



"Trustee of the Diocese of Cleveland" and as such owes a fiduciary duty to conserve the assets of the Diocese. Plaintiffs demand that defendant Bishop Pilla be compelled "to render...an account of the administration of the trust of the Diocese of Cleveland." Such account, they state, should include the Catholic Cemeteries Association, the Diocese Office of Pension, Finance, and Insurance, and as well the "third party businesses" of defendants Smith, Kelley, and Zgoznik.

{¶5} In Counts III, IV, and V plaintiffs allege that the acts of the various defendants constitute, respectively, a "Breach of Duty of Loyalty", "Breach of Duty of Care", and "Negligent Supervision".

{¶6} Finally, in Count VI plaintiffs claim that the Attorney General, defendant Petro, has the duty to investigate charges of fiscal misconduct with respect to a charitable trust, pursuant to Ohio Rev. Code §109.21; accordingly, they call upon him to conduct an investigation into the alleged activities of defendants Pilla, Smith, Kelley, and Zgoznik.

{¶7} The Court notes that defendant Zgoznik is named both in his capacity as Assistant Treasurer for the Diocese and as Statutory Agent for the following: Institutional Business Solutions (fka Monastra & Associates, Inc.); Institutional Financial Advisors; and Zgoznik & Associates. Defendant Wilfred L. Anderson is named as Statutory Agent for Alexander Systems, Ltd., and Zrino Jukic is named as Statutory Agent for ZJ & Associates, Inc. None of those entities is itself named as a defendant, and the Complaint alleges no specific acts committed by defendants Anderson or Jukic.

{¶8} Before the Court at this time are the motions of all defendants<sup>1</sup> to dismiss the complaint. Inasmuch as the other defendants for the most part incorporate the issues asserted by defendant Bishop Anthony M. Pilla, the Court will deal initially with his motion and will consider the other motions at the conclusion of this Memorandum of Opinion.<sup>2</sup>

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<sup>1</sup> Two of the defendants— Wilfred Anderson and Jrino Jukic—have not been served, and thus are not considered in the following discussion.

<sup>2</sup> In the interest of full disclosure, the Court notes that the husband of its Staff Attorney (Elizabeth Molnar) is employed as an Associate in Jones Day, which is the law firm that represents defendant Bishop Pilla. That associate, Isaac Molnar, is not of record herein and he is not identified as having any involvement in preparing the Motion to Dismiss. In order to avoid any concerns as to a possible conflict of interest, however, the Court states for the record that Ms. Molnar has not had any involvement in the Court's consideration of this case, and specifically has not participated in any discussions concerning the motions *sub judice*.

{¶9} Summarizing his motion, Bishop Pilla asserts: (1) that plaintiffs lack standing to bring any of their claims against any of the defendants, (2) that this Court lacks subject-matter jurisdiction, pursuant to the First (and Fourteenth) Amendments to the United States Constitution, and (3) that the Complaint fails to state a claim upon which relief may be granted. The Court will deal with each of these assertions in order.

{¶10} At the outset the Court observes that, in considering a motion to dismiss, it must accept as true all allegations in the Complaint. Accordingly, it is accepted for the purposes of the instant motion that all the named plaintiffs not only are members of the Roman Catholic faith, but that they all are "registered members of their respective parishes" and "financial contributors and supporters of their parishes." It is further accepted for the purposes of these motions that, during the relevant time-frame, the defendants held the various positions set forth in the Complaint.

#### I. Do Plaintiffs Have Standing?

{¶11} It is settled law that, before an Ohio court may consider the merits of a legal claim, the party seeking relief is required to establish standing to sue. *Smith v. Hayes*, 2005 WL 1394779 Ohio App. 10 Dist., 2005, citing *Bowers v. Ohio State Dental Bd.* (2001), 142 Ohio App.3d 376, 380.

In the majority of cases brought by a private litigant, the issue of standing "depends upon whether the party has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, quoting *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179.  
(Cited in *Hayes, supra*)<sup>3</sup>

Furthermore, unless a plaintiff can demonstrate that he has standing, the complaint must be dismissed for want of subject-matter jurisdiction. *Hayes, supra*.

