

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2011-CP-40-01320

Delories Jenkins, Respondent,

v.

Refuge Temple Church of God in Christ, Inc., and Wayne Penn, Sr., Daniel Ward, Jr., James A. Tucker and Eronda Jackson, Individually and as Members of the Board of Directors of Refuge Temple Church Of God In Christ, Inc., Defendants,

of whom Refuge Temple Church of God in Christ, Inc., is the Appellant.

FINAL REPLY OF APPELLANT

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Appellant Refuge Temple Church Of God In Christ, Inc. (hereinafter "Refuge Temple") submits the following Reply Brief in support of its appeal:

I. Objection to factual representations in Respondent's Initial Brief

As a preliminary matter, Refuge Temple objects to Respondent's assertions that Pastor Jenkins was paid pursuant to the "Pastor's Employment and Retirement Agreement (hereinafter "the Agreement") until his death, and that support payments were made to Respondent after Pastor Jenkins' death pursuant to the Agreement. (Respt's Br., p. 2.) The question of whether these payments were made pursuant to the Agreement has been disputed at every stage of this proceeding. (R. p. 21; ¶¶ 7-9). Respondent admitted at trial that the amount she received after Pastor Jenkins' death was not the full amount of Pastor Jenkins' salary. (R. p. 43). Refuge Temple pointed out that provisions of the Agreement other than the one at issue were never enforced. (R. p. 189; Appellant's Br., p. 24.) Additionally, Refuge Temple presented unrebutted testimony that no one other than the signatories to the Agreement and Respondent, former Pastor Jenkins' wife, had seen the Agreement until it was produced in the context of this litigation. (R. p. 59).

II. The ministerial exception is not confined to judicial review of statutes

Respondent's argument in part I.A. of her brief that the ministerial exception only applies to judicial review of statutes lacks merit. Neither party to this case is arguing that a statute must be struck down as unconstitutional. Instead, Refuge Temple argued that civil courts lack jurisdiction to interfere with employment matters between religious organizations and their ministers. In Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 132 S. Ct. 694 (2012), the Supreme Court held that the Establishment and Free Exercise Clauses of the United States

Constitution prevent the Government from interfering with decisions by religious groups regarding their ministers. Id. at 703. The court held that even civil rights statutes such as Title VII of the Civil Rights Act of 1964 must yield when employment decisions between a religious organization and its minister are involved. Id. at 705.

As Respondent acknowledges, her claim is not based upon a civil rights statute, but only upon an alleged contractual right. Thus, Hosanna-Tabor applies with even greater force in this case. The Fourth Circuit has applied the ministerial exception in the context of a wrongful termination claim based upon state-law contract and tort principles. Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 330 (4th Cir. 1997).

Neither party to this case is seeking judicial review of a statute. The issue is whether civil courts have jurisdiction to interfere in this ecclesiastical matter. Therefore, no statutory basis is necessary.

III. The Agreement was not properly executed and approved under the ecclesiastical rules of the denomination.

Respondent admitted that Refuge Temple is part of a hierarchical church organization—the Church Of God In Christ. (Respt's Br., p. 5.) Therefore, the rules of the denomination are controlling. Seldon v. Singletary, 284 S.C. 148, 149-50, 326 S.E.2d 147, 148 (1985). This case cannot be decided upon neutral principles of contract law because the procedure by which the Agreement was purportedly executed and approved was not authorized by the governing rules of the denomination.

Refuge Temple argued that two of the three board members who signed the Agreement, Connie Ward and Daniel Ward, Jr., were not properly elected. Respondent's argument that the bylaws removed this transaction from the authority of the denomination mischaracterizes the applicable documents.

As Respondent points out, the Official Manual for the denomination provides that in cases where the law requires a special mode of election of the Church Trustees; that mode must be followed. (R. p. 163). “The law” refers to civil law, not the church bylaws.

South Carolina law does not impose a special mode of election. The South Carolina Nonprofit Corporations Act merely provides that for corporations not having voting members, directors must be elected, appointed, or designated as provided in the articles or bylaws. S.C. Code Ann. § 33-31-804(b) (2006). This is not a prescription for a special mode of election, but a general requirement that the procedure must follow the governing corporate documents. But even if this requirement is viewed as a “special mode of election,” any doubt is removed by Section 33-31-180 of the South Carolina Code, which expressly provides that in the event of conflict between the Nonprofit Corporation Act and a religious doctrine governing the affairs of a religious corporation, the religious doctrine controls.

