

CASE NO. S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EPISCOPAL CHURCH CASES

JANE HYDE RASMUSSEN, et al.,
Plaintiffs and Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,
Respondent.

THE REV. PRAVEEN BUNYAN, et al.,
Real Parties in Interest.

California Court of Appeal, Fourth District, Division Three, No. G042454
Orange County Superior Court, Case Nos. J.C.C.P. 4392; 04CC00647
The Honorable Thierry Patrick Colaw, Coordination Trial Judge

PETITION FOR REVIEW
[Cal. Rules of Court, R. 8.500]

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INTRODUCTION

What did this Court mandate in *Episcopal Church Cases* (2009) 45 Cal.4th 467? Disagreeing with the trial court, the Court of Appeal majority held that this Court in *Episcopal Church Cases* conclusively resolved the property dispute in favor of plaintiff Episcopal Diocese of Los Angeles and plaintiff-in-intervention The Episcopal Church. The majority held that based on the successful appeal of anti-SLAPP motion and demurrer rulings, this Court preemptively adjudicated any factual or other defenses that defendants might raise or discover on remand. The dissenting Court of Appeal justice found the majority's reading unprecedented given the procedural posture of the case before this Court.

Both the Court of Appeal majority and the dissenting justice have invited review. The majority expressed that it had “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.” (Opn. at 3.) Dissenting Justice Fybel was even more direct: “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.” (Opn. at 19, Fybel, J., dissenting). As the dissent describes:

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.”

(*Id.*, emphasis in original.)

Review, thus, is necessary to explain this Court's mandate in *Episcopal Church Cases*, specifically whether this Court meant for plaintiffs to obtain judgment after having, on appeal, fended off early attacks to their complaints *before* defendants answered, raised affirmative defenses, or were able to conduct discovery or have a trial.

Review is also necessary to address an important, far-reaching question of the extent to which the procedural posture of a case frames the relief that a court, including an appellate court or even this Court, may render. More generally, the petition here asks whether lower courts must read this Court's opinions in the context of the procedural posture of the case before this Court, or in a way that would avoid infringement on a party's due process right to a determination by a factfinder of factual disputes.

As the majority opinion demonstrates, at least some read *Episcopal Church Cases* as standing for the proposition that a court (this Court, any appellate court, or even a trial court) may direct entry of judgment in favor of a plaintiff on nothing more than the overruling of a demurrer or the denial (in this case, a finding of procedural inappropriateness) of an anti-SLAPP motion. If that is true, it is a radical new procedural rule extraneous to the Code of Civil Procedure and existing case law that should be vetted by this Court so that fair warning can be given to litigants (especially defendants) and their counsel.

This new procedural rule is particularly resonant in the circumstances here. In *Episcopal Church Cases*, this Court's majority took pains to explain that it was following supposedly religion-neutral principles, not the deference to church hierarchy method employed by the Court of Appeal before review was granted. Yet, the result, as interpreted by the very same Court of Appeal, is that religious denominations, at least the apparently preferred Episcopal Church, are entitled to summary

dispositions of property disputes in their favor without the usual legal procedures and due process protections solely upon the filing of a complaint. Certain denominations, particularly the Episcopal Church, are interpreting this Court's opinion that way in other cases. These are important issues that go to the heart of whether there are to be preferred, established religions in California.

Finally, the underlying merits of *Episcopal Church Cases* deserve revisiting as within months after this Court's decision, the South Carolina Supreme Court came to the diametrically opposite result on essentially identical facts involving the same denomination, the Episcopal Church, and the same so-called Dennis Canon. That a sister state Supreme Court read the neutral principles of law doctrine and federal constitutional First Amendment Establishment Clause principles as not allowing the unilateral self-creation of beneficial property interests by a purported church rule, strongly suggests that this Court should question and reexamine its result and reasoning.

For all of these reasons, review should be granted.

ISSUES PRESENTED

1. Did this Court in *Episcopal Church Cases* (2009) 45 Cal.4th 467, decided on the appeal from demurrer and anti-SLAPP rulings, intend *sub silentio* to direct entry of judgment in favor of plaintiffs and thereby to deprive defendants of the opportunity to answer the allegations against them and to present any factual or other defenses on the merits?

Both the majority and the dissent in the Court of Appeal have invited this Court to answer that question.

2. As a matter of procedural fairness and constitutionally mandated due process (under both the California Constitution, art. I, sec. 7, and the United States Constitution, Amend. V & XIV), can a court in considering an appeal premised upon a demurrer or anti-SLAPP ruling direct entry of judgment in favor of a plaintiff without ever affording a defendant an opportunity to plead affirmative defenses, conduct discovery, or present a factual case on the merits that might involve disputed issues of fact?

3. Should this Court revisit the issues in *Episcopal Church Cases* in light of the diametrically contrary ruling of the South Carolina Supreme Court on essentially identical facts in *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina* (2009) 685 S.E.2d 163?

STATEMENT OF THE CASE

A. The Underlying Property Dispute Leading to the Diocese's and Episcopal Church's Lawsuit to Obtain Property Titled in the Name of St. James Church.

When the board of directors (vestry) and members of St. James Church (“St. James”) decided that they no longer wanted to be affiliated with the Episcopal Church, they withdrew the church corporation from that denomination. (*Episcopal Church Cases, supra*, 45 Cal.4th at 475-476.)¹ St. James, a California nonprofit religious corporation, holds title to its real property in its own name. (*Id.* at 474.) When it withdrew from the denomination, the Episcopal Diocese of Los Angeles sued, claiming that by virtue of St. James’s withdrawal all of its property *ipso facto* became the property of the Diocese under the Episcopal Church’s “Dennis Canon,” which purports to self-declare a beneficial interest in favor of the Episcopal Church in all property held in the name of all local congregations. (*Id.* at 474-476.)

