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

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I. INTRODUCTION

The response filed by Plaintiff Jane Doe does not address the most pressing questions before this Court, such as:

- How can equitable estoppel bar the statute of limitations if there are no statements to the plaintiff regarding any settlement or legal claim?
- How does a statement that the identity of the child's father be kept secret somehow "defraud" or prevent Plaintiff from filing a legal action?
- How can statements that constitute an underlying cause of action also serve as the "subsequent" actions that prevented Plaintiff from filing a timely action?
- Does a desire to avoid scandal or litigation, coupled with a statement to keep a matter secret or confidential, abrogate the statute of limitations under Ohio law?
- Does equitable estoppel continue indefinitely, regardless of a plaintiff's lack of diligence for forty years?
- How can a nun's opinion about whether the Church will confer the sacrament of baptism in the future be a misstatement of existing fact? And how can that statement be untangled from the underlying religious beliefs protected by the First Amendment?
- Finally, how does strenuously advocating and arguing for a woman to place her child for adoption create a cause of action under Ohio law against nonparties to the adoption?

These questions expose the many significant flaws underlying Plaintiff's arguments and the decision by the Court of Appeals. Absent a reversal by this Court, the Court of Appeals' decision creates a limitless precedent in the statute of limitations context and contradicts this Court's pronouncement on equitable estoppel in *Doe v. Archdiocese of Cincinnati* (2006), 109 Ohio St.3d 491, 2006-Ohio-2625 ("*Doe*"). Because the allegations in this Complaint do satisfy any of the elements required in *Doe* and other case law, the doctrine of equitable estoppel does not apply to bar the statute of limitations in this case. Accordingly, the case should be dismissed.

This case also raises a significant constitutional issue due to the unavoidable 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. It is impossible to prove the veracity of any of the statements without delving into the religious beliefs of the speakers or the doctrine of the Roman Catholic Church. Because this action is premised upon statements from an alleged "spiritual advisor" that are irretrievably entangled with religious beliefs, the action fails.

Lastly, aside from the statute of limitations and religious entanglement issues, this Court should consider whether the alleged conduct is actionable at all. If allowed to proceed, this case would create a precedent for litigation by any mother against individuals who advised her to place a child for adoption. If someone advocated adoption to avoid scandal – whether a relative, a counselor, or spiritual advisor – the person might be sued. If a father argued that he might lose his job, or that adoption is the best thing for the baby, then presumably that father could be sued for such "intimidating" statements. Such an illogical cause of action violates public policy and conflicts with R.C. 3107.01-.19, which provides the sole statutory mechanism for challenging an adoption in Ohio.

For all of these reasons, the Court should reverse the Court of Appeals decision and dismiss this case with prejudice as a matter of law.

II. 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.

The most glaring deficiency in the Complaint is the lack of any statements or conduct that defrauded or somehow prevented Plaintiff from filing an action for nearly 40 years. In the recent *Doe* decision, the Court stated the well-recognized standard for applying equitable estoppel to a statute of limitations defense. Equitable estoppel should apply only if "subsequent and specific

actions by defendants somehow kept them from timely bringing suit...." *Doe*, ¶ 45 (emphasis added), quoting, *Zumpano v. Quinn* (N.Y. 2006), Slip Op. 01245, 849 N.E.2d 926, 2006 WL 395229.

Other courts have explained the type of active preventative conduct that triggers the equitable estoppel doctrine. According to the Sixth Circuit Court of Appeals, the conduct must consist of "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). Ohio courts have 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 v. Diocese of Cleveland* (1988), 126 Ohio App.3d 299, 315, 710 N.E.2d 330; *A.S. v. Fairfield School Dist.*, 12th App. No. CA 2003-04-088, 2003-Ohio-6260, ¶ 8, 2003 WL 22764383. The overarching thread is that the conduct should somehow defraud the plaintiff or lull the plaintiff into not pursuing a lawsuit in a timely manner.

