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**ORIGINAL**

2017 OK 106



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

**FILED**  
**SUPREME COURT**  
**STATE OF OKLAHOMA**

DEC 19 2017

JOHN DOE (a pseudonym for the Plaintiff),

Plaintiff/Appellant,

vs.

THE FIRST PRESBYTERIAN CHURCH  
U.S.A. OF TULSA, OKLAHOMA, and  
JAMES D. MILLER,

Defendants/Appellees.

No. 115,182

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**ON APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
HONORABLE DAMAN H. CANTRELL DISTRICT JUDGE**

¶0 Appellant filed suit against Appellees, a church and its minister, alleging torts and breach of contract after notice of his baptism was published on the internet. Appellant alleged he consented to baptism only after Appellees assured him his privacy would be maintained. Appellant alleged that Appellees' act of publishing the fact of his baptism to the world wide web resulted in his alleged kidnaping and subsequent torture by extremists while he traveled in Syria. The trial court sustained Appellees' motion to dismiss for lack of subject matter jurisdiction. Appellant appealed and this Court issued an Order granting Appellant's motion to retain this appeal.

**REHEARING GRANTED; OPINION OF THE COURT ISSUED  
FEBRUARY 22, 2017, IS WITHDRAWN AND THIS OPINION  
ORDERED SUBSTITUTED THEREFOR.**

**ORDER OF THE TRIAL COURT IS REVERSED  
AND REMANDED WITH INSTRUCTIONS.**

G. Steven Stidham, Tulsa, Oklahoma, For Plaintiff/Appellant,

John H. Tucker and Denelda Richardson, Tulsa, Oklahoma, For Defendants/Appellees.

## OPINION

WATT, J.:

¶1 This Court retained this case to consider whether a motion to dismiss for lack of subject matter jurisdiction can be granted where factual determinations are required by the trial court on issues that are central to the plaintiff's claims. The district court considered evidence outside plaintiff's petition and determined the publication of plaintiff's baptism on the world wide web was within the ecclesiastical realm of the Appellees' church hierarchy thereby depriving the trial court of subject matter jurisdiction. We reverse the district court's order and remand this matter for further proceedings.

## **FACTUAL AND PROCEDURAL HISTORY**

¶2 Appellant/Doe filed suit against The First Presbyterian Church U.S.A. ("FPC"), of Tulsa, Oklahoma and its minister, James D. Miller, ("Appellees"), based on theories of torts and breach of contract. Doe seeks damages arising out of alleged harm he incurred from Appellees' publishing notice of his baptism on the world wide web. Doe claimed that he advised Appellees of the need to keep his baptism private and as confidential as possible. Doe asserted that Appellees assured him that his

conversion to Christianity would be held as confidential as possible. Doe alleged that because of Appellees' assurances, he proceeded with baptism by Appellees. Stated differently, Doe's allegation emphasized that he did not give consent to the FPC to publicize his baptism.

¶3 Doe and Appellees agreed that Doe did not become a member of Appellees' church and Doe *did not consent to membership*. All parties agreed that Doe consented to baptism, however, Doe asserted his consent was conditioned on insuring his privacy concerns were honored by Appellees. Appellees urged that they had no knowledge of Doe's requests for confidentiality in baptism; and even if they had, church doctrine would have prohibited them from keeping matters private. The only record before us reflects that Doe simply (1) wanted to be baptized into the *Christian* faith, not to become a member of Appellees' church, and (2) only sought baptism if this process could be private and not publicized.

¶4 Doe was born in Syria and is of Muslim descent; he has permanent resident status in the United States. He has met all qualifications for citizenship and is waiting for the U.S. to schedule him to take the citizenship oath. While living in the United States, Doe became interested in converting to Christianity. Doe expressed concern about his safety if he became baptized. A FPC member, Mrs. Slick, sent a text to Doe and advised him:

“I will call my pastor today and let you know how we will PRIVATELY work this out. Nobody will find out. We will make sure that your secret is safe.”

