

Cell Motion
March 11, 1988
9:30 a.m.

1988

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DONALD L. BARNETT,

Plaintiff,

vs.

JACK A. HICKS, JACK H. DuBOIS and
E. SCOTT HARTLEY, individually and
as the Board of Directors of
COMMUNITY CHAPEL AND BIBLE TRAINING
CENTER and COMMUNITY CHAPEL AND
BIBLE TRAINING CENTER,

Defendants.

NO. 88-2-04148-2

MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

I. RELIEF REQUESTED

Plaintiff, Donald Lee Barnett ("Barnett") has moved this court for a preliminary injunction and/or a temporary restraining order, which would restrain Jack Hicks, Jack DuBois, and E. Scott Hartley, individually and as Directors of Community Chapel and Bible Training Center ("Defendants"), from interfering with the rights and duties of Barnett as such rights and duties existed on the morning of March 3, 1988. Barnett has also moved that the Directors show cause why a preliminary injunction to like effect should not be entered during the pendency of this action.

Defendants oppose Barnett's request for injunctive relief.

II. STATEMENT OF FACTS

Please see Affidavit of E. Scott Hartley.

11 PB

1 Another case adds two more considerations: the balance of the
2 relative equities of the parties, and the interests of the public
3 or interested third-parties. Tyler Pipe Industries, Inc., vs.
4 Dept. of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213, 1217 (1982).

5 B. Barnett Does Not Have A Clear Legal or Equitable Right:

6 The requirement of showing a "clear legal or equitable
7 right" means that the party seeking the injunction has the burden
8 or showing a likelihood of success on the merits. Tyler, at 793-
9 94. As the following argument shows, Barnett will be unable to
10 show he has a clear legal or equitable right with a likelihood of
11 success on the merits.

12 1. Defendant Directors Properly Removed Barnett as Director
13 for Breach of Fiduciary Duties.

14 A corporate director occupies a fiduciary relationship to a
15 private corporation and shareholders thereof akin to that of a
16 trustee, and owes undivided loyalty and a standard of behavior
17 above that of the workaday world. Williams vs. Queen Fisheries,
18 Inc., 2 Wn.App. 691, 694, 469 P.2d 583 (1970). See also
19 Leppaluoto vs. Eggleston, 57 Wn.2d 393, 357 P.2d 725 (1960). A
20 director is vested with responsibility for the management of
21 corporate affairs, and he or she must execute that duty with the
22 recognition that he or she acts on behalf of others; the
23 obligation does not tolerate faithlessness or self-dealing.

24 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
25 MOTION FOR PRELIMINARY INJUNCTION - 3

1 ConAgra, Inc., v. Cargill, Inc., 222 Neb. 136, 382 N.W.2d 576
2 (1986). In California, directors of charitable corporations are
3 considered to be treated as trustees with respect to the standard
4 of care and duty of loyalty. See American Center for Education,
5 Inc., v. Cavnar, 145 Cal.Rptr. 736, 80 CA.3d 476 (Cal.App.-
6 1978).

7 A breach of fiduciary duty by a corporate director occurs
8 when an injury or loss to the corporation results from a
9 director's negligence, acquisition of any undue personal
10 advantage, benefit or profit, or other similar conduct causing
11 injury or loss to the corporation. South Seas Corp. v. Sablan,
12 525 F. Supp. 1033, aff'd 691 F.2d 508 (D.C.N. Mariana Is. 1981).

13 Barnett has breached his fiduciary duties to Community
14 Chapel, a nonprofit Washington corporation, by the following acts
15 and alleged acts:

16 His admitted sexual activity with female
17 members of Community Chapel has disrupted,
18 and is contrary to the purposes of the
Articles of Community Chapel.

19 Barnett's refusal to accept "special status
20 restrictions," which would prevent him from
21 having any unaccompanied contact with female
22 members of the congregation, creates a
situation in which Community Chapel and its
Directors could become potentially liable
for Barnett's sexual activity.

