

PUBLIC COPY

NO. 58170-3

SUPREME COURT OF THE
STATE OF WASHINGTON

DONALD L. BARNETT,
Appellant,

v.

JACK E. HICKS, JACK H. DuBOIS, and E. SCOTT
BARTLEY, individually and as the Board of Directors
of Community Chapel and Bible Training Center and
COMMUNITY CHAPEL AND BIBLE TRAINING CENTER, and
DAVID MOTHERWELL, E. MITZEL and JEFF MacGREGOR,
as members of the Board of Directors,

Respondents.

BRIEF OF APPELLANT

Charles K. Wiggins
Laura Buckland
EDWARDS, SIEB, WIGGINS
& HATHAWAY

Attorneys for Appellant

6501 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104
206/624-0974

PUBLIC COPY

OCT - 2 1961
CLERK OF SUPREME COURT
STATE OF WASHINGTON

BY CLERK
CLERK
STATE OF WASHINGTON
OCT 2 1961

TABLE OF CONTENTS

	<u>Page</u>
I. NATURE OF CASE	1
II. ASSIGNMENTS OF ERROR	2
III. ISSUES PRESENTED	3
IV. STATEMENT OF THE CASE: PROCEDURAL HISTORY	6
V. STATEMENT OF THE CASE: FACTUAL BACKGROUND	7
A. The Articles And Bylaws Of Community Chapel Have Provided Since The Corporation Was Formed That The Articles And Bylaws Could Not Be Amended Without The Concurrence Of Donald Barnett, The Founding Pastor, And That Pastor Barnett Could Not Be Removed	7
B. Members Of Community Chapel, Including Pastor Barnett, Fell Into Sin	9
C. Jerry Zwack's Grievances Against Pastor Barnett Led Pastor Barnett And The Eldership To Hold Hearings On Jerry Zwack's Grievances Against Pastor Barnett	12
D. Zwack And Pastor Barnett Testified During The Eldership Hearings, But No Women Testified About The Allegations Against Pastor Barnett	14
E. Pastor Barnett Refused To Accept The Special Status Imposed In A Secret Meeting Without Notice To Pastor Barnett	16
F. The Defendants Consistently Maintained That The Three Senior Elders Had Removed Pastor Barnett On March 4, But At Trial They Changed Their Story To Assert That The Eldership	

of 16 Had Removed Pastor Barnett On March 3	18
VI. ARGUMENT	21
A. Introduction.	21
1. Summary Of Argument.	21
2. Standard of Review.	22
B. The Senior Elders And Eldership Had No Implied Right To Remove Pastor Barnett For Perceived Breaches Of Fiduciary Duty Under The Constitu- tion, State Law, Or the Articles And Bylaws Of Community Chapel.	23
1. The Federal And State Constitu- tions Prohibit The Civil Courts From Imposing Fiduciary Duties On The Pastor Of A Church In His Role As Pastor And Approv- ing Removal Of The Pastor For A Perceived Breach Of Those Duties.	23
2. The Trial Court Improperly Validated the Senior Elders' Removal of Pastor Barnett Without Finding that Pastor Barnett Violated Any Fiduciary Duty.	30
3. An Implied Right in Common Law Does Not Authorize the Senior Elders to Defy the Express Provisions of Community Chapel's Articles And Bylaws.	34
a. The Bylaws Do Not Confer Substantive or Procedural Authority to Discharge Pastor Barnett	34
b. The Elders Violated the Bylaws Procedural Require- ments in Their Attempt to Remove Pastor Barnett.	36

(1) The Elders Violated The Bylaw That Prohibited Senior Elders From Meeting Without The Presence Or Permission Of Pastor Barnett.	36
(2) The Court Ignored The Bylaws Prohibiting Removal Of A Subsequent Pastor Without Congregational Vote	39
4. Even If Pastor Barnett Could Be Removed In Contravention Of The Bylaws, He Violated No Fiduciary Duty Because He Was Not Intentionally Disloyal To The Corporation's Business Interests.	40
5. The Senior Elders Could Not Have Reasonably Believed That Pastor Barnett's Conduct Warranted Removal Because They Engaged In Similar Sexual Conduct	41
C. The January 25 Agreement Did Not Deprive Pastor Barnett Of The Protective Provisions Of The Bylaws When It Authorized The Eldership To Conduct The Hearings, Because Neither The Language Of The Agreement Nor The Parties Said Anything About Any Power To Discipline, Disfellowship Or Remove Pastor Barnett	42
1. The January 25 Agreement Cannot Determine Control Of Community Chapel Because It Did Not Alter The Organism By Which The Church Is Governed.	42

2.	The Plain Language of the January 25, 1988 Agreement States Only Pastor Barnett's Willingness for the Elders to Hold Hearings.	45
3.	Even If The Language Of The Agreement Is Ambiguous, There Is No Evidence Suggesting That Pastor Barnett Intended To Subject Himself To Discipline By The Elders.	47
4.	The Agreement Is Irrelevant Because The Eldership Did Not Purport To Discharge Pastor Barnett.	50
D.	The Purported Removal Of Pastor Barnett Was Illegal And Invalid Because The Eldership Violated Their Own Guidelines For The Eldership Hearings.	53
1.	The Trial Court Ignored Hearing Guidelines that Required The Eldership to Prove the Allegations Against Pastor Barnett by "Witnesses.	53
2.	The Trial Court Ignored Violations of the Hearing Guidelines that Provided Pastor Barnett with the Opportunity to Rebut.	56
E.	No One Could Disfellowship Pastor Barnett Because The Specific Protective Provisions In The Bylaws Must Prevail Over The More General Provisions On Disfellowship.	58
F.	The Provisions Of The Bylaws Protecting Pastor Barnett From Removal Prevented The Elders From Terminating Pastor Barnett For Breach Of His "Employment Contract"	60
G.	The Trial Court Improperly Allowed As Parties Directors Of The Defen-	

dant Church Who Were Not Properly Appointed To The Board Of Senior Elders.	61
VII. CONCLUSION	62

APPENDIX

A	Constitution and RCW cites
B	Findings of Fact and Conclusions of Law
C	Exhibit 15: January 25, 1988 Agreement
D	Exhibit 23: Guidelines for Eldership Hearings
E	Pastor Barnett's Proposed Findings Erroneously Rejected By The Court

TABLE OF AUTHORITIES

CASES

<u>Antioch Temple, Inc. v. Parekh</u> , 383 Mass. 854, 422 N.E.2d 1337 (1981) . . .	27
<u>Baldwin v. Sisters of Providence</u> , 112 Wn.2d 127, 769 P.2d 298 (1989) . . .	32, 33
<u>Barnett v. Hicks</u> , 114 Wn.2d 879, 792 P.2d 150 (1990)	1, 7
<u>Berg v. Hudesman</u> , 115 Wn.2d 657, 801 P.2d 222 (1990)	47
<u>Burgeson v. Columbia Producers</u> , 60 Wn. App. 363, 803 P.2d 838 (1991) . . .	22, 23
<u>Church of Christ v. Carder</u> , 105 Wn.2d 204, 713 P.2d 101 (1986)	26, 53
<u>Corbray v. Stevenson</u> , 98 Wn.2d 410, 656 P.2d 473 (1982)	54
<u>Demopolis v. Galvin</u> , 57 Wn. App. 47, 786 P.2d 804 (1990)	31
<u>Destefano v. Grabrian</u> , 763 P.2d 275 (Colo. 1988)	28
<u>Employment Division v. Smith</u> , 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 875 (1990)	29
<u>In Re Estate of Osborn</u> , 128 Ill. App. 3d 453, 470 N.E.2d 1114 (1984) . . .	27
<u>In re Estate of Wahl</u> , 99 Wn.2d 828, 664 P.2d 1250 (1983)	45
<u>Fish v. Koldkrist Beverage Ice</u> , 60 Wn. App. 122, 802 P.2d 837 (1991) . . .	23
<u>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</u> , 106 Wn.2d 826, 726 P.2d 8 (1986)	49

<u>Fox v. Order of United Commercial Travelers</u> , 192 F.2d 844 (5th Cir. 1951)	54
<u>Grace v. Grace Institute</u> , 226 N.E.2d 531, 279 N.Y.S.2d 721 (N.Y. App. 1967)	41
<u>Henry v. Lind</u> , 76 Wn.2d 199, 455 P.2d 927 (1969)	48, 52
<u>Higgins v. Maher</u> , 210 Cal. App. 3d 1168, 258 Cal. Rptr. 757 (1989), cert. denied, 110 S. Ct. 1135 (1990)	26
<u>Kaufmann v. Sheehan</u> , 707 F.2d 355 (8th Cir. 1983)	26
<u>Kedroff v. St. Nicholas Cathedral</u> , 344 U.S. 94, 73 S. Ct. 143, 154, 97 L. Ed. 120 (1952), 344 U.S. at 116	24, 26, 27
<u>Kwik-Lok Corp. v. Pulse</u> , 41 Wn. App. 142, 702 P.2d 1226 (1985)	50
<u>Lycette v. Green River Gorge</u> , 21 Wn.2d 859, 153 P.2d 873 (1944)	37
<u>McClure v. Salvation Army</u> , 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972)	26, 27
<u>Nally v. Grace Community Church</u> , 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (1987), rev'd on other grounds, 47 Cal. 3d 278, 253 Cal. Rptr. 97 (1988)	28
<u>Natal v. Christian and Missionary Alliance</u> , 878 F.2d 1575 (1st Cir. 1989)	26
<u>Olympia Police Guild v. Olympia</u> , 60 Wn. App. 556, 805 P.2d 245 (1991)	45
<u>PUD No. 1 of Lewis County v. Washington Public Power Supply System</u> , 104 Wn.2d 353, 705 P.2d 1195 (1985)	59

