

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
)
 The Protestant Episcopal Church In The)
 Diocese Of South Carolina; The Trustees of)
 The Protestant Episcopal Church in South)
 Carolina, a South Carolina Corporate Body;)
 et al.,)
)
 PLAINTIFFS,)
)
 v.)
)
 The Episcopal Church (a/k/a, The)
 Protestant Episcopal Church in the)
 United States of America); The Episcopal)
 Church in South Carolina,)
)
 DEFENDANTS.)
)

IN THE COURT OF COMMON PLEAS
 FOR THE FIRST JUDICIAL CIRCUIT

Case No.: 2013-CP-18-00013

**TECSC'S MOTION
 FOR RECONSIDERATION**

CERTIFIED COPY
 2013 NOV 25 AM 9:18
 Clerk of Court
 DORCHESTER COUNTY

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Defendant The Episcopal Church in South Carolina ("TECSC"), hereby moves the Honorable Diane S. Goodstein of the First Judicial Circuit in Dorchester County, pursuant to Rule 59, SCRCP, to reconsider the Order entered by the Clerk on October 18, 2013, denying Defendants' motion to compel dated September 19, 2013. The Order is attached hereto.

A. The Court Erred By Relying On The Self-Serving Affidavit Of Alan Runyan And Failing To Consider The Contradictory Documentary Evidence Submitted By TECSC From Plaintiffs' Discovery Production

The Court erred in relying on the self-serving affidavit of Alan Runyan and concluding that Mr. Runyan's legal representation was limited to the Diocese's corporate entity. The Court should have considered the evidence submitted by TECSC from Plaintiffs' discovery production that directly contradicts that conclusion. In particular, the Minutes of the Standing Committee of

the Diocese of South Carolina explicitly provide that Mr. Runyan was engaged by and represented the "Standing Committee" of the Diocese, both as an ecclesiastical body and, purportedly, as the Board of Directors of the corporation, on both ecclesiastical and corporate issues.

2/9/2010 - "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." DSC-313-01475.

7/16/2010 - "**Mr. Runyan** and Mr. Logan reviewed recent legal and **canonical issues**." DSC-313-01476.

3/1/2011 - "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.**" DSC-313-01482.

5/1/2012 - "Alan Runyan informed the SC [Standing Committee] that the blue book issued to **General Convention 2012** deputies contains resolutions pertaining to changing disciplinary **canons of the Episcopal Church.**" DSC-313-01509.

The Standing Committee of the Diocese is an ecclesiastical body that came into existence long before the Diocese's corporate entity was formed in 1973. It 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.

For the entire period in question, the members of the Standing Committee were elected by and served the ecclesiastical Diocese, represented in this litigation as TECSC.

As the above Minutes demonstrate, Mr. Runyan was engaged to represent the "Standing Committee" in early 2010. It was not until over a year later in 2011 that the members of the Standing Committee considered themselves to *simultaneously* be the Board of Directors of the Diocese's corporate entity and the ecclesiastical Standing Committee. From that point forward, the Standing Committee meetings purported to be both the ecclesiastical and corporate meetings simultaneously.

In light of these Minutes, it is notable that the words "Standing Committee" do not appear anywhere in Mr. Runyan's affidavit describing his representation. Not only did the Standing Committee clearly believe Mr. Runyan was its lawyer, Mr. Runyan attended most, if not all, of the Standing Committee meetings during the period in question.

In sum, this evidence clearly demonstrates that Mr. Runyan's representation was not restricted to the Diocese's corporate entity; rather, he jointly represented the Standing Committee as a part of the ecclesiastical organization of the Diocese. As such, based on the law pertaining to joint representation and organizational clients, set forth in further detail below, no communications from or to Mr. Runyan are privileged as to TECSC during the period in question.

B. The Court Erred In Finding That TECSC Came Into Existence In 2013

The Order states: "At the hearing it was represented to the Court that the Defendant came into existence in the later part of January, 2013 as an unincorporate association." This errant

finding is based, again, on the self-serving statements of Plaintiffs' counsel. TECSC is the reorganized continuing Diocese of South Carolina that is a sub-unit of the hierarchical organization of The Episcopal Church. TECSC's existence dates back into the Eighteenth Century, which was long before the formation of the Diocese's corporations that have been named as Plaintiffs in this action *ultra vires*. The Diocese's corporate entity was formed in 1973. The Trustees were formed in 1902.

C. The Court Erred In Mischaracterizing And Failing To Consider TECSC's Meritorious Arguments

The Order states: "The Defendant TECSC's contention is that it is the client and that, as the client, it is entitled to the attorney-client information that existed before the disaffiliation between Plaintiffs and the Defendant TEC." This characterization does not adequately represent TECSC's arguments, which should be reconsidered by the Court, as detailed below.

