

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

DONALD LEE BARNETT,)	
)	
Plaintiff,)	Cause No. 88-2-04148-2
)	
Vs.)	
)	
JACK A. HICKS, JACK H. DUBOIS, and)	TRIAL TRANSCRIPT
E. SCOTT HARTLEY, individually and)	VOLUME XII, pp. 1839-1968
as the board of Directors of COMMUNITY)	
CHAPEL AND BIBLE TRAINING CENTER)	March 14th, 1991
and COMMUNITY CHAPEL AND BIBLE)	
TRAINING CENTER,)	
)	
Defendants.)	

**TRIAL TRANSCRIPT, VOLUME XII
PAGES 1839-1968**

BE IT REMEMBERED the above-named cause of action came on for arbitration on March 14th, 1991 before the HONORABLE WALTER DEIERLEIN, JR. at Judicial Arbitration and Mediation Services, Inc. Seattle, Washington;

CHARLES WIGGINS, Attorney at Law, appearing on behalf of the Plaintiff;

ROBERT ROHAN and DAVID KNIBB, Attorneys at Law, appearing on behalf of the Defendants;

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Colloquy

2
1 THE COURT: The first matter I'd like to
2 take up is the sealing of papers. And I know how you
3 seal an exhibit and a document or something like that,
4 ~~but I don't know how we're going to seal these papers.~~

5 Do you have any suggestions, Mr. Wiggins?

6 MR. WIGGINS: Well, Your Honor, we've always
7 contemplated that we would seal portions of the
8 pleadings and portion of the exhibits and portions of
9 the record, and I what I had anticipated we would do
10 is we would simply -- The pleadings that are under
11 seal --

12 THE COURT: Are they still under seal, by
13 the way?

14 MR. ROHAN: They haven't been filed.

15 MR. WIGGINS: Nothing has been filed yet.
16 Since we came into this forum, nothing has been filed
17 with the court. So, my point is I just don't want
18 them in open court files unsealed. So, what I would
19 contemplate is entry of an order that seals selected
20 pleadings, selected portions of the report of
21 proceedings, and selected exhibits, put them in an
22 envelope and take them down and file them.

23 THE COURT: How do we seal a selected
24 portion of any of this?

25 MR. WIGGINS: Of the findings?

Colloquy

1 THE COURT: Well, suppose pleadings, for
2 example.

3 MR. WIGGINS: I suppose we could either seal
4 a complete pleading that contains anything that should
5 be sealed or we could seal, just pull pages out of it
6 and put a page in place of it that says these pages
7 have been sealed and put the papers in a large
8 envelope and sealed by order of the court. I think
9 the general rules state basically that you can do
10 this.

11 THE COURT: Do you have any better idea?

12 MR. ROHAN: No.

13 THE COURT: How you do feel about sealing?

14 MR. ROHAN: Whatever you want to seal is
15 fine with me.

16 THE COURT: I started to keep track of the
17 ~~populations of the findings at least that you were referring to~~
18 here as wishing to be sealed, but I lost track and I
19 don't have a very complete number.

20 MR. WIGGINS: What I would propose with
21 respect to the findings particularly is that we have
22 those findings that are sealed be not in, be in a
23 separate pleading, sort of an addendum sealed finding
24 and that that document be separate and apart from the

Colloquy

1 MR. ROHAN: I guess what I would suggest on
2 that and I think this would be agreeable is that we
3 have one document that has all the findings that are
4 sealed or unsealed and that be sealed.

5 MR. WIGGINS: That's correct, we're in
6 agreement on that.

7 THE COURT: And then the one for filing is
8 one in which certain areas are taken out and dummy
9 pages inserted.

10 MR. WIGGINS: With respect to the findings,
11 I don't really care if we have a set of findings that
12 says 1 through 15 and then 16 says sealed and we go on
13 to 17 and then 18 says sealed or we just number the
14 unsealed consecutively and the sealed consecutively,
15 it doesn't matter to me.

16 THE COURT: Okay. I will approve and order
17 sealed the papers that you referred to, whatever they
18 may be. That may include complaint or cross-claim
19 rather and part of the findings and whatever else,
20 some of the exhibits no doubt, and you make the
21 regular, I mean the expurgated portions, make them
22 available to Mr. Rohan so he sees what you are
23 actually putting in the file.

24 MR. WIGGINS: That would be fine, Your
25 Honor. In fact, I would propose to send him a list of

Colloquy

1 what I want to seal and then he can add to it or
2 discuss it and then we should be able to arrive at an
3 agreed order to present to you.

4 THE COURT: I was just concerned that maybe
5 I was required to rule on what was sealed and what

supposed to do something about it. It wasn't sealed and it was s

t, that's fine. Okay.

I say something? Just as a
it would be important to
ings, that we number them all
that the sequence is not
st say that Finding 15, for
's all that the findings say

that's acceptable to me and I

erwise people are misled and

, how to proceed at this
ner informally how you
oday and tomorrow as going.

e?
think so. My suggestion, Your
ough, although it's laborious
to do it, start with No. 1

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it. But if you will do i

MR. KNIBB: Can
practical matter, I think
retain the sequence of th
from one to whatever so t
disturbed and we might ju
example, is sealed. That
in the public copy.

MR. WIGGINS: TH
think that makes sense.

MR. ROHAN: Othe
will be confused.

THE COURT: Now,
point. Let's discuss rath
anticipate this session to
Can we get everything done

MR. ROHAN: I th
Honor, would be to go thro
I think it's the only way

Colloquy

1 and work our way through, each of us speak hopefully
2 on some of the ones that are important. It's going to
3 be more than a few minutes but on the other ones try
4 to limit ourselves to just a few minutes on each one
5 and then have the Court decide what it's going to do.
6 Otherwise, we could be here a week.

7 THE COURT: I was embarrassed to handwrite
8 26 findings. When they came back 119 and then Mr.
9 Wiggins embroidered those, I was horrified.

10 MR. ROHAN: And I think as motions for
11 reconsideration come up as part of the findings, we
12 can talk about them as part of whatever finding is
13 appropriate to come up.

14 THE COURT: I've been thinking about that
15 and I think it would go smoother if I expressed myself
16 on the motion to reconsider right at this outset. I
17 don't know how you people feel about that. I'm
18 prepared to start without any particular argument at
19 this point unless you feel that you would like to add
20 to or answer arguments in writing that have arisen
21 since you last met. How do you feel about that? Do
22 you want more time to argue these?

23 MR. WIGGINS: Your Honor, I'd like to just

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Motion for Reconsideration

1 think I need to repeat things.

2 THE COURT: I will say, and this is intended
3 as an honest face-to-face compliment, the arguments
4 that you gentlemen reduced to writing on the motion to
5 reconsider I think are the best written arguments that
6 you've made and I was happy to see them. They didn't
7 belabor points that we had gone over in the past.
8 They talked about the same issues but at least I
9 thought they were good arguments and I was ready to
10 rule. Okay.

11 MR. WIGGINS: Just briefly, Your Honor. Our
12 motion for reconsideration really is limited to the
13 question or what I want to limit my remarks to is the
14 question of fiduciary duty and whether the Court can
15 impose any fiduciary duty on a pastor in his role as
16 pastor. And I put down something of a challenge in my

17 motion for reconsideration. I realized when I studied
18 this and I ran a rather extensive search on Westlaw, I
19 could not find a single case which imposed fiduciary
20 duties on a pastor in his role of pastor. There were
21 a couple of cases that talked about a fiduciary duty
22 as a counselor but never, never has there been a
23 decision that I have found that talks about a pastor's
24 duties as a fiduciary to the corporation or to the
25 members of the church in his capacity as pastor.

Motion for Reconsideration

1 (Off-the-record discussion.)

2 THE COURT: A Susan Gilmore is here of the
3 Seattle Times.

4 MR. ROHAN: It's a public hearing.

5 THE COURT: We'll talk guardedly.

6 MR. WIGGINS: We're going to have some
7 trouble with sealed findings if we are going to have a
8 reporter.

9 THE COURT: Maybe and maybe not. I'm aware
10 of what you are getting at..

11 MR. WIGGINS: All right, thank you. And I
12 read the Defendants' Answer with some care and rather
13 with interest because they did not find a single case
14 which answered the challenge I laid down. There's not
15 a case apparently that either of us can find after
16 months of research imposing fiduciary duties on a
17 pastor in his role as pastor.

18 Now, they do come up with lots of secular cases.
19 They do come up with secular corporations and things
20 like that, and their only answer to this is, well,
21 golly, there must be, just because there's not a case
22 out there doesn't mean we shouldn't apply the
23 principles to this situation. Well, I agree with
24 that, but the principle that governs this is the First
25 Amendment and the establishment clause. That's why

Motion for Reconsideration

1 there's no cases because a court cannot measure the
2 performance of a pastor in his role as pastor.
3 There's no way of doing it under the First Amendment.

4 It's very interesting if you go back historically
5 to the early days in this country in the colonies, the
6 thing that really offended people was the state or the
7 colony or the crown had the right to approve who was a
8 minister. That's what really bothered people. And
9 the reason the Baptists were dissenters was because
10 they wanted to choose their own ministers and the
11 crown wouldn't approve them. That was one of the
12 leading reasons why the colony of Virginia adopted a

~~bill of rights and the state of Virginia adopted a~~

13 ~~bill of rights which became the foundation for the~~
14 ~~First Amendment. It's the evaluation of the duties of~~
15 ~~a preacher, you cannot do it.~~

16
17 Now, the Defendants point out, golly, there are
18 cases where people sue churches for the actions of a
19 pastor. Sure, but that's not what we're dealing with
20 here. Nobody sued based on the incidents that are
21 alleged in this case, not a single lawsuit. And,
22 furthermore, nobody is suing the church. The question
23 here is whether this Court can remove the pastor or
24 approve the removal of the pastor under secular law,
25 breach of fiduciary duty.

Motion for Reconsideration

1 You cannot transfer those principles across from
2 the civil context into the religious context purely
3 because there is no civil analog to a pastor. There
4 is not a person who functions outside of religion in
5 the role of a pastor. That's why you can't immediately

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of fiduciary
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nister, but it is the duty
nimum standards that apply

6 fiduciary duties on a pastor and that is
7 cannot talk about fiduciary duties and b
8 fiduciary duties and removal for breach
9 duties because they aren't there.

10 Now, I suppose if the evidence had
11 Barnett was counseling women and if there
12 evidence that in the counseling, marital
13 relationship he committed some breach, y
14 under one of these other cases that I ci
15 motion for reconsideration but that's no
16 situation we have here. The only reason
17 a fiduciary duty in the counseling situa
18 because there is such a thing as a secul
19 but there's no such thing as a secular p

20 MR. ROHAN: Mr. Knibb is going
21 for us.

22 MR. KNIBB: I'll be very brief
23 pointed out that we're not asking the Co
24 the job description for a mi
25 of the Court to establish mi

Court's Ruling

1 to pastors as they do to anyone else and that there
2 are cases which have held pastors to these standards
3 and we cited some of them in our brief, State v.
4 Verben, where the pastor was convicted for handing out
5 medicine without a license. That was part of his
6 belief about healing and so forth.

7 There is a 1988 case where a tort action was
8 brought against a diocese based on a priest's
9 molestation of altar boys and the Court said that such
10 an action could be maintained.

11 Now, it's true that those were not actions in
12 which the Court was defining the job description of

...a...
...that will allow liability
for such conduct is in
re's a public policy
a duty that he must
there are duties imposed
law is not novel at all
ted in our brief.
emplating this argument,
e were actually wrestling
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ce. And when I say
ility of the elders to

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...control and the fact that a
to be imposed upon a minister
effect an expression that the
saying that that minister has
maintain. So, the idea that
upon ministers as a matter of
based on the cases we have ci
THE COURT: In cont
it occurred to me that what w
with was the series of protec
brought about this circumstan
circumstance, I mean the inab

Court's Ruling

1 take any action whatsoever without the presence or
2 consent of the pastor. If this had been a different
3 corporate structure without all those protective
4 provisions, I dare say we wouldn't be here. The
5 elders would have met and they would have voted on
6 whether or not to oust the minister. If the minister
7 won, got two out of the three votes, the dissenter
8 would not have been permitted to bring an action
9 saying, look, Judge, this transgression was so serious
10 that regardless of what these other elders did you
11 should rule as a matter of law that the original
12 pastor should be ousted. That is an example of what
13 you are talking about, Mr. Wiggins, when you say that
14 the Court can't interfere with the affairs of the
15 church.

16 If the minister had lost and the prescribed
17 number of elders that voted to oust him, it wouldn't
18 have made any difference what he did or if he had done
19 nothing he would be out. So, what we're talking about
20 now I think is whether or not the protective
21 provisions bar any action by the elders to oust the
22 minister regardless of what he does, whether it's a
23 breach of fiduciary duty or pastoral duty breach or
24 what.

25 Now, I skirted that idea the last time we met

Court's Ruling

1 when I said how broad are these protective provisions,
2 to what extent will they shield the minister from any
3 action whatsoever taken by the elders. Does the duty
4 of the elders rise at some point, depending upon the
5 seriousness of the breach, to a point where they
6 exceed in force the protective provisions? Reducing
7 it to layman's terms, isn't there some place, some act
8 that a minister does that demands, regardless of the
9 provisions of the bylaws, that the elders be permitted
10 to exercise their power and authority in the governing
11 of the church?

12 Now, that situation had been referred to here as
13 the breach of fiduciary duty or a breach of pastoral
14 duty. The reason why the issue has never risen I
15 suppose is, as you point out, Mr. Wiggins, and Mr.
16 Rohan is quick to agree, that this is a unique case.
17 I've never heard of one like it where the provisions
18 of the bylaws and articles go to the extent of
19 identifying the president, or pastor in this case, so
20 closely with the corporation that he must participate
21 in everything that is said and done by the directors
22 to make it effective.

23 To put it in another context, and we'll get to
24 this situation in the course of settling the findings
25 and particularly the conclusions, do you think that

Court's Ruling

1 the Supreme Court is prepared in this enlightened day
2 and age to say, elders, you didn't have the power and
3 the authority to do what you did in spite of what the
4 pastor has done? Your only recourse is to walk away
5 and let the pastor presumably continue.

6 Isn't there some place where the law will step in
7 and permit a governing board like this Board of Senior
8 Elders to exercise their power without being
9 checkmated by the protective provisions? I can't
10 believe the Supreme Court will turn its back and walk
11 away and say, too bad, there's nothing under these
12 circumstances that can be done in the eyes of the law
13 for you.

14 What say you as to that, Mr. Wiggins?

15 MR. WIGGINS: Your Honor, they have already
16 done that once.

17 THE COURT: No, they didn't.

18 MR. WIGGINS: The argument that was made
19 before was Pastor Barnett has such control over this
20 corporation we cannot allow that as a matter of fact.
21 That was the argument.

22 THE COURT: That's not what they said in
23 answer.

24 MR. WIGGINS: But the argument that was made
25 was that these bylaws and articles are contrary to law

Court's Ruling

1 and to public policy and the Supreme Court didn't buy
2 that. They said that's not right, it's not our
3 business. These may be inadvisable but it's not our
4 business to go out and amend inadvisable articles and
5 bylaws. And they said we will remand for
6 determination on the elders' counterclaim, our second
7 counterclaim that Pastor Barnett breached his
8 fiduciary duty.

9 Now, that was what they remanded on but nobody
10 had breached the duty because it really wasn't before the

11 fiduciary duty because it really wasn't before the
12 Court. That's the issue now. And the trouble is the
13 Court, as the Court indicates, where is that line.
14 Well, the whole concept of separation of church and
15 state is that the line is at the church door. The
16 Court can't walk into there and decide how a pastor
17 behaves.

18 This case might be different if Pastor Barnett
19 had broken a law, but he didn't. Adultery is not a
20 crime. The legislature decided some years ago that
21 adultery is not a crime. So, I don't know what would
22 happen if there were a criminal situation, but there
23 wasn't.

24 Furthermore, they talk about the lawsuits that
25 were based on activities years earlier, but the

Court's Ruling

1 evidence that you've heard about didn't result in any
2 lawsuit. There's been no evidence that any lawsuit
3 was filed because none was filed based on the conduct
4 they are talking about. So, there's not a third party
5 who came into court and complained. And furthermore,

re talking about here they
and complain about.
heard their testimony.
st have had more than
and husbands suing.
is the Butler Brown Hall
ree women and that was
urred years earlier,
t. That's not the
out that conduct for
ver came up. What
case is conduct that
wasn't against the law.
I would quote the
fifth Circuit case, the
the motion for
start down this, the
l of separation of church
ng torrent and there's

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even the evidence that they'r
couldn't get women to come in
They got three people and you
THE COURT: They mu
that, there were women suing
MR. WIGGINS: There
lawsuit. There are those thr
based on conduct that had occ
there's no question about tha
reason. I mean, they knew ab
quite some time before this e
they're talking about in this
never resulted in a lawsuit,
So, my answer is I guess
Supreme Court judge in that F
McClure case that's cited in
reconsideration that once you
trickle that breaches the wal
and state soon becomes a ragi
just no place to stop it.

Court's Ruling

1 THE COURT: That was one where the
2 parishioner complained. Here we're talking about a
3 governing board complaining.

4 MR. WIGGINS: Your Honor, actually McClure
5 was a case where the woman employee of the Salvation
6 Army, she was not a parishioner, she was an ordained
7 person --

8 THE COURT: All right.

9 MR. WIGGINS: And the Court said we're not
10 even going to apply the equal pay act to the church
11 because we're not going to get into that. So that's
12 my answer. I think the Supreme Court has said
13 something about it and I guess we're all faced with a
14 total lack of law governing articles like this and
15 there isn't anything to justify what happened here.
16 And I can only tell you that I think the thing that
17 prevents it is the First Amendment and the State
18 corollary to the First Amendment, that should be the
19 governing rule here.

