IN THE SUPREME COURT OF OHIO

JANE DOE, Plaintiff-Appellee, -vs- ARCHDIOCESE OF CINCINNATI, Defendant-Appellant.	Case No. 2006-1155 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals No. C-050438 Trial Court No. A-0409650

MERIT BRIEF OF
APPELLANT THE ARCHDIOCESE OF CINCINNATI

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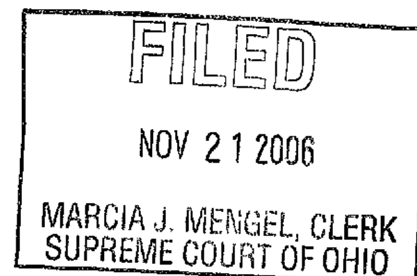

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I. INTRODUCTION

This case arises out of alleged statements in 1965 that persuaded the Plaintiff to give her child up for adoption. During the Plaintiff's pregnancy, a nun and a priest allegedly told the Plaintiff that adoption was the best option, that God would bless her, that the pregnancy was her responsibility, and that keeping the baby could have ramifications for her spiritual life, the baby, and the priest's career. The priest is alleged to be the father of the child. Now, four decades later, Plaintiff has sued the Archdiocese of Cincinnati ("Archdiocese") claiming that these statements advocating adoption in 1965 constituted "intimidation" and are now actionable.

The trial court dismissed the entire action based on the statute of limitations. (App. 15) The Court of Appeals reversed in part, allowing three of the claims to proceed. (App. 3) But the Court of Appeals erred and the entire action should be dismissed for numerous reasons.

The Statute of Limitations Issue. Plaintiff concedes that this action is beyond the statute of limitations, but claims that equitable estoppel applies to bar the limitations defense. The Court of Appeals concluded that the doctrine of equitable estoppel barred the statute of limitations defense, even though the alleged statements had no relation to the filing of any suit and did not prevent the Plaintiff from filing suit. Not only does the Court of Appeals' decision create a limitless precedent in the statute of limitations context, but it is directly contrary to this Court's recent pronouncement on equitable estoppel in *Doe v. Archdiocese of Cincinnati* (2006), 109 Ohio St.3d 491, 2006-Ohio-2625 ("*Doe*"). In this case, there are no alleged statements that prevented or delayed the plaintiff in filing the action. The only alleged statements pertained to whether Plaintiff should place her child for adoption. There are no representations made in 1965 or thereafter regarding any lawsuit or settlement, the length of the statute of limitations, or when, how, or who the Plaintiff could sue. Thus, the doctrine of equitable estoppel does not apply.

The equitable estoppel argument and the cause of action also fail because none of the alleged statements were misrepresentations of existing fact, as required by Ohio law. The alleged statements to Plaintiff were nothing more than advice and arguments in favor of adoption (e.g., adoption is the "best option"). Some of the statements were opinions about possible future events, not existing facts. As set forth below, the statements are not actionable because they are not misstatements of existing fact.

The Entanglement with Religion. This case also raises a constitutional conflict due to the entanglement between the alleged statements and subjective religious beliefs, which are protected by the First Amendment of the United States Constitution and Article I, § 7 of the Ohio Constitution. For example, there are statements that Plaintiff should "offer her suffering to God," or that "God would bless her for giving the child up for adoption." There are also alleged statements that the Church would not baptize her child or that the father could not remain a priest if the Church had to pay child support. All of these statements are entangled with the speaker's subjective religious views and church procedures. It would be impossible to prove the veracity of any of the statements without delving into the religious beliefs of the speakers or even the doctrine of the Roman Catholic Church. Because Plaintiff's action is premised upon statements that are irretrievably entangled with religious beliefs, the action fails.

Ohio Statutes and Public Policy Prohibit Such Challenges to Adoptions. The Court of Appeals' decision would allow a mother to assert a cause of action against any individual who advocates adoption, even without similar statements. If a father states that he might lose his job, or that adoption is the best thing for the baby, then presumably that father could be sued – even decades later – for these "intimidating" statements. If a relative with ulterior motives states that "the church" would want the child placed for adoption, then the Court of Appeals' decision would allow a lawsuit

based on the comments. It is notable that such novel lawsuits would be prosecuted against third parties who are not involved in the adoption process and would seek monetary damages, as opposed to a change in custody. This recognition of a new cause of action violates public policy and conflicts with R.C. 3107.01-.19, which is the exclusive statutory mechanism for challenging an adoption. Instead, the Court of Appeals effectively ruled that the act of persuading a person to give a child up for adoption is actionable in Ohio at any time, regardless of the procedures required in R.C. 3107. Such a result would have a significant negative impact on adoptions in the State of Ohio.

II. STATEMENT OF FACTS

All of the relevant alleged facts occurred in 1965. Plaintiff claims that she had a sexual relationship with a former priest when she was 16 years of age and became pregnant by him. (Supp., ¶¶ 1, 12) During the pregnancy, Plaintiff stayed at a home for unwed mothers. (Supp., ¶¶ 1, 15) Plaintiff gave birth in November 1965. (Supp., ¶ 22) Plaintiff then placed the child for legal adoption through St. Joseph's Orphanage, presumably through the proper legal channels and with the knowledge and consent of her parents. (Supp., ¶ 22)

Almost four decades after the adoption, Plaintiff brought this action based on statements made to her in 1965. The thrust of this action is that Plaintiff believes she was pressured during her pregnancy to place the child for adoption. (Supp., ¶¶ 16-21) Plaintiff alleges that this pressure came from two individuals, Sister Mary Patrick (a former teacher) and Norman Heil (the father of the child). *Id.* Plaintiff alleges that Sister Mary Patrick, as her "spiritual advisor," told Plaintiff:

- The pregnancy was Plaintiff's fault and she had no one else to blame for her predicament.
- She must suffer in silence, offer her suffering to God, and God would bless her for it.
- The "biggest sacrifice will be when you put your baby up for adoption, when you sign away your rights to your child.... [I]t is for his own good that this child must never, under any condition learn of its parentage, that God will provide

some other Mother and Father to love and care for him.... It will be unbelievably hard, but even for yourself it is the only answer."

- Giving up the child will make her a more mature and more wholesome woman.
- If the child is not placed for adoption, the child would not be baptized by the Church and cleansed of original sin.
- Adoption was necessary because Sister Mary Patrick was thinking of her and eternity and her child and the "whole Mystical Body."

