

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO  
CIVIL DIVISION

2005 AUG -9 A 9:34

ROSIE ANDUJAR, *et al.*

CASE NO.: 05-CV-565095

Plaintiffs,

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

JUDGE STUART FRIEDMAN

v.

BISHOP PILLA, *et al.*

Defendants.

**MOTION TO DENY**  
**DEFENDANTS JOSEPH H.**  
**SMITH, JHS ENTERPRISES,**  
**TEE SPORTS, INC., AND**  
**THOMAS J. KELLEY MOTION**  
**TO DISMISS**

NOW COME Plaintiffs, by and through undersigned counsel, and hereby move to deny Defendants Joseph H. Smith, JHS Enterprises, Tee Sports, Inc., and Thomas J. Kelley Motion to Dismiss because Plaintiffs' have standing to bring these claims against all Defendants and this Court has subject matter jurisdiction over the claims against Bishop Pilla, based on the First Amendment to the United States Constitution. For the reasons more fully stated in the attached Memorandum In Opposition, Defendants Motion to Dismiss should be denied.

Respectfully submitted,



SANTIAGO FELICIANO, JR. (#0020278)

The Hanna Building

1422 Euclid Avenue, Suite 1162

Cleveland, OH 44115

(216) 583-0950

(216) 583-0952 (fax)

[felicianoc1@hotmail.com](mailto:felicianoc1@hotmail.com)

Counsel for Plaintiffs

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss was served via ordinary U.S. mail on this 8<sup>th</sup> day of August 2005, on the following:

John M. Newman, Jr.  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114-1190  
Counsel for Defendant Anthony M. Pilla

Beth A. Sebaugh  
Bonnezzi, Switzer, Murphy, & Polito, L.P.A.  
526 Superior Avenue, Suite 1400  
Cleveland, OH 44114-1491  
Counsel for Defendant Thomas J. Kelley

Michael Rzymek  
Assistant Attorney General  
Charitable Law Section  
150 Gay Street, 23<sup>rd</sup> Floor  
Columbus, OH 43215-3130  
Counsel for Jim Petro, Attorney General

Joseph H. Smith  
Diocese of Columbus  
Finance and Insurance Offices  
198 E. Broad Street  
Columbus, OH 43215

Anton Zgoznic  
9495 Winterberry Lane  
Mentor, OH 44060

Anton Zgoznic, as Statutory Agent for  
Institutional Business Solutions, formerly  
Monastra & Associates, Inc.  
7325 Production Drive  
Mentor, OH 44060

Anton Zgoznic, as Statutory Agent for  
Institutional Financial Advisors  
36060 Freed Court

Eastlake, OH 44095

Anton Zgoznic, as Statutory Agent for  
Zgoznic & Associates  
7325 Production Drive  
Mentor, OH 44060

Wilfred L. Anderson, as Statutory Agent for  
Alexander Systems, Ltd.  
2760 Brainard Hills Drive  
Pepper Pike, OH 44124

Zrino Jukic, as Statutory Agent for  
ZJ & Associates, Inc.  
9063 Arden Drive  
Mentor, OH 44060

Joseph H. Smith, as Statutory Agent for  
JHS Enterprises, Inc.  
P.O. Box 40092  
Bay Village, OH 44140

Joseph H. Smith, as Statutory Agent for  
Tee Sports, Inc.  
31353 St. Andrews  
Westlake, OH 44145

  
SANTIAGO FELICIANO, JR.  
Counsel for Plaintiffs

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO  
CIVIL DIVISION

ROSIE ANDUJAR, <i>et al.</i>	:	CASE NO.: 05-CV-565095
Plaintiffs,	:	JUDGE STUART FRIEDMAN
	:	
v.	:	<u>MEMORANDUM IN</u>
	:	<u>OPPOSITION TO</u>
BISHOP PILLA, <i>et al.</i>	:	<u>DEFENDANTS JOSEPH H.</u>
	:	<u>SMITH, JHS ENTERPRISES,</u>
Defendants.	:	<u>TEE SPORTS, INC., AND</u>
	:	<u>THOMAS J. KELLEY MOTION</u>
	:	<u>TO DISMISS</u>

