

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013

The Protestant Episcopal
Church In The Diocese Of
South Carolina, et al.,

Respondents,

v.

The Episcopal Church, et al.

Appellants.

**THE EPISCOPAL CHURCH IN SOUTH CAROLINA'S
RETURN TO MOTION TO DISMISS APPEAL**

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SC Court of Appeals

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The Episcopal Church in South Carolina (“TECSC” or “Appellant”) submits this return to the Respondents motion to dismiss the appeal pursuant to Rule 240, SCACR.

I. INTRODUCTION

This case involves an identity dispute between one group of individuals that disaffiliated from The Episcopal Church in late 2012 (represented here as the Respondents) and another group that remained a part of The Episcopal Church (represented here as the Appellant). Since the split, both groups claim to be the one and only *continuing* Episcopal Diocese of South Carolina and the rightful owner and controller of its multiple ecclesiastical and corporate component parts, as well as its real and personal property, including its trademarks and other intellectual property. By way of declaratory and various other claims and counterclaims, the trial court has been asked to decide which group is in fact the continuing Episcopal Diocese of South Carolina and is entitled to its rights.

It is important to note that when the Respondents filed this lawsuit (against The Episcopal Church as the only defendant initially), they named themselves as the Diocese’s corporations. Soon thereafter, they obtained an *ex parte* TRO preventing any individual not included on a list that they compiled from using the names and marks of the Diocese, and served it upon the leaders of the Appellant. Solely to avoid being held in contempt of the TRO, the Appellant adopted the pseudo name TECSC and began operating as an unincorporated association, as opposed to operating under the names of the Diocese’s corporations. The Respondents then served TECSC as a second defendant to the lawsuit. It is only because the Respondents were first to the courthouse that they, instead of the Appellant, appear in this litigation under the name of the Diocese’s corporations. Their fortuitous designation in the caption, however, should not entitle them to any advantage on the merits of this identity dispute.

To investigate the relevant facts and legal positions taken by the *then-unified* Diocese leading up to the split in late 2012, the Appellant sought discovery of attorney-client communications from 2009 through late 2012 between the Diocese's Bishop and the Diocese's lawyer (who is now the Respondents' lead counsel in this litigation, despite indications of a conflict). In response, the Respondents objected and produced a privilege log referencing over a thousand documents. In short, the Appellant believes that any attorney-client privilege during that period belongs to it as the continuing Diocese, or is shared by it as a former joint client, or cannot be asserted against it as a beneficiary. The trial court, however, refused to compel such discovery, holding that the representation in question was limited to the Diocese's corporations, that the corporations disaffiliated from The Episcopal Church and brought this lawsuit, and that the Appellant did not exist until 2013 – and therefore that the Respondents, not the Appellant, are the continuing Diocese's corporations and have exclusive privilege rights to all the documents at issue.

The trial court's order warrants an immediate appeal under S.C. Code Ann. § 14-3-330 (Supp. 2012). Pursuant to subsection (1) of that statute, in light of the unique nature of this identity dispute, the substance and effect of the trial court's order goes beyond an ordinary denial of a discovery motion and directly involves the merits of the parties' claims and defenses. The order prematurely affirms the legal effect of the Respondents' alleged corporate acts and fails to recognize the Appellant's allegations and well-supported legal arguments that those purported corporate acts were taken by individuals without such authority and are null and void, as well as its allegation that it is the continuing Diocese that has existed since the eighteenth century. The order effectuates an award of several of the enumerated declaratory requests in the Complaint's prayer for relief, as well as an award of some of the Diocese's personal property that is at issue in

this case. The physical documents themselves are of course personal property of the Diocese, while the information contained in those documents is intellectual property of the Diocese.

Under subsection (2) of § 14-3-330, the order affects substantial rights, including the application of the attorney-client privilege, which has been recognized for its importance in this context by the South Carolina Supreme Court. Simply put, a party is fundamentally entitled to know what its own lawyer advised it to do. Without understanding its own prior legal positions, the Appellant cannot fully ascertain how it should defend itself in this litigation. Moreover, in this dispute where both sides claim to be the one and only continuing Episcopal Diocese of South Carolina after the split in late 2012, the Respondents' exclusive possession and access to the prior legal positions of the *then-unified* Diocese gives the Respondents' an unfair informational advantage. The fact that the same lawyer is now representing the Respondents in this litigation only compounds that unfairness.

