IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

ICA EFiled: Feb 06 2023
01:18PM EST
Transaction ID 69080688

Appeal No. 22-ICA-141

C.S.,

Petitioner/Plaintiff,

v.

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CHRIS AND SANDRALEE JENSEN, MATTHEW WHITCOMB, DON WRYE, ANTHONY NAEGLE, AND CHRISTOPHER MICHAEL JENSEN,

Respondents/Defendants.

Brief of Respondents Steven Grow and Donald Fishel

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INTRODUCTION

This is C.S.'s third lawsuit arising from the same facts. In all three he has repeatedly, *and correctly*, alleged that Respondents Donald Fishel and Steven Grow were Church clergy and Church agents "at all times relevant" to his claims. That was never a disputed fact.

C.S. sued the Church in 2013, as well as Bishop Fishel and President Grow, alleging that their conduct was the Church's conduct. C.S. voluntarily dismissed that claim after years of litigation because, as his mother testified, he could not prove his case. Among other things, *he had testified that Michael Jensen did not abuse him*. (Appx.1143-44.)

Bishop Fishel's and President Grow's actions as Church agents were again the basis for C.S.'s claims against the Church in a subsequent arbitration, which C.S. lost after a full hearing on the merits. Because the Church's alleged liability was based on their actions as undisputed Church agents, the arbitrator's ruling necessarily exonerated them.

C.S. is now trying to put President Grow's and Bishop Fishel's actions on trial for a *third* time. Although the Complaint alleges *only* that they acted in their capacity as agents, he now says that this time he is suing them in their individual capacities, and not as Church agents.

Not only is that untrue, it is also too late. In three different cases C.S. pleaded that "at all relevant times" they were Church agents. And that is true. Their actions were as Church clergy, as the facts pleaded in C.S.'s three different complaints make clear. There is a perfect unity of interest between them and the Church.

It is black letter law that if you sue a principal for vicarious liability based on the actions of its agents and lose, res judicata forbids a suit against the agents. C.S.'s claims are therefore barred.

But C.S. has a bigger problem. After the time and expense of the 2013 Lawsuit, the Church wanted to ensure that the arbitration would be C.S.'s last lawsuit arising out of his allegation that Michael Jensen had abused him. Thus, the Church and C.S. agreed that the arbitration would not only end C.S.'s pursuit of the Church, it would be a "final resolution" of "*all* claims or controversies that were or could have been asserted in the [2013 Lawsuit]." C.S. could not sue the Church *or its clergymen* again. The circuit court correctly held that this lawsuit violates that unambiguous agreement and is therefore barred. This Court should affirm.

STATEMENT OF THE CASE

A. Statement of Facts

The 2013 Lawsuit

In 2013, C.S. and several others, including C.S.'s parents and two brothers, filed suit against The Church of Jesus Christ of Latter-day Saints ("the Church"[1]) and various individuals, including Church clergymen Steven Grow and Donald Fishel ("2013 Lawsuit"). (Appx. 164-243.) Three law firms represented C.S.: Fitzsimmons Law Firm PLLC, Zuckerman Spaeder LLP, and Kosnoff Fasy PLLC. (Appx. 162.)

This was not a case of clergy abuse. Rather, C.S. alleged that when he was 12, his older brother's friend, Michael Jensen, abused him.[2]

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[1] Before 2019, two corporate entities existed to hold assets and conduct secular affairs for the Church: (1) Corporation of the President of The Church of Jesus Christ of Latter-day Saints ("COP"), and (2) Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("COPB"). In 2019, COPB was renamed "The Church of Jesus Christ of Latter-day Saints, a Utah corporation sole" ("CHC") and COP merged with CHC. C.S. originally sued COP and COPB in this case, but agreed to substitute CHC as the proper defendant. Subsequently, C.S. acknowledged that res judicata barred his claim against CHC. *See* Petitioner's Br. at 3 n.2. Thus, the Church is no longer a defendant, and is not a respondent here.

[2] Defendants rely on pleadings and other documents from the 2013 Lawsuit and the 2019 arbitration. "[W]hen entertaining a motion to dismiss on the ground of res judicata, a court may take judicial notice of

(Appx. 201-03.) He alleged that "at all relevant times" Bishop Fishel, President Grow, and all the other individual Defendants (including Michael's parents[3]) acted as Church agents, knew Michael posed a danger, and failed to protect him, and that the Church was vicariously liable for their conduct.[4] (Appx. 175-77, 183-86.)

C.S. was deposed *and testified that Michael Jensen did not abuse him*.[5] His mother (as guardian and next friend) voluntarily dismissed his

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facts from a prior judicial proceeding when the res judicata defense raises no disputed issue of fact." *Richardson v. Church of God Int'l*, Civ. A. No. 1:13–21821, 2014 WL 4202619, at *2 (S.D.W. Va. Aug. 22, 2014) (applying West Virginia law).

