

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) FOR THE FIRST JUDICIAL CIRCUIT

The Protestant Episcopal Church In The) Civil Action No. 2017-CP-18-1909
Diocese of South Carolina; All Saints)
Protestant Episcopal Church, Inc.; Christ)
St. Paul’s Episcopal Church; Church of)
The Cross, Inc. and Church Of The)
Cross Declaration Of Trust; Church Of)
The Holy Comforter; Church Of The)
Redeemer; Holy Trinity Episcopal)
Church; St. Luke’s Church, Hilton Head)
Island; St. Bartholomews Episcopal)
Church; St. Davids Church; St. James’)
Church, James Island, S.C.; St. Paul’s)
Episcopal Church of Bennettsville, Inc.;)
The Church of St. Luke and St. Paul,)
Radcliffeboro; The Church of Our)
Saviour of The Diocese of South)
Carolina; The Church of The Epiphany)
(Episcopal); The Church Of The Good)
Shepherd, Charleston, SC; The Church)
Of The Holy Cross; The Church of The)
Resurrection, Surfside; The Protestant)
Episcopal Church, of the Parish of Saint)
Philip, in Charleston, in the State of)
South Carolina; The Protestant)
Episcopal Church, The Parish of Saint)
Michael, in Charleston, in the State of)
South Carolina and St. Michael’s Church)
Declaration of Trust; The Vestry and)
Church of Wardens of St. Jude’s Church)
of Walterboro; The Vestry and Church)
Wardens of the Episcopal Church of the)
Parish of St. Helena and the Parish)
Church of St. Helena Trust; The Vestry)
and Church of Wardens of The)
Episcopal Church of the Parish of St.)
Matthew; The Vestry and Wardens of St.)
Paul’s Church, Summerville; Trinity)
Church of Myrtle Beach; Trinity)
Episcopal Church; Trinity Episcopal)
Church, Pinopolis; Vestry and Church-)
Wardens of The Episcopal Church of the)
Parish of Christ Church; Vestry and)

**RESPONSE IN OPPOSITION TO
MOTION TO DISMISS**

Church Wardens of The Episcopal)
Church of the Parish St. John's)
Charleston County; The Vestries and)
Churchwardens of the Parish of Old St.)
Andrew's Parish Church,)
)
Plaintiffs,)
)
vs.)
)
The Episcopal Church (a/k/a, The)
Protestant Episcopal Church in the)
United States of America); The)
Episcopal Church in South Carolina,)
)
Defendant.)
)

The above-captioned plaintiff parishes and the Protestant Episcopal Church in the Diocese of South Carolina (collectively “Plaintiffs”) hereby file this memorandum in opposition to the Motion to Dismiss the Amended Complaint filed by Defendants The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of America) (“TEC”) and The Episcopal Church in South Carolina (“ECSC”). This memorandum also responds to the Memorandum of law in Support of TEC and ECSC’s Motion to Dismiss Plaintiffs’ Complaint under the Betterment Act.

INTRODUCTION

For hundreds of years, generations of South Carolinian Episcopalians have built, rebuilt, repaired and maintained their churches through fires, war, growth, and decay. These parishes maintained a loose and indirect affiliation with a national church and the worldwide Anglican Communion, structuring their canons to recognize their own authority over their properties. In 1979, in response to the growing risk of property disputes, the national church slipped language into its governing documents attempting to place all property of all Episcopal churches nationwide into trusts in favor of the national church. In 2009, the South Carolina Supreme Court found that

this unilateral act by the national church had no effect whatsoever on title to property that had been owned by a local church in fee simple for hundreds of years after that local church disassociated itself with the national church. *All Saints Par. Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 385 S.C. 428, 446, 685 S.E.2d 163, 172 (2009). In contravention of that decision, TEC and ECSC take the position that the South Carolina Supreme Court, through a patchwork of five separate opinions in *Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church*, 421 S.C. 211, 222, 806 S.E.2d 82, 87–88 (2017) (the “Collective Opinions”), has held in result that certain Plaintiff parishes’ mere *continued affiliation* with the national church after the inclusion of such language evidenced their intent to transfer all of their properties to the national church. (See communication from Atty. Mary Kostel, attached as Exhibit A.)

Before this Court is an action to compensate Plaintiffs for the value of the betterments built and improved on these properties for hundreds of years by Plaintiffs prior to the properties having been declared property of a national church that never contributed to their improvement. Under the betterments statute, any Plaintiffs who were displaced of their properties are entitled to the value of the improvements they constructed on the properties.

