Filed 3/26/10 Episcopal Church Cases CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EPISCOPAL CHURCH CASES.	G042454
JANE HYDE RASMUSSEN et al.,	(JCCP No. 4392)
Petitioners,	O P I N I O N
v.	
THE SUPERIOR COURT OF ORANGE COUNTY,	
Respondent;	
THE REV. PRAVEEN BUNYAN et al.,	
Real Parties in Interest.	

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Writ granted.

Holme Roberts & Owen, John R. Shiner, Brent E. Rychener; Horvitz & Levy, Jeremy B. Rosen, James A. Sonne; Goodwin Procter, David Booth Beers, Heather H. Anderson and Jeffrey David Skinner for Petitioners.

No appearance for Respondent.

Payne & Fears, Eric C. Sohlgren, Benjamin A. Nix, Daniel F. Lula, Erik M. Andersen; Greines, Martin, Stein & Richland and Robert A. Olson for Real Parties in Interest.

* * *

I. *Overview*

Our dissenting colleague contends that the Supreme Court did not "decide," in *Episcopal Church Cases* (2009) 45 Cal.4th 467 (*Episcopal Church Cases I*), who now actually owns the church property in dispute in this litigation, and now suggests the Supreme Court grant review to re-write its opinion to conform to his views.

And indeed a re-write is what it must take, because, as shown by the plain language of the *Episcopal Church Cases I* opinion -- indeed the plain *post-modification* language of *Episcopal Church Cases I* -- the high court did conclusively "decide" who *now* owns the property. Here's just a sample: "For these reasons, we agree with the Court of Appeal's conclusion (although not with all of its reasoning) that, *on this record*, when defendants disaffiliated from the Episcopal Church, *the local church property reverted to the general church*." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 493, italics added.)

"Reverted" is a past tense, already-happened, done-deal sort of word.

And "this record," as the Supreme Court referred to it and as we explain below, definitely *included* the very letter that the local church now relies on, and relied on in the trial court to justify the defeat of the motion for judgment on the pleadings brought in the wake of *Episcopal Church Cases I*. It is the order denying the general church's motion for judgment on the pleadings that we now review in this writ proceeding. (After the California Supreme Court's opinion became final, the local church filed an answer in the trial court -- within 10 days actually. Then, in the trial

court, the general church (and its subdivision, the Los Angeles Diocese), made a motion for judgment on the pleadings. As against the motion, the local church posited a March 18, 1991 letter in which the general church allegedly waived any claim to the property. In light of the March 1991 letter, the trial judge denied the general church's motion, reasoning: "The waiver issue was not before the Court of Appeal nor the Supreme Court, was expressly or impliedly decided by either court. It is not the law of the case.")

We must remember that the Supreme Court can decide any issue it pleases that is "fairly included" in the briefing. (*People v. Alice* (2007) 41 Cal.4th 668, 677 ["Rule 8.516(b)(1) of the California Rules of Court provides that, without permitting the parties to submit supplemental briefs, '[t]he Supreme Court may decide any issues that are raised or fairly included in the petition [for review] or answer.'"].)

And, according to the Supreme Court in *Episcopal Church Cases I*, the issue of the actual ownership of the property was "fully briefed" in the proceeding before it: "Both lower courts also addressed *the merits of the dispute over ownership* of the local church -- the trial court found in favor of the local church and the Court of Appeal found clear and convincing evidence in favor of the general church. We will also *address this question*, which the parties as well as various amici curiae *have fully briefed*." (*Episcopal Church Cases, supra*, 45 Cal.4th at p. 478, italics added.)[1]

We have no doubt, of course, that if we are incorrect in relying on the plain language of the Supreme Court's opinion in granting the general church's petition for writ of mandate, the high court will correct our error. Even so, secular courts, like many members of many religions, must take their direction from "authoritative texts," and in this proceeding, *Episcopal Church Cases I* is our authoritative text. Guided by that text, we must grant the petition. This is not a case where we must peer through a dark glass. The Supreme Court used clear, unequivocal language in its opinion, including the post-modification version of it.

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[1] The March 1991 letter was from the secretary to the Bishop of the Los Angeles Diocese at the time to the board of the local church concerning a property transaction. We quote the entirety of the letter anon.

Indeed, our opinion in this writ proceeding has already been pretty much written for us by the Supreme Court. We need only introduce the general topic addressed by a given swath of text -- and that only for reader convenience of literary continuity; the Supreme Court's opinion speaks for itself. We emphasize now that all quotations are from the *post-modification* version of the opinion:

II. *Ownership Was At Issue*

The Supreme Court framed the "dispute" before it expressly in terms of present ownership: "Both the local church and the general church *claim ownership* of the local church building and the property on which the building stands. The parties have asked the courts of this state to resolve *this dispute*. . . ." (*Episcopal Church Cases I, supra*, 45 Cal.4th at pp. 472-473, italics added.)