20 THE COURT: Okay. I'll deny the motion to
21 reconsider on those grounds.

22 Now, should we proceed with the findings? I am
23 working off of this work copy that is highlighted.
24 Now, I don't know how this is going to go over with
25 you, gentlemen, but I want to cut as much as I can. I

Argument Re. Findings of Fact

1 think that we go into details that are not germane to
2 what we're looking at here. We are looking at the
3 four, three, I guess, three or four remaining
4 cross-claims. One is based on the, quote, agreement,
5 quote. I'm never quite sure whether that is separate

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The other is breach of contract,
breach of fiduciary relationship.

ROHAN: And the disfellowshipping alone.

COURT: And the disfellowshipping. So,
in mind, and with what we're talking about
being the bastion of the protective
I think the findings can be cut down
Let's try it anyway.

WIGGINS: Your Honor, I did have a
several objections to these findings.

COURT: Based on hearsay?

WIGGINS: And whether you just wanted to
get to the specific findings --

COURT: Let's wait until we get to one
where hearsay is significant in some, it is

WIGGINS: Thank you.

COURT: We don't mean to just plain
Susan, you are just going about our

6 or part of another
7 the other is based
8 MR. WIGGINS
9 THE COURT
10 with those in mind
11 is the battering
12 provisions, I think
13 considerably.
14 MR. WIGGINS
15 couple of generations
16 THE COURT
17 MR. WIGGINS
18 wait until we get
19 THE COURT
20 because I think
21 not in others.
22 MR. WIGGINS
23 THE COURT
24 disregard you,
25 business.

Argument Re. Findings of Fact

1 Okay, Finding of Fact 1.

2 MR. ROHAN: I don't think anybody has any
3 objection to 1 or 2.

4 THE COURT: Neither do I. And 2 likewise,
5 right?

6 MR. WIGGINS: Right.

7 THE COURT: And No. 3?

8 MR. ROHAN: I don't think there's any
9 objection to it. I think the pastor wants to add an
10 additional finding.

11 MR. WIGGINS: Right. I have proposed
12 findings pages 10 through 11.

13 THE COURT: You have additions?

14 MR. WIGGINS: Additions, Your Honor. In my
15 objections, I have additions at pages 10 through 11, I
16 think they're in the notebook. I think it's after the
17 motion for reconsideration. Finding 3.1 talks about
18 the reasons why the protective provisions were
19 inserted.

20 THE COURT: Why is that important?

21 MR. WIGGINS: I think it's important because
22 there in fact is a doctrinal reason for these
23 protective provisions. That's why it's important.
24 Now, might I say this, Your Honor, if you want to keep
25 these findings shorter, I don't object to shortening

Argument Re. Findings of Fact

1 them up, but I would like to know this with respect to
2 any finding that's rejected. I would like to know
3 whether you're rejecting it because you find it's
4 unsupported or whether you're just rejecting it
5 because you don't think it's necessary to include it
6 in the findings because I'm going to be stuck on
7 appeal with some kind of presumption.

Argument Re. Findings of Fact

1 findings.

2 MR. ROHAN: I don't think any of the other
3 ones proposed are material. Well, I don't think any
4 of them that are proposed, 3.1 through 3.4, are
5 material. In addition, I think some of them in fact
6 are unsupported or at least parts of 3.2, 3.3, and 3.4

7 where people allegedly agreed to things. I think
8 they're immaterial and we don't need anything more

than what we have already. I don't think it's
anything important in that the Court has made its
decision and I would leave them out.

THE COURT: I just assume that referring to
Exhibit 1 through 10 it's included the material in 1
to 10.

MR. WIGGINS: Your Honor, may I focus on
3.1? 3.1 gives the reasons why these protective
provisions were inserted into the articles and bylaws
and that's not something that is found in the
documents themselves as clearly as it's found in this
finding. And it's certainly supported by Pastor
Barnett's testimony and nobody contradicted it. And I
think it's important to our case that these protective
provisions are based on doctrinal beliefs. That's the
reason they're in there. It's not just willy-nilly
that somebody wanted that in there, it's because

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Argument Re. Findings of Fact

1 there's a theological doctrine that backs it up.

2 MR. ROHAN: Your Honor, one of the things we
3 chose not to get into, and I think based on the urging
4 of counsel, is doctrinal differences because nothing
5 that occurred later in the case was based on doctrinal
6 differences. And to get into doctrinal matters and
7 make findings on doctrinal matters is the very thing
8 that Pastor Barnett has been arguing and he's trying
9 to avoid. I don't think it's material and certainly
10 it's not important to any of the findings and the
11 conclusions that the Court has made already in its
12 oral decision.

13 MR. WIGGINS: I guess there's two questions.
14 One is did he testify to this truthfully and the
15 second is do we need to put it in the findings.

16 THE COURT: Yes, he did testify to it and,
17 no, we do not need to put it in for the purposes of my
18 decision and you may accept that.

19 MR. WIGGINS: I will not take formal
20 exception.

21 THE COURT: No, you don't have to as I
22 understand it now. And I'm happy to see this complete
23 work on both of your parts because we don't have to go
24 through the offer of telling why it's all here before
25 me.

Argument Re. Findings of Fact

1 MR. ROHAN: I think numbers 4 through --

2 MR. WIGGINS: Excuse me, that was 3.1. We
3 have 3.2 and 3.3 and 3.4 which are on page 11 which
4 basically recite when each of the senior elders became
5 a senior elder and recites that that particular elder
6 agreed to the protective provisions by signing a
7 statement. At the end of each revision of the bylaws,
8 it says they hereby approve of this set of bylaws.

9 THE COURT: It's obvious from looking at the
10 exhibits that's what they did.

11 MR. WIGGINS: Okay, thank you, Your Honor.

12 MR. ROHAN: Those would also be not
13 included?

14 THE COURT: Not necessary.

inding 15 MR. ROHAN: Then I think we're up to F.
16 6.

ould 17 MR. WIGGINS: I guess, Your Honor, I w
cites 18 say if we want to shorten these up, Finding 6 rec
19 the protective provisions. I don't mind whether
them 20 they're in the findings or not, I'd like to have

our 21 ~~in the findings as Mr. Rohan's arguments~~
22 MR. ROHAN: I took them out of one of y
23 earlier documents.

em. 24 THE COURT: I remember going through th
ere 25 Well, I want to shorten them where I can. But wh

Argument Re. Findings of Fact

1 you feel they should be, I'm willing to leave them in.
2 Okay, we're on page 6.

3 MR. ROHAN: I think those are all agreed to.
4 I think 7 is agreed.

5 THE COURT: 7 is agreed. Now, on page 8,
6 this is for both of your information, line 4, "Several
7 parishioners were ministers ordained and licensed by
8 the Community Chapel". I've stricken all of that down
9 through the end of Finding 11.

10 MR. ROHAN: Including 11?

11 THE COURT: Why must we say that several
12 parishioners or ministers were ordained or licensed by
13 Community Chapel? Pastor Barnett signed the licenses.
14 The ministers were in accordance with the bylaws, that
15 power to preach and perform weddings. Why do we need
16 that?

17 MR. ROHAN: We don't have any objection.

18 ~~THE COURT: Do you see what I've stricken?~~

19 MR. WIGGINS: Yes, Your Honor.

20 THE COURT: Starting with the word "several"
21 down through the word "counseling" on Finding 11. You
22 better mark this so you can revise this.

23 MR. KNIBB: I'm keeping a master. Do you
24 want us to retype these? We have them on word
25 processing.

Argument Re. Findings of Fact

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THE COURT: Yes. I am highlighting where I mark, too. And when something is stricken, I'll highlight it. Okay, No. 12 is intact, as I understand it.

MR. ROHAN: Yes.

THE COURT: No. 13?

MR. ROHAN: 13, 14, and 15 are acceptable to all.

THE COURT: 15, I struck the last sentence. "In a separate file in this action, the church parsonage was found to be in --", in that last sentence in paragraph 15.

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and he did it on corporation property and I think that is important to later developments in this case. And

Judge Norman Quinn so found it
I think it ought to be in here.
Your Honor, it's totally

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since it is a fact and Judge
in a separate trial, I think

MR. WIGGINS: Yes

not a private residence. It was

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when he says it was

Argument Re. Findings of Fact

1 of it is really quite irrelevant to anything in here.
2 And certainly this last sentence is irrelevant and I
3 don't believe there was evidence of that. I guess
4 he's asking you to take judicial notice.

5 MR. ROHAN: It's in this lawsuit.

6 MR. WIGGINS: You don't need it in the
7 findings.

8 MR. ROHAN: You're a better appellate lawyer

9 ~~than I am, but I'm a member of the bar here, you are not.~~

10 right here I can see it, but that is what was found
11 earlier by Judge Quinn in this case in this same cause
12 number.

13 THE COURT: I don't see the thrust of your
14 point as being material in this situation. I don't
15 know that anything that pastor did in the parsonage is
16 any worse than at the Hilton Hotel or on the beach or
17 anyplace else.

18 MR. WIGGINS: Not that there's evidence of
19 anything at the Hilton Hotel or on the beach.

20 THE COURT: No, I'm just groping for

ons. 21 situati

MR. KNIBB: Your Honor, with respect to the

22
23 on you made in findings 10, 11 and the one you
24 made now, do I gather that you are excluding them
25 e you do not regard them as material? It's not

23 factia
24 just m
25 becaus

Argument Re. Findings of Fact

1 a question of whether they're supported by the
2 evidence?

3 THE COURT: No.

4 MR. WIGGINS: May I just ask, Your Honor, so
5 we don't have to ask this question every time we take
6 something out, can we ask for kind of a standing

~~ruling by you that if you take something out~~
8 you don't believe it's true or --

9 THE COURT: I will say and tell y

10 I will tell you that I believe that it wasn
11 supported by the evidence.

12 MR. KNIBB: Absent some remark by
13 that effect --

14 THE COURT: Absent some remark, I
15 it's immaterial.

16 MR. KNIBB: Fine. That will shor
17 up.

18 THE COURT: Okay, 16.

19 MR. WIGGINS: Your Honor, this br
20 my proposed 15.1, 15.2, and 15.3 which tell
21 spiritual development at Community Chapel.
22 that these findings are important because t
23 that we're talking about in many of these c
24 out of or is intricately related to a spiri
25 connection.

Argument Re. Findings of Fact

1 THE COURT: I understand.

2 MR. ROHAN: My problem with them is I do not
3 believe that the Court can find that people were
4 delivered from demons. I don't believe the Court can
5 make that finding, that it was a factual matter that
6 people were delivered of demons.

7 THE COURT: Is that what it says?

8 MR. ROHAN: 15.1 says people began to
9 experience spiritual healing and other spiritual
10 experiences, and I don't think the Court can make a
11 factual finding as to that, that members of the church
12 also began to experience deliverance from the power of
13 demons. I don't think the Court can make the findings
14 as to that. Those are not facts. These are
15 ~~metaphysical matters, they're not factual matters.~~ I
16 think in the proposed Finding 15.2 you cannot find
17 that someone delivered one from demon possession
18 through a deliverance session. I don't think it's a
19 fact.

20 I think in 15.3 you cannot find that they
21 experienced spiritual exuberance when in fact the only
22 person who testified was Donald Barnett. And we're
23 talking now about an entire congregation as if
24 everybody in the church did that. I don't think what
25 the pastor said supports that. I don't think you can

Argument Re. Findings of Fact

1 find it as a fact that they began to feel united to
2 one another which is on the eighth line down in 15.3.
3 ~~I don't think you can find on 15.3 that they~~
4 experienced spiritual connection where two church
5 members feel drawn to one another and would feel the
6 love of Jesus intensely through the other person. I
7 don't think those are facts capable of this Court
8 finding them as facts. I think these are metaphysical
9 and spiritual matters. In addition, I believe they
10 are all immaterial. None of this is material.

11 THE COURT: Why do you think it's material?

12 MR. WIGGINS: Your Honor, because --

13 THE COURT: This is why I think they may not
14 be. I don't think anything contained here is what the
15 elders considered when they took the action they did.

16 MR. WIGGINS: But the problem with that,
17 Your Honor, is your decision and the proposal by the
18 Defendants goes beyond simply whether the elders were
19 justified in reaching the decision they reached. What
20 you have found involves breaches of fiduciary duty.
21 You've found that as a matter of fact or law. Those
22 are facts you are arriving at, not just I think there
23 was enough there for the elders to reach that
24 conclusion. Those are two different things. And I
25 don't believe it is possible to understand what

Argument Re. Findings of Fact

1 happened in this church without understanding this
2 background. That's why I think it's material.

3 With respect to the metaphysical truth of a lot
4 of these things, the problem is we have been involved
5 in theology since day one in this case. The question
6 of whether these protective provisions are based on
7 theological truth or not is certainly an issue that
8 the Court has had to wrestle with, and I don't mind if
9 we change these things to say that the members of the
10 ~~church believed that they experienced this or the~~
11 ~~members of the church believed that they experienced~~
12 that.

13 The other objection Mr. Rohan makes is that it's
14 not enough that Pastor Barnett said members of the
15 congregation experienced spiritual exuberance. He
16 certainly testified to that, that members of the
17 church experienced that. That's an experience that is
18 something that people manifest through their actions,
19 through your words, through what they say, and Pastor
20 Barnett absolutely testified to that. None of the
21 elders got up here and said that was all a bunch of
22 hog wash, none of that happened. Not one of them said
23 that. I got the feeling that some of them no longer
24 believed in all of that but they certainly didn't say
25 that it wasn't generally felt and experienced by these

17. ROHAN: Your Honor, this again gets us
18. geological matters and they are not
19. any of the findings of the Court.
20. COURT: I don't see they are material

1 people.
2
3 back into the
4 material to
5

21. 5.3, not on the basis that is not
22. the evidence.

6 I'll refuse
7 supported by

23. ROHAN: And 15.1 and 15.2 also?

8 MR.

24. COURT: Yeah, 1, 2, and 3, but because
25. germane to the issues presented here.

9 THE
10 they are not

26. COURT: 16.

11 THE

27. WIGGINS: Your Honor, I have --

12 MR.

28. COURT: Okay, let's see. 16B I have
29. self from parenthesis 9, the sixth line
30. to the end, or is that G? No, it's 9,
31. the paragraph dealing with the Tacoma

13 THE
14 stricken myse
15 down, through
16 at the end of

32. you to that?

17

satellite church. Now, what say y

33. r, I would like to

18

MR. WIGGINS: Your Honor

34. what it is?

19

review this just for a moment.

35. objected to more than

21

THE COURT: You've strik

MR. WIGGINS: Well, I

36. s do what I've done

22

that.

THE COURT: Well, let's

24

first.

37. at

25

MR. WIGGINS: I don't mind striking th

Argument Re. Findings of Fact

1 part.

2 THE COURT: Why do you think that should be
3 in there?

4 MR. ROHAN: I think that the Gabrielson case
5 should be mentioned because it was testified to by Mr.
6 Hicks. And the reason why Community Chapel's
7 insurance was cancelled was because of both the Butler
8 Hall Brown suit and the --

9 THE COURT: We're not down to the insurance
10 yet, are we?

11 MR. ROHAN: No, the insurance is C.

12 THE COURT: Well, let's wait.

13 MR. ROHAN: We may want to put something in.

14 THE COURT: Okay. What else do you have to
15 say?

16 MR. WIGGINS: Your Honor, the other thing I
17 have to say is that this finding singles out one of
18 many lawsuits that involved Community Chapel. The
19 evidence was that not just this civil lawsuit was
20 filed against Community Chapel but criminal charges
21 were filed against Mr. Motherwell and others at the
22 church. The evidence shows that civil lawsuits were
23 brought against Defendant Hartley and at least one
24 other member of the Board of Elders.

25 Now, if these lawsuits are material to any

Argument Re. Findings of Fact

1 evaluation of Pastor Barnett's conduct, it's certainly
2 material that there were lawsuits against the very
3 people sitting in judgment on him and that they did
4 nothing about the misconduct by those men. You
5 excluded evidence of misconduct by other elders. But
6 the fact of the other matter is, if we're going to
7 talk about lawsuits, there were lawsuits against these
8 other people sitting in judgment on him and it's
9 unfair to single out just this lawsuit and not mention
10 the others.

11 THE COURT: The reason I limited the

12 evidence and that I feel it sho
13 is that Pastor Barnett's the on
14 about. We're not talking about
15 or anybody else.

16 MR. WIGGINS: But, Yo
17 conclusion is that there are so
18 bad that they go beyond the pro
19 Mr. Rohan proposes findings tha
20 in good faith for them to make
21 point is they weren't such bad
22 people sitting on judgment didn
23 anything to themselves for thos
24 actions. That's the point.

25 MR. ROHAN: Your Hono

uld be specified here
ly one we're talking
Hartley and Motherwell

ur Honor, your
me things that are so
ective provisions.
t it was reasonable and
those conclusions. My
things that the very
't feel they had to do
e very same types of
r, there's no evidence

Argument Re. Findings of Fact

1 in the record here that any of the action, any of
2 these lawsuits involved any of the elders' conduct
3 vis-a-vis Community Chapel, number one.