<u>Parsons Supply, Inc. v. Smith</u> , 22 Wn. App. 520, 591 P.2d 821 (1979) . . .	33, 41
<u>Presbyterian Church v. Mary Elizabeth Blue Hill Memorial Presbyterian Church</u> , 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969)	24
<u>Providence Baptist Church of San Francisco v. Superior Court</u> , 40 Cal. 2d 55, 251 P.2d 10 (1952)	27
<u>Serbian Eastern Orthodox Diocese v. Milivojevic</u> , 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976) . . .	24, 45
<u>Simpson v. Wells Lamont Corp.</u> , 494 F.2d 490 (5th Cir. 1974)	26
<u>Southside Tabernacle v. Pentecostal Church of God</u> , 32 Wn. App. 814, 650 P.2d 231 (1982)	27
<u>Touissant v. Blue Cross & Blue Shield</u> , 408 Mich. 579, 292 N.W.2d 880 (1980)	33
<u>Universal/Land Construction Co. v. Spokane</u> , 49 Wn. App. 634, 745 P.2d 53 (1987)	50
<u>Vincent v. Raqlin</u> , 114 Mich. App. 242, 318 N.W.2d 629 (1982)	27
<u>Walker Memorial Baptist Church v. Saunders</u> , 285 N.Y. 462, 35 N.E.2d 42 (1941)	27
<u>Washington Local Lodge No. 104 v. International Broth. of Boilermakers</u> , 28 Wn.2d 536, 183 P.2d 504 (1947) .	59
<u>Watson v. Jones</u> , 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1872)	43
<u>Wigqinton v. Order of United Commercial Travelers of America</u> , 126 F.2d 659 (7th Cir. 1942), cert. denied, 317 U.S. 636, 63 S. Ct. 28, 87 L. Ed. 2d 513 (1942)	54

<u>Williams v. Queen Fisheries, Inc., 2</u> Wn. App. 691, 469 P.2d 583 (1970) .	33, 41
--	--------

STATUTES

RCW 23B.08.080	35
RCW 23B.08.090	35
RCW 24.03.100	35
RCW 24.03.103	35
RCW 24.03.115	49
RCW 24.03.265	36
U.S. Const., amend. I	26
WA State Const., Article I, § 11	26

MISCELLANEOUS

A. Stokes & L. Pfeffer, <u>Church and State in the United States</u> 65, 71, 92-100 (1964)	25
A. Sutherland, <u>Constitutionalism in America</u> 49 (1965)	25
Church of England. A.J. Beitzinger, <u>A History of American Political Thought</u> 32-37 (1972)	25
<u>Revised Model Nonprofit Corporation Act, § 1.80</u> (1987)	35
W. Miller, <u>The First Liberty</u> 5, 15 (1986)	25

I. NATURE OF CASE

This is the second appeal of this case. This Court remanded the earlier appeal to consider the defendants' claim that Pastor Barnett breached his fiduciary duty. Barnett v. Hicks, 114 Wn.2d 879, 885, 792 P.2d 150 (1990).

The trial court did not hold that Pastor Barnett breached any fiduciary duty. In ten days of testimony, the defendants failed to present competent evidence of a breach of fiduciary duty. Instead, the defendants persuaded the trial court to hold that the defendants "reasonably believed that Pastor Barnett had breached his fiduciary duties." (F/F 100, CP 155) The trial judge approved the removal of Pastor Barnett even without a finding of breach of fiduciary duty because the judge was offended that Pastor Barnett had committed adultery with five women, calling this "one of the most flagrant breaches of pastoral duty one can imagine." (RP 1829)¹

¹Portions of the record have been sealed under agreement of the parties (CP 88), and this brief includes confidential materials. The clerk's papers have been divided into a "public record" set and a "sealed" set.

The trial court violated the federal and state constitutions by hearing evidence of the substantive reasons for the defendants' decision to try to remove Pastor Barnett. No reported American case has ever condoned such an inquiry into the fitness of a pastor to retain his pastorate.

II. ASSIGNMENTS OF ERROR

Error is assigned to:

1. Entry of judgment removing Pastor Barnett from all positions with Community Chapel and denying his request for a permanent injunction. (CP 105)
2. Entry of order denying Pastor Barnett's Motion for Reconsideration. (RP 1854)
3. Entry of order granting leave to amend defendants' answer and counterclaims. (CP 372)
4. Entry of order authorizing adding additional defendants. (CP 637)
5. Entry of order denying Pastor Barnett's Motion for Summary Judgment. (CP 696)
6. Entry of order denying Pastor Barnett's Motion for Judgment on the Pleadings. (CP 638)
7. Admission of testimony concerning the substantive reasons for Pastor Barnett's termination. (CP 175-76, 637, 772, RP 453, 2182)

8. Admission of the hearsay presented during the eldership hearings and documents created as a result of the hearings. (RP 459, 498, 513-14, 520-21, 569-70, 890-91, 1004)

9. Pastor Barnett has attempted in good faith to assign error as necessary to permit the Court to reach the merits of his appeal. Pastor Barnett also assigns error to any other finding, conclusion or ruling which prejudicially affects his appeal.

10-13. Refusal to enter Pastor Barnett's proposed findings 38.1, 62.1, 89.1, and unnumbered proposed finding at CP 980. Proposed findings are set forth in Appendix E.

15-106. Entry of the following findings of fact: 15, 29, 33, 36-38, 41, 45, 47-49, 52, 55, 57-59, 62, 64, 66-73, 75, 79, 80-85, 88, 92, 94-95, 99-102, 105. (Assignments of error to the findings of fact are referred to by the finding numbers.) A complete copy of the findings of fact is attached as Appendix B.

III. ISSUES PRESENTED

A. Do the federal and state constitutions prohibit the civil courts from imposing fiduciary duties on the pastor of a church in his role as pastor, and approving removal of the pastor for a

perceived breach of fiduciary duty? (A.E. 1-2, 5-9, 15, 41-44, 46-47, 71, 100; Argument B.1)

B. Assuming that the elders had some power to remove Pastor Barnett for breach of fiduciary duty, were the elders required to prove to the trial court that Pastor Barnett in fact breached some fiduciary duty? (A.E. 1-2, 5, 8-9, 47, 71-72, 99-102; Argument B.2)

C. Where the articles and bylaws of Community Chapel made plaintiff Donald Barnett pastor for life and prohibited his removal, did the board of senior elders/directors have any power to remove Pastor Barnett for breach of fiduciary duty? (A.E. 1-2, 5-9, 11, 13, 49, 52, 59, 62, 66, 68-71, 73, 81-85, 88-92, 94-95, 101-102; Argument B.3)

D. Could Pastor Barnett's private conduct, which did not conflict with and was not disloyal to the business interests of Community Chapel, be considered a breach of fiduciary duty? (A.E. 1-2, 8-9, 47, 100; Argument B.4)

E. Could the elders have reasonably believed that Pastor Barnett's conduct warranted discharge when they engaged in similar sexual conduct? (A.E. 1-2, 5-9, 47, 64, 68-72, 94, 99-102; Argument B.5)

F. Did Pastor Barnett's written agreement to permit the eldership to conduct hearings authorize the eldership to discipline, remove or disfellowship Pastor Barnett, where the agreement says nothing about such authority and the evidence is undisputed that the parties did not discuss such authority before the agreement? (A.E. 1-3, 5-9, 29, 33, 36, 47-48, 67, 70, 73, 85; Argument C)

G. Whether the purported removal of Pastor Barnett was invalid because the eldership violated their own procedural guidelines. (A.E. 1-3, 5-10, 37, 38, 47-48, 55, 57; Argument D)

H. Whether the specific provisions of the bylaws protecting Pastor Barnett from removal must prevail over the general provisions allowing disfellowship of members? (A.E. 1-3, 5-6, 9, 12, 80-82, 84-85, 91-92, 94-95; Argument E)

I. Did the provisions of the bylaws protecting Pastor Barnett from removal prevent the elders from terminating Pastor Barnett for breach of his "employment contract"? (A.E. 1-2, 5-9, 41-44, 46-47, 52, 59, 62, 64, 66, 68-73, 81-85, 88-92, 94-95, 99-102; Argument F)

J. Did the trial court err in allowing defendants Motherwell, McGregor, and Mitzel, to

join this lawsuit as parties representing Community Chapel, where they were never properly appointed as directors of Community Chapel? (A.E. 1-5, 9, 106; Argument G)

IV. STATEMENT OF THE CASE: PROCEDURAL HISTORY

Pastor Donald L. Barnett commenced this action on March 4, 1988 seeking an injunction to prevent the senior elders/directors of Community Chapel from interfering with him in his duties as chairman of the board of senior elders, president, and pastor of the church. (CP 3) Before Pastor Barnett could obtain a restraining order, the senior elders purported to amend the articles and bylaws, remove Pastor Barnett from all of his offices, and disfellowship (*i.e.*, excommunicate) him from the church. (Ex. 47) The elders then excluded Pastor Barnett from the church facilities. This split the congregation into two factions--the pastor's group and the elders' group.

