

DANIEL M. HARRIGAN

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SUMMIT COUNTY  
CLERK OF ~~INDIANA~~ THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

EASTMINSTER PRESBYTERY )

Plaintiff )

-vs- )

STARK & KNOLL )

Defendant )

CASE NO. CV 2009-07-5332 144

JUDGE PARKER

**JUDGMENT and ORDER**  
(Final and Appealable)

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This matter is before the court on defendants' motion for summary judgment. The plaintiff has filed its response, and the defendants have filed a reply brief. The matter is now fully addressed by the parties and is ripe for disposition. Upon consideration of the issues and the Civ.R. 56 materials presented, the court finds that the defendants' motion has merit and will enter summary judgment in favor of the defendants.

**FACTUAL BACKGROUND**

This is a legal malpractice action arising from a previous case involving a schism<sup>1</sup> in the Presbyterian Church in Hudson, Ohio ("HPC"). HPC had been associated with and under the ecclesiastical control of the Eastminster Presbytery, the local representative of the Presbyterian Church of the United States of America ("PCUSA"). On September 28, 2006, HPC filed an action seeking injunctive and declaratory relief. HPC sought to disaffiliate itself from the PCUSA. Eastminster filed a counterclaim and argued that HPC could not

<sup>1</sup> The schism occurred over the ordination of gay clergy and the appointment of gay elders.

voluntarily disaffiliate and that all real and personal property it had it held in trust for the PCUSA according to a church document called the Book of Order, which sets forth the form of government, the directory of worship, and the rules of discipline for the Presbyterian Church. Eastminster sought related declaratory relief.

Eastminster claimed that the Book of Order established an express trust. Eastminster claimed that the defendants' failure to ensure that a copy of the Book of Order was included in a joint exhibit binder submitted to the magistrate along with the parties' joint motions for summary judgment in the underlying case amounted to professional negligence.

The magistrate granted summary judgment in favor of HPC, finding that, "there was no recorded documented evidence to establish that any such trust was in existence, or created on or about the time the property was deeded from the Grantors referred to above to the Plaintiff, nor is there any evidence that a trust document was created thereafter specifically dealing with real and personal property at issue in this case." The magistrate also determined that HPC's affiliation with Eastminster was voluntary, which meant that HPC could disaffiliate itself from Eastminster. Eastminster filed objections to the magistrate's report. The trial court modified and affirmed as modified the magistrate's decision. Eastminster appealed that decision. The appeals court affirmed the decision on February 9, 2009. The present case followed.

#### **LEGAL STANDARD**

In *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, at syllabus, the Ohio Supreme Court held that "[t]o establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation

and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss."

The *Vahila* court noted, "the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case." 77 Ohio St.3d at 427-428, 1997-Ohio-259, 674 N.E.2d 1164. "The *Vahila* court determined that 'depending on the situation, [a plaintiff may be required] to provide some evidence of the merits of the underlying claim,' but declined to 'endorse a blanket proposition that requires a plaintiff to prove, *in every instance*, that he or she would have been successful in the underlying matter.' (Emphasis added.) *Id.* at 428, 674 N.E.2d 1164." *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.* 119 Ohio St. 3d 209, 2008-Ohio-3833, 893 N.E.2d 173, at ¶15.

"The language quoted above shows that the court rejected a wholesale adoption of a 'but for' test for proving causation and the mandatory application of the 'case-within-a-case doctrine.' The doctrine, also known as the 'trial-within-a-trial doctrine,' provides that '[a]ll the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiffs former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial; in considering whether the plaintiff has carried that burden, however, the trier of fact may consider whether the defendant lawyer's misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial.' *Restatement of the Law 3d, Law Governing Lawyers* (2000) 390, Section 53, Comment b." *Id.* at ¶16

**ISSUE PRESENTED**

Among the myriad arguments presented, the court identifies but one linchpin issue in this matter, without which, no other argument can follow: Did the Book of Order – or any other document – establish an express trust under Ohio law? This court answers the interrogative in the negative.

**ANALYSIS**

Under the above precepts, the plaintiff must establish that without the alleged negligence of the defendants in failing to ensure that the Book of Order was admitted into evidence, the result at trial, or in this matter, on summary judgment would have been different.

Without conceding negligence, the defendants contend that the plaintiff could not and cannot establish proximate cause because there is no evidentiary basis for concluding that had the missing evidence, i.e. the Book of Order, or the missing case-law analysis<sup>2</sup> been provided for consideration by the magistrate a different outcome would have been reached, and that without the probability of a different outcome, the plaintiff cannot prove proximate causation or damages.