Also: "After the disaffiliation, *a further dispute arose as to who owned the church building that St. James Parish used for worship and the property on which the building stands* -- the local church that left the Episcopal Church or the higher church authorities. [¶] *To resolve this dispute*, the Los Angeles Diocese and various individuals, including a dissenter from the decision by St. James Parish to disaffiliate (hereafter collectively Los Angeles Diocese), sued various individuals connected with St. James Parish (defendants) alleging eight property-recovery-related causes of action. Later, the national Episcopal Church successfully sought to intervene on the side of the Los Angeles Diocese and filed its own complaint in intervention against defendants. In essence, both sides in this litigation, i.e., defendants on one side, and the Los Angeles Diocese and Episcopal Church allied on the other side, *claim ownership* of the local church building and property on which it stands." (*Episcopal Church Cases I*, *supra*, 45 Cal.4th at p. 476, italics added.)

III. *"This Record," As the Phrase Was Used In Episcopal Church Cases I, Included the Letter on Which the Local Church Now Relies*

The March 1991 letter that the local church now relies on to argue waiver was *itself* part of the "record" before this court and the Supreme Court. Rule 8.120 of the California Rules of Court define what is the "record on appeal" and subdivision (a)(1) of the rule specifies that the "normal record on appeal" includes a "record of the written documents from the superior court proceedings."

The written documents from the superior court proceedings leading to the appeal and subsequent grant of the petition for review included, as one might expect, a trial court memorandum of points and authorities in support of the anti-SLAPP motion brought by the local church -- the same anti-SLAPP motion that, along with a sustained demurrer to a complaint in intervention by the general church, gave rise to the final judgments that led to the appeal that led to the Supreme Court's opinion in *Episcopal Church Cases I*. That memorandum of points and authorities argued the effect of the March 1991 letter:

"Plaintiffs also have no probability of success on the merits of their trust claim *because the Diocese has already waived and promised not to assert any claim of trust with respect to a large portion of St. James Church's property. In 1991*, prior to purchasing an adjacent parcel of property with funds donated directly to it for this purpose by a major donor, and improving that property at a cost of several million dollars, *St. James Church sought and obtained a written promise that neither the Diocese nor its bishop would ever assert a claim of ownership over that property*. (Dale Decl., ¶ 15, Exh. 'I'). In reasonable reliance on this promise, St. James Church acquired the property, merged it with the existing property, conducted a multi-year capital campaign among its membership, and built an entirely new complex of worship, administrative and office buildings across all of its property. (*Id.*, ¶ 16.) Plaintiffs are therefore estopped

from asserting any claim to ownership, whether by trust or otherwise, with respect to this property." (Italics added.)

The Dale declaration referred to in the points and authorities was indeed the March 1991 letter. Dale, himself one of the directors of the local church, said in his declaration: "At no time after acquiring these properties has St. James Church ever conveyed them to, or stated any intent to hold its property in trust for, any of the Plaintiffs. ¶ In fact, in 1991, prior to St. James Church purchasing the adjacent property at 505 32nd Street, its president and chief executive officer, the Reverend David C. Anderson (along with the member wishing to donate the necessary funds), requested and received from the Diocese a letter confirming that St. James Church would own and hold this property for itself, and promising not to assert any claim of trust or other ownership over the property to be purchased. A true and correct copy of this written waiver letter, kept in the ordinary course of business in St. James Church's files, is attached as Exhibit 'I.'"

We quote the entirety of the letter in the margin.[2] The local church's points and authorities faithfully characterized it as the basis of a waiver and estoppel argument. That is, "this record" included what might be the local church's reliance point involving the March 1991 letter.

And the waiver point was indeed addressed by the Supreme Court in *Episcopal Church Cases I*, in this passage: "Defendants state that, over the years, *St. James Parish 'purchased additional parcels of property in its own name*, with funds donated exclusively by its members.' They contend that it would be unjust and contrary

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[2] The context of the letter was a proposed acquisition of adjacent property to then-extent church property on 32nd Street in Newport Beach.

