

**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 E. SCOTT HARTLEY, individually and as the board of Directors of COMMUNITY CHAPEL AND BIBLE TRAINING CENTER and COMMUNITY CHAPEL AND BIBLE TRAINING CENTER,)	TRIAL TRANSCRIPT VOLUME XIII, pp. 1969-2203
)	March 15th, 1991
)	
Defendants.)	
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**TRIAL TRANSCRIPT, VOLUME XIII
PAGES 1969-2203**

BE IT REMEMBERED the above-named cause of action came on for arbitration on March 15th, 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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Argument Re. Findings of Fact

1 THE COURT: Clearing up some of the things
2 that were left undone yesterday, I think we talked
3 about Proposed Findings 32 and 33, didn't we, that
4 were not fully -- Well, not 32, although you have
5 proposed 32.1 and 32.2 referencing Pastor Barnett's
6 understanding of the purpose of the meeting. That
7 probably is not particularly appropriate to 32, but
8 might be.

9 MR. ROHAN: Your Honor, if you will recall,
10 we left you with papers on that. The testimony of Mr.
11 Motherwell who clearly states that he kept telling
12 Pastor Barnett that this was not contained in Jerry
13 Zwack's letter, which it wasn't, and that he
14 continually told Pastor Barnett that the real
15 grievance of Jerry Zwack had to do with his sexual

Which pages are you referring

I gave those to the Court
referred to yesterday. I don't
believe I gave you the

Hicks' cross-examination. I
thing else.

There was something from Mr.

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conduct.

MR. WIGGINS:

to?

MR. ROHAN: I

yesterday. Whatever I
have a copy of it. I have
references.

THE COURT: H

thought there was somet

MR. ROHAN: T

Argument Re. Findings of Fact

1 Motherwell's testimony. Mr. Hicks also testified at
2 pages 1324 through 1326 and 1334 and 1346. Mr. Hicks
3 also testified in his discussions with Donald Barnett
4 that Pastor Barnett thought that going back eight
5 years was beyond the scope of the examinations, but he
6 didn't think that, he thought the other material was
7 in fact within Jerry Zwack's grievances. So, Mr.
8 Motherwell and Mr. Zwack both, excuse me, Mr.
9 Motherwell and Mr. Hicks both testified that --

10 Mr. Hicks testified as to what he had talked to
11 Donald Barnett about which was that Barnett understood
12 that. And Mr. Motherwell testified that although
13 Pastor Barnett kept bringing this up or brought this
14 up at least once that he informed them that you have
15 to look at Jerry Zwack's letter. And Jerry Zwack's
16 letter clearly states the grievances are his sexual
17 conduct. I think it's immaterial as well.

18 MR. WIGGINS: I would like to respond to
19 that, Your Honor. Mr. Rohan, I asked for the page
20 reference --

21 MR. ROHAN: Page 1014 and 1015, I think.

22 MR. WIGGINS: See, this is not accurate.
23 This not what Motherwell testified. He did not say
24 that Barnett kept bringing it up and he kept saying,
25 no, that's not the subject of the hearings. That is

Argument Re. Findings of Fact

1 not correct at all. In fact, the question -- I'm
2 looking at 1014. It's Volume III. 1014, here's the
3 question. Don Barnett -- This is an answer by
4 Motherwell on direct. "Don Barnett, if part of
5 Jerry's grievances were or what was behind this was
6 that Jerry got laid off from his job at the Counseling
7 Center and removed from his Bible College class. He
8 would ask me that from time to time and I would say
9 that I didn't believe that that was central to Jerry's
10 grievances that he wanted to discuss at these
11 hearings, that what was central, not that it wasn't an
12 issue" -- what was central not that it wasn't an
13 issue -- "but Jerry in his discussions with me made
14 no mention that that was an issue in these hearings,
15 that the issue Jerry wished to delve into was the
16 problems that Don was having with women". And he
17 doesn't say, oh, no, I didn't say that was included at
18 all. What he says is I didn't think that was central
19 to the issues.
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Argument Re. Findings of Fact

1 provisions, that he came in and admitted all his past
2 sexual conduct and we disfellowshipped him. In other
3 words, Barnett is a fool. That is the theory, and it
4 doesn't make any sense.

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15 It doesn't make any sense to say what they're
16 saying. Otherwise, he never would have entered into
17 that agreement. In fact, he testified very clearly to
18 that, that he never would have entered into the
19 agreement if he thought, A, that was the scope of the
20 hearings and, B, he was giving up all this protection.

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Argument Re. Findings of Fact

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5 MR. WIGGINS: Your Honor, the testimony --

6 THE COURT: Wait just a minute. I will
7 include a single sentence, where I'm not quite sure.
8 It doesn't seem to fit 32. Well, it occurs to me to
9 fit 32, but it should be in --

10 MR. KNIBB: May I suggest somewhere
11 immediately before 39 because that's where we start
12 the hearing.

13 MR. WIGGINS: Your Honor, we're talking here
14 about what led up to the hearings. And talking about
15 the discussion between Motherwell and Barnett and I
16 guess I don't know exactly what you want to say so I'm
17 not sure.

18 THE COURT: I want to say something like
19 this where we talk about Zwack's letter.

20 MR. KNIBB: That's on --

21 THE COURT: I'm not thinking very clearly
22 today because I thought I could pick out right away
23 where we did talk about Zwack's letter.

24 MR. ROHAN: Zwack's letter is paragraph 18,
25 I think.

Argument Re. Findings of Fact

1 MR. WIGGINS: That's right.

2 MR. ROHAN: It might be helpful at the end
3 of paragraph 19 where Pastor Barnett received a copy
4 of the letter.

5 THE COURT: Okay. And a paragraph there
6 which says Pastor Barnett understood or believed that
7 the grievances included the claim that Zwack's release
8 from Bible College class and removal from the
9 Counseling Center -- I think that calls for a period.
10 Now read back what I said.

11 MR. WIGGINS: Pastor Barnett believed that
12 the grievances included the claim that Jerry Zwack's
13 release from the Bible College class and removal from
14 the Counseling Center --

15 THE COURT: Were due to actions of the
16 original pastor. That's as far as I'll go on that.

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22 THE COURT: I will not include that because
23 I think the letter is more inclusive than that.

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MR. WIGGINS: Well, it's inclusive, Your
Honor, but the point of it is to stop what he

Argument Re. Findings of Fact

1 perceives as ongoing sexual misconduct. It is not to
2 punish --

3 THE COURT: I don't care how narrowly he
4 construed it, it's what it appeared to be on
5 examination.

6 MR. WIGGINS: I'm not speaking of what he
7 says, Your Honor. The letter from Jerry Zwack does
8 not say anything like Pastor Barnett must be
9 ~~disciplined or removed because of this. What it says~~

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is that misconduct has to stop. That's what

It says I will be satisfied, words to the effect

will be satisfied if Don's marriage with Barbara

restored, or words along those lines. Let me

that. It says nothing about I think Don has

removed. He never says that.

THE COURT: Well, no, that's right.

doesn't. He says he has to be stopped.

MR. ROHAN: Which obviously includes

evidence of his prior sexual misconduct. That's

pretty clear throughout that letter.

MR. WIGGINS: My point is that Barbara

believed that the things he had done in the past

not grounds for getting rid of him. What was

ground for some action, and he didn't believe

he gotten rid of anyway, but he believed that

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it's exactly why he did it.
may argue that, but I'm not

ve go on to 36A. We have
36 yesterday. We have
the Court talked about
Wiggins a copy of our
what you said yesterday.
t you said yesterday I
tence. I think we added
not much. We added

ave two concerns about
that what you said was the
letter. See where I'm
d right on and said, and
ticipated in by Pastor
s what you said and I think
uling. And I think what
fferent thing and the
is as much in contract

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MR. WIGGINS: Tha

THE COURT: You m

going to make a finding.

MR. ROHAN: So, w

proposed, we talking about
proposed 36A based on what
yesterday. I've given Mr.
proposal. This is based on
It's almost verbatim of wha
think we added the last sen
part of the last sentence,
binding.

MR. WIGGINS: I h

this. The major concern is
issues raised in the Zwack
referring to? You continue
which was agreed on and par
Barnett. And I think that'
that's the intent of your r
they're saying here is a di
purpose seems to be ease th

Argument Re. Findings of Fact

1 language and binding contract language.

2 You indicated you are not inclined to say there
3 was consideration for it, but they want to get as
4 close as they can to contract language. I'm laying
5 the cards on the table here, Your Honor. I don't
6 think any of us should be devious about this and I
7 don't think they're being devious about it. But the
8 point is you said what you think the facts are and
9 that's what the finding ought to say. That's a fact.

10 MR. ROHAN: Your Honor, two points on that.
11 One is I don't believe you've ever said the January
12 25, 1988 agreement did not have consideration. I
13 think the record is replete. We talked about that
14 yesterday. And that our purpose in the second
15 sentence, "Pastor Barnett and all others concerned
16 treated this as a finding procedure and agreed to and
17 participated in it is in fact very much supported by
18 the evidence. It's supported by the evidence that --

19 THE COURT: I'll take 36A.

20 MR. WIGGINS: I have a trouble with the
21 first sentence, Your Honor. You've said this.
22 Community Chapel had no existing procedure dealing
23 with issues such as those raised. Actually, that's
24 not quite correct. Community Chapel's bylaws said
25 there was no way to deal with this. That's what they

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1 said. And I don't think it's accurate to say they had
2 no existing procedures. They said nobody has
3 authority to deal with this, that's what the bylaws
4 said.

5 THE COURT: Well, it will stand. The point
6 I'm trying to make is there wasn't any existing
7 procedure, whether that was because nobody thought
8 there should be any or they thought -- That
9 capsulizes what I mean.

10 MR. ROHAN: This means we remove the
11 paragraph 33 that is in the findings.

12 MR. WIGGINS: Right.

13 MR. ROHAN: And this substitutes for it, but
14 it follows paragraph 36. I believe that was your
15 instruction yesterday. So, the existing paragraph 36A
16 that we have proposed is replaced by 33. That's the
17 one that talks about the conducting of the hearings

... substituting for 33

at you stated
The changes as

et me read it.

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... removed 33 and we're moving it by subs

36A and putting it after 36.

We have also proposed based on wh
yesterday a revision of paragraph 37.
I understand them and Mr. Knibb --

MR. KNIBB: Shall I explain?

THE COURT: Just a minute, l

Argument Re. Findings of Fact

1 MR. KNIBB: This is changed in two ways from
2 the former 37. We deleted everything out of our prior
3 finding after the sentence which ends Barnett and
4 Zwack were not present. This is as the Court
5 indicated yesterday. We just deleted all of that
6 information. And secondly, that was because the Court
7 said that the additional language we had was
8 redundant, if you recall. And the second thing we did
9 is we deleted any references as to what Zwack
10 understood, because I think Mr. Wiggins' point on that
11 was well taken. Otherwise, it's identical to the
12 prior proposal.

13 MR. WIGGINS: Your Honor, yesterday's
14 conversation on this revealed something to me that I

15 just hadn't quite understood. I think when you talk
16 about witnesses I think you correctly observed that
17 okay, these people come in as witnesses. And whether
18 or not Barnett knew that Zwack, Motherwell, Peters
19 and Hartley would be witnesses against him is
20 different than saying, therefore, anything they said
21 was fair game and they could repeat hearsay
22 allegations.

23 THE COURT: I don't say that.

24 MR. WIGGINS: Yes, but that's what this
25 finding says, because they go on to say on the fourth

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Argument Re. Findings of Fact

1 line down, whose knowledge was primarily based". See,
2 that's the problem with it. And even though Barnett,
3 even though he may have known that Motherwell might be
4 a witness, he never says anything to indicate that he
5 knew and Motherwell never says anything to indicate
6 that Barnett thought that Motherwell was going to get
7 in and repeat hearsay allegations and repeat
8 secondhand stuff.

9 MR. ROHAN: That's both untrue -- Mr.
10 Motherwell testified --

11 THE COURT: I don't know what they testified
12 to at the hearing, whether it was hearsay testimony or
13 not hearsay testimony. I just know that that is what
14 the eldership received and these people did act as
15 witnesses there and were understood to be witnesses
16 there. That's as far as I'm going to go.

17 MR. WIGGINS: That would mean striking
18 everything after Hartley, I believe, Your Honor,

19 THE COURT: I think it takes the whole
20 place.

21 MR. ROHAN: The new one takes the place of
22 the old one.

23 MR. WIGGINS: I'm looking at the new one.

24 THE COURT: Here, we're quibbling over an
25 approach to a problem that I've already taken and that

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1 is that these people appeared, testified, and knew
2 they were going and everybody knew they were going to
3 testify at the hearing and their testimony was
4 received at the hearing. Now, if improperly, that's
5 up to the hearing, that's not up to me. I'm not going
6 to second guess them.

7 MR. WIGGINS: But, Your Honor, then I think
8 the point that is incorrect about this finding, then
9 what you're saying is you would go down, you will
10 accept this much of what is now on this new Finding
11 37. I'm looking at this new sheet of paper they've
12 handed up. Pastor Barnett and the eldership
13 understood that Paragraph 7 of the guidelines
14 referring to witnesses was to include individuals such
15 as Zwack, Motherwell, Peterson, and Hartley, period.
16 That's what you've said, because the rest of this they
17 are now looking for you to say "and Barnett understood
18 that they were going to repeat hearsay allegations"
19 and you're not willing to go that far, so the rest of
20 this should come out.

21 MR. ROHAN: Your Honor, I think that's not
22 true. Pastor Barnett knew that Jerry Zwack was going
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6 MR. ROHAN: Right, thank you, Your Honor.
7 I think our next one is --

8 MR. WIGGINS: Your Honor --

9 THE COURT: You can except to that, as you
10 have. I'll regard your exceptions as appropriate.

11 MR. WIGGINS: But that still doesn't solve
12 the problem with this finding, Your Honor.

13 THE COURT: But that's what I'm going to
14 find.

15 MR. WIGGINS: The last sentence is a
16 completely different finding, because the last
17 sentence has to do with the reason Barnett asked
18 Motherwell to serve on the eldership. And I know
19 Motherwell said that, Barnett didn't say that. What
20 Barnett said was that he was concerned about Jerry
21 Zwack leaving the hearing when Motherwell started to
22 testify in favor of Barnett which, of course, means
23 that Motherwell was going to testify while Barnett was
24 present, not when Barnett was not present. So, I
25 don't think --

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1 Motherwell said a lot of stuff that I don't
2 believe. Let me retract that. Motherwell said a lot
3 of stuff that I don't think you have to accept because
4 I don't think it's consistent with either logic or the
5 rest of the evidence, and I think this is one of those
6 things.

7 MR. ROHAN: There was a lot of testimony on
8 that, Your Honor.

9 THE COURT: Okay, remove 37 and put in this
10 one.

11 MR. ROHAN: Thank you, Your Honor.
12 Paragraph 38.

13 THE COURT: We removed 33?

14 MR. ROHAN: We have removed 33, yes, Your
15 Honor.

16 Now, we're up to 38. This is taken, if you look
17 at page 38 of the findings, this is almost word for
18 word of your, one of your proposed findings on page
19 38.

20 MR. WIGGINS: Three lines from the bottom.

21 MR. ROHAN: It occurs to the arbitrator,
22 this is what you stated --

23 THE COURT: Okay. What say you to that?

24 MR. WIGGINS: Well, Your Honor, you know,
25 the idea of having the people sitting in judgment on

Argument Re. Findings of Fact

1 him giving testimony against him behind closed doors
2 that he had no opportunity to rebut during the
3 deliberative stage of the hearings is neither
4 reasonable, proper, fair, or protective of anyone.
5 Now, you have found that Barnett agreed to such a
6 procedure, apparently you found that, however
7 irrational that may have been. But none of us sitting
8 in this room would think that that is reasonable,
9 proper, and fair. None of us would think that. And
10 the reason we don't think that --

11 THE COURT: That's because we're used to
12 judicial proceedings.

13 MR. WIGGINS: That's exactly right. That's
14 what this suggests, that you are finding this but you
15 shouldn't be finding this because it was irrational
16 and unfair. Now, Barnett and the elders can devise
17 any procedure they want. I totally disagree that
18 Barnett agreed to the concept that you have imposed
19 upon him or that they have imposed upon him, but we
20 shouldn't be finding that it was proper and fair
21 because it wasn't. It was crazy, frankly. It was
22 just crazy. Well, really, Your Honor.

23 THE COURT: I know, but that exists in so
24 many areas, I'm amused to hear you say that. When a
25 fellow is fired from a job, who hears his complaints

Argument Re. Findings of Fact

1 about unlawful or who hears his claim that he should
2 be kept on employment?

3 MR. WIGGINS: Well, that depends on whether
4 he has a contract that protects him or not.

5 THE COURT: Or that says something else.

6 MR. WIGGINS: Under that Baldwin case, if
7 you're dealing with an implied contract based on the
8 employment manual written by the employer, the
9 employer evaluates it because the employer put it in
10 there. But here we're not dealing with that type of
11 thing.

12 THE COURT: I know but that doesn't make it
13 not any the less fair.

14 MR. WIGGINS: There's another difference,
15 Your Honor. When you have an employer doing that, at
16 least the concept is somebody is sitting and listening
17 to somebody else give evidence and then they make a
18 decision, I'm the foreman or I'm the supervisor or I'm
19 the union representative or whatever it is, and I hear
20 all of this and I make a decision it happened or it
21 didn't happen and the employee has an opportunity to
22 rebut it. That didn't happen here.

23 THE COURT: But I think it's fair.

24 MR. WIGGINS: Do you think it is altogether
25 reasonable, proper, protective of all?

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1 THE COURT: Under the circumstances, yeah.

2 MR. ROHAN: Thank you, Your Honor.

3 THE COURT: I don't know of anybody that's
4 guaranteed the right of independent hearing and
5 counsel and notice and all the other things that we
6 apply to judicial proceedings in a situation like
7 this.

8 MR. WIGGINS: Well, Your Honor, you see
9 here's the problem. We're reading an awful lot into
10 an incredibly vague document that purportedly removes
11 a dozen or so very specific protections. We're saying
12 that Barnett then went in and admitted all these
13 things, signed his own death warrant essentially, so
14 to speak. And, gosh, he, of course, had to know that
15 behind closed doors people were going to be bringing
16 evidence against him, not only bring evidence against
17 him but they knew they were going to go out and
18 investigate it and come back and talk about it. And
19 these people who were doing this were concluding, oh,
20 he's a liar because I don't believe him, I believe
21 this person that I've talked to. And then the rest of
22 them sitting around are supposed to decide, yeah,
23 Barnett is a liar because one of our members concluded
24 that somebody else is telling the truth but we haven't
25 heard from that person. The whole thing is crazy.

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1 saying something was in issue. And what you are
2 supposed to do, Judge, is find as a matter of fact if
3 there was an issue of fact what it was, not just what
4 somebody said.

5 I think here we're talking about what somebody
6 said. Don't you believe that to be a fact? So, what
7 we're concerning about was what was said before the
8 elders.

9 MR. ROHAN: Your Honor, if I might make one
10 comment. I'm not sure whether this is relevant to
11 what you're talking about or not. What we're doing
12 here in terms of this is similar to what an employer
13 and employee would do and what the Court is being
14 asked to look at is was there evidence sufficient
15 to --

16 THE COURT: What was the evidence.

17 MR. ROHAN: Right. So, I think it is
18 important to say what the evidence was and I think
19 this is a listing of Zwack's evidence and I think it
20 is backed up and I can give the references, depending
21 on what Mr. Wiggins says.

22 THE COURT: What objection do you have to
23 41?

24 MR. WIGGINS: Your Honor, I think that -- I
25 do not believe that the evidence supports this. Now,

Argument Re. Findings of Fact

1 if we're going, I think we ought to go through page by
2 page what Mr. Rohan believes supports this and I want
3 to respond to it page by page, because with most of
4 these things there's gross characterization, vague
5 generalities, and the evidence often doesn't hit what
6 is being said here. That's my first point about it.

7 The second point about it is this undertaking is
8 impossible. It is flat out impossible. And the
9 reason it's impossible is these witnesses testified
10 over and over they weren't sure what Zwack said, what
11 was said in the hearing of Barnett, what was said
12 outside the hearing of Barnett, what the elders said.
13 And often you get them testifying about, oh, yes,
14 there was an incident of so-and-so and then another
15 will come in, oh, yes, there was an incident of so and
16 so. You have no idea how many people we're talking
17 about, nothing like that.

18 Also, sexual misconduct, we have no idea what
19 that means. And I really object to the use of that
20 because it sounds -- I don't know what it means. I
21 don't think these people knew what it meant. And they
22 also come to some remarkable conclusions. There was
23 testimony, and I'm trying to think of an example of
24 this, that Barnett -- I know what it was. Mr. --

25 THE COURT: Touched the breasts of somebody?

Argument Re. Findings of Fact

1 MR. WIGGINS: Not that, the elder who
2 testified second, his name begins with H --

3 MR. ROHAN: Harold.

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10 this and I concluded that. And we have no idea how
11 much is conclusionary on Zwack's part, on their part,
12 or your part. We are now into you're finding what
13 somebody else said Zwack said what he was told by a
14 woman. And it is an impossible undertaking. I just
15 don't think the evidence supports it and I don't think
16 we should have gotten into it either, but that's kind
17 of a different question. But I would suggest if we
18 want to embark on this that we start going through
19 this because I want to look at these references and
20 respond to them page by page.

21 MR. ROHAN: Your Honor, in effect --

22 THE COURT: Here.

23 MR. ROHAN: We don't want to get bogged down

24 at this point if all of these things are the Cou

25 listened to the testimony and that is the Court'

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1 finding, 90 percent of this paragraph including all
2 the stuff there. Mr. Wiggins just talked about it.
3 We could go through and relate substantial portions of
4 the trial which I don't think is productive. I think
5 we'll be here for a long period of time if we're going
6 to do that. If we cannot sustain this on appeal,
7 obviously we can't. You believe and I believe that we
8 have evidence in the records that supports all of
9 this. I could go over it line by line. It's
10 voluminous, but it does support what the Court said.
11 It doesn't mention lying which was talked a lot about,
12 that's the only thing I would want to add. But as it
13 stands, it does relate what the witness has said Jerry
14 Zwack related.

15 MR. WIGGINS: Let me respond to that, Your
16 Honor. We have the transcript now. We know what was
17 said at the trial. What Mr. Rohan wants me to do is
18 to make this same argument to the appellate judges and
19 they are even less inclined to do this than you are.
20 And it's not their job to do it. It's your job to
21 find facts and it's your job to say what the evidence
22 was and what you believe and what you don't believe.

23 My problem with it is that this whole trial was
24 so grossly vague and characterized by generalities and
25 hearsay, you know, I don't fault the fact that you

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1 come up with a vague finding and a broad finding like
2 this because the evidence is of this quality and it's
3 not good enough. That's my point. But I think we
4 ought to go over it page by page. I think I'm
5 entitled to do that. We've got the transcript.

6 THE COURT: Well, I'm not going over it item
7 by item to substantiate each one of these. I just
8 won't do it. As you have said, it requires going
9 through the transcript and picking and choosing what
10 testimony was adduced, what elders now remember as
11 having come up at the hearing, and I just can't go
12 through that much testimony to do that.

13 What I had believed after I saw this reduced
14 writing and revised by Mr. Rohan is to start in by
15 saying the eldership received testimony. Even the
16 word is testimony is probably grossly misused here.

17 MR. KNIBB: Information?

18 MR. WIGGINS: Statements, I would say.

~~THE COURT: Evidence, with a word for the...~~

m, evidence?

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the

MR. ROHAN: Evidence, right.

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MR. WIGGINS: That's worse than testimony.

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THE COURT: Statement, I suppose.

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tements, scratch the word Zwack, relating a number

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visits by women of the congregation coming to the

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of

Argument Re. Findings of Fact

1 Counseling Center and to counselors. Anybody object
2 to counselors? If you want to identify them further,
3 I don't know whether Zwack was a counselor or not.

4 MR. ROHAN: He had been, he wasn't at this
5 time though. So, maybe we should say received
6 statements from Zwack and a number of the elders and
7 counselors.

8 MR. WIGGINS: May I ask, Your Honor, I guess
9 you're now going beyond what Zwack said and what
10 others said which was something during the trial you
11 made a distinction on. There was a distinction
12 between evidence that was given while Barnett was
13 present and evidence that was given when he was not
14 present. In fact, you pretty consistently maintain
15 that distinction.

16 THE COURT: Yeah, I'm not making any
17 distinction.

18 MR. ROHAN: That would include what we
19 already have in paragraph 56.

20 THE COURT: I know that you are concerned
21 about what was said when Barnett was not there.

22 MR. WIGGINS: Yes.

23 THE COURT: But I believe that the elders
24 had, by their procedures, would do that and that was
25 told.

Argument Re. Findings of Fact

1 MR. ROHAN: How else are we also going to
2 change this? Since we're making changes, I think that
3 we should add as we placed in, one of the things you
4 placed in paragraph 56 was "lying".

5 MR. WIGGINS: Here's the problem --

6 MR. ROHAN: Add that, and the other thing I
7 would add is that they were threatened with
8 disfellowship. They were threatening them with
9 disfellowshipping. On paragraph 56 we talk about both
10 lying and threatening with disfellowship and certainly
11 that was adequate testimony on both of those things.