(Supp., ¶¶ 17-18) Norman Heil, the father of the child, asked Plaintiff to place the baby for adoption and stated that adoption was the "only option for their child." (Supp., ¶ 19) Heil said that he could not remain a priest if the Church had to pay child support. *Id.* Norman Heil died years ago and the whereabouts of Sister Mary Patrick are unknown. Plaintiff does not specify which of the stated opinions were allegedly "false statements." Plaintiff merely claims that the statements, as a whole, were "self-serving, deceitful, illusory, and objectively unprovable." (Supp., ¶ 20)[1]

There are significant omissions in the Complaint. There are no allegations relating to the almost four decades between the adoption and the filing of this action. There is no explanation in the pleadings why Plaintiff filed her action in 2004, as opposed to the prior 39 years. There are no alleged statements to Plaintiff at the time regarding potential legal actions. There was no offer to settle any claim. Indeed, there are no statements at all after the adoption.

This action was dismissed by the trial court pursuant to Civ. R. 12. (App. 15) The Court of Appeals affirmed the dismissal of several claims, but reversed the dismissal of three of the claims. (App. 13-14) The three surviving claims at issue are for intentional infliction of emotional distress (Count II), tortious interference with familial relations (Count III), and breach of fiduciary duty (Count V). *Id.* The Archdiocese filed a Notice of Appeal to this Court on June 15, 2006. (App. 1)

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[1] For purposes of the pleading stage, the lower courts have assumed that whatever may have been said by Heil and/or Sister Mary Patrick could be legally attributable to the Archdiocese itself. It is highly unlikely that application of agency principles to such facts could ultimately support such a conclusion.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Equitable estoppel does not bar a statute of limitations defense unless a factual misrepresentation actually prevented the plaintiff from pursuing the action in a timely manner.

This action, filed in 2004 and based upon conduct in 1965, is barred on its face by the statute of limitations.[2] Plaintiff conceded this fact. Plaintiff also concedes that the discovery rule is not applicable, stating that "Ms. Doe has always known the party responsible for her suffering." (Plaintiff's Ct. of App. Brief, p. 9) This concession is consistent with the Ohio Supreme Court's past rulings that the discovery rule is not applicable where the victim is aware of the injurious conduct, the identity of the perpetrators, and that knowledge continued without any impediment. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 538-41, 629 N.E.2d 402. Because Plaintiff was always aware of the events relating to the adoption, the discovery rule is not applicable.

Given the limitations bar, Plaintiff instead argued that the doctrine of equitable estoppel precludes the Archdiocese from raising the statute of limitations as a defense. The Court of Appeals reversed the Rule 12 dismissal on that basis. (App. 6-10) However, the Court of Appeals issued its decision in the present case before this Court explained the limits of the equitable estoppel doctrine in *Doe v. Archdiocese* (2006), 109 Ohio St.3d 491, 2006-Ohio-2625. It is this misapplication of the equitable estoppel doctrine by the Court of Appeals that this Court must correct based on *Doe*.

Given that this case is predicated on alleged statements made 40 years ago, the policies underlying the statute of limitations must be considered in analyzing the equitable estoppel claim. Statutes of limitations are legislatively-created periods of time in which an injured party may assert a claim in a court in Ohio. *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 391-92,

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[2] Plaintiff does not identify the statute of limitations applicable to her claims, but it is at most four years for all of the claims. R.C. 2305.10; *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 629 N.E.2d 402 (two years for negligent supervision); R.C. 2305.09 (four years for interference with familial relationship); *Holzwart v. Wehman* (1982), 1 Ohio St.3d 26, 437 N.E.2d 589 (four years for loss of child's consortium); *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 453 N.E.2d 666 (four years for emotional distress).

2002-Ohio-892, 763 N.E.2d 160. The policies underlying a limitations period are fourfold: (1) to ensure fairness to the defendant; (2) to encourage the prompt prosecution of causes of action; (3) to suppress stale and fraudulent claims; and (4) to avoid the inconvenience and difficulties of proof engendered by delay. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88, 447 N.E.2d 727. All of these policies support the dismissal of the Complaint.

As this Court is aware from its recent *Doe* decision, the doctrine of equitable estoppel has become the strategy of choice for plaintiffs trying to attack a statute of limitations defense. The decision in *Doe* represented this Court's first consideration of equitable estoppel in this context. *Doe*, 2006-Ohio-2625, ¶¶ 42-50. The present case provides the opportunity for the Court to reinforce its position on this issue.

As stated in *Doe*, the purpose of equitable estoppel is "to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice." *Doe*, ¶ 43, quoting, *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, 555 N.E.2d 630. Importantly, the Court noted that equitable estoppel should apply only if "<u>subsequent and specific actions by defendants somehow kept them from timely bringing suit</u>...." *Doe*, ¶ 45 (emphasis added), quoting, *Zumpano v. Quinn* (N.Y. 2006), Slip Op. 01245, 849 N.E.2d 926, 2006 WL 395229. Because there were no alleged misrepresentations in *Doe*, the Court did not elaborate on the limits of an equitable estoppel claim.

In the present case, Plaintiff's equitable estoppel claim fails for numerous reasons. First, there are no "subsequent" statements or actions separate from the alleged tort. As stated in *Doe*, to establish equitable estoppel, a plaintiff must establish "subsequent" actions by the defendants that prevented the suit. *Doe*, ¶ 45, citing *Zumpano* (emphasis added). This "subsequent" element

necessarily and logically requires that the estoppel claim be based on acts that are separate from and after the underlying wrongful conduct. In other words, events occur that give rise to a cause of action and then, subsequently, the wrongdoer makes a false statement to the victim that prevents or delays the filing of the case.

Here, the present Complaint contains no alleged communications at all between the parties after the adoption. The same pre-adoption statements are alleged to be both the basis for the action and the basis for equitable estoppel. In other words, there is no distinction between the statements in the underlying cause of action and the statements for the alleged equitable estoppel. This is fatal to Plaintiff's estoppel argument. Plaintiff cannot show any "subsequent" actions that prevented her from filing suit. The present action does not satisfy this element of the equitable estoppel doctrine set forth in *Doe*.

Second, to establish equitable estoppel, these subsequent actions must prevent the timely filing of suit. *Doe*, ¶ 45 ("actions by defendants somehow kept them from timely bringing suit"). The Sixth Circuit Court of Appeals likewise held that equitable estoppels is invoked only when the defendant "takes active steps to prevent the plaintiff from suing in time, such as by hiding evidence or promising not to plead the statute of limitations." *Bridgeport Music, Inc. v. Diamond Time, Ltd.*, 371 F.3d 883, 891 (6th Cir. 2004) (emphasis added); *see also, Belton v. Charlotte*, 175 Fed. Appx. 641, 2006 WL 1444394, *654 (4th Cir. 2006); *Easterly v. Budd*, 2006 WL 2404143, *10-11 (N.D. Ohio 2006). In contrast, the Court of Appeals held that the plaintiff must merely have "encouraged the party not to bring suit." (App. 9, ¶ 15)

A number of Ohio courts have addressed the type of "prevention" statements that must exist to justify denying the statute of limitations defense to a party. *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 246, 743 N.E.2d 484; *Livingston v. Diocese of Cleveland* (1988), 126 Ohio

App.3d 299, 314, 710 N.E.2d 330, 339; *A.S. v. Fairfield School Dist.*, 12th App. No. CA 2003-04-088, 2003-Ohio-6260, 2003 WL 22764383; *Doe v. Rupp*, 8th App. No. 71938, 72966, 1998 WL 32774; *Cramer v. Archdiocese of Cincinnati*, 158 Ohio App.3d 110, 2004-Ohio-3891, ¶ 20, 814 N.E.2d 97. These Ohio courts held that a plaintiff relying on equitable estoppel must prove: (1) a statement that the statutory limitations period was larger than it actually was; (2) a promise to make a settlement if plaintiff did not bring the threatened suit; or (3) similar representations or conduct on the defendant's part to prevent the lawsuit. *Livingston*, 126 Ohio App.3d at 315; *A.S.*, 2003-Ohio-6260, ¶ 8. That is, the alleged misrepresentation must actually prevent or delay the plaintiff from pursuing the claim within the limitations period.

