STATE OF MICHIGAN

COURT OF APPEALS

FR. EDUARD PERRONE,

Plaintiff-Appellant,

and

DAVID SCHUSTER,

Plaintiff,

v

MARY ROSE MAHER, ST. MARY'S HAVEN, and NANCY LEPAGE,

Defendants,

and

ARCHDIOCESE OF DETROIT,

Appellee.

UNPUBLISHED
December 21, 2021

No. 355057
Wayne Circuit Court
LC No. 19-010951-NO

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

PER CURIAM.

Plaintiff, Fr. Eduard Perrone, appeals as of right from the trial court's final order, dismissing the case with prejudice and commensurately challenges the concurrent order granting appellee Archdiocese of Detroit's motion to enforce a protective order and finding Fr. Perrone in contempt, as well as an earlier order requiring return or destruction of confidential materials procured by plaintiffs under a protective order.[1] Finding error warranting reversal regarding the

[1] We will refer to Fr. Perrone and Schuster collectively as "plaintiffs;" however, we acknowledge only Fr. Perrone is appealing the trial court's orders and Schuster is not a party to this appeal.

finding of contempt, we vacate that portion of the order and remand for further contempt proceedings consistent with this opinion. Finding no other errors warranting reversal, we otherwise affirm the orders of the trial court.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of an alleged statement made in 2018, by an unnamed individual, John Doe, that Fr. Perrone sexually abused him approximately 40 years earlier. According to plaintiffs, Doe's wife called the Archdiocese on May 24, 2018, to report her husband's allegation of abuse. G. Michael Bugarin and James Smith investigated the abuse allegations on behalf of the Archdiocese.

Plaintiffs alleged Doe contacted defendant, Mary Rose Maher, through a Facebook group she organized titled "Opus Bono Exposed." Maher had written a blog post on the internet titled "Altar Boy Abuse & Cover-Up by Fr. Eduard Perrone & David Schuster at Assumption Grotto Church Detroit, MI," which generated media interest. Maher later allegedly convinced Doe to tell his story to the media, wherein he stated, "Fr. Perrone engaged in 'inappropriate' grabbing and groping by Fr. Perrone at the swim parties at the Perrone family lake house." Doe also told the reporters that he reported the claims to law enforcement but action was never taken.

Plaintiffs claim Bugarin fabricated a "rape allegation," which he then presented to the Archdiocese Review Board. After the meeting with the Review Board, the Archdiocese issued a press release, which Bugarin repeated to parishioners at Assumption Grotto, stating the Review Board found Doe's allegations credible, meaning they had a "semblance of truth."

After plaintiffs filed the present lawsuit, defendants sent a subpoena duces tecum to the Archdiocese seeking unredacted copies of all documents related to the Archdiocese's investigation into Fr. Perrone. In the subpoena, defendants excluded from the request for documents "information which concern ecclesiastical matters." The Archdiocese moved to quash the subpoena, which the trial court denied and ordered the Archdiocese to produce the records subject to a protective order. The Archdiocese later agreed to allow plaintiffs to file an amended complaint referring to and quoting from confidential materials produced subject to the protective order.

The parties subsequently stipulated to dismiss with prejudice defendants Maher and St. Mary's Haven, leaving only LePage as a defendant. After acceptance of a case evaluation award by the remaining parties, the trial court closed the case on August 12, 2020, and entered an order regarding the same on October 6, 2020. Before the trial court entered the October 6, 2020 final order, however, Fr. Perrone filed a lawsuit against Bugarin for defamation on August 26, 2020 (*Bugarin* Complaint). In the Archdiocese's view, the *Bugarin* Complaint cited to and quoted from information Fr. Perrone learned from confidential materials obtained under the protective order in this case, and the Archdiocese thereafter moved to enforce the provisions of the protective order. In addition to the Archdiocese's motion, Fr. Perrone moved to preserve the confidential records obtained in the litigation.