Santiago Feliciano, Jr. (#0020278)  
The Hanna Building  
1422 Euclid Avenue, Suite 1162  
Cleveland, OH 44115  
(216) 583-0950  
(216) 583-0952 (fax)  
felicianoc1@hotmail.com  
Counsel for Plaintiffs

## **TABLE OF CONTENTS**

I.	INTRODUCTION .....	3
II.	LAW AND ARGUMENT .....	3
	<b>A. Plaintiffs Have Standing to Bring These Claims Against All Defendants.....</b>	<b>4</b>
	<b>B. This Court Has Subject Matter Jurisdiction Over the Claims . Against All Defendants, Based on the First Amendment to the United States Constitution .....</b>	<b>6</b>
III.	CONCLUSION .....	8

**MEMORANDUM IN OPPOSITION TO DEFENDANTS**  
**JOSEPH H. SMITH, JHS ENTERPRISES, TEE SPORTS, INC.,**  
**AND THOMAS J. KELLEY MOTION TO DISMISS**

**I. INTRODUCTION**

Before this Court is Plaintiffs' Memorandum in Opposition to Defendants Joseph H. Smith, JHS Enterprises, Tee Sports, Inc., and Thomas J. Kelley Motion to Dismiss. On June 13, 2005, Plaintiffs filed a lawsuit in Cuyahoga County Common Pleas Court claiming that current and former employees of the Diocese of Cleveland wrongfully converted Diocesan assets and that these individuals entrusted with protecting the assets of the Diocese of Cleveland breached both their duties of care and loyalty. Additionally, Plaintiffs' claim that Bishop Anthony M. Pilla ("Bishop Pilla"), Bishop of the Diocese of Cleveland and Trustee of all Diocesan assets, is liable for negligent supervision of these employees. Plaintiffs' demand that the absconded monies be returned to the Diocese of Cleveland and an accurate accounting of the Diocese be completed. Plaintiffs are registered members of their respective parishes within the Diocese of Cleveland.

Subsequently, Defendants Joseph H. Smith, JHS Enterprises, Tee Sports, Inc., and Thomas J. Kelley filed a Motion to Dismiss claiming that Plaintiffs lack standing to sue and that the Court lacks jurisdiction to order the relief requested by Plaintiffs. For the reasons stated below, this Court should deny Defendants' Motion to Dismiss.

**II. LAW AND ARGUMENT**

Defendants Joseph H. Smith, JHS Enterprises, Tee Sports, Inc., and Thomas J. Kelley Motion to Dismiss should be denied because: (a) Plaintiffs have standing to bring these claims against all Defendants; and (b) this Court has subject matter jurisdiction over the claims against all Defendants, based on the First Amendment to the United States

Constitution.

**A. Plaintiffs Have Standing to Bring These Claims Against All Defendants.**

Plaintiffs have standing to bring these claims against all Defendants because each Plaintiff is a beneficiary of the trust of the Diocese of Cleveland and a conclusion to the contrary is against public policy.

In *Mannix v. Purcell*, the Ohio Supreme Court first recognized a diocese of the Roman Catholic Church as a charitable trust. *Mannix v. Purcell* (1888), 46 Ohio St. 102, 19 N.E. 572. Bishop Pilla, in his ecclesiastical capacity as Bishop of the Diocese of Cleveland, is identified by both civil and church law as trustee of all trust assets, both real and personal property, of the Diocese of Cleveland (see Statement of the Catholic Conference of Ohio, attached to Complaint). According to Ohio Revised Code Section 109.23(A), a charitable trust is any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, religious, or educational purpose. Under Ohio Revised Code Section 109.24 states that the Attorney General has the sole authority to enforce a charitable trust; however, the statute does not unequivocally prevent a private party from prosecuting an action to enforce a charitable trust.