23 Barnett has asked a potential witness that
her testimony, if requested, be in accord

24 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
25 MOTION FOR PRELIMINARY INJUNCTION - 4

1 with his earlier deposition testimony.

2 These actions have caused harm and injury to the internal
3 congregational life at Community Chapel, and they are contrary to
4 the stated purposes of Community Chapel. These actions have
5 forced Community Chapel to defend itself in several lawsuits, and
6 there is the potential that it will be found liable for damages
7 because of such litigation. Further, if allowed to go unchecked,
8 a continuation of Barnett's sexual activity could increase the
9 likelihood that Community Chapel and its Directors would be named
10 defendants in other litigation.

11 A corporation possesses the inherent power to remove a
12 member, officer or director for cause, regardless of the presence
13 of a provision in the charter or by-laws providing for such
14 removal. Grace v. Grace Institute, 19 N.Y.2d 307, 279 N.Y.S.2d
15 721, 226 N.E.2d 531 (1967); Eckhaus v. Ma, 635 F.Supp. 873
16 (S.D.N.Y. 1986). In Grace, a charitable corporation was governed
17 by three life members. One of these life members commenced
18 several legal actions against the Grace Institute, and because of
19 such actions he was removed by the other two members. The
20 Institute, by these two other members, argued it could expel the
21 life member and trustee for his obstructing and impairing the
22 corporation's activities. The court, which applied a corporate
23 rather than a trust analysis, agreed.

24 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
25 MOTION FOR PRELIMINARY INJUNCTION - 5

1 The Legislature (which had incorporated this
2 charitable corporation) surely could not have intended
3 that a life member retain his position regardless of
4 the manner in which he abused his trust. The
5 petitioner may not be removed so long as he adheres to
6 what must be regarded as an implied condition of his
7 position -- that is so long as he faithfully serves
8 the Institute. Once he breaches that condition and
9 engages in activities that obstruct and interfere with
10 the operation of the corporation and the purposes for
11 which the Legislature created it, he may be removed.

12 Grace vs. Grace Institute, 226 N.E.2d 531, at 534.

13 Defendants, as Directors of Community Chapel, acted properly
14 in the manner in removing Barnett for cause. Hearings were
15 conducted at which, over the course of his testifying for 15
16 hours, Barnett admitted to numerous incidents of improper sexual
17 activity with female members of the congregation. The Directors
18 also had before them the lawsuits which alleged similar improper
19 sexual conduct by Barnett, and Barnett's refusal to accept
20 restrictions on his contact with unaccompanied female members of
21 the church.

22 R.C.W. 24.03.100 provides that:

23 A director may be removed from office pursuant to any
24 procedure therefore provided in the articles of
25 incorporation.

Article III, Section 3 of the Articles of Community Chapel
state as follows:

Senior Elders (Directors) are appointed for life
unless removed by a three-fourths (3/4) vote of the
others of the same office, by resignation, or by any

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION - 6

1 other means provided in the corporation Bylaws.

2 This provision plainly allows three Directors, by unanimous
3 vote, to remove a fourth Director.

4 R.C.W. 24.03.025(7) states that:

5 (W)henever a provision of the articles of
6 incorporation is inconsistent with a bylaw, the
7 provision of the articles of incorporation should be
8 controlling.

9 Thus, even though By-Laws may not allow for the removal of
10 Barnett as a Director, Article III, Sec. 3, which allows such
11 removal, is controlling.

12 This removal took place Friday afternoon, March 3, 1988,
13 after the Director's meeting of earlier that morning was
14 reconvened.

15 2. Defendants Properly Amended Articles of Incorporation,
16 Thereby Deleting Requirement of Original Pastor's Concurrence to
17 Amend Bylaws.

18 R.C.W. 24.03.165(2) allows a majority of directors to amend
19 corporate Bylaws.

20 Where there are no members, or no members having
21 voting rights, an amendment shall be adopted at a
22 meeting of the board of directors upon receiving the
23 vote of a majority of directors in office.

