Record No. 120919

In the Supreme Court of Virginia

THE FALLS CHURCH (ALSO KNOWN AS THE CHURCH AT THE FALLS–THE FALLS CHURCH), DEFENDANT-APPELLANT

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA, PLAINTIFFS-APPELLEES

APPELLANT THE FALLS CHURCH'S APPLICATION FOR REHEARING

SCOTT J. WARD (VSB #37758)
sjw@gg-law.com
TIMOTHY R. OBITTS (VSB #42370)
tro@gg-law.com
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102
(703) 761-5000 (telephone)
(703) 761-5023 (facsimile)

JAMES A. JOHNSON
jjohnson@semmes.com
PAUL N. FARQUHARSON
pfarquharson@semmes.com
TYLER O. PROUT (VSB #74180)
tprout@semmes.com
Semmes, Bowen & Semmes, P.C.
25 South Charles Street, Ste. 1400
Baltimore, MD 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile)

GORDON A. COFFEE (VSB #25808)
gcoffee@winston.com
GENE C. SCHAERR
gschaerr@winston.com
STEFFEN N. JOHNSON
sjohnson@winston.com
ANDREW C. NICHOLS (VSB #66679)
anichols@winston.com
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000 (telephone)
(202) 282-5100 (facsimile)

Counsel for Appellant The Falls Church

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FEDERAL STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

GLOSSARY

Diocese	The Protestant Episcopal Church in the Diocese of Virginia
DVA Br.	Brief of Appellee Protestant Episcopal Church in the Diocese of Virginia
TEC	The Protestant Episcopal Church in the United States of America
TEC Br.	Brief for Appellee-Cross Appellant The Episcopal Church
TFC or Church	The Falls Church
TFC Br.	Opening Brief for Appellant The Falls Church
TFC Reply Br.	Reply Brief for Appellant The Falls Church
7/13/07 Br.	Plaintiffs' Brief in Opposition to Demurrers and Pleas in Bar (filed July 13, 2007)
11/5/08 Br.	The Episcopal Church's and The Protestant Episcopal Church in the Diocese of Virginia's Responsive Post-Trial Brief Regarding Church of the Word (filed Nov. 5, 2008)

INTRODUCTION

Pursuant to Rule 5:37, The Falls Church respectfully seeks rehearing of the Court's April 18, 2013, decision ("Op.") (attached) regarding the application of Va. Code § 57-7.1. The "constructive trust" theory on which the Court relied has never—in over six years of litigation—been pled, argued, briefed, or proven by TEC or the Diocese. Their complaints do not even allege the factual predicates for imposing a constructive trust—that TFC was a "trustee," that it owed plaintiffs a "fiduciary duty," or that it breached such a duty. They assert only an "express trust." TEC Br. 33 (asking to "reverse the circuit court's finding that [their] express trust rules are unenforceable"); DVA Br. 47 (§57-7.1 validates their "express trust"); Op. 16 (plaintiffs assert "an express trust"). As Justice McLanahan noted in concurrence, the "constructive trust" issue was simply not "before this Court." Op. 35 n.1.

Even if a "constructive trust" argument had been raised, however, the decision would be unsupportable. Although the Court recognized that denominational trusts were not valid prior to §57-7.1's adoption in 1993 (Op. 12), the Court's imposition of a constructive trust rested on canons and conduct that predate 1993 (Op. 24). The Court thus applied §57-7.1 retroactively to deprive TFC of vested property rights, in violation of settled statutory construction law, the Contracts Clause, and the First Amendment.

In sum, the Court "based [its] decision on [both] a mistake of fact" and a "mistake of law," either of which provides good cause for rehearing. *See Tanner v. State Corp. Comm'n*, 266 Va. 170, 172-73 (2003); Rule 5:37(e).

BACKGROUND

In reversing the trial court's ruling that §57-7.1 does not validate denominational trusts, this Court properly held that plaintiffs could not establish either "an express denominational trust" or "a resulting trust" under Virginia law. Op. 17, 18. As the Court noted, "any express trusts purportedly created by the Dennis Canon were ineffective in Virginia," as trusts must be "construed according to the law in effect *at the time the trust is executed*" and pre-1993 law did not allow denominational trusts. Op. 17 (citation omitted). Further, aware that plaintiffs made no financial contributions toward the purchase of TFC's property, the Court deemed it "readily apparent that the record … does not support the existence of a resulting trust." Op. 18.

The Court went on, however, to hold that "a constructive trust [must] be imposed on [TFC's] property for [plaintiffs'] benefit." Op. 25. According to the Court, this was justified because TFC breached a "fiduciary obligation to [plaintiffs]." Op. 25. The Court found this "fiduciary relationship" in "the Dennis Canon" and in "implicit" aspects of TFC's relationship with the denomination, including conduct that long predated adoption of §57-7.1 in

1993. Op. 20.[1] TFC's withdrawal from the denomination with its property was viewed as "a violation of [this] fiduciary obligation." Op. 25.