Here, there are no alleged statements that prevented Plaintiff from filing an action. There are no allegations that Plaintiff ever discussed the possibility of a civil action at all with the Archdiocese. Plaintiff did not allege any "affirmative statement that the statutory period to bring an action was larger than it actually was," as required in *Livingston* and *A.S. Id.* Plaintiff also did not allege that the Archdiocese made "promises to make a better settlement of the claim if plaintiff did not bring the threatened suit." *Id.* There is no claim of hidden evidence or promises to not assert a limitations defense. The allegations therefore do not fall within the "prevention" requirement or rationale of the cases discussed above.

The Court of Appeals conceded that there were no express statements to the Plaintiff regarding the length of time for bringing suit, nor was there any offer to settle a claim. (App. 9, ¶ 15) The court reasoned that, because there were no direct statements by the Archdiocese, Plaintiff must allege "similar misrepresentations or conduct." *Id.* However, instead of identifying such conduct, the Court of Appeals relied on allegations that the Archdiocese was "motivated by a desire to prevent Doe from bringing suit." (App. 9, ¶ 16) But subjective, personal desires do not justify the

application of equitable estoppel to override the statute of limitations. There must be some alleged conduct that induced Plaintiff to not file suit and prevented her from doing so in a timely manner. Because there were no statements at all between the parties pertaining to a possible claim, Plaintiff's equitable estoppel argument fails.

The Court of Appeals in the present case did not have the benefit of this Court's decision in *Doe* regarding the application of the equitable estoppel doctrine. The Court of Appeals attempted to distinguish *Livingston* by citing the alleged statements to Plaintiff that: (1) Plaintiff should not reveal the identity of the father; (2) that the pregnancy was Plaintiff's responsibility; and (3) that the child would not be baptized. (App. 8, ¶ 12) But an estoppel claim cannot be premised upon statements that request secrecy. Both the *Livingston* and *A.S.* cases rejected equitable estoppel based on alleged statements that urged secrecy. *Livingston*, 126 Ohio App.3d at 315 (priests told plaintiffs "not to tell" anyone about the alleged abuse or it would "bring down the church."); *A.S.*, 2003-Ohio-6260 (defendant told plaintiffs that no one would believe them). In both cases, the statements did not constitute equitable estoppel. Asking a person to keep a situation in confidence does not prevent the person from filing suit. It certainly does not justify ignoring the statute of limitations established by the General Assembly. None of the alleged statements relate to the filing of a lawsuit or the limitations period. There is no basis to conclude that these statements prevented Plaintiff from bringing suit in a timely manner. Accordingly, the equitable estoppel argument fails.

Additionally, the court in *A.S.* required that there be some wrongful conduct or impediment during the limitations period. The court in *A.S.* pointed out that there were no representations at all between the plaintiffs and defendant after the plaintiffs turned 18 years old. As a result, the defendant did not engage in any misrepresentations or conduct during the limitations period that misled plaintiffs with regard to the filing of their claims, or which precluded them from timely filing

their claims. *A.S.*, 2003-Ohio-6260, ¶ 10. In the present case, there is no alleged communication with the Plaintiff after she turned 18 years old. This precludes any equitable estoppel defense.

To establish equitable estoppel, Plaintiff also must prove that she relied on the alleged statements in not filing the suit. The concurring opinion by Judge Gorman in *Cramer* explained the importance of this reliance element. *Cramer*, 2004–Ohio-3891, ¶ 32. Judge Gorman observed that the doctrine of equitable estoppel should not delay the statute of limitations period without "affirmative evidence of detrimental reliance" upon the defendant's conduct. Otherwise, "the doctrine becomes little more than an improper makeshift version of the discovery rule." *Id.* The Sixth Circuit likewise held that a plaintiff claiming equitable estoppel must not exhibit a lack of diligence in pursuing the claim. *Bridgeport Music*, 371 F.3d at 891. This reasoning is consistent with the underlying premise stated in *Doe* that the deceptive statements must prevent the plaintiff from pursuing a claim.

In this case, there is no allegation that Plaintiff pursued this matter in the nearly four decades before the filing of this action. There is no allegation of any new fact or revelation in the past 38 years that led to the initiation of this action. There is simply no reliance element in this case that justifies the delay in filing suit.

The Court of Appeals' decision noted that the Plaintiff alleged her upbringing as a devout Catholic, which led her to believe the alleged statements. (App. 8, ¶ 13) The Court of Appeals opined, "Given the religious indoctrination that Doe had experienced, her reliance was both reasonable and in good faith." *Id.* But that does not show reliance in the context of precluding the statute of limitations. The Court of Appeals failed to recognize that there was nothing in the alleged statements that prevented the filing of the suit or explained the delay in filing suit for nearly 40

years. What Plaintiff seeks is, in Judge Gorman's words, an "improper makeshift version of the discovery rule."

Concurrent with the reliance element, the Court should consider when the application of equitable estoppel comes to an end. As the Idaho Supreme Court recently held, equitable estoppel does not bar the statute of limitations forever; "it lasts only for a reasonable time after the party asserting estoppel discovers or reasonably could have discovered the truth." *Ferro v. Society of St. Pius X* (2006), Idaho S.Ct. No. 31807, 2006 WL 2795621, *3 (rejecting equitable estoppel claim where plaintiff failed to pursue claim with due diligence). There must be some standard whereby the limitations period is finally triggered, such as when the alleged statements that delayed the suit are discovered as false.

The rule created by the Court of Appeals allowed Plaintiff, with full knowledge of all of the facts, to sit on her rights for nearly four decades and subjectively choose the time in which to sue. This cannot be the law in Ohio. As the Court has previously stated, the limitations period should start when the plaintiff knows of the offense and the identity of the perpetrator. *Doe*, 2006-Ohio-2625, ¶ 20. From the time Plaintiff reached the age of majority, she knew of: (1) the pregnancy; (2) the identity of the father; (3) the alleged statements by Norman Heil and Sister Mary Patrick; (4) that she had placed her child for adoption; and (5) that she did not want to place the child for adoption. Nothing new was discovered. These are the same facts upon which Plaintiff makes her claim, only 38 years later.