12 MR. WIGGINS: Here's the problem about the
13 lying. You know, somebody come in and says Don
14 Barnett is lying when he says so and so. That doesn't
15 mean anything. These people are supposed to be
16 finders of fact as well as give evidence. And one of
17 them says, oh, Barnett is lying because so-and-so --

18 THE COURT: I know this to be a fact, yeah.

19 MR. WIGGINS: Yeah, and it's something that
20 he heard from somebody else. That's the problem with
21 lying.

22 THE COURT: If I were to devise judicial
23 procedures to hold hearings on these matters, that
24 would be an entirely different thing, but I'm not.

25 MR. WIGGINS: But you have put your

Argument Re. Findings of Fact

~~Impugnability of these proceedings.~~

THE COURT: Suppose the board had the right to remove him and this was challenged to the board's removing him. Would there be this scrutiny of the testimony that was received by the board, who said what to whom and whether it was hearsay and whether the board had any information on the side and whether they talked to each other about that information outside the presence of Barnett? I don't think so.

MR. WIGGINS: Well, Your Honor, if the board had power to remove him, the Court wouldn't be permitted to go into the reasons that the board removed him at all. That's the whole problem with this procedure. And none of this stuff should have come in to begin with for that reason and it shouldn't be coming into these findings.

THE COURT: Well, it should come in if this constitutes under their theory and under my agreement if this constitutes a breach of fiduciary duty or pastoral duty.

MR. ROHAN: Your Honor, the changes you're making, I understand at the beginning you are going to say the eldership received statements related --

MR. WIGGINS: Relating.

MR. ROHAN: Relating a number of visits, et

Argument Re. Findings of Fact

1 cetera. And then are we going to put in that, do we
2 have to put in anything about Zwack, counselors, or
3 elders or can we just --

4 THE COURT: Are you down here to Zwack?

5 MR. ROHAN: Oh, yeah, I think we have to put
6 in that the eldership received statements relating, I
7 guess we have to put in who made the statements. I
8 would say the eldership received statements from
9 Zwack, elders, and counselors relating. So, the
10 beginning would be the eldership received statements
11 from Zwack, elders, and counselors relating a number
12 of visits, et cetera.

13 MR. WIGGINS: If you're going to put
14 something in, it ought to be from Zwack and members of
15 eldership because there are no counselors who came in
16 to testify.

17 MR. ROHAN: Members of the eldership is fine
18 with me.

19 THE COURT: Received statements from --

20 MR. ROHAN: From Zwack and members of the
21 eldership.

22 THE COURT: All right.

23 MR. ROHAN: Then we go on with this, to them
24 personally.

25 MR. WIGGINS: Part of the problem is that's

Argument Re. Findings of Fact

1 not descriptive of everything that happened. Part of
2 the evidence here was that Peterson and Hartley went
3 out and investigated. Women didn't come to them, they
4 went out and talked to women. So, it's not just that
5 women came to them.

6 MR. ROHAN: Let's state then the eldership
7 received statements from Zwack and members of the
8 eldership regarding --

9 MR. KNIBB: I don't like to draft in
10 committee. I think we should come back with it.

11 MR. ROHAN: Why don't we bring a proposal
12 back after lunch.

13 THE COURT: Okay.

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25 THE COURT: I do.

Argument Re. Findings of Fact

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THE COURT: I'm not going to attempt to do that, identify them or number them.

MR. WIGGINS: Okay, then what is the

...e them spiritual harm?

...hat should be also led one

...eah, a woman.

...hat's to Mrs. A.

...What is this? Is this

...e talking about?

...2, we've stricken that, now

...Your Honor, on 43, I guess

...Mrs. A. You didn't think Zwack

~~I didn't think that was the~~

...That was Bergin, wasn't it?

...Well, it was Zwack and

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...reference to might caus

MR. ROHAN: T

woman to fear.

THE COURT: Y

MR. ROHAN: T

MR. WIGGINS:

...disfellowshipping you'r

THE COURT: 4

...we're at 43.

MR. WIGGINS:

...this is a reference to

~~testified about Mrs. A.~~

...evidence.

THE COURT: T

MR. ROHAN: W

Argument Re. Findings of Fact

1 Motherwell. There's a reference on page, Report of
 2 Proceedings page 1013. Mr. Motherwell was asked the
 3 following question: "You were here when Mrs. A. testified",
 4 that is here in the front of Your Honor?
 5 "Yes". "Was what she testified to at this hearing
 6 related at the hearings" -- that we're having here --
 7 "related at the hearings either by yourself or Jerry
 8 Zwack?" Answer: "Yes". So, everything that she
 9 testified to in front of this Court was testified to
 10 by either Motherwell or Zwack. And I think it is
 11 improper to say Zwack reported, but we can say it was
 12 reported.

13 MR. WIGGINS: Here's the problem, Your
 14 Honor. This is a good example of how gross this

~~L, because he said were you here~~
~~Yes. Was what she testified to~~
 related at the hearing by either
 Zwack? Yes. Now, he cannot
 he said everything she said here
 hearings. This can't possibly mean
 at Mr. Rohan said it means.
 : That's what the testimony is.
 NS: It cannot possibly be true.
 : We have to move along. No. 44.
 NS: Your Honor, what is the change

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testimony is. Well
 when she testified
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 they said in the he
 that, but that's wh
 MR. ROHAN
 MR. WIGGI
 THE COURT
 MR. WIGGI

Argument Re. Findings of Fact

1 to 43 then?

2 MR. ROHAN: Zwack should to be dropped.

3 THE COURT: It was reported. Now we're at
4 44.

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9 THE COURT: What are you talking about?

10 MR. WIGGINS: I'm still on 43.

11 THE COURT: Well, I'm not, I'm on 44.

12 MR. WIGGINS: Your Honor, you didn't make
13 this finding.

14 THE COURT: I know I didn't.
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Argument Re. Findings of Fact

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THE COURT: Okay. Now, No. 44.

MR. ROHAN: I think there's no objection to 44, only that it be sealed.

MR. WIGGINS: The only problem with 44 is it ought to be clear that he was paying for their expenses with his money. That was the testimony.

MR. ROHAN: I don't have any objection to that. Paying for their expenses with his money. And then we were up to 45.

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THE COURT: All right. Indicating that his

~~sexual was consensual strike usual Okay Now~~

we're at 46.

MR. WIGGINS: Now, may I ask, Your Honor, here is a situation where are you finding him the truth or not?

THE COURT: Pardon?

MR. ROHAN: I don't believe you're

Honor,
m telling
finding

Argument Re. Findings of Fact

1 that, this was just what Pastor Barnett stated, not
2 that this is the truth.

3 MR. WIGGINS: Well, here's the finding,
4 there's what he said. I guess that is in the same
5 context that you're not finding a fact here, you are
6 relating what he said at the hearings.

7 THE COURT: Yeah.

8 MR. WIGGINS: Okay.

9 MR. ROHAN: 46.

10 MR. WIGGINS: Oh, yeah, Your Honor, this is
11 a good example of what they are doing with these
12 findings. Oh, Pastor Barnett had abundant time to
13 present his case. He didn't make any request for
14 additional information. He didn't know the
15 information that was being presented against him.
16 That's the problem with this finding. And you didn't
17 make the finding and I don't know what materiality it
18 has besides the fact that it's misleading.

19 MR. ROHAN: It's not misleading. Pastor
20 Barnett knew there was testimony and we have already
21 put that in the findings that he knew other people
22 were going to testify.

23 THE COURT: 46 should be okay.

24 MR. ROHAN: Thank you, Your Honor. 47 is
25 agreed to.

Argument Re. Findings of Fact

1 MR. WIGGINS: No, 47 is agreed to the way
2 the Court drafted it, which is his wife had separated
3 from him. You've changed that to take that fact out.

4 MR. KNIBB: Isn't estranged the same idea?

5 MR. WIGGINS: No, it's different. His wife
6 separated from him. She's not merely an estranged
7 wife, she left him. That's what the Court says and
8 that's what the evidence is. She left him. That's
9 different than saying she's an estranged wife.

10 MR. ROHAN: Your Honor, she left him because
11 of Pastor Barnett's conduct.

12 MR. WIGGINS: That's a really argumentative
13 thing to say and it gets totally into the relationship
14 between the two of them.

15 MR. ROHAN: Which you brought up first.

16 MR. WIGGINS: Which Pastor Barnett thought
17 was the subject of the hearings.

18 THE COURT: Okay, let's strike estranged if
19 there's some connotation to that.

20 MR. WIGGINS: Your Honor, I'd like to --

21 THE COURT: And reinsert who had separated
22 from him, reinstate that. And demons.

23 MR. ROHAN: 48.

24 MR. WIGGINS: Now, here we are, Your Honor,
25 I guess we're now getting to the standard that you're

Argument Re. Findings of Fact

1 going to use and what you are really doing here. Did
2 they reasonably conclude that Pastor Barnett had
3 refused trust and confidence placed in him. Was it
4 reasonable for them to rely on gross hearsay behind
5 closed doors statements, was that reasonable. They
6 are asking you to place your judicial approval on
7 saying, oh, yes, this was all reasonable. No, it
8 wasn't reasonable for them to conclude that from
9 totally hearsay evidence presented behind closed doors
10 against him.

11 MR. ROHAN: Your Honor, I think clearly this
12 is what the Court has found that the eldership --

13 THE COURT: That the eldership had
14 sufficient evidence.

15 MR. ROHAN: We'll take out reasonably
16 concluded and substitute has --

17 THE COURT: To reasonably conclude.

18 MR. WIGGINS: Your Honor, now you have
19 placed a legal standard into this and now you are
20 saying they had sufficient evidence. They didn't have
21 sufficient evidence. Now you've made the finding even
22 more dramatic, even worse because they didn't have
23 sufficient evidence at all.

24 THE COURT: All right. So, you can show to
25 the Supreme Court.

Argument Re. Findings of Fact

1 MR. WIGGINS: I'm troubled by this because,
2 Your Honor, there are two forms of evidence that we're
3 talking about here. There's evidence presented to the
4 eldership, there's evidence that was presented to you.
5 And what are you referring to here?

6 THE COURT: That was presented to them.

7 MR. WIGGINS: All secondhand information.

8 MR. ROHAN: It's not all secondhand
9 information.

10 MR. WIGGINS: Oh, his admissions basically.
11 See, that's the problem here. We get into were the
12 admissions sufficient to reasonably concluded this.

13 ~~MR. ROHAN: Your Honor, it was the evidence~~
14 as a whole was sufficient.

15 THE COURT: Okay.

16 MR. ROHAN: 49.

17 THE COURT: No. 49.

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Argument Re. Findings of Fact

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Argument Re. Findings of Fact

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5 Now, I have a problem with the first part of this
6 finding, Your Honor. The first part of the findings
7 says the eldership did not violate Guideline 7, the
8 requirement that no facts shall be accepted as a fact
9 unless admitted and proven by witnesses was met. It
10 wasn't. And the stuff was proven by hearsay. You're
11 now including with this finding that witnesses meant
12 they could come in and tell hearsay. That's the
13 impact of this.

14 THE COURT: Probably could and that's what
15 they testified to in some instances.

16 MR. WIGGINS: So, you do think there was no
17 violation of the guidelines.

18 THE COURT: No, not in that respect. No.
19 50.

20 MR. ROHAN: No. 50.

21 THE COURT: Okay, I'll retract lashed out.
22 What did he do, admonished?

23 MR. WIGGINS: I think you could say he

Argument Re. Findings of Fact

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THE COURT: He not only did that, he was agitated, distraught, and angry and challenged their --

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MR. ROHAN: And Mr. Harold testified to that.

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MR. WIGGINS: Where?

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MR. ROHAN: Page 868. He was very unnerved, very agitated, and very angry.

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9

THE COURT: And he challenged --

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MR. ROHAN: Right, he challenged their authority to conduct and continue the hearings

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~~to Mr. Markovic on page 507.~~

13

THE COURT: Okay, challenged their authority.

14

y to

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MR. ROHAN: Challenged their authority to conduct and continue the hearings.

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MR. KNIBBE: Yes.

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MR. WIGGINS: Would you hear, there's something

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else that's wrong with this. First of all, I want

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get what it is. During which he challenged their

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authority.

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MR. KNIBBE: Why don't we say during which

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he became agitated, distraught, and angry and he

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challenged their authority to conduct and continue

Argument Re. Findings of Fact

10 1 hearings.

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MR. WIGGINS: Okay, now here's the problem,

gry. The testimony
r. Harold, is not
is testifying about
was present with
about. That's

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with agitated, distraught, and an
that Mr. Rohan just pointed to, Mr
about this tape. What Mr. Harold
is the last meeting where Barnett
him, that's what he's testifying a
exactly what he says.

eting in which Donald
meeting on the 3rd.

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MR. ROHAN: The last mee

k at it, because

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Barnett was a participant was the

ys. He is talking

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MR. WIGGINS: Let's look

on Barnett was a

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that's not what this testimony say

e were two meetings.

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last meeting.

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participant.

got that impression.

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THE COURT: I know there

, I object to that.

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The lashing out really was on the

s this read? I'm

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Somebody said that or at least I g

with the during which

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MR. WIGGINS: Well, see,

nd angry and

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I'll stop with that. So, how does

duct and continue the

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still not sure how this reads.

old said he became

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MR. KNIBB: Beginning wi



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he became agitated, distraught, an

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challenged their authority to conc

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hearings.

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MR. WIGGINS: Okay, Haro

Argument Re. Findings of Fact

1 agitated and angry, he doesn't say he became
2 distraught.

3 MR. ROHAN: He says unnerved.

4 MR. WIGGINS: Where does he say that?

5 MR. ROHAN: Right before where he says
6 unnerved, very agitated, angry, he also says unglued.
7 These are findings, Your Honor.

8 MR. WIGGINS: These are findings you're
9 making about how somebody else characterized a tape
10 that he heard. He wasn't even there. Harold wasn't
11 even there unless this is in fact the meeting where
12 Harold was present. That's what he's really
13 testifying about, he's not testifying about the tape,
14 that's my point.

15 MR. ROHAN: I think we all agree on
16 paragraph 51.

17 THE COURT: Yeah, I would think so.

18 MR. ROHAN: The next one is 52.

19 MR. WIGGINS: This was actually inaccurate.
20 Exhibit 29 is the tape of the meeting, it's not the
21 minutes of the meeting, it's the letter from the
22 eldership.

23 THE COURT: Where are we here?

24 MR. ROHAN: We have corrected that, Your
25 Honor. We corrected Mr. Wiggin's complaint. It's now

Argument Re. Findings of Fact

1 accurate.

2 MR. WIGGINS: But then you see you were
3 apparently referring the reader to a tape. You
4 thought that this was a transcription of the meeting
5 and it wasn't. And that's why you referred the
6 reviewer to this.

7 MR. ROHAN: I don't believe that's why you
8 did, Your Honor.

9 THE COURT: No, no. I did not mistake that,
10 I wanted them to read the letter that was in response
11 because you will remember that 51 was not one of my
12 hearings. 51, the exhibit included the questions and
13 the answers and that's wasn't a tape, that was the
14 letter.

15 MR. ROHAN: That's Exhibit 29.

16 MR. WIGGINS: That's right, Your Honor. I'm
17 not arguing about what you intended, but what you said
18 was the essence of the remarks of Pastor Barnett as
19 ~~contained in Exhibit 29 should be read by any~~

20 reviewer. Well, the eight questions he asks are
21 contained in Exhibit 29. That was why I thought that
22 you weren't referring to the letter from the
23 eldership. But if you think that the letter should be
24 read by the reviewer, then the finding is correct
25 there.

Argument Re. Findings of Fact

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MR. ROHAN: Paragraph 53.

MR. WIGGINS: This is another good example of a misstatement of the evidence. There is not evidence that there's a consensus of the eldership that Barnett's remarks violated the January 25 agreement. It's just not there. Exhibit 29, the very detail of the letter, they don't say that anywhere.

MR. ROHAN: There's a number of the witnesses that testified that they felt that he had violated the January 25 agreement.

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did challenge them, their authority, want
what right they had. Do the bylaws give
right? Who is on trial? Why do you do t
And so forth and so on and they took that
attempt to interfere with this hearing di
MR. WIGGINS: The finding doesn
Your Honor. I'm at the top of page 22.
Finding 53. At the very top line of 22 i
the consensus of the eldership that Pasto
violated the January 25 agreement. That
MR. ROHAN: It is true, Your Ho
MacKenzie testified on page 507 that he w
challenging the authority to conduct and
hearing.

Argument Re. Findings of Fact

1 MR. WIGGINS: Okay, that's Mr. MacKenzie's
2 testimony.

3 MR. ROHAN: Wait a minute, let me finish.
4 Mr. Harold testified at page 861, "He abrogated our
5 agreement". "What agreement are you talking about?"
6 "Our agreement that he signed, the one right in front
7 of us here". Which is the January 25 agreement. "He

~~"In numerous times in the meetings tried to exercise"~~
8 authority over them, and he didn't permit the hearings
9 to continue until they were concluded to the
10 satisfaction of the elders".

11 Page 874, Harold. This was in cross-examination.
12 "There were some feathers ruffled among members of the
13 eldership?" Answer: "I think there was a distinct
14 degree of dismay that this agreement that had been
15 signed on the 25th was now, and he had freely and
16 openly signed it" -- that is Barnett -- "was now being
17 thrown aside as though he had never made the
18 agreement. So we were dismayed".

19 On Mr. Thiel's testimony, page 1417. Question:
20 "Did you believe it was a violation of the guidelines
21 and the special agreement?" Answer: "It was a clear
22 violation".

23 THE COURT: Do you object to consensus?

24 MR. WIGGINS: Yeah, there was not the
25

Argument Re. Findings of Fact

11 1 consensus.

2 THE COURT: It was the feeling.

3 MR. ROHAN: The belief.

4 MR. WIGGINS: Of three of the elders.

5 MR. ROHAN: I just quoted four.

6 THE COURT: Belief of the eldership.

7 MR. WIGGINS: Your Honor, that's not the
8 testimony.

9 MR. ROHAN: Mr. Harold testified -- It was
10 asked by counsel for Barnett.

11 THE COURT: Let's go to No. 54. We changed
12 two words there, Mr. Knibb.

13 MR. WIGGINS: That's not what Harold said.

14 THE COURT: We changed two words there,
15 belief and -- Just one word.

16 MR. WIGGINS: That's not Harold's testimony,
17 Your Honor.

18 THE COURT: All right, 54.

19 MR. WIGGINS: Here's a good example, Your
20 Honor. It's interesting there's, I don't know if I
21 should say that, but there's a verse in Luke --

22 ~~THE COURT: Here, I objected myself to this.~~

23 one. I don't want to make that finding. The elder
24 made that finding and I don't know that that says
25 anything more than the prior.

Argument Re. Findings of Fact

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MR. ROHAN: I don't think it does, that's fine with us.

THE COURT: Let's strike 54.

MR. ROHAN: 55. Mr. Wiggins objects to the second sentence. I think we're in agreement that the second sentence should be taken out.

THE COURT: Pardon?

MR. ROHAN: The second sentence that we added should be taken out.

MR. WIGGINS: Your Honor, this does bring up

another point that I would like to raise here and it's point as to a comment you made last night when we were off the record when we left when you said the special status doesn't have anything to do with this because --

THE COURT: I'm questioning, I don't know.

MR. WIGGINS: Well, I'd like to address that and this is a good place for it because this is where it comes up first here. You know, I did make the point repeatedly, I don't know if it's repeatedly but more than once that the meeting at which the special status was allegedly imposed by Pastor Barnett was an illegal meeting. It was not a meeting of the Board of directors.

THE COURT: You made that.

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Argument Re. Findings of Fact

1 MR. WIGGINS: Right. And I made that point
2 in my closing argument as well and I also made the
3 point that the reason that the elders, many of the
4 elders gave is they were highly offended that Donald
5 Barnett did not accept the special status and that's
6 why they decided to disfellowship him. That was the
7 reason.

8 A good example of that is DuBois whose deposition
9 is before you flat out says that. That's the reason
10 that we disfellowshipped him. And I did make that
11 argument in my closing and I've made that argument
12 throughout and I've repeatedly said everything after
13 that is affected by the fact here they all think, by
14 golly, the special status, boy that special status
15 he's not accepting it and yet --

16 THE COURT: Your objection to that being he
17 didn't repent, he didn't try to correct himself, he
18 said I'll go my own way.

19 MR. WIGGINS: Their objection being once he
20 refused to accept the special status that was enough,
21 that was all they needed, and that's what they said.

22 THE COURT: What do you mean that's all they
23 needed?

24 MR. WIGGINS: That he didn't accept the
25 special status and he should have accepted the special

Argument Re. Findings of Fact

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status and that was the thing, that was the reason

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they disfellowshipped him. That was an illegal act

e toward

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THE COURT: Because of his attitude

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the attempt to correct him.

ude toward

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MR. WIGGINS: Because of his attitude

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THE COURT: But what did the special

us? It

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what was the significance of the special status

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was an attempt to correct and I'm

felt would correct him and he said, no, I'm not

10

they

to do that.

11

going

MR. WIGGINS: What he said was he wasn't

12

going to accept that special status and he said that repeatedly and that's what bothered them.

13

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THE COURT: I'm beyond that point now because I feel that -- I don't know yet what to make of the special status.

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MR. ROHAN: I think we should discuss those as they come up in the findings.

18

19

THE COURT: Yeah.

20

MR. ROHAN: Because I have a lot to say about that. Paragraph 56, it seems to me we've taken care of that by the revisions we've made to paragraph 41. I think Paragraph 56 we no longer need because it's redundant after what we said in paragraph 41.

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Argument Re. Findings of Fact

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MR. WIGGINS: Peterson's testimony, like all of their testimony was so vague. If you want to point out a specific place, then fine, let's look at it.

THE COURT: Where would you put that?

MR. ROHAN: I would put that after improper advances.

MR. KNIBB: Isn't 41 the one that we were going to --

Argument Re. Findings of Fact

1 MR. ROHAN: Right, we're going to revise
2 that. We can bring that back after lunch.

3 MR. WIGGINS: We have revised it.

4 THE COURT: Redraft I have on it. Now we're
5 up to 56.

6 MR. ROHAN: 56, we're going to take out and
7 we're going to revise 41 because its redundant and 57
8 everybody agrees to.

9 MR. WIGGINS: Excuse me, you're going a
10 little faster than I'm able to.

11 MR. ROHAN: I'm sorry. 57 doesn't make any
12 sense when you take out 56.

13 MR. WIGGINS: Well, I think --

14 MR. ROHAN: Because we have a split between
15 what was said in their presence and what wasn't.

16 MR. WIGGINS: I think that the importance of
17 57 is that there were many things that were said that
18 Pastor Barnett was not present to hear or answer or
19 deny.

20 MR. ROHAN: Either Jerry Zwack or Donald
21 Barnett were present to hear, answer, or deny all of
22 the --

23 MR. WIGGINS: Let's not say all, let's say
24 much because --

25 MR. ROHAN: A portion.

Argument Re. Findings of Fact

1 THE COURT: To hear, answer, or deny.

2 MR. ROHAN: A portion.

3 THE COURT: The remarks of the elders.

4 MR. WIGGINS: No, the information given by
5 the elders, that ties back in.

6 THE COURT: Information given by the elders.

7 MR. ROHAN: Well, we have to say outside, we
8 have to say something to the effect because it wasn't
9 all the information given by the elders.

10 MR. WIGGINS: What information by the elder
11 was given in his presence?

12 MR. ROHAN: There is testimony by at least

13 one or two of the witnesses that said they testified
14 to things when Don was still there that they
15 interjected.

16 MR. WIGGINS: During the exclusive eldership
17 review sessions.

18 MR. ROHAN: That would be fine.

19 THE COURT: During the exclusive eldership
20 review sessions.

21 THE COURT: Okay, 58.

22 MR. WIGGINS: Your Honor, my problem with 58
23 is you have imposed on Barnett conscious knowledge.

24 MR. ROHAN: There's significant testimony on
25 those points, Your Honor.

Argument Re. Findings of Fact

1 MR. WIGGINS: You have imposed on Barnett
2 based on Zwack's letter knowledge that a statement
3 that's made on the last page of that letter a month
4 later, that was in Barnett's mind when he entered into
5 the agreement and he looked at the guidelines, a
6 letter which he sometime read and we don't even know
7 whether he had a copy of it, but he read it sometime.

8 MR. ROHAN: Your Honor, the witness has
9 testified in length on this.

10 THE COURT: Where's the letter?

11 MR. WIGGINS: It's 22. I have a copy of it.
12 Would you like to see it?

13 MR. ROHAN: The finding is based not only on
14 that letter but on a lot of testimony of the witnesses
15 to that effect. It's not just the letter.

16 MR. WIGGINS: You read some testimony of
17 Motherwell, that's not a lot of testimony by a lot of
18 witnesses.

19 MR. ROHAN: Well, there's other testimony
20 too.

21 MR. WIGGINS: The statement is at the top of
22 page 4, I believe.

23 THE COURT: Well, I made a finding that he
24 got the letter.

25 MR. ROHAN: That's right, Your Honor.

Argument Re. Findings of Fact

1 THE COURT: Or he saw it.

2 MR. WIGGINS: Saw it or read it.

3 THE COURT: At the time on December the 24th
4 that it was delivered to the others. No other
5 reasonable inference when he calls them up and tells
6 them, he implores them to return the letter and not
7 read it. I don't believe that he didn't know what it
8 said, I just can't believe it.