On October 6, 2020, the trial court entered an order granting the Archdiocese's motion to enforce the protective order. The trial court's order required Fr. Perrone to remove all references to the confidential materials from his court filings and prohibited him from using those materials

in the future. The trial court sanctioned Fr. Perrone $500 "for violating the Protective Order by providing the complaint containing references to AOD's Confidential Material to the media." The trial court also denied Fr. Perrone's motion to preserve the confidential records. This appeal followed.[2]

II. STANDARD OF REVIEW

This Court "review[s] for an abuse of discretion a trial court's decision on a motion for a protective order." *Alberto v Toyota Motor Corp*, 289 Mich App 328, 340; 796 NW2d 490 (2010). This Court also "review[s] for an abuse of discretion a trial court's decision to hold a party or individual in contempt." *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Factual findings made by the trial court are reviewed for clear error. *Beach v Lima Twp*, 283 Mich App 504, 524 n 7; 770 NW2d 386 (2009). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

III. ANALYSIS

Fr. Perrone's principal argument on appeal is that the trial court abused its discretion when ruling on matters dealing with the protective order and confidential documents because the Archdiocese waived enforcement of the protective order. The Archdiocese disputes that it waived the protective order. The trial court did not explicitly rule on the issue.

"[A] waiver is a voluntary and intentional abandonment of a known right." *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). In other words, "the freedom to contract does not authorize a party to unilaterally alter an existing bilateral agreement." *Id*. at 372. "Rather, a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract." *Id*. In the context of a claim of waiver of a contractual provision:

> The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract. In meeting this clear and convincing burden, a party advancing amendment must establish that the parties mutually intended to modify the particular original contract, including its restrictive amendment clauses such as written modification or anti-waiver clauses. [*Id*. at 373.]

[2] Fr. Perrone moved to stay enforcement of the trial court's order denying his motion to preserve confidential materials, which this Court granted on November 3, 2020. *Perrone v Maher*, unpublished order of the Court of Appeals, entered November 3, 2020 (Docket No. 355057).

The communications between the parties and the Archdiocese do not establish mutual intent between Fr. Perrone and the Archdiocese to waive the protections of the protective order. In an e-mail communication between Fr. Perrone's attorney, Kathleen Klaus, and the Archdiocese's attorney, Thomas Van Dusen, Klaus stated to Van Dusen: "I've been talking with Joe [Viviano] about withdrawing our motion for relief from the protective order on the condition that we be allowed to file an amended complaint that refers to and in some cases quotes from the confidential materials." Klaus confirmed to Van Dusen that "[a]lthough Joe's clients have an interested [sic] in the protected materials, only the AOD and the court can waive the confidentiality designation to the materials."

In response to further negotiations, Van Dusen wrote to Klaus his understanding of the agreement between the Archdiocese and Fr. Perrone:

> 1. Plaintiffs intend to file a second amended complaint that is based on material produced by the AOD that has been designated as confidential under the protective order. Any such designated confidential material will not be attached as exhibits to the amended complaint.
>
> 2. Defendants have stipulated to filing the second amended complaint.
>
> 3. Plaintiffs will withdraw their motion for partial relief from the protective order.
>
> 4. We do not understand your statement that "if the AOD uses the confidential material in a pleading or press release, we reserve the right to ask that all of the materials be made public." We understand your reference to a "pleading or press release" to be a public pleading or press release. We intend to file any document with confidential material under seal. Thus, it will be in a pleading, but will not be public. Please confirm that you will not be asking to make all confidential material public as a result of the AOD filing a pleading under seal.

In response to Van Dusen's e-mail, Klaus responded: "Yes on 1 through 3. On 4, our position is that, if the AOD files confidential materials in the public record or otherwise makes that information public, then we can renew our motion and argue waiver."

Contrary to Fr. Perrone's arguments, nothing in these communications demonstrates that the Archdiocese agreed to allow him to cite or quote from the confidential materials in the *Bugarin* Complaint. The Archdiocese made it clear that it did not view the agreement as allowing the confidential material to "be public" simply because it consented to Fr. Perrone filing the second amended complaint. Fr. Perrone confirmed this understanding when he stated he would argue waiver if the Archdiocese filed the confidential materials "in the public record or otherwise makes that information public . . . ." The communications between Klaus and Van Dusen indicate the Archdiocese was willing to waive the provisions of the protective order only for purposes of the present litigation and did not extend to a blanket waiver of the protective order. Having failed to demonstrate by clear and convincing evidence the Archdiocese intended to waive all confidentiality over the materials it produced, plaintiff cannot show the trial court abused its discretion.

