

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A. R. 28(g).

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- It contains 9,282 words
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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p. _____), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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I. COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the trial court committed reversible error when it enforced the clear and unambiguous provisions of the Constitution of the Presbyterian Church, to which the local church had agreed to be bound, and concluded ownership of local church property reverted to the religious denomination upon dissolution of the local church.

II. STATEMENT OF THE CASE

A. The Parties.

Plaintiff Presbytery of Plains and Peaks (“Presbytery”) is a governing body within the hierarchical structure of the Presbyterian Church (U.S.A.) (“PCUSA”). The Presbytery is incorporated as a nonprofit corporation, and is the legal successor to the Presbytery of Boulder. Vol. I Tr. at 40:16-41:4.¹ Under the Constitution of the PCUSA, the Presbytery is responsible for the mission and the government of the PCUSA throughout its geographic district, and has the sole

¹ Trial was held from April 21-23, 2008, with each day’s proceedings transcribed separately. Presbytery 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).

responsibility and power to “divide, dismiss, or dissolve” churches in its district.

Vol. I Tr. at 43:5-18; CD 1050-1136.²

Plaintiff Covenant Presbyterian Church of Boulder County (“Covenant Presbyterian Church”) was a PCUSA church within the Presbytery’s jurisdiction from 1983 until it was dissolved in 2000. The Presbytery chartered Covenant Presbyterian Church as a PCUSA church in 1983, established its corporate structure, and financed its purchase of real property and construction of church buildings. Supp. CD 10-11 (Gupton Tr. 8:13-11:1).³

Defendant Georges Michael Housney (“Housney”) served as an unofficial, non-Presbyterian pastor at Covenant Presbyterian Church for a few months preceding the dissolution of Covenant Presbyterian Church in 2000. CD 1339-1340. After the dissolution, Housney pastored a non-Presbyterian remnant group of persons who had attended Covenant Presbyterian Church. In July 2000, unbeknownst to the Presbytery, Housney filed a one-page “Biennial Report” with the Colorado Secretary of State. CD 57. In this form, Housney claimed to be an officer of Covenant Presbyterian Church and purported to change its corporate

² Most trial exhibits are contained on the disk transmitted by the district court containing 1356 pages. Citations are designated by “CD ____.”

³ The district court transmitted a supplemental disk containing 86 pages. Citations are to “Supp. CD ____.”

name to Indian Peaks Community Church (“IPCC”). *Id.* Based solely on Houssney’s filing this one-page ministerial form, Defendant IPCC claims to be the legal successor to Covenant Presbyterian Church. At the time of the trial in April 2008, not a single person who had been a member of Covenant Presbyterian Church, prior to its dissolution, continued as an active member of IPCC. Vol. II Tr. 181:23-182:4.

B. Nature of the Case.

The trial court properly resolved this church property dispute through the straight-forward application of the clear and unambiguous provisions of the PCUSA Constitution which provides: “[W]henever a particular church is formally dissolved by the presbytery,” the particular church’s property “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 the presbytery may direct, in conformity with the Constitution of the Presbyterian Church (U.S.A.)” CD 1083.

This provision of the PCUSA Constitution, along with other evidence admitted at trial, requires affirmance of the trial court’s judgment in Plaintiffs’ favor on their claim to ownership and possession of property formerly used by Covenant Presbyterian Church at 9880 Baseline Road in Lafayette, Colorado (the

“Property”). The Presbytery bought the Property, established Covenant Presbyterian Church as a new congregation of the PCUSA, and financed/oversaw the construction of church buildings on the Property. Covenant Presbyterian Church, in turn, agreed to be bound by the PCUSA Constitution. CD 1237-1242, 1275-1279.

In February 2000, the Presbytery dissolved Covenant Presbyterian Church as a PCUSA church. CD 1145. Thus, under the plain language of the PCUSA Constitution, the Presbytery became the owner of the Property, and Defendants have no ownership interest in the Property.

Affirmance is also required on an even more basic level – Defendants have no standing to claim any legal interest in the Property. Although Defendants were allowed to use the Property after the Presbytery dissolved Covenant Presbyterian Church, they failed at trial to establish that IPCC is legal successor in interest to Covenant Presbyterian Church. Ruling, p. 12, entered July 23, 2008, Filing ID 20770952.⁴ Thus, regardless of whether the Property reverted to the Presbytery upon dissolution of Covenant Presbyterian Church, Defendants have no basis to claim any ownership interest.

C. Course of Proceedings.

⁴ The Ruling and Order entered July 23, 2008, is referred to as “Ruling.”

Plaintiffs initiated this action by filing their Complaint on April 17, 2007. Trial to the court occurred on April 21-23, 2008. During the three-day trial, the court heard testimony from eight witnesses.

D. Disposition in the Court Below.

After carefully considering the witnesses' testimony and the documentary evidence admitted at trial, the trial court entered judgment for Plaintiffs. The court found the evidence places this case squarely within the holding in *Golden Lodge No. 13 v. Grand Lodge of Independent Order of Odd Fellows*, 80 P.3d 857 (Colo. App. 2003) ("*Golden Lodge*"). Ruling, p. 10, entered July 23, 2008, Filing ID 20770952. Based on the evidence, the trial court held that Covenant Presbyterian Church was a particular church of PCUSA, bound by the PCUSA Constitution, when it was dissolved in 2000. *Id.* Upon dissolution of Covenant Presbyterian Church, the PCUSA Constitution gave ownership of the Property to the Presbytery. *Id.*

In addition, the trial court concluded the evidence did not support any of Defendants' counterclaims or affirmative defenses. Ruling, pp. 11-12, entered July 23, 2008, Filing ID 20770952. Specifically, it rejected Defendants' argument that the Presbytery had relinquished its rights to the Property after Covenant Presbyterian Church was dissolved. *Id.* at 11. The court found, "the record is

replete with examples of the Presbytery’s and Defendants’ acknowledgement of Presbytery’s ownership in the Property,” and the “conduct of the parties demonstrates unequivocally that the Presbytery did not subsequently relinquish its rights to the Property after Covenant was dissolved as a particular church.” *Id.* The court similarly cited substantial evidence in rejecting Defendants’ affirmative defenses of adverse possession, statute of frauds, and the doctrines of waiver, laches, and estoppel. *Id.* at 11-12.⁵

The court also held Plaintiffs were entitled to judgment on an independent basis. It determined the evidence did not support the “heart of IPCC’s defense” that it is legal successor to Covenant Presbyterian Church. Ruling, p. 12, entered July 23, 2008, Filing ID 20770952. The “evidence simply does not support this claim and the Court cannot reach this conclusion.” *Id.*

Finally, the trial court denied IPCC’s claim that it had suffered detriment by paying the mortgage on the Property for seven years. Ruling, p. 12, entered July 23, 2008, Filing ID 20770952. The court, again citing substantial evidence in the record, found that IPCC had paid the mortgage each month in lieu of rent and

⁵ Defendants’ Opening Brief does not assert the trial court erred in rejecting these affirmative defenses.