Lastly, Plaintiff must also prove that the alleged statements were misrepresentations of existing fact. *Helman*, 139 Ohio App.3d at 246; *JRC Holdings, Inc. v. Samsel Services Company*, 166 Ohio App.3d 328, 2006-Ohio-2148, ¶¶ 28-29, 850 N.E.2d 773. This is a required element for both the underlying tort claims and Plaintiff's equitable estoppel defense to the statute of limitations.

The statements alleged in the Complaint are statements of opinion and advice; they are not misrepresentations of fact. Statements that "the pregnancy is Plaintiff's responsibility" and "Plaintiff has no one to blame" are clearly opinion, not factual statements. Likewise, there is no factual statement in telling Plaintiff that she would be blessed by God for placing the child for adoption or that it is for the good of the child. Statements as to whether the child should learn of its parentage are also opinions. (Supp., ¶¶ 17-18) All of these statements are opinion and belief, not representations of fact.

Plaintiff also claims that she was told that the Church would not baptize the child unless it was placed for adoption. (Supp., ¶¶ 17-18) And Heil said that he could not remain a priest if the Church had to pay child support. *Id.* These statements about the potential baptism of the child or the career of the father are speculative and subjective opinions about the future. Such allegations fail because the statements are not representations of existing fact. These statements of advice or opinion are not misrepresentations of fact sufficient to establish the underlying tort or a claim of equitable estoppel in a statute of limitations context.

For the many reasons set forth above, Plaintiff's equitable estoppel argument fails as a matter of law and the action is barred by the statute of limitations. The Court should reverse the Court of Appeals in part and enter judgment in favor of the Archdiocese.

Proposition of Law No. 2: A claim for misrepresentation or equitable estoppel cannot be premised on statements entangled with religious beliefs protected by the First Amendment of the U.S. Constitution and Ohio Constitution, Art. I, Section 7.

The First Amendment of the U.S. Constitution has been interpreted to mean that courts cannot inquire into ecclesiastical questions or resolve disputes involving church doctrine and religious practices. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presb. Church* (1969), 393 U.S. 440, 447, 89 S.Ct. 601, 21 L.Ed.2d 658. If a court cannot resolve a dispute without

extensive inquiry into religious law or polity, the court must defer to the determinations of the religious institution. *Serbian E. Orthodox Diocese v. Milivojevich* (1976), 426 U.S. 696, 709, 96 S.Ct. 2372, 49 L.Ed.2d 151. This concept is sometimes referred to as the "church autonomy doctrine," which prohibits court review of internal church matters pertaining to faith, doctrine, or church governance. *Bryce v. Episcopal Church in the Diocese of Colo.* (10th Cir. 2002), 289 F.3d 648, 655. The threshold inquiry is whether the alleged wrongful conduct is "rooted in religious belief." *Id.* at 657. The religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Indiana Employment Security Div.* (1981), 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624.

The Ohio Constitution provides even broader protection to religion, stating that any "interference with the rights of conscience" shall not be permitted. Ohio Constitution, Art. I, Section 7; *Humphrey v. Lane*, 89 Ohio St.3d 62, 68, 2000-Ohio-435, 728 N.E.2d 1039.

This Court has previously expressed its reluctance to examine the validity of religious tenets in the context of tort claims. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584. In *Byrd*, the court ruled that allegations of negligent hiring by religious institution must satisfy a higher standard because it would otherwise be necessary to examine the due care of a religious institution's employment policies. The policies would be "infused with the religious tenets of the particular sect involved." *Id.* at 61, 565 N.E.2d at 590. As observed by this Court: "If the state becomes involved in assessing the adequacy of these standards, serious entanglement problems may arise under the First Amendment." *Id.*, citing *Lemon v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105.

Courts from other states have rejected similar tort claims that were entangled with religious-oriented statements. In a similar Utah case, religious entanglement precluded a tort action against a minister for advising an abuse victim to "forgive, forget, and seek atonement." *Franco v. Church of*

Jesus Christ of Latter-Day Saints (Utah 2001), 21 P.3d 198, 205-06. In Connecticut, a plaintiff alleged that she was abused by her husband, but members of the church told her to endure it and made derogatory remarks about plaintiff until her eventual expulsion from the church. *DeCorso v. Watchtower Bible & Tract Society* (Conn. App. 2003), 78 Conn. App. 865, 829 A.2d 38. The court refused to consider the emotional distress claim due to excessive entanglement with religious beliefs and practices. *Id.* at 877. In Massachusetts, the court dismissed a parent's emotional distress claims based on a child being lured into the Hare Krishna religion. *Murphy v. I.S.K. Con. of New England, Inc.* (1991), 409 Mass. 842, 571 N.E.2d 340. The court ruled that the First Amendment precluded consideration of the claims as dependent upon statements infused with religious beliefs. All of these cases involved statements of advice and opinion that were infused with religious beliefs. And all of the claims were rejected for that very reason.

In the present case, the alleged statements, the underlying claims, and the estoppel argument are all entangled with the First Amendment. Plaintiff was allegedly told that God would bless her for giving the child up for adoption, that God would provide loving parents, that the Church may not baptize her child, and that Sister Mary Patrick was thinking of Plaintiff and eternity and the "whole Mystical Body." (Supp., ¶¶ 17-18) These are all statements of religious belief. The same is true of the priest's opinion that "adoption was the only option" and that he would not be able to remain a priest. (Supp., ¶ 19) Plaintiff alleges that these statements by the nun and priest were "self-serving, deceitful, illusory and objectively unprovable." (Supp., ¶ 20) Thus, the underlying claims and the estoppel argument depend on the alleged falsehood of these statements. These alleged statements of the nun and the priest are infused with religious belief and doctrine. As a result, this action is irreparably entangled with the religious tenets and beliefs of the nun and the priest, as well as the Roman Catholic Church.

The causation issue is also entangled with religious beliefs because Plaintiff attaches the adoption decision to her own religious beliefs. She alleged that she believed the Church's teachings and feared her child "would never be cleansed of sin" if she did not listen to her spiritual advisor, Sister Mary Patrick. (Supp., ¶ 21) According to the Complaint, Plaintiff consented to the adoption in part because of her faith and concern about eternal damnation. (Supp., ¶ 21) It is impossible to address causation without passing judgment on the underlying religious beliefs that influenced all of the parties.

