

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, A UTAH CORPORATION SOLE; THE CORPORATION OF THE  
PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS;  
LENZNER MEDICAL SERVICES LLC, AN ARIZONA LIMITED LIABILITY COMPANY;  
DR. JOHN HERROD AND SHERRIE FARNSWORTH HERROD, INDIVIDUALLY AND  
AS A JOINTLY MARRIED COUPLE; ROBERT KIM MAUZY AND MICHELLE MORGAN  
MAUZY, INDIVIDUALLY AND AS A JOINTLY MARRIED COUPLE; SHAUNICE WARR,  
INDIVIDUALLY,  
*Petitioners,*

*v.*

HON. LAURA CARDINAL, JUDGE OF THE SUPERIOR COURT  
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF COCHISE,  
*Respondent,*

*and*

JANE DOE I; JANE DOE II; AND JOHN DOE, BY AND THROUGH CONSERVATOR,  
FLEMING AND CURTI PLC,  
*Real Parties in Interest.*

No. 2 CA-SA 2022-0047  
Filed December 15, 2022

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);  
Ariz. R. P. Spec. Act. 7(g), (i).*

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Special Action Proceeding  
Cochise County Cause No. S0200CV202000599

**JURISDICTION ACCEPTED; RELIEF GRANTED**

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COUNSEL

Osborn Maledon P.A., Phoenix  
By William J. Maledon, Scott W. Rodgers, Joseph N. Roth,  
and Travis C. Hunt

Borowiec & Borowiec P.C., Sierra Vista  
By Joel P. Borowiec  
*Counsel for Petitioners*

Ahwatukee Legal Office P.C., Phoenix  
By David L. Abney

Cadigan Law Firm PLLC, Tucson  
By Lynne M. Cadigan and Taylor Boren

Manly, Stewart & Finaldi, Irvine, California  
By John C. Manly, Courtney M. Thom, Ashley T. Rayfield,  
and Ariel J. Romero  
*Counsel for Real Parties in Interest*

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**MEMORANDUM DECISION**

Presiding Judge Eppich authored the decision of the Court, in which  
Vice Chief Judge Staring and Judge Brearcliffe concurred.

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E P P I C H, Presiding Judge:

¶1 The petitioners (collectively, LDS) seek special action review of the respondent judge's order directing disclosure of evidence relating to church disciplinary council proceedings based on her conclusion that the priest-penitent privilege did not apply. LDS challenges her determinations that the penitent had waived the privilege and that an attendee of a church disciplinary council was not clergy subject to the privilege. We accept special action jurisdiction and grant relief.

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¶2 This special action arises out of a lawsuit by the real-parties-in-interest (collectively, plaintiffs) against the Church of Jesus Christ of Latter-day Saints and two bishops of the church, John Herrod and Kim Mauzy. The plaintiffs are victims of sexual abuse by Paul Adams, their father, who was a member of the church. In 2013, Adams was excommunicated from the church following confessions to Herrod and a church disciplinary council called by Mauzy.

¶3 Adams posted on the internet numerous videos of him sexually abusing his children. In 2017, he was arrested, confessed his crimes to law enforcement, and was indicted for twenty-six felonies related to the abuse. Adams subsequently killed himself. After Adams's suicide, and after there had been extensive publicity about the abuse, Herrod acknowledged to a law enforcement officer that he had "knowledge [before Adams's arrest] that Paul Adams was harming his children" and advised Adams to "turn [him]self in."

¶4 Several disputes arose during discovery in the matter. Relevant here, in resolving those disputes, the respondent judge addressed whether LDS was required to disclose the file related to Adams's disciplinary council proceeding and whether a witness to that proceeding, Richard Fife, was constrained by the priest-penitent privilege from testifying about the proceeding.

¶5 The respondent judge determined Adams had waived the priest-penitent privilege by his "subsequent, overtly public admission of his sexual abuse of his children," including his statements on social media and posting of videos. The respondent also determined that Fife was not restrained from testifying by the priest-penitent privilege because he was not a "clergyman or priest" as contemplated by A.R.S. § 12-2233 and instead had attended the proceeding as a non-participating "ward clerk." The respondent ordered LDS to disclose the disciplinary file. She determined that "all members of the disciplinary council, as well as any member of the Church with knowledge of the acts of Paul Adams resulting in his excommunication from the church, subsequent arrest and indictment, [we]re relieved of the duty of confidentiality" and required "to respond to any questions regarding their knowledge of any information regarding Paul Adams' sexual abuse of his children." This petition for special action followed. A trial court's ruling that information is not privileged is appropriate for special action review. *See Waters v. O'Connor*, 209 Ariz. 380, ¶¶ 1, 3 (App. 2004); *see also* Ariz. R. P. Spec. Act. 1(a), 3(c).