The letter, addressed to the Rev. David C. Anderson, said:

"This is to confirm our conversations and my previous correspondence to you about the possible acquisition of additional property. ¶ Please know that the position of Bishop Borsch and the Diocese is as follows: ¶ The Rector, Wardens and Vestry of Saint James' Parish, Inc. of Newport Beach, are given permission by the Bishop of Los Angeles, the Rt. Rev. Frederick H. Borsch, to purchase and own the property on 32nd Street in Newport Beach, in the name of the Rector, Wardens and Vestry of Saint James' Parish, Inc. and not held in trust for the Diocese of Los Angeles, or the Corporation Sole. ¶ I trust this will be sufficient. If not, please do not hesitate to contact me. ¶ This comes with my best wishes. ¶ Faithfully in Christ, ¶ The Rev. Canon D. Bruce MacPherson, Canon to the Ordinary and Attorney in-Fact for the Bishop of Los Angeles."

to the intent of the members who, they argue, 'acquired, built, improved, maintained, repaired, cared for and used the real and personal property at issue for over fifty years,' to cause the local parish to 'los[e] its property simply because it has changed its spiritual affiliation.' But the matter is not so clear. We may assume that St. James Parish's members did what defendants say they did for all this time. But they did it for a local church that was a constituent member of a greater church and that promised to remain so. Did they act over the years intending to contribute to a church that was part of the Episcopal Church or to contribute to St. James Parish even if it later joined a different church? It is impossible to say for sure. Probably different contributors over the years would have had different answers if they had thought about it and were asked. *The only intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity*." (*Episcopal Church Cases I, supra*, 45 Cal.4th at pp. 492-493, italics added.)

IV. *The High Court's Conclusion Was Framed in Terms of Present Ownership by the General Church*

The high court's conclusion was framed in terms of current ownership: "Applying the neutral principles of law approach, *we conclude, on this record, that the general church, not the local church, owns the property in question*." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 473, italics added.)

The conclusion was also framed in present tense terms: "Although the deeds to the property have long been in the name of the local church, that church agreed from the beginning of its existence to be part of the greater church and to be bound by its governing documents. These governing documents make clear that church property *is held in trust for the general church* and may be controlled by the local church only so long as that local church remains a part of the general church. *When it disaffiliated from*

the general church, the local church did not have the right to take the church property with it." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 473, italics added.)

And it was further reiterated in a passage dealing with a statute passed long prior to the March 1991 letter: "Section 9142, subdivisions (c) and (d), does not permit state interference in religious doctrine and leaves control of ecclesiastical policy and doctrine to the church. Subdivision (c) of that section permits the governing instruments of the general church to create an express trust in church property, which Canon I.7.4 does. Subdivision (d) permits changing a trust, but only if done in the instrument that created it. Canon I.7.4 has not been amended. So it would appear that *this statute also compels the conclusion that the general church owns the property now that defendants have left the general church*." (*Episcopal Church Cases, supra I*, 45 Cal.4th at pp. 488-489, italics added and original italics deleted.)

V. *The High Court's Conclusion Was Based on the Concept that the Property Had Already Reverted to the General Church As a Matter of Law*

In the context of discussing federal precedent on point, the *Episcopal Church Cases I* opinion used the words "conclusion" -- as in its own conclusion -- and "reverted" -- as in a legal result already accomplished by operation of law -- in the same sentence: "Thus, the high court's discussion in *Jones v. Wolf, supra*, 443 U.S. at page 606 together with the Episcopal Church's adoption of Canon I.7.4 in response, strongly supports the conclusion that, *once defendants left the general church, the property reverted to the general church*." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 487, italics added.)

VI. *The High Court's Judgment Was Also Framed in Terms of Current Ownership by the General Church Because of a Prior Reversion*

The *Episcopal Church Cases I* opinion framed the record below this way: "The Court of Appeal consolidated the appeals and reversed the judgments. *That court ruled* that the action was not a SLAPP suit subject to the special motion to strike, and *that the higher church authorities*, not defendants, *own* the disputed property." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 476, italics added.)

The point was made a second time: "For these reasons, we agree with the Court of Appeal's conclusion (although not with all of its reasoning) that, on this record, when defendants disaffiliated from the Episcopal Church, *the local church property reverted to the general church*. (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 493, italics added.)

And it was the judgment of the Court of Appeal, stated in one place in the present tense that "the higher church authorities, not defendants, own the disputed property" and in another place in the past tense that the property has already "reverted to the general church," which was the judgment of the Supreme Court: "We affirm the judgment of the Court of Appeal, which reached the same conclusions, although not always for the same reasons." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 473.)

VII. *Justice Kennard In Her Concurrence Also Understood the Majority Opinion to State the Present Tense Ownership of the Property By the General Church*

Justice Kennard, in her separate concurring opinion, understood that actual ownership was being determined: "Ownership of the property is *at issue here*." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 493 (conc. opn. of Kennard, J.), italics added.)