The Collective Opinions reversed the circuit court’s finding that Plaintiffs were the fee simple owners of their properties. However, even if the Collective Opinions held that TEC was the owner of some of the Plaintiffs’ properties or that the properties were placed in trust, as TEC and ECSC argue, the Collective Opinions did not: 1) identify which properties were placed in trust; 2) specify the express written agreement that created the trusts over those properties; or 3) declare the current status of title for or existence of the trusts over those properties. The issues left undecided by the Supreme Court require factual investigation and the application of South

Carolina trust law by this Court in order to further determine that TEC and ECSC are liable to Plaintiffs for the value of the improvements Plaintiffs made on their properties.

TEC and ECSC's Motion to Dismiss attempts to circumvent these issues by simply declaring the effect of the Collective Opinions based on their desired outcome. In fact, TEC and ECSC take factually inconsistent positions between this action and *Protestant Episcopal Church* regarding the holding of the Collective Opinions, favoring the interpretation that better serves their purposes in the particular actions.

TEC and ECSC's Motion to Dismiss must be denied for several reasons. First, Plaintiffs' betterments action was timely filed because it was filed within forty-eight hours of the remittitur in the underlying action. Second, the Motion to Dismiss relies on facts outside of the Amended Complaint and conclusions outside of the Collective Opinions. Furthermore, even accepting all of TEC and ECSC's arguments as true, Plaintiffs are still entitled to betterments under multiple theories of South Carolina law. Finally, Plaintiffs' arguments about res judicata and standing are irrelevant. The Motion to Dismiss should be denied.

BACKGROUND

I. The Parties.

Plaintiffs are comprised of: twenty-eight parishes (the "Plaintiff parishes"), which are individual local churches (all being nonprofit corporations) and their congregations; and the Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese of South Carolina"), which is a voluntary nonprofit corporation which the individual parishes joined. As set forth in the Amended Complaint, each of the Plaintiff parishes possesses a distinct history, and many of the parishes can trace a continuous existence back to the colonial era. (*See* Am. Compl. ¶¶ 20-284.) The Diocese of South Carolina has operated as an unincorporated association since 1785

and was incorporated in 1973. (*Id.* ¶ 12.) The Defendants are two entities: The Episcopal Church, the national voluntary association of dioceses formed in 1789, and The Episcopal Church in South Carolina, a diocese created in 2013 after the disassociation of the Diocese of South Carolina.

Since their founding, the Plaintiffs' congregations have donated or obtained funds to pay for the construction, upkeep, and expansion of their churches. (*Id.* ¶¶ 24, 31, 39, 47, 64, 71, 80, 88, 97, 92, 100, 108, 113, 120, 132, 141, 152, 160, 169, 182, 192, 202, 210, 220, 234, 244, 255, 265, 279.) TEC and ECSC have not contributed. (*See id.*) As described more fully in the Amended Complaint, all of the Plaintiff parishes' churches have been built, rebuilt, repaired, and improved by their congregations over generations. (*See id.* ¶¶ 20-284.)

II. The Dennis Canon.

In 1979, the United States Supreme Court decided *Jones v. Wolf*, a church property dispute case, in favor of a disassociating local church. 443 U.S. 595 (1979). In dicta responding to the dissent in *Jones*, the *Jones* Court stated that, prior to the eruption of a dispute, the national church may take steps to ensure that a loyal faction will retain church property. *Id.* at 606. The Court stated:

[The national church] 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 by the parties, *provided it is embodied in some legally cognizable form.*

Id. (emphasis added).

In response to *Jones*, TEC adopted the Dennis Canon at its 1979 General Convention.¹ The Dennis Canon provides:

Sec. 4. All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Sec. 5. The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

The Diocese of South Carolina was a member of TEC from 1789 through 2012 except for several years during the Civil War when it voluntarily withdrew. In 1841, the Diocese of South Carolina added the following language to its Diocese Constitution: “[t]he Church in the Diocese of South Carolina accedes to and adopts the Constitution and Canons of [TEC] and acknowledges this authority accordingly.” In 1987, the Diocese of South Carolina amended its Constitution to incorporate language similar to the Dennis Canon:

All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for [TEC] and the [Diocese of South Carolina]. The existence of this trust, however, shall in no way limit the power and Authority of the Parish, Mission, or Congregation existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject to, [TEC] and the [Diocese of South Carolina].

¹ TEC is an elective body governed by Constitution and Canons. Constitutional amendments require a three-year vetting process and a vote of approval by the member dioceses. Canons may be immediately approved by a simple voice vote at a Convention. Canons can also be modified at any succeeding convention.

See Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church, 421 S.C. 211, 222, 806 S.E.2d 82, 87–88 (2017). The Diocese removed this provision in October 2010.

III. Procedural History.

Around 2006, doctrinal disputes arose between TEC and a number of dioceses, including the Diocese of South Carolina. In 2009, the Diocese of South Carolina began the process of amending its governing documents and providing quitclaim deeds to each of the parishes disclaiming any diocesan interest in each parish’s properties. One of the amendments was to remove references to TEC and its Canons, including the Dennis Canon, in the Diocese Constitution and corporate bylaws.

In 2012, the Diocese of South Carolina formally disassociated from TEC. In 2013, Plaintiffs brought an action against TEC and ECSC seeking a declaration that they owned the title to the parish and diocese properties in fee simple (“*Protestant Episcopal Church*”). (Am. Compl. ¶ 6.) TEC and ECSC counterclaimed, seeking a declaration that the real properties must be held and used solely for the mission and ministry of TEC and ECSC. (*Id.*)

On February 3, 2015, after a three-week bench trial, the Honorable Diane Goodstein issued an order finding in favor of Plaintiffs, holding that the Plaintiff Parishes and the Diocese of South Carolina are the owners of their real, personal, and intellectual properties, and that TEC and ECSC have no legal, beneficial, or equitable interest in those properties. (*Id.* ¶ 8.) Judge Goodstein also issued a permanent injunction enjoining anyone except the Diocese and its employees from using the Diocese and its names, marks, and seal, and protected the marks of St. Philip’s, St. Michael’s and The Parish Church of St. Helena. (*See* Feb. 3, 2015 Final Order at pp. 44-46.) TEC and ECSC appealed portions of the order, and on August 2, 2017, in an opinion in which all five Justices wrote separately, the South Carolina Supreme Court reversed Judge Goodstein’s decision in part.

(*Id.*) On November 17, 2017, the South Carolina Supreme Court denied Plaintiffs' petition for rehearing by virtue of a deadlocked 2 to 2 vote, with Justice Hearn not participating. (*Id.*) Plaintiffs petitioned for a writ of certiorari to the United States Supreme Court, which was denied.

This action was filed on November 19, 2017. (*See* Compl.) In this action, Plaintiffs seek recovery from TEC and ECSC for the full present value of any improvements made on the properties formerly owned by Plaintiffs which are determined to be owned by TEC and ECSC. (Am. Compl. ¶ 10.)

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6), SCRPC is only appropriate where the pleading fails to state facts sufficient to constitute a cause of action. Rule 12, SCRPC. In ruling on a motion to dismiss, the Court may rely only on the allegations of the pleadings and must accept all well-pled allegations as true. *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014). Dismissal is only appropriate where the facts alleged and inferences reasonably deducible therefrom, when viewed in the light most favorable to the claimant, would not entitle the claimant to relief *on any theory*. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 74-75, 753 S.E.2d 846, 850 (2014).

ARGUMENT

I. This action was timely filed within forty-eight hours of the final judgment in favor of TEC and ECSC.

TEC and ECSC argue this action should be dismissed as untimely because it was not filed within the forty-eight hours of the rendering of the judgment. TEC and ECSC's position is untenable, and the motion to dismiss should be denied.

The betterments statute states:

After *final judgment in favor of the plaintiff* in an action to recover lands and tenements, if the defendant has purchased or acquired the lands and tenements recovered in such action or taken a lease thereof or those under whom he holds have purchased or acquired a title to such lands and tenements or taken a lease thereof, supposing at the time of such purchase or acquisition such title to be good in fee or such lease to convey and secure the title and interest therein expressed, such defendant shall be entitled to recover of the plaintiff in such action the full value of all improvements made upon such land by such defendant or those under whom he claims, in the manner provided in this chapter.

S.C. Code Ann. § 27-27-10 (emphasis added). The betterments action must be filed within forty-eight hours after such judgment. S.C. Code Ann. § 27-27-30.

Under South Carolina law, an opinion of the South Carolina Supreme Court is not final until the sending of the remittitur, and the timely filing of a petition for rehearing stays the sending of the remittitur and deprives the decision of finality. *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 23, 736 S.E.2d 651, 655 n.2 (2012). The appeal is only finally disposed upon the sending of the remittitur. Rule 221, SCACR.

In *Protestant Episcopal Church*, the remittitur was sent on November 17, 2017, at which time the Collective Opinions became final. This action was filed on November 19, 2017. (*See* Compl.) Thus, this action was timely filed.