In December 1988 Judge Norman Quinn granted summary judgment on the defendants' first counter-claim, ratifying the senior elders' amendments to the bylaws and removal of Pastor Barnett. (CP 82) This Court reversed the summary judgment in June 1990, and upheld the validity of the provision of

the articles that Pastor Barnett must concur in any amendment to the articles or bylaws. Barnett v. Hicks, 114 Wn.2d 879, 995, '92 P.2d 150 (1990). The Court left for determination on remand the senior elders' second counterclaim for breach of fiduciary duty. Id.

On remand, the parties agreed to refer this case to retired Judge Walter Deierlein for trial. (CP 84) Judge Deierlein heard testimony of Pastor Barnett's private sexual relationships, all for the avowed purpose of proving a breach of fiduciary duty, and yet the trial court never made any finding that Pastor Barnett breached his fiduciary duties! Instead, Judge Deierlein entered findings that the elders "reasonably believed" that Pastor Barnett had taken some actions and had breached his duties. (F/F 47, 71, 72, 99, 100)

V. STATEMENT OF THE CASE: FACTUAL BACKGROUND

- A. The Articles And Bylaws Of Community Chapel Have Provided Since The Corporation Was Formed That The Articles And Bylaws Could Not Be Amended Without The Concurrence Of Donald Barnett, The Founding Pastor, And That Pastor Barnett Could Not Be Removed.

In 1967 Pastor Barnett felt the call of God to found Community Chapel. (RP 94) Upon the advice of an attorney-member, a steering committee prepared Articles of Incorporation and Bylaws. (RP

95) Pastor Barnett explained to the committee his deep conviction that God has ordained the pastor to lead the church and to have control over the eldership -- "God calls the pastor, and only God can remove a pastor." (RP 96, 106)

The steering committee drew up articles of incorporation which provided that both the articles and bylaws could only be amended with "the original Pastor's concurrence, if still presiding." (Ex. 1, p. 3-4) The bylaws provided that the pastor is the spiritual overseer of the church, and cannot be removed:

The pastor, having established the original church, (along with the congregation and, we feel, by God) shall have oversight of same until the pastor agrees to change.

(Ex. 4, p. 4) Both the steering committee and the congregation of the fledgling church unanimously ratified these provisions. (RP 108-09)

The provisions protecting Pastor Barnett ("the protective provisions") were expanded as the church grew. (RP 128-49) All three elders who later voted to remove Pastor Barnett had signed every bylaw revision put before them, including the protective provisions. (Ex. 4-10)

The most important protective provisions of the bylaws are set out in Finding of Fact 6:

The original chairman of the board of senior elders is Donald Lee Barnett, who cannot be removed from office while living.

The original pastor shall not be subject to removal from the position of chairman of the board of senior elders.

The board of senior elders shall not meet to discuss problems or make decisions without the presence or permission of the chairman and a minimum of all members of the board of senior elders save one, except to consider the chairman's salary. . . . [If the board meets without the chairman under emergency circumstances] the board shall not make any decisions contrary to what it believes the chairman's decision would be, if the case is such as to require his concurrence . . .

The original president of the corporation is Donald Lee Barnett, who cannot be removed from office while living.

The original pastor, having established the original church by the direction of God and with support of the congregation, shall have oversight of the same until the pastor agrees to change . . .

[T]he original pastor . . . cannot be removed from office while living . . .

(CP 109-111)

B. Members Of Community Chapel, Including Pastor Barnett, Fell Into Sin.

In the early 1980's, the members of Community Chapel first experienced spiritual connections, a unique bond in which two worshippers experience the

love and presence of God. (RP 182-183) spiritual connections were intense, and sometimes led to adultery even among leaders and senior elders of the church. (RP 1612-1613) Although adultery was one of many grounds for which a member "might" be disfellowshipped (Ex. 10, p. 26), members were disfellowshipped only for refusing to repent. (RP 1613-15)

In 1985 Mrs. Barnett cut off conjugal relations with Pastor Barnett, telling him she no longer needed him. (RP 188-93) Love and companionship ended: "She didn't eat any meals at home. She didn't cook. She didn't fix the house. She wasn't at home. She just was gone." (RP 196)

SEALED BY ORDER OF THE CLERK

The defendants' theory was that these women were manipulated and seduced. But there was no such evidence and the trial court declined to enter any such finding.

One of the five women testified at trial. "A" was a part-time employee of Community Chapel. (RP 745)

SEALED BY ORDER OF THE CLERK

She admitted writing to Pastor Barnett that she loved him and was sorry for hurting him. (RP 781) A's testimony was impeached by her best friend at the time, who testified that A never appeared depressed over her relationship with Pastor Barnett or expressed any

fear of him.² (RP 1207) The trial court made no findings on the credibility of truth of A's testimony.³

C. Jerry Zwack's Grievances Against Pastor Barnett Led Pastor Barnett And The Eldership To Hold Hearings On Jerry Zwack's Grievances Against Pastor Barnett.

In 1987, Jerry Zwack, who was the spiritual connection of Pastor Barnett's wife, became increasingly embittered towards Pastor Barnett. Defendant/Senior Elder Hicks terminated Zwack from his full-time position at Community Chapel, and Zwack incorrectly blamed Pastor Barnett for his termination. (RP 1294-1300, 1649) Zwack also blamed Pastor Barnett when a Bible college class was restructured without Zwack's participation. (RP 217-24) Zwack felt that Pastor Barnett was hurting Mrs. Barnett through his relationships with other women. (RP 227)

SEALED BY ORDER OF THE CLERK

²In 20-50 conversations with A during this time, the only dissatisfaction A expressed to her friend was that she was jealous of Pastor Barnett's attention to other women. (RP 1205-06) Several months later, A told her friend that she was angry with Pastor Barnett and wanted to "get him back." (RP 1209)

³Only two other women testified about sexual contact with Pastor Barnett, neither of whom testified to any compulsion or force. (RP 545, 550-63)

A group of 16 men was selected to conduct hearings to address Zwack's grievances. (F/F 21) The group of 16 is referred to in these proceedings and in this brief as the "Eldership" to distinguish it from the "Elders" and the "Senior Elders." (F/F 21) (RP 462-63) David Motherwell, the liaison between the eldership and Pastor Barnett (RP 463, 1108), told Pastor Barnett that the purpose of the hearings was to resolve Zwack's grievances. (RP 1109-10) Pastor Barnett believed Zwack's grievances to include Zwack's termination from the Bible College and the Counseling Center. (F/F 19) Motherwell told Pastor Barnett that the eldership acknowledged that they had no "teeth," i.e. no authority to take action against Pastor Barnett based on Zwack's allegations. (RP 230-31)

Neither Motherwell nor anyone else suggested to Pastor Barnett that he was giving up any protections or authorizing any disciplinary action by agreeing to participate in the eldership hearings. (RP 237-39, 1106, 1109) No one intended disciplinary action when the hearings began. (RP 1108-09) Pastor Barnett would never have agreed to hold the

hearings if Motherwell had suggested they might lead to discipline or disfellowship. (RP 240-41)

Elder MacKenzie, the moderator of the hearings, prepared an agreement authorizing the eldership to hold the hearings. (F/F 29) (Ex. 15, a copy is attached as Appendix C.) In five brief sentences, Pastor Barnett agreed that the eldership could conduct hearings; that the eldership would exercise final authority over the hearings; and that the hearings could continue "until they are concluded to the satisfaction of the elders." The agreement does not say that the elders can take any action, or that Pastor Barnett is giving up any protection under the bylaws, or that disciplinary action can be taken against Pastor Barnett.

D. Zwack And Pastor Barnett Testified During The Eldership Hearings, But No Women Testified About The Allegations Against Pastor Barnett.

The eldership hearings began on January 25, 1988. (F/F 39) Zwack spoke first, followed by Pastor Barnett, then each responded to the other. (F/F 40)

The only witnesses at the eldership hearings were Zwack and Pastor Barnett. No woman testified about any relationship with Pastor Barnett. Instead, Zwack repeated hearsay allegations. (E.g.,

RP 680-90) When Pastor Barnett denied the hearsay allegations, the elders concluded that Pastor Barnett must be lying, and that this provided one more ground for removing him. (RP 737) Zwack admitted that he had no knowledge that Pastor Barnett had committed any sexual acts in the six months since Barnett's deliverance. (RP 318, 1474-75, 1633-34)

The eldership deputized two elders to privately investigate and report on Zwack's allegations against Pastor Barnett without his presence or knowledge. (RP 689-90, 711-14, 1165-66) Other elders also presented hearsay testimony of what they claimed women had said to them, primarily during counseling sessions. (RP 513-15) Pastor Barnett never heard these accusations and never had an opportunity to rebut them.⁴

⁴The hearsay testimony presented at the eldership hearings was repeated at trial over Pastor Barnett's objection. (RP 498-99) Moreover, the court allowed various elders to testify to their recollection of Zwack's hearsay testimony presented during the hearings -- double hearsay. (RP 500-01)

E. Pastor Barnett Refused To Accept The Special Status Imposed In A Secret Meeting Without Notice To Pastor Barnett.

The three senior elders, together with Pastor Barnett as chairman, were the board of directors of Community Chapel. (Ex. 3) The bylaws prohibited the three senior elders from meeting to discuss church business without Pastor Barnett. (RP 1231, 1586-87, Ex. 10, p. 6) In disregard of this prohibition, the senior elders met on February 10 and voted to place Pastor Barnett on "special status." (F/F 59) The "special status" drastically limited Pastor Barnett's ability to spend time with any woman other than his wife. (Ex. 43)