And she read the majority opinion, as do we, to say that the general church "owns" -- present tense -- the subject property: "I agree with the majority that *the Protestant Episcopal Church in the United States of America (Episcopal Church) owns the property* to which St. James Parish in Newport Beach (St. James Parish) has held title since 1950. (*Episcopal Church Cases, supra,* 45 Cal.4th at p. 493 (conc. opn. of Kennard, J.), italics added.)

Indeed, the majority's decision on the issue of who *now* owns the 32nd Street property was integral to the reason Justice Kennard wrote separately. Remember: When the case was before this court the first time around, this court followed the "principle of government approach." And in the briefing to the Supreme Court, the general church advocated the principle of government approach.

By contrast, it was the local church that advocated, first to this court and then later to the Supreme Court, the "neutral principles" approach. And guess what. The Supreme Court *adopted* the neutral principles approach advocated by the local church!

So why did the local church lose? The only way that the judgment of the Court of Appeal could possibly have been affirmed was if the result required by the neutral principles approach adopted by the Supreme Court yielded the same result as the principle of government approach used by the lower court.

And that was why Justice Kennard wrote a concurring and not a dissenting opinion. As Justice Kennard understood the case, it was that the general church who had won the dispute over the property -- remember, under the majority's approach the general church had *lost* the dispute over which rule of law to apply.

Thus, after a discussion of the operation of Corporations Code section 9142, Justice Kennard wrote: "Applying California's statute [section 9142] in resolving church property disputes, *the majority concludes that the Episcopal Church now is the owner of the St. James Parish property in question. I agree.*" (*Episcopal Church Cases, supra,* 45 Cal.4th at p. 495 (conc. opn. of Kennard, J.), italics added.)

"Now is the owner." Not a phrase hedged with qualification.

Justice Kennard then hastened to add: "But that conclusion is not based on neutral principles of law. No principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner. . . . . *If a neutral principle of law approach were applied here, the Episcopal Church might well lose* because the 1950 deed to the disputed property is in the name of St. James Parish, and the Episcopal Church's 1979 declaration that the parish was holding the property in trust for the Episcopal Church is of no legal consequence." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 495 (conc. opn. of Kennard, J.), italics added and fns. omitted.)

Thus, Justice Kennard, as do we here, understood the majority opinion to have established that the general church had "won" the case: "But under the principle of government approach, *the Episcopal Church wins* because that method makes the decision of the highest authority of a hierarchical church, here the Episcopal Church, binding on a civil court. This result is constitutional, but only because the dispute involves religious bodies and then only because the principle of government approach, permissible under the First Amendment, allows a state to give unbridled deference to the superior religious body or general church." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 495 (conc. opn. of Kennard, J.), italics added.)

VIII. *Four Small Modifications*

A. The Modifications Themselves

Episcopal Church Cases I was initially filed January 5, 2009. The Supreme Court modified its opinion by order filed February 25, 2009. The order made four changes. It expressly stated that the modification did not "affect the judgment."

Two of the changes were to insert the appositive clause "on this record" in two summarizing sentences.

Thus, on page 473, of the official reporter, in the introductory portion of the opinion summarizing its conclusion, the Supreme Court inserted the phrase "on this record" in a sentence that was saying the general church and *not* the local church now "owns" the disputed property: "Applying the neutral principles of approach, we

conclude, on this record, that the general church, not the local church, owns the property in question." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 473.)

The court did the same thing on page 493, in its final substantive paragraph, which continued to use the word "reverted": "For these reasons, we agree with the Court of Appeal's conclusion (although not with all of its reasoning) that, on this record, when defendants disaffiliated from the Episcopal Church, the local property reverted to the general church." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 493.)

The third modification was in a sentence on page 476 that was summarizing the procedural history of the case to that point. This passage substituted the word "address" where the original had read "decide." Thus the original read: "We granted review to decide both whether this action is subject to the special motion to strike under Code of Civil Procedure section 425.16 and the merits of the church property dispute." The modified text read: "We granted review to decide both whether this action is subject to the special motion to strike under Code of Civil Procedure section 425.16 and to address the merits of the church property dispute." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 476.)

The final fourth modification was on page 478, to the introductory paragraph right under the (unchanged) heading "Resolving the Dispute over the Church Property." This modification substituted "addressed" for "decided" in the context of discussing what the lower courts had done. It also substituted the word "analyze" where the original had said "resolve." The original had read: "Both lower courts also decided the merits of the dispute over ownership of the local church -- the trial court in favor of the local church and the Court of Appeal in favor of the general church. We will also decide this question, which the parties as well as various amici curiae have fully briefed. We will first consider what method the secular courts of this state should use to resolve disputes over church property. We will then apply that method to resolve the dispute of this case." The new text, post-modification, read: "Both lower courts also addressed the merits of the dispute over ownership of the local church -- the trial court found in favor of the local church and the Court of Appeal found clear and convincing evidence in favor of

the general church. We will also address this question, which the parties as well as various amici curiae have fully briefed. We will first consider what method the secular courts of this state should use to resolve disputes over church property. We will then apply that method to *analyze* the dispute of this case." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 478, italics added.)

