

BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00416

FRANK L. SCHMIDT, JR., ET AL.

APPELLANTS

VERSUS

**THE CATHOLIC DIOCESE OF BILOXI, INC.; MOST
REVEREND THOMAS J. RODI, AS BISHOP OF THE
CATHOLIC DIOCESE OF BILOXI, MISSISSIPPI AND
AS PRESIDENT OF THE CATHOLIC DIOCESE OF
BILOXI, INC.; AND REV. DENNIS CARVER,
INDIVIDUALLY AND AS PASTOR OF ST. PAUL
CATHOLIC CHURCH, PASS CHRISTIAN, MISSISSIPPI**

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**APPEAL FROM THE CHANCERY COURT
OF HARRISON COUNTY, MISSISSIPPI**

BRIEF OF APPELLEES

(ORAL ARGUMENT NOT REQUESTED)

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The undersigned counsel of record for Appellees certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. The lower court reviewed the information presented by the parties and determined that the Court lacked subject matter jurisdiction over the allegations contained in Plaintiffs' Complaint. In reaching its decision, the lower court relied upon well-settled Mississippi and federal constitutional jurisprudence.

Because the issues in this case are not novel and have been authoritatively decided by prior decisions, and because the relevant facts and arguments are adequately presented in the briefs and the record in this case, oral argument is not needed. Miss. R. App. P. 34.

STATEMENT OF THE ISSUES

- I. The Chancellor properly dismissed Plaintiffs' lawsuit for lack of subject matter jurisdiction.
- II. The Chancellor properly denied Plaintiffs' Motion to Strike the Affidavit of Bishop Thomas J. Rodi.
- III. The Chancellor's dismissal of the case with prejudice was proper.

STATEMENT OF THE CASE

I. Course of Proceedings and Dispositions in the Court Below

On May 1, 2007, 157 parishioners of the former St. Paul Catholic Church (“Plaintiffs” or “Appellants”) filed a 35-page Complaint, excluding exhibits, against The Catholic Diocese of Biloxi, Inc. (“Diocese”), the Most Rev. Bishop Thomas J. Rodi, as President of the corporation and as Bishop (“Bishop Rodi”), and Rev. Dennis Carver (“Father Carver”) (collectively referred to as “Church Defendants” or “Appellees”). R. 1-66. The Complaint contains myriad claims against the Church Defendants, all of which relate to the former St. Paul Catholic Church property located in Pass Christian, Mississippi. R. 1-66. On June 4, 2007, the Church Defendants filed their Answer and Defenses to Plaintiff’s Complaint and also their Motion to Dismiss Plaintiffs’ Complaint for Lack of Subject Matter Jurisdiction. R. 68-135. Church Defendants’ Motion to Dismiss included the Affidavit of Bishop Rodi. R. 73-98.

On July 11, 2007, after seeking numerous requests for extensions of time to file their response to Church Defendants’ Motion to Dismiss, Plaintiffs propounded extensive discovery on Church Defendants. R. 160-164; R. 1237-1269. The discovery requests included twenty interrogatories and thirty-one requests for production of documents. R. 160-164; R. 1237-1269. Although more than fifty individual discovery requests were served, not a single interrogatory or request for production was directed to the jurisdictional issue. R. 160-164; R. 1237-1269. Instead, all discovery requests sought information directly related to the merits of the case. R. 160-164; R. 1237-1268.

On July 16, 2007, the parties participated in a scheduling conference with the Court. R. 152, 168. The Court ruled that the Church Defendants were not required to answer pending discovery requests propounded by Plaintiffs until the jurisdictional issue was resolved, and further ordered that Plaintiffs file their response to the Church Defendants’ Motion to Dismiss.

R. 152; 168. The Court specifically stated that Plaintiffs would be allowed to submit affidavits in support of their response to Church Defendants' Motion to Dismiss. R. 168. Rather than filing a Motion to Reconsider or their response to the pending motion, Plaintiffs instead filed a Motion to Strike the Affidavit of Bishop Rodi, or In the Alternative, to Conduct Discovery. R. 138-166. After the parties briefed the issue, a hearing was held to allow the parties to present oral argument and any additional exhibits or evidence. After the hearing, the Court entered an Order denying Plaintiffs' Motion to Strike Bishop Rodi's Affidavit and issued an order limiting discovery to jurisdictional issues:

Outlining the procedure required to be followed to close the St. Paul Church.

Present documents written or otherwise reflecting that the proper outlined procedure was followed by those required to do so.

Proper procedure as to notification of all known parties who gave special gifts for the express purpose of rebuilding the structure, that the structure would no longer be used as a church, and their right to have their money returned to them if they wished. This inquiry is to be done if, in fact, this as indicated was one of the procedures to be followed by the church leaders.

R. 198; see also R. 1356-1357.

In accordance with the Court's Order, the parties participated in limited discovery,¹ and on October 8, 2007, Plaintiffs filed their Memorandum in Opposition to Church Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction. R. 1408-1538. On December 20,

¹Plaintiffs claim, "There is no evidence in the Record. Yes, there are a lot of discovery answers in the file, however, most of these were not even filed with the Clerk." Brief of Appellants at 6. In addition to misstating the facts, this statement is inaccurate and not credible. Plaintiffs designated the Record, which included "The entire record, including without limitation, all clerk's papers, correspondence among counsel and the Court, pleadings, and all exhibits filed, taken or offered in this case, all orders, judgments, opinions and transcripts." R. 1701. All discovery responses were filed by the Church Defendants with the Chancery Clerk and are therefore part of the Record Evidence. R. 231-1135; 1367-1404. Finally, both parties reviewed the Record for this appeal and certified that it was complete and accurate. All of these papers, correspondence, pleadings, exhibits, orders, judgments, opinions and transcripts make up the "Record Evidence" in this appeal.

2007, a hearing on Church Defendants' Motion to Dismiss was held and the Court allowed both parties to present extensive oral argument and introduce exhibits or evidence establishing their respective positions. See Court Reporter's Transcript, Volume 2 of 2, pgs. 103-185 (December 20, 2007) (hereafter cited as "Tr., Vol. 2, ____").

On March 3, 2008, the Court entered its Final Judgment of Dismissal with Findings of Fact and Conclusions of Law dismissing Plaintiffs' Complaint with prejudice. R. 1680-1696. The Order stated that Plaintiffs' Complaint was dismissed for the following reasons:

Church Defendants' Motion to Dismiss is granted to avoid excessive entanglement.

The Church Defendants' Motion to Dismiss is granted because contrary to Plaintiffs' contention, their lawsuit does not involve a property dispute.

The Church Defendants' Motion to Dismiss is granted because it is impermissible for this Court to examine whether the Church Defendants' decision to form Holy Family Catholic Parish was a misuse of Church funds.

The Church Defendants' Motion to Dismiss is granted because this Court cannot define the proper fiduciary duty of care.

Neutral principles of law cannot be used to determine if a trust exists.

R. 1680-1696. It is from this final order which Plaintiffs now appeal. R. 1697-1700.

II. Statement of the Facts

On August 29, 2005, Hurricane Katrina devastated the Mississippi Gulf Coast causing extensive damage to St. Paul Catholic Church, which was located on Highway 90 in Pass Christian. R. 100. In the wake of the destruction, the Church Defendants considered the appropriate course of action to take as they addressed the needs of the many Catholic churches in the diocese that sustained damage as a result of the storm. R. 100. Following the procedure set forth in The Code of Canon Law, the Church Defendants determined that St. Paul Parish and Our Lady of Lourdes Parish should be combined into a single parish named Holy Family Parish.

R. 101; R. 245-246; see also Exhibits, Volume 1 of 1, Exhibit 1 (hereafter cited as “Ex. ____”). On November 27, 2005, Bishop Rodi issued a decree stating that the Holy Family Parish would include the territories of St. Paul Catholic Parish and Our Lady of Lourdes Parish and that Holy Family Parish would have two parish churches (thus, allowing St. Paul’s Catholic Church to rebuild). R. 103; R. 245-246; see also Ex. 1. Due to spiritual, polity and temporal, as well as economic considerations, Bishop Rodi issued a subsequent decree stating that Holy Family Parish would have one parish church and that the church building would be located at the current site of Our Lady of Lourdes Church on Menge Avenue in Pass Christian. R. 103; R. 247; see also Ex. 1.²

The Code of Canon Law states that “It is only for the diocesan bishop to erect, suppress, or alter parishes.” R. 75; R. 103. The Code of Canon Law sets forth an exacting process that a Bishop must follow before altering parishes such as St. Paul’s. R. 75; R. 103. The Church Defendants adhered to this process in reaching the decision to combine the former parishes into one. R. 75; R. 103. Absolutely no Record Evidence exists to contradict or refute the Church Defendants’ position that the Bishop followed the proper canonical procedures.

