

<b>COURT OF APPEALS, STATE OF COLORADO</b> Colorado State Judicial Building 2 East 14 <sup>th</sup> Avenue Denver, Colorado 80203	<p style="text-align: center;">COURT USE ONLY</p> <p style="text-align: center;">Case Number 2008 CA 1828</p>
Appeal from the District Court, Boulder County, Colorado Honorable M. Gwyneth Whalen, Presiding Case Number 2007 CV 349	
<b>Plaintiffs/Appellees:</b> PRESBYTERY OF PLAINS AND PEAKS and COVENANT PRESBYTERIAN CHURCH OF BOULDER COUNTY  v.  <b>Defendants/Appellants:</b> INDIAN PEAKS COMMUNITY CHURCH and GEORGES MICHAEL HOUSSNEY	
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<b>APPELLANTS' OPENING BRIEF</b>	

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## **ISSUES PRESENTED**

1. Whether, applying neutral principles of law, property belonging to a church corporation can be subjected to a trust for the benefit of a religious denomination where the only writing establishing such trust was imposed by the beneficiary-denomination and not assented to in writing by the settlor-church corporation;

2. Whether, if a trust existed and the denomination upon ecclesiastic dissolution of the local congregation had authority to direct the use and disposition of the church's property, the denomination retained rights to *redirect* the usage of the property after the original designated purposes were abandoned; and

3. Whether a trial court adjudicating rights to real property pursuant to C.R.C.P. 105 must hear evidence on and award recovery of the value of improvements paid for by the party who is not awarded possession, as required by Rule 105(e).

## **STATEMENT OF THE CASE**

### **I. Nature, Course and Disposition.**

This is a property dispute between an independent church corporation, Indian Peaks Community Church ("IPCC"), and a religious denomination, Presbyterian



Church U.S.A. (“PCUSA”), acting through its affiliate, Presbytery of Plains and Peaks (“Presbytery”). Presbytery conveyed the property to IPCC<sup>1</sup> in 1992 and IPCC is the sole owner of record by warranty deed. ROA 381/1356.<sup>2</sup> Presbytery claims an interest in the property pursuant to an express trust under which IPCC allegedly held the property for the use and benefit of PCUSA. *See* ROA 1083/1356.

After denial of cross-motions for summary judgment, a trial was held “pursuant to Rule 105” to determine the rights and interests of the parties. Ruling at 1.<sup>3</sup> The trial court held that, after conveying the property to IPCC, Presbytery “retained an ownership interest” and that upon the formal dissolution of the “Covenant” congregation as a PCUSA church, the property “reverted to PCUSA under the trust clause in the [PCUSA] Constitution.” *Id.* at 10. The trial court excluded evidence of IPCC’s contributions to the value of the property and refused to grant relief pursuant to Rule 105(e). *See* Order entered July 8, 2008, Filing ID 20559831; Vol. II Tr. at 142:14-143:2.

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<sup>1</sup> IPCC is a non-profit corporation, formerly known as Covenant Presbyterian Church of Boulder County, and the grantee on the deed.

<sup>2</sup> Most trial exhibits are contained on the disk transmitted by the district court containing 1356 pages. Citations are designated by “ROA \_\_\_/1356.”

<sup>3</sup> The Ruling and Order entered July 23, 2008, is referred to as “Ruling.”

## **II. Statement of Facts.**

### **A. IPCC is a Legal Entity—a Corporation; Covenant is an Ecclesiastical Entity—a Particular Church of PCUSA.**

IPCC is a Colorado non-profit corporation, formed on June 29, 1992, under the name Covenant Presbyterian Church of Boulder County. ROA 787/1356, 753/1356. It changed its name to Indian Peaks Community Church on November 21, 1999, ROA 414/1356, and first reported this name change to the Secretary of State in its biennial report on July 11, 2000. ROA 776/1356. IPCC continues to exist and operate today. ROA 787/1356.

IPCC, as a corporate entity, was formed “under the law of Colorado.” *Id.* It was formed by members of Covenant Presbyterian Church (“Covenant”), a separate and distinct ecclesiastical entity, formed under the religious laws of PCUSA, chartered by PCUSA in 1983 and dissolved in January 2000. Vol. I Tr. at 92:8-20.<sup>4</sup> Covenant, as a “particular church” of the PCUSA, was subject to PCUSA’s polity as set forth in the Constitution of the Presbyterian Church (U.S.A.), including the

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<sup>4</sup> Trial was held from April 21-23, 2008, with each day’s proceedings transcribed separately. IPCC refers herein to the proceedings: on April 21, 2008, as “Vol. I Tr.” (Filing ID 22772161); on April 22, 2008, as “Vol. II Tr.” (Filing ID 23150362); and on April 23, 2008, as “Vol. III Tr.” (Filing ID 22772161).

Book of Order.<sup>5</sup> *See* Supp ROA 11/86<sup>6</sup> Gupton Tr. at 13:6-25; ROA 1078/1356, *et seq.* (ecclesiastical rules governing particular churches).

**B. The Property Was Originally Owned by Presbytery, Held in Trust for PCUSA, and Used by Covenant.**

On June 23, 1982, in anticipation of establishing Covenant as a particular church of the PCUSA, Presbytery purchased the property at issue here, then vacant land in Lafayette, Colorado, for \$30,000.00. ROA 401-403/1356.<sup>7</sup> Presbytery, also a legal entity owning the property in its corporate name (*see* ROA 796-809/1356), conveyed a trust interest for PCUSA's benefit, stating in its deed:

Purchasers covenant that the subject property shall be used exclusively for church purposes, as interpreted by the United Presbyterian Church, U.S.A. [PCUSA], and for no other purposes other than as incidental and reasonably related purposes for church activity for a period of ten years from the date of closing.

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<sup>5</sup> PCUSA's Constitution contains: (1) a Book of Confessions, comprised of theological treatises; and (2) a Book of Order, containing rules governing PCUSA-affiliated entities. *See* Vol. I Tr. at 42:18-43:2.

<sup>6</sup> The district court transmitted a supplemental disk containing 86 pages. Citations are to "Supp ROA \_\_\_/86."

<sup>7</sup> The contract and deed refer to Presbytery's and PCUSA's respective predecessors, "The Boulder Presbytery" and "United Presbyterian Church USA." IPCC briefs the facts as though the actions of the predecessors were taken by Presbytery and/or PCUSA.

ROA 383/1256.

PCUSA's Constitution contains a general trust clause, making PCUSA the beneficiary entitled to the use and benefit of all property owned by its affiliated entities:

All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).

ROA 1083/1356. Notably, Presbytery expressly limited the trust for this property to "a period of ten years." ROA 383/1256.