“received the benefit of using the building for less than fair market rental during this time.” *Id.*

E. Statement of Relevant Facts.

1. Structure of the Presbyterian Church (U.S.A.)

The PCUSA is a body of Reformed Christians who have agreed to conduct their worship, discipline, governance, and other religious activities in conformity with the PCUSA Constitution. Vol. I Tr. 41:5-43:18. The Constitution consists of Part I (Book of Confessions) and Part II (Book of Order). Vol. I Tr. 42:17-43:2. The Book of Order includes the Rules of Discipline, the Directory for Worship, and the Form of Government, which includes a detailed set of provisions establishing the formal structure of the Church. *Id.*

The PCUSA is hierarchical in its structure. Vol. I Tr. 43:3-18. There are four governing bodies in ascending order: session of the church, presbytery, synod, and General Assembly. Vol. I Tr. 43:5-44:18. The jurisdiction of each governing body is limited by the express provisions of the Constitution, with powers not mentioned being reserved in the presbyteries, and with the acts of each governing body subject to review by the next higher governing body. CD 1064, 1085.

Within the PCUSA, the presbytery is a key governing body and has broad authority over local churches within its jurisdiction. CD 1108-1112. The presbytery is the expression of the PCUSA within a certain district, and consists of all the ministers and churches within that district. CD 1108. Only the presbytery can organize, receive, and dissolve a local church. CD 1109. A local church cannot call a minister without action by the presbytery, and only the presbytery can dissolve the relationship between a minister and a particular church. CD 1110.

Among other explicitly stated powers, the presbytery has “the responsibility and power . . . to divide, dismiss, or dissolve churches in consultation with their members.” CD 1109. The presbytery also has the power and responsibility to review the minutes and records of each church within the presbytery to determine whether the proceedings have been conducted in accordance with the PCUSA Constitution. CD 1091-1092. In addition, the presbytery has the responsibility and power to “take special oversight of churches without pastors.” CD 1110. Where a congregation has no Presbyterian pastor, as was the case with Covenant Presbyterian Church in 1999, the presbytery shall appoint a moderator to preside at congregational meetings. CD 1080.

Local congregations chartered within the PCUSA are referred to as particular churches of the PCUSA and serve as essential mission arms of the

various presbyteries and the larger church. CD 1078. A particular church “can be organized only by the authority of a presbytery and shall function under the provisions of [the] Constitution.” *Id.* Persons wishing to unite in forming a new congregation are required by the PCUSA Constitution to promise they will be bound by “the principles of faith, mission, and order of the Presbyterian Church (U.S.A.).” CD 1078-1079.

Each particular church of the PCUSA is governed by, and bound by, the PCUSA Constitution. Vol. I Tr. 49:10-50:7; CD 1063, 1078. The particular churches of the PCUSA, taken collectively, constitute one Church. CD 1063.

2. The PCUSA Constitution governs how church property is held.

The PCUSA Constitution, in the Book of Order, provides that “all property held by or for a particular church, . . . whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, . . . is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).” CD 1083.

The Book of Order also provides that, “Whenever a particular church is formally dissolved by the presbytery, . . . [the particular church’s] 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 the presbytery may direct, in conformity with the Constitution of the Presbyterian Church (U.S.A.).” CD 1083.

Every local church which is recognized and received as a member of the PCUSA is bound by the PCUSA’s Constitution, including the Book of Order’s provisions relating to ownership of church property. CD 1063, 1078, 1083-1084; Vol. I Tr. 50:8-56:17.

In its publication, “Companion to the Constitution,” PCUSA explains in layperson’s language the application of the Church’s trust and reversion provisions:

It is perhaps easiest to see that trust relationship in a new church. Before a new church is formed, a site is often chosen. Before chartering, the presbytery exercises its responsibility of locating the new church and prepares the way for members to covenant together. The presbytery lends its own funds or approves mortgages to borrow funds and cooperates in construction. As the new church is chartered, its members accept the trust of the property and take on more and more of the finances. Often, the presbytery will transfer title to the congregation when it assumes full self-support. In the future, if the congregation ceases to exist, the property will be transferred back to the presbytery to keep the trust of those who have contributed for the purpose of establishing and maintaining a Presbyterian church.

CD 373-374.

3. History of Covenant Presbyterian Church.

In or about 1982, Presbytery of Boulder purchased the Property for the purpose of planting a new Presbyterian church in Lafayette, Colorado. Supp. CD 10-11 (Gupton Tr. 8:13-10:2). Presbytery of Boulder financed the purchase of the Property with its own funds as well as loan proceeds from promissory notes executed by Presbytery of Boulder. Supp. CD 10-11 (Gupton Tr. 9:21-10:2); CD 1294.

Presbytery of Boulder chartered Covenant Presbyterian Church as a PCUSA church in Lafayette in or about 1983. The Presbytery also established a corporate structure for Covenant Presbyterian Church in the form of a Colorado non-profit corporation known as Covenant Presbyterian Church of Boulder County. CD 1176, 1192, 1194, 1195, 1208, 1212, 1214.

Covenant Presbyterian Church's Articles of Incorporation filed with the Secretary of State for the State of Colorado on October 11, 1983, acknowledge repeatedly that the congregation is part of the PCUSA, and bound by its rules:

- “The purposes for which this corporation is formed are for the support of the gospel and the maintenance of religious worship according to the standards, customs and usages of the Presbyterian Church (U.S.A.)”;

- “All powers shall vest with the Session which will exercise its duties and responsibilities according to the standards, customs, and usages of the Presbyterian Church (U.S.A.)”;
- “The responsibilities [of the Pastor, Clerk of Session and Treasurer] shall be as set forth in the guidelines as set forth by the Presbyterian Church (U.S.A.)”; and
- “Membership in the church shall be ordained as set forth in the guidelines of the Presbyterian Church.”
- Covenant Presbyterian Church shall not “lease, sell, or mortgage its real property” except by “written permission of the Presbytery.” CD 1237-1242.

