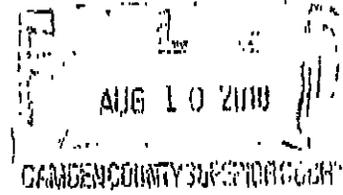


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Attorneys for Plaintiff(s)



PLAINTIFF(S)
:
:
K.R., a minor by her parent and guardian,
M.R. and M.R., in her own right
:
:
vs.
:
:
DEFENDANT(S)
:
:
JEFFREY POWELL and/or CHERRY
HILL TOWNSHIP BOARD OF
EDUCATION and/or ROSA
INTERNATIONAL MIDDLE SCHOOL
and/or JOHN DOE(S) "A-Z", fictitious
name(s), jointly, severally, individually
and/or in the alternative

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAMDEN COUNTY
DOCKET NO.: *S-4005-10*
CIVIL ACTION
COMPLAINT AND DEMAND FOR
FOR JURY TRIAL

Plaintiffs, K.R., a minor by her parent and guardian, M.R. and M.R., in her own right, residing in the Township of Cherry Hill, County of Camden and State of New Jersey, hereby complain against the Defendants and say:

FIRST COUNT

1. At all times material hereto, the Plaintiff, K.R., is a minor, and therefore, has elected to maintain her anonymity pursuant to N.J.S.A. 2A:61B-1.

2. At all times material hereto, the Defendant, Jeffrey Powell, was an employee, agent and/or servant of Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), employed in his capacity as a teacher's aide and was acting within the scope of his agency, employment and servitude with same and was acting under color of the laws of the State of New Jersey.

3. At all times material hereto, the Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), were the recipients of Federal Financial Assistance and/or Federal Financial Funds, and therefore, were required by law to comply with the provisions of 20 U.S.C. §1681, et. seq., (Title IX) and/or 42 U.S.C. §1983, and was acting under color of the laws of the State of New Jersey in the operation of their public schools, including Rosa International Middle School.

4. At all times material hereto, the Plaintiff, K. R., a minor, was a female student enrolled at and attending the public middle school owned, operated and under the exclusive care, custody and control of Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), located at 485 Browning Lane, in the Township of Cherry Hill, County of Camden and State of New Jersey.

5. Beginning on or about September 1, 2008, while acting as an employee, agent and/or servant of Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z" fictitious name(s), the Defendant, Jeffrey Powell, did carelessly, negligently, intentionally and/or with willful and wanton recklessness physically and sexually assault the minor Plaintiff, K.R., which conduct proximately resulted in the minor Plaintiff, K.R., suffering severe and permanent personal injuries.

6. As a direct and proximate result of the carelessness, negligence, intentional and/or willful and wanton reckless conduct of the Defendant as aforesaid, the minor Plaintiff, K.R., was injured both grievously and irreversibly; she has in the past and will in the future be plagued by great pain, shock and mental anguish. She has been forced to incur ruinous diverse expenses for medical, hospital and nursing attention in an effort to alleviate the injuries from which she is suffering; she has in the past and will in the future be prevented from attending to her lawful affairs and occupation.

WHEREFORE, Plaintiff, K.R., a minor by her parent and guardian M.R., demands judgment against the Defendants, Jeffrey Powell and/or Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), jointly, severally, individually and/or in the alternative, for compensatory and punitive damages, costs of suit, interest and attorneys fees in accordance with the provisions of N.J.S.A. 2A:61B-1.

SECOND COUNT

1. Plaintiff, K.R., a minor, by her parent and guardian, M.R., hereby repeats each and every allegation of the First Count as if the same were set forth at length herein.

2. By reason of the facts and circumstances set forth above, the Defendants did violate the provisions of the New Jersey Law Against Discrimination as set forth in N.J.S.A. 10:5-1, et seq. and/or did violate the provisions of 20 U.S.C. §1681, et. seq., (Title IX) and/or did violate the minor Plaintiff's, K.R., Civil Rights as set forth in 42 U.S.C. §1983, which conduct constituted quid pro quo sexual harassment and which further conduct did create a hostile public educational environment.

