

BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO: 2008-CA-00416

FRANK L. SCHMIDT, JR., ET AL

APPELLANTS

VERSUS

CATHOLIC DIOCESE OF BILOXI, ET AL

APPELLEES

APPEAL FROM THE CHANCERY COURT
OF HARRISON COUNTY, MISSISSIPPI

APPELLANTS' BRIEF IN REPLY

(ORAL ARGUMENT REQUESTED)

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I. INTRODUCTION:

Before engaging in rebuttal argument it is necessary to pause for a moment and reflect upon the overall picture of what we are dealing with.

The argument of the Appellee can be summarized as follows: "Hands off, this is a Church matter. We are protected by the First Amendment".

Lets again take a look at the First Amendment - - those 45 words in the United States Constitution that say:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Of these 45 words, only 16 apply to religion. These 16 words, over the years, have to come to mean to some, and apparently the Catholic Diocese, that all Church activity is entitled to constitutional protection. Nothing could be further from the truth.

If these 16 words were the only thing we had to guide us, there would be no doubt that anyone possessing an understanding of how to apply the written word would

send this matter back to the Chancellor for a full hearing and determination of the applicable property issues. But, Oh how the Courts have expanded upon these 16 words.

Being mindful of the major guiding light (the 1st Amendment) and mindful of this Court's rulings in *Mabus* (884So.2d747), *Free Will* (716 So.2d 200) and *Morrison*(905 So.2d 1213) the Appellants will now argue in rebuttal.

II. ARGUMENT IN REPLY

A. APPLICATION OF NEUTRAL PRINCIPALS OF LAW

Property ownership in the United States is determined by neutral secular principals of law. The First Amendment does not establish a right in the Church to avoid application of neutral and generally applicable laws. In Mississippi, as in every other State, the Church is a property owner (whether it be real or personal property), just like everyone else.

Even the Roman Catholic Church itself has recognized that secular law should be applied when applicable. At the second Vatican Council, Pope Paul, VI promulgated a Declaration of Religious Freedom which was entitled "Dignitatis Humanae" (October 7, 1965). Paragraph 7 thereof states the following:

The right to religious freedom is exercised in human society: hence its exercise is subject to certain regulatory norms. In the use of all freedoms the moral principle of personal and social responsibility is to be observed. In the exercise of their rights, individual men and social groups are bound by the moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare of all. Men are to deal with their fellows in justice and civility.

Furthermore, society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection. However, government is not to act in an

arbitrary fashion or in an unfair spirit of partisanship. Its action is to be controlled by juridical norms which are in conformity with the objective moral order. These norms arise out of the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights, also out of the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice, and finally out of the need for a proper guardianship of public morality.

These matters constitute the basic component of the common welfare: they are what is meant by public order. For the rest, the usages of society are to be the usages of freedom in their full range: that is, the freedom of man is to be respected as far as possible and is not to be curtailed except when and insofar as necessary.

The Mississippi Supreme Court in *Free Will, Morrison* and *Mabus* has recognized these same concepts as set forth by the Pope in 1965.

Pope Paul, VI also touched on the issues presented in this case in paragraph II, where the *Dignitatis Humanae* states:

He acknowledged the power of government and its rights, when He commanded that tribute be given to Caesar: but he gave clear warning that the higher rights of God are to be kept inviolate: "Render to Caesar the things that are Caesar's and to God the things that are God's".

And then in paragraph II he quoted Paul in Romans where it is stated:

Let everyone be subject to higher authorities....He who resists authority resists God's ordinance.

The Appellants are more than willing to render under God the things that are God's, but it must be recognized that the State of Mississippi has a more than adequate system of laws governing real property and personal property. This was clearly recognized in *Free Will*. These are the only things requested to be determined by the Court in this case. All Appellants are asking for is the application of neutral principles of law to the status of certain deeds and the status of certain gifts made to the Appellees for

a specific purpose. How does this request threaten the establishment of Religion? How does it impact the free exercise thereof? How can it even be said that there are entanglements? Pope Paul, VI quoted Matthew: "Render to Ceasar the things that are Ceasar's." We are talking about things that belong to "Ceasar" in this Appeal. We are not talking about closing the doors of St. Paul church. We are not talking about use of church property. We are not talking about the governance of the parishes. All we are talking about is a dispute about property ownership. How can it even be questioned that these matters should be determined by the application of neutral principles of law. Render to Ceasar the things that are Ceasar's. Need we say more. To do otherwise is to resist God's ordinance.