B. Their Significance

The California Supreme Court has systemic duties not fastened on the intermediate courts of appeal. The Supreme Court's "purpose is to decide important legal questions and maintain statewide harmony and uniformity of decision." (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 13:1, p. 13-1.) Thus it is not surprising that the reason the Supreme Court granted review in *Episcopal Church Cases I* was "*primarily* to decide how the secular courts of this state should resolve disputes over church property." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 473, italics added.)

Even so, the California Supreme Court has a "well-established rule" against issuing advisory opinions. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 284 ["The well-established rule is that we should avoid advisory opinions."]; *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 ["The rendering of advisory opinions falls within neither the functions nor jurisdiction of this court."]; *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119-120 [following *Lynch*, and explaining that *Lynch's* rule against the "'rendering of advisory opinions'" is "equally binding on us today"].)

We have already seen that the phrase "on this record" includes the March 1991 letter that prompted the trial court in the writ proceeding before us to deny the general church's motion for judgment on the pleading. "This record" included the March 1991 letter. And that fact was brought to the Supreme Court's attention in the opposition to the petition for modification. Using the phrase "this record" was thus an elegant way of disposing of the specificities of the March 1991 letter. "This record" became the

equivalent of a memo to the lower courts: "The argument has already been made -- just look in 'this record.'"

So -- are we to believe that the two *other* modifications converted *Episcopal Church Cases I* into an advisory opinion -- in which the court's words "reverted" and "now owns" become merely a result on a """'hypothetical state of facts"""? (*People v. Slayton* (2001) 26 Cal.4th 1076, 1084; *People v. Chadd* (1981) 28 Cal.3d 739, 746 ["We will not ... adjudicate hypothetical claims or render purely advisory opinions"].)

No. Remember that the Supreme Court has a systemic role of assuring "uniformity of decision," and, in the exercise of that systemic role, used the *Episcopal Church Cases I* as the occasion to self-consciously "adopt" the "neutral principles of law approach" for use in California. (See *Episcopal Church Cases I, supra,* 45 Cal.4th at p. 473.) Using "address" for "decide" and "analyze" for "resolve" emphasized the high court's institutional role of declaring the proper rule of decision for all the courts of the state. Note, in this regard, that "address" is a term regularly used by courts in the substantive discussion of the merits of a case. Lower court exegesis of higher court opinions has in fact treated "address" as a synonym for "resolve." (E.g., *City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1436 [noting previous Supreme Court opinion had not "addressed" certain issue but "only resolved" certain "narrow issues"].)

Beyond that, the Supreme Court could easily, had it decided to, have qualified its "reverted" and "now owns" language with a small footnote to the effect that there might *still* be arguments as to the claim of the local church that had not yet been considered and so "reverted" and "now owns" was to be understood in some metaphysical, advisory sense. It didn't do any such thing, and the one qualification of adding "on this record," as we have seen, actually reinforced the finality of the determination of ownership.

We also note that the majority in *Episcopal Church Cases I*, in making the modification, did nothing to try to disabuse Justice Kennard of her reading of the

majority opinion (i.e., her statements that the general church "owns the property" and the general church "is now the owner of the St. James Parish in question"). There was no footnote to say, for example, "in light of these modifications, our concurring colleague's characterization of our decision today that the general church 'now is the owner' of the property in question is perhaps premature," or something like that.

Finally, despite the substitution of the word "analyze" for "resolve" in one instance, the post-modification opinion left the word *resolve* intact in the topic heading applying *neutral principles to the case at hand*, where it wrote, "Resolving the Dispute of This Case." (*Episcopal Church Cases I, supra*, 45 Cal.4th at p. 485.) The court did not introduce that section of the opinion with the words, "Thinking About the Right Rule to Govern the Dispute of This Case" or "Analyzing the Dispute of this Case" or other such locutions. The court left it at "Resolving *the* Dispute of This Case." (Italics added.) *The* dispute between the litigants was over who gets the property on 32nd Street in Newport Beach, not the relatively abstruse question of whether California courts should use a neutral principles, as distinct from a principle of government, approach, in *generally* analyzing church property cases.