The Presbytery arranged financing and oversaw construction of a church building on the Property. Supp. CD 10-11 (Gupton Tr. 9:5-11:1).⁶ In or about 1992, the Presbytery transferred formal title to the Property to the Covenant Church Corporation, subject to the PCUSA Constitution’s provisions relating to

⁶ Defendants refer to a ten-year use restriction in the original Property deed. Opening Brief, p. 4. This deed restriction was included at the seller’s request, and is wholly separate and apart from the Book of Order’s trust and reverter provisions. Supp. CD 19 (Gupton Tr. 42:17-44:7); CD 1083.

ownership of church property. CD 1230; Supp. CD 16-17 (Gupton Tr. 33:9-34:8); CD 1083.

At some point in 1992, Covenant Presbyterian Church learned that its nonprofit corporate status had lapsed due to administrative oversight. To correct this situation, one of Covenant Presbyterian Church's directors, Larry Gupton, re-filed "Articles of Incorporation" with the Colorado Secretary of State but there was no intent to create a new corporation, change Covenant's corporate status, or change its relationship to the Presbytery or PCUSA. Supp. CD 14-16 (Gupton Tr. 24:24-32:16). The 1992 Articles were never discussed or voted upon by the board or the congregation, and Covenant Presbyterian Church continued to follow its previously existing Articles and Bylaws. Supp. CD 15 (Gupton Tr. 27:17-29:5). The 1992 Articles specifically stated that, upon dissolution, Covenant Presbyterian Church's assets would be distributed as "set forth in the Bylaws and the Presbyterian Church (U.S.A.) 'Book of Order.'" Supp. CD 14-16 (Gupton Tr. 24:24-32:16).

From 1983 until its dissolution in 2000, Covenant Presbyterian Church remained a particular church of the Presbytery within the PCUSA. Supp. CD 47, 64 (Houssney Tr. 36:21-24; 103:3-8). During this time, Covenant Presbyterian Church was continuously identified in the official records of the

Presbytery as being part of the Presbytery, was represented at official meetings of the Presbytery as provided in the PCUSA Constitution, and its records were reviewed by the Presbytery in accordance with the PCUSA Constitution to ensure compliance with the Constitution. Supp. CD 13-14 (Gupton Tr. 21:8-22:23); CD 1251-1254, 1263-1273, 1326-1337. Defendants concede Covenant remained “subject to PCUSA’s polity as set forth in the Constitution of [PCUSA], including the Book of Order.” Opening Brief, pp. 3-4.

4. Dissolution of Covenant Presbyterian Church.

Despite the best efforts of the Presbytery, Covenant Presbyterian Church was not successful and the Presbytery began exploring whether its resources would be better utilized to establish a new church in another location. CD 1138; Vol. I Tr. 159:5-25. In October 1999, the Presbytery voted to establish an administrative commission to determine the advisability of dissolving Covenant Presbyterian Church and beginning a new church development in that area. CD 1138. The commission was given the name, “Lafayette Administrative Commission.” CD 1145-1147.

The Lafayette Administrative Commission met in November and December 1999. At its December meeting, it voted to recommend that the congregation of Covenant Presbyterian Church request that the church be

dissolved. CD 1145-1147. On or about December 21, 1999, the Session of Covenant Presbyterian Church recommended to the congregation that they “request that the Commission of Presbytery dissolve the Covenant Presbyterian Church no later than January 31, 2000.” CD 1140.

On or about January 9, 2000, the members of Covenant Presbyterian Church voted in favor of requesting that “Covenant [Presbyterian] Church be dissolved by a duly authorized Commission of the Presbytery of Plains and Peaks. We further request, if the way be clear, that this dissolution take place no later than January 31, 2000.” CD 1142-1143. In February 2000, the Presbytery voted “to approve the action of the Lafayette Administrative Commission in dissolving the Congregation of Lafayette Covenant Presbyterian Church as of January 31, 2000.” CD 1145.

According to the PCUSA Constitution, “whenever a particular church is formally dissolved by the presbytery,” the particular church’s property “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 the presbytery may direct, in conformity with the Constitution of the Presbyterian Church (U.S.A).” CD 1083.

The record of the Presbytery's February 2000 meeting, during which the Presbytery dissolved Covenant Presbyterian Church, makes several things clear.⁷ First, the Presbytery voted to affirm the location of Lafayette, Colorado as a site for new church development under the supervision of the Presbytery, but the new church development would not necessarily be at the 9880 Baseline Property. Vol. I Tr. 162:3-22; CD 268-269; Vol. II Tr. 195:16-23. Second, the Presbytery might decide to sell the Property and locate the new church development elsewhere. CD 269; Vol. II Tr. 194:2-6. Third, the remnant group being pastored by Houssney would be invited to participate in the new church development process, but the remnant group would be separate and distinct from any new church development. CD 271, 273-274, 276. Finally, the record of proceedings makes it clear that neither the new church development nor the remnant group were considered a continuation of Covenant Presbyterian Church. Vol. I Tr. 164:11-19. The chairperson of the Lafayette Administrative Commission emphasized there would be "a very clean break from the past." CD 268. Houssney himself stated during the Presbytery meeting, "There is no old congregation. It's dissolved. It's finished." CD 281.

⁷ The Presbytery's meeting on February 4, 2000 was recorded on videotape. A court reporter's transcription of the relevant portion of the videotape was admitted at trial. CD 265-289.

5. Post-dissolution conduct of the parties.

After formally dissolving Covenant Presbyterian Church, the Presbytery consented to Defendants' temporarily using the Property for religious purposes (although not as a Presbyterian church and not as a continuation of Covenant). Vol. I Tr. 164:11-19; CD 1149. Around the same time, Defendants (with the consent of the Presbytery) adopted the name of Indian Peaks Community Church ("IPCC") for the non-Presbyterian remnant group which Housney pastored on the Property. CD 16-18.

In June 2000, the official minutes of the Presbytery indicate that the Trustees/Council of the Presbytery "are the trustees for the property at 9880 Baseline Road, Lafayette, Colorado," and, as such, would begin to "negotiate financial arrangements with the Indian Peaks Christian community and the current nursery school for use of the facilities at 9880 Baseline Road, Lafayette, Colorado." CD 1149.

The Presbytery discussed possible lease arrangements with Defendants for their use of the Property, but no formal lease arrangements were finalized. CD 27-28, 30-31, 39, 49-50, 52-53. The Presbytery and Defendants informally agreed, pending a formalization of lease terms, that IPCC would make

the mortgage payments on the Property in lieu of lease payments. Vol. II Tr. 55:15-57:6.

