

IN THE SUPREME COURT OF OHIO

09-0550

HUDSON PRESBYTERIAN CHURCH,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 EASTMINSTER PRESBYTERY,)
)
 Defendant-Appellant.)

Case No. _____

On Appeal from the Summit
County Court of Appeals, Ninth
Appellate District

Court of Appeals Case
No. 24279

MEMORNANDUM IN SUPPORT OF JURISDICTION

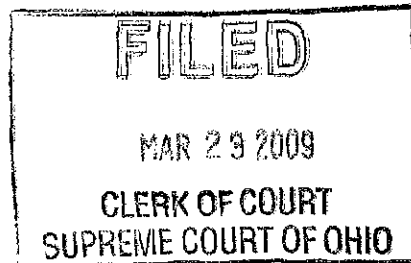
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MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT EASTMINSTER PRESBYTERY

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Decision and Journal Entry of the Summit County Court of Appeals (February 4, 2009)1

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Throughout the United States over the last several years, a raft of church property disputes have erupted concerning the Presbyterian Church and other hierarchical churches. The central questions in these disputes is initially how a court can resolve the case without intruding into religious matters protected by the 1st and 14th amendments,¹ and then whether a trust can be created over church property via the addition of a trust clause in the national church's Constitution as opposed to the inclusion of a trust provision in each of the thousands (or hundreds of thousands) of deeds, charters, bylaws or like documents held by all of the national church's constituent local church bodies. The United States Supreme Court's 1974 keystone decision in *Jones v. Wolf*,² identified constitutional procedures ("neutral principles" and "hierarchical deference") by which civil courts could decide such cases and was plain in holding that the inclusion of a trust provision such as the one in the Presbyterian Church U.S.A. ("PCUSA") *Book of Order* is all that is required to impose a trust over all of the church's property. Nonetheless, the Court's silence on the issue since *Jones* has led to this recent flow of suits, and to inconsistent results in the lower courts. As a result, unless or until the U.S. Supreme Court takes the issue up again, the highest state courts must resolve this issue on a state-by-state basis to establish with certainty how *Jones* will be read in their states. Notably, only two cases have made it to the state supreme courts—in California and in Kentucky—and each has read *Jones* to mean what it says: That the national church Constitution need only include a trust provision to protect the church's property and that the exorbitant cost and burden that would be

¹ *Kedroff v. Saint Nicholas Cathedral*, (1952), 344 U.S. 94, 120-21 ("Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.")

² *Jones v. Wolf*, 433 U.S. 595 (1979).

required to amend all of the property documents at the local level is simply not necessary.³

The instant case raises this basic dispute here in Ohio and, so, creates the opportunity for this Court to provide sorely needed guidance to lower courts concerning how to deal with these proliferating matters and what *Jones* stands for in the State. Following *Jones v. Wolf*, the PCUSA amended its *Book of Order* in 1981 to include a trust provision that is substantively identical to the trust provisions upheld by the California and Kentucky Supreme Courts in the constitutions of the Episcopal Church and the Cumberland Presbyterian Church. Despite this, Appellee Hudson Presbyterian Church (“HPC”) brought suit in the civil courts seeking quiet title over the church grounds, buildings, and personal property, and contending that the trust provision in the *Book of Order* could be disregarded because no trust was found in the deeds, charters and corporate by-laws signed by HPC.

In this way, this dispute is iconic of numerous like disputes pending in the lower courts in Ohio and in states across the country. Ohio continues to be faced with disputes that have erupted between general churches such as the PCUSA and some of their member churches⁴ over the mission and direction of the denomination, ordination standards of pastors and church officials, and other ecclesiastical matters. These disputes often lead to schisms within the member (local) church that require ecclesiastical resolution under church polity. However, with increasing regularity, local churches such as HPC are improperly disregarding the ecclesiastical procedures

³ **Episcopal Church:** *e.g.*, *Episcopal Church Cases*, 45 Cal.4th 467, 473 (Cal. 2009) (“Applying the neutral principles of law approach, we conclude, on this record, that the general church, not the local church, owns the property in question.”); **Cumberland Presbyterian Church:** *e.g.*, *Cumberland Presbytery of Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 442 (Ky. 1992) (“[T]he Cumberland Presbyterian denomination followed to a T the suggestion of the U.S. Supreme Court in [*Jones v.*] *Wolf* as to a method of ensuring ‘that the faction loyal to the hierarchical church will retain the church property’”).

⁴ Appellant Eastminster Presbytery and Appellee Hudson Presbyterian Church are members of the PCUSA. The PCUSA is a body of Reformed Christians who have agreed to conduct their worship and other religious activities in conformity with the PCUSA’s Constitution.

for resolving internal disputes are, instead, seeking relief in civil courts to quiet title to entrusted property to the detriment of the denomination. A resolution of this case on the merits will have immediate impact on these pending cases and on future cases of the same kind—once litigants know how *Jones* will be applied in the State, they will be impelled to resolve the great majority of similar cases without court intervention, and those cases that must be resolved in court can proceed under clear law.

In addition, this case raises significant questions impacting a wide range of civil litigants in the State extending far beyond churches or church property disputes. Specifically, the lower Court of Appeals and the Court of Common Pleas both avoided deciding the trust question by finding a lack of evidence of a trust in the *Book of Order* as a result of a purported violation of Civ.R. 56, citing an alleged failure by Eastminster Presbytery to provide “admissible” evidence. In doing so, the lower courts established a rule that on motions for summary judgment, courts can, *sua sponte*, throw out evidence even where there is stipulation by the parties to the authenticity of the evidence offered for consideration, no dispute amongst the parties as to this stipulation, nor any objection or motion by either party to reject the evidence. Given the importance of summary judgment proceedings in clearing court dockets of non-meritorious cases, the ramifications of these rulings cannot be overstated. Parties will now be discouraged from entering into time and cost-saving joint agreements concerning evidence not even in dispute, and will instead choose more inefficient mechanisms to authenticate documents, even where there is no disagreement. Moreover, because the courts applied the rule arbitrarily—fully crediting the evidence of HPC and discrediting the evidence of Eastminster despite the same alleged Civ. R. 56 defects—these rulings will only add to the confusion of parties seeking efficient resolutions of disputes on summary judgment. Accordingly, Appellant respectfully

submits that a reversal here is of great general interest to the myriad litigants in Ohio courts who need to know how Civ.R. 56 should be applied, and to make clear below that the rule should be read to promote, and not to subvert, the efficient and economical resolution of cases on summary judgment, especially in the absence of legitimate factual disputes. At a minimum, the Court should make clear that Civ.R. 56 cannot be read as a basis to find a lack of evidence for one litigant while the same form of evidence is accepted for a second litigant.