Therefore, the law does not require a special mode of election of church trustees. The Constitution of the Church Of God In Christ provides that when the law does not require a special mode of election, trustees “shall be elected by a majority of the members of the congregation, present and voting, in a regular or special business meeting of the church.” (R. p. 164). This mandate is repeated in the church laws and doctrines portion of the Official Manual. (R. pp. 166–167). The denomination requires that trustees be elected, rather than appointed by the pastor, and this requirement supersedes contrary provisions in the bylaws. (R. pp. 163, 166). The board members who signed and approved the Agreement were not elected as required by the ecclesiastical mandates of the denomination. Therefore, the trial court erred in finding a valid and enforceable contract.

IV. Respondent failed to demonstrate that the conflict of interest transaction at issue was inherently fair to Refuge Temple.

The Agreement was executed and approved by three individuals—Pastor Jenkins, Connie Bowman, and Daniel Ward, Jr. Respondent admits that Pastor Jenkins' vote was tainted with conflict of interest. (Respt's Br., p. 8.) This conflict can be overcome only by proof that the Agreement was fair to Refuge Temple. Straight v. Goss, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009). Respondent failed to overcome this burden. Moreover, the evidence indicates that neither Bowman nor Ward were in a position to impartially represent the congregation in this matter.

A conflict of interest transaction is voidable if the transaction was fair to the corporation at the time it was entered into. S.C. Code Ann. § 33-31-831(a) (2006). Respondent has the burden of proving the fairness of the transaction to Refuge Temple. In re Southern Textile Knitters, 65 Fed. App'x 426, 433-34 (4th Cir. 2003). The test is whether, under all the circumstances, the transaction carries the earmarks of an arm's length transaction. Id., Official Comment 2.a. (citing Pepper v. Litton, 308 U.S. 295, 306 (1939)). Among the things a court should consider are "whether there was an attempt to deal openly and fairly with the corporation and to act in good faith in furthering the corporation's best interests." Id., Official Comment 6.

No attempt was made to deal openly and fairly with the congregation of Refuge Temple in this case. The two board members who signed the Agreement were Pastor Jenkins' secretary and a relatively new church member. (R. pp. 69–70, 78–79). Ward was appointed by Pastor Jenkins without any input from the congregation. (R. p. 79). Bowman, as Pastor Jenkins' secretary, had an economic interest in keeping her job. The congregation was never notified of the meeting during which the Agreement was adopted, nor was it

ever presented to the congregation for ratification. (R. pp. 71–72). Fiscal decisions were normally presented to the congregation. (R. p. 83). Moreover, the Agreement was removed from the church along with all other church records after Pastor Jenkins’ death. (R. p. 59). None of this testimony was rebutted at trial.

Respondent’s relies solely upon her testimony that she provided assistance to her husband by attending certain meetings and visiting the sick when he was unable to do so. (R. pp. 34–35). This testimony cannot sustain Respondent’s burden of proving that the Agreement was fair to Refuge Temple when it was adopted.

Directors of a corporation have a fiduciary duty to act in good faith and in the best interests of the corporation. S.C. Code Ann. § 33-31-830(a) (2006). This relationship is in the nature of an express trust, similar to the duties of an agent to his principal. Gilbert v. McLeod Infirmary, 219 S.C. 174, 185, 64 S.E.2d 524, 528 (1951). When directors cause the corporation to enter into a transaction with themselves as individuals, these transactions “are subject to the closest scrutiny, under the most searching light of truth, and must be characterized by absolute good faith.” Id. at 187, 64 S.E.2d at 529. Such transactions are voidable unless approved by disinterested directors, who themselves constitute a quorum, by unanimous vote. Id. at 188, 64 S.E.2d at 530. A director who exercises a controlling influence over co-directors cannot defend a conflict of interest transaction on the ground that the action was approved by those co-directors. Id. at 188-89, 64 S.E.2d at 530.

In Gilbert, the court held that the sale of corporate property to a director could not be sustained. Id. at 191, 64 S.E.2d at 531. The court noted that the director who sought to purchase the property used his influence to overshadow his fellow directors even though he did not actually vote. Id. at 189, 64 S.E.2d at 530. His attorney, who was also a board

member, actively campaigned in favor of the sale and voted to approve the transaction. The court concluded that “It cannot be fairly said under these circumstances that the challenged sale was the result of the untrammelled reason and judgment of the Board of Trustees in behalf of the corporation, and it was entitled to no less than that.” Id.

