

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE EPISCOPAL DIOCESE OF
OHIO, et al.,

Plaintiffs,

v.

THE ANGLICAN CHURCH OF THE
TRANSFIGURATION, et al.,

Defendants.

: CASE NO. CV-08-654973

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: Judge Deena R. Calabrese

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: **OMNIBUS OPINION AND ORDER**

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I. INTRODUCTION

It is tempting to conflate a litigation file's size with its complexity. This case presents that enticement. Nevertheless, despite the sheer volume of submissions from the parties – dozens of pages of cross-motions for summary judgment and supplemental authority, and thousands of pages of appendices – this case is straightforward. For the reasons discussed below, the Court finds and concludes that Plaintiffs are entitled to partial summary judgment, and Defendants must therefore “surrender the church keys.”¹ The church property in question is held in trust for the benefit of Plaintiffs Episcopal Diocese of Ohio and The Protestant Episcopal Church in the United States of America.

II. PROCEDURAL HISTORY

This case centers on a church property dispute. The within litigation was initiated March 26, 2008, by Plaintiffs Episcopal Diocese of Ohio (the “Episcopal Diocese” or the “Diocese”), Trustees of the Diocese of Ohio (“Ohio Trustees”), The Parish of the Church of the

¹ Episcopal Diocese of Massachusetts v. Devine, 59 Mass. App. Ct. 722, 723, 797 N.E.2d 916, 918 (Mass. 2003).

Transfiguration (“Transfiguration”), St. Barnabas Protestant Episcopal Church (“St. Barnabas”), The Episcopal Church of the Holy Spirit (“Holy Spirit”), St. Anne’s in the Fields Episcopal Church (“St. Anne’s”), and St. Luke’s Episcopal Church (“St. Luke’s”). Intervening Plaintiff The Protestant Episcopal Church in the United States of America (the “Episcopal Church” or the “ECUSA”) later joined the roster of plaintiffs and filed its own complaint. The Defendants consist of seceding members of the above-referenced parishes, as well as the new church entities formed through amendments to the parishes’ articles of incorporation.

Plaintiffs have moved for partial summary judgment on the claims in their complaints, as well as on critical counts of Defendants’ counterclaims. Defendants have likewise filed cross-motions for summary judgment. The seven pending cross-motions for partial summary judgment are:

1. Plaintiffs’ and the Episcopal Church’s Motion for Partial Summary Judgment;
2. Defendant Attorney General of Ohio’s Motion for Partial Summary Judgment;²
3. Defendant St. Barnabas Anglican Church’s Motion for Partial Summary Judgment;
4. Defendant Church of the Holy Spirit’s Motion for Partial Summary Judgment;
5. Defendant St. Anne’s in the Fields Anglican Church’s Motion for Partial Summary Judgment;
6. Defendant St. Luke’s Anglican Church’s Motion for Partial Summary Judgment; and
7. Defendant The Anglican Church of the Transfiguration’s Motion for Summary Judgment

² The Attorney General is charged by common law and the Charitable Trust Act, O.R.C. § 109.23 et seq., with the enforcement of charitable trusts, and has appeared in this case to protect the interests of charitable beneficiaries.

Despite the *partial* nature of the motions for summary judgment, the collection of over 20 exemplary briefs presents a winner-take-all proposition: The subject property belongs either to Plaintiffs or to the various Defendants.

III. FACTUAL AND LEGAL BACKGROUND

A. The ECUSA, The Diocese Of Ohio, And The Five Parishes

The applicable legal framework is determined, in part, by whether the Episcopal Church is hierarchical or congregational. “A hierarchal or connectional church is one in which a local church is a subordinate member of a general church which has complete control over the entire membership of the general church.” African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394, ¶ 36 (Ohio App. 5th Dist. 2009) (citing Tibbs v. Kendrick, 93 Ohio App.3d 35, 637 N.E.2d 39 (Ohio App. 8th Dist. 1994)).³

If a church is hierarchical, the First Amendment requires courts to “defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.” Jones v. Wolf, 443 U.S. 595, 602 (1979). Critically, once “[h]aving found a hierarchical relationship,” courts are likewise “authorize[d] to look beyond deeds and articles of incorporation to church constitutions and similar documents.” Southern Ohio State Exec. Offices of Church of God v. Fairborn Church of God, 61 Ohio App.3d 526, 538, 573 N.E.2d 172, 180 (Ohio App. 2nd Dist. 1989). The Fairborn court further noted that while Ohio case law “restricts an Ohio court employing neutral principles of law in a property dispute case to those