4 THE COURT: Well, I think that's because I
5 sustained when he objected.

6 MR. ROHAN: And, number two, the only reason
7 why the lawsuit is relevant is basically because it
8 results in the insurance being cancelled and the fact
9 that the elders took that into account in removing
10 Donald Barnett and disfellowshipping him. That's why

11 it's relevant. The only ones that were testified
12 that link to the insurance company was by Mr. Hill
13 were --

14 THE COURT: We haven't gotten to the
15 insurance yet. That's in the next one.

16 MR. ROHAN: But that's the reason. We
17 guess the part you leave in is fine with me.

18 MR. WIGGINS: That's what we're talking
19 about, Your Honor. To the extent that the reason
20 finding is in here is because of the insurance.

21 THE COURT: I've kind of lost track now
22 where we are.

23 MR. WIGGINS: Well, I think Mr. Rohan
24 to keep rolling back together B and C because he
25 we need to talk about the lawsuit because of the

Argument Re. Findings of Fact

1 situation of the insurance. Well, if we are going to
2 talk about cancellation of the insurance because of
3 lawsuits, we ought to talk about all of them.

4 THE COURT: That's the special one under C.

5 MR. WIGGINS: The point is and the other
6 thing that is included in here is that these were

~~unsettling events as to Community Chapel, and you can't~~

7
8 say, well, this was an unsettling event and not
9 mention the other lawsuits which were also unsettling
10 events. We're not here talking about what evidence
11 was presented against Pastor Barnett, here we're
12 talking about kind of the atmosphere or the gestalt or
13 whatever the word is, the general tone of things at
14 Community Chapel. Well, it not only included a civil
15 lawsuit with three alleged victims against Barnett, it
16 included criminal charges against Motherwell, another
17 civil lawsuit against Hartley, that's what it
18 included.

19 Your Honor, might I propose that we do talk about
20 the insurance finding because if we can get a reading
21 from you on that I think it would help us resolve
22 this, just to move things along.

23 THE COURT: Let's talk about C. Is that C?
24 Yeah.

25 MR. WIGGINS: Yes, Your Honor. Here I have

Argument Re. Findings of Fact

1 objected because the evidence, the only evidence as to
2 why the insurance was cancelled was Hicks said, well,
3 they told me that it was cancelled because of lawsuits
4 against Barnett. We objected to that. It's clearly
5 not admitted for the truth of the matter asserted and
6 so we can't have a finding that says it was cancelled
7 because of Barnett, it's just not possible. There's
8 not evidence to support that.

9 And if we're going to talk about insurance and
10 talk about lawsuits against Barnett, it becomes
11 misleading if you don't talk about all the lawsuits,
12 because I have to tell you to an insurer the fact that
13 there is one lawsuit against the pastor is one thing,
14 but the fact that there are other lawsuits against

15 other people, too, in fact there were criminal
16 charges, those are all red flags.

17 MR. ROYAL: Your Honor, the testimony that
18 was permitted by the Court was what reason that the
19 insurance company gave for having cancelled the policy
20 and you permitted Mr. Hicks to testify that because

21 he had heard what the reason was that they gave. And
22 the reason that they gave was because of the Butler
23 Hall Brown lawsuit and the Gabrielson lawsuit. That
24 was the testimony of Mr. Hicks and that is supported
25 by the findings. And the important thing here is that

Argument Re. Findings of Fact

1 all of the insurance was cancelled.

2 THE COURT: Isn't that hearsay? Let me ask
3 you that.

4 MR. ROHAN: There's an exception. Let me
5 think about that. There would be an exception here
6 for hearsay because it was based on why Hicks and the
7 other people believed the insurance was cancelled.
8 They believed it was cancelled because Barnett was
9 involved in these lawsuits.

10 THE COURT: I was at one point inclined to
11 omit C entirely. What say you to that?

12 MR. ROHAN: I think it's important because
13 it comes up in the insurance issue and the liability

14	of the church for not only these suits that
15	in effect but the liability for future suits
16	elders testified that they thought might occur
17	were worried about liability and that liability
18	was heightened by the fact they were no longer
19	for those actions. At the time that Barnett
20	removed in 1988, if a suit had been filed at
21	on the day before that there would have been
22	insurance coverage, there would have been no
23	provided by the insurance company, there would
24	been no settlement money provided by the insurance
25	company, so they were bare. They were running bare

Argument Re. Findings of Fact

1 because of the actions of Donald Barnett. I think
2 that's critical. It's one of the factors that went
3 into these people's minds of why he had to be removed.

4 THE COURT: You say because of the actions
5 of Barnett. Can they say that it was not in part due
6 to other lawsuits?

7 MR. ROHAN: There was no testimony --

8 THE COURT: I know that.

9 MR. ROHAN: -- that the insurance people
10 said it was due to anything else.

11 THE COURT: But that was because I wouldn't
12 permit inquiry into other lawsuits.

13 MR. ROHAN: No, I think that's a different
14 subject. If someone had cross-examined Mr. Hicks and
15 said, well, isn't it true that the insurance company
16 not only mentioned these lawsuits but mentioned other
17 lawsuits, the question wasn't asked and it would have
18 been a proper question. There is nothing wrong with
19 that question because you don't mention what the suits
20 were. Mr. Hicks testified that it was only Butler
21 Hall Brown and the Gabrielson suits and those were the
22 only two suits that the insurance company mentioned
23 and there was no examination. They attempted to do
24 follow-up in terms of bringing in these other suits,
25 but there was no examination of Mr. Hicks as to, well,

Argument Re. Findings of Fact

1 really didn't the insurance company say this or say
2 that or say something else. Mr. Hicks is the only
3 evidence to that.

4 MR. WIGGINS: Your Honor, the problem with
5 cross-examining Mr. Hicks is it's hearsay. We can't
6 cross-examine the truth of why the insurance company
7 cancelled coverage by cross-examining Mr. Hicks.

8 MR. ROHAN: They did cross-examine Mr.
9 Hicks, Mr. Johnson cross-examined him.

~~MR. WIGGINS: It doesn't have anything to do~~

11 with the truth of it.

12 MR. ROHAN: Question: And because of
13 that -- this is Mr. Johnson asking Mr. Hicks --
14 because of that you don't believe that they had
15 concern, that wasn't one of the lawsuits that
16 concerned them -- talking about a different law
17 Answer: It was never brought to my attention
18 that was any part of the insurance company's p
19 Then he goes on.

20 MR. WIGGINS: That's the very problem
21 Honor. He doesn't know and he admits it. Well
22 was never brought to my attention. I didn't ask
23 if they cancelled because of a lawsuit against
24 Hartley. It's not admitted for the truth of the
25 matter asserted. There can't be a finding say

Argument Re. Findings of Fact

1 true. That's the problem with it. You know, I think
2 it's unfair to single that out. It creates a grossly
3 misleading question here and we didn't cross-examine
4 Mr. Hicks because no insurance agent came in on this
5 question. We didn't know anybody thought that was
6 material.

7 MR. ROHAN: I think if we could state that
8 if that's the concern that the elders believed that
9 this was true, because I think that's the important
10 part to show the elders' state of mind when they
11 removed Pastor Barnett, if the elder believed that the
12 insurance had been cancelled because of these lawsuits
13 that Donald Barnett was involved in, I think that
14 would satisfy that and get us around. There's no more

15 hearsay because it's what the elders believe
16 an exception to the hearsay rule. And it is
17 it's one of the things mentioned by them in
18 potential liability for lawsuits as to why
19 removed Pastor Barnett.

20 MR. WIGGINS: Your Honor, I guess
21 to hear what Mr. Hicks said as to whether that
22 fact what he testified. I don't think he testified
23 believed that, I don't know. Did he say he testified
24 that the elders believed that the insurance
25 was cancelled because of lawsuits against P

Argument Re. Findings of Fact

1 Barnett? Did he say that? What page are you on?

2 MR. ROHAN: 1228. "Did the insurance
3 company tell you which lawsuits caused them to do
4 this?" "They assigned the alleged liability of the
5 church in the Gabrielson versus Community Chapel and
6 Don Barnett and Jack McDonald and also the so-called
7 Butler Hall Brown case versus I think it was Don
8 Barnett and Community Chapel".

9 MR. WIGGINS: He is not testifying that the
10 elders believed that that was why the insurance
11 coverage was cancelled. For all we know, Hartley was
12 told because it was a lawsuit against Hartley. DuBois
13 may have been told it was because of the lawsuit
14 against Motherwell. We don't have any idea of that.

15 MR. ROHAN: Your Honor, I think this is
16 sufficient to support a finding that the elders
17 believed that the reason that insurance was cancelled
18 was because of the lawsuits based on his testimony.

19 MR. WIGGINS: Your Honor, the problem is Mr.
20 Hicks didn't testify to that. He didn't even testify
21 that he believed that that was the reason. He says
22 that's the reason --

23 THE COURT: He said they were assigned.

24 MR. WIGGINS: That's right. I got to tell
25 you when I hear the reason an insurance company gives

Argument Re. Findings of Fact

1 for cancelling coverage, I generally don't believe it
2 because they generally don't tell you all the reasons
3 or the right reasons.

4 MR. KNIBB: That's not evidence.

5 MR. WIGGINS: I know it's not, but it's
6 common sense for anybody that has dealt with an
7 insurance company.

8 MR. ROHAN: Your Honor, I think it is
9 important because insurance was one of the reasons.

10 THE COURT: Well, I am considering striking
11 out because the lawsuits joined the church and the
12 defendants in misconduct cases and leaving the
13 insurance carrier for the church cancelled its
14 coverage.

15 MR. WIGGINS: That I think is supported by
16 the evidence.

17 THE COURT: So, that is the extent of --

18 MR. WIGGINS: What about the rest of C, Your
19 Honor?

20 MR. ROHAN: I think the rest of C is fine.
21 It's what is testified to. The insurance carrier
22 defended the lawsuit. The insurance carrier's
23 cancellation affected all the insurance coverage.
24 That was testified to. As a result, Community Chapel
25 was uninsured. That was testified to. And they

Argument Re. Findings of Fact

1. attempted but were unable to procure insurance. That
2 was also testified to.

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THE COURT: I think the rest of

right.

MR. WIGGINS: All right. Now
us back to what lawsuits we talk about
we don't have the predicate for any part
being the cause of the cancellation, is
single out a lawsuit or two lawsuits against
Barnett and ignore all the other lawsuits
answer is no, it's not fair.

MR. ROHAN: Your Honor, the lawsuits
mentioned by individuals in terms of Jack
mentions it in his testimony before the court
put in by deposition that the lawsuits testified
originally believed weren't true and the

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they're relevant. Since the other lawsuits
into and there was no testimony it went
thinking about why they removed Barnett,
are irrelevant and we only want to put in

Argument Re. Findings of Fact

1 relevant.

2 THE COURT: I'm going to leave the rest of
3 it.

4 MR. WIGGINS: Your Honor, what about the
5 other lawsuits, the lawsuit of criminal charges?

6 THE COURT: I'm going to keep them out.

7 Now, D, I've stricken the part that you added,
8 Mr. Rohan.

9 MR. WIGGINS: Personally, I kind of liked
10 it, Your Honor.

11 MR. ROHAN: That's fine with us.

12 THE COURT: Why shouldn't I strike it?

13 MR. WIGGINS: Well, strike it out. I
14 thought it was kind of nice but I don't care.

15 THE COURT: Okay, it's out. Started with
16 "the Barnetts" and ending in "marriage".

17 MR. ROHAN: Okay.

18 THE COURT: Okay, E.

19 MR. WIGGINS: No objection.

20 MR. ROHAN: I think E and F are both agreed
21 to.

22 THE COURT: E and F are okay. Church
23 leaders, you say you don't know what church leaders.

24 MR. WIGGINS: Well, Your Honor, I guess
25 it's vague and it doesn't say who they were talking

Argument Re. Findings of Fact

1 ~~about and certainly the evidence doesn't support~~

Pastor Barnett turned a deaf ear. The evidence was
that he responded at some length to Jerry Zwack, it's
just that Jerry Zwack was never satisfied with what
Pastor Barnett had to say. And the evidence also was
that Pastor Barnett agreed at one time in the summer
of 1987 to marriage counseling with Mr. Hartley and
Lanny Peterson and then he dropped them as his
marriage counselors. The problem with that is that's
not church leaders approaching him to express their
concern and dismay. Also, I don't think Mr.
Motherwell ever said that Pastor Barnett turned a deaf
ear to him and Pastor Barnett didn't counsel with him.
To the contrary, Pastor Barnett spent time counseling.

THE COURT: I was thinking of Lanny
Peterson. Who was the other?

MR. WIGGINS: Hartley.

MR. ROHAN: Lanny Peterson testified in 1987
after a woman had come to him that he had gone to
Pastor Barnett --

THE COURT: I think I'll leave that in.

MR. WIGGINS: Your Honor, then it should say
there was one time that Lanny Peterson approached
Pastor Barnett and whatever you're accepting as Lanny
Peterson's evidence.

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Argument Re. Findings of Fact

1 THE COURT: I think there were two people.

2 MR. WIGGINS: I don't know what they're
3 referring to, Your Honor.

4 THE COURT: Hartley and --

5 MR. ROHAN: Russell MacKenzie.

6 MR. WIGGINS: I don't recall anything --
7 Where is that?

8 MR. ROHAN: I remember Peterson because I
9 looked that up. He talked about, Scott Hartley, lying
10 to them.

11 MR. WIGGINS: Scott Hartley what?

12 MR. KNIBB: Scott Hartley said he lied.

13 MR. ROHAN: Scott Hartley also talked to
14 him, that's at page 681 and 682.

15 MR. WIGGINS: I just want to look at this
16 Your Honor, because I don't believe it --

17 MR. ROHAN: Starts at line 22 at the bottom.
18 through the next page.

19 MR. WIGGINS: See what he says here, Scott
20 Hartley said he lied to us in our counseling session.
21 Scott Hartley is talking about the counseling --

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MR. WIGGINS: That is not church leaders approaching the pastor to express their concern, that is a statement he made in a counseling session, a marriage counseling session, and then they learned something else and they concluded it was a lie.

THE COURT: Didn't Zwack say the same thing, that he had gone to Barnett repeatedly?

MR. ROHAN: Yes, it's in his letter of the 22nd and Pastor Barnett turned a deaf ear to him.

MR. WIGGINS: The trouble with Zwack's letter, Your Honor, is that it isn't evidence that this occurred. You are making a finding here, I, the Honorable Deierlein find the church leaders approached the pastor to express their concerns and dismay, but you don't have Jerry Zwack saying that. All you have is a letter which we objected as hearsay and it was admitted for whatever reason, whatever theory, but it's not evidence. You see, this is one of those hearsay examples. It's not evidence you can rely on

Argument Re. Findings of Fact

1 for purposes of making a finding like that.

2 MR. ROHAN: There's testimony that Jack was

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MR. WIGGINS: I have a couple of comments.

Argument Re. Findings of Fact

1 THE COURT: Well, I'm not going to say that.
2 We're talking now about this G.

3 MR. WIGGINS: That's right. I guess the
4 point that Mr. Rohan is making is that because Greg
5 Thiel says that Zwack said that, quote, Don said to
6 him that Don would not have him disfellowshipped if
7 Jerry repented and did certain things, I mean, this is
8 very convoluted.

9 THE COURT: No, I don't think that was the
10 situation. Thiel was there in the presence of Zwack
11 and Barnett.

12 MR. ROHAN: This was at the eldership
13 hearing and Zwack was telling what Don had done to him
14 a year or so before, but Don and Jerry were both there
15 in the eldership hearings.

16 MR. WIGGINS: I have a couple of problems
17 with that. First of all, it's still hearsay for
18 purposes of your making this finding. This is not a
19 finding that incidentally the elders believed.

20 THE COURT: I know what it says.

21 MR. WIGGINS: You are finding this and Jerry
22 Zwack has not testified to that. Greg Thiel has given
23 hearsay testimony to that effect and we to the point

24 of tedium objected to hearsay and finally took a
25 continuing objection.

Argument Re. Findings of Fact

1 THE COURT: I don't think Thiel's testimony
2 is hearsay.

3 MR. WIGGINS: Thiel's testimony that Zwack
4 said that Barnett said Barnett would not disfellowship
5 Zwack if he did certain things, that's hearsay because
6 it's a statement that Zwack made.

7 THE COURT: Didn't he further testify as to
8 what Barnett said?

9 MR. WIGGINS: Yes. He is testifying that
10 Jerry Zwack said that Barnett said.

11 THE COURT: No.

12 MR. WIGGINS: And that he gave that
13 testimony while Barnett was present.

14 MR. ROHAN: Why don't we put in G that at
15 least one church leader.

16 MR. WIGGINS: Which incident are we talking
17 about?

18 MR. ROHAN: Well, we're saying at least, but
19 I believe there's more than one, at least Lanny
20 Peterson.

21 MR. WIGGINS: But I haven't seen that. You
22 showed me something about Hartley.

23 MR. ROHAN: The Court has indicated that the
24 Court recalls that.

25 MR. WIGGINS: Your Honor, I have to tell

1 And I may not be right.

2 If the order is sealed as Mr. Wiggins suggests,
3 we would have to show compelling circumstances to
4 unseal them or you could argue even to refer to them
5 in the Court of Appeals. That's certainly not what
6 anybody wants. All of your factual Findings, all of
7 your Conclusions of Law I should be able to argue in
8 the Court of Appeals. Nobody should be able to say at
9 this point since that Finding is sealed, Mr. Rohan,
10 you can't even argue in front of the Court of Appeals.
11 The Court of Appeals is entitled to look at the entire
12 document. That's my concern. My language that I have
13 in the beginning of the order speaks to the reasons
14 why the Court is doing this and I think it's
15 important. The reason why the Court is doing this is
16 because -- That's on page 1 of the -- I'll let you
17 read it.