The Court of Appeals ignored the principles cited above by holding that a court is permitted to determine whether the religious statements were pretext for a secular purpose. (App. 10-11) In doing so, the Court of Appeals relied upon a discrimination case. *Basinger v. Pilarczyk* (1997), 125 Ohio App.3d 74, 707 N.E.2d 1149. In *Basinger*, the plaintiffs were two teachers at a parochial school. They were terminated for having a personal relationship that violated the religious tenets of the church and school. The plaintiffs brought contractual challenges to their termination, as well as an age discrimination claim. The Court of Appeals in *Basinger* affirmed dismissal of the contract claims on First Amendment grounds but remanded the age discrimination claim to determine whether the termination for religious reasons was a pretext for illegal conduct, i.e., age discrimination.

Here, the pretext analysis for the age discrimination claim in *Basinger* is inapplicable. The Court of Appeals in the present case reasoned that the alleged adoption-related statements to Plaintiff may have been pretext for a secular purpose. However, the purported secular purpose would have been promoting adoption and minimizing scandal, not unlawful discrimination. *Basinger* is distinguishable because it involved a potential pretext for <u>unlawful</u> conduct. The secular purpose in the present case is legal.

This case is comparable to the dismissed claims in *Basinger*. In that context, the Court of Appeals held, "To explore whether All Saints School's decision to terminate the Basingers breached the contract on grounds that they cannot enter into a canonically invalid marriage and thus are unfit for the school's religious mission would have required the trial judge authoritatively to interpret the teachings, philosophies, and laws of the Roman Catholic Church to determine whether the Basingers violated them." *Id.* at 76, 707 N.E.2d at 1150. Because such an analysis created a risk of government-religion entanglement, it violated the First Amendment and required dismissal of the claims. *Id.*

Indeed, the Court of Appeals' analysis of the reliance issue highlights the entanglement with religion and First Amendment applications. The Court of Appeals specifically cited Plaintiff's allegations that she was raised as a devout Catholic, attended Catholic schools, and regularly attended mass. (App. 8, ¶ 13) This upbringing and "religious indoctrination" of Plaintiff led the Court of Appeals to conclude that Plaintiff reasonably relied on the alleged statements. *Id.* These allegations alone require an inquiry into Plaintiff's religious beliefs, which is also precluded by the First Amendment.

The Court cannot confirm or even consider the veracity of the alleged religious statements in this case. Nor can the Court interpret any of the religious or moral beliefs on the part of Plaintiff, the speakers, or the Church. The present action must be dismissed due to the direct and inevitable entanglement with the First Amendment.

<u>Proposition of Law No. 3</u>: Public policy does not permit a cause of action for monetary damages against individuals who were not parties to the adoption merely because they advocated adoption.

Setting aside the statute of limitations and the First Amendment considerations, there is an over-arching flaw in Plaintiff's action. This is not an action against any of the parties to the

adoption. This is also not an action that seeks declarative relief to undo the adoption or alter custody in any manner. Instead, as a result of this adoption, Plaintiff is seeking monetary damages from third parties who did not adopt the child. The question is whether, as a matter of public policy in Ohio, a mother who consented to place her child for adoption can then bring an action for monetary damages against nonparties to the adoption based solely upon verbal pressure. There is simply no recognized authority in Ohio or elsewhere that permits such a claim.

At the outset, the underlying "wrongful conduct" cannot be deemed actionable at all. Public policy prohibits any action based entirely on statements that advocate adoption. It should not matter if the statements are construed as "pressure." If a mother who gives her child up for adoption is permitted to seek damages against any party who influenced her decision, then a host of counselors, parents, and relatives could be sued for making comments similar to those alleged in this case. The mere fact that a mother has a change of heart is not sufficient to prove a claim of duress or undue influence that would invalidate consent. *In re Adoption of Wenger*, 5th App. Dist. No. 1994-CA-00036, 1994 WL 530819, *2-3. Indeed, allowing such a revocation runs contrary to public policy. *Id.* Adoptions can often result in regret. Regret that may surface decades later is simply not actionable against third parties as a matter of public policy. It does not transform advocacy or "pressure" into a cause of action.[3]

Within this context, the Court must consider whether the alleged facts state a claim against third parties for tortious interference with parental relations and whether that cause of action is recognized in Ohio. In Ohio, the Ohio legislature has created a statutory cause of action against non-parents for depriving a parent of interest in a minor, but that cause of action is strictly limited to "child stealing crimes." R.C. 2307.50. Likewise, a Massachusetts court allowed a cause of action

[3] The fact that Plaintiff was a minor at the time is not material. R.C. 5103.16 states that the consent to placing a child for adoption executed by a minor parent before a judge of the probate court is as valid as though executed by an adult. R.C. 5103.16.

for interference with parental rights, but it was limited to the enticement, abduction, harboring, or secreting of a minor from the parents. *Murphy*, 409 Mass. at 860, 571 N.E.2d 351. The Ohio General Assembly never sanctioned this type of non-custody action against third parties for monetary damages. Where there is no recognized cause of action that fits the Plaintiff's complaints of adoption pressure, the Court should not venture to create one that is contrary to R.C. 2307.50. Additionally, the Ohio legislature has created a comprehensive statutory scheme for adoptions. R.C. 3107.01-.19; R.C. 5103.15-.16. In Ohio, adoption is a creature of statute and jurisdiction over adoption proceedings is vested exclusively in the Probate Court. R.C. 3107.02; *In re Adoption of Biddle* (1958), 168 Ohio St. 209, 214, 152 N.E.2d 105.

Here, the child was placed for adoption through St. Joseph's Orphanage. (Supp., ¶ 22) Even as far back as 1953, the Ohio legislature had enacted a statutory procedure, R.C. 5103.15-.16, for the placement of children with private institutions for adoption. The intent of these statutes was to provide judicial control over the placement of children for adoption which is not conducted through a statutorily-authorized agency. *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260, 452 N.E.2d 1304. The statutes create such judicial control by having the parents of the child personally appear before the proper probate court for approval of the placement and adoption. *Id.*; *In re Boyd's Adoption* (Ohio Prob. 1962) 185 N.E.2d 331, 89 Ohio Law Abs. 202. Thus, Plaintiff's placement of the child for adoption was governed by statute.

Any challenges to undo an adoption decree are also governed by statute. Chapter 3107 of the Ohio Revised Code, and specifically R.C. 3107.16, sets forth explicit procedures for adoptions, the consent required, and the avenues for challenging adoptions. R.C. 3107.16(B), which was added in 1976, generally provides that an adoption decree cannot be questioned or challenged by any person

on any ground beyond one year after the adoption decree, unless the adoption would not have been granted but for fraud perpetrated by the adoption petitioner (i.e., the adopting parent).