After Presbytery chartered Covenant as a particular church of PCUSA in 1983, Covenant's leaders (the "session," *see* ROA 1100-1107/1356) formed a corporation called Covenant Presbyterian Church of Boulder County ("Covenant 1983 Corporation"). *See* ROA 788-793/1356. This corporation's bylaws provided for conformity with the PCUSA Constitution, but were not signed. ROA 755-759/1356; *see also* Supp ROA 32/86 Gupton Tr. at 96:9-97:4. The Covenant 1983

Corporation was suspended in 1985, and dissolved on January 1, 1989. ROA 795/1356. It was never reinstated. Supp ROA 32/86 Gupton Tr. at 96:3-6.

Notwithstanding the neglect and failure of the Covenant 1983 Corporation, the Covenant session and congregation continued to operate as an ecclesiastical PCUSA church and, in 1986, a building was constructed for Covenant's use on the Presbytery's land. *See id.* 27/86, Gupton Tr. at 74:16-75:5. The building was financed partially by loans provided by PCUSA-related entities, and by one commercial loan . ROA 392/1356 (1982 loan from PCUSA for vacant land); ROA 816/1356 (loan from synod for building); ROA 822 (loan from PCUSA for building); ROA 829/1356 (commercial loan for building). Loan installments and other costs associated with the property were paid by Covenant through gifts and donations from its congregants. Supp ROA 25/86 Gupton Tr. at 66:16-67:8.

**C. The Property Was Conveyed to IPCC in 1992, Free From Any Trust for PCUSA's Benefit.**

On July 1, 1992, Presbytery voted to and did convey the property to the Covenant congregation. ROA 567/1356, 381/1356. Upon discovering that the Covenant 1983 Corporation had been dissolved, Covenant formed a new corporation, IPCC, for the purpose of receiving title to the property. Supp ROA 14-

15/86 Gupton Tr. at 25:23-26:5. IPCC's articles of incorporation did not mention PCUSA or its Constitution, except that any "distribution of assets on [IPCC's corporate] dissolution" was governed by the Book of Order. ROA 753/1356; *see also* Vol. I Tr. at 86:1-7. IPCC had no bylaws, although one member of the Covenant session testified that it continued to abide by the articles and unsigned bylaws of the Covenant 1983 Corporation. Supp ROA 15/86 Gupton Tr. at 28:24-29:5. Other members of the session testified that they never saw the Covenant 1983 Corporation's articles or bylaws. Vol. II Tr. at 254:21-255:2.

In any event, IPCC was formed and Presbytery conveyed the property to it by unrestricted warranty deed. ROA 381/1356. Presbytery's official minutes do not mention the expiration of the ten-year trust that Presbytery had previously imposed on the property, nor does the record reflect any intent to impose a new trust. To the contrary, Presbytery conveyed the property and improvements to IPCC by a deed warranting that title to the property is free from unrecorded encumbrances. *Id.* The deed does not refer to PCUSA or its Constitution, does not contain any reverter clause, does not state or imply that Presbytery retained any interest in the property, and does not contain any language that might be construed as evidencing an intent to convey the property into a trust for the use and benefit of PCUSA. *Id.*; *see also*

Vol. I. Tr. at 98:18-99:2. Nor was any separate trust instrument executed. Vol. II Tr. at 255:9-17; *see also* Ruling at 5 (“Covenant never signed a document conveying a trust interest in the property to the Presbytery after July 1, 1992”).

IPCC thereafter paid for the property and improvements, including the original loan by which Presbytery’s acquisition of vacant land was financed. ROA 841/1356. IPCC paid off the loans from PCUSA-related entities. *See, e.g.*, ROA 844-846/1356. IPCC refinanced and continued to service the commercial loan. ROA 849-855/1356; *see also* Vol. III Tr. at 17:9-16. IPCC also paid for virtually all of the insurance, maintenance, and other expenses associated with the property. Supp ROA 25, 26, 28/86 Gupton Tr. at 66:16-19, 71:13-21, 80:8-14.

**D. Presbytery Voluntarily Dissolved Relations Between PCUSA and IPCC/Covenant as of January 31, 2000.**

In 1999, IPCC/Covenant was struggling as a particular church of PCUSA. Vol. II Tr. at 80:8-18, 260:22-261:10. Its Presbyterian minister had left two years earlier, and no replacement had been found or provided by Presbytery. Vol. II Tr. at 80:14-22, 256:7-15; ROA 404/1356. Weekend services were attended by only about a dozen congregants. *Id.*; Vol. II Tr. at 87:1-16, 260:22-24. It could barely meet its financial obligations and was on the verge of closing its doors. Vol. II Tr.

at 261:3-10. In the absence of a minister, IPCC/Covenant's leadership relied on interim or visiting pastors to conduct Sunday services. Vol. II Tr. at 261:13-17.

One such visiting pastor was Georges Housney, who visited in March 1999 to report on missions work that had been supported by IPCC. Vol. II Tr. at 82:4-15, 261:22-262:10. IPCC/Covenant's session invited him to preach more regularly, which he did. *Id.* at 83:4-8, 262:9-10. In May 1999, Housney attended a meeting of the session and shared his vision and ideas for rebuilding the congregation. ROA 404/1356. In June 1999, the session elected him as moderator, essentially turning over leadership of IPCC/Covenant to him. ROA 407/1356; Vol. II Tr. at 90:5-20; Vol. III Tr. at 3:15-21.

Presbytery initially objected because Housney, though ordained as a nondenominational minister, was not ordained as a PCUSA pastor, and therefore was ineligible to moderate the session of the ecclesiastical entity. ROA 996/1356. Presbytery sent a representative to IPCC/Covenant's next session meeting in July 1999 who "stressed that the denomination has to follow the book of order." ROA 409/1356; *see also* Vol. II Tr. at 91:24-92:2. Presbytery assigned its representative to replace Housney in the role of moderator, which was interpreted by IPCC/Covenant's session as "put[ting] the brakes on their plans for a fresh launch,"



and caused IPCC/Covenant leaders to be “hurt, indignant, and visibly upset, with flashes of real anger.” ROA 997/1356; Vol. III Tr. at 4:16-5:9. Presbytery eventually cooperated with Houssey, however, labeled him an “organizing evangelist” to clarify that he was not a PCUSA-ordained minister, and committed to validate his role at IPCC/Covenant and his relationship with Presbytery. ROA 410, 411/1356; *see also* Vol. II Tr. at 94:3-95:3.

In the meantime, under Pastor Houssey’s leadership, IPCC/Covenant’s congregation was revitalized. *See* Vol. II Tr. at 87:19-88:10, Vol. III Tr. at 2:22-3:6. Presbytery formed a Covenant New Church Development Task Force, which voted unanimously to “support the program of vitality and enthusiasm that has emerged at Lafayette since [Houssey’s] arrival.” ROA 1003/1356. With Presbytery’s blessing, IPCC/Covenant changed its name to Indian Peaks Community Church. ROA 414/1356; Vol. III Tr. at 9:10-12. Even Presbytery agreed that the name change was required to avoid “a considerable negative connotation for the residents in the area,” and to exemplify that a “fresh start” had occurred. ROA 628/1356.