18 THE COURT: Page 1?

19 MR. ROHAN: Yes, Your Honor. That's a
20 quote, almost a verbatim quote from the parties'
21 agreement on sealing. That's why we agreed or the
22 standard we agreed to in our arbitration agreement. I
23 have a copy of that here.

24 THE COURT: I just looked at it before we
25 started.

Argument Re. Findings of Fact

1 ~~testimony is hearsay, that is what this~~
said. What Jerry Zwack said is hearsay. It is 2 Zwack
statement that's admitted for the truth of the 3 a sta
matter asserted. It's hearsay, it can't come in. It 4 matte
can't come in for the truth of the matter. That's the 5 can't
point. They had Jerry Zwack listed. They could have 6 point
called him, they didn't. 7 calle

THE COURT: At least one. 8

MR. WIGGINS: Okay, at least one. 9

THE COURT: Do you have that in there for 10
attention, Mr. Knibb? 11 correc

MR. KNIBB: Yes. 12

MR. ROHAN: At least one church leader. 13

MR. WIGGINS: Now, what their characterizing 14
turning a deaf ear should really say that the 15 as tur
denied that he was engaged in misconduct. 16 pastor
that's what he did. He didn't turn a deaf ear, he 17 That's
attended to it. Now, Peterson may have believed the 18 respon

19 woman and not Barnett, but he didn't turn a deaf ear. 19

20 That implies he didn't pay any attention to them. He 20

21 did. 21

MR. ROHAN: I think, Your Honor, the 22
evidence clearly shows he didn't pay attention to 23
anybody. 24

THE COURT: I may have said implore when I 25

Argument Re. Findings of Fact

~~should have been asked. In going to court we will be~~

1
2 privilege of authorship here.

3 MR. WIGGINS: I'll try to limit myself, Your
4 Honor, to those that I think are important.

5 THE COURT: Do you have any comment on the
6 unsavory publicity?

7 MR. WIGGINS: Here's the problem with
8 unsavory publicity. Now we have limited this to just
9 one lawsuit earlier in this same finding. And if
10 we're going to talk about unsavory publicity, the
11 evidence from Hicks was that a large part of this
12 unsavory publicity in the fall of 1987 was the
13 criminal proceedings against Mr. Motherwell and Mr.
14 Hartley. That's part of the unsavory publicity.

15 THE COURT: Our reporter is gone at the
16 wrong time.

17 MR. ROHAN: Your Honor, I think that this
18 finding is supported by the facts. Unsavory publicity
19 did reflect on Pastor Barnett and the church. It's
20 supported by the underlying facts.

21 MR. WIGGINS: Your Honor, I'm not saying
22 it's not supported by the evidence. The trouble is
23 it's misleading because it occurs within the same
24 finding that talks about one lawsuit against Pastor
25 Barnett when in fact there were criminal proceedings

Argument Re. Findings of Fact

1 against other people in this church that generated
2 publicity and civil lawsuits against Hartley and one
3 other member of the eldership which also generated
4 publicity.

5 MR. ROHAN: But the only material lawsuit is
6 the one that the Court has already determined --

7 THE COURT: The one that reflected Barnett.
8 Okay, down to 17.

9 MR. WIGGINS: Your Honor, here's the
10 problem. Hicks fired Jerry Zwack. He was very
11 unhappy with Jerry Zwack. Pastor Barnett tried for a
12 long time to keep Jerry Zwack from being fired. He
13 was finally fired. That's what the finding ought to
14 say. Jerry Zwack was hired by Mr. Hicks. I proposed
15 several findings on this.

16 THE COURT: I thought I was being charitable
17 to Pastor Barnett the way I wrote that.

18 MR. ROHAN: I think you were charitable to
19 him.

20 THE COURT: He was felt by Barnett to harbor
21 some ill feelings toward him growing out of his
22 termination and so forth.

23 MR. ROHAN: I think that's the only thing
24 the evidence will support is that Barnett felt that,
25 because I don't believe anybody else testified that he

Argument Re. Findings of Fact

1 was bitter or anything like that.

2 THE COURT: Hicks did. Hicks went into
3 detail. To his living day he will always believe that
4 Barnett was the one that did it.

5 MR. WIGGINS: Your Honor, there's another
6 reason why.

7 THE COURT: Let's just say who was wrongly
8 felt by Barnett to harbor --

9 MR. WIGGINS: There's no question Barnett
10 felt he did harbor ill will toward him, it's just that
11 Barnett didn't fire him. And the way the sentence
12 reads it creates the impression Barnett fired him.

13 MR. ROHAN: I don't think it does. He was
14 cut from his employment from the Church Counseling
15 Center and was felt by Barnett to harbor some ill will
16 growing out of his termination.

17 ~~MR. WIGGINS: There's already more to be said~~

18 that, Your Honor. I have proposed three findings,
19 17.1, 17.2, and 17.3. They deal with three very
20 specific grievances that Jerry Zwack had against
21 Pastor Barnett. And there isn't any question he had
22 these grievances. Hicks testified that he had these
23 same grievances. He talked about them. And Pastor
24 Barnett very definitely believed these were the
25 grievances that Zwack had against him. That's a very

Argument Re. Findings of Fact

1 important part of the case.

2 MR. ROHAN: Your Honor, the reason why this
3 is anything other than what we put there as material
4 is that there is no evidence that Jerry Zwack in his
5 letter of December 22 which contained his grievances
6 or any other credible testimony that Jerry Zwack was
7 asking for his job back or something like that. In
8 fact, there is testimony to the contrary that Jerry
9 Zwack was not interested in that.

10 THE COURT: I read that letter several times
11 and I didn't hear him complaining about being fired.

12 MR. ROHAN: Right. So, that's why I don't
13 think any of that is material. What they're trying
14 to say is somehow Jerry Zwack is this sort of
15 Machiavellian evil figure that's coming up and making
16 all these things up when in fact I don't believe
17 anybody believes that.

18 MR. WIGGINS: Well, Your Honor, Pastor
19 Barnett testified very clearly about these three
20 grievances and nobody claims or nobody said, oh, no, I

grievances,

22

Barnett thought these were Jerry Zwack's

23

there isn't any testimony like that.

Motherwell.

24

MR. ROHAN: Yes, there is David

letter, you

25

THE COURT: When you read the l

Argument Re. Findings of Fact

1 don't get that impression. That's my point.

2 MR. ROHAN: Right.

3 MR. WIGGINS: Your Honor, the problem is
4 that Pastor Barnett testified that he believes there
5 was another letter that was involved here, a letter
6 that he never has found and he also --

7 THE COURT: I don't know anything about
8 that.

9 MR. WIGGINS: He also testified to a number
10 of discussions he had with David Motherwell about that
11 and to discussions he had with Zwack.

12 And the other thing that supports this is Hicks'
13 testimony. Hicks testified that there's no question
14 that Barnett felt that the hearings ran far beyond
15 what Barnett understood to be the grievances.
16 MacKenzie's testimony supports the fact as soon as
17 they started the hearings and Zwack started getting to
18 an incident that occurred years earlier Barnett
19 objected to that.

20 So, there's a lot of evidence that Barnett felt
21 all along that this was far beyond Zwack's grievances.
22 And certainly these facts, nobody disputes that he was
23 cut by Hicks from the Counseling Center and that Zwack
24 thought that that was Barnett's fault. Nobody
25 disputes he was taken out his counseling class and

Argument Re. Findings of Fact

14 1 that he felt that was Barnett's fault. And nobody
2 disputes that he thought that Pastor Barnett was
3 hurting Barbara through Barnett's present activities.
4 There's no dispute about that. That's why these
5 findings are accurate.

6 MR. ROHAN: There's no dispute about whether
7 or not Jerry Zwack felt bitter. In fact, Jerry Zwack
8 in his letter is saying he is not bitter.

9 THE COURT: All I would do is add in fact
10 Jerry was terminated by Hicks.

11 MR. WIGGINS: Where are we adding this?

12 THE COURT: Right before paragraph 18. In
13 fact, Zwack was terminated by Hicks.

14 (Short break taken.)

15 MR. KNIBB: Your Honor, can I suggest an
16 editorial change in paragraph 17? Where you had added
17 a sentence in fact Jerry was terminated by Hicks.

18 THE COURT: You want to slip that in
19 earlier?

20 MR. KNIBB: Yes. I was going to suggest
21 that we put it in the first line where we say Jerry
22 Zwack who had been cut by Hicks from his employment at
23 the church's Counseling Center.

24 THE COURT: Does that suit you?

25 MR. WIGGINS: That's fine.

Argument Re. Findings of Fact

1 MR. KNIBB: I think this reads more
2 smoothly.

3 THE COURT: Okay, we're now at 18.

4 MR. WIGGINS: May I ask a question? Was
5 that December 24th or December 22nd?

6 MR. ROHAN: December 23rd.

7 MR. WIGGINS: Okay, let's change the
8 finding.

9 MR. ROHAN: It was delivered on the 24th, so
10 that is correct. As stands, it's correct because it
11 was delivered on the 24th.

12 THE COURT: Yeah, I remember on Christmas
13 Eve. Here it comes, Merry Christmas to you.

14 All right, No. 18. I have as the first sentence,
15 this letter, Exhibit 22, herein and by this reference
16 incorporated in these findings and should be read in
17 its entirety by anyone reviewing these findings,
18 period. All the rest remaining stricken. What say
19 you as to that? I know Mr. Wiggins doesn't like my
20 calling attention to this, but that's the only way to
21 get an appellate judge to read it. Otherwise, he says
22 sure, Exhibit 22, if I ever get around to it.

23 MR. ROHAN: I think that's why I like both
24 having that part in and the rest.

25 THE COURT: Well, I don't like to excerpt

Argument Re. Findings of Fact

1 it, that's my point. And I think the whole thing
2 should be read by everybody because this really frames
3 the elders' hearings and it's an important piece of
4 evidence, not because it is true but because of what
5 it says.

6 Down to 19.

7 MR. WIGGINS: Your Honor, I just had a few
8 minor changes. I took exception to the word
9 "implored". I don't think the evidence supports that
10 and it puts the pastor in a demeaning light that is
11 not supported by the evidence and it's an image of him
12 coming and begging people to do something and I don't
13 think that's appropriate.

14 The other part of the finding to which I take
15 exception is the statement that few, if any, of the
16 recipients complied with Pastor Barnett's request. I
17 don't believe there's any evidence to support that. I
18 know that Mr. MacKenzie testified he didn't return the
19 letter. I don't know if there's any other testimony.

20 MR. ROHAN: Mr. Motherwell testified on page
21 996 that he had read the letter and Pastor Barnett
22 asked him to try to get the other elders, stop the
23 other elders from reading the letter and I think
24 implored is correct. And Mr. Motherwell testified, I
25 believe he asked me if I heard from them to ask them

Argument Re. Findings of Fact

1 to not read the letter. And I said no, I felt they
2 should read the letter. So, I think two of them are
3 testifying that in fact they didn't and I think the
4 Court is correct when it says few, if any.

5 THE COURT: I didn't hear Pastor Barnett say
6 anybody sent the letter back.

7 MR. WIGGINS: There isn't any testimony on
8 that point and Motherwell testimony didn't support
9 that either.

10 MR. ROHAN: Page 996 of Motherwell and 458
11 and 459 of Mr. MacKenzie.

12 MR. WIGGINS: This is one of those examples,
13 Your Honor, where there's not evidence that this
14 didn't happen but there's no evidence that it did
15 happen.

16 MR. ROHAN: There's two people testifying
17 directly that they did not send the letter back to
18 Pastor Barnett.

19 MR. WIGGINS: That's correct, but there were
20 about 16 addressees of the letter. You have less than
21 20 percent of the people testifying on the subject at
22 all.

23 THE COURT: MacKenzie didn't.

24 MR. ROHAN: MacKenzie said he didn't and
25 Motherwell testified that he got the letter and said

Argument Re. Findings of Fact

1 testified as to the
2 contents of the letter.
3 e contents of the
4 id, I believe Mr. Harold
5 f the elders except
6 the letter.
7 he course of the hearing
8 ings, one, that they all
9 hey all read the letter
10
11 state that there is no
12 ients complied with
13
14 are trying to shorten
15 indings there is no
16 nt.
17 ms to meet your
18
19 the point of even
20 plied with the request.
21 e real problem is the
22 ked people to return a
23 saying he implored.
24 t, asked?
25 ay ordered the

1 he didn't. And other people t
2 letter because they knew the c
3 Several people testified to th
4 letter. I believe Mr. Thiel d
5 did. In fact, I believe all o
6 Lanny Peterson testified about
7 THE COURT: During t
8 I was surprised to find two th
9 took notes and kept them and t
10 and didn't send it back.
11 MR. ROHAN: We could
12 evidence that any of the recip
13 Pastor Barnett's request.
14 MR. WIGGINS: If you
15 findings, there are a lot of f
16 evidence on the particular poi
17 MR. ROHAN: That see
18 objection about few, if any.
19 MR. WIGGINS: What's
20 talking about whether they com
21 It doesn't go anywhere, but th
22 implored. The fact that he as
23 letter is very different than
24 THE COURT: All righ
25 MR. ROHAN: Can we s

Argument Re. Findings of Fact

1 recipients to bring the letter to him?

2 THE COURT: I was going to say begged.

3 MR. WIGGINS: That's the same as implored.

4 THE COURT: Asked is good enough. All
5 right.

6 MR. ROHAN: We would strike "few, if any"
7 and put "there is no evidence that any".

8 MR. WIGGINS: I guess then it ought to say
9 there's no evidence that any of the recipients
10 complied with Pastor Barnett and there's no evidence
11 that 14 of them did not. That's the problem with this
12 finding. There's no evidence either way.

13 MR. ROHAN: Well, I think that's accurate.
14 The only evidence that's in there was put in by us.
15 There is evidence that a number of them read it. So,
16 I think you can infer from the fact that they read it
17 that they didn't send it back.

18 THE COURT: Unopened.

19 MR. ROHAN: And the Zwack letter clearly
20 prompted them to proceed.

21 MR. WIGGINS: Well, I don't think it leads
22 anywhere, I don't think it makes any difference so I'm
23 not going to fuss.

24 THE COURT: Okay, No. 20. No objection
25 apparently.

Argument Re. Findings of Fact

1 MR. ROHAN: No objection.

2 THE COURT: 21.

3 MR. WIGGINS: Right, Your Honor --

4 THE COURT: Motherwell and the other two
5 were all ministers, weren't they?

6 MR. WIGGINS: Motherwell was a minister. I
7 don't know that the other two were, but I don't know.

8 MR. ROHAN: They were counselors. Well,

9 ~~Bergin was a minister and the other one was Mathews~~

THE COURT: I know Bergin was because I was
interested in what he did. He came from Burlington.

MR. ROHAN: Do we talk about the ministers?
We talk about them being counselors.

MR. MOTHERWELL: As elders.

THE COURT: I was going to put
counselor/ministers.

MR. ROHAN: I don't know if that's accurate.
I know they were counselors. Mathews and Bergin and

10

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Argument Re. Findings of Fact

16 1 been talking about 20. Here the problem, Your Honor.
2 This Finding 21 says "including", I guess that should
3 be "included in the group was".

4 THE COURT: Would you make that change, Mr.
5 Knibb.

6 MR. KNIBB: Sorry?

7 MR. WIGGINS: 21 should be "included" not
8 "including". Included in the group was David
9 Motherwell, Pastor Barnett's counselor, and who was
10 nominated to the group by the pastor to assure that
11 Pastor Barnett's position on the grievances be brought
12 before the group. Now, I have done quite a search on
13 this and I can't find that evidence. Pastor Barnett
14 did not testify to what he had contact
15 Motherwell did.

16 MR. ROHAN: Page 997 and 998. David
17 Motherwell testified on direct, "What did he", meaning
18 Barnett, "tell you as to why he wanted you to be on
19 the committee?" Answer: "Because he knew that we
20 knew the information contained in the grievances of
21 Jerry Zwack and he knew that in his absence that
22 John", who is Bergin, "and I could keep accurate track
23 of that information and the discussion of it, also
24 that he wanted me there to testify as to what, if
25 anything, he was doing in regard to those grievances".

Argument Re. Findings of Fact

1 David Motherwell, page 998, lines 14 and 15.

2 Question: "What was said by you or Donald Barnett
3 about that?" Answer: "That he knew there would be
4 testimony given while he wasn't present and he knew
5 who it would come from, that it would come from those
6 individuals that he requested to be there and that he
7 understood that that was to happen in the course of
8 the hearings". "And by those individuals, he was
9 referring to David Motherwell, yourself, and John

10 Bergin?" Answer: "Myself and John Bergin, as well as

11 Lanny Peterson and Scott Hartley".

12 MR. WIGGINS: Your Honor, the only thing
13 that Pastor Barnett -- Pastor Barnett never says
14 to begin with.

15 THE COURT: I know he didn't.

16 MR. WIGGINS: And the only thing that P
17 Barnett says about this is that he wanted the wor
18 "and Jerry" inserted into the agreement, the Janu
19 25 agreement, I'm referring to my objections here
20 because he knew, he was concerned that as soon as
21 Jerry saw that the eldership was taking Barnett's
22 and as soon as he heard David Motherwell testify
23 Jerry Zwack would repudiate the whole hearing pro
24 What he is saying here is that Jerry Zwack was go
25 to hear David Motherwell testify. What this says

Argument Re. Findings of Fact

1 about testifying is that David Motherwell would
2 testify and the whole implication of all that is
3 Pastor Barnett was going to be present. Pastor
4 Barnett --

5 THE COURT: No, I don't see that.

6 MR. ROHAN: On page 998 he says that he,
7 meaning Donald Barnett, line 15, and he, Barnett, knew
8 there would be testimony given while he wasn't
9 present, that's Barnett wasn't present, and he knew
10 who it would come from.

