

**FILED**

**MAY 01 2018**

**A.C.J.C.**

SUPREME COURT OF NEW JERSEY  
ADVISORY COMMITTEE ON  
JUDICIAL CONDUCT

DOCKET NO: ACJC 2017-364

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IN THE MATTER OF  
  
THERESA A. MULLEN  
JUDGE OF THE SUPERIOR COURT

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FORMAL COMPLAINT

Maureen G. Bauman, Disciplinary Counsel, Advisory Committee on Judicial Conduct (“Complainant”), complaining of Theresa E. Mullen (“Respondent”), says:

**Facts**

1. Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1993.
2. At all times relevant to this matter, Respondent served as a judge of the Superior Court of New Jersey, assigned to the Family Division in the Union Vicinage, a position to which she was first appointed in October 2014 and continues to hold.
3. Respondent’s daughters, S.P. and K.P., attended St. Theresa School (“STS”) in Kenilworth, New Jersey. Respondent’s eldest daughter, S.P., played on the girls’ basketball team during the 2015-2016 school year.
4. STS disbanded the girls’ basketball team following the 2015-2016 school year.
5. On or about December 2, 2016, Respondent’s husband, Scott Phillips (“Plaintiff”), through his counsel, Susan B. McCrea, Esq. (“Ms. McCrea”), filed a Verified Complaint and an Order to Show Cause (“OSC”) in the Essex County Superior Court for a Preliminary Injunction to compel

the Archdiocese of Newark and STS (“Defendants”) to instate S.P., a 7<sup>th</sup> grader at the time, to the boys’ basketball team for the 2016-2017 school year.

6. On December 2, 2016, Essex County Superior Court Judge Donald A. Kessler denied Ms. McCrea’s application.

7. On or about December 9, 2016, Plaintiff, Mr. Phillips, filed an Amended Verified Complaint and OSC for a Preliminary Injunction to compel Defendants to instate S.P. to the boys’ 7<sup>th</sup> grade basketball team, which Plaintiff supplemented on December 15 and 16, 2016.

8. On or about December 20, 2016, Defendants, through their counsel, Christopher H. Westrick, Esq. (“Mr. Westrick”), submitted a brief in opposition to Mr. Phillips’ application for injunctive relief.

9. On or about January 5, 2017, the matter was heard by Judge Kessler who denied the relief sought by Mr. Phillips, finding there to be no legal foundation for the child’s right to play basketball, and granted him leave to amend the complaint to seek such injunctive relief.

10. On or about February 17, 2017, Judge Kessler reversed his prior decision upon learning that there were girls playing on a boys’ team at St. John’s School in Clark, New Jersey.

11. S.P. played on the boys’ basketball team at STS and both of Respondent’s daughters finished the 2016-2017 school year.

12. On or about February 1, 2017, Margaret A. Dames, Ed.D. (“Dr. Dames”), Secretary for Catholic Education/Superintendent of Schools for the Archdiocese of Newark, which includes STS, notified Respondent and her husband, via letter, that based on their ongoing lawsuit against STS, and pursuant to a provision in the Parent/Student Handbook, they were to remove S.P. and K.P. from the school immediately. The following language from the STS Parent/Student Handbook was relied upon in reaching this decision and quoted in the letter:

If a parent implicates St. Theresa School in a legal matter, or names St. Theresa School as a defendant in a civil matter, the parent/guardian will be requested to remove their children immediately from the school

13. Mr. Phillips acknowledged receipt of the Parent/Teacher handbook in writing on August 20, 2016.

14. On or about February 1, 2017, Mr. Westrick sent an email to Ms. McCrea providing her with a copy of the letter referred to in Paragraph 12 that was to be hand delivered to Plaintiffs that afternoon. In his email, Mr. Westrick stated, "I believe the letter is self-explanatory but to avoid any confusion, neither S.P. nor K.P. should be coming to St. Theresa's School tomorrow morning or any day thereafter."

15. Upon learning that the Phillips children would not be allowed to return to STS, Ms. McCrea filed an OSC for a Preliminary Injunction "to restrain and enjoin defendants from expelling the plaintiff's children from attendance at STS."

16. Early in the morning on February 2, 2017, an anonymous telephone call was received in the Rectory at St. Theresa's R.C. Church advising that news media would be present at STS that morning during school drop off. Since the matter involving the Phillips family was ongoing, school and church officials assumed that to be the reason for the presence of news media at STS.