³ “A congregational polity, on the other hand, exists when ‘a religious ... congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to a higher authority.’” Tibbs, supra (quoting State ex rel. Morrow v. Hill, 51 Ohio St.2d 74, 76, 364 N.E.2d 1156, 1158 (1977)).

documents that reflect the ‘ordinary indicia of property rights[,]’ those indicia may be present in *constitutional documents of the general denominational church.*” *Id.* (internal citations omitted) (emphasis added). Furthermore, “[t]hough Ohio law does not support the theory of implied trust, underlying documents may show the existence of an express or constructive trust, or similar interest, which are recognized in Ohio.” *Id.*

Plaintiffs, aided by a heavy load of internal church documents and relevant case law, have conclusively established that the Episcopal Church is hierarchical in nature. *See, e.g., Episcopal Diocese of Massachusetts v. Devine*, 59 Mass. App. Ct. 722, 727, 797 N.E.2d 916, 921 (Mass. 2003) (“the Episcopal Church is hierarchical”); *Protestant Episcopal Church in Diocese of New Jersey v. Graves*, 83 N.J. 572, 575, 417 A.2d 19, 21 (N.J. 1980) (same); *Daniel v. Wray*, 158 N.C.App. 161, 163, 580 S.E.2d 711, 714 (N.C. App. 2003) (“The Protestant Episcopal Church in the United States of America ... is a hierarchical or connectional church”). In *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 305 Ga.App. 87, 699 S.E.2d 45 (Ga. App. 2010), the court painstakingly justified its conclusion that the ECUSA is hierarchical:

Here, careful consideration of the National Episcopal Church’s structure and history persuades us that the National Episcopal Church is hierarchical. The church organization has three tiers: (1) the National Episcopal Church, (2) geographically-defined dioceses that belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church, and (3) local parishes that belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church and the individual diocese in which the parish is located. At the present time, the National Episcopal Church is comprised of 111 dioceses and thousands of individual churches, each of which must be affiliated with a diocese. The National Episcopal Church is governed by a general convention composed of bishops and deputies. The dioceses are governed by bishops and an annual convention. Each parish is governed by a vestry, which is akin to a board of directors. The vestry of each church sends delegates to its diocesan convention, and each diocese sends delegates to the general convention. There are governing documents at each level of the church. The National Episcopal Church has a constitution and canons, which are similar to bylaws. The dioceses also have

constitutions and canons, but these are subordinate to the governing documents of the National Episcopal Church. The individual parishes are controlled by the terms of their charters and bylaws, which are in turn subordinate to the constitutions and canons of both the diocese and the National Episcopal Church. In addition, the dioceses and parishes are subject to the doctrine, discipline, and worship of the National Episcopal Church generally.

Id., 699 S.E.2d at 48.

Defendants' argument to the contrary consists of footnotes in various briefs remarking that "Defendants do not concede in any way that the ECUSA is a hierarchical church." See, e.g., The Anglican Church of the Transfiguration's Combined Brief in Opposition to Motion for Summary Judgment of Plaintiff, Intervening Plaintiff, and the Ohio Attorney General at 4 n.14.⁴ The footnote cites, but does not discuss, the affidavit of one Mary McReynolds.⁵

Plaintiffs correctly note that in the summary judgment context, a party's mere statement that it does not concede a disputed point is arguably tantamount to doing precisely that. Once Plaintiffs demonstrated the lack of any fact issue regarding the Episcopal Church's hierarchical structure, it was Defendants' burden to present competent, admissible evidence to the contrary. Their one-sentence reference to an affidavit is not sufficient, particularly where Defendants have not produced a single court decision supporting their position on this issue. This Court finds and concludes that the Episcopal Church is hierarchical.

⁴ See also Brief of Church of The Holy Spirit, St. Anne's In The Fields Anglican Church, St. Barnabas Anglican Church, and St. Luke's Anglican Church in Opposition to Plaintiffs' and the Episcopal Church's Motion for Partial Summary Judgment at 2 n.4.

⁵ McReynolds' affidavit spans 128 paragraphs over the course of 63 pages, not counting exhibits. Defendants nevertheless neglect to offer any meaningful narrative development of her testimony in their various briefs, including testimony regarding whether the ECUSA is hierarchical. This might be taken as evidencing some lack of faith in McReynolds' claim that the Episcopal Church is not hierarchical. The "mere existence of a scintilla of evidence in support of the [parties'] position will be insufficient" to escape summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 252 (1986).