Pastor Barnett told the eldership that he could not accept the special status and they could not impose it. (RP 1652) The special status would prevent him from receiving or giving spiritual counsel and assistance. (RP 1653-55) Special status was manifestly unfair because the elders had sinned sexually, and yet did not impose special status on themselves. (RP 1658-59) The eldership had no authority to impose special status on Pastor Barnett, and it would be wrong for him to yield to their building rebellion. (RP 1651)

SEALED BY ORDER OF THE CLERK

Pastor Barnett had ordered the elders not to make any statements to the congregation at the regular Friday night service, but to await his return when they would resolve the problem according to the bylaws. (RP 1549) Pastor Barnett learned about the eldership's disclosures to the congregation when he returned on Saturday night. (RP 256)

On Sunday, February 28, the congregation gave Pastor Barnett a standing ovation when he entered the sanctuary. (RP 259) He rebutted the elders' accusations. (F/F 76; Ex. 31) Pastor Barnett accused the elders of a power play. (Ex. 31, p. 3) Pastor Barnett stated that he was no longer living in sin, and that his past sins were under the blood of Christ. (Ex. 31, p.5) Pastor Barnett asked for a show of hands whether the congregation would support him over the elders -- "it looked like every hand went up," with only a handful of dissenters. (RP 260)

Pastor Barnett had reason to believe that this was a power play. (RP 259) For several years the elders had wanted more control over the church. (RP 1651) Some elders, including defendant Hicks, opposed Pastor Barnett's prohibition against divorcing a spouse to marry a spiritual connection. (RP 1671, 1673-74) Hicks later divorced his wife and married his connection. (RP 1674-75) Defendant Hartley felt that he would be promoted if Pastor Barnett were removed. (RP 1676-77)

F. The Defendants Consistently Maintained That The Three Senior Elders Had Removed Pastor Barnett On March 4, But At Trial They Changed Their Story To Assert That The Eldership of 16 Had Removed Pastor Barnett On March 3.

The senior elders secretly met with attorney Jim Leach during the week of February 29 to plot to remove Pastor Barnett. Leach advised a four-step process: amend the articles of incorporation to eliminate the requirement that Pastor Barnett's concur in any amendment to the bylaws; file the amendment in Olympia; amend the bylaws to remove the protective provisions; and finally, remove Pastor Barnett. (RP 1375-76)

The senior elders implemented this four-step process in two meetings on March 4. In the morning, they surprised Pastor Barnett by appearing as

a group at the parsonage. (F/F 86) Hicks refused to tell Pastor Barnett if the elders had been holding illegal meetings without Pastor Barnett's presence, and Pastor Barnett then told the senior elders to leave the parsonage. (RP 265-665, F/F 89) The senior elders went to Hicks' office, where they signed articles of amendment previously drafted by Leach to eliminate Pastor Barnett's concurrence power. (RP 1356-58, F/F 89)

Hartley drove to Olympia and filed articles of amendment. (F/F 89) The senior elders then held a secret meeting without Pastor Barnett. (RP 1368) The minutes for the senior elders' secret afternoon meeting reflect that they followed the exact sequence of Leach's plan to remove Pastor Barnett. (Ex. 48) They voted to remove the protective provisions from the bylaws. (Ex. 48, 50) They voted to remove Pastor Barnett as a member of the Board of Directors. (Ex. 48) Finally, they voted to disfellowship him. (Ex. 48) They signed a letter advising Pastor Barnett that they had adopted amendments to remove "previous limitations in the bylaws to your dismissal." (Ex. 49, p.3)

For the next 34 months, the senior elders repeatedly asserted that they had amended the

bylaws in order to remove Pastor Barnett on March 4: in Hicks' deposition only five days later (RP 1356-58); in their answer to the complaint filed the following month (CP 20); in a letter to the congregation the following month (RP 655-56); and in their amended answer after they had lost on appeal (CP 308-10).

At trial, the defendants came up with the new theory that the entire eldership had actually disfellowshipped Pastor Barnett on March 3. This theory enabled the defendants to argue that Pastor Barnett was not entitled to notice of the surprise meeting on the afternoon of March 4, because he had already been removed! (CP 801)

If the defendants had thought of this theory earlier, the first appeal to this court would presumably not have been necessary, since it dealt exclusively with the validity of the senior elders' actions on March 4. The trial court accepted the defendants' new theory, and found that Pastor Barnett was effectively removed on March 3.
(F/F 85)

VI. ARGUMENT

A. Introduction.

1. Summary Of Argument.

The court below upheld the defendants' removal of Pastor Barnett as pastor of Community Chapel because it considered him unfit to be a pastor. Neither the court nor the defendants had the authority to remove Pastor Barnett as pastor of Community Chapel. The state and federal constitutions deprive the court of the power to judge Pastor Barnett's qualifications as pastor; and the articles and bylaws deprive the defendants of the power to terminate Pastor Barnett.

The trial court's decision recites four erroneous theories for removing Pastor Barnett: inherent authority to remove Pastor Barnett for breach of fiduciary duties; the agreement to hold the Zwack hearings; disfellowship of Pastor Barnett; and breach of Pastor Barnett's "employment contract."

The alleged breach of fiduciary duty is the issue for which this Court remanded for trial, and the issue on which the trial court rested its decision:

Just as an explanation or as a gratis comment, if I were hearing this case as a final authority so to speak without regard to appellate review, this is the one that I would hang my hat on.

(RP 2249-50) (emphasis supplied)

The defendants' three alternative theories are spurious at best. Defendants raised these claims to draw the court's attention away from the lack of evidence and legal authority for removing Pastor Barnett. Defendants hope the sheer volume of arguments in defense of their actions will give the appearance that their case is far more complicated than it really is and obfuscate the only real issue.

This Court should dispel the defendants' sophistic smoke screen, reverse the trial court, invalidate the senior elders' attempts to remove Pastor Barnett, and restore Pastor Barnett to his rightful leadership positions at Community Chapel.

2. Standard of Review.

The constitutional issues presented by this appeal are reviewed de novo. The construction of the articles and bylaws, the January 25, 1988 agreement and corresponding guidelines are questions of law, reviewable de novo. Burgeson v. Columbia Producers, 60 Wn. App. 363, 366-67, 803

P.2d 838 (1991). The intention of the parties to a contract is a question of fact reviewed for substantial evidence. Id.; see Fish v. Koldkrist Beverage Ice, 60 Wn. App. 122, 125, 802 P.2d 837 (1991). Other trial court's findings are also reviewed under the substantial evidence standard. Fish, 60 Wn. App. at 125.

B. The Senior Elders And Eldership Had No Implied Right To Remove Pastor Barnett For Perceived Breaches Of Fiduciary Duty Under The Constitution, State Law, Or The Articles And Bylaws Of Community Chapel.

There are five separate reasons why the trial court's fiduciary duty theory is erroneous. Any one of these five reasons requires reversal.

1. The Federal And State Constitutions Prohibit The Civil Courts From Imposing Fiduciary Duties On The Pastor Of A Church In His Role As Pastor And Approving Removal Of The Pastor For A Perceived Breach Of Those Duties.

The linchpin of the trial judge's decision was his deep-seated conviction that a pastor who commits adultery with members of his congregation has breached a fiduciary duty which justifies his removal. The judge stated that the he could not imagine "anymore powerful fiduciary relationship than that of pastor and member." (RP 1835) The trial court wrote on blank slate. Never before has

a court imposed fiduciary duties on a pastor simply by virtue of the pastor-congregant relationship.

Pastor Barnett repeatedly objected to the trial court's inquiry into the substantive reasons for his termination, and into the actions which allegedly constituted a breach of fiduciary duty. (CP 175-76, 637, 772; RP 453) This Court should hold as a matter of law that the Constitution prohibits a secular court from determining whether a pastor has breached his fiduciary duties.

The first amendment guarantees to religious organizations the right to decide matters of church governance for themselves, free from government control or manipulation. Serbian Eastern Orthodox Diocese v. Milivojevic, 426 U.S. 696, 697, 96 S. Ct. 2372, 2375, 49 L. Ed. 2d 151 (1976) (Religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine.") (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S. Ct. 143, 154, 97 L. Ed. 120 (1952)); Presbyterian Church v. Mary Elizabeth Blue Hill Memorial Presbyterian Church, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969).

Our country and constitution were founded upon freeing religious organizations from the stranglehold of government. The Pilgrims were considered radical reformers because of their belief that the choice of religious leaders should be approved by the members of the religious congregations, not the king, who was the head of the Church of England. A.J. Beitzinger, A History of American Political Thought 32-37 (1972); A. Sutherland, Constitutionalism in America 49 (1965). In colonial Virginia, the governor controlled the appointment of ministers and was empowered to silence the preaching of all other persons. The established Episcopal Church was vigorously attacked by Baptists, whose ministers often met unauthorized in homes and preached without licenses. W. Miller, The First Liberty 5, 15 (1986). Both Baptists and Presbyterians successfully pressed the Virginia House of Delegates for an end of the established church, largely through the efforts of James Madison, who later introduced the first amendment and shepherded it through congress. Miller, supra, at 7, 17, 34-50; A. Stokes & L. Pfeffer, Church and State in the United States 65, 71, 92-100 (1964).