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**Did Adams waive the priest-penitent privilege?<sup>1</sup>**

¶6 Pursuant to § 12-2233, “In a civil action a clergyman or priest shall not, without the consent of the person making a confession, be examined as to any confession made to him in his character as clergyman or priest in the course of discipline enjoined by the church to which he belongs.”<sup>2</sup> This statute, like all privilege statutes, must be “restrictively interpreted” because it “impede[s] the truth-finding function of the courts.” *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24, 29 (App. 1988). Privileges protect communications, but not facts known from other sources. See *Ulibarri v. Superior Court*, 184 Ariz. 382, 385, *corrected* (App. 1995); see also *State v. Sucharew*, 205 Ariz. 16, ¶ 11 (App. 2003) (privilege “exists to protect confidential communications”). And, just as a person cannot make a fact confidential by communicating it to an attorney or a priest, see *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981), disclosing a fact does not mean all communications about that fact lose any extant privilege.

¶7 The privilege may nonetheless be waived expressly or implicitly. *Church of Jesus Christ of Latter-Day Saints*, 159 Ariz. at 29. Implied waiver occurs when the privilege holder “has abandoned privacy and confidentiality through inconsistent conduct” by revealing “not only the fact, but the substance” of a private communication. *Id.* We review de novo whether a privilege exists and whether it has been waived. *State v. Archibeque*, 223 Ariz. 231, ¶ 5 (App. 2009).

¶8 LDS asserts the respondent judge erred by concluding Adams had waived the priest-penitent privilege by broadcasting his criminal

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<sup>1</sup>The priest-penitent privilege is also known by several other labels, such as the clergyman-penitent privilege. The terms are interchangeable.

<sup>2</sup>The priest-penitent privilege is also implicated by several statutes concerning reporting requirements for abuse. See A.R.S. §§ 8-805(C), 13-3620(L), 46-453(B). This court has rejected the argument that these statutes provide a basis for a priest to refuse to testify even when the penitent has waived the priest-penitent privilege. *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24, 32 (App. 1988). Given our disposition of this matter, we need not reach LDS’s argument that that case was wrongly decided and that priests have an “independent right to maintain confidentiality of confessions.”

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conduct on the internet and by confessing to police. The respondent noted Adams's "profound disregard" for the church's disciplinary process and concluded Adams's conduct was inconsistent with a desire for confidentiality and was sufficient to waive the privilege. But this reasoning disregards a necessary element before waiver may be found. It is not enough to publicly admit the "facts" involving the same conduct that may have been previously disclosed in confidence. The communicant must also reveal the substance of the confession itself. That is, here, waiver could exist had Adams not only revealed that he had committed these offenses but also what he had communicated in confession to Harrod or Mauzy.<sup>3</sup> See *Church of Jesus Christ of Latter-Day Saints*, 159 Ariz. at 29.

¶9 The plaintiffs cite numerous cases in support of their contention that discussing the conduct underlying the confession is sufficient, standing alone, to waive the privilege as to the confession itself. For several reasons we do not find them persuasive. For example, the plaintiffs cite *Perry v. State*, 655 S.W.2d 380, 381 (Ark. 1983), in which the court stated the defendant had "told about everyone he could about killing his wife and, therefore, waived any privilege he might claim." In *Perry*, the defendant publicly disclosed his conduct before and after confessing to a minister with a church elder present. The court, however, did not explain whether the defendant's latter disclosure included only the underlying conduct or the content of the confession. Similarly, in *People v. Carmona*, 587 N.Y.S.2d 749, 750 (App. Div. 1992), the court found waiver when the defendant "voluntarily repeat[ed] the substance of his admissions to the priest, an act clearly inconsistent with any desire to maintain a priest-penitent privilege." But, by repeating the substance of his admissions, it appears the defendant disclosed not only the underlying conduct but the content of his confession. Thus, neither of these cases provides meaningful support for the plaintiffs' argument.

¶10 Moreover, the cases cited in *Carmona* are distinguishable.<sup>4</sup> For example, the court cites *People v. O'Connor*, 447 N.Y.S.2d 553 (App. Div.

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<sup>3</sup>We do not suggest that the only way the penitent could impliedly waive the privilege is by specifically invoking the fact of the confession; we conclude only that admitting the conduct underlying the confession is insufficient to waive the privilege as to the confession itself.

<sup>4</sup>Notably, the *Carmona* court cited *Church of Jesus Christ of Latter-Day Saints*, which, as we have explained, does not support the plaintiffs'

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1982). In that case, the defendant called a lawyer, who had represented him years prior when the attorney was in private practice, but who was at the time an assistant district attorney, to arrange for his surrender to police. *Id.* at 555, 557. The appellate court found no privilege existed between him and the lawyer because the defendant knew the attorney could not represent him and, in any event, he had not sought legal advice. Moreover, when addressing waiver, the court explained “a defendant who voluntarily discloses privileged communications to police before trial waives the privilege.” *Id.* at 557. The court did not further discuss whether the defendant had disclosed merely the facts of his offense to law enforcement or the content of his communication with the attorney as well. *Id.* at 557-58.