Crucially, however, Plaintiffs' evidence regarding the hierarchical structure of the ECUSA, and the place the relevant parishes occupied in that hierarchy, goes much further. Plaintiffs contend, and Defendants have not disputed, that congregations wishing to become parishes of the Episcopal Diocese of Ohio must, *inter alia*, pledge "conformity to the Constitution and Canons of The Episcopal Church and the Diocese of Ohio" and to "the doctrine, discipline, and worship of the National Constitution, the National Canons, and [the Diocesan] canons." Plaintiffs' Appendix 4 (Affidavit of the Rt. Rev. Mark Hollingsworth at ¶ 8).

Accordingly, Plaintiffs have submitted copious evidence of the five parishes' pledged and actual submission to the governance of the Episcopal Church. The unrefuted evidence shows that St. Barnabas, for example, promised in 1948 to conform to the church's doctrine and discipline, as well as the Constitution and Canons of both the General Convention and the Ohio Diocese. Its 1948 articles of incorporation laid out its purpose as, *inter alia*, worship according to the ECUSA's doctrine and discipline. When it petitioned in 1950 for status as a parish, St. Barnabas again submitted the above-referenced articles of incorporation. Later, St. Barnabas sought Diocese permission before alienating or encumbering real property. Six years after the General Convention adopted the 1979 Trust Canon (discussed below at page 9, and also known as the "Dennis Canon"), and again in 1993, St. Barnabas adopted by-laws stating, among other things, that it "adopted the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Ohio." Pltf. Apx. 13 (Hollingsworth Aff. at ¶ 35).

Likewise, in 1966, St. Luke's was created as a mission after individuals filed a petition that promised conformity to church doctrines, discipline, liturgy, rites, and usages, along with accession to the governing church's constitutions and canons. St. Luke's articles of incorporation declared its purpose as worship "according to the doctrine, discipline and worship

of the Protestant Episcopal Church; also to acquire the land and build and operate a Protestant Episcopal Church thereon.” Pltf. Apx. 19 (Hollingsworth Aff. at ¶ 52). When St. Luke’s sought parish status in 1974, its petition stated its purpose as including worshipping in accordance with church doctrine, and further promised “conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 20 (Hollingsworth Aff. at ¶ 56). On several occasions, St. Luke’s sought diocesan permission before alienating real property. On at least one occasion, a land purchase brought the 1979 Trust Canon into play: In 1996, St. Luke’s asked permission from the Diocese to purchase certain land in Fairlawn, Ohio. The Bishop consented, but only after informing St. Luke’s rector that “it is important that the Vestry understands that the parish is governed by [the Church’s 1979 Trust Canon].” Pltf. Apx. 24 (Hollingsworth Aff. at ¶ 72).

The Diocese established Holy Spirit as a mission in 1984, after passage of the Dennis Canon. The Diocese purchased real property in 1985 for construction of a church, and it is un rebutted that the Diocese currently holds title to the property. The church grounds were later declared “affiliated with the [the Episcopal Church] and subject to its Constitution and Canons.” Pltf. Apx. 32 (Hollingsworth Aff. at ¶ 92). Like the other parishes above, Holy Spirit’s articles of incorporation stated its purpose as worshipping according to Episcopal Church doctrine, and pledged “conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 32-33 (Hollingsworth Aff. at ¶ 93). See also Pltf. Apx. 33 (Hollingsworth Aff. at ¶ 94) (virtually identical covenants upon admission as a parish) and Pltf. Apx. 36-37 (Hollingsworth Aff. at ¶ 107) (by-laws promising conformance to Constitution and Canons of Ohio Diocese and restating requirement that parish seek Diocesan consent before encumbering or alienating property).

Transfiguration, formed in 1990 via the merger of two parishes, similarly stated that its purpose was to worship in the tradition of the Protestant Episcopal Church, and likewise promised “conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 45 (Hollingsworth Aff. at ¶ 131). Its articles of incorporation reference compliance with “the rules and discipline of the Protestant Episcopal Church of America.” Pltf. Apx. 44 (Hollingsworth Aff. at ¶ 129). There is no dispute that Transfiguration sought Diocesan consent before alienating certain real property.

Finally, St. Anne’s 1904 petition for mission status promised conformity with Church doctrines, liturgy, and the like, and further covenanted “conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 53 (Hollingsworth Aff. at ¶ 155). The year 1957 brought a location change for St. Anne’s, which indisputably sought Diocesan permission for the move. St. Anne’s 1958 articles of incorporation followed the same pattern as the parishes above, namely, they provided that St. Anne’s purpose was to worship according to the doctrine and other traditions of the ECUSA, “and in conformity with the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 55 (Hollingsworth Aff. at ¶ 161). In 1997, St. Anne’s petitioned for parish status. Once again, this petition pledged conformance to Church doctrine and adherence to the “Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 56 (Hollingsworth Aff. at ¶ 167). The petition also remarked: “We do further represent that said parish shall hold all of its property as a trustee for the Episcopal Church and the Diocese of Ohio.” Pltf. Apx. 56 (Hollingsworth Aff. at ¶ 167).

