the meeting of the Executive Committee where the decision was made to repudiate the Second Contract.⁷ [Ashenoff R:677: 678; 680; 684-685; 688; 692; 695; Mirson; 481; 515-516; 560-561; 568-569]⁸ Both refused to answer questions as basic as whether the defamatory statements were in fact said and by whom. [R:818-823] In addition, both Mirson and Ashenoff refused to state why the Temple chose to repudiate the Second Contract claiming that such questions invaded their First Amendment protections. [Id.] They would only say that Rabbi Goodman was "terminated" for "inappropriate Rabbinical behavior". [R:778; 841; 724] Ashenoff, 76.

In an effort to obtain discovery necessary for the hearing on the issue of jurisdiction, Rabbi Goodman filed a Motion for Clarification in the trial court seeking to have the court clarify

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Temple Shir Ami has admitted that it has a tape recording of the meeting of the Executive Committee.

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This is not a complete listing of all of the record citations. It is simply a sampling of all of the occasions where Respondent's refused to respond to questions.

its position or, alternatively, change its position regarding its blanket prohibition against discovery. [R:374-410] On September 19, 1996, the trial court denied Rabbi Goodman's Motion for Rehearing. [R:429]

The hearing on the Respondents' Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction began on October 30, 1996.⁹ During the course of the hearing, Brian Mirson testified as the corporate representative of Temple Shir Ami, over Rabbi Goodman's objection, to numerous items that he had refused or been instructed not to testify to at the time of his deposition. [TA:55-56; 56-59] Other than claiming that the Rabbi had "breached confidences," Mirson refused to identify any specific reason as to why Temple Shir Ami repudiated the Second Contract, but simply stated that the Rabbi was guilty of "inappropriate Rabbinical behavior." [TA:52] In addition, Mirson admitted that the only basis he had for claiming that the Rabbi Goodman had violated confidences, was the hearsay statements of third parties and that no one had ever told him that Rabbi Goodman had violated a confidence of theirs. [TA:87]

Rabbi Goodman objected strenuously to Mirson's testimony to the extent it involved statements made about which Mirson had refused to testify at his deposition. [TA:57] In addition, Rabbi

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Because the hearing was not completed at that time, it was continued on January 23, 1997 and was finalized on February 13, 1997.

Goodman objected to Mirson being permitted to testify generally that Rabbi Goodman had been guilty of "inappropriate Rabbinical behavior." [TA:53]

When the objection was made the court simply permitted Mirson to testify stating that the objection made by Rabbi Goodman was without legal basis and that if Mirson had refused to so testify at his deposition, Rabbi Goodman should have returned to court for a motion to compel. [TA:59] Counsel for Rabbi Goodman advised the court that he had done so to no avail. [TA:59] Although he had refused to answer questions on Ashenoff's statements at his deposition, Mirson testified at the hearing, over Rabbi Goodman's objection, about Ashenoff's statements concerning the alleged attack by Rabbi Goodman and was permitted to state that the statements had little or no effect on the decision made by the Board. [TA:62-63]

Robin Rashkind, a former director of Temple Shir Ami, testified that Richard Ashenoff advised the Board at the March 29 board meeting that he had undertaken an investigation and found out that Rabbi Goodman had attacked a Senior Rabbi at his prior place of employment. [TB:93] Rashkind said that based on that, Ashenoff and other members of the Executive Committee recommended that the Temple terminate Rabbi Goodman. [TB:93] A secret vote was taken and the Board voted to repudiate the Second Contract. [TB:96]

At the conclusion of the hearing, Judge Esquiroz concluded that the issues raised in the action against the Temple were ecclesiastic in nature and outside the jurisdiction of the court. [TC:56] The court went on to state that "[t]he Ashenoff situation presents a closer question," but granted the motion to dismiss for lack of subject matter jurisdiction against Ashenoff as well. [TC:56-57] On May 16, 1997, Rabbi Goodman filed his appeal to the Third District Court of Appeal. After hearing oral argument, the Third District Court of Appeal issued its opinion on June 3, 1998. In its opinion, the district court never addressed Rabbi Goodman's claims against the Temple and Ashenoff individually but simply concluded:

The allegedly defamatory report and tortious interference occurred as part of this religious dispute and would require the trial court to weigh their effect on the board members as compared to the effects of the other considerations which clearly are religious disagreements.