3. As a direct and proximate result of the quid pro quo sexual harassment and the creation of a hostile public educational environment created the action as described above, the minor

Plaintiff, K.R., did believe implicitly or explicitly that if she did not accede to the demands of Defendant, Jeffrey Powell, as set forth above, he would negatively affect her education and as a further direct and proximate result of the acts set forth above, the public educational environment at Rose International Middle School became abusive and hostile; all of which caused the minor Plaintiff, K.R., to sustain severe and permanent emotional distress and to be caused to incur diverse and ruinous expenses for medical treatment or to relieve herself of the severe and permanent emotional distress she has sustained.

WHEREFORE, Plaintiff, K.R., a minor by her parent and guardian M.R., demands judgment against the Defendants, Jeffrey Powell and/or Cherry Hill Township Board of Education and/or Rosa International Middle School, jointly, severally, individually and/or in the alternative, on this Court, for compensatory and punitive damages, together with interest, costs of suit and attorneys fees in accordance with N.J.S.A. 10:5-1, et seq. and/or 20 U.S.C. §1681, et. seq. (Title IX) and/or 42 U.S.C. §1983.

THIRD COUNT

1. Plaintiff, K.P., a minor by her parent and guardian S.C., hereby repeats each and every allegation of the First and Second Counts as if same were set forth at length herein.

2. At all times material hereto, the Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), by and through their agents, servants and/or employees, did did act with negligence, recklessness and/or deliberate indifference by authorizing, sanctioning and/or ratifying the act of sexual harassment and sexual misconduct by Defendant, Jeffrey Powell, as set forth above, and did further fail to discipline, fire or otherwise investigate the charges of sexual harassment and sexual misconduct leveled against Defendant, Jeffrey Powell, as set forth above, all of which conduct or

lack thereof, created a hostile public educational environment and did violate the New Jersey Law Against Discrimination as set forth in N.J.S.A. 10:5-1, et seq. and/or the provisions of 20 U.S.C. §1681, et. seq. (Title IX) and/or did violate the minor Plaintiff's, K.R., Civil Rights as set forth in 42 U.S.C. §1983.

3. As a direct and proximate result of the violations of the New Jersey Law Against Discrimination and/or Title IX and/or 42 U.S.C. §1983 by Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), as described above, the condition of minor Plaintiff's, K.R., public educational environment was severely altered; her public educational environment became abusive and hostile; she was caused to sustain severe and permanent emotional distress; she has been caused to sustain severe financial ruin in order to alleviate herself from the emotional distress sustained.

WHEREFORE, Plaintiff, K.R., a minor by her parent and guardian M.R., demands judgment against the Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), jointly, severally, individually and/or in the alternative, on this Count, for compensatory and punitive damages, together with interest, costs of suit and attorneys fees in accordance with N.J.S.A. 10:5-1, et seq. and/or 20 U.S.C. §1681, et. seq. (Title IX) and/or 42 U.S.C. §1983.

FOURTH COUNT

1. Plaintiff, K.R., a minor by parent and guardian M.R., hereby repeats each and every allegation of the First through Third Counts as if the same were set forth at length herein.

2. At all times material hereto, the Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), did negligently, carelessly, recklessly and/or with deliberate indifference fail to have in place at the

Rosa International Middle School at the location as aforesaid, a well publicized and enforceable anti-harassment policy, and further did carelessly, negligently, recklessly and/or with deliberate indifference fail to have an effective formal and/or informal complaint structure; and did carelessly, negligently recklessly and/or with deliberate indifference fail to have proper sexual harassment training and/or monitoring mechanisms in place, which said carelessness, negligence, recklessness and/or with deliberate indifference proximately resulted in the creation of a hostile public educational environment which directly and proximately resulted in the condition of the minor Plaintiff's, K.R., public educational environment to be altered; her public educational environment became hostile and abusive; she was caused to sustain severe and permanent emotional distress; she has been caused to sustain severe and permanent financial ruin in an attempt to alleviate herself from the emotional injuries she has sustained.