B. Control Of Church Property

Plaintiffs have submitted uncontested evidence regarding the ECUSA and Diocesan canons – stretching back to 1868 – that govern the handling of parish property. For example,

ECUSA Canons II.6(2) and I.7(3) prohibit alienation or encumbrance of real property, “consecrated” or otherwise, without Diocesan consent. Certain Diocesan canons contain similar prohibitions. Additional canons entitle the parish rector to control property subject, e.g., to church canons and the Bishop’s directives. Still others require parishes to maintain insurance. Diocesan Canon II.7.3, which was adopted in 1900, provides that the Convention may declare a parish “extinct” due to its failure to abide by Church “doctrine, discipline, and worship,” and that upon such declaration, “title to all the property [of the parish] shall at once vest in the Trustees of the Diocese.” Pltf. Apx. 6 (Hollingsworth Aff. at ¶ 13). Plaintiffs point out, and Defendants do not contest, that these canons were adopted before the five parishes at issue were formed.

Most crucial, however, is the ECUSA’s 1979 Trust Canon, adopted by the General Convention as Canon I.7(4)-(5), and also known as the “Dennis Canon.” It reads, in pertinent part, as follows:

Sec. 4 All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Sec. 5 The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

See Episcopal Diocese of Rochester v. Harnish, 11 N.Y.3d 340, 352 n.5 (2008). As discussed in more detail below, there is no question that the ECUSA enacted the Dennis Canon in response to the Supreme Court’s landmark opinion in Jones, supra.⁶ Furthermore, Plaintiffs note that (a) the

⁶ The Diocese enacted an analogous provision, Diocesan Canon II.1.1, in 1999. In relevant part, it states that parishes “hold title to all real and other property in their care and custody in trust for the Diocese.” Pltf. Apx. 5 (Hollingsworth Aff. at ¶ 12).

Dennis Canon was enacted before the formation of three of the five parishes at issue in this litigation; (b) the remaining two parishes participated in its passage through democratic processes; and (c) none of the 5 parishes objected to the 1979 Trust Canon until the current dispute.

C. The Disaffiliation

In late 2005 and early 2006, Defendants purported to terminate their affiliation with the Episcopal Diocese and the ECUSA, without the benefit of following canonical processes, and most decidedly without the consent of the ECUSA or the Episcopal Diocese. It is undisputed that the Bishop declared the five parishes “imperiled” and authorized Parish Trustees to assume control of parish property. It is likewise undisputed that pursuant to Diocesan Canon II.6, said Trustees deeded each property to the Diocese. Despite these actions, Defendants have thereafter claimed ownership and control of real and personal parish property to the exclusion of the ECUSA and the Episcopal Diocese.

IV. ANALYSIS

A. Summary Judgment Standard

In order to withstand a motion for summary judgment, a party is required to establish, through competent, admissible evidence, the existence of genuine issues of material fact. Ohio R. Civ. P. 56(E). “Pursuant to Civ. R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor.” Zivich v. Mentor Soccer Club, Inc., 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, 1998-Ohio-389 (1998). Once the moving party satisfies its burden, the burden shifts to the non-moving party, which “may not rest on mere allegations of denials of the party’s pleading,” but

instead must, “by affidavit or as otherwise provided in this rule ... set forth specific facts showing that there is a genuine issue for trial.” Ohio R. Civ. P. 56(E); Dresher v. Burt, 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 273-274, 1996-Ohio-107 (1996).

B. The Neutral Principles Analysis

While the First Amendment prohibits civil courts from intruding into religious matters involving doctrine, polity, and practice, courts are nevertheless empowered to decide property disputes that have no relationship to religious doctrine. In an effort to avoid unconstitutional religious entanglements, the U.S. Supreme Court, in Jones, supra, “definitively approved the neutral principles approach” for the purpose of resolving church property disputes. In re Episcopal Church Cases, 45 Cal.4th 467, 481, 198 P.3d 66, 76, 87 Cal.Rptr.3d 275, 287 (Cal. 2009). The Supreme Court explained the advantages of this method:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

Jones, supra, 443 U.S. at 603. Ohio and other jurisdictions have since adopted the neutral principles approach.