{¶12} Defendant Pilla asserts that, as a charitable trust, the Diocese "...is by nature devoted to the accomplishment of purposes beneficial to a public and not to any specified

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<sup>3</sup> Ohio courts have recognized what has come to be called a "public action exception" to the standing rule; however, that very limited exception is not relevant to the issues presented in this case. See: *Smith v. Hayes, supra*, at ¶9.

beneficiaries"<sup>4</sup>; as such, he argues, "the law generally prohibits a private citizen from suing to enforce such a trust." Plaintiffs concur that the Diocese operates as a charitable trust, and that, pursuant to Ohio Rev. Code §109.24, only the Attorney General has the authority to enforce a charitable trust. They claim, however, that "the statute does not unequivocally prevent a private party from prosecuting an action to enforce a charitable trust." While that is certainly true, the Court finds that case law in Ohio and elsewhere frowns upon such private actions. See, for example, *Plant, et al., v. Upper Valley Medical Center, Inc., et al.*, 1996 WL 185341 (Ohio App. 2 Dist.), wherein the Court held, at \*3, that:

Although the Plaintiffs may be beneficiaries of the trust, R. C. §109.24 grants to the attorney general sole discretion regarding the administration and enforcement of charitable trusts. Parties, other than the attorney general, may have standing. The Plaintiffs, however, do not fall into one of these possible exceptions. The law as to who may maintain an action for the enforcement of a charitable trust is best stated in the second Restatement of the Law of Trusts 2d 278, Section 391 as follows:

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or 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 or by the settlor or his heirs, personal representatives or next of kin.

The restatement in Comment (C) sets forth the following statement of law: '...The mere fact that a person is a possible beneficiary is not sufficient to entitle him to maintain a suit for the enforcement of a charitable trust....'

Again, at \*4:

Where the party is not mentioned in the document creating the charitable trust as an actual or selected beneficiary, the party is at best a probable beneficiary and does not have standing to enforce the trust. Permitting probable beneficiaries to bring legal actions, without the consent or assistance of the attorney general, presents several problems. Authorizing every beneficiary of the charitable trust to file claims whenever they are [sic] dissatisfied with the actions of the trustees would unnecessarily burden the trustees with frequent and possible [sic] frivolous law suits.

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<sup>4</sup> While plaintiffs do not dispute that the Catholic Diocese of Cleveland, as a charitable trust, operates "for purposes beneficial to a public" (emphasis added), the use of the indefinite article suggests that the beneficiaries of such trust are not intended to be *the* public at large, but rather a subcategory. Presumably, the public intended by such language would be either adherents to the Roman Catholic faith (whether generally or within the Cleveland Diocese) or members of the parishes in the Cleveland Diocese. Under the circumstances, however, the Court need not determine what particular "public" is meant, as plaintiffs have failed to allege facts that would support any special interest apart from the interest of other Roman Catholics in the Diocese.

{¶13} Plaintiffs, in response, have cited no statutory or case law to support their claim that, as “beneficiaries of the charitable trust of the Diocese of Cleveland”, they are entitled to standing. At best, it has been held that: “[t]he language of the statute does not...prevent the Attorney General from permitting other parties from prosecuting an action to enforce a charitable trust.” *Plant, supra*, at \*3. As no such permission has been sought, of course, that issue is not properly before the Court at this time.

{¶14} As noted *supra*, plaintiffs assert that—as adherents to the Roman Catholic faith and members of their respective parishes in the Diocese—they are beneficiaries of the charitable trust. *Plant, supra*, makes it clear, however, that a suit may be maintained only by “a person who has a *special interest* in the enforcement of the charitable trust.” (Emphasis added.) Thus, in order to acquire standing to enforce such charitable trust, it is not sufficient that one merely be an adherent to the faith, or even a member of a parish within the Diocese. Rather, the plaintiffs must demonstrate that they personally have a particular interest in the substance of that trust. See: *Plant, supra*, at \*4, and particularly footnote 3 therein:

The treatise *Trust and Trustees* defines an actual or selected beneficiary as a beneficiary personally named in the document creating the trust. Examples of actual or selected beneficiaries include charitable trusts created to aid a clergyman for a specific church or a trust created to aid a specific charity in addition to those selected by the trustees taken from a general class. A ‘probable beneficiary’ is defined as a member of the general beneficiary class whose rights to the trust are identical to any other beneficiary of the charitable trust.

Accord: *Shriner v. ProMedica Health System, Inc.* (N.D. Ohio, 2005) 2005 WL 139128, in which the Court held that: “As a general rule, no public citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefitted by the trust.” *Bogert, Bogert's Trusts & Trustees* § 414, at 39.” Following this analysis, the Complaint does not allege that these plaintiffs enjoy any particular rights under the charitable trust; thus, they must be considered to be mere *probable beneficiaries, i.e.*, individuals whose rights under that trust are no greater than those of any other members of any parishes within the Cleveland Diocese.