In response to the Church Defendants’ decision to alter the parish structure of the diocese and not rebuild the former St. Paul Catholic Church, on May 1, 2007, Plaintiffs filed a Complaint against the Church Defendants in the Chancery Court of Harrison County. R. 1-66. The Complaint contained numerous claims against the Church Defendants, all of which related to the former St. Paul Catholic Church property. R. 1-66. As the litigation has moved forward, Plaintiffs have continued to retreat from some of their original positions (after having the benefit

²In addition to filing this civil lawsuit against the Church Defendants, certain Plaintiffs, including Plaintiffs’ counsel, filed a canonical appeal through the Catholic Church. See Tr., Vol. 2, 110, 117 and 145. On November 30, 2007, the Vatican’s Congregation for the Clergy issued a decree rejecting Plaintiffs’ appeal. Id.

of reviewing Church Defendants' Motion to Dismiss and now the Chancery Court's Final Order). Plaintiffs now claim that this matter is purely a property dispute and, as such, the lower court erred by not applying neutral principles of law to attempt to resolve the dispute. R. 1415. However, Plaintiffs' Complaint contains numerous allegations confirming this is not a property dispute, but instead an **internal church struggle**. R. 1-66. Nonetheless, Plaintiffs cannot crawl away from the averments contained in their Complaint:

B. Actions of Defendants not in **Best Interest** of Plaintiffs.

LI.

Plaintiffs aver that Defendants' proposed merger of St. Paul into OLL in actuality is **nothing more than closing the doors of St. Paul** and telling its Members they have been assigned to a church outside the city limits of Pass Christian. **Defendant's decision is a termination of St. Paul.**

R. 28 (emphasis added). Plaintiffs also aver that they "believe that the final outcome of this Cause will hinge on whether under [sic] Defendants owed, and continue to owe, a **fiduciary duty** to Plaintiffs and the other members of the congregation of St. Paul Catholic Church under Mississippi law." R. 27 (emphasis added). Further, Plaintiffs accuse Father Carver of failing to adequately take care of the church site and "aver that current condition of St. Paul Church is not benefiting a house of God . . ." R. 17. Plaintiffs claim that Father Carver has **breached a fiduciary duty** owed to Plaintiffs because he "has not conducted any mold remediation, and has done **very little to repair and preserve** St. Paul since August 29, 2005, basically allowing the conditions of St. Paul Catholic Church to deteriorate." R. 17-18 (emphasis added). Even the Plaintiffs' attempt to adopt trust law principles necessarily invokes an improper "best interest" and breach of fiduciary duty analysis:

Plaintiffs assert that the decision of their trustee to close St. Paul and dismiss its congregation after 166 years, and to convert the "trust property" for the trustee's own use and benefit cannot possibly be in Plaintiffs' best interests. Plaintiffs further contend that the actions and omissions of Defendants are so egregious that they constitute a **breach of the fiduciary duties** owed to Plaintiffs. Accordingly, Plaintiffs respectfully contend that they are entitled under Mississippi law to a

permanent injunction against Defendants **enjoining them from proceeding with their proposed plans of closing St. Paul Church, demolishing OLL and developing the Lourdes Complex.**

R. 29. (emphasis added). The Appellants' Brief submitted to this Court also provides invaluable insight as to the true nature of this dispute:

While many of the parishioners, especially the old-timers, may not have understood the exact reason for the combining of the two Parishes, that action was not questioned since the Bishop, in his decree, had specifically stated that St. Paul would be repaired. . . . Then, 16 months later, on March 13, 2007, the Bishop entered another decree stating that there would be no St. Paul, **but rather that the Holy Family Parish would have only one church to be located at the present site of Our Lady of Lourdes . . .** *This was the final blow* to many of the Parishioners whose lives had always centered around St. Paul Church on the beachfront in Pass Christian, Mississippi.

See Appellant Brief at 3 (emphasis added) (hereafter cited as "App. Br. ____"). In their "Conclusion," Plaintiffs state:

I doubt that anyone other than the Plaintiffs could come anywhere near understanding where the Plaintiffs found themselves in March, 2007, when it was announced that **St. Paul would not be rebuilt. . . .**

Perhaps the only way to understand the setting of this lawsuit is to have actually been one of the survivors of Hurricane Katrina who stood at a damaged Church and celebrated the Eucharist in the washed-out interior of such a Church. . . .

Then the **Bishop took away their money, their Church, and worst of all, their hope. . . .**³

See App. Br. 28-29 (emphasis added). Such statements clearly demonstrate that this lawsuit cannot be categorized as a mere "property dispute," but instead is an internal struggle between a few parishioners and their Church leaders.

³Plaintiffs make this statement after alleging – for the first time – that the Bishop stated he would allow the former St. Paul Church to be rebuilt if the parishioners would "allow the Diocese to close their school." App. Br. 28. While Church Defendants deny such allegation, it is irrelevant to this lawsuit as it is not contained in the appeal record. Notwithstanding same, it is yet another example that this lawsuit is an internal church dispute which is beyond the Court's subject matter jurisdiction.

The issues contained in Plaintiffs' Complaint are beyond the Court's subject matter jurisdiction and further demonstrate that Plaintiffs' causes of action arise from the Church Defendants' decision not to rebuild the former St. Paul Catholic Church.

SUMMARY OF THE ARGUMENT

Subject matter jurisdiction is a threshold issue which the trial "court must determine . . . first, before determining the merits of the case." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 84 (1998); 2 Moore's Federal Practice, §12.30[1] (3d ed. 2001). Subject matter jurisdiction must always be proper and can never be waived. Id.

Dismissal of Complaint for Lack of Subject Matter Jurisdiction

The Chancellor properly dismissed Plaintiffs' Complaint for lack of subject matter jurisdiction. Although the core of this dispute is an internal disagreement relating to Church Defendants' decision not to rebuild the former St. Paul Catholic Church after it was profaned during Hurricane Katrina, Plaintiffs attempt to circumvent the First Amendment by claiming this matter is no more than a property dispute. However, their argument is not supported by any jurisprudence. Simply because a piece of property is involved in a dispute – here the former St. Paul Catholic Church – it does not mean the lawsuit is a "property dispute." Additionally, Plaintiffs' pleadings and their actions, are further evidence that this lawsuit is an internal church struggle, which is beyond the Court's subject matter jurisdiction.

Even if the Court considered this lawsuit to be a property dispute (which it is not), neutral principles of property law cannot be used to resolve this action in the manner sought by Plaintiffs. In Bishop Rodi's November 27, 2005 decree, he stated that as a result of the merger of St. Paul Parish and Our Lady of Lourdes Parish that all former St. Paul Catholic Church's assets, which includes the former church building, were transferred to Holy Family Parish. Additionally, the property deed which Plaintiffs claim made Bishop Rodi trustee for the alleged

trust in this case states that the conveyance was made in accordance with church law (The Code of Canon Law). For this Court to attempt to address Plaintiffs' claims, the Court would be forced to examine The Code of Canon Law. As such, the Chancery Court properly dismissed Plaintiffs' Complaint for lack of subject matter jurisdiction.

Plaintiffs' Complaint also includes allegations that Church Defendants' decision to form Holy Family Parish was a misuse of church funds. Plaintiffs state that the Church Defendants' decision was not in the "best interests" of the members of the parishes and was "fiscally irresponsible." R. 30. The Chancery Court properly held that it was impossible to address these issues without examining The Code of Canon Law. R. 1690-1692. These issues are matters that require ecclesiastical inquiry, and are therefore, beyond the Court's subject matter jurisdiction.

The Chancery Court did not err in dismissing Plaintiffs' Complaint because it is no more than a dispute between a few parishioners and their church leaders. Courts have repeatedly declined to accept jurisdiction over claims involving church-minister disputes because the relationships touch upon religious doctrine, canon law and church polity. Court have held that such disputes are "*per se*" a religious matter. Under The Code of Canon Law, there is a specific process to be followed when a parish is closed and/or altered. Bishop Rodi followed the proper church procedures, and therefore, the Chancery Court did not err in dismissing Plaintiffs' Complaint.

Plaintiffs also attempt to avoid the First Amendment by claiming that Church Defendants breached a fiduciary duty owed to them as parishioners. Civil Courts have consistently rejected these type of claims because in order to determine if such a duty was breached, the court would first have to define the proper duty of care owed to the Plaintiffs by the Church Defendants.

Also, a civil court is prevented from considering issues relating to membership. Accordingly, the Chancery Court did not err in dismissing Plaintiffs' Complaint.