Goodman v. Temple Shir Ami, Inc., 712 So. 2d 775, 777 (Fla. 3d DCA 1998). After the district court denied his motion for rehearing, Rabbi Goodman filed his Petition to Invoke Discretionary Jurisdiction which this Court granted on December 14, 1998.

ISSUES ON APPEAL

- I. Whether the district court erred in affirming the dismissal of Rabbi Goodman's claims against Richard Ashenoff.
 - A. Whether Florida Courts have jurisdiction to decide Rabbi Goodman's claims against Richard Ashenoff.
- II. Whether the district court erred in affirming the dismissal of Rabbi Goodman's claims against Temple Shir Ami.
 - A. Whether Florida Courts have jurisdiction to consider Temple Shir Ami's failure to comply with its own By-laws.
 - B. Whether Florida Courts have jurisdiction to decide Rabbi Goodman's Second Contract claim against Temple Shir Ami.
 - C. Whether Florida Courts have jurisdiction to decide Rabbi Goodman's defamation claims against Temple Shir Ami.
- III. Whether the district court erred in affirming the trial court's limitation on Rabbi Goodman's discovery and its permitting Temple Shir Ami to testify to issues it refused to address during discovery.
- IV. Whether Rabbi Goodman is constitutionally guaranteed redress for his injuries.

SUMMARY OF THE ARGUMENT

The lower courts erred in ruling that Rabbi Goodman may not maintain his claims against Richard Ashenoff. While the right to believe is absolute, the right to act is not. The First Amendment does not bar Rabbi Goodman's claim against Richard Ashenoff for the defamatory statements he made. Ashenoff's claim that he was exercising his religious freedom does not bar a claim for

defamation or tortious interference. Where religious freedom is raised as a defense to an action for defamation, the court is required to balance the interests of the State in protecting its citizens against the burden imposed by the law on the free exercise of religion. Rabbi Goodman's right to be free from malicious defamation and tortious interference clearly outweighs any alleged religious right exercised by Ashenoff in defaming Rabbi Goodman. Accordingly, the lower court erred in dismissing Rabbi Goodman's claims against Ashenoff.

The trial court erred in dismissing Rabbi Goodman's claims against Temple Shir Ami. Since Temple Shir Ami is congregational in structure -- without any court or tribunal to resolve its disputes -- Florida Courts are not only capable of, but are required to determine whether Temple Shir Ami complied with its own By-laws. Such minimal court inquiry would in no way require the court to involve itself in any ecclesiastical concerns of Temple Shir Ami. Temple Shir Ami failed to follow its own By-laws by failing to: (1) permit Rabbi Goodman to respond to charges against him at the Executive Committee meeting; and (2) provide adequate notice to the Board of Directors for the Special Meeting at which his termination was decided.

The lower courts also erred in precluding Rabbi Goodman from maintaining his contract claim against Temple Shir Ami. To date, Temple Shir Ami has failed to advise Rabbi Goodman or to present any evidence as to the reason that it decided to repudiate the

Second Contract. Instead, it has simply argued that because Temple Shir Ami is a religious organization and Rabbi Goodman is a religious leader, Rabbi Goodman is not entitled to the same privileges afforded to all other citizens; a remedy for wrongs perpetuated against them. This position has been rejected by a number of courts which have determined that a religious leader is entitled to maintain a contract claim against a religious organization where the employment decisions made do not implicate religious beliefs, procedures or law. Temple Shir Ami has failed to advise Rabbi Goodman or the court as to the reason for its position, and in fact has refused to allow discovery on that precise issue. The evidence shows that Temple Shir Ami's decision to repudiate the Second Contract was the result of Ashenoff's false statement and not any religious reason. Accordingly, lower courts improperly denied Rabbi Goodman access to court.