The Diocese sued not only St. James, but its individual vestry members and clergy, for monetary damages.² The Episcopal Church filed a complaint-in-intervention seeking declaratory relief against all defendants aimed at obtaining the property. (*Id.* at 476.)

¹ As this case has already been before this Court, where possible, the “facts” are taken from this Court’s prior opinion, *Episcopal Church Cases* (2009) 45 Cal.4th 467, recognizing that the procedural posture of the case was on appeal from the grant of a demurrer and anti-SLAPP motion, and therefore the “facts” were plaintiffs’ allegations and evidence viewed in a light most favorable to them.

² For convenience, all of the defendants are also referred to as “St. James” herein.

B. Trial Court Round 1: The Trial Court Sustains St. James’s Demurrer to the Episcopal Church’s Complaint-In-Intervention and Grants St. James’s Anti-SLAPP Motion to Dismiss the Diocese’s Lawsuit.

Before any answer was filed, St. James demurred to the Episcopal Church’s complaint-in-intervention and brought an anti-SLAPP motion³ to dismiss the Diocese’s complaint. The trial court sustained the demurrer and granted the anti-SLAPP motion. It entered a judgment of dismissal. (*Id.*)

In the meantime, St. James had filed a cross-complaint in response to the Diocese’s lawsuit alleging that the Diocese, as the Episcopal Church’s agent, had expressly guaranteed that St. James would hold, free of any trust obligation, property on 32nd Street in Newport Beach. (Petitioners’ Exhibits to Petition for Writ of Mandate [“PE”], Vol. 1, PWM000102-119.) St. James attached a letter from the Diocese to that effect as an exhibit to its cross-complaint. (*Id.* at PWM000121.) When the demurrer was sustained and the anti-SLAPP motion granted, St. James dismissed the cross-complaint as moot before any appeal. (*Id.* at PWM000161.)

C. Appellate Round 1: The Court of Appeal Reverses the Judgment of Dismissal and Remands for “Further Proceedings.”

On the Diocese’s and Episcopal Church’s appeal, the Court of Appeal rejected decades of “neutral principles” case law in California, and instead formulated a “principle of government” or “deference to church hierarchy” approach to church property disputes, holding that an anti-SLAPP motion did not lie and that the demurrer should have been

³ An anti-SLAPP motion refers to a Code of Civil Procedure section 425.16 motion to dismiss a matter qualifying as “Strategic Litigation Against Public Participation.”

overruled. It mandated: “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*, No. G036096, reproduced at 152 Cal.App.4th 845 and quoted at Slip Opn., Fybel, J., dissenting at 4.)⁴

D. Appellate Round 2: In *Episcopal Church Cases*, This Court Disagrees With Some of the Court of Appeal’s Reasoning But “Affirms” Its Judgment.

This Court granted St. James’s petition for review. In *Episcopal Church Cases* (2009) 45 Cal.4th 467, this Court disagreed with the “principle of government” approach formulated by the Court of Appeal and instead adopted a “neutral principles of law” approach. Nonetheless, it “agree[d] with the Court of Appeal’s conclusion (although not with all of its reasoning)” on both the procedural unavailability of an anti-SLAPP motion and the insufficiency of the demurrer. (*Id.* at 493.) Its entire mandate was: “We affirm the judgment of the Court of Appeal.” (*Id.*)

E. At St. James’s Request, This Court Modifies Its Opinion.

Correctly anticipating that the Diocese and Episcopal Church might claim that this Court’s opinion, even at the early procedural pleading stage, was case-dispositive, St. James petitioned for rehearing or clarification of the opinion. The petition sought to make clear that St. James should be allowed to raise factual defenses on remand and to obtain a factfinder’s determination of disputed factual issues, pointing as an example for remand St. James’s claim that the Episcopal Church and the Diocese were estopped

⁴ The Slip Opinion is attached to this petition per California Rules of Court, Rule 8.504(b)(4).

from asserting any beneficial rights as to certain property by virtue of their written promise not to do so. (Petition for Rehearing or Modification of Decision [filed January 21, 2009], pp. 4-5.) The Episcopal Church and the Diocese opposed such clarification. They asserted that all issues, including factual issues, had already necessarily been disposed of, pointing to the fact that the estoppel letter appeared in the “record” as an exhibit to the cross-complaint dismissed before appeal, even though it had never been previously mentioned in any appellate briefing, argument or decision. (Respondents’ Answer to Petition for Rehearing or Modification of Decision [filed on January 29, 2009], pp. 3-4.)

This Court modified its opinion to include new, qualifying, language as follows (modified language in ***bold and italics***; deleted language in ~~strike out~~):

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. (Opn. at 2; 45 Cal.4th at 473.)

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. (Opn. at 6; 45 Cal.4th at 476.)

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 ***found clear and convincing evidence*** in favor of the general church. (Opn. at 9; 45 Cal.4th at 478.)

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*** ~~resolve~~ the dispute of this case. (*Id.*)

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. (Opn. at 31; 45 Cal.4th at 493.)

F. In Opposition to St. James’s Petition to the United States Supreme Court for Certiorari, the Episcopal Church and the Diocese Assert That This Court’s Opinion in Episcopal Church Cases Did Not Finally Determine the Parties’ Rights.

St. James petitioned the United States Supreme Court for certiorari. In opposing certiorari, the Episcopal Church and the Diocese argued that this Court’s opinion was not a final determination of the merits of this matter. (Real Parties In Interest’s Exhibits [“RPE”], Vol. 5, RPE1276-77.) They argued that the petition for certiorari was premature because “no final judgment or decree has been rendered” in this case. (*Id.*) The United States Supreme Court denied certiorari.