In sum, this appeal raises important issues concerning the manner in which Ohio will resolve church property disputes, how *Jones* should be applied in Ohio courts, and whether Civ.R. 56 can be read to compel affidavits or other evidence even for facts that are not in dispute, and in a way that excludes one side's evidence but not the second. Appellants respectfully ask this Court to take this appeal and, finally, resolve the underlying dispute on the merits.

STATEMENT OF THE CASE AND FACTS

HPC was founded by Eastminster as a PCUSA church in 1982. At the time, it was established, HPC covenanted and agreed to be bound by the polity and form of governance (including procedures for dispute resolution) set forth in the denomination's Constitution, comprised of the *Book of Order* and *Book of Confessions*. Until this dispute arose nearly 25 years later, HPC held itself out as a PCUSA church, followed the *Book of Order*, and admitted that it held property in trust for the PCUSA pursuant to the express trust provision in the *Book of Order*.

Although the *Book of Order* sets forth the sole and dispositive means for local churches such as the HPC to withdraw from the PCUSA,⁵ HPC disregarded these ecclesiastical procedures and took to the courts to fulfill its objectives of unilaterally disaffiliating from the PCUSA while

⁵ (Trial Exhibit 7, 2005 Book of Order, §§ G-1.0500, G-4.0104); (Trial Exhibit 157, Cramer Affidavit ¶ 4); (Tr. Ex. 161 ¶ 7).

retaining the church property it held in trust for the PCUSA. HPC filed a Complaint for Declaratory Judgment in the Summit County Court of Common Pleas seeking a judgment that it held unencumbered title to the property in dispute and judgment affirming its purported entitlement to unilaterally disaffiliate from the PCUSA.⁶ Eastminster counterclaimed for declaratory judgment to the opposite effect.⁷

Shortly thereafter, the parties filed competing Motions for Summary Judgment and jointly submitted a set of Joint Exhibits in lieu of unilaterally submitting evidence authenticated by affidavit pursuant to Civ. R. 56(E).⁸ Eastminster moved, *inter alia*, that there was no disputed issue of fact as to the existence of a binding express property trust provision in the *Book of Order*. Its Motion was supported by an affidavit by the PCUSA Director of Constitutional Services, Rev. Mark Tammen, who swore to the existence of the aforementioned trust provision in the PCUSA *Book of Order* since 1981 and quoted its language. Eastminster also referred repeatedly to the *Book of Order* (submitted as joint exhibits) and its trust provision in its motion.

In its Motion and in its Opposition to Eastminster's Motion, HPC did not offer a single affidavit or other piece of evidence supporting its claim that there was no binding trust provision in the *Book of Order*. Rather, HPC acknowledged the existence of the *Book of Order* trust provision in its opposition motion.⁹ Similarly, its own Motion for Summary Judgment, HPC did not move for a finding, and in fact did not even allege, that there was not a trust provision in the *Book of Order* since 1981. Indeed, at no time, has HPC disputed the existence of the following provision in all versions of the PCUSA *Book of Order* since 1981:

⁶ (Appellate Exhibit 1, HPC Complaint for Declaratory Judgment, Sept. 28, 2006)

⁷ (Appellate Exhibit 2, Eastminster Answer and Counterclaim, Nov. 20, 2006)

⁸ (Appellate Exhibit 5, Eastminster Presbytery's Motion for Summary Judgment, April 16, 2007); (Appellate Exhibit 6, Hudson Presbyterian Church's Motion for Summary Judgment, April 16, 2007).

⁹ "One sentence in the *Book of Order* is not sufficiently clear to create an express trust...." (Appellate Exhibit 9, Hudson Presbyterian Church's Reply Brief in Support of Summary Judgment in its Favor and In Opposition to Eastminster Presbytery's Motion for Summary Judgment, May 14, 2007 at 26).

All property held by or for a particular church, a presbytery, a synod, the General Assembly, or The United Presbyterian Church in the United States of America, whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of the particular church or of a more inclusive judicatory or retained for the production of income, is held in trust nevertheless for the use and benefit of The United Presbyterian Church in the United States of America.¹⁰

Despite this, the lower courts in this matter found that no trust existed in favor of the PCUSA without even considering the trust clause that has existed in the *Book of Order* at all relevant times. The Court of Common Pleas found that the very high standard for summary judgment had been reached based on a purported failure of proof by Eastminster, which failure of proof derived squarely from the court's exclusion from evidence of the 1981 *Book of Order*, which established HPC held the property at issue in this action in trust for the PCUSA (and so to Eastminster as the PCUSA's governing body over the HPC). Although none of the exhibits submitted by either party were accompanied by a affidavit under Civ.R. 56(E), the Court of Common Pleas selectively excluded the trust provision of 1981 *Book of Order* (Joint Exhibit 150) despite the fact that the parties stipulated to its authenticity and admissibility and jointly submitted it to the Court in a Joint Exhibit Binder. Moreover, the trial court granted summary judgment against Eastminster without considering whether the 1983 and 2005 *Books of Order* (which were also in evidence and existed before this dispute erupted) recited an express trust.

The Court of Appeals affirmed the trial court's exclusion of the trust provision of the 1981 *Book of Order* because "Eastminster failed to incorporate the content of Exhibit 150, the 1981 *Book of Order*, by reference" "through a properly framed affidavit" as required by Civ.R.

¹⁰ Emphases here and in quotations throughout this brief are supplied unless otherwise noted. (Tr. Ex. 150); (Tr. Ex. 7, §G-80200).