In June 2000, the Presbytery advised Housney about the need to incorporate his church group and to obtain its own tax identification number. CD 55; Vol. II Tr. 50:20-51:13. In July 2000, unbeknownst to the Presbytery, Housney filed a one-page “Biennial Report” with the Colorado Secretary of State. CD 57. In this document, Housney represented he was an authorized officer of Covenant Presbyterian Church, even though Covenant Presbyterian Church had been dissolved in February 2000 and there had been no election of directors or officers since its dissolution. Vol. II Tr. 215:12-18. Nevertheless, Housney filed the one-page form with the Colorado Secretary of State and purported to change the corporate name of Covenant Presbyterian Church to IPCC. CD 57.

On numerous occasions after the dissolution of Covenant Presbyterian Church as a particular church of the PCUSA, Defendants recognized and acknowledged the Presbytery’s ownership and control of the Property:

- IPCC’s congregational minutes dated September 6, 2002 state “we are technically now renting the property,” and, “as renters we will have to sign a term lease.” The same minutes also state, “the Presbyterian Church may have other plans for our property, and we may be required to vacate.” CD 109;

- On February 5, 2004, Houssey, on behalf of IPCC, wrote a letter to the Presbytery requesting that the Presbytery consider donating the property to IPCC or that the “Presbytery and IPCC negotiate other options including allowing [IPCC] 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.” CD 144-146;

- IPCC’s meeting minutes dated March 6, 2004 indicate Defendants decided not to invest money in putting up a new church sign, “since we don’t know if we are going to be here much longer if the Presbytery decides to kick us out.” CD 148-150.

Although IPCC used the Property on a regular basis after February 2000, the parties never formalized a lease agreement. Instead, they continued to operate under the informal agreement that IPCC would pay the monthly mortgage in lieu of rent. Vol. II Tr. 55:15-57:6. With the Presbytery’s consent, IPCC also received payments from a pre-school and other groups using the Property. CD 242-250; Vol. II Tr. 239:8-16. As a result, the mortgage payments made by IPCC clearly were less than fair market rental value for the Property. Indeed, for several years, the payments received by IPCC from other groups using the Property exceeded the total mortgage payments made by IPCC. CD 242-250; Vol. II Tr. 236:14-237:16.

During the first several years after the Presbytery dissolved Covenant Presbyterian Church, the remnant group meeting on the Property, under Houssney's leadership, led the Presbytery to believe it would eventually ask to be recognized as a church of the PCUSA. CD 63, 93, 95, 97-99, 111, 113, 115, 117. In May 2004, after it finally became clear IPCC would not seek to become a Presbyterian church, the Presbytery asked IPCC to sign a formal lease agreement. Vol. I Tr. 75:19-79:3. Defendants refused to enter into a formal lease agreement. *Id.* The Presbytery made additional, unsuccessful attempts to engage IPCC in negotiating a lease agreement, but subsequently learned that IPCC intended to claim ownership of the Property through some sort of "squatters' rights." CD 174-177. The Presbytery then filed this lawsuit in April 2007.

III. PLAINTIFFS' DISAGREEMENT WITH DEFENDANTS' STATEMENTS REGARDING STANDARD OF REVIEW

Plaintiffs disagree with Defendants' statements regarding the proper standard of review under Sections I.A. and II.A. of the Opening Brief. The trial court's judgment rests upon numerous factual findings based upon its consideration of three days of live testimony. "The findings of the trier of fact must be accepted on review, unless they are so clearly erroneous as not to find support in the record." *Page v. Clark*, 592 P.2d 792, 796 (Colo. 1979).

Determinations regarding the credibility of witnesses, the sufficiency and weight of

evidence, and conclusions based on these determinations similarly are within the trial judge's discretion and will not be disturbed on review unless clearly erroneous. *Broncucia v. McGee*, 173 Colo. 22, 25, 475 P.2d 336, 337 (1970).

IV. SUMMARY OF ARGUMENT

Colorado courts analyze church property disputes under the “neutral principles of law” approach set forth in *Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85 (Colo. 1986). *Mote* adopted the neutral principles analysis from *Jones v. Wolf*, 443 U.S. 595, 606 (1979), which specifically held a denomination may amend its constitution to create an enforceable trust on local church property in favor of the denomination. *Mote* held the local church property in that case was held in trust for the denomination even though legal title was held solely in the name of the local church. 716 P.2d 85 at 108.

Mote further emphasized that, under its neutral principles approach, “other principles from the common and statutory law of . . . voluntary associations might be the basis for a determination that a general church has a right, title or interest in the church property.” *Id.* at 101. The evidence in this case, examined under *Mote*, requires affirmance on several independent grounds.

First, the trial court properly found this case falls squarely within the Colorado Court of Appeal's decision in *Golden Lodge, supra*, 80 P.3d 857, which

enforced a similar reverter clause. In applying *Golden Lodge*, the trial court properly applied neutral principles of law applicable to all voluntary associations. Defendants have no basis to distinguish the facts of this case from *Golden Lodge*. In fact, although the trial court made *Golden Lodge* the centerpiece of its decision, Defendants' Opening Brief does not even mention *Golden Lodge*, let alone make any attempt to distinguish it. *See infra*, pp. 24-27.

Second, even if *Golden Lodge* were not dispositive, the Presbytery also prevails under the general trust analysis in *Mote*. *Mote* analyzed the property deeds, the local church's articles of incorporation and bylaws, and the denomination's governing documents. An examination of these same documents in this case compares favorably to *Mote* in the Presbytery's favor, and requires the same result. *See infra*, pp. 38-42.

Finally, even if Defendants could somehow overcome enforcement of the reverter clause under *Golden Lodge* and the general trust analysis under *Mote*, affirmance of the judgment is still required because the evidence demonstrates IPCC is not legal successor to Covenant Presbytery Church and therefore could not, in any event, have any legal claim to the Property. *See infra*, pp. 42-44. Even though the trial court properly characterized this issue as "the heart of IPCC's defense," Defendants' Opening Brief makes no attempt to challenge the trial

court's finding that the "evidence simply does not support this claim and the Court cannot reach this conclusion." Ruling, p. 12, entered July 23, 2008, Filing ID 20770952.

The evidence supporting affirmance on each of these independent grounds is substantial, and, on many critical issues, uncontradicted.

V. ARGUMENT

A. The Trial Court Properly Applied the Neutral Principles Approach set forth in *Bishop and Diocese of Colorado v. Mote*.

