

To be Argued by:
Donald G. Nichol, Esq.
(Time Requested:
15 Minutes)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

The Presbytery of Hudson River of the Presbyterian Church (U.S.A.)
and Rev. Richard M. Spierling as Chair of the Administrative
Commission appointed by the said Presbytery with respect to the
First Presbyterian Church of Ridgebury,

Plaintiffs- Appellants,

Docket No. 2008-04618

- against -

The Trustees of the First Presbyterian Church and Congregation of
Ridgeberry a/k/a Ridgebury Church and/or The Church at Ridgebury,
Trustees of the First Presbyterian Church and Congregation of
Ridgebury, Trustees of the Presbyterian Church of Ridgebury, New
York and The Ridgebury Presbyterian Church; and Lori DeBlock,
Les Kirby, Marie Knibbs, Dorothy Kwapong, Ronald Lyons, Theda
Wolfe, the Rev. Robert W. Hoag, and Stanley Wayne,

Defendants-Respondents.

AFFIRMATION IN OPPOSITION TO MOTION TO STRIKE

of

Defendants-Respondents,
except the Rev. Robert W. Hoag,
an innocent bystander

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Defendants-Respondents.

Donald G. Nichol, an attorney licensed in New York affirms under penalties of perjury:

1. I am a member of Jacobowitz & Gubits, LLP, attorneys for the Defendants-Respondents. As such I am fully familiar with the facts and circumstances related to this appeal and with the Record on Appeal. I am an ordained Presbyterian Elder currently serving as Coordinator of Ministries at The Church at Ridgebury.¹ I make this affirmation in opposition to Plaintiffs-Appellants motion to strike the Answering Brief.

¹ I was originally ordained an Elder in the PC(USA). I am on the Board of Directors of a Christian High School and a Bible Institute. I teach Presbyterian doctrine and history and examine prospective Elders on these subjects. Thus, I naturally cite authority for our beliefs.

2. This appeal concerns Appellants' attempt to usurp a property interest in The Church at Ridgebury, a local Presbyterian Church which currently is affiliated with the Evangelical Presbyterian Church denomination. Appellants sole claim to a property interest is based on a disputed religious provision in the PC(USA) Book of Order, the secondary part of a religious constitution which by its own terms "is not attended with civil effects" (BoO, G-1.0308). The disputed religious trust provision is *ultra vires*, (G-1.0307), is overruled by the primary part of the religious constitution (Book of Confessions, 6.148), and has been rejected by the highest authority in any Presbyterian Church (BoC, 6.010.)

3. Ridgebury's ownership is supported by all secular documents and authorities: deeds, certificates of incorporation, and state laws.

4. Appellants, in their Appellants' Brief, failed to even mention, let alone discuss, the religious controversy regarding the religious constitution which is fully documented in the Record below and was fully briefed in Memoranda of Law for the court below.

5. The existence of the religious dispute is listed among the undisputed facts (R-21,22, xv) and stated in Plaintiff's own exhibit (R-609) where it is admitted:

...the issues in that [property] dispute are invariably intertwined with issues regarding a doctrinal or other ecclesiastical matter.

6. The Courts should note that the existence of the religious argument concerning the denominational constitution merely means that the Court must abstain from considering that religious document. The Court, therefore, must decide the case on the other (truly) neutral principles of law.

7. Appellants now attempt to strike substantial portions of the Answering Brief, claiming any discussion of the religious dispute or any legal argument contrary to their erroneous claims, and/or the citation of authority in relation thereto, is improper, even though it is fully supported by the Record and fully briefed below.

8. Appellants have waived any objection to the Answering Brief by filing a Reply Brief.

9. Now, after having had the advantage of a Reply, they seek to strike the Answering Brief to which they replied.

10. The motion to strike is entirely without merit and, on information and belief, was made solely for sanctionable reasons. Appellants were shown references to the matters in the Answering Brief in the Record and Memoranda of Law below, but refused to withdraw their motion.

11. The motion to strike demonstrates a lack of knowledge of the contents of the Record, the denominational constitution (which they themselves introduced below), and even of their own pleadings.

12. The motion to strike seeks to eliminate facts and arguments fully presented below which are contrary to their own erroneous statement and analysis of the issues.

13. It should be noted that Appellants' attorneys on the appeal did not represent the Appellants below.

14. The intent of the motion to strike is well summed up in the words of A.W. Tozer:

This is not the only instance where an attempt was made to slay a truth to keep it quiet lest it appear as a material witness against an error.
The Knowledge of the Holy, Chap. 7, p. 38.