Plaintiffs allege multiple incidents of negligence on the part of the defendants, the most important of which being their alleged failure to ensure that a complete copy of the Book of Order was included in the evidentiary binder provided for the magistrate. The plaintiff's contention is that the following language from the Book of Order establishes de jure that HPC held all property in trust for Eastminster: "All property held by or for a particular church, \*\*\* whether legal title lodged in a corporation, a trustee or trustees, or an

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<sup>2</sup> Plaintiff also asserts that defendants failed to cite several important case decisions that would have allowed the court in the underlying case to reach a conclusion favorable to Eastminster.

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."<sup>3</sup>

Civ.R. 56 (C) provides in part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "The nonmoving party has the burden of producing documentary evidence to demonstrate genuine issue of material fact exists."<sup>4</sup> Therefore, it is incumbent upon parties opposing summary judgment to file opposing affidavits and/or some other evidence that would place in issue the facts alleged in the moving party's motion, affidavit, and supporting documents.

Key to the determination of this case within a case is who owns the property in question and in what capacity does that party own such property? No one disputed that legal title to the property was shown to be in HPC. Fred Schwarz, an elder in HPC offered testimony by way of affidavit, attached as Exhibit D to the defendants' motion, that HPC is the title owner of the two parcels of land upon which the church building sets. He verified Exhibits E and F, which are true and accurate copies of the warranty deeds to the parcel in question, and which indicate that HPC holds title to the property.<sup>5</sup> Therefore, unless it has been established that an express trust exists, Eastminster's claims to HPC's property must fail.

<sup>3</sup> The quoted language was brought to the attention of the court in the underlying case, but the magistrate, the trial judge and the court of appeals all noted that it was not before the court in a form permitted to be considered under Rule 56.

<sup>4</sup> *Hoffman v Davidson* (1987), 31 Ohio St. 3d 60, 61, 31 OBR 165, 508 N.E.2d 958.

<sup>5</sup> While mention is made here only of the real property in dispute, at issue in the matter is all property of HPC, both realty and personalty.

WAS THERE A TRUST?

“In Ohio, ‘[e]xpress trusts arise by a manifested intent, either written or oral, to create a trust.’ *Levens Corp. v. Aberth* (Feb. 10, 1993), 9<sup>th</sup> Dist. No. 15661, 1993 Ohio App. LEXIS 727 at \*15, citing *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 172, 297 N.E.2d 113. The elements of a trust are as follows: ‘[T]o constitute an express trust there must be an explicit declaration of trust, \*\*\* accompanied with an intention to create a trust, followed by an actual conveyance or transfer of lawful, definite property or estate or interest, made by a person capable of making a transfer thereof, for a definite term, vesting the legal title presently in a person capable of holding it, to hold as trustee for the benefit of a cestui que trust or purpose to which the trust fund is to be applied; or a retention of title by the owner under circumstances which clearly and unequivocally disclose an intent to hold for the use of another.’ *Hatch v. Lallo* (March 27, 2002), 9<sup>th</sup> Dist. No. 20642, at \*1, 2002 Ohio 1376, quoting *Ulmer v. Fulton* (1935), 129 Ohio St. 323, 329-40, 195 N.E. 557.’ Unless the settlor and the trustee of a trust are the same person or entity, the mere assertion that property is held in trust, without the transfer of the legal interest or title to the property, cannot create an express trust. *Hatch*, at \*2, 2002 Ohio 1376.”

*Hudson Presbyterian Church v. Eastminster Presbytery* (9<sup>th</sup> Dist. No. 24279) 2009-Ohio-446.

In *Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen* (1970), 21 Ohio St.2d 154, 256 N.E.2d 212, the court iterated its holding that Ohio does not recognize

“an implied-trust theory of real property when a local church joins a church hierarchy. \*\*\*.

Therefore, in the absence of a conveyance of property by legal instruments or the existence of an express trust, the title to the property is vested in the corporation.” *Id.* at 161.

The existence of a trust must be established by clear and convincing evidence. *Gertz v. Doria* (1989), 63 Ohio App.3d 235, 237, 578 N.E.2d 534. Further, the interpretation of trusts, which necessarily includes the notion of the existence of trusts is a question of law for the court. See *Hatch v. Lallo*, (9<sup>th</sup> Dist. No. 20642), 2002-Ohio-1376, at 2.

As to the issue at hand, the plaintiff has offered the affidavit of Elder Dale Riley in support of its motion. In that affidavit, Mr. Riley offers the opinion that, "Prior to and since the organization of the HPC in 1982 and the acquisition of the church's property, the Book of Order has subjected all of a particular church's property to an express trust in favor of the PCUSA." (Riley affidavit at p. 3)

The court does not believe that such an affidavit, which in truth offers the *legal* opinion of the affiant, can create an issue of fact. As noted above, resolution of questions concerning the existence of a trust is a matter solely within the province of the court. Interestingly, the General Presbyter of the Eastminster Presbytery admitted in deposition in the underlying case that there was no express trust. While this may also be a legal conclusion within purview of the court, it is significant that a ranking representative of the party that would be the purported beneficiary would concede that neither its own Book of Order nor the HPC articles of incorporation and bylaws, considered jointly or separately, created an express trust.