WHEREFORE, Plaintiff, K.R., a minor by her parent and guardian M.R., demands judgment against the Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), jointly, severally, individually and/or in the alternative, on this Count, for compensatory and punitive damages, together with interest, costs of suit and attorneys fees in accordance with N.J.S.A. 10:5-1, et seq. and/or 20 U.S.C. §1681, et. seq. (Title IX) and/or 42 U.S.C. §1983.

FIFTH COUNT

1. Plaintiff, K.R., a minor by her parent and guardian M.R., hereby repeats each and every allegation of the First through Fourth Counts as if the same were set forth at length herein.
2. At all times material hereto, the Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), acted negligently, carelessly, recklessly and/or deliberate indifference to the sexual harassment

complaint of minor Plaintiff, K.R.; did act negligently, carelessly, recklessly and/or with deliberate indifference in failing to establish a sexual harassment policy; and did act negligently, carelessly, recklessly and/or with deliberate indifference in failing to enforce a sexual harassment policy; which said carelessness, negligence, recklessness and/or deliberate indifference proximately resulted in the creation of a hostile public educational environment for the minor Plaintiff, K.R.; did alter the public educational environment of the minor Plaintiff, K.R.; did create a hostile and abusive public educational environment for minor Plaintiff, K.R., and did cause minor Plaintiff, K.R., to sustain severe and permanent emotional distress and to sustain severe and permanent financial ruin in an attempt to alleviate herself from the emotional injuries she sustained.

WHEREFORE, Plaintiff, K.R., a minor by her parent and guardian M.R., demands judgment against the Defendants, Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), jointly, severally, individually and/or in the alternative, on this Court, for compensatory and punitive damages, together with interest, costs of suit and attorneys fees in accordance with N.J.S.A. 10:5-1, et seq. and/or 20 U.S.C. §1681, et. seq. (Title IX) and/or 42 U.S.C. §1983.

SIXTH COUNT

1. Plaintiff, M.R., hereby repeats each and every allegation of the First through Fifth Counts as if same were set forth at length herein.
2. At all times material hereto, the Plaintiff, M.R., was the parent and guardian of the minor Plaintiff, K.R.
3. As a direct and proximate result of the injuries sustained by the minor Plaintiff, K.R., her parent and guardian, the Plaintiff, M.R., has incurred and is incurring and will in the future be

caused to incur great expenses for hospital and medical treatment to rectify the minor Plaintiff's injuries.

WHEREFORE, Plaintiff, M.R., demands judgment against the Defendants, Jeffrey Powell, and/or Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), jointly, severally, individually and/or in the alternative, on this Count, for damages, together with interest, costs of suit and attorneys fees in accordance with N.J.S.A. 10:5-1, et seq. and/or 20 U.S.C. §1681, et. seq. (Title IX) and/or 42 U.S.C. §1983.

SEVENTH COUNT

1. Plaintiffs, K.R., a minor by her parent and guardian, M.R. and M.R. in her own right, hereby repeat each and allegation of the First through Sixth Counts as if same were set forth at length herein.

2. As a direct and proximate result of the carelessness, negligence, intentional reckless, willful and/or wanton deliberate indifferent conduct of the Defendants as aforesaid, the minor Plaintiff, K.R., was injured both grievously and irreversibly; she has in the past and will in the future be plagued by great pain, shock and mental anguish. She has been forced to incur ruinous diverse expenses for medical, hospital and nursing attention in an effort to alleviate the injuries from which she is suffering; she has in the past and will in the future be prevented from attending to her lawful affairs and occupation.

WHEREFORE, Plaintiffs, K.R., a minor by her parent and guardian M.R. and M.R. in her own right, demand judgment against the Defendants, Jeffrey Powell and/or Cherry Hill Township Board of Education and/or Rosa International Middle School and/or John Doe(s) "A-Z", fictitious name(s), jointly, severally, individually and/or in the alternative, for compensatory and punitive

damages, costs of suit, interest and attorneys fees in accordance with N.J.S.A. 2A:61B-1 and/or N.J.S.A. 10:5-1, et seq. and/or 20 U.S.C. §1681, et. seq. (Title IX) and/or 42 U.S.C. §1983.