11 MR. WIGGINS: That's not what Barnett's
12 testimony is, Your Honor.

13 MR. ROHAN: That's correct and I think the
14 Court chose to believe Mr. Motherwell's testimony.

15 MR. WIGGINS: Well, that's the question.

16 THE COURT: That's why I put it in there.
17 He was suggested to the board, Motherwell was, by
18 Barnett, and Motherwell claims that that was to
19 testify or to hold up Barnett's end of it. And that's

20 ~~what that testimony was to do in the finding.~~

21 MR. WIGGINS: All right, Your Honor.
22 Motherwell said words like that. I guess there is
23 something to base that finding on.

24 MR. ROHAN: So, we're up to 22 then?

25 THE COURT: 22. I don't know that

Argument Re. Findings of Fact

1 Motherwell was the counselor up to March 4.

2 MR. ROHAN: I have several references to
3 that, Your Honor.

4 THE COURT: I was going to change that to
5 during the eldership hearings.

6 MR. ROHAN: There's on page 1122 of Mr.
7 Motherwell during his cross-examination by Mr. Pierce,
8 1122, line 14. Question: "You got up at the
9 eldership hearings, excuse me, got up and spoke to the
10 congregation on March 4, 1988; is that correct?"
11 Answer: "I did". "And you told them that you were
12 going to be speaking as Donald Barnett's counselor; is
13 that correct?" Answer: "I was his counselor". That
14 was on March 4. 29th of February, the question to Mr.
15 Thiel about the 29th of February. "Who brought it up,
16 if you recall?" "Don's counselor, David Motherwell".
17 That's on page 1428.

18 On page 573 of MacKenzie's testimony, he's
19 talking about the March 4 senior elders' letter.
20 "What, based on your knowledge, what capacity was
21 David Motherwell?" Answer: "David Motherwell was Don
22 Barnett's personal counselor". There's also a
23 reference in Exhibit 37 which is the February 28th
24 sermon where Donald Barnett admits that he had at the
25 present time three counselors and, in fact, David

Argument Re. Findings of Fact

1 Motherwell was one of his counselors, the February
2 28th sermon.

3 MR. WIGGINS: That's not in evidence. Oh,
4 February 28, okay.

5 MR. ROHAN: There's a sentence in there.

6 MR. WIGGINS: Well, if Barnett says that in
7 the February 28th sermon, I can't dispute that.

8 MR. ROHAN: Oh, page 55, Exhibit 31. "I'm
9 under three counselors already". "Leave me to God and
10 my counselor, David Motherwell", which is about eight
11 or nine lines up from the bottom. So, Don Barnett on
12 February 28 says he is his counselor. So, based on
13 all of that, that's four people testifying that David
14 Motherwell was Donald Barnett's counselor, including
15 Pastor Barnett himself.

16 THE COURT: I missed that one on March 4, so
17 I had interlined during the eldership hearings.

18 MR. ROHAN: I think March 4 is important
19 because Donald Barnett's letter disfellowshipping
20 Donald Barnett was dated March 4. He was
21 disfellowshipping him as his counselor. That's a very
22 critical finding. It's very important to our case.

23 THE COURT: What say you?

24 MR. WIGGINS: Well, Your Honor, I think the
25 problem comes in that there comes a time during these

Argument Re. Findings of Fact

1 hearings when David Motherwell's role is not as a
2 counselor and here's the problem. Pastor Barnett
3 thought that David Motherwell was his counselor. He
4 thought he was going into these hearings to receive
5 counsel. That was his testimony, and they were going
6 to try to heal the relationship between him and Jerry.
7 Well, the Court doesn't accept that. The Court is
8 saying, no, the eldership was sitting in judgment on
9 him and they were going to impose discipline. That's
10 an inconsistent role with the counseling role and even
11 Mr. Motherwell says in one of his letters --

12 THE COURT: I don't say that they went into
13 the hearing expecting to inflict discipline. They may
14 have taken whatever action that was to their
15 satisfaction. And once they got into the hearing, the
16 mood changed.

17 MR. BOHAN: Your Honor, the evidence that I
18 just cited states that as of March 4, 1988 David
19 Motherwell in fact was Donald Barnett's counselor. In

nettt admitted that he
nce points to the
selor. And I think
clearly supported by
ant.

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21
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25

fact, six days earlier Donald Bar
was his counselor. All the eviden
fact that in fact he was his coun
that finding should stand. It's
the evidence and it's very importa

THE COURT: All right.

1 sufficient and appropriate to take action to
2 disfellowship Pastor Barnett.

3 Disfellowship is a spiritual action, it's a
4 spiritual matter, and this Court cannot be involved in
5 deciding whether there's grounds to disfellowship
6 somebody, it's a First Amendment problem. You know
7 whatever else may be said about the eldership
8 hearings, you just cannot say that the Court can have
9 any cognizance over whether there were grounds to
10 disfellowship the pastor.

11 MR. ROHAN: Your Honor, we've argued this at
12 length and every time we have argued it the Court has
13 ruled that, the Court would look at the actions of the
14 elders and has looked at the actions of the elders
15 and, as a matter of fact, that's what this whole trial
16 is about. The Court has decided this numerous times.
17 The Court has jurisdiction over the non-religious
18 aspects of this and that's what the Court has found
19 before.

20 This is a critical Findings in terms of this
21 follows the language in Baldwin vs. Sisters of
22 Providence which is a Washington case that says what
23 the standard is for people to determine whether or not
24 there's just cause and whether or not there's a breach
25 of fiduciary duty and the language is taken directly

Argument Re. Findings of Fact

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moment, I just want to 2
3
s. We're in agreement 4
n agreement on 24, if 5
6
e essentially your 7
dispute we have is over 8
9
the elders being aware. 10
11
dn't make this finding. 12
sure I even want that 25 13
14
or, I think on page 12 15
16
ou specifically 17
18
. At the bottom of page 19
tate, "It was developed 20
, if not all, of the 21
ppeared here and 22
of the Articles of 23
of Faith and Bylaws and 24
aware of these 25
ll them, and the fact

23.

MR. WIGGINS: Just a
make sure.

MR. ROHAN: 22 stand
on 23, I believe. And we're i
the Court agrees on 23 and 24.

THE COURT: Yeah.

MR. ROHAN: Those ar
findings. And then the next d
paragraph 25.

THE COURT: Most of
I'm not sure that I --

MR. WIGGINS: You di

THE COURT: I'm not
in.

MR. ROHAN: Your Hon
and 13 of your oral decision y
discussed this, if I'm correct
12 of your oral decision you s
during the testimony that most
members of the committee who a
testified were somewhat aware
Incorporation and the Articles
that they understood and were
protective provisions, as I ca

Argument Re. Findings of Fact

1 that in the organization of the church the pastor was
2 above the church and controlled the church and had
3 crucial authority over all of the other divisions of
4 authority."

5 THE COURT: I remember that each one of them
6 was asked that on cross-examination by Pierce and by
7 Johnson and by Mr. Wiggins, as a matter of fact, all
8 of them who appeared here.

9 MR. WIGGINS: Yeah, the problem here is, of
10 course, that first of all most of the eldership did
11 not appear and testify here. And, secondly, the
12 people who did testify didn't testify that the others
13 were aware of this. And, thirdly, they certainly
14 became aware of it at some point during the hearings
15 when they discussed what their authority was, but this
16 finding refers to, this is in the sequence before they
17 even went into the hearings and there is not any
18 evidence that most, if not all, were aware of the
19 articles and bylaws.

20 THE COURT: I'll put "many" then.

21 MR. ROHAN: Many of the eldership?

22 MR. KNIBB: Many in the eldership?

23 THE COURT: Many of the eldership.

24 MR. ROHAN: 26.

25 MR. WIGGINS: Your Honor, your finding, I

Argument Re. Findings of Fact

1 think which is the part that's not highlighted here,
2 is probably supported by the evidence. The changes
3 that Mr. Rohan has added are not supported. First of
4 all, this introductory phrase, because the eldership
5 was aware of the protective provisions, well, now we
6 don't even have that predicate anymore because we have
7 changed that to many of the eldership. So, this can't
8 be true of all the eldership anymore.

9 Secondly, this statement that the eldership also
10 wanted to outline what was to be done as part of these
11 hearings, we're talking about this as leading up to
12 the agreement. And the agreement doesn't outline what
13 was to be done as part of the hearings. And so this
14 interlineation here doesn't really make any sense at
15 all.

16 THE COURT: What doesn't?

17 MR. WIGGINS: Well, the two things that
18 don't are the first clause, because the eldership was
19 aware of the protective provisions, because it's not
20 supported by the evidence and you didn't find that to
21 begin with.

22 THE COURT: Well, I don't know that that
23 makes any difference.

24 MR. ROHAN: I think that's an important
25 point because one of the reasons why the January 25

Argument Re. Findings of Fact

1 agreement was entered into was because the elders
2 obviously knew that Donald Barnett had all these
3 extraordinary powers. If he didn't have any
4 extraordinary powers, it wouldn't be necessary to
5 enter into the agreement.

6 THE COURT: That's why No. 25 is important.

7 MR. ROHAN: That's correct.

8 THE COURT: I don't know that it needs to go
9 into 26.

10 MR. WIGGINS: Then the last -- But I don't
11 think this first phrase follows anymore because of the
12 change we've made in 25.

13 MR. ROHAN: Maybe we should say because many
14 of the eldership were aware, to make it consistent
15 with 25.

16 MR. WIGGINS: But the protective provisions
17 weren't why they were concerned about a whitewash.
18 They were worried about a whitewash because they were
19 worried people might think they were trying to protect
20 Pastor Barnett. That doesn't have anything to do with
21 his powers.

22 MR. ROHAN: Your Honor, I can give you
23 several references on this.

24 THE COURT: They were worried that he would
25 stop them too.

Argument Re. Findings of Fact

1 MR. WIGGINS: I agree with that.

2 MR. ROHAN: Mr. Thiel on page 1401, number
3 one, that he would exercise his pastoral authority
4 over the hearings.

5 THE COURT: Here, let's go back to 26 and
6 because of the repetition here let's start up on the
7 top of page 15 with the word "some".

8 MR. ROHAN: So, we're eliminating the others
9 because of the repetition?

10 THE COURT: Well, that's not what I was
11 talking about. I was talking about the phrase "some
12 of the members were" and it starts over again on top
13 of the page, some of them were. Some of the members
14 were.

15 MR. KNIBB: Shall we say some of the
16 eldership were?

17 THE COURT: All right.

18 MR. ROHAN: Your Honor, we're eliminating
19 the first phrase because the eldership was aware of
20 the protective provisions?

21 THE COURT: Yeah.

22 MR. ROHAN: And we're doing that because we
23 already included it in No. 25?

24 THE COURT: Yes.

25 MR. WIGGINS: Now, Your Honor, the last

Argument Re. Findings of Fact

1 sentence of this finding doesn't make sense to me.
2 The eldership also wanted to outline what was to be
3 done as part of these hearings. What we're leading up
4 to is the agreement of January 25. Well, the
5 agreement doesn't outline what was to be done as part
6 of these hearings.

7 MR. ROHAN: The agreement does, but we can
8 argue that then.

9 MR. WIGGINS: It says they will have
10 hearings --

11 THE COURT: The combined written words in
12 the guidelines and the agreement go to make up the
13 procedure the eldership developed and which was
14 accepted by Pastor Barnett and they proceeded on that
15 basis. That's my conclusion.

...y formed part of the
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...as written.
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MR. WIGGINS
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...didn't say what was to be done.
THE COURT: No, but the
procedure.
MR. WIGGINS: So, you'r
in?
THE COURT: Yes.
MR. ROHAN: And I think
agreement that 27 and 28 are okay
MR. WIGGINS: I don't o

Argument Re. Findings of Fact

1 MR. ROHAN: So, we're up to paragraph 29.

2 THE COURT: 29.

3 MR. WIGGINS: Your Honor, on 29 Mr. Rohan
4 has added the second sentence which is, "Because no
5 one could be sure what information the hearing might
6 adduce, the agreement was made intentionally broad to
7 cover a wide range of circumstances". That's not
8 supported by the evidence because the agreement is not
9 intentionally broad at all.

10 THE COURT: That's what MacKenzie said he
11 did.

12 MR. ROHAN: That's correct.

13 THE COURT: When he drew it. He said I
14 didn't know what was going to come in and he said he
15 made it intentionally broad.

16 MR. WIGGINS: Here's the problem with Mr.
17 MacKenzie's testimony on that point. Mr. MacKenzie
18 testified he was a careful writer.

19 THE COURT: That's right.

20 MR. WIGGINS: And if you are a careful
21 writer, Your Honor, and you really wanted to make sure
22 that everybody understood what was going to happen,
23 you'd say what was going to happen. MacKenzie, on the
24 other hand, if this is what he intended from the
25 outset, he certainly concealed it as well as he could.

Argument Re. Findings of Fact

1 His testimony on this is not credible. That's one of
2 the problems with it.

3 You know, the guy comes in here and he testifies
4 so definitely about what he intended to do and all
5 that, but you don't get any of that in the writing.
6 And when you interpret a writing like this, you can't
7 just say it was made intentionally broad because that
8 is an uncommunicated subjective intent. Unless he
9 said to Pastor Barnett or somebody said to Pastor
10 Barnett it's made intentionally broad so that it's
11 going to cover everything, it really doesn't make any

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difference what MacKenzie thinks. I don't
he said is credible, but it certainly wasn't
communicated. It is not evidence that goes
interpreting what the agreement means because
didn't communicate it.
MR. ROHAN: Your Honor, the agree
is broad enough to attach that interpretat
We have all read the agreement numerous ti
MacKenzie is not a lawyer.

THE COURT: It's certainly broad

MR. ROHAN: MacKenzie is not a lawyer. He is

lawyer.
THE COURT: I don't know how much broader
c. I'm paraphrasing here, but I'm not, the

22
23 just not a
24 T
25 you can get

Argument Re. Findings of Fact

1 last part of this, that the eldership could proceed to
2 their satisfaction.

3 MR. WIGGINS: That's where you're wrong,
4 Your Honor, because it didn't say they could proceed.
5 The hearings will proceed until they are concluded.

6 THE COURT: I don't mean to be quoted, but
7 that's the general idea.

8 MR. WIGGINS: My point though -- Let me go
9 back to what Mr. Rohan said, Your Honor, about Mr.
10 MacKenzie not being a lawyer. Of course, when you
11 look at a contract you're trying to interpret what the

the intent of the

is never

the objective

objective.

is anymore.

Honor, the Byrd

that.

can bring in

But in terms of

Mr. MacKenzie now

to cover a wide

was no discussion

there was

contract means in accordance with the

parties, but it's not an intent that

expressed. We go in Washington on the

manifestation of intent, not the sub

THE COURT: Not the way it

MR. WIGGINS: Well, Your Honor

versus Newton case doesn't repudiate

THE COURT: It says you can

everything else too.

MR. WIGGINS: That's true.

this finding it's not material that

says he made it intentionally broad

range of circumstances because there

of that fact and there's no evidence

Argument Re. Findings of Fact

1 discussion of that fact. To the contrary, the
2 evidence is there wasn't any discussion about that.

3 THE COURT: That's right. He drew it the
4 way he wanted it and I'm impressed by the fact that it
5 is broad. It is broad as all outdoors.

6 MR. WIGGINS: The problem, Your Honor, is
7 ~~you are -- Well. I guess I'm getting ahead of myself~~

8 but I have to tell you that if you are finding that he
9 truly did this to make it as broad as possible, then
10 nobody told Barnett that that was the intent and there
11 is not a shed of evidence that anybody told Barnett
12 that was the intent. In fact, to the contrary.

13 Then the man is either -- This was a trap.
14 That's what really happened here because nobody said
15 anything to Barnett about this and you look at that
16 agreement and you cannot -- I keep coming back to the
17 fact it doesn't say they can do anything except hold
18 the hearings and conclude the hearings to their
19 satisfaction. It doesn't say they can do anything.
20 In fact, they didn't think they could do anything.

21 THE COURT: Does it say they conclude the
22 hearings to their satisfaction? I've been trying to
23 find my copy.

24 MR. KNIBB: Shall exercise final authority.

25 MR. WIGGINS: But you keep leaving out, see,

Argument Re. Findings of Fact

1 every time somebody quotes this they leave something
2 out. The board of elders as a group shall exercise
3 final authority over these meetings, over these
4 meetings. Now, that doesn't say we can do any more.
5 And then it goes on to say in the next paragraph, Don
6 and Jerry shall permit the hearings to continue until
7 they are concluded to the satisfaction of the elders
8 It doesn't say they can do anything. That's the
9 problem.

10 You know what this is like? This is like the
11 special prosecutor or special investigator. I talked
12 about Archibald Cox before and you didn't like my
13 analogy, but let's talk about Archibald Cox again.
14 was appointed by President Nixon to investigate the
15 Watergate break-in and Nixon couldn't basically stop
16 him once he started the whole ball rolling. But that
17 didn't mean he gave up his Constitutional protection
18 against impeachment and it didn't mean that Archibald
19 Cox got to say, "Mr. Nixon, I think you're out of
20 here". That's not what it meant at all. That's the
21 analogy.