As discussed above, Courts draw a distinction between so-called “hierarchical” churches on the one hand and “congregational” churches on the other. In Jones, supra, the Supreme Court plainly stated that courts must defer to a hierarchical church’s determinations on issues of religious doctrine and polity: “[T]he [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.” Jones, supra, 443 U.S. at 602. A court applying the neutral principles analysis to a church property dispute may examine “the language of the deeds, the terms of the local church

charters, the state statutes governing the holding of church property, *and the provisions in the constitution of the general church concerning the ownership and control of church property.*”

Jones, *supra*, 443 U.S. at 603 (emphasis added).

As stated above, Ohio subscribes to the neutral principles analysis. See, e.g., African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009). Indeed, Ohio courts have relied on the neutral principles analysis since well before Jones. See Serbian Orthodox Church Congregation of St. Demetrius of Akron v. Kelemen, 21 Ohio St.2d 154, 157-159, 256 N.E.2d 212, 215-216 (1970). Plaintiffs also correctly point out that Ohio courts have long held that application of the neutral principles analysis may lead to considering a hierarchical church’s constitution and canons. Matz v. Salem Church, 1986 WL 10932 (Ohio App. 4th Dist. 1986); Fostoria Bible Holiness Church, Inc. v. The Calvary Wesleyan Church, 1977 WL 199328 (Ohio App. 3rd Dist. 1977).

Plaintiffs have established, and the weight of authority is clear, that the ECUSA is a hierarchical church. The dispositive question then becomes whether the ECUSA and/or the Diocese have effectively created a trust such that, upon the disaffiliation of the five parishes, the property in dispute reverted to ownership by the mother church. At the center of the legal battle is this passage from Jones, particularly the final six words:

Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is *embodied in some legally cognizable form.*

Jones, 443 U.S. at 606 (emphasis added). Plaintiffs argue that the Dennis Canon (along with certain canons of the local Diocese), when considered in light of each parish's unequivocally-stated intent to submit to the governance of the general church, creates exactly the type of enforceable express trust contemplated by the U.S. Supreme Court. Indeed, it could not be more plain than that Jones invited churches to incorporate such trust language into their constitutions precisely to ward off property disputes like the one before this Court.

Defendants view Jones differently. In essence, they contend that by requiring something "embodied in some legally cognizable form," id., the Jones Court contemplated an express trust only where the trust is established in the same manner as any commonplace secular trust, using "objective, well-established concepts of trust and property law familiar to lawyers and judges." Id., 443 U.S. at 604. According to Defendants' view, for an express trust to exist in the present case, it must have been created in the same fashion, for example, as a trust regarding a coffee shop. Defendants would thus argue that because the mere amendment of a church constitution bears little resemblance to the trust and property principles "familiar to lawyers and judges" in Ohio, it cannot effect an express trust.

Plaintiffs' argument, however, is the sounder of the two, and has been adopted by appellate courts (including courts of last resort) across the country. This Court joins the majority of those jurisdictions holding that on almost precisely identical facts, the Court must examine and give effect to the hierarchical church's internal governing documents, and must accordingly find that the parishes hold property subject to an express trust in favor of the ECUSA and its local Diocese.

This Court agrees with the multiple tribunals that have applied the neutral principles analysis and held the Dennis Canon "dispositive." See, e.g., Episcopal Diocese of Rochester v.

Harnish, 11 N.Y.3d 340, 352 (2008). The Harnish court's succinct analysis is both persuasive and, as explained below, consistent with additional appellate authority:

The remaining factor for consideration under neutral principles, however, requires that we look to "the constitution of the general church concerning the ownership and control of church property." It is this factor that we find dispositive. We conclude that the Dennis Canons clearly establish an express trust in favor of the Rochester Diocese and the National Church and that All Saints agreed to abide by this express trust either upon incorporation in 1927 or upon recognition as a parish in spiritual union with the Rochester Diocese in 1947. We therefore need not consider the existence of an implied trust. In agreeing to abide by all 'canonical and legal enactments,' it is unlikely that the parties intended that the local parish could reserve a veto over every future change in the canons. We find it significant, moreover, that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision.

Id. at 352 (internal citations omitted).