17. To avoid any type of confrontation, Father Joseph S. Bejgrowicz ("Fr. Joe"), Pastor of St. Theresa's R.C. Church, called the Kenilworth Police Department and requested their presence at STS on February 2, 2017.

18. Deacon Joseph Caporoso ("Deacon Joe") was present at STS on February 2, 2017 along with Father Vincent D'Agostino ("Fr. D'Agostino") and two uniformed officers from the Kenilworth Police Department.

19. Despite being notified at least twice that her children should not return to STS, Respondent went to STS with her daughters on February 2, 2017. When Respondent went to the back entrance to the school regularly used by students to enter the building, she was met by Fr. Joe, Fr. Vincent, and Deacon Joe. Police Chief John Zimmerman (“Chief Zimmerman”), Detective Sergeant Jim Grady (“Det. Sgt. Grady”), and Detective Brian Pickton (“Det. Pickton”) of the Kenilworth Police Department.

20. Fr. Joe reviewed Dr. Dames’ February 1, 2017 letter with Respondent and advised Respondent that she had to leave the premises. Respondent refused to leave.

21. Respondent stated that she did not agree with the expulsion. The letter she received stated the school “requested” her children not come back to STS and she was “denying the school’s request.” Her children were not leaving the school.

22. Det. Sgt. Grady also told Respondent to leave the premises. Respondent’s response was that the officer should handcuff and arrest her.

23. Det. Pickton escorted Respondent to the office to speak with the school administration and Chief Zimmerman.

24. Respondent met with school officials in the principal’s office while her children waited in the hallway. At the conclusion of the meeting, school officials informed Respondent that her children were expelled and she was no longer welcome on school property. Respondent, again, refused to leave.

25. Deacon Joe requested Respondent leave the office to allow school officials the opportunity to discuss the matter with their counsel. Respondent initially refused to leave but eventually agreed.

26. Fr. Joe accompanied Respondent outside of the office where an exchange took place. Respondent recorded this exchange on her cellular phone.

27. While Respondent was in the school's hallway between the office where the meeting was taking place and the gym, Patrolman Sean Kavernick ("Ptl. Kavernick") approached Respondent and asked her to leave the premises. Respondent did not comply with this request and instead indicated that she wanted to be handcuffed and remained fixed in one spot, was unwilling to leave the premises.

28. Thereafter, Respondent returned to the office where Deacon Joe read to Respondent the following statement of James Goodness, Vice Chancellor and Director of Communications for the Archdiocese of Newark, :

After consulting with counsel for the Archdiocese, we understand that you refuse to withdraw the children from school as you have been requested to do pursuant to the Student Handbook that you signed on August 16, 2016. Therefore, the children are expelled. You must leave the premises immediately. If you refuse to comply, then you will be considered trespassing.

29. Despite the clear intent of the above statement, and after being read counsel's statement three times, Respondent refused to leave the premises.

30. Respondent repeatedly stated that if the police wanted to arrest her and her children for trespassing, "they can go ahead and do that."

31. At one point during the meeting, Fr. Vincent suggested that Respondent's attorney communicate with the Archdiocese's attorney. Respondent did not agree with Fr. Vincent's suggestion and continued to argue about the propriety of her children's expulsion.

32. Respondent continued to be confrontational with school officials and repeatedly challenged law enforcement to take her into custody.

33. The school administration requested the police remove Respondent from school property. Fr. Joe stated he would be signing a complaint for trespass due to Respondent's refusal to leave school property.

34. Det. Sgt. Grady, Det. Pickton, Ptl. Kavernick and Chief Zimmerman removed Respondent from the school.

35. Based on her conduct as described above, Fr. Joe signed a complaint against Respondent and she was charged with violating N.J.S.A. 2C:18-3(b) which states:

Defiant trespasser. A person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by;

(1) Actual communication to the actor; or

(2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or fencing or other enclosure manifestly designed to exclude others.