The Respondents' motion to dismiss this appeal relies on two misguided arguments. First, without addressing the actual substance and effect of the order, the Respondents ask this Court to summarily conclude that the appeal should be dismissed because it derives from a discovery order. The case law they cite does not support such an indiscriminate rule and is otherwise not analogous to the unique nature of this identity dispute. Second, the Respondents argue that the Appellant waived its right to challenge the order because it did not ask the trial court to conduct a futile *in camera* review of more than a thousand documents to determine if each one qualifies as a privileged communication. The Appellant has never disputed that a privilege attaches to the communications; rather, as mentioned above, the Appellant's point is that the privilege belongs to it, or is shared by it as a former joint client, or cannot be asserted against it as a beneficiary.

II. PROCEDURAL BACKGROUND

On January 4, 2013, the Respondents – purporting to be the Diocese’s corporations and thirty-seven parish corporations (some of which joined the lawsuit later) – filed this action against The Episcopal Church.

On January 23, 2013, upon the Respondents’ *ex parte* motion, the trial court issued a TRO forbidding any person or entity not included on a list of persons submitted by the Respondents from using the names and marks of the Diocese.

On January 29, 2013, the case was designated as complex and assigned to the Honorable Diane S. Goodstein.

On January 31, 2013, The Episcopal Church consented to a temporary injunction maintaining the status quo of the relief provided in the trial court’s TRO, but reserving its right to later move to modify or dissolve the temporary injunction upon 14 days notice.

On March 5, 2013, the Respondents added the Appellant as a party defendant. A short time prior, solely to comply with the TRO and temporary injunction that had already been entered in the case before it became a party, the Appellant had adopted the pseudo name TECSC at its Diocesan Convention on January 26, 2013. However, as consistently asserted in its pleadings and other documents filed with the trial court, the Appellant is in fact the continuing Episcopal Diocese of South Carolina that has existed since the eighteenth century, as recognized by The Episcopal Church.

On March 27, 2013, the Appellant served Respondents with its first request for production of documents. To investigate the relevant facts and legal positions taken by the *then-unified* Diocese leading up to the split in late 2012, the Appellant sought discovery of attorney-

client communications during the period of 2009 to 2012 between the Diocese's Bishop and the Diocese's lawyer, as follows:

Produce all correspondence and other communications, including e-mails, prior to November 17, 2012, between Bishop Mark J. Lawrence and C. Alan Runyan, referring, relating to, concerning, or discussing the relationship between the Diocese of South Carolina and The Episcopal Church.

On August 15, 2013, Respondents objected to this request claiming attorney-client privilege and produced a privilege log referencing over a thousand documents.

On September 19, 2013, after conferring and being unable to resolve the issue, the Appellant filed a motion to compel, which the Court denied in an order entered by the clerk on November 18, 2013. On November 25, 2013, the Appellant filed a motion for reconsideration, which the Court denied orally at a hearing on December 30, 2013 and by written order entered on December 31, 2013.

Currently, discovery is not yet complete and depositions have not yet been taken. Judge Goodstein has scheduled the trial for July of 2014. Several other motions are also pending relating to vacating or modifying the preliminary injunction, joining proper, necessary, and indispensable parties, and other discovery issues.

III. FACTUAL BACKGROUND

The Episcopal Diocese of South Carolina is a complex organization. It is a geographical sub-unit of the hierarchical religious organization of The Episcopal Church consisting of 111 dioceses governed by a legislative body called the General Convention, comprising the House of Bishops, made up of active and retired bishops of the dioceses, and the House of Deputies, constituting lay and clergy representatives elected by each of the dioceses. See TECSC Ans. and Countercl. at ¶ 525. The Episcopal Church also has an Executive Council, consisting of elected

bishops, priests and lay persons, who, under the leadership of the Presiding Bishop, manage the fiscal and programmatic affairs of The Episcopal Church between meetings of the General Convention. See TECSC Ans. and Countercl. at ¶ 570. Internally, the Episcopal Diocese of South Carolina is composed of a subordinate legislative body known as the Diocesan Convention,¹ a Bishop,² a Standing Committee,³ and two corporations: a Board of Trustees formed in 1902, and a corporate entity formed in the Diocese's own name in 1973. See TECSC Ans. and Countercl. at ¶¶ 525-528, 571-575, 593-599. From the Diocese's founding in the eighteenth century leading up to the instant conflict, the entire organization of the Diocese, including all of its ecclesiastical and corporate component parts, has operated under the Constitution and Canons of The Episcopal Church and the Book of Common Prayer, as supplemented but not contravened by the Constitution and Canons of the Diocese, which are adopted by the Diocese's Convention. See TECSC Ans. and Countercl. at ¶ 525-526, 564-586.