[3] C.S. says Michael Jensen's parents were "distinguished leaders" in the Church. (Petitioner's Br. at 1.) Not true. They were volunteers in a local congregation, like millions of other Church members.

[4] C.S.'s assertion that the defendants "were fully aware of Michael Jenson's [sic] lengthy and grotesque history of sexually abusing children" (Petitioner's Br. at 1) is not relevant to this appeal *and not true*. Nearly all of the abuse came to light only after Michael was arrested.

[5] When deposed during the arbitration, C.S. claimed that he had been abused and that he had always previously lied when denying that Michael had abused him. "Q. Okay. So you lied to your dad and you lied to the lawyers and your therapist and everybody else …? A. Yes." (Appx. 794.)

claims after consulting with her team of attorneys.[6] (Appx. 247-58.) His parents and two brothers continued to pursue their claims.

In 2018, after ten weeks of trial, Judge Wilkes declared a mistrial because of misconduct by C.S.'s father. "We're going home. Get off the witness stand. This witness is incredible, I'm declaring a mistrial." (Appx. 264.) The parties then settled. (Appx. 273.)

The 2019 Arbitration

C.S. decided to try again. He found a new lawyer and the Church and C.S. executed an Arbitration Agreement. (Appx. 278-81.) C.S. and the Church "mutually consent[ed]" that the arbitration would be a "final and binding … resolution" of "all [of C.S.'s] claims or controversies that were or could have been asserted in [the 2013 Lawsuit]." (Appx. 278.)

Although Bishop Fishel and President Grow were not named as defendants in the arbitration, the Church's alleged liability was based on

[6] C.S. now says he voluntarily dismissed his claims "due to the extraordinary pressure brought to bear through Defendants harassing and vexatious litigation strategy …." (Petitioner's Br. at 2.) Not true. His mother testified that she, her husband, and their team of lawyers decided to dismiss C.S.'s claims because they "didn't know if we had enough information to prove his case." (Appx.497.)

their actions as Church agents. C.S.'s Amended Notice of Arbitration alleged:

- The Church's stake presidents (regional clergy) are "within [the Church's] control … and are its agents and servants." (Appx. 624.)
- The Church's bishops (congregational clergy) "have comprehensive pastoral and administrative responsibility" for the congregation and are the "highest ranking [Church] official in each ward." (Appx. 624-25.)
- Donald Fishel was "the Bishop of the Hedgesville Ward" of the Church and "knew and/or had reasonable cause to suspect and/or should have known that Michael Jensen had sexually abused young children and posed a danger [and] failed to take any action to protect or warn [C.S.] or his family." (Appx. 627.)
- Steven Grow as "the Stake President of the Martinsburg, West Virginia Stake" also "knew or reasonably should have known that Michael Jensen had abused young children" and "failed to take any action to protect or warn [C.S.] or his family." (Appx. 627-28.)
- "At all relevant times" Bishop Fishel and President Grow acted "as agents of the Church, pursuant to the supervision and control and direction of the Church." (Appx. 628-29.)
- Bishop Fishel and President Grow "in their capacities as agents and representatives of the Church, knew and/or had reasonable cause to suspect … that Michael Jensen had sexually abused minor children." (Appx. 640.)
- "[A]s clergy," Bishop Fishel and President Grow had a "special relationship with members of the congregation, including [C.S.]" that "gave rise to a duty to protect members of the congregation, including [C.S.] from foreseeable risk of harm …." (Appx. 637-38.)

- "[Church] Agents … including Stake President Grow [and] Bishop Fishel. … had a duty to exercise ordinary care …." (Appx. 639-40.)
- "[Church] Agents' breaches of duty were substantial factors in [C.S.'s] injuries." (Appx. 641.)
- Bishop Fishel and President Grow "were acting as agents and representatives of the Church, within the scope of their actual and/or apparent authority, with respect to the acts, omissions and breaches of duty alleged herein." (Appx. 641.)
- "In their capacities as [Church] agents and representatives," Bishop Fishel and President Grow "had an affirmative duty to protect [C.S.] from the known and reasonably foreseeable risk that he would be sexually abused by Michael Jensen." (Appx. 645.)
- The Church "is vicariously liable and legally responsible for [their] acts and omissions … and breaches of duty." (Appx. 641.)

In fact, every allegation regarding Bishop Fishel and President Grow *in all three cases* related to their actions as Church clergy. The duty alleged in all three cases was premised on their position as Church clergy. They had no connection with C.S. other than as Church clergy.

C.S. tried to prove his case to the arbitrator using the extensive discovery from the 2013 Lawsuit (in which over 80 depositions were taken), supplemented with additional depositions of President Grow and Bishop Fishel (among others). (Appx. 918.) The parties presented live testimony from ten witnesses, including President Grow and Bishop

Fishel. (Appx. 918.) The parties also submitted 100 pages of pre- and post-hearing briefs.[7] (Appx. 918.)