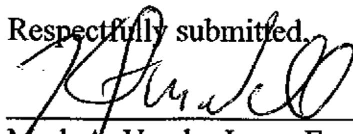
But this is not a case in which the mother seeks to invalidate her consent pursuant to R.C. 3107.16 in order to regain custody of the child. This is not an action in which the biological parent did not have notice of the adoption, nor does this case involve fraud by the adopting parents. *See In re: Adoption of Knipper* (1986), 30 Ohio App.3d 214, 507 N.E.2d 436. Instead, this is a claim against third parties for monetary damages. The claim therefore does not fall within any of the exclusive statutory remedies or procedures set forth by the Ohio legislature in R.C. 3107.16, nor does the claim fall within the one-year time limitation created by that statute. This novel and indirect attack on the 1965 adoption decree is contrary to the statutory scheme set forth by the Ohio legislature in Chapter 3107 and R.C. 5103.15-.16. Allowing this claim to proceed would effectively negate the requirements created in the Ohio statutory scheme.

Based on the existing statutory scheme and the lack of any case law supporting Plaintiff's action, this Court should dismiss the action in its entirety. Public policy in Ohio does not permit such an action against third parties for monetary damages based on their opinions and advice regarding an adoption.

IV. CONCLUSION

For all the reasons set forth above, Defendant-Appellee Archdiocese of Cincinnati requests that the Ohio Supreme Court reverse the Court of Appeals and enter judgment dismissing the entire action with prejudice.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following by regular U.S. mail this 21st day of November, 2006:

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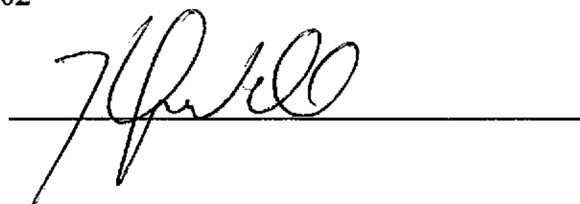

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IN THE SUPREME COURT OF OHIO **06-1155**

JANE DOE,

Plaintiff-Appellee,

-vs-

ARCHDIOCESE OF CINCINNATI,

Defendant-Appellant.

On Appeal from the Hamilton County Court of Appeals, First Appellate District

A-0419650

Court of Appeals Case No. C-050438

FILED
COURT OF APPEALS
JUN 2 0 2006
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

NOTICE OF APPEAL OF APPELLANT ARCHDIOCESE OF CINCINNATI

FILED
JUN 15 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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NOTICE OF APPEAL OF APPELLANT ARCHDIOCESE OF CINCINNATI

Pursuant to Supreme Court Rule II, §§ 1(A)(2) and (3), the Archdiocese of Cincinnati hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-05-0438 on May 5, 2006.

This case is a claimed right of appeal that raises a substantial constitutional question involving the First Amendment. This case is also a discretionary appeal that involves a question of public or great general interest.

Respectfully submitted,

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I hereby certify that a copy of the foregoing has been duly served upon the following by regular U.S. mail this 15th day of Jun, 2006:

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JANE DOE,	:	APPEAL NO. C-050438 TRIAL NO. A-0409650
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
vs.	:	
ARCHDIOCESE OF CINCINNATI,	:	
Defendant-Appellee.	:	

This cause having been heard upon the appeal, the record and the briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Decision filed herein and made a part hereof.

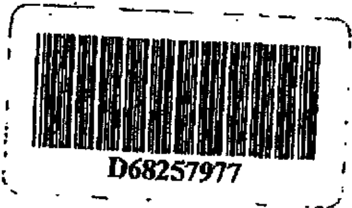
Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and Orders that costs are taxed in compliance with App. R. 24.

The Court further Orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution pursuant to App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on May 5, 2006 per Order of the Court.

By: ____________________
Presiding Judge



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HAMILTON COUNTY

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JANE DOE,	:	APPEAL NO. C-050438 TRIAL NO. A-0409650
Plaintiff-Appellant,	:	*DECISION.*
vs.	:	
ARCHDIOCESE OF CINCINNATI,	:	
Defendant-Appellee.	:	

PRESENTED TO THE CLERK
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COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: May 5, 2006

Mark D. Mezibov, *Christian A. Jenkins*, and *Mezibov & Jenkins, LLP*, for Plaintiff-Appellant,

Mark A. Vander Laan, *Kirk M. Wall*, *Timothy S. Mangan*, and *Dinsmore & Schohl, LLP*, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

FILED
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GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH

SYLVIA S. HENDON, Judge.

{¶1} Plaintiff-appellant Jane Doe has appealed from the trial court's entry granting the motion to dismiss of defendant-appellee the Archdiocese of Cincinnati. For the following reasons, we reverse the trial court's judgment in part.

I. Factual Background

{¶2} This case arose out of a relationship that began in 1965 between Doe and her parish priest, Father Norman Heil. Doe alleges that Father Heil induced her into carrying on a sexual relationship with him, and that, as a result of the relationship, Doe became pregnant. Doe further alleges that various members of the Archdiocese knew of the relationship between Doe and Father Heil, and that the Archdiocese paid for her to spend a large portion of her pregnancy at Maple Knoll Hospital and Home, a private institution that housed unwed, pregnant teenagers.

{¶3} Doe asserts that Sister Mary Patrick, a former teacher of Doe's, pressured her throughout her pregnancy into giving her child up for adoption and into remaining silent about the identity of her child's father. Doe's complaint states that Sister Mary Patrick told Doe that her baby would not be baptized, and thus not cleansed of original sin, if Doe did not consent to an adoption. Doe was raised as a devout Roman Catholic, and she heeded Sister Mary Patrick's words. According to the complaint, Sister Mary Patrick continuously attempted to coerce and intimidate Doe by telling Doe that her pregnancy was solely her fault and that she had to offer penance by giving up her child. Father Heil also told Doe that she had to place their child up for adoption because he could not remain a priest if the Church were required to pay for 18 years of child support. Doe's complaint further alleges that

other agents of the Archdiocese intimidated Doe into giving up her child, although the complaint does not specify these other agents by name.

{¶4} Doe gave birth in November of 1965, and she placed her child for adoption. Doe alleges that, as a consequence of giving up her child, she has suffered emotional, mental, and spiritual anguish for years.

{¶5} In December of 2004, Doe filed suit against the Archdiocese, raising claims of negligent infliction of emotional distress, intentional infliction of emotional distress, tortious interference with familial relations, loss of filial consortium, breach of fiduciary duty, and negligent supervision and retention. The Archdiocese filed a Civ.R. 12(B)(6) motion to dismiss, which the trial court granted. The trial court apparently found that the statute of limitations barred Doe's claims.