IX. *Disposition*

Let a writ issue requiring the Superior Court of Orange County to vacate its order denying the motion of the Episcopal Church and Los Angeles Diocese for judgment on the pleadings, and to enter a new order granting that motion.

Petitioners shall recover their costs in this proceeding.

SILLS, P. J.

I CONCUR:

MOORE, J.

MOORE, J., Concurring.

Until I read the dissent, it did not occur to me the Supreme Court meant anything other than exactly what its opinion states. That is, aware of the dangers involved "[w]hen secular courts are asked to resolve an internal church dispute over property ownership," the court applied the neutral principles of law approach and decided "the general church, not the local church, owns the property in question." (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 472-473.)

Hence the dissent spurred me to investigate whether or not the California Supreme Court is hesitant or unclear in its directions to lower courts when issuing opinions involving either demurrers or motions to strike under California Code of Civil Procedure, section 425.16. What I discovered confirms my first reaction.

The Supreme Court is quite clear with its instructions when further action is required: "The Court of Appeal's judgment is reversed. The matter is remanded to the Court of Appeal with directions to affirm the trial court's order insofar as it granted the anti-SLAPP motion, to reverse the trial court's order insofar as it denied that motion, and to remand the matter to the trial court for further proceedings consistent with this opinion." (*Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 321.) "We reverse the judgment of the Court of Appeal and remand the case for further proceedings consistent with our opinion." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 298.) "We reverse the judgment of the Court of Appeal and remand the case to that court for further proceedings consistent with this opinion. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1066.) "We reverse the judgment of the Court of Appeal and remand with instructions that the matter be returned to the trial court for reinstatement of its previous order denying the award of attorney fees and costs." (*S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 383.) "We reverse the

judgment of the Court of Appeal with instructions to remand the case for a new trial in accordance with our opinion." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 201, fn. omitted.) "We reverse this portion of the Court of Appeal's judgment, and instead remand for proceedings consistent with the views expressed in this opinion." (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 28.) "The judgment of the Court of Appeal affirming the award of attorney fees in the present case is reversed, and the cause is remanded for proceedings consistent with the views expressed in this opinion." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 584.) "Accordingly, we reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with our opinion." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 892.) "Accordingly, we shall reverse the judgment of the Court of Appeal. But because the Court of Appeal did not consider whether plaintiffs have established a probability of prevailing ([Code of Civ. Proc.,]§ 425.16, subd. (b)), we shall remand the cause to permit the court to address that question in the first instance. On reconsideration, therefore, the Court of Appeal should consider whether plaintiffs' fraud and contract claims have the minimal merit required to survive an anti-SLAPP motion." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 95.) "We believe the trial court was correct to find [Government Code] section 66022 applicable, and the Court of Appeal erred when it concluded otherwise. Accordingly, we reverse the judgment of the Court of Appeal and remand for further proceedings consistent with this opinion." (*Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1199.) "For the foregoing reasons, we reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with this decision." (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 380.) "For the foregoing reasons, we affirm the judgment of the Court of Appeal and remand the case with directions that it be remanded in

turn to the superior court for recalculation of attorney fees consistent with the views expressed herein." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1142.) "The judgment of the Court of Appeal is affirmed insofar as it reversed the order denying GWFSC's petition to compel arbitration. The judgment is reversed insofar as it directed the trial court to conduct jury trials on plaintiffs' claims of fraud in the inception. The cause is remanded to the Court of Appeal with instructions to direct further proceedings in the trial court consistent with our opinion." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 431.) "Accordingly, we find it appropriate to remand the matter to the Court of Appeal, with directions that it remand to the trial court for further proceedings consistent with this opinion. [Citations.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 449.) On the other hand, when no further action is required, the matter is affirmed, just as in this case: "As explained above, although we conclude that the Court of Appeal applied an incorrect standard in evaluating the validity of the City's conduct, we nonetheless conclude that the appellate court reached the correct result in upholding the trial court's order granting defendants' motion to strike the supplemental complaint. Accordingly, the judgment of the Court of Appeal is affirmed." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 41.)

MOORE, J.

FYBEL, J., Dissenting.

INTRODUCTION AND SUMMARY

I respectfully dissent because the majority and I differ in our interpretation of the Supreme Court's disposition and the meaning of the Supreme Court's opinion in *Episcopal Church Cases* (2009) 45 Cal.4th 467. I believe the disposition of the Supreme Court's opinion, which affirms without change the disposition of our previous opinion (*Episcopal Church Cases* (June 25, 2007, G036096)), does not authorize the unprecedented result of entering judgment in favor of plaintiffs.[1] I respectfully suggest that these differences can best be resolved by a grant of review with an order from the Supreme Court setting forth the procedures to be followed by the trial court. I do not suggest the Supreme Court "rewrite" its opinion as described by the majority.