1. Any Attorney-Client Privilege As To The Diocese's Documents Prior To The Plaintiffs' Purported Withdrawal Belongs To TECSC As The Continuing Diocese And Cannot Be Asserted By Plaintiffs

Any attorney-client privilege as to the Diocese's documents prior to the Plaintiffs' purported withdrawal from TEC belongs to the *continuing* Diocese. The *continuing* Diocese is in fact TECSC because it is recognized as such by TEC, the highest ecclesiastical authority in a hierarchical¹ religious organization protected by the First Amendment from the intrusion of civil courts on such matters. See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25

¹ The Honorable Judge Houck found that The Episcopal Church is a hierarchical church in his Order remanding this case. Order, Civil Action No. 2:13-00893-CWH at 4 n.2 (D.S.C. June 10, 2103). See also Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872); Dixon v. Edwards, 290 F.3d 699, 716 (4th Cir. 2002) ("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).

(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”).

Assuming *arguendo* that the First Amendment should be set aside in favor of neutral principles of law, the controlling neutral principle of law according to South Carolina’s Nonprofit Corporation Act, S.C. Code Ann. § 33-31-180 (Supp. 2012) 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.” In other words, *the* neutral principle of South Carolina nonprofit corporation law with respect to this dispute over the Diocese’s corporate entities is that the ecclesiastical polity of Diocese and The Episcopal Church is controlling on corporate issues.

Accordingly, TECSC – rather than the Plaintiffs – is entitled to any privilege that may exist as to the documents at issue, both from ecclesiastical and corporate angles.

If it were assumed, however, *arguendo*, that neither the First Amendment nor S.C. Code Ann. § 33-31-180 apply, then the document trail leading up to Plaintiffs’ purported withdrawal would become indispensable to determining which party is the continuing Diocese in the first

place. TECSC alleges that such documents will establish that Bishop Lawrence, who was the undisputed Bishop of the Diocese prior to November 17, 2012, had knowledge that he could not lawfully cause the Diocese to withdraw from TEC and nevertheless conspired with his followers, most notably members of the Standing Committee, to attempt to do so – for example, according to TECSC’s pleading, by secretly and unlawfully issuing quitclaim deeds from the Diocese to the parishes, improperly amending the Diocese’s Constitution and Canons regarding its duties and allegiance to TEC, and deceitfully changing the purpose of the Diocese’s nonprofit corporate entities. To have a chance to prove those allegations, TECSC must be given access to Bishop Lawrence’s correspondence with Mr. Runyan, who was representing the Diocese at the time.

In sum, to set aside TECSC’s constitutional First Amendment rights, ignore the neutral principle of law of S.C. Code Ann. § 33-31-180, and then allow the Plaintiffs to hide behind the privilege belonging only to the continuing Diocese at this stage in the litigation would be tantamount to applying an irrefutable presumption that the Plaintiff indeed is the continuing Diocese. The Defendants would effectively be denied an opportunity to defend themselves in this case. Instructively, faced with this same paradoxical issue in another case involving church litigation, a state court in Alabama compelled production of such documents over an objection of attorney client privilege. The Protestant Episcopal Church In The Diocese Of The Central Gulf Coast, Inc. v. The Minister, Church Wardens and Vestry of Christ Church, CV-003235, Order dated April 26, 2001 (Circuit Court Mobile County, Alabama).

2. Prior To The Plaintiffs’ Purported Withdrawal From The Episcopal Church, Mr. Runyan Represented The Diocese

Prior to Plaintiffs’ alleged withdrawal from The Episcopal Church, Mr. Runyan represented the then-unified Diocese, which included the constituency that is now reorganized as TECSC, as well as the constituency now holding themselves out as the Plaintiffs. In other

words, Mr. Runyan jointly represented the alleged diocesan parties on opposing sides of this litigation.

The law is clear that jointly represented parties cannot assert privilege against each other as to the period of joint representation. See Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1174 (D.S.C. 1974); 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.”).

As discussed above, the Court should not accept Mr. Runyan’s contention that he only represented the Diocese’s corporate entities separate and apart from the Diocese as a whole ecclesiastical organization – they are inextricably entwined. As is clear from Plaintiffs’ own pleading, the whole organization of the Diocese includes the diocesan corporation, along with the corporation of the Trustees, and the Convention of the Diocese (an ecclesiastical body, not just an event), which includes the ecclesiastical Bishop and ecclesiastical representatives from all the Diocese’s parishes. Plaintiffs’ Second Amended Complaint at ¶ 5, 20-22, 29-34, etc.

Rule 1.13 of the South Carolina Rules of Professional Conduct compels the conclusion that Mr. Runyan’s client was the organization of the whole Diocese and not just Bishop

Lawrence or his faction or the corporation they controlled, thereby destroying any privilege against TECSC.

Rule 1.13(a) begins by reciting the black letter rule: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

Rule 1.13(f) further provides: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

Rule 1.13(g) provides: "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

Comment 10 to Rule 1.13 provides: "Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged."