¶11 The court in *Carmona* also relied on *People v. Fentress*, 425 N.Y.S.2d 485 (Cnty. Ct. 1980). There, the court found a defendant had no reasonable expectation his statements to an attorney would be confidential because the defendant agreed to disclose “the fact of the homicide” to police. *Id.* at 493-94. The court further relied on *State v. Andrews*, 357 P.2d 739, 744 (Kan. 1960), which states, “Where the one making the privileged conversation tells the facts to other third parties, the privilege is waived and the minister, physician or lawyer may be allowed to testify as to the communication made to him.” But, insofar as the court in *Andrews* meant the privilege is waived if the person merely discusses the same subject matter, and not the communication itself, the cases it cites do not support that outcome. For example, it cited *Cranston v. Stewart*, 334 P.2d 337, 340-41 (Kan. 1959), in which the court held that a party could not testify about the content of a contract yet also assert that some of the contract’s content was confidential because an attorney had drafted it. Again, that scenario is not present here.

¶12 Adams publicly disclosed only his crimes, not the content of his confession to the church. Thus, the respondent erred by concluding his advertising of his crimes and later confession to law enforcement waived the priest-penitent privilege.<sup>5</sup>

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argument that admitting the conduct underlying the confession waives the privilege.

<sup>5</sup>In the plaintiffs’ response to LDS’s special action petition, they assert Adams waived the privilege while incarcerated during a recorded telephone conversation with Mauzy. They acknowledged at oral argument, however, that evidence of the contents of that call was not before the

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**Was Fife constrained by the priest-penitent privilege?**

¶13 The LDS next asserts the respondent erred in determining Fife was merely a ward clerk and not clergy subject to the privilege, thus requiring Fife to submit to questions about the disciplinary council proceeding. To determine whether an individual is a “clergyman or priest” as contemplated by § 12-2233, a court examines “whether the church’s ecclesiastical rules, customs, and laws recognize the person as a clergyman or priest.” *Archibeque*, 223 Ariz. 231, ¶ 8 (addressing definition under § 13-4062(3)). The individual need not be “ordained clergy,” but must be, “within the spiritual traditions and doctrines of their faith, . . . qualified and capable of encouraging the communicants to abandon and perhaps make amends for wrongful and destructive behavior.” *Waters*, 209 Ariz. 380, ¶¶ 18-19.

¶14 LDS argues there is nothing in the record supporting the respondent judge’s conclusion that Fife was present merely to record the proceedings without participating in the discussion or decision. It asserts, instead, that the only evidence in the record is that Fife attended the council as First Counselor of the Bishopric. The plaintiffs cite no evidence supporting the respondent’s conclusion that Fife was merely a ward clerk and acknowledged at oral argument that the record does not support the respondent’s finding. Based on the record citations the LDS has provided, Fife’s role at the disciplinary council is not apparent—he acknowledged having served as a ward clerk and as first counselor. But he refused to answer any questions about the disciplinary council itself, including about his role in that proceeding, although he claimed he was not a “secretary” at the time. Given the lack of evidence and the plaintiffs’ concession, the respondent erred by concluding that Fife was not clergy. *See Moreno v. Jones*, 213 Ariz. 94, ¶ 20 (2006) (appellate court need not defer to finding unsupported by evidence); *Archibeque*, 223 Ariz. 231, ¶ 5 (trial court’s factual findings in privilege analysis reviewed for abuse of discretion).

¶15 The plaintiffs seem to assert, however, that Fife is not constrained by the privilege because it has been waived by the sharing of Adams’s confession amongst church clergy and attorneys. But, in Arizona,

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respondent at the time of her ruling. Thus, we do not address it in the first instance. *See Linder v. Brown & Herrick*, 189 Ariz. 398, 409 (App. 1997) (“This court cannot consider on appeal evidence that was not before the trial court.”).

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the priest cannot waive the penitent's privilege. *See Waters*, 209 Ariz. 380, ¶ 12 ("The privilege afforded by the statute belongs to the communicant: a clergyman may not disclose the communicant's confidences without the communicant's consent."). And, in any event, the respondent judge did not rule on this basis and nothing in the limited materials provided to this court indicates whether this argument was raised below. Thus, we do not address it further.<sup>6</sup>

¶16 We accept special action jurisdiction and grant relief. We vacate the respondent judge's order directing that church members are not constrained by the privilege and the disciplinary council file be disclosed.

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<sup>6</sup>We additionally express no opinion whether the priest-penitent privilege applies to non-testimonial evidence or whether LDS may be required to disclose communications unrelated to church discipline that nonetheless contain information about Adams's confessions.