The trial court and all parties agreed the case should be analyzed under *Bishop and Diocese of Colorado v. Mote, supra*. In finding local church property was held in trust for the larger denomination, *Mote* looked to a variety of evidence, including property records, articles and bylaws of the local church, and the denomination's governing documents. *Id.* at 88, 88-89, 104-105, and 105-109. *Mote* emphasized that, in addition to trust law, "principles from the common and statutory law of . . . voluntary associations might be the basis for a determination that a general church has a right, title or interest in the [local] church property." *Id.* at 101. *Mote* further recognized that the denomination may establish its right of ownership or control over the disputed church property "by reason of a trust, a *reverter clause*, or some other basis." *Id.* at 99 (italics added). An enforceable

trust or reverter clause may be added through amendment to the denomination's constitution. *See Jones, supra*, 443 U.S. at 606.

Under *Mote*, the judgment in Plaintiffs' favor should be affirmed on any one of three independent grounds discussed in Sections B, C and D below.

B. *Golden Lodge* is Directly on Point, and Requires Affirmance of the Judgment.

Under Colorado law, like that of most states, “[t]he relationship between a voluntary association and its members is a contractual one and, by joining such an organization, a member agrees to submit to its rules and regulations and assumes the obligations incident to membership.” *Jorgensen Realty, Inc. v. Box*, 701 P.2d 1256, 1257 (Colo. Ct. App. 1985); *see also Allander v. Carpenters Dist. Council of Denver*, 358 P.2d 8, 11 (Colo. 1960) (member of voluntary association “is not at liberty to disregard [its] constitution and by-laws, [or] ignore its lawful dictates”). Voluntary associations “may seek enforcement of their rules in the civil courts if a dispute involves property rights or is otherwise judicially cognizable.” *Golden Lodge, supra*, 80 P.3d at 859. Moreover, when a member leaves a voluntary association, it “lose[s] [its] rights to association property, title to which stays in the members remaining in the association.” 7 C.J.S. Ass’ns § 44 (2004).

The facts in *Golden Lodge* are identical to this case in all material respects. As here, *Golden Lodge* involved a voluntary organization consisting of three tiers –

a supreme governing body, “grand lodges” that “preside over and govern over local lodges in a particular geographical area,” and “local lodges . . . which are chartered by their respective grand lodges.” *Golden Lodge, supra*, 80 P.3d at 858. In *Golden Lodge*, the voluntary association’s rules and regulations provided that when a grand lodge revokes the charter of a local lodge, the local lodge’s property reverts to the grand lodge. *Id.* at 859-860. The Colorado Grand Lodge, like the Presbytery here, revoked the charter of the local lodge. The court enforced the organization’s reversion rule and quieted title in Colorado Grand Lodge. The court emphasized that voluntary organizations “make their own laws and regulations, and courts ordinarily enforce them.” *Id.* at 859. “[S]uch organizations may seek enforcement of their rules in the civil courts if a dispute involves property rights or is otherwise judicially cognizable.” *Id.*

The same result is required here. Defendants conceded the analysis in *Golden Lodge* must be applied here – they stated this dispute should be treated as if it “arose out of any other . . . voluntary association.” IPCC’s Response to Presbytery’s Motion for Summary Judgment, pp. 4-5, filed February 19, 2008 (Filing ID 18650329). Thus, *Golden Lodge* establishes the relevant law for voluntary associations under identical circumstances. Here, as in *Golden Lodge*, the organization’s rules (*i.e.*, the Book of Order) clearly and unambiguously

provide that local church property reverted to the Presbytery when the local church was dissolved as a particular church of the PCUSA. CD 1083. This unambiguous provision must be enforced by civil courts, just as the court enforced the similar dissolution/reversion provision in *Golden Lodge*.

In a weak attempt to distinguish the decision, Defendants argued below that *Golden Lodge* does not apply because in that case it was undisputed “that when the general association revoked the local chapter’s charter, all real and personal property reverted to the general association.” IPCC’s Response to Presbytery’s Motion for Summary Judgment, pp. 10-11, filed February 19, 2008 (Filing ID 18650329). This is no distinction – here, as in *Golden Lodge*, it is undisputed that the Book of Order similarly provides that local church property reverts to the Presbytery upon dissolution by the Presbytery of the local church as a particular church of the PCUSA. CD 1083.

Indeed, the facts here even more clearly support summary judgment in favor of the Presbytery than the facts in *Golden Lodge*. In *Golden Lodge*, the local lodge argued the requirements for revoking its charter had not been met, and that Colorado Grand Lodge had not followed proper procedures for suspending and revoking its charter. 80 P.3d at 859. Here, in contrast, the local congregation

requested its own dissolution pursuant to the Book of Order's provisions. CD 1142-1143.

Given that Plaintiffs prominently featured *Golden Lodge* in their Trial Brief and closing argument, and the trial court made *Golden Lodge* the centerpiece of its decision, one might expect Defendants would spend a considerable portion of their Opening Brief challenging the dispositive effect of *Golden Lodge*. Instead, the Opening Brief does not even mention it, let alone attempt to distinguish it. Defendants' silence could not be more telling.

The overwhelming evidence supporting the trial court's decision may be summarized by answering the following four questions which are dispositive under *Golden Lodge*.

1. Until February 2000, was Covenant Presbyterian Church a particular church of Presbyterian Church U.S.A. ("PCUSA") and therefore bound by the PCUSA Constitution (also referred to as the Book of Order)?

The undisputed evidence demonstrated that Covenant Presbyterian Church remained a "particular church" of the PCUSA, and bound by the Book of Order, when the Presbytery voted to dissolve Covenant as a particular church of the PCUSA in February 2000. Covenant's bylaws provided that the church "is a particular congregation of the Presbyterian Church (U.S.A.) in the United States of

America and is subject to the guidance and direction of the jurisdiction.” CD 1275-1279. The bylaws further stated that they “shall be in conformity with the constitution of the Presbyterian Church (U.S.A.) as interpreted by the judicatories of jurisdiction,” and “may not be amended contrary to . . . the Constitution of Presbyterian Church (U.S.A.).” *Id.*

Defendant Housney conceded that Covenant Presbyterian Church operated under the Book of Order when it was dissolved as a particular church of the PCUSA:

Q. But as of December '99, the session [of Covenant Presbyterian Church] was still operating under the Book of Order?

A. I suppose, yes. Legally, yes. I mean, officially, I should say.

* * *

Q. When the session voted to request dissolution in December of 1999 and the congregation voted to go forward with that recommendation in January of 2000, Covenant Presbyterian Church was operating under the Book of Order?