Rabbi Goodman is likewise entitled to maintain an action against Temple Shir Ami for defamation based on false statements made by the Board of Directors to the general congregants that Rabbi Goodman had beaten up another human being. In determining such a claim, the court will not be called upon to decide any dispute which would involve religious beliefs, procedures or law.

Finally, the trial court erred by depriving Rabbi Goodman of a full and fair hearing. Discovery is permissible in civil cases involving religious organizations as long as the state is not a party to the action.

ARGUMENT

- I. The lower courts erred in dismissing Rabbi Goodman's claims against Richard Ashenoff.
 - A. Florida courts have jurisdiction to decide Rabbi Goodman's claims against Richard Ashenoff.

The district court erred in upholding the trial court's ruling that it is barred by the First Amendment from deciding Rabbi Goodman's claims against Richard Ashenoff. Although Rabbi Goodman was precluded from conducting adequate discovery into the statements made at the meetings of Temple Shir Ami, an issue addressed in section C, infra, he has alleged, and Rashkind's testimony supports the allegations, that Ashenoff knowingly defamed him at the meeting by telling the Board that Rabbi Goodman had attacked and caused serious bodily harm to the Senior Rabbi at the temple where Rabbi Goodman was employed prior to coming to Temple Shir Ami. Rabbi Goodman further alleged that Ashenoff made the statements with malice in order to influence the decision of the Board.¹⁰

¹⁰

The issue of whether these statements were in fact made goes to the merits. Since the trial court refused to permit discovery

Throughout this case Ashenoff has taken the position that because the victim of his malicious defamation was a Rabbi and because his statements were made in the context of a meeting of a religious organization, Rabbi Goodman is not only precluded from maintaining an action for the outrageous tort but cannot even inquire into it. This, according to Ashenoff, is the protection afforded him by the First Amendment.

It has long been held that "[a]lthough the freedom to believe is absolute, the freedom to act cannot be. Conduct must remain subject to regulation for the protection of society." Alberts v. Devine, 395 Mass. 59, 479 N.E. 2d 113, 123, cert. denied, 474 U.S. 1013 (1985).

Where a conflict arises between an act a person claims to be religiously mandated and the State's interest in upholding its laws, the Court must balance the competing interests by weighing the burden imposed by the law on the free exercise of religion to determine which interest must yield. Courts have consistently held that the protection of a good reputation is an important state interest and one which outweighs a person's claimed free exercise right to maliciously defame another. McNair v. Worldwide Church of God, 197 Cal. App.3d 363, 242 Cal. Rptr. 823, 830 (Cal. Ct. App.

on these issues and Temple Shir Ami refused to answer questions directed at these facts, the Court should consider the facts alleged in the Second Amended Complaint to be true.

1988); Cabinet v. Shapiro, 17 N.J. Super. 540, 86 A.2d 314 (N.J. Super. Ct. Law Div. 1952). Courts throughout the United States have found that a claim for defamation against an individual member of a religious organization is not barred by the First Amendment. See Loeb v. Geronemus, 66 So. 2d 241 (Fla. 1953); McNair; Marshall v. Munro, 845 P.2d 424 (Alaska 1993); Cabinet v. Shapiro, 17 N.J. Super. 540, 86 A.2d 314 (N.J. Super. Ct. Law Div. 1952).

Ashenoff has never specifically identified what religious right he was exercising by maliciously defaming Rabbi Goodman. Ashenoff has throughout this case simply maintained that Rabbi Goodman is entitled to absolutely no redress for the tortious acts undertaken against him, regardless of what they were, and that Rabbi Goodman is not even entitled to discover or inquire as to the extent of those acts. In fact, Ashenoff's religious rights are in no way impinged upon by the enforcement of Florida's strong interest in protecting its citizens' reputations and right to be free from having their contracts interfered with.