TEC and ECSC contend that this betterments action should have been filed within forty-eight hours of the issuance of the Supreme Court's Collective Opinions on August 2, 2017. (Mem. in Supp. Mot. Dismiss at pp. 11-13.) TEC and ECSC cite no authority in support of their interpretation, which is untenable in light of *Harleysville*. Instead, TEC and ECSC cite two South Carolina Supreme Court opinions from the 1880s which, they argue, hold that a betterments action must be filed within forty-eight hours of the *circuit court's* entry of judgment. (*See* Mem. in Supp. of Mot. Dismiss at pp. 12-13 (citing *Garrison v. Dougherty*, 18 S.C. 486, 487 (1883), *Godfrey v.*

Fielding, 21 S.C. 313, 316-17 (1884)).) Here, the circuit court entered judgment in favor of Plaintiffs. It is nonsensical to argue that Plaintiffs should have filed a betterments action within forty-eight hours after prevailing at the circuit court. TEC and ECSC's argument that this betterments action is untimely lacks support under South Carolina law and must be rejected.

II. Plaintiffs are entitled to betterments under several theories of South Carolina law, and TEC and ECSC's arguments to the contrary are based on facts and legal conclusions outside the pleadings.

A. TEC and ECSC's Motion to Dismiss assumes facts outside the Amended Complaint and yet to be discovered.

In their Motion to Dismiss, TEC and ECSC claim that the betterments statute is inapplicable because TEC and ECSC do not own the land at issue. (Mem. in Supp. Mot. Dismiss at pp. 5-7.) TEC and ECSC assert that all parish properties are owned by the Plaintiff parishes and held in trust for TEC and ECSC in accordance with the Dennis Canon, and all diocesan property is owned by the Trustees of the Diocese of South Carolina and held in trust for ECSC. (*Id.*) Contrary to TEC and ECSC's arguments, the actual status of title to the properties was never determined in *Protestant Episcopal Church*. TEC and ECSC's Motion to Dismiss must be denied because it hinges on facts not alleged in the Amended Complaint, misconstrues the limited holding of the South Carolina Supreme Court's Collective Opinions, and requires discovery and investigation of unresolved factual issues.

After a three-week trial in *Protestant Episcopal Church*, Judge Goodstein issued a declaratory judgment finding that Plaintiffs owned their properties in fee simple. For the first time, in their Motion to Reconsider Judge Goodstein's final order, TEC and ECSC raised the issue of "accession," ***claiming*** that twenty-eight of the Plaintiff parishes acceded to TEC's Canons, including the Dennis Canon. However, for all but three of the Plaintiff parishes, no ***evidence*** of

accession appeared anywhere in the record, and the evidence of accession for those three parishes was minimal.

On appeal, the South Carolina Supreme Court reversed the trial court's judgment through a concurrence of three Justices relying upon two different theories, thereby deciding that Plaintiffs were not the fee simple owners of the properties.

Acting Justice Pleicones, in the lead opinion, held only that he "would therefore reverse the circuit court's decision to the extent it declined to give effect to the Dennis Canon and its diocesan counterpart, and to the extent it held that the Disassociated Diocese, the Trustees, and parishes controlled or owned the disputed real and personal property." *Id.*, 421 S.C. at 230, 806 S.E.2d at 92. Acting Justice Pleicones's opinion did not address what effect reversal would have on *current* title, such as whether "giv[ing] effect" to the Dennis Canon placed the properties in trust, and if so, whether those trusts still existed after Plaintiffs' disassociation from TEC. Acting Justice Pleicones declined to grant rehearing.

Justice Hearn joined "the lead opinion in departing from *All Saints* to the extent it held that the Dennis Canon and subsequent acquiescence by individual parishes were insufficient to establish a trust in favor of the National Church." *Id.*, 421 S.C. at 240, 806 S.E.2d at 97. Justice Hearn noted that the issue of the seven or eight of the Plaintiff parishes who did not accede to the Dennis Canon was not before the Supreme Court. *Id.*, 421 S.C. at 242, 806 S.E.2d at 98. Otherwise, Justice Hearn's opinion also did not address the effect of the opinion on title. Justice Hearn recused herself from participation in the petition for rehearing.