DEMAND FOR TRIAL BY JURY

PLEASE TAKE NOTICE that the plaintiff(s) hereby demand a trial by jury.

CERTIFICATION PURSUANT TO R.4:5-1

Following my initial review of this matter, it appears that there are no other actions or arbitrations relating to this suit pending or presently contemplated.

Following my initial review of this matter, it appears that there are no other persons who should be joined as parties.

DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that pursuant to R.4:25-4, **LOUIS G. HASNER**, is hereby designated Trial Counsel.

HOCKFIELD, HASNER & KASHER, P.A.
Attorneys for Plaintiff(s)

BY: Louis G. Hasner
LOUIS G. HASNER, ESQ.

Date: August 9, 2010

HOCKFIELD, HASNER & KASHER, P.A.
By: Louis G. Hasner, Esquire (LGH 6773)
425 Route 70 West
Cherry Hill, NJ 08002
(856) 429-1802
Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

K.R., a minor by her parent and natural guardian, M.R. and M.R., in her own right : CIVIL ACTION
: :
: NO.: 10-cv-04488(JHR)
vs. :
: :
JEFFREY POWELL, et al : :

ORDER ENTERING JUDGMENT AND DIRECTING DEPOSIT OF FUNDS

THIS MATTER having come before the Court in accordance with R.4:44-3 on *May 16, 2011*, and Louis G. Hasner, Esquire, attorney for the Plaintiff, and Michael Dolich, Esquire, attorney for the Defendants, Cherry Hill Township Board of Education and Rosa International Middle School, appearing, and the attorneys for the parties having reported to the Court that they have arrived at a settlement of the minor Plaintiff's claim between the Plaintiff and the Defendants, Cherry Hill Township Board of Education and Rosa International Middle School, and the Court having reviewed the physician reports and taken proofs on the record concerning the minor's injuries, disabilities and medical expenses and being satisfied that the settlement amount is fair and reasonable and in the minor's best interest.

IT IS on this 16th day of May, 2011, ORDERED and ADJUDGED that

1. Judgment is entered on behalf of K.R., a minor by her parent and guardian, in the gross amount of \$35,000.00 against the Defendants, Cherry Hill Township Board of Education and Rosa International Middle School, without costs and/or interest.

2. The following deductions shall be made from the gross settlement and paid by the Defendants in separate drafts as follows:

a. \$9,873.98 to be paid to the Plaintiff's attorney which reimburses \$1,498.63 for actual disbursements, costs and expenses and satisfies the attorneys' contingent fees of \$8,375.35.

3. [redacted] shall immediately apply to the Surrogate of Camden County pursuant to R. 4:81 for the appointment of a guardian of the estate of the minor. It shall be the responsibility of the attorney for the Plaintiff to see that this appointment is completed.

4. Pursuant to R. 4:48A the net recovery of \$25,126.02, payable for the benefit of the minor Plaintiff, shall be paid by or on behalf of the Defendant by check payable to the "Surrogate of Camden County Intermingled Trust Fund F/B/O of [redacted] a minor", within /4 days of this Judgment. It is and shall be the responsibility of the attorney for the Plaintiff to see that this deposit is completed.

5. Upon payment of the minor's net recovery into the Surrogates' Intermingled Trust Fund, the posting of a bond by the person applying to be guardian of the minor's estate is dispensed with pursuant to N.J.S.A. 3B:15-16.