{¶15} For the reasons set forth herein, the Court concludes that plaintiffs have failed to establish that they have standing to bring this action; accordingly, the Complaint must be dismissed for want of subject-matter jurisdiction.

## II. Is Jurisdiction Barred Under The Constitutional Separation Of Church And State?

{¶16} Although its holding on the question of standing requires dismissal of this case as to all parties and all claims, the Court finds that it is nevertheless appropriate to review the remaining issues raised in Bishop Pilla's motion to dismiss.

{¶17} Defendant Pilla asserts that this Court lacks subject-matter jurisdiction, pursuant to the Constitutionally-mandated separation of church and state. Upon review of the applicable law and the issues raised in plaintiffs' Complaint, the Court respectfully disagrees with the defendant's contention.

{¶18} Plaintiffs characterize this case as one involving stewardship of assets of the Diocese; defendant Pilla refers instead to his stewardship of the Diocese itself: "...the decisions he has made and steps he has taken or not taken in overseeing the religious body that is the Diocese." It is uncontroverted that civil courts lack jurisdiction to determine ecclesiastical or spiritual disputes, but that they may consider and decide disputes that concern such temporal issues as the management of finances and physical assets, so long as such issues do not touch upon matters of faith, doctrine, or who may mount the pulpit and preach.

{¶19} Both sides have cited *Tibbs v. Kendrick* (1994, 8<sup>th</sup> Dist.) 93 Ohio App. 3d 35. In that case the Court of Appeals differentiated between congregational and hierarchical churches; it is undisputed that the Roman Catholic Diocese of Cleveland is hierarchical in its organization and structure. The Court cited *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 713:

[N]o 'arbitrariness' exception in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations is consistent with the constitutional mandate that 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. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits....

Although the foregoing analysis severely restricts the scope of jurisdiction of civil courts with respect to cases involving hierarchical churches, this Court is not convinced that it bars

review of the temporal issues raised by plaintiffs herein. The allegations as to Bishop Pilla do not concern his *ecclesiastical* stewardship of the Diocese of Cleveland, but rather his *fiscal* stewardship of the *assets* of that organization.

{¶20} Defendant Pilla also relies upon *Robinson v. Freedom Faith Missionary Baptist Church*, 2d Dist. No 20232, 2004-Ohio-2607, 2004 WL 1145914. Upon a full review of that decision, the Court finds defendant's reliance upon it not well-taken. In *Robinson* the court specifically noted that it had subject-matter jurisdiction *only* if the dispute involved *secular* issues. Noting specifically that the defendant church was congregational, rather than hierarchical, the court observed, at ¶29, that

Plaintiff has made an allegation of breach of fiduciary duty and seeks an accounting of church finances. This inquiry would necessarily involve whether the pastor of the Church engaged in wrongdoing, and therefore, whether he should be removed as pastor. This is not a matter for the Court to decide.

Thus, a seemingly secular issue of alleged mishandling of church assets carried ramifications whether the pastor should remain at his pulpit—certainly an ecclesiastical issue.

On the other hand, where—as here—the church involved is hierarchical in structure, the determination of whether a priest or bishop is to be removed from his position lies within the exclusive jurisdiction of the church hierarchy, irrespective of any decision the civil courts may make with respect to a request for an accounting of diocesan assets. This is especially the case where—as here—the complaint is devoid of allegations of active participation by Bishop Pilla in any claimed misuse of those assets.

{¶21} The Court finds troubling the plaintiffs' reliance, at ¶¶38-9 and at ¶¶60-62 of the Complaint, upon the Code of Canon Law. Contrary to plaintiffs' assertion, this Court may not consider disputes that require interpretation or application of the Code of Canon Law of the Roman Catholic Church. The First and Fourteenth Amendments clearly reserve such jurisdiction to the ecclesiastical courts—most especially in the case of a hierarchical church such as the Roman Catholic Church. Similarly, no temporal court should be so arrogant as to presume to determine matters of "divine law" as referred to in Par. 39. Whatever jurisdiction this Court may have with respect to the issues *sub judice* is limited to determination

of the facts in dispute, in the light of the laws and constitutions of the United States and the State of Ohio.