9 MR. WIGGINS: My point is, Your Honor, that
10 what this finding leads to is that on January 25, a
11 month later when he enters into the agreement and

12 ~~agrees to the guidelines he has in his mind a~~
13 statement on page 4 of the letter which he read a
14 month earlier, not that --

15 THE COURT: I don't know how many times he
16 read it.

17 MR. WIGGINS: Well, of course you don't.
18 That's the point.

19 THE COURT: But I'm sure he knew what was
20 the letter because I'm sure he read it more than once.
21 I'm sure he knew what this was all about. I can't
22 believe that he -- Here. Imagine how this must have
23 seemed to anybody. The elders themselves were 16 of
24 them. My God, that's more than -- I counted how many
25 were in the hearing down there and we didn't even

Argument Re. Findings of Fact

1 have, I think we had 12 at one time and the place was
2 packed. Sixteen elders sitting there that he knew
3 were going to be hearing this thing. His counselor
4 was going over and had gone over these papers with
5 him, the agreement and the guidelines. It was not
6 something that he was willingly entering into. He had
7 to have known what this was all about. I can't
8 believe that he didn't.

9 MR. WIGGINS: Your Honor, I'm not disputing
10 that. The problem is he knew all too well that Jerry
11 Zwack was bitter towards him and for months had been
12 carping about things he had done. He knew a lot about
13 what Jerry Zwack was complaining about.

14 The problem is we're looking at this letter as if
15 it's like a criminal information or something that you
16 read to somebody and they're charged with knowing
17 everything in it. My point is this finding goes to
18 say a month after he read the letter we're not going
19 to look at what he knew about Jerry Zwack all of 1987.
20 We're not going to look at what he thought the
21 grievances were, we're going to say he is thinking

22 then when he reads this statement about witnesses and
23 testimony being given against him, he's going to think
24 back to a letter he read a month earlier that says
25 these people have knowledge about this. I think

Argument Re. Findings of Fact

1 that's not logical.

2 MR. ROHAN: There were several items of
3 testimony that support Finding 58. The first one
4 appears on page 997. David Motherwell testifying,
5 "Did he" -- Barnett -- "tell you why he wanted you to
6 be on the committee?" Answer: "Because he" --
7 Barnett -- "knew that we knew the information
8 contained in the grievances of Jerry Zwack and he knew
9 that in his absence" -- Barnett's absence -- "that
10 John" -- it says John but it's Bergin -- "and I could
11 keep accurate track of that information and the
12 discussion of it, also that he wanted me there to
13 testify as to what, if anything, he was doing in
14 regards to those grievances".

15 Page 998. "And that's what Donald Barnett asked
16 you to do; is that right?" "Yes". "Was there any
17 discussion at that time or up to and including
18 January 25, 1988 with you and Donald Barnett where
19 there was any discussion of testimony being taken at
20 the hearings where Donald Barnett was not present or
21 would not be present?" Answer: "There was".
22 Question: "What was said by you or Donald Barnett
23 about that?" Answer: "That he" -- Barnett -- "knew
24 there would be testimony given while he" -- Barnett --
25 "wasn't present and he knew who it would come from" --

Argument Re. Findings of Fact

1 "And by those individuals he was referring to David
2 Motherwell, yourself, and John Bergin?" Answer:
3 "Myself and John Bergin, as well as Lanny Peterson and
4 Scott Hartley".

5 Then we turn to page 1005. This happened during
6 the hearings. "Jerry Zwack said that I had more
7 information on this woman than I would give during the
8 eldership review sessions while Don was still there".
9 That is, Don was there at the eldership hearings.
10 "And by I, you meant you, David Motherwell?" "Yes,
11 correct".

12 And then probably the best on page 1013 Mr.
13 Motherwell states: "Jerry also said that myself" --
14 this is during the hearings, Jerry Zwack said that,
15 "myself and Lanny Peterson knew more about this woman
16 and would testify. This woman was labeled Woman No. 4
17 at the eldership hearings. And that we would testify
18 at the eldership review sessions as to what we knew
19 that was in addition to what either he testified or
20 Barnett testified of." Question: "What was testified
21 to by the -- Did Donald Barnett object at that point
22 to this woman's testimony being raised later?"
23 Answer: "No".

24 Page 1149 of Motherwell. "Did Pastor Barnett
25 know you were going to be giving evidence at the

Argument Re. Findings of Fact

14 1 elders' hearing?" Answer: "Oh, yes". "Prior to
2 January 25, 1988, did you tell Pastor Barnett that you
3 would be providing evidence at the elders' hearings?"
4 "He knew I had evidence and we discussed me providing
5 evidence and we discussed John Bergin providing
6 evidence. That was one of the reasons I was selected,
7 because I had evidence".

8 And on page 1150. Question: "Prior to
9 January 25, 1988, did you tell Pastor Barnett that you
10 would be telling the elders group, with regards to the
11 Lake Chelan woman?" Answer: "He" -- meaning
12 Barnett -- "told me that I would. It's clear that
13 Pastor Barnett knew that David Motherwell, Lanny
14 Peterson, and John Bergin were going to be testifying
15 in his absence. That was testified to numerous times
16 by Mr. Motherwell at the hearing and it supports
17 paragraph 58.

18 MR. WIGGINS: That's all Motherwell's
19 statements and it gets better every time he tells it.
20 The first time he says it is, oh, yes he knew that the
21 information contained in there that I would be
22 testifying about it and he wanted me there to testify.
23 What he knew, what he knew, not secondhand hearsay
24 stuff, but what he knew. And then every time --
25 Motherwell wants to embellish on it every time he

Argument Re. Findings of Fact

1 tells it. Oh, yes, he knew it was going to be behind
2 closed doors and I told him that. The last time we
3 get it, oh, he told me to say it. I mean, it gets
4 better and better. Every time the man has a break his
5 story improves.

6 MR. ROHAN: There weren't that many breaks
7 during his testimony.

8 MR. WIGGINS: I've already pointed out a
9 change that he made in his testimony between another
10 break, the one about teeth.

11 MR. ROHAN: Your Honor, that was evidence
12 that was presented at the hearing. It's believed by
13 the Court.

14 THE COURT: Yeah, where are we?

15 MR. WIGGINS: What you believe is that the
16 letter --

17 MR. ROHAN: We're on paragraph 58. I think
18 it should stand as written.

19 MR. WIGGINS: What you believe is that the
20 letter gave him notice of this and I'm saying I don't
21 think that's true. Now, Mr. Rohan says lots of
22 witnesses, there was lots of evidence. Well, there
23 was one witness, Mr. Motherwell.

24 THE COURT: Well, the letter says it to
25 start with.

Argument Re. Findings of Fact

1 MR. ROHAN: Right. So based on the letter
2 and Mr. Motherwell's testimony.

3 THE COURT: The letter says these people
4 know a whole lot about it and they can tell better
5 than I can, quote Zwack.

6 MR. WIGGINS: That doesn't get you to saying
7 they are therefore going to come in behind closed
8 doors and give hearsay testimony.

9 THE COURT: No, but they're on notice they
10 will be given facts.

11 MR. WIGGINS: Facts are one thing, Your
12 Honor, this is hearsay, this is gross reports. And
13 one of the excerpts that Mr. Rohan read here is
14 something that happened after Zwack started
15 testifying. Barnett, did he object? No. What
16 happened when Barnett was objecting? Immediately
17 after the hearings started he objected and the
18 eldership got up and they walked out and came back in
19 and said your objection is overruled. You're not
20 supposed to be objecting at all. That's what they
21 told them. And MacKenzie considered it a breach of
22 the guidelines for Barnett to object. That's what he
23 said. So, the lack of objection isn't very probative.

24 MR. ROHAN: I think the finding should
25 stand, Your Honor, the way its written, 58.

Argument Re. Findings of Fact

1 THE COURT: I'll accept 58.

2 MR. ROHAN: Thank you, Your Honor. 59 is a
3 short one.

4 THE COURT: The only thing I can say to that
5 is no witnesses, neither one of them called any
6 witnesses.

7 MR. ROHAN: That's fine. We'll take out the
8 word further.

9 MR. WIGGINS: Excuse me for a moment.

10 THE COURT: What say you as to that?

11 MR. WIGGINS: You had a similar finding that
12 ~~got taken out earlier. I'm trying figure out which~~
13 one it was. The problem with this is it's another one
14 of these findings that's misleading in that it
15 suggests that it follows, well, that he knew lots of
16 testimony was going to be given behind closed doors.
17 Here he's not proposing witnesses. The implication is
18 he's not proposing witnesses to rebut the information
19 that he doesn't know about that's being presented
20 behind closed doors. That's why it shouldn't be in
21 there.

22 THE COURT: What he heard from Zwack was
23 disputable.

24 MR. WIGGINS: Sure, Your Honor.

25 THE COURT: No witnesses were proposed.

Argument Re. Findings of Fact

1 That's the way 59 now stands.

2 No. 60, I have a question on this. Right off
3 hand I can't think of what Guideline 9 was now.

4 MR. ROHAN: Guideline 9 states that Donald
5 Barnett and Jerry Zwack must both be present at all
6 the hearings except for the exclusive eldership review
7 session which will be held after the hearings are
8 completed. Neither Don nor Jerry shall attend these
9 review sessions.

10 THE COURT: Okay.

11 MR. WIGGINS: I don't think that the
12 evidence supports. The only evidence that supports
13 this is Motherwell's testimony.

14 THE COURT: I don't know what this says
15 other than that he knew that that's what was going to
16 happen going in.

17 MR. ROHAN: That's correct.

18 MR. WIGGINS: Which I think you have already
19 found.

20 THE COURT: Yeah. So, I don't know what
21 this adds.

22 MR. ROHAN: What this adds is that it
23 eliminated any dispute as to whether or not they
24 violated Guideline 9 by stating that they did not so
25 violate it.

Argument Re. Findings of Fact

1 MR. WIGGINS: It's kind of a conclusion.

2 MR. ROHAN: There's no earlier finding about
3 compliance with this guideline.

4 THE COURT: I'll leave it in just simply
5 because I don't think it hurts or helps or adds but
6 clarifies maybe.

7 61. We have stricken -- No, I guess I did that.

8 MR. WIGGINS: Your Honor, Guideline 6 was
9 the guideline that included confidentiality
10 requirements, Guideline 6, and they clearly violated
11 Guideline 6 when they got up at the worship session on
12 February 26.

13 MR. ROHAN: That's discussed in a later
14 finding.

15 THE COURT: Yeah, where they said they kept
16 their, quote, temporary notes, quote, when the lawsuit
17 was started. What does six say? How does it read?

18 MR. ROHAN: Six states the hearing shall be
19 strictly confidential. No permanent notes or
20 recordings of new kind shall be permitted. No
21 discussion of the hearings shall be permitted with
22 people outside the elders who attend.

23 So, what we're talking about here is that
24 provision of Guideline 6 which talks about keeping
25 permanent notes, we talk about the other provision of

Argument Re. Findings of Fact

1 confidentiality in a later finding, so if we want to
2 state that the eldership did not violate that part of
3 Guideline 6 which prohibited keeping, that would be
4 fine with us because we deal with the other part
5 later.

6 THE COURT: Why do we even mention it here?

7 MR. ROHAN: Because it was a major point
8 raised by --

9 THE COURT: That is something you're going
10 to cover?

11 MR. ROHAN: Well, the permanent notes was an
12 argument raised by Pastor Barnett throughout the
13 hearing. He asked a lot of people --

14 THE COURT: Yeah, I know. Didn't we take
15 care of that?

16 MR. ROHAN: No, we haven't talked about
17 permanent notes yet. The only thing we talk about
18 later is the confidentiality because the
19 confidentiality came up at the Friday evening service
20 of February 26. So, all we meant to talk about here
21 was the keeping of permanent notes and I think since
22 those are two separate sections of Guideline 6 we
23 would like a finding that says that and we would
24 change this one.

25 THE COURT: What I did was strike the first

Argument Re. Findings of Fact

1 sentence.

2 MR. ROHAN: The first sentence or the first
3 two sentences?

4 THE COURT: The first sentence starting with
5 the guidelines did not prevent taking temporary notes
6 once Pastor Barnett filed this action. The eldership
7 was justified in preserving their temporary notes,
8 bearing in mind that the action was started on March
9 4.

10 MR. ROHAN: So, the first sentence you think
11 is redundant based on the last sentence because it's
12 covered by the last sentence, they clearly didn't
13 violate the guideline.

14 THE COURT: So, I think the first sentence
15 should be out.

16 MR. ROHAN: Because it's redundant, is that
17 correct, Your Honor?

18 THE COURT: Yeah. Striking the first
19 sentence. We start that finding with the guideline
20 did not prevent.

21 MR. WIGGINS: Your Honor, I disagree with
22 the concept they were justified in preserving their
23 temporary notes at all. They all reviewed their notes
24 before they came into this hearings. There were to be
25 ~~no permanent notes. This is three years later. We~~

Argument Re. Findings of Fact

1 reason for that is to help ensure the confidentiality
2 of it. That confidentiality has been breached here as
3 it never should have been. The notes were part of it.
4 I've said my piece.

5 THE COURT: Once the action was started
6 challenging the actions of the eldership, I think the
7 confidentiality went out the window.

8 MR. ROHAN: 62.

9 MR. WIGGINS: I have a proposed finding on
10 the confidentiality part of Guideline 6. If you look
11 at page 37 of my objections, Your Honor.

12 MR. ROHAN: Could we discuss that when we
13 discuss the later finding?

14 MR. KNIBB: Reserving it to 78?

15 MR. ROHAN: 79.

16 MR. WIGGINS: I think it goes here because
17 you're talking about Guideline 6.

18 THE COURT: What did you say?

19 MR. WIGGINS: Your Honor, I have a proposed
20 Finding 61.1 that the eldership violated Guideline 6
21 when they stated to the congregation on February 26

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THE COURT: Taking notes only.

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MR. WIGGINS: But that's the same guideline

THE COURT: I struck the first sentence.

MR. ROHAN: So, we can bring it up when we

talk about 79.

MR. KNIBB: Charlie, look at 78.

MR. WIGGINS: Oh, I understand what you're saying.

THE COURT: 62. February 10.

MR. ROHAN: Your Honor, one of the things that when you propose your conclusions that you gave us last night, you stated that the senior elders or you gave us the conclusions that you --

THE COURT: Well, to the extent that I --

MR. ROHAN: Right, right. And we had looked at those and one of them I believe states that the senior elders acting as a board and individually disfellowshipped Donald Barnett. And I think that's the same sense of what we're trying to say here is that the three senior elders individually placed him on special status. That was the testimony if you'll recall of Mr. Hicks. Mr. Hicks so testified.

THE COURT: I'm not sure they can do that individually, can they?

MR. ROHAN: Yes. There was testimony that

Argument Re. Findings of Fact

1 special status could be imposed by the senior elders
2 as well as elders and counselors and that was a
3 practice at Community Chapel. And each of course of

4 the three members of senior elders were senior el
5 and could place people on special status. So, th
6 had it within their capacity to do so and the fin
7 should reflect they did it individually as well a
8 whatever they did. Otherwise, Mr. Wiggins is goi
9 argue that the action would be void.

10 MR. WIGGINS: I would like to be heard
11 this, Your Honor. I would like to direct the Cou
12 Exhibit 24.

13 THE COURT: I know about 24. It says it

14 stated as a board action.

15 MR. WIGGINS: That's exactly ri
16 took minutes of this meeting. What reall
17 about this is that I never should have mo
18 summary judgment because they have flip-f
19 the summary judgment. This man, Hicks, w
20 here on the stand and reinvented the whee

21 what happened re: these guys and the action...

22 individually, they didn't purport to act individually.
23 They did it as a board. And their board action was
24 illegal. There's just no doubt about it. In this
25 letter they not only say this is a board action, they

Argument Re. Findings of Fact

1 go on to say if you think that this is --

2 THE COURT: Let me talk to Mr. Rohan. What
3 effect, or let put it a different way, I don't know
4 how to say this. This may be garbled, as it usually
5 is, but let me give you this idea. The bylaws prevent
6 the board from acting, the Board of Senior Elders from
7 acting without Barnett's appearance or consent,
8 something like that. He has to be given his approval
9 to any action taken in his absence so forth and so on.
10 That's one of the protective provisions.

11 MR. ROHAN: Your Honor, one of the things
12 you said --

13 THE COURT: If you refer back to the bylaws,
14 everything they have done is contrary to the bylaws
15 except as they might have acted individually. Do they
16 have any inherent power to act without the limitations
17 of the bylaws in exercise of inherent discretion,
18 inherent jurisdiction in light of what has happened
19 here, in light of the findings?

20 MR. ROHAN: I guess I'd answer that in two
21 ways. The first thing is that the senior elders had
22 the power individually to place somebody on special
23 status and thus the three of them getting together
24 wasn't a lawful meeting. Still, the three of them
25 together placed Donald Barnett on special status.

Argument Re. Findings of Fact

1 Each of the three of them had that power individually
2 and certainly they could and did and so testified that
3 he was placed on special status. So, they had the
4 power individually under Community Chapel's procedures
5 to put him on special status and they did regardless
6 of whether the board action was proper or improper.

7 In terms of the board action, there is an implied
8 right where there is wrongful conduct for people to
9 act as the Court has said, and I think this finding
10 should be both that that was part of that implied act.
11 If they impliedly have the right to disfellowship him,
12 then they impliedly have the right to do some less
13 severe discipline than that. And what was happening
14 here, the reason they placed him on special status and
15 the reason the three of them wanted to do it privately
16 was not to embarrass the pastor.

17 And now their desire to do this in a way that
18 would be the least restrictive form and not embarrass
19 him publicly. They didn't go around and tell
20 everybody. It was another week or so before they told
21 the elders, other than David Motherwell who was his

to do this in such a way.
now trying to twist this around
didn't have the power, since
meeting, you didn't properly

22 counsel, but they tried
23 Pastor Barnett is no
24 and say, well, since you
25 it was an illegal board m

Argument Re. Findings of Fact

1 put him on special status, even though individually
2 you could, and since it was an illegal special status,
3 the disfellowshipment is illegal because that was the
4 reason why some of the elders gave, at least a partial
5 reason, why they disfellowshipped him. So, this was
6 the first link in a chain that goes up.

7 And in terms of our record on appeal, certainly
8 we'd like to have a finding that the three senior
9 elders in their individual capacity placed him on
10 special status and that is in fact what Mr. Hicks
11 testified to.

12 THE COURT: Well, they did as a board in
13 this, quote, illegal act or, quote, illegal meeting.

14 MR. ROHAN: One of the things you said to us
15 early on in this case that I thought was significant
16 and correct was that regardless of someone's belief in
17 their authority that they had the authority and that
18 they could exercise it.

19 THE COURT: If you have the authority, you
20 have the authority, whether you know you have or think
21 you have or go to other extremes or not.

22 MR. ROHAN: Right. And here the three
23 senior elders each individually had the authority to
24 place him on special status under the practice and
25 procedure of Community Chapel. That's why we worded

Argument Re. Findings of Fact

...it the way we did, the three senior elders...
should say individually at a meeting without the
presence or notice of that. But it is a very key
element on our part and I think the evidence supports
they did it individually and collectively just
you proposed or you stated in the conclusions you
us last night in terms of alleged wrongdoing.

MR. WIGGINS: I'd like to be heard when you
ready to hear me. Your Honor, here's the problem.

law -- I want to go through a couple of the
bits. First of all, the agreement, the January 25
agreement says the eldership, it talks about the
eldership having power to conduct these hearings and
says this agreement shall not extend to any other
such matters. That's the first thing.

The second thing is as you've pointed out, the
laws don't say that the Board of Senior Elders can't
at a Board of Senior Elders meeting, they say the
senior elders shall not get together and discuss
business without Pastor Barnett being there. They
won't do it. That's what it says.

Now, the law recognizes a major difference
between people getting together collectively and doing
something versus people doing something individually.
The reason is the dynamics change. People are

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Argument Re. Findings of Fact

1 influenced to do things, people discuss things, they
2 act differently when they act as a group. That's why
3 the law has a whole concept of conspiracy. It's
4 because people act differently when they get together
5 as a group and they can do things differently when
6 they get together as a group. It makes a difference.
7 And it is false to say these people acted
8 individually. They didn't do it. They got together
9 as a group.

10 Now, why it makes a difference that they did that
11 is this. You recall in the tape that you talked about
12 and you changed that Pastor Barnett, you know, he met
13 with the three senior elders and Motherwell on
14 February 3rd, one week before this meeting. He
15 frankly thought the senior elders were sympathetic to
16 him and Jack Hicks was somewhat sympathetic to him and
17 Jack Hicks there's testimony went back and tried to
18 impose new guidelines to kind of tighten up the
19 procedures. Jack Hicks was not totally unsympathetic
20 to Don Barnett at that point. And Barnett thought
21 they were somewhat sympathetic to him.

22 Now, what would have happened if the senior
23 elders had said, Pastor Barnett, we have got to get
24 together. Don, we have to get together and we've got
25 to discuss this because something has got to be done

Argument Re. Findings of Fact

1 and you're going to have to do something here. We
2 don't know what would have happened.

3 Now, Mr. Rohan made a big issue out of the fact
4 that Pastor Barnett said in his sermon on February 28
5 he was complaining about the fact they had tried to do
6 this and impose this special status in a meeting that
7 he wasn't invited to. And Mr. Rohan was the one who
8 impeached Pastor Barnett by reminding Pastor Barnett
9 that he said if you want to do something have a legal
10 meeting. Let's get together and talk about it, let's
11 discuss it as a group, let's vote on it as a group.

12 Now, nobody knows what would have happened if
13 they had done that. It might well be that they all
14 would have come to some consensus about a reasonable
15 way of dealing with this and things wouldn't have
16 blown up. But they didn't do it that way. The
17 reality is they didn't do it that way. They didn't
18 present it that way to Pastor Barnett. Nobody ever
19 said to Pastor Barnett, gee, we have the power to do
20 this individually, so we're doing it individually.
21 It's not the fact that you weren't invited to the
22 board meeting. And he reacted in kind. He reacted to
23 the fact that this was presented to him --

24 THE COURT: Why didn't he do that? Just to
25 follow your argument, on the day they met at his

Argument Re. Findings of Fact

1 house, why didn't he sit down with them and say, now,
2 look fellows, let's have a meeting. Instead of saying
3 no, no, get out, I'm not. I want to discuss this, you
4 want to discuss that, go. Why didn't he do that?

5 MR. WIGGINS: That was a month later, Your
6 Honor, and a lot of water had gone under the bridge at
7 this point. At this point, they had met without him.
8 They had purported to impose special status on him.

9 THE COURT: There are always differences, I
10 mean even time and people and everything else, but he
11 could have done it then, it seems to me.

12 MR. WIGGINS: There comes a point when you
13 can't, when it's too late. And what really got to him
14 was, you know, in this church he was the Pope. He was
15 the Pope. He could not be deposed. He was the
16 pipeline to God. That's the way he regarded himself.
17 That's the way the people regarded him. He was the
18 Pope, he couldn't be removed. And once they got up
19 and they said to the congregation, your Pope has
20 committed adultery and we have told him he should
21 accent special status. that he has to go on special

22 status and he won't do it and so we're going to force
23 it down his throat, the situation is unalterably
24 compromised. At that point you can't retract things
25 like that, you can't go back and you can't have

Argument Re. Findings of Fact

1 meetings. But they did not do this individually.
2 What disturbs me about it --

3 THE COURT: Can you support any showing that
4 they did this individually?

5 MR. ROHAN: Yes. We have the testimony of
6 Mr. Hicks on page 1231. He's asked the question, I
7 don't have the question, but the answer is "I could
8 not call it a senior elders meeting." This is the
9 meeting on February 10th. "I could not call it a
10 senior elders meeting. Certainly Don Barnett, the
11 fourth member, was not present. Also, the matters
12 being discussed were not the ones that required the
13 action of the Board of Senior Elders. This was simply
14 a collective decision of the three of us, which we

15 each individually had the authority on our own,
16 without the other or without a board to make a
17 felt it was appropriate to record that decision.
18 That's what Mr. Hicks testified to. So, there
19 support for that. If we say the three senior e
20 individually --

21 MR. WIGGINS: Your Honor, the testimo
22 flies in the face of those minutes. It flies i
23 face of the letter. Sure, you can get a witness
24 stand up and mouth words that will support some

25 ~~you know, because it is an important theory, but the~~

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Argument Re. Findings of Fact

1 what they said.

2 THE COURT: Where would you put --

4 senior elders as individuals.

5 THE COURT: Well, they placed
6 board as an individual and collective

7 MR. ROHAN: As an individual
8 act.

9 MR. WIGGINS: May I hear from

10 MR. KNIBB: I've got met an
11 pastor on special status as an individual
12 collective act.

13 MR. WIGGINS: That's the

14 MR. ROHAN: Yes.

15 MR. WIGGINS: Your Honor,
16 my vehement objection to this. What
17 is not a search for truth, it's a search
18 that will support a result. This is
19 truth.

20 THE COURT: I'm giving you
21 have to appeal.

22 MR. WIGGINS: Thank you,

23 THE COURT: 63, any objection

24 MR. ROHAN: I don't believe

25 MR. WIGGINS: I don't see

Argument Re. Findings of Fact

18 1 hold on for one second. I do think, Your Honor, that
2 my proposed 62.1 is also accurate. That's at page 39
3 of my objections. That is one hundred percent
4 correct.

5 THE COURT: Except that it doesn't --

6 MR. ROHAN: The material parts of that are
7 already covered.

8 THE COURT: Yeah. I don't see, the only
9 difference is the individual and collective act part.

10 MR. WIGGINS: Then I guess if we wanted to
11 combine this with 62 -- Here's what I would suggest,

12 ~~that 62 say where we inserted as an individual and~~
collective act it should be as an individual and board
act, Board of Senior Elders act, because that's the
collection we're talking about

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MR. ROHAN: No, I think that's wrong, Your

16

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Honcr.

THE COURT: I'll leave it as it is.

