

DISTRICT COURT, EL PASO COUNTY, COLORADO
270 South Tejon Street
Colorado Springs, CO 80903
(719) 448-7700

Plaintiff and Counterclaim Defendant:
GRACE CHURCH & ST. STEPHEN'S, a Colorado nonprofit corporation,

Defendant and Counterclaimant:
THE BISHOP AND DIOCESE OF COLORADO, a Colorado nonprofit corporation,

Third Party Counterclaimants:
THE DIOCESE OF COLORADO IN THE EPISCOPAL CHURCH; GRACE AND ST. STEPHEN'S EPISCOPAL CHURCH; and GRACE CHURCH AND ST. STEPHEN'S, a Colorado religious society and corporation

Counterclaim Defendants:
REV. DONALD ARMSTRONG, III; CHARLES C. BROWN; DARELEEN SCHAFFER; JON WROBLEWSKI; MARGE GOSS; CRAIG WHITNEY; ROBERT C. BALINK; CHAD FRIESE; MICHAEL BARBER; KEITH STAMPER; JASON HUNTLEY; EMILY KLINE; RIP HOLLISTER; JACK GLORIOD; EDWIN J. MONTGOMERY, JR; KEVIN DIBBLE; SUSAN SPENCER; ALAN CRIPPEN II; ST. STEPHEN'S CLASSICAL ACADEMY, a Colorado nonprofit corporation; and GRACE CHURCH & ST. STEPHEN'S, a Colorado unincorporated nonprofit association;

Additional Counterclaim Defendant:
ROBERT J. O'NEILL

Additional Defendant Counterclaimant:
THE EPISCOPAL CHURCH

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COURT USE ONLY

Case No. 2007CV1971

DIV. COM-5

REPLY ON MOTION TO STRIKE PRIVILEGED MATERIALS

Plaintiff, Grace Church & St. Stephens, a Colorado nonprofit corporation (“Grace Church”), through its undersigned attorney, replies to The Episcopal Church Entities (the “Diocese”) Response to Motion to Strike Privileged Materials as follows:

The Diocese bases its argument in its Response Brief on its tired and patently frivolously arguments that Grace Church (the 1973 Colorado nonprofit corporation) “really” doesn’t exist and instead Ms. Adams’ December 8, 2006 attorney-client memorandum to “Members of the Vestry” was somehow given to some mythical entity other than the Vestry (i.e., board of directors) of Grace Church, who were the individuals who undeniably received it and discussed it with Ms. Adams. (See affidavit of Warden Jon Wroblewski, attached to Grace Church’s Motion to Strike). The Diocese’s arguments are frivolous because:

1. The 1923 Corporation didn’t exist on December 8, 2006 when the memorandum was delivered to Grace Church’s Vestry. It is undisputed that corporation became defunct on December 31, 1972 and was dissolved by operation of law in 1977. It then continued to be a dissolved corporation until at least October 18, 2007 when Martin Nussbaum filed Articles of Reinstatement purporting to reinstate the 1923 Church with the Colorado Secretary of State (see Exhibit 1 hereto). This is an outright admission by the Diocese’s own counsel that the 1923 Church was dissolved prior to filing the Articles of Reinstatement. For Mr. Nussbaum to now argue the 1923 Church was a validly existing corporation capable of carrying on business on December 8, 2006 when he didn’t file Articles of Reinstatement for it until October 18, 2007 is patently frivolous and groundless.

2. By at least March 10, 1999, all parties, including the Diocese and Grace Church (and its legal counsel) knew unequivocally that Grace Church was operating under its 1973 Articles of

Incorporation and 1974 bylaws. See March 5, 1999 letter from the Diocese to Grace Church (Exhibit 2 hereto) and the March 10, 1999 reply from Grace Church's attorney (Exhibit 3 hereto). Grace Church's March 10, 1999 reply specifically pointed out that these documents were redone in 1973 and 1974, and:

"You will note that the articles do not say much. It is the preference of the congregation, the Vestry, and the Rector that they remain broad in the light of the varied ministries carried on by Grace Church, reaching across this country and around the world."

The Diocese raised no objection to these Articles of Incorporation, nor did they ever request they be changed.

3. The Diocese's arguments that Grace Church didn't comply with the then-applicable nonprofit corporation law when it was formed back in 1973 is equally frivolous. The Diocese's Response stating "plaintiff admits [Grace Church] had no bylaws" is flatly false. On page 7 of their March 10, 2008 Joint Response, Plaintiff and the Counterclaim Defendants stated "... nor is a nonprofit corporation required to adopt bylaws, although it is uncontested Grace Church eventually did so." (Emphasis added.) And indeed Grace Church did. Attached as Exhibit 4 hereto are minutes of the February 25, 1974 Vestry meeting where the Vestry of Grace Church (including seven of the ten initial directors named in the 1973 Articles of Incorporation) adopted bylaws for Grace Church. This was well within the one year term of the initial board of directors. The Diocese is well aware of this, as it attached a copy of these minutes to its Summary Judgment Brief as Exhibit AM. Thus, the Diocese's arguments that Grace Church never had bylaws, and thus cannot be a valid nonprofit corporation, are patently frivolous and are conclusively contradicted by exhibits attached to its own pleadings. As previously noted by Grace Church, the initial bylaws quite appropriately made

reference to the Canons of The Episcopal Church, which have “moral” and not “legal” effect¹ since at the time (and up until 2007), Grace Church elected to remain loosely affiliated with the Diocese. When Grace Church determined to terminate this affiliation in 2007 and instead affiliate with CANA, it quite appropriately amended its bylaws to reflect this new affiliation.