56(E).¹¹ The Court of Appeals also found that the Court of Common Pleas did not err in failing to determine whether HPC was bound by the express trust provision of the 1983 and 2005 *Books of Order* because “Eastminster’s evidence of the 1983 and 2005 *Books of Order* suffers from the same defects as its evidence of the 1981 *Book of Order*. That is, the *Books* are not Civ.R. 56(C) evidence, and there is no indication that Eastminster incorporated the *Books* by reference through one or more properly framed affidavits.”¹² Moreover, although HPC’s joint submission of Joint Exhibit 150 and its repeated concessions that the exhibit was from the 1981 *Book of Order*, in addition to its binding representation to the court that the parties “essentially stipulate[d] to the authenticity of documents,”¹³ operated as a stipulation to these facts, the Court of Appeals concluded that “the record does not support Eastminster’s conclusion that the parties stipulated to all of the exhibits,”¹⁴ because “Eastminster did not introduce admissible evidence of the Presbyterian Church (U.S.A.)’s constitution,”¹⁵ the Court of Appeals concluded that “Eastminster failed to prove an express trust” and affirmed summary judgment for HPC and against Eastminster.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Where adverse parties stipulate in advance to the authenticity of evidence and do not dispute the facts shown by the evidence, grant of summary judgment based on inadmissibility of the agreed upon evidence is improper.

¹¹ (Court of Appeals Decision and Journal Entry, Decision, Feb. 4, 2009, ¶18)

¹² (Court. App. Dec. ¶26)

¹³ (3/28/07 Hearing Tr., 9:21-10:2)

¹⁴ (Court. App. Dec. ¶16)

¹⁵ (Court. App. Dec. ¶26)

It is settled law that on a motion summary judgment, an Ohio court is not required to accept evidence that does not conform to Civ.R. 56(C).¹⁶ But it is also settled that stipulations of fact as to the validity and authenticity of evidence are expressly permitted under Civ.R. 56(C)¹⁷ and parties routinely do this in the interests of efficiency knowing that an agreement to the authenticity of a document is not necessarily the same as an agreement to its significance.¹⁸

In its Motion for Summary Judgment, HPC stated that “[b]y agreement of the parties, and with consent of the Court, all exhibits are being filed separately in a Joint Appendix. This includes all agreed-upon exhibits, affidavits, and case law.”¹⁹ Additionally, before the Magistrate, HPC reiterated “[y]our Honor, what we’ve discussed so far is essentially stipulating to the authenticity of documents. And right now this appears to be the binder of documents we will be submitting.”²⁰ Nevertheless, the dispositive evidence for determining whether there was a binding express trust between HPC and the PCUSA—the jointly submitted Book of Order—was summarily ruled inadmissible despite these agreements and despite no objection to the admission of this evidence by HPC. On Summary Judgment, where there is no objection to the admission of evidence, the court has *discretion* to consider or to reject the evidence that does not

¹⁶ *Bowmer v. Dettelbach*, 672 N.E.2d 1081, 1084 (Ohio Ct. App. 1996)

¹⁷ The rule states in part that “[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact.” Civ.R. 56(C).

¹⁸ *McKenzie v. Advance Stores Co.*, 488 F.Supp.2d. 658, 663 (S.D. Ohio 2007) (Acknowledging without challenge the parties’ “stipulation of facts and exhibits”); *Price v. Daugherty*, 450 N.E.2d 296, 305 (Ohio Ct. App. 1982)(Court of Appeals upholding the admissibility of a hospital records, authenticity of which was stipulated to at trial.); *Partain v. City of Brooklyn*, 138 N.E.2d 180, 183 (Ohio Ct. App. 1955)(“[P]arties have entered into a stipulation...admitting the authenticity of certain documents and exhibits presented without necessarily admitting their effect....”)

¹⁹ (Tr. Ex. 6 FN 1)

²⁰ (Court. App. Dec. ¶16). Additional documents were added after this point, but clearly pursuant the parties previous agreement to authenticate documents by stipulation.

conform with Civ.R. 56(E).²¹ But where there is agreement amongst all parties as to the authenticity of evidence, particularly dispositive evidence, it is an abuse of discretion to exclude it.²² Particularly here where such exclusion was the basis for finding against Eastminster on HPC's Motion for Summary Judgment.

Finally, even assuming *arguendo* that Joint Exhibit 150 would be inadmissible at trial, the trial court's refusal to consider the content of the 1981 *Book of Order*, and its consequential grant of summary judgment, still amount to clear error because even inadmissible evidence should be considered for the purpose of determining the existence of a question of fact that would preclude summary judgment.²³

Proposition of Law No. II: Where a movant provides an affidavit in support of the existence of a non-disputed issue of material fact, dispositive in the movant's favor, and the non-movant fails to dispute the fact and even acknowledges its existence, the court must either rule in the movant's favor or find a genuine dispute as to the existence of the material fact. Judgment against the movant as to the non-existence of this non-disputed material fact is improper as a matter of law.

Civ.R. 56(E) states in relevant part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, **by affidavit or as otherwise** provided in this rule, **must set forth specific facts** showing that there is a genuine issue for trial. **If the party does not so respond, summary judgment,** if appropriate, **shall be entered** against the party.

A sworn affidavit is not solely a tool for authenticating evidence, it is itself evidence in a motion

²¹ *Bowmer*, 672 N.E.2d at 1084.

²² *Citizens for Choice v. Summit County Council* (2001), 143 Ohio App. 3d 823, 833 ("It is error for a court to disregard the stipulations of the parties and to decide a civil case on a matter agreed by the parties not to be in dispute, unless there is some fundamental reason in the interest of justice to do otherwise.")