The law generally prohibits a private citizen from suing to enforce a charitable trust, because such a trust is by nature devoted to the accomplishment of purposes beneficial to the public and not to any specified beneficiaries. See *Shriner v. ProMedica Health Sys., Inc.* (N.D. Ohio 2005), 2005 U.S. Dist. LEXIS 894, at 894. A suit may be

maintained for the enforcement of a charitable trust by the Attorney General or other public officer, by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest. See Restatement of the Law of Trusts 2d, Section 391. A party may not maintain an action merely because they are concerned citizens taken from the public at large. *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24.

Plaintiffs are more than just "miscellaneous members" of group of concerned citizens from Northeastern Ohio. They are beneficiaries of the charitable trust of the Diocese of Cleveland because each individual Plaintiff is a registered member of their respective parishes and their membership at their parishes is readily ascertainable to prove they are beneficiaries of the trust. Additionally, Plaintiffs are financial contributors and supporters of their parishes. Because Plaintiffs are beneficiaries of the charitable trust of the Diocese of Cleveland they have standing to bring these claims against all Defendants. Thus, Defendants' Motion to Dismiss should be denied on this issue.

Moreover, a determination that Plaintiffs have no interest in the charitable trust of the Diocese of Cleveland and, therefore, have no standing to sue is against public policy. Public policy dictates that Plaintiffs have standing to sue for the enforcement of a charitable trust when individuals entrusted with its continuance have absconded millions of dollars from it for their own benefit. Bishop Pilla's interpretation of the charitable trust of the Diocese of Cleveland is so narrowly construed as to not permit accountability for the clear abuses by all Defendants named in this lawsuit. Therefore, Plaintiffs have standing to sue as beneficiaries as a matter of public policy and Defendants' Motion to Dismiss should be denied.



**B. This Court Has Subject Matter Jurisdiction Over the Claims Against All Defendants, Based on the First Amendment to the United States Constitution.**

This Court has subject matter jurisdiction over Plaintiffs' claims. Generally, civil courts will not interfere in church matters related to faith; however, they may intervene if property or civil rights are involved. The authority of civil courts to inquire into religious disputes was confirmed by the Supreme Court of the United States in *Jones v. Wolf* (1979), 443 U.S. 595. The state has an obvious and legitimate interest in the peaceful resolution of property disputes and in providing a civil forum in which the ownership and control of church property can be determined conclusively. *Id.* at 600; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969), 393 U.S. 440, 445.

The first amendment prohibits civil courts from resolving church property disputes by inquiring into and resolving disputed issues of religious doctrine and practice. *Id.*; *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich* (1976), 426 U.S. 696, 710 ("Serbian Orthodox Diocese"); *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* (1970), 396 U.S. 367, 368 (per curiam) ("Sharpsburg Church"). However, when a disputed issue of religious doctrine or practice is relevant to a property dispute, a civil court must defer to the resolution of that issue arrived at by the highest court, tribunal or controlling body of a hierarchical church organization. *Jones v. Wolf*, 443 U.S. at 602, 604; *Serbian Orthodox Diocese*, 426 U.S. at 709, 724-25; *Watson v. Jones* (1871), 80 U.S. (13 Wall.) 679, 727.

Despite the limitations on civil courts to interject into matters of church disputes, this Court has competent jurisdiction to do so in this case. This Court has an obvious interest in protecting the rights and ownership interests of the beneficiaries of the Diocese of Cleveland. It is not necessary for the court to delve into matters of church practices or doctrines in order to adjudicate this dispute. By adopting a “neutral principles of law” approach, a trier of fact can accurately determine whether Defendants committed the acts asserted in the complaint. Therefore, adjudication of this matter by this Court is not prohibited by the First Amendment.

