IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 96-CA-00161 COA

MILBURN MALLETTE **APPELLANT**

v.

CHURCH OF GOD INTERNATIONAL, JAMES D. JENKINS, CARL E. ALLEN, G. E. ALLEN, PETTIS BREWER, JAMES E. GHOLSON, LENZY EVANS, BEVEN JOE SMITH, RAY H. HUGHES, DAVID LEE MEADOWS, TROY ALVIN BAGGETT, WILLIAM L. OWENS, EDWARD D. BEAN, AND A. LEVELLE KELLY **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	OCTOBER 17, 1995
TRIAL JUDGE:	HONORABLE JERRY O. TERRY, SR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILLIAM MICHAEL KULICK
ATTORNEYS FOR APPELLEES:	DAVID M. OTT, MARK A. NELSON DRAYTON BERKLEY
NATURE OF THE CASE:	CIVIL - TORTS (OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE)
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT FOR DEFENDANTS
DISPOSITION:	AFFIRMED IN PART; REVERSED IN PART 12/16/97
MOTION FOR REHEARING FILED: 12/30/1997	
CERTIORARI FILED:3/9/1998	
MANDATE ISSUED:	

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

The Circuit Court of Harrison County granted summary judgment in favor of the defendants. On appeal, Mallette asserts that the trial court erred in: (1) finding that the doctrine of ecclesiastical

abstention prohibited the court from exercising jurisdiction; (2) misapplying the standard for determining whether to grant summary judgment; and (3) failing to provide adequate notification of the conversion of the motion to dismiss to a motion for summary judgment. Though we agree that the doctrine of ecclesiastical abstention applies, we cannot determine based on this record whether all of Mallette's tort claims are beyond the doctrine's reach. We reverse and remand for further proceedings.

FACTS

On May 21, 1993, a member of the Church of God in Long Beach notified the church Overseer for Mississippi that she had engaged in an affair with the minister of her church, Milburn Mallette. The member's husband and another member of the congregation also informed the Overseer about the alleged affair. In response, the Overseer appointed an investigative committee. The committee, after its review, found enough merit to the charges that it recommended the appointment of a trial board. The Overseer appointed a trial board and advised Mallette to appear before the board to answer charges of "unbecoming conduct with the opposite sex." After conducting a hearing, the board concluded that there was sufficient evidence to find Mallette guilty of misconduct. The board recommended the revocation of Mallette's ministerial credentials for a minimum of one year and notified him of its decision. Mallette appealed the decision of the trial board to an appeal board which sustained the findings of the lower tribunal.

On August 26, 1994, Mallette filed suit against thirteen defendants. Mallette alleged that the defendants had committed the torts of libel and defamation, intentional infliction of emotional distress, along with breach of contract. In an amended complaint, Mallette also contended that the defendants were liable for violating his due process rights and for invasion of privacy. The defendants filed a motion to dismiss Mallette's complaint arguing that the doctrine of ecclesiastical abstention barred the trial court from exercising jurisdiction. A stay of discovery was entered by the court pending resolution of the motion. The trial court treated the motion as one for summary judgment since it was presented with evidence outside of the pleadings. On October 17, 1995, the court granted summary judgment for the defendants with the exception of Sandy Boyd, Charles J. Kissee, and Kimberly Kissee. The court also under Rule 54(b) found that there was no just cause for delay and entered a final judgment as to all but the three just-named defendants.

DISCUSSION

On appeal, Mallette contends that the doctrine of ecclesiastical abstention does not foreclose review. Mallette states that he dismissed his claims for breach of contract and violation of due process rights, and that the only claims before the trial court involved intentional torts. We have examined the record and discover no formal dismissal of the contract and due process claims. Regardless, Mallette's statements on appeal at least constitute an abandonment of those claims and we consider them no longer to be part of the case.

Mallette then argues that resolution of the tort claims does not involve extensive inquiry into the interpretation of the church doctrine. Asserting that such inquiry is the test by which to determine whether he has a cause of action, Mallette argues that the trial court erred in dismissing the complaint.