Arbitrator's Ruling

The arbitrator concluded that "[C.S.] has not carried his burden of proving, by a preponderance of the evidence, all the required elements of his claims. Accordingly, [C.S.] has not established entitlement to any recovery against [the Church]." (Appx. 283-84.) The final award was "in full settlement of all claims, defenses, allegations and counterclaims which were, or could have been, submitted to this Arbitration." (Appx. 284.)

[7] Matters "susceptible to judicial notice" include "facts from a prior judicial proceeding when the res judicata defense raises no disputed issue of fact." *Gulas v. Infocision Mgmt. Corp.*, 599 S.E.2d 648, 652 n.4 (W. Va. 2004) (quotation marks omitted). Courts can also consider "[d]ocuments establishing the existence of the parallel litigation, the parties to that litigation, and the issues therein raised." *See Estate of Jones by Jones v. City of Martinsburg*, Civ. A. Nos. No. 18-0927, 18-1045, 2020 WL 8991834, at *6 (W. Va. Oct. 30, 2020). "Orders and other matters of record in court proceedings" are also subject to judicial notice. *Id.* So too are settlement agreements. *See Mueller v. Shepherd Univ. Bd. of Governors*, Civ. A. No. 11-0567, 2012 WL 5990134, at *1 (W. Va. Nov. 30, 2012).

C.S.'s Third Lawsuit

In November 2021, C.S. and his brother M.S. (who was not a plaintiff in the 2013 Lawsuit or the 2019 arbitration[8]) filed this lawsuit against the Church, Bishop Fishel, President Grow, Bishop Matthew Whitcomb, Donald Wrye, Anthony Naegel, Christopher and Sandralee Jensen, and Michael Jensen. (Appx. 16-48.) C.S.'s allegations are cut almost whole cloth from the Amended Complaint in the 2013 Lawsuit and the Amended Notice of Arbitration. The Church attached as an appendix to its motion to dismiss a chart showing the similarity of the allegations C.S. made in (1) the 2013 Lawsuit, (2) the 2019 arbitration, and (3) this lawsuit. (Appx. 87-93.)

C.S. again brought claims against Bishop Fishel and President Grow *in their capacities as Church agents*: Bishop Fishel was "at all relevant times, the Bishop of the Hedgesville Ward" and "an agent of the Church." (Appx. 18-19.) "[A]s bishop, Fishel knew and/or had reasonable cause to suspect that Michael Jensen was sexually abusing young

[8] M.S. voluntarily dismissed his claims and is now looking for a new attorney. His claims are irrelevant to this appeal.

children" and failed to protect C.S. (Appx. 19.) President Grow "was the Stake President of the Martinsburg, West Virginia Stake … at all relevant times," "knew, suspected, or reasonably should have known that Michael Jensen had sexually abused young children," and failed to protect C.S. (Appx. 19.) "[A]s supervisory agents or leaders within the Church," and "[i]n their capacities as stake president [and] bishop," Bishop Fishel and President Grow were Church agents and "had a special relationship with members of the congregation" that "gave rise to a duty to protect members" from foreseeable harm. (Appx. 27.) "All named Defendants maintained a special relationship to the [S. family] via their leadership roles within the strict hierarchy of the church …." (Appx. 45.)

B. <u>Procedural History</u>

The Church, President Grow, and Bishop Fishel moved to dismiss. (Appx. 57-86.) The other Defendants, represented by separate counsel, also moved to dismiss. The Church, Grow, and Fishel argued that C.S.'s claims are barred by (1) the Arbitration Agreement, and (2) res judicata. (Appx. 57-86.)

Before oral argument, C.S. conceded that res judicata barred his claims against the Church. Thus, this appeal "is exclusively related to

[his] claims against the named Respondents in their personal and individual capacities."[9] (Petitioner's Br. at 3, n.2.)

The court dismissed C.S.'s claims against all Defendants based on the unambiguous covenant in the Arbitration Agreement that the arbitration would be a "final resolution" of "all claims or controversies that were or could have been asserted in the [2013 Lawsuit]."

> The Court concludes that this language is not ambiguous, as it is not reasonably susceptible to different meanings. The Court finds it compelling, persuasive and dispositive that all the allegations raised by C.S. in the current complaint could have been raised in the [2013 Lawsuit]. Indeed, Plaintiff's counsel admitted and acknowledged on the record that the facts alleged in the current complaint could have been raised in the initial complaint filed by C.S., and the Court recognizes that acknowledgement as an undisputable finding of fact.

[9] C.S. omitted Fishel and Grow from his Notice of Appeal and, accordingly, these individuals do not appear in the caption. Respondents assume this was an inadvertent error. C.S. did include the Church ("CHC") in his Notice of Appeal, but he does *not* appeal CHC's dismissal. *See* Notice of Appeal response to Question 16 ("Plaintiff C.S. now appeals the dismissal of his claims against all named Defendants **excepting CHC**." (emphasis added)); Petitioner's Br. at 3 n.2 ("[T]here are no church entities which are named as Respondent in the instant appeal, and the appeal is exclusively related to Petitioner's claims against the named Respondents in their personal and individual capacities.").