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MR. ROHAN: Thank you. 63 I think we're all

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nt, at least I didn't see any objection to

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in agreemen

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it.

THE COURT: 64.

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MR. WIGGINS: 64 is really not correct.

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THE COURT: I thought I found something.

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MR. ROHAN: You did find that. In fact, you

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Argument Re. Findings of Fact

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said that in your --

THE COURT: I know I said it but I thought I had basis for saying it.

MR. ROHAN: Exhibit 39 which was admitted which was the special status procedure and policies.

THE COURT: Yeah, that's where.

MR. ROHAN: A, as a step before disfellowshipping.

MR. WIGGINS: That's exactly what I'm referring to. Exhibit 39 says it is used in a number of ways. One of the ways in which it's used is as a step before disfellowshipping and so I think this should say, if you're going to enter something like this --

THE COURT: Among other things?

MR. WIGGINS: That's correct.

64, special status was also
among other, I don't like the word
Your Honor, that's not correct
it can be used in a number of
is a first step toward
that's only one of the ways. It
where it is not a first step
ng.

THE COURT
18 among other things, am
19 things.
20 MR. WIGGINS:
21 because what 39 says i
22 ways. One of the ways
23 disfellowshipping. Th
24 can be used in a way w
25 before disfellowshipp

Argument Re. Findings of Fact

1 THE COURT: That's what I'm trying to say.

2 MR. ROHAN: Your Honor, there's six ways.

3 The first way is what is in 63 which we all agree is a
4 form of probation as a means for the church government
5 to discipline another. The only other way that would
6 apply here is as a step before disfellowshipping. The
7 other four reasons in this memo, one is as a means to
8 keep non-members from causing trouble. Barnett was
9 not a non-member.

10 THE COURT: Here, I'm having trouble framing
11 this 64. Special status was also --

12 MR. WIGGINS: Might I suggest a way?

13 THE COURT: Among other things.

14 MR. ROHAN: Why don't we put back in your
15 words described as. That would take care of it.
16 Special status was also described as the first step in
17 disfellowshipping.

18 MR. WIGGINS: That's a different concept.
19 The way the finding should read to be consistent with
20 the exhibit is one of the uses of special status was
21 as the first step in disfellowshipping. That's the
22 correct finding.

23 THE COURT: One of the uses of special
24 status.

25 MR. ROHAN: And then leave the rest the way

Argument Re. Findings of Fact

1 you don't like.

2 MR. WIGGINS: That's correct, that's
3 correct. And I think first of all the bylaws don't
4 say that and the memo I don't think says that. The
5 Exhibit 39 doesn't say that. It doesn't say that
6 elders, senior elders could put people on special
7 status and I don't know what the evidence is that they
8 claim to support this.

9 MR. ROHAN: There's a lot of evidence.

10 THE COURT: There was considerable testimony
11 on that.

12 MR. ROHAN: Mr. Motherwell testified at page
13 1043, "Who at Community Chapel was permitted to place
14 an individual on special status?" "The practice was
15 very common and consistently that a counselor or an
16 elder, senior elder would place individuals on special
17 status".

18 MR. WIGGINS: That's a counselor or an
19 elder, that doesn't say that it was a common practice
20 for a senior elder or an elder to do it.

21 MR. ROHAN: It was custom and practice, not
22 a common practice, custom and practice that they could
23 place them on special status.

24 MR. WIGGINS: His testimony, if you read the
25 sentence quite literally, his testimony is that it was

Argument Re. Findings of Fact

19 1 custom and practice, is that what he says?

2 MR. ROHAN: Yes. "Who at Community Chapel
3 is permitted to place an individual on special
4 status?"

5 MR. WIGGINS: See, that's the question. Who
6 is permitted to do it? And he says, well, a counselor
7 or elder. He doesn't say it was custom or practice
8 for a senior elder or an elder to do it.

9 MR. ROHAN: Here Mr. Hicks testified it was
10 a longstanding policy at the church that senior elders
11 among others could disfellowship people as the need
12 required and was appropriate. They also thereby were
13 authorized to take any lesser levels of action and
14 special status was a lesser level of action: Answer:
15 Yes. And Mr. Hicks also has other testimony about the
16 fact that it included the senior elders and some of
17 the elders.

18 MR. WIGGINS: That's different from saying
19 that's custom and practice.

20 ~~MR. ROHAN: I think that supports custom and
21 practice, Your Honor.~~

22 THE COURT: Okay, 66.

23 MR. ROHAN: We agree on 66, 67, and 68.
24 Those are all agreed to.

25 MR. WIGGINS: Well, I guess --

Argument Re. Findings of Fact

1 MR. ROHAN: They're all not objected to.

2 MR. WIGGINS: Well, the reason they're not
3 objected to is that I disagree with the fact that they
4 in fact placed him on special status.

5 THE COURT: I understand.

6 ~~MR. WIGGINS: That's the problem. Before~~
7 placing Barnett on special status. That implies they
8 effectively placed him on special status. 66, for
9 example. I object on those grounds.

10 MR. ROHAN: Can we start after lunch with
11 No. 69?

12 MR. WIGGINS: In fact, all of those assume
13 that they effectively did that.

14 MR. ROHAN: Is that appropriate.

15 THE COURT: Okay.

16 (Luncheon break.)

17 MR. ROHAN: Shall we start by going over
18 Finding 41?

19 THE COURT: Okay, have you gone over 41.

20 MR. WIGGINS: Yes, Your Honor. Here's what
21 I would suggest. I felt we were a lot closer to a
22 finding and I thought that Mr. Knibb was going to
23 polish this up, but this looks an awful lot like the
24 things that were originally there. There hasn't been
25 much changed here. Here's what I would propose. I'm

Argument Re. Findings of Fact

1 reading from their 41. The eldership received
2 statements by Jerry and members of the eldership. Now
3 from there I would delete everything to the end of
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19 THE COURT: I'll leave it in, better to say
20 it. When you start designating various things --

21 MR. WIGGINS: The problem is it can be
22 anything, Your Honor. They can then say you found
23 this and you found that. Who knows what that means.

24 MR. ROHAN: We can only say what is in the
25 record, as you well know.

Argument Re. Findings of Fact

you also know, you may not
that's in the record. We are
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er the broadest possible
an can argue any
eal. This is the time to

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MR. WIGGINS: As

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finding facts here. This i
facts, not the place to ent
findings from which Mr. Rob
conceivable evidence on app

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Argument Re. Findings of Fact

1 very seldom thought people were lying in your years in
2 court and that's the trouble with this. It's a
3 terrible sounding --

4 THE COURT: All I'm saying is they received
5 statements. I'm not saying that they lied and covered
6 up those actions, but that's what they found because
7 they, the eldership, constantly referred to that in
8 their letters to Barnett. I believe that they heard
9 that.

10 MR. ROHAN: Thank you. We'll go on to No.
11 70.

12 MR. KNIBB: Can I just clarify what we have
13 agreed to?

14 THE COURT: I put in two words --

15 MR. KNIBB: Of complaints from women of the
16 congregation complaining in detail.

17 THE COURT: Yes.

18 MR. WIGGINS: I don't think it's in detail,
19 it's not in detail.

20 MR. ROHAN: No. 70.

21 THE COURT: This was after the fact by the
22 eldership committee?

23 MR. ROHAN: Yes.

24 MR. WIGGINS: Your Honor, the problem with
25 this finding it's that it is again a reconstruction

Argument Re. Findings of Fact

1 after the fact that's contrary to the written document
2 that these people wrote at the time. They don't ever
3 say in their letter to Pastor Barnett we are placing
4 you on special status. What they are saying is we
5 want you to know we agree with the action of the
6 senior elders and we implore you to accept it. That's
7 probably the place where the word implore appeared.

8 What I understand is this. Pastor Barnett is
9 accused of having made something up because Jerry
10 Zwack's letter which wasn't addressed to him doesn't
11 say things that Pastor Barnett thinks were grievances.
12 But here these people can walk away from every letter
13 they ever wrote and contradict the clear terms of the
14 letter and say, oh, we did something different.
15 There's a double standard that these people are
16 applying to Pastor Barnett and it is totally wrong.

17 And when they wrote these things, what they said
18 had an impact and they committed themselves.

19 THE COURT: Let's go back to the letter.

20 MR. ROHAN: Your Honor, the letter of
21 February 24 states we want you to know that every
22 member of the committee completely supports the
23 letter including placing you on special status
24 under the terms of the status.

25 When Mr. MacKenzie was asked about that, he

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Argument Re. Findings of Fact

1 stated at page 518 we decided to write a letter of
2 concurrence ratifying what they did. I looked up

3 ratified last night in my dictionary, Webster
4 Dictionary. Ratified means to approve and sa
5 formally as if anybody else, somebody ratified

~~and themselves other testimony.~~

~~THE COURT: What do you have any answer to~~

9 this statement "and themselves voted to place him on
10 special status"?

11 MR. ROHAN: Okay. Well, the one comment by
12 MacKenzie ratifying and ratifying I think means to
13 approve and sanction themselves.

14 THE COURT: The letter doesn't quite say
15 that.

16 MR. ROHAN: The letter states that we
17 support this letter including placing you on special
18 status by unanimous vote of the entire church
19 eldership and asks for immediate and full compliance
20 with the conditions of the special status letter to
21 you.

22 And there's a statement in Motherwell at page
23 1046, "What was the votes for?" "The vote was for to
24 ~~part of the vote was for support in~~

25 joining with the action to join with the act

Argument Re. Findings of Fact

1 special status and placing Barnett on special status
2 and the vote was unanimous.

3 At page 1065, Motherwell, "How did you vote to
4 put him on special status? In your opinion at that
5 point, was he on special status or not on special
6 status?" Answer: "He was on special status".

7 THE COURT: Well, I think I'll change this
8 to read the remaining elders agreed with the decision
9 to place him on the status.

10 MR. WIGGINS: May I suggest a change?

11 THE COURT: And strike the rest of that
12 sentence.

13 MR. WIGGINS: Rather than striking the rest
14 of the sentence, I would suggest that it say and
15 themselves asked him to comply.

16 THE COURT: Ratified the action.

17 MR. WIGGINS: No, what they did was they
18 asked him to comply with the conditions of the senior
19 elders' special status letter to him. Those are the
20 very words that Mr. Rohan read out of the letter.
21 They asked him to comply with the conditions of the
22 senior elders' special status letter to you.

23 And as far as reading definitions out of the
24 dictionary of a word that Mr. MacKenzie tossed out
25 here, we have gone far afield from what words might

Argument Re. Findings of Fact

1 mean in terms of the law or in terms of the Bible
2 which these people were certainly relying on. And I
3 think Mr. Rohan, the weight he puts on that one word
4 by Mr. MacKenzie just won't bear up.

5 MR. ROHAN: How do you want it to read, Your
6 Honor?

7 THE COURT: Just a minute. Okay, the first
8 sentence shall now read as follows: "The remaining
9 elders agreed with the senior elders' decision to
10 place Pastor Barnett on special status and they
11 themselves voted to ratify the action of the senior
12 elders and to request him to comply with the terms and
13 conditions of the special status", and striking place
14 him on and insert "at that point".

15 MR. ROHAN: Your Honor, could I ask that you
16 say that the remaining eldership because we have
17 always made a distinction between the two.

18 THE COURT: I didn't mean to change the
19 eldership.

20 MR. KNIBB. I didn't get all of that
21 language, Your Honor. You said they voted to ratify
22 the action of the senior elders and to ask him --

23 THE COURT: And to request him to comply
24 with the conditions of and back to the sentence
25 "special status".

Argument Re. Findings of Fact

1 MR. KNIBB: When you say him, it's not
2 clear.

3 THE COURT: All right, Pastor Barnett.

4 MR. WIGGINS: All right, Your Honor, then to
5 be consistent with that change, the next sentence
6 should also be changed. It reads their letter to
7 Pastor Barnett regarding special status is Exhibit 30.
8 Motherwell was one of the eldership. This next phrase
9 should be deleted. Who placed Pastor Barnett on
10 special status because that assumes exactly what you
11 just struck from the first sentence. Strike that and
12 it can continue on after that.

13 THE COURT: Yeah, who placed him on special
14 status. I'll just strike that.

15 MR. WIGGINS: My last point is a very minor
16 one.

17 MR. KNIBB: I'm sorry, I don't understand
18 what we're doing. Motherwell was one of the eldership
19 what?

20 MR. WIGGINS: We're striking who placed
21 Pastor Barnett on special status.

22 MR. KNIBB: Well, then what does the
23 sentence mean?

24 MR. WIGGINS: Motherwell was one of the
25 eldership and he had earlier agreed with the senior

Argument Re. Findings of Fact

1 elders' special status. That's what the sentence now
2 reads.

3 MR. KNIBB: Is that what Your Honor means?

4 THE COURT: Yeah. I'm striking who placed
5 Pastor Barnett on special status.

6 MR. ROHAN: Shouldn't we put Motherwell was
7 one of the eldership ratifying the action of the
8 senior elders?

9 THE COURT: No, we can get too picky.

10 MR. WIGGINS: My last point, Your Honor, is
11 that this says that Motherwell and Mathews were given
12 notice of this in accordance with standard procedures.
13 Well, they were given notice because they were part of
14 of the eldership, and I think that introductory phrase
15 should simply be stricken. In accordance with the
16 standard. In fact, the rest of it doesn't mean
17 anything.

18 MR. ROHAN: Your Honor, on page 1045 --

19 THE COURT: Just a minute. No, that will
20 stand.

21 MR. ROHAN: Thank you, Your Honor. No. 71.

22 MR. WIGGINS: Your Honor, to be consistent
23 with the change you just made, eldership --

24 MR. ROHAN: Should we say and the eldership
25 ratification?

Argument Re. Findings of Fact

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MR. WIGGINS: All right. So, it should be

~~the decision about the question of whether or not Pastor Barnett~~

3 Barnett on special status.

4 THE COURT: And the eldership's
5 ratification.

6 MR. WIGGINS: I really don't believe it's
7 proper to use that word here, Your Honor.

8 THE COURT: That was what the evidence
9 showed.

10 MR. WIGGINS: All right. Now, I have one
11 other problem with this. Defining that this was a
12 reasonable response to circumstances disclosed by t
13 eldership hearings and review sessions and the even
14 following them, the problem is it was not a reasonable

15 response for the senior elders to hold a board meeting
16 to do this. It was not reasonable. It was illegal.

17 MR. ROHAN: We have already crossed that
18 bridge. You held it was individually and
19 collectively.

20 THE COURT: I think to be consistent with my
21 position he have to find that.

22 72, beginning with Pastor Barnett's February
23 speech followed by his reaction to special status.

24 MR. WIGGINS: My problem with this is that
25 it was not obvious to anyone that, quote, Pastor

Argument Re. Findings of Fact

1 Barnett was resisting any attempt by them to correct
2 his conduct. What was resisting was the special
3 status that had been imposed upon him. That is
4 exactly what he was resisting.

5 MR. ROHAN: He was resisting the February
6 23rd, he was resisting the elders' hearings at that
7 point, he had resisted the earlier attempts -- Well,
8 I'm confining to this period. He had resisted on
9 February 3rd and his speech to the elders on February
10 25. He basically told them that he was trying to
11 abrogate that earlier agreement of the 25th. He was
12 certainly resisting any attempt. There's nothing in
13 any of their attempts to correct his conduct that he
14 in any way agreed to any way, shape, or form.

15 MR. WIGGINS: My point is, Your Honor, there
16 was only one attempt.

17 THE COURT: 72 I'll accept.

18 MR. WIGGINS: Oh, I have a proposed 72.1.
19 We're talking here about the February 25 meeting.
20 Page 44 of my materials.

21 MR. ROHAN: We believe, Your Honor, that
22 that is immaterial. In addition, Mr. Motherwell I
23 believe also testified that he didn't recall that and
24 he was present at that time if there was any such
25 conversation.

MR. WIGGINS: That's not contradictory of it.

THE COURT: I don't think he made any specific request that they not do anything at the meeting of the congregation at the service. He just says let's table this until I get back; isn't that what he said?

MR. WIGGINS: No, Your Honor, I'm fairly confident and I can find the citation at our next break. Maybe we should defer this. I'm fairly

~~confident that he testified that he told them not to disclose anything to the congregation, don't do anything about this at the worship service.~~

THE COURT: He didn't say anything about disclosing. That was their own idea.

MR. WIGGINS: Well, what the finding says is he ordered them not to say anything at the worship services about the special status or the eldership hearing until further eldership hearings the following week. My recollection is that's what he testified to. Now, I can try to find that. I'd like to find if that is supported.

THE COURT: If you want to come back to that, we will.

MR. ROHAN: 73.

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Argument Re. Findings of Fact

1 THE COURT: I struck the last sentence.

2 MR. ROHAN: Yeah, we were going to withdraw
3 the last sentence. 74.

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THE COURT: Are we still back on that?

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MR. WIGGINS: I'm on 74. I haven't spoken
to 74 yet. And I don't think there is evidence that
they had that anything was ongoing or that -- And if
there is, it should be specific. It should say what
evidence they had. And I just don't know what they're
relying on.

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MR. ROHAN: Your Honor, this is a belief
that the elders testified to.

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THE COURT: That's what I thought after
listening to them. That's what they thought and it
was the basis upon which they addressed the
congregation later that he wanted to warn them.

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MR. WIGGINS: Okay. Then we ought to take
out reasonably. If the finding is this is what they

Argument Re. Findings of Fact

1 believed, then that's your finding. But I don't think
2 they have evidence to support that.

3 MR. ROHAN: Your Honor, it was a reasonable
4 belief. I can go into why I think it was a reasonable
5 belief.

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Argument Re. Findings of Fact

1 bad conduct.

2 THE COURT: That's why I didn't want the "in
3 light of pending lawsuit". Sure, they reasonably
4 believed they could be sued.
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Argument Re. Findings of Fact

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Argument Re. Findings of Fact

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12 MR. WIGGINS: Your Honor, the bylaws didn't
13 give them any responsibility to do that and there's
14 the answer to it.

15 THE COURT: 76.

16 MR. ROHAN: I think we're all in agreement
17 on 76.

18 MR. WIGGINS: I have a 76.1 on page 46 of my
19 objections.

20 MR. KNIBB: There is a typo in 76 in the
21 second sentence. It says they asked the congregation
22 pray, it should be they asked the congregation to
23 pray.

24 MR. ROHAN: No, that's not 76.

25 MR. KNIBB: My numbers are different. This

Argument Re. Findings of Fact

1 is hard, I'm sorry.

2 MR. ROHAN: That's 77 and we haven't gotten
3 there yet.

4 THE COURT: Okay, 76.

5 MR. WIGGINS: My 76.1 really relates to 72.1
6 because if Pastor Barnett told them not to disclose
7 this and the bylaws say he is in charge of the worship
8 services, then they violated the bylaws when they got
9 up and announced this or disclosed it. And so you've
10 asked me to see if I can find any evidence on it and I
11 will see if I can find any evidence on it. I would
12 like to hold this one in abeyance, 76.1.

13 MR. ROHAN: Your Honor, I believe it's a
14 ~~conclusion, not a factual finding and, No. 2, I~~
15 believe it's not material.

16 THE COURT: Well, that's what they did and I
17 will accept a statement that the bylaws provided that
18 pastor had charge of all worship services.

19 MR. KNIBB: If there's evidence for that.

20 THE COURT: Well, I think it's in the
21 bylaws.

22 MR. ROHAN: That's in the bylaws, not that
23 they violated it.

24 THE COURT: Where would you put it?

25 MR. WIGGINS: It belongs right after 76

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1 because 76 says the elders got up at the regular
2 worship service and they placed Barnett, announcing
3 they had placed him on special status, et cetera.

4 And as far as this is a conclusion of law and
5 shouldn't be in a finding, my goodness, we have sat
6 here and gone through conclusions that this didn't
7 violate that and they had authority la-de-da. You
8 know, it's a little late for Mr. Rohan to start saying
9 this is not a finding.

10 MR. ROHAN: Your Honor, the violation of the
11 bylaws, one, I don't believe they violated the bylaws
12 ~~because I don't believe Pastor Barnett told them not~~
13 ~~to mention the special status at the hearings, and I~~
14 believe it's incredible to believe they would have
15 thought at the time --

16 THE COURT: I don't know and Mr. Wiggins is
17 going to try to find --

18 MR. ROHAN: So, we should come back to this
19 one?

20 THE COURT: No, let's take care of this now.
21 We're coming back to too many of them.

22 MR. ROHAN: I think it's correct to state
23 that the bylaws of Community Chapel state the pastor
24 is in charge of all services. That's true. I don't
25 have any objection to that. But the announcement

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1 violated the bylaws, I don't think that's true.

2 MR. WIGGINS: If he gave them that direction
3 and the bylaws say he is in charge of the services
4 whether he's present or not and he told them not to
5 get up and announce the special status or disclose
6 what had happened in the hearings and they did, the
7 conclude is inexorable. It's a finding just like the
8 finding they didn't violate Guideline 6, that's the
9 same thing.

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20 THE COURT: I still believe that a reference
21 should be made that the bylaws vest in Pastor Barnett
22 the --

23 MR. ROHAN: The power. I think what the
24 bylaws do say is that he is in charge of all worship
25 services, and I think that should be back in paragraph

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1 6 where we list the pastor's powers.

2 THE COURT: It was.

3 MR. WIGGINS: No, those were the protective
4 provisions, this is different.

5 THE COURT: Under paragraph 77 I will
6 include an additional sentence which says the bylaws
7 state that Pastor Barnett shall be in charge of
8 worship services. I'm not sure it says worship
9 services.

10 MR. WIGGINS: I believe it does, Your Honor.
11 Maybe we ought to look at it. I think it says in
12 charge in worship services whether or not he is
13 present. I'm pretty sure it's that specific.

14 MR. WIGGINS: It says all services. The
15 pastor shall be officially in charge of all services
16 of the church whether or not they are held on the
17 church grounds and whether or not he is present at the
18 meeting.

19 THE COURT: Okay. All services of the
20 church. Do you have that, Mr. Knibb? Under 77 the
21 bylaws state that Pastor Barnett shall in charge of
22 all services of the church.

23 MR. WIGGINS: Your Honor, shouldn't it say
24 whether or not he is present? Because that's the
25 point here. He wasn't present at this service.

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1 THE COURT: Whether or not he is present.

2 MR. KNIBB: 77 is also the one where the
3 typo is in the second sentence. We should insert the
4 word "to" after the word "congregation".

5 MR. WIGGINS: Excuse me, I have a 76.2 also,
6 the bottom of page 46.

7 THE COURT: That's what we get into in 79.

8 MR. WIGGINS: That's correct.

9 MR. ROHAN: Are we talking now about 79?

10 THE COURT: Yes.

11 MR. WIGGINS: Would you like us to address
12 that?

13 THE COURT: Do you think they violated the
14 bylaw?

15 MR. ROHAN: No.

16 THE COURT: Rather the guidelines.

17 MR. ROHAN: No, for a couple of reasons.
18 One, Mr. MacKenzie states at page 608 that he believed
19 this was one of the final decisions of the eldership
-20 that was permitted to be made under Guideline 11.
21 Guideline 11 permitted them to make final decisions.

22 In addition, Mr. Peterson I believe testified at
23 page 1406 that Donald Barnett had earlier violated the
24 confidentiality of the guidelines by going out and
25 discussing with a woman testimony that occurred at the

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1 hearings. And he came back to the hearings and said
2 this women really didn't say what somebody else said
3 she said. So, Barnett himself had violated them
4 earlier.

5 In addition, what they did was they disclosed
6 merely conclusions. They did not disclose any of the
7 evidence presented. They didn't say that Donald
8 Barnett did this to Woman 1, 2, 3, 4, and 5, they only
9 testified as to their conclusions. I don't think that
10 was a violation.

11 In addition to that, it was incumbent upon the
12 eldership at the time because they had the
13 responsibility to Community Chapel and the female
14 congregants to take the next step. This was going the
15 next step.

16 So, for all four of those reasons, this is in
17 accordance with Guideline 11 as testified to by Mr.
18 MacKenzie, Donald Barnett violated them earlier, the
19 fact that they had responsibility to the people and
20 the fact they did not disclose what occurred at the
21 hearing, they just disclosed some conclusions and made
22 it as minimal as possible. I do not believe they
23 breached the confidentiality. That's why we have the
24 second sentence in paragraph 79. It was limited to
25 what was reasonably necessary to inform the

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1 congregation.

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1 violate it, or depth of rewriting history, I don't
2 know which.

3 MR. ROHAN: We believe it's supported by the
4 evidence and we believe that the explanation made
5 there that they testified to was reasonably necessary
6 to inform the congregation of the reasons why. They
7 did not even at that point go out and say Don Barnett
8 said he fondled this person or did that to that person
9 or anything like that.

10 At all times the elders all along the way,
11 special status, they tried to do it privately with
12 Barnett and he wouldn't agree and then the three of
13 them and the 16 of them went to him and he didn't
14 agree to that. There was another part.

15 Then they had to go to the congregation. They
16 had a responsibility. And it would have been
17 incredible if these men at that point had just said,
18 well, we don't really care about the women in the
19 church, we're not going to tell them anything.

20 And a person who had been in the church for that

21 ~~person for 20 years it would be no wonder if that belief~~
22 these women in the church not to be alone with Pastor
23 Barnett because he was on special status without
24 giving them a reason. I think it was eminently
25 reasonable and it was not a violation of the

Argument Re. Findings of Fact

1 guidelines because it was one of their final
2 conclusions.

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1 MR. ROHAN: This is where we would like to
2 make our typographical correct.

3 THE COURT: I don't understand what you
4 people are talking about. 77? I'm already passed
5 that. Isn't that the one we put the additional
6 sentence on?