By October 1999, the parties had decided to investigate the advisability of dissolving their formal bonds and designating the site as a “new church

development” project. *See* ROA 579/1356 (establishing a Lafayette Administrative Commission to act on Presbytery’s behalf for this purpose). The advantage of doing so would be that Pastor Houssney could continue his leadership and revitalization of the church without being ordained by PCUSA or otherwise subject to the Book of Order. Vol. III Tr. at 6:13-15; *see also* Vol. I Tr. at 185:5-20. As a new church development project, IPCC could qualify for funding and financial support not otherwise available. Vol. II Tr. at 14:13-21; *see also* Vol. III Tr. at 6:15-18; Vol. II Tr. at 101:16-102:2 (IPCC expected to receive financial support after the dissolution). When the church became viable such that Pastor Houssney’s leadership was no longer required, it could re-affiliate with PCUSA under PCUSA’s normal procedures for new church development projects. Vol. I Tr. at 174:5-8; Vol. II Tr. at 104:9-105:8. 106:8-18. Significantly, it was understood from the beginning that “[i]f the decision is made to dissolve Covenant, the members *and facilities* would be incorporated into the new church.” Supp ROA 1/86 (emphasis added).

As the Presbytery’s Lafayette Administrative Commission (“LAC”) assessed the financial needs of the church, it noted that, although Houssney was attempting to remedy cash flow problems, “the ‘till’ is almost empty,” and help from the PCUSA synod and other sources was “sorely needed.” ROA 729/1356. The LAC noted that

PCUSA sources of funding were available for new church development projects.

*Id.*; *see also* Vol. I tr. at 14:13-21. Based on this assessment, the LAC decided to propose to the Lafayette congregation that they “dissolve the relationship with the Presbytery . . . while preserving the existence of the Covenant Corporation.” ROA 729/1356. The LAC’s formal recommendation to the congregation was:

1. The congregation agree to move toward dissolution of the congregation no later than January 31, 2000
  2. The congregation agree to work with the Commission in clarifying the status and objectives of the Covenant Corporation
  3. The congregation agree to participate in the new church development process
- This recommendation assumes that the corporation will continue to exist in its present form...*

ROA 731/1356.

After recommending that the local congregation request formal dissolution of its relationship with PCUSA, the LAC also made certain recommendations to Presbytery. First, the LAC decided to ask Presbytery to approve Pastor Housney’s role in “charting the course” for the new church development project. ROA 732/1356. Second, it decided to ask Presbytery to take the following formal actions:

Approve the action of the Lafayette Administrative Commission in accepting the dissolution of the Congregation of Lafayette Covenant Church;  
Affirm the location of north Lafayette, Colorado, as a site for new church development;  
Authorize the Lafayette Administrative Commission to assume any or all powers and responsibilities of a session for the benefit and ministry of the new congregation.

ROA 734/1356.

For a time, things went as planned. IPCC/Covenant's session passed a resolution to recommend to the congregation that it formally request dissolution from PCUSA, agree to work with the LAC in clarifying the status and obligations of the corporation "prior to the dissolution," and commit to cooperating with the LAC in launching a new church development project. ROA 415/1356. The recommendation was accepted by the congregation. Vol. II Tr. at 97:13-15.

Presbytery, for its part, also formally voted to approve the action of the LAC in dissolving the relationship between Covenant and PCUSA, effective as of January 31, 2000. ROA 627/1356. Presbytery formally "affirm[ed] the location of Lafayette, Colorado as a site for new church development." *Id.* Presbytery formally commended the work of Pastor Houssney from June 1999 to January 31, 2000, and committed to "support his continuing work with the New Church

Development in the Lafayette/East Boulder County area under the authority and supervision of the [Lafayette] Administrative Commission.” ROA 623/1356.

Presbytery clarified that the LAC’s authority to oversee the new church development process was to be exercised “for the benefit and ministry of the new congregation.” ROA 627/1356. These actions were taken with the understanding, as reflected in the formal minutes, that “the corporation will continue to exist in its present form.” ROA 628/1356.

**E. Presbytery Directed That the Property Remain With IPCC, and be Used for a New Church Development Project.**

Although Presbytery voluntarily dissolved the relationship between Covenant and PCUSA with full knowledge that the IPCC corporation held title to the property and would continue to exist, Presbytery did nothing to manifest an intent to own or control IPCC’s property after the dissolution. The Book of Order contains a specific provision addressing disposition of property held in trust for PCUSA upon dissolution of a particular church:

Whenever a particular church is formally dissolved by the presbytery . . . such property as it may have shall be held, used, and applied for such uses, purposes, and trusts as the presbytery may direct, limit, and appoint, or such property may be sold or disposed of as presbytery may direct, in conformity with the Constitution of the Presbyterian Church (U.S.A.).

ROA 1083/1356.

Here, Presbytery did not direct that the property be sold, conveyed to Presbytery, or conveyed to any trust. *See* Vol. I Tr. at 119:6-10, 121:13-17; Vol. II Tr. at 107:5-22; Vol. III Tr. at 12:1-8. To the contrary, it directed that the property remain titled in the IPCC corporation, which it acknowledged would continue to exist independently after the dissolution of Covenant, with the prior understanding that upon dissolution of the congregation's affiliation with PCUSA, the "facilities would be incorporated into the new church." Supp ROA 1/86; *see also* ROA 628/1356.

At the Presbytery meeting in which Covenant's dissolution from PCUSA was approved, the LAC's moderator explained that Presbytery had the option to "sell that property, make a lot of money, move the location" for new church development to another site. ROA 269/1356 Presbytery Mtg. Tr. at 5:16-20. But, alternatively, there were good reasons to pursue a new church development on the existing site. *Id.* at 5:20-6:11. These reasons included that IPCC, under Housney's leadership, had developed a congregation that could pay for the property, and "[i]f we were to somehow lose that congregation that is currently worshipping there under George

Houssney’s leadership, all of us would have to start paying the bills.” *Id.* at 6:6-9; *see also* Vol. I Tr. at 177:1-7. Upon the LAC’s recommendation, Presbytery decided not to sell the property, but rather directed that the property shall be held by IPCC and used for a new church development project in the Lafayette/East Boulder County area, led by Pastor Houssney, with further express directions that the new church development project must be pursued “for the benefit and ministry of the new congregation.” ROA 623, 627/1356.