A reading and review of the record and the Brief of the Appellees' would show that they are more interested in diverting the attention of the Court away from the real issues of the lawsuit than they are about arguing the applicable law. One argument of the Appellees' is entitled: "This lawsuit has nothing to do with a property dispute". (See Appellees' Brief, page 15). That is patently untrue. This lawsuit is nothing but a property dispute. Then they make the assertion that even if it is a property dispute it can not be resolved by neutral principals of property law. This Court has addressed this issue in previous cases and held just the opposite. Then the Appellees engage in the argument that seems to be the last ditch effort in these type of cases where they say that it would constitute an impermissible entanglement for this Court to examine the issues. However, they don't stop there, they then try to convince the Court that this is a Church - Pastor dispute. They allege that the Appellant's are trying to reopen St. Paul Catholic Church. They say that this is a lawsuit about the combining of the parishes. None of these statements are true. Apparently these tactics worked with the Chancellor as is

obvious when one reads the Chancellors first Order dated August 8, 2006 (ARE, TAB 6) and then reads the final Judgment of the Court dated February 27, 2007 (ARE, TAB 7). The Appellants asked the Court to look through these smoke screens and be mindful of the fact that this is a property dispute involving the status of real property and personal property. These are the only issues. How many times do we have to say this?

B. COMMENTS ON NEUTRAL PRINCIPALS REGARDING TRUSTS

Appellants take exception to the Chancellor's finding that the First Amendment prohibited him from defining a trustee's proper duty of care if a religious organization or member of the clergy served as trustee, reasoning it would require civil courts to define a "cleric's normative obligations" and cause it to "inevitably become excessively entangled in matters of faith, doctrine, canon law and ecclesiastical relationships." ARE, TAB 7, In making this finding, the Chancellor surprisingly ignored this Court's decisions in *Morrison* and *Mabus*; instead choosing to rely on twenty out-of-state decisions involving claims of "clergy malpractice".¹

Not one case cited by the Chancellor involved the secular actions or omissions of a trustee, nor did any of them involve the administration of trust property. The Chancellor evidently assumed Appellees were exempt from Mississippi trust and property laws simply by being members of the clergy. However, as this Court correctly noted in *Mabus*, the "First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships."² Quoting from Article 3, §§18 and 24 of the Mississippi Constitution, the *Mabus* Court further held that no

¹ ARE, TAB 7 at 14. Many of the cases cited by the Chancellor were referenced in the *Mabus* Decision, which affirmed the lower court's granting summary judgment for the "clergy malpractice claims" and denying summary judgment for the "breach of fiduciary duty claims." See. *Mabus* 884 So.2d at 754

² See. *Mabus*, 884 So.2d at 754 (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-36 (5th Cir.1998)).

preference should be given by law to any religious organization, nor should the free exercise clause be construed to justify wrongful acts of the clergy, declaring that all Mississippi courts “shall be open; and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.” *Id.* at 754-55. Therefore, to the “extent that this case can be considered without pressing into ecclesiastical matters, jurisdiction over the subject matter of this case is not barred by the First Amendment.” *Id.*

Appellants did not request the Chancellor to define or establish a professional standard of care for members of the clergy. In fact, Appellants submit that the lower court is capable of determining whether Appellees have or will breach their fiduciary duties without considering any standard of care. See. *Id.* 757. As correctly noted by this Court in *Mabus*, fiduciary duty claims involve breaches of trust, not deviations from professional standards of care. *Id.*

Appellants are merely seeking confirmation that Appellees, as trustees, are subject to the same fiduciary duties of trust, loyalty, and fidelity as secular trustees. The administration of trust property is a secular activity, and to avail themselves of the protections of the First Amendment, Appellees are required to prove that the alleged wrongdoings “were rooted in religious belief”. *Id.* The Appelles have not shown this, and the Court has jurisdiction in this Cause.

Appellants also take exception to the Chancellor’s finding that neutral principles of law could not even be applied to determine whether a trust exists, primarily because it determined Appellants were not members of St. Paul Catholic Parish on the date their

suit was filed, and thus “lacked standing to file the lawsuit”.³ In making this finding, the lower court has placed too much emphasis on the effects of the merger of St. Paul Catholic Parish. Appellants

The Appellants were still members of Holy Family Catholic Parish, i.e., successor in interest to St. Paul Catholic Parish, and in accordance with Bishop Rodi’s Decree of November 25, 2005, Holy Family Parish “obtained the goods and patrimonial rights of Saint Paul Parish . . . as well as the obligations with which they were burdened . . .”⁴. Thus, Appellants, as members of Holy Family Catholic Parish, have not ceased to exist and remain identifiable beneficiaries of the express trust created for their benefit.