Chief Justice Beatty concurred in part and dissented in part from the lead opinion. Chief Justice Beatty found that "the Dennis Canon, by itself, does not have the force and effect to transfer ownership of property as it is not the 'legally cognizable form' required by *Jones*." *Id.*, 421 S.C.

at 250, 806 S.E.2d at 103. Instead, Chief Justice Beatty stated that he “would find the parishes that did not expressly accede to the Dennis Canon cannot be divested of their property. *Id.*, 421 S.C. at 251, 806 S.E.2d at 103. However, Chief Justice Beatty did not identify which parishes acceded to the Dennis Canon and which did not, nor whether any of the trusts still exist. Chief Justice Beatty declined to grant rehearing, and also declined to name anyone to act in place of Justice Hearn, who recused herself from participation in rehearing.

Justice Kittredge dissented in part and concurred in part, finding that the proper application of the neutral principles of law approach required a finding that all thirty-six parishes retain ownership of their properties. *Id.* Justice Kittredge would have found that the parishes who acceded to the Dennis Canon created a trust in favor of TEC, but subsequently withdrew their accession. *Id.*, 421 S.C. at 257, 806 S.E.2d at 106. Justice Kittredge found that the eight parishes who did not accede to the Dennis Canon were entitled to keep their properties. *Id.*, 421 S.C. at 257, 806 S.E.2d at 107. Justice Kittredge’s opinion does not identify the acceding parishes. Justice Kittredge also indicated that rehearing should have been granted in his view.

Finally, Acting Justice Toal dissented and would have held that the parishes were the title owners in fee simple of their properties under a neutral principles of law approach. *Id.*, 421 S.C. at 261, 806 S.E.2d at 108. Acting Justice Toal also noted that the trustees over the Diocese’s property, Camp St. Christopher, never acceded to the Dennis Canon, and thus it should be held in favor of the Diocese of South Carolina. *Id.*, 421 S.C. at 287, 806 S.E.2d at 123.

In dicta, Acting Justice Toal attempted to give meaning to effect of the Pleicones, Hearn, and Beatty opinions in a footnote.²

² No opinion from any of the other Justices indicates any concurrence with this footnote of Acting Justice Toal, and Acting Justice Toal herself indicated she would have granted rehearing and that further litigation will be required to determine the truth regarding these church property disputes.

Thus, the result reached on title is: 1) with regard to the eight church organizations which did not accede to the Dennis Canon, Chief Justice Beatty, Justice Kittredge, and I would hold that title remains in the eight plaintiff church organizations; 2) with regard to the twenty-eight church organizations which acceded to the Dennis Canon, a majority consisting of Chief Justice Beatty, Justice Hearn, and Acting Justice Pleicones would hold that a trust in favor of the national church is imposed on the property and therefore, *title is in the national church*; and 3) with regard to Camp St. Christopher, Chief Justice Beatty, Justice Hearn, and Acting Justice Pleicones would hold title is in the trustee corporation for the benefit of the associated diocese, whereas Justice Kittredge and I would hold that the trustee corporation holds title for the benefit of the disassociated diocese.

Id., 421 S.C. at 291, 806 S.E.2d at 125 (2017) (emphasis added). In the emphasized portion of the Collective Opinions—the only time in which any Justice discussed the actual effect on *current* title—Acting Justice Toal found that title was held by TEC, not in a trust. Additionally, Acting Justice Toal did not identify which parishes acceded to the Dennis Canon.³

Thus, contrary to TEC and ECSC’s assertions, the Collective Opinions did not “recognize” that the properties at issue are owned by Plaintiffs in trust for TEC and ECSC. (Mot. Dismiss at p. 1; Mem. in Supp. Mot. Dismiss at p. 5.) The Collective Opinions do not determine: (1) if the acceding parishes’ properties were placed in trusts in favor of TEC and ECSC *at the time of accession* and if so, whether those trusts are still in existence *today*; (2) if title transferred to TEC and ECSC, as Acting Justice Toal suggests, at the time of accession; or (3) which of the Plaintiff parishes acceded.

³ Acting Justice Toal identifies eight churches for whom TEC “did not reference” any documents of accession. *See id.*, 421 S.C. at 266, 806 S.E.2d at 111 n.49. Acting Justice Toal’s decision that only eight parishes did not accede to the Dennis Canon did not derive “from anything mentioned by [Plaintiffs] in the pleading, the record, or the brief, but rather from the post-trial motion filed by [TEC].” *Id.*, 421 S.C. at 242, 806 S.E.2d at 99. TEC’s counsel’s *argument* that TEC located twenty-eight accession documents **does not prove that those churches acceded**, and Acting Justice Toal’s reference on TEC’s argument is not authoritative because, as noted, it is not based on any evidence of record whatsoever and lacks the support of the other Justices.