36. On or about February 15, 2017, the Archbishop of Newark, Cardinal Joseph W. Tobin, rescinded the expulsion.

37. On or about April 3, 2017, a letter was sent by Dr. Dames on behalf of the Archdiocese of Newark to Respondent and Mr. Phillips advising them that STS would not be able to accept S.P.'s and K.P.'s enrollment for the 2017-2018 school year. After citing the Mission Statement of STS, the letter stated:

Actions and events initiated by you over the last several months have directly interfered with the fulfillment of this Mission not only for St. Theresa's School, but also for many of its administration, staff, students, and parents. In order to restore the promise of a "family atmosphere" characterized by "respect, challenge, responsibility, and exceptional love," St. Theresa's School will not be able to accept [S.P.]'s and [K.P.]'s enrollment for the 2017-18 school year.

38. While the lawsuit was pending, the Archdiocese of Newark and STS received letters and emails from parents and other family members of students enrolled in STS recounting stories of

bullying, rudeness, intimidation and harassment by S.P., Mr. Phillips and Respondent. One letter stated, “[t]he recent legal battles and their constant publicity has had nothing but negative impact on the school environment and the children’s learning experience.” Another parent wrote, “[w]hen the judge threw out this case instead of leaving well enough along (sic) Mr. Phillips and his lawyer/Union County Judge wife Theresa E. Mullen decided to sue again to appeal the case.” The mother of a 7<sup>th</sup> grade student wrote, “[t]he parents have become so litigious in nature that we as parents are afraid to speak out against them for fear of retribution, unfounded or not, my family included.” The parent of a 2016 graduate wrote, “[t]he Mullen-Phillip’s family is making a mockery out of our school. There are camera crews and newspaper articles daily. I fear that they will not stop until they get what they want.”

39. On or about March 2, 2017, Mr. Phillips filed a motion to again amend the Complaint to add approximately 80 parents from STS as defendants alleging that those parents signed a petition opposing his bid to readmit their daughters, making them accomplices to the “expulsion.” The Amended Complaint also sought to add Sister Helene Godin (“Sr. Helene”), Principal of STS until the conclusion of the 2016 school year, due to the fact that Respondent’s and Mr. Phillips’ son, B.P., did not achieve the honor of valedictorian at STS.

40. On or about March 31, 2017, the Court entered an order denying the motion to amend. Although Respondent was no longer a party to the lawsuit, many of the pleadings filed with the court incorrectly listed her, along with Mr. Phillips, as guardian ad litem of the children.

41. On or about April 7, 2017, STS returned the registration applications of S.P. and K.P. for the 2017-2018 school year. STS determined that Respondent’s and Mr. Phillips’ conduct was inconsistent with its Catholic mission.

42. On or about May 9, 2017, a Third Amended Complaint was filed by Mr. Phillips alleging that the April 7, 2017 letter was another form of expulsion for filing the lawsuit. The Complaint sought “specific performance, monetary damages, punitive damages, sanctions, public correction of facts, counsel fees and costs of suit, and such other relief as [the] Court deems appropriate and just.”

43. On or about May 18, 2017, Defendants served Plaintiff’s counsel with deposition notices for Mr. Phillips and Respondent. At that time, Respondent was a proposed party represented by Ms. McCrea.

44. Ms. McCrea advised counsel for Defendants that she would not produce her clients since it was inappropriate at the time in light of a Case Management Order regarding discovery and that “Ms. Mullen is not yet a Plaintiff as the Motion to Amend is still pending.”

45. On or about June 2, 2017, Mr. Phillips filed an application for a permanent injunction compelling STS to educate S.P. and K.P. for one year and three years, respectively, and for a stay of the plenary hearing scheduled for July 24, 2017.

46. Defendants opposed the application asserting that the Court lacked jurisdiction to hear the re-enrollment issue under the First Amendment to the United States Constitution and that the claims asserted “fail as they cannot demonstrate entitlement to an injunction as a matter of law.”

47. As a result of Ms. McCrea’s refusal to produce her clients for the deposition, Mr. Westrick filed a motion to compel and a motion for sanctions and costs associated with bringing the motion. On July 11, 2017, Judge Kessler ordered Respondent and Mr. Phillips to appear for depositions on July 19, 2017.

48. Respondent, as a fact witness, failed to appear at the court-ordered deposition on July 19, 2017.



49. As a result of Respondent's failure to appear at the court-ordered deposition, Mr. Westrick filed another motion to compel Respondent's deposition, which was granted.

50. On July 26, 2017, Respondent's court-ordered deposition was taken in respect of the lawsuit filed against STS.

51. Respondent refused to answer approximately 95% of the questions posed to her, contrary to Rule 4:14-3 (c), which requires a deponent to answer all questions except those subject to a privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.