15. Appellants main objection is that the matters they seek to strike show the error of their claims.

16. Humorously, Appellants even seek to strike references to their own pleadings, the decision below, Court of Appeals cases, and even Supreme Court cases. A few quick examples will illustrate:

- a. On page 13 of the Answering Brief, we note that the adoption of the disputed trust provision "was taken at the perceived invitation of the Supreme Court..." Appellants seek to strike. In their own Complaint (R-131 ¶24,) Appellants state "at the invitation of the United States Supreme Court" they adopted the disputed trust provision. Appellants

seek to strike a reference to their own Complaint.

- b. On page 4 of the Answering Brief, we summarize a point regarding state law: “Trusts must be established by the Owner and not the putative beneficiary.” Appellants seek to strike. The court below stated in its decision (R-14): “It is hornbook property law that only the owner of real property can convey an interest in the property; B can not create a future interest in A's property without A's consent (see generally, Bogert, Trusts & Trustees [2nd ed rev] §§ 141 et seq).” Appellants seek to strike a summary of the decision of the court below.
- c. On page 46 of the Answering Brief we state:

In 1929, an attempt was made to alter this Presbyterian norm of property ownership by introduction of a requirement for local churches to hold their property in trust for the denomination. This attempt was defeated. Thus it is clear that before the 1980's, it was undisputed that all local presbyterian churches owned their property free and clear of any claimed denominational trust, by implication or otherwise.

Appellants seek to strike.

The Court of Appeals stated in *FPC Schenectady v UPCUSA*, 62 NY2d 110, 125 stated:

Additionally, not only does the Book of Order contain no provision of trust, but in 1929 UPCUSA proposed an amendment to the church rules establishing a trust of all church properties for the denominational church and the amendment failed to receive the necessary votes of the Presbyteries for passage.

Appellants seek to strike references to Court of Appeals decisions which are contrary to their factual claims and legal arguments.

- d. On page 3 of the Answering Brief, we summarize our argument concerning Ridgebury's deeds: "The US Supreme Court has held that it is the obvious duty of the court to enforce the deeds." Appellants seek to strike. The US Supreme Court in *Jones v Wolf*, 443 US 593, 603 (footnote 3) states:

Indeed, even in *Watson v Jones*, a common law decision heavily relied on by the dissent, Mr. Justice Miller, in speaking for the Court, stated that, regardless of the form of church government, it would be the "obvious duty" of a civil tribunal to enforce the "express terms" of the deed, will or other instrument of church property ownership. 13 Wall at 722-723.

Appellants seek to strike references to Supreme Court decisions, particularly when the US Supreme Court expressly limits the dicta which the Appellants would have this court adopt. This holding of the Supreme Court that courts have an obvious duty to enforce the deeds is the crux of our case.

17. Though Appellants seek to strike portions of the Answering Brief, the Brief is in fact fully supported by the Record. A Comprehensive List of matters Appellants seek to strike is annexed as Exhibit "A." Not all references in the Record are identified, but sufficient references are provided to justify the discussion

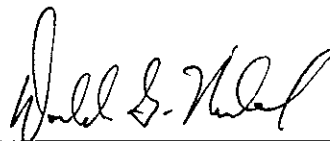
in the Brief.

18. In preparing this List, we note that the Record fails to include a series of letters to the Court below which were initiated by the Appellants and responded to by me. I have found electronic copies of my responses, but not the original letters. These letters include discussion regarding distinguishing Methodist and Episcopal cases.

19. All the matters presented in the Answering Brief were presented before the Court below, except the new *Episcopal Diocese v Harnish* case. This new case, however, did not in any way overrule, criticize, or limit the Court of Appeals holding in *First Presbyterian Church of Schenectady v UPCUSA*, 62 NY2d 110 relied on by the court below and fully distinguishable from the *Episcopal Diocese* case for which a writ of certiorari to the US Supreme Court is being sought.

20. Since the Appellants motion is lacking in merit, it should be denied, together with such other and further relief as the Court deems just and/or equitable.