After the dissolution, IPCC had no affiliation with PCUSA, apart from its commitment to cooperate in the new church development effort, and IPCC operated independently of PCUSA and its Book of Order: it governed itself through a “Leadership Team” rather than a session; it abandoned the requirements that its leaders be PCUSA-ordained ministers, deacons or elders; it allowed non-Presbyterian members into the congregation; it withdrew from participating in Presbytery meetings; and it made no contributions or dues payments to Presbytery or PCUSA. Vol. II Tr. at 118:4-16, 120:19-121:7; Vol. III Tr. at 13:1-14:3. IPCC also accepted full responsibility for the property and its associated obligations, including: paying off all mortgages owed to PCUSA-related entities, Vol. III Tr. at 17:9-16; refinancing and paying the commercial mortgage, *id.*; leasing the property

to third parties without Presbytery's knowledge or consent; repairing and maintaining the property; and insuring the property. *See generally* Vol. II Tr. at 133:18-142:13; *see also* Vol. III Tr. at 16:15-20 (Presbytery did not contribute towards mortgages or maintenance of property).

**F. Presbytery Abandoned the New Church Development Project, and Did Not Retain any Right to Redirect the Usage or Disposition of the Property.**

Although it operated independently, IPCC cooperated with Presbytery and the LAC in the new church development project. Vol. II Tr. at 117:23-118:3. Within two months, however, on March 10, 2000, Presbytery “decided to adopt a more structured and better organized approach to new church development.” ROA 1012/1356. Under this new approach, Presbytery decided to dissolve the LAC, and to form a new “Lafayette area committee” along with other “area committee[s]” that would assess the viability of new church development sites in locations other than Lafayette. *Id.* Presbytery later informed IPCC it was abandoning the Lafayette site as a new church development project. *See* Vol. III Tr. at 14:4-22; *see also* ROA 1014-15/1356. Pastor Houssney objected because “[h]e rejects outright any suggestion that the duty of the LAC was simply to dissolve the Laf[ayette] congregation” and then “just disappear;” [h]e believes that the present location of



the church in Lafayette is the only place to do the NCD [new church development];” he complained that the IPCC congregation “would be cheated if the Presbytery now dropped them, went back to the drawing board and decided to do the NCD somewhere else;” and he urged that “it is too late to start over.” *Id.*

Notwithstanding IPCC’s objections, Presbytery dissolved the LAC because its New Church Development Task Force decided to move the focus of development from Lafayette to the south Fort Collins area. ROA 679/1356; *see also* ROA 1017/1356 (reiterating that the LAC was dissolved because Presbytery “withdrew its designation of the Lafayette area as its priority location for a Presbytery NCD and decided to move its efforts to south Fort Collins, in spite of the work that had been done in Lafayette in the previous months”); Vol. I Tr. at 116:21-117:2; Vol. II Tr. at 62:11-18. At the same time, Presbytery asserted that its “Trustees Council” had somehow become trustees for the IPCC property, and that it was engaged in negotiation of financial arrangements for IPCC’s continued use of the property. ROA 679/1356. There is no record of the creation of any trust subsequent to the dissolution of Covenant, apart from the subjective belief of individuals associated with PCUSA that PCUSA always owns the property of its particular churches, and ownership reverts when the congregation is dissolved. *See,*

*e.g.*, Supp ROA 12-13/86 Gupton Tr. at 17:14-18:2. Moreover, no agreements or other formal financial arrangements for IPCC's use of the property were actually negotiated or made. Vol. II Tr. at 1-5; *see also* Vol. I Tr. at 73:25-74:4.

**G. IPCC Attempted but Failed to Rejoin PCUSA, and This Dispute Arose Over Ownership and Use of the Property.**

In April 2000, after learning that Presbytery had abandoned the new church development project, IPCC's Leadership Team attempted to rejoin PCUSA in order to obtain financial support. Vol. II Tr. at 144:25-145:8. This attempt failed to secure the consent of the congregation, which "decided to go independent." ROA 937/1356. Discussions about rejoining PCUSA continued until September 2003, when the IPCC congregation again voted overwhelmingly to remain nondenominational. ROA 941/1356; Vol. II tr. at 154:25-155:6. In the course of discussions about rejoining PCUSA, IPCC members debated the validity of Presbytery's claim to own the property, asking questions like "are we currently paying rent or mortgage?" ROA 433/1356. In some cases, IPCC members expressed a belief that "we are technically now renting the property," ROA

109/1356, or the building “belongs to Presbyterians.” *See* Vol. II Tr. at 225:9-25.<sup>8</sup>

At other times, members expressed the opposite view: “we have changed our name, but we have not changed our ability to be a property owning entity . . . [and we] remain as the rightful owner of the property.” ROA 955/1356; *see also* Vol. II Tr. at 154:6-11.

After IPCC finally decided to remain independent of PCUSA, Presbytery informed it that “the future of the property was going to be discussed in the February 2004 [Presbytery] meeting.” ROA 965/1356. Pastor Houssney wrote to Presbytery, observing that:

1. We did not choose to leave the denomination. I came to help a Presbyterian Church. . . . I was lending a hand to a struggling church without understanding what was being discussed behind the scenes.
2. We fully cooperated with the various committees representing the Presbytery. We never tried to challenge any decisions concerning our church.
3. Due to our identity as a nondenominational church, we attracted parishioners who were disinclined toward joining any particular denomination. This made rejoining the [PCUSA] denomination more difficult.
- 3.[sic] The congregation has sacrificially maintained the

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<sup>8</sup> This testimony refers to Exhibit 78 at 4, which the district court clerk inadvertently omitted from the record on appeal because she scanned only one side of a two-sided document. *See* ROA 118-120.

property and paid up all its financial obligations including one private loan from a local bank.

*Id.* Houssey further expressed deep concern “that any action by Presbytery that would remove us from the facility would deal a devastating blow to this congregation.” *Id.* Thus, to settle any dispute about the property, *see* Vol. II Tr. at 158:22-159:4, 161:3-10, IPCC requested that “the Presbytery prayerfully consider one of these options:”

1. That IPCC continues to use the property as we have been for a specified period of time past the burning of the debt, which our small congregation has struggled to pay for these years.
2. That Presbytery graciously donate the property to IPCC so that we can develop it and have the stability necessary for growth.
3. That Presbytery and IPCC negotiate other options including allowing us to buy the property at a reasonable price based on our ability to run a capital campaign to mortgage the property with an independent lender.

ROA 965/1356.

IPCC later learned that Presbytery “tabled our letter” and “did not discuss it at their [February 2004] meeting.” ROA 446/1356. In May 2004, a lawyer representing Presbytery telephoned Pastor Houssey regarding whether IPCC would sign a lease. ROA 454/1356; *see also* Vol. I. Tr. at 75:18-76:2. IPCC refused, and

the matter was dropped for three years. *See id.* at 76:22-78:11, Vol. II Tr. at 157:6-12. In April 2007, Presbytery again requested a lease and filed this action. ROA 1020-21/1356; Complaint filed April 17, 2007, Filing ID 14513225.