Those factual issues cannot be assumed at the motion to dismiss stage. If any of the Plaintiff parishes expressly acceded to the Dennis Canon and their properties are now owned by TEC and ECSC, they are entitled to compensation under the betterments statute for the present value of the improvements to real property and leaseholds created by Plaintiffs. However, the identities of any such parishes has not been determined and is not alleged in the Amended Complaint. Accordingly, TEC and ECSC's Motion to Dismiss must be denied.

B. Even accepting TEC and ECSC's arguments as true, Plaintiffs are entitled to betterments under several principles of South Carolina law.

A motion to dismiss should only be granted where the facts alleged and inferences reasonably deducible therefrom, when viewed in the light most favorable to the claimant, would not entitle the claimant to relief *on any theory*. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 74-75, 753 S.E.2d 846, 850 (2014). Assuming for the sake of argument that the Plaintiff parishes who acceded to the Dennis Canon placed their properties in trusts, as TEC and ECSC claim, (Mem. in Supp. of Mot. Dismiss at pp. 5-8), then those trusts have since ceased to exist by the operation of South Carolina law under several legal principles. In that scenario, TEC and ECSC would hold the properties in fee simple, and those Plaintiffs would be entitled to betterments. Thus, because the allegations of the Amended Complaint state a viable betterments claim under several theories of South Carolina law even under TEC and ECSC's factual presumptions, the motion to dismiss must be denied.

1. Plaintiffs' betterments claim is viable under the terms of the Dennis Canon.

Assuming that the parish properties were placed in trust, as TEC and ECSC argue, then those trusts have ceased to exist under the terms of the Dennis Canon. Accordingly, TEC and ECSC would hold the title in fee simple, and betterments would be appropriate.

Under South Carolina law, the nature, duration, and extent of a trust are governed by the express language of the trust itself. *Linder v. Nicholson Bank & Tr. Co.*, 170 S.C. 373, 170 S.E. 429, 431 (1933). When the terms of the trust's continued existence are accomplished, the trust ceases to exist, and the legal estate becomes invested in the beneficiary of the trust by operation of law. *Leaphart v. Nat'l Sur. Co.*, 167 S.C. 327, 166 S.E. 415, 419 (1932); *see also* 76 Am. Jur. 2d Trusts § 86; *Macaulay v. Wachovia Bank of S.C., N.A.*, 333 S.C. 201, 208, 508 S.E.2d 46, 50 (Ct. App. 1998) (applying Florida law).

Pursuant to Chief Justice Beatty's opinion, any Plaintiffs that expressly acceded in writing to the Dennis Canon created express trusts over their properties in favor of TEC. As set forth above, the Dennis Canon states:

Sec. 4. All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Sec. 5. The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

Thus, the Dennis Canon imposes a single obligation on Plaintiffs: to maintain their relationship with TEC.

In 2012, Plaintiffs disassociated from TEC, no longer remaining a part of or subject to its constitutions or canons. Accordingly, the sole condition of the express trusts created by the parishes' accession to the Dennis Canon was satisfied, and the trusts terminated. To the extent any parish is determined by this Court to have in fact expressly agreed to the Dennis Canon, the

trusts terminated, legal title to the properties thereafter vested in TEC and ECSC, and this betterments action is thus proper.

2. Plaintiffs' betterments claim is viable under the Statute of Uses and the merger doctrine.

Assuming that the parish properties were placed in trust, then those trusts no longer had duties for the trustees to fulfill after disassociation. In that scenario, the Statute of Uses and doctrine of merger result in the merging of legal and equitable title to the properties in TEC for any parish for whom there was a valid express accession to the Dennis Canon, and such parishes would be entitled to betterments.

A trust is active when a trustee is “necessary to carry out the valid purposes of the trust[.]” *Johnson v. Thornton*, 264 S.C. 252, 258, 214 S.E.2d 124, 127 (1975). The test for whether a trustee is necessary is whether the trustee has “some active and substantial duty to perform, or useful purpose to subserve,” “with respect to the control, protection, management, or disposition of the trust property.” *Id.* If the trustee does not have some active and substantial duty to perform that requires his continued ownership of legal title, then the trust is passive. *Rentz v. Polk*, 267 S.C. 359, 363, 228 S.E.2d 106, 108 (1976).