²³ *See Napier v. Brown*, 492 N.E.2d 847, 850 (Ohio Ct. App. 1985) (holding that "a deposition may be considered on a motion for summary judgment for the purpose of determining whether a genuine issue of material fact exists, regardless of the likelihood that the deposition may be inadmissible evidence against the party at trial.").

for summary judgment where the facts alleged in the affidavit are based on the personal knowledge of the affiant.²⁴ Rev. Tammen testified to his “own personal knowledge” that there was a trust provision in the 1981 *Book of Order* and he recited that provision. HPC never challenged Rev. Tammen’s uncontroverted statements in its Opposition Motion to Eastminster’s Motion for Summary Judgment with any evidence “by affidavit or otherwise.” Therefore, even assuming *arguendo* that the affidavit was insufficient to authenticate Joint Exhibit 150, Rev. Tammen’s undisputed statements based on his personal knowledge of the 1981 trust provision were themselves sufficient to prevail on summary judgment, particularly where HPC offered no contradictory evidence of the type required by Civ.R. 56(E). In fact, HPC acknowledged the trust provision, stating, without evidence, that “the trust does not describe with any particularity [details of the trust]” and that “[o]ne sentence in the *Book of Order* is not sufficiently clear to create and express trust.”²⁵

On at least this basis alone, summary judgment in favor HPC should have been denied and instead granted for Eastminster. At a minimum, Rev. Tammen’s sworn and unchallenged statements established the existence and content of the trust provision that precluded judgment for HPC and merited summary judgment for Eastminster. Eastminster was entitled to judgment in its favor. Given that HPC never alleged a dispute as to the existence of the 1981 trust provision in its own Motion for Summary Judgment and never moved for such a finding, the Court had no basis to find no genuine issue of dispute as to the non-existence of the trust provision, as all evidence on summary judgment must be viewed in favor of the non-movant

²⁴ *Papadelis v. First American Savings Bank*, 679 N.E.2d 356, 358 (Ohio Ct. App. 1996) (“In this case, Eisenhardt’s affidavit specifically states that he “has personal knowledge of the facts alleged herein.” Thus, absent evidence to the contrary, this fact cannot be disputed.”); *See also*, Civ.R. 56(E).

²⁵ (App. Ex. 9 pp. 25, 27)

Eastminster.²⁶

Proposition of Law No. III: Where moving and non-moving parties have evidence that suffers from the same Rule 56 defect, it is an abuse of discretion to arbitrarily fully credit the moving party's evidence while discrediting the non-moving party's evidence.

The Court of Appeals held that it was not an abuse of discretion for the trial court to reject Joint Exhibit 150 because it was not evidence of the type listed in Civ.R. 56(C) and it was not authenticated by a "properly-framed" affidavit.²⁷ According to the Court of Appeals, where a party wishes to rely on evidence not expressly identified by Civ.R. 56(C), the "evidence must be incorporated through a properly-framed affidavit,"²⁸ and on that basis the Court of Appeals also found that the 1983 and 2005 Books of Order "suffered from the same defects as [Eastminster's] evidence of the 1981 Books of Order" in that they were not Civ.R. 56(C) evidence.²⁹

The Court of Appeals' conclusion is unsupported at law. In *Rutkai* (the only decision relied upon by the court for the proposition that non-Rule 56 (C) evidence must be presented by affidavit), the defendant objected to the admission of three photos as being unauthenticated.³⁰ Here, however, HPC did not object to the *Books of Order* or the Tammen Affidavit.

Furthermore, like Eastminster, HPC also relied on evidence not listed in Civ.R. 56(C), for example its By-Laws and amendments, mortgages, and insurance policies, in its Motion for Summary Judgment. The lower court's grant of summary judgment was grounded in this non-conforming evidence. For example, the Magistrate relied on HPC's By-Laws in its findings of

²⁶ *State ex rel. Cassels v. Dayton City School District Board of Education*, 631 N.E.2d 150, 152 (Ohio 1994); *Village of Grafton v. Ohio Edison Company*, 671 N.E.2d 241, 245 (Ohio 1996).

²⁷ (Court. App. Dec. ¶18)

²⁸ *Rutkai v. Freeland*, 2008 WL 5159030 (Ohio App. 9 Dist. 2008)

²⁹ (Court. App. Dec. ¶26)

³⁰ *Rutkai* at *2, ¶8.

fact stating “[t]he only writing related to trust is that found in the *Book of Order*...and is not supported by the existing by-laws of the Plaintiff...”³¹ However, no affidavit was submitted by HPC authenticating these By-Laws or other evidence. Although HPC’s evidence suffered from the same Civ.R. 56(E) “defect” as Eastminster’s, the lower courts fully credited and relied upon HPC’s evidence and dismissed Eastminster’s dispositive evidence, and on that basis granted summary judgment in favor of HPC. Arbitrary, unreasonable, and unfounded rulings and treatment of evidence such as this are abuses of discretion.³²

Proposition of Law No. IV: Under *Jones v. Wolf*, a local church that is part of a hierarchical denomination holds its property in trust for the denominational church where, before there is any issue of a dispute between the parties, the denomination’s Constitution recites an express trust in favor of the denomination.

In its landmark 1979 decision, the U.S. Supreme Court directly instructed the Presbyterian Church (as well as all hierarchical churches) that, to *ensure that church property would be retained by its loyal members* in the event of a dispute, it could amend its church constitution rather than amending individual deeds and corporate charters:

Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. **At any time before the dispute erupts**, the parties can **ensure**, if they so desire, **that the faction loyal to the hierarchical church will retain the church property**. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. **Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.** The burden involved in taking such steps will be minimal.³³

In this way, the U.S. Supreme Court provided three alternative places where express trust language could ensure that the church property remained with its loyal members: deeds, corporate charters, or the constitution of the general church.

³¹ (App. Ex. 11)

³² []

³³ *Jones v. Wolf*, 443 U.S. at 606.

Heeding the U.S. Supreme Court's instruction, in 1981, the Presbyterian Church amended its *Book of Order* to include a *Jones v. Wolf*-style statement of an express trust in favor of the general church to memorialize long-standing implied trust arrangements.³⁴ As the U.S. Supreme Court suggested, this approach provided a consistent, comprehensive memorialization of the intent of the parties within the denomination, and imposed a significantly reduced burden compared to what would have been required to amend each of the tens-of-thousands of deeds and local church corporate charters. Notably, the trust provision was in effect when Eastminster chartered and organized HPC as a UPCUSA church in June 1982 and, until this dispute erupted, HPC at all times agreed to be bound by the *Book of Order* (as evidenced by its conduct and its corporate documents) and never challenged the validity or applicability of the trust provision.