### **SUMMARY OF THE ARGUMENT**

Although religious polity permits PCUSA to unilaterally create a trust interest in real property for its own benefit, to be valid under neutral principles of law, a trust interest must be conveyed in writing according to the manifest intent of the settlor-church corporation. The property at issue here was not conveyed in writing to any valid trust, and belongs to IPCC pursuant to an unrestricted warranty deed granted by Presbytery.

If the property was held in trust, that trust was governed by express language in the PCUSA Constitution providing only for PCUSA's "use and benefit" of the property, not "ownership" or "reverter." Additionally, upon dissolving a particular church, PCUSA's Constitution provides only the limited right to direct the usage or disposition of property, not to own it. Upon dissolving Covenant, Presbytery directed that the property would remain titled to IPCC and be used for new church development. PCUSA relinquished, and the Colorado and United States Constitutions prohibited, any further right to redirect the usage or disposition of the

property after PCUSA abandoned the new church development project.

If ownership or possession of the property was properly awarded to Presbytery, IPCC should have been awarded compensation for its contributions to the value of the property, made in good faith and under color of title, pursuant to C.R.C.P. 105(e). The trial court erroneously excluded evidence of such contributions, and if the property is not awarded to IPCC, a new trial should be granted to determine the amount of IPCC's recoverable contributions.

#### **ARGUMENT**

#### **I. IPCC's Property Was Not Conveyed Into A Valid Trust For PCUSA's Benefit.**

##### **A. Standard of Review.**

The application of legal standards for resolving church property disputes, especially in determining whether an express trust has been imposed upon local church property, is a question of law reviewed *de novo*. See *Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85 (Colo. 1985), *cert. denied*, 472 U.S. 826 (1986). Interpretation of trust instruments is reviewed *de novo*. *The Denver Foundation v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1122 (Colo. 2007). Determination of whether a valid trust interest was created, involving interpretation of deeds and

statutes, also is reviewed *de novo*. *In re Estate of Kiser*, 72 P.3d 425, 428 (Colo. App. 2003).

**B. The Trial Court Erred by Applying Polity Theory to Establish a Trust, Rather Than Applying Neutral Principles of Law.**

Colorado’s leading case for determining church property disputes is *Bishop and Diocese of Colorado v. Mote*. This case is distinguishable from *Mote* in that it does not involve a church in schism—where one faction of a congregation attempts to secede from the denomination and take the property with it—but instead involves a congregation whose relationship with the denomination was voluntarily dissolved. Nevertheless, *Mote* is instructive, particularly in rejecting “polity” theory, and requiring courts to analyze church property disputes by applying neutral principles of law. *Mote*, 716 P.2d at 91-97.

The polity approach argues that local congregations are organized and operated as subordinate units of a hierarchical organization, in which the canons and rules of the general church, based on ecclesiastical authority, can supersede disposition of church property under state laws. *Id.* at 92. This approach was sanctioned by the United States Supreme Court in the landmark case of *Watson v. Jones*, 80 U.S. 679 (1871), which involved a local schism in the Presbyterian

church. The United States Supreme Court ruled that civil courts had no business interfering in the rule of any particular religious denomination, and allowed the national denomination to control the dispute under its own ecclesiastical rules. *Id.* at 726-27.

The neutral principles approach began to take shape in 1969, when the United States Supreme Court decided the case of *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), involving a dispute over whether the national denomination had abandoned or departed from the tenets of faith that existed at the time the local church joined the national organization. The Supreme Court recognized that to resolve this dispute, it would have to decide a purely ecclesiastical question, which church subscribes to the true faith. Justice Brennan reasoned that civil courts cannot make such decisions without violating the United States Constitution's Freedom of Establishment clause. He ruled that there are "neutral principles of law" for use in property disputes that can be applied without establishing a church's faith. *Id.* at 606.

In yet another Presbyterian church property dispute, *Jones v. Wolf*, 443 U.S. 595 (1979), the United States Supreme Court held that a State could adopt either the polity approach or the neutral principles approach, as long as courts do not consider



doctrinal matters. *Id.* at 602. By that time, however, Colorado courts already had rejected polity theory, and adopted the neutral principles approach, wherein courts are directed to look at formal title as documented by deeds and other corporate records, and to apply common law trust theories to determine whether property is held for the benefit of a national organization. *Bernson v. Koch*, 534 P.2d 334 (Colo. App. 1975); *Dickey v. Snodgrass*, 673 P.2d 51 (Colo. App. 1983). The original Colorado authority, a 1908 Colorado Supreme Court case, also had laid the foundation for applying neutral principles. In *Horst v. Traudt*, 96 P. 259 (Colo. 1908), the Colorado Supreme Court ruled that religious societies that incorporate themselves under the laws of the State of Colorado “become thereby civil corporations, as distinguished from ecclesiastical corporations.” *Id.* at 259. The Court reasoned that religious vestrymen (by whatever name they are known – e.g., session) have powers and duties similar to corporate officers and directors, and members of the congregation are like shareholders in a corporation. *Id.* at 260.

In *Mote*, the Colorado Supreme Court expressly rejected the polity approach and adopted the neutral principles approach. *Mote*, 716 P.2d at 91-97. Applying neutral principles to a case involving congregational schism, the Supreme Court found that the local church’s articles of incorporation and bylaws, together with the

denomination's constitution, established a trust on the local church's property for the benefit of the denomination. *Id.* at 108.

The trial court here, while paying lip service to *Mote*'s requirement for application of neutral principles of law, *see* Ruling at 9, actually applied a polity approach. The trial court acknowledged that after receiving a warranty deed for the property, IPCC<sup>9</sup> "never signed a document conveying a trust interest in the property to the Presbytery." Ruling at 5. Notwithstanding this express finding of inadequacy of any express trust under Colorado law (as more fully discussed below), the trial court also ruled that a signed writing was unnecessary because Covenant, as a particular church, was "the local manifestation of the [PCUSA]," *id.* at 2, the PCUSA Constitution imposes a trust on "all property" of a local church, *id.* at 3, the PCUSA General Assembly's interpretation of the Book of Order "shall be binding," *id.*, two members of Covenant's session subjectively believed that PCUSA "owns the property" or it "would go back to the PCUSA" on dissolution, and because the right of the Presbytery to retain an interest in the property "was expressly provided

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<sup>9</sup> The trial court did not distinguish between the corporate entity and the ecclesiastical entity, and referred to the corporation and the ecclesiastical entity interchangeably as "Covenant."

for in the [PCUSA] Constitution,” *id.* at 5. The trial court thus did exactly what the Supreme Court has forbidden; it elevated ecclesiastical authority over state law.