There is no legal authority for Ashenoff's position that he can defame and otherwise unjustifiably interfere with another's rights with complete impunity simply by claiming that his religious beliefs compelled such behavior.

The First Amendment has no application in this case with regard to Ashenoff. While a board member of a religious organization may enjoy a qualified privilege, see Schreidell v.

Shoter, 500 So. 2d 228 (Fla. 3d DCA 1986), review denied, 511 So. 2d 299 (Fla. 1987), the privilege is based in common law and does not arise out of the First Amendment.

Ashenoff's position that the Rabbi is entitled to no redress, that Ashenoff is cloaked with First Amendment immunity without even providing any religious explanation for his actions and that Rabbi Goodman is prohibited from even inquiring into the events that took place is not only completely unsupported by the law, it is unconscionable. The trial court erred in dismissing Rabbi Goodman's claims against Ashenoff.

II. Florida courts have jurisdiction to decide Rabbi Goodman's claims against Temple Shir Ami.

Throughout this case Petitioners have taken the position that once they allege that this is a dispute between a temple and its Rabbi, the court is precluded from making any further inquiry. That position was soundly rejected Farias v. International Church of the Foursquare Gospel, No. 95-4784 (11th Cir. Apr. 24, 1996)¹¹ which established that there is no "per se rule" in Florida preventing Federal courts from adjudicating disputes between religious organizations and their clergy.

11

A copy of Farias v. International Church of the Foursquare Gospel, No. 95-4784 (11th Cir. Apr. 24, 1996), along with the Order of the United States District Court it overruled, is included in the Appendix hereto.

- A. Florida courts have jurisdiction to consider Temple Shir Ami's failure to comply with its own By-laws.

Florida courts have routinely held that civil courts have authority to decide disputes concerning a religious organization's failure to comply with its own by-laws. See, e.g., Epperson v. Myers, 58 So. 2d 150 (Fla. 1952); Hemphill v. Zion Hope Primitive Baptist Church, 447 So. 2d 976 (Fla. 1st DCA 1984); Covington v. Bowers, 442 So. 2d 1068 (Fla. 1st DCA 1983); Umberger v. Johns, 363 So. 2d 63 (Fla. 1st DCA 1978). This approach is almost universally true where the religious organization is congregational -- entirely autonomous with no tribunal established to resolve its disputes -- rather than hierarchical -- part of a larger organization which has established a tribunal to resolve its disputes. See, e.g., Abyssinia Missionary Baptist Church v. Nixon, 340 So. 2d 746 (Ala. 1977); Kennedy v. Gray, 248 Kan. 486, 807 P.2d 670, 677 (1991); Waters v. Hargest, 593 S.W. 2d 364 (Tex. Civ. App. 1979); Reid v. Gholson, 327 S.E. 2d 107, 113 (Va. 1985), cert. denied, 474 U.S. 824, 106 S. Ct. 80, 88 L. Ed. 2d 65 (1985); see Franzen v. Poulos, 604 So. 2d 1260, 1263 n. 4 (Fla. 3d DCA 1993) (recognizing the different application of the law where the church is congregational rather than hierarchical).

Courts have reasoned that since a determination as to whether a religious organization has complied with its by-laws is completely devoid of religious content, a civil court may decide the issue in cases where the religious organization has not chosen to create a tribunal to decide matters of internal governance and procedure for itself. Reid, 327 S.E. 2d at 113; see also Kennedy, 807 P.2d at 677 ("If a congregational church provides a procedure for expulsion of a member, a good faith effort to follow that procedure must be made.").

