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**May 05 2022**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2020-000986

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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; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Church Of The Cross, Inc. and Church Of The Cross Declaration Of Trust; Church Of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Bartholomew's Episcopal Church; St. David's Church; St. James; Church, James Island, S.C.; St. Paul's Episcopal Church of Bennettsville, Inc.; The Church Of St. Luke and St Paul, Radcliffeboro; The Church Of Our Saviour Of The Diocese of South Carolina; The Church Of The Epiphany (Episcopal); The Church Of The Good Shepherd, Charleston, SC; The Church Of The Holy Cross; The Church Of The Resurrection, Surfside; The Protestant Episcopal Church, Of The Parish Of Saint Philip, In Charleston, In The State Of South Carolina; The Protestant Episcopal Church, The Parish Of Saint Michael, In Charleston, In The State Of South Carolina and St. Michael's Church Declaration Of Trust; The Vestry And Church Wardens Of The Episcopal Church Of The Parish Of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. Matthew; The Vestry and Wardens Of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens Of The Episcopal Church Of The Parish Of Christ Church; Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. John's, Charleston County, The Vestry And Church Wardens Of St. Jude's Church Of Walterboro The Vestries And Churchwardens Of The Parish Of St. Andrew,

Respondents,

v.

The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of America); The Episcopal Church in South Carolina,

Appellants.

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**PETITION FOR REHEARING OF THE VESTRY AND CHURCH WARDENS  
OF ST. JUDE’S CHURCH OF WALTERBORO**

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, The Vestry and Church Wardens of St. Jude’s Church of Walterboro (“St. Jude’s”), through its undersigned counsel, respectfully petitions this Court for a rehearing based on facts, points, and arguments overlooked or misapprehended as set forth herein.

For the first time, this Court has articulated the basis and timing of parish trust creation in its parish by parish review determining as a matter of law if, when and how trusts were created by 14 plaintiffs, among them St. Jude’s. As a matter of law, the trust found by this Court to have been created by the amendments to the 1990 and 2006 Constitution lacked the present intent since those documents were not amended to include phrases such as “adopt” or “accede to” in 1990 or 2006. Those phrases were part of the Constitution as early as 1975, if not earlier, and were not amended to add those terms after the 1979 adoption of the National Church’s Dennis canon or the 1987 adoption of the Diocesan canon.

**I. There Was No Confluence of a Declaration of Trust and Present Intent to Create a Trust in Any of St. Jude’s Constitutions, Including the amendments to the 1990 Canons and 2006 Constitutions.**

“we must evaluate the Parishes’ actions under South Carolina trust law, including the requirements that the owner take *present action* coupled with *the present intent* to create a trust for the beneficiary.” ^ (emphasis added). Opinion at \*6.

This Court noted that “[n]ine Parishes *amended their constitutions* or bylaws *after the National Church adopted the Dennis Canon in 1979 and after the Lower Diocese adopted the Diocesan Canon in 1987 to include phrases* such as we ‘adopt’ or ‘accede to’ the Canons of the National Church and the Lower Diocese.” Opinion at \*9 (emphasis added). To be clear, St. Jude’s

did not amend its Constitution to include phrases such as adopt or accede after 1979 or 1987. St. Jude's had this language in its Constitutions for years before the Dennis Canon was ever passed. Pre-Dennis Canon accession is not present action with a present intent to agree to a trust that did not yet exist.

More specifically, for years before the passage of the diocesan Dennis Canon and many years before the passage of the national Dennis Canon, St. Jude's included the language at issue in its Constitutions. St. Jude's 1975<sup>1</sup> Constitutions both contain the accession and adoption language. ROA 5726. The national Dennis Canon was adopted by the National Church in 1979 and the Diocese adopted its version of the canon in 1987.<sup>2</sup> Opinion \*2 & \*5-6.

St. Jude's carried over the same language from previous decades in amending its 1990 Canons and 2006 Constitution. There is no document in the record (or elsewhere) that exhibits both (1) a present action to create a trust and (2) a present intent to create a trust. There was no positive action taken by St. Jude's with respect to the creation of a trust in its 1990 Canons.<sup>3</sup> In fact, there

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<sup>1</sup> The language at issue appears in the 1975 Constitution (ROA 5726) of St. Jude's and carried over to the 1990 and 2006 Constitutions (ROA 5731, 5745). The amendments in 1990 were only to the Canons. ROA 5731, 5742-44.