(Appx. 1210.) Having dismissed on that basis, the court said it was "not necessary … to rule on the issue of privity," which was the only disputed issue regarding res judicata. (Appx. 1211.)

C.S. filed a Rule 59(e) motion arguing that the court "did not … analyze or make findings as to Plaintiff's argument that a valid contract did not exist vis-à-vis any of the non-Church Defendants …." (Appx. 1214.) The Church responded:

> There is a contract between C.S. and the Church. Defendants' motions asked the Court to apply the plain and unambiguous language of that contract, which the Court did. C.S.' assertion that Grow, Fishel, Whitcomb, Wrye, Naegel, and the Jensens were not parties to that contract is irrelevant. No one said they were. C.S. and the Church agreed that the arbitration would be a "final and binding" resolution of "all claims or controversies that were or could have been asserted [by C.S.] in [the 2013 Litigation]." This is the critical language that, yet again, Plaintiff ignores.

(Appx. 1225.)

The circuit court rejected C.S.'s Rule 59(e) motion because it "points to no new evidence or case law and does not raise new arguments." C.S. was merely "asking the Court to reconsider its prior ruling." (Appx. 50.) The court reiterated its conclusion that the Arbitration Agreement "is not ambiguous" and that C.S. "consented to resolve by arbitration all his

claims or controversies that were or could have been asserted in the 2013 case and no other parties were necessary for [Plaintiff] to waive those rights." (Appx. 51.) C.S. "had the opportunity to present his claims," was "represented by counsel at all stages," and was "unsuccessful in his arguments." (Appx. 51.)

Without objection from the Defendants, the circuit court certified its rulings as final under Rule 54(b). (Appx. 51-52.)

SUMMARY OF THE ARGUMENT

1. The Arbitration Agreement bars C.S.'s claims.

C.S. agreed that the 2019 arbitration would be a "final resolution" of "*all* claims or controversies that were or could have been asserted in the [2013 Lawsuit]." C.S. could not sue the Church, *or its clergymen or other alleged agents*, again. Indeed, *any claim* he could have filed in the 2013 Lawsuit would be forever precluded.

C.S. contends that Bishop Fishel and President Grow cannot benefit from the Arbitration Agreement because they did not give consideration for it. But C.S. cites no support requiring consideration from Bishop Fishel and President Grow specifically. He received consideration from the Church for entering into the Arbitration

Agreement itself. Settlement agreements frequently release all claims arising out of a transaction. There is no reason an arbitration agreement cannot do the same.

C.S. contends that the Arbitration Agreement is unconscionable if it applies to anyone other than the Church. But the Church was always the only defendant with resources to pay any meaningful judgment. And the Church never contested the fact that it was liable for Bishop Fishel and President Grow, if C.S. could prove they were negligent. In reality, C.S. gave nothing up by agreeing he would not sue them, or anyone else, for Michael Jensen's alleged abuse.

Finally, C.S. contends that the Church drafted the Arbitration Agreement so it must be construed against the Church. To the contrary, it was a mutually negotiated agreement and not the kind of adhesion contract to which this axiom applies.

2. Res judicata bars C.S.'s claims.

It is black letter law that if you sue a principal for vicarious liability based on the conduct of its agents, and you lose, res judicata bars any claim against the agents arising out of the same conduct. C.S. sued the Church for alleged wrongdoing by Bishop Fishel and President Grow. He

lost. Res judicata therefore bars his claims against them. His assertion that he is suing them in their individual capacities, and not as Church agents, is not true. Every allegation against them is as Church agents. And he alleges they had a duty to protect him only because they were Church clergy. Res judicata therefore bars C.S.'s claims against Bishop Fishel and President Grow.

STATEMENT REGARDING ORAL ARGUMENT

Respondents Steven Grow and Donald Fishel believe oral argument would not benefit the Court. If oral argument is ordered, it should be held under Rule 19, as this case involves alleged error in the application of settled law. A memorandum decision would be appropriate.

ARGUMENT

I. STANDARD OF REVIEW

"[A]ppellate review of a circuit court's order granting a motion to dismiss a complaint is de novo."[10] *Malone v. Potomac Highlands Airport*

[10] The petitioner must refer to and attach to the notice of appeal the order(s) being appealed. W.Va. R. App. P. 5(b). Petitioner's Notice of Appeal refers to and attaches only the circuit court's July 20, 2022, order denying his Rule 59(e) motion. It does not refer to or attach the June 7, 2022, ruling granting the motions to dismiss. Arguably, C.S. has not appealed the June 7, 2022 Order. In any case, it appears that "[t]he

Auth., 786 S.E.2d 594, 599 (W. Va. 2015) (quotation marks and brackets omitted).