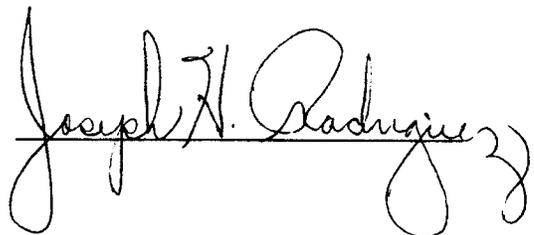
6. Monies may be withdrawn from said account only upon further order of the Superior Court of New Jersey, Chancery Division, Probate Part, pursuant to *N.J.S.A.* 3B:15-17, or upon the minor attaining majority pursuant to *N.J.S.A.* 3B:15-17.1.

7. The Custodial Guardian shall provide the Surrogate with the minor's Social Security Number and a copy of the minor's birth certificate. Personal identifying information shall be redacted from said documents and the same shall not be released to or made available for public scrutiny unless ordered to do so by the Superior Court.

8. The Custodial Guardian of the minor's estate is not authorized to receive any additional funds or property on behalf of the minor, except upon application to the Superior Court, Chancery Division, Probate Part, where the terms or conditions for the receipt of additional funds or property may be fixed. Pursuant to *N.J.S.A.* 3B:12-37, said limitation shall be stated in the Letter of Guardianship certificates hereinafter issued by the Surrogate.

9. Upon qualifying, the Surrogate of Camden County shall issue Letters of Guardianship for the Estate of _____ a minor, and thereupon said person appointed guardian be and is hereby authorized to perform all the duties and responsibilities of a guardian as allowed by law, except as limited herein.

10. The attorney for the Plaintiff shall deliver a copy of this Judgment to all parties and the Surrogate of Camden County within 14 days of the date hereof.

A handwritten signature in black ink, reading "Joseph N. Radzigue". The signature is written in a cursive style with a horizontal line underneath the name. There is a small flourish or mark at the end of the signature.

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4519-09T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEFFREY POWELL,

Defendant-Appellant.

Argued May 18, 2011 - Decided July 21, 2011

Before Judges Sapp-Peterson and Fasciale.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Accusation No. 10-02-0683.

Surinder K. Aggarwal and Lilia Londar argued the cause for appellant (William H. Buckman Law Firm, attorneys; William H. Buckman, of counsel; Andrew M. Smith, Ms. Aggarwal and Ms. Londar, on the briefs).

Jason Magid, Assistant Prosecutor, argued the cause for respondent (Warren W. Faulk, Camden County Prosecutor, attorney; Robin A. Hamett, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In this appeal, defendant argues that the trial judge erred in denying his application, filed prior to sentencing, to withdraw his guilty plea. Because we are satisfied defendant

has failed to demonstrate that any of the Slater¹ factors favored the granting of the relief sought, we find no abuse of discretion in the denial of the motion and affirm.

Defendant was charged with two counts of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3a, and one count of second-degree endangering the welfare of a child by engaging "in sexual conduct which would impair or debauch the morals of [a] child," N.J.S.A. 2C:24-4a, in connection with his position as a teacher's aide in a middle school. Defendant retained counsel and surrendered to authorities.

Defendant's attorney entered into plea negotiations that culminated in a negotiated plea agreement in which the State, in exchange for defendant's plea to an accusation charging third-degree endangering the welfare of a child, would recommend a four-year probationary term conditioned upon defendant serving 364 days in the Camden County Correctional Facility. The plea agreement was also conditioned upon defendant having no further contact with the victim, forfeiting his right to public employment, currently and prospectively, and undergoing an evaluation at the Adult Diagnostic and Treatment Center at Avenel. Further, the agreement placed defendant on notice that he would be subject to Megan's law, parole supervision for life,

¹ State v. Slater, 198 N.J. 145 (2009).

as well as appropriate fines and penalties. Finally, defendant waived his right to appeal, and the State agreed to dismiss the underlying warrant.

The terms of the plea agreement were placed on the record in open court, with trial counsel confirming its terms in defendant's presence. Trial counsel represented to the court that she had ample time to review the charges and to discuss the conditions of defendant's guilty plea as well as his decision to proceed by accusation rather than having the matter presented to a grand jury for consideration. Trial counsel also represented that she had reviewed the requisite plea forms with defendant and filled in answers to questions contained in the forms based upon defendant's responses.