The United States Supreme Court has recognized the distinction between congregational and hierarchical religious organizations. In Serbian Eastern Orthodox Diocese for U.S. of America & Canada v. Milivojevich, 426 U.S. 696, 724-25, 96 S.Ct. 2372, 2387-88, 49 L.Ed.2d 151, 171-72 (1976) the Court held:

In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

426 U.S. at 724-25, 96 S.Ct. at 2387-88, 49 L.Ed.2d 171-72 (emphasis added). Based on Milivojevich civil courts have jurisdiction to compel religious organizations' adherence to their own by-laws except where the religious organization is hierarchical and has created tribunals to decide its own disputes. It is

undisputed that Temple Shir Ami is a congregational organization which has not created any tribunal to resolve its disputes. It is an entirely autonomous congregation which is neither controlled by nor affiliated with any national religious organization. It is simply governed by its By-laws.

Temple Shir Ami's termination of Rabbi Goodman is ineffectual because it was not accomplished in accordance with Temple Shir Ami's By-laws. See Kupperman v. Congregation Nusach Sfard, 39 Misc. 2d 107, 240 N.Y.S. 2d 315 (N.Y. Sup. Ct. 1963) (action taken by board of directors to terminate Rabbi at meetings held pursuant to improper notice held a nullity).

Temple Shir Ami violated its own By-laws by failing to, inter alia, (1) give Rabbi Goodman the opportunity to attend or make a presentation to the Executive Committee at the meeting at which the decision was made to recommend the repudiation of the Second Contract -- a right guaranteed by the By-laws; and (2) provide proper notice both in terms of time and agenda of the emergency meeting at which the Executive Committee's recommendation to repudiate the Second Contract was discussed and adopted by the Board of Directors. The issue of whether Temple Shir Ami properly followed its own By-laws does not involve ecclesiastical matters and must, therefore, be decided by the civil courts in this case where the Temple has chosen not to "create tribunals for adjudicating disputes over these matters." Milivojevich, 426 U.S. at 724.

Having failed to establish its own tribunal for resolving such disputes, Temple Shir Ami should not be permitted to deprive Rabbi Goodman of his constitutional guarantee of redress simply by claiming that Florida Courts are incapable of deciding whether a religious organization provided adequate notice. This is especially true here, where there is no other forum with the authority to decide this case and the relief sought is not reinstatement but money damages. See, e.g., Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) (where priest, who had found new employment, sued church for breach of an employment contract, court had jurisdiction to consider the claim because it did not create an excessive entanglement between church and state because it involved only monetary damages); See Kupperman, 240 N.Y.S. 2d at 315 (Rabbi terminated by action taken by board of directors at meeting held pursuant to improper notice awarded damages based on the amount he would have received through date of proper termination). In this case, Rabbi Goodman seeks only monetary damages and not reinstatement. There is therefore no danger of an excessive entanglement by Florida Courts. No court will be called upon to decide who shall lead Temple Shir Ami.

- B. Florida Courts have jurisdiction to decide Rabbi Goodman's Second Contract claim against Temple Shir Ami.¹²

Rabbi Goodman sued Temple Shir Ami under the Second Contract because Temple Shir Ami unjustifiably repudiated the Second Contract. A number of Federal courts have moved away from the knee-jerk, "per se" position espoused by the Respondents that whenever a case involves a religious leader and a religious organization, the court must automatically abstain from considering it. See, e.g., Farias v. International Church of the Foursquare Gospel, No. 95-4784 (11th Cir. Apr. 24, 1996); Drevlow v. Lutheran Church Missouri Synod, 991 F.2d 468 (8th Cir. 1993); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990). The Eleventh Circuit Court of Appeals has rejected that position in Farias v. International Church of the Foursquare Gospel, No. 95-4784 (11th Cir. Apr. 24, 1996), a case involving issues which are similar to the present case.

Farias involved a dispute between a minister and a church directly relating to the minister's employment by the church. The United States District Court for the Southern District of Florida dismissed all of Farias' claims against the church on ground that the First Amendment prohibited the court from adjudicating any claim between a church and its minister relating to his employment.

¹²

Since Temple Shir Ami has not sought to appeal the district court's ruling on the First Contract, that issue is not addressed here.