II. THE CIRCUIT COURT CONCLUDED CORRECTLY THAT THE ARBITRATION AGREEMENT PRECLUDES C.S.'S CLAIMS

C.S. and the Church agreed that the arbitration would be a "final and binding" resolution of "all claims or controversies that were or could have been asserted [by C.S.] in [the 2013 Litigation]." (Appx. 439.) At oral argument, C.S.'s counsel conceded that all claims pleaded here were or could have been asserted in the 2013 Lawsuit.

> Q. Could they have been considered before?
>
> A. Yes…. [A]ll this is stuff that happened prior to [the 2013 Lawsuit].

(Appx. 1259-60.) Indeed, the Complaint in this action does not contain *any* material allegations that were not included in the 2013 Lawsuit, as a demonstrative chart prepared by Respondents shows. (Appx. 87-93.)

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standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." *Pritt v. Republican Nat. Comm.*, 557 S.E.2d 853, 859 (W. Va. 2001).

In an effort to overcome the unambiguous Arbitration Agreement, C.S. argues that: (1) it is not a valid and binding contract as to Fishel, Grow and the other individual Defendants; (2) Fishel, Grow, and the other individual Defendants did not give consideration; (3) the Defendants' interpretation would make the Arbitration Agreement unconscionable; and (4) it should be construed against the Church. As the circuit court recognized, none of these arguments has merit.

A. The Arbitration Agreement is a binding contract.

C.S. asserts that the Arbitration Agreement "was not enforceable vis-à-vis the non church Defendants because it did not constitute a valid contract by and between" him and them. (Petitioner's Br. at 5.) But that makes no difference. The Arbitration Agreement is a binding contract between C.S. and the Church. The Church bargained for final resolution of *all* claims. And that is what C.S. agreed to.

The Arbitration Agreement is like a settlement agreement. Settlement agreements frequently release and bar claims against nonparties. Sometimes those parties are listed specifically. Sometimes they are released by categories such as "agents, subsidiaries, assigns,"

and so forth. But frequently parties settle and release all claims arising out of a certain transaction or set of facts.

Here, the parties agreed that the arbitration would be a final and binding resolution of "all claims" C.S. did or could have brought in the 2013 Lawsuit. "[T[here cannot be any broader classification than the word all," which "leaves room for no exceptions." *Calladine v. Hyster Co.*, 399 N.W.2d 404, 408 (Mich. App. 1986).

C.S. asserts that "[w]hile it is admirable that the Church wants to protect its flock, it has no legal right to prevent its parishioners from being sued in their individual capacities … on the basis of a contract which it unilaterally made exclusively with C.S." (Petitioner's Br. at 13.) This is wrong for at least two reasons. First, the provision *protects the Church*. One obvious reason for such a broad provision is for the defendant to avoid any possibility of future legal burdens. If the plaintiff can sue other alleged tortfeasors, the defendant would be left open to possible claims for contribution or indemnity and may wind up having to litigate the case anyway. This is especially true where, as here, the allegations against Bishop Fishel and President Grow are intrinsically linked to their role as clergy of the Church.

Second, there is no reason in law or logic that C.S. and the Church could not agree that the arbitration would bar any claim C.S. could have asserted in the 2013 Lawsuit. C.S. cites no case holding that the Church could not negotiate for, and he could not agree to, a provision that would prevent him from suing the Church's clergymen or anyone else.

Keep in mind that C.S.'s consistent theory in three different complaints was that *all the individual Defendants were Church agents at all relevant times*. (Appx. 27.) "All named Defendants maintained a special relationship to the [S. family] via their leadership roles within the strict hierarchy of the church …." (Appx. 45.) His theory was that the Church was liable for their actions, so by suing the Church alone he was not giving up anything.

Finally, if the disputed provision protects only the Church, it does nothing. Arbitration between C.S. and the Church would by operation of law automatically preclude any subsequent suit by C.S. against the Church, obviating the need for that provision. The purpose of the provision was to end litigation over Michael Jensen's alleged abuse of C.S. once *and for all*.

B. The Church gave consideration.

C.S. asserts that Fishel and Grow (and the other Respondents) cannot benefit from the Arbitration Agreement because they did not give consideration. (Petitioner's Br. at 8.) But the Church gave consideration for the release of *all* claims. The question is one of interpretation, not consideration.

And C.S. did receive valuable consideration. He was able to avoid the expenses, burden, and slower pace of traditional litigation, while still seeking full recovery for his alleged injuries. He only had to sue the Church because it assumed liability for any Church entity or Church agent. The Church agreed to arrange for testimony from Bishop Fishel, President Grow, Chris Vincent, and Matthew Whitcomb.[11] (Appx. 440.) And they agreed to voluntarily testify—some at both a deposition and the final hearing—to avoid being named as defendants. (Appx. 520.)