Fr. Perrone also argues that because the Archdiocese agreed to accept service of the *Bugarin* Complaint, the Archdiocese waived enforcement of the protective order. Fr. Perrone cites no legal authority in support of the position that acceptance of service acts as waiver to anything alleged in or attached to the complaint. See *Hooker v Moore*, 326 Mich App 552, 557 n 2; 928 NW2d 287 (2018) ("[W]hen a party merely announces his or her position and fails to cite any supporting legal authority, the issue is deemed abandoned."). Moreover, such an act by the Archdiocese—acceptance of service—does not rise to the level of "clear and convincing evidence" required to show mutuality of assent. See *Nagel Precision, Inc*, 469 Mich at 373. Indeed, voluntary acceptance of service only potentially waives defects in service of process and lack of personal jurisdiction of the court, but not overall defenses. See *In re Estate of Gordon*, 222 Mich App 148, 158; 564 NW2d 497 (1997) ("[A] party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections."); MCR 2.105(K)(1) ("Provisions for service of process contained in these rules are intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances. These rules are not intended to limit or expand the jurisdiction given the Michigan courts over a defendant. The jurisdiction of a court over a defendant is governed by the United States Constitution and the constitution and laws of the State of Michigan.").

Moreover, to the extent the trial court based its decision on the fact that there was no waiver of the protective order, Fr. Perrone has failed to satisfy his burden on review that the trial court clearly erred. In the light most favorable to Fr. Perrone, the communications evidence ambiguity as to what his intentions would be once the Archdiocese agreed to the filing of the second amended complaint. Nevertheless, to the extent the trial court resolved that issue in the Archdiocese's favor, Fr. Perrone cannot show through somewhat ambiguous communications, or through acceptance of service, that the trial court clearly made a mistake in finding for the Archdiocese. See *Krol*, 256 Mich App at 512. The trial court was within its discretion to conclude the Archdiocese did not waive the provisions of the protective order.

Fr. Perrone also argues the trial court abused its discretion when it imposed the $500 fine. According to Fr. Perrone, the fine was criminal in nature and the process afforded by the trial court was insufficient. We agree with plaintiff and vacate the portion of the order imposing the $500 fine. We otherwise affirm the order of the trial court.

As a preliminary matter, in the trial court, Fr. Perrone did not argue that the imposition of the fine was a criminal fine requiring additional due process. Instead, he based his defense on the fact that the Archdiocese waived the protective order. Accordingly, Fr. Perrone has failed to preserve on appeal the issue of whether the fine constituted criminal contempt. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227-228; 964 NW2d 809 (2020) (an issue must be raised in or decided by the trial court in order to be preserved for appellate review)). Thus, Fr. Perrone must not only show that there was error by the trial court, but must also show that the error was plain and the outcome would have been different had the error not occurred. See *Total Armored Car*

Serv, Inc v Dep't of Treasury, 325 Mich App 403, 412; 926 NW2d 276 (2018); *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).[3]

"Contempt of court is defined as a wilful act, omission, or statement that tends to impair the authority or impede the functioning of a court." *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 387; 853 NW2d 421 (2014) (quotation marks and citation omitted). "Courts in Michigan have inherent and statutory power to punish contempt of court by fine or imprisonment." *Id*. To avoid contempt, "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Dudzinski*, 257 Mich App at 110. "[A]ll contempt proceedings are referred to as quasi-criminal or criminal in nature." *Porter v Porter*, 285 Mich App 450, 456; 776 NW2d 377 (2009) (quotation marks and citations omitted). "The distinction between civil and criminal contempt is important because a criminal contempt proceeding requires some, but not all, of the due process safeguards of an ordinary criminal trial." *Id*. (quotation marks and citation omitted).