If Eastminster wanted to be the beneficiary of an express trust, it would have been in its own best interest to ensure that a trust was created. This could have been accomplished by ensuring that HPC's articles of incorporation or bylaws indicated that any property it held was to be held in trust for the benefit of Eastminster. Similarly, Eastminster could have had HPC execute new deeds, in which HPC, as settlor of a trust, would indicate that it is the title owner as trustee for the benefit of Eastminster. In the analysis, more important than the desires of the purported beneficiary are the acts or words of the purported settlor – HPC. Therefore, if there is anything equivocal about the alleged express trust-creating document, then by definition, such would make the evidence of the existence of a trust less than clear and convincing.

Nothing in the articles or bylaws of HPC creates an express trust. The only way one could infer a trust is to couple HPC's voluntary association with Eastminster – as expressed in its articles of incorporation – to Eastminster's attempt to create a trust within the language in its Book of Order. Eastminster may have intended that a trust be established by HPC, but it is plain that it was HPC alone that could take action to place its property in trust for the benefit of Eastminster. The law clearly requires more than the bald assertion – by the beneficiary – that a trust exists. HPC would had to have in some manner indicated its intention to create an express trust for the benefit of Eastminster. Such is manifestly absent in this matter. HPC's articles of incorporation do not indicate such intent. Its bylaws do not indicate such intent. HPC is listed as the title owner of the real property with no indication that it owned the property as trustee for Eastminster.

Eastminster contends HPC's articles of incorporation, which expressed HPC's intent "To voluntarily associate together for divine worship and godly living, agreeable 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" constituted HPC's acceptance of the trust language set forth in the main church's Book of Order. In the underlying case, HPC's association with Eastminster was found to be voluntary, which indicates that such association was purely elective and not permanent. Quantum lack of legal documents or other recognizable indicia of a trust aside, that fact does little to suggest any intent to establish and maintain a trust relationship. The court in the underlying case found that no trust had been created because nothing in the HPC articles of incorporation could be considered the clear and convincing expression of HPC's intent to create an express trust. Because the court in the underlying case found that there was no expression of HPC's intent to create an express trust,

Eastminster could not have won that case even if the Book of Order had been properly included in the summary judgment record.

This court reaches the same conclusion. Because the court finds HPC's voluntary association with Eastminster not to be an expression of its intent to alienate the equitable property interest from the legal estate, the court finds there to be no express trust created by any combination of HPC and PCUSA documents. See *Jones v. Wolf* (1979), 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775. Therefore, no trust was created in any legally cognizable form.

#### **THE CASE WITHIN A CASE**

In determining that there was no trust created by HPC's voluntary association with Eastminster, the court concludes that there is no way in this action to find that the defendants' non-submission into evidence of the various Books of Order actually caused Eastminster to not prevail in the previous action. Because the plaintiff cannot prove proximate cause, the plaintiffs' claims must fail and summary judgment must be granted.

#### **PLAINTIFF'S SPOILIATION CLAIM**

Given the above disposition of the case, the alleged spoliation of evidence, as has been alleged by the plaintiffs, cannot be found to have impaired the plaintiff's ability to prosecute this case. Therefore, the spoliation claim fails for want of evidence that the alleged spoliation of evidence by defendants herein was the proximate cause of any harm to Eastminster. However, even if the court were to evaluate the merits of the spoliation claim, it concludes that reasonable minds could not differ and there is no evidence upon which a jury could decide that defendants destroyed evidence with the intention to impair the plaintiff's prosecution of its case.

**INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Also pending with the court is the motion for summary judgment filed on behalf of individual Stark & Knoll, L.P.A. attorneys Tipping, Lepp, Rench, Krajewski, Susany, and Knoll, plaintiff's response, and the defendants' reply. The disposition of Stark & Knoll's motion also requires the granting of the individual defendants' motion as there is no issue of material fact concerning the actions of these individuals and plaintiff has no ability to prove that their alleged negligence was the proximate cause of plaintiff's harm.

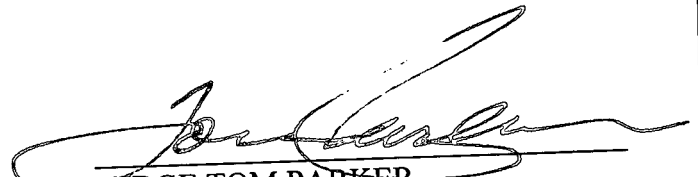
**CONCLUSION**

The court hereby GRANTS summary judgment in favor of all defendants on all of plaintiff's claims. Judgment is entered accordingly.

Costs to the plaintiff.

There is no just reason for delay.

IT IS SO ORDERED.



JUDGE TOM PARKER

cc: Attorney Timothy A. Shimko  
Attorney Lawrence A. Sutter

WW:lcb  
09-5332G