While they are not clear as to the type of trust created, Plaintiffs also allege in their Complaint that a "trust" has been created under Mississippi law, and that neutral principle of law can be applied to determine Plaintiffs' rights under the alleged trust. Such claim is baseless. First, an express trust does not exist under Mississippi law because the alleged trust does not satisfy Mississippi Code § 91-9-1, et seq., including § 91-9-7. Second, a resulting trust does not exist under Mississippi law because it is undisputed that Plaintiffs did not pay for the church parcels at the time the parcels were conveyed. Third, a private trust cannot exist under Mississippi law, as the alleged trust would clearly violate the rule against perpetuities, and therefore, any alleged trust would be void. Fourth, even if this Court were to find that a charitable trust exists, charitable trusts have no individual beneficiaries so Plaintiffs cannot claim to be beneficiaries under a charitable trust. Finally, regardless of any type of trust Plaintiffs claim was created, in order for Plaintiffs to be considered the beneficiaries of the trust – and in order for them to have standing to bring this lawsuit – Plaintiffs must be members or beneficiaries of the alleged trust. Here, Plaintiffs must be members of the parishes or congregations referenced in the deeds at issue. The law prevents this Court from determining the disputed issues of whether Plaintiffs are members of the referenced parishes or congregations. This determination is for church law only. Such a decision is beyond the Court's subject matter jurisdiction.

Plaintiffs also argue that Church Defendants have violated Mississippi's regulations for charitable solicitations. See Miss. Code § 79-11-501, et seq., "Regulation of Charitable Solicitations." While Church Defendants maintain that they have at all times complied with Mississippi law and The Code of Canon Law, Plaintiffs' argument nonetheless fails as a matter of law. Under the statute, most religious organizations, including Church Defendants, are

expressly excluded from the section. The religious organization exception is yet another clear example of the State's reluctance to become entangled in matters of religion.

Finally, Plaintiffs rely on Mississippi Code § 89-1-17 for their argument that because the initial deeds in the chain of title of the former St. Paul Catholic Church site do not specifically state that the conveyance was made in accordance with The Code of Canon Law that Bishop Rodi cannot later impose such condition upon the subsequent beneficiaries. However, Plaintiffs' interpretation is again flawed because the statute does not state that a person may not convey his interest in a piece of property with certain requirements or other limitations. As such, Plaintiffs' argument fails as a matter of law.

Accordingly, the Chancery Court properly dismissed Plaintiffs' Complaint for lack of subject matter jurisdiction.

Motion to Strike the Affidavit of Bishop Rodi

The Chancellor properly denied Plaintiffs' Motion to Strike the Affidavit of Bishop Rodi. In accordance with the Mississippi Rules of Civil Procedure, the Church Defendants attached the Affidavit of Bishop Rodi in support of their Motion to Dismiss for Lack of Subject Matter Jurisdiction. In a "factual attack," the defendant challenges the existence of subject matter jurisdiction irrespective of the pleadings.

Bishop Rodi's affidavit simply clarified many of the points contained in Plaintiffs' Complaint. Church Defendants' use of the affidavit was not to address the merits of Plaintiffs' claims, but rather, to demonstrate to the Court that Plaintiffs' claims fall outside of the subject matter jurisdiction of the Chancery Court. As such, the Chancery Court properly denied Plaintiffs' motion.

Dismissal of the Case with Prejudice

The Chancery Court properly dismissed Plaintiffs' Complaint with prejudice. The First Amendment Doctrine of Church Autonomy not only deprives the Chancery Court of Harrison County of subject matter jurisdiction, but it effectively deprives all courts of jurisdiction. Accordingly, the Chancellor properly dismissed the case with prejudice.

STANDARD OF REVIEW

I. Dismissal of Lawsuit for Lack of Subject Matter Jurisdiction

"It is widely – indeed, universally – accepted . . . that courts of appeal, when reviewing Rule 12(b)(1) dismissals by district courts, for a lack of subject matter jurisdiction, exercise *de novo* review over legal conclusions. However, appellate courts examine jurisdictional findings of fact by the trial courts only for clear error on the part of the district court." Wright & Miller, Federal Practice and Procedure: Civil 3d §1350 (2004). "[T]his Court will not disturb the findings of the trial court unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied." Scaggs v. GPCH-GP, Inc., 931 So. 2d 1274, 1275 (2006) (citing Bell v. City of Bay St. Louis, 467 So. 2d 657, 661 (Miss. 1985)); see also Keyes v. Berry, 2008 WL 4981086, at *2 (Miss. App. Nov. 25, 2008). Accordingly, the legal conclusions of the Chancery Court should be reviewed under the *de novo* standard, but the factual findings by the Chancery Court should not be disturbed absent a finding of "clear error."

II. Order Denying Plaintiffs' Motion to Strike the Affidavit of Bishop Thomas J. Rodi

When reviewing a lower court's decision to allow or disallow evidence, this Court utilizes an abuse of discretion standard. Webb v. Braswell, 930 So. 2d 387 (Miss. 2006); Hudson v. Palmer, 977 So. 2d 369, 377 (Miss. Ct. App. 2007). Ultimately, the decision of whether to strike an affidavit lies within the sound discretion of the trial court. John Mozingo Real Estate & Auction Inc. v. Nat'l Auction Group Inc., 925 So. 2d 141, 148 (Miss. Ct. App. 2006).

ARGUMENT

I. The Chancellor Properly Dismissed Plaintiffs' Lawsuit for Lack of Subject Matter Jurisdiction.

Subject matter jurisdiction is a threshold issue which the trial “court must determine . . . first, before determining the merits of the case.” Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 84 (1998); 2 Moore’s Federal Practice, §12.30[1] (3d ed. 2001). Subject matter jurisdiction must always be proper and can never be waived. Id. “It is widely – indeed, universally – accepted . . . that courts of appeal, when reviewing Rule 12(b)(1) dismissals by district courts, for a lack of subject matter jurisdiction, exercise de novo review over legal conclusions. However, appellate courts examine jurisdictional findings of fact by the trial courts only for clear error on the part of the district court.” Wright & Miller, Federal Practice and Procedure: Civil 3d §1350 (2004).

When, as here, the Church Defendants support a motion to dismiss for lack of subject matter jurisdiction with an affidavit, the Plaintiffs have the burden of establishing by a preponderance of the evidence that jurisdiction exists. Kizer v. Fin. Am. Credit Corp., 454 F. Supp. 937, 938 (N.D. Miss. 1978). “[A] plaintiff bears the unquestioned burden of establishing jurisdiction where the question of the sufficiency of his jurisdictional allegations is before the court on a motion to dismiss.” Id. See also Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416, 418 (5th Cir. 1972) (holding that when a plaintiff’s allegations of jurisdiction are questioned, “the burden is on the plaintiff to prove jurisdiction”).

With the filing of Church Defendants’ Motion to Dismiss, and supporting affidavit, the Plaintiffs have the “unquestioned burden of establishing jurisdiction.” Plaintiffs have failed to meet their burden, and therefore, the lower court was correct in dismissing their Complaint for lack of subject matter jurisdiction.

A. This Lawsuit Has Nothing to Do With a Property Dispute.

In a retreat from their averments contained in their Complaint, Plaintiffs have attempted to reclassify this lawsuit as a property dispute. Nonetheless, whether classified as a property dispute or an internal struggle between a few parishioners and their church leaders, this lawsuit cannot be resolved by applying neutral principles of law.

1. Plaintiffs' argument that this matter is a property dispute is not supported by any jurisprudence.

This lawsuit cannot be classified as a property dispute involving a church split between two rival factions claiming ownership over church real estate. At the core of this dispute is an internal disagreement relating to the Church Defendants' decision not to rebuild the former St. Paul Catholic Church. Simply because a destroyed building (former St. Paul Catholic Church) is involved, it does not mean this lawsuit is necessarily a "property dispute." See Canovaro v. Brothers of Order of Hermits, 191 A. 140, 146 (Pa. 1937) (stating that "The decision of the proper ecclesiastical tribunals [to suppress a parish] must be accepted by the civil courts unless it violates the civil law or is plainly in disregard of the church canons, even though it touches directly upon property rights which fall within the jurisdiction of civil courts.").

In Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So. 2d 200, 204 (Miss. 1998), a case which clearly involved a "property dispute" between rival factions, the local congregation and minister continued to use church property for services after the national church organization defrocked the minister and refused to recognize the local congregation as part of the organization. The national organization filed a lawsuit against the local congregation claiming the national church organization was the rightful owner of the property. Even though the Court ultimately was able to apply neutral principles of law in order to determine property ownership, the Court stated:

Civil courts have the general authority to resolve the question of church property ownership . . . **The first amendment to the United States constitution, however, severely circumscribes the role that civil courts may play in resolving church property disputes.** The first amendment, therefore, forbids civil courts from resolving church property disputes by inquiring into and resolving disputed issues of religious doctrine and practice.

Id. At 204 (emphasis added) (citations omitted).

Plaintiffs' citation of Freewill Pentecostal and other "property dispute" cases to support their position in this lawsuit is misplaced. In Freewill Pentecostal, the court determined which rival faction – the local congregation or the national organization – owned the church property. After it determined the ownership issue, the Court withdrew from the dispute to avoid excessive entanglement. Here, there are not two rival factions claiming ownership interest in the same church property. Rather, there are 157 disgruntled parishioners (out of a congregation of approximately 700) who claim that the Church Defendants' decisions relating to the use of the property and buildings constituted a breach of a fiduciary duty.