The Court did not explain how pre-1993 canons or conduct that could not then have created an express trust could nevertheless show that TFC "intended, agreed and expected that the property at issue would be held in trust by [TFC] as trustee for [plaintiffs'] benefit." Op. 24. Nor did the Court consider whether plaintiffs had pled or pressed a constructive trust theory.

ARGUMENT

I. The Court's decision rests on a "constructive trust" theory that was not alleged, much less proven, at any point in this litigation.

In over six years of litigation, TEC and the Diocese have pressed just one trust theory—that their trust canons create an "express trust" interest in TFC's property. TEC's assignment of cross-error asked the Court to "reverse the circuit court's finding that the church's and the Diocese's express trust rules are unenforceable." TEC Br. 33. Indeed, an express trust is the only type of trust claimed in any of plaintiffs' briefs (*e.g.*, TEC Br. 40; DVA Br. 50, 47-49; TEC Opp. 1), and the Court's own opinion described plaintiffs as "contend[ing] that [their canons] created an express trust." Op. 16.

[1] *See id*. (the Dennis Canon "merely codified … a trust relationship that has been implicit in the relationship between local parishes and dioceses since … 1789"); *see also* Op. 24 (citing "at least 100 years" of attendance at Diocesan council, bishop visits dating to "1934," and other pre-1993 conduct).

Thus, when the Court held that pre-1993 law barred any "express denominational trust" (Op. 24), it should have rejected the cross-assignment.[2] Instead, the Court devised a new trust theory *sua sponte*: It would amount to "'fraud or injustice'" to let TFC retain property bought with its own money, warranting imposition of a "'constructive trust[].'" Op. 18 (citations omitted).

Setting aside the merits of this decision (*see infra* at 7-10), it was improper for the Court to reverse the trial court's §57-7.1 ruling based on facts and a legal theory not "before the Court." Op. 35 n.1 (McLanahan, J.). Not *once* did plaintiffs assert the "fraud," "injustice," or "unconscionable" conduct required to justify imposition of a constructive trust. Op. 18. Not once in its 113-page opinion did the trial court describe TFC as a trustee owing a fiduciary duty to plaintiffs—the factual predicates for the Court's imposition

[2] The Court did not discuss other reasons why plaintiffs could not assert an express trust. But one must hold title to create an express trust, *Leonard v. Counts*, 221 Va. 582, 588 (1980) ("an express trust is based on the declared intention of the trustor," not a putative beneficiary), and neither plaintiff held title. TFC Reply Br. 18-19. Further, §57-7.1 requires a "conveyance"—something plaintiffs have expressly disclaimed from the outset of the case. 7/13/07 Br. 23 (asserting, in successfully opposing application of the Statute of Frauds (Va. Code §11-2), that "plaintiffs do not allege a 'conveyance' (or a contract to convey)"); TFC Reply Br. 18. Thus, even assuming, *arguendo*, that denominations must be permitted to form trusts on non-discriminatory terms (Op. 36 (McLanahan, J., concurring)), plaintiffs are unable to do so. *GMC v. Tracy*, 519 U.S. 278, 298-99 (1997) ("any notion of discrimination assumes a comparison of substantially similar entities"). In their view, the canons need not comply with the neutral requirements of §57-7.1 or the trust law generally—which is not a claim for equal treatment.

of a constructive trust. Op. 24. In sum, nowhere below, in opposing review, or in this Court did plaintiffs seek a "constructive trust."

In fact, the one time a constructive trust issue came up below, plaintiffs opposed another defendant's attempt to impose a constructive trust on property held by the Diocese's trustees on the following basis: "There can be no constructive trust" because such a trust requires "a fraud" or "a failure of justice," and "*COTW has not pled or proven such circumstances*." 11/5/08 Br. 5 (emphasis added). Had this Court held plaintiffs to their own standards, it would have been compelled to affirm the §57-7.1 ruling.

In devising its own remedy and constructing unsupported factual findings *sua sponte*, the Court violated longstanding precedent. This Court has repeatedly refused to consider issues not raised and briefed on appeal. A recent example is *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 94 n.3 (2012), where the Court "w[ould] not consider" whether a sanctioned party had been ordered to appear because the issue "was not raised on appeal."