The majority by its opinion grants relief to plaintiffs that would *enter judgment in favor of plaintiffs* after the overruling of defendants' demurrer and denial of defendants' motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16). This result is unprecedented and without any basis in law. As aptly described by defendants' return in this proceeding, entry of judgment for plaintiffs at this procedural stage is "revolutionary." I can write with certainty that this is the only case in the *history* of California where entry of judgment has been ordered upon overruling a demurrer and denial of an anti-SLAPP motion. Any case or statutory authority supporting the majority's order to enter judgment for a plaintiff after the overruling of a demurrer and denial of an anti-SLAPP motion is conspicuous by its absence from the majority opinion. The majority opinion

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[1] Plaintiffs and petitioners (plaintiffs) are the "general church" as referred to in the majority opinion, and defendants and real parties in interest (defendants) are the "local church" as referred to in the majority opinion.

acknowledges this procedural posture (maj. opn., *ante*, at p. 5) but then does not deal at all with its legal effect.

The basic principles governing this case are straightforward and should have led to the denial of the writ petition and agreement with the trial court's ruling. Both this court and the Supreme Court agreed the subject complaints stated a cause of action and the demurrer should have been overruled. Both this court and the Supreme Court agreed the anti-SLAPP motion should have been denied. This court's disposition reversed the judgment entered by the trial court after it erroneously sustained the demurrer and granted the motion to strike. This court remanded for "[f]urther proceedings" (*Episcopal Church Cases*, *supra*, G036096) and the Supreme Court affirmed that disposition (*Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 493).

On remand, the trial court denied plaintiffs' motion for judgment on the pleadings, correctly ruling that plaintiffs must prove their case with evidence addressing the merits, and defendants should be allowed to file an answer denying or admitting the allegations and asserting affirmative defenses and defend themselves with evidence on the merits.

The majority opinion does not take issue with any of the principles regarding demurrers and anti-SLAPP motions I explain in this dissent, yet it grants the writ petition. Why? The majority opinion rests entirely on quotes from the Supreme Court's opinion concerning ownership rights interpreted under the neutral principles approach. But *all* of those statements by the Supreme Court were in the context of determining the sufficiency of the complaints' allegations. Those statements naturally and correctly treated those allegations as true in analyzing whether a demurrer should have been sustained or overruled. I read those quotes in the context of a ruling on a demurrer; the majority does not, and that is where we part company.

THE DISPOSITION OF THE SUPREME COURT'S OPINION

California Rules of Court, rule 8.528(a) provides: "After review, the Supreme Court normally will affirm, reverse, or modify the judgment of the Court of Appeal, but may order another disposition." Our judgment reversed the dismissal of the complaints entered in the trial court and remanded for further proceedings. (*Episcopal Church Cases, supra*, G036096.) The Supreme Court's disposition read in full: "We affirm the judgment of the Court of Appeal." (*Episcopal Church Cases, supra*, 45 Cal.4th at p. 493.) Thus, the Supreme Court's disposition affirmed that judgment and left it intact and unchanged; nothing in the Supreme Court's opinion expresses any other disposition. Therefore, as the matter stands, the operative disposition was to reverse and remand for further proceedings, not to enter judgment for plaintiffs.

The concurrence merely drives home my point: The Supreme Court meant exactly what its opinion stated in the disposition. Both the majority opinion and the concurrence studiously avoid quoting or addressing the Supreme Court's actual disposition. None of the dispositions quoted in the concurrence's string cite deals with a procedural posture resembling the one in this case. In my view, if the Supreme Court truly wished to approve the unprecedented result of entry of judgment in plaintiffs' favor after overruling a demurrer and denying an anti-SLAPP motion, the court would have expressly and in no uncertain terms said so.

THE DEMURRER

A demurrer tests the sufficiency of a complaint. In ruling on a demurrer, the court assumes all the well-pleaded allegations of the complaint to be true; if the complaint states a cause of action, the demurrer is overruled. "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp.*

(1983) 35 Cal.3d 197, 213; see *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [court reviewing propriety of ruling on demurrer is not concerned with the "plaintiff's ability to prove . . . allegations, or the possible difficulty in making such proof"]; *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 867 ["'A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations'"].)

In this case, the trial court originally sustained the demurrer, but both this court and the Supreme Court concluded (for different reasons) that the complaints did state a cause of action. Neither our own opinion nor the Supreme Court's opinion was "advisory." We applied the principle of government approach and the Supreme Court applied the neutral principles approach to the allegations of the complaints to determine whether a cause of action was stated. Both courts determined that a cause of action was stated.