The first amendment to the U.S. Constitution and Article I, § 11 of the Washington Constitution prohibit a secular court from participating in the decision to hire or fire the pastor of a church. Kedroff, 344 U.S. at 116 (first amendment guarantees the freedom to select clergy); Natal v. Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974); McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir.), cert. denied, 409 U.S. 896 (1972); Higgins v. Maher, 210 Cal. App. 3d 1168, 258 Cal. Rptr. 757, 759-60 (1989) ("The authorities are next to unanimous in concluding that civil courts may not involve themselves in reviewing the termination of clergy for theological or disciplinary reasons."), cert. denied, 110 S. Ct. 1135 (1990).

The secular courts' role in church leadership struggles is severely circumscribed. The courts can do no more than examine the church's governing documents to determine whether power exists to remove the pastor and, if authority exists, whether the church has followed its own procedures in exercising that power. Church of Christ v. Carder,

105 Wn.2d 204, 713 P.2d 101 (1986); Southside Tabernacle v. Pentecostal Church of God, 32 Wn. App. 814, 819, 650 P.2d 231 (1982); Providence Baptist Church of San Francisco v. Superior Court, 40 Cal.2d 55, 251 P.2d 10, 14 (1952); Antioch Temple, Inc. v. Parekh, 383 Mass. 854, 422 N.E.2d 1337, 1341 (1981); Vincent v. Raqlin, 114 Mich. App. 242, 318 N.W.2d 629 (1982); Walker Memorial Baptist Church v. Saunders, 285 N.Y. 462, 35 N.E.2d 42 (1941).

These decisions recognize the inseparable relationship between the performance of a church's spiritual leader and the church's religious mission. Kedroff, 344 U.S. at 116; McClure, 460 F.2d at 558-59. Any inquiry into the performance of pastoral duties is necessarily an interference in substantive ecclesiastical concerns. McClure, 460 F.2d at 558-59.

Courts have refused invitations to enter this constitutional sanctuary and have declined to impose fiduciary duties on a pastor simply by virtue of his position as a pastor. In Re Estate of Osborn, 128 Ill. App. 3d 453, 470 N.E.2d 1114, 1117 (1984) (clergy-congregant relationship does not create a fiduciary duty). Any imposition of

duty on pastors has been limited to counseling relationship with a congregant. And these courts have taken pains to limit a pastor's duties to those which are imposed on all counselors, secular and religious alike. E.g., Destefano v. Grabrian, 763 P.2d 275, 284 (Colo. 1988); Nally v. Grace Community Church, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215, 219 (1987), rev'd on other grounds, 47 Cal.3d 278, 253 Cal. Rptr. 97 (1988). Despite the overwhelming authority prohibiting the court from entering into this forbidden territory, the trial court improperly considered evidence of Pastor Barnett's conduct to decide whether he breached an ill-defined fiduciary duty, making him unfit and justifying his removal as pastor. (F/F 15, 41-44, 46-47)

The trial court's analysis of the scope of Pastor Barnett's fiduciary duties necessarily entangled it in religious doctrines. The trial court imposed fiduciary duties upon Pastor Barnett as a pastor solely within the context of his private relationship with church members, not as a secular corporate officer. (RP 1835, F/F 47, 100) There are no secular standards to govern the relationship between a pastor and his church, and

whether a pastor should be retained by a church. Adultery, sin, repentance, holiness, forgiveness, redemption -- these are the doctrines that controlled any fiduciary duty Pastor Barnett owed to his church and congregation. The court's personal belief or disbelief in sin, redemption, and forgiveness is irrelevant. It is clear that these doctrines guide this church. And the First Amendment prohibits a court from choosing among theological doctrines, accepting some and rejecting others.⁵

Pastor Barnett testified that the statement in the bylaws directing that the Pastor shall live a Godly life does not mean that the Pastor must be without sin, for none of us is without sin. (RP 306-07) No matter how repugnant this was to the secular judge, Community Chapel believed that pastors and elders should be able to commit sin

⁵The defendants gave Pastor Barnett theological reasons for their decision to discipline him, citing scriptural authority and their belief that they acted in accordance with "proper stewardship of [the] holy trust" given to them by God. (Ex. 24) In like spirit, Pastor Barnett offered a theological defense; his sins were under the blood of Christ and forgiven. (Ex. 31, p.5) The trial court's decision improperly entered into and decided this theological debate. See Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 1599, 108 L. Ed. 2d 876 (1990).

(including adultery) and be forgiven the same as any other congregant -- and remain in the church.

In short, no court has ever found that the pastor-congregant relationship gives rise to a fiduciary duty, or that breach of that fiduciary duty is grounds for removal of the pastor. This court's decision is unique, and uniquely violates the federal and state constitutions.

2. The Trial Court Improperly Validated the Senior Elders' Removal of Pastor Barnett Without Finding that Pastor Barnett Violated Any Fiduciary Duty.

The trial court heard extensive testimony of the substantive reasons for Pastor Barnett's removal for the avowed purpose of deciding the elders' claim that he breached some fiduciary duty, and yet the trial court never made any finding that Pastor Barnett breached his fiduciary duties. Pastor Barnett argued to the trial court that such a finding was necessary, but impossible because of the absence of competent record evidence. (RP 2182-83, 2225) Instead, the court entered a finding that the elders "reasonably believed" that Pastor Barnett had breached his duties.⁶ (F/F 100)

⁶All of the court's findings and conclusions about Pastor Barnett's conduct were similarly couched in terms of the eldership's having had sufficient evidence to reasonably conclude that

This Court should rule as a matter of law that this second-hand fact finding is no less a violation of Pastor Barnett's constitutional rights than a full-fledged decision on the merits and cannot support his termination in direct violation of the articles and bylaws. The defendants have failed to carry their burden of proof and the Court should reverse. Demopolis v. Galvin, 57 Wn. App. 47, 786 P.2d 804 (1990) ("the absence of findings on an issue for which a party had the burden of proof is presumed to result from lack of proof").

The trial court erred in admitting hearsay of testimony given at the eldership hearings, and hearsay of statements made by various women about Pastor Barnett. None of this hearsay was competent to prove a breach of fiduciary duty, breach of "employment contract," or for any other reason. ER 803, 804.

The trial court does not avoid constitutional error by relying on the elders' perceptions of whether Pastor Barnett violated his fiduciary duty. The court still heard and considered evidence of Community Chapel's religious doctrines and Pastor

Pastor Barnett had taken various actions. (F/F 47, 71, 72, 99)

Barnett's conduct. As discussed above, the federal and state constitution forbid this inquiry into the substantive reasons for Pastor Barnett's removal.

The trial court's second-hand fact finding was based on a decision of this Court which is easily distinguished. Baldwin v. Sisters of Providence, 112 Wn.2d 127, 769 P.2d 298 (1989). In Baldwin, the employee was terminated for sexually molesting a female patient. The employee claimed a breach of an implied covenant in the employee manual that any discharge would be based on just cause. The parties agreed that sexual abuse of a patient is just cause for termination, and the only issue was who should determine if the employee had in fact molested a patient--the employer or the trier of fact. 112 Wn.2d at 137. This Court reasoned that although the employer had voluntarily inserted the just cause provision in the employee manual, it had not given away its right to determine just cause to another decision maker. Accordingly, the employer's determination of just cause was entitled to some deference. 112 Wn.2d at 138-39.

Baldwin and this case are polar opposites. In Baldwin the employee relied on an implied right to continued employment. Here, Pastor Barnett relies

on numerous express protective provisions. The courts, not one of the parties to the contract, must decide whether an express contract provision has been breached. See Touissant v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880, 896 (1980).

There is another important distinction between this case and Baldwin. In Baldwin, the employer was accused of one specific act which the parties agreed was just cause for removal. 112 Wn.2d at 137. Here, by contrast, Pastor Barnett disputes that the hearsay evidence presented by the defendants establishes an actionable breach of fiduciary duty. The trial court never decided this issue, but simply held that the elders reasonably found a breach of fiduciary duty based on "information adduced at their hearings". The trial court improperly abdicated to the defendants both its fact finding role and its role in applying the law to the facts.

Courts applying the fiduciary duty standard have consistently determined independently whether an objective standard of disloyalty was breached. See, e.g., Parsons Supply, Inc. v. Smith, 22 Wn. App. 520, 524, 591 P.2d 821 (1979); Williams v.

Queen Fisheries, Inc., 2 Wn. App. 691, 695, 469 P.2d 583 (1970).

This Court should not allow the defendants to strip Pastor Barnett of express protections under the constitution and the church's articles and bylaws in the name of fiduciary duty because they have failed to prove that he breached those duties.

3. An Implied Right in Common Law Does Not Authorize the Senior Elders to Defy the Express Provisions of Community Chapel's Articles And Bylaws.
 - a. The Bylaws Do Not Confer Substantive or Procedural Authority to Discharge Pastor Barnett.

Community Chapel's bylaws repeatedly and unequivocally state that Pastor Barnett may not be removed from office. (F/F 6) Pastor Barnett argued that the defendants' theory of an "implied right" to remove for breach of fiduciary duty could not overcome the clear provisions of the articles and bylaws. (RP 453; CP 175-76, 637- 772) The trial court rejected this argument, gutting the bylaws of any protective provisions.

The trial court's decision is contrary to the uniform judicial holdings that the church's articles and bylaws determine which of two compet-

ing factions represents the true or legitimate authority of a church. See, supra pp. 24-27.

Washington corporation laws confirm that there is no inherent right to remove a corporate officer contrary to its bylaws. Directors of nonprofit corporations are removed pursuant to the articles or the bylaws. RCW 24.03.100. The members can remove a member-elected director, RCW 24.03.103, but Community Chapel has no members. Similarly, shareholders may remove the director of a profit corporation without cause only if the articles so provide. RCW 23B.08.080.