The facts of this case are similar to those in Gilbert. Respondent simply cannot demonstrate that any sincere effort was made to enter into an arms-length, good faith agreement with Refuge Temple in this matter. The trial court erred in finding that Bowman and Ward constituted a quorum of the board because the evidence indicates that they were subject to the influence of Pastor Jenkins. There is nothing to indicate that they could adequately represent the congregation for such a momentous decision.

Even assuming that Bowman and Ward were properly elected, the fact remains that the congregation was never provided proper notice. The Agreement was approved at a special meeting in which the notice and call requirements were waived. (R. p. 91). However, the denomination requires that special meetings must be announced on a Sunday preceding and the notice must state the purpose of the call and the time and place of the meeting. (R. p. 57; R. pp. 164, 166–167). Refuge Temple presented testimony at trial that the congregation was never notified of this meeting. (R pp. 44–45). This procedure does not carry the earmarks of an arms-length transaction, and the transaction therefore cannot stand.

V. The *ultra vires* doctrine is not applicable in this case.

Respondent’s argument that Refuge Temple has raised an improper *ultra vires* defense also misses the mark. The law regarding the *ultra vires* defense has been codified in the Nonprofit Corporation Act. See S.C. Code Ann. § 33-31-304 (2006). That section

provides that the validity of a corporate action may not be challenged on the ground that the corporation lacked power to act. S.C. Code Ann. § 33-31-304(a).

Refuge Temple has not argued that it lacked power to act. The scope of Section 33-31-304 is narrow, and this statute does not bar claims by the corporation seeking to avoid liability on the ground that the person acting for the corporation lacked agency authority to act for the corporation. *Id.*, Official Comment, ¶ 5. Refuge Temple's argument in this case—that the signatories of the Agreement lacked appropriate agency authority to represent the congregation under ecclesiastical requirements and/or South Carolina law—falls within this exception. Moreover, Respondent, as Pastor Jenkins' spouse, is not an innocent third party.

VI. Refuge Temple did not waive its right to challenge the validity of the Agreement.

Respondent cannot demonstrate that Refuge Temple knew of the terms of the agreement and slept on its rights. Refuge Temple's current pastor testified at trial that he was aware of "bits and pieces tied into the old bylaws." (R. p. 59). However, he did not see the actual Agreement until it was produced in this litigation. (R. p. 59). There is no evidence that anyone other than the signatories and Respondent knew of the provision of the Agreement at issue in this case until this action was filed. The defense that Refuge Temple's new pastor and the congregation were not aware of the Agreement was asserted as a defense in Refuge Temple's Answer in response to the first instance in which the Agreement was raised by Respondent—her Complaint.

Furthermore, the correspondence from Mozzini and Associates does not establish a "voluntary and intentional relinquishment or abandonment of a known right." Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470-71 (2007). The reference to legitimacy

related to classification of the payments for tax purposes. (R. pp. 152–153). The letter states that “If the Church wishes to bless [Respondent] for all of her and her late husband’s work over the years for the Church, we should consider giving her a retirement package.” (R. pp. 152–153). This is consistent with Pastor Penn’s testimony that it was church custom to provide for the surviving spouse of a former pastor for a period of several years. (R. pp. 58–60). It is telling that this letter makes no mention of the Agreement.

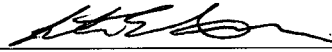
There is no evidence in this case to support the trial court’s finding that Refuge Temple waived its objections to the Agreement. The burden of proving waiver is on Respondent, and this Court has warned that caution should be exercised in finding an implied waiver. NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). Thus, the trial court’s finding should be reversed.

CONCLUSION

The trial court’s ruling was improper because it interfered in an ecclesiastical dispute between a church and its pastor. But even if this civil courts have jurisdiction, the evidence indicates that appropriate procedures were not followed to bind Refuge Temple to this contract. The board members who approved the Agreement lacked proper authority under governing ecclesiastical law. Respondent failed to demonstrate the fairness of this conflict of interest transaction to Refuge Temple. The existence of the Agreement was not disclosed to Refuge Temple until years after the fact. For the reasons set forth above, Respondent’s arguments cannot sustain the erroneous ruling of the trial court. Refuge Temple respectfully requests that this Court reverse the trial court’s Order and remand with instructions to direct that the trial court dismiss all claims against Refuge Temple.

Respectfully submitted,

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CERTIFICATE

I, Peter E. Farr, Esquire, attorney for the Appellant, certify that the Final Reply Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Appellate Court Rules.

January 5, 2017.

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