[11] This was a valuable promise. An arbitrator can issue subpoenas for testimony from in-state witnesses at the arbitration hearing, but not for out-of-state witnesses or depositions. *See* W. Va. Code § 55-10-19. *See also Colo. Mills, LLC v. Sunopta Grains & Foods Inc.*, 269 P.3d 731 (Colo. 2012) (holding that under the RUAA (which West Virginia follows) arbitrators cannot enforce subpoenas against out-of-state parties).

C. The Arbitration Agreement is not unconscionable.

C.S. argues that if the Church's consideration is all that is required, "then the agreement is unconscionable because it creates a right of recovery for C.S. only upon success at arbitration and only against [the Church], while creating total immunity" for others "including protecting the abuser himself, Michael Jensen." (Petitioner's Br. at 8-9.) But that is not the least bit unconscionable. At every stage, C.S. alleged that the individual Defendants were Church agents. He was always after the Church, which is the only party with the financial resources to provide meaningful recovery. Giving up the right to sue individual Defendants (including the incarcerated Michael Jensen) hardly makes the agreement unconscionable.

D. The Arbitration Agreement is unambiguous and was mutually negotiated.

Finally, C.S. asserts that the Arbitration Agreement should be construed against the Church because it was drafted by the Church's counsel. C.S.'s counsel keeps making this argument even though it is patently false. It was a negotiated contract with substantial input from C.S.'s attorney. (Appx. 468-73.) "[T]he 'contra proferentem' canon is meant primarily for cases where the written contract is standardized and

between parties of unequal bargaining power." *Yellowbook Inc. v. Brandeberry*, 708 F.3d 837, 847 (6th Cir. 2013) (quotation marks omitted). *Cf. Payne v. Weston,* 466 S.E.2d 161, 166 (W. Va. 1995) (holding that ambiguities in insurance policies are construed against drafter). The doctrine has no application here.

In sum, the circuit court's conclusion was correct, and this Court should affirm.

III. C.S.'S CLAIMS ARE BARRED BY RES JUDICATA.

The circuit court could just as easily have found that res judicata bars C.S.'s claims against Bishop Fishel and President Grow, as they argued below. After concluding that C.S.'s claims should be dismissed based on the Arbitration Agreement, the circuit court declined to address res judicata. (Appx. 1211.) But this Court "may affirm a circuit court for any reason disclosed by the record." *Banbury Holdings, LLC v. May*, 837 S.E.2d 695, 697 n.4 (W. Va. 2019). *See also* Syl. Pt. 2, *Adkins v. Gatson*, 624 S.E.2d 769 (2005) ("This Court may … affirm … on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." (quotation marks omitted)).

"Res judicata … bars a party from suing on a claim that has already been litigated to a final judgment by that party … and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 803 S.E.2d 519, 530 (W. Va. 2017). By doing so it "assures that judgments are conclusive, thus avoiding relitigation of issues that were or could have been raised in the original action." *Id*. at 529.

"The application of *res judicata* to bar litigation involves a question of law …." *Mountain Am., LLC v. Huffman*, 735 S.E.2d 711, 713 (W. Va. 2012). Thus, it may be, and frequently is, resolved on a motion to dismiss. *See Lloyd's, Inc. v. Lloyd*, 693 S.E.2d 451, 460 (W. Va. 2010) (affirming dismissal based on res judicata where plaintiff's claim "could have been resolved had it been presented in the prior litigation"); *Baker v. Chemours Co. FC, LLC*, 855 S.E.2d 344 (W. Va. 2021) (affirming grant of motion to dismiss based on res judicata).

Res judicata depends on three things:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties.

> Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Syl. Pt. 2, *Dan Ryan Builders*, 803 S.E.2d at 521 (quotation marks omitted). Each element is satisfied here.

A. The Arbitrator's award satisfies res judicata's first requirement – a final adjudication on the merits.

C.S. fully litigated his claims in the 2019 arbitration. He was represented by counsel. He conducted all the discovery he wanted. He also used the discovery developed during six years of litigation in the 2013 Lawsuit. He participated in a full evidentiary hearing. And the arbitrator entered a final adjudication on the merits.

A final adjudication on the merits in arbitration satisfies res judicata's first requirement. *See Cabot Oil & Gas Corp. v. Beaver Coal Co., Ltd.*, Civ. A. Nos. 16–0904, 16–0905, 2017 WL 5192490 (W. Va. Nov. 9, 2017) (citing *Boomer Coal & Coke Co. v. Osenton*, 133 S.E. 381, 385 (W. Va. 1926)); *see also Dytko v. Chesapeake Appalachia, LLC*, Civ. A. No. 5:13CV150, 2016 WL 3983657, at *5 (N.D.W. Va. July 25, 2016) ("[I]t is clear that res judicata may apply to arbitration proceedings."). C.S. did not contest this below.

B. The privity between President Fishel and Bishop Grow, on one hand, and the Church, on the other, satisfies res judicata's second requirement.