HPC did not refute the *Jones v. Wolf* ruling concerning the trust language, but instead argued that the Court required that the trust in the *Book of Order* was not in a "legally cognizable form."³⁵ HPC's position rests on the argument that, despite the Supreme Court's holding that "the constitution of the general church can be made to recite and express trust," somehow Eastminster still had to have the property deeds or HPC's charter and By-Laws amended to recite an express trust. The Supreme Court was clear, however, in noting that "the burden involved in" amending the denominations constitution to recite a property trust in favor of the denomination "would be minimal" as opposed to the burdens of re-writing tens of thousands of deeds and corporate documents of the member churches.

State courts have followed *Jones* and recognized trust clauses in denomination's Constitutions as cognizable forms of trust. The state courts of California, Georgia, New York,

³⁴ As discussed, an express trust is recited in § G-8.0201 of the 1983 and 2005 *Books of Order* and § 72.02 of the 1981 *Book of Order* of the PCUSA's predecessor, the United Presbyterian Church of the United States ("UPCUSA").

³⁵ *Jones v. Wolf*, 443 U.S. at 606. [See also Trial Exhibit 6, page 43, HPC Motion for SJ]

and Louisiana have held the trust provision of the *Book of Order* created a cognizable express trust under their laws.³⁶ California, New York and other states have also held that analogous provisions in the constitutions of the Episcopal Church, Methodist Church, and Cumberland Presbyterian Church recite an express trust in favor of the general church.³⁷ There simply is no genuine issue of material fact that the trust provision in the Books of Order is binding on HPC. However, the lower courts in this case never reached this issue because the *Books of Order* were meritlessly thrown out of the record. This Court's ruling on the application of *Jones* in Ohio and on whether the *Book of Order* recites an express trust will provide the lower courts in this case and in others with the clarity that they crave and likely reduce the number of church property

³⁶ *Korean United Presbyt. Church of Los Angeles v. Presbytery of the Pacific*, 281 Cal. Rptr. 396, 414 (Cal. Ct. App. 1991), overruled on other grounds by *Morehart v. County of Santa Barbara*, 29 Cal. Rptr. 2d 804 (1994) (“At the time this dispute arose, the *Book of Order* of PCUSA provided that church property was held in express trust, for the use and benefit of PCUSA. This factor also supports a finding of express trust.”); *First Presbyt. Church of Oakfield v. Presbytery of Genesee Val. of Presbyt. Church*, 866 N.Y.S.2d 900 (N.Y. App. Div. 4th Dep’t Nov. 14, 2008) (summary decision enforcing the express trust clause provision in the *Book of Order* and affirming the lower court’s finding that the local church held property subject to an express trust); *Jerusalem Presbyterian Church v. Mission Presbytery*, 2008 WL 1882798, at*3 (Tex. Ct. App. 2008) (“The evidence presented at the hearing [which included the *Book of Order* trust provision] showed that all property held by local churches such as Jerusalem Presbyterian Church is held in trust for the use and benefit of the Presbyterian Church (U.S.A.)”); *Timberidge Presbyterian Church v. Presbytery of Greater Atlanta, Inc.*, File No. 07-CV-4142-M (Ga. Super. Ct. March 6, 2009) (“It is clear that Sections G-8.0201 and G-8.0301 of the PCUSA *Book of Order* ... created a trust in favor of the denomination as to any property held by the local church.”).

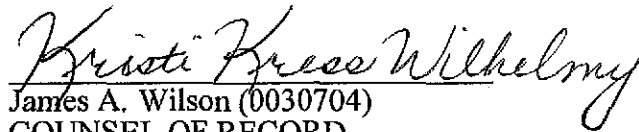
³⁷ **Methodist Church:** e.g., *Jones v. Wolf*, 443 U.S. 595 (1979) (observing that in the Georgia Supreme Court’s decision in *Carnes v. Smith*, 236 Ga. 30, “the provisions of the Constitution of the general church, the Book of Church Order, concerning the ownership and control of property” recited a “trust in favor of the general church”). **Episcopal Church:** e.g., *Episcopal Church Cases*, 45 Cal.4th 467, 473 (Cal. 2009); *Episcopal Diocese Of Rochester v. Harnish*, 11 N.Y.3d 340, 2008 WL 4657796 at *3 (Oct. 23, 2008) (N.Y. Ct. App.) (observing that the enactment of the Dennis Canons by the Episcopal Church was in response to “exactly what this language [in *Jones v. Wolf*] suggested – to ‘ensure ... that the faction loyal to the hierarchical church [would] retain the church property.’”); *In re Church Of St. James The Less*, 585 Pa. 428, 440 (Pa. 2005) (“[The Dennis] canon solely required local churches to hold their property in trust for the Diocese and the National Episcopal Church”). **Cumberland Presbyterian Church:** e.g., *Cumberland Presbytery of Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 442 (Ky. 1992).

disputes that end up in Ohio's courts.

CONCLUSION

For each of the reasons discussed above, this case is a case of public and great general interest and involves a substantial constitutional question. Eastminster respectfully requests that the Court accept jurisdiction and requests full briefing on the merits of this case.

Respectfully submitted,



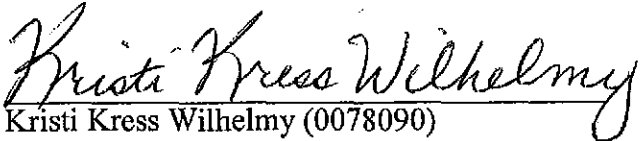
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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the Mechanical Requirements set forth in Rule VII(4)(A) of the Rules of Practice of the Supreme Court of Ohio. This Brief is printed using Times New Roman 12-point typeface using Microsoft Word word processing software and contains 5,830 words.