He was baptized by Miller in a non-televised service. The day after Doe’s baptism, Appellees published notice of the baptism on the world wide web. When Doe traveled to Syria, he was kidnapped and held against his will with threats of being murdered for his conversion. Doe escaped, but alleged in so doing he killed one of his captors. Doe claimed that he suffered significant physical and emotional harm from his kidnapping and escape. Doe alleged that his captors learned of his conversion from the internet publication announcing he had been baptized at the FPC.

¶5 This matter comes before this Court on appeal from the district court’s granting Appellees’ Motion to Dismiss for Lack of Subject Matter Jurisdiction. This was Appellees’ *second* attempt at a motion to dismiss.

### **First Motion to Dismiss for Failure to State a Claim**

¶6 Appellees’ urged in their first motion, that “all actions related to the baptism of Plaintiff are protected from judicial scrutiny under the Free Exercise Clause of the First Amendment of the U.S. Constitution.”<sup>1</sup> In denying the first motion to dismiss, the trial court noted that the Appellees’ act of publishing Doe’s baptism on the world

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<sup>1</sup> *Doe v. The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and James D. Miller*, CJ 2014-02210, Tulsa County District Court, Opinion and Order on Motion to Dismiss, October 24, 2014.

wide web “did not arguably occur as part of the baptismal service, nor has it been established that the publication of names of those that are baptized are part of the FPC’s *ecclesiastical* practices.”<sup>2</sup> The district court also noted:

While recordation of such names appears to be part of the FPC’s standard procedure, publication of those names for the general public via the internet has not been established in the record as a required ecclesiastical practice of the FPC. ***Additionally, as the Plaintiff has never been a member of the FPC, it has not been established that the Plaintiff consented to submission to the ecclesiastical practices of the FPC beyond the actual baptism ceremony and service.***<sup>3</sup>

It is undisputed that Doe *did not become a member of the Appellee church*. Appellees’ initial motion to dismiss was denied by the trial court, noting that dismissals are disfavored by this Court;<sup>4</sup> and such motions are to be denied if a

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<sup>2</sup> *Doe v. The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and James D. Miller*, CJ 2014-02210, Tulsa County District Court, Opinion and Order on Motion to Dismiss, October 24, 2014. (Emphasis added).

<sup>3</sup> *Doe v. The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and James D. Miller*, CJ 2014-02210, Tulsa County District Court, Opinion and Order on Motion to Dismiss, October 24, 2014, (Emphasis added).

<sup>4</sup> *Doe v. The First Presbyterian Church U.S.A. of Tulsa, Oklahoma and James D. Miller*, CJ 2014-02210, Tulsa County District Court, Opinion and Order on Motion to Dismiss, filed October 24, 2014, denying the Appellees’ motion the court stated: “In the present case, the acts by the Defendants that are central to the Plaintiff’s claims did not arguably occur as part of the baptismal service, nor has it been established that the publication of names of those that are baptized are part of FPC’s ecclesiastical practices. While recordation of such names appears to be part of the FPC’s standard procedure, publication of those names for the general public via the internet has not been established in the record as a required ecclesiastical practice of the FPC. Additionally, as the Plaintiff has never been a member of the FPC, it has not been established that the Plaintiff consented to submission to the ecclesiastical practices of the FPC beyond the actual baptism ceremony and service.”

plaintiff's allegations contain any set of facts sufficient to support a cognizable legal theory. *Rogers v. Quiktrip Corp.*, 2010 OK 3, 230 P.3d 855.

### **Second Motion to Dismiss for Lack of Subject Matter Jurisdiction**

¶7 The appeal before this Court relates to the Second Motion to Dismiss, wherein Appellees asserted the district court lacked subject matter jurisdiction under 12 O.S. 2011, § 2012 (b) (1). Doe's response to this motion was titled, "Plaintiff's Response to Defendants' Motion for Summary Judgment".