A court may remove a director of a profit corporation on the grounds of fraudulent or dishonest conduct, or other specified grounds. RCW 23B.08.090 But the legislature chose not to authorize removal of directors of non-profit, non-member corporations except as authorized in the bylaws or articles. See also Revised Model Nonprofit Corporation Act, § 1.80 (1987) (recognizing that governmental accommodation of religious beliefs may prevent the removal of directors of religious corporations for cause).

The trial judge disregarded Community Chapel's articles and bylaws because he felt that "there has

to be a point at which the conduct of a pastor can be called into question." (RP 2250). The trial court and the defendants ignored the one statutory provision which defines that "point." RCW 24.03.265 provides for liquidation of a nonprofit corporation if the actions of those controlling the corporation are illegal, oppressive, or fraudulent. But the elders didn't want to liquidate the church, they wanted to seize control. Rather than invoke these statutory protections, the senior elders destroyed the very documents they purported to protect.

The trial court's findings that the elders' actions were valid or reasonable despite their inconsistency with the bylaws are erroneous and should be reversed. (F/F 52, 59, 62, 66, 68, 70, 73, 81, 83, 84, 85, 88, 90, 91, 92, 94, 95, 101, 102)

b. The Elders Violated the Bylaws Procedural Requirements in Their Attempt to Remove Pastor Barnett.

- (1) The Elders Violated The Bylaw That Prohibited Senior Elders From Meeting Without The Presence Or Permission Of Pastor Barnett.

Community Chapel's bylaws prohibited the senior elders from meeting without the presence or

permission of Pastor Barnett. (Ex. 10, p. 6) At the least, this provision required the senior elders to give notice to Pastor Barnett of all meetings of the senior elders. Lycette v. Green River Gorge, 21 Wn.2d 859, 153 P.2d 873 (1944) (meeting of board without notice to all directors is illegal). They not only failed to give notice, they actively concealed a plot to depose him. The trial court erred as a matter of law in upholding the actions taken at these illegal meetings, (F/F 59, 66, 68, 73, 81, 82, 83, 84, 85, 88, 90, 91, 92, 94, 95, 101, 102) and in rejecting Pastor Barnett's proposed finding 62.1. (CP 961)

On February 10, the senior elders secretly met to place Pastor Barnett on "special status."⁷ (F/F 63) Pastor Barnett justifiably rejected the senior elders' attempted usurpation of authority. The trial court improperly characterized this rejection as "defiance," (F/F 100) erroneously reasoning that

⁷This illegal meeting precipitated Pastor Barnett's challenge to the eldership's unlawful actions and the senior elders' full rebellion. Had the senior elders followed the bylaws and included Pastor Barnett in the meeting, the situation would probably have been resolved, avoiding the very rebellion against which the protective provisions were to guard. (RP 96)

this "defiance" justified the senior elders' further illegal actions. (F/F 49, 69, 70, 71)

To circumvent these bylaw provisions, the defendants pleaded for a finding that the senior elders acted individually in order to prevail in this appeal. (RP 2041-42) The trial court succumbed and added the statement that the three senior elders' vote to place Pastor Barnett on special status was "an individual and collective act." (RP 2047, F/F 59) When Pastor Barnett excepted, the trial court responded, "I'm giving you the best shot you have to appeal." (RP 2047)

This finding of "individual and collective act" is contrary to the evidence. The defendants prepared minutes for the February 10 meeting, in which the meeting was referred to as a "senior elders' meeting," and the minutes were signed by the "corporate secretary." (Ex. 43) In addition, the letter sent to Pastor Barnett advising him of the special status decision expressly stated that it was a "senior elder/corporate board of directors matter." (Ex. 24)⁸

⁸In any event, this finding of "individual" actions does not circumvent the notice requirement. The bylaw does not say that the senior elders shall only give notice to Pastor Barnett when they "act collectively." Rather, the senior elders are

During the week of February 29, the senior elders furtively met with their attorney to discuss how to circumvent the articles and bylaws in order to remove Pastor Barnett. (RP 1375-76) And on March 4, the senior elders executed their planned coup by secretly meeting to remove the protective provisions, and then purporting to remove Pastor Barnett from all positions and disfellowshipping him. (F/F 90, 91, 92; Ex. 48, 50) Each of these steps -- special status, removal of the concurrence requirement, removal of the protective provisions, and removal of Pastor Barnett -- was illegal for failure to provide Pastor Barnett notice and failure to gain his concurrence.

(2) The Court Ignored The Bylaws Prohibiting Removal Of A Subsequent Pastor Without Congregational Vote.

The trial court's conclusion that Pastor Barnett's termination could be upheld without the congregation's approval is erroneous as a matter of law. (F/F 98) The bylaws provide that Pastor Barnett cannot be removed at all and any other pastor cannot be removed without a vote by the

required to give notice to Pastor Barnett whenever they meet to discuss problems or make decisions. (RP 1231, 1586-87; Ex. 10, p. 6)

congregation. (Ex. 10, p. 17) In other words, the bylaws do not contemplate any circumstance where the senior elders control the removal of the pastor; only the congregation has this power. This is an important protection. It shows that Community Chapel was not established to be run exclusively by the senior elders.

If the court is going to rewrite the bylaws to authorize Pastor Barnett's removal, the court should place the removal power in the hands of the congregation, not the senior elders.⁹

4. Even If Pastor Barnett Could Be Removed In Contravention Of The Bylaws, He Violated No Fiduciary Duty Because He Was Not Intentionally Disloyal To The Corporation's Business Interests.

The trial court erroneously concluded that Pastor Barnett's acts could be considered a breach of fiduciary duty. (F/F 47, 100) As a matter of law, acts that allegedly expose a religious corporation to potential tort liability cannot alone be considered a breach of fiduciary duty.

⁹And, in fact, the congregation overwhelmingly supported Pastor Barnett, giving him a standing ovation upon his return after the elders made public their decision to place him on special status and voting by a show of hands to support Pastor Barnett over the elders. (RF 259)

Nothing in Pastor Barnett's conduct demonstrates disloyalty towards the business interests of Community Chapel. See Williams v. Queen Fisheries, Inc., 2 Wn. App. 691, 469 P.2d 583 (1970); Parsons Supply Inc. v. Smith, 22 Wn. App. 520, 591 P.2d 821 (1979); Grace v. Grace Institute, 226 N.E.2d 531, 279 N.Y.S.2d 721, (N.Y. App. 1967). This Court should hold that the findings of fact do not support a conclusion of breach of fiduciary duty because there is no finding (or evidence) that Pastor Barnett was intentionally disloyal to Community Chapel.

5. The Senior Elders Could Not Have Reasonably Believed That Pastor Barnett's Conduct Warranted Removal Because They Engaged In Similar Sexual Conduct.

The trial court's findings that the defendants reasonably believed that Pastor Barnett's alleged sexual misconduct was a breach of fiduciary duty that warranted his discharge are not supported by substantial evidence in the record. (F/F 47, 64, 68, 69, 70, 71, 72, 94, 99, 100, 101, 102) Two of the original defendants responsible for Pastor Barnett's purported removal had themselves been involved in sexual misconduct at least as egregious as any alleged against Pastor Barnett, and in circumstances far more compromising to the church.

(RP 908, 959-60, 1614-1615, 1655-56) Sexual misconduct by defendants in this case continued through the very day on which the defendants purported to disfellowship Pastor Barnett. (CP 144) Considering their own continuing sexual misconduct, the defendants could not have reasonably believed that Pastor Barnett should be discharged for breach of fiduciary duty while they remained in office.

- C. The January 25 Agreement Did Not Deprive Pastor Barnett Of The Protective Provisions Of The Bylaws When It Authorized The Eldership To Conduct The Hearings, Because Neither The Language Of The Agreement Nor The Parties Said Anything About Any Power To Discipline, Disfellowship Or Remove Pastor Barnett.

There are four separate and independent reasons why the January 25 agreement cannot be interpreted as the trial court interpreted it. For any one of these reasons, the trial court erred in relying on the January 25 agreement in upholding the purported removal of Pastor Barnett.

1. The January 25 Agreement Cannot Determine Control of Community Chapel Because It Did Not Alter The Organism By Which The Church Is Governed.

The January 25, 1988 agreement was a unilateral document signed by Pastor Barnett but not the

senior elders.¹⁰ The agreement did not modify the bylaws of the church, which could only be modified by a vote of the board of senior elders, including "the original Pastor's concurrence," formalized by a written amendment to the bylaws. (Ex. 10, pp. 13-14)

The January 25 agreement could not control over the protective provisions of the bylaws. The first amendment requires that disputes over church government be resolved by the acknowledged organism by which the church is governed. The U.S. Supreme Court has stated that when a schism divides a church into two conflicting bodies,

the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to use of the property.

Watson v. Jones, 80 U.S. (13 Wall.) 679, 725, 20 L.Ed. 636 (1872)(quoted in Church of Christ v. Carder, 105 Wn.2d at 209).

¹⁰The January 25 document is not an "agreement" because the eldership do not undertake to do anything. However, since the trial court has consistently used the term "agreement" to describe the document, we adopt it for clarity.