The First Amendment of the United States Constitution and Article 3, Section 18 of the Mississippi Constitution both guarantee the right to religious freedom. The doctrine of ecclesiastical abstention prohibits a civil court from exercising jurisdiction over a matter that would require the court to inquire into religious law and government. ***Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 709 (1976).** This abstention includes church-related questions of discipline, faith, rule, custom, or law. ***Id.* at 710.** According to the doctrine, "civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them. . . ." ***Id. at 709.***

This state's supreme court has deferred to decisions of churches in situations involving termination of the pastor, the appointment or removal of a deacon, the use of church property for worship services, and the excommunication of a pastor. ***Blue v. Jones*, 230 So. 2d 569 (Miss. 1970);*Grantham v. Humphries*, 185 Miss. 496, 188 So. 313 (Miss. 1939); *Edwards v. De Vance*, 138 Miss. 580, 103 So. 194 (Miss. 1925); *Mason v. Lee*, 96 Miss. 186, 50 So. 625 (Miss. 1909).** The court has resolved disputes that it found did not require interpretation of religious doctrine. ***Linton v. Flowers*, 230 Miss. 838, 94 So. 2d 615, 619-20 (Miss. 1957).**

We start the resolution of this essential issue on appeal by first determining exactly what the trial court did. The defendants (not including Boyd and the Kissees) filed a motion to dismiss under Rule 12b(6), arguing that their actions were immune from court scrutiny because of the First Amendment. Several exhibits were attached to the motion, including documents from the church investigations of Mallette and copies of relevant pages from the minutes of a meeting of the General Assembly of the Church of God. The plaintiff's answer to the motion also contained substantial recitations of the facts and attached were various documents supporting the plaintiff's position. Mallette argues on appeal that the trial court did not give adequate notice that this motion to dismiss was being converted to a summary judgment motion.

First, the rules themselves provide that if "matters outside the pleadings are presented to and not excluded by the court, the motion [to dismiss] shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. . . ." **Miss. R. Civ. P. 12(b)**. A substantial amount of material is in the body of both the motion and the answer, and even more evidence extrinsic to the complaint appears as exhibits to both side's materials on the motion to dismiss. The trial court considered this additional information and stated in its order that the complaint was being dismissed with prejudice "pursuant to Rule 56. . . ."

The motion to dismiss was filed on April 20, 1995; the answer to the motion was filed June 9. On June 26 a hearing was conducted on the motion. No testimony or other evidence was received, and legal arguments only were presented. Mallette's attorney during his argument treated the hearing as one for summary judgment. At one stage Mallette's attorney says "as Your Honor knows, the standard for summary judgment, in the very least, we should see -- we should be able to get the documents." In other words, Mallette considered the hearing to be one for summary judgment, but argued that judgment was premature since fact questions could arise once discovery was permitted. Mallette was aware that the court was conducting a summary judgment hearing and made no objection on timeliness of notice or on any other basis.

After the trial judge specifically ruled on October 17, 1995, that he was granting judgment under Rule 56, Mallette filed a "Motion to Alter or Amend Order Granting Summary Judgment." Nowhere in that motion does he argue that the hearing in June had improperly been converted from one on a motion to dismiss to one for summary judgment. It seems evident from this state of the record that the parties and the court were satisfied at least to the extent that of not raising an objection to treat the motion as one for summary judgment. Mallette cannot on appeal withdraw his consent to the process. Cases cited by Mallette in which there was no consent are irrelevant. ***E.g., Palmer v. Biloxi Regional Medical Center,* 649 So. 2d 179, 181-182 (Miss. 1994)** (party at hearing objected to considering the hearing one for summary judgment).

We next turn to what allegations and supporting evidence form the substance of Mallette's claims. Under notice pleading rules, the complaint itself quite properly has general allegations. The complaint states that on August 27, 1993, Mallette learned that he had been discharged from his ministerial duties. It is then alleged that various defendants acting individually or as a conspiracy, committed a variety of torts that caused the plaintiff's injury.

In the documents and allegations of the motion to dismiss and the response, it becomes clear that most of Mallette's claims arise from events that occurred during the church's investigations into the charges against him. Mallette argues that these charges were retaliation for his defense in 1990 of a long time treasurer of the state office of the church. Mallette asserts that his efforts led to the treasurer's exoneration. Mallette's investigation of those charges allegedly also uncovered other problems that created suspicion regarding some of those accusing the state treasurer. None of the claimed injury arises from the events occurring at the time of the state treasurer charges and alleged exoneration. Instead, the subsequent investigations of Mallette creates his alleged injury.