¶8 Appellees' argument in the second motion to dismiss, consists of essentially two themes: (1) they disputed having knowledge of Doe's need for privacy or special considerations regarding baptism; and (2) the Presbyterian church doctrine mandates that information identifying those who have been baptized be made public. Appellees argued that publishing to the internet is so intertwined with the baptismal requirements as to render it part of the church doctrinal policy; therefore the church immunity doctrine, rooted in the guarantees of the First amendment, prohibits any secular court from making inquires into anything relating to baptism. Accordingly, Appellees asserted the district court lacked subject matter jurisdiction to hear Doe's claims.

¶9 Doe alleged that conversion from Islam to Christianity can carry the grave consequence of death, which is often done by beheading. Doe alleged that when he

discussed his desire to convert to Christianity, he advised Appellees of the potentially fatal consequences he could incur for conversion. Doe also alleged that he repeatedly expressed to Appellees his need for a private and confidential baptism. Appellees also disputed they had knowledge of Doe's concerns regarding the potential dangers for a conversion. They further denied that Mrs. Slick's representation constituted notice to the Appellees or a promise of confidentiality. **Appellees submitted the following additional evidence for the trial court to resolve disputed facts:** (1) excerpts from the Presbyterian 'Book of Order,'<sup>5</sup> (2) affidavits from governing church officials, and (3) deposition testimony, in support of Appellees' assertion that church doctrine would have prevented FPC from honoring Doe's request.

¶10 Although Appellees' arguments and supporting exhibits are difficult to follow and lack defining clarity on this issue, it is not necessary for this Court to determine the Presbyterian Church (U.S.A.) doctrinal positions relating to baptism. **The foundational inquiry is to discern exactly what Doe asked Appellees to do with respect to baptism, what Appellees agreed to perform for Doe, and ultimately the nature and extent of Doe's consent surrounding baptism.** These fundamental factual inquiries to Doe's claims for relief are *clearly disputed*.

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<sup>5</sup> The Book of Order is a governing document of the Presbyterian Church (U.S.A.), and it is designated as Part 2 of its governing Constitution.

¶11 The trial court struggled with resolution of these very fact issues stating:

This Court does not hint at deciding whether something is sacramental, but rather must make a *factual determination* about the sincere representation of the Church as far as the sacramental nature of the act of baptism. Again, this has been a tricky issue to consider.

Order on Hearing Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 7. (Emphasis added).

The district court also noted the following key points:

By admission of both parties, *he did not ask to become a full member and otherwise be bound further by the numerous rules of the church and its denomination.* Therefore, *it could be assumed he may not have understood fully the requirements of baptism by the [FPC]. It is unclear to this Court if Plaintiff had been exposed to the detailed Constitution of the Presbyterian Church (U.S.A.), which includes a Book of Order.* Still, his baptism placed him squarely under the rules the Defendants have had for baptism.

Order on Hearing Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 6. (Emphasis added).

¶12 **The findings made by the district court are pivotal to Doe's claims and inextricably intertwined with the issue of subject matter jurisdiction.** Under these circumstances, Appellees' motion to dismiss for lack of subject matter jurisdiction should be treated as a motion for summary judgment. *Osage Nation v. Board of Commissioners of Osage County*, 2017 OK 34, 394 P.3d 1224. The trial court erred when it dismissed this matter finding it lacked subject matter jurisdiction.

**Oklahoma District Courts Have Unlimited Jurisdiction Over**



## **All Justiciable Matters Unless Otherwise Provided by Law**

¶13 We have previously recognized that the “state judiciary’s subject matter jurisdiction is derived from the State Constitution which gives Oklahoma courts unlimited original jurisdiction over all justiciable matters unless otherwise provided by law.” *Reeds v. Walker*, 2006 OK 43, ¶ 11, 157 P.3d 100, 107. By contrast, federal courts are courts of limited jurisdiction, and it is presumed that jurisdiction is lacking absent an adequate showing by the party invoking the federal court’s jurisdiction. *Id.* The central theme of Appellees’ second motion to dismiss is that the church autonomy doctrine deprives the district court of subject matter jurisdiction asserting that Doe’s claims are rooted in the ecclesiastical practices of the church.