{¶22} Accordingly, the Court finds that it does have jurisdiction over allegations of fiscal mismanagement, even where the alleged misconduct relates to the operation of a hierarchical church, so long as matters of faith, dogma, or religious practice are not impinged.

### III. Does the Complaint State Any Claims as to This Defendant?

{¶23} As stated by defendant, and conceded by plaintiffs' counsel, the first claim in the Complaint makes no allegations as to Bishop Pilla. Accordingly, the defendant's motion to dismiss is moot with respect to Count 1.

{¶24} Count 2 alleges that, as Trustee of the Diocese, Bishop Pilla "...under both Ohio and Church law... is under a duty to keep a separate account of the income, receipts, and disbursements of the trust and to render an accounting to the beneficiaries." (Emphasis added.) Although not raised by defendant, the Court observes that it already has determined that the plaintiffs are at most *probable beneficiaries*, and thus not entitled to the rights that an *actual* beneficiary would enjoy—including the right to demand an accounting. Defendant Pilla asserts that "...there is no law providing that status alone creates a claim or otherwise confers any right to a court-ordered accounting or records inspection." The Court agrees with the defendant on this point, and further notes that it is the Attorney General of Ohio alone who is charged with overseeing the fiscal integrity of the operation of a charitable trust. See, in this respect, Ohio Rev. Code §109.24:

The powers of the attorney general under sections 109.23 to 109.33 of the Revised Code shall be in addition to and not in limitation of his powers held at common law. The attorney general may investigate transactions and relationships of trustees of a charitable trust for the purpose of determining whether the property held for charitable, religious, or educational purposes has been and is being properly administered in accordance with fiduciary principles as established by the courts and statutes of this state. The attorney general is empowered to require the production of any books or papers which are relevant to the inquiry.

Thus, the decision whether to institute an investigation into the fiscal operation of a charitable trust, including a religious institution such as the Catholic Diocese of Cleveland, lies within the sole discretion of the Attorney General. Plaintiffs have provided no support for



their contention that this Court has the power to order such an investigation. Accordingly, the Court finds that defendant's motion is well-taken as to Count 2.

{¶25} Count 3 alleges that all defendants breached a "duty of loyalty"; however, it does not allege any specific acts by Bishop Pilla in furtherance of such claimed breach. This is reflected by the fact that the *damnum* in that Count does not make any demand with respect to the Bishop. The Court also notes, with concern, that the claimed "duty of loyalty" is supported primarily by reference to the Code of Canon Law of the Roman Catholic Church (Canon 1284, §2); this suggests that any analysis into whether the Bishop has violated such duty would require the Court to construe not the civil laws but Canon Law. Therefore, and consistent with the analysis and conclusion in ¶21, *supra*, the Court finds that defendant's motion is well-taken as to Count 3 as well.

{¶26} Count 4 charges a breach of a duty of care. Again, although this count alleges various acts on the part of Bishop Pilla that are claimed to constitute a breach of such duty of care, the prayer seeks relief only against defendants Smith, Kelley, and Zgoznic, as well as against various businesses these defendants are alleged to control. No relief is sought from Bishop Pilla. Again, the Court notes that plaintiffs have not named these business themselves as defendants.

{¶27} Additionally, as defendant Pilla suggests, plaintiffs have failed to allege any manner in which the Bishop failed to meet his duty of care. Ohio Rev. Code, §1702.30(B), requires that a director of a non-profit corporation perform his duties in good faith and:

...in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. In performing the duties of a director, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, that are prepared or presented by the following:

- (1) One or more directors, officers, or employees of the corporation who the director reasonably believes are reliable and competent in the matters prepared or presented;
- (2) Counsel, public accountants, or other persons as to matters that the director reasonably believes are within the person's professional or expert competence;
- (3) A committee of the directors upon which the director does not serve, duly established in accordance with a provision of the articles or the regulations,

as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

See: *Celebrezze v. Variety Club Tent No. 6 Charities, Inc.*, 9<sup>th</sup> Dist. No. 92 CA 005297, 1992 WL 316354. As defendant points out, the Complaint fails to allege that Bishop Pilla was aware of the claimed misconduct of defendants Smith, Kelley, and Zgoznic, or that he was derelict in not becoming aware of it, or that he was culpably deficient in his oversight of the affairs of the Diocese. The Court grants the motion of defendant Pilla as to count 4.