Kristi Kress Wilhelmy (0078090)

APPENDIX

Appx. Page

Decision and Journal Entry of the Summit County Court of Appeals
(February 4, 2009) 1

STATE OF OHIO)
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HERRIGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2009 FEB -4

HUDSON PRESBYTERIAN CHURCH

SUMMIT COUNTY
CLERK OF COURTS

CA No. 24279

Appellee

v.

EASTMINSTER PRESBYTERY, et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006 09 6162

DECISION AND JOURNAL ENTRY

Dated: February 4, 2009

DANIEL M. HERRIGAN
2009 FEB -4 AM 9:52
SUMMIT COUNTY
CLERK OF COURTS

WHITMORE, Judge.

{¶1} Defendant-Appellant, Eastminster Presbytery ("Eastminster"), appeals from the judgment of the Summit County Court of Common Pleas, which granted summary judgment in favor of Plaintiff-Appellee, Hudson Presbyterian Church ("HPC"). This Court affirms.

I

{¶2} HPC incorporated and filed its articles of incorporation with the Ohio Secretary of State in the summer of 1982. In listing the purposes for the formation of the organization, HPC's original articles of incorporation provided, in part, as follows:

"To voluntarily associate together for divine worship and godly living, agreeably to the Holy Scriptures, submitting to the authority and form of government as set forth in the Constitution (as amended) of the United Presbyterian Church in the United States of America, and under the further authority of Eastminster Presbytery."

{¶8} Subsequently, Eastminster filed objections to the magistrate's decision. On May 23, 2008, the trial court issued its order overruling Eastminster's objections and entering a declaratory judgment in HPC's favor. Eastminster now appeals from the trial court's order and raises four assignments of error for our review. For ease of analysis, we rearrange several of the assignments of error.

II

Assignment of Error Number Four

"THE COURT ERRED IN INTERVENING IN CHURCH POLITY AND ECCLESIASTICAL MATTERS WHEN IT ALLOWED HPC TO UNILATERALLY DISAFFILIATE AND TAKE ENTRUSTED PROPERTY WITH IT[.]"

{¶9} In its fourth assignment of error, Eastminster argues that the trial court erred in exercising jurisdiction over this matter. Specifically, Eastminster argues that the dispute at issue is ecclesiastical in nature and, therefore, not within the jurisdiction of a secular court. We disagree.

{¶10} "It is well-settled that American courts will steadfastly decline to interfere in church disputes over doctrinal or spiritual matters." *Winston v. Second Baptist Missionary Church of Lorain* (Sept. 10, 1997), 9th Dist. No. 96CA006588, at *2. A court may decide a church dispute, however, if it does not require that the court "delve into areas of church dogma" or interpret doctrinal beliefs. *Id.* A court may exercise its jurisdiction over a church dispute if it is able to resolve the dispute by employing neutral principles of law. See *id.* (upholding court's conclusion that church breached its constitution in electing a reverend based on the court's neutral and secular reading of the church's constitution); *Jones v. Wolf* (1979), 443 U.S. 595, 602-04 (espousing rights of States to determine church property disputes based on "neutral principles of law"); *State ex rel. Morrow v. Hill* (1977), 51 Ohio St.2d 74, 80 (upholding court's

decision regarding local church's affiliation with national church based on consideration of "purely factual matters *** [unrelated to] religious doctrines, tenets or practices"); *Serbian Orthodox Church of Congregation of St. Demetrius of Akron v. Kelemen* (1970), 21 Ohio St.2d 154, 158, 162 (remanding for a neutral law inquiry to determine whether church had right to its name and certain property).

{¶11} In citing multiple reasons as to why HPC's "efforts to disaffiliate and misappropriate entrusted property were illegal and void[.]" Eastminster merely espouses various bases for disagreeing with the trial court's decision. Eastminster declares without explanation that the trial court's exercise of jurisdiction "patently violated the First Amendment" because it decided matters "expressly governed by church polity." While Eastminster mentions the neutral principles of law doctrine, it does so only to specify that the doctrine does not apply "to religious controversies in the areas of church government, order and discipline[.]" *Hutchinson v. Thomas* (6th Circ. 1986), 789 F.2d 392, 396. Eastminster fails to explain why this matter constitutes such a nonjusticiable religious controversy. See App.R. 16(A)(7) (providing that an appellant bears the burden of demonstrating error on appeal). The fact that a trial court's decision will have implications for a religious entity is not a per se indication that the trial court lacks jurisdiction over the matter. See *Winston*, at *2. Eastminster's fourth assignment of error is overruled.

Assignment of Error Number One

"THE TRIAL COURT ERRED IN EXCLUDING THE 1981 BOOK OF ORDER AND REFUSING TO CONSIDER ITS TRUST PROVISION[.]"

{¶12} In its first assignment of error, Eastminster argues that the trial court erred in excluding one of its exhibits and in concluding that the best evidence rule barred the admission of other evidence reiterating the language contained in the exhibit. We disagree.

{¶13} “The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.” *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An appellate court will not disturb evidentiary rulings absent an abuse of discretion that produced a material prejudice to the aggrieved party. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, at ¶14. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶14} As part of the joint exhibit binder that the parties submitted with their respective motions for summary judgment, Eastminster included Exhibit 150. The exhibit consisted of a single photocopied page, which was entitled “Chapter XLII Of Property” and contained several paragraphs. One of the paragraphs provided as follows:

“All property held by or for a particular church, *** whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of the particular church or of a more inclusive judicatory or retained for the production of income, is held in trust nevertheless for the use and benefit of The United Presbyterian Church in the United States of America.”

The table of contents at the beginning of the joint exhibit binder indicated that Exhibit 150 consisted of “UPCUSA Book of Order (excerpts from 5/23/81, G.XLII Sec. 72.02 and 72.03).” One of Eastminster’s affidavits in support of its motion for summary judgment, the affidavit of Reverend Mark A. Tammen, also contained the above-quoted paragraph and indicated that it was included in the United Presbyterian Church in the U.S.A.’s 1981 Book of Order.