### **Motion to Dismiss For Lack of Subject Matter Jurisdiction to Motion for Summary Judgment And Consideration of Evidence Outside the Pleadings**

¶14 A party is generally allowed to submit evidence outside the pleadings when making a challenge to the courts subject matter jurisdiction under 12 O.S. 2011, §2012 (b) (1), without converting the pleading into a motion for summary judgment. *Osage Nation v. Bd. of Commissioners of Osage County and Osage Nation v. Osage County Bd. Of Adjustment*, 2017 OK 34, ¶ 64, 394 P.3d 1224, 1245. But, **when this additional disputed evidence relates to an element of the cause of action pled by a party, the motion to dismiss for lack of subject matter jurisdiction is converted**

**to one for summary judgment.** *Id.* at ¶ 64.<sup>6</sup> Under the Oklahoma pleading code, when evidence outside of the pleadings is attached to a motion to dismiss for failure to state a claim pursuant to 12 O.S. 2011 §2012 (b) (6), it is treated as a motion for summary judgment. This Court has routinely held where there are material disputed facts in a motion for summary judgment, the controversy at issue is not ripe for summary adjudication.<sup>7</sup>

¶15 In the matter before us, the trial court specifically stated it made a *factual determination* about the Appellees’ “sincere representation” of the governing church body’s policies regarding the sacramental nature of baptism. The trial court goes so far to say that Doe “*may not have understood fully the requirements of baptism by [FPC].*” Of equal concern, the trial court also noted that it was unclear if Doe had even been exposed to the requirements set out in the Book of Order, contained in the Constitution of the Presbyterian Church (U.S.A.). **These type of factual considerations are essential components to Doe’s claims for relief. As such, his motion to dismiss for lack of subject matter jurisdiction should have been**

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<sup>6</sup> Also see, *Pringle v. U.S.*, 208 F.3d 1220, 1223, (10<sup>th</sup> Cir., 2000), *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, (Miss., 2005), when the resolution of the jurisdictional question requires resolution of an aspect of the substantive claim, courts are required to convert a motion to dismiss for subject matter jurisdiction into a motion to dismiss for failure to state a claim or a motion for summary judgment.

<sup>7</sup> *Malson v. Palmer Broadcasting*, 1997 OK 42 ¶ 11, 936 P.2d 940, 942.

**treated as one for summary judgment.** Because of the disputed material facts, this matter was not ripe for summary adjudication and for this reason alone, should be remanded back to the trial court.

**Church Autonomy Doctrine History from United States Supreme Court  
and Oklahoma: Ecclesiastical Jurisdiction of a Church is Limited to  
Those Who Consent to Church Governance**

¶16 It is a fundamental principle in this country that all people have the “full right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights.” *Watson v. Jones*, 80 US 679, 728 (1871). In this early opinion, SCOTUS explained it is unquestioned that religious institutions have a protected right to create tribunals to resolve controverted questions of faith and for “the ecclesiastical government of all the individual members, congregations and officers within the general association. However, this **ecclesiastical jurisdiction is limited: those who “unite themselves to such a body, do so with the implied consent to this government. . .”** *Watson*, 80 U.S. at 729.<sup>8</sup>

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<sup>8</sup> The Court specifically stated:

All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among  
(continued...)

¶17 *Watson* involved a property dispute that arose between different factions within a certain Presbyterian church by an appointed internal tribunal. The SCOTUS found that the members had consented to the authority of the church and moreover that the church was part of a larger body within the Presbyterian church. Each church consented to the governance of the larger church. Because all were members within the church and the larger church organizational body and had consented to being part of this religious organization, the SCOTUS said secular courts should defer to the decision of the internal governing structure. The *Watson* decision was decided on common law grounds without explicit reliance on the First Amendment.