52. At the start of Mr. Phillips' deposition, Mr. Westrick objected to Respondent's presence in the room as she was not a party to the case and, therefore, was not entitled to be present in the room. Ms. McCrea was not willing to comply with the request that Respondent leave the room during the deposition of Mr. Phillips. As a result, a phone call was made to Judge Kessler.

53. Ms. McCrea advised Judge Kessler that Respondent is the mother of the children involved in the case and ". . . the kind of testimony that's likely to be elicited from Mr. Phillips has really nothing to do with Ms. Mullen. . . . She's an officer of the court. She's a superior court judge. She is certainly not going to make any gestures or motions or anything like that to Mr. Phillips. There's nothing that will prohibit her from being here."

54. Finding no legal basis under the court rules, Judge Kessler stated since Respondent was not a party to the case, she would not be permitted to remain in the room during Mr. Phillips' deposition.

55. As a result of Respondent's obstructive behavior during her deposition on July 26, 2017 and her refusal to answer approximately 95% of the questions posed to her, Mr. Westrick filed another motion seeking to compel Respondent's deposition. Mr. Westrick also requested that the Court impose sanctions against the Plaintiff.

56. Judge Kessler heard oral argument on July 28, 2017. Ms. McCrea provided Judge Kessler with a “rough draft” of the deposition transcript since the certified version had not yet been prepared by the court reporter.

57. Mr. Westrick stated that despite Judge Kessler’s “directives and crystal clear orders,” Respondent and Mr. Phillips “physically showing up and sitting in a conference room doesn’t equate to giving a deposition.” He further stated, “[m]ost disturbing, one of the deponents is a sitting Superior Court judge and knows what the rules provide.”

58. Ms. McCrea took the position that Respondent “cannot be forced to testify as to her version of events.”

59. Prior to rendering his decision to grant Defendants’ motion, Judge Kessler referred to his July 19, 2017 Order compelling Respondent and Mr. Phillips to appear for depositions and stated, “Plaintiff and Ms. Mullen made a unilateral decision without the authority of the Court to choose not to show up for the deposition for the stated reason that they intended to file an application for leave to appeal, however, they didn’t show up for the deposition and no such appeal was filed up to today.”

60. Judge Kessler once again ordered Respondent and Mr. Phillips to appear for depositions on July 31, 2017 and granted Defendants’ application for monetary sanctions against Plaintiff for the cost and expenses associated with the re-deposition of Respondent and Mr. Phillips, including counsel fees.

61. A request was made by Respondent’s counsel that Judge Kessler issue an order prohibiting the parties from referring to Respondent’s judicial office as it could impact on her position. Judge Kessler granted that request.

62. Following Judge Kessler's decision as stated above, Ms. McCrea, at Respondent's request, criticized Judge Kessler for announcing the sanctions in open court and argued that Judge Kessler should have stated the sanctions in a closed hearing. Ms. McCrea stated,

I conferred with my client, Your Honor, and I just want to make a record. . . . On the record, my client feels that she was publicly humiliated in her judicial position. . . . She feels embarrassed and extremely humiliated as a sitting judge."

63. On or about July 31, 2017, Respondent's deposition was taken again as per Judge Kessler's order of July 28, 2017.

64. Respondent requested "that the entire deposition transcript be sealed and to be used by counsel and the Court only for the next forty-eight (48) hours, pending a specific application to redact or seal portions of the deposition transcript, because she is a sitting Superior Court Judge and her personal life should be confidential."

65. On August 1, 2017, Judge Kessler denied Respondent's application to seal the deposition transcript.

66. On January 24 and 25, 2018, the Honorable Alberto Rivas, A.J.S.C. presided over Respondent's trial for defiant trespass. The following witnesses testified on behalf of the State of New Jersey: Det. Sgt. Grady, Chief John Zimmerman, Ptl. Kavernick, Fr. Joe, Deacon Joe, Fr. Vincent and Sr. Helene. Respondent was the sole witness to testify in her defense.

67. On February 28, 2018, Judge Rivas rendered his written decision finding Respondent guilty of defiant trespass, stating that "Mullen remained in the school knowing she was not licensed or privileged to do so after actual notice to leave was communicated to her several times. The State's witnesses were more credible than Mullen."