On appeal, the Eleventh Circuit Court of Appeals, adopting the reasoning of the Eight Circuit Court of Appeals in Drevlow v. Lutheran Church Missouri Synod, 991 F.2d 468 (8th Cir. 1993), reversed the district court and held that because (i) the case would not involve inquiry into "the religious beliefs, laws and regulations" of the church, and (ii) the church had not offered "any religious explanation for its action that might entangle the court in an ecclesiastical concern in violation of the First Amendment," the minister was entitled to pursue his action against the church. Farias, at 3.

While the First Amendment prohibits civil courts from considering and deciding ecclesiastical decisions of religious organizations, the "First Amendment does not shield employment decisions made by religious organizations from civil court review, [] where the employment decisions do not implicate religious beliefs, procedures, or law." Drevlow, 991 F.2d at 471; Farias. The First Amendment does not bar a religious leader from enforcing rights arising out of an employment contract with a religious organization in civil courts. See, e.g., Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990). As stated in Minker, "[a] church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil courts". Id. at 1359.

To date, no religious explanation has been given for Temple Shir Ami's repudiation of the Second Contract. While representatives have been willing to say that Rabbi Goodman was guilty of "inappropriate Rabbinical behavior" the only evidence as to the reason why Temple Shir Ami repudiated the Second Contract is Mirson's statement to Rabbi Goodman: "We don't like your style." The facts clearly demonstrate that Temple Shir Ami repudiated the Second Contract based on the fabricated claim that Rabbi Goodman had physically assaulted another person. It is also obvious based on the circumstances of the March 29th Board of Directors meeting that certain members of the Executive Committee, who "did not like Rabbi Goodman's style", used the fabrication to persuade the Board of Directors to vote for the repudiation of the Second Contract.

Of course, Temple Shir Ami could now easily claim to have a religious basis for its decision which might then involve the hypothetical ecclesiastical issues. However, even if it were to do so, it would be entirely proper for the finder of fact to decide (i) whether the ecclesiastical issues raised by Temple Shir Ami were the real reason for its decision, see DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993) (fact-finder may determine whether religious reason given by church for termination was merely pretextual without considering the validity of the reason given); Fellowship Tabernacle, Inc. v. Baker, 125 Idaho 261, 869 P.2d 578 (1994) (while jury could not decide whether religious reasons given by church for terminating pastor were objectively valid, it could

decide whether reasons given were in fact why pastor was terminated); (ii) whether the religious premise for the action in fact exists, see Drevlow, 991 F.2d at 472, n. 3; or (3) whether Rabbi Goodman in fact undertook the action complained of. None of these inquiries would result in the Court's impermissible determination as to the validity of the beliefs. See Drevlow, 991 F.2d at 472, n. 3.

In many respects what sets this case apart from those cited by the Respondents throughout below is the fact that Temple Shir Ami voluntarily entered into a written employment contract with Rabbi Goodman when it hired him. See A: Ex A. The First Contract is essentially no different from any employment agreement between an employer and employee. It includes provisions which could only be enforced by the Florida Courts. Temple Shir Ami included for example a "non-compete provision" in the contract prohibiting Rabbi Goodman from accepting employment with any other Temple within twenty-five miles of Temple Shir Ami for one year after leaving Temple Shir Ami. Temple Shir Ami has no tribunal or affiliation with a body that could enforce the non-compete provision and the First Contract does not specify a means by which such a provision could be enforced. Having insisted on the provision, it is obvious that Temple Shir Ami itself agreed that disputes over the First Contract would be litigated in Florida Courts.

It is clear from the foregoing that there is no constitutional impediment to a Florida Court considering and deciding Rabbi Goodman's contract claim against Temple Shir Ami. This case should be decided on the facts, not on hypothetical issues and straw men set up to deprive Rabbi Goodman of his constitutional right to redress in the courts.