The first event from which Mallette claims injury was an allegedly retaliatory investigation into whether he had obtained a beer license at a small grocery and meat market that he owned along with another individual. A church committee was formed to investigate that possibility, which would be treated as "unbecoming conduct" for a minister of the Church of God. In late 1992, the committee investigating those charges dissolved, according to Mallette, because it was shown that his partner in the business had obtained the beer license, not him. During that investigation, Mallette claims that the attorney for his business partner must have been contacted. Mallette assumes that happened because of events at a deposition taken as a result of a separate legal dispute with his partner. At that deposition Mallette was asked about a letter that was sent him by the state Overseer. That letter was the notice given Mallette of a fact finding committee hearing in April of 1992 at which Mallette was to address the allegations he had made against the state Overseer, and also was to respond to charges that Mallette held a beer license.

There is no explanation in the record of how this letter came to be in the possession of the attorney for Mallette's business partner. This is part of Mallette's evidence that the church went "outside its walls" to publicize its investigation of Mallette. However, this letter sets out the beer license issue, which his business partner was a justified source from whom the church could seek information, and mentions that Mallette had made charges against the Overseer. The latter revelation is not dissemination of the reverse, i.e., the church's claims against Mallette.

Mallette also attempts to show that the church injected itself into his private dispute with his business

partner by showing a letter sent to the Overseer by the committee that investigated the beer license issue. That letter in two sentences refers to the problems that Mallette has had with the church, and also states that he "is now engaged in a legal dispute" against his business partner. Mallette's deposition is mentioned and is said to "reveal much about how he thinks." Since this was the committee formed to investigate the beer license question, that committee's becoming aware of a deposition regarding the dispute with the business partner is understandable. The letter informed the Overseer, a governing member of the church, of the result of this part of the investigation.

Mallette's last claim arises from actions of a church committee that was formed to investigate allegations raised by Kim Kissee that she and Mallette had a sexual affair. That committee allegedly talked to various individuals, businesses, and law enforcement agencies during their investigation. The one example of a claim based on activities inside the walls of the church is that a woman (not one of the defendants) read a letter in Mallette's church, the information from that letter allegedly coming from the Kissees or from the church itself. The letter described the alleged affair with Kim Kissee. Mallette says that the church "published this hearsay statement to the congregation to further impugn [his] character."

Mallette's answer to the motion to dismiss summarizes his need for discovery:

> The procedures and methods employed by the officials of the church in its so called "investigations" and "trials" are not simply being sought as in some scattered fishing expedition. Reverend Mallette has requested information specifically tied to the three phases of the proceedings brought against him.

Thus, Mallette's focus is on the misconduct investigations. He claims that these investigations were motivated by vengeful motives and resulted in contacts being made outside of the church in order to determine the truth of the Kissees' allegations and the complaint about the beer license. As Mallette says, "the church used and misused its own procedures to intentionally malign and harm Reverend Mallette." The discovery that he seeks "is designed to reveal the malice and the behavior directed at Reverend Mallette." The harm Mallette states, occurred "outside the walls of this church, and thereby subject[ed] the church to secular scrutiny."

This constitutes the claims brought against the defendants. Our task is to determine if some or all of them are within the protections of the First Amendment. Mallette's view is simple: anything said outside the literal walls of the church is unprotected, and in the case of the letter read to the congregation, if the motives are sufficiently malicious, even actions within the literal church walls are subject to "secular scrutiny."

We reiterate the constitutional dimension of this dispute. Freedom of religion under the First Amendment requires that the government not intrude into "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them. . . ." ***Serbian Orthodox Dioceses,* 426 U.S. 696 at 714**(quoting *Watson v. Jones,* 80 U.S. 679, 733 (1872)). What in a large sense Mallette claims is that bad motives -- revenge, cover up of his accusers' misconduct, retaliation for whistle-blowing -- controlled the investigations. He would seem to have us hold that if those motivations actually infected the investigation, then Mallette should have a claim. Implicitly, if those bad motives do not exist, then no claim may be brought regarding the church action. It is obvious that Mallette's position is the exact opposite of

ecclesiastical abstention. He would have the activities investigated by a civil court, and depending on the conclusion regarding their honesty and good faith, there may or may not be First Amendment protection for them. In fact, the protection exists to block inquiry by secular courts into certain kinds of activities.

There is ample authority that disciplining and terminating ministers are not actions that can be inquired into by this or any court. We cannot draw the line that Mallette would have us draw, that the disciplining is beyond our inquiry, but that the procedures followed to determine whether there should be discipline are entirely open for court review. Unless the First Amendment only protects churches that act without seeking information before reaching disciplinary decisions, then the ability to discipline within the protections of the First Amendment includes the ability to investigate before determining whether to discipline. All the allegations regarding contacts with the law enforcement, motels, and other entities that were part of the various investigatory committees' work are beyond the jurisdiction of a court to review.

