# STATE OF MICHIGAN

# COURT OF APPEALS

FR. EDUARD PERRONE,

Plaintiff-Appellant,

v

G. MICHAEL BUGARIN,

Defendant-Appellee.

UNPUBLISHED
December 21, 2021

No. 356201
Wayne Circuit Court
LC No. 20-011004-NO

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. Finding no errors warranting reversal, we affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of a dispute after plaintiff was removed from The Assumption of the Blessed Virgin Mary Parish (Assumption Grotto), a Roman Catholic parish within the Archdiocese of Detroit (Archdiocese). As alleged by plaintiff, an allegation of sexual abuse was made against him by John Doe, an unnamed individual, in May 2018. The abuse allegation led to plaintiff's removal as priest of Assumption Grotto.

According to plaintiff, Doe allegedly spoke with Detective Sergeant Nancy LePage of the Macomb County Sheriff's office after Doe's allegations were communicated to defendant and the Archdiocese. Plaintiff claimed that Doe never alleged that Fr. Perrone sodomized him, yet LePage falsely reported that he did. No other alleged abuse victims identified by Doe admitted to being victimized either, yet LePage allegedly attributed false allegations to the other victims as well.

Doe was subsequently interviewed by news reporters in May 2019, in which he stated that "Fr. Perrone engaged in 'inappropriate' grabbing and groping at the swim parties at the Perrone family lake house." Doe also told the reporters that the information was passed along to law enforcement but no action was taken. Plaintiff claimed the media attention "caused significant consternation" with the Archdiocese, which was worried the news stories "portray[ed] them as having taken no action in the face of a complaint of clergy sex abuse." Subsequently, defendant

"publicly announced to the Parishioners of Assumption Grotto that 'credible allegations' of sex abuse of a minor had been made against Fr. Perrone."

On August 26, 2020, plaintiff filed his initial complaint against defendant, asserting claims for defamation, intentional infliction of emotional distress (IIED), and false light. The trial court subsequently entered an order enforcing a stipulated protective order in related litigation, *Perrone v Maher*, lower court case no. 19-010951-NO. In the order, the trial court found that the Archdiocese's "Confidential Materials from [the *Perrone v Maher*] litigation were used in violation of the October 1, 2019 Stipulated Protective Order . . . ." The trial court ordered plaintiff to remove all references to confidential material from his complaint and prohibited him from using such materials in the future.

In lieu of answering plaintiff's amended complaint, defendant moved for summary disposition under MCR 2.116(C)(8), asserting the First Amendment to the United States Constitution barred the trial court from adjudicating plaintiff's claims (otherwise known as the ecclesiastical abstention doctrine). Defendant also argued plaintiff otherwise failed to state a claim for relief in his complaint. In response to defendant's motion, plaintiff asserted the trial court was not prohibited from adjudicating plaintiff's claims because doing so would not require resolution of ecclesiastical questions. Plaintiff insisted he was suing for damages related to defendant's criminal and tortious conduct, and not to resolve ecclesiastical doctrine. According to plaintiff, defendant sought complete immunity under the ecclesiastical doctrine, which does not exist under Michigan law.

In a written order entered on November 22, 2021, the trial court granted defendant's motion, stating: "Any complaints against Defendant for statements made to church members in connection with an investigation involving Plaintiff belong in a canonical forum . . . ." This appeal followed.

## II. STANDARD OF REVIEW

This Court reviews de novo questions of constitutional law. *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 448; 952 NW2d 434 (2020). "This Court . . . [also] reviews de novo a trial court's decision on a motion for summary disposition." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015). Defendants moved for summary disposition under MCR 2.116(C)(8):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Dell*, 312 Mich App at 739-740.]

"A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010). "Conclusory statements, unsupported by factual allegations, are

insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

In addition, 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). "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

Plaintiff first argues the trial court erred when it granted summary disposition in defendant's favor because the ecclesiastical abstention doctrine did not bar his claims. According to plaintiff, the trial court was not required to decide or interpret issues of church policy or doctrine to adjudicate his claims. We disagree.

Under the religion clause of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US Const, Am I. The religion clause applies to Michigan law by virtue of the Fourteenth Amendment to the United States Constitution. *Winkler v Marist Fathers of Detroit*, 500 Mich 327, 337 n 4; 901 NW2d 566 (2017). We have previously held that courts are "severely circumscribed by the First and Fourteenth Amendments to the United States Constitution . . . in resolution of disputes between a church and its members." *Pilgrim's Rest Baptist Church v Pearson*, 310 Mich App 318, 323; 872 NW2d 16 (2015), overruled in part in *Winkler*, 500 Mich at 337-340.

The ecclesiastical abstention doctrine arises from the religion clause of the First Amendment. *Winkler*, 500 Mich at 337. Under the ecclesiastical abstention doctrine, a court may not "substitute its opinion in lieu of that of the authorized tribunals of the church in ecclesiastical matters." *First Protestant Reformed Church of Grand Rapids v DeWolf*, 344 Mich 624, 631; 75 NW2d 19 (1956). Thus, the doctrine

> reflects [the] Court's longstanding recognition that it would be inconsistent with complete and untrammeled religious liberty for civil courts to enter into a consideration of church doctrine or church discipline, to inquire into the regularity of the proceedings of church tribunals having cognizance of such matters, or to determine whether a resolution was passed in accordance with the canon law of the church, except insofar as it may be necessary to do so, in determining whether or not it was the church that acted therein. [*Winkler*, 500 Mich at 337-338.]