As noted above, a multitude of appellate tribunals have likewise given effect to the Dennis Canon. See Masterson v. Diocese of Northwest Texas, 2011 WL 1005382 (Texas Ct. App. March 16, 2011) (parish agreed to be bound by Episcopal Church's governing documents, and "[t]hese governing documents make clear that church property is held in trust for the Episcopal Church and may be subject to Good Shepherd's authority only so long as Good Shepherd remains a part of and subject to the Episcopal Church and its Constitution and Canons"); Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc., 305 Ga.App. 87, 96, 699 S.E.2d 45, 52 (Ga. App. 2010) (Dennis Canon was promulgated in response to Jones, and "courts across the country have recognized that the Dennis Canon effectuates an express trust regarding parish property"); In re Episcopal Church Cases, 45 Cal.4th 467, 490, 198 P.3d 66, 87 Cal.Rptr.3d 275 (Cal. 2009) (enforcing express trust based on Dennis Canon); Rector, Wardens and Vestrymen of Trinity-Saint Michael's Parish, Inc. v. Episcopal Church in Diocese of Connecticut, 224 Conn. 797, 821-823, 620 A.2d 1280 (Conn. 1993) (same); Protestant Episcopal Church in Diocese of New Jersey v. Graves, 83 N.J. 572,

581-582, 417 A.2d 19 (N.J. 1980) (Dennis Canon functions as express trust provision); Daniel v. Wray, 158 N.C.App. 161, 171, 580 S.E.2d 711 (N.C. App. 2003) (same); In re Church Of St. James The Less, 585 Pa. 428, 452, 888 A.2d 795 (Pa. 2005) (enforcing express trust based on Dennis Canon).⁷

Notably, in African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009), the court quoted the Jones language regarding the “legally cognizable form” requirement, followed that up with a rather general summary regarding Ohio trust law, id. at ¶¶ 39-42, and then promptly proceeded to consider *church documents* analogous to the Dennis Canon. The court ultimately held that “[i]t is the act of affiliation with AMEC that creates the transfer of property from St. Johns AME. Because St. Johns AME is both the settlor and trustee, no additional transfer was necessary to create the express trust.” Id. at ¶ 61.⁸

For the reasons expressed in Harnish and its sister courts across the nation, this Court finds and concludes that the Dennis Canon governs the outcome of this litigation. Indeed, as reflected above, St. Barnabas and St. Luke’s did not take issue with the applicability of the Dennis Canon for more than twenty years after its enactment.⁹ The remaining three

⁷ See also African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009) (finding that Jones sanctioned use of express trust in church constitution as means of securing property ownership, and enforcing express trust provision in church *Doctrine and Discipline*).

⁸ See also In re Episcopal Church Cases, 45 Cal.4th 467, 493, 198 P.3d 66, 84, 87 Cal.Rptr.3d 275, 297 (Cal. 2009) (“The only intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.”)

⁹ To the extent Defendants now argue that the Dennis Canon was improperly adopted, see, e.g., St Barnabas Anglican Church’s Motion for Partial Summary Judgment at 13 n.5, the Court

(continued...)

congregations – Holy Spirit, Transfiguration, and St. Anne’s – applied for admission as parishes *after* the enactment of the Dennis Canon, and pledged to be bound by this and all other ECUSA and Diocesan canons. St. Anne’s pledge actually included an express statement that it would hold all of its property as a trustee for the ECUSA and the Diocese.

Like the Court of Appeals of New York in Harnish, this Court finds the existence of an express trust dispositive of this matter. The real and personal property at issue is impressed with a trust in favor of the ECUSA and the Episcopal Diocese.¹⁰ There is no need to consider the alternative existence of a constructive trust, any other form of implied trust, or a charitable trust. See, e.g., Harnish, *supra*, 11 N.Y.3d at 352.

C. Collateral Estoppel

In one of many submissions of supplemental authority, Defendants argue that All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina, 385 S.C. 428, 685 S.E.2d 163 (S.C. 2009) has collateral estoppel effect with respect to application of the Dennis Canon. The ECUSA was a party in the Waccamaw case, where the court found the Dennis Canon ineffective to create an express trust. The Waccamaw court held, in pertinent part:

(...cont'd)

must step aside to avoid unconstitutionally entangling itself in a religious dispute. “[T]he First Amendment to the United States Constitution precludes this Court from questioning the validity of the process by which the church legislates.” Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc., 305 Ga.App. 87, 97, 699 S.E.2d 45, 53 (Ga. App. 2010) (citing Jones, *supra*, 443 U.S. at 602); see also Episcopal Church Cases, 45 Cal.4th 467, 492, 198 P.3d 66, 84, 87 Cal.Rptr.3d 275, 296.

¹⁰ It also appears clear that “the Dennis Canon ... merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of PECUSA in 1789.” Rector, Wardens and Vestrymen of Trinity-Saint Michael’s Parish, Inc. v. Episcopal Church in Diocese of Connecticut, 224 Conn. 797, 821, 620 A.2d 1280, 1292 (Conn. 1993). This conclusion, however, is not required to support the Court’s ultimate holding.

[W]e hold that neither the 2000 Notice nor the Dennis Canon has any legal effect on title to the All Saints congregation's property. ... It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another. The Diocese did not, at the time it recorded the 2000 Notice, have any interest in the congregation's property. Therefore, the recordation of the 2000 Notice could not have created a trust over the property.