Seeking discovery of the internal operations of the investigation committee is quintessentially an inquiry into ecclesiastical government. Even Mallette has abandoned his explicit claims attacking the due process of the church. He cannot revive those claims in this way.

What is not so clear is whether certain other actions had anything to do with either investigating in order to determine whether to discipline Mallette, or in other ways the actions were taken in furtherance of church doctrine. One event has already been described that at least raises a question: the reading of a letter to a congregation explaining Mallette's alleged affair. What we do not have in the record, and certainly no findings by the court below, is that the reading of the letter setting out the alleged affair was propelled by church doctrine. It is not for a court to determine the propriety of a practice adopted by a church of announcing to a congregation the alleged misdeeds of a pastor, but we do not know if such a doctrine exists here. Some courts have concluded that it is possible even for a minister to commit defamation during his sermon that is compensable. ***McNair v. Worldwide Church of God,* 197 Cal. App. 3rd 363 (1987); *Hester v. Barnett,* 723 S.W. 2d 544 (Mo. App. 1987). *See generally Barnes v. Outlaw,* 937 P.2d 323, 326 (Az. App. 1996)**. That approach is consistent with ecclesiastical abstention. It is not the situs of the action that creates the protection, it is the subject-matter. Actions that apply church doctrine and exercise governing authority are protected.

On the present state of the record, we can make conclusions regarding certain of the claims, but not as to others. We therefore remand for further proceedings so that the trial court can determine whether any claims exist outside of the following protected actions of the church: (1) any claims arising from the investigation into the desirability of disciplining Reverend Mallette; (2) any statements or contacts made by the church that were necessitated by religious law of the Church of God, e.g., a principle that church members be informed of charges and the result of investigations. There may be other ecclesiastical reasons supporting the church conduct, so the two listed above are not exclusive. If any publicity was not within the subject matter of protected actions, then a claim regarding them may exist. As already indicated, only the letter read to the congregation raises a question on this record.

Neither the United States Constitution nor the Mississippi Constitution provides religious

organizations with blanket immunity from defamatory statements. ***See Gorman v. Swaggart,* 524 So. 2d 915, 922 (La. Ct. App. 1988).** The blanket may or may not be of the size to cover all that occurred here.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE TAXED ONE-HALF TO THE APPELLANT AND ONE-HALF TO THE APPELLEES.

McMILLIN, P.J., AND COLEMAN, HERRING, HINKEBEIN, KING, JJ., CONCUR.

DIAZ, J., CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY BRIDGES, C.J. AND PAYNE, J.

PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION.

THOMAS, P.J., NOT PARTICIPATING.

DIAZ, J., CONCURRING:

I write separately to concur with the majority opinion. Summary judgment is a powerful tool which "should be used wisely and sparingly." ***Martin v. Simmons*, 571 So. 2d 254, 258 (Miss. 1990).** It should only be granted when "there is no genuine issue as to any material fact." M.R.C.P. 56(c). The trial judge in the case at bar failed to consider that perhaps some of Mallette's claims were in fact beyond the scope of the ecclesiastical abstention doctrine and therefore within the domain of the trial court. It is for this reason that "[w]e urge caution in the granting of summary judgment." ***Martin*, 571 So. 2d at 258.** ***See also Fortenberry v. Memorial Hosp. At Gulfport, Inc.*, 676 So. 2d 252 (Miss. 1996); *Hardy v. K Mart Corp.*, 669 So. 2d 34 (Miss. 1996); *Huffman v. Walker Jones Equip. Co., Inc.*, 658 So. 2d 871 (Miss. 1995); *Owen v. Pringle*, 621 So. 2d 668 (Miss. 1993); *Swan v. I.P., Inc.*, 613 So. 2d 846 (Miss. 1993); *Rosen v. Gulf Shores, Inc.*, 610 So. 2d 366 (Miss. 1992); *Gilich v. Mississippi State Highway Comm'n*, 574 So. 2d 8 (Miss. 1990).** Because the trial judge clearly erred in granting summary judgment so casually, I would direct the trial court to allow Mallette the opportunity to put forth evidence in support of his claim.

BRIDGES, C.J. AND PAYNE, J., JOIN THIS SEPARATE OPINION.

PAYNE, J., CONCURRING:

I would affirm the summary judgment. I concur only because "constitutional protections do not give blanket immunity from defamatory statements." ***Gorman v. Swaggart*** was an example of how *not* to do church discipline. Biblical mandates for church discipline are found in Matthew 18:15-17 and I Corinthians 6:1.