II. Standard of Review

{¶6} We review a trial court's ruling on a Civ.R. 12(B)(6) motion to dismiss de novo.[1] We must consider all the plaintiff's factual allegations to be true, and all reasonable inferences must be drawn in favor of the plaintiff.[2] A Civ.R. 12(B)(6) motion to dismiss should only be granted if a plaintiff can prove no set of facts that would entitle her to relief.[3]

III. Equitable Estoppel

{¶7} Doe concedes that the statutes of limitations for her claims have expired, but she argues that the Archdiocese should be equitably estopped from asserting the statutes of limitations as a defense. Equitable estoppel "prevents a

[1] *Battersby v. Avatar, Inc.*, 157 Ohio App.3d 648, 2004-Ohio-3324, 813 N.E.2d, at ¶5.
[2] Id.
[3] *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753.

party from exercising rights which that party might have otherwise had against one who has, in good faith, relied upon the conduct of that party to his detriment."[4]

A. Legal Requirements

{¶8} In order to establish equitable estoppel, a plaintiff must make a prima facie showing of four elements: (1) that the defendant made a factual misrepresentation; (2) that the misrepresentation was misleading; (3) that the misrepresentation induced actual reliance that was reasonable and in good faith; and (4) that the misrepresentation caused detriment to the relying party.[5] Regarding the first two elements, a plaintiff must show either actual or constructive fraud.[6]

{¶9} Additionally, when it is used in a statute-of-limitations context, a plaintiff asserting equitable estoppel must show either "an affirmative statement that the statutory period to bring an action was larger than it actually was or promises to make a better settlement of the claim if plaintiff did not bring the threatened suit, or similar misrepresentations or conduct on the defendant's part."[7]

B. Application to Doe

{¶10} Doe's complaint is replete with allegations that the Archdiocese intimidated her into believing that the pregnancy was solely her fault, pressured her into giving up her child, and coerced her into remaining silent about the identity of her child's father. She was led to believe that her child would not be baptized absent an adoption.

{¶11} The Archdiocese urges us to conclude that these statements were not factual misrepresentations, but rather were expressions of subjective, personal

[4] *Daniels v. Bertke Electric Co.* (Mar. 13, 1998), 1st Dist. No. C-970419.
[5] *Livingston v. Diocese of Cleveland* (1998), 126 Ohio App.3d 299, 314, 710 N.E.2d 330.
[6] Id. at 315.
[7] Id. (internal quotations omitted).

beliefs. But drawing all reasonable inferences in favor of Doe, we conclude that Doe has effectively alleged that these statements by the Archdiocese constituted misleading factual misrepresentations. We do not presume to determine whether these statements were in fact factual misrepresentations; our decision is solely based on the sufficiency of the allegations in Doe's complaint.

{¶12} The Archdiocese further argues that even if these allegations are factual, they are insufficient to warrant the application of equitable estoppel. For support, the Archdiocese relies on *Livingston v. Diocese of Cleveland*,[8] a case involving sexual-abuse claims brought against the Diocese of Cleveland. The *Livingston* court held that statements in which the victims were told not to tell of the abuse they had suffered were insufficient to meet the first two elements of equitable estoppel.[9] But *Livingston* is distinguishable from the case at bar. Doe has alleged not only that she was threatened to never reveal the identity of her baby's father, but also that she was told that she alone was responsible for her pregnancy and that her child would not be baptized if she did not place it for adoption. These allegations, taken together, are sufficient assertions of fraud and misrepresentation.

{¶13} Doe has also successfully alleged that her reliance on the Archdiocese's misrepresentations was reasonable and in good faith. Doe was raised in a devout Catholic home; she attended Catholic schools, participated in her parish's youth group, and regularly attended Mass. Doe's upbringing, coupled with the intimidation she experienced while pregnant, led her to believe the Archdiocese's statements. Given the religious indoctrination that Doe had experienced, her reliance was both reasonable and in good faith.

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[8] *Diocese of Cleveland*, 126 Ohio App.3d 299.
[9] Id. at 315.

{¶14} Doe's complaint further adequately alleges that she suffered detriment as a result of the Archdiocese's misrepresentations. Doe underwent psychotherapy and hospitalization for mental anguish; she has additionally suffered from the loss of a relationship with her daughter. We conclude that Doe has sufficiently alleged the necessary elements of equitable estoppel.

{¶15} But, as we have already noted, when a party relies on equitable estoppel in a statute-of-limitations context, it must additionally show some statement or conduct by the defendant that in essence encouraged the party not to bring suit. In the present case, the Archdiocese made no express statements to Doe regarding the length of time she had to bring a claim against it. Nor did the Archdiocese make any attempt or offer to settle Doe's potential claims. Because the Archdiocese made no direct or express statements, to successfully rely on equitable estoppel Doe must have alleged that the Archdiocese utilized "similar misrepresentations or conduct" to prevent her from filing suit.

{¶16} Doe's complaint asserts that the statements made to her by various representatives of the Archdiocese were "made with the sole purpose and intent to coerce Ms. Doe to forgo the best legal interests of her and of her child * * *."[10] It further alleges that the conduct of, and the actions taken by, the Archdiocese "were calculated to, and resulted in, Ms. Doe's relinquishment of her parental rights and the forbearance from any legal action."[11] After reviewing Doe's complaint, we conclude that these statements adequately allege that the Archdiocese's conduct was motivated by a desire to prevent Doe from bringing suit. Again, we emphasize that we pass no judgment as to whether the Archdiocese was actually motivated by such a

[10] Complaint, ¶20.
[11] Complaint, ¶25.

desire; rather, our conclusion is based on the well-pleaded allegations in Doe's complaint.

{¶17} In summary, we conclude that Doe has successfully alleged the necessary elements to apply the defense of equitable estoppel.

IV. Religious Entanglement

{¶18} The Archdiocese argues that should this court hold the defense of equitable estoppel to be applicable, we should nonetheless affirm the dismissal of Doe's claims because a trial court cannot determine their validity without infringing on the First Amendment principle of religious freedom. According to the Archdiocese, this case cannot be decided without a court assessing the legitimacy of many of the Catholic Church's beliefs, including those on baptism and sin.

{¶19} A court's inquiry into religious doctrine is limited. "The First Amendment to the United States Constitution, through the Fourteenth Amendment, prohibits state courts from making any inquiry into religious doctrine, practice or policy."[12] But a court is not prohibited from determining whether a religious institution's proffered reason for its action is a mere pretext for a secular purpose.[13]

{¶20} Doe urges this court to conclude that the Archdiocese's actions were in fact motivated by a secular purpose, and that its reliance on the church's religious beliefs to justify its actions was solely a pretext. Although Doe's complaint does not expressly contain such an allegation, we believe it can reasonably be inferred.

{¶21} The complaint alleges that Doe was coerced into giving up her child to protect Father Heil and the Church, that Father Heil told Doe he would be unable to

[12] *State ex rel. First New Shiloh Baptist Church v. The Honorable John M. Meager* (Apr. 16, 1997), 1st Dist. No. C-960371.
[13] See *Basinger v. Pilarczyk* (1997), 125 Ohio App.3d 74, 75, 707 N.E.2d 1149.

remain a priest if the Church had to pay for 18 years of child support, and that the Archdiocese representatives were acting with the Church's pecuniary interests in mind. Considering these allegations to be true, and making all reasonable inferences in favor of Doe, we conclude that Doe's complaint sufficiently alleges that the Archdiocese's actions were motivated by a secular purpose.