68. In noting that Respondent testified that she had absolutely no contact with Officer Kavernick in direct contravention with the Officer's "unequivocal testimony," Judge Rivas wrote, "The court finds Officer Kavernick's testimony credible and Mullen's testimony incredible."

69. In his written opinion, Judge Rivas described Respondent as "combative and evasive on the stand, and that her statements about her understanding of the letter and the import of the signed acknowledgement further undermine her credibility."

### COUNT I

70. Complainant repeats the allegations contained in the foregoing paragraphs as if each were set forth fully and at length herein.

71. By appearing at STS on February 2, 2017 after being notified that her daughters were expelled and refusing to leave after being told to do so several times by STS officials and Kenilworth police officers, in violation of N.J.S.A. 2C:18-3(b), Respondent demonstrated a failure to conform her conduct to the high standards expected of judges and impugned the integrity of the Judiciary in violation of Canon 1, Rule 1.1 and Canon 2, Rule 2.1 of the Code of Judicial Conduct.

72. By that same conduct, Respondent also violated Canon 1, Rule 1.2 of the Code of Judicial Conduct, which requires judges to respect and comply with the law.

73. Respondent's conviction for defiant trespass (N.J.S.A.2C:18-3(b)) impugned the integrity of the Judiciary in violation of Canon 1, Rule 1.1, Rule 1.2, and Canon 2, Rule 2.1 of the Code of Judicial Conduct.

### COUNT II

74. Complainant repeats the allegations contained in the foregoing paragraphs as if each were set forth fully and at length herein.

75. By her conduct in providing false testimony before Judge Rivas on January 25, 2018 in respect of her encounter with Officer Kavenick at STS on February 2, 2017, Respondent's conduct reflected adversely on her honesty and fitness to serve as a judge in violation of Canon 2, Rule 2.1 of the Code of Judicial Conduct.

76. By that same conduct, Respondent demeaned the judicial office in violation of Canon 5, Rule 5.1(A) of the Code of Judicial Conduct.

### **COUNT III**

77. Complainant repeats the allegations contained in the foregoing paragraphs as if each were set forth fully and at length herein.

78. By her obstructive behavior during the course of her court-ordered deposition on July 26, 2017 that resulted in the imposition of sanctions against Mr. Phillips for Respondent's refusal to answer approximately 95% of the questions posed to her, Respondent demonstrated a failure to conform her conduct to the high standards expected of judges and impugned the integrity of the Judiciary in violation of Canon 1, Rule 1.1 and Canon 2, Rule 2.1 of the Code of Judicial Conduct.

### **COUNT IV**

79. Complainant repeats the allegations contained in the foregoing paragraph as if each were set forth fully and at length herein.

80. By her conduct in asserting her judicial office in response to the imposition of sanctions by Judge Kessler announced in open court on July 28, 2017, Respondent violated Canon 1, Rule 1.1, Canon 2, Rule 2.1 and Canon 2, Rule 2.3(A) of the Code of Judicial Conduct.

WHEREFORE, Complainant charges that Respondent has violated the following Canons of the Code of Judicial Conduct:

Canon 1, Rule 1.1, which requires that judges observe high standards of conduct so that the integrity and independence of the judiciary may be preserved;

Canon 1, Rule 1.2, which requires that judges respect and comply with the law;

Canon 2, Rule 2.1, which requires judges to promote public confidence in the independence, integrity and impartiality of the judiciary;

Canon 2, Rule 2.3 (A), which requires judges to avoid lending the prestige of their office to advance a personal interest;

Canon 5, Rule 5.1 (A), which requires judges to conduct their extrajudicial activities in a manner that would not demean the judicial office.

DATED: May 1, 2018

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WHEREFORE, Complainant charges that Respondent has violated the following Canons of the Code of Judicial Conduct:

Canon 1, Rule 1.1, which requires that judges observe high standards of conduct so that the integrity and independence of the judiciary may be preserved;

Canon 1, Rule 1.2, which requires that judges respect and comply with the law;

Canon 2, Rule 2.1, which requires judges to promote public confidence in the independence, integrity and impartiality of the judiciary;

Canon 2, Rule 2.3 (A), which requires judges to avoid lending the prestige of their office to advance a personal interest;

Canon 5, Rule 5.1 (A), which requires judges to conduct their extrajudicial activities in a manner that would not demean the judicial office.

DATED: May 1, 2018



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