G. Trial Court Round 2: St. James Answers the Complaints, Asserting Affirmative Factual Defenses, and the Trial Court Overrules the Diocese’s Demurrer to St. James’s Cross-Complaint and Denies the Episcopal Church’s Request for Judgment in Its Favor.

After remittitur to the trial court, St. James filed answers to the Diocese’s first amended complaint and the Episcopal Church’s first amended complaint-in-intervention, and St. James corporation (not the individual defendants) renewed the cross-complaint against the Diocese. (Slip Opn., majority, at 3; PE, Vol. 1, PWM000172-185; PWM000186-195.) In its answers, St. James alleged various factual affirmative defenses, including that by virtue of their conduct, including the Diocese’s letter to that effect, the Diocese and its principal, The Episcopal Church, were estopped from asserting trust rights over the St. James property on 32nd

Street in Newport Beach. (PE, Vol. 1, PWM000188.) The cross-complaint made similar allegations as well as alleging misrepresentation. (PE, Vol. 1, PWM000176-178.)

St. James then obtained deposition testimony from the Reverend Canon D. Bruce MacPherson (now Episcopal Bishop MacPherson) that on behalf of and at the direction of then Episcopal Bishop Frederick H. Borsch, he sent a letter to St. James intending to waive any claim by the Diocese of Los Angeles and the Episcopal Church over all of the St. James property on 32nd Street in Newport Beach. (RPE, Vol. 1, RPE0014:18-15:3; *see* Real Parties' Writ Return, pp. 11-16). Bishop MacPherson also testified that the purpose of the conversations between the Diocese and St. James was for St. James to hold title to its property in its own name free of any trust. (1 RPE 11:2-12.) This was part of an agreement in order for St. James to secure substantial donations for its building program. (PE, Vol. 1, PWM000174, ¶¶ 10-12; PWM000175, ¶13.)

Subsequently, the trial court overruled the Diocese's demurrer to the cross-complaint and denied the request for judgment on the pleadings (specifically, St. James's answer to the Episcopal complaint-in-intervention) brought by the Episcopal Church and joined by the Diocese.⁵ (Slip Opn., majority, at 3; PE, Vol. 1, PWM000052-57.) In doing so, the trial court rejected the argument that this Court in *Episcopal Church Cases* had effectively directed entry of judgment in favor of the Episcopal Church and the Diocese. (*Id.* at PWM000055.)⁶

⁵ The Diocese has never moved for judgment on its own first amended complaint or St. James's answer to it. Thus, even if this Court had resolved the property dispute on the merits as the Court of Appeal majority held, the Diocese's contract and tort claims against the individual defendants remain unaffected and judgment cannot and should not be entered against them.

⁶ The trial court's ruling is attached to this petition as Attachment C.

H. Appellate Round 3: The Court of Appeal Issues a Writ of Mandate Directing Entry of Judgment in Favor of The Episcopal Church, Construing This Court’s Opinion in *Episcopal Church Cases* as *Conclusively* Determining Who Owns the St. James Property.

The Episcopal Church and the Diocese petitioned for a writ of mandate directing the trial court to enter judgment on the pleadings in their favor on the basis of this Court’s opinion and mandate.

1. The Majority Opinion.

The majority, per Presiding Justice Sills, granted the writ petition and directed that 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.” (Slip. opn. at 15.)⁷ The majority reasoned that “the plain language of the *Episcopal Church Cases I* opinion” conclusively decided that plaintiffs own the St. James property, thus compelling entry of judgment in favor of the Episcopal Church. (Slip Opn. at 2.)

The majority gave short shrift to the procedural posture of the case before this Court when it decided *Episcopal Church Cases*, asserting that “the Supreme Court can decide any issue it pleases that is ‘fairly included’ in the briefing.” (Slip Opn. at 3.) Rather, it held that because this Court’s opinion used present and past tense language in “analyzing” and “addressing” the dispute, to the effect that the Episcopal Church “owns” the disputed property and that the property “reverted” to the Episcopal Church,

⁷ The majority, concurring and dissenting opinions are Attachment A to this petition.

this Court necessarily decided any and all possible issues in this case, including all existing factual disputes and any yet-to-be-pleaded defenses that might be premised upon disputed factual matters that had not been discovered yet. (Slip Opn. 3, 7-10.) In its view, because “ownership” was at issue in the demurrer and anti-SLAPP motion (both of which attacked the sufficiency of the Episcopal complaints), and therefore the dispute that this Court addressed, this Court’s decision must have conclusively determined property ownership without the need for answers, defenses, discovery or trial. (See Slip Opn. at 6.)

The majority read this Court’s modifications of its opinion on St. James’s petition for rehearing in this Court as strengthening, rather than weakening, a directive that judgment be entered in favor of the Episcopal Church and the Diocese. It viewed the twice inserted “on this record” qualification as a veiled reference to (or in the majority’s phrasing, “an elegant way of disposing of”) defenses St. James might raise from an unauthenticated copy of the March 1991 letter (that was only a part of St. James’s not yet pleaded factual defenses), which was included in the appellate appendix by *plaintiffs* as an attachment to a mooted and withdrawn cross-complaint.⁸

The majority so read “on this record” even though the significance of the 1991 letter had never been briefed or argued on appeal by any party, the trial court ruling had not relied upon the letter nor was it relevant under the evidentiary standards for a demurrer or anti-SLAPP motion, and even

⁸ As described above, this “record” changed when St. James obtained deposition testimony *after* remand from this Court establishing that the Episcopal Church in the Diocese of Los Angeles waived any trust interest over the St. James property on 32nd Street, in exchange for significant donations made to St. James to acquire property and construct new buildings. Thus, there are significant factual issues to be decided by a factfinder in the trial court that the majority’s opinion seeks to foreclose.

though St. James’s yet-to-be-pleaded affirmative defenses were not issues that this Court granted review to decide. (Slip Opn. at 2-3, 13-14.) The majority so read “on this record” even though St. James was not required to plead *any* factual defense in filing a demurrer to the Episcopal complaint-in-intervention or in seeking to dismiss the Diocese’s complaint on the ground that *plaintiff* could not make out a prima facie case. Nevertheless, in the majority’s view, “on this record” translates as “the equivalent of a memo to the lower courts: ‘The argument has already been made – just look in “this record.”’” (Slip Opn. at 13-14.)