Assuming arguendo, the Church Defendants hold the church property in trust for the Plaintiffs (which they do not), the Plaintiffs' seek further relief from the Chancery Court relating to the best use of the property and buildings. Such deliberations undoubtedly will cause excessive entanglement (discussed more fully below), and it will be impossible for this Court to make the requested determinations by applying neutral principles of the law.⁴

2. Plaintiffs' actions belie their claims that this is a property dispute.

Although Plaintiffs retreat from their averments contained within their Complaint and now argue that this case is purely a "property dispute," and although Plaintiffs now refuse to

⁴Plaintiffs request the Court to direct the actions of the Bishop as trustee in their best interests and in a manner that is "agreeable" to them. R. 34. If the Court awarded the Plaintiffs the requested relief, the Court would be become excessively entangled with the church.

challenge the Church Defendants' authority to merge St. Paul and Our Lady of Lourdes Parishes, Plaintiffs' actions and statements suggest that their true intent is otherwise. R. 1415.

Vatican { At the same time Plaintiffs filed this action in Chancery Court, Plaintiffs' counsel and several plaintiffs appealed the Church Defendants' decision to close the former St. Paul Catholic Church to the Vatican, or as Plaintiffs describe it in their Complaint, the decision relating to "changing the use of the Church site from a parochial use to a secular use." R. 33-34; see also Tr., Vol. 2, 110, 117 and 145. On November 30, 2007, the Vatican's Congregation for the Clergy issued a decree rejecting Plaintiffs' appeal. Id. As noted by the Chancery Court in its final order dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction, "In addition to filing this action, Plaintiffs' counsel and several lead Plaintiffs appealed the Church Defendants' actions through the Catholic Church's ecclesiastical tribunals. The Vatican determined that Bishop Rodi followed The Code of Canon Law of the Roman Catholic Church in the actions he took." R. 1682.

Plaintiffs' pleadings – including their appeal brief – as well as their actions, demonstrate that, regardless of how the Plaintiffs attempt to categorize their claims to the Court, Plaintiffs' demands for relief arise from the Church Defendants' decision to consolidate St. Paul Parish and Our Lady of Lourdes Parish and the decision not to rebuild the former St. Paul Catholic Church. Without question, any attempt to track the property and assets of St. Paul Parish to the newly formed Holy Family Parish will involve review of not only internal church decisions, but also this Court's interpretation of church law (The Code of Canon Law). The requested Court review of church decisions and of church canons is clearly beyond the Court's subject matter jurisdiction.

B. Even if considered a property dispute, neutral principles of property law cannot be used to resolve this action.

Even if this Court determines that the lower court should have treated this dispute as a “property dispute,” Plaintiffs’ claims are still beyond this Court’s subject-matter jurisdiction because this lawsuit cannot be resolved by applying neutral principles of law.

1. The Decree combining St. Paul Parish and Our Lady of Lourdes Parish specifically addresses St. Paul Catholic Church’s assets and property.

Contrary to their assertions in their Complaint, the Plaintiffs have taken the position that **“Plaintiffs do not challenge the authority of the Defendants to merge St. Paul and Our Lady of Lourdes Parish.”** R. 1415 (emphasis in original). Nonetheless, in direct contradiction of this statement, Plaintiffs continue to argue that this lawsuit should be treated as if it is a property dispute.

In his November 27, 2005 decree, Bishop Rodi stated:

In accordance with canon 121, Holy Family Parish obtains the goods and patrimonial rights proper to Saint Paul Parish and Our Lady of Lourdes Parish as well as the obligations with which they were burdened.

R. 245-246; see also Ex. 1. As a result of the merger of the St. Paul Parish and Our Lady of Lourdes Parish, the former St. Paul Catholic Church’s assets, and therefore the property at issue, were transferred to Holy Family Parish. Id. For this Court to address Plaintiffs’ claims against the Church Defendants relating to the former St. Paul church property, the Court must not only delve into The Code of Canon Law, but must also overrule the Vatican’s Congregation for the Clergy’s decree rejecting Plaintiffs’ appeal.⁵ See Tr., Vol. 2, 110, 117 and 145; see also R. 1682.

⁵See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) (stating, “Civil courts shall not disturb the decisions of the highest ecclesiastical tribunal a church of hierarchical polity, but must accept such decisions as binding on them . . .”).

It is simply impossible for this Court to carve out any of the issues posed by Plaintiffs and resolve these issues by applying neutral principles of law.

Furthermore, by claiming they have no issue with the consolidation of the parishes, the Plaintiffs have confessed they have no issue with Bishop Rodi's transfer of the former St. Paul Catholic Church's assets to Holy Family Parish. R. 245-246; see also Ex. 1. Not only have they conceded that Bishop Rodi has such authority (R. 1415), they have attached an affidavit of another Roman Catholic Bishop, the Most Reverend William S. Skylstad, in support of their Opposition to Church Defendants' Motion to Dismiss. R. 1436-1478.⁶ Bishop Skylstad's affidavit confirms Bishop Rodi's authority to consolidate parishes and merge assets:

The bishop does not own the goods of a diocese, and the pastor does not own the goods of the parish. Ownership pertains to the juridic person itself. The responsibility of administration of the goods is exercised by its administrator. *The administration is regulated by canon law . . .*

Acquisition and alienation of "stable patrimony," as the Church identifies those assets such as land and buildings that are intended to be held for a long period of time, is *highly regulated by canon law*. All administrators must adhere to this law. . . .

The parish may be closed by the bishop. What happens to its stable patrimony? The basic rule is: *the money goes where the parishioners go. The parishioners of the extinct juridic person (or parish that has ceased to operate) will be joined to an existing juridic person (parish), or a new juridic person will be formed out of two or more parishes.* This new juridic person acquires the rights and obligations – and the stable patrimony of the former juridic persons.

⁶Plaintiffs attached the Affidavit of William S. Skylstad, who served as the Bishop of the Spokane, Washington Diocese, to their Opposition to Church Defendants' Motion to Dismiss. R. 1436-1478. Skylstad's Affidavit was submitted in litigation completely unrelated to this lawsuit, which was pending in the United States Bankruptcy Court of the Eastern District of Washington. R. 1436. Bishop Skylstad provided no information regarding this lawsuit. R. 1436-1478. Furthermore, there are more than 175 dioceses throughout the United States. Each diocese is formed differently under civil law to comply with applicable state property laws. As such, each diocese holds title to property differently. According to Bishop Skylstad's affidavit, the Diocese of Spokane Washington is a corporation sole. R. 1448. As such, Plaintiffs' reliance on Bishop Skylstad's affidavit, as well as the related bankruptcy litigation, is misplaced because it involves a church entity (corporation sole), which does not exist in this case. Nonetheless, it does serve to explain Canon law and its application to church property ownership, and it is for that reason only instructive in this appeal.

R. 1459, 1475-1476 (emphasis added). The evidence submitted by Plaintiffs supports the Church Defendants' claims that neutral principles of law cannot be applied to the facts of this case.

2. **The Deed that Plaintiffs claim made Bishop Rodi trustee of the alleged trust specifically states that the conveyance of property was made in accordance with The Code of Canon Law.**

Plaintiffs attach four deeds to their Complaint. Three of the deeds expressly refer to The Code of Canon Law in the body of the documents. R. 56, 59, 63. The deeds also state that the transfer of property is being made for the benefit and use of the members of the Catholic Parish, which is beyond this Court's subject-matter jurisdiction (discussed more fully below). R. 56, 59, 62. Moreover, the deed Plaintiffs claim made Bishop Rodi trustee of the alleged trust, provides that the property is conveyed to Bishop Rodi as "trustee for the use and benefit of the members of each Catholic Parish or Congregation in accordance with the Canon Law of the Roman Catholic Church . . ." R. 62-64 (emphasis added).

can they circumvent it this way?

The face of the deeds are further evidence that this Court cannot use neutral principles of

law in order to resolve this dispute. The Court cannot examine the deeds without considering the application of The Code of Canon Law which is specifically identified in the documents.

C. **It is Impermissible Entanglement for this Court to Examine Whether the Church Defendants' Decision to Form Holy Family Parish was a Misuse of Church Funds.**

Embedded within plaintiffs' Complaint among its allegations of breach of fiduciary duty, Plaintiffs refer to the Church Defendants' alleged misuse of church funds and request this Court to determine if the use of certain church funds is in the best interest of the Plaintiffs. See R. 30. Specifically, paragraph LVII of Plaintiffs' Complaint states, "Plaintiffs aver that the decision to proceed in the above-described manner [to create a new church complex on Our Ladies of Lourdes church site] is not in the best interests of the Members, nor the members of the congregation of OLL, and is fiscally irresponsible." R. 30.

like Harris

This exact issue was addressed in Harris v. Matthews, 643 S.E.2d 566 (N.C. 2007). In Harris, certain members of the congregation believed the preacher and other church administrators had misappropriated church funds. Id. at 568. The plaintiffs filed a lawsuit against the preacher, church secretary and Chairman of the Board of Trustees alleging conversion of funds, breach of fiduciary duty and civil conspiracy. Id. The preacher filed a motion to dismiss based on lack of subject-matter jurisdiction. Id.