22 They can hold hearings and hold hearings under
23 this agreement until the cows come home and they have
24 to conclude them somehow to their satisfaction and
25 Don's got to let them conclude them to their

Argument Re. Findings of Fact

1 satisfaction. And you know how they did conclude
2 them? They finally concluded them recommending to the
3 elders that the elders disfellowship Pastor Barnett.
4 They didn't do it themselves.

5 THE COURT: Well, we get into problems on
6 that one.

7 MR. WIGGINS: But I'm not getting into that

8 as much as saying this language, it's broad in the

and he won't

9

sense they can conduct these hearings

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stop the hearings.

e?

11

THE COURT: Where are we here

ne with 29.

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MR. ROHAN: I think we're done

e hasn't ruled

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MR. WIGGINS: Well, the judge

ond sentence

14

on the 29. I have objected to the sec

here into what

15

which is as an insertion by Defendants

What is the ruling?

16

you had found

ROHAN: We'd like to keep the language

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MR.

based on what you said that certainly

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in those

was as broad as all outdoors and it was

19

the agreement

inally broad.

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made intention

COURT: I'm going to let 29 stand as it

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PRO

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his.

ROHAN: Thank you, Your Honor. I think

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MR.

agreement that 30 is okay.

24

we're at

WIGGINS: I don't have any objection.

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25

MR.

Argument Re. Findings of Fact

1 MR. ROHAN: We're on to 31.

2 MR. WIGGINS: Now, 31, Your Honor, we get
3 back into the question about -- First of all, this is
4 something that's been added by the Defendants. We get
5 into this question about the lawsuit and we're only
6 mentioning lawsuits involving Pastor Barnett when
7 everybody knew there were other lawsuits damaging
8 Community Chapel. So, it's unfair to Pastor Barnett
9 to single out this lawsuit.

10 The second sentence has to do with great urgency
11 to resolve Zwack's charges. I just don't think that
12 the evidence supports this great urgency to resolve
13 Zwack's charges. In fact, they didn't resolve them
14 with any urgency until well over a month.

15 MR. ROHAN: Your Honor, if I might, David
16 Motherwell testified at page 1002, this is Donald
17 Barnett talking on the 25 of January 1988, "Did he
18 indicate at the end of your conversation whether he
19 agreed or disagreed as a whole with the guidelines?"
20 "His indication was that he agreed. He was at this
21 time on this date much more concerned about what would
22 happen if he didn't cooperate with the hearings than
23 if they went forth". "Did he tell you why he was
24 concerned if the hearings didn't happen?" "Well, he
25 considered Jerry Zwack's promise that he'd take it to

Argument Re. Findings of Fact

1 a broader audience, the material to a broader audience
2 as something that Jerry would follow up on".

3 THE COURT: And I will incorporate that idea
4 in lieu of where pending lawsuits --

5 MR. ROHAN: Pastor Barnett was aware that
6 Jerry Zwack had threatened to go to a broader audience
7 if there were no --

8 MR. KNIBB: That's already said in number
9 30.

10 MR. ROHAN: How about if we cross out the
11 first sentence of 31 and just leave the second
12 sentence, this concern referring back to Jerry might
13 publish his grievances.

14 THE COURT: Disclose them to the newspaper
15 reporters.

16 MR. WIGGINS: I guess maybe this is a
17 question of language. Urgency implies to me that
18 something has to be done immediately and I think what
19 you're saying is there was importance in resolving
20 Jerry Zwack's charges and I think they all agreed on
21 that. The urgency suggests to me kind of a time
22 factor that I don't think the evidence supports.

23 MR. ROHAN: Urgency is taken out of your
24 oral opinion at page 11 where you state, "And this
25 situation has received publicity, damaging publicity,

Argument Re. Findings of Fact

1 up to that point anyway and that made great urgency to
2 resolving his problem".

3 THE COURT: Well, great importance is
4 probably what I meant.

5 MR. WIGGINS: I agree with that. That's
6 fine.

7 MR. KNIBB: So, we're using great
8 importance?

9 THE COURT: Instead of urgency. Just the
10 one word is out.

11 MR. WIGGINS: And taking out the first
12 sentence.

13 MR. KNIBB: Right.

14 MR. ROHAN: Up to 32, I believe.

15 MR. WIGGINS: Your Honor, here I think we
16 ought to set the agreement out in the finding.

17 THE COURT: I didn't want to make them any
18 longer than they had to be.

19 MR. WIGGINS: We kind of left that concern
20 behind, Your Honor.

21 THE COURT: I'm trying to cut it down.

22 MR. WIGGINS: Here's my point, Your Honor.
23 I think if you want the judge to look at the exhibits,
24 get them to look at the exhibits. The thing is one,
25 the thing they will look at is findings and I think we

Argument Re. Findings of Fact

1 all agree the agreement is very important for anybody
2 to look at. And I agree with that and I think it
3 ought to be right here in the findings. It's not at
4 make or break point with me. I've said my piece.

5 THE COURT: Well, I just know what happens
6 up there and they don't get the exhibits.

7 MR. WIGGINS: That's right.

8 THE COURT: They don't get the exhibits.
9 They have to go dig for them. And half the time the
10 clerk can't find them, the clerk assigned to the
11 opinion writer, much less the rest of the court. And
12 you tell them that's contained in Exhibit 15, they
13 say, fine, that's contained in Exhibit 15. What does
14 it say? Well, I don't know. And they either have to
15 be told to read the thing or set it out in full. And
16 I did the same thing with the guidelines. Sure, a
17 shorter trial and less evidence to make findings out
18 of I'd put it in, but I don't want to put it in here.

19 MR. WIGGINS: It's been my understanding
20 that they don't have the exhibits before them, but
21 this exhibit is a pretty short exhibit and it's a
22 pretty critical exhibit. That's the reason I thought
23 it ought to be put in, but I'm not going to push on
24 this issue.

25 THE COURT: Good appellate practice requires

Argument Re. Findings of Fact

1 that you show up with blow-ups.

2 MR. WIGGINS: We both have blow-ups of this
3 agreement.

4 THE COURT: Put it out there so they see it
5 or pass them up copies of it and read it to them.

6 MR. WIGGINS: All right, thank you, Your
7 Honor. I have some proposed findings on that which
8 follow this on 32.

9 THE COURT: I'm there.

10 MR. ROHAN: Your Honor, if I could speak to
11 that, David Motherwell testified on these very points
12 at pages 1014 and 1015. And it's contrary to what the
13 proposed finding is. Mr. Motherwell, did you and
14 Donald Barnett ever have a discussion as what Jerry
15 Zwack's grievances were? Yes, we did. What did you
16 and Donald Barnett talk about what they were? And
17 then he talked about, this discussion was actually
18 discussions that occurred between the time that Jerry
19 wrote this letter on the 23rd of December and the
20 commencement of the eldership hearings on the 25th of
21 January and he, Donald Barnett, would ask me if part
22 of Jerry's grievances were what was behind this was
23 Jerry got laid off from his job at the Counseling
24 Center and removed from the Bible College class. He
25 would ask me that from time to time and I would say

Argument Re. Findings of Fact

1 that I didn't believe that that was central to Jerry's
2 grievances that he wanted to discuss at the hearing,
3 that what was central, not that it wasn't an issue,
4 Jerry in his discussions with me made no mention that
5 that was an issue in these hearings and that the issue
6 Jerry wished to delve into was problems that Don was
7 having with women.

8 So, that's Motherwell's conversation with Barnett
9 which is inconsistent with these proposed findings.
10 Motherwell is basically saying in that that he kept
11 telling Barnett those were the purposes of the
12 hearing.

13 Donald Barnett testified to some mysterious
14 letter that has never showed up in the evidence, I
15 frankly don't believe any such letter exists, that
16 Jerry somehow wrote down these three grievances. And
17 if you look at December 22nd letter or 23rd letter
18 from Jerry Zwack, he doesn't say in there that these
19 are my grievances. It says the grievances, basically
20 if you read that letter and I think it supports my --

21 THE COURT: I've read it a half a dozen
22 times.

23 MR. ROHAN: Right. It's talking about
24 Donald Barnett's sexual problems.

25 THE COURT: Yeah.

Argument Re. Findings of Fact

1 MR. ROHAN: And sexual misconduct.

2 THE COURT: Almost exclusively.

3 MR. ROHAN: Right. So, I think this is an
4 improper finding.

5 MR. WIGGINS: Now, Your Honor, this is a
6 conflict in the testimony. There is no question this
7 is a conflict in the testimony. Mr. Rohan had read
8 from Mr. Motherwell's testimony, I'll read from Mr.
9 Barnett's testimony, page 232. "As you discussed this
10 with Mr. Motherwell, what was the purpose of these
11 meetings to be? What was to be determined?" Answer:
12 "Well, I asked him what Jerry Zwack's letter said and
13 he said, well, he had three complaints. He had a
14 complaint about me. David said he characterized it as
15 me putting him out of the Bible College class, which I
16 never really did, I just restructured the class and
17 I --"

18 "The second grievance he stated was that I had
19 set up with Jack Hicks to have him removed from the
20 Counseling Center under maybe I suppose a false
21 conclusion of the budget crunch when he didn't feel
22 like he should be included in the budget crunch."

23 "Thirdly, he was concerned my relationships with
24 women at this time I might be doing things that would

Argument Re. Findings of Fact

1 This is a flat out inconsistency.

2 THE COURT: Let me ask you this: Do you
3 maintain that he didn't get the Jerry Zwack letter of
4 December 23rd at the time?

5 MR. WIGGINS: I maintain he read the letter.
6 He testified that he doesn't know what he read.

7 THE COURT: He not only read the letter, he
8 got it and he knew it would be circulated and he told
9 them not to read it, the recipients, and to send it to
10 him. I can't believe anything other than the fact
11 that he knew what was in that letter.

12 MR. WIGGINS: But, Your Honor, that doesn't
13 erase --

14 THE COURT: And the letter doesn't say
15 anything about it, it says I know I've been fired but
16 it doesn't raise that as an issue.

17 MR. WIGGINS: But, Your Honor, we're not
18 dealing with this in a vacuum. Well, we're dealing
19 with it in something of a vacuum. We're looking at
20 this as having been triggered by Jerry Zwack's letter.
21 Don Barnett wasn't. Don Barnett had lived with Jerry
22 Zwack and his problems he had with Barbara for several
23 years. This was the background. And his testimony in

24 fact was that this happened.

25

Now, what happened to the letter? He does think

Argument Re. Findings of Fact

1 there's another letter. There's no question he thinks
2 there's another letter. Is he lying that he thinks
3 there's another letter? I don't think that he's
4 lying. I don't believe that Pastor Barnett is lying
5 about that. Mr. Rohan said he doesn't believe there
6 was a letter. I think that Pastor Barnett was not
7 lying about that fact. But what we think doesn't make
8 any difference because the point is Pastor Barnett
9 didn't ultimately wind up with the files of this
10 church. He wasn't an addressee of this letter. Even
11 if he read this letter, nobody gave him -- They
12 wanted to propose findings nobody gave him a copy back
13 of it. He didn't even have a copy of it. He didn't
14 sit around and read it six times like we've done.
15 That's the problem. And there's all of this history.

16 And then I think we have to go on and look at the
17 evidence to support my next finding which is
18 immediately when they get into this stuff Barnett
19 objects. It's beyond the specific grievances of what
20 they were talking about. And the guidelines talk
21 about Jerry Zwack's specific grievances. It's not
22 he's just complaining about anything in the world, and
23 you know this is kind of interesting because that
24 language certainly supports Pastor Barnett's
25 understanding there were in fact specific grievances,

Argument Re. Findings of Fact

1 not just any old thing that Jerry Zwack said.

2 When I examined Mr. MacKenzie, I asked him about
3 that. And Mr. MacKenzie had no clear idea at all what
4 the specific grievances were. And I asked him about
5 what did you do when you ruled on this objection that
6 Pastor Barnett made. Oh, anything that had to do with
7 misconduct, that was within the scope of the hearings,
8 whatever Jerry wanted to complain about. It is
9 contrary to the language of the guidelines. Barnett
10 went in expecting that there were specific grievances
11 and we don't even get a list of what the specific
12 grievances are in this case until some months later.

13 THE COURT: That's why I think it's all
14 framed by the letter.

15 MR. WIGGINS: But the letter doesn't
16 conclude specific grievances. The letter is just a
17 rambling dissertation of a lot of stuff. And Barnett
18 is very adamant that there were specific grievances
19 and these were them. And it's not just Barnett.
20 Hicks testified that it was clear to him that the
21 scope of the hearing had gone far beyond what Barnett
22 originally thought would be the case.

23 THE COURT: And it did.

24 MR. ROHAN: Your Honor, Mr. Hicks' statement
25 is taken out of context. Mr. Hicks testified that

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1346 under cross-examination from Mr. Johnson I think Mr. Hicks based on his testimony about Zwack would certainly be a very credible witness in this case. He didn't get into it.

Mr. Johnson, "Did Barnett react during the hearings in a way that manifested a position or attitude on his part that they were, that the hearings were becoming broader than he had agreed to?" Answer: "I'll have to answer no to that".

Mr. Hicks testified on page 1346 several times that the scope of the hearings were based on Jerry Zwack's grievances. He, Barnett, agreed to hear all of Jerry Zwack's grievances. That's a quote from Mr. Hicks' testimony. It's clear that Mr. Hicks did think that going back further than eight years which oddly enough is the same period of time as the Court. But that's the same thing. So, we were simpatico on that. That's what he was complaining about. So, I think that both Mr. Wiggins' proposed Finding 32.1 and 32.2 should both be rejected by the Court.

MR. WIGGINS: Well, Your Honor --

THE COURT: Let me consider that. This is where it starts getting deep and we can argue back and

Argument Re. Findings of Fact

1 forth from now until whenever. See Finding 32 --

2 MR. WIGGINS: 32.1 and 32.2, Your Honor, are
3 the findings we have been discussing. We have been
4 discussing findings in my proposal, page 19 and 20.

5 MR. ROHAN: I can leave you with the
6 testimony from the various witnesses out of my book
7 here, I'll be happy to do that.

8 THE COURT: Yeah. Let me see what they say.

9 MR. WIGGINS: Are you going to give him 1324
10 to 26?

11 MR. ROHAN: I'm going to give him 1002.
12 Wait a minute, no. I'm going to give him pages 1324
13 through 1326, page 1334, page 1346.

14 MR. WIGGINS: That's fine. I do think it
15 just flat out calls for a finding, choosing between
16 the two.

17 THE COURT: Okay, 33, I guess. Except for
18 the fact that that comes in the wrong place, that
19 idea, the idea that they proceeded under the agreement
20 and the guidelines and the composition of the
21 eldership to a hearing.

22 MR. WIGGINS: Your Honor, my objection to
23 ~~this is that it says No. 33, January 25, 1998~~
24 agreement was supported by consideration. That
25 implies that Barnett got something in return for the

Argument Re. Findings of Fact

1 agreement. And when I asked Mr. MacKenzie about this,
2 and I'm reading from page 597, "Now, Mr. MacKenzie,
3 did the members of the eldership committee discuss
4 whether you would have proceeded even without an
5 agreement signed by Pastor Barnett?" "No". "Would
6 you have proceeded even without an agreement signed by
7 Pastor Barnett?" Objection, calls for speculation.
8 And he answers anyway, "I don't know". That's the
9 evidence. The evidence is he didn't know whether this
10 agreement was supported by consideration.

11 MR. ROHAN: Your Honor, there's a great deal
12 of evidence that points to the fact there clearly was
13 consideration. No. 1, Donald Barnett as we've already
14 seen was concerned, that's why he thought this was of
15 great importance, that there would be publicity.
16 There would have been publicity about this thing if
17 Jerry had gone to a broader audience had the elders
18 not agreed to have a hearing.

19 Secondly in addition to that, there was testimony
20 that the agreement was necessary in order to protect
21 Don if the hearings came out in his favor from charges
22 by people. Well, this is just a whitewash, you
23 control the church and all of this. And the elders
24 would be able to say, no, no, no, Don gave up his
25 power. He said we're the final decision-makers. We

Argument Re. Findings of Fact

1 have control over this thing and this is not
2 controlled by Don. We were not being Don's puppets in
3 this thing. There was ample consideration for Donald
4 Barnett through this agreement. This was not an
5 agreement that he just signed willy-nilly and he even
6 put in the phrase "and Jerry".

7 MR. WIGGINS: We're getting mixed up here,
8 Your Honor, between whether they would hold the
9 hearings or not and any benefit of holding the
10 hearings and signing the agreement to hold the
11 hearings. And the question is would they have held
12 the hearings without an agreement. And if they would
13 have held the hearing without an agreement, he
14 wouldn't get any consideration. That's the reason
15 that this testimony is important.

16 MR. ROHAN: That's just not true. If I'm
17 talking to a friend of mine and I have a car and I'm
18 thinking, well, maybe I should give my friend my car
19 and he says I'll give you a hundred bucks for it and I
20 say, oh, okay. So, I take the hundred bucks. Is
21 there no consideration if I would have given it to him
22 for free anyway?

23 THE COURT: I do believe that the agreement
24 of the 25th did form a part of the procedure that was
25 agreed upon by the elders and Barnett. And I was

Argument Re. Findings of Fact

1 going to put it over here after the guidelines to
2 include the guidelines because Barnett carefully
3 examined both, in my version of the evidence, both of
4 agreement and the guidelines and discussed them with
5 Motherwell and said, okay, let's go.