Likewise, the majority viewed the changes from “resolve” and “decide” to “address” and “analyze” as broadening rather than narrowing the reach of the decision, a proclamation that this Court was not only deciding the present case, but “declar[ing] the proper rule of decision for all the courts of the state” (even though the rehearing petition had not questioned that such was the decision’s effect). (Slip Opn. at p. 14.) And, the majority concluded that if this Court had not intended to finally decide the property dispute in favor of the Episcopal Church and the Diocese, it would have been more explicit in its qualifications. (Slip Opn. at 14-15.)

Finally, the majority invited this Court to intervene if the majority misread the Court’s mandate: “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.” (Slip Opn. at 3.)

2. Justice Moore’s Concurrence.

Justice Moore joined the majority opinion and concurred. In her concurrence, she reasoned that because in other instances this Court had been explicit that it was remanding a case for further proceedings and it did

not say so in this instance, it must not have contemplated further proceedings. (Slip Opn., Moore, J., concurring, at 1-3.) In her view, because this Court “affirmed” the Court of Appeal’s decision (even though that decision was to *reverse* the trial court and to direct “[f]urther proceedings . . . consistent with [is] opinion”), that necessarily meant that it was directing entry of judgment in favor of the Episcopal Church (and the Diocese on St. James’s cross-complaint). According to the concurring opinion, “when no further action is required, the matter is affirmed, just as in this case.” (Slip Opn., Moore, J., concurring at 3.) Thus, the Court of Appeal’s order directing further proceedings consistent with its opinion was either overlooked or misinterpreted.

3. Justice Fybel’s Dissent.

Justice Fybel vigorously dissented. He characterized the result reached by the majority as “unprecedented,” “without any basis in law,” “revolutionary,” and “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.” (Slip Opn., Fybel, J., dissenting at 1, emphasis in original.)

In particular, he noted that “the disposition of the Supreme Court’s opinion, . . . affirms without change the disposition of our previous opinion (*Episcopal Church Cases* (June 25, 2007, G036096)) . . .” (Slip Opn., Fybel, J., dissenting at 1.) That previous disposition was that “[t]he 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.*)” (Slip Opn., Fybel, J., dissenting at 4-5, emphasis in original.)

“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.” (Slip Opn., Fybel, J., dissenting at 4-5.) “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.” (Slip Opn., Fybel, J., dissenting at 3.) In other words, this Court’s affirmance of the Court of Appeal’s mandate could not be taken as a *new* directive for entry of judgment in favor of plaintiffs. (Slip Opn., Fybel, J., dissenting at 5.)

And, in his view, St. James “properly ask[ed] what was the effect of [this Court’s] modifications if not to clarify that [this] Court was not finally adjudicating the claims and ordering entry of judgment. (Slip Opn., Fybel, J., dissenting at 5, emphasis added.)

What most disturbed Justice Fybel was that the majority ignored the procedural posture of the case before this Court (an appeal from the sustaining of a demurrer and the grant of an anti-SLAPP motion), and the majority’s conversion of a defendant’s challenge to the legal sufficiency of a complaint (or of the prima facie evidence supporting it) into an opportunity to enter judgment in favor of a plaintiff, thus depriving a defendant of its day in court without any opportunity to plead affirmative defenses, conduct discovery, or to try disputed factual matters. “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.” (Slip Opn., Fybel, J., dissenting at 1.)

After reviewing the established law that a demurrer merely challenges the sufficiency of allegations that must be taken as true and that an anti-SLAPP motion merely challenges the sufficiency of plaintiff’s prima facie evidence supporting such allegations, Justice Fybel expressed a concern that goes far beyond this case, noting that “if [this] 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.” (Slip Opn., Fybel, J., dissenting at 3.) “The procedural posture . . . explains the language used in [this] Court’s opinion” and the “opinion is best understood in the context in which it was actually written, namely, [this] Court treated all the allegations of the complaints as true because it was reviewing a ruling on a demurrer. Employing well established authority . . . [this] 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.” (Slip Opn., Fybel, J., dissenting at 5.)

Further, regarding the anti-SLAPP motion, the dissent noted that “[b]oth [the] [C]ourt [of Appeal in its prior opinion] and [this] Court decided that the first prong of the anti-SLAPP test [whether the action arose out of protected activity] was not satisfied That was the end of [this] Court’s analysis and discussion of the anti-SLAPP motion. Because the complaints did not allege protected activity, [this] Court did not address the second prong of the anti-SLAPP test [probability of success on the merits] in its opinion. For this reason, the [Court of Appeal’s] majority [writ] opinion’s attention to the prong of prevailing on the merits – and especially its extended discussion of the March 1991 letter – is totally irrelevant.” (Slip Opn., Fybel, J., dissenting at 6.)

Even if the Court of Appeal majority could have reached the second prong of the anti-SLAPP analysis, “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.” (*Id.*)

Accordingly, Justice Fybel urged this Court to “grant [] review with an order from the Supreme Court setting forth the procedures to be followed by the trial court.” (Slip Opn., Fybel, J., dissenting at 1.)

I. The Court of Appeal Rejects Rehearing.

St. James petitioned for rehearing, arguing that the Court of Appeal’s majority opinion improperly ignored the procedural posture of the case before this Court. St. James also argued that the majority’s interpretation of this Court’s prior opinion violated due process by decreeing entry of judgment in favor of the religious entity plaintiffs based on nothing more than their filing of complaints and the overruling of a demurrer and the determination that an anti-SLAPP motion was procedurally unavailable.