On an interlocutory appeal, the court held that the claims asserted – almost identical to the ones present here – were “precisely the type of ecclesiastical inquiry courts are forbidden to make.” Id. at 571. The court held that in order for a trial court to address the plaintiffs’ claims it would be forced to “interpose its judgment as to both the proper role of those church officials and whether each expenditure was proper in light of [the church’s] religious doctrine and practice, to the exclusion of the judgment of the church’s duly constituted leadership.” Id. The court continued, and stated:

Plaintiffs argue [they are] entitled to recover damages from defendants because they breached their fiduciary duties by improperly using church funds, which constitutes conversion. Determining whether actions, including expenditures, by a church’s pastor, secretary, and chairman of the Board of Trustees were proper requires an examination of the church’s view of the role of pastor, staff, and church leaders, their authority and compensation and church management. ***Because a church’s religious doctrine and practice affect its understanding of each of these concepts, seeking a court’s review of the matters presented here is no different than asking a court to determine whether a particular church’s grounds for membership are spiritually or doctrinally correct or whether a church’s charitable pursuits accord with the congregation’s beliefs.*** None of these issues can be addressed using neutral principles of law.

Id. (emphasis added).⁷

⁷In Harris, the plaintiffs also make “broad assertion[s]” that because the church is a nonprofit corporation, the court should apply the North Carolina Nonprofit Act in order to resolve the dispute. Id. at 572. The North Carolina Supreme Court rejected this argument stating “[r]egardless of a church’s corporate structure, the Constitution requires courts to defer to the church’s internal governing body with regard to the ecclesiastical decisions concerning church management and use of funds.” Id.

The plaintiffs are not only asking the Court to determine whether the Church Defendants were fiscally responsible, they are asking the Court to determine if the use of the church funds "are in the best interests" of the members. It is impossible to consider either of these questions without examining The Code of Canon Law which addresses "the church's view of the role of pastor, staff, and church leaders." See Harris, 643 S.E.2d at 571; see also R. 73-75.

Additionally, as the Chancery Court held in its final order dismissing Plaintiffs' Complaint:

[F]ollowing Canon Law, the Church Defendants contacted the donors who made restricted donations for the rebuilding of St. Paul Catholic Church after hurricane Katrina and informed the donor that the decision had been made not to rebuild St. Paul Catholic Church. Church Defendants offered to refund the donation at the donor's request. Four individuals requested that their donations be returned. Church Defendants refunded the donations as requested by the donors. See Church Defendants' Interrogatory Answer No. 1; see also Church Defendants' Supplemental Interrogatory Answer No. 1.

R. 1692; see also R. 231-235, R. 270-933 and R. 1367-1368.

The allegations contained in the Plaintiffs' Complaint are matters which require ecclesiastical inquiry and thus, are beyond the Court's subject matter jurisdiction.

(continued)

Here, like the Harris plaintiffs, Plaintiffs argue the Church Defendants hold the church property in trust and as such, Mississippi trust laws should govern this dispute. However, the Mississippi Supreme Court (much like the North Carolina Supreme Court) has not only rejected this argument, but has held Mississippi Code § 91-9-301, §91-9-303 and §91-9-305 unconstitutional. See Sustar v. Williams, 263 So. 2d 537, 544 (Miss. 1972). In Sustar, the Court held, **based upon both the Mississippi and United States Constitutions**, that such code sections:

[W]ould allow the chancery courts of Mississippi on the vote of a two-thirds majority of the local congregation to take over the administration and government of a local church. **This law would violate that fundamental principle that we have held inviolate since the founding of this country, the principle of the separation of church and state.**

Id. at 546 (emphasis added).

D. Plaintiffs' Complaint Should be Dismissed Because This Matter is a Church-Pastor Dispute.

Courts apply the Doctrine of Church Autonomy to church-pastor disputes to avoid entangling themselves in such intrinsically religious relationships. Minker v. United Methodist Church, 894 F.2d 1355 (D.C. Cir. 1990). Because every aspect of the church-minister relationship touches upon religious doctrine, canon law, and church polity, civil courts have repeatedly declined jurisdiction over all claims arising from such relationships.

The claims and issues raised by the Plaintiffs necessarily touch upon the church-pastor relationship which is universally recognized as intrinsically religious. “[D]etermination of ‘whose voice speaks for the church’ is *per se* a religious matter. . . We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the ‘gifts and graces’ of a minister must be left to ecclesiastical institutions.” Minker v. United Methodist Church, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990).

The wellspring for the branch of Church Autonomy Doctrine involving church-minister disputes is the Fifth Circuit case of McClure v. The Salvation Army, 460 F.2d 553 (5th Cir. 1972), which held that the Doctrine of Church Autonomy bars civil adjudication of a minister’s Title VII discrimination claim because the relationship between a church and its minister is intrinsically religious.

The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister’s salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

McClure, 460 F.2d at 558-59 (5th Cir. 1972) ; see also Mallette v. Church of God Int’l., 789 So. 2d 120 (Miss. App. 2001).

Here, the core issue is a disagreement between certain parishioners (the plaintiffs) and the Church Defendants relating to the future of St. Paul's Catholic Parish. The disagreement is over whose "voice" should speak for the church. Under The Code of Canon Law, there is an specific procedure to be followed when determining if a parish should be altered. As noted by the Chancery Court, the church procedures were followed by the Church Defendants and the decision to create Holy Family Parish was reached by the proper ecclesiastical authority. As such, the Chancery Court did not err in dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction.

E. Excessive Entanglement Will be Created if this Court Attempts to Define the Proper Duty of Care for Church Defendants.

Some Plaintiffs, including those here, seeking to circumvent the First Amendment have pleaded breach of fiduciary duty. A claim of breach of fiduciary duty, in which the fiduciary obligation arises from the alleged position of trust held by a cleric, necessarily requires a civil court to define a cleric's normative obligations and inevitably entangles the court in matters of faith, doctrine, canon law, and ecclesiastical relationships.

If the Court were to recognize such a breach of fiduciary duty, it would be required to define a reasonable duty standard and evaluate [the pastor's] conduct against that standard, an inquiry identical to that which Illinois has declined to undertake in the context of a clergy malpractice claim and one that is of doubtful validity under the free exercise clause. It is clear that Illinois would not entertain a claim for breach of fiduciary obligation under the circumstances alleged here.

Dausch v. Ryske, 52 F.3d 1425, 1438-39 (7th Cir. 1994). In Nally v. Grace Cmty. Church, the Court stated:

Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. **This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.**

763 P.2d 948, 960 (Cal. 1988) (emphasis added). Accordingly, civil courts have consistently rejected such clergy fiduciary duty claims.

The Chancery Court properly held in its final order that:

In order for this Court to attempt to define whether the Church Defendants breached a fiduciary duty to the Plaintiffs, the Court would necessarily be forced to evaluate not only the church's beliefs and laws, but also the Court would have to define the standard of care that should be followed by other priests and bishops. Such determination would undoubtedly cause excessive entanglement with the Church.

R. 1693.

For the Court to attempt to define the proper fiduciary duty of care for priests or bishops would cause the Court to become excessively tangled. Accordingly, the Chancery Court did not err in dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction.

F. Neutral Principles of Law Cannot Be Used to Determine if a Trust Exists.

Plaintiffs claim in their brief that a trust has been created. While they are not clear as to the specific type of trust that they believe exist, their entire argument nonetheless rests upon the theory that (1) a trust exists, (2) Bishop Rodi is the trustee of the alleged trust and (3) the 157 Plaintiffs⁸ are beneficiaries of said trust, which thereby gives them standing to seek court intervention to challenge decisions with which they disagree. See Brief of Appellants at 22; see also R. 1424-1426. Plaintiffs' argument that this Court can apply neutral principles of law in order to determine whether a trust exists is baseless.⁹

⁸Plaintiffs represent a fraction of the entire congregation of the former St. Paul Catholic Parish. While Plaintiffs claim they are beneficiaries of the alleged trust, they never address whether the remaining former members of St. Paul Catholic Parish – who did not file a lawsuit against their church leaders and may very well disagree with this litigation – are also beneficiaries.