Here, it is undisputed that there were no express statements to the Plaintiff regarding the length of time for bringing suit. There was no mention of a claim, much less an offer to settle a claim. (App. 9, ¶ 15) There is no claim of hidden evidence or promises to not assert a limitations defense. Indeed, there were no direct statements by the Archdiocese hierarchy at all. This case does not fit within any of the grounds for equitable estoppel set forth in *Bridgeport Music, Livingston, or A.S.* Plaintiff argues that the alleged statements fall under a general catchall mentioned in *Livingston* for "similar misrepresentations or conduct," but Plaintiff does not explain how the present case fits within the examples of equitable estoppel in the case law. In sum, Plaintiff's Complaint does not state a claim that she was ever duped or precluded from filing suit in a timely manner.

Importantly, the Court of Appeals did not have the benefit of the *Doe* decision and applied the wrong standard. The Court of Appeals held that the plaintiff must merely have "encouraged the party not to bring suit." (App. 9, ¶ 15) In contrast, this Court stated in *Doe* that the alleged conduct must be "subsequent and specific actions by defendants [that] somehow kept them from timely bringing suit..." *Doe*, ¶ 45. Merely encouraging a party to not file a lawsuit is not the same as taking action to prevent a claimant from filing a timely suit. Even under the incorrect standard used by the Court of Appeals, the alleged conduct is insufficient. There was no alleged statement by the Archdiocese that mentioned the possibility of a lawsuit or claim at all, so it cannot be said that the Archdiocese discouraged Plaintiff from filing suit.

Moreover, Plaintiff and the Court of Appeals incorrectly focus on the Archdiocese's alleged intent to avoid scandal or litigation. But there is nothing improper with a party having a desire to avoid scandal or litigation. Indeed, there is nothing wrong with a party openly stating that it wishes to avoid litigation or a public scandal. However, under the Court of Appeals' interpretation, having a motivation to avoid scandal or litigation justifies the application of equitable estoppel to override the statute of limitations, regardless of what the actual conduct was. This does not reflect the principles of equitable estoppel as set forth in *Doe* or any other case law.

In fact, in addressing the "prevention" element, Ohio courts have previously held that statements by a defendant asking a plaintiff not to sue, or to keep the matter secret are not sufficient to establish equitable estoppel. 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. It is certainly rational and expected that individuals might tell

another to keep a matter confidential or not sue regarding a certain event. But such statements, without more, are proper and do not override the statute of limitations.

The rationale for this distinction is apparent – there is no inherent deception or fraud in wanting or asking a person to keep something a secret or to not sue. And the application of equitable estoppel to override the limitations period should only be used where a "plaintiff is induced by fraud, misrepresentations or deception to refrain from filing a timely action" and there is reasonable reliance on the misrepresentations. *Zumpano*, 6 N.Y.3d at 674, 849 N.E.2d at 929. Here, there are no statements asking Plaintiff to not sue. Merely asking Plaintiff to keep the child's parentage a secret is even less problematic than the requests for total secrecy in *Livingston* and *A.S.* They do not prevent Plaintiff from timely pursuing a cause of action and do not constitute justify applying the doctrine of equitable estoppel.

Plaintiff also did not show 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. Instead, Plaintiff claims that these are factual issues that cannot be resolved in a motion to dismiss. But the alleged statements fail as a matter of law. An alleged statement to Plaintiff that she should place the child for adoption and not tell anyone about the child's parentage is, at best, a request or a demand. Likewise, the statement about the potential baptism of the child is a view or opinion of what may happen in the future. Such allegations fail because the statements are not representations of <u>existing</u> fact. In fact, the Complaint concedes that the statements are not misrepresentations of fact in alleges that they are "illusory and objectively unprovable." (Supp. 6, ¶ 20) Accepting the allegations as true, these requests or statements of advice or opinion are not misrepresentations of fact and cannot support a claim of equitable estoppel in a statute of limitations context.

Notably, there are several arguments that Plaintiff did not address at all in her response brief. First, there are no "subsequent" actions separate from the alleged tort in this case. In *Doe*, the Court stated that equitable estoppel should apply only if "subsequent and specific actions by defendants somehow kept them from timely bringing suit...." *Doe*, ¶ 45 (emphasis added), quoting, *Zumpano*, 849 N.E.2d 926. This "subsequent" element in *Doe* necessarily and logically requires that the estoppel claim be based on acts that occurred after the underlying wrongful conduct. Here, all of the statements by Sister Mary Patrick and Mr. Heil occurred prior to the adoption and relate solely to the decision to place the child for adoption. There are no statements made after the adoption or in relation to any possible legal claim. Put simply, the same pre-adoption statements are alleged to be both the basis for the action and the basis for equitable estoppel. Because Plaintiff cannot show any "subsequent" actions that prevented her from filing suit, the present action does not satisfy this element of equitable estoppel in *Doe*. Plaintiff did not address to this argument at all.