6 MR. WIGGINS: So, I'm not understanding the
7 first sentence here.

8 THE COURT: I think 33 is in the wrong place
9 and does not include the guidelines and the conduct of
10 the hearing.

11 MR. ROHAN: So, we would --

12 THE COURT: Remove it from there.

13 MR. ROHAN: Remove it and move it to right
14 above 35?

15 THE COURT: Well, let's go down now and
16 figure out where we put it.

17 MR. KNIBB: If I understand what Your Honor
18 is suggesting, it should really go between 27 and 28.

19 THE COURT: If we get that far, yeah,
20 because 've got a question on 37 as to why that's
21 there at all.

22 MR. WIGGINS: Your Honor, we're going to
23 move it, okay, but I'm still objecting to this first
24 sentence.

25 THE COURT: Well, it isn't there yet.

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1 MR. WIGGINS: Okay, maybe we should defer
2 this then.

3 MR. ROHAN: No. 34 we're talking about?

4 THE COURT: Yeah, 34.

5 MR. WIGGINS: Yeah, Your Honor, may I just
6 take a moment here. Okay. I'm ready to talk about
7 this, Your Honor. The Court has said that you read
8 the agreement very broadly and you think it says what
9 it says. And I read it differently, okay. But we're
10 now, I guess, making a finding as to what Barnett knew
11 or understood when he signed this. That's what's at
12 the bottom of page 16 as part of 34. When he signed
13 this, Barnett understood that the eldership hearings
14 were not just a fact-finding hearing.

15 There really is not evidence to support that.
16 There's not any evidence to support that Barnett
17 understood that the hearings were anything more than
18 either a counseling session or a hearing session. The
19 agreement itself doesn't say what is going to happen
20 as a result of these hearings. The parties didn't
21 talk about what was going to happen as a result of
22 these hearings. Barnett testified that he didn't
23 think they were going to have any power to discipline
24 him. He testified that Motherwell told him that the
25 elders admitted they had no power to discipline him.

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1 They had no teeth is the term that he used. And Mr.
2 Motherwell even admits that they may have used the
3 term teeth.

4 Now, after a recess he came back and he suddenly
5 remembered that it wasn't just a matter of the term
6 teeth, well, he didn't use the term but maybe Barnett
7 did. I don't know how he can remember that if he
8 didn't remember using the term, but that's his
9 testimony. So, he doesn't testify to as to any
10 understanding that Barnett had or any knowledge that
11 Barnett had that this was going to be the effect of
12 this agreement. Nobody testified to that. The only
13 testimony about that is Barnett testified that he did
14 not.

15 And the agreement doesn't say what the finding
16 says, and so it's a pretty critical thing when you're
17 talking about somebody's knowledge. You have no
18 direct evidence of it. The agreement doesn't say what
19 the finding says. And the evidence is they didn't
20 talk about this and I just don't see any way you could
21 say this.

22 MR. ROHAN: Your Honor, on page 14 of your
23 oral decision you made essentially this finding.

24 THE COURT: Yeah, I know.

25 MR. ROHAN: And it's supported actually by a

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1 whole slew of evidence, if I might go into that. At
2 page 466, Mr. MacKenzie states "the purpose of the
3 hearings and gave that final authority to reach
4 decisions and take actions to the committee". That
5 was the January 25 agreement.

6 MR. WIGGINS: Where is that?

7 MR. ROHAN: Page 466 lines 4 and 5. "Gave
8 that final authority to reach decisions and take
9 actions to the committee". On line 21, "I wanted to
10 make sure that Don did not do what some members of the
11 committee feared he would do which is misuse his
12 pastoral authority to order the hearings to stop so
13 they could not be concluded with a decision and action
14 at the end".

15 Page 467, Mr. MacKenzie, line 5, "The elders
16 could continue to investigate and take any action they
17 wanted which satisfied their minds and their
18 opinions".

19 Page 485 of Mr. MacKenzie's testimony, "During
20 this period of time" -- this is critical because this
21 is an admission by Donald Barnett -- "During this
22 period of time, did Donald Barnett give any indication
23 to you that he was willing to submit to the committee
24 and abide by its decision?" "Yes". "Can you give us
25 those instances?" And he talks about the sermons that

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1 he's taken but more importantly he talks about a note
2 that Donald Barnett passed to him in the hearing and
3 that note was a handwritten note which was introduced
4 at the hearing, and that's Exhibit 28. That
5 handwritten note says that Donald Barnett passed to
6 Jerry Zwack, "Russ, we need to ask JZ", Jerry Zwack,
7 "to agree to accepting this court's decision and not
8 take his grievances to the church, press, courts".
9 And if I can show the Court that.

10 THE COURT: I've seen that.

11 MR. ROHAN: That to me is a very critical
12 admission by Donald Barnett, accept this court's
13 decision that Donald Barnett is admitting that, yes,
14 under the January 25 agreement there's going to be a
15 decision. And there's going to be a decision of my
16 conduct. And I think that that is something he wrote
17 at the time and I think that's probably the best
18 evidence, what he wrote at the time.

19 MR. WIGGINS: Your Honor, everything that
20 Mr. Rohan read at page 466 and 467 of Mr. MacKenzie is
21 Mr. MacKenzie telling us what he thought, not what he
22 said to Pastor Barnett, because he never said any of
23 this stuff to Pastor Barnett. And nobody said any of
24 this stuff to Pastor Barnett. Now, the law is pretty
25 clear, not pretty, it's crystal clear in Washington,

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1 what somebody thought a contract meant doesn't have
2 anything to do with what the other person thought the
3 contract meant unless they communicated and it's not
4 communicated by Russ MacKenzie. There is no question
5 that's true.

6 Now, let's look at this note. What he says in
7 this note is we want Jerry Zwack to accept this
8 court's decision and not take the grievances to the
9 church, press, courts. He didn't contemplate that
10 they were going to impose any discipline on Jerry
11 Zwack, he didn't contemplate they were going to impose
12 any discipline on him. What he contemplated was there
13 was going to be some kind of a fact-finding decision.
14 And actually what he contemplated is they were going
15 to try to heal the relationship between them.

16 THE COURT: I realize that's what Pastor
17 Barnett says, but this is what I find. 34.

18 MR. WIGGINS: What is what you find, Your
19 Honor?

20 MR. ROHAN: 34 the way it's written.

21 MR. WIGGINS: Okay, Your Honor, I would
22 repeat my objection to this because the evidence
23 doesn't support this finding.

24 MR. ROHAN: It may make it easier on Mr.
25 Wiggins if the last line of that after Pastor Barnett,

Argument Re. Findings of Fact

1 we inserted that Pastor Barnett manifest his
2 understanding that the eldership.

3 MR. WIGGINS: No, I disagree with that. I
4 think that's even less accurate. No, it's not less
5 accurate, it's certainly nothing that the Court said.

6 MR. ROHAN: 35 I think we both agree with;
7 correct?

8 THE COURT: Yeah. And I accept that, too,
9 even though it doesn't have what I have concluded in
10 the other. I think it should be demonstrated to the
11 reviewer.

12 MR. ROHAN: Do you want us to add that any
13 reviewer should read Exhibit 23? Is that what you're
14 referring to?

15 MR. WIGGINS: If we're going to single
16 anything out, we really ought to single out the
17 guidelines.

18 THE COURT: Yeah, that's right.

19 MR. KNIBB: So, we should add "and should be
20 read by any reviewer"?

21 THE COURT: Yeah.

22 MR. WIGGINS: Of course, I don't agree with
23 any of these references.

24 THE COURT: You're not bound by what you
25 say, you're bound by what you have on paper.

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1 MR. ROHAN: I think we're up to No. 36, Your
2 Honor.

3 MR. WIGGINS: Your Honor, my objection to
4 this is very brief, just the statement that Motherwell
5 provided Pastor Barnett a copy of the guidelines. I
6 don't think that's supported by the evidence. The
7 evidence from Motherwell is that he discussed the
8 guidelines with Pastor Barnett. I think he got a copy
9 at the eldership hearing. I think there is that but

that. But certainly the
evidence is there. If it is, I

10
11
12

I'm not even sure of the
implication of this is
and I don't think the

Motherwell describes what he
Motherwell at pages --
He had specific questions on
Right. "Prior to the hearings
also written guidelines that you

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stand corrected.
THE COURT:
said.
MR. ROHAN:
THE COURT:
certain things.
MR. ROHAN:
starting, were there a

seen marked as Exhibit 23, did you discuss
guidelines with Donald Barnett?" "Briefly, I
"Did he indicate at the end of your
tion whether he agreed or disagreed as a whole

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what's b
those gu
did, yes
conversa

Argument Re. Findings of Fact

1 with the guidelines?" Answer: "His indication was
2 that he agreed".

3 And there's testimony by Mr. MacKenzie at page
4 467, "The committee appointed David Motherwell to take
5 the special agreement to Don's home along with a copy
6 of the guidelines and go over it with Don, have Don
7 sign it, leave the guidelines with Don and then come
8 back. And David Motherwell did these things so I
9 didn't do it myself".

10 MR. WIGGINS: Your Honor, Mr. Motherwell
11 didn't testify he gave Barnett a copy. I agree that
12 Motherwell said that he discussed the guidelines with
13 Barnett and I don't dispute that. It's not a major
14 ~~point but what he just read about MacKenzie's~~

15 testimony is MacKenzie doesn't know that Motherwell
16 gave Don Barnett a copy. Motherwell didn't say that

17 MR. ROHAN: Motherwell said he went over
18 with him and talked about it with him.

19 MR. WIGGINS: Oh, sure, I don't dispute
20 that.

21 THE COURT: I thought he had some specific
22 questions.

23 MR. ROHAN: He did.

24 THE COURT: Maybe that was Barnett.

25 MR. ROHAN: No, I skipped that when I read

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1 from Mr. Motherwell. But they discussed it for three
2 pages.

3 THE COURT: They discussed several specific
4 guidelines.

5 MR. ROHAN: Guideline Nos. 7, 10, 9, some
6 other ones. Yes, they went over it in detail. So,
7 maybe what we should say is that David Motherwell and
8 Pastor Barnett went over in detail the guidelines, the
9 written guidelines before commencement of the hearings
10 and refer to the exhibit numbers so we know we're
11 talking about the final guidelines.

12 THE COURT: They discussed these. I'm

13 willing to leave it in as it is.

14 MR. ROHAN: Okay, thank you, Your Honor.

15 There's other testimony that Barnett did get a copy
16 the same day, the 25th, when the hearings started.

17 MR. WIGGINS: There may be, I'm not saying
18 that there's not. It's just that there's not any
19 testimony that Motherwell gave Barnett a copy of the
20 guidelines.

21 MR. ROHAN: It was not objected to, counsel.

22 THE COURT: Okay. Now, after 36 I think
23 should put in a revised 33. Now, if we can hammer
24 something quickly on 33, that's fine. Otherwise, I
25 try to do that tonight. The idea being that the

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1 agreement and the guidelines, the undertaking of the
2 eldership to hold the hearings constituted the
3 procedures for determining and resolving the issues
4 raised in the Zwack letter of December 23rd and which
5 was agreed upon by and participated in, agreed upon

6 ~~and participated in by Pastor Barnett, Nov. 15, 1946~~

7 want to sleep on that, that's fine.

8 MR. ROHAN: We'd put that after the first
9 sentence of 33?

10 THE COURT: Well, no, I don't know where. I
11 don't know how your machine works, whether by skipping
12 a cog you throw everything off. If so --

13 MR. ROHAN: We can put it.

14 THE COURT: 33 should come out and that
15 would go in.

16 MR. ROHAN: That's not a problem.

17 THE COURT: And I think it should be a
18 specific finding because I'm sure that Mr. Wiggins
19 will want to object violently to that particular
20 finding.

21 MR. WIGGINS: Well, what I have down, Your
22 Honor, that you read is the January 25 agreement and
23 the guidelines, the undertaking to hold the hearings
24 constituted the procedures for determining and
25 resolving the issues raised in the Zwack letter of

Argument Re. Findings of Fact

1 December 23 and which was agreed on and participated
2 in by Pastor Barnett.

3 THE COURT: Right. Now, I did that
4 extemporaneously. You may have, you may want to beef
5 that up in some way.

6 MR. ROHAN: We'll prepare one tonight, type
7 it up and submit it.

8 THE COURT: My point is that there, No. 1,
9 was no procedure of any kind in the bylaws and
10 articles of this church that dealt with any -- what do
11 I want to say -- not necessarily removal but review
12 and discipline of the original pastor of the

13 protective provisions, remove from the Board of
14 Directors, the Board of Senior Elders any authority
15 and power to proceed except by the specific consent
16 and agreement of the original pastor. And that when
17 this matter arising out of the Zwack letter faced the
18 church, this procedure was adopted and agreed upon as
19 a means of disposing, probably adjudicating and
20 disposing of the issue. That's the intent in that
21 finding.

22 MR. WIGGINS: Your Honor, may I make a
23 couple of objections?

24 THE COURT: Yes.

25 MR. WIGGINS: While we're on this finding, I

Argument Re. Findings of Fact

1 can see that as I understand it we're taking out the
2 statement that the agreement was supported by
3 consideration and we're reciting what actually
4 happened and we're combining the guidelines --

5 THE COURT: And accepted by all concerned.

6 MR. WIGGINS: I just want to get that nailed
7 down.

8 THE COURT: That's the way I framed it. I
9 will probably get comments from the other side.

10 MR. ROHAN: Your Honor, I don't think what
11 you're saying is inconsistent with the agreement
12 having consideration.

13 THE COURT: I don't either. I don't know
14 that I made any finding on consideration one way or
15 another.

16 MR. ROHAN: Because I think you're finding
17 that the January 25 agreement is the valid agreement
18 and combined with the guidelines they set up the
19 procedures and the consideration is in there to show
20 that it's a valid contract.

21 MR. WIGGINS: Well --

22 THE COURT: Mr. Wiggins to the contrary.

23 MR. WIGGINS: This is the second point I
24 want to make.

25 THE COURT: Because this is flashed on you

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1 at the last minute, I will come back to this. What
2 number are you going to assign to this?

3 MR. ROHAN: I'll put it down as 36A until we
4 get --

5 THE COURT: I think we've skipped some
6 findings in there.

7 MR. ROHAN: They'll all be renumbered at the
8 end.

9 MR. WIGGINS: Your Honor, here's what's
10 troubling me here. We are going back based on a very
11 vague document, you called it broad, I called it
12 vague, and we are saying that Pastor Barnett and I
13 guess the senior elders as well basically overruled or
14 waived, waived is the best word, provisions, clear
15 provision of the bylaws.

16 THE COURT: And which you violently
17 disagree.

18 MR. WIGGINS: Here's where I'm going,
19 Honor. I'm trying it get to a point here. What
20 troubles me about that is that bylaws are bylaw
21 they provide a way to amend them and a way you
22 them. If these had been amended, there would h
23 been no question what was going on.

24 THE COURT: That's what I said here a
25 and a half ago, two hours ago.

Argument Re. Findings of Fact

1 MR. WIGGINS: That's right. If they had
2 been amended, if the parties had sat down there would
3 be no question what was going on.

4 THE COURT: Or if they didn't exist in the
5 form that they did.

6 MR. WIGGINS: That's right. But now instead
7 of amending the bylaws, we're taking the vaguest
8 document you could have and we are saying it overrules
9 a whole series of very extraordinarily specific
10 provisions and we're imposing them on someone who,
11 whatever you may find, the evidence is really not that
12 clear that he understood that was what was going on.

13 THE COURT: The alternative would be, of
14 course, for him to just plain do what President Nixon
15 did, stonewall the thing. I'm not going to listen to
16 anything that Zwack has to say. I'm not going to
17 enter into any kind of a hearing process whatsoever.

18 I don't care what the eldership committee does and
19 I'll take my chances on the publicity.

20 MR. WIGGINS: But President Nixon did the
21 same thing that Pastor Barnett did, he appointed a
22 investigator. That's the point.

23 THE COURT: I don't know.

24 MR. WIGGINS: But it didn't amend the
25 constitution and it didn't amend any statute to th

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1 THE COURT: But it didn't lessen what the
2 investigating committee did.

3 MR. WIGGINS: No, I knew that, but still
4 they would have had to impeach him.

5 THE COURT: Okay. No. 37, and I have a big
6 question mark here. Why is this in here?

7 MR. ROHAN: 37 is in there because one of
8 Pastor Barnett's major defenses, as it turned out at
9 trial, although we didn't realize before, was this
10 whole notion of what was a witness and what was not a
11 witness. What we're trying to say there, and maybe we
12 say it to wordily, what we're trying to say there is
13 that the witnesses that were called and allowed to
14 testify at the elders' hearing, both when the pastor
15 was there and wasn't there, were proper in accordance
16 with what everybody believed was going to happen.

17 MR. WIGGINS: With respect to whether or not
18 they understood this before trial, I don't know if Mr.
19 Rohan understood that was a defense before trial. The
20 problem is here, Your Honor, there really isn't any
21 evidence that Pastor Barnett understood this to be the
22 case. The fact of the matter is --

23 THE COURT: He went back to the Bible.

24 MR. WIGGINS: Yeah. There it is. It says
25 it will be proven by admissions or by witnesses.

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1 MR. ROHAN: It doesn't say "by", "before",
2 Your Honor, and I don't want to get into argument over
3 what the Bible says or doesn't say. I scrupulously
4 avoided it. There's more than one interpretation of
5 the Biblical provisions.