C. Florida Courts have jurisdiction to decide Rabbi Goodman's defamation claims against Temple Shir Ami.

Rabbi Goodman sued Temple Shir Ami for defamation because members of the Board of Directors published to the congregants false statements made by Ashenoff that Rabbi Goodman had attacked and beaten another human being. A good reputation is a valuable property right subject to the protection of the civil courts. McNair v. Worldwide Church of God, 197 Cal. App.3d 363, 242 Cal. Rptr. 823, 830 (Cal. Ct. App. 1988); Cabinet v. Shapiro, 17 N.J. Super. 540, 86 A.2d 314 (N.J. Super. Ct. Law Div. 1952). Religious organizations are not immune from suit for their defamatory statements even where such statements are intertwined with religious speech. See McNair, 197 Cal. App.3d at 363, 242 Cal. Rptr. at 823. Because a court may decide a dispute involving a religious organization provided its resolution does not implicate religious beliefs, procedures, or law, Farias; Drevlow, the trial court has jurisdiction of Rabbi Goodman's defamation claims against Temple Shir Ami.

Just as with Rabbi Goodman's defamation claim against Ashenoff, the statements made have no religious basis or connotations and Temple Shir Ami has given no religious explanation for the statements which could entangle the court in Temple Shir Ami's religious affairs. See Farias; Drevlow. Absolutely no inquiry into doctrinal matters is required with regard to Temple Shir Ami's statement that Rabbi Goodman had beaten another human being. The only issues to be resolved with respect to the defamation claim based on this statement is whether the directors made the statement, whether the statement was true and whether it was published with some level of culpability, see Miami Herald Publishing Co. v. Ane, 458 So. 2d 239 (Fla. 1984). Marshall v. Munro, 845 P.2d 424 (Alaska 1993). Based on the foregoing, Rabbi Goodman's claim for defamation against Temple Shir Ami is not barred by the First Amendment.

III. The lower courts erred by limiting Rabbi Goodman's discovery and by permitting Temple Shir Ami to testify to issues it refused to address during discovery.

On March 1, 1996, the district court denied the Respondents' Petition for Writ of Prohibition and returned the case to the trial court for a "more complete development of the underlying facts and [] an initial determination by the trial court" (Emphasis added.)

On remand, the trial court limited discovery to such an extent that Rabbi Goodman was prevented from even inquiring into the most basic facts unpinning his claims and the issue of whether the court must abstain from deciding them. The trial court limited the proceedings solely to jurisdiction and restricted discovery such that Rabbi Goodman was prohibited from even inquiring into the discussions at meetings where the facts surrounding the claims in this case and those which would establish jurisdiction took place. The trial court ordered that "[s]tatements concerning the choice of a Rabbi made at board meetings of the synagogue are not discoverable." Based on this ruling, the Respondents refused to answer any questions at their depositions which in anyway disclosed discussions conducted at either meetings of the Board of Directors or the Executive Committee. Instead, when asked what it was that Rabbi Goodman did that led the board to repudiate the Second Contract, they responded in well-rehearsed fashion "inappropriate Rabbinical behavior."

As a result of the trial court's ruling¹³, Rabbi Goodman was prevented from obtaining evidence to support his position that Temple Shir Ami's snap decision to repudiate the Second Contract had no religious basis but was instead the result of a lie made up by a group who had failed to oust him in the past. See Rollins Burdick Hunter, Inc. v. Euroclassics Ltd., Inc., 502 So.2d 959 (Fla. 3d DCA 1987) (trial court committed reversible error where it prevented discovery needed to prove affirmative defense.)