Similarly, the Court has repeatedly refused to address arguments not raised below. In *Keener v. Keener*, 278 Va. 435, 441 n.3 (2009), for example, the Court refused to consider arguments involving the validity of a trust. Although the defendant could "be said to have contested the trust's provisions" in her "counterclaim," the plaintiffs "never argued that point at trial"

and "th[e] issue c[ould not] be raised for the first time on appeal." *Id*. So too in *Lawlor v. Com.*, the Court "w[ould] not consider" an issue where the party raising it "never argued [it], sought or obtained a ruling, or otherwise provided the [trial] court with an opportunity to rule on it." 738 S.E.2d 847, 886 (2013). In short, "arguments … on appeal … must be limited to issues preserved in the trial court" and "presented before the appellate courts." *McDonald v. Com*., 274 Va. 249, 255 (2007). Plaintiffs did neither.

Indeed, as the Court stated in ruling that TFC did not preserve one of *its* arguments, only "an objection … stated with reasonable certainty at the time of the ruling" "will be considered as a basis for reversal." Op. 28 (quoting Rule 5:25). This Court "will not consider" an argument "never raised … before the trial court." *Id*. The same rule should apply to plaintiffs' cross-assignment, which sought reversal of the ruling that §57-7.1 did not apply. Yet the Court here reframed the §57-7.1 issue in a materially different way, fashioned its own remedy, and made factual findings that plaintiffs never sought, either below or on appeal. TFC had no opportunity to address the facts or the issues, and the Court made no effort to justify such unprecedented *sua sponte* action. Rehearing is therefore warranted.

II. Even if the "constructive trust" issue had been before the Court, rehearing would be warranted to address a mistake of law.

Even if the "constructive trust" issue were before the Court, however,

rehearing would be warranted to address a "mistake of law." *Tanner*, 266 Va. at 172-73. The Court imposed a trust based on the following analysis:

> [N]either TEC nor the Diocese can claim a proprietary interest in the property by way of an express denominational trust. However, when one considers the constitution and canons, specifically the adoption of the Dennis Canon, and the course of dealing between the parties, The Falls Church, TEC and the Diocese intended, agreed and expected that the property at issue would be held in trust by The Falls Church as trustee for the benefit of TEC and the Diocese. As such, we find that the fiduciary relationship required to impose a constructive trust has been shown to exist. The fact that The Falls Church attempted to withdraw from TEC and the Diocese and yet still maintain the property represents a violation of its fiduciary obligation to TEC and the Diocese. Therefore, equity dictates that a constructive trust be imposed on the property[.]

Op. 24-25. In other words, canons that were legally void when passed and conduct that had no legal import when it occurred became legally significant when §57-7.1 was enacted, and thus divested TFC of its property.

The Court offered no justification for holding that §57-7.1 retroactively created a duty or an intent on TFC's part to hold property for plaintiffs' benefit. Respectfully, none exists. Relying on TFC's alleged "intent" conflicts with the Court's statement that constructive trusts arise "'independently of the intention of the parties.'" Op. 18. But even setting that aside, TFC cannot have "intended," acted, or had a "duty" to create a denominational trust—express, constructive, or otherwise—when such trusts were illegal. An illegal fiduciary duty cannot provide the basis for a "constructive trust."

And as the Court noted, before 1993 "express *and* implied trusts for hierarchical churches '[were] invalid under Virginia law.'" Op. 12 (quoting *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 507 (1974)) (emphasis added).

The Court's reasoning is also circular. The Court's stated basis for imposing a constructive trust was its view that TFC violated a fiduciary duty that (the Court reasoned) in turn arose because there was a trust. But whether a trust existed was the very issue before the Court. If there had been a valid trust without the Court imposing one, there would have been no need to create a constructive trust. And if there was not a valid trust before the Court imposed one, then there was no fiduciary duty to breach, and no basis for the Court's underlying factual finding. The Court's analysis thus assumed the answer to the question it was addressing.

The Court recognized that express trusts must be tested against "the law in effect *at the time the trust is executed*." Op. 17 (citing *McGehee v. Edwards*, 268 Va. 15, 20 (2004)). Yet the Court did not say why a different rule governs constructive trusts. A consistent rule is required by the rules of statutory construction, the Contracts Clause, and the Religion Clauses.

As a matter of statutory construction, §57-7.1 does not purport to apply retroactively, and "a statute is always construed to operate prospectively unless a contrary legislative intent is manifest." *Berner v. Mills*, 265 Va.

408, 413 (2003).[3] Under the Contracts Clause (U.S. Const. Art. I, §10), a church's deed is a "binding contract"; it is "beyond the legislative power" to retroactively "deprive[] the cestuis que trusts named therein, and created by the trust, of their property." *Finley v. Brent*, 87 Va. 103, 108-09 (1890); *see also Diocese of Sw. Va. v. Wyckoff*, Op. 6 (Amherst Cty. Nov. 16, 1979) (Koontz, J.) (noting the "constitutional infirm[ities] of applying [a law] to … deeds … which predate [it]"); TFC Reply Br. 20; TFC Br. 42-43.