Id., 685 S.E.2d at 174.¹¹ Defendants therefore argue that Waccamaw collaterally estops the ECUSA – and the local Diocese – from arguing to the contrary. The Court finds Defendants' arguments unpersuasive for several reasons.

The Ohio Supreme Court has defined the elements of collateral estoppel – or issue preclusion – as follows:

(1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) there was a final judgment on the merits in the previous case after full and fair opportunity to litigate the issue; (3) the issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) the issue must have been identical to the issue involved in the prior suit.

Monahan v. Eagle Picher Industries, Inc., 21 Ohio App.3d 179, 486 N.E.2d 1165, syllabus ¶ 1 (Ohio App. 1st Dist. 1984). While the doctrine technically requires mutuality of the parties, Ohio courts have long recognized exceptions. As one court summarized:

Ohio law has taken a broad and imprecise interpretation of the mutuality exception. Issue preclusion takes effect *unless the party lacked a full and fair opportunity to litigate or the circumstances justify relitigation*. Hicks v. De La Cruz (1977), 52 Ohio St.2d 71, 74, 369 N.E.2d 776. Interpreting its own ruling in Hicks, the Ohio Supreme Court stated, “ * * * this court has not, * * * abandoned the mutuality rule, but has only shown that it is willing to relax the rule where justice would reasonably require it.” Goodson, 2 Ohio St.3d at 199, 443 N.E.2d 978.

¹¹ This holding appears to be in tension with Jones, which plainly contemplates the creation of express trusts through amendments to church canons. Moreover, there is an argument that Waccamaw's interpretation of Jones is logically flawed. Specifically, if the diocese or general church already had title to the property in question, there would be no need for a trust, as the property would already be sufficiently protected. See Green v. Campbell (NO. 09-986), Petition for Writ of Certiorari at 20.

Young v. Gorski, 2004 WL 540944, 2004-Ohio-1325 at ¶ 9 (Ohio App. 6th Dist. 2004) (emphasis added). See also id. at ¶ 13 (“Ohio law has adopted an equitable interpretation with its exceptions to mutuality. Issue preclusion takes effect unless (1) the party lacked a full and fair opportunity to litigate or (2) the circumstances or justice requires relitigation.”); Marc Glassman, Inc. v. Fagan, 2006 WL 3028419, 2006-Ohio-5577 at ¶ 9 (Ohio App. 8th Dist. 2006).

The emphasized language in Young, supra, sets the stage in the present case. First, the Court finds and concludes that no matter the role of the ECUSA in the Waccamaw litigation, the Episcopal Diocese of Ohio was not in privity with any litigants in that case. Second, the Court finds collateral estoppel inappropriate due to the fact that the Waccamaw decision expressly turned on South Carolina trust principles rather than Ohio law. Third, it is inappropriate to grant the Waccamaw case collateral estoppel effect because it is contrary to the heavy weight of authority.

1. **The Privity Issue**

Even if the ECUSA is collaterally estopped from relying on the Dennis Canon for the creation of an express trust, the question remains whether the Episcopal Diocese of Ohio – which played no role in the South Carolina Waccamaw litigation – is likewise estopped. Defendants claim that the local Diocese is “obviously” in privity with the national church for collateral estoppel purposes. The Court disagrees.

“For a non-party to be considered in privity to a party in the first proceeding, the rights of the party in the pending action must have been presented and adjudicated in the first proceeding, or the non-party must have controlled or participated in the litigation in the first proceeding.” Naff v. Standard Oil Co., 527 F.Supp. 160, 164 (S.D. Ohio 1981) (citing 1B Moore’s Federal Practice P 0.411(1) (2d ed. 1980)). See also Cleveland v. Hogan, 92 Ohio Misc.2d 34, 42, 699 N.E.2d 1020, 1025 (Ohio Mun. 1998) (same). The Eighth District Court of

Appeals has likewise commented: “The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be ‘heard’ in the due process sense.” Johnson v. City of Cleveland, 1988 WL 3749, 3 (Ohio App. 8th Dist. 1988). See also Goodson v. McDonough Power Equipment, Inc., 2 Ohio St.3d 193, 198, 443 N.E.2d 978, 983 (“collateral estoppel can only be applied against parties who have had a prior ‘full and fair’ opportunity to litigate their claims”); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 339 (5th Cir. 1982) (discussing relationships “sufficiently close” to justify preclusion, and indicating that the “rationale ... is obviously that in these instances the nonparty has in effect had his day in court”).