⁹Religious organization law writers caution against classifying church property ownership as "trust" property under civil law:

1. An Express Trust Does Not Exist Under Mississippi Law.


Mississippi Code § 91-9-1, et seq., defines the requirements for express trusts involving real property, including the requirement that the trust, or an abbreviated certificate of trust (pursuant to § 91-9-7) be recorded. None of the deeds allegedly creating the trusts contain even the bare information mandated under the abbreviated certificate of trust, and the statutes clearly contemplate the “entire” trust will contain more information. Additionally, Plaintiffs claim that an express trust exists also fails as Mississippi Code § 91-9-1 and § 91-9-7 require that the duration of the trust be specified in the recorded instrument. The word “forever” is the only time duration in the “trust” deeds. R. 63. As such, under Mississippi law, an express trust has not been created.

2. A Resulting Trust Does Not Exist Under Mississippi Law.

Plaintiffs claim – for the first time on appeal – that Catholic Church law also supports the argument that a resulting trust has been created under Mississippi law. See App. Br. 25. However, Plaintiffs fail to cite any authority for this bold, yet baseless, legal statement. Id.

Under Mississippi law, “the basis of a resulting trust is that the person seeking to assert the trust actually made payment or partial payment for the property allegedly in trust at the time

(continued)



[T]he law of religious organizations is special; it is not simply a species within some other generic category, such as tax-exempt or nonprofit corporations law. The uniqueness of religious organizations is so fundamental that it cannot be overlooked. Case law blurring the distinction will be flawed in the most radical analytical perspective.

The churches are not trusts, foundations, simple associations of people grouped around a particular purpose, or nonprofit corporations in a legal sense; they often use these legal forms to hold, use and dispose of property as a means of protecting and implementing their religious and charitable purposes. Essentially, as well as functionally, the churches are special.

1 Religious Organizations and the Law §1:1 (William W. Bassett, 2006).

the property was conveyed . . . the fact of payment must be established beyond a reasonable doubt. Medders v. Ryde, 458 So. 2d 685 (Miss. 1984) (emphasis added). Plaintiffs readily admit that to claim a resulting trust, purchase money must be advanced. App. Br. 23. Not only could Plaintiffs not establish that they paid for the church parcels under any standard of proof, Plaintiffs admit that the property was purchased by others. R. 9, 10, 11-14. Accordingly, a resulting trust does not exist.

3. A Private Trust Cannot Exist Under Mississippi Law.

A number of deeds upon which Plaintiffs base their claim, and which are attached to their Complaint, purportedly convey the property to the Bishop of the Catholic Diocese “and his successors in office forever,” indicating that the office of Bishop was to continue as “trustee” for the duration of any “trust”, potentially forever. R. 63. Clearly, if a trust was created by these deeds (which Church Defendants maintain is not the case), it was intended and has been regarded as perpetual based upon both the fact that the term “forever” is utilized in the deed when speaking of the “trustee’s” tenure, and also based upon the fact that if a trust was formed, this trust was in existence approximately 150 years.

Private trusts are subject to the familiar rule against perpetuities and beneficiaries’ interests must vest, if at all, within lives in being plus twenty-one years, or same is void. Hall v. Latham, 193 So. 2d 587, 591 (Miss. 1967). A trust founded in 1866 (or earlier)¹⁰ wherein the beneficial interest has not vested and where, as Plaintiffs admit, title remains in the trustee,

¹⁰Plaintiffs state that the first parcel of the former St. Paul Catholic Church location was acquired in 1843, other parcels followed, and St. Paul Church was built in 1851, from which the supposed trust ultimately arose. App. Br. 1-2; see also R. 9, 10, 11-14. Plaintiffs also claim in their brief that St. Paul Catholic Church was established at this location in 1866, not 1851. App. Br. 2. The Catholic Church recognizes the establishment of St. Paul Parish as being earlier than either date.

RAP

would clearly violate this rule and could not constitute a valid private trust. As such, a private trust for the benefit of the Plaintiffs cannot exist under Mississippi law.

4. **Plaintiffs have no standing to bring this lawsuit even if this Court were to find that a charitable trust exists.**

The law of religious organizations is unique and church property ownership should not be classified as "trust" property. See 1 Religious Organizations and the Law §1:1 (William W. Bassett, 2006).

Even if this Court were to find that a charitable trust exists, charitable trusts have no individual beneficiaries so Plaintiffs cannot claim to be beneficiaries under such a trust. As such, Plaintiffs have no standing to seek relief from this Court.

In Hall v. Latham, 193 So. 2d 587 (Miss. 1967) , this Court stated:

The most important distinction between a private trust and a charitable trust is with reference to beneficiaries. A private trust is not valid unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities. In the case of a charitable trust the beneficial interest is not given to individual beneficiaries, but the property is devoted to the accomplishment of purposes which are beneficial or supposed to be beneficial to the community, and the persons who are to receive benefits from the trust need not be designated.

Id. at 591-92 (emphasis added). If the deeds in fact created a St. Paul trust as Plaintiffs claim, Plaintiffs cannot be beneficiaries of the charitable trust because charitable trusts in Mississippi have no individual beneficiaries.¹¹

¹¹This is for a good reason. By way of example, membership in any congregation is fluid so that not even one member of a congregation today may be a member in ten, or twenty, one hundred fifty years, yet there remains but one congregation though the individuals be different. Any reference to the congregation or members should, therefore, clearly be synonymous with the parish itself (called a "juridic entity" under Catholic Church law) and not the individual Plaintiffs. If the Plaintiffs, claiming to be today's members or congregation, are adjudged beneficiaries entitled to have their way over the decisions of their Church leaders, and the Church leader's decisions included the needs of future Catholics as well as present, a court could potentially be faced with beneficiaries requesting the Court to determine and safeguard future Catholics' spiritual and temporal interests. This clearly violates federal and state law.

Plaintiffs' claims are factually no different from a lawsuit claiming that a school was formed as an educational trust, that Plaintiffs and their children are the beneficiaries of that trust, and Plaintiffs, therefore, have standing to oppose the closing of the school or any other actions of the trustee. In Freedman's Aid & Southern Education Society v. Scott, 87 So. 659 (Miss. 1921), the Plaintiffs claimed that they donated money and helped construct a school, and the school was built for the benefit of their children to attend, and thus they had standing to oppose the closing of the school. In rejecting the Plaintiffs' claims in that case, this Court stated:

It appears from the evidence that some of the complainants contributed \$5 . . . and it was shown that some parties in the community helped cut lumber and do the work of building the schoolhouse . . . If there is any trust it is for the benefit of this school, and the instrument relied on nowhere imposes any obligation on the school to receive the complainants or their children as students therein . . . If there is any trust at all it must be a trust for the benefit of the trustees . . .

Freedman's Aid, 87 So. at 660-661. Also, the fact that funds were supposedly donated by the plaintiffs or on plaintiffs' behalf in the Freedman's Aid decision (which is a claim Plaintiffs also have made) did not change the outcome of that case. The Freedman's Aid decision instructs that, if there is a charitable trust, the donation of money or the anticipation or receipt of a benefit from the trust will not transform the claimant into a beneficiary of such a charitable trust with legal standing to seek redress. Plaintiffs, therefore, have no standing as alleged beneficiaries of a "St. Paul charitable trust."

5. **Neutral principles of law cannot be used to determine whether Plaintiffs are members of any Catholic church or congregation.**

Regardless of any type of trust Plaintiffs claim was created, in order for Plaintiffs to be considered the beneficiaries of a trust and for them to have standing to bring this lawsuit, Plaintiffs must be members of the Catholic Congregation referenced in the alleged trust. Under The Code of Canon Law, St. Paul Catholic Church ceased to exist on August 29, 2005, when it

was profaned by Hurricane Katrina. R. 231-235.¹² St. Paul Parish ceased to exist when it was combined with Our Lady of Lourdes Parish and Holy Family Parish was formed pursuant to Bishop Rodi's November 27, 2005 decree. R. 231-235. As such, Plaintiffs are no longer members of St. Paul Catholic Church or St. Paul Parish as they allege. Accordingly, even a trust exists (which it does not), Plaintiffs are not, and cannot be, beneficiaries and do not have standing to bring an action under any trust.

In Croatian Roman Catholic Congregation v. Wuerl, 668 A.2d 1151 (Pa. Super. 1995), three Roman Catholic congregations filed a lawsuit challenging the church's decision to suppress certain parishes. The Court held that the Plaintiffs did not have standing to file the lawsuit because, after the church issued its decrees suppressing the parishes, the parishes ceased to exist. Id. at 1152. The Court further held that the church's decision to suppress the parishes was an "ecclesiastical matter which is not reviewable by civil courts." Id. Finally, the Court stated that, "Church membership is an ecclesiastical matter, not temporal. There is no property right in membership, and there can be no property rights in lay members except through their membership in the congregation." Id. at 1153 (citing Canovaro v. Brothers of Order of Hermits, 191 A. 140 (Pa. 1937)). The Mississippi Supreme Court has also recognized that civil courts may not consider issues relating to membership in a congregation because such determination

¹²Although Plaintiffs describe the "washed out interior" of the church building in their brief, Plaintiffs state that the former St. Paul Catholic Church was not profaned during Hurricane Katrina. See App. Br. 3, 28. Plaintiffs specifically state that, "It continued to be a place of worship and, this remained a Church, even under canon law." Brief of Appellants at 3. However, Plaintiffs cite no authority for this statement. As reflected in the record, under The Code of Canon Law, St. Paul Catholic Church ceased to be a church on August 29, 2005. R. 231-235. The only way the former St. Paul Church could once again be considered a Catholic Church under The Code of Canon Law would be for the Bishop to consent in writing and for the building to then be dedicated with a solemn rite. Canon 1215, Canon 1217. R. 132. No such action has taken place, and rather Church Defendants have determined that rededicating the former St. Paul Church as a Catholic Church was not in the best interest of the Parish. R. 32. As such, pursuant to The Code of Canon Law, St. Paul Church ceased to be a Catholic Church on August 20, 2005. R. 232.

would constitute excessive entanglement. See Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (Miss. 2005) (stating that “our civil courts may not resolve disputes of scriptural interpretation or denial of membership in a particular congregation”).