Dated: January 21, 2009
Walden, New York



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Comprehensive List of Matters Appellants Seek to Strike
with Citations to the Record and Argument Below
(Citations are not exhaustive, just illustrative)

Yellow Lined Text which Plaintiffs seek to strike	Answering Brief page #	Record or Argument Citation
Supreme Court holds court must enforce deeds	3	<i>Jones v Wolf</i> , 443 US 595, 603 Footnote 3
Ridgebury's pre-1828 status	3	<i>Petty v Tooker</i> , 21 NY 267, <i>Schnectady</i> case p. 125
Amended Certificate contains revocation	4	R-63
Trusts must be established by owner, not beneficiary	4	Decision below, R-14
Denominational constitution has no civil effect	4	BoO G-1.0300, Ans Memo on cross motion, Point IV
The Express Property Guaranty	4	BoC, 6.148, R-28, Briefed in Memoranda below, Point I
Highest Judicatory supports Ridgebury	5	BoC, 6.010, R-22, R-26, R-27
Ridgebury retains veto power	5	BoC, 3.20, 6.174, R-29
PC(USA) is presbyterian, not hierarchical	5	R-26, R-34, R-42
Reformed in Doctrine, Presbyterian in Governance	8	R-26 (Same on PCUSA website. Presbyterian 101)
Associating and disassociating	9	R-66-76
Local Churches always owned and controlled property	10	<i>Schnectady</i> case
Ridgebury never conveyed a trust	11	R-21, Undisputed Facts
Ownership in hands of Deacons	12	1560, 1578 Disciplines, R-52
Express Property Guarantees	12	BoC, 6.148, R-28, Briefed in Memoranda below
1929 attempt to adopt a trust provision	12	<i>Schnectady</i> case, p125, For splits see R-66-77
Adoption of trust provisions	13	Decision below, R-12-13, Complaint R-42
Veto Power not recinded	13	BoC, 3.20, 6.174, R-29
Regulative Principle	14	BoO, G-1.0307, R-26
Presbyterian (non-hierarchical) structure	14	R-26, R-34, R-42, R-74,76-78
Power shared in Presbyterian system	15	BoO, G-4-0302, R-28, R-644
Authority of Scripture, Rank of constitutional documents	15	R-26, G-18.0201,.0301, G-1.0307
All interpretation of denom. const. interprets Scripture	16	R-517, 518, G-1.0307, citation to recognized authority
Express Property Guarantees, Veto	16	BoC, 6.148, 3.20, 6.173, R-28,29
Book of Confessions controlling	16	R-645,646
Local Church to control Presbyteries	17	BoC, 6.173-4, R28, R644
Presbytery in violation of constitution	17	R-30,31, R-647-650
Presbytery did not require written trust	17	R-21, Undisputed Facts
PC(USA) constitution has no civil effect	24	BoO G-1.0300, Ans Memo on cross motion, Point IV
Courts not to determine religious doctrine	25	<i>Cong. Yetev Lev</i> , 9 NY3d 282, 286
Religious discipline for religious violations	25	G-1.0308,
Trust provision ultra vires	26	G-1.0307, R-27,28, R-35; citation to authority
Express Property Guaranty	26	BoC, 6.148, R-28, Briefed in Memoranda below, Point I
Confessions overrule Book of Order	27	R-26, citations to recognized authority; Briefed below
Confessions part of constitutions, not to be ignored	28	R-645, 646, R-651-655
Confessions supported by Scriptural Reference	29	R-25-28, BoC, endnotes
Veto Power / shared powers / non-hierarchical	29	BoC, 3.20, 6.148,R-29, R-28, R-644, R-26, R-34,R-42 etc
Johnston v Heartland Prebytery	30	quoted at R-28 and R-644
Westminster CoF, Scots CoF	30	BoC, 6.173,3.20, R-28,29, quoted in Record
Professor Erickson	31	R-74,77,78
Non- Hierarchical	32	R-26, R-34, R-42, citations to recognized authority
Constitution prohibits binding non- party	33	<i>Hansen</i> , 357 US 235, 250, <i>Gilberg</i> , 53 NY2d 285, 291
Disaffiliation by unanimous vote	41	R-63
1805 Certificate of Incorp - control in local hands	42	R-60
Only Property owner can create a trust	44	Decision below R-14, R-17, Briefed below, Point II
Historical lack of trust, 1560, 1578, 1646, 1817	45	R-52, etc. See also <i>Schnectady</i> case, p. 125
1929 attempt to adopt a trust provision	46	<i>Schnectady</i> case at 125
Basic premises of trust law preclude trust	46	Decision below R-14, Hornbook law
Undisputed that there was no vote to grant trust	48	Undisputed Facts,R-23, 24
Distinguishable from Episcopal/ Methodist	50	Decision below R-14-17, letter to court below
Amended Certificate cites means of granting trust	62	R-63, par 3
Vote in accord with 400+ years of Presbyterian polity	62	R-50, R-52
Ridgebury has ownership and control of property	63	Undisputed Facts, R-23, 24
Outline of differences in <i>Episcopal Diocese</i> case	65	Just compare the case to the record here.