V. Sufficiency of the Individual Claims

{¶22} The Archdiocese further argues that several of Doe's claims must fail as a matter of law because her complaint does not state claims upon which relief can be granted. The Archdiocese takes issue with Doe's claims of negligent infliction of emotional distress, loss of filial consortium, and negligent supervision and retention. We address each claim in turn.

A. Negligent Infliction of Emotional Distress

{¶23} A claim of negligent infliction of emotional distress occurs when "the plaintiff has either witnessed or experienced a dangerous accident or appreciated the actual physical peril."[14] This district has further held that the tort requires a bystander or witness to be traumatized by the emotionally distressing occurrence of a sudden, negligently caused event.[15]

{¶24} Doe did not experience a dangerous accident or appreciate physical peril resulting from such an accident. Nor did she witness a sudden, negligently caused event. Rather, Doe alleges that her trauma resulted from continuous and intentional pressure and intimidation over a lengthy period of time. The allegations in Doe's complaint cannot sustain a claim of negligent infliction of emotional distress. We note that it is of no importance that Doe did not suffer physical harm.

[14] *Bunger v. Lawson Co.* (1998), 82 Ohio St.3d 463, 466, 696 N.E.2d 1029.
[15] *Brose v. Bartlemay* (Apr. 16, 1997), 1st Dist. No. C-960423.

Severe emotional injuries will suffice for a claim of negligent infliction of emotional distress.[16] But Doe's claim necessarily must fail because she neither experienced nor witnessed a sudden traumatizing event or accident.[17] We conclude as a matter of law that Doe's claim for negligent infliction of emotion distress was properly dismissed.

B. Loss of Filial Consortium

{¶25} The Ohio Supreme Court first recognized the tort of loss of filial consortium in *Gallimore v. Children's Hospital Medical Center*.[18] The court held that "a parent may recover damages, in a derivative action against a third-party tortfeasor who intentionally or negligently causes physical injury to the parent's minor child, for loss of filial consortium."[19]

{¶26} The facts alleged in Doe's complaint do not support this cause of action. Loss of filial consortium requires the child to experience some type of physical injury. Doe has made no allegation that her child experienced any type of physical injury, and we accordingly conclude that her claim for loss of filial consortium was properly dismissed.

C. Negligent Supervision and Retention

{¶27} To prevail on a claim for negligent supervision and retention, a plaintiff must show the following: "(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in * * * retaining the employee as the proximate cause of plaintiff's injury."[20] A plaintiff must also show that the

[16] *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 451 N.E.2d 759, paragraph three of the syllabus.
[17] See *Heiner v. Moretuzzo* (1995), 73 Ohio St.3d 80, 652 N.E.2d 664.
[18] (1993), 67 Ohio St.3d 244, 617 N.E.2d 1052.
[19] Id. at 251.
[20] *Steppe v. KMart Stores* (1999), 136 Ohio App.3d 454, 465, 737 N.E.2d 58.

employee's act was reasonably foreseeable.[21] An act is reasonably foreseeable if the employer knew or should have known of the employee's "propensity to engage in similar criminal, tortious, or dangerous conduct."[22]

{¶28} In essence, this tort requires the plaintiff to suffer an injury at the hands of an employee, after an employer has discovered the employee's incompetence and continued to maintain his employment. Doe's complaint does not support this cause of action. She does allege that the Archdiocese was aware that its employees were coercing and intimidating her. But she makes no allegations that the employees had engaged in similar behavior in the past, or that the Archdiocese had maintained their employment after becoming aware of such conduct. The complaint is void of any allegation that the behavior of the Archdiocese employees was reasonably foreseeable before it occurred. We conclude that Doe's claim for negligent supervision and retention was properly dismissed.

VI. Conclusion

{¶29} Because Doe's complaint sufficiently alleges the necessary elements of equitable estoppel, we conclude that the trial court erred in dismissing her claims based upon the statute of limitations. And because Doe has also adequately asserted that the Archdiocese's actions were motivated by a secular purpose, we conclude that her complaint could not be dismissed on First Amendment grounds. However, regarding Doe's claims of negligent infliction of emotional distress, loss of filial consortium, and negligent supervision and retention, we hold that Doe's complaint fails to state claims upon which relief can be granted.

[21] *Wagoner v. United Dairy Farmers, Inc.* (Nov. 17, 2000), 1st Dist. No. C-990767.
[22] Id.

{¶30} We thus affirm the dismissal of Doe's claims for negligent infliction of emotional distress, loss of filial consortium, and negligent supervision and retention. But we reverse the trial court's dismissal of Doe's claims for intentional infliction of emotional distress, tortious interference with familial relationships, and breach of fiduciary duty, and we remand this cause for further proceedings in accordance with law.

Judgment affirmed in part and reversed in part, and cause remanded.

HILDEBRANDT, P.J., and DOAN, J., concur.

Please Note:

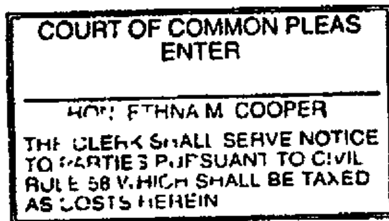
The court has recorded its own entry on the date of the release of this decision.

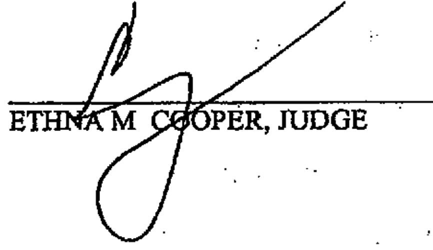
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

JANE DOE,	:	Case No. A049650
Plaintiff,	:	
v.	:	ETHNA M COOPER, JUDGE
ARCHDIOCESE OF CINCINNATI,	:	**ENTRY GRANTING DEFENDANT'S MOTION TO DISMISS**
Defendant.	:	

The within matter is before this Honorable Court on Defendant's Motion to Dismiss. Pursuant to the authority contained in John Doe 1-7, et al. v. Archdiocese of Cincinnati (Dec. 23, 2004), 2004 Ohio 7003, First District Nos. C-030900, C-030949, C-030950 and C-040072; Joseph Cramer v. Archdiocese of Cincinnati (2004), 158 Ohio App.3d 110; Christy Miller v. Archdiocese of Cincinnati (Dec. 29, 2004), Appeal Nos. C-040233, C-040347, C-040170, C-040171 and C-040050; John Doe #32 v. Archdiocese of Cincinnati (Jan. 26, 2005), Case No. A0309008, and John Doe #6, et al v. Archdiocese of Cincinnati, et al. (March 31, 2005), Case No. A0307468, Defendant's Motion to Dismiss is well-taken and is therefore GRANTED.

IT IS SO ORDERED.





ETHNA M COOPER, JUDGE

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