¶18 However, the pronouncements of *Watson* were further refined in *Kedroff v. St. Nicholas Cathedral*, where SCOTUS recognized the authority and autonomy of the church to be free from the secular control in matters of church government, faith and

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<sup>8</sup> (...continued)

themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. *Watson*, 80 U.S. at 729.

doctrine under the guarantees of the First Amendment to the U.S. Constitution. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 115-116, 73 S.Ct. 143, 154-155, 97 L.Ed. 120. (1952). In this context, a church's freedom from secular control is solely based on membership in the church. Generally speaking, a church should be free from secular control and interference by state courts for claims against a church brought by a ***member who has agreed and consented to the ecclesiastical practices of the church.*** *Id.* This protection from secular courts as outlined by SCOTUS is directly tied to church membership and the consent of the member to enter under the control of the church.

¶19 This Court has refused to extend this application to shield a church from tort liability for claims brought by a plaintiff that arose after church membership ceased. *Guinn v. Church of Christ of Collinsville*, 1989 OK 8, 775 P.2d 768. We clearly recognized that a church may be shielded from tort liability for church sanctioned disciplinary actions taken against a "member." *Id.* However, this shield from liability evaporates for claims that arise after a member has separated from the church and is no longer a church member. *Guinn* made clear, the foundation for a church to be entitled to this level of protection is rooted in the pronouncements by the SCOTUS in *Watson* and *Kedroff*, outlining that ecclesiastical protection for a church arises solely from ***membership*** and the consent by the person to be governed by the church.

Under *Guinn*, a church has no defense of ecclesiastical jurisdiction for a claim brought by a *non-member* like Doe, where it is *undisputed*, as noted by the district court that “*by admission of both parties, [Doe] did not ask to become a full member and otherwise be bound further by the numerous rules of the church and its denomination*”<sup>9</sup>

¶20 We have very clearly outlined the profound constitutional underpinnings of this limited protection to a church. It is deeply rooted in our federal constitutional heritage. This Court recognized that “[w]hen people voluntarily join together in pursuit of spiritual fulfillment, the First Amendment requires that the government respect their decision and not impose its own ideas on the religious organization.” *Guinn, supra* ¶ 21, 775 P.2d 774. We specifically recognized that the First Amendment allows individuals to “freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them.” *Id.* The key to the defense raised by Appellees stems from an agreement that arises between the church and the individual who has *freely chosen to join in membership and agree and consent* to that church’s ecclesiastical

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<sup>9</sup> Order on Hearing Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 6. (Emphasis added).

jurisdiction. When that agreement occurs, “[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.”<sup>10</sup>

¶21 In *Guinn*, we made clear that the church could defend its claims by the plaintiff for disciplinary actions brought against her while she was still a church member. However, we were unequivocal, “[j]ust as freedom to worship is protected by the First Amendment, so also is the liberty to recede from one’s religious allegiance.” *Id* at ¶ 27, 775 P.2d 776. We went further: “The First Amendment clearly safeguards the freedom to worship *as well as the freedom not to worship*.” *Id*. In the record before us and as clearly outlined by the district court, Doe without question *never became a member*. Doe specifically made clear that he was not becoming a member of the Appellee’s church. The record is void of any evidence that Doe ever consented to Appellees’ ecclesiastical jurisdiction.