The bylaws govern Community Chapel, not a paper drafted by the eldership and handed to Pastor Barnett for his unilateral signature, particularly since the paper does not even purport to alter or modify the bylaws or to give anyone power to discipline Pastor Barnett. If the eldership had wanted to alter the fundamental structure of the church in this way, they should have drafted an amendment to the bylaws (and articles) to accomplish this dramatic change. The eldership cannot claim power that is contrary to the bylaws through judicial interpretation of a vague unilateral agreement to allow the eldership to conduct hearings. And in fact, the eldership did not contemplate such a dramatic alteration of the structure of the church, and Pastor Barnett would never have agreed to it.

The trial court's interpretation of the January 25 agreement is also contrary to the theology which underlies the bylaws of Community Chapel-- the pastor, not the elders, controls the church. The trial court was not free to reject this consistent theological principle in interpreting the January 25 agreement.

2. The Plain Language of the January 25, 1988 Agreement States Only Pastor Barnett's Willingness for the Elders to Hold Hearings.

The language of the January 25 agreement cannot be interpreted in the expansive manner suggested by the court. See In re Estate of Wahl, 99 Wn.2d 828, 664 P.2d 1250 (1983) (intention of parties is ascertained largely from the language of the contract); Olympia Police Guild v. Olympia, 60 Wn. App. 556, 558-59, 805 P.2d 245 (1991) (language of document prevails over unexpressed and inconsistent intent of parties). Moreover, the first amendment forbids the trial court from looking beyond the plain language of the agreement when interpretation of the agreement requires extensive review of church polity and doctrine. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 2384-86, 49 L. Ed. 2d 151 (1976) (court's interpretation of church's constitutional provisions impermissible because it required evaluation of conflicting testimony concerning internal church procedures).

The agreement simply gave the eldership permission to conduct hearings on the specific grievances between Pastor Barnett and Jerry Zwack. The agreement allows the eldership "final authority

over [the] meetings" and permits the hearings "to continue until they are concluded to the satisfaction of the elders." This language does not confer upon the eldership the additional power to discipline Pastor Barnett or change in any way the many protections given to Pastor Barnett in the articles and bylaws.

The trial court's finding that the agreement "was made intentionally broad to cover a wide range of circumstances" is contrary to the agreement's express limitations.¹¹ (F/F 29) First, the agreement relates only to Zwack's grievances against Pastor Barnett "and no other church matters." Second, the agreement speaks only of limited and self-imposed restraints on Pastor Barnett: the substance of the agreement is prefaced by a request that Pastor Barnett "voluntarily submit to two conditions." (Ex. 15) Lastly, Pastor Barnett amended the second paragraph of the agreement to read that he "and Jerry [Zwack]; would permit the

¹¹The finding is unsupported by substantial evidence. The trial court (and defense counsel) incorrectly believed that MacKenzie said that he made the agreement "intentionally broad." (RP 1916) MacKenzie never said this and no such intention was ever conveyed to Pastor Barnett. MacKenzie actually said that the subject matter of Zwack's complaints was broad (RP 463), not that the agreement was broad.

hearings to continue until they [were] concluded." (Ex. 15) Because Zwack had no power to relinquish, this statement could not be the grant of disciplinary power that the elders now envision.

The trial court concluded that Pastor Barnett's statement: "I permit you to conduct hearings" is equivalent to "I permit you to conduct hearings and discipline me in any way you see fit." This is nonsense. The agreement only authorizes the eldership to hold the hearings, not to discipline Pastor Barnett.

3. Even If The Language Of The Agreement Is Ambiguous, There Is No Evidence Suggesting That Pastor Barnett Intended To Subject Himself To Discipline By The Elders.

No substantive evidence supports the trial court's finding that "[b]y agreeing to the terms of [the agreement], Pastor Barnett acknowledged the eldership's authority to discipline him" or that Pastor Barnett "had to have known" that the eldership could discipline him. (F/F 33) To ascertain the meaning of unclear and ambiguous language in a contract, each provision must be read in light of all of the surrounding circumstances in order to give effect to the intentions of the parties. Berg v. Hudesman, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990)

No one ever suggested to Pastor Barnett that the agreement empowered the eldership to remove him. See pp. 13-14 supra. And Pastor Barnett testified unequivocally that he never would have permitted the hearings to go forward had the agreement so provided. (RP 240-41) The eldership sought and negotiated the agreement in order to free the hearings of even the appearance of Pastor Barnett's influence. (F/F 24, 26) The eldership sought power over the hearings, not over Pastor Barnett.

Moreover, the conduct of the parties confirms that neither the eldership nor Pastor Barnett intended the agreement to empower the eldership to discipline Pastor Barnett. See Henry v. Lind, 76 Wn.2d 199, 455 P.2d 927 (1969). The defendants' own tardiness in asserting this argument proves its invalidity. If the eldership had intended the agreement to empower them to remove Pastor Barnett, they would not have waited 2 1/2 years to raise this specious argument. Instead, from the outset, the eldership deferred to the senior elders' attempts to discipline Pastor Barnett. (F/F 67, 84) And from the first attempt to place him on special status, Pastor Barnett challenged all

actions, whether by the senior elders or the eldership, to discipline him. (F/F 49, 50, 69, 70, 76, 77, 95, 100)

Courts will not give a contract an unreasonable and imprudent interpretation, when a more reasonable interpretation is possible. Fisher Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 837, 726 P.2d 8 (1986). It is not reasonable to conclude that Pastor Barnett would have relinquished all of the protections afforded him by the articles and bylaws simply to resolve the grievances of one disaffected member of the congregation. (F/F 29, 33, 36) The government of the church was structured according to scripture and Community Chapel's religious doctrines. Pastor Barnett could not have abdicated his position without turning his back on a fundamental doctrine of his church -- the pastor serves at the pleasure of God, not the elders.

The trial court's interpretation of the agreement also clashes with the protective provisions in the articles and bylaws. RCW 24.03.115 specifically prohibits the senior elders and Pastor Barnett from delegating their power to amend the articles and bylaws to anyone. According to the trial

court, the eldership accomplished by a unilateral agreement what the bylaws expressly forbade. The trial court's adoption of this unreasonable, irrational and illegal interpretation should be reversed.

Finally, if the agreement is ambiguous, the trial court should have construed the ambiguity against its drafter. Universal/Land Construction Co. v. Spokane, 49 Wn. App. 634, 745 P.2d 53 (1987); Kwik-Lok Corp. v. Pulse, 41 Wn. App. 142, 702 P.2d 1226 (1985). The agreement was drafted by the eldership (F/F 29), and should be construed narrowly to limit the powers of the eldership.

4. The Agreement Is Irrelevant Because The Eldership Did Not Purport To Discharge Pastor Barnett.

In any event, whether or not the agreement gave the eldership the authority to discharge Pastor Barnett is irrelevant. The eldership did not purport to discharge Pastor Barnett pursuant to the agreement. The senior elders purported to discharge Pastor Barnett pursuant to their own secret vote to place Pastor Barnett on special status and their secret votes on the afternoon of March 4 to amend the bylaws and remove Pastor

Barnett from his positions.¹² The trial court's findings that the eldership took disciplinary action are not supported by substantial evidence in the record and should be reversed. (F/F 67, 70, 73, 85) The trial court should have entered Pastor Barnett's proposed finding that the eldership simply voted to recommend that the senior elders disfellowship Pastor Barnett. (CP 980)

The trial court entered a finding that the eldership voted on March 3 to disfellowship Pastor Barnett. This finding is contrary to all credible record evidence, including the defendants' own testimony and conduct, and should be reversed.¹³

¹²There is an important distinction between the group of elders conducting the Zwack hearings and the senior elders -- Pastor Barnett was entitled to be present and vote on any matters considered by the Board of Senior Elders. See, pp. 36-39, supra. Accordingly, it makes a great deal of difference whether the agreement empowered the eldership or the senior elders. It is clear that the agreement did not give any additional powers to the senior elders as a board.

¹³The trial court also entered a finding that the entire eldership "ratified" the senior elders' decision to place Pastor Barnett on special status, and that this vote properly placed Pastor Barnett on special status pursuant to the agreement. (F/F 67) This finding is also contrary to the facts. The special status was not imposed by all 16 elders voting as a group. Instead, the three senior elders met and voted separately and then presented their decision to the other 13 elders. (F/F 59) The vote of the remaining 13 elders was not to

The court should look to the parties' subsequent conduct in evaluating the defendants' claim that Pastor Barnett was disfellowshipped on March 3. Henry v. Lind, 76 Wn.2d 199, 199, 455 P.2d 927 (1969) ("This case proves the old saying that action speaks louder than words").

For three years, defendants steadfastly asserted that the senior elders disfellowshipped Pastor Barnett on March 4. The defendant's last-minute fabrication about a vote on March 3 to disfellowship Pastor Barnett is contrary to the minutes of the March 3 meeting (Ex. 33, 34), the senior elders' actions on March 4, Hicks' deposition testimony on March 9, the letter they wrote to the congregation in April, their answer to the complaint, amended answer, and all their prior pleadings. See pp. 18-20 supra.

This Court should not accept the defendants' last minute creation of additional and necessary votes to support a new, desperate theory. The March 3 eldership "vote" to disfellowship Pastor Barnett never took place.

place Pastor Barnett on special status as a part of the hearings, but simply to encourage Pastor Barnett to accept the special status imposed by the senior elders. (Ex. 30)

D. The Purported Removal Of Pastor Barnett Was Illegal And Invalid Because The Eldership Violated Their Own Guidelines For The Eldership Hearings.

The attempt to remove Pastor Barnett was invalid because the eldership violated its own guidelines for the hearings. See Carder, supra, 105 Wn.2d at 207-11.