A. Correct.

Supp. CD 47, 64 (Houssney Tr. 36:21-24; 103:3-8).

This conclusion – that Covenant continued to operate under the Book of Order until the Presbytery dissolved it – was confirmed by another witness called by Defendants. Dr. Janet Davies, a life-long Presbyterian and a long-time member and leader of Covenant Presbyterian Church, testified Covenant followed the Book of Order throughout the late 1990’s. Vol. III Tr. 31:2-20. Specifically, Dr. Davies testified that, on several occasions in the late 1990’s, Covenant complied with the Book of Order by seeking the Presbytery’s consent when it contemplated leasing or selling the Property.

Q. Again, before Covenant could lease its property it needed to get permission from the Presbytery under that section of the Book of Order that we just looked at?

A. It was understood at that time we needed to.

* * *

Q. We talked about 8.0501 and now its 8.0502 [of the Book of Order] that says that “A particular church shall not lease its real property without the written permission

of the Presbytery transmitted through the session of the particular church.”

A. Okay.

Q. Is that correct?

A. That’s correct.

Q. And that’s the provision of the Book of Order that Covenant Presbyterian Church session was complying with in Exhibit 34?

A. Apparently, it was.

Vol. III Tr. 35:19-25, 36:18-37:3.

The same result – that Covenant Presbyterian Church was bound by the PCUSA Constitution – also follows as a matter of law. Under Colorado law, “[t]he relationship between a voluntary association and its members is a contractual one and, by joining such an organization, a member agrees to submit to its rules and regulations and assumes the obligations incident to membership.” *Jorgensen Realty, supra*, 701 P.2d at 1257; *see also Allander, supra*, 358 P.2d at 11 (member of voluntary association “is not at liberty to disregard [its] constitution and by-laws”).

2. Did the Presbytery dissolve Covenant Presbyterian Church as a particular church of the PCUSA?

The evidence was also undisputed on this question as well. Covenant Presbyterian Church's governing body, or session, *requested* that the Presbytery dissolve Covenant. CD 1140. On February 4, 2000, the Presbytery voted to "approve the action of the Lafayette Administrative Commission in dissolving of the Congregation of Lafayette Covenant Presbyterian Church as of January 31, 2000." CD 1145-1147.

Again, Houssney conceded this point:

Q. And at this meeting, did the session of Covenant Presbyterian Church ask to be dissolved by the Presbytery?

A. It's obvious here that motion by Bob Davies, who was a member of the session of Covenant requested that.

Q. And that request was approved by the session?

A. Seconded and approved by common consent.

* * *

Q. And is it your recollection that the congregation did vote to approve the same request for dissolution that had been recommended by the session?

A. Correct. . . .

Supp. CD 46-47 (Houssney Tr. 33:9-17; 37:17-20).⁸

3. Does the PCUSA Constitution give ownership of the Property to the Presbytery upon dissolution of Covenant Presbyterian Church as a particular church of the PCUSA?

The simple answer is “yes” based on uncontradicted evidence. The PCUSA Constitution, G-8.0401, explicitly provides, “Whenever a particular church is formally dissolved by the presbytery,” the particular church’s property “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 the presbytery may direct, in conformity with the Constitution of the Presbyterian Church (U.S.A).” CD 1083.

⁸ Defendants try to recast the dissolution of Covenant Presbyterian Church as merely dissolving its “relationship” with the PCUSA. Opening Brief, p. 14. This is directly refuted by the evidence above, as well as Houssney’s own statement, “We did not decide to leave . . . they dissolved us.” CD 174.

Larry Gupton, a member of Covenant Presbyterian Church's governing board from 1985 until 1994, testified that it was well-understood the Book of Order gave the denomination an interest in local church property:

Q. During the twelve-year period that you were involved as an active member of Covenant, what was your understanding with respect to Covenant's relationship to Presbyterian Church USA?

A. The relationship was interactive and subordinate. In the sense that I understood the structure of the Presbyterian Church USA from the orientation and training that I got as an elder.

And the structure of the church is the General Assembly is the highest body. Synod is the next level, Presbytery and the church. So it's a hierarchy similar to what a government you would see in the United States, for example.

So I understood the relationship – and during the training that I received as an elder, it was emphasized and the point of discussion many times that the land and

buildings were the property of the Presbyterian Church, even though the congregation was holding that property in trust, that it was always the property – always the property of the entire Presbyterian Church USA, all the members throughout the world.

* * *

A. Each elder candidate subsequent to the training to be an elder, that is typically in my case, was done by the pastor, Franklin Medford, is examined consistent with the Book of Order by the other members of the Session.

* * *

Q. In the course of your reviewing the Book of Order for your examination, do you recall reviewing the Book of Order's provisions regarding church property?

A. Yes. Yes, I do. It was the point of emphasis and intense discussion regarding the fact that property and buildings – land and buildings were owned by the church – the broader church, Presbyterian Church USA. And that individual congregations, while being stewards,

trustees of that property, were not final owners of it. And in the event that the church was dissolved or for any reason, that the property would go back to [PCUSA].

Supp. CD 11-13 (Gupton Tr. 11:11-12:7; 16:23-18:2).

4. After Covenant Presbyterian Church was dissolved as a particular church of the PCUSA, did the Presbytery subsequently relinquish its rights to the Property?

Defendants' entire appeal rests on their assertion that the "Presbytery did nothing to manifest an intent to own or control [the Property] after the dissolution." Opening Brief, p. 14. The record shows nothing could be further from the truth.

During the years immediately following the Presbytery's dissolving Covenant Presbyterian Church as a particular church of the PCUSA, the parties' own words and conduct demonstrated their clear understanding that the Presbytery retained ownership of the Property. CD 1149, 31, 36, 39, 46, 59, 61, 67, 69, 72, 91, 109, 117, 138, 145, 148, 152; Second Supp. CD 5, p. 4.⁹

⁹ The district court submitted a second supplemental disk containing corrections to eight exhibits. Citations are to "Second Supp. CD ____."

By way of example, IPCC's congregational minutes stated "we are technically now renting the property" and "as renters we will have to sign a term lease." CD 109. The same minutes indicate "the Presbyterian Church may have other plans for our property, and we may be required to vacate." *Id.* A subsequent letter to members of IPCC explained, "for the past three years we, as an independent church, have been blessed by the privilege of meeting in a building that belongs to Presbyterians." Second Supp. CD 5, p. 4. IPCC's meeting minutes dated March 6, 2004 concluded, "we don't know if we are going to be here much longer if the Presbytery decides to kick us out." CD 148-150.