Applying these provisions of Rule 1.13, the Court should have concluded that: Mr. Runyan represented the whole Diocese acting through its duly authorized constituent Bishop Lawrence; Mr. Runyan had a duty to explain to Bishop Lawrence that he represented the whole organization of the Diocese and not him or his faction or the corporation they controlled individually; if Mr. Runyan desired to represent Bishop Lawrence or his faction or the corporation, individually, he would have had to obtain the consent of the whole organization of

the Diocese from others than Bishop Lawrence or his faction; and ultimately, therefore, that communications between Mr. Runyan and Bishop Lawrence are not privileged as to TECSC.

3. The Attorney-Client Privilege Cannot Be Asserted Against TECSC And TEC As Beneficiaries Of Bishop Lawrence's Fiduciary Duties Prior To The Plaintiffs' Purported Withdrawal

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) (“We believe the Garner analysis provides a sound basis for balancing a corporation’s need to communicate confidentially with its attorneys against the shareholders’ interests as beneficiaries of a fiduciary relationship.”); (citing Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970) (“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.”)); 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).

Importantly, the Garner decision specifically notes that advice relating to corporate action, given before that action was taken, is not necessarily protected by the attorney client privilege. Id.

The Garner case and its progeny are on point here.

Prior to November 17, 2012, Bishop Lawrence indisputably represented, acted on behalf of, and owed a fiduciary duty and a duty of loyalty to the Diocese (including the constituents that

have reorganized as TECSC) and its corporate entities, and the parishes and parishioners within the Diocese, as well as TEC.

Ecclesiastical authority for those fiduciary duties included, for example: The Book of Common Prayer, "The Ordination of a Bishop," p. 513 (2007) ("...I do solemnly engage to conform to the doctrine, discipline, and worship of The Episcopal Church."); *id.* at 518 ("... Will you guard the faith, unity and discipline of the Church? Answer: I will for the love of God."); Constitution & Canons of The Episcopal Church, Title IV Canon 3 Sec. 1(a) ("A Member of the Clergy shall be subject to proceedings under this Title for knowingly violating or attempting to violate, directly, or through the acts of another person, the Constitution or Canons of the Church of any Diocese."); Title IV Canon 4 Sec. 1 ("In exercising his or her ministry, a Member of the Clergy shall: . . . (b) conform to the Rubrics of the Book of Common Prayer . . . (c) abide by the promises and vows made when ordained . . . (e) safeguard the property and funds of the Church and Community . . . (g) exercise his or her ministry in accordance with applicable provisions of the Constitution and Canons of the Church and of the Diocese, ecclesiastical licensure or commission and Community rule or bylaws"); Title I Canon 7, Sec. 4 ("All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which said parish, Mission, or Congregation is located."); *Serbian*, 426 U.S. at 724-25; *Dixon*, 290 F.3d at 714; *cf. Hosanna-Tabor*, 132 S. Ct. at 704; *Watson*, 80 U.S. at 727.

South Carolina corporate law also imposed such fiduciary duties on Bishop Lawrence, which as mentioned above, in conjunction with the neutral principle of law as to religious corporations, should have been carried out with deference to The Episcopal Church's ecclesiastical polity in accordance with the First Amendment. *See e.g.*, South Carolina

Nonprofit Corporation Act, S.C. Code Ann. § 33-31-830 (“A director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation. (b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: . . . (4) in the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and who the director believes is reliable and competent in the matters presented. (c) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.”); S.C. Code Ann. § 33-31-842 (same as above for officers); S.C. Code Ann. § 33-31-180 (“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.”) ; Serbian, 426 U.S. at 724-25; Dixon, 290 F.3d at 714; cf. Hosanna-Tabor, 132 S. Ct. at 704; Watson, 80 U.S. at 727.

As discussed above, TECSC alleges that Bishop Lawrence breached his duties leading up to the purported withdrawal of the Diocese from TEC, for example, as alleged by TECSC, by secretly and unlawfully issuing quitclaim deeds from the Diocese to the parishes, improperly amending the Diocese’s Canons regarding its duties and allegiance to TEC, deceitfully changing the purpose of the Diocese’s nonprofit corporate entities, and ultimately wrongfully causing the Diocese to attempt to withdraw from The Episcopal Church.


In sum, TECSC's allegations that Bishop Lawrence breached his fiduciary duties to TECSC and TEC destroy any assertion of privilege against TECSC and TEC as to any communications Bishop Lawrence had at that time.

WHEREFORE, Defendant TECSC respectfully requests that the Court reconsider its Order and grant its motion compel the Plaintiffs to produce the documents in question.

(Signature page to follow)

Dated: 11/25/ 2013

Respectfully submitted,



Thomas S. Tisdale (S.C. Bar #: 805584)
Jason S. Smith (S.C. Bar #: 80700)
HELLMAN YATES & TISDALE, PA
King & Queen Building
145 King Street, Suite 102
Charleston, South Carolina 29401
Telephone: (843) 266-9099
Facsimile: (843) 266-9188
tst@hellmanyates.com
js@hellmanyates.com

*Counsel for Defendant The Episcopal Church in
South Carolina*