6 THE COURT: I don't believe I should
7 interpret this.

8 MR. WIGGINS: But the point I was going to
9 make, Your Honor, is the agreement says, I'm not going
10 into what the Bible says, what the agreement says is
11 that no accusation will be accepted except on
12 admissions or the testimony of witnesses. Mr.
13 MacKenzie testified that --

14 THE COURT: Didn't he make admissions?

15 MR. WIGGINS: Sure, he did, Your Honor, he
16 made admissions and I don't mind findings about his
17 admissions. We're going to get to that as to what he
18 admitted and what he didn't admit and we can certainly
19 fight that battle. We're talking here about witnesses
20 and whether there were witnesses. And Mr.
21 MacKenzie --

22 THE COURT: What's that all about?

23 MR. WIGGINS: The question really is did the

going enough
obvious they did

24
25

~~elders follow their own objectives in~~
the eldership hearing and I say it's c

Argument Re. Findings of Fact

1 not follow their own guidelines because it says the
2 guidelines, and they all agreed on them, the
3 accusations wouldn't be accepted unless they were
4 established by admission or by witnesses. Now, if you
5 think it was all established by admissions, we don't
6 need to into get into this stuff.

7 THE COURT: A significant part of that was
8 admitted.

9 MR. ROHAN: The sexual misconduct was
10 admitted.

11 MR. WIGGINS: Let me interject. We'll get
12 to that. For the reasons I have explained, I don't
13 like the term sexual misconduct. It means a lot of
14 things to a lot of different people. We really ought
15 to be more careful slinging words like that around.

16 THE COURT: I'm used to hearing defense
17 lawyers talking about that in terms of what is
18 personal indignities. That's suppose to have a very
19 meaningful interpretation.

20 MR. ROHAN: Our point is to show the elders
21 followed the guidelines. Maybe we should just simply
22 say that the eldership followed the guidelines.

23 THE COURT: I'm going to find that
24 ultimately. If you want to single out this and focus
25 on this, I will make a finding on witnesses.

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1 MR. WIGGINS: Well, here's my point, and I
2 don't mean to belabor it. If you're going to rule
3 against me, you're going to rule against me. But my
4 point is that Pastor Barnett, nobody accuses Pastor
5 Barnett of having thought that witnesses included
6 behind closed doors. Maybe they do accuse him of that
7 but the testimony doesn't support that. And Mr.
8 MacKenzie stood up in his opening statement to Pastor
9 Barnett and everybody else and said, Pastor Barnett, I
10 encourage you because this has to be proven by
11 witnesses or admissions admit stuff even if there's no
12 eyewitnesses to it. That's what he told them. The
13 context of all this is there were going to be
14 eyewitnesses, witnesses.

15 And to the extent that somebody can come in and
16 say Pastor Barnett admitted something, I suppose
17 they're a witness that Pastor Barnett admitted it.
18 But these people come in bringing in a woman came to
19 me and said this and a woman came to me and said that.
20 They aren't witnesses. That's my whole point.

21 THE COURT: At the beginning of this
22 procedure, MacKenzie says now this is what we'll do
23 and both of you gentlemen have to remain here during
24 all of this until we get into the deliberative part.
25 First he takes and he has the floor and cannot be

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1 interrupted and he can go as long as the committee
2 feels he should go. Then you get a chance to talk and
3 then he gets a chance to talk and he gets a chance to
4 talk. Now, they understood that was the way it was
5 going to work, didn't they?

6 MR. WIGGINS: Your Honor --

7 THE COURT: Up to where I have left off?

8 MR. WIGGINS: Well, I don't think they
9 understood there would not be any other witnesses.

10 THE COURT: Wait a minute, I didn't get to
11 that point. And then at the conclusion of the two
12 sessions, the elders said, well, look. He's accusing
13 him and he's admitting it. Why bring these ladies in
14 here to in detail say what he has admitted to having
15 done? Now, that's what also happened, wasn't it?

16 MR. WIGGINS: I agree with that.

17 THE COURT: Why the talk about witnesses?
18 Where was the issue as to the part that he admitted?

19 MR. WIGGINS: There's not a problem with
20 what he admitted. They complied with the guidelines
21 to the extent that Pastor Barnett admitted things and
22 they accepted the accusations to the extent that
23 Pastor Barnett admitted it, that's true.

24 THE COURT: Now, where are we in terms of
25 witnesses with respect to other matters?

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1 MR. WIGGINS: Well, the problem then becomes
2 Jerry Zwack is not -- First of all witnesses. Jerry
3 Zwack is a witness.

4 THE COURT: We haven't called any witnesses
5 yet. He has admitted it and the elders say, boy, we
6 listened to nine hours of him and 30 hours of him and
7 he's admitted it. And are we going to call Lady A,
8 Lady B, Lady C now in here to find out if what he has
9 admitted is true? And they said, no, we have heard
10 enough.

11 MR. WIGGINS: I agree with that. Now, the
12 problem comes with the idea that they then go into
13 deliberation and sit around and send out Lanny
14 Peterson and Scott Hartley to go and talk to women and
15 Hartley and Peterson come back and recount things they
16 have learned and they are called witnesses and
17 statements they make become evidence here. That's not
18 witnesses.

19 The other problem is to the extent that Jerry
20 Zwack is saying things he knows about, sure, he's a
21 witness about things he knows about. But is not a
22 witness that Don Barnett committed adultery with Mrs.
23 A because --

24 THE COURT: All he knows is they complained
25 about it.

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1 MR. WIGGINS: That's right, that's all he
2 knows.

3 MR. ROHAN: Your Honor, the standard --

4 THE COURT: We haven't gotten to the
5 standard yet of what measure or balance of proof, what
6 type of proof is necessary. But we're talking about
7 witnesses. Barnett was supposed to have known that
8 there would be this testimony out of his presence at
9 some time, according to the testimony. So I'm just
10 trying to, I'm not arguing with you, I'm just trying
11 to express the intent that I have in framing the
12 instructions or I mean the findings.

13 MR. WIGGINS: Right. Your Honor, even if
14 you accept what Mr. Motherwell says that he can come
15 in and say what he knows about what Barnett has done,
16 he's not a witness to adultery because someone comes
17 and tells him that. He's not a witness then, that's
18 the point. But all of these findings that they're
19 proposing are premised on that kind of evidence as
20 those people being witnesses. That's the point.
21 That's where I'm having a problem.

22 THE COURT: No, I don't think so.

23 MR. ROHAN: Your Honor, the problem here I
24 think is that we're using witnesses as the word we all
25 use as lawyers and we all know what it means.

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1 Whenever we use the term witness, we think of hearsay
2 and we think of eyewitness. We think of somebody that
3 has direct knowledge of something. Well, this is

4 what these hearings were all about. It's clear that
5 Pastor Barnett told David Motherwell and there's a
6 reference in Motherwell's testimony that he told me
7 that he was going to tell the hearings about the
8 Chelan woman because he thought he was going to go
9 Barnett's side of deal. And that Barnett certainly
10 understood that David Motherwell would be a witness

11 And witness in this sense is not used in the
12 sense we use it as lawyers but it's used in the sense
13 that people that came in that had information that
14 other people in the room basically or they as a group
15 thought were credible and that would include Pastor
16 Barnett, that would include Jerry Zwack to what extent
17 the women came to him, and that included David
18 Motherwell and Lanny Peterson, and the others that
19 came in and said the women came to me and this is
20 they said to me. And Donald Barnett said this to me.
21 That was allowed and that was the definition of
22 witnesses and I think each of the elders testified

23 ~~that was the definition of witnesses. They were~~
24 cross-examined at length about it and all of the
25 still continued to say that was the definition of

Argument Re. Findings of Fact

1 witness.

2 MR. WIGGINS: Well, the problem with the
3 cross-examination of MacKenzie about witnesses, for
4 example, is he completely could not figure out how to
5 answer when I went through a long series of questions
6 about how many witnesses you have got when you're
7 piling hearsay on hearsay. Now, he seemed to set out
8 with the idea that Mrs. A told Zwack about an incident
9 of adultery and Mrs. A told Motherwell about an
10 incident of adultery, they're two witnesses. That's
11 where he seemed to start out. And that just flies in
12 the face of common sense.

13 And I also disagree with the statement that
14 people think of the term witness, lay people think of
15 the term witness without thinking of the hearsay rule.
16 If people know anything about the law, they know two
17 things. They know about the Miranda rights and they
18 know about the hearsay because that's all they ever
19 see on the TV.

20 MR. ROHAN: Your Honor, the nature of the
21 allegation is the fact that it was Barnett having --

22 THE COURT: We're going over and over here
23 this same idea. Are we now focusing on 37?

24 MR. ROHAN: My co-counsel suggests we take
25 out the references to Zwack in paragraph 37, because

Argument Re. Findings of Fact

1 there was testimony about Barnett but there was not
2 testimony about Zwack. And Zwack, actually what he
3 thinks or doesn't think isn't important, it's what the
~~judges think or think~~

MR. WIGGINS: That's sort of a meaningless
change, Your Honor.

THE COURT: I don't see what that
accomplishes.

MR. ROHAN: I think other than that, the
findings go into what developed at trial and I had
forgotten they have raised it in the summary judgment
but witnesses was an important point.

MR. KNIBB: I suggested taking Zwack out
because Mr. Wiggins had objected. In his objections
he says there's no evidence of Zwack's understanding
and I think he's right.

THE COURT: Well, he gave a statement or I
assume evidence at the hearings.

MR. ROHAN: He did, there's no question
about that.

THE COURT: You couldn't help to have
related to what he purported.

MR. WIGGINS: Your Honor, when we talk about
Motherwell as a witness, even if you think that
Motherwell was going to be a witness, what Pastor

Argument Re. Findings of Fact

1 Barnett thought Motherwell would testify to was what
2 Barnett had told Motherwell and certainly Motherwell
3 could testify to that because that was an admission by
4 Barnett. Motherwell could testify, well, Barnett
5 discussed this with me or he didn't discuss that, he
6 certainly could do that. He could testify that
7 Barnett admitted this or admitted that, sure he can do
8 that. But that doesn't get you to whether he would be
9 a witness to events that are totally hearsay things.
10 You know, we're talking about Barnett's understanding
11 here and his testimony is pretty clear, he doesn't
12 understand it this way.

13 THE COURT: Well, this doesn't say what the
14 witnesses testified to.

15 MR. ROHAN: No, but the important thing
16 about this is that Pastor Barnett has raised the
17 defense that Jerry Zwack's testimony, for instance,
18 he's claiming Jerry Zwack wasn't a witness because he
19 didn't have personal knowledge. If he wasn't a
20 witness, that means nothing that was said at the
21 elders' hearings other than what Donald Barnett
22 admitted to was evidence and everything else has to be
23 thrown out. If you throw out everything else, I mean
24 if you only have Donald Barnett's naked admissions of
25 sexual misconduct, of course there was evidence of

Argument Re. Findings of Fact

1 what Donald Barnett did in terms of refusing special
2 status, the elders knew they were all witnesses to
3 ~~under anybody's definition, but he's basically just~~
4 trying to gut the case by removing anything out that
5 anybody else testified to at the hearings including
6 Jerry Zwack.

7 THE COURT: No, I think Jerry Zwack should
8 stay in. I don't know what he testified to, but I
9 can't help but believe that he testified as to
10 complaints that were made.

11 MR. ROHAN: Right. And that he would be a
12 witness.

13 THE COURT: To that extent, he was a
14 witness.

15 MR. ROHAN: Right. I agree with that. What
16 paragraph 37 and --

17 THE COURT: Now, whether that proves it --

18 MR. ROHAN: Right. All we're trying to do
19 in paragraph 37 is talk about the defense that Pastor
20 Barnett raises that he was saying that certain people
21 shouldn't be witnesses and that was improper that
22 Hartley and Motherwell and Zwack testified to these
23 things. But certainly Jerry Zwack was always intended
24 to be a witness. Pastor Barnett has to admit that he
25 thought Jerry Zwack was going to be a witness.

Argument Re. Findings of Fact

1 Otherwise, he wouldn't have been testifying for eight
2 hours.

3 MR. WIGGINS: Sure. There were things that
4 Jerry Zwack could testify to. Of course, there are.
5 And the fact of the matter is he made his accusations.
6 He was there as an accuser. He was there like a
7 complainer and he's making his accusations and Barnett
8 admitted adultery. He admitted some of the
9 accusations.

10 THE COURT: Okay, I'll go down to where it
11 says 28, 29 and strike the part that there was no
12 intent at the eldership hearings by Zwack and Pastor
13 Barnett to exclude information because the witness did
14 not personally observe and just leave that blank.

15 ~~MR. BOHAN: My understanding is that you are~~
16 in agreement that the individuals that testified at
17 the elders' hearings were witnesses under what the
18 parties understood to be witnesses. That's the intent
19 of this whole thing. And it's my understanding from
20 what the Court said earlier that you believe that the
21 testimony that was provided at the hearings was
22 provided in accordance with the guidelines. That
23 means everybody that testified, Motherwell, Zwack, and
24 Barnett were in fact witnesses because the elders
25 based their decision ---

Argument Re. Findings of Fact

1 THE COURT: And to what their testimony was
2 I'm not aware, but they were witnesses.

3 MR. ROHAN: Well, their testimony we go into
4 later on. It's covered by some of the other findings
5 what their testimony was, but it's important that, my
6 understanding is that the elders followed the

~~and that they followed the guidelines in paragraph~~

7 that it
8 the guidelines that required witnesses and to
9 allow people to testify because Donald Barne
10 David Motherwell testified that Donald Barne
11 want you to testify at the hearing. I expect
12 testify at the hearings.

13 THE COURT: Okay. Why haven't we
14 everything that needs to be said down to whe
15 28, 29?

16 MR. ROHAN: Well, because they're
17 about -- Here we're talking about there was
18 by Zwack to exclude information because the
19 had not personally observed what Pastor Barn
20 done or said to the women involved. That's
21 the two or more rule. What Pastor Barnett i
22 arguing --

23 THE COURT: I'm not going to touch
24 or more rule, that's a Biblical declaration
25 will not --

Argument Re. Findings of Fact

1 MR. ROHAN: So, by striking the last part of
2 this finding, you are not saying that the testimony
3 that was given by Motherwell and Peterson and the
4 other elders at the hearings and the testimony of
5 Zwack was improper, you're saying that it was
6 following all the testimony of the hearings.

7 THE COURT: That's what it says up front,
8 Pastor Barnett and the eldership all understood that
9 paragraph 7 referred to witnesses was to include
10 individuals such as Zwack, Motherwell, Peterson,
11 Hartley, whose knowledge of Pastor Barnett's
12 activities was primarily based on information.

13 MR. ROHAN: So, the only reason to strike
14 the other one is that you think it's basically
15 redundant?

16 THE COURT: Yes. Well, it goes into what
17 they intended that they didn't exclude and so forth.

18 MR. ROHAN: But it's already covered by the
19 point above.

20 MR. WIGGINS: Your Honor, here's the
21 problem. It doesn't make any sense to have this
22 finding in the light of the recitation that you gave
23 when you were explaining to me what happened at the
24 hearings which I think was correct that they listened
25 to Jerry Zwack for nine hours, they listened to

Argument Re. Findings of Fact

f admissions. So, they
else do we need to hear?
e admissions, we don't
v, that's inconsistent
which is they --
m worried about what
re because actually I've
n here?" And I don't
whole lot about
ett understood to be a
s about anyone who
d all that. That makes
e. That was totally
cerned. We're not
evidence or burdens of
ling with common old
I guess, Your Honor,
e thing out because what
ey're going to argue
something that I don't
to do a little bit too
they're trying to do is
going to be a witness.

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Don, and Barnett made a lot of
turned to each and said what e
Don Barnett has made all these
need to call these women. Now
with what Mr. Rohan is saying
THE COURT: Well, I'
lies underneath the sheets her
got this note, "Why is this in
know. I know that you made a
witnesses and what Pastor Barr
witness and what the Bible say
witnesses against an elder and
absolutely no difference to me
irrelevant as far as I was con
dealing with Biblical rules of
proof at this point, we're dea
ordinary hearing rules.
MR. WIGGINS: Well,
then we ought to take the whol
the finding is going to be, th
this finding and say you meant
think you mean. We're trying
much with this finding. What
say everybody knew Zwack was g

Argument Re. Findings of Fact

1 Therefore, anything that Zwack said was evidence, or
2 could be used against Pastor Barnett and he'd be one
3 of the witnesses to that fact. And Zwack is a

4 witness, Don knows Zwack is going to be witness, and
5 so when Zwack comes in and says Mrs. A came to me and
6 said that Pastor Barnett did so and so, Zwack is a
7 witness to that fact. He's not a witness to that
8 fact. That's where we're getting confused. We're
9 trying to do two steps here.

10 THE COURT: He's worried about what you're
11 going to say about following the procedure and I don't
12 know exactly what you're going to say either. But if
13 you're going to follow Pastor Barnett's theory of
14 witnesses, I don't think you're going to get very far.

15 MR. WIGGINS: I appreciate that advice.
16 I'll consider that, that's a good point.

17 THE COURT: They are going to say wait a
18 minute here. It's going back to a very well
19 established religious principle but it doesn't work in
20 our courts.

21 MR. WIGGINS: Of course, the problem with
22 trying to exclude the Bible and all of that stuff,
23 Your Honor, is there's an agreement that was written
24 by a man who was steeped in the Bible, who was chosen
25 by Pastor Barnett to head the hearings because he was

Argument Re. Findings of Fact

1 steeped in the Bible. And Mr. MacKenzie testified
2 that this verse that Mr. Rohan wants to walk away from
3 was a very important --

4 THE COURT: We're getting close to quitting
5 time here. If you feel that some reference is going
6 to have to made in here about who was a witness and
7 who wasn't a witness, pick it out and shoot it to me
8 first thing in the morning.

9 MR. WIGGINS: We're to leave this finding
10 now?

11 THE COURT: We're going to pass.

12 MR. WIGGINS: Defer this, okay.

13 (Court was at evening
14 recess.)

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