Defendant Houssney removed any doubt on this issue in his trial testimony. He admitted he wrote a letter in 2004 which acknowledged the Presbytery's ownership of the Property, and asked the Presbytery to consider *selling* or *donating* the Property to IPCC:

Q. And you sent that to the Presbytery or the stated clerk of the Presbytery in February 2004?

A. Correct.

Q. Would you agree that there is nothing in this letter which indicates Indian Peaks believes it has a legal claim to the property?

A. It does not appear to be that way in this letter.

* * *

Q. You would agree that first option that you stated in your letter assumes ownership of the property by the Presbytery; right?

A. I was hoping they would relinquish that claim of ownership through asking them to donate it.

Q. But there is nothing in the letter that asks the Presbytery to relinquish their claim?

A. Not in those words.

Q. And, again, option number one assumes the Presbytery owns the property and could lease it to you?

A. I'm going to agree with you.

Q. And option two assumes the Presbytery owns the property and would donate it to you?

A. That's what it reads like.

Q. And option three assumes the Presbytery owns the property and might allow you to buy it at a reasonable price?

A. That's correct.

Vol. II Tr. 227:8-19; 229:18-230:11.¹⁰

Houssney also testified that, when the Presbytery declined his written request to donate or sell the property to IPCC, his strategy was to “hang in there until enough years went by that [IPCC] might claim ownership by adverse possession of the property.” Vol. II Tr. 232:16-19.

Thus, overwhelming, let alone substantial, evidence refutes Defendants' central contention that the “Presbytery did nothing to manifest an intent to own or control [the Property] after the dissolution” of Covenant Presbyterian Church.

C. Alternatively, the Judgment Should be Affirmed under the General Trust Analysis in *Mote*.

In *Mote*, the court found the local church property was held in trust for the denomination based on the court's examination of property records, the local church's articles and bylaws, and the governing documents of the denomination. An examination of these factors in this case compels the same result.

¹⁰ Defendant Houssney also admitted that, as early as February 2000, immediately after the dissolution of Covenant Presbyterian Church, “the Presbytery was the trustee of the church at that time,” and “the Presbytery could decide if it chose to do so to sell the property on Baseline Road and start its new church development somewhere else.” Vol. II Tr. 192:2-6; 195:16-21.

In examining the property records in *Mote*, the Colorado Supreme Court indicated the deeds named only the local church, contained no reference to the denomination, and contained nothing to indicate the local church held the properties in trust. *Mote, supra*, 716 P.2d at 104. *Mote* further stated that the Diocese, equivalent to the Presbytery in this case, had never given property to the local church, had never paid for property, and had never provided direct financial support to the local church for the acquisition of property. *Id.*

The facts regarding the Property in this case are much more favorable to the Presbytery. The real property deed names Covenant Presbyterian Church, not Defendant IPCC. Although IPCC claims to be legal successor to Covenant Presbyterian Church, the trial court found the evidence simply does not support this conclusion. *See infra*, pp. 42-44. Unlike in *Mote*, the Presbytery paid for the Property initially and provided direct financial support to the local church for construction of improvements and other purposes. In fact, the direct financial support given by the Presbytery to Covenant Presbyterian Church exceeded \$265,000. Vol. I Tr. 138:14-22.

Mote next looked at the local church's articles and bylaws. The court found that neither the articles nor the bylaws contained any explicit declaration of a trust in favor of the general church, but did indicate that the local church agreed to be

bound by the Constitution and Canons of the denomination. *Mote, supra*, 716 P.2d at 104-105.

Again, the facts in this case are stronger than those in *Mote* in favor of the Presbytery. Covenant Presbyterian Church's Articles of Incorporation provided that "the purposes for which this corporation is formed are for the support of the Gospel and the maintenance of religious worship according to the standards, customs and usages of the Presbyterian Church (U.S.A.)." CD 1237-1242. The Articles also recognized that Covenant Presbyterian Church could not lease, sell or mortgage its real property except by written permission of the Presbytery. *Id.* Covenant Presbyterian Church's Bylaws provided that the Church "is a particular congregation of the Presbyterian Church (U.S.A.) . . . and is subject to the guidance and direction of the jurisdiction," the Bylaws "shall be in conformity with the Constitution of the Presbyterian Church (U.S.A.)," and "may not be amended contrary to the Constitution of Presbyterian Church, (U.S.A.)." CD 1275-1279.

Defendants assert that the trial court should not have considered Covenant's 1983 Articles and its 1989 Bylaws. They contend Covenant's original Articles were superseded by a one-page document filed with the Secretary of State in 1992. The uncontradicted testimony of Larry Gupton, who prepared and filed the 1992 document on behalf of Covenant, dispels this notion. Supp. CD 14-16 (Gupton Tr.

24:24-32:16). Mr. Gupton testified that the 1992 Articles were not intended to create a new corporation or change Covenant's status as a member church of the PCUSA or its relationship to the Presbytery. Supp. CD 15 (Gupton Tr. 27:23-28:12). According to Mr. Gupton and the records of Covenant's board meetings, the 1992 Articles were never discussed or voted upon by the board or the congregation. Supp. CD 15 (Gupton Tr. 26:15-27:22). Mr. Gupton testified that the 1992 Articles were only a "technical reincorporation" to fix its corporate standing, and that Covenant continued to follow the previously existing Articles and Bylaws and continued to be bound by the Book of Order. Supp. CD 15 (Gupton Tr. 27:17-29:5). Mr. Gupton stated specifically that the 1992 Articles were intended to incorporate the Book of Order's dissolution provision. Supp. CD 15-16 (Gupton Tr. 29:11-32:16).

Finally, *Mote* examined the denomination's governing documents. The court found that the constitutions and canons of The Episcopal Church created a trust over local church property, even though they did not contain any provision explicitly establishing a trust in favor of the general church. *Mote, supra*, 716 P.2d at 105.

Again, the facts here even more clearly support a trust than the facts in *Mote*. The Book of Order explicitly provides for a trust over all local church property in

favor of the denomination. CD 1083. The Book of Order also explicitly provides that, “[w]henever a particular church is formally dissolved by the Presbytery, the particular church’s property 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 held or disposed of as the Presbytery may direct.” *Id.*

Based on a side-by-side analysis of the facts in this case compared to *Mote*, there is no question that the result should be the same in this case.