Defendants argue that Plaintiffs’ claims are no different than those alleged in the *Tibbs v. Kendrick* (8th Dist. 1994), 93 Ohio App.3d 35, 40-41, 637 N.E.2d 397. Motion to Dismiss ¶ 10. In *Tibbs*, the Eighth District held that civil courts lack subject matter jurisdiction to entertain claims by beneficiaries of a trust against trustees of a congregational church. The Church in *Tibbs*, however, was a congregational church, as opposed to the Roman Catholic Church, which is a hierarchal church. The difference between the two churches is that in a congregational church the members make binding decisions, whereas in a hierarchal church decisions are made by designated and appointed officials, i.e. cardinals, bishops, etc. Because of this discrepancy between the church in *Tibbs* and the Diocese of Cleveland, Defendants’ argument that *Tibbs* is controlling on the First Amendment issue is inaccurate.

Moreover, the Code of Canon Law states “that civil laws to which the law of the Church yields *are to be observed in canon law with the same effects*, insofar as they are not contrary to divine law and unless canon law provides otherwise (emphasis added). The Code of Canon Law, Canon 22. Therefore, this Court can apply the “neutral


principles of law” doctrine, which would dispense of any anxiety about violating the First Amendment. Defendants contend that *Tibbs* is not controlling as applied to the “neutral principles of law” doctrine; however, they argued that *Tibbs* was controlling in the previous paragraph. Motion to Dismiss ¶ 11. Nevertheless, it is not necessary for this Court to inquire into matters of church practices or doctrines in order to adjudicate this dispute.

Furthermore, it is not necessary to examine canon law to determine that Defendants should be held to a reasonable prudent person standard. The question of whether Defendants acted reasonably is a question of fact that a trier of fact could decide without having to consider canon law and possibly offending the First Amendment. Thus, this Court’s subject matter jurisdiction over this case is not prohibited by the First Amendment and Defendants’ Motion to Dismiss should be denied.

### III. CONCLUSION

For the foregoing reasons, Defendants Joseph H. Smith, JHS Enterprises, Tee Sports, Inc., and Thomas J. Kelley Motion to Dismiss should be denied.

Respectfully submitted,

  
SANTIAGO FELICIANO, JR. (#0020278)  
The Hanna Building  
1422 Euclid Avenue, Suite 1162  
Cleveland, OH 44115  
(216) 583-0950  
(216) 583-0952 (fax)  
Counsel for Plaintiffs

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss was served via ordinary U.S. mail on this 8<sup>th</sup> day of August 2005, on the following:

John M. Newman, Jr.  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114-1190  
Counsel for Defendant Anthony M. Pilla

Beth A. Sebaugh  
Bonnezzi, Switzer, Murphy, & Polito, L.P.A.  
526 Superior Avenue, Suite 1400  
Cleveland, OH 44114-1491  
Counsel for Defendant Thomas J. Kelley

Michael Rzymek  
Assistant Attorney General  
Charitable Law Section  
150 Gay Street, 23<sup>rd</sup> Floor  
Columbus, OH 43215-3130  
Counsel for Jim Petro, Attorney General

Joseph H. Smith  
31641 Compass Cove  
Avon Lake, OH 44012

Anton Zgozник  
9495 Winterberry Lane  
Mentor, OH 44060

Anton Zgozник, as Statutory Agent for  
Institutional Business Solutions, formerly  
Monastra & Associates, Inc.  
7325 Production Drive  
Mentor, OH 44060

Anton Zgozник, as Statutory Agent for  
Institutional Financial Advisors  
36060 Freed Court  
Eastlake, OH 44095

Anton Zgoznic, as Statutory Agent for  
Zgoznic & Associates  
7325 Production Drive  
Mentor, OH 44060

Wilfred L. Anderson, as Statutory Agent for  
Alexander Systems, Ltd.  
2760 Brainard Hills Drive  
Pepper Pike, OH 44124

Zrino Jukic, as Statutory Agent for  
ZJ & Associates, Inc.  
9063 Arden Drive  
Mentor, OH 44060

Joseph H. Smith, as Statutory Agent for  
JHS Enterprises, Inc.  
P.O. Box 40092  
Bay Village, OH 44140

Joseph H. Smith, as Statutory Agent for  
Tee Sports, Inc.  
31353 St. Andrews  
Westlake, OH 44145

  
SANTIAGO FELICIANO, JR.  
Counsel for Plaintiffs