24 Article VI, Section 1 of Community Chapel's Articles, states
25 as follows:

Amendments to these Articles of Incorporation may be

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION - 7

1 made by a three-fourths (3/4) affirmative vote of the
2 Board of Senior Elders and the original Pastor's
3 concurrence, if he is still presiding.

4 Barnett points to R.C.W. 24.03.455, which allows articles to
5 require the vote of a greater number or proportion of directors
6 than required by Chapter 24.03. This statute, however, does not
7 allow a veto power to be given to someone not acting in a
8 Director's capacity. But that is precisely what happens in
9 Section 1 of Article VI, which gives a veto power to the original
10 pastor. On its face, this section does not require that the
11 Directors be unanimous in their vote.

12 This distinction is clearer, perhaps, if one were to suppose
13 that Barnett resigned as a Director. In that event, he could not
14 take advantage of R.C.W. 24.03.455 to demand that he concur with
15 proposed amendments, because .455 only permits provisions
16 requiring more than a majority of directors to amend articles. It
17 does not allow provisions giving a veto power to someone in
18 another position.

19 On its face, Article VI, Section 1, does not require a
20 unanimous vote of directors. Further, where there is any
21 ambiguity in this language, public policy should support a
22 construction which does not hold the majority of directors hostage
23 to the will of a director who claims to be a director for life.
24 This is especially true where there are not voting members of a

25 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION - 8

1 charitable, non-profit corporation which has many interested
2 third-parties who rely upon the corporation, who look to the
3 corporation to provide the structure for the church ministries,
4 and who give of their time and money to such organization.

5 The effect of these Directors amending the Articles was to
6 clearly state that a majority of Directors could amend Articles
7 and Bylaws without the concurrence of the original pastor.

8 Barnett was properly removed as Director according to the
9 Articles; and the Articles were properly amended by a three-
10 fourths (3/4) majority of Directors. Barnett has no clear legal
11 or equitable right, and there is little likelihood he will prevail
12 on the merits.

13 C. Balancing Equities of Parties:

14 The Defendants did not act to remove Barnett without giving
15 Barnett an opportunity to be heard. Indeed, there is no dispute
16 that Barnett engaged in improper sexual activities over a period
17 of at least one year. There is also no dispute that Barnett has
18 refused to accept the restrictions placed upon him by the
19 Directors. The facts indicate that the Defendants gave Barnett
20 every possible opportunity to remain within Community Chapel.

21 Furthermore, if Barnett is allowed to return to Community
22 Chapel as Director and Pastor, there is the potential danger that
23 the church's various ministries will be disrupted, as Barnett has

24 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
25 MOTION FOR PRELIMINARY INJUNCTION - 9

1 threatened to remove those staff who do not follow his position.
2 Presently, the church staff of over 15 is unanimous in their
3 support of the Defendant's actions in removing Barnett.

4 D. Public Interests/Interested Third-Parties:

5 Community Chapel, as a non-profit corporation, has no voting
6 members; yet it has well over 1,000 individuals who are members of
7 the church. These people are certainly interested third-parties.
8 They have an interest that Community Chapel function as a church
9 and that it carry out its various purposes and ministries. They
10 also have an interest that the church not be subjected to lawsuits
11 over the misconduct of Barnett, that the female members of the
12 congregation be protected from him, and that the church not be
13 deadlocked.

14 The entire staff of Community Chapel is in support of the
15 Defendant Directors' action in removing Barnett as Director and as
16 pastor. If Barnett were to return, there is a well-founded fear
17 that he would attempt to terminate their employment.

18 The public also has an interest in promoting a policy that
19 will allow a director, appointed for life, to be removed for cause
20 by a majority of the other directors or voting members.

21 E. Court Has No Jurisdiction to Review Church Discipline of
22 Barnett

23 Barnett was also put out of the church by the Senior Elders

24 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
25 MOTION FOR PRELIMINARY INJUNCTION - 10

1 and Directors on March 3, 1988.