7 MR. KNIBB: That's what I understood.

8 THE COURT: Yeah, I did too. There's no 78
9 and I thought we were talking about 79, the violation
10 of the confidentiality guideline. That's the one I'm
11 coming back to.

12 MR. WIGGINS: Your Honor, we never discussed
13 77.

14 THE COURT: Well, I have and I'm satisfied
15 with it. No. 80. Probably you don't like that
16 language.

17 MR. WIGGINS: Well, it's not so much the
18 language.

19 THE COURT: Whatever the thought is, it
20 should be in there.

21 MR. WIGGINS: I proposed 80.1 and I proposed
22 82.1.

23 THE COURT: I spent four hours I guess
24 listening to tapes and I thought to myself after I
25 finished what in the world did he say? He said

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1 everything. He said yes and he said no. He said
2 maybe and he said positively. He said this and he
3 said that. And you cannot characterize that sermon.
4 He said, yes, I did it and, no, I didn't and, yes,
5 they helped me and, no, I was guided by demons. I
6 don't know what you say, I really don't. If you can
7 help me on that, I would be happy to have you. He
8 said everything. I doubt that counsel has even sat
9 down and listened to that or read that sermon.

10 MR. KNIBB: I have.

11 MR. ROHAN: I read it twice.

12 MR. WIGGINS: I have too. I haven't
13 listened to the tapes though.

14 THE COURT: You know what it said then and
15 how you're going to characterize that sermon I don't
16 know.

17 MR. WIGGINS: Well, Your Honor, if it defies
18 characterization, that's what we ought to say and we
19 ought not have all this characterization in it.
20 That's what we ought to say. I'm perfectly capable of
21 going through and pulling things out just as Mr. Rohan
22 is capable of going through and pulling things out.

23 THE COURT: And how you can come to some
24 finding what that says.

25 MR. ROHAN: I think what you have written

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6 1 there in 81 is precisely correct and what we put down
2 in 82, and I actually went through and, I actually
3 didn't, Lynn did, I didn't embark on that task myself.

4 THE COURT: 81 looks like mine.

5 MR. ROHAN: 81 is your's, I think that's
6 correct. We went through and we found support for all
7 of that in the sermon.

8 MR. WIGGINS: The problem is, Your Honor, as
9 you say, there are a lot of statements in that sermon
10 and you cannot go through this and say, as you say for
11 example, it was complete rebuke of the eldership,
12 their motives and what they were trying to do. That
13 really was not entirely accurate because he says other
14 things that are completely different.

15 THE COURT: He says he loves them.

16 MR. WIGGINS: That's exactly right. So, I
17 think it's unfair to pick out one set of things and
18 not put in the others. Now, I've put in the other
19 things in my proposed 82.1 and there are a bunch of
20 them. The things that he says that I've pulled out
21 here are one hundred percent consistent with his
22 defense at this trial. They have flip-flopped on that
23 letter they wrote and they may have flip-flopped on
24 all of their depositions but not Pastor Barnett. He
25 has stuck with his position from the very day one and

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1 think that's significant.

2 If we're going to pull things out of this sermon
3 and say it's complete rebuke and he would answer to no
4 one, we ought to pull out the other things too. I
5 think probably the best thing to do is say it defies
6 characterization and leave it at that. I also think
7 it's very clear that he called for a vote and that he
8 was overwhelmingly supported. That's another thing I

9 think that ought to be in here.

10 MR. ROHAN: I would like to talk about

11 vote separately, but, Your Honor, I think what
12 have done in 81 is pretty extraordinary and I
13 ought to stay in and I think what you have put
14 things that you believe are material to this case
15 what he said in his sermon. I think that the
16 things that are sought to be added are not material
17 things, so I think we ought to leave 81 the way

18 MR. WIGGINS: Well, see, the problem

19 Your Honor, the second sentence, for example,
20 certainly said this, but the second sentence of
21 Pastor Barnett's address was a complete rebuke
22 of the eldership, their motives, and what they were to
23 do. But as you indicate and as I say, it's not
24 a complete rebuke. There are other statements in
25 that cut against that.

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1 THE COURT: The more I read what I wrote the
2 better I like it.

3 MR. WIGGINS: I certainly disagree with the
4 last sentence, it wasn't a direct eldership, that it
5 was either him or the elders, he told them all to go
6 back to work and get on with the business of the
7 church.

8 MR. ROHAN: He told them to obey or
9 resign.

10 THE COURT: Yeah.

11 MR. WIGGINS: Something that the Pope can
12 do, that's the problem with it.

13 MR. ROHAN: I think we should leave 81 the
14 way it is.

15 MR. WIGGINS: I just think it creates a
16 misleading impression.

17 THE COURT: The significant part of that
18 sermon was that he was not going to follow any of the
19 conditions of the special status. That much I will
20 say. And another sentence which said much of his
21 sermon defies any characterized conclusion. What do
22 you think of that, because that's the nub of it, what
23 I was trying to say here.

24 MR. ROHAN: I think what you have in 81 is

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1 sentence at the end about the other thing, that's your
2 view of the evidence. Then we ought to put it at the
3 end of 81, add a sentence in 81 that just says that.

4 MR. KNIBB: Much the sermon defies --

5 THE COURT: What I'm trying to do is avoid
6 rewriting that transcript and what I also am trying to
7 do is make the point that in this sermon he refuses to
8 follow the terms and conditions of the special status.

9 MR. WIGGINS: Your Honor, then I'm willing
10 to live with that. I'd rather have everything I want
11 just as Mr. Rohan would rather have everything he
12 wants. But I think you could easily change 80 to
13 incorporate what you said and that would do it. And
14 I'm reading from Finding 80, upon his return, Pastor
15 Barnett addressed the congregation on February 28,
16 1988 in a lengthy sermon in which he, strike upbraided
17 the eldership and senior elders and substitute
18 instead, stated that he would not follow the terms and
19 the conditions of special status. Then the rest would
-20 say, see Exhibit 31, written transcript, and Exhibit
-21 ~~32 tape recording of his sermon and add the sentence.~~

22 much of his sermon defies characterization and I think
23 that does it.

24 MR. ROHAN: I missed what we're adding to
25 80. You want to add to 80 the sentence about he

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1 wouldn't accept the special status?

2 THE COURT: No, he has that in 80.

3 MR. WIGGINS: I'm striking out of 80

4 upbraided the eldership and the senior elders and
5 substituting stated he would not follow the terms and
6 the conditions of the special status, because this
7 upbraiding the eldership is just like complete rebuke
8 of the eldership. It doesn't fairly characterize what
9 he said for the reason that you've identified. The
10 sermon does cover a lot of ground and perhaps does
11 defy characterization.

12 MR. ROHAN: I think it's important because
13 the senior elders's reaction is that he defied their
14 authority. I think the two key things are he defied
15 their authority and that he tried to end the hearings
16 by telling them to go back to work or resign and would
17 not accept the special status. I think the other
18 important thing in there is that he defied the elders
19 and I think it's very important he defied the elders
20 and sought basically to end the hearings.

21 MR. WIGGINS: The problem is here you are
22 with an agreement signed in January of that year
23 saying he'll let the hearings continue until they're
24 concluded to the satisfaction of the elders, but this
25 doesn't affect anything else having to do with the

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1 church.

2 And then you have the bylaws saying he's in
3 charge of the church services, and these guys get up
4 and spill the beans in the church service on Friday
5 night. And then to come along and say and therefore

6 ~~he is out of line when he defies them. It's just~~
7 inappropriate. And it's unfair to him and it's unfa
8 to characterize the sermon that way in light of the
9 whole sets of the circumstance. I think you said wh
10 is accurate, the sermon defies characterization.

11 MR. ROHAN: I think we should put in he
12 upbraided the elders, because that's certainly what

13 ~~happened. It was a deliberate act to be imposed upon~~
14 the special status.

15 THE COURT: I'm down on the third line of 80
16 now, Mr. Knibb, that he stated he would not follow
17 the --

18 MR. WIGGINS: The terms.

19 THE COURT: -- terms and conditions of the
20 special status and would not accept the authority of
21 the eldership.

22 MR. WIGGINS: To do what, Your Honor?

23 THE COURT: In any respect.

24 MR. WIGGINS: Well, he also says, of course,
25 that he told them to do everything according to the

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1. bylaws. If you are going to split this church if you
are going to make a power play, he said then you have
to do it in an official, proper way and that means we

have to have a senior elder meeting with the pastor
present and discuss the issues and we'll vote on it.

MR. ROHAN: So, we're going to cross out
upbraided the eldership?

THE COURT: Yeah, see so-and-so and
so-and-so tape recording of the sermon which is so
extended that it defies characterization.

MR. ROHAN: He have at the end of sermon,
which is so extended that it defies characterization.

THE COURT: And we leave out '81 entirely.

MR. ROHAN: Right.

MR. WIGGINS: I assume we leave out 82, also
Your Honor.

MR. ROHAN: 82 I think is important, Your
Honor, because it talks about that he would answer to
no one for his conduct and continue to act as he saw
fit. I think that's critical. It was an ultimate
fact and it is something that he stated that he was
responsible to no one. In fact, he stated that all
the way through. It's pretty hard to argue with it.
Mr. Wiggins argues if he committed murder that
literally wouldn't affect this.

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1 THE COURT: My note to myself on this is
2 that think I should strike the whole thing. I can't
3 remember now exactly what I had in mind.

4 MR. WIGGINS: Well, I agree with you.

5 THE COURT: Just a minute. I think I'll
6 strike it. 81 and 82 are off.

7 MR. ROHAN: We go on to 83.

8 THE COURT: Yes.

9 MR. WIGGINS: I don't believe I objected to
10 83 or 84.

11 MR. ROHAN: 83 and 84 stay in and we're up
12 to 85.

13 MR. WIGGINS: Oh, you don't like governing
14 documents.

15 MR. WIGGINS: Well, I think the articles and
16 the bylaws are clearly the governing documents. I
17 think this is kind of a legal conclusion. The reason
18 it's a legal conclusion is that this is a term they
19 used in the cases regarding First Amendment cases.

20 MR. ROHAN: Your Honor, it is because it's
21 in the cases. The cases talk about what are the
22 governing documents of the church. The cases talk
23 about, for instance, in the Baptist church they use
24 the Hiscock Manual which is not the articles and

but it's a manual that the church puts out in 25 bylaws

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1 Here the documents we want are the special status
2 guidelines. Special status, as you recall, is not
3 mentioned at all, excuse me, yes, special status not
4 mentioned at all in the articles and the bylaws.

5 THE COURT: We're talking now about
6 disfellowship.

7 MR. ROHAN: Right. And then the
8 disfellowshipping memos here, the July 30, 1987 memo
9 is the memo that gives, where Pastor Barnett takes
10 back his authority to approve disfellowshippings and
11 the September 25 --

12 THE COURT: I'll put down official
13 documents, how would that be?

14 MR. ROHAN: Well, I think governing
15 documents means that the official -- I think
16 governing documents goes to what governs a corporation
17 in this case. Pastor Barnett, in both of these
18 Exhibit 14 and Exhibit 37 and the special status
19 document are all key documents in this case. They are
20 key documents because the bylaws allow him to
21 designate someone. So, the only way the bylaws are
22 understandable is if you know who designated to
23 approve disfellowshipping.

24 In Exhibit 14 he took back the approval from
25 Hicks, took it back to himself, and Exhibit 37 there's

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1 testimony that he gave that authority to David
2 Motherwell. That's why I think it's a governing
3 document.

4 THE COURT: I have down official documents.

5 MR. WIGGINS: Stricken governing and put
6 official?

7 THE COURT: Yes, 86.

8 MR. WIGGINS: Oh, yes. Your Honor, I know
9 that they have, they talked about how, oh, yes, Pastor
10 Barnett delegated the power to concur in
11 disfellowshipping Mr. Motherwell by virtue of a memo
12 that Jack Hicks wrote when Jerry Zwack was fired,
13 exhibit 37.

14 And, of course, what that memo says is David
15 Motherwell will have oversight over all counseling and
16 spiritual matters for the department including uniform
17 counseling standards, counselor development, counselor
18 appeals, oversight of volunteer counselors, counselor
19 consultation regarding disfellowship. David will also
20 be the primary interface with the pastor for all the
21 counselors and will be responsible to the pastor for
22 the counsel being given the accurate extension of the
23 pastor. It doesn't say -- First of all, Pastor
24 Barnett would have to designate somebody as his
25 designee for purposes of disfellowship under the

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1 bylaws.

2 THE COURT: There was considerable testimony
3 back and forth on this, on the meaning of Exhibit 37.

4 MR. ROHAN: I don't think it was back and
5 forth. We had several witnesses testify very clearly.
6 Mr. Hicks testified that -- this is at page 1252 --
7 Mr. Hicks testified that this gave David Motherwell
8 the full power to approve disfellowships. Mr. Hicks
9 testified that he discussed the memo with Donald
10 Barnett personally prior to the dates of it and he
11 approved its contents. And Jack Hicks says not only
12 that, we discussed it in detail. It was a
13 considerable discussion what he wanted included in the
14 descriptions of David Motherwell and Chris Mathews
15 that was jointly worked out. Hicks testified it was
16 directly from Pastor Barnett.

17 And when asked on cross-examination in fact by
18 Pastor Barnett's counsel, Mr. Johnson, does this mean
19 that David Motherwell will be the final person that
20 would have to approve disfellowships, the question was
21 yes, that that is exactly what it did. Jack Hicks was
22 the person that had that responsibility previously,
23 that it was given to.

24 THE COURT: What I meant was back and forth.
25 I recall Pastor Barnett's testimony about the detail

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1 that was piling up on him in about that time and that
2 he couldn't be expected to attend to all the details
3 and that he was delegating some of it. What did he
4 say about that?

5 MR. ROHAN: Pastor Barnett, I can't remember
6 what Pastor Barnett said, but he did say that he
7 was -- There was a dispute over how available he was
8 and I think Hicks and some other people said he had
9 office hours like on Tuesday afternoon and Thursday
10 afternoon and nobody could get a hold of him. Pastor
11 Barnett, as we all know, goes frequently on vacation
12 and was busy doing a lot of other things and didn't

~~have the time to do it. That's what Hicks talks~~
14 about, that's what Motherwell talks about, and that
15 what John Harold talked about. And I think Barnett
16 also talked about him being busy.

17 THE COURT: What did he say about 37
18 specifically or did he?

19 MR. ROHAN: I don't have any references, I
20 only looked up --

21 THE COURT: What did Barnett say?

22 MR. WIGGINS: Your Honor, Barnett said he
23 had not designated anyone to be his designee.

24 THE COURT: I think he even said he hadn't
25 designated Hicks.

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1 MR. WIGGINS: Well, no, he acknowledged
2 earlier in the course of things he designated Hicks
3 for a while. And then there's this memo that's
4 Exhibit 14 that revokes that designation and it does
5 so in no uncertain terms. It's very clearly, Exhibit
6 14.

7 Now, we get over to Exhibit 37 which is
8 extraordinarily vague drafted by Jack Hicks and it's
9 claimed that that, therefore, was a redesignation. It
10 doesn't say that.

11 Furthermore, I want to talk about Pastor
12 Barnett's testimony about his limited office hours.

13 ~~What he testify to was there was a time when that~~
14 occurred and he tried that for a period of some week
15 and it didn't work and he gave up on it. That's what
16 his testimony was.

17 The other testimony was, it's ironic, the day
18 this memo, Exhibit 37, was signed was the day
19 Motherwell was on trial in his criminal trial. It's
20 not that he was more available than Pastor Barnett.
21 That was one of the ways we started getting into the
22 whole subject. It is really quite ironic David
23 Motherwell was in court on trial the day that memo was
24 issued.

25 MR. ROHAN: Your Honor, this is one of the

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1 critical findings we believe in this matter because
2 the bylaws state that Pastor Barnett has to concur in
3 disfellowshipping. There are a couple of ways that
4 doesn't apply in this case. One of the major ways is
5 that he has delegated to David Motherwell to be his
6 designee. Mr. Harold testified to that, Mr. Hicks
7 testified as to that.

8 Mr. Hicks I believe the Court will give a lot of
9 credibility to given the forthright way he testified
10 about Mr. Zwack and things like that. Mr. Hicks
11 testified very clearly that he personally talked to
12 Donald Barnett about this and that the import of this
13 was that David Motherwell would be the pastor's
14 designee for disfellowshipping.

15 It also makes sense. Pastor Barnett chose David
16 Motherwell to be the head of the Counseling Center.
17 Pastor Barnett chose David Motherwell to be his
18 personal counselor. Pastor Barnett had a lot of faith
19 in David Motherwell. This is a very, very critical
20 finding to us on the disfellowshipping because if
21 David Motherwell was his designee, we don't even have
22 to worry about whether something was emergency or
23 aggravated.

24 We also think it was emergency or aggravated, but
25 this is a very critical finding and is clearly

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1 supported by the evidence and we have numerous
2 references in --

3 THE COURT: Let me come back to 86. Okay,
4 87.

5 MR. WIGGINS: What was your ruling on 86,
6 Your Honor?

7 THE COURT: We're coming back to it.

8 MR. WIGGINS: Oh, okay. Oh, yeah, it was
9 the custom and practice that senior elders, elders,
10 and counselors had and exercised the power of
11 disfellowship. I have to tell you my memory is not
12 ~~always the best but I only recall one incident where~~
13 testified to that a person other than a counselor
14 exercised the power to disfellowship. That's the
15 first point. Yeah, one incident does not make a
16 practice or a custom. Even if it were a practice or a
17 custom, it wouldn't be binding on Pastor Barnett. The
18 law is pretty clear on that.

19 MR. ROHAN: There are numerous witnesses
20 that testified.

21 THE COURT: I know they did. I'm not quite
22 up on what they said.

23 MR. ROHAN: There are numerous witnesses
24 that testified that the senior elders, elders, and
25 counselors all had the power to disfellowship someone.

Argument Re. Findings of Fact

1 THE COURT: I remember that.

2 MR. ROHAN: I don't understand I guess what
3 the problem is. There's testimony that counselors and
4 elders exercised that power. There was testimony at
5 one point that Scott Hartley who was a senior elder
6 exercised that power. Hicks obviously
7 disfellowshipped people. So, these are two of the
8 senior elders that had that and exercised that power.
9 I don't recall if Jack DuBois in his deposition stated
10 that he had, but I think he as the head of the Bible
11 College was sort of out of that group, so I think
12 there is support for that first sentence and I think
13 for the rest of the paragraph.

14 MR. WIGGINS: The question is not anything
15 that they may say today about their power and
16 authority, the question is was it the custom and
17 practice and there just isn't evidence.

18 MR. ROHAN: There are a number of people
19 that testified as to that, it was the custom and
20 practice that those people had the to power to
21 disfellowship someone. Harold testified to it.

22 THE COURT: Yes, I remember that.

23 MR. ROHAN: Motherwell testified to it.

24 THE COURT: Okay, 88.

25 MR. WIGGINS: This finding, Your Honor, it's

Argument Re. Findings of Fact

1 wrong for a couple of reasons. One is that, of
2 course, their claim is that Pastor Barnett had
3 designated someone for the purpose of concurrence. I
4 don't think there's evidence that they didn't get to
5 concurrence of the designee.

6 And the other reason that it's wrong is that
7 Exhibit 14 makes it very clear that any
8 disfellowshipment under emergency or urgent conditions
9 is subject to ratification by the pastor on his
10 return. It's very clear. That's what Exhibit 14
11 says.

12 Now, we come along with Exhibit 37. It doesn't
13 say a darn thing. It doesn't say a thing about --

14 THE COURT: Ratification.

15 MR. WIGGINS: -- ratification, not at all.

16 That was the policy. It was subject to ratification
17 after he returned.

18 MR. ROHAN: Your Honor, the bylaws talk
19 about it's subject to -- The bylaws don't talk about
20 it in that way. In fact, I'll get out what the bylaw
21 say because it's different.

22 MR. WIGGINS: What the bylaws say is that
23 the counselor must tell the person that he's being
24 disfellowshipped with the concurrence of the pastor or
25 that he is being disfellowshipped until the pastor

Argument Re. Findings of Fact

1 returns and there can be come discussion.

2 MR. ROHAN: It doesn't talk about the pastor
3 returning in the bylaws. Let me find it.

4 MR. WIGGINS: Page 27 of Exhibit 10.

5 MR. ROHAN: Here it is. In emergency or
6 aggravated matters, the pastor or his designee shall
7 be notified as soon as is reasonably possible. It
8 doesn't say anything about the pastor's return. In
9 emergency or aggravated matters, the pastor or his
10 designee shall be notified as soon as is reasonably
11 possible. What we're talking about in 88 is it was
12 the custom and practice at Community Chapel that
13 individuals can be disfellowshipped without the
14 concurrence of Pastor Barnett under emergency or
15 aggravated circumstances.

16 Mr. Harold testified that he, I believe it was
17 Wayne Snowy that he did that, too, for sexual
18 misconduct, as a matter of fact, disfellowshipped him
19 on the spot.

20 MR. WIGGINS: That's the one incident that
21 does not a custom or practice make. But I'm looking
22 at the bylaws also and Mr. Rohan skipped over
23 something, Section 1-E, which says counselor shall,
24 quote, notify the individual that either he is put out
25 of the church with the concurrence of the pastor or

Argument Re. Findings of Fact

1 his designee or else that a recommendation is being
2 sent to the pastor or his designee to the effect that
3 he be put out of the church and, therefore, that he
4 will not have to fellowship.

5 THE COURT: Does that apply only to the
6 counselor?

7 MR. ROHAN: That does not apply in emergency
8 or aggravated situations. Emergency or aggravated
9 situations is a separate clause here and it says that
10 in emergency --

11 THE COURT: What does E say?

12 MR. WIGGINS: Here, Your Honor, it's
13 highlighted in yellow.

14 MR. ROHAN: And No. 4 is the other one.
15 Four is the exception to Paragraph 1. Paragraph 4 is
16 the exception to Paragraph 1.

17 MR. WIGGINS: My point is you have to read
18 these things together, you can't just pluck one thing
19 out and say that it means that when you're ignoring
20 the rest of it.

21 MR. ROHAN: This was one of the more
22 important findings I think the court is going to make
23 in this case, because it goes to whether we followed
24 the proper procedure in disfellowshipping Barnett.

25 MR. WIGGINS: That's true, it's very

Argument Re. Findings of Fact

1 important, and the point is the bylaws don't say this.

2 MR. ROHAN: That is why it says it was the
3 custom and practice.

4 MR. WIGGINS: And the one incident that
5 there's been testimony of would be Wayne Snowy.
6 That's not a custom or practice.

7 MR. ROHAN: There's not a lot of people that
8 had sexual misconduct.

9 THE COURT: Okay.

10 MR. ROHAN: David Motherwell also testified
11 about that, that in practice there arose from time to
12 ~~time emergency situations where the counselors from~~
13 time to time would disfellowship on the spot. So,
14 they both, there are two people who testified as to
15 that.

16 MR. WIGGINS: Where is that?

17 MR. ROHAN: Page 1050. We would ask that it
18 stand as proposed. As you know, we linked this up
19 later because a lot of people testified this was the
20 most emergent or aggravated situation the church ever
21 faced.

22 MR. WIGGINS: You know, I just, I'm not,
23 sure, Mr. Motherwell comes to the rescue here again,
24 too, but the fact is the bylaws don't permit this.
25 The only evidence of any specific incident was the

Argument Re. Findings of Fact

1 Wayne Snowy and I just don't think it was a custom or
2 practice and it's not consistent with the --

3 THE COURT: I'm going to give 88.

4 MR. ROHAN: Thank you.

5 THE COURT: 89, I want to --

6 MR. ROHAN: The reason 89 is worded the way
7 it is --

8 THE COURT: My intent is to strike this
9 sentence that says the bylaws protective provisions
10 did not exempt Pastor Barnett from disfellowshipping.

11 MR. ROHAN: Because it's redundant? Mr.
12 DuBois testified that he believed Pastor Barnett could
13 be disfellowshipped. Obviously the other elders that
14 disfellowshipped him also believed he could be
15 disfellowshipped.

16 THE COURT: I'm not going to know whether the
bylaws did, protective provisions did or did not
exempt him. 17

18 MR. ROHAN: They don't state that. You want
to strike that because they don't state that? 19

20 THE COURT: Yes. 21

22 MR. ROHAN: That's fine. That is not stated
in the bylaws but he is exempt. 23

24 THE COURT: Striking that sentence, Mr.
Knibb. 25

Argument Re. Findings of Fact

1 MR. WIGGINS: Your Honor, you're leaving
2 that individual, including Pastor Barnett, was subject
3 to disfellowshipping and you are striking the sentence
4 that says that Pastor Barnett wasn't exempt.

5 MR. ROHAN: No, he's striking the bylaws
6 protective provision.

7 MR. WIGGINS: I know, but the problem is if
8 you don't know whether the bylaws exempted Pastor
9 Barnett from disfellowshipping, then we don't know
10 whether the second sentence is true. Pastor Barnett
11 was not exempt from disfellowshipping. And we don't

12 know whether the first sentence is true, whether any
13 individual was subject to disfellowshipping.

14 Here's the problem with this. Now, at one point
15 the Defendants agreed in their briefing that as far as
16 disfellowshipping is concerned a secular court can't
17 get into the reasons for disfellowshipping. You just
18 can't do it because it's an religious inquiry.