{¶15} The trial court determined that Eastminster failed to submit admissible evidence of the 1981 Book of Order’s contents. Furthermore, the court refused to consider Eastminster’s

affidavits as evidence of the content of Exhibit 150 because the affidavits did not constitute the best evidence of the 1981 Book of Order and Eastminster failed to set forth any exception to the best evidence rule. Eastminster argues that the trial court erred in excluding its exhibit because: (1) HPC never challenged either the authenticity or admissibility of Exhibit 150; (2) the parties essentially stipulated to Exhibit 150 at a March 28, 2007 hearing before the magistrate, and the stipulation was binding on the trial court; (3) the trial court refused to allow Eastminster to supplement the record with a complete copy of the 1981 Book of Order in order to remedy any defects in Exhibit 150; and (4) "even inadmissible evidence should be considered" at the summary judgment stage.

{¶16} The absence of any challenge to Exhibit 150 on the part of HPC had no bearing on the trial court's ability to strike the exhibit because a "trial court maintains the discretion to sua sponte exclude or admit evidence." *State v. Southala Chandathany*, 9th Dist. No. 02CA0081-M, 2003-Ohio-1593, at ¶5, fn.1. Moreover, the record does not support Eastminster's assertion that the parties entered into a binding stipulation with regard to the exhibits. At a March 28, 2007 hearing before the magistrate, HPC's attorney responded to the magistrate's inquiry about the status of discovery as follows:

"Your Honor, what we've discussed so far is essentially stipulating to the authenticity of documents. And right now this appears to be the binder of documents that we will be submitting. With all due apologies to the court, we got about 120 documents."

Apart from the tenuous conclusion that an "essential[] stipulati[on]" to authenticity equates to a comprehensive and binding stipulation, HPC's attorney indicated that they had approximately 120 documents in the binder of documents to be submitted. The parties' joint exhibit binder ultimately contained over 160 exhibits. It is unclear which of the exhibits the parties already had at the time they appeared before the magistrate and which exhibits they collected after the

hearing. Accordingly, the record does not support Eastminster's conclusion that the parties stipulated to all of the exhibits. The trial court had the discretion to conclude that the parties did not stipulate to Exhibit 150 and to consider Exhibit 150's admissibility sua sponte. *Id.*

{¶17} There also is no indication that the trial court abused its discretion by refusing to allow Eastminster to provide it with additional evidence. Civ.R. 53(D)(4)(d) provides, in relevant part, that:

"In ruling on objections [to a magistrate's decision], the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court *may hear* additional evidence but may refuse to do so unless the objecting party demonstrates that [it] could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." (Emphasis added.)

After the magistrate issued his decision, Eastminster sought to supplement the parties' joint exhibit binder. One of the supplements Eastminster sought to admit was a cover page for Exhibit 150 so as to identify it as an excerpt from the 1981 Book of Order. During a November 9, 2006 hearing before the magistrate, HPC expressed its difficulty in obtaining a copy of the 1981 Book of Order. Eastminster responded by promising to provide HPC with a complete copy of the 1981 Book of Order. Accordingly, Eastminster had a complete copy of the 1981 Book of Order, which would have included the date of its publication, and apparently decided not to include it as part of Exhibit 150. It did not attempt to do so until after the magistrate issued his decision in favor of HPC. Based on the availability of the additional evidence and Eastminster's delay in seeking its admission, we cannot say that the trial court abused its discretion in refusing to permit Eastminster to supplement Exhibit 150. See *id.* See, also, *Toth v. Toth*, 6th Dist. No. OT-05-006, 2005-Ohio-7001, at ¶23-25.

{¶18} The trial court did not abuse its discretion in refusing to consider Exhibit 150 for purposes of summary judgment. Civ.R. 56(C) limits the type of evidence that a trial court may consider in determining whether a party is entitled to summary judgment. If a party wishes to rely on a piece of evidence excluded from Civ.R. 56(C)'s exclusive list, the evidence must be incorporated by reference through a properly framed affidavit. *Rutkai v. Freeland*, 9th Dist. No. 24267, 2008-Ohio-6440, at ¶7; Civ.R. 56(E). Exhibit 150, a single page photocopy, did not constitute one of the listed Civ.R. 56(C) materials. As such, Exhibit 150's admission depended upon its incorporation by reference through a properly framed affidavit. Civ.R. 56(E). Although Reverend Tammen's affidavit quoted part of the same material contained in Exhibit 150, the affidavit did not refer to Exhibit 150. Consequently, Eastminster failed to incorporate the content of Exhibit 150, the 1981 Book of Order, by reference.⁴ The trial court was under no obligation to consider Exhibit 150. See *Richardson v. Auto-Owners Mut. Ins. Co.*, 9th Dist. No. 21697, 2004-Ohio-1878, at ¶29 (providing that trial court has discretion whether to consider improper Civ.R. 56 evidence).

{¶19} Finally, we cannot agree that the trial court abused its discretion by concluding that Eastminster could not rely upon Reverend Tammen's affidavit as a substitute for the content of Exhibit 150. This Court has held that "[e]vidence submitted with a motion for summary judgment is proper only 'if the evidence is admissible at trial.'" *Nationwide Life Ins. v. Kallberg*, 9th Dist. No. 06CA008968, 2007-Ohio-2041, at ¶20, quoting *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. No. 21499, 2003-Ohio-7190, at ¶7. Evid.R. 1002, the Best Evidence Rule,

⁴ Although Exhibit 157, the affidavit of Reverend Meta Cramer, attested to the authenticity of the 1981 Book of Order "[a]ttached hereto, as Exhibit 'A'" Eastminster failed to attach any "Exhibit A" to Cramer's affidavit. Further, Cramer's affidavit was not notarized.

provides that “[t]o prove the content of a writing, *** the original writing *** is required, except as otherwise provided in these rules[.]” Evid.R. 1004 contains a list of various exceptions to the Best Evidence Rule, whereby a party may introduce other evidence to prove the content of a writing. Eastminster failed to explain why it was necessary to rely on Reverend Tammer’s affidavit to prove the content of the 1981 Book of Order. Indeed, Eastminster indicated during a November 9, 2006 hearing that it at least had a copy of the entire 1981 Book of Order in its possession. The trial court did not abuse its discretion in refusing to consider Reverend Tammer’s affidavit as evidence of the content of the 1981 Book of Order based on Eastminster’s failure to comply with the Best Evidence Rule. Eastminster’s first assignment of error is overruled.