**C. Applying Neutral Principles of Law, There Was No Valid Conveyance of a Trust Interest In or After 1992.**

Although Presbyterian polity permits the creation of a trust by the beneficiary (PCUSA) without any signed writing by the settlor (a particular church), *see* Vol. I Tr. at 103:1-17, neutral principles of law do not permit the beneficiary alone to create a trust. Under Colorado law, trusts are created when the settlor objectively manifests an intention to create a trust relationship. *In re Estate of Daniels*, 665 P.2d 594, 595 (Colo. 1983); Restatement (Third) of Trusts §13. This intent must be expressed in a manner that is “clear, explicit, definite, unequivocal, and unambiguous.” *Mote*, 716 P.2d at 100; *Morgan v. Wright*, 399 P.2d 788, 790-91 (Colo. 1965).

When a trust involves an interest in real property, the trust conveyance must be in writing. C.R.S. § 38-10-106 (no interest in land “nor any trust or power over or concerning lands” shall be created or declared unless “by deed or conveyance in writing”); *Armor v. Spalding*, 23 P. 789, 790 (Colo. 1890) (“[t]he conditions of the alleged trust not being written, its enforcement is inhibited by the statute of frauds”);

*Learned v. Tritch*, 6 Colo. 432, 439-40, 1882 WL 230 (Colo. 1882) (express trusts relating to lands “must be manifested and proved by writing”). A written trust must be signed by the settlor and must identify the trust property, the beneficiaries and the purposes of the trust. Restatement (Third) of Trusts § 22(1)(b). Where a trust involving real property is not in writing, “the declarant holds the property free of enforceable trust.” Restatement (Third) of Trusts § 24(4).

IPCC did not create any enforceable trust because there is no written conveyance of a trust interest. Presbytery conveyed the property to IPCC in 1992 by virtue of an unreserved warranty deed. Under neutral principles of Colorado law, a grantor who warrants the title of property expressly covenants that as of the date of transfer, the conveyance is in fee simple “free and clear from all encumbrances, except as stated in the instrument.” C.R.S. § 38-30-113(2)(b). No trust or other restrictions are stated in IPCC’s warranty deed. *See* ROA 381/1356. Thus, the express trust alleged by Presbytery would have had to be created after the conveyance by warranty deed in 1992.

However, the trial court correctly found that “Covenant never signed a document conveying a trust interest in the property to the Presbytery after July 1, 1992.” Ruling at 5. Thus, there is no writing objectively manifesting an intent by

the alleged settlor, IPCC, to create a trust whereby its property was held for the use and benefit of PCUSA. Even if the trial court was correct in finding that members of Covenant's session subjectively believed the property was owned by or could revert to Presbytery, such subjective beliefs are irrelevant in the absence of an objective manifestation of intent to create a trust. *See In re Estate of Daniels*, 665 P.2d at 595 ("settlor must manifest such intent by objective expressions . . . and the settlor's subjective thoughts and beliefs are not relevant").

**D. IPCC Had No Articles of Incorporation or Bylaws That Created a Trust Interest.**

In *Mote*, the Supreme Court held that a local church's articles of incorporation and bylaws, in conjunction with a religious denomination's constitution, could combine to make up the required writing to establish a trust interest. *See Mote*, 716 P.2d at 104. The trial court here also referred to "Covenant's articles of incorporation and bylaws" as conveying a trust interest in the property. Ruling at 5. The trial court erred. The articles of incorporation and bylaws presented in this case do not convey a trust interest, much less a trust interest that is "clear, explicit, definite, unequivocal, and unambiguous," as required by *Mote*, 716 P.2d at 100. *See also Morgan v. Wright*, 399 P.2d 788, 790-91

(Colo. 1965); *In re Estate of Granberry*, 30 Colo.App. 590, 595, 498 P.2d 960, 963 (1972) (express trust must be based on “clear and convincing evidence”).

*Mote*’s facts are distinguishable. The articles of incorporation at issue in *Mote* expressly provided: that the purpose of the local church is “to administer the temporalities [including real property] of the Protestant Episcopal Church;” that the local corporation was barred from incurring indebtedness which might alienate or encumber church property without the consent of the Diocese; and that the local church “does hereby expressly accede to all the provisions of the constitution and canons adopted by the . . . Protestant Episcopal Church.” *Mote*, 716 P.2d at 104. In *Mote*, the local church’s bylaws also expressly acceded to the constitution and canons of the general denomination. *Id.* at 105.

Here, IPCC’s articles of incorporation contain no such provisions—they state only that “Provisions regarding the distribution of assets on dissolution [of the corporation] are: set forth in the Bylaws and the Presbyterian Church USA ‘Book of Order.’” ROA 753/1356. IPCC’s corporate existence has not been dissolved, so even this limited trust provision cannot have been triggered. Nothing states that IPCC’s property will be held for the use and benefit of the PCUSA, nor do the articles provide that IPCC accedes generally to the PCUSA Constitution. IPCC had

no bylaws. No other trust instrument was executed. There simply is no document by which IPCC manifested its intent to be bound by the trust clause in the PCUSA Book of Order.

Presbytery argued at trial, and presumably will argue here, that IPCC is bound by the articles of incorporation and bylaws of the Covenant 1983 Corporation. Under neutral principles of law, however, that entity is separate and distinct, formed in 1983 and permanently dissolved in 1989. *See* ROA 795/1356. This prior corporation had articles of incorporation that: provided for general subscription to PCUSA “customs and usages,” ROA 789/1356 art. II; stated its officers were governed by PCUSA “guidelines,” *id.* art IV; and explicitly prohibited leasing, selling or mortgaging its real property except with permission from the Presbytery, *id.* art. VI. These provisions are insufficient to create a trust over the property. They also are inapplicable because: (1) the Covenant 1983 Corporation never owned any real property, and when IPCC was formed for the purpose of receiving the specific property at issue here, Covenant’s session filed *different* articles of incorporation; and (2) the IPCC corporation, as a legal entity, should be bound only by its own articles of incorporation, not those of a distinct and nonexistent corporation.

The 1983 corporation's bylaws were *unsigned*, and thus could not create a valid trust interest in land, even when they were being used by the 1983 corporation. *See* ROA 755-759/1356. Moreover, while the unsigned bylaws generally subscribe to the PCUSA Constitution, they explicitly grant the congregation authority to function under the laws of the State of Colorado “in *addition* to serving its regular function as provided in the [PCUSA Constitution].” ROA 755/1356 art. I § 3 (emphasis added). Thus, the congregation could own real property either within its authority under the PCUSA Constitution or its authority under the laws of Colorado. *Id.* art. II § C, art. I § 3. To the extent PCUSA polity required property to be held by members of the session as “Trustees,” *see id.* art. II § C, that polity was not followed; the property was not held by any trustees, it was held by the corporation in its own name, free from any trust.