During the period in question prior to the split (2009 to late 2012), the separate groups that now constitute the Respondents and the Appellant were united. See TECSC Ans. and

¹ The Convention is a legislative body consisting of clergy and laity elected by their congregations. The Convention adopts the Constitution and Canons of the Diocese. See TECSC Ans. and Countercl. at ¶¶ 573-574.

² The Bishop is endowed with authority pursuant to Article II of the Constitution of The Episcopal Church. See TECSC Ans. and Countercl. at ¶¶ 569, 575.

³ The Standing Committee is a creature of Article IV of the Constitution of The Episcopal Church, which provides that every diocese shall have a Standing Committee elected by its Convention that shall serve as the Bishop's Council of Advice and shall, if no Bishop is canonically authorized to act, serve as the Ecclesiastical Authority of the Diocese, and that the rights and duties of the Standing Committee may be prescribed in the Canons of the Diocese but may not contravene the Constitution and Canons of The Episcopal Church. See TECSC Ans. and Countercl. at ¶¶ 525-528, 571-575, 593-599. Examples of typical business of the Standing Committee would include approving the selection of clergy for ordination, confirming the election of bishops in other dioceses, and granting permission for the parishes to take actions affecting parish property.

Countercl. at ¶ 525-528, 564-634. Together, they made up the legislative body of the Convention, as well as the Standing Committee and the Trustees, whose members were elected by the Convention. See TECSC Ans. and Countercl. at ¶¶ 525-528, 571-575, 593-599. Mark Lawrence was their Bishop. See TECSC Ans. and Countercl. at ¶ 526. Bishop Lawrence had been elected by the Convention and ordained by The Episcopal Church in 2008 in accordance with the Constitution and Canons of The Episcopal Church and the Book of Common Prayer, which required him to take a personal vow and sign a declaration to adhere to the doctrine, discipline, and worship of The Episcopal Church and to protect the property of the Diocese. See TECSC Ans. and Countercl. at ¶¶ 526, 578-9, 586. Inherent in his authority upon his ordination as a Bishop of The Episcopal Church and of the Diocese of South Carolina, and without any further elections or approvals, Lawrence also became the presiding chair of the Convention, the President of the Trustees, and the “Bishop” of the Diocese’s corporation according to its 1973 charter. See TECSC Ans. and Countercl. at ¶¶ 575, 587. He did not, however, become an officer or member of the Standing Committee, although the Standing Committee came into his service in its role as the Bishop’s Council of Advice. See TECSC Ans. and Countercl. at ¶¶ 575, 587.

It is the Appellant’s position on the merits in this case that during the time Lawrence was Bishop of the *then-united* Diocese, he breached his fiduciary duties, abused and acted outside of his authority as Bishop, and engaged in various *ultra vires* and unlawful acts to prepare to leave The Episcopal Church and take away the Diocese’s corporations and the Diocese’s property. See TECSC Ans. and Countercl. at ¶¶ 506-523, 525-528, 564-634.

For example, Lawrence improperly amended the charter of the Diocese’s corporate entity in complete contradiction to its governing rules by removing its express purpose to operate under

the Constitution and Canons of The Episcopal Church. See TECSC Ans. and Countercl. at ¶¶ 600-610. . In place of those long standing governing rules, Lawrence and others drafted self-serving bylaws, making Lawrence the corporation’s “Chief Operating Officer,” irrespective of his authority as a Bishop of The Episcopal Church, and an *ex officio* member of the board of directors, and also making the contemporaneous members of the Standing Committee directors of the corporation. See TECSC Ans. and Countercl. at ¶¶ 600-610. Lawrence and others later told members of the Standing Committee that they were simultaneously the board of directors of the Diocese’s corporate entity and encouraged them to vote to withdraw both the Standing Committee and the corporation from The Episcopal Church. See TECSC Ans. and Countercl. at ¶¶ 600-610; Letter from Appellant’s Counsel to Judge Goodstein, dated October 22, 2013 (attaching Respondents’ Document Production Bates No. DSC-313-01482); TECSC’s Mot. Reconsid. at 2. Similarly, Lawrence and others wrongfully led the Diocesan Convention to amend the Diocese’s Constitution and Canons to remove their accession to the Constitution and Canons of The Episcopal Church in contravention to their own terms, which required accession from all its dioceses. See TECSC Ans. and Countercl. at ¶¶ 600-610.