4. The bylaws issue notwithstanding (see above), the Diocese’s argument that Grace Church did not meet all the technical requirements of the nonprofit corporation code back in 1973 and therefore cannot exist today as a valid nonprofit corporation are equally frivolous. The current nonprofit corporation code was adopted by the legislature in 1997 and became effective on July 1, 1998, at which time it became applicable to “all domestic nonprofit corporations.” (C.R.S. §7-121-102). Thus, whatever technical non-compliance with the prior statutes (if any) may have existed prior to July 1, 1998, subsequent to that date, Grace Church has been in full compliance with all statutory provisions applicable to Colorado nonprofit corporations.

5. There is no legal entity called “the Parish.” This is a purely fictional entity invented by the Diocese’s counsel. There are no articles of incorporation for it, there is no charter, there are no members, no board of directors, no officers, and no assets.² It is a purely fictional entity – it never has and does not now exist. The Diocese has not offered any factual evidence or documentation establishing the legal existence of “the Parish”, quite simply because there is none. The Diocese’s continued assertion that “the Parish” exists as a legal entity, without any factual substantiation whatsoever, is not only groundless and frivolous, it is a violation of Rule 11, C.R.C.P.

1 See McReynolds’ affidavit, paragraph 38, attached as an exhibit to Grace Church’s Motion for Summary Judgment.

2 As even noted by the Diocese in its Reply Brief, “the Vestry ... acts as the board of directors for the nonprofit entity.” (p.4). The only nonprofit entity legally in existence at that time was Grace Church.

6. Since 1973, Grace Church has been governed by its elected Vestry, which has included those who now challenge its existence. At the time of the Adams' memo, there was only one Vestry to which Ms. Adams' memo was submitted and that board of directors could only represent one legal entity. The Diocese has previously admitted that board represented Grace Church, the 1973 corporation:

"Finally, even if Ms. Adams addressed the memorandum to the leaders of the 1973 corporation, one of them, Robert McJimsey, has waived the privilege by providing the memorandum to the undersigned to offer as evidence here." (Footnote 9 to the Diocese's Motion for Summary Judgment.)³

Ms. Adams clearly did address her memorandum to the board of Grace Church, because that is who she gave it to – no one else. That board uncontrovertibly served as the board of Grace Church and not any other legal (or fictional) entity, since it could only serve the entity whose members elected it – Grace Church. Thus, Ms. Adams' memo was only delivered to the board of Grace Church, and only they can waive the privilege. The Diocese has not even suggested the memo was delivered to anyone else, so its claim that somehow some other imaginary entity also was the recipient of Ms. Adams' legal advice is simply specious and totally devoid of any good faith factual basis.

WHEREFORE, Grace Church respectfully requests this Court enter its orders:

A. Striking the December 8, 2006 Adams' Memorandum and any reference to it from any pleadings in this case and prohibiting any use of it or any reference to it in any further proceedings in this action; and

³ As noted in Grace Church's Motion to Strike, the Diocese's claim that Mr. McJimsey, on his own, could waive Grace Church's privilege, is directly contrary to Colorado law. Instead, Mr. McJimsey is "... duty bound to keep

B. Awarding Plaintiff and Counterclaim Defendants their costs and attorneys fees against the Diocese and its counsel under C.R.S. §13-17-102 and C.R.C.P. Rule 11 in responding to the Diocese's assertions regarding the 1923 Corporation and the fictional "Parish corporation" because:

- (1) By filing Articles of Reinstatement for the 1923 Corporation on October 18, 2007, the Diocese's own counsel has admitted that entity was legally dissolved prior to that date;
- (2) The Diocese's arguments that Grace Church never had bylaws are conclusively refuted by exhibits previously attached to the Diocese's own Summary Judgment Motion; and
- (3) The Diocese's claims that there is a separate "Parish corporation" are not well grounded in fact or law, and are devoid of any credible evidence supporting them.

FURTHERMORE, if the Court finds that there are genuine issues of fact concerning these issues, the privileged material must nevertheless be stricken, because the Diocesan argument is circular. The Diocese contends that it is entitled to use privileged materials because there was no 1973 corporation --- but that is one of the ultimate issues to be decided in the case. In effect, there is no way to allow the privilege material into evidence without overruling the controlling cases of Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454 (Colo. App. 2003).

such information confidential." Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454 (Colo. App. 2003).

Respectfully submitted April 21, 2008.

J. GREGORY WALTA, P.C.

/s/ J. Gregory Walta
Attorney for Plaintiff
Grace Church & St. Stephen's

CERTIFICATE OF SERVICE

I certify that April 21, 2008, a true and correct copy of this document was sent via Justice Link to the following:

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