More importantly, even if the Covenant 1983 Corporation's articles of incorporation and unsigned bylaws could be binding on IPCC, they could not be interpreted as conveying a valid trust interest here because they do not identify the subject property and thus run afoul of legal requirements. *See* Restatement (Third) of Trusts § 22(1)(b) (requiring identification of the trust property); *see also Granberry*, 30 Colo.App. at 596, 498 P.2d at 963 (trust document must contain an



“identifiable trust res”). Indeed, because the Covenant 1983 Corporation’s articles of incorporation and bylaws predate IPCC’s acquisition of the subject property, any trust created by those documents did not include the subject property. If they did intend to include later-acquired property, such trust was extinguished when the property was conveyed from Presbytery to IPCC by warranty deed, free and clear of encumbrances. *See* C.R.S. § 38-30-113(2)(b). Thus, the trial court’s ruling that no trust document was executed after July 1, 1992, still is dispositive, regardless of whether the Covenant 1983 Corporation’s articles of incorporation or bylaws provided for a general trust over IPCC’s property. The property at issue here was not conveyed to any trust for the use and benefit of PCUSA.

**II. Assuming a Trust Existed, Presbytery Directed Upon Dissolution of Covenant That the Property Would Remain With IPCC, and Presbytery Relinquished Any Further Rights and Interests in the Property.**

**A. Standard of Review.**

Interpretation of trust instruments is reviewed *de novo*. *The Denver Foundation*, 163 P.3d at 1122. Application of a constitutional standard is subject to *de novo* review on appeal. *People v. District Court, City and County of Denver*, 953 P.2d 184, 187 n.4 (Colo. 1998).

**B. Presbytery Had No Ownership or Reversionary Interest.**

Because there was no valid trust, and because the IPCC corporation was not dissolved—thus triggering the Book of Order provision in its articles of incorporation, Presbytery has no interest in IPCC’s property. Assuming *arguendo* that there was a valid trust, and that the Book of Order controlled the disposition of property upon the ecclesiastical dissolution of Covenant, Presbytery still could not have an *ownership* or *reversionary* interest. The trial court erroneously ruled that:

[A]lthough the Presbytery had conveyed the Property to Covenant by warranty deed in 1992, the Presbytery retained an ownership interest in the Property under the unambiguous terms of its Constitution. When the Presbytery dissolved Covenant, the Constitution gave ownership of the Property to the Presbytery. The Property reverted to PCUSA under the trust clause in the Constitution.

Ruling at 10.

The PCUSA trust clause, if applicable, only provides that property owned by a particular church corporation is held in trust for the “use and benefit” of PCUSA. ROA 1083/1356. It does not provide for an ownership interest, or a reverter. Thus, the property is still *owned* by the corporation, and the only question is which group may use and enjoy the benefits of the property. *See Mote*, 716 P.2d at 90

(acknowledging that there was no dispute that the local church corporation held legal title the property, but only a dispute about which group “is entitled to possess and enjoy the church property”). Presumably, if the trust clause applied, IPCC retained rights not inconsistent with the uses and benefits required by PCUSA. For example, IPCC retained rights to use the property for its own church services at times not used by PCUSA, and for other purposes not inconsistent with PCUSA interests.

**C. Presbytery Directed That the Property Would Remain Titled in IPCC and Used For IPCC’s Benefit After the Dissolution of Covenant.**

If a trust existed and PCUSA’s Constitution applied, then upon the dissolution of Covenant as a particular church of PCUSA, Presbytery had only the limited rights set forth in the Book of Order provision for “Property of Church Dissolved or Extinct,” ROA 1083/1356. That provision does not provide for automatic ownership or reverter. It provides only that the property shall be sold, applied to specific uses, or otherwise disposed of “as the presbytery may direct.”

*Id.*

Here, Presbytery did not direct that the property be sold; it did not direct that the property be conveyed back to Presbytery or to PCUSA; it did not direct that the

property be held in trust for PCUSA's benefit. Presbytery directed that the property remain with IPCC, and that it be used for a new church development project under Pastor Houssney's leadership. This new church development project was to be funded and overseen by Presbytery's LAC, but the LAC was expressly directed to administer the project "for the benefit and ministry of the new church," not for PCUSA's benefit. ROA 627/1356.

Presbytery subsequently withdrew its new church development plan and dissolved the LAC, thereby abandoning its directive. At that point, it relinquished any further interest it had in the property. Trusts are deemed terminated when their purposes expire. Restatement (Third) of Trusts § 61. Presbytery did not retain any right to redirect the usage of the property after its original directive was abandoned and terminated.

**D. The United States and Colorado Constitutions Prohibit Imposition of Book of Order Provisions Against IPCC and Its Property After January 31, 2000.**

Nor can Presbytery claim any right under its Book of Order to revive its authority to direct the disposition of the property at issue here. After January 31, 2000, IPCC was independent and even Presbytery's own representatives acknowledged that the Book of Order no longer applied to IPCC or its property.

Vol. I Tr. at 192:20-194:10. The United States and Colorado Constitutions prohibit enforcement of the PCUSA trust provisions or any other part of Book of Order against IPCC and its property after Covenant was dissolved and IPCC began operating independently as a nondenominational church.

The Establishment Clause of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. 1. The United States and Colorado Supreme Courts both have recognized that the “clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *State of Colorado v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013, 1019 (Colo. 1995) quoting *Alleghany County v. American Civil Liberties Union*, 492 U.S. 573, 605 (1989). The law must be applied in a manner that “neither enhances nor inhibits religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Establishment Clause, and the framework for reviewing constitutionality set forth in *Lemon*, are binding on the States, including Colorado, by virtue of the Fourteenth Amendment to the United States Constitution. *Freedom from Religion Foundation*, 898 P.2d at 1019, 1021.

Colorado’s Constitution contains religious freedom and preference clauses

that “are considerably more specific than the Establishment Clause of the First Amendment.” *Conrad v. City and County of Denver*, 656 P.2d 662, 670 (Colo. 1983). The Colorado Constitution unambiguously provides that “No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.” Colo. Const. art. II § 4. So specific is the Colorado Constitution’s proscription against preferential treatment of one religious denomination over another, that the strict scrutiny analysis required under the Establishment Clause, *see Larson*, 456 U.S. at 246, was deemed unnecessary in Colorado—“Colorado’s preference clause is clear. . . [it] flatly prohibits any preferential treatment.” *Conrad*, 656 P.2d at 672.

Thus, even if Presbytery succeeds in demonstrating that there was a trust prior to January 31, 2000, it may not apply the Book of Order against IPCC afterwards. Since January 31, 2000, IPCC has been independent and does not support PCUSA. Any decision by this Court enforcing PCUSA polity against IPCC without its consent would express a preference for PCUSA and would compel IPCC to support a religious denomination against its will. Any such decision would violate the United States and Colorado Constitutions.