Bishop Fishel and President Grow were not parties to the arbitration. But "res judicata applies not only to parties to a prior proceeding in which there was a final judgment but also to those in privity with them." *Baker*, 855 S.E.2d at 353 (quotation marks omitted).

"[T]he privity concept is fairly elastic under West Virginia law, as elsewhere." *Gribben v. Kirk*, 466 S.E.2d 147, 157 n.21 (W. Va. 1995). It is "especially broad when … res judicata is invoked against a plaintiff who has repeatedly asserted essentially the same claims against different defendants." *Dunlap v. Cottman Transmission Sys., LLC*, 689 F. App'x 188, 189 (4th Cir. 2017).

Privity exists where the parties "represent[ ] the same legal right." *Baker*, 855 S.E.2d at 353 (quotation marks omitted). Thus, there is almost always privity between principal and agent. "[T]he employer/employee relationship is sufficient to establish privity," for example. *Id.* (quotation marks omitted).

Where a plaintiff sues both master and servant "based solely on the tortious conduct of the servant, and the servant is acquitted, there can be

no recovery against the master." *Willigerod v. Sharafabadi*, 158 S.E.2d 175, 178 (W. Va. 1967) (citation omitted). Likewise, "[w]here respondeat superior is the sole asserted basis of liability against an employer for the tort of an employee, an adjudication on the merits in favor of … the employer … precludes suit against the [employee]." 50 CJS *Judgments* § 1077.

In *Kinsley v. Markovic*, 333 F.2d 684, 685 (4th Cir. 1964), where the plaintiff lost his suit against a taxi company, res judicata barred his subsequent claim against the taxi driver "whose conduct had constituted the basis" of the claim against the taxi company. *See also Mears v. Town of Oxford, Md.*, 762 F.2d 368, 371 n.3 (4th Cir. 1985) (privity between a town and defendants who were town representatives acting on its behalf).

In *Richardson v. Church of God International*, Civ. A. No. 1:13–21821, 2014 WL 4202619 (S.D.W. Va. Aug. 22, 2014), res judicata barred the plaintiff's claims against a pastor and other church leaders because the plaintiff had sued the church and lost. There was privity because the "actions alleged against [the individuals] were all performed in their roles" as "representatives of the Pineville Church of God" and the defendant pastor "share[d] substantial identify of interests with the

Pineville Church of God." *Id.* at *3-4. "[A]ll of the claims against the Church of God [were] based on the alleged actions of the individuals …." *Id.* at *4. The individuals and the church "share a common interest of absolving the Pineville Church of God and those associated with the church of any fault." *Id.* Thus, the court dismissed the claims against the individual Defendants based on res judicata. Change the names and that reasoning applies perfectly here.

Similarly, in *Baker*, 855 S.E.2d 344, the plaintiff, Kimberly Baker, sued her employer, Chemours, alleging "hostile environment-gender harassment," gender discrimination, and retaliation (*Baker I*). The mistreatment allegedly continued *after* Baker filed her complaint. After losing on summary judgment, Baker filed a new case against Chemours, adding Kevin Crislip as a defendant (*Baker II*). The circuit court concluded that res judicata barred the claims. Baker appealed, but the West Virginia Supreme Court of Appeals affirmed. Although Crislip had not been a defendant in *Baker I*, the court had "no difficulty in finding that respondent Crislip is and was in privity with respondent Chemours, the primary defendant in both *Baker I* and *Baker II*." *Id.* at 353. Crislip "was alleged to be in the petitioner's supervisory chain at Chemours'

facility, closing his eyes to acts of discrimination against her and aiding and abetting Chemours in its campaign of harassment and discrimination." *Id.* at 353-54. "[O]ne relationship long held to fall within the concept of privity is that between a nonparty and party who acts as the nonparty's representative." *Id.* at 354 (quotation marks and brackets omitted).

Baker II establishes that if you sue a company because its supervisors allegedly turn a blind eye to misconduct, you cannot subsequently sue the supervisors. That is remarkably like this case where C.S. sued the Church because its clergy allegedly turned a blind eye and failed to protect him from sexual abuse. Res judicata bars his claims against those clergy. *See also Horne v. Lightning Energy Serv., L.L.C.*, 123 F. Supp. 3d 830, 840 (N.D.W. Va. 2015) (manager shared "substantial identity of interest" with employer because "the claims alleged … all arose out of the same factual circumstances").

And that is plainly not only the correct legal outcome, but a fair outcome against a plaintiff who has had his day in court. Privity "is primarily concerned with assuring fairness towards the party … against whom res judicata is raised." *Richardson*, 2014 WL 4202619, at *3. It

ensures that the person against whom it is asserted "had a prior opportunity to have litigated his claim." *Baker*, 855 S.E.2d at 353 (quotation marks omitted).