<sup>2</sup> "To create a valid trust, the settlor must indicate an intention to create a trust." S.C. Code Ann. § 62-7-402 cmt. (citing Restatement (Third) of Trusts § 13). Notably, the drafters of the South Carolina Trust Code rely heavily on the Restatement (Third) of Trusts in its reporter's comments throughout the Trust Code. Regarding the manifestation of trust intention, the Restatement states that "[i]n interpreting the words and conduct of property owners, circumstances that shed light upon their intentions are relevant ... Acts or communications prior to and subsequent to, as well as those contemporaneous with, the transfer or other act that is claimed to create a trust may be relevant in determining whether a property owner had the requisite intent to create a trust." Restatement (Third) of Trusts § 13 cmt. b (2003). Importantly, the Restatement states "the manifestation of intent to create a trust *inter vivos* ordinarily requires that the intention be to create the trust *at that time*. Thus, an *intention to create a trust at some time in the future ordinarily does not create an express trust*." *Id.* at cmt. a (emphasis added). Stated differently, there must be a confluence of (1) a declaration of trust and (2) present intent to create the trust.

<sup>3</sup> The law of South Carolina requires present intent to act. St. Jude's ministerial repetition of the accession language from pre-Dennis Canon periods in its 1990 and 2006 Constitutions does not constitute the present intention to create a trust. It is not a positive act, as required by this

has never been a positive act by St. Jude’s with respect to either the national Dennis Canon in 1979 and the diocesan Dennis Canon in 1987. Rather, St. Jude’s was maintaining the status quo with continued use of the accession language. It has no coupled present action with a present intent to create a trust. Quite simply, the 1990 amendments to the Canons and 2006 Constitutions does not “indicate [St. Jude’s] had the present intent for the writing to create a trust for [the National Church and its diocese].” Opinion at \*6.

Moreover, this Court discussed this issue in its opinion with respect to Christ Church, Mount Pleasant.<sup>4</sup> Opinion at \*10. In 1980, Christ Church, Mount Pleasant amended its Bylaws to include the following: “In the event Christ Church, Mount Pleasant, S.C. should ever dissolve ..., the Standing Committee of the [Lower Diocese] shall become the managing body of the corporation, with full power and authority without restriction, to sell or mortgage its property or any part thereof, to convey any or all of its property to the [Trustees].” *Id.* at 32 (alterations in original). This Court

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Court’s Opinion. *See* Opinion at \*5; *see also Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 389 (1986) (drawing distinction between “positive act” as a power that is mandatory for a trustee versus a discretionary power “when the trustee may refrain from exercising it.”); *cf. Black’s Law Dictionary* 22 (8th ed. 2005) (defining “act” as “1. Something done or performed, esp. voluntarily. 2. The process of doing or performing; an occurrence that results from a person’s will being exerted on the external world – Also termed *positive act*; *act of commission*.”).

<sup>4</sup> This Court also discussed this issue with respect to St. Helena’s 1987 Bylaws. Opinion at \*7. With respect to St. Helena’s, this Court noted that the parish’s use of the word “pledges” indicates a future action, not a present action, and therefore no express trust could arise. *Id.* There was no confluence of a declaration of trust and a present intent. *Id.* The same is true for the parishes that “operated” or were “organized” pursuant to the canons of the National Church and its diocese. *Id.* at \*8. These parishes’ uses of “operating” a church contemplated a “future action” and “not the present action necessary to satisfy the first element” according to this Court. *Id.* at \*7.

Throughout this Opinion, this Court repeats the need for a present action to accompany a present intent for an express trust to arise. (*See also* this Court’s discussion of parishes that “agreed to be bound by” or “agreed to conform to” the Canons of the National Church and its diocese. Opinion at \*9. There was no such marriage of a present action and a present intent regarding St. Jude’s. St. Jude’s had been using the language that purportedly represents a declaration of trust for years before the enactment of the national Dennis Canon and the diocesan Dennis Canon. There was no confluence of a declaration of trust and present intent for St. Jude’s.

recognized this language created a beneficial interest in the Lower Diocese. *Id.* But importantly, this Court concluded that “[b]ecause this amendment was made seven years before the Lower Diocese adopted the Diocesan Canon, we cannot rely on Christ Church, Mount Pleasant’s participation in the Lower’s Diocese’s adoption of the Diocesan Canon as evidence of its intent to create a trust.” *Id.*

The same is true for St. Jude’s. For years prior to the enactment of both the national Dennis Canon and the diocesan Dennis Canon, St. Jude’s had accession language. The 1975 Constitution of St. Jude’s and its use of accession language is not evidence of a present intent to create a trust, like this Court found with respect to Christ Church, Mount Pleasant. St. Jude’s never had a present intent to create a trust in favor of the National Church or its diocese. And its use of accession language cannot be evidence of any intent as announced by this Court in its analysis of Christ Church, Mount Pleasant, simply because the Dennis Canon did not exist at the time of adoption of St. Jude’s 1975 Constitution.

### **CONCLUSION**

For the above-stated reasons, this Court respectfully should reconsider its opinion with respect to St. Jude’s and hold that St. Jude’s did not create a trust in favor of the National Church or its diocese. Alternatively, St. Jude’s requests a rehearing on this issue.

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