"A party charged with criminal contempt is presumed innocent, enjoys the right against self-incrimination, and the contempt must be proven beyond a reasonable doubt." *Id*. In addition, a party accused of criminal contempt must "be informed of the nature of the charge against him or her and . . . be given adequate opportunity to prepare a defense and to secure the assistance of counsel." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007). "In contrast, in a civil contempt proceeding, the accused must be accorded rudimentary due process, i.e., notice and an opportunity to present a defense, and the party seeking enforcement of the court's order bears the burden of proving by a preponderance of the evidence that the order was violated." *Porter*, 285 Mich App at 456-457.

"[W]hen a court exercises its criminal contempt power it is not attempting to force the contemnor to comply with an order, but is simply punishing the contemnor for past misconduct that was an affront to the court's dignity." *Id*. at 455. "On the other hand, if the court employs its contempt power to coerce compliance with a present or future obligation or to reimburse the complainant for costs incurred by the contemptuous behavior, including attorney fees, the proceedings are civil." *Id*.

The trial court sanctioned plaintiff $500 for "violating the protective order by providing the complaint containing references to AOD's Confidential Material to the media." Contrary to the Archdiocese's argument, this sanction by the trial court was in the form of criminal contempt, not civil contempt. Fr. Perrone was not sanctioned to compel his compliance with the order; instead, he was sanctioned for a transgression against the trial court that he could no longer remedy once the act was completed. See *Porter*, 285 Mich App at 455. Thus, Fr. Perrone was entitled to

[3] Unpreserved issues are reviewed for plain error. *Total Armored Car Serv*, 325 Mich App at 412. "To establish an entitlement to relief based on plain error, the injured party must show (1) that an error occurred, (2) that the error was plain and (3) that the plain error affected [its] substantial rights." *Id*. (quotation marks and citation omitted) (alteration in original). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9.

additional due-process safeguards that the trial court did not afford him. For example, the Archdiocese did not present direct evidence that Fr. Perrone provided the *Bugarin* Complaint to the media. And moreover, given Fr. Perrone's right against self-incrimination, see *id*. at 456, his failure to deny he gave the *Bugarin* Complaint to the media cannot act as an admission of guilt.

The fact that the trial court erred in this manner, however, does not satisfy Fr. Perrone's burden on appeal, since he did not raise these issues in the trial court. Fr. Perrone must show that, absent the mistakes, the result would have been different. See *In re Utrera*, 281 Mich App at 9. Fr. Perrone has met that standard. Had the trial court followed the proper procedure, it is evident that the evidence submitted by the Archdiocese in support of its assertion the *Bugarin* Complaint was given to the media by Fr. Perrone did not meet the correct burden of proof of beyond a reasonable doubt. The evidence submitted was a printout of a news article that, while it quotes one of Fr. Perrone's attorneys, does not state or imply the *Bugarin* Complaint was given by Fr. Perrone. In addition, and contrary to the Archdiocese's argument, it was not Fr. Perrone's burden to call witnesses or raise objections; rather, it was the Archdiocese's burden to show a violation beyond a reasonable doubt. The Archdiocese failed to do so, and we vacate the portion of the order sanctioning Fr. Perrone $500.

Next, Fr. Perrone asserts on appeal the trial court abused its discretion when it granted the Archdiocese's motion to enforce the protective order because, according to Fr. Perrone, the Archdiocese waived the provisions of the protective order. Fr. Perrone also asserts that once the confidential materials were placed into the public record, the trial court could not restrict his use of them. We disagree.

Fr. Perrone argues he should not have been prohibited from using the confidential materials because the Archdiocese waived confidentiality. As noted above, waiver requires clear and convincing evidence showing mutuality of assent to the waiver. See *Nagel Precision, Inc*, 469 Mich at 372-373. The communications between Klaus and Van Dusen, in which Fr. Perrone claims the Archdiocese waived confidentiality, do no such thing. The Archdiocese clearly stated its position that it would not file the materials in the public record and considered the waiver to extend only to the second amended complaint.

Fr. Perrone also argues, however, that he had a right under the First Amendment to use the materials because once they were referred to in the second amended complaint, they became part of the public record and no order of the court could restrict their use. In support, Fr. Perrone relies on *Cox Broadcasting Corp v Cohn*, 420 US 469, 471-474; 95 S Ct 1029; 43 L Ed 2d 328 (1975), which addressed the issue of whether the First Amendment protected a media company from damages after it published the name of a rape survivor in violation of state law. In concluding the media company had a First Amendment right to publish the name, the Supreme Court stated:

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. [*Id*. at 496.]