19 And now the position by Defendants says, well,
20 Pastor Barnett could be disfellowshipped which means
21 that a court can't inquire why he was
22 disfellowshipped. They can do it for any reason. And
23 that means that the protective provisions, it's the
24 protective provisions that don't have any teeth, not
25 the elders that don't have any teeth. It's the

Argument Re. Findings of Fact

1 protective provisions, because if they can
2 disfellowship him and the Court can't look into it, he
3 doesn't have any protection. That's why this
4 collapses of its own weight. It doesn't make any
5 sense. The protective provisions then can't be
6 enforced.

7 Now, the other thing is I know that they all got
8 up here and mouthed the words that they believed at
9 the time that Pastor Barnett to be disfellowshipped,
10 but that is probably -- Well, I don't credit for that
11 one minute. They even have to sit here and say that
12 it doesn't matter what they believed at the time,
13 whether they had power. The fact is they didn't
14 believe they had the power.

15 MR. ROHAN: Your Honor, before you make a
16 decision here, a couple of things. One is I think
17 that the way it's structured now is right. The bylaw
18 provisions talk about this office of Barnett or that
19 office. When we get to, and there are a lot of them
20 in there, but when we get to disfellowshipping,
21 there's not one word in there in the disfellowshipping
22 section that Pastor Barnett is exempted from
23 disfellowshipping. And I think it would have struck
24 anybody in that church as horrific if Pastor Barnett
25 had even suggested to them at one point that he could

Argument Re. Findings of Fact

1 ~~not be disfellowshipped. Anybody that violated the~~
2 rules of the church was subject to disfellowshipping.
3 That's clearly all the way through this church.
4 There's no exception in the disfellowshipping section
5 for Pastor Barnett. So, if you look at the bylaws,
6 there's nothing in there that says he was exempted.

7 MR. WIGGINS: Your Honor, may I say one more
8 thing here. Mr. MacKenzie, one of their witnesses
9 said, he admitted in April of 1988 he wrote a letter
10 to the congregation explaining to the congregation
11 that they had to amend the bylaws because everybody
12 was subject to disfellowship except Pastor Barnett.
13 That's what he thought. That's what the elders
14 thought at the time.

15 And Hicks, Hartley, and DuBois wrote that letter
16 on March 4th to Pastor Barnett in which they say this
17 disfellowship is not contrary to any provision of our
18 articles and bylaws as currently amended. And they
19 had just amended them that afternoon, invalidly as it
20 turned out, but they said that.

21 I know he has a fantastic explanation as to what
22 that means that the currently amended refers to 1986,
23 two years earlier, not two hours earlier, but that is
24 a fantastic explanation. They didn't believe that
25 they had the power to disfellowship Pastor Barnett

Argument Re. Findings of Fact

1 under the bylaws.

2 And all this about what the bylaws say, you know,
3 when you interpret these documents, here's the guys
4 that wrote them and signed them year after year after
5 year. They didn't believe they had the power to
6 disfellowship Pastor Barnett. They thought it was
7 necessary for them to go through all these hoops of
8 getting provisions written out of the articles,
9 getting provisions written out of the bylaws and then
10 they could disfellowship them.

11 And Hicks even said five or six days after this
12 that they had to do it that way, that they had to go
13 through these steps in his deposition back in 1988. I
14 know here three years later he now knows the lay of
15 the land and he knows what he has to say but it ain't
16 so.

17 MR. ROHAN: Your Honor, this is a very
18 critical finding. There is nothing in the
19 disfellowshipping section of the bylaws that says that
20 Pastor B is exempted and you would have expected if he
21 put it in everywhere else that he would have put it in
22 there but he chose not to --

23 THE COURT: Well, I'm not going to retract
24 the stricken part that I've already taken care of.

25 MR. ROHAN: Right. Just strike that and

Argument Re. Findings of Fact

1 leave the rest.

2 MR. WIGGINS: Then it's a finding because
3 you're interpreting the bylaws. I mean it's not a
4 finding. You are interpreting the bylaws. You're
5 disregarding basically the other evidence, the
6 letters, but you know, I just think it is so
7 incredible.

8 MR. ROHAN: So, we're up to 90 which we all
9 agree to? We go on to 91.

10 MR. WIGGINS: Wait, wait, wait, before we go
11 on to 91, I need to look at something else here. I
12 think the last two sentences of 89 are absolutely
13 incorrect. All the eldership agreed that Pastor
14 Barnett was subject to disfellowshipping. At the
15 time, they didn't believe that. They didn't say that.

16 THE COURT: I'll strike that.

17 MR. WIGGINS: And I also think that the
18 sentence before that is incorrect because we have
19 already gone through the sermon of February 28 and the
20 one thing --

21 THE COURT: Okay, 90.

22 MR. ROHAN: We agree on 90, so we're on to
23 91.

24 THE COURT: Any problem with 91?

25 MR. WIGGINS: Oh, yes, Your Honor, there is.

Argument Re. Findings of Fact

1 The vote -- I'm now looking at the documents here.

2 THE COURT: 34?

3 MR. WIGGINS: Yes, Your Honor. The vote was
4 not to disfellowship Pastor Barnett, the vote was to
5 make the recommendation to Pastor Barnett and this is
6 the day on which they prepared minutes of this
7 meeting.

8 THE COURT: And to approve it.

9 MR. WIGGINS: They didn't vote to
10 disfellowship him, that's my point. They voted to
11 make a recommendation for the disfellowship of Pastor
12 Barnett.

13 THE COURT: That's what 90 says.

14 MR. WIGGINS: If this says voted to make a
15 recommendation to the senior elders to disfellowship
16 Pastor Barnett, then I agree.

17 MR. ROHAN: 90 you agreed to, we're on 91.

18 MR. WIGGINS: Oh, I thought we were on 91.

19 MR. ROHAN: 90 he agrees to, we're on 91.

20 MR. WIGGINS: Yeah. That's exactly what
21 they did, they voted to recommend what you've already
22 found in 90. They voted to recommend to the senior
23 eldership to disfellowship Pastor Barnett. That's
24 what Exhibit 34 says. And in their prior pleadings
25 they say that Pastor Barnett was disfellowshipped on

Argument Re. Findings of Fact

1 March the 4th, not on March the 3rd. And here they
2 are coming up with a finding that says it happened
3 on --

4 MR. ROHAN: That's because the letter is
5 dated March 4.

6 MR. WIGGINS: At that point, they weren't
7 even thinking about --

8 THE COURT: Well, the entire membership
9 didn't meet on the 4th.

10 MR. ROHAN: No, they didn't. They met on
11 the 3rd and the letter is dated the 4th. The letter
12 states, therefore, we are forced to disfellowship you
13 because we have put out others for far less than what

signed by a committee of the church for a period of time

put out for a period of time by a committee of the church

14 Thiel, and Mackenzie all

15
16

senior elders.
Harold, Motherwell

17 were at least two votes taken on
18 by the 10 to recommend to the
19 was because they felt Barnett
20 they didn't do it that way. The
21 voted to disfellowship him.

17
18
19
20
21
22
23
24
25

testified that there was
the 3rd, one vote was
senior elders and that
was going to complain
second vote was all 16

22 That's not Harold's testimony.
23 There were three votes. He's
24 fified to three votes. He
25 the votes was the 16. All of

MR. WIGGINS:
MR. ROHAN:
the only one that test
testified that one of

Argument Re. Findings of Fact

1 them testified and agreed --

2 THE COURT: Okay, I don't know why I should
3 monkey with that.

4 MR. ROHAN: I think 91 is exactly right.

5 MR. WIGGINS: Your Honor, the reason you
6 should monkey with it is that it isn't what they say
7 in the letter, it isn't what they said to Barnett at
8 the time, it isn't what they said in their pleading.

9 THE COURT: Isn't it what they said in the
10 letter?

11 MR. ROHAN: Yes. The letter says, quote,
12 therefore, we means the 16, are forced to
13 disfellowship you, Barnett, because we have put others
14 out for far less than what you being put out for.
15 This letter also talks about the earlier vote, but
16 this letter talks signed by the 16, it talks about the
17 second vote, and then goes on in one paragraph and
18 says we did this and we did that.

19 THE COURT: Is that the four-page letter?

20 MR. ROHAN: Yes, six pages.

21 MR. WIGGINS: Your Honor, since we all think
22 this is an important finding, I would ask you to look
23 at the letter because I want to talk about it.

24 THE COURT: I remember reading it and
25 looking for the part that he had already read to me.

Argument Re. Findings of Fact

1 MR. WIGGINS: Okay. What he is referring to
2 is the --

3 MR. ROHAN: It's highlighted on the copy.

4 MR. WIGGINS: The sentence at the end of
5 that paragraph. Therefore, we are forced to
6 disfellowship you because we have put others out of
7 the church for far less. That's the sentence. But
8 let's walk through the letter. If you look at the
9 second paragraph of the letter, it says the elders,
10 not including the senior elders, voted unanimously to
11 put you out of the church and made that recommendation
12 to the senior elders who will themselves vote and act
13 on it.

14 Now, the beginning of the next paragraph, there's
15 some grammar, you know, Mr. MacKenzie the careful
16 writer writes their letter and how does he start this
17 paragraph? This letter is to inform you of the main
18 reasons why we took this action. What is this action?
19 It's the recommendation to the senior elders. That's
20 the action.

21 THE COURT: I'm not so sure.

22 MR. WIGGINS: Well, that's what it says.
23 Then they go on to talk about that and then they reach
24 their conclusion, therefore, we are forced to
25 disfellowship you, but the conclusion is --

Argument Re. Findings of Fact

1

THE COURT: It depends. It's a very cutely

2

3 says the elders, including but not including the

4

4 senior elders, voted unanimously to put you out

5

5 church and made that recommendation to the senior

6

7

MR. ROHAN: And then later

8

letter --

9

THE COURT: Therefore, down

10

10 paragraph, we are forced to disfellowship

11

11 you have put, we have put others out.

12

MR. WIGGINS: You are skipping

13

13 sentence of that paragraph which is the

14

14 inform you the main reasons why we took

15

15 which is the action referred to in the

16

16 paragraph. I don't think it's a cutely

17

17 I think it's a cutely interpreted letter

18

18 what's going on here.

19

And you know what this really is

20

20 this case, the truth of the matter, in

21

21 this. These guys knew they had authority

22

22 these hearings, but they didn't think

23

23 authority to disfellowship Pastor Barn

24

24 even say that. And they thought that

25

25 to conclude the hearings by making a r

Argument Re. Findings of Fact

1 the senior elders to disfellowship Pastor Barnett.
2 That's what they did. And the senior elders thought
3 that they would have to amend the articles and the
4 bylaws in order to act on that recommendation. And
5 that's what they did. And it is consistent with every
6 document in this case. You don't have to explain away
7 any of these documents, you don't have to walk away
8 from lots of deposition testimony, it makes sense if
9 you read it just the the way the document is.

10 MR. ROHAN: This letter is consistent with
11 the February 24 letter of the senior elders where they
12 quote from the January 25 agreement and say it's one
13 of the sources of their authority. This one says we
14 are forced to disfellowship you. We means the 16
15 people who signed it.

16 THE COURT: I'll leave 91 stand.

17 MR. ROHAN: Thank you, Your Honor. 92 I
18 think we all agree on, at least my notes say that.
19 93.

20 MR. WIGGINS: I have proposed an alternative
21 which is certainly more accurate than what is phrased
22 here. A dispute arose as to the purpose of the
23 meeting. My proposed 92.1 explains what happened, not
24 in conclusionary terms but what happened. And it's
25 not disputed by Hicks that this is the way it

Argument Re. Findings of Fact

1 happened. Page 59 of my observation sets forth my
2 proposed finding as an alternative.

3 MR. ROHAN: Your Honor, we talk about the
4 vote in paragraph 94. All we talk about in 93 is the
5 fact that Barnett wanted to discuss one matter, the
6 senior elders wanted to discuss the proposed
7 amendments to remove the protective provisions from
8 the articles. So, I think that is correctly worded.
9 I think 94 then we talk about the vote.

10 MR. WIGGINS: Excuse me, we're on 93. I
11 have proposed an alternative that correctly recites
12 what the evidence is.

13 MR. ROHAN: Well, your 93 talks about my 94.

14 MR. WIGGINS: No, my 93.1 on page 59 --

15 MR. ROHAN: Right. You talk about do not
16 wish to take the vote. You talk about voting.

17 MR. WIGGINS: The first sentence says Pastor
18 Barnett explained why he called the meeting. The
19 second says Hicks said that they wished to take a vote
20 and Barnett responded he didn't wish to take a vote.
21 That is what happened.

22 What Mr. Rohan has done is he has made a
23 conclusion from that. A dispute arose as to the
24 purpose of the meeting. It's different from that.
25 The man who called the meeting and was the chair of

Argument Re. Findings of Fact

1 the meeting announced why he had called it. Mr.
2 Hicks, who was not the chairman, called the meeting.

3 THE COURT: He didn't call it a meeting, he
4 called them in serially or individually. That I think
5 came up after they all showed up at once.

6 MR. WIGGINS: That's true. He called them
7 individually. There really wasn't any notice or any
8 meeting called I suppose is the way to put it.

9 THE COURT: That's right.

10 MR. ROHAN: I think ours is the more
11 accurate and should be the one that the Court should
12 adopt. And then talk about 94 which is the way the
13 vote was taken.

14 THE COURT: We're talking about 93.

15 MR. ROHAN: Yes, Your Honor, and I think
16 that's accurate. Senior elder did want to discuss the
17 proposed amendment and Barnett wanted to discuss a
18 matter having to do with addressing the congregation.
19 That is exactly accurate.

20 THE COURT: What is the matter with 93?

21 MR. WIGGINS: I'm reciting what the dispute
22 is and why there was a dispute. It's factual. It's
23 based on the evidence, it's consistent with Hicks,
24 it's consistent with Barnett.

25 THE COURT: Well, the dispute because of the

Argument Re. Findings of Fact

1 tension arising?

2 MR. WIGGINS: Well, My problem with it is it
3 sounds like these four guys got together and, gee, one
4 of them wants to say this and three of them want to
5 say that. The guy who summoned them all to come and

... was not present at the meeting for a special reason.

7 That's what my finding says. And they said, g
8 have a different agenda in mind. And they were
9 chair, they didn't call the meeting. That's t
10 point. That's why I have done it this way.

11 THE COURT: That's what he said. He
12 to discuss having to do with addressing the
13 congregation. And then they said, no, we want
14 propose amendments. Now, here, I have even a
15 reason. I don't know what this has to do with
16 price of tea in China, because it would have i
17 had, if I had agreed that this meeting was a c
18 meeting in the afternoon or that the aborted b
19 change, the amendments to the bylaws was effect
20 but I didn't find that.

21 MR. WIGGINS: In this case, this is
22 those situations where we can --

23 THE COURT: How about that, Mr. Rohan
24 Mr. Knibb?

25 MR. ROHAN: The only thing that is

Argument Re. Findings of Fact

1 important, Your Honor, is that, and this is based on
2 those documents you gave us last night, you found that
3 the senior elders at the meeting they had in the
4 afternoon on March 4 --

5 THE COURT: Yes.

6 MR. ROHAN: -- disfellowshipped Barnett
7 individually and as a group. That's the only
8 conclusion that we end up with. Maybe Dave and I
9 could talk about --

10 THE COURT: I read that and wondered what
11 are we getting into here, because --

12 MR. ROHAN: I think, Your Honor, during the
13 break perhaps Mr. Knibb and I can talk about --

14 THE COURT: Actually, I see no point in 98
15 and 99.

16 MR. ROHAN: How about if Mr. Knibb and I
17 talk about this?

18 THE COURT: All right. I think the only
19 thing of significance that happened on March the 4th

~~20 ... meeting the meeting of the Board of Senior Elders --~~

individually or collectively and doing what they did
on disfellowship.

MR. WIGGINS: I think that's probably true.

THE COURT: Think about it anyway.

(Short break taken.)

21

22

23

24

25

Argument Re. Findings of Fact

1 MR. ROHAN: The feeling, Your Honor, is that
2 based on your comments in paragraph 99 that it is
3 necessary to have the background of your conclusions
4 or your facts, the facts you're finding there that by
5 all these facts and circumstances Barnett could not
6 complain about the senior elders' authority acting as
7 the Board of Directors without notice to him or his
8 presence. And that it would then be important to have
9 a description of the events that led up to that.

10 MR. WIGGINS: I agree with that, Your Honor.
11 That does bring back to my mind why I think all of
12 this is in here because you can't understand this
13 about the afternoon meeting without some recitation of
14 what went on in the morning meeting.

15 MR. ROHAN: So, if we go back to, that
16 brings us back to 93 and 94.

17 MR. WIGGINS: Frankly, I'm not as concerned
18 about No. 93. There's a shading of meaning there, but
19 I'm not as concerned about 93 as I am about 94. We
20 would agree to one of them, we weren't trying to be

but the proposed amendments refer to the
articles

21

22

THE COURT: Jumping to 95?

23

MR. ROHAN: No, 94.

24

THE COURT: But I mean take one or the

25

Argument Re. Findings of Fact

1 other, 93 or 94, and jumping to 95?

2 MR. ROHAN: No, I think we need both 93 and
3 94. You think Mr. Wiggins is saying he could live
4 with 93 but he would like to talk about 94. Is that
5 correct?

6 MR. WIGGINS: Yes.

7 THE COURT: So, No. --

8 MR. ROHAN: So, if we jump down to 94 and we
9 keep in 93, what I'm saying is one of Mr. Wiggins's
10 comments is about which of the amendments, and it's
11 clearly the amendments to the articles. I don't have
12 any problem with inserting wherever we say amendments
13 in 94 we put "to the articles".

14 THE COURT: What was that? You state your
15 objection.

16 MR. WIGGINS: Well, I had an objection to
17 the amendments in the plural. It was amendments to
18 the article, it's not amendments to the bylaws. That
19 was the problem. If we make that change, I made it in
20 the second or third sentence of Finding 94, but if we
21 make it at the bottom of 31 amendments to the

es.

THE COURT: Okay. We make amendments plural

d to singular in all cases?

MR. ROHAN: No, we make it amendments to the

22

articl

23

24

reduce

25

Argument Re. Findings of Fact

1 articles, add the phrase "to the articles", because
2 they're not the bylaws amendments that were voted on
3 here.

4 MR. WIGGINS: May I ask, it was one
5 resolution to amend several things, that's what you're
6 referring to?

7 MR. ROHAN: Yes.

8 MR. WIGGINS: That will cure one of my
9 problem here and I just want it known that we dispute
10 that there was a vote taken at all, but that's
11 probably not too important here. I dispute there was
12 a vote taken. What I would like, though, is I guess
13 my feeling is that, I guess I want to talk about 95.

14 THE COURT: I thought we were getting into a
15 lot of changes in wordage that didn't really
16 significantly change the meaning of 92, 93, 94, 95 and
17 I wanted to kind of short circuit.

18 MR. WIGGINS: Well, I do think there's a
19 difference in 95, Your Honor, and it's this. There is
20 a scenario that Pastor Barnett testified to about why
21 he told the elders they might as well leave if they
22 weren't going to cooperate and talk openly and they
23 left.

24 Now, the word that grates on me is the word
25 ousting. You could say that what Barnett did was

Argument Re. Findings of Fact

1 oust, but the image that that conjures up is an image
2 of a bouncer, ousting and physically throwing somebody
3 out, and I know how these things happen. You get
4 something like this in a finding and then it goes into
5 an opinion and it really is an inaccurate
6 characterization. It creates a whole series of images
7 that are not what happened. That's why I proposed --

8 THE COURT: All we're doing is argue about
9 the word ousting?

10 MR. ROHAN: That's the word you used in
11 paragraph --

12 THE COURT: Yeah, I know.

13 MR. ROHAN: It's backed up by Mr. Hicks. He
14 said he unceremoniously told us to get out. I mean,
15 it was not physically throwing us out of the house but
16 sure in my estimation amounted to the same thing.

17 MR. WIGGINS: And that is not inconsistent
18 with what Pastor Barnett says.

19 THE COURT: How would you characterize the
20 termination of the meeting?

21 MR. WIGGINS: I would say what I've said in
22 my proposed 95.1 which is on page 62.

23 MR. ROHAN: Your Honor, the problem I have
24 with that is I think it should say Pastor Barnett told
25 them to get out which is what Mr. Hicks testified to,

Argument Re. Findings of Fact

1 it's not that he advised them that they might as well
2 leave if they were not going to cooperate.

3 MR. WIGGINS: I don't mind changing advised
4 to told.

5 MR. ROHAN: I think it's told them to leave,
6 period, because Mr. Hicks, that's what he testified,
7 unceremoniously announced that he didn't want to
8 discuss anything more with us and told us to get out.

9 MR. WIGGINS: Sure, that's what Mr. Hicks
10 said. What Pastor Barnett said is I said for you to
11 leave the house right now if you are not going to be
12 honest and if you're not going to face up to your

~~illegal activities. And you can't talk before one.~~

another you can leave and they got up and left. See,
Your Honor, that's different than saying he told them
to leave.

MR. ROHAN: The Court already found that --

THE COURT: You are talking about two
different versions.

MR. WIGGINS: We're talking about a specific
version by Barnett and a very general version by Hicks
that is subject to an interpretation. It's very
different.

THE COURT: Terminated the meeting by
telling them to leave. How would that be?

Argument Re. Findings of Fact

1 MR. WIGGINS: Well, the problem is he didn't
2 say that. What he said was if you're not going to
3 answer my question about whether you think we're
4 meeting illegally, there's no point in our going on
5 and you may as well leave. That's different. That

Argument Re. Findings of Fact

1 think that that is an accurate finding. I don't think
2 it is a reasonable conclusion that if they had
3 notified him that now we have filed the amendments
4 that we have voted on and now we're going to vote on
5 the bylaw amendments, you know, it doesn't follow to
6 say that. But that's the import of that finding. He
7 didn't know what the meeting was going to be. They
8 didn't tell him about the meeting and it really
9 doesn't matter whether they thought he would have

~~attended or not or whether we thought he would have~~ 10
attended or not. They had to give him notice. They 11
had to. At least they had to do that. The bylaws 12
said he had to be there. 13

MR. ROHAN: Your find in 99 -- 14

THE COURT: Aren't we talking about 99? 15

MR. ROHAN: Maybe we should just take out 16
the second sentence of 96 and rely on 99, because I 17
think all this is covered by 99. 18

THE COURT: Starting with in light? 19

~~MR. ROHAN: That's right. And that's~~

~~because it's covered in 99. And then 97, this is~~

22 based on -- 97 is the documents you gave us the other
23 day, last night, stated you were going to make a
24 finding that the three senior elders individually and

~~collectively voted to follow the path~~

Argument Re. Findings of Fact

1 Based on that, what we would like this finding to read
2 is that the three senior elders voted, and insert
3 individually and collectively, to disfellowship Donald
4 Barnett and separately voted to remove him from his
5 offices.

6 MR. WIGGINS: Your Honor, you can't vote
7 individually and collectively. Either you take a vote
8 as a group or you don't take a vote as a group.
9 Either you disfellowship Don Barnett as a group or you
10 don't disfellowship him as a group. They held a
11 meeting. They thought they needed to hold a meeting.
12 What are you inserting here?

13 MR. ROHAN: Individually and collectively
14 after the word voted. The rest stays the same.

15 MR. WIGGINS: Of course, it doesn't makes
16 sense to say that they voted individually.

17 THE COURT: Okay, we're at 98 now.

18 MR. ROHAN: This says the difference
19 basically between voting to disfellowship him which
20 everybody testified was different than their vote to
21 remove him.

22 MR. WIGGINS: Your Honor, Exhibit 48 is the
23 elders' own letter that they signed that day
24 themselves, actually their own minutes, not their
25 letter, their own minutes say they voted to send,

Argument Re. Findings of Fact

1 quote, a letter to Donald Barnett stating that the
2 Board of Directors were disfellowshipping him from
3 this church, end of quote.

4 Now, they prepared minutes, they say all members
5 are present, they have a vote 3 to 0 that's signed by
6 the corporate secretary. This finding is flat out
7 contrary. That's all there is to it. I don't care
8 what Hicks may have mouthed or said, but it's flat out
9 contrary to what they said they were doing. I just
10 don't understand why Pastor Barnett is bound by things
11 in a letter by Jerry Zwack addressed to him and these
12 guys can get away with slipping and sliding out of
13 everything they are saying.

14 MR. ROHAN: Your Honor, this is not only
15 backed up by Mr. Hicks but it's also part of your
16 finding, that conclusion that you made.

17 THE COURT: My findings were based on --

18 MR. ROHAN: I think 98 should stand.

19 THE COURT: Was there anyone else other than
20 Hicks that said this?

21 MR. WIGGINS: There really couldn't be
22 because Hartley didn't testify and I don't think
23 DuBois did.

24 MR. ROHAN: DuBois deposition unfortunately
25 didn't go into it and he was not available for us

Argument Re. Findings of Fact

1 because we didn't really get to examine him.

2 Oh, Mr. Knibb just reminded me of something else.
3 There is indication throughout the testimony that
4 senior elders were permitted to disfellowship an
5 individual. So, it's also based on that cumulative
6 evidence in addition to Mr. Hicks testifying. So,
7 there is more support for that, it's not that this
8 operates in a vacuum.

9 THE COURT: Well, don't you run into the
10 same defense argument that that may be but this was a
11 board action?

12 MR. ROHAN: Well, but if they did it
13 individually, I mean if it's a board action, I think
14 it's like a vote on the special status, that these
15 people had the power individually to do this and they
16 so did it. They also believed they had the power not
17 to disfellowship him as a board but they believed they
18 had power to remove him as a board based on their
19 lawyer's advice. As you recall, the lawyer's advice
20 never went to the disfellowshipping, it only went into
21 whether or not they could remove him as a board.
22 That's why the attorney said you should remove him as
23 a board and have the series of meetings.