In addition to the matters discussed hereinabove, Appellants also take exception to Appellees’ arguments regarding the creation of trusts and Appellant’s standing to enforce the trust created for their benefit. Appellees argue that pursuant to Mississippi Code §91-9-1, et seq., including Mississippi Code §91-9-7, an express trust could not take effect until after a “certificate of trust” was filed of record. Appellee’s Brief at 26. However, Mississippi Code §91-9-7 did not become effective until July 1, 2001, over 5

³ ARE, TAB 2 at 15 and 16The lower court inappropriately based its finding on Defendants’ responses to certain interrogatories, in which Defendants claimed that “St. Paul Catholic Parish ceased to exist, or have any members, when it was combined with Our Lady of Lourdes Catholic Parish and Holy Family Catholic Parish was formed pursuant to Bishop Rodi’s November 27, 2005 decree.” These responses were not admitted into evidence, and pursuant to the lower court’s Orders, Plaintiffs were essentially prohibited from conducting any further inquiry on these issues. See **Record at 189; Record at 1358; and Transcript Vol. 1 at 58 and 59.**

⁴ – ARE, TAB 4

years after the last parcel was conveyed to Bishop Howze in trust, and is thus not applicable. More importantly, even if this statute was applicable, Mississippi Code §91-9-1 provides that a trust created through the conveyance of real property is exempt from Mississippi Code §91-9-7, and that “such trust or confidence shall be of like force and effect the same as it would have been if this statute had not been passed.” Review of the eight deeds at issue in this cause make it abundantly clear that the respective grantors intended for the property to be conveyed to the Catholic Church in trust for the benefit of Appellants, as members of the congregation of St. Paul Catholic Parish.

Appellees have also claimed a resulting trust could not have been created, because “it is undisputed that Plaintiffs did not pay for the church parcels at the time the parcels were conveyed.” Appellees’ Brief at 11. This statement is absolutely untrue. Appellants have repeatedly alleged, through both oral argument and their pleadings, that certain Appellants donated money specifically for the purchase of certain parcels making up the Church Site and/or in the construction of the current St. Paul Church building.⁵ Moreover, this Court has held on numerous occasions that a resulting trust exists where an absolute obligation to pay is incurred by the beneficiary as part of the original transaction.⁶ It is a widely known fact that the members of the congregation of each Catholic parish are burdened with the responsibility of satisfying their Parish’s debts. Thus, the members of St. Paul’s congregation became obligated to pay all indebtedness incurred by St. Paul’s Parish at the time of the transaction, and a resulting trust was created for their benefit.

⁵ See Motion to Strike Affidavit of Bishop Rodi, Exhibit F, Record p. 65. Transcript of Hearing of Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction, Vol. 2, Page 148. See. Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction, (Record 1426).

⁶ See generally. *Allgood v. Allgood*, 473 So.2d 416, 421(Miss. 1985); *Brown v. Gravlee Lumber Co.*, 314 So. 2d 907, 911 (Miss. 1977); and *Williams v. Heinz*, 216 Miss. 195, 199-200(Miss. 1953).

Finally, Appellants take exception to Appellees' claim that public trusts cannot have identifiable beneficiaries, preventing Appellant's from having standing to pursue their claims. Appelles' Brief at 27-29. In support of their claim, Defendants submit two decisions readily distinguishable from the facts of this Cause. In *Hall v. Latham*, the court confirmed the universally accepted premise that the beneficial interest of a charitable trust is not given to individual beneficiaries;⁷ however, it did not declare that charitable trusts cannot have identifiable beneficiaries. Moreover, in *Freedman's Aid & Southern Education Society v. Scott*,⁸ the court found that the trust was created for the benefit of an identifiable beneficiary, i.e., the school, thus that the lawsuit should have been brought by the school's trustees, not the parents of potential students.

It is widely accepted that a charitable trust, i.e., a public trust, can be created for the benefit of the members of a small, identifiable group or segment of the public; and that any member of such group can maintain a suit for specific enforcement of such trust against the trustee on behalf of himself and the other members of such class.⁹ In this Cause, all but two of the deeds expressly provide that the subject property was conveyed in trust for the benefit of the members of the congregation of St. Paul Catholic Church, Pass Christian, Mississippi.¹⁰ Appellants, as members of such congregation, are an easily identifiable, distinguishable segment of the general public, the trust created was clearly for their benefit, and they have standing to specifically enforce the trust.¹¹ .