Passive trusts are subject to the operation of the Statute of Uses. Where the “trustee is charged with no duty which renders it necessary that the legal estate should remain in him to enable him properly to perform such duty, the Statute of Uses executes the use and carries the legal title to the [beneficial] use.” *All Saints Par. Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 385 S.C. 428, 446, 685 S.E.2d 163, 172 (2009) (quoting *Faber v. Police*, 10 S.C. 376, 389–90 (1877)). “Further, in a trust where the trustees have no duties, ‘the legal and equitable titles are merged in the beneficiaries and the beneficial use is converted into legal ownership.’” *All Saints*, 385 S.C. at 446, 685 S.E.2d at 172–73 (quoting *Johnson*, 264 S.C. at 257, 214 S.E.2d at

127).

As described above, the supposed Dennis Canon trust imposes a single obligation on Plaintiffs: to remain associated with The Episcopal Church. Upon their disassociation, Plaintiffs renounced that relationship. Thus, the trusts were passive and had no remaining duties requiring that Plaintiffs continue to serve as trustees or continue to hold legal title to the properties. Therefore, even if the trusts did not cease to exist by operation of law, the Statute of Uses merged the legal title with the equitable title, and legal ownership would be currently vested in TEC or ECSC. Accordingly, this betterments action is proper for any parish which this Court determines has expressly acceded to the Dennis Canon.

III. TEC and ECSC's interpretation of the Collective Opinions in this action is directly contradicted by their interpretation of the Collective Opinions in the declaratory judgment action.

On May 8, 2018, months after filing their Motion to Dismiss in this action, TEC and ECSC filed a Petition for Execution in the declaratory judgment action. (*See* Petition for Execution, *Protestant Episcopal Church in the Diocese of South Carolina et al. v. The Episcopal Church et al.*, 2013-CP-18-00013.) TEC and ECSC's arguments in their Motion to Dismiss and their Petition for Execution rest upon legally irreconcilable readings of the Collective Opinions' effect on current title to the properties, and their Motion to Dismiss should be denied in light of their new interpretation of the Collective Opinions.

In their Motion to Dismiss in this action, TEC and ECSC take the position that Plaintiffs still hold legal title to the properties in trust. TEC and ECSC state that the "land and buildings of the parishes are owned by the Plaintiff parishes," and TEC and ECSC "do not own the land at issue and did not bring an action to recover land." (Mot. Dismiss p. 1.) In short, according to TEC and

ECSC in this case,⁴ Plaintiffs cannot be entitled to betterments because Plaintiffs are, and will continue to be, the trustees of the properties vested with legal ownership.

On the other hand, in their Petition for Execution in the declaratory judgment action, TEC and ECSC take the position that the Collective Opinions established their right to immediate possession of the properties and request that this Court merely “enforce” the Collective Opinions by immediately transferring possession and control of the properties from Plaintiffs to TEC and ECSC. (*Id.* at p. 3.) TEC and ECSC quote the footnote in Acting Justice Toal’s dissenting opinion, which, in an attempt to rationalize the outcome of the Collective Opinions, stated that TEC held legal title to the parish properties. (Petition for Execution p. 8 (citing Collective Opinions, 421 S.C. at 291, 806 S.E.2d at 125 n.72 (Toal, J., dissenting))). Furthermore, in TEC and ECSC’s Memorandum in Support of their Petition for Execution, TEC argues that, upon Plaintiffs’ disaffiliation, “title to their property belonged to TEC and its Associated Diocese, [ECSC].” (Mem. in Supp. Am. Pet. Execution at p. 9.) TEC and ECSC thus offer an entirely contradictory interpretation of the Collective Opinions in the declaratory judgment action: that the Opinion finally granted the right of possession and legal title to TEC and ECSC.

TEC and ECSC’s interpretation of the Collective Opinions in their Petition for Execution forecloses their position in the Motion to Dismiss before the Court. As set forth above, the possession of the legal estate by a person who possesses beneficial enjoyment of the trust *res* merges the title and terminates the trust. *Epworth Children's Home v. Beasley*, 365 S.C. 157, 171, 616 S.E.2d 710, 718 (2005) (quoting *Bd. of Directors of Theological Seminary v. Lowrance*, 126

⁴ Similarly, in the federal court action related to the church’s intellectual property rights, Defendants stated that the Collective Opinions requires that Plaintiffs hold their real and personal properties in trust for Defendants as beneficiaries. (*See* Mot. Amend, *vonRosenberg et al. v. Lawrence et al.*, C.A. No. 2:13-cv-00587, ECF No. 125-1 p.4 (D.S.C. Mar. 1, 2018).)