Additionally, among other things, Lawrence and others, acting outside of their authority, executed quitclaim deeds from various combinations of the Diocese (as a whole), the Diocese’s corporate entity, and the Standing Committee to the parishes of the Diocese to frustrate the interests of Appellant and The Episcopal Church. See TECSC Ans. and Countercl. at ¶¶ 587-592. Using his influence over the Trustees and the Diocese’s corporate entity, by contract, Lawrence also attempted to shield his own personal interests in the Bishop’s salary and residence in anticipation of having his authority as Bishop removed by The Episcopal Church. See TECSC Ans. and Countercl. at ¶¶ 506-523, 525-528, 564-634.

During this time that the Diocese was united and Bishop Lawrence and others were carrying out the above *ultra vires* and unlawful acts, Alan Runyan served as a lawyer for the Diocese in various respects. He was officially engaged by the Standing Committee of the Diocese in 2010:

Minutes of the Standing Committee
The Diocese of South Carolina
February 9, 2010

. . . The Rev. Miller read a letter of agreement and recommended that the **Standing Committee** consider engage **Mr. Alan Runyan** as counsel. The Rev. Gaillard moved same, Mr. Drakeford seconded the motion, and it passed.

Respondents' Document Production Bates No. DSC-313-01475; TECSC's Mot. Reconsid. at 2;
Letter from Appellant's Counsel to Judge Goodstein, dated October 22, 2013.

Mr. Runyan's representation of the Standing Committee, which had always been an ecclesiastical body, purportedly extended to the Diocese's corporation in 2011 when the members of the Standing Committee began, for the first time, purporting to meet and act simultaneously as the Standing Committee and the Diocese's corporation:

Minutes of the Meeting
of the Diocese of South Carolina
Standing Committee

March 1, 2011

. . . Mr. Wade Logan, Chancellor, explained that he, the Bishop, Canon Lewis had the right to seat and voice, but no vote, at meetings of the Committee and also that the **members of the Standing Committee are simultaneously the members of the Board of Directors** for The Protestant Episcopal Church in the Diocese of South Carolina. Mr. Logan described some of the formalities required under corporate law. **Bishop Lawrence explained Mr. Logan's role and that Alan Runyan had been retained by the Standing Committee to give advice as its lawyer.**"

Respondents' Document Production Bates No. DSC-313-01482; TECSC's Mot. Reconsid. at 2; Letter from Appellant's Counsel to Judge Goodstein, dated October 22, 2013.

Mr. Runyan was also involved with the legislative body of the Convention and meetings of the Trustees, he provided legal advice to many of the parishes of the Diocese, and he regularly communicated with Bishop Lawrence and others outside of any of these forums starting in at least 2009. See Respondents' Privilege Log; Letter from Respondents' Counsel to Judge Goodstein, dated October 23, 2013 ("Mr. Runyan's representation is of the organization in its entirety."). Notably, Mr. Runyan also signed many of the quitclaim deeds mentioned above as a witness. In all, the Respondents' privilege log includes over one thousand documents. Id.

In late 2012, the Respondents contend that they withdrew and disaffiliated the Diocese from The Episcopal Church through separate acts of the Diocese's corporation, the Standing Committee, and the Convention. Compl. at ¶¶ 23-27. The Appellant contends, on the other hand, that those purported acts were *ultra vires* and did not disaffiliate the Diocese from The Episcopal Church; rather, the only effect of those acts was to personally disaffiliate themselves as individuals from The Episcopal Church and the Diocese of South Carolina. See TECSC Ans. and Countercl. at ¶¶ 506-523, 525-528, 564-634. The Appellant accordingly regards Mr. Runyan's purported representation of the Diocese (and any of its ecclesiastical or corporate component parts) since late 2012 only as legal representation of a personally disaffiliated group of individuals.

The Appellant further asserts that it, not the group represented here as the Respondents, is the one and only continuing Diocese of South Carolina; that its Convention, Bishop, and Standing Committee are the continuing ecclesiastical component parts of the Diocese; and that it is the rightful owner and controller of the Diocese's corporations. See TECSC Ans. and

Countercl. at ¶¶ 525-528, 564-634. Accordingly, the Appellant believes that Mr. Runyan served as its attorney in multiple respects prior to the split in late 2012 and that it is therefore entitled to any communications Mr. Runyan had with its Bishop during that period, Bishop Lawrence.