The court personally addressed defendant, who was placed under oath. Defendant acknowledged to the court that he heard and understood the nature of the charges against him, the terms and conditions of the proposed plea agreement, including the fact that he was waiving indictment. Defendant conveyed to the court his desire to waive indictment and to plead guilty in accordance with the plea agreement.

Next, through counsel, defendant provided a factual basis for his guilty plea:

[DEFENSE COUNSEL]: Mr. Powell, I'd like to draw your attention, as the [j]udge indicated that's on this charging document,

that on or about April and May of 2009 in Cherry Hill, you were a teacher at a Cherry Hill school?

THE DEFENDANT: Correct.

[DEFENSE COUNSEL]: Or a teacher's aide?

THE DEFENDANT: Teacher's aide. Correct.

[DEFENSE COUNSEL]: And in your capacity as a teacher's aide, did you come in contact or get to know a young woman by the name of -- or the initials of K.R.?

THE DEFENDANT: Correct.

[DEFENSE COUNSEL]: And she was under the age of [sixteen], right?

THE DEFENDANT: Yeah.

[DEFENSE COUNSEL]: She was about [thirteen] or [fourteen]?

THE DEFENDANT: Fourteen.

[DEFENSE COUNSEL]: Okay.

THE DEFENDANT: Fourteen, yeah.

[DEFENSE COUNSEL]: Did you on several occasions have some phone discussions with K.R. that you acknowledge were inappropriate?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: And do you acknowledge that they were inappropriate, because they had the tendency to impair or debauch her morals, because they were conversations of a sexual nature?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: And specifically, did you participate in these conversations where the two of you spoke about engaging in various sexual acts?

THE DEFENDANT: In the future, yes.

[DEFENSE COUNSEL]: Okay. Judge, I think that's sufficient to --

THE COURT: [Prosecutor], any cross?

[DEFENSE COUNSEL]: -- establish the charge of endangering.

[ASSISTANT PROSECUTOR]: I just want to get my head around what's being said here.

You were talking about having sex with this girl in the future, sir?

THE DEFENDANT: No.

[DEFENSE COUNSEL]: Sexual acts, not specifically sexual intercourse.

[ASSISTANT PROSECUTOR]: Okay.

[DEFENSE COUNSEL]: And I will clarify that if necessary. But was it acts of oral sex that the two of you discussed?

THE DEFENDANT: She asked me --

[DEFENSE COUNSEL]: Jeffrey, just answer yes or no. Did you participate in discussions with this young child under the age of [sixteen] about participating in oral sexual acts with her at some point in the future?

THE DEFENDANT: Yes.

[ASSISTANT PROSECUTOR]: All right. You also took her to your home on a number of occasions?

[DEFENSE COUNSEL]: Well, I -- it's not necessary to establish that, for purposes of the factual basis, which only requires having sexually explicit conversations. I think my client can acknowledge that he took her to her -- his home on one occasion. And it's in the accusation[.] [W]e didn't cross it out.

[ASSISTANT PROSECUTOR]: Okay. Your home is in Cherry Hill?

THE DEFENDANT: Yes.

[ASSISTANT PROSECUTOR]: And these conversations took place when you were in Cherry Hill?

THE DEFENDANT: Yes.

[ASSISTANT PROSECUTOR]: So, your discussions weren't about having oral sex with this girl immediately, but at some future time?

THE DEFENDANT: Yes.

[ASSISTANT PROSECUTOR]: Okay. And she was [fourteen] at the time these discussions were going on?

THE DEFENDANT: Yes.

The court, apparently not satisfied with defendant's responses, engaged defendant in further colloquy after the prosecutor expressed the belief that defendant's factual recitation was "probably sufficient under State [v.] Maxwell[, 361 N.J. Super. 502 (Law Div. 2001), aff'd, 361 N.J. Super. 401 (App. Div.), certif. denied, 178 N.J. 34 (2003)]." The court responded:

THE COURT: No, that's -- I know what you're having a hard time getting your head around; probably the same thing I am.