The majority of courts that have considered this issue have ruled that the First Amendment is no bar to discovery in a case such as this. There is no blanket rule that exempts a religious organization from discovery in civil cases. See, e.g., Alberts v. Devine, 395 Mass. 59, 479 N.E.2d 113 (1984) (First Amendment did not bar minister from conducting discovery on issues relating to his church's refusal to reappoint him); Hutchison v. Luddy, 414 Pa. Super. 138, 606 A.2d 905 (Pa. Super. Ct. 1992) (compelling church to comply with discovery in a civil case appropriate where it neither chills the church's free exercise of its religious beliefs nor results in governmental interference); see also In re The Bible Speaks, 69 B.R. 643 (Bankr. D. Mass. 1987) (where the state is not a party in a civil case, the First Amendment does not bar discovery involving religious issues propounded on a religious organization).

¹³

The district court never addressed this issue in its opinion.

There is no indication that permitting the Petitioner to proceed with discovery in this case would either chill the Respondents' exercise of religious belief or excessively entangle the government in the affairs of the Respondents. See Alberts, 395 Mass. at 75, 479 N.E.2d at 123 (discovery propounded on church not barred in employment case between church and minister because there was no indication that it would lead to "repetitious inquiry or continuing surveillance that would amount to the excessive entanglement between government and religion....").

The discovery sought by Rabbi Goodman goes directly to the issues that were before the court on jurisdiction and to the arguments the Respondents put forth and testified to at the hearing.

Throughout the case, the Respondents have taken the position that Florida courts lack jurisdiction because they, the Respondents, have told us so by simply telling us that Rabbi Goodman is guilty of "inappropriate Rabbinical behavior." Having told us their view of the conclusion to be drawn from the facts, the Respondents contend that Rabbi Goodman and the court may not ask what those facts are or arrive at their own conclusions based on those facts. It goes without saying that the Respondents' position is untenable.

IV. Rabbi Goodman is constitutionally guaranteed redress for his injuries.

Under the Fifth Amendment to the United States Constitution and Article I, Section 21 of the Florida Constitution, all citizens are guaranteed access to court for "redress of any injury." The United States and Florida Constitutions further guarantee equal protection. U.S. Const. amend. XIV, § 1; Art. I, § 2, Fla. Const. The trial court's order and the district court's opinion in this case effectively deny the Petitioner access to the courts of this State and the right to redress for wrongs committed against him. Because Temple Shir Ami has chosen to have no tribunal or facility to resolve its disputes, if the lower courts' rulings are permitted to stand, a citizen of this state against whom wrongs have been committed will have no remedy. As this Court pointed out a long time ago: "For every wrong there is a remedy." Holland v. Mayes, 155 Fla. 129, 19 So.2d 709 (1944).

Rabbi Goodman is not requesting that the court interfere in anyway with Temple Shir Ami's choice of its religious leader. Rabbi Goodman is not requesting that the court reinstate him as the religious leader of Temple Shir Ami. Rabbi Goodman asks only that he be compensated with damages for the injury he has suffered as a result of Temple Shir Ami's decision to repudiate the Second Contract and for the Respondents' torts. Accordingly, this case will not create an excessive entanglement with Temple Shir Ami or chill the free exercise of the Respondents' First Amendment rights.

Instead, it will simply require religious organizations and those who control them to be responsible for their torts and discourage them from making "empty, misleading promises to [their] clergy." Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1360 (D.C. Cir. 1990). Anything less will relegate civil courts in cases involving religious organizations with no means for dispute resolution "into handmaidens of arbitrary lawlessness." Serbian Eastern Orthodox Diocese for U.S. of America & Canada v. Milivojevich, 426 U.S. 696, 727, 96 S.Ct. 2372, 2389, 49 L.Ed.2d 151 (1976) (Rehnquist, J., dissenting). Under the Fifth Amendment to the United States Constitution and Article I, Section 21 of the Florida Constitution, Rabbi Goodman is entitled to redress for his injuries. In this case, redress can only be accomplished in the civil courts.

CONCLUSION

In light of the foregoing, Petitioner Rabbi Robert A. Goodman respectfully requests that the Court reverse the opinion of the Third District Court of Appeal and remand this action for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner typed in 12 point Courier New font was served by mail this 28th day of January 1999, upon the following:

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