1. The Trial Court Ignored Hearing Guidelines that Required The Eldership to Prove the Allegations Against Pastor Barnett by "Witnesses."

The senior elders' decision to remove Pastor Barnett was based almost exclusively on hearsay testimony in direct violation of the hearing's procedural requirement that "no allegation shall be accepted as fact unless it is admitted to be true, or it is supported by witnesses." (Ex. 23, a copy is attached as Appendix D) Instead of "witnesses," the eldership relied on second and third hand reports from Zwack and each other about Pastor Barnett's relationships with women congregants.

Both parties understood that "witnesses" meant individuals with personal knowledge of the facts to which they testified. MacKenzie, the author of the guidelines, stated at the beginning of the hearings that any allegations must be proven by "eyewitness testimony." (RP 615-16) Pastor Barnett testified

that the Bible establishes the requirement of eyewitnesses. (RP 334) Within Community Chapel, the word "witness" has a theological meaning, restricted to "people who witnessed an event . . . [carrying] a connotation of a personal experience and not just somebody who has heard something hearsay." (RP 1607)

Indeed, Pastor Barnett's interpretation of the witness requirement is the ordinary understanding of that term. See Corbray v. Stevenson, 98 Wn.2d 410, 656 P.2d 173 (1982) (words in a contract will be given their ordinary meaning). Courts interpreting contract provisions requiring a witness to an event have held that "[a] witness is one who testifies to what he has seen, heard or otherwise observed." Wigginton v. Order of United Commercial Travelers of America, 126 F.2d 659, 666 (7th Cir. 1942), cert. denied, 317 U.S. 636, 63 S. Ct. 28, 87 L. Ed. 2d 513 (1942); see Fox v. Order of United Commercial Travelers, 192 F.2d 844 (5th Cir. 1951).

Pastor Barnett agreed to the hearings in order to dispel rumor, not validate it. The elders' insistence that "witness" includes anyone hearing rumor of a "fact" supplies no more procedural pro-

tection for Pastor Barnett than no witness requirement at all.

The trial court impliedly recognized that Pastor Barnett was the only true "witness" at the hearings.

SEALED BY ORDER OF THE CLERK

The eldership violated the "witness" requirement by relying on hearsay allegations to conclude that Pastor Barnett misused his pastoral authority.

2. The Trial Court Ignored Violations of the Hearing Guidelines that Provided Pastor Barnett with the Opportunity to Rebut.

The eldership's reliance on reports of hearsay and their own secret investigations presented during the eldership review sessions deprived Pastor Barnett of the opportunity to rebut the testimony against him. No substantial evidence supports the trial court's findings that Pastor Barnett was "on notice" of and "consented to" reports of information to the eldership in his absence. (F/F 55, 57) The trial court should have entered Pastor Barnett's proposed finding 38.1 that he was denied the opportunity to rebut the testimony against him. (CP 947)

The guidelines contemplated that Zwack and Pastor Barnett would each present their case, that each would rebut the other's positions, and that the eldership would then hold "exclusive eldership review sessions . . . after the hearings [were] completed." (Ex. 23) In other words, all information would be given in the presence of Pastor Barnett so that he had the opportunity to respond to all allegations.

Pastor Barnett testified that he believed all information would be given in his and Zwack's

presence and did not know that the eldership would procure additional information during the exclusive review session. (RP 243, 1609-10) And the eldership admitted that no one told Pastor Barnett that the eldership would conduct their own investigations and report their hearsay findings back during the exclusive eldership review sessions. (RP 632-33, 713-14, 1165-66)

Motherwell's testimony that he told Pastor Barnett that elders Motherwell, Bergen, Peterson and Hartley would testify while Pastor Barnett was not present (RP 998) is not trustworthy. His story changed on cross-examination when he testified that he had no conversation with Pastor Barnett about elders providing evidence during the exclusive review sessions.¹⁴ (RP 1166) And even if Motherwell's earlier statement was true, it does not support the finding that Pastor Barnett knew

¹⁴This was just one example of Motherwell's unfortunate habit of changing his testimony during the case. In the two months between his deposition and the trial, Motherwell also changed his story about whether he individually disfellowshipped Pastor Barnett, and could offer no explanation at trial of this shift. (RP 1175-76) Motherwell, who now heads Community Chapel, with its substantial facilities and millions of dollars in cash (although the congregation has never chosen him as its leader), has a considerable personal stake in the outcome of this litigation.

that other elders would repeat hearsay information, or that elders would be deputized to investigate Zwack's allegations.

The complete lack of rudimentary procedural fairness demonstrates that the trial court erred in concluding that the hearings and review session procedures were "altogether reasonable, proper, fair, and protective of all." (FF 38, 45) The elderships' total reliance on hearsay, disclosed and undisclosed, was unfair to Pastor Barnett and violated the guidelines for the hearings.

E. No One Could Disfellowship Pastor Barnett Because The Specific Protective Provisions In The Bylaws Must Prevail Over The More General Provisions On Disfellowship.

The trial court erroneously concluded that the elders disfellowshipped Pastor Barnett, removing him from all offices within the church (F/F 84, 85, 91, 92, 94, 95) and erred in rejecting Pastor Barnett's proposed finding 89.1. (CP 979) This Court should rule as a matter of law that the elders could not have disfellowshipped Pastor Barnett because the disfellowshipping provisions do not apply to Pastor Barnett.

The bylaws include many specific protections for Pastor Barnett, stating that he cannot be removed from office. (F/F 6) These specific

provisions must govern over the more general provisions in the bylaws for disfellowshipping, which do not mention Pastor Barnett. See Washington Local Lodge No. 104 v. International Broth. of Boilermakers, 28 Wn.2d 536, 183 P.2d 504 (1947).

The bylaws must be construed to give meaning to all of their parts. See PUD No. 1 of Lewis County v. Washington Pub. Power Supply Sys., 104 Wn.2d 353, 705 P.2d 1195 (1985). All of the protective provisions would be rendered meaningless if the defendants had the power to disfellowship Pastor Barnett. (F/F 78)

The elderships' and senior elders' own actions confirmed their understanding that they had no power to disfellowship Pastor Barnett. The elders never purported to follow the bylaw provisions to disfellowship Pastor Barnett. Pastor Barnett's counselor did not disfellowship him, (F/F 93), and no concurrence by Pastor Barnett or his designee was sought, as required by the bylaws. (Ex. 10, p. 6, 27)¹⁵

¹⁵The trial court's findings that suggest the elders properly followed the bylaw disfellowshipping provisions despite these violations are erroneous. (F/F 80, 92, 93, 94, 95)

Instead, the elders, knowing that they had no power to disfellowship Pastor Barnett, engaged in covert and illegal corporate maneuvers to remove the bylaw provisions that protected him so that they could disfellowship him on March 4.

F. The Provisions Of The Bylaws Protecting Pastor Barnett From Removal Prevented The Elders From Terminating Pastor Barnett For Breach Of His "Employment Contract".

The trial court's determination that the elders reasonably concluded that "Pastor Barnett had materially breached the terms of his employment contract with Community Chapel" cannot be supported by the law or the facts. (F/F 99) First, the trial court can no more inquire into the defendants' breach of contract claim than it can inquire into their breach of fiduciary duty claim -- both require unconstitutional intrusions into the substantive reasons for Pastor Barnett's discharge. See, pp. 23-30 supra. Nor does this theory relieve the trial court from making a full-fledged finding that Pastor Barnett in fact breached the contract in order to uphold the defendant's illegal actions. See, pp. 30-34 supra. Finally, assuming that the bylaws should be treated as an employment contract, they do not permit termination of Pastor Barnett. See, pp. 34-36 supra. The elders did not act

reasonably because they acted in violation of the bylaws. (F/F 72, 92, 94, 99, 100, 101, 102) Just as with the fiduciary duty claim, the trial court improperly looked beyond the governing documents of Community Chapel to some supposed implied right that strips Pastor Barnett of his protections under the constitution and the bylaws.

G. The Trial Court Improperly Allowed As Parties Directors Of The Defendant Church Who Were Not Properly Appointed To The Board Of Senior Elders.

David Motherwell, Jeff McGregor, and E. Mitzel are not proper parties to this lawsuit. Though they claim to be members of the Board of Senior Elders of the Community Chapel, they were never validly appointed to those positions. (See CP 577-89, 682-83) They purport to serve as senior elders despite the fact that no pastor has ever approved their appointment as required by the bylaws. (Ex 10, p. 5) Moreover, they were "appointed" under a process that eliminated the basic governing structure of Community Chapel. These men are not senior elders; they have usurped their power in flagrant violation of the bylaws. The trial court erroneously granted them leave to join as defendants and their motion to amend their answer and counter-claims. (CP 372)

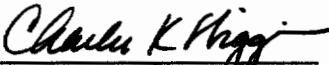
VII. CONCLUSION

The defendants have for almost three years successfully excluded Pastor Barnett and his congregation from the lovely facilities and substantial cash reserves of Community Chapel. The defendants have freely spent the money of this corporation on themselves and their legal defense. They have failed to prove any breach of fiduciary duty through full discovery, two appeals, and a lengthy trial. It is time to oust these usurpers. The Court should reverse and remand with directions to restore Pastor Barnett to his rightful position as senior pastor of Community Chapel.

DATED this 27 day of September, 1991.

EDWARDS, SIEH, WIGGINS &
HATHAWAY, P.S.

By


Charles K. Wiggins, WSBA 6948
Laura Buckland, WSBA 16141
Attorneys for Appellant
Donald L. Barnett