Second, Plaintiff also did not address the requirement articulated in *A.S.* that there be some wrongful conduct or impediment during the limitations period. *A.S.*, 2003-Ohio-6260, ¶ 10. Here, there is no alleged communication with the Plaintiff after the adoption or after she turned 18 years old. While the limitations period was running after Plaintiff's 18th birthday, there was no wrongful conduct or impediment that prevented Plaintiff from filing suit. This is yet another reason why equitable estoppel does not apply in this case to bar the statute of limitations defense.

Plaintiff also did not respond to the reliance issue, which is often recast in terms of the Plaintiff's diligence. The Sixth Circuit has 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, Plaintiff did not pursue 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 opined, "Given the religious indoctrination that Doe had experienced, her reliance was both reasonable and in good faith." *Id.* At best, that statement addresses reliance in the context of the underlying cause of action, not reliance in the context of precluding the statute of limitations. 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.

Lastly, Plaintiff did not address when the application of equitable estoppel should end. 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. Plaintiff, with full knowledge of all of the facts, sat on her claims for nearly four decades and subjectively elected the time to sue. This cannot be the law in Ohio. As the Court has previously stated in other contexts, the limitations period should start when the plaintiff knows of the offense and the identity of the perpetrator. *Doe*, 2006-Ohio-2625, ¶ 20; *see also, Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 538-41, 629 N.E.2d 402. 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.

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.

<u>Proposition of Law No. 2:</u> 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.

In addressing this proposition of law, Plaintiff relies extensively on *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 527 N.E.2d 1235, which pertained to a husband's claim against a minister and church for the minister's sexual affair with the plaintiff's wife. The *Strock* decision addressed the concept of immunity for religious institutions, claims of "clergy malpractice," and the viability of amatory actions. In that limited context, the Court logically held that the sexual affair was not a religious practice protected by the First Amendment. The present action is not like *Strock* in any respect. Unlike *Strock*, Plaintiff's claim rests entirely on alleged statements by religious personnel about sacraments and spiritual well-being that, on their face, are infused with religious belief and doctrine.

Accordingly, the issue is the extent to which a Court is prohibited from inquiring into ecclesiastical questions or resolving 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. In *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584, this Court noted: "If the state becomes involved in assessing the adequacy of these standards, serious entanglement problems may arise under the First Amendment." *Id.*, <u>citing</u> *Lemon v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105.

Plaintiff declined to address the cases cited by the Archdiocese where courts rejected similar claims that were entangled with religious-oriented statements. *Franco v. Church of Jesus Christ of*

Latter-Day Saints (Utah 2001), 21 P.3d 198, 205-06 (religious entanglement precluded a tort action against a minister for advising an abuse victim to "forgive, forget, and seek atonement."); *DeCorso v. Watchtower Bible & Tract Society* (Conn. App. 2003), 78 Conn. App. 865, 877, 829 A.2d 38 (no claim where church told abuse victim to endure it and expelled her from church); *Murphy v. I.S.K. Con. of New England, Inc.* (1991), 409 Mass. 842, 571 N.E.2d 340 (no claim for child lured into Hare Krishna). All of these cases involved controversial statements and advice that were infused with religious beliefs. And all of the claims were rejected for that very reason.

In trying to avoid the religious entanglement issue, Plaintiff contradicts her own allegations. On one hand, Plaintiff argues that the alleged statements by Sister Mary Patrick are not entangled with religious doctrine and belief. But, at the same time, Plaintiff alleged and admitted that Sister Mary Patrick was speaking as Plaintiff's "spiritual advisor during her pregnancy." (Supp., ¶ 17) She further 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. (Supp., ¶ 21) Thus, Plaintiff cannot distance the statements from their obvious religious context in order to respond to the religious entanglement issue.

Plaintiff also claims that there should be a trial on the "sincerity" of the religious statements but, at the same time, the Complaint concedes that the statements are "objectively unprovable." (Supp. 6, ¶ 20) Plaintiff also does not explain how the parties can realistically conduct such an inquiry decades after the alleged statements when the speakers are dead.