¶22 In a later decision, we again made clear that “the church has no power over those who live outside of the spiritual community.” *Hadnot v. Shaw*, 1992 OK 21, ¶ 17, 826 P.2d 978, 988. We again recognized that the First Amendment protects the “jurisdiction of an ecclesiastical tribunal by the Free Exercise Clause’s shield, [but] it also serves to protect the rights of an individual to worship or not to worship according to one’s conscience.” *Id*. In *Hadnot* we again considered the potential tort

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<sup>10</sup> *Guinn*, *supra* ¶ 21, 775 P. 2d 774, citing *Watson v. Jones*, *supra* 80 U.S. at 728-729.

liability that could be imposed on a church by a member for disciplinary action taken against the member. Like in *Guinn*, there was a demarcated time when membership ceased. This Court without reservation recognized and honored the ecclesiastical jurisdiction of the Church for acts that arose during the time of membership. We likewise acknowledged that this defense is wholly tied to consent by the individual to the church's judicature which arises *solely from membership*.

¶23 The *Hadnot* court unquestionably recognized that “when the church-member relationship is severed through an *affirmative act either* of a parishioner's withdrawal or *of excommunication* by the ecclesiastical body, a different situation arises.” *Hadnot, supra* ¶ 19, 826 P.2d 989. Once membership ceases, from withdrawal or excommunication, “*the absolute privilege from tort liability no longer attaches. Id.* In the matter before this Court, *all parties agree*, as so forthrightly noted by the district court, *Doe never consented to membership*. The foundational underpinning of ecclesiastical jurisdiction, *membership*, is simply missing. The one requirement that was originally recognized by SCOTUS and provided the basis for this Court's recognition of this exception, is wholly absent in this matter.

**The Church Autonomy Doctrine is an Affirmative Defense and  
does not deprive the Court of Subject Matter Jurisdiction**



¶24 Further, the United States Supreme Court and the 10<sup>th</sup> Circuit Court of Appeals have recognized that the ministerial exception or the church autonomy doctrine, grounded in the Religion clause of the First Amendment, “*operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.*” *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* , 565 U.S 171, 132 S.Ct. 694, 181 L.Ed.2d 650, fn. 4 (Emphasis added). Prior to *Hosanna*, there was a conflict among the federal circuit courts over whether the ministerial exception and the church autonomy doctrine should be treated as a jurisdictional bar or as a defense on the merits.<sup>11</sup> The SCOTUS noted that “the issue presented by the exception is ‘whether the allegations the plaintiff makes entitle him to relief,’ not whether the court has ‘power to hear [the] case.’” *Id.* at fn. 4, (internal citation omitted).

¶25 All parties agree Doe simply asked for baptism, but never to become a member subject to the Appellees’ ecclesiastical hierarchy. Without this consent, Doe’s religious freedom to *not subject himself to the Appellees’ judicature* must be respected and honored under the longstanding and clear constitutional decisions from

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<sup>11</sup> See, *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (2002), finding defendant’s argument that the church autonomy doctrine deprived the court of subject matter jurisdiction under 12 (b) (1) is more appropriately treated as a challenge to the sufficiency of the plaintiffs’ claims, under 12 (b) (6). Because the defendants in *Bryce* presented outside evidence, the motion to dismiss for failure to state a claim was instead treated as a motion for summary judgment. See also, *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (2010), noting that the ministerial exception, much like the broader church autonomy doctrine may bar the success of a plaintiff’s claims but neither doctrine affects the court’s jurisdiction to hear the claims.

our Court and the Supreme Court of the United States. What Doe consented to and what the FPC communicated to Doe must be determined as a foundational inquiry regarding Doe's claims.

¶26 It was error for the district court to conclude that it had no subject matter jurisdiction to hear Doe's claims on the basis of ecclesiastical jurisdiction. The record below is replete with contested issues of fact which must be resolved by the trier of fact in an adversarial hearing below. This matter is hereby remanded back to the trial court for proceedings consistent with this decision.

**DISTRICT COURT'S JUDGMENT REVERSED;  
AND MATTER REMANDED FOR FURTHER PROCEEDINGS**

Gurich, V.C.J., Kauger, Watt, Edmondson, Colbert, JJ. - Concur  
Combs, C.J. (by separate writing), Winchester, (by separate writing), Reif (by separate writing), Wyrick, JJ. - Dissent