C.S. has now filed three lawsuits based on the same facts. In all three, he unequivocally alleged that "at all relevant times" Bishop Fishel and President Grow acted as Church agents. C.S. cannot point to a single allegation in this case of conduct by Fishel and Grow in their "individual" capacities and not as Church agents. And at no point in the 2013 Lawsuit, the 2019 arbitration, or in this case did the Church deny the identity of interest between it and its clergy.[12] *Their conduct was the Church's conduct and would have been the basis for the Church's liability*, if the arbitrator had concluded they were negligent.

Further, if Bishop Fishel and President Grow had any duty to protect C.S., it is only because they were the Church's agents. They had

[12] C.S.'s repeated allegation that Bishop Grow and President Fishel were "at all relevant times" Church agents, and the Church's agreement with that fact, should constitute a judicial admission that C.S. cannot now contradict. "A judicial admission is a statement of fact made by a party in the course of the litigation for the purpose of withdrawing the fact from the realm of dispute." Syl. pt. 4, *State v. McWilliams*, 352 S.E.2d 120 (1986).

no relationship with C.S. or his family outside of their responsibilities as Church clergy. "Generally, a person does not have a duty to protect others from the deliberate criminal conduct of third parties." *Miller v. Whitworth*, 455 S.E.2d 821, 825 (W. Va. 1995). There is an exception where the defendant has a "special relationship" with the injured person. *Id.* C.S. has repeatedly relied on Bishop Fishel's and President Grow's status as Church clergy as the basis for the "special relationship" that imposed on them a duty to protect him. He alleged that "as clergy," Bishop Fishel and President Grow had a "special relationship with members of the congregation, including [C.S.]" that "gave rise to a duty to protect members of the congregation, including [C.S.] from foreseeable risk of harm …." (Appx. 637-38.) "In their capacities as stake president [and] bishop," Fishel and Grow "had a special relationship with members of the congregation" that "gave rise to a duty to protect members" from foreseeable harm. (Appx. 27.)

C.S. had his day in court against Bishop Fishel and President Grow because his claim against the Church was based on their actions. The arbitrator's decision necessarily exonerated them. The arbitrator's decision could only have been based on one or more of the following

findings: (1) Michael Jensen did not abuse C.S., (2) the Church's agents owed no duty to C.S., (3) the Church's agents were not negligent, or (4) any negligence was not the proximate cause of the abuse. Any of those conclusions would exonerate Bishop Fishel and President Grow. That alone shows the unity of interest necessary for privity to exist.

Below, C.S. resisted res judicata with *Gentry v. Farraggia*, 53 S.E.2d 741 (W. Va. 1949) and *Barnett v. Wolfolk*, 140 S.E.2d 466 (W. Va. 1965). But these cases show why res judicata is applicable to a plaintiff who has had his day in court.

In *Gentry*, a taxicab *owner* lost a lawsuit for damage caused to the cab by a collision. The taxicab *driver* then sued the same defendant for personal injuries. The court held that the owner's failed suit did not preclude a claim by the driver, who had not had his day in court, and sought to recover for rights "entirely separate and distinct" from the owner's rights. *Gentry*, 53 S.E.2d at 742-43.

In *Barnett*, two companies sued each other for an accident involving their trucks. A jury found both drivers at fault and said neither company was entitled to recovery. Subsequently, the driver of one company—who had not had his day in court—sued the other company. The court held

that his claim was not barred. "The mere relationship of master and servant cannot, *as against the servant*, form a basis for application of the doctrine of res judicata in respect to a judgment rendered in a former in personam action to which the master was a party but to which the servant was not a party …." Syl. Pt. 2, *Barnett*, 140 S.E.2d 466.

Both cases involved injured parties seeking their first chance at recovery. C.S. had his day in court. He seeks a second chance to recover based on the same conduct. Res judicata prohibits that.

C. C.S.'s claims could have been resolved in the arbitration, which satisfies res judicata's third requirement.

C.S. did not contest res judicata's third requirement. His counsel admitted that all claims could have been brought in the arbitration. (Appx. 1259-60.) He did plead legal theories in this case that he did not plead in the arbitration. But a plaintiff cannot avoid res judicata by pleading "a different legal theory" or seeking "different relief" when the subject matter is the same. *Dan Ryan Builders,* 803 S.E.2d at 529.

Because all three of res judicata's requirements are satisfied, this Court can affirm on these alternative grounds.

CONCLUSION

C.S. had a full and fair opportunity in the arbitration to prove that Michael Jensen abused him, and that Bishop Fishel and President Grow had a duty to protect him and failed to do so. The arbitration was a "final resolution" of that claim and bars any attempted relitigation, both because of its own unambiguous terms and based on the doctrine of res judicata. This Court should affirm.

Dated: February 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William J. Powell, Esquire, counsel for the Respondents Steven Grow and Donald Fishel, do hereby verify that I served a true copy of the ***"Brief of Respondents Steven Grow and Donald Fishel"*** upon all counsel via the WV Intermediate Court of Appeals File & ServXpress e-filing system this 6th day of February, 2023.

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