In other words, according to the Supreme Court: "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id*.

Fr. Perrone's reliance on *Cox* is misplaced. In *Cox*, the Supreme Court focused specifically on the media organization that, through no improper means, obtained the name of the victim in public court filings. The media company was not a party to any litigation or court proceeding, but rather was simply reporting on news of public interest. *Id*. at 495. In contrast here, Fr. Perrone obtained the confidential materials not through the public record, but rather through the court process he invoked, and through the protective order he agreed to. Thus, *Cox* is inapplicable because, unlike in *Cox*, Fr. Perrone's interest in reporting on news of public interest is not the same as the media company's interest. Moreover, unlike *Cox*, Fr. Perrone did not happen upon the information in a public filing; he obtained it through entry of a protective order subject to the trial court's jurisdiction.

Fr. Perrone's reliance on *Doe v Lockwood*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued June 27, 1996 (Case No. 94-00568); 89 F3d 833 (Table),[4] is equally misplaced. In *Doe*, the plaintiff brought suit after the defendants disclosed to the public that the plaintiff was HIV-positive. *Doe*, unpub op at 1. In concluding that the plaintiff could not sustain his lawsuit because he disclosed the information in open court, the Sixth Circuit stated it is a

> well-established principle of American jurisprudence that the release of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its further use. A line of Supreme Court cases emphasizes the importance of public trials to our system of justice and recognizes the right to publish information made a part of the record in a judicial proceeding. [*Id*. at 4.]

On the one hand, *Doe* is more analogous to the present case because, like the plaintiff in *Doe*, the Archdiocese allowed certain confidential information into the court record. This, however, is where the similarity ends. Unlike *Doe*, the Archdiocese made every effort to ensure that while the confidential materials would be produced and used in this litigation, all parties and the trial court agreed that the use was restricted to the litigation. To otherwise allow Fr. Perrone to escape the requirements of the protective order because the information was cited in (his own) public court filing would undermine the purpose and protections afforded parties when they enter into such an order.

The Archdiocese did not waive the provisions of the protective order to allow Fr. Perrone to use confidential materials in the *Bugarin* Complaint. In addition, Fr. Perrone did not have an

[4] *Doe* is not a published federal case. "While we recognize that unpublished decisions from the United States Court of Appeals are not binding, we can turn to them as persuasive authority." *Bartlett Investments Inc v Certain Underwriters at Lloyd's London*, 319 Mich App 54, 60 n 2; 899 NW2d 761 (2017).

unqualified right to use the confidential materials simply because he was allowed to cite to them in the second amended complaint.

Fr. Perrone's last argument on appeal concerns his assertion the trial court abused its discretion when it denied his motion to preserve the confidential records, since the protective order required him to return or destroy them after the lawsuit concluded. This argument is misplaced. Fr. Perrone ascribes various nefarious motives to the Archdiocese, none of which have support in the record. The most Fr. Perrone can point to is a missing colloquy between Doe and LePage in a transcript of an audio recording produced to Fr. Perrone by the Archdiocese. Fr. Perrone's argument falls flat, however, because the Archdiocese also produced the audio recording to him. If the Archdiocese were trying to conceal or destroy evidence, they would not have produced the recording.

The protective order required the parties to return or destroy the confidential material at the conclusion of the litigation. Once the trial court closed the case, it was not outside the trial court's discretion to enforce the terms of the stipulated order and require Fr. Perrone to return the confidential materials. In other words, Fr. Perrone "should be estopped from renouncing the protective order after stipulating to its terms, receiving its benefits, and thereby inducing defendant to produce confidential documents in reliance upon the protective order's provisions concerning confidentiality and the return of documents." See *Briggs v Upjohn Co*, 200 Mich App 62, 64-65; 503 NW2d 695 (1993).

The portion of the trial court's order sanctioning plaintiff $500 is vacated and remanded for further proceedings. The trial court's orders are otherwise affirmed. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michelle M. Rick