As a result, the disposition of the Court of Appeal opinion stated, in full: "The judgments of dismissal against the diocese and the national church are both reversed. Further proceedings shall be consistent with this opinion. Appellants shall recover their costs on appeal." (*Episcopal Church Cases*, *supra*, G036096.) There was nothing in this disposition supporting entry of judgment for plaintiffs. Instead, the disposition was to the contrary: remand the case to the trial court for "[f]urther proceedings." (*Ibid*.)

The disposition of the California Supreme Court's opinion stated in full: "We affirm the judgment of the Court of Appeal." (*Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 493.) There was *nothing* in the disposition ordering judgment to be entered for plaintiffs.

The case was remanded on this basis. Plaintiffs asked the trial court to enter judgment in their favor and the trial court declined, properly, following the

Supreme Court's affirmance of our disposition. There is no authority—and the majority cites none—that supports entry of judgment because a demurrer was overruled.

The procedural posture also explains the language used in the Supreme Court's opinion. The majority opinion and plaintiffs rely exclusively on quotes from the Supreme Court's opinion that speak in terms of plaintiffs owning the property in the present tense. Defendants rely on the court's modifications to its opinion, namely the ones adding the words "on this record," changing the words "decided" or "decide" to "addressed" or "address," and changing the word "resolve" to "analyze." (*Episcopal Church Cases, supra,* 45 Cal.4th 467, mod. 45 Cal.4th 742a.) Defendants properly ask what was the effect of those modifications if not to clarify that the Supreme Court was not finally adjudicating the claims and ordering entry of judgment.

The Supreme Court's opinion is best understood in the context in which it was actually written, namely, the Supreme Court treated all the allegations of the complaints as true because it was reviewing a ruling on a demurrer. Employing well-established authority cited *ante,* the Supreme Court phrased its opinion in terms of ownership because those were the allegations of the complaints—nothing more, nothing less—and the complaints stated a cause of action.

THE ANTI-SLAPP MOTION TO STRIKE

The trial court in this case originally granted defendants' anti-SLAPP motion on the grounds that the complaints alleged protected activity and plaintiffs failed to present a prima facie case of probability of prevailing on the merits.

In this case, the Supreme Court quoted the applicable test for an anti-SLAPP motion from *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76: "[Code of Civil Procedure] '[s]ection 425.16 requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the

challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.'" (*Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 477.)

Both this court and the Supreme Court decided that the first prong of the anti-SLAPP test was not satisfied because the complaints did not allege protected activity within the meaning of Code of Civil Procedure section 425.16, subdivision (b)(1). Instead, the gravamen of the complaints alleged a real estate dispute. That was the end of the Supreme Court's analysis and discussion of the anti-SLAPP motion. Because the complaints did not allege protected activity, the Supreme Court did not address the second prong of the anti-SLAPP test in its opinion. For this reason, the majority opinion's attention to the prong of prevailing on the merits—and especially its extended discussion of the March 1991 letter—is totally irrelevant.

The Supreme Court held defendants' anti-SLAPP motion should have been denied. But the Supreme Court did not order entry of judgment against defendants on that basis. The majority opinion does not, and cannot, cite any authority supporting entry of judgment on the merits after denial of an anti-SLAPP motion. Indeed, the anti-SLAPP statute itself is contrary to the majority's opinion. Code of Civil Procedure section 425.16, subdivision (b)(3) expressly prohibits the use at a later stage of the case of a court's determination that the plaintiff has established a probability of prevailing in an anti-SLAPP motion.[2]

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[2] Code of Civil Procedure section 425.16, subdivision (b)(3) provides: "If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding."

AFTER FILING OF THE SUPREME COURT'S OPINION, PLAINTIFFS REPRESENT TO UNITED STATES SUPREME COURT THAT THE CASE IS NOT FINAL

In their brief before the United States Supreme Court in opposition to a petition for writ of certiorari, plaintiffs took the position that no jurisdiction existed to review the decision of the California Supreme Court because "no final judgment or decree has been rendered . . . ." (Boldface and capitalization omitted.) That was a correct statement of the law for all the reasons I have explained in this dissent. Indeed, before the filing of the California Supreme Court's opinion, plaintiffs *never* took the position that judgment should be entered in their favor as a result of the overruling of the demurrer and denial of the anti-SLAPP motion. In this proceeding, plaintiffs change their position and argue they are entitled to judgment as a result of the Supreme Court's opinion. Plaintiffs should not be permitted to argue lack of finality to the United States Supreme Court and then later argue finality to the California state courts.

CONCLUSION

For all these reasons, I respectfully dissent.

FYBEL, J.