Additionally, Plaintiff's brief repeatedly recasts Sr. Mary Patrick's statement about the possibility of baptism as a threat that the child would be "condemned to hell." But there is no such mention of the word "hell" or the like in the Complaint. Indeed, Plaintiff's statements regarding "hell" are well beyond any reasonable inference from the pleadings. Not only are Plaintiff's

inflammatory statements a rank misinterpretation of Catholic teaching and belief, but they further demonstrate the inextricable entanglement of the allegations with religious doctrine.

The Court of Appeals' analysis of the reliance issue further 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 require an inquiry into Plaintiff's religious beliefs, which is prohibited.

As one last desperate argument, Plaintiff claims that the factual inquiry could center on whether the Archdiocese would have administered the sacrament of baptism – which is a religious creation – to this child at some time. (Appellee Brf. at 16) Again, this argument demonstrates the underlying entanglement. Such an inquiry would address ecclesiastical questions and disputes involving church doctrine and religious practices, which is strictly prohibited. *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; *see also, Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584, *citing Lemon v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105. There is simply no way to avoid the religious entanglement issues in this Complaint.

In the end, there is no way to distinguish the present case from the abundant case law that has rejected claims based on statements of religious beliefs or practices. Neither the Court nor a jury can confirm or even consider the veracity of the alleged religious statements in this case. Nor can the

Court interpret any of the beliefs on the part of Plaintiff, the speakers, or the Church. The present action must be dismissed due to its unavoidable 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.

Plaintiff argues that the Archdiocese waived any public policy argument by not presenting the argument to the trial court or Court of Appeals, citing *In re Dismissal of Mitchell* (1979), 60 Ohio St.2d 85, 90, 397 N.E.2d 764, 768. However, Plaintiff is mistaken. The Archdiocese did brief and present this very same argument to the Court of Appeals without objection from the Plaintiff. *See* T.d. 12, pp. 17-18. Accordingly, the holding of *Mitchell* does not apply and this Court may fully consider the argument.

That said, Plaintiff's response misses the core issue raised by the Archdiocese. The Court is presented with a unique action that seeks monetary damages from third parties who did not adopt the child. That is, a mother who consented to place her child for adoption is now asserting an action for monetary damages against nonparties to the adoption based solely upon verbal pressure. Neither party has presented any case law from any jurisdiction recognizing such a claim. By allowing this claim, the Court would implicitly sanction any claim by a mother who gives her child up for adoption and sues a party who pressured her decision. A host of counselors, parents, and relatives could be sued for making comments similar to those alleged in this case.

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 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, in Massachusetts, a cause of action for

interference with parental rights is 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 and this Court should not endeavor to create such a cause of action.

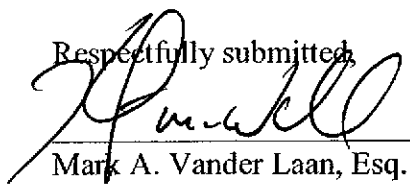
Additionally, the Ohio legislature has created a comprehensive statutory scheme for adoptions, which Plaintiff dismisses for no substantive reason. R.C. 3107.01-.19; R.C. 5103.15-.16. These statutes provide judicial control over the placement of children for adoption by having the parents of the child personally appear before the proper probate court for approval of the placement and adoption. *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260, 452 N.E.2d 1304; *In re Boyd's Adoption* (Ohio Prob. 1962) 185 N.E.2d 331, 89 Ohio Law Abs. 202. Any challenges to an adoption decree are governed by R.C. 3107.16, which states 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 adopting parent.

The present case, which seeks monetary damages against third parties 40 years after an adoption, does not fall within any of the exclusive statutory remedies or procedures set forth by the Ohio legislature. The claim also does not fall within the one-year time limitation created by R.C. 5103.16. Accordingly, 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.

III. 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 8th day of February, 2007:

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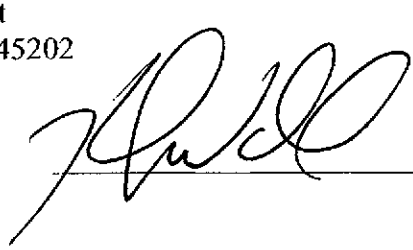

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