S.C. 89, 119 S.E. 383, 388 (1923)). Thus, the application of TEC and ECSC's position in their Petition for Execution entitles Plaintiffs to betterments and requires denial of their Motion to Dismiss in this matter. TEC and ECSC cannot modify their reading of the Collective Opinions to match the most favorable position to them in each particular action.

More importantly, however, is that TEC and ECSC offer two irreconcilable readings of the Collective Opinions on the straightforward, preliminary issue of legal title to the properties. This only further establishes that the Collective Opinions did not decide the wide-ranging issues that TEC and ECSC claim it did. Rather than litigating these outstanding issues, TEC and ECSC simply ask the Court to conclude that the Collective Opinions decided the issues in the manner most favorable to them in each particular action, regardless of factual inconsistency.

Instead, as set forth in Section II above, the only permissible reading of the Collective Opinions is the narrowest: the Collective Opinions reversed the trial court's order and found that the Dennis Canon created a trust, when combined with an express written agreement to it, over certain properties under South Carolina law. Further fact-finding is necessary to decide the application of the Collective Opinions to *current* property ownership and title and to the particular properties at issue. With respect to those properties where TEC and ECSC are determined to have title, Plaintiffs are entitled to betterments.

IV. Plaintiffs do not lack standing to bring this action because any trusts that were created can no longer be in existence, and even if they do exist, Plaintiffs are not the trustees.

A. Res judicata and collateral estoppel do not apply.

TEC and ECSC argue that Plaintiffs are barred from re-litigating the question of who is the successor to the Protestant Episcopal Church in the Diocese of South Carolina, claiming that ECSC has been determined to be the true successor. (Mem. in Supp. of Mot. Dismiss at pp. 9-11.)

Plaintiffs are not litigating that question in this action. To the contrary, this betterments action presumes that TEC or ECSC is the current owner of the properties at issue—in which case Plaintiffs are entitled to the value of the betterments they constructed. The question of Plaintiffs’ entitlement to betterments has never been decided and could not have been decided in *Protestant Episcopal Church*, so res judicata and collateral estoppel are not relevant. See, e.g., *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018), *reh’g denied* (Apr. 26, 2018) (“[R]es judicata precludes parties from subsequently relitigating issues **actually litigated** and those that might have been litigated in a prior action.” (quotation omitted and emphasis added)).

TEC and ECSC claim that, because ECSC is the “true lower diocese” in South Carolina, ECSC, or a “Trustee Corporation,” acquired any such rights the Diocese of South Carolina had in the property. (Mem. in Supp. Mot. Dismiss at p. 6 (“As for the property of the diocese, which is owned by the Trustee Corporation (which is not even named as a party in this action), the Court determined that it is held in trust for TEC’s Associated Diocese.”) TEC and ECSC simultaneously claim that the Plaintiff entity captioned as the Diocese of South Carolina—in other words, the diocesan entity that disassociated from TEC—has no entitlement to betterments or any other rights whatsoever. (*Id.* at pp. 9-10.) TEC and ECSC cannot revise history. The Plaintiff entity referenced as the Diocese of South Carolina undeniably owned the diocesan property at all times until 2017. That entity, regardless of naming conventions, is entitled to betterments.

B. Plaintiffs are not the trustees of any trusts.

TEC contends that the Plaintiff parishes cannot bring this betterments action because “trustees cannot make claims against their own beneficiaries.” (Mem. in Supp. Mot. Dismiss at pp. 8-9.) As set forth above, any trusts found by the Supreme Court have since ceased to exist,

and under South Carolina law, legal ownership of the properties is vested in TEC and ECSC. Accordingly, Plaintiffs are not trustees and have standing to bring this betterments claim.

Assuming, *arguendo*, that the trusts continued to exist, Plaintiffs still have standing to bring this action because they have repudiated their roles as trustees. When a trustee acts inconsistently with the existence of a trust, he repudiates his obligations as trustee. *Presbyterian Church of James Island v. Pendarvis*, 227 S.C. 50, 58, 86 S.E.2d 740, 743–44 (1955). A beneficiary with knowledge of the repudiation can no longer rely upon the trustee’s continued performance of its duty. *Id.*, 227 S.C. at 58, 86 S.E.2d at 744. Thus, Plaintiffs cannot currently be the trustees of the trusts after disassociating from TEC, and Plaintiffs, to the extent this Court finds that there has been an accession as to their properties to the Dennis Canon, have standing to seek the value of their improvements to the properties from TEC and ECSC.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny TEC and ECSC’s Motion to Dismiss.

Respectfully submitted,

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October 5, 2018