IV. ARGUMENT AND AUTHORITIES

A. The Trial Court’s Order Is Immediately Appealable Under S.C. Code Ann. § 14-3-330

“Whether an order issued prior to or during trial is immediately appealable is governed primarily by Section 14-3-330 of the South Carolina Code (1979 & Supp.2012).” EnerSys Delaware, Inc. v. Hopkins, 738 S.E.2d 478, 401 S.C. 615 (S.C. 2013). Section 14-3-330 provides appellate jurisdiction over:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action

S.C. Code Ann. § 14-3-330.

“Further, an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation.”

Hite v. Thomas & Howard Co., 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991), overruled on other grounds by Huntley v. Young, 319 S.C. 559, 462 S.E.2d 860 (1995). “This Court reviews

interlocutory orders when they contain other appealable issues.” Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002).

Without addressing the actual substance and effect of the order, the Respondents ask this Court to summarily conclude that the appeal should be dismissed because it derives from a discovery order. The case law the Respondents cite does not support such an indiscriminate rule and is otherwise not analogous to the unique nature of this identity dispute. See Respondents’ Motion to Dismiss at 2-3. Indeed, the first case that the Respondents quote in their motion explains that although discovery orders generally are not immediately appealable, it is only because they typically do not involve the merits of the action or affect a substantial right when analyzed under § 14-3-330. See Respondents’ Motion to Dismiss at 2-3 (quoting Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 SE.2d 112, 122, (2008) (“[T]he fact remains that discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right.”).

To be sure, however, there are numerous examples of interlocutory discovery orders that have been considered on immediate appeal. See e.g., Tobacoville USA, Inc. v. McMaster, 387 S.C. 287, 692 S.E.2d 526 (2010) (interlocutory appeal from a motion to compel documents where one party invoked the attorney-client privilege); Solis v. Food Employers Labor Relations Ass’n., 644 F.3d 221, 226 (4th Cir. 2011) (accepting an interlocutory appeal involving the applicability of the attorney-client privilege and holding that the determination is a question of law); Garner v. Wolfenbarger, 430 F.2d 1093, 1096-7 (5th Cir. 1970) (“The availability or unavailability of the testimony and documents sought may affect the disposition of the pending motions to dismiss. Review under § 1292(b) is available where decision on an issue would

affect the scope of the evidence in a complex case, even short of requiring complete dismissal.”); Fausek v. White, 965 F.2d 126 (6th Cir. 1992) (interlocutory appeal involving attorney-client privilege of a corporation against its former minority shareholders).

i. **Pursuant To Subsection (1) Of § 14-3-330, The Order Involves The Merits Of This Case And Is Therefore Immediately Appealable**

One of the Appellant’s core positions in this litigation is that the Diocese’s corporations did not, in fact, disaffiliate from The Episcopal Church or the Diocese; rather, only certain individuals did, personally, and those individuals had no authority to take the corporations or any of the Diocese’s property with them when they left, nor did they have the authority to bring this lawsuit in the name of the Diocese’s corporations, and all of their purported corporate acts attempting to do so are therefore *ultra vires* and null and void. See TECSC Ans. and Countercl. at ¶¶ 506-523, 525-528, 564-634.

Another of the Appellant’s primary allegations is that it, as opposed to the group of individuals represented here as the Respondents, is the continuing Diocese that has existed since the eighteenth century. See TECSC Ans. and Countercl. at ¶¶ 506-523, 525-528, 564-634. Again, the Appellant is only operating under the pseudo name TECSC as an unincorporated association – rather than as the Diocese’s corporations – to avoid being held in contempt of the temporary injunction that was put in place *ex parte* before it was made a party to this action.

The Appellant’s positions are supported by United States Supreme Court jurisprudence protecting the authority of hierarchical religious organizations to resolve disputes arising under religious law and polity. See TECSC’s Mem. In Sup. Of Motion To Compel at 2-3; TECSC’s Mot. Reconsid. at 4-5. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976); Dixon v. Edwards, 290 F.3d 699, 714 (4th Cir. 2002) (“It is axiomatic that the civil courts lack any authority to resolve disputes arising under religious law and polity, and they must

defer to the highest ecclesiastical tribunal within a hierarchical church applying its religious law.”); cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 704 (2012) (“[I]t is impermissible for the government to contradict a church’s determination of who can act as its ministers.”); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872) (“[W]henver the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them”). The Federal District Court of South Carolina found that The Episcopal Church is a hierarchical church in an Order remanding this case. Order, Civil Action No. 2:13-00893-CWH at 4 n.2 (D.S.C. June 10, 2103) (citing Watson, 80 U.S. (13 Wall.) at 729; Dixon, 290 F.3d at 716 (“The Episcopal Church is hierarchical.”); Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc., 699 S.E.2d 45, 48 (Ga. Ct. App. 2010) (same); Episcopal Diocese of Mass. v. DeVine, 797 N.E.2d 916, 921 (Mass. 2003) (same); Daniel v. Wray, 580 S.E.2d 711, 714 (N.C. Ct. App. 2003) (same); Protestant Episcopal Church in the Diocese of N.J. v. Graves, 417 A.2d 19, 21 (N.J. 1980) (same).