24 But the disfellowshipping was always treated
25 separately and several witness testified that, Mr.

Argument Re. Findings of Fact

1 MacKenzie testified at length in April when he wrote a
2 letter to the congregation explaining in April 1988
3 after this event what happened that when he was
4 talking about some of the items it was based on the
5 lawyer's advice and that was all on the removal of
6 him, none of it had to do with disfellowshipping. So,
7 I think as it stands it's accurate.

8 MR. WIGGINS: Your Honor, it is so clear
9 that they acted as a board. They wrote the letter
10 saying they were acting as a board. It is just like
11 the February 10 meeting in the sense that they were
12 acting, they got together as a board and they met and
13 they took action. You know, they have fought tooth
14 and nail to preserve the idea that this was a meeting
15 of the board. The reason they have done that is
16 that's what it was, it was a meeting of the board.
17 Now, to say that then, well, it doesn't matter, they
18 can get together individually to do the same thing, is
19 just nonsense.

20 MR. ROHAN: This is based on their belief as
21 senior elders that they had not only the right to do
22 this but they had a responsibility to do that as
23 separate from a Corporate Board of Directors action

~~which they also took a separate vote to remove him~~

25 They did those actions separately and I think it's

Argument Re. Findings of Fact

1

significant they did do those things.

2

MR. WIGGINS: It is just that testimony that

Argument Re. Findings of Fact

1 without notice to him or his presence. I think that's
2 where it gets us.

3 MR. WIGGINS: Your Honor, I believe the
4 reason you said that is you thought, well, they were
5 acting as a board, not individually, because that's
6 what they did. They got together and they voted.
7 Yeah, there were two votes and they both are reflected
8 in the corporate minutes, 3 to 0, signed by Scott
9 Hartley as corporate secretary. And to say now they

~~acted individually, is nonsense. They acted as a~~

They acted as the Board of Directors. And
why you put this in here because you thought
ere acting as a board just as they thought they
cting as a board. This is a -- As I say, I
mistake moving for summary judgment because I
them off. That's all there is to it.

MR. ROHAN: Your Honor, this is consistent
he conclusions you gave us last night that they
individually and collectively in
lowshipping.

MR. WIGGINS: Well, I think we should work
he finding of what the facts are to the
sions, not from what we think the conclusions
~~be back to what the facts ought to be~~

MR. ROHAN: And Finding 87 found that the

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Argument Re. Findings of Fact

1 senior elders could disfellowship somebody, so they
2 clearly had the power to disfellowship someone and
3 their actions individually in disfellowshipping him
4 were adequate.

5 MR. WIGGINS: Maybe we ought to look at the
6 letter they wrote, Your Honor, because it's so clear
7 what they purport to be doing here.

8 MR. ROHAN: What exhibit?

9 MR. WIGGINS: Exhibit 49. In page 3 of this
10 letter they he say this disfellowship is not contrary
11 to any provision in our Articles of Incorporation or
12 bylaws as currently amended. Previous limitations in
13 the bylaws to your dismissal have been removed by
14 legally adopting amendments as of today. They didn't
15 think they had the power to do this, so they got
16 together as the board, they amended the bylaws, and
17 their power to do that, of course, depended on the
18 amendment they tried to do in the morning, the
19 articles which the Supreme Court has already tossed
20 out. They laid out this whole game plan, this whole
21 program. We're going to amend the articles and then
22 we're going to amend the bylaws, then we're going to
23 remove him, and then we're going to disfellowship him.
24 And they thought they had to do it in that order. And
25 Hicks testified a week after this that he thought they

Argument Re. Findings of Fact

1 had to do it in that order. That was what they
2 believed they were doing.

3 THE COURT: Well, they were mistaken.

4 MR. ROHAN: Based on their lawyer's advice
5 they were mistaken.

6 MR. WIGGINS: They may have been mistaken --

7 THE COURT: What they legally could and
8 could not do.

9 MR. WIGGINS: That's right. But that
10 doesn't affect what they were doing. They were acting
11 as the board. They wouldn't be acting individually if
12 they didn't think they had the power, that's my point.
13 They didn't think they had the power, and they don't
14 say they had the power.

15 MR. ROHAN: Your Honor, in Mr. Hicks'
16 testimony in this letter, the first sentence and there
17 are two sentences, this disfellowship was not contrary
18 to any provision of our articles and bylaws as
19 currently amended. He said that refers to
20 disfellowshipping. The second one is previous
21 limitations in the bylaws to your dismissal, referring
22 to the second vote, had been removed by legally
23 adopted amendments as of today. The second one
24 consisted of their lawyer's advice. This is
25 consistent with that and they did have the power

Argument Re. Findings of Fact

1 individually as senior elders to disfellowship him and
2 they exercised the power on March 4th.

3 MR. WIGGINS: But, it's so clear not only
4 from that but from MacKenzie's letter in April where
5 he says that the power to disfellowship applies to
6 everyone on earth except Don Barnett. It's so clear
7 that the elders believed they could not disfellowship
8 him without amending these bylaws. That's what they
9 believed. And if they believed that, they would not
10 be saying, by golly, we're individually going to
11 disfellowship him and, by golly, we're going to vote
12 altogether to disfellowship him.

13 MR. ROHAN: The reason they vote altogether,
14 the reason they vote, the three of them on February
15 10th to put him on special status is again to make an
16 impression on both Pastor Barnett and the
17 congregation. That's why they were operating jointly,
18 but the other part the Supreme Court threw out is
19 based on some erroneous legal advice. I think as
20 written this No. 98 is accurate.

21 MR. WIGGINS: One other letter --

22 THE COURT: That Supreme Court decision,
23 where is it again?

24 MR. ROHAN: The Supreme Court decision is
25 only talking about --

Argument Re. Findings of Fact

1 THE COURT: Well, they talk about the
2 dispute of the meeting on --

3 MR. ROHAN: On March 4th.

4 THE COURT: It's a cleverly worded thing.
5 Where is it?

6 MR. ROHAN: I'll get it.

7 THE COURT: I've got so many copies of it.
8 I get more information out of this opinion than I do
9 out of reading you people's briefs. For an opinion
10 based on summary judgment, there's more facts in this
11 case than I've ever seen before. "On March 4, 1988, a
12 board meeting was called". Now, how they arrived at
13 that one is a strange one to me. "And the senior
14 elders met with the Plaintiff. The circumstances of
15 ~~the meeting are disputed. The elders claim they~~

16 passed a resolution to amend the Articles of
17 Incorporation in response to which the Plaintiff asked
18 the elders to leave his residence. Plaintiff denies
19 any vote was taken. He does, however, acknowledge
20 that amendments to the articles had been placed on the
21 table in front of him. In addition, he concedes the
22 elders said they wanted to take a vote on some matter;
23 however, the Plaintiff claims he asked the elders to
24 leave before any further action was taken. It is
25 undisputed, however, the elders continued the meeting

Argument Re. Findings of Fact

1 at another site and the Plaintiff did not join them.
2 At the continued meeting, the elders amended the
3 articles by striking the provision requiring the
4 concurrence of the Plaintiff on any amendment to the
5 articles and bylaws. They also voted to remove
6 Plaintiff as senior elder pursuant to the amended

7 articles. In addition, the senior elders amended
8 bylaws to remove the provision which gave the
9 pastor the authority to veto the action of the board.

10 Now, these are all findings or bases upon which
11 the Court thereafter rules as follows. Last

12 paragraph. "The Board of Senior Elders/Directors
13 Community Chapel has no authority without the
14 concurrence of the Plaintiff to amend the Article
15 Incorporation and Bylaws. While we reverse the
16 court and remand for further proceedings, we point
17 this does not necessarily defeat the effort of the
18 board to oust the Plaintiff."

19 Let me read again. The Board of Senior
20 Elders/Directors of the Community Chapel has no
21 authority without the concurrence of the Plaintiff
22 amend the Articles of Incorporation and Bylaws".
23 does that establish it for all time?

24 MR. ROHAN: Oh, I would think not, because
25 if he was properly disfellowshipped --

Argument Re. Findings of Fact

1 THE COURT: Well, that may be if the
2 disfellowshipping works, but it certainly has no
3 authority under the bylaws.

4 MR. ROHAN: Your Honor, one thing that Mr.
5 Knibb and I just talked about. You found that the
6 eldership group properly disfellowshipped him on the
7 3rd, the day before the meeting. That means as of the
8 4th he's out.

9 THE COURT: 3rd.

10 MR. ROHAN: As of the 3rd he's out, so the
11 next day when the senior elders got together Pastor
12 Barnett isn't a senior elder.

13 MR. WIGGINS: You see, Your Honor, why this
14 is so silly. They didn't ever even argue that. This
15 whole thing gets cut out of whole cloth after that
16 opinion comes down. This whole argument gets cut out
17 of whole cloth. You didn't see this argument back in
18 1988 at the time these things happened. Nobody popped
19 up and said, oh, no, we did this individually. Nobody
20 said that. What they were saying then is we acted as
21 the Board of Directors.

22 And I'd like to mention something else. We're
23 talking about disfellowshipping as the Board of
24 Directors or individually and here's Exhibit 48.
25 Here's what Scott Hartley signed as corporate

Argument Re. Findings of Fact

1 secretary. Quote, Letter to Don Barnett stating that
2 the Board of Directors were disfellowshipping him from
3 this church. Approved 3 to 0. That's what it says.
4 Now, I think they should be estopped from making this
5 argument.

6 THE COURT: If at that point Barnett was
7 out, he was out.

8 MR. WIGGINS: That is why -- At which
9 point?

10 THE COURT: On the 4th.

11 MR. WIGGINS: By virtue of this vote?

12 MR. ROHAN: No, the day before on the 3rd.

13 THE COURT: The day before on the 3rd.

14 MR. WIGGINS: Well, that's why this is so
15 silly. Your Honor, because they never argued that in
16 1988, never.

17 THE COURT: Well, I know they were arguing
18 their cross-claim on the basis of violation of the
19 state statute.

20 MR. ROHAN: That's because we were looking

~~here in the case, what we~~

~~is case over on summary.~~

Here's my point. When these
, nobody was sayings, oh, yeah,

~~for. Well, when I in~~

~~wanted to do was get th~~
judgment.

MR. WIGGINS:
things occurred in 1988

Argument Re. Findings of Fact

1 the eldership disfellowshipped Pastor Barnett on March
2 the 3rd. Not a sole said that. That is only
3 something they cook up now. And what they have on
4 March the 3rd is a piece of paper with a vote that the
5 10 of the 16 elders voted, I don't even remember what
6 it says, I think voted to recommend to the senior
7 elders that they disfellowship Pastor Barnett.

8 Now, they took these other monumental votes, the
9 really important votes, and they didn't even document
10 them.

11 THE COURT: I don't know how these add up in
12 the findings. I have heretofore said that I would
13 give, adopt the findings that the eldership committee
14 had authority under their procedure to disfellowship
15 him and that they did on the 3rd, and that on that

16 ~~pastor barnett was not a member on the 4th. And the~~
17 action they took on the 4th as a board, and I can't
18 deny, I mean I don't see how they can deny that the
19 action was a board action, was valid. Now, it all
20 hangs on the disfellowship on the 3rd. That's the way
21 I see it as to their claim under disfellowship and
22 under the eldership hearings.

23 Now, we get later to the authority of the Board
24 of Elders to oust Pastor Barnett under the theory of
25 inherent power and we get later to the claim of

Argument Re. Findings of Fact

1 ousting Pastor Barnett under the theory of breach of
2 contract.

3 MR. ROHAN: So, they are alternate theories,
4 that's why it's important to make findings.

5 MR. WIGGINS: Your Honor, if I could just
6 reflect on something. What you are saying is that the
7 eldership voted on March the 3rd to disfellowship
8 Pastor Barnett. Despite that sort of belt and
9 suspenders approach, they make a recommend to the
10 senior elders to disfellowship Pastor Barnett.
11 Despite that, the senior elders feel compelled to meet
12 with Pastor Barnett, drive to Olympia, file amendment
13 to the articles, come back, amend the bylaws, dismiss
14 Barnett, and then disfellowship him. I mean, we're
15 getting a little far afield here.

16 MR. ROHAN: Because the lawyer suggested it.

17 MR. WIGGINS: And then Mr. MacKenzie, of
18 course, was the chairman of this body that allegedly
19 disfellowshipped him, writes a letter to the members
20 of the congregation purporting to explain what
21 happened in all of this saying without the amendments
22 to the bylaws Barnett could not be disfellowshipped.

23 MR. ROHAN: Based on the lawyer's advice.

24 MR. WIGGINS: It doesn't say I read them to
25 him, it doesn't say that.

Argument Re. Findings of Fact

1 THE COURT: I don't know what you are
2 saying.

3 MR. WIGGINS: What I'm saying is they

~~wouldn't have been able to do that. It's not a total, after the fact, sort of a~~
~~things. It in fact what they thought they were doing on~~
~~March the 3rd was disfellowshipping Pastor Bennett. It~~
~~just think it is a total, after the fact, sort of a~~
~~rationalization and it doesn't make any sense. It~~
~~never has made any sense.~~

~~THE COURT: Well, it might not make any~~
~~sense, that's what they did.~~

~~MR. WIGGINS: Well, the problem with saying~~
~~something like that doesn't make any sense, that's not~~
~~the first time we've come to that conclusion.~~

~~THE COURT: We have been talking about this~~
~~many, many hours. And the fact of the matter is this~~
~~up to me now to decide what kind of papers it sign and~~
~~that's the kind of papers it sign.~~

~~MR. WIGGINS: Well, right. When the point~~
~~that you're saying that is germane to 99 is that the~~
~~senior elders acted as a Board of Senior Elders when~~
they attempted to disfellowship him. That's what I
heard you say.

THE COURT: No.

MR. ROHAN: In removing them they acted as a

Argument Re. Findings of Fact

1 board.

2 THE COURT: No, the eldership did on the
3 3rd.

4 MR. WIGGINS: Right. But I understood you
5 to say, and it always hangs on that, because what they
6 did on the 4th they did as a board, they did it
7 without notice, they did it without a proper meeting.

8 THE COURT: Yeah.

9 MR. WIGGINS: Then what are we going to do
10 with Finding 99.

11 MR. ROHAN: I think Finding 99 is still your
12 finding.

13 MR. WIGGINS: No. No, because you see the
14 first sentence now becomes wrong. In voting on
15 March 4, 1988 to remove Pastor Barnett from all
16 offices the parenthetical is no longer accurate
17 because you've said they acted to disfellowship him as
18 the Board of Elders, not individually. So, that
19 parenthetical should come out.

20 MR. ROHAN: No, because in 97 which you've
21 already agreed to stated you voted individually and
22 collective in terms of disfellowship.

23 MR. WIGGINS: What the judge just said is he
24 doesn't agree that they voted individually, he just
25 said that.

Argument Re. Findings of Fact

1 MR. ROHAN: That's not what I heard. I
2 thought we were going to keep 97 and 98 and that 99
3 you would enter as --

4 THE COURT: I think now in reflection 97 and
5 98 should come out.

6 MR. WIGGINS: Then on 99, Your Honor, you
7 would take out the parenthetical, I assume, in the
8 first sentence because we're saying that they acted to
9 disfellowship him in their capacity as the Board of
10 Directors.

11 THE COURT: Well, and they also removed him.

12 MR. WIGGINS: But I'm not saying strike the
13 first sentence, I'm just saying that the parentheses
14 as distinct from disfellowshipping him should come out
15 because what you're saying is to the extent they took
16 the vote to disfellowship him or acted to
17 disfellowship him on the 4th, they did it as a board
18 and that it was an invalid action because he wasn't
19 there. He didn't have notice.

20 THE COURT: He wasn't a member at that
21 point.

~~22 MR. ROHAN: So, your finding is as of March~~

23 4 Barnett was no longer a member of Board of
24 Directors, so we should make that a finding.

25 MR. WIGGINS: So, 97 and 98 come out and we

Argument Re. Findings of Fact

1 need a finding here.

2 MR. ROHAN: Well, I think if we have 97 the
3 way it is --

4 THE COURT: It's going to have to be
5 rewritten.

6 MR. ROHAN: Right. We should have a finding
7 that says Barnett was -- Actually, we should have a
8 sentence probably back in 92 that as of this date, as
9 of March -- Well, I guess on 91 it should state as of
10 this date Pastor Barnett no longer held any of his
11 offices at Community Chapel.

12 THE COURT: Yeah.

13 MR. ROHAN: So, in 91 we should say as of
14 3/3/88, Pastor Barnett no longer held any positions
15 with Community Chapel.

16 THE COURT: Now, the findings -- Wait a
17 minute.

18 MR. ROHAN: We have alternative theories.

19 THE COURT: Yeah, I recognize that.

20 MR. ROHAN: So, based on our alternative
21 theory, paragraphs 92 through 99 still need to come in
22 on the alternative theory because if the Supreme Court
23 reversed we wouldn't have to retry the case on these
24 points.

25 THE COURT: Right.

Argument Re. Findings of Fact

1 MR. ROHAN: So, it seems to me we ought to
2 then put in and identify that 92 through 90 whatever
3 is based on our alternative grounds. And I would
4 suggest we make findings and that we then leave in 97
5 the way you originally modified it, leave in 98 and 99
6 as alternative grounds.

7 MR. WIGGINS: Your Honor, these are findings
8 of fact. We're not talking about whether these are
9 grounds or issues or argues or whatever. We're not
10 talking conclusions of law here, we're talking about
11 findings of fact. And what you have said that it all
12 hangs on the disfellowship on March the 3rd as to
13 board action in disfellowshipping. They did not act
14 individually. They acted as a board to try to
15 disfellowship him. What that means is that I guess
16 maybe we ought to leave in the rest.

17 THE COURT: They may find that that is not
18 valid, that won't stand the light of day. Now, let's
19 take a look at inherent power.

20 MR. WIGGINS: I agree, they may do that.
21 So, we should have a finding that very precisely says
22 that the vote to disfellowship Pastor Barnett was
23 taken by the board, not individually, but by the board
24 because that's what you're saying, because they've
25 said that over and over because they put that down in

Argument Re. Findings of Fact

1 their minutes. We're not going to listen to Hicks get
2 up now and repudiate all that. So, here's what I
3 suggest, we leave in -- Let's go back to 97, 98, and
4 99. On 97 we take out the "individually and" because
5 we added individually collectively.

6 THE COURT: That takes out 98 too.

7 MR. WIGGINS: You would take out 97 and 98?

8 THE COURT: No, but that takes out 98 too.

9 MR. WIGGINS: Except that I thought we were
10 going to enter findings in case the Court wants these
11 findings, so that appears to me to be correct. 98

12 ~~appears to be correct. They acted in their capacity.~~

13 ~~No, you're right, it does take out 98, I'm sorry, so~~

14 we would take out individually out of 97, delete 98.

15 MR. ROHAN: Your Honor, before we do that my
16 understanding earlier I guess is that we were holding
17 that the elders voted individually and collectively.

18 THE COURT: Pardon?

19 MR. ROHAN: That you did hold that the
20 senior elders voted individually and collectively as
21 part of our alternative theory to disfellowship.

22 THE COURT: Well, I've changed my mind on
23 that because I don't think they voted individually.

24 MR. WIGGINS: So, we take out individually
25 and we just leave in collectively. 98 now reads the

Argument Re. Findings of Fact

1 three senior elders voted collectively to
2 disfellowship Pastor Barnett, and it should remain the
3 Board of Senior Elders, not the three senior elders
4 because it was a board that voted.

5 THE COURT: All right.

6 MR. ROHAN: The Board of Senior Elders.

7 MR. WIGGINS: And then we take out 98.

8 MR. KNIBB: So, do I understand 97 should
9 now read at this afternoon meeting the Board of Senior
10 Elders voted collectively to disfellowship Donald
11 Barnett and separately voted to remove him from all
12 offices?

13 MR. ROHAN: Yes.

14 MR. KNIBB: That's everybody's
15 understanding?

16 MR. WIGGINS: That's my understanding.

17 MR. ROHAN: Take out 98. And 99 we take out
18 in voting --

19 THE COURT: It occurs to me that the
20 disfellowshipping by the eldership committee ends the
21 ball game under that theory.

22 MR. ROHAN: That's correct.

23 MR. WIGGINS: That's right.

24 THE COURT: And we identify future findings
25 as on the alternative theory.

Argument Re. Findings of Fact

1 MR. ROHAN: Right.

2 THE COURT: Of breach of fiduciary
3 relationship or fiduciary duty.

4 MR. WIGGINS: Your Honor, I guess my only
5 point about that was that's what they did. I don't
6 care whether we put on the alternative findings but
7 these are findings and this is what happened. And
8 this is the way they voted and this is the way they
9 acted. And the conclusion I guess is going to be,
10 which I'm of course not happy about, the conclusion
11 going to be on March 3rd that he was disfellowshipped
12 by the eldership as a group. And I don't like that
13 but that's your conclusions.

14 THE COURT: That has to be the conclusion to
15 be consistent with the proposition that the eldership
16 committee was operating on that procedure with that
17 authority and could take the action they did.

18 MR. WIGGINS: I agree. That's what would
19 follow from that.

20 THE COURT: And it would seem to me and I'm
21 running this by you hoping for a little help here that
22 I was right when I said that under this claim 92 on
23 was not material.

24 MR. ROHAN: Right. That's what you said
25 before.

Argument Re. Findings of Fact

1 MR. WIGGINS: But my understand is we still
2 need them.

3 THE COURT: But he will get to them under
4 alternate theory.

5 MR. WIGGINS: In the sense that this is just
6 a chronological recitation of the findings. we're
7 just moving right along.

8 THE COURT: Yes. And now Mr. Knibb, after
9 91 --

10 MR. ROHAN: We're going to put as of
11 March 3, 1988?

12 THE COURT: No, after 91 there should be in
13 caps in the middle of the line "The following findings
14 apply to theory of breach of fiduciary duty".

15 MR. KNIBB: The problem with that, Your
16 Honor, is that it's not accurate because there are a
17 number of additional findings which are not limited to
18 just that.

19 THE COURT: Well, we get to them later on.

20 MR. ROHAN: Right, then we'll put another
21 bracket in the middle of the page.

22 MR. KNIBB: Well, we're sort of changing our
23 style in the middle of the findings.

24 THE COURT: Yes, we are but we maintain the
25 same sequence.

Argument Re. Findings of Fact

1 MR. WIGGINS: I guess I agree with Mr.
2 Knibb, I wouldn't interject that kind of recitation in
3 the findings. I don't think it's necessary and I'm
4 not sure it helps the reader particularly.

5 MR. KNIBB: I agree with Mr. Wiggins.

6 MR. ROHAN: We have to have something that
7 says --

8 THE COURT: I don't want to have to go back
9 and explain why we are now discharging and holding
10 valid the action of the board on the 4th on the basis
11 of the fact that Barnett was disfellowshipped, no.

fellowshipped, then the board
to stand on a different basis
g unless the reader realizes
ng on. Now, do I make sense to

You make sense to me. I guess
t I think are important. One is
nt on 91 that says that as of
tt no longer held any positions
at the end of 91.

All right.

And then you have that block
en we get to other findings that
e elders' hearings, which there

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Assuming he wasn't dis
action on the 4th has
and it can be confusing
that that's what's going
anybody but myself?

MR. ROHAN:

there's two things that
that we have a statement
that date Donald Barnett
with Community Chapel,

THE COURT:

MR. ROHAN:

statement, and then what
are related back to the

Argument Re. Findings of Fact

20 1 are some at the end, we put a different block heading.
2 I think somehow we have to mark that these are
3 alternative, that the findings are only necessary --

4 THE COURT: Well, yes, that's why I say it
5 would be most confusing if you start off now talking
6 about breach of fiduciary duty.

7 THE COURT: What say you, Mr. Wiggins?

8 MR. WIGGINS: Your Honor, I'm thinking about
9 a different problem here. Here's what I'm thinking
10 about. I have to tell you that I don't believe that
11 what you're finding about disfellowshipping Pastor
12 Barnett on the 3rd is credible and I never believed
13 that was going to be the theory that this case was
14 going to turn on. We made discovery decisions based
15 on our theory and what those documents said and we
16 didn't call people based on that and we didn't do
17 discovery and this is a whole --

18 THE COURT: But that was part of the
19 pleadings.

20 MR. WIGGINS: Well, I don't agree with that.
21 I'd have to go back and look, but I don't think we

22 were put on notice of this.

23 THE COURT: Of disfellowshipping?

24 MR. WIGGINS: Of disfellowshipping
25 eldership on March the 3rd. I do not believe

Argument Re. Findings of Fact

1 put on notice of that, but I'd have to go back and
2 review that. But I am troubled, deeply troubled.

3 THE COURT: I am, too, now that you mention
4 it. I don't see it in the pleadings but it was
5 introduced. I'm going to rule on it.

6 ~~MR. WIGGINS: I have to go back and rethink~~
7 that because if that is clearly disclosed by the
8 pleadings back at the stage that we were doing
9 discovery --

10 THE COURT: I don't think it was disclosed
11 in the pleadings, because I looked at the cross-claim
12 as recently as yesterday I think and there were four
13 bases left under the amended cross-claim, inherent
14 power, under breach of fiduciary, breach of contract,
15 agreement of January --

16 MR. ROHAN: That's exactly what --

17 MR. WIGGINS: Disfellowship in accordance
18 with the bylaws.

19 MR. ROHAN: But the March 3 meeting is the
20 result of the January 25 agreement that gave the
21 eldership the powers, so that was disclosed.