⁷ 193 So. 2d 587 (Miss. 1967)

⁸ 185 Miss. 299, 87 So. 659 (Miss. 1921)

⁹ See. Restatement of Trusts 2d, §391 (1959), especially comments c and d; 15 Am. Jur. 2d Charities §142; 14 C.J.S. Charities s 58, p. 527; Annot.; 3 Scott on Trusts, Charitable Trusts, Sec. 391, p. 2055; Bogert, The Law of Trusts and Trustees, s 414, p. 344 (1964); see also, *Gray v. St. Mathews Cathedral Endowment Fund, Inc.*, 544 S.W. 2d 488, and *Weaver v. Wood*, 425 Mass. 270, 680 N.E.2d 918 (1997), cert. denied, 522 U.S. 1049, 118 S. Ct. 694, 139 L. Ed. 2d 639 (1998)(private plaintiff has standing to pursue claims against public charity where plaintiff asserts interests distinct from general public).

¹⁰ See Prehearing Memorandum, Exhibits A-1 through A-14 (Record 1548-1581).

¹¹ See *Gray* 544 S.W.2d at 490; see also *Lokey v. Texas Methodist Foundation*, 479 S.W.2d 260 (Tex. 1972).

C. THE DISMISSAL WITH PREJUDICE WAS IN ERROR

The matter should not have been dismissed with prejudice.

This Court in *Raynor v. Raytheon Company* 858 So. 2d 132 (2003) determined a Dismissal with Prejudice means an adjudication on the merits and final disposition. The Appellee, on pages 37 and 38 of their Brief, simply make a pronouncement that our reliance on this case is misplaced because this is a jurisdiction matter. We don't deny this is a jurisdictional matter and we don't deny that if one Court doesn't have jurisdiction no Court has jurisdiction. That has nothing to do with the Chancellor's ruling that the matter should be dismissed with prejudice. In *Rayner* the Court clearly recognized the jurisdictional issues involved and again we quote *Rayner* as follows:

We modify the decision of the circuit court only to the extent that dismissal was *with prejudice*. Generally, a dismissal with prejudice connotes an adjudication on the merits. See *generally Foundry Sys. & Supply, Inc. v. Indus. Dev. Corp.*, 124 Ga.App. 589, 185 S.E.2d 94, 95 (1971) (The phrase "with prejudice" in [the context of when an action is dismissed with prejudice] means an "adjudication on the merits and final disposition, barring the right to bring or maintain an action on the same claim or cause. *Pulley v. Chicago, R.I. & P.R.*, 122 Kan. 269, 251 P. 1100 (1927). Black's Law Dictionary, 4th ed., p. 555"). Thus, lacking jurisdiction, the circuit court was without authority to address the merits. The circuit court should have simply dismissed this case for lack of jurisdiction. (p. 134)

Therefore, the Chancellor was in error in dismissing this matter with prejudice.

III. CONCLUSION

At the risk of being extremely repetitive the, Appellants respectfully represent that the matters set forth in this lawsuit have been adequately covered in *Freewill, Mabus and Morrison*. To affirm the Chancellor's decision in this matter would require an overruling of these cases.

The Appellants respectfully submit that this matter be remanded with directions to have a full hearing regarding the status of the real property and personal property set forth in the Pleadings.

In closing we respectfully call the Court's attention to the words of Pope Paul, VI in the Dignitatis Humanae where he stated: "Furthermore, society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection".

Wasn't the Pope saying that this Court has a duty to remand this case?

RESPECTFULLY SUBMITTED, this the 6th day of February, 2009.

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CERTIFICATE OF SERVICE

I, VIRGIL G. GILLESPIE, do hereby certify that I have this date hand delivered a true and correct copy of the above and the foregoing Brief to the following:

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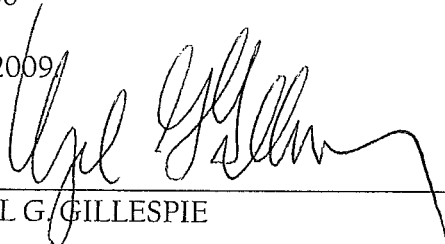
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So Certified, this the 6th day of February, 2009



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