There is no question that the Episcopal Diocese of Ohio was not a party to the Waccamaw litigation. Furthermore, Defendants have come forward with no evidence that the Episcopal Diocese of Ohio was in any position to control, direct, or otherwise influence the Waccamaw litigation, much less that it actually did so. The record reflects a complete absence of the type of privity required for collateral estoppel purposes. The Episcopal Diocese of Ohio has not had its day in Court. Thus, the Waccamaw litigation has absolutely no preclusive effect on the claims asserted by the Diocese. As a result, even if the Court were to find that Waccamaw had preclusive effect vis-à-vis the ECUSA, the practical outcome of this litigation would not change – the Court would find that a trust exists in favor of the Episcopal Diocese of Ohio. Even that alternative finding, however, is unnecessary for the reasons discussed below.

2. The Applicable Law Issue

More fundamentally, the Waccamaw court’s decision regarding the effect of the Dennis Canon explicitly turned on South Carolina trust law. Throughout their briefs, Defendants have often urged this Court to keep in mind that this case must be decided by applying Ohio law,

including its law of trusts. Having found what appears to be the only recent appellate-level decision in the country to reject the proposition that the Dennis Canon created a valid express trust, Defendants may not ignore the fact that it explicitly flowed from the application of a different state's trust law. For this distinct reason, the Court rejects Defendants' collateral estoppel argument in its entirety.

3. The Weight of Authority

"The dangers of issue preclusion are as apparent as its virtues. The central danger lies in the simple but devastating fact that the first litigated determination of an issue may be wrong."

- 18 Wright, Miller & Cooper, Federal Practice & Procedure 142, Section 4416¹²

It is impossible for this Court to accept that despite prevailing on the Dennis Canon issue in New York, Texas, Georgia, California, Connecticut, New Jersey, North Carolina, and Pennsylvania, a single negative decision ends the ECUSA's winning streak for all time, and in all jurisdictions that have yet to address the issue. This is especially true here, where the Waccamaw opinion utterly ignored the weight of authority. As the Second Circuit phrased it: "Although collateral estoppel jurisprudence generally places termination of litigation ahead of a correct result, there are some circumstances that so undermine confidence in the validity of an original determination as to render application of the doctrine impermissibly 'unfair' to a defendant." S.E.C. v. Monarch Funding Corp., 192 F.3d 295, 304 (2d Cir. 1999).

Indeed, cases discussing the offensive use of collateral estoppel are instructive in this instance. Courts have held that the "inconsistency of opinions" presents "the exact instance where it would be unfair for the trial court to allow the use of offensive collateral estoppel."

¹² See also Goodson v. McDonough Power Equipment, Inc., 2 Ohio St.3d 193, 443 N.E.2d 978, 986 n.14 (1983) (quoting same).

Erbeck v. U.S., 533 F.Supp. 444, 447 (S.D. Ohio 1982). The court continued: “A decision by one court, therefore, should not bind this Court’s determination of the issue, *particularly when, as in this case the decision plaintiffs rely upon is against the weight of authority.*” Id. (emphasis added). See also Pacific Great Lakes Corp. v. Bessemer & Lake Erie R.R., 130 Ohio App.3d 477, 720 N.E.2d 551 (Ohio App. 8th Dist. 1998) (inconsistency of opinions can provide valid basis for rejecting offensive nonmutual collateral estoppel).

While the present case involves the application of *defensive* rather than offensive nonmutual collateral estoppel, the simple fact remains that Waccamaw is against the weight of authority regarding the enforceability of the Dennis Canon. This Ohio Court finds it would be unfair to Plaintiffs to give preclusive effect to a South Carolina decision, applying South Carolina law, in a manner that conflicts with the overwhelming weight of authority.


V. CONCLUSION

For all the foregoing reasons, the Court finds and concludes that Plaintiffs are entitled to partial summary judgment, that Defendants are not, and that the church property at issue, real and personal, is impressed with a trust in favor of the ECUSA and the Episcopal Diocese.

Specifically:

1. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to IV of Plaintiffs’ Complaint and on Counts I to V of ECUSA’s Complaint;
2. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to IV and VI of Defendant Church of the Holy Spirit’s amended counterclaims;
3. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to III of Defendant St. Anne’s in the Fields Anglican Church’s amended counterclaims;
4. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to III of Defendant St. Barnabas Anglican Church’s amended counterclaims;

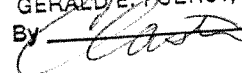
5. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to III of Defendant St. Luke's Anglican Church's amended counterclaims; and
6. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to V of Defendant The Anglican Church of the Transfiguration's counterclaims.


Judge Deena R. Calabrese

Date: 4-15-11

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