Well, did you talk about having sex with her after she reached the age of [sixteen], [seventeen] and [eighteen] or did you talk to her about having sex in the not-too-distant future, is what I'm asking you?

THE DEFENDANT: After she turned [eighteen].

THE COURT: There you go.

[DEFENSE COUNSEL]: Judge, it's still -
-

THE COURT: Do you think that's enough, [Prosecutor]?

[DEFENSE COUNSEL]: Because of -- if I could submit, Your Honor. Because of her young age at this very time that he's being charged, that she was under the age of [sixteen], that she was only [fourteen], it's still the kind of sexual conduct that impairs her morals, because it's not the kind of language -- especially coming from a school teacher -- that you're supposed to engage in with a young child. It's --

THE COURT: I'm not arguing with you about it[.] I just wanted to make it clear as to what he alleged, because I want to make sure he understands that, no matter what, no matter what the future thoughts are, the fact of the matter is, you engaged in this inappropriate conduct with her while she was under the age. You were laying the groundwork, the foundation, while she was underage. You were attempting to gratify yourself, is that correct, by talking to her about these acts while she was underage? Am I correct?

THE DEFENDANT: Well, she was talking to me about them, to be honest.

THE COURT: And didn't you know it was inappropriate, because of your age and your position as a teacher's aide, with someone that young?

THE DEFENDANT: Yes.

THE COURT: Okay. And you did it anyhow, right?

THE DEFENDANT: Yes.

THE COURT: Anything else, [Prosecutor]?

[ASSISTANT PROSECUTOR]: I guess you would see this girl five days a week in school, then, even though you were having these conversations at night with her?

THE DEFENDANT: Yes.

At the conclusion of this exchange, the court accepted defendant's guilty plea and scheduled the matter for sentencing. One day later, defendant contacted new counsel, who was subsequently retained. New counsel filed a motion to withdraw defendant's guilty plea four days after defendant entered his guilty plea. Defendant claimed that he was forced to accept the plea offer and felt pressured to do so by his first attorney, who told him that if he did not accept the State's offer, he would be charged with official misconduct and face a minimum of five years incarceration. Defendant also contended defense counsel told him that 364 days in the county jail was what she

would recommend for her son and that she was not a risk-taker when it came to trial. He alleged further that defense counsel told him to fabricate his factual basis for the endangering charge because the facts, as he had conveyed them to her, would not substantiate an endangering charge.

The court conducted a hearing at which defendant's first defense counsel testified. During counsel's testimony, she referenced numerous correspondence directed to defendant discussing the defense of the matter on defendant's behalf. At the conclusion of the hearing, the court denied the motion, finding defense counsel's testimony credible and no validity to defendant's claims in his certification that defense counsel required defendant to fabricate the facts supporting his guilty plea, commanded defendant to plead guilty, or wrote down the word "guilty" when the court questioned "what his plea was" at the plea hearing. The present appeal followed.

On appeal, defendant presents the following points for our consideration:

POINT I

THE COURT ERRED AS A MATTER OF LAW IN DENYING DEFENDANT'S MOTION TO VACATE HIS PLEA DAYS AFTER IT WAS ENTERED AND PRIOR TO ANY SENTENCING.

POINT II

DEFENDANT HAD A VALID INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT SHOULD HAVE VACATED HIS PLEA AGREEMENT.

POINT III

IT WAS A GROSS MISCARRIAGE OF JUSTICE FOR THE COURT TO ALLOW COUNSEL TO WITHDRAW SO SHE COULD BE CALLED BY THE STATE TO TESTIFY . . . IN OPPOSITION TO DEFENDANT'S MOTION TO VACATE HIS PLEA.

A. DEFENDANT NEVER WAIVED HIS ATTORNEY-CLIENT PRIVILEGE.

We have considered the points raised in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons expressed by Judge Irvin J. Snyder in his March 16, 2010 oral opinion. We add the following comments.