The Court of Appeal denied rehearing on April 26, 2010, with Justice Fybel dissenting. (*See* Attachment B.)

WHY REVIEW IS NECESSARY

I. REVIEW IS NECESSARY TO DETERMINE THE MEANING OF THIS COURT’S MANDATE IN *EPISCOPAL CHURCH CASES*.

The key issue in this writ proceeding is what did this Court mandate in its *Episcopal Church Cases* decision. Two lower court judicial officers –

the Court of Appeal majority – read this Court’s decision as requiring entry of judgment in favor of the Episcopal Church despite the fact that the case, as considered by this Court, had never proceeded past the filing of a complaint, a demurrer, and an anti-SLAPP motion. Two other lower court judicial officers – the dissenting Court of Appeal justice and the trial judge (an experienced jurist in Orange County’s Civil Complex division) – read this Court’s opinion as saying no such thing, but merely remanding the matter for further proceedings as typically occurs upon the appellate reversal of a judgment entered after the sustaining of a demurrer or the granting of an anti-SLAPP motion. At a minimum, this split in opinion suggests that this Court’s mandate is ambiguous to at least some reasonable minds.

Only this Court can say what its mandate in *Episcopal Church Cases* should mean. The Court of Appeal has asked for this Court to set the record straight: “[N]o 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.” (Slip Opn. at 3.) “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.” (Slip Opn., Fybel, J., dissenting, at 1). Clarifying its mandate is a central, inherent judicial power of this Court. (*See* Cal. Const., art. VI, § 1.)

And, what this Court mandated in *Episcopal Church Cases* matters a great deal to more than just the parties to this case. First, the result in *Episcopal Church Cases* governs what can be done in other church property cases. The Episcopal Church, for example, has argued that *Episcopal Church Cases* requires entry of judgment in its favor in church property disputes across the board, regardless of factual disputes. (*See, e.g., Huber v. Jackson* (2009) 175 Cal.App.4th 663, 672.) Second, as the

Court of Appeal majority here demonstrates, others courts might also read *Episcopal Church Cases* as directing that the Episcopal Church is to prevail in all future property disputes with local churches as a matter of fiat on nothing more than the filing of a complaint, as “disagreement with clear language in a Supreme Court opinion concededly puts a lower court in a ‘delicate position.’” (*State of Cal. v. Superior Court* (2000) 78 Cal.App.4th 1019, 1029.) Third, although “deference to church hierarchy” is the *sine qua non* of the non-“neutral principles of law” theories for resolving church property disputes, whether the Episcopal Church is, in fact, a hierarchical church has never been established, other than by its self-serving representation. As with other issues, St. James should be allowed to obtain and present evidence on this important issue.

Review should be granted to clear up the confusion and uncertainty created by the language used in *Episcopal Church Cases*.

II. REVIEW IS NECESSARY TO DETERMINE WHETHER THE OVERRULING OF A DEMURRER OR THE DENIAL OF AN ANTI-SLAPP MOTION PERMITS A COURT TO ORDER JUDGMENT TO BE ENTERED IN FAVOR OF A PLAINTIFF, AND MORE GENERALLY, IF THE PROCEDURAL POSTURE OF A CASE IMPOSES LIMITS ON A COURT’S POWER TO ORDER ENTRY OF JUDGMENT.

The issues for review here are not limited to the actual mandate in *Episcopal Church Cases*, as important as that question is. Rather, they go to the heart of California procedure and how courts and attorneys understand it in two important respects:

(1) Does this Court – or any court (intermediate appellate court, trial court) – have the power to order entry of judgment in favor of a plaintiff

based on nothing more than the overruling of a demurrer or the denial (or in this case, determination of procedural inapplicability) of an anti-SLAPP motion; and,

(2) In reading this Court's – or any appellate court's – opinions, are lower courts to disregard the procedural context in which the case came up on appeal?

The Court of Appeal majority answered both of these questions “yes.” Dissenting Justice Fybel found those answers “unprecedented” and “revolutionary.”

A. The Court of Appeal Majority's Determination That Judgment May Be Entered in Favor of a Plaintiff Based on Nothing More Than the Overruling of a Defendant's Demurrer or the Denial of a Defendant's Anti-SLAPP Motion Is a Radical Remaking of Legal Procedure With Grave and Far Reaching Implications Throughout the Legal System.

Despite its bow to “authoritative texts,” the Court of Appeal majority effected a sea change in the law of procedure without addressing why the “authoritative texts” of the Legislature's statutes (e.g., Code of Civil Procedure section 425.16(b)(3)) or this Court's previous decisions could be side-stepped. The majority's view that this Court (or presumably any appellate or trial court) can order entry of judgment in favor of a plaintiff upon the overruling of a demurrer or the denial of an anti-SLAPP motion necessarily means that defendants and their counsel across the State must prepare for that possibility. Essentially, defendants and defense counsel must either (1) forego those procedures, resulting in cases lingering in trial courts when they should not, and depriving defendants in SLAPP cases of the very expedited remedy that the Legislature intended them to have, or

else (2) endeavor in presenting a demurrer or an anti-SLAPP motion to present a full evidentiary record in support of their position in the pleading stage of the case (despite the contrary strictures for a demurrer and the contrary intent behind the anti-SLAPP motion). It means that counsel, both in the trial court and on appeal, on pain of having judgment entered against the client for having dared challenge the legal sufficiency of the complaint, must disregard the rules about construing allegations and evidence in the light most favorable to the complaint at such an early procedural posture, and instead argue *defense-favorable* factual inferences to forestall a court's exercise of a new power to conclusively resolve even disputed factual issues against the defendant without trial.

Published or unpublished, the Court of Appeal majority's holding in this case is a chilling message to *all* defendants and defense counsel as to risks undertaken in challenging the legal sufficiency of a complaint or of the evidence supporting a possible SLAPP claim. It provides a roadmap to plaintiffs throughout the State on how to bypass litigation and go straight from allegations to judgment while depriving a defendant of its day in court. Published or unpublished, it will wreak havoc on established procedural norms because it puts parties and clients at risk for not presenting and fully arguing a *factual* case at even the most preliminary procedural stage, a difficult if not impossible feat for a defendant given the tight deadlines for filing a demurrer and anti-SLAPP motion. (Code Civ. Proc. §§ 430.40(a) [demurrer must be filed within 30 days after service of complaint]; 425.16(f) [anti-SLAPP motion generally must be filed within 60 days after service of complaint].) As a consequence, trial court and appellate records which should address only the allegations and evidence in the light most favorable to the plaintiff will, of necessity, have to be clouded by defendants with the disputed facts favoring the defense at risk

of being held to have waived the right to present a *factual* case by bringing a demurrer or an anti-SLAPP motion.

Such a radical remaking of California procedure calls for this Court's review.

B. The Court of Appeal Majority's "Plain Language" Approach for Reading Appellate Decisions, at Odds with a Procedural Context Approach, Evidences a Critical Lack of Uniformity in the Law Regarding How the Precedential Effect of This Court's Opinions Is to Be Determined.

The Court of Appeal majority's "plain language" approach to reading this Court's *Episcopal Court Cases* decision reflects a discontinuity in the law as to how this Court's precedents are to be read. On the one hand, a long line of authority proclaims that "a case should 'not be read as standing for more than its context and rationale will reasonably support.'" (*Solin v. O'Melveny & Myers LLP* (2001) 89 Cal.App.4th 451, 460, *citation omitted*; see *Reese v. Wong* (2002) 93 Cal.App.4th 51, 58.) This is consistent with the rule that "[l]anguage used in any opinion is of course to be understood in the light of the facts and issues then before the court and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524.) Similarly, "[t]he holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning. [Citations.]" (*In re H.E.* (2008) 169 Cal.App.4th 710, 721, *quoting McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226.)

The Court of Appeal's "plain language" approach is most at odds with this Court's principle, emphasized by Justice Fybel in dissent, that

“[a]n appreciation of the procedural context of the case is critical to a proper understanding” of an appellate decision. (*Cornette v. Dep’t of Transp.* (2001) 26 Cal.4th 63, 75.)

On the other hand, other decisions have recognized that “disagreement with clear language in a Supreme Court opinion concededly puts a lower court in a ‘delicate position.’” (*State of Cal. v. Superior Court* (2000) 78 Cal.App.4th 1019, 1029 [declining to read “in six lines of a (Supreme Court) case devoted to insurance law, (as) intended to create a new conceptual scheme relating to water law”], quoting *Fireman’s Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1301.) The Court of Appeal majority resolved this “delicate position” by creating a norm that “plain language” controls over procedural context.

The concurring opinion went even further: If this Court (or any appellate court) does not expressly direct further proceedings, the presumption is that judgment should be entered in favor of the party prevailing on appeal. (*Contra Regents of Univ. of Cal. v. Public Employment Relations Bd.* (1990) 220 Cal.App.3d 346, 356-357 [unqualified reversal sets case at large for further proceedings].) Given the lack of uniform approach that the Court of Appeal majority’s “plain language” analysis and the concurring opinion’s “further proceedings” requirement represent, this Court should grant review to reaffirm that context – especially procedural context – is paramount in determining the effect of an appellate opinion.

C. Whether This Court’s Opinions Should Be Read, Like Statutes, to Avoid Serious Constitutional Problems – in This Case Due Process Concerns – Is an Important Legal Issue in Support of Granting Review.

As a prudential matter, courts interpret *statutory* dictates to avoid constitutional concerns: “Whenever possible, statutes are to be interpreted as consistent with applicable constitutional provisions so as to harmonize both.” (*Mendez v. Kurten* (1985) 170 Cal.App.3d 481, 485; *see Conservatorship of Wendland* (2001) 26 Cal.4th 519, 543.) No decision appears to address whether appellate opinions should be read in the same light. Nonetheless, the same reasoning would appear to apply in construing judicial opinions.

The issue has especially strong application here where the Court of Appeal majority held that, regardless of the procedural posture of the case or contrary statutes, this Court was empowered to “decide any issue it pleases that is ‘fairly included’ in the briefing,” including any factual issues it might wish to permanently decide in the first instance. (Slip Opn., maj. at 3, *quoting* Cal. Rules of Ct., R. 8.516.) Such a reading of the procedural rules would appear to raise substantial constitutional jury trial right and due process questions. (Cal. Const., art. I, § 7; U.S. Const., Amend. V, XIV.)

Due process includes the opportunity to present live witnesses and evidence and the opportunity to cross-examine witnesses and evidence *before a factfinder*. These constitutional rights simply are not part of the process of arguing cases heard by this Court, which is not a factfinder. And, due process requires *notice* to a party that it must present its *factual* case to the tribunal. Yet, the standard of review on appeal – the standard of which St. James was afforded notice – was that all evidence and allegations were to be construed in favor of the Episcopal Church and the Diocese.

The result is that the Court of Appeal majority reads this Court's *Episcopal Church Cases* opinion as usurping the functions of a factfinder and affording this Court an ability to determine "as it pleases" (and apparently without prior notice to litigants) whether it is deciding legal or factual issues. The approach doubtless raises serious due process concerns.

Should this Court be presumed to have intended to create such constitutionally questionable standards? We think not. Rather, the presumption should be that this Court seeks to avoid constitutionally infirm or even questionable approaches. Whether, like statutes, this Court's opinions should be read to avoid constitutional dilemmas, however, remains an open question. Like the other guidelines for how this Court's opinions should be read and construed, this too is an important, indeed, critical legal issue that spans far beyond the facts of this case.

III. THIS COURT SHOULD GRANT REVIEW TO REVISIT THE IMPORTANT FIRST AMENDMENT ESTABLISHMENT AND FREE EXERCISE CLAUSE ISSUES RAISED IN ITS PRIOR OPINION IN LIGHT OF THE RECENT, CONTRARY SOUTH CAROLINA SUPREME COURT OPINION.

In *Episcopal Church Cases*, this Court held that neutral principles of law could allow a religious denomination to self-create a springing beneficial trust right in the property of any local church that left its religious fold. Less than a year later, the South Carolina Supreme Court came to the opposite result on essentially identical facts.

In *All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina* (2009) 685 S.E.2d 163, the South Carolina Supreme Court addressed claims nearly identical to those at issue here – assertions by the very same denomination that it had sovereign rights

in the property held by a legally-separate local church corporation premised on the same purported Dennis Canon. Like this Court, the South Carolina Supreme Court held that “where a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so.” (*Id.* at 445.)

Applying the same neutral secular legal principles as this Court examined, however, the South Carolina Supreme Court held that because secular persons have no right to unilaterally create trusts in their favor over property that they do not own (which is true in California as well, *see* Prob. Code §§ 15201 [“A trust is created only if the settlor properly manifests an intention to create a trust”]; 15200 [trust is created by property’s owner so declaring or transferring property]), a religious entity could not do so either. (685 S.E.2d at 449.)

South Carolina was not alone. The Arkansas Supreme Court (again after *Episcopal Church Cases*) reached essentially the same conclusion. (*Arkansas Annual Conf. of AME Church, Inc. v. New Direction Praise & Worship Ctr, Inc.* (2009) 375 Ark. 428, 435, *cert. denied*, 130 S.Ct. 70 [“courts must settle the (property) dispute by applying neutral principles of law,” including the general principle in most states that trust interests can only be created by the trustee, not unilaterally by the purported beneficiary of the trust].)

These contrary decisions – premised on the First Amendment to the United States Constitution – by the Supreme Courts of sister states within months of this Court’s *Episcopal Church Cases* opinion, strongly suggest that this Court should revisit the very substantial issues in its original *Episcopal Church Cases* opinion. (*See Moradi-Shalal v. Fireman’s Fund Ins. Companies* (1988) 46 Cal.3d 287, 297-299 [overruling this Court’s own prior precedent, in part, due to rejection by other states]; *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 98-100 [same].)

CONCLUSION

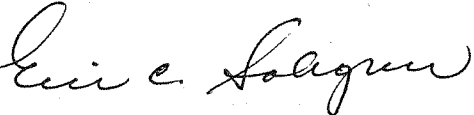
This Court should grant review. It should do so to clarify its intended mandate in *Episcopal Church Cases*, to elucidate the norms by which lower courts should interpret its opinions, and to revisit the merits of *Episcopal Church Cases* itself.

Alternatively, this Court should grant review and retransfer the matter to the Court of Appeal with directions that the petition for writ of mandate be denied and that the case be remanded to the trial court for further proceedings, including the pleading and trial of disputed factual matters, consistent with the Court's *Episcopal Church Cases* opinion.

DATED: May 3, 2010

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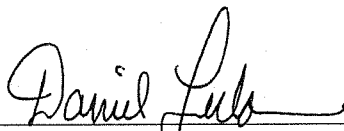
Attorneys for Defendants and Real Parties in
Interest THE REV. PRAVEEN BUNYAN, et
al.

CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rules 8.204(c)(1) & 8.360(b)(1))

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, that the **PETITION FOR REVIEW** is produced using 13-point Roman type including footnotes and contains 7,465 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: May 3, 2010



Daniel F. Lula

Attachment A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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.

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

² The context of the letter was a proposed acquisition of adjacent property to then-extant 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

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

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.

Attachment B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL-4TH DIST DIV 3

FILED

APR 26 2010

Deputy Clerk _____

EPISCOPAL CHURCH CASES.

JANE HYDE RASMUSSEN et al,
Petitioners,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,
Respondent.

THE REV. PRAVEEN BUNYON et al.,
Real Parties in Interest.

G042454

(Super. Ct. No. JCCP 4392)

ORDER

The petition for rehearing is DENIED.

SILLS, P.J.

SILLS, P. J.

I CONCUR:

MOORE, J.
MOORE, J.

I would grant the petition for rehearing.

FYBEL, J.
FYBEL, J.

COPY

Attachment C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER
MINUTE ORDER

Date: 07/10/2009

Time: 12:13:24 AM

Dept: CX104

Judicial Officer Presiding: Judge Thierry Patrick Colaw
Clerk: P. Rief

Bailiff/Court Attendant: None

Reporter: None

Case Init. Date: 02/06/2008

Case No: JCCP 4392

Case Title: Episcopal Church Cases

Case Category: Civil - Unlimited

Case Type: Other Real Property

Event Type: Chambers Work

Causal Document & Date Filed:

Appearances:

1. DEMURRER BY CROSS-DEFENDANTS RASMUSSEN TO CROSS-COMPLAINT IN RASMUSSEN v. THE REV. PRAVEEN BUNYAN
2. MOTION BY PLAINTIFF IN INTERVENTION, THE EPISCOPAL CHURCH, FOR JUDGMENT ON THE PLEADINGS
3. JOINDER BY PLAINTIFFS JANE HYDE RASMUSSEN, THE RIGHT REV. ROBERT M. ANDERSON, THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, AND THE RIGHT REV. J. JON BRUNO, BISHOP DIOCESAN OF THE EPISCOPAL DIOCESE OF LOS ANGELES IN THE EPISCOPAL CHURCH'S MOTION FOR JUDGMENT ON THE PLEADINGS

In re included action *Rasmussen v. The Rev. Praveen Bunyan* (Orange County case no. 04CC00647)

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 07/02/2009 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

See attached Notice of Ruling.