2 The Community Chapel Bylaws (Division Two, Section VI,
3 Article Two) state that for the protection of the Church,
4 individuals who continue in significant sin without repentance,
5 including those who are potentially subversive and/or dangerous to
6 the well-being of the Church and its government and/or its
7 participants, must be excluded absolutely, and that such
8 individuals shall be "put out of the Church." The result is that
9 the individual is barred from entrance to Church property and
10 functions and the active participants are instructed to have no
11 fellowship with him. (See Exhibit "A" attached hereto.)

12 The reasons for such action are doctrinal and theological in
13 nature.

14 Courts should not inquire into the propriety of religious
15 disciplinary proceedings and must accept certain consequences,
16 such as removal from the ministry, as incidental effects of those
17 ecclesiastical determinations which are not subject to judicial
18 abrogation. Joiner v. Wecks, 383 So.2d 101 (La.App. 1980). Civil
19 courts refrain from determining the merits of disputes of
20 religious corporations involving religious doctrine because of the
21 First Amendment's prohibitions against the establishment of
22 religion. New Jersey Association for Children With Learning
23 Disabilities vs. Burlington County Association for Children With

24 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
25 MOTION FOR PRELIMINARY INJUNCTION - 11

1 Learning Disabilities, 174 N.J. Super. 149, 415 A.2d 1196 (N.J.
2 Super. A.D. 1980). And church members are not entitled to rely on
3 incorporation of church under state laws as a basis for resort to
4 courts for redress of allegedly violated rights, if these rights
5 require the determination of ecclesiastical matters. Henry v.
6 Newman, 351 So.2d 1277 (La.App. 1977).

7 Although the procedure for "putting someone out of the
8 church" grants the individual a right of appeal to a board of two
9 or more Senior Elders as determined by the Pastor, the section on
10 disfellowshipping does not state that the Pastor cannot be put out
11 of the church. And, the Elders having determined that Barnett was
12 not following Biblical principals of repentance and obedience, put
13 Barnett out of the church on March 3, 1988, in accord with its
14 Bylaws and suggested procedures.

15 In Elmore Hebrew Center v. Fishman, 522 A.2d 497 (N.J.
16 Super.A.D. 1987), a rabbi was removed on grounds that he had lied
17 to members of the synagogue about certain misconduct. And it is
18 worth quoting at length from page 501.

19 Our analysis of the pleadings and the record satisfies
20 us that religious questions permeate all of the issues
21 in this case and relate to interpretations of the
22 concept of rabbinic tenure. It is clear from the fact
23 of the complaint that the religious dispute is
24 inseparably intertwined in the allegations of the
25 complaint, particularly when it asserts: failure to
fulfill the duties of a rabbi to the congregation;
whether there were misstatements in the presence of

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION - 12

1 the Torahs in the EHC sanctuary; lack of judgment
2 required of a spiritual leader of EHC; causing
3 division and dissension within the congregation; being
4 unacceptable as the congregation's spiritual leader,
5 disruption of religious services and preventing the
6 servicing of the religious needs of the congregation.
7 Indeed, many of the other claims depend on defendant
8 Fishman's status as the rabbi of EHC, such as what
9 happened with respect to the final version of his
10 employment contract, his control over congregation
11 funds and activities, and his relationship with the
12 particular Board of Trustees which instituted this
13 suit. The religious overtones are pervasive and all
14 encompassing in this case. Abstention by the Chancery
15 Division from the religious aspects of the dispute was
16 entirely warranted.

17
18
19
20
21
22
23
24
25

V. CONCLUSION

Barnett has failed to show he has a clear legal or equitable right, the equities do not fail him, and the interests of the public and interested third-parties should allow the majority of Directors to remove Barnett and amend the Articles and Bylaws.

Further, on First Amendment grounds, this court should refrain from inquiring into the doctrinal and theological reasons over which Barnett was "put out of" or "disfellowshipped" from the church.

DATED this 10th day of March, 1988.

LEACH, BROWN & ANDERSEN



JAMES G. LEACH
Attorney for Defendants

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION - 13