In Slater, supra, 198 N.J. at 156, the Court held that whether a plea may be set aside is a matter resting in the exercise of the trial court's discretion. Where, as in this case, the application to withdraw a guilty plea is filed prior to sentencing, "courts are to exercise their discretion liberally to allow plea withdrawals." Ibid. (citing State v. Smullen, 118 N.J. 408, 416 (1990)). Notwithstanding this liberal standard, "'the burden rests on the defendant, in the first instance, to present some plausible basis for his request, and his good faith in asserting a defense on the merits.'" Ibid. (quoting Smullen, supra, 118 N.J. at 416). Stated differently, "'[l]iberality in exercising discretion does not

mean an abdication of all discretion.'" Id. at 157 (quoting Smullen, supra, 118 N.J. at 416). In considering whether to permit a withdrawal, judges are to "consider and balance . . . : (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." Id. at 157-58. Measured against these standards, we find no abuse of discretion in the judge's denial of defendant's motion.

As noted above, Judge Snyder carefully examined defendant at great length at the plea hearing. Defendant, through questioning from his attorney and later by the court, continually acknowledged throughout the plea hearing that he understood what he was waiving and the potential consequences of his guilty plea. Defendant also presented a thorough factual basis for his guilty plea. By contrast, in seeking withdrawal of his guilty plea, defendant provided a certification that expressed no colorable claim of innocence. New counsel explained to the court that the motion to withdraw the guilty plea was "put together in short order based on the need, in fact, to vacate this as quickly as possible. . . . [W]e didn't get into necessarily the merits of this case, other than, you know, the conversations that I've had with my client. And if

it's necessary to put him on, we can discuss the conversations that I've had." Although the court recessed, during which time new counsel had the opportunity to listen to the plea hearing tape, when the proceeding resumed, defendant did not testify. Thus, what remained before the court was no evidence of any colorable claim of innocence.

The court next turned its attention to the claimed ethical violations alleged against defense counsel and found the allegations lacked credibility. The credibility determination of the trial judge is entitled to our deference. See State v. Locurto, 157 N.J. 463, 470-71 (1999). We must defer to the factfinder's ability to judge credibility because the factfinder had the opportunity to observe the witness. Ibid. Thus, the facts as found by the trial court as to the second Slater factor also do not support defendant's argument.

The third Slater factor also tilted against vacating defendant's guilty plea. Defendant's plea was the product of a negotiated plea that was of great benefit to defendant because it spared him the risk of a far greater prison term if convicted. State v. Warren, 115 N.J. 433, 443 (1989).

As to the fourth factor, defendant failed to offer the requisite proof establishing the first three Slater factors. Thus, the State was not required to show prejudice. Slater, supra, 198 N.J. at 162.

Finally, defendant claims the court, in permitting defense counsel to testify, undermined defendant's ability to move to vacate his guilty plea on the basis of a colorable claim of innocence because she was permitted to testify without limitation. We find no abuse of discretion in permitting defense counsel to testify or in permitting the scope of the testimony to extend into discussions surrounding defendant's guilty plea.

Defendant accused defense counsel of instructing him to fabricate his factual basis for the guilty plea. Her testimony was necessary and certainly permissible under the Rules of Professional Conduct, which permit a lawyer to reveal confidential information to the extent necessary to defend against a claim such as alleged by defendant. See RPC 1.6(d)(2). Moreover, the assertion of a colorable claim of innocence was not undermined by defense counsel's testimony, which occurred after defendant filed his motion and supporting certification and after defendant was afforded an opportunity to present his proofs bearing upon defense counsel's ineffectiveness. The certification defendant submitted in support of his motion to withdraw his guilty plea did not assert a colorable claim of innocence. Rather, it states that he "repeatedly told [his] attorney [he] wanted a trial." A desire for trial, however, is not an assertion of a colorable claim of

innocence, but a demand that the State prove its allegations with proof beyond a reasonable doubt. Slater, supra, 198 N.J. at 158-59.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION