

THE EPISCOPAL CHURCH, et al.,)	IN THE DISTRICT COURT OF
)	
VS.)	TARRANT COUNTY, TEXAS
)	
FRANKLIN SALAZAR, et al. ¹)	141 ST DISTRICT COURT

**RULE 12 MOTION CHALLENGING AUTHORITY OF ATTORNEYS
J. SHELBY SHARPE, SCOTT BRISTER, AND KENDALL GRAY**

TO THE HONORABLE JUDGE OF SAID COURT:

The Local Episcopal Parties and the Local Episcopal Congregations file this Rule 12 motion and would respectfully show the Court as follows:²

I.

Here, two factions claim to be the Episcopal Diocese of Fort Worth and the Corporation of the Episcopal Diocese of Fort Worth. One faction (the Local Episcopal Parties) is recognized by The Episcopal Church. The other faction (Defendants, a breakaway faction) is not.

II.

Even though the breakaway faction has severed ties with The Episcopal Church and joined a South American church, they have attempted to appear in this case as the Episcopal Diocese and its Corporation.

FILED
 TARRANT COUNTY
 2010 DEC 29 PM 1:30
 THOMAS A. WILKER
 DISTRICT CLERK

¹ The style is being shortened at the request of the Clerk's office. It does not imply that any parties are omitted or dropped from the case.

² This motion is specifically brought by the individual Local Episcopal Parties, the Rt. Rev. C. Wallis Ohl, Robert Hicks, Floyd McKneely, Shannon Shipp, David Skelton, Whit Smith, Margaret Mieuli, Anne T. Bass, Walt Cabe, the Rev. Christopher Jambor, the Rev. Frederick Barber, the Rev. David Madison, Robert M. Bass, the Rev. James Hazel, Cherie Shipp, the Rev. John Stanley, Dr. Trace Worrell, the Rt. Rev. Edwin F. Gulick, Jr., and Kathleen Wells, all of whom are represented by Jonathan D.F. Nelson, Kathleen Wells, and Vinson & Elkins LLP, as well as the Local Episcopal Congregations, all of whom are represented by Frank Hill and Hill Gilstrap, P.C. This motion is brought in the alternative and without waiving any other relief.

For two separate and independent reasons, the breakaway faction's attorneys³ lack authority to represent "The Episcopal Diocese of Fort Worth" and the "Corporation of The Episcopal Diocese of Fort Worth" in this case under Texas Rule of Civil Procedure 12.

While the Local Episcopal Parties and the Episcopal parishes and missions request that this motion be heard and determined before the summary judgment hearing, this motion should in no way postpone or delay the January 14, 2011 summary judgment hearing. Pursuant to the Fort Worth Court of Appeals' mandamus opinion, the Local Episcopal Parties' and The Episcopal Church's summary judgment motions are brought against the opposing *individuals*.⁴ Any Rule 12 order striking Defendants' unauthorized "Diocese" and "Corporation" pleadings would have no effect on the opposing individuals' live pleadings or on those individuals' cross-motion for partial summary judgment. Summary judgment should proceed unabated toward a timely and just resolution of this dispute.

III.

First, the breakaway-faction attorneys lack authority to represent the Diocese and Corporation under the Fort Worth Court of Appeals' June 25, 2010 mandamus opinion. Pursuant to that opinion, until this Court determines on the merits which faction has legal authority to act for the Diocese and Corporation, neither faction has authority to bring suit against the other in the name of the Diocese and Corporation.

³ This Motion specifically challenges the authority of J. Shelby Sharpe; Sharpe, Tillman & Melton; Scott Brister; Kendall Gray; and Andrews Kurth, L.L.P. (hereafter, the breakaway-faction attorneys).

⁴ Out of an abundance of caution, the Local Episcopal Parties' amended motion for partial summary judgment does contain at note 2 the alternative provision: "to any extent necessary, this motion is brought against Defendant/Third-Party Plaintiff/Counter-Defendant The Anglican Province Of The Southern Cone's 'Diocese Of Fort Worth,' which has wrongfully appeared as 'The Episcopal Diocese of Fort Worth,' and Intervenor/Third-Party Plaintiff/Defendant/Counter-Defendant The Anglican Province Of The Southern Cone's 'Corporation Of The Episcopal Diocese Of Fort Worth,' which has wrongfully appeared as 'The Corporation of the Episcopal Diocese of Fort Worth.'" But if those wrongful entities' pleadings are stricken, then that alternative condition would not take effect, and the summary judgment proceedings would continue unabated against the individuals only.

The Court of Appeals held: (1) “There is a single Fort Worth Diocese and Corporation, which both a majority and a minority faction claim to control”;⁵ (2) “a lawyer may not be hired to represent a corporation by one of two factions in the organization against the other faction”;⁶ and (3) “[t]he trial court did not determine on the merits which Bishop and which Trustees are the authorized persons within the Corporation and the Fort Worth Diocese, nor do we. The question of ‘identity’ remains to be determined in the course of the litigation.”⁷ Accordingly, neither faction currently has legal authority to hire counsel on behalf of the Diocese and Corporation in this litigation until the identity question is answered.

The Court of Appeals’ legal foundation for this holding applies to both factions:

Because a corporation cannot sue itself, the trier of fact will be unnecessarily confused by presentations from two opposing factions who claim to be the Corporation and the Fort Worth Diocese. Unless the trial court’s order is modified to strike the pleadings filed by Mr. Nelson and Ms. Wells on behalf of the Corporation and the Fort Worth Diocese and to bar those attorneys from appearing in the underlying cause as attorneys of record for the Corporation and the Fort Worth Diocese, **confusion in the litigation will be perpetuated, including the appearance that the issue is already resolved in favor of one party before the questions of identity and title to the property held by the Corporation and the Fort Worth Diocese are determined in the course of the litigation.**⁸

This holding necessarily applies with equal force to both factions. If allowing the Local Episcopal Parties to bring suit in the name of the Diocese and Corporation would violate the Court of Appeals’ mandate against suggesting “that the [identity] issue is already resolved in favor of one party,” so, too, would allowing the breakaway faction to bring suit as the Diocese

⁵ *In re Salazar*, 315 S.W.3d 279, 285 (Tex. App.—Fort Worth 2010, orig. proceeding).

⁶ *Id.* at 286.

⁷ *Id.*

⁸ *Id.* at 287 (emphasis added).

and Corporation. Either way, under the Court of Appeals' analysis, neither faction can create the appearance of advantage over the other by claiming the "identity" of the Diocese and the Corporation when the trial court has yet to determine that question under substantive law on the merits.

The Court of Appeals suggested a neutral path forward: attorneys may bring this case in the name of the individuals they represent but not on behalf of the Diocese or Corporation, until the Court resolves on the merits which party may legally act as the Diocese and Corporation.⁹

That is what the Local Episcopal Parties have done, restyling their suit and their claims as brought by individuals, and filing their summary judgment motion against the opposing individual parties. For the reasons above, the breakaway faction should be compelled to do the same: their pleadings in the name of their individual clients should remain in force, but their pleadings in the name of the Diocese and Corporation should be stricken under Rule 12. This procedural act should in no way impede or delay the January 14, 2011 summary judgment hearing, insofar as those cross-motions for summary judgment are brought *by* individuals *against* individuals, as the Court of Appeals mandated.

IV.

Second, the breakaway-faction attorneys lack authority to prosecute or defend this case on behalf of the Diocese and Corporation because, once this Court reaches the merits of the "identity" question, it is indisputable that only the Local Episcopal Parties have legal authority to act on behalf of the Diocese and Corporation.

The law and evidence supporting this position are set forth in the Local Episcopal Parties' Amended Motion for Partial Summary Judgment and The Episcopal Church's Motion for

⁹ *Id.* at 286.

Summary Judgment, both set for hearing on January 14, 2011, and in their Joint Appendix, their supplemental summary judgment evidence, and their second supplemental summary judgment evidence, as well as in Plaintiffs' responses to the original Rule 12 motions¹⁰ and evidence attached thereto and the Rule 12 hearing transcripts,¹¹ which are incorporated herein by reference.

The Local Episcopal Parties' and The Episcopal Church's summary judgment briefs are comprehensive, but the matter is simple: Under 100 years of bedrock First Amendment and Texas law, only The Episcopal Church can answer the strictly religious question of which faction represents the Episcopal Diocese and its Corporation. The United States Supreme Court has held that "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern."¹² The Fort Worth Court of Appeals affirmed: "Civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."¹³ The Supreme Court of Texas held in 1909, and reaffirmed in 2007, that "whenever the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."¹⁴ In breakaway-faction scenarios like this one, Texas law, applying unchanging First

¹⁰ Plaintiffs' Response to Defendant's Motion Challenging Attorneys' Authority (filed 9/8/09); Plaintiffs' Supplemental Response to Defendant's Motion Challenging Authority of Attorneys (filed 9/15/09).

¹¹ Transcripts on Rule 12 Hearings (9/9/09 & 9/16/09).

¹² *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 717 (1976).

¹³ *Patterson v. Sw. Baptist Theological Seminary*, 858 S.W.2d 602, 605-06 (Tex. App.—Fort Worth 1993, no writ) (citing *Milivojevich*, 426 U.S. at 713).

¹⁴ *Brown v. Clark*, 116 S.W. 360, 363 (Tex. 1909) (quoting *Watson v. Jones*, 80 U.S. 679, 727 (1871) (internal quotation marks omitted), cited with approval in *Westbrook v. Penley*, 231 S.W.3d 389, 398 (Tex. 2007).

Amendment doctrine, “requires deference to [the mother church’s] identity of [one party], the loyal group, as the representative of the local church.”¹⁵

Here, it is undisputed that The Episcopal Church, at its highest levels of authority, recognizes only the Local Episcopal Parties named in footnote 2 as the leaders and representatives of the Episcopal Diocese of Fort Worth and its institutions.¹⁶ Defendants (the breakaway faction) do not and cannot dispute this. Defendants expressly severed ties with The Episcopal Church, joined a church in South America, and are not recognized as the Episcopal Diocese or Corporation by The Episcopal Church.

Thus, if the Court is inclined at this moment, based on all of the information before it in the record, to reach the merits of the identity question, the legal analysis is straight-forward: this Court, like all civil courts, should recognize, defer to, and apply the purely religious determination of The Episcopal Church that the Local Episcopal Parties represent the Episcopal Diocese of Fort Worth and its institutions. Defendants do not and cannot in good faith suggest that The Episcopal Church recognizes them as the Diocese and Corporation.

Accordingly, on the merits, no one with legal authority in the actual Diocese or Corporation has hired or retained the breakaway-faction attorneys, Sharpe, Brister, Gray, or their firms, to prosecute this suit. Again, their pleadings for those entities should be stricken.

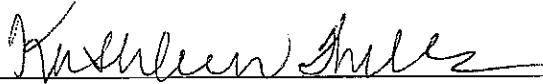
¹⁵ *Schismatic & Purported Casa Linda Presbyterian Church in Am. V. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 707 (Tex. App.—Dallas 1986, writ ref’d n.r.e.); see also *Schofield v. Superior Court*, ___ Cal. Rptr. 3d ___, 2010 WL 4644707 (Cal. App. Ct. Nov. 18, 2010) (holding trial court erred by not deferring to The Episcopal Church’s determination of which faction was true diocesan leadership).

¹⁶ Indeed, the Local Episcopal Parties and The Episcopal Church are aligned in this case. And detailed evidentiary support for this conclusion is set forth in the Local Episcopal Parties’ Amended Motion for Partial Summary Judgment at notes 14-15 and Sections VII.E-F.

V.

BASED ON THE ABOVE, Movants respectfully request that J. Shelby Sharpe; Sharpe, Tillman & Melton; Scott Brister, Kendall Gray; and Andrews Kurth, L.L.P. be cited to appear before the Court and show their authority to act in this case and that upon hearing, the Court find that J. Shelby Sharpe; Sharpe, Tillman & Melton; Scott Brister; Kendall Gray; and Andrews Kurth, L.L.P. have no authority to prosecute or defend in this case on behalf of the Episcopal Diocese of Fort Worth or the Corporation of The Episcopal Diocese of Fort Worth, and strike their pleadings in the name of Episcopal Diocese of Fort Worth or the Corporation of The Episcopal Diocese of Fort Worth, and for such other and further relief as the Court may deem just.

Respectfully submitted,



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THE STATE OF TEXAS
COUNTY OF TARRANT

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BEFORE ME, the undersigned notary public, on this day personally appeared KATHLEEN WELLS, who being by me duly sworn, upon oath deposed and said:

“I am over the age of 18 years and competent to make this affidavit and have personal knowledge of the facts stated herein. I am the Chancellor of the Episcopal Diocese of Fort Worth and have served as Chancellor since February 7, 2009. I have been recognized by The Episcopal Church as the Chancellor of the Episcopal Diocese of Fort Worth. Under Diocesan Canon 6, I represent the Corporation of The Episcopal Diocese of Fort Worth and the Standing Committee and the Bishop of the Episcopal Diocese of Fort Worth; I also represent the individuals named as plaintiffs, third-party defendants and/or counter-plaintiffs in this case. All of the individuals whom I represent have been recognized by The Episcopal Church as the Bishop or other officials of the Episcopal Diocese of Fort Worth, the Corporation of the Episcopal Diocese of Fort Worth, and/or other institutions of the Episcopal Diocese of Fort Worth. I have personal knowledge of the identity of legal counsel hired by the Episcopal Diocese of Fort Worth and The Corporation of the Episcopal Diocese of Fort Worth since February 7, 2009. I have personal knowledge that no one in authority for the Episcopal Diocese of Fort Worth or the Corporation of The Episcopal Diocese of Fort Worth has retained or requested J. Shelby Sharpe; Sharpe, Tillman & Melton; Kendall

Gray; Scott Brister; or Andrews Kurth, L.L.P. to appear in these proceedings on behalf of those entities.”

Kathleen Wells

Kathleen Wells

SUBSCRIBED AND SWORN TO BEFORE ME this 21st day of December, 2010, to certify which witness my hand and seal of office.

Stephanie Rowell

Notary Public in and for the State of Texas



CERTIFICATE OF CONFERENCE

Counsel for the Local Episcopal Parties has conferred with counsel for Defendants, and counsel could not agree on the foregoing motion.

Kathleen Wells for
Kathleen Wells *Jonathan Nelson*

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Rule 12 Motion Challenging Authority of Attorneys J. Shelby Sharpe, Kendall Gray, and Scott Brister has been sent this 27th day of December, 2010, by facsimile and electronic mail as follows:

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