Assignment of Error Number Two

“THE TRIAL COURT ERRED IN FAILING TO FIND A TRUST FOR THE
[PRESBYTERIAN CHURCH U.S.A.] BASED ON THE EXTENSIVE
EVIDENCE IN THE RECORD[.]”

{¶20} In its second assignment of error, Eastminster argues that the trial court erred in determining that HPC did not hold its church property in trust for the Presbyterian Church (U.S.A.). Specifically, Eastminster argues that the trial court erred in failing to conclude that the Presbyterian Church (U.S.A.)’s constitution created an express trust that governed HPC’s property. We disagree.

{¶21} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶22} Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶23} Eastminster argues that HPC agreed to abide by the Presbyterian Church (U.S.A.)’s constitution, contained in its Book of Order, and that the constitution contained an express trust. Eastminster relies upon the United States Supreme Court decision in *Jones v. Wolf* (1979), 443 U.S. 595, to argue that an express trust governed HPC’s property. In *Jones*, the Court held that:

“Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated

provides that “[t]o prove the content of a writing, *** the original writing *** is required, except as otherwise provided in these rules[.]” Evid.R. 1004 contains a list of various exceptions to the Best Evidence Rule, whereby a party may introduce other evidence to prove the content of a writing. Eastminster failed to explain why it was necessary to rely on Reverend Tammen’s affidavit to prove the content of the 1981 Book of Order. Indeed, Eastminster indicated during a November 9, 2006 hearing that it at least had a copy of the entire 1981 Book of Order in its possession. The trial court did not abuse its discretion in refusing to consider Reverend Tammen’s affidavit as evidence of the content of the 1981 Book of Order based on Eastminster’s failure to comply with the Best Evidence Rule. Eastminster’s first assignment of error is overruled.

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grounds if such grounds exist. See, e.g., *Phillips v. Cochrum*, 9th Dist. No. 23349, 2007-Ohio-247.

{¶26} Eastminster argues that HPC “was bound by the express trust clauses in the 1983 and 2005 Books of Order.” Eastminster avers that the trial court “failed to consider the trust clauses in the 1983 or 2005 Books of Order at all” because it did not mention either trust clauses in its order granting HPC summary judgment. Yet, Eastminster’s evidence of the 1983 and 2005 Books of Order suffers from the same defects as its evidence of the 1981 Book of Order. That is, the Books are not Civ.R. 56(C) evidence, and there is no indication that Eastminster incorporated the Books by reference through one or more properly framed affidavits. *Ruthai* at ¶7; Civ.R. 56(E). Accordingly, we agree with the court’s ultimate determination, that Eastminster failed to prove an express trust, based on a separate ground: that Eastminster did not introduce admissible evidence of the Presbyterian Church (U.S.A.)’s constitution.⁵ See *Phillips*, supra. See, also, *Hatch*, at *1 (requiring an express declaration of trust as part of the formation of an express trust). Eastminster’s second assignment of error is overruled.

Assignment of Error Number Three

“THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THAT HPC HELD ITS PROPERTY FREE FROM A CHARITABLE TRUST[.]”

{¶27} In its third assignment of error, Eastminster argues that the trial court erred in determining that HPC did not hold its property in a charitable trust for the benefit of the

⁵ To the extent that Eastminster argues that various affidavits it provided attest to the content of the 1983 and 2005 Book of Order, we note that these affidavits also suffer from the same defects as Reverend Tammen’s affidavit attesting to the 1981 Book of Order. That is, they are not the best evidence of the Books. See *Kallberg* at ¶20 (noting that the propriety of summary judgment evidence depends in part upon its admissibility at trial).

Presbyterian Church (U.S.A.). Specifically, Eastminster argues that the Presbyterian Church (U.S.A.)'s contributions to HPC created a charitable trust within the meaning of R.C. 109.23.

{¶28} In reviewing a trial court's decision to overrule a party's objections to a magistrate's recommendation for summary judgment and to enter summary judgment on behalf of one of the parties, this Court looks to the arguments and evidence that the parties presented at the summary judgment stage. See, e.g., *Midland Funding LLC-MFL v. Halberg-Weiss*, 9th Dist. No. 23461, 2007-Ohio-3241, at ¶5-11; *Community Health Partners v. Med. Mut. of Ohio*, 9th Dist. No. 05CA008693, 2005-Ohio-6913, at ¶4-17. The record reflects that Eastminster's motion for summary judgment is devoid of any argument that HPC held its property in a charitable trust. Rather, the Attorney General argued that a charitable trust existed. Eastminster's objection to the magistrate's decision on this matter provided, in relevant part, as follows:

"[T]he Magistrate concluded, without explanation or analysis, that the State's position regarding the existence of a charitable trust was without merit. Accordingly, the Magistrate's Decision erred as a matter of law in denying the State of Ohio's motion for summary judgment. Eastminster supports the State's Objections and Memorandum in Support herein to support this objection."

Eastminster may not rely upon the Attorney General's motion as a means of preserving an argument that it failed to make on its own behalf. Because it failed to raise any charitable trust argument in its own motion for summary judgment, Eastminster cannot now raise this argument on appeal. See *White v. Summa Health System*, 9th Dist. No. 24282, 2008-Ohio-6790, at ¶24. Eastminster's third assignment of error is overruled.

III

{¶29} Eastminster's four assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

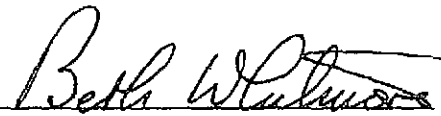
Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.


BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

I certify this to be a true copy of the original
Daniel M. Hartigan, Clerk of Courts


Clerk

APPEARANCES:

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FORREST A. NORMAN and RICHARD C.O. REZIE, Attorneys at Law, for Appellee.