D. The Judgment Should be Affirmed on a Third Independent Ground — Defendants Failed to Prove IPCC is Legal Successor to Covenant Presbyterian Church.

Even assuming, *arguendo*, that the overwhelming evidence did not support affirmance of the judgment under the Book of Order’s reverter clause and trust provision, the judgment must still be affirmed because Defendants failed to establish at trial that IPCC is legal successor to Covenant Presbyterian Church.

Defendants’ only tenuous claim to the Property at trial was that several months after the Presbytery dissolved Covenant Presbyterian Church, Defendant Housney, unbeknownst to the Presbytery, filed a one-page document with the Colorado Secretary of State. CD 57. In this form, Housney claimed to be an officer of Covenant Presbyterian Church and purported to change its corporate name to IPCC. *Id.* This unauthorized attempt to usurp control of the Covenant

Presbyterian Church corporation is insufficient, based on all the evidence, to give IPCC a claim to the Property.

As an initial matter, IPCC was not, in fact, a continuation of Covenant Presbyterian Church. Upon the dissolution of Covenant Presbyterian Church in February 2000, Houssney clearly acknowledged IPCC was a *new* church, and that Covenant Presbyterian Church no longer existed — “There is no old congregation. It’s dissolved. It’s finished.” CD 281. The uncontradicted evidence showed that, at the time of Covenant Presbyterian Church’s dissolution, it had seven remaining members, and all of these became members of the Presbytery rather than IPCC. Vol. I Tr. 164:20-165:19.

Further, Houssney conceded in his trial testimony that the Presbytery had advised and expected IPCC to incorporate and get its own tax identification number. CD 55; Vol. II Tr. 50:20-51:13; 204:23-205:9. The Presbytery never gave IPCC authority to usurp control of Covenant Presbyterian Church’s corporate shell. *Id.* The Presbytery was unaware that Houssney had filed the name change with the Colorado Secretary of State, and Houssney acknowledged he never told the Presbytery he had purported to change the name of the corporation rather than incorporating IPCC as a new corporation. Vol. II Tr. 206:13-17.

Substantial additional evidence refuted any claim by Defendants that IPCC was legal successor to Covenant Presbyterian Church. Housney testified that IPCC never followed the bylaws of Covenant Presbyterian Church because IPCC was “a new church.” Vol. II Tr. 214:14-23. According to Housney’s own testimony, he filed the one-page document claiming IPCC was the successor to Covenant Presbyterian Church even though IPCC never followed or even looked at Covenant’s bylaws, never adopted its own articles and bylaws, and held no election of directors or officers by eligible members of Covenant Presbyterian Church. Vol. II Tr. 214:14-215:25. Since Housney had never been elected as an officer or director by the members of Covenant Presbyterian Church, he could not have had authority to convert Covenant Presbyterian Church to IPCC.

Based on all the evidence, the trial court correctly concluded “the evidence simply does not support” IPCC’s “claim to be the legal successor in interest to Covenant.” Ruling, p. 12, entered July 23, 2008, Filing ID 20770952. Therefore, Defendants lack any legal standing to claim any interest in the Property.

E. The Trial Court Did Not Abuse its Discretion in Striking Defendants’ Claim to Recover the Value of Alleged Improvements to the Property.

In their Trial Brief filed on April 11, 2008, ten days before trial, Defendants attempted to raise an entirely new claim under C.R.C.P. 105(e). Rule 105(e)

allows a party to assert a “set-off” or “counterclaim” where the party has been holding real property under color of title, and in good faith made permanent improvements upon the disputed property. In their Trial Brief, Defendants claimed they were in entitled to 90% of the value of the Property based on their assertion that IPCC and its alleged predecessor, Covenant Presbyterian Church, had made mortgage payments on the Property since 1983. Defendant’s Trial Brief, p. 5, filed April 11, 2008 (Filing ID 19381368).

In response to Defendants’ Trial Brief, Plaintiffs moved to strike the new claim on the basis Defendants had never previously asserted any “set-off” or “counterclaim” under Rule 105(e), and Defendants’ prior disclosure of damages had indicated, “the amount of IPCC’s damages to date are small, perhaps around \$2,000.” Motion to Strike, filed April 14, 2008 (Filing ID 19399714). Based on Defendants’ delay in raising their new claim until the eve of trial, and the prejudice caused to Plaintiffs by such delay, the trial court properly exercised its discretion in striking Defendants’ claim under Rule 105(e). Order Granting Motion to Strike, filed July 8, 2008 (Filing ID 20559831).

In any event, the trial court’s striking Defendants’ claim could not constitute reversible error because the evidence submitted at trial established that any such claim would fail for myriad reasons.

First, IPCC's own Trial Brief contended that it adversely possessed the Property beginning on January 31, 2000. Defendant's Trial Brief, p. 4, filed April 11, 2008 (Filing ID 19381368). The permanent improvements on the Property were completed in 1985, more than fifteen years before Defendants allegedly began adversely possessing the Property. CD 968-971. No permanent improvements have been constructed since 1985.

Second, Defendants' possession of the Property after January 31, 2000 was not "adverse" because the Presbytery gave Defendants permission to use the Property. Defendants repeatedly acknowledged the Presbytery's ownership interest and made mortgage payments in lieu of rent. Vol. II Tr. 55:15-57:6.

Third, Defendants cannot recover in equity because they made the mortgage payments on the Property with notice of Presbytery's claim to ownership. Defendants were not acting in "good faith" under Rule 105(e) because their admitted goal was simply to "hang in there" long enough to claim adverse possession. Vol. II Tr. 232:16-19.

Fourth, the total payments made by Defendants since January 31, 2000 were much less than the fair market rental value. The mortgage payments made by Defendants since 2000 total less than \$125,000. CD 242-250. During that same eight-year period, Defendants received income from the Property in excess of

\$68,000, leaving a net total payment by Defendants of less than \$56,000. *Id.* This represents a monthly net payment by Defendants of less than \$600, clearly less than fair market rental value.

Finally, awarding any sum of money to Defendants would be contrary to the holdings in *Golden Lodge* and *Mote*, which enforced the property interests of the larger voluntary association without any suggestion that the local lodge or local church were entitled to a set-off.

VI. CONCLUSION

The judgment should be affirmed.

Respectfully this 14th day of August, 2009.

Brent E. Rychener

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of August, 2009, a true and correct copy of the foregoing **ANSWER BRIEF** was served via U.S. Mail:

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