Clerk to give notice to Holme, Roberts & Owen, LLP and Holme, Roberts & Owen, LLP to give notice to all other parties.

Date: 07/10/2009

MINUTE ORDER

Page: 1

Dept: CX104

Calendar No :

Coordination Proceeding Special Title
[California Rules of Court Rule 3.550]

EPISCOPAL CHURCH CASES

Included Actions:

Rasmussen v. The Rev. Praveen Bunyan
[Orange County Case No. 04CC00647];

Adair v. The Rev. Jose Poch
[Los Angeles County Case No. BC321101]; and

O'Halloran v. The Rev. William A. Thompson
[Los Angeles County Case No. BC321102].

THE RECTOR WARDENS AND
VESTRYMEN OF ST. JAMES PARISH IN
NEWPORT BEACH, CALIFORNIA, a
California nonprofit religious corporation,

Cross-Complainant,

v.

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF LOS ANGELES, a
California nonprofit religious corporation; THE
BISHOP OF THE PROTESTANT
EPISCOPAL CHURCH IN LOS ANGELES, a
California corporation sole; etc., *et alia*,

Cross-Defendants.

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. 4392

NOTICE OF RULING

1. The Court has reviewed the points and authorities and taken argument on the Demurrer of Cross-Defendant Rasmussen ["Rasmussen"] to the Cross-Complaint of The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California, Cross-Complainants ["St. James"]. What follows is the ruling on that demurrer.

A. The request by St James for Judicial Notice is granted. However, the Court cannot accept the documents for the truth of the contents thereof. [*Sosinky v. Grant* (1992) 6 Cal. App. 4th 1548, 1564-1569; *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal. App. 4th 97, 113.]

B. The request by Rasmussen for Judicial Notice is granted. However, the Court cannot accept the documents for the truth of the contents thereof. [*Sosinky v. Grant* (1992) 6 Cal. App. 4th 1548, 1564-1569; *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal. App. 4th 97, 113.]

C. The demurrer is overruled. In the decision of the California Supreme Court in *Episcopal Church Cases* [2009] 45 Cal.4th 467 as modified 25 February 2009, the Supreme Court clarified that it "granted review to decide 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, supra*, at page 476.] The changes made to the opinion in the modified decision are consistent with due process principles and the record of the proceedings before the Supreme Court, the Court of Appeal, and the trial court. The Supreme Court's final decision makes clear that neither two lower courts decided the merits of the dispute, but only "addressed" them. It must be emphasized that the matter was on appeal from the grant of a preliminary motion under C.C.P. § 425.16.

(1) In the Court of Appeal opinion, that Court reviewed the granting by the trial court of an anti-SLAPP motion under C.C.P. § 425.16. The Court of Appeal held that the trial court erred in its analysis of the first prong of the requirements of 425.16 by finding that the plaintiffs' lawsuit qualified for anti-SLAPP treatment. The Court held that it did not. The Court then proceeded to analyze the second prong of the statute to determine whether or not the trial court erred in determining that the Plaintiffs had not established the probable validity of the claim. With C.C.P. § 425.16 and prong two as a backdrop, the Court of Appeal held that it was error also for the trial court to grant the motion based upon its determination that it was unlikely that Plaintiffs would prevail. The Court of Appeal held that

neither prong of the statute was satisfied. The Court of Appeal reversed the trial court's judgments of dismissal of Plaintiffs' complaint.

(2) The Supreme Court granted review. It held, as did the appellate court, that the first prong had not been satisfied. The Plaintiffs' lawsuit did not qualify for anti-SLAPP treatment. The Supreme Court then went on to address the case [under the second prong of 425.16] and held that on the record before them the Plaintiffs' case had merit. In other words, neither prong of C.C.P. § 425.16 was satisfied in the Supreme Court's analysis. The Supreme Court affirmed the judgment of the Court of Appeal which had previously ordered that the dismissals by the trial court were reversed and that "further proceedings shall be consistent with this opinion." This is not trial on the merits, and, in modifying its opinion, the Supreme Court underlined this by adding the words "on this record" [emphasis added] at several points in the opinion. It was the anti-SLAPP motion alone that provided the mechanism by which the case was appealed. The waiver issue was not before the Supreme Court or the Court of Appeal. The waiver issue was neither expressly nor impliedly decided by either court.

D. The Moving Party shall answer within 21 days. If they contend that the reasoning of the Supreme Court based upon its analysis of the "neutral principles of law" approach and the review and consideration of evidentiary sources such as deeds to the property in dispute, the articles of incorporation, the general church's constitution, canons, rules, and relevant statutes, including Corp. Code § 9142, merit judgment on those facts and law alone, they can move for summary judgment at the appropriate juncture in the proceedings.

2. The Court has reviewed the points and authorities and taken argument on the Motion by Plaintiff in Intervention for Judgment on the Pleadings on its Complaint as against the St. James defendants.

A. The Requests for Judicial Notice are granted, however, the Court cannot accept the documents for the truth of the contents thereof. [*Sosinky v. Grant* (1992) 6 Cal. App. 4th 1548, 1564-1569; *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal. App. 4th 97, 113.]

B. The Motion is Denied. The answer states sufficient facts to constitute a defense.

3. The request by the Rasmussen Plaintiffs for Joinder in the Motion by The Episcopal Church for Judgment on the Pleadings is granted. The Motion is denied for the same reasons set forth above in the underlying Motion for Judgment on the Pleadings.

4. The Clerk shall give Notice.