The Appellant’s positions are also supported under South Carolina civil law based on the Diocese’s corporate charter from 1973 and other organizational documents, the authority and fiduciary duties of the Bishop and others, and the application of South Carolina’s Nonprofit Corporation Act to the Respondents’ purported corporate acts, particularly S.C. Code Ann. § 33-31-180 (Supp. 2012), which provides as follows: “If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine controls to the extent required by the Constitution of the United States or the

Constitution of South Carolina, or both.” See TECSC’s Mem. In Sup. Of Motion To Compel at 3; TECSC’s Mot. Reconsid. at 5.

Instead of accepting the Appellant’s allegations as true at this early juncture in the litigation, the trial court has ventured into the merits – and has done so prematurely. In denying the Appellant’s motion to compel, the court determined that the Diocese’s corporations, in fact, disaffiliated from The Episcopal Church and brought this lawsuit, and that TECSC is a brand new organization formed in 2013 – thereby affirming Respondent’s allegations and failing to recognize the existence of Appellant’s allegations and legal arguments to the contrary:

In this action, the Defendant states that it is the client and as the client it has the right to documents subject to the privileges. However, the Plaintiffs are South Carolina Non-Profit Corporations and contend that the Defendant does not have standing to seek its documents subject to the privileges. In essence, the Defendant contends that even though it is now disaffiliated from the Plaintiffs, it still has a right, as having been a part of the Plaintiffs, to review the privileged documents. But the privilege belongs to the non-profit corporations, the Plaintiffs, and not to the persons who were formally associated with the Plaintiffs.

Order at 3.

At the hearing it was represented that the Defendant came into existence in the later part of January, 2013, as an unincorporated association.

Order at 2.

These determinations clearly involve the merits of the parties’ claims and defenses in this identity dispute and effectuate an award of several of the enumerated declaratory requests in the Complaint’s prayer for relief. The order also amounts to an award of some of the Diocese’s personal property that is at issue in this case. The physical documents themselves are of course personal property of the Diocese, while the information contained in those documents is intellectual property of the Diocese. In both personal property contexts, the trial court has made

a final ruling in the Respondents favor. See Complaint at ¶¶ 1-34, 472-505, and Prayer For Relief; TECSC Ans. and Countercl. at ¶¶ 506-523, 525-528, 564-634, and Prayer For Relief; Plaintiffs Diocese and Trustees Reply to TECSC’s Ans. and Countercl. at ¶¶ 1-27.

ii. **Pursuant To Subsection (2) Of § 14-3-330, The Order Affects Substantial Rights And Is Therefore Immediately Appealable.**

The attorney-client privilege is among the most fundamental and important legal rights protected in our judicial system. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”). Accordingly, the South Carolina Supreme Court has recognized the “importance of the attorney client privilege” in determining whether an interlocutory order involves a substantial right. Energys Delaware, Inc. v. Hopkins, 738 S.E.2d 478, 401 S.C. 615 (2013); Hagood v. Sommerville, 607 S.E.2d 707, 362 S.C. 191 (2005). Indeed, there are many examples of interlocutory appeals involving the attorney-client privilege. See e.g., Tobaccoville, 387 S.C. 287, 692 S.E.2d 526; Garner, 430 F.2d at 1096-7 (accepting appeal and holding that the availability of the attorney/client privilege is a “controlling question of law,” as opposed to a question of fact or matter of discretion of the trial court.”); Fausek, 965 F.2d 126.