**III. If the Property is Awarded to Presbytery, IPCC's Contributions to the Value of Improvements Should be Reimbursed Pursuant to Rule 105(e), and the Trial Court Erred in Excluding Evidence of Such Contributions.**

**A. Standard of Review and Preservation of the Issue.**

A district court's exclusion of evidence is reviewed for abuse of discretion. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000). To preserve an objection to the exclusion of evidence, a party must make an offer of proof demonstrating the relevance and admissibility of the evidence. *Vu v. Fouts*, 924 P.2d 1129, 1131 (Colo. App. 1996); C.R.E. 103(a)(2). IPCC's counsel attempted to present evidence of IPCC's contributions to the value of the property, and the trial court excluded the evidence and refused any further offer of proof. Vol. II Tr. at 142:14-143:2. No further objection or offer of proof was required. C.R.E. 103(a)(2).

**B. If Presbytery Was Properly Awarded Possession, IPCC is Entitled to Recover Its Contributions to the Value of the Property and a New Trial is Required.**

Both Presbytery and IPCC asserted claims for declaratory judgment pursuant to C.R.C.P. 105, and the trial court expressly acknowledged that Rule 105 governed this action. *See* Ruling at 1. Rule 105 requires the trial court to make a "complete adjudication" of the rights of the parties. C.R.C.P. 105(a). It also states in

mandatory language that where a party holding under color of title has made permanent improvements to the property, like IPCC here, “the value of such improvements *shall* be allowed as a set-off or as a counterclaim” in the event judgment is entered for the other party for possession. C.R.C.P. 105(e) (emphasis added).

Presbytery moved to strike IPCC’s Rule 105(e) claim, arguing that it was asserted for the first time in IPCC’s trial brief, that documents supporting the claim had not been disclosed, and that Presbytery was prejudiced by being denied the opportunity for further discovery. *See* Motion to Strike New Claim Raised in Defendant’s Trial Brief (“Presbytery Motion”) at 2, Filing ID 19399714. The trial court granted the motion without discussion. Order entered July 8, 2008, Filing ID 20559831. The trial court then excluded evidence of IPCC’s contributions to the value of the property at trial, again without explaining the basis for the ruling. Vol. II Tr. at 142:14-143:2.

The trial court erred; an award for contributions to the value of improvements is mandatory. C.R.C.P. 105(e). No Colorado authority requires a party to plead separately and specifically under subsection (e) of Rule 105. The trial court’s refusal to state any reasons or justification for striking IPCC’s claims and excluding



evidence further demonstrates the abuse of discretion.

Moreover, Presbytery was not surprised by IPCC's claim. In its Answer and Counterclaims, beyond requesting relief pursuant to Rule 105, IPCC alleged that it "repaid all loans and obligations associated with the property." Defendant's Answer, Affirmative Defenses, Counterclaim and Jury Demand ¶ 46, Filing ID 15737664. IPCC separately alleged that after the disaffiliation with Presbytery, IPCC refinanced the property and fully satisfied various promissory notes, including interest. *Id.* ¶59. These allegations were sufficient to provide "reasonable notice" that IPCC claimed entitlement to relief pursuant to Rule 105(e). *See DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103, 105 (Colo. App. 1981).

The issue of contributions to improvements also was expressly included in the Trial Management Order without objection. *See* Trial Management Order ("TMO") at 6, entered April 16, 2008, Filing ID 19443138. The TMO reiterated IPCC's claim that, "In the unlikely event that the court holds in equity that title should be quieted in Presbytery, equity also requires reimbursement of the hundreds of thousands of dollars of value added to the property by IPCC." *Id.* The TMO, once entered, controlled the subsequent course of the trial, and modification or divergence from the TMO should have been allowed only upon demonstration that

the modification or divergence could not with reasonable diligence have been anticipated. C.R.C.P. 16(f)(5).

Presbytery's claim that documents supporting IPCC's request for relief under Rule 105(e) were not properly disclosed also is unfounded. Exhibits documenting IPCC's contributions to the value of the property not only were provided to Presbytery prior to trial, but Presbytery had stipulated to their admission into evidence three days before moving to strike IPCC's claim. *Compare* Exhibits E125–ROA 968/1356 (assessor valuation of the property), E79-E94–ROA 815-855/1356 (property financing documents) *and* Supplement to Trial Management Order at 14-15, 17, Filing ID 19373191 (dated April 11, 2008, and stipulating to admission of exhibits) *with* Presbytery Motion (dated April 14, 2008). The trial court's exclusion of evidence after Presbytery had stipulated to admission of supporting exhibits further documents the trial court's error.

Where erroneous exclusion of evidence at trial affects the “substantial right” of a party, a new trial is required. *Banek v. J.L. Thomas*, 733 P.2d 1171, 1178 (Colo. 1986); *see also* C.R.E. 103(a). “An error affects a substantial right when it can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself.” *Banek*, 733 P.2d at 1178.

Here, the abusive ruling affected IPCC's substantial rights and rendered the outcome of the trial unfair. From 1992 to the present time, IPCC has paid all expenses associated with the property, including the original note by which the vacant land was purchased, and all notes used to finance construction of the building. IPCC continued to pay these obligations even after Covenant was dissolved, and still is servicing the loans today.<sup>10</sup> In addition to paying the mortgage obligations, IPCC insured, maintained and improved the property and facilities. At all times, IPCC believed it owned the property, and IPCC had color of title (at least) by virtue of its warranty deed.

The value of the property is far greater today than when IPCC took its warranty deed, and if possession is awarded to Presbytery, the law requires compensation to IPCC for the added value. C.R.C.P. 105(e). Because the trial court excluded evidence of such value, a new trial is required in the event this Court upholds the other challenged rulings.

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<sup>10</sup> Although Presbytery claims to own and was awarded the property, it refused to take over payment of the property-related debts after the trial, notwithstanding the trial court's finding that Presbytery acknowledged it "is responsible for the indebtedness, maintenance, and care of the property." Ruling at 7. The mortgage obligation thus remains in IPCC's corporate name even though the property was held to have reverted to Presbytery.

## CONCLUSION

For the reasons stated in this Opening Brief, IPCC respectfully requests that the trial court's Ruling be reversed, and the case remanded with instructions to quiet title to the property in IPCC, free and clear of any and all trust and other interests asserted by Presbytery and PCUSA. If the trial court's ruling regarding ownership or possession of the property is upheld, IPCC requests remand for a new trial to determine the amount of compensation owed for IPCC's contributions to the value of the property and improvements pursuant to Rule 105(e).

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on June 5, 2009, I served a copy of the foregoing **APPELLANTS' OPENING BRIEF** by United States Mail, postage prepaid, addressed to:

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/s/ Richard T. LiPuma

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Richard T. LiPuma