Retroactive application of statutes (or canons) affecting TFC's vested property rights here also violates principles of free exercise, which require "giv[ing] effect to the result indicated by the parties" (plural), as "embodied in … legally cognizable form." *Jones v. Wolf*, 443 U.S. 595, 606 (1979). As the Arkansas Supreme Court noted in refusing to "impose[] a trust in favor of the National Church upon property previously held by the local congregations," "parties to a conveyance have a right to rely upon the law as it was at that time." *Arkansas Presbytery v. Hudson*, 40 S.W.3d 301, 309-10 (Ark. 2001). Indeed, if courts could retroactively divest churches of property, then no church could join a denomination without risking loss of their members' grants and contributions. Such a rule would greatly discourage

[3] The text points *against* retroactivity. Where former §57-7 validated future conveyances *and* those "which … *ha*[*ve*] *been* made," §57-7.1 states only that a conveyance "which *is* made ... *shall be* valid." (Emphasis added.)

denominational affiliation, thus hindering religious liberty. TFC Br. 40.

Perhaps aware of this retroactivity problem, the Court asserted that it was "implicitly" understood when TFC joined the denomination that congregational property would be held in trust for plaintiffs. Op. 20. But it is difficult to understand how that could have been "implicit" in Virginia, where, as the Diocese complained to the General Assembly a decade after TFC's affiliation, "no Christian denomination is capable of taking and holding property of the smallest amount." A5307, A5316 (transcription). Not surprisingly, the cases cited in support of the Court's statement were from other States.

The Court cited TFC's 1836 accession to "canon[s] which shall be framed … for the government of this church in ecclesiastical concerns" (Op. 22), but those very canons assured TFC that it "shall hold all glebes, lands, parsonage houses, churches, books, plate, or other property *now belonging or hereafter accruing* to [affiliated] churches … *for the benefit of the congregation*." A5912a (emphasis added). TFC also retained the right to "make such rules … for managing [its] affairs and temporal concerns, … as [it] shall think most conducive to its interest." *Id*. Thus, while plaintiffs held "ecclesiastical" authority, "temporal" authority remained with TFC. That remained TFC's understanding throughout its affiliation with plaintiffs.

The application for rehearing should be granted.

Respectfully submitted,

GORDON A. COFFEE (VSB #25808)
gcoffee@winston.com
GENE C. SCHAERR
gschaerr@winston.com
STEFFEN N. JOHNSON
sjohnson@winston.com
ANDREW C. NICHOLS (VSB #66679)
anichols@winston.com
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000 (telephone)
(202) 282-5100 (facsimile)

SCOTT J. WARD (VSB #37758)
sjw@gg-law.com
TIMOTHY R. OBITTS (VSB #42370)
tro@gg-law.com
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102
(703) 761-5000 (telephone)
(703) 761-5023 (facsimile)

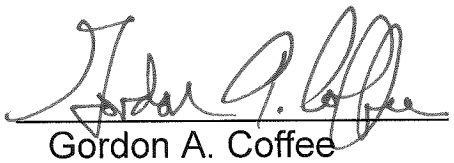
JAMES A. JOHNSON
jjohnson@semmes.com
PAUL N. FARQUHARSON
pfarquharson@semmes.com
TYLER O. PROUT (VSB #74180)
tprout@semmes.com
Semmes, Bowen & Semmes, P.C.
25 South Charles Street, Ste. 1400
Baltimore, MD 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile)

Counsel for Appellant The Falls Church

May 17, 2013

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition does not exceed the longer of 10 pages or 1,750 words.



Gordon A. Coffee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2013, copies of the foregoing Application for Rehearing were sent by electronic and first-class mail to all counsel named below, and transmitted to the clerk of this Court via hand delivery.

Bradfute W. Davenport, Jr., Esquire
George A. Somerville, Esquire
Mary C. Zinsner, Esquire
Brian D. Fowler
TROUTMAN SANDERS, LLP
P.O. Box 1122
Richmond, VA 23218

Counsel for Protestant Episcopal Church in the Diocese of Virginia

David Booth Beers, Esquire
GOODWIN PROCTER, LLP
901 New York Ave., N.W.
Washington, D.C. 20001

Mary E. Kostel
The Episcopal Church
c/o GOODWIN PROCTER, LLP
901 New York Ave., N.W.
Washington, D.C. 20001

Counsel for Protestant Episcopal Church in the U.S.A.

E. Duncan Getchell, Jr.
Solicitor General of Virginia
Wesley G. Russell, Jr.
Deputy Attorney General
Michael H. Brady
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Counsel for the Commonwealth of Virginia

Thomas C. Palmer, Esquire
BRAULT PALMER GROVE
WHITE & STEINHILBER, LLP
3554 Chain Bridge Road, Ste. 400
Fairfax, VA 22030

Counsel for William W. Goodrich and Steven Skancke, in capacity as trustees for The Falls Church

Gordon A. Coffee