This appeal involves the attorney-client privilege in a way that is certainly substantial. The Appellant is fundamentally entitled to know what its own lawyer advised it. Without understanding its own prior legal positions, the Appellant cannot fully ascertain how it should defend itself in this litigation. Moreover, in this identity dispute where both sides claim to be the one and only continuing Episcopal Diocese of South Carolina after the split in late 2012, the Respondents’ exclusive possession and access to the prior legal positions of the *then-unified* Diocese gives the Respondents’ an unfair informational advantage in this litigation, particularly given the nature of the declaratory claims at issue. Again, it is only because the Respondents

were the first to the courthouse that they, instead of the Appellant, appear in this litigation under the name of the Diocese's corporations. Surely, it would be incongruous to allow the Respondents to use their fortuitous designation in the caption to hide more than a thousand documents that are highly relevant to this identity dispute, and thereafter, declare them to be the winners of the identity dispute. See Garner, 430 F.2d at 1097 ("The privilege does not arise from the position of the corporation as a party but its status as a client."); The Glidden Co. v. Jandernoa, 173 F.R.D. 459, 474 (W.D. Mich. 1997) ("Because the attorney-client privilege belongs to the client, it would be perverse to allow the privilege to be asserted against the client."), citing Moore Business Forms, Inc. v. Cordant Holdings Corp., Nos. 13911, 14595, 1996 WL 307444, at * 6 (Del. Ch. June 4, 1996).

The fact that the same lawyer is now representing the Respondents in this litigation only compounds that unfairness.

Notably, even if this Court were to agree with the trial court that the Respondents *are* the Diocese's corporations (which as discussed above would be a premature decision on the merits), the application of the attorney client privilege would still be an immediately appealable issue for this Court based on the Appellant's arguments that it was a joint client of Mr. Runyan's and that it was a beneficiary of his legal services.

The trial court errantly disregarded those additional arguments, relying on a self-serving affidavit from Mr. Runyan that described his representation as limited and isolated to the Diocese's corporations.

Prior to the motion hearing, the Plaintiffs filed with this Court an Affidavit of C. Alan Runyan. According to Mr. Runyan's Affidavit, he is a South Carolina lawyer and is legal counsel for the Plaintiffs. He was first contacted by the Plaintiffs in October 2009 and then retained as counsel in November 2009 "...to render legal counsel and advice with respect to potential litigation with the

Defendant, The Episcopal Church.” He then states that since October 2009 to the present, he has functioned in his capacity as legal counsel in his communications with his clients, the Plaintiffs. Mr. Runyan then identifies, in his Affidavit, the directors/officers of the plaintiffs with whom he has communicated. Attached to his Affidavit is a privilege Log which Mr. Runyan states contains the documents which are protected by the attorney-client privilege and/or the work product privilege

. . . . Another argument asserted by the Defendant was that the Defendant was the client since it was the plaintiff and therefore it and the Plaintiffs share the privileges. The Defendant relied upon the analysis applicable to multi-party representation. I find this not to be applicable. Mr. Runyan’s Affidavit identifies his clients and his two clients are the Plaintiffs. He does not, in his Affidavit, state at any time that he represented the Defendant.

Order at 1-2, 4.

As described in the factual background, the Diocese is a complex organization with a multitude of ecclesiastical and corporate component parts. Contrary to Mr. Runyan’s affidavit, during the time the Diocese was unified prior to the split in late 2012, it is clear that Mr. Runyan’s representation was not limited or isolated to the Diocese’s corporations. As set forth above, he was officially engaged by the ecclesiastical Standing Committee of the Diocese in 2010 – over a year before the Standing Committee members purported to begin meeting simultaneously as the board of directors of the Diocese’s corporation in 2011. Mr. Runyan was also involved in meetings of the Diocese’s Convention and the Trustees; he provided legal advice to many of the parishes of the Diocese; and he regularly communicated with Bishop Lawrence outside of any of these forums starting at least in 2009. Respondents’ Privilege Log; Respondents’ Document Production Bates No. DSC-313-01475; DSC-313-01482; TECSC’s Mot. Reconsid. at 2; Letter from Appellant’s Counsel to Judge Goodstein, dated October 22, 2013; Letter from Respondents’ Counsel to Judge Goodstein, dated October 23, 2013 (“Mr. Runyan’s representation is of the organization in its entirety.”).

The overlapping nature of Mr. Runyan's representation across the ecclesiastical and corporate components of the whole organization of the unified Diocese prevents any one component or constituency of the Diocese from asserting the attorney client privilege against any other during that period. Thus, even if the Diocese's corporations are presumed, *arguendo*, to have lawfully disaffiliated themselves from The Episcopal Church, the Appellant would be entitled to share the privilege as a joint client in two contexts: first, as the continuing ecclesiastical component of the Diocese under the U.S. Supreme Court jurisprudence discussed above; and second, as a former part of the then-unified constituency of the Diocese. See Rule 1.13 of the South Carolina Rules of Professional Conduct ("Organization As Client"); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1174 (D.S.C. 1974) (discussing joint client and privilege); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357, 1364 (S.D.N.Y. 1983) ("the 'joint client' exception to the attorney-client privilege is well recognized"); Brown v. Green, 165 S.E.2d 534, 538, 3 N.C.App. 506, 512 (N.C.App. 1969) ("Therefore, as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged inter sese."); see also John P. Freeman, Understanding The Joint Client Exception To The Attorney-Client Privilege, South Carolina Lawyer, Vol. 1, No. 1, Pg. 32 (1989) ("In a nutshell, there can be no attorney-client privilege asserted in favor of one co-client and against another simultaneously represented co-client as to communications relating to subject matter common to the representation of both."); Tobaccoville USA, 387 S.C. at 293, 692 S.E.2d at 530 ("While the relationship the AG has with the NAAG is not the traditional attorney client relationship envisioned in Doster, we nonetheless find that these communications may be covered by the attorney client privilege.").