The ecclesiastical abstention doctrine does not, however, completely divest civil courts of jurisdiction over matters concerning religious institutions. *Id*. at 339. Thus, "application of the ecclesiastical abstention doctrine is not determined by reference to the category or class of case the plaintiff has stated," and "[w]hether a claim sounds in property, tort, or tax, for instance, is not dispositive." *Id*. at 341. "What matters instead is whether the actual adjudication of a particular

legal claim would require the resolution of ecclesiastical questions; if so, the court must abstain from resolving those questions itself, defer to the religious entity's resolution of such questions, and adjudicate the claim accordingly." *Id.*

Plaintiff asserted claims of defamation, IIED, and false light against defendant.[1] Plaintiff's claims are predicated on the press release issued by the Archdiocese and repeated by defendant stating the Archdiocese found Doe's allegations credible, meaning they had a semblance of truth. Plaintiff does not allege that defendant publicly stated the details of the investigation or named plaintiff's accuser. Relevant to plaintiff's defamation and false light claims, the issue of whether plaintiff can show that the statement was false—i.e., that the allegations were not credible—turns on the manner in which the Archdiocese investigates and evaluates claims of sexual abuse made against its clergy. And relevant to plaintiff's IIED claim, the issue of whether defendant's conduct was extreme and outrageous depends on how the Archdiocese evaluated Doe's claims of sexual abuse, to determine whether or not they were, in fact, credible. Resolution of the claim would also require the trial court to assess the Archdiocese's meaning of "credibility," and whether that comports with commensurate standards under civil law. Thus, any inquiry into the means and methods by which the Archdiocese evaluates such claims would require the trial court to inquire into ecclesiastical matters forbidden under the First Amendment. See *Winkler*, 500 Mich at 338.

In addition, resolution of plaintiffs' claims would require the trial court to determine whether the method by which the Archdiocese communicated with its parish constituted extreme and outrageous conduct, as was required for his IIED claim, or was unreasonable and objectionable, under his false light claim. Such an inquiry by the trial court would be improper under the First Amendment because it would, in effect, second guess the Archdiocese's decisions regarding how to best communicate allegations within its clergy with its parish. See *Fowler v Rhode Island*, 345 US 67, 70; 73 S Ct 526; 97 L Ed 828 (1953) (holding it is not "in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings."). The trial court correctly concluded that plaintiffs' claims were barred under the ecclesiastical abstention doctrine.

Plaintiff also argues the trial court abused its discretion when it entered the order enforcing the protective order in the *Maher* litigation and required him to amend his complaint. In *Maher*, the parties stipulated to a protective order governing the use of confidential material. After plaintiff filed his complaint in this case, defendant filed a motion to enforce the protective order, claiming the complaint contained confidential material from *Maher* in violation of the confidentiality provision of the protective order. Plaintiff contends that the Archdiocese, in *Maher*, waived the provisions of the protective order maintaining confidentiality over materials it produced.

"[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

[1] All three claims asserted by plaintiff either require him to prove defendant made a false statement, see *Eddington v Torres*, 311 Mich App 198, 200; 874 NW2d 394 (2015) (defamation), *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 385; 689 NW2d 145 (2004) (false light), or engaged in extreme and outrageous conduct, *Dalley*, 287 Mich App at 321 (IIED).

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.]

The communications between the parties and the Archdiocese in *Maher* do not establish a mutual intent of plaintiff and the Archdiocese to waive the confidentiality provision 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 and Van Dusen agreed to allow plaintiff to refer to and quote portions of the confidential material produced by the Archdiocese in an amended complaint plaintiff sought to file. In a follow-up communication, Klaus confirmed the two sides had an agreement to allow Fr. Perrone to file a second amended complaint in *Maher*, and Van Dusen agreed to accept service of the complaint in this case on behalf of defendant.

Contrary to plaintiff's arguments, nothing in these communications demonstrate that the Archdiocese agreed to allow plaintiff to cite or quote from the confidential materials in the complaint filed in this case. 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 *Maher* litigation and did not extend to a blanket waiver of the protective order.

Plaintiff also argues that because the Archdiocese agreed to accept service of the complaint in this case, 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.").

Plaintiff also argues, however, that he had a right under the First Amendment to use the materials because once they were referred to in the amended complaint in the *Maher* litigation, they became part of the public record and no order of the court could restrict their use. In support, plaintiff 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, found in public court documents, 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*.

Plaintiff's reliance on *Cox* is misplaced. In *Cox*, the Supreme Court focused specifically on the press that, through no improper means, obtained the name of the victim through 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, plaintiff obtained the confidential materials not through the public record, as in *Cox*, but rather through the court process he himself invoked, and through the protective order he agreed to. Plaintiff 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),[2] 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 himself 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

[2] *Doe* is an unpublished federal case and, while not binding, may be considered for its persuasive value. *Bartlett Investments Inc v Certain Underwriters at Lloyd's London*, 319 Mich App 54, 60 n 2; 899 NW2d 761 (2017).

> 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 than *Cox* because like the plaintiff in *Doe*, the Archdiocese allowed certain confidential information into the record of a judicial proceeding. 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 the litigation, all parties and the trial court agreed that the use was restricted to the litigation. To otherwise allow plaintiff 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.[3] The trial court's order was not an abuse of its discretion.

Affirmed. Defendant, as the prevailing party, may tax costs.

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

[3] Defendant is wrong to suggest that plaintiff's appeal merely amounts to a collateral attack on the order entered in *Maher*. While plaintiff certainly challenges the underlying order in *Maher* that precipitated the order entered in this case, plaintiff's complaint in this case was impacted through the order of the trial court requiring plaintiff to comply with the protective order and remove all references to the confidential materials. Thus, plaintiff is challenging the order entered in this case, and we reject defendant's request that we decline to address the issue.