{¶28} Count 5 sets forth a claim of negligent supervision. Plaintiffs' position with respect to this count seems to suggest that, since Bishop Pilla is trustee of the Diocese, he *ipso facto* must answer for any alleged misconduct of the other defendants in the exercise of their duties. Again—as defendant's brief notes, plaintiffs have failed to allege any specific facts that would establish that Bishop Pilla was or should have been alerted to any misconduct by defendants Smith, Kelley, or Zgoznic.

{¶29} Plaintiff's counsel correctly notes that, as Bishop, defendant Pilla "...was the employer of Mr. Smith, Mr. Kelley, and Mr. Zgoznic." However, counsel leaps from that assertion to the claim that any misconduct by them *per se* supports a charge of negligent supervision as to Bishop Pilla. We are not dealing here with an area where the law imposes absolute liability; rather, there must be specific facts alleged that would show—once again—that the Bishop either was aware of such misconduct, or was derelict in not becoming aware of it, or that he was culpably deficient in his oversight. None of this is present here. The Court grants the motion of defendant Bishop Pilla to dismiss count 5.

{¶30} Count 6 makes no allegations against Bishop Pilla. Furthermore, as the briefs of defendants Pilla and Petro both observe, Ohio R. C. §109.24 specifically states that the Attorney General may institute proceedings at his own discretion or upon the direction of the Governor, the Senate, the House of Representatives, or the Supreme Court.<sup>5</sup> *Expressio unius est exclusio alterius*. The Common Pleas Court clearly lacks jurisdiction to order the Attorney General to institute an investigation. Count 6 must be dismissed.

#### IV. The Motions of the Remaining Defendants to Dismiss

{¶31} The docket discloses that defendant Jim Petro, Attorney General of Ohio filed his Answer on July 12, 2005 and subsequently filed a motion to dismiss on August 1, 2005, citing lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Ohio Civil Rule 12(B) specifically requires that a motion to dismiss "...be made before pleading if a further pleading is permitted." Accordingly, defendant Petro's motion to dismiss was filed out of rule. Nonetheless, in light of the Court's determination that the plaintiffs lack standing, the Court must conclude as well that it lacks subject-matter jurisdiction with respect to all defendants and all claims. Accordingly, the Court hereby dismisses the Complaint as to defendant Petro.

{¶32} Other defendants have filed what may most aptly be described as "me too" motions to dismiss. In essence these defendants rely primarily upon the argument in support of Bishop Pilla's motion that the plaintiffs lack standing. Accordingly, and for the reasons set forth *supra*, the Court grants the following motions to dismiss<sup>5</sup>:

- a. Motion of Thomas J. Kelley;
- b. Motion of Joseph H. Smith, JHS Enterprises, and Tee Sports, Inc.;
- c. Motion of Anton Zgoznic, Institutional Business Solutions (fka Monastra & Associates), Institutional Financial Advisors, and Zgoznic & Associates

{¶33} Finally, the Court notes that two named defendants have not yet been served: Wilfred Anderson, in his capacity as statutory agent for Alexander Systems, Ltd., and Jrino

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<sup>5</sup> Ohio R. C. §109.24: The attorney general shall institute and prosecute a proper action to enforce the performance of any charitable trust, and to restrain the abuse of it whenever he considers such action advisable or if directed to do so by the governor, the supreme court, the general assembly, or either house of the general assembly.

<sup>6</sup> Interestingly, a review of the Complaint discloses that—although defendants Smith and Zgoznic are named both in their individual capacities and as statutory agents for the named entities, those entities themselves are not named as defendants.

Jukic, as statutory agent for ZJ & Associates, Inc. Having determined that the plaintiffs lack standing, the Court must dismiss those defendants *sua sponte*.<sup>7</sup>

**IT IS SO ORDERED.**

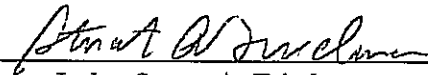


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Judge Stuart A. Friedman

Dated: September 12, 2005

**SERVICE**

Copies of the foregoing Memorandum of Opinion and Order were sent via U.S. mail to all counsel of record this date: September 12, 2005.



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Judge Stuart A. Friedman

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<sup>7</sup> Although the Complaint alleges that defendants Smith, Kelley, and Zgoznic converted Diocesan assets to, *inter alia*, Alexander Systems and ZJ, there is no allegation that Anderson or Jukic, or those entities, or indeed anyone connected to them committed any acts in furtherance of such conversion, and neither Alexander Systems nor ZJ & Associates is itself named in the Complaint as a defendant.