Irrespective of the Respondents' attempt to shield Mr. Runyan's communications in a corporate box, the Appellant was, at a minimum, a beneficiary of fiduciary duties that it alleges were undertaken, owed, and breached by Bishop Lawrence, as detailed in the factual background. The attorney-client privilege does not work unjustly to deny beneficiaries access to the work of their fiduciaries where such work was completed supposedly on their behalf and paid for by them. See Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 351-2 (4th Cir. 1992) (following Garner); Garner, 430 F.2d at 1095 ("This case presents the important question of the availability to a corporation of the privilege against disclosure of communications between it and its attorney, when access to the communications is sought by stockholders of the corporation in litigation brought by them against the corporation charging the corporation and its officers with acts injurious to their interests as stockholders."); Solis, 644 F.3d at 226-7; The Glidden Co., 173 F.R.D. at 478 ("the fiduciary's duties of candor outweigh his interests in attorney-client confidences"); Roberts v. Heim, 123 F.R.D. 614 (N.D. Cal. 1988) (limited partner class members held entitled to obtain discovery of files of law firm that represented promoter/general partner).

B. TECSC Has Not Waived Its Right To Appeal

The Respondents argue that the Appellant waived its right to challenge the order because it did not ask the trial court to conduct a futile *in camera* review of more than a thousand documents to determine if each one qualifies as a privileged communication. The Appellant has never disputed that a privilege attaches to the communications; rather, the Appellant's point is that the privilege belongs to it, or is shared by it as a former joint client, or cannot be asserted against it as a beneficiary.

Moreover, TECSC fully preserved its arguments for appeal in its motion for reconsideration, pursuant to under Rule 59, SCRC.P.

V. CONCLUSION

This appeal does not arise from a typical discovery order. Given the unique nature of this identity dispute, the findings in the order amount to determinations on the merits and an award of the declaratory relief and some of the personal property prayed for in the Complaint. The order also disregards the Appellant's substantial rights by putting it in a disadvantageous position where only the Respondents know what legal advice was given to the unified Diocese leading up to the split between the Appellant and the Respondents. In other words, the order preordains a winner in this identity dispute and prevents any chance for a fair fight.

WHEREFORE, respectfully, this Court should dismiss the Respondents' motion to dismiss the appeal.

(Signature page to follow)

Dated: January 24, 2014

Respectfully submitted,



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013

The Protestant Episcopal
Church In The Diocese Of
South Carolina, et al.,

Respondents,

v.


The Episcopal Church, et al.

Appellants.

PROOF OF SERVICE

I certify that I have served Appellant The Episcopal Church in South Carolina's Return to Motion to Dismiss Appeal and Rule 240, SCACR, Documents in Support of The Episcopal Church in South Carolina's Return to Motion to Dismiss on all counsel of record for Respondents by depositing a copy of it in the United States Mail, postage prepaid, on January 24, 2014.

January 24, 2014


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January 24, 2014

SC Court of Appeals

Via FedEx (tracking no.: 797722096859; 797722097156)

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, S.C. 29201

RE: The Protestant Episcopal Church in the Diocese of South Carolina, et al. v. The Episcopal Church, et al., Case No. 2013-CP-18-00013

Dear Ms. Kitchings:

Enclosed for filing is one (1) original and two (2) copies of the following: Appellant's Return to the Motion to Dismiss Appeal; Rule 240(e), SCACR, Documents in Support of Appellant's Return to the Motion to Dismiss Appeal; and the Proof of Service.

Please return one, file-stamped copy to our office. I have enclosed a stamped, self-addressed envelope for your convenience.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me at your convenience.

With best wishes, I am

Very truly yours,



Thomas S. Tisdale

TST:asb
w/Enclosures

cc: Counsel of Record for Respondents (via U.S. Mail)