In order for a Court to determine if a valid trust exists under Mississippi law, the Court would first have to determine if the Plaintiffs are in fact beneficiaries of the alleged trust. The deeds Plaintiffs rely on in support of their argument refer to the “members of Catholic Parishes or Congregations.” As stated above, the law prevents this Court from determining whether Plaintiffs are members of the referenced Catholic parishes or congregations. Such decision is beyond this Court’s subject-matter jurisdiction.¹³

G. Church Defendants are not Subject to Mississippi’s Regulations for Charitable Solicitations.

Plaintiffs argue that Church Defendants are subject to Mississippi Code § 79-11-501, et seq., “Regulation of Charitable Solicitations,” and further allege that Church Defendants have violated this statute. App. Br. 15-16; see also R. 1430. Church Defendants have at all times abided by Mississippi law and The Code of Canon Law. However, the Plaintiffs’ allegations

¹³As stated above, this is not a property dispute where a court can make a decision using principles of law and then quickly remove itself. In this case, Plaintiffs request the Court to specifically direct the actions of the Bishop as trustee in a manner in which is “agreeable” to them and in their best interest, which will undoubtedly require continued court involvement and administration of any “trust.” R. 34. The Court and Bishop would then be faced with a constant struggle of the role of civil law (as it applied to trust issues) and The Code of Canon Law. In Sustar v. Williams, 263 So. 2d 537 (Miss. 1972) the Court refused to allow a chancery court to oversee a church trustee because such oversight by the court would lead to impermissible entanglement. The Court held that certain state statutes were unconstitutional because they permitted “courts to appoint trustees of the church property and the courts would be constantly subject to involvement in church disputes if required to do so.” Id. at 543. Additionally, in the concurring opinion (joined by four additional justices), the Court stated that the unconstitutional statutes “would allow the chancery courts of Mississippi on a vote of two-thirds majority of the local congregation to take over the administration and government of a local church. This law would violate that fundamental principle that we have held inviolate since the founding of this country, the principle of the separation of church and state.” Id. at 546.

further demonstrate that they do not understand the basic principle of separation of church and state.

Church Defendants, as well as most religious organizations, are expressly excluded from the “Regulation of Charitable Solicitations.” Section 79-11-501(a)(iii) states “‘Charitable Organization’ does **not include any bona fide duly constituted religious institutions** and such separate groups or corporations which form an integral part of religious institutions . . . ” (emphasis added). This religious institution exception is yet another example of the reluctance of the State to become entangled in religious matters.

Plaintiffs’ argument that Church Defendants are subject to the “Regulation of Charitable Solicitations” is simply incorrect; therefore, it fails as a matter of law.

H. Plaintiffs’ Interpretation of Miss. Code § 89-1-17 is Incorrect.

Plaintiffs argue that because the initial deeds in the chain of title of the former St. Paul Catholic Church site do not specifically state that the conveyance was made “in accordance with the Canon Law of the Roman Catholic Church” that Bishop Rodi cannot “impos[e] Canon Law upon the beneficiaries”. See App. Br. 16. As authority for such position, Plaintiffs cite the Court to Mississippi Code § 89-1-17. Plaintiffs state that “Mississippi law is quite clear. A grantor can only convey what rights it holds in the property.” See App. Br. 16. Such statement is simply incorrect and a flawed interpretation of the statute.

Mississippi Code §89-1-17 states that it is unlawful for a person to convey “a greater estate” than the person owns. For example, if a person owns a life estate in a piece of property, §89-1-17 prohibits the individual from conveying the same piece of property to a person in fee simple. The statute does not state that a person may not convey his interest in a piece of property with certain requirements or other limitations.

Even if the initial deeds do not contemplate The Code of Canon Law (which is not true),¹⁴ Plaintiffs argument that § 89-1-17 restricts Bishop Rodi and/or Bishop Howze from including a condition that the conveyance be subject to The Code of Canon Law in a subsequent deed is simply flawed. As such, Plaintiffs' argument fails as a matter of law.

I. Summary.

The Plaintiffs' lawsuit has nothing whatsoever to do with a property dispute. It does not involve a dispute of the ownership of real estate. Instead, it is about an internal church dispute between disgruntled parishioners and their church leaders. Even if this matter is considered a "property dispute," the fact that there is no way a court can apply neutral principles of law to grant the relief requested by Plaintiffs, places this lawsuit in a category of disputes classified as "untouchable" by constitutional jurisprudence. By requesting that the Court decide a duty of care and rule in favor of the Plaintiffs in their "best interest," the Plaintiffs necessarily invoke impermissible entanglement between church and state. When stripped of its "window dressing" tag of a "property dispute," this dispute reveals its true nature – a difference of opinion between a few church members and their leaders about how church assets are "best" used.

Accordingly, the Chancery Court did not err in dismissing the Plaintiffs' lawsuit under Rule 12(b)(1) of the Mississippi Rules of Civil Procedure. The Court should affirm the lower court's dismissal for lack of subject matter jurisdiction.

¹⁴At the December 20, 2007 hearing, Plaintiffs drew the Court's attention to the term "Apostolic Administrator" which appears in the several older deeds before the 2001 transfer from Bishop Howze to Bishop Rodi. R. 131. Plaintiffs, however, did not cite the court to where the term "Apostolic Administrator" is defined under Mississippi law for the reason that it is a term defined under church law (The Code of Canon Law), as Church Defendants explained to the court at the hearing. Besides using the term "Apostolic Administrator," these older deeds specifically reference Canon Law. R. 56-61. The terms Apostolic Administrator and Canon Law appear in the 1977 deed from Bishop Brunini (who was himself Apostolic Administrator before being appointed Bishop) to Bishop Howze and the 1977 deed from Catholic Diocese of Natchez-Jackson corporation to Bishop Howze. R. 56-61.

II. The Chancellor Properly Denied Plaintiffs' Motion to Strike the Affidavit of Bishop Thomas J. Rodi.

The lower court properly refused to strike the affidavit of Bishop Rodi, which was attached to Church Defendants' Motion to Dismiss. Plaintiffs argue that the Court's August 8, 2007 discovery order cannot be reconciled with the Court's final order of February 27, 2008. App. Br. 6. Plaintiffs state in their brief that, "The Chancellor had no more evidence, no more factual basis before it on the latter date than it did on the former date, yet the two Orders appear to have been written about two different matters." Id. Such statement is simply incorrect. The August 8, 2007 order was a discovery order and simply addressed whether the Plaintiffs should be allowed to conduct discovery. R. 189-199. Additionally, in the discovery Order, the Court stated:

In making this decision, the Court urges all parties to this issue not to read more into this opinion than what it has written. This Court is very much aware that its consideration in this case is extremely limited. This Court does not feel it has the authority nor certainly it has no inclination to second guess or change the hierarchical decisions placed in effect. This is meant to be a simple matter in that if there is a procedure to do what has been done, if so, was it complied with by those in charge.

R. 199. Moreover, when the discovery order was entered, Plaintiffs had not filed their opposition to Church Defendants' Motion to Dismiss. During the six months between the orders, discovery was conducted, Plaintiffs filed their opposition, Church Defendants filed a reply brief, Plaintiffs filed a Pre-Hearing memorandum and Church Defendants again responded. Moreover, a hearing was held on Church Defendants' Motion to Dismiss where the Court allowed each party to argue their respective positions. As such, the Court had ample evidence before it when it determined that the Court lacked subject-matter jurisdiction over Plaintiffs' Complaint.

When reviewing a lower court's decision to allow or disallow evidence, this Court utilizes an abuse of discretion standard. Webb v. Braswell, 930 So. 2d 387 (Miss. 2006). Hudson v.

SDR on affidavit

Palmer, 977 So. 2d 369, 377 (Miss. Ct. App. 2007). The decision of whether to strike an affidavit lies within the sound discretion of the trial court. John Mozingo Real Estate & Auction Inc. v. National Auction Group Inc., 925 So. 2d 141, 148 (Miss. Ct. App. 2006).

Under Mississippi law, the Church Defendants properly attached the Affidavit of Bishop Rodi in support of their Motion to Dismiss for Lack of Subject Matter Jurisdiction. When a defendant seeks dismissal of an action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, a court may base its decision on one of the following: “(1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the Court’s resolution of disputed facts.” Montez v. Dep’t of Navy, 392 F.3d 147,149 (5th Cir. 2004); see Herod v. Potter, 2007 U.S. Dist. LEXIS 10043 (N.D. Miss. February 12, 2007). A “facial attack” on the Complaint requires the Court to determine if the Plaintiff has sufficiently alleged a basis of subject-matter jurisdiction. Yates v. Johanns, 2007 U.S. Dist. LEXIS 19328 (N.D. Miss. March 19, 2007). In a facial attack, all of the allegations in Plaintiffs’ Complaint are taken as true for the purposes of the motion. Id. On the other hand, a “factual attack” challenges the existence of subject matter jurisdiction irrespective of the pleadings. Id. at, *2.

At the trial court level, Plaintiffs’ motion demanded that the Court strike the affidavit of Bishop Rodi. R. 138-166. In a factual attack, Plaintiffs’ allegations are not presumed to be truthful, but rather, “the Court can decide disputed issues of material fact in order to determine whether or not it has jurisdiction to hear the case.” Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir.1980). When a defendant has made a factual attack upon the court’s subject-matter jurisdiction, a plaintiff is “required to submit facts through some evidentiary method and has the burden of proving by preponderance of the evidence that the trial Court does have subject matter jurisdiction.” Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981). Here, Plaintiffs

have failed to submit any evidence whatsoever to support their argument that the Chancery Court had subject matter jurisdiction over the dispute.

The Court is “free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case.” Montez v. Dep’t of Navy, 392 F.3d 147, 149 (5th Cir. 2004). In resolving any factual disputes, the court further has the discretion “to devise a method for making a determination with regard to the jurisdictional issue.” Moran v. Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994); see Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F.2d 884, 892 (5th Cir. 1977) (stating that “there is no statutory direction to proceed upon an issue for jurisdiction, to know that its determination is left to the trial Court”). The Court’s authority allows it to consider affidavits, allow further discovery, hear oral testimony and/or conduct an evidentiary hearing. Id.; see also Moran, 27 F.3d at 173 (holding the Court did not abuse its discretion in denying Plaintiffs’ request for an evidentiary hearing as a Court “may” consider oral evidence along with written evidence but it is not required to conduct an evidentiary hearing). If in the Court’s discretion it allows additional discovery, such discovery must be limited to “only that which is necessary to determine the preliminary jurisdictional issue.” Hishon v. King & Spalding, 467 U.S. 69, 73, n.2 (1984) (holding that there were no jurisdictional facts in dispute although the Court had allowed limited discovery relating to how the law firm was organized for jurisdictional purposes).

Bishop Rodi’s affidavit clarified many of the points already contained in Plaintiffs’ pleadings: the dispute involves a hierarchal church; it questions the judgment of church officers; and it calls into question church governance and The Code of Canon Law. R. 73-98. Additionally, Church Defendants cited the applicable sections of The Code of Canon Law which supported Bishop Rodi’s statements in his affidavit and also attached copies of such sections as exhibits to the motion. R. 73-98. The purpose of the affidavit was not to address the merits of

Plaintiffs' claims, but rather, to demonstrate to the Court that Plaintiffs' claims fall outside of the subject-matter jurisdiction of this Court. As such, the Church Defendants properly attached the affidavit of the bishop of the diocese in support of their motion and the lower court properly denied Plaintiffs' motion to strike.¹⁵

III. The Chancellor's Dismissal of the Case with Prejudice was Proper.

The lower court properly dismissed Plaintiffs' Complaint with prejudice. The Plaintiffs argue that the case should not have been dismissed with prejudice because the case was dismissed for lack of subject matter jurisdiction. R. 1680-1696. The Plaintiffs' argument is completely without merit as this case cannot be brought in another court that properly has subject matter jurisdiction. The First Amendment Doctrine of Church Autonomy not only "deprives this Court of subject matter jurisdiction," but effectively deprives **all courts** of subject matter jurisdiction.¹⁶ Plaintiffs' reliance on Rayner v. Raytheon Co., 858 So. 2d 132, 134 (Miss.

¹⁵Plaintiffs failed to cite any case law supporting their argument that the Chancellor erred in failing to strike Bishop Rodi's affidavit. See App. Br. 27. In their motion to strike, Plaintiffs cited one case, U.S. v. Univ. of Massachusetts Mem'l Med. Ctr., 296 F. Supp. 2d 20 (D. Mass. 2003), in support of their motion. R. 149. However, this Massachusetts case **has been overruled**. See U.S. v. Lahey Clinic Hosp., Inc., 399 F.3d 1, 7, n.4 (1st Cir. 2005). Plaintiffs' reliance on this case is misplaced. The Court in Univ. of Massachusetts Memorial Medical Center stated:

If the challenge is to the sufficiency of the facts supporting jurisdiction, the Court should credit the plaintiff's well-plead factual allegations as true and draw all reasonable inferences from them in his favor. If, however, the challenge is to the accuracy of the facts supporting jurisdiction, 'the plaintiff's jurisdictional averments are entitled to no presumptive weight; the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties.

Univ. of Massachusetts Mem'l Med. Ctr., 296 F. Supp. at 20-23. (citation omitted).

¹⁶The Chancellor opined regarding the lack of jurisdiction of all Mississippi courts:

For over a century Mississippi courts have repeatedly held that the separation of church and state deprives a civil court of jurisdiction over ecclesiastical matters. See e.g., Mallette v. Church of God Int'l, 789 So. 2d 120, 123 (Miss. App. 2001) ("A civil court is forbidden . . . from being involved in ecclesiastical disputes"); Sustar v. Williams, 263 So. 2d 537, 540 (Miss. 1972) (Mississippi "courts refuse to interpret ecclesiastical dogma and . . . [they] accept the highest ecclesiastical authority in each church as being the faith and practice of that church"); Grantham v. Humphries, 188 So. 2d 313, 314

2003), is misplaced as the federal court in Rayner had jurisdiction to hear the case and not the circuit court. The Court stated that “[u]ntil remanded, this case remains in the jurisdiction of the federal court.” Id. Because the Plaintiffs’ claims are jurisdictionally barred from being heard in all courts, the Chancellor properly dismissed the case with prejudice.

CONCLUSION

This Court has been reluctant to adjudicate matters of religious doctrine or theology. “It is not for us to decide as a Court as to whether the mode of baptism . . . should be immersion, sprinkling or pouring.” Linton v. Flowers, 94 So. 2d 615 (Miss. 1957). This Court has seen fit to allow churches to have their own separate jurisdiction so as to govern internal church matters. Carothers v. Moseley, 55 So. 881 (Miss. 1911). Recognition of proper trustees, pastors and deacons of a church have been left to be decided by the church and not the courts. Blue v. Jones, 230 So. 2d 569 (Miss. 1970).

A thorough review of the record reveals that the lower court’s decision was proper. Moreover, Appellants have failed to meet their burden of demonstrating that the lower court erred by dismissing Plaintiffs’ Complaint. Accordingly, the judgment of the lower court’s order dismissing Plaintiffs’ Complaint for lack of subject matter jurisdiction with prejudice should be affirmed. Moreover, the Chancery Court’s ruling refusing to strike the Affidavit of Bishop Rodi was likewise not erroneous. Finally, the Chancery Court decision to dismiss the cause of action without prejudice was proper and supported by Mississippi law.

(continued)

(Miss. 1939) (“The question involved is ecclesiastical and not one for the civil courts. The church authorities and such tribunals as they may set up for themselves are supreme in such matters.”). **Accordingly, Plaintiffs’ complaint is dismissed with prejudice . . .**

R. 1684-1685 (emphasis added).

RESPECTFULLY SUBMITTED, this the 23rd day of December, 2008.

**THE CATHOLIC DIOCESE OF BILOXI
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DENNIS CARVER, APPELLEES**

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CERTIFICATE OF SERVICE

I, Julie Jarrell Gresham, attorney of record for Appellees, do hereby certify that I have this day mailed, via U.S. Mail, postage prepaid, a true and correct copy of the foregoing to the following persons at the address indicated:

Judge Thomas Lee Zebert
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THIS, the 23rd day of December, 2008.



Julie Jarrell Gresham

CERTIFICATE OF FILING

I, Julie Jarrell Gresham, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day sent, by Federal Express, all costs prepaid, the original and three (3) copies of the Brief of Appellees, along with a copy of the same on CD in Word format for filing to:

Ms. Betty Sephton
Supreme Court Clerk
450 High Street
Jackson, MS 38201-1082

THIS, the 23rd day of December, 2008.



Julie Jarrell Gresham