22 THE COURT: Now, we're back to my concern
23 for some way identifying these. We did or I tried to
24 under conclusions of law, if you will remember, I
25 proposed various conclusions of law identifying what

Argument Re. Findings of Fact

1 they applied to, what they related to. And I think
2 the findings should do the same.

MR. KNIBB: Your Honor, if Justice

4 after finding 91 we include a statement to the
5 following effect. And I'll just run this through
6 rough draft form. The following finding about
7 Barnett's removal on March 4, 1988 relates to

8 ~~alternative theories of the case.~~

9 ~~THE COURT: Well, all right, you can~~
10 ~~paraphrase it. If you want to. All I was going to~~
11 ~~findings relating to claims based on future~~
12 ~~negligence or duty.~~

13 ~~MR. KNIBB: The concern I have about~~

14 ~~Your Honor, is that the findings relating to B~~
15 ~~removal on March 4 may relate to more than jus~~
16 ~~they may relate to his removal on any ground.~~

17 THE COURT: You mean the preceding o

18 MR. KNIBB: No, the March 4 ones, be
19 an appellate court were to disagree with you a
20 effectiveness of the March 3 disfellowshipping
21 the March 4 disfellowshipping becomes relevant
22 claim that the March 3 relates to. So, I'm he
23 to put a label on what theory it relates to.

24 MR. WIGGINS: May I make a suggestion

25 THE COURT: Let's look at this with

Argument Re. Findings of Fact

1 head. I am trying, and this isn't the first case I've
2 tried where I do this, to decide all issues before me.

I don't want the Supreme Court sending this thing back
after all the money you people have spent and the time
you've wasted only to say, well, the Court never got
around to deciding whether this was a breach of
fiduciary duty. They just talked about
disfellowshipping.

~~Okay. So, we're going to decide on fiduciary
duty, too, and maybe just running all those facts
serially is sufficient and then in our conclusions we
designate a conclusion that Barnett was~~

disfellowshipped by the action of the eldership on
their meeting after March 3rd.

Next conclusion, Barnett was removed from all
offices in the church by the action of the Board of
Directors on March 4.

Conclusion No. 5 or next conclusion, Barnett was
removed from all offices and the church by action of
the board under their meeting of March 4 on the basis
of breach of contract, and next number conclusion,
whatever.

MR. KNIBB: Well, essentially that's the
structure we followed in this proposal.

THE COURT: Yeah. Are we still on it?

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Argument Re. Findings of Fact

1 MR. KNIBB: I think so. We didn't attempt
2 in drafting the findings to lump findings that related
3 to one theory necessarily in one place but just to
4 kind of go through them from A to Z.

5 MR. WIGGINS: Your Honor, if you want to put
6 something in here, if you think it's necessary to put
7 something in here, I would just suggest that at the
8 end of 91 the way it now reads you simply insert a
9 sentence. Of course, I don't like any of this, but
10 you simply insert a sentence that says based on this
11 finding some of the following findings may not be
12 necessary. That's all you need.

13 Then it's clear that these findings, you're doing
14 ~~your job to hand all the facts or cover all the bases~~
15 or something like that, just a statement that says
16 some of the following findings, because I agree that
17 there may be other findings that relate to different
18 theories, I don't know. I hadn't really thought that
19 through.

20 MR. KNIBB: I would be comfortable with Mr.
21 Wiggins's suggestion.

22 THE COURT: All right.

23 Now, getting back to Nos. 92 and 93, how are
24 these material under any stretch of the imagination?

25 MR. ROHAN: If you are going to still

Argument Re. Findings of Fact

1 continue with 99, then they're relevant. If your
2 holding is still what's in paragraph 99, then they are
3 relevant.

4 MR. WIGGINS: I agree, Your Honor. It
5 finishes the story. This is love's labor lost. I
6 hate to waste the effort we have already gone through
7 this far.

8 THE COURT: We're back to 99. Wait just a
9 minute. 98 is out.

10 MR. ROHAN: That's correct.

11 THE COURT: Need that be expressed in any
12 place other than here?

13 MR. ROHAN: No, because I think it's covered
14 by 99, what's in 98.

15 MR. WIGGINS: I have some things to say
16 about 99. I don't think this is disputed. Well, wait
17 a minute. Well, I think the reason it's out is you
18 ruled to the contrary here that they acted --

19 THE COURT: As a board.

20 MR. WIGGINS: -- as a board. That's why
21 it's out.

22 THE COURT: 98 is out.

23 MR. ROHAN: The first part is, the second
24 part is not.

25 THE COURT: Well, we covered that in 99.

Argument Re. Findings of Fact

1 MR. ROHAN: Right. So, in 99 we should take
2 out in voting on March 4 to remove Pastor Barnett from
3 all offices and disfellowshipping him.

4 THE COURT: The senior elders acted in their
5 capacity as directors.

6 MR. ROHAN: Right.

7 MR. WIGGINS: Okay. So, we're striking out
8 as distinct from disfellowshipping him and putting and
9 disfellowshipping him, and taking out the parentheses.

10 MR. ROHAN: And we're leaving in the rest.

11 MR. WIGGINS: Well, I guess we changed the
12 word ousting in 95. That's one of my problems with
13 this. I don't really think the rest of this, I think
14 the meeting was invalid. It wasn't a continuation.
15 He didn't get notice. He wasn't told, and I don't
16 think you can say the rest of this. I don't think
17 they could conclude that he wouldn't come. I don't
18 think that you could say that Barnett couldn't
19 complain about it.

20 It's a matter of law and I have cited this
21 Lisette case in here. It doesn't matter if they
22 thought that he wouldn't come, it doesn't matter if
23 they thought he voted against it. They have to give
24 him notice. So, I just don't think we need the rest
25 of this finding at all. It's more or less a

Argument Re. Findings of Fact

1 conclusion, it's not really a finding.

2 MR. ROHAN: I think it is a finding. I
3 think it's an important finding, Your Honor. I would
4 agree to changing out to put when he was told by, the
5 very day when he told the three senior elders to leave
6 the parsonage. But all of this is the basis, 99, in
7 which we have made all the other changes back in here
8 and I think 99 is critical in that the senior elders,
9 that they did not have to give him notice because of
10 the circumstances that existed.

ason why he
were meeting
t, almost
t he was
e outfit?

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THE COURT: I have another re
needn't be told. At the very time they
on March 4, he was bringing this lawsuit
identical times, and how can he say tha
entitled to notice when he was suing th

he claim, the prayer

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MR. WIGGINS: Well, t
for relief --

THE COURT: I know.

ouldn't act in
s exactly what they

MR. WIGGINS: They sh
violation of the bylaws. That'
were doing. That's the point.

ut if he was right,

THE COURT: I know, b
he's right.

lso think saying that
bout the senior

MR. WIGGINS: And I a
Pastor Barnett can't complain a

Argument Re. Findings of Fact

1 elders --

2 THE COURT: Well, that's an inappropriate
3 way to express it. Notice of this meeting was not
4 required to be given.

5 MR. KNIBB: Was not required.

6 THE COURT: Was not required to be given to
7 Pastor Barnett.

8 MR. ROHAN: So, viewed by all these facts
9 and circumstances, notice of this meeting was not
10 required to be given to Pastor Barnett.

11 MR. WIGGINS: May we say the senior elders
12 were not required to give notice to Pastor Barnett?
13 It's just a simpler way of saying the same thing.

14 THE COURT: Yeah, I was worried about my
15 sentence structure too.

16 MR. ROHAN: The senior elders were not
17 required to give notice of this meeting to Barnett; is
18 that right?

19 MR. WIGGINS: Well, I guess so. Of course,
20 I disagree with this, but grammatically that's better.
21 Okay. So, now the last sentence reads.

22 MR. ROHAN: Viewed by all these facts and
23 circumstances.

24 MR. WIGGINS: Notice of this meeting was --

25 MR. ROHAN: The senior elders were not

Argument Re. Findings of Fact

1 required to give notice of meeting to Pastor Barnett.

2 MR. KNIBB: Of this meeting.

3 MR. ROHAN: Of this meeting.

4 MR. WIGGINS: Could we simply say viewed
5 under all these facts and circumstances?

6 MR. KNIBB: That's fine with me.

7 MR. WIGGINS: Just another grammatical
8 change.

9 MR. ROHAN: Then we get up to No. 100. You
10 think that's accurate? Motherwell --

11 THE COURT: Why do we have to have that in?

12 MR. ROHAN: But that's part of the factual
13 thing that they then notified them that he was
14 disfellowshipped, and it's important. We have not
15 talked about Motherwell's separate disfellowshipping
16 of Pastor Barnett. Motherwell testified about that --
17 David testified about that in his testimony. In fact,
18 the Court at page 1197, you at that time agreed on
19 page 1197 that there were several references in
20 David's letter that indicated that he had been
21 disfellowshipped. And I think it's important to have
22 it in there to show that he was given notice of it and

~~this also talks about the notice of the senior elders~~

letter the day before.

MR. WIGGINS: Your Honor, I have a problem

Argument Re. Findings of Fact

1 with that finding. Mr. Motherwell testified in
2 November 1990, just two months before this trial, that
3 he did not individually disfellowship Pastor Barnett.
4 And I would like to refer you to my objection at the
5 bottom of page 65 of my objections.

6 THE COURT: Is it in evidence?

7 MR. WIGGINS: It's in evidence. What I
8 copied here is a part of the transcript on page 65 of
9 my objections, and the testimony is, he's impeached
10 with the following testimony. It's more than
11 impeachment because he's a party, of course.

12 Here was the question and answer. "All I'm
13 asking is as his counselor, did you disfellowship
14 him?" Answer: "As part of the unit I did."
15 Question: "But individually as his counselor, did
16 you?" Answer: "I didn't need to because the unit
17 did. If the unit hadn't, I would have." Question:
18 "So, the unit did and, therefore, you, individually as
19 his counselor did not disfellowship him." Answer:
20 "No, because the unit did". Yes, he answers. That's
21 what happened.

22 So, you know, I have to say, Your Honor --

23 MR. ROHAN: Your Honor, I may have gone to
24 St. Anne's but even in St. Anne's the grammar of this
25 thing does not say what Mr. Wiggins says it said.

Argument Re. Findings of Fact

1 It's a double negative in the deposition. The
2 deposition says, "So, the unit did and, therefore, you
3 individually as his counselor did not disfellowship
4 him?" Answer: "No". The answer no to a negative
5 indicates that he had done it. That's true. That's
6 why in depositions you never ask negative questions.

7 (Short break taken.)

8 MR. ROHAN: Your Honor the important thing

a deposition, not at
negative.
stand the answer that
ion of the group.

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is that the question was asked at
trial. That question is a double
THE COURT: But I under
He gave to be that it was the act

But the unit he's
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al in this case, he
e disfellowshipped
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oth testified that he
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owshipped him and

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Isn't that what he says?
MR. ROHAN: He says no.
talking about is the people on th
THE COURT: Let me read
MR. ROHAN: Then at tri
testifies that as his counselor h
him. And several other people in
think Mr. Thiel and Mr. MacKenzie
was -- Mr. MacKenzie and Thiel b
was committed to disfellowshippin
about that on the 29th. He was h
the one who was Donald Barnett's
testified directly that I disfell

Argument Re. Findings of Fact

1 sent him a letter and you read the letter which was
2 delivered by him on March 27th.

3 MR. WIGGINS: If that is the explanation of
4 this answer, certainly Mr. Motherwell could have given
5 it but he didn't. And Mr. Rohan didn't ask him to

6 explain it. There's a flat out contradiction here to
7 what he said at trial. He never purports to explain.
8 And if you look at lines 8, 9, and 10 of the page
9 you're looking at there, Mr. Pierce asked him, "Were
10 your answers given at the time true and correct?"
11 Answer: "Well, so the unit did". He doesn't say what
12 I really meant was I did individually.

13 THE COURT: I understand. Then I don't
14 think the testimony is difficult to understand. I
15 believe that he testified that the unit did and he
16 didn't. So, where are we here now?

17 MR. ROHAN: So, on 100 you are going to
18 strike the second sentence?

19 THE COURT: Is this the finding that he did

20 MR. ROHAN: Yes. The second sentence in 100
21 is a finding that he did, informing him of his
22 disfellowshipping of Pastor Barnett as his counselor.
23 Of course, he voted as part of the unit and he was his
24 counselor too.

25 THE COURT: I'll strike 100.

Argument Re. Findings of Fact

1 MR. ROHAN: Well, the first sentence is the
2 delivery of the eldership's letter to Barnett and the
3 elders' March 4 letter informing him of his
4 disfellowshipping.

5 THE COURT: Why is that important?

6 MR. ROHAN: So that he was given notice at
7 one point.

8 THE COURT: Is that necessary?

9 MR. WIGGINS: I don't mind.

10 MR. ROHAN: Mr. Wiggins says he doesn't
11 mind.

12 MR. WIGGINS: Now, I do think, however, the
13 second sentence should be changed to say what you're
14 finding which is that Motherwell did not individually
15 disfellowship Pastor Barnett. That's the finding.

16 MR. ROHAN: I don't think that's a necessary
17 finding.

18 MR. WIGGINS: They struggled to get the
19 finding they did and I think you found against them.

20 THE COURT: Okay, then put in --

21 MR. ROHAN: I don't know if that's material
22 at this point.

23 THE COURT: That's what I was wondering.

24 MR. WIGGINS: Here's why it's material, Your
25 Honor. We're putting in alternative findings.

Argument Re. Findings of Fact

1 THE COURT: Of the -- See that, Mr. Knibb?

2 MR. KNIBB: Pardon?

3 MR. WIGGINS: The end of the second line in
4 100.

5 THE COURT: The disfellowshipping.

6 MR. WIGGINS: Change his to the. Now, the
7 second sentence here I believe should read Motherwell
8 did not individually disfellowship Pastor Barnett. I
9 think that's all that needs to be said.

10 THE COURT: Where does it say he did?

11 MR. WIGGINS: Right here at the end of that
12 sentence. This second sentence in 100, Motherwell had
13 delivered to Pastor Barnett a second letter dated
14 March 4, 1988 informing him of his disfellowshipping
15 of Pastor Barnett as his counselor. See, that's where
16 they're putting that in and that's why I objected to
17 it. Now it ought to say Motherwell did not
18 individually disfellowship Pastor Barnett.

19 THE COURT: That knocks out even the
20 correction we made.

21 MR. ROHAN: I don't think that's necessary,
22 Your Honor. You made the correction. I think that's
23 all we need to do.

24 MR. WIGGINS: Your Honor, I finally get a
25 finding going my way, I'd like to have it.

Argument Re. Findings of Fact

1 THE COURT: Well, we will give yours and
2 knock out this talk about delivering the letter.

3 MR. WIGGINS: Let's knock out that second
4 sentence. What I would like to say in place of that
5 second sentence is very simply Motherwell did not
6 individually disfellowship Pastor Barnett.

7 THE COURT: Okay. Now, are we proceeding in
8 order?

9 MR. ROHAN: Yes. 101 is necessary because
10 in the disfellowshipping of Barnett two things, well,
11 one of two things needs to occur and I think both did
12 happen. One of them is that there was an emergency or
13 aggravated situation and these individuals, the
14 eldership and senior elders, reasonably concluded
15 there was an emergency and, thus, they didn't have to
16 provide him notice of his disfellowshipping.
17 Otherwise, Mr. Wiggins can argue that the
18 disfellowshipping is invalid.

19 MR. WIGGINS: And my response to that is
20 that when you look at emergency or aggravated
21 circumstances under the bylaws, the whole context is
22 you can't reach the pastor so you have to act
23 immediately, and that wasn't the situation. They had
24 just met with him in the morning.

25 THE COURT: I thought that had to do with

Argument Re. Findings of Fact

1 giving notice.

2 MR. ROHAN: Giving notice to him of the
3 disfellowshipping as opposed to under the
4 disfellowshipping guidelines in the bylaws.

5 MR. WIGGINS: The only reason they're going
6 after this is their theory is the pastor doesn't have
7 to concur in the disfellowshipping if there's an
8 emergency or aggravated circumstance. And my response
9 to that is the situation in which he doesn't have to
10 ~~concur if at all is that he is not available. That's~~

11 ~~Why it's an emergency if he's not available and even~~

12 then it's subject to his ratification. It's kind of a
13 tertiary back-up theory for them.

14 MR. ROHAN: There needs to be a finding that
15 in order to have the effect of the disfellowshipping
16 that they followed the rules. This is one of the
17 rules and we think we've shown that all these
18 witnesses testified that there was no greater
19 emergency ever facing this church than this.

20 THE COURT: All right. But that is not my
21 legal theory. My legal theory is based on the cases
22 that say and every case that I've ever seen required
23 the approval of the fellow who got fired says that
24 doesn't make any difference.

25 MR. ROHAN: Right.

Argument Re. Findings of Fact

1 THE COURT: Even if his approval is
2 required, we're not going to hold that it is
3 necessary.

4 MR. WIGGINS: But what they are getting at
5 here is this is an emergency or an aggravated
6 circumstance and we don't have to get the concurrence
7 from the pastor.

8 THE COURT: I went on into something
9 different.

10 MR. WIGGINS: That's right.

11 THE COURT: My theory is he doesn't have to
12 have notice.

13 MR. WIGGINS: Then I think we ought to take
14 out this stuff about emergency or aggravated
15 circumstances. They can argue it, I can argue it, but
16 you're not relying on this. You didn't reach your
17 decision based on this. We can argue back and forth
18 all day.

19 MR. ROHAN: It's a finding that is our
20 theory and I think you found that that in fact was,
21 the witnesses testified this was a tremendous
22 emergency and I think the Court is aware basically of
23 what was happening.

24 THE COURT: Well, I do, too, but I don't
25 know if that excuses ultimate concurrence.

Argument Re. Findings of Fact

1 MR. ROHAN: But the bylaws, one of the
2 provisions of the bylaws say you don't have to concur
3 with the pastor if you have an emergency.

4 THE COURT: To get the concurrence?

5 MR. ROHAN: That's right. You don't need
6 his concurrence.

7 THE COURT: All right.

8 MR. ROHAN: And 102 is the same, along the
9 same lines.

10 MR. WIGGINS: That was in the second
11 sentence. The point is an emergency means you have
12 got to disfellowship somebody right away and you can't
13 get a hold of the pastor. That's the whole context in
14 which this whole thing arises. It's not such an
15 emergency that the pastor doesn't need to be
16 consulted. It was the pastor can't be consulted
17 because he's not available. That's the context of the
18 emergency.

19 MR. ROHAN: Mr. Harold testified, of course,
20 that when he disfellowshipped Wayne Snowy, Barnett was
21 available.

~~THE COURT: I don't think the emergency~~

22

~~there referred to was the unavailability of the~~

23

Argument Re. Findings of Fact

4 1 MR. ROHAN: Shall we go to 103?

2 THE COURT: Okay.

3 MR. ROHAN: Pastor was warned, he was warned
4 by David Motherwell that it would be end if he didn't
5 follow the special status. Jack DuBois testified in
6 his deposition and it was put into evidence that, of
7 course, that happened if somebody, that was the thing
8 if somebody didn't follow the special status, of
9 course, they would be disfellowshipped. But Pastor
10 Barnett was warned about it and he admitted that
11 during his February 28, 1988 sermon.

12 MR. WIGGINS: I disagree with Mr. Rohan's
13 version of the evidence. I don't think that is
14 accurate at all, and I don't think even Mr. Motherwell
15 said that he was warned before the February 28
16 address. I don't think that's true.

17 MR. ROHAN: I can get his references in his
18 deposition. Page 1087. Question: "After Donald
19 Barnett's February 28 sermon defying the special
20 status that you testified about earlier, was there any
21 point in warning him at that point he may be
22 disfellowshipped?" Answer: "Since he was already
23 warned that if he would not follow special status,
24 accept the special status, No. 1, I felt, no, there
25 wasn't". So, he's testifying he was already warned

Argument Re. Findings of Fact

4
1 that.

2 THE COURT: Who said that?

3 MR. ROHAN: David Motherwell. In addition
4 on page 1110, "Your first conversation with Pastor
5 Barnett", this is cross-examination by Mr. Pierce,
6 "Your first conversation with Pastor Barnett with
7 regard to the fact that eldership might wish to
8 disfellowship him was after the elders put him on
9 special status; is that correct?" Answer: "That's
10 correct, if I understand your question". Question:
11 "So, as far as you know from your communications with
12 Pastor Barnett, he had no idea of any disfellowship
13 action that might be taken by the elders from you as
14 the liaison until after the senior elders put him on
15 special status?" Answer: "None that I can recall".
16 The emphasis of that was certainly after he was put on
17 special status.

13 MR. WIGGINS: Of course, that simply says
19 sometime after February 10, 1988.

20 THE COURT: What are we talking about? The
21 requirement that Barnett be given notice that if he
22 doesn't comply with special status that he might be
23 disfellowshipped?

24 MR. WIGGINS: That's what we're talking
25 about.

Argument Re. Findings of Fact

1 MR. ROHAN: That's right.

2 THE COURT: Is that necessary?

3 MR. ROHAN: Well, it's one of the arguments
4 that Pastor Barnett has made that he was never
5 notified.

6 THE COURT: My God, he was the pastor. He
7 was supposed to, he says, supposed to be in charge of
8 disfellowshipping and knew all about special status
9 and disfellowshipping.

10 MR. ROHAN: Right. So, he would obviously
11 know.

12 MR. WIGGINS: Here's the problem. They had
13 not talked to Don about this --

14 THE COURT: I know.

15 MR. WIGGINS: And they didn't think they had
16 the power to do it so they imposed this special
17 status.

18 THE COURT: We're not talking about that,
19 we're talking about notice.

20 MR. WIGGINS: And what it says is he was
21 told this. He was warned this. What they're saying
22 is he was warned he might be disfellowshipped even
23 though the senior elders didn't think they had the
24 power to do it. That's what the finding is going to
25 amount to.

Argument Re. Findings of Fact

1 MR. ROHAN: No.

2 MR. WIGGINS: And Mr. Motherwell's testimony
3 said sometime after he was put on special status he
4 was warned about this. It doesn't say when any of
5 that happened. Now, Motherwell does, his answer kind
6 of assumes at some time he was already warned. It
7 doesn't say who warned him or what was said. You
8 can't tell from Motherwell's statement what he talked
9 about.

10 MR. ROHAN: No, Mr. Pierce asked him the
11 question on cross-examination, a leading question

~~in fact notified him of the~~
in fact notified him of the
and it was Mr. Pierce's
my question. He did a much
this respect.
No, that context, if you look
question has to do with was
ut the possible disfellowship
reement? That's the context in
that question. And that's why
ou didn't say anything about
cial status. Well, we don't
s given to him from this

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wanted. He said he had
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MR. WIGGINS: I
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there any discussion about
before he signed the agre
which Mr. Pierce asked th
he asked it that way. Yo
this until after the spec
know when any warning was
answer.

Argument Re. Findings of Fact

1 MR. ROHAN: He warned him before he was
2 disfellowshipped, because otherwise there wasn't --
3 All this 103 says is Pastor Barnett was warned before
4 the decision to disfellowship him that such action
5 might be taken. It's ludicrous to presume that he was
6 warned after he was disfellowshipped, oh, by the way,
7 that special status if you broke it --

8 THE COURT: I'll let it in. I think that's
9 a weird finding frankly.

10 MR. ROHAN: Paragraph 104 is that Pastor
11 Barnett never requested an appeal or reconsideration.
12 And he testified and this was something he said in
13 answer to the lawsuit, although -- I mean his
14 deposition -- that he regarded his filing the lawsuit
15 equivalent of such an appeal. He tried to change that
16 testimony when he was on the witness stand, but that's
17 what his earlier testimony had been. And Mr. DuBois
18 at pages 55 and 56 and 71 of his deposition also
19 testified that Barnett never requested an appeal. And
20 Barnett full well knew that he had the right to
21 appeal.

22 MR. WIGGINS: Well, the finding that I have
23 proposed is that he couldn't appeal because all three
24 senior elders purported to disfellowship him. He felt
25 he was precluded from appealing because the senior

Argument Re. Findings of Fact

1 elders' attorney told him if he appeared at the church
2 he would be arrested for trespassing and he certainly
3 said that. Nobody disputes the senior elders'
4 attorney told him that. And he felt that the only
5 choice he had was to file a lawsuit. That's the
6 point. The point about the appeal is simply this.

7 THE COURT: But how is that going to even
8 enter?

9 MR. WIGGINS: The point about the appeal is
10 three senior elders, it is inconsistent with the
11 bylaws to say that three senior elders can sit down
12 and disfellowship somebody because the bylaws
13 contemplate the right of appeal to senior elders who

have not been part of the disfellowship decision.

That's the way we get into this and somehow the

Defendants have transformed this into asking Barnett

about an appeal. But the reason I went into it was it

makes the right of appeal nonsense because the bylaws

say if a senior elder imposes a disfellowship then

other senior elders have to be included in the panel

that --

THE COURT: The full eldership was the one

that disfellowshipped him.

MR. WIGGINS: That's why it's inconsistent

with the bylaws, that's the point. None of this other

Argument Re. Findings of Fact

1 stuff has anything to do with it.

2 MR. ROHAN: I think this stuff is important.

3 THE COURT: It will remain in.

4 MR. ROHAN: 105 is not objected to. Barnett
5 has proposed a separate finding.

6 MR. WIGGINS: Yes. The point I'm throwing
7 in --

8 THE COURT: I know what we're throwing in.

9 MR. WIGGINS: There was a vote taken at the
10 February 28 service.

11 THE COURT: Not as far as I was concerned.
12 He said how many of you want me? How many of you want
13 him? And they threw up their hands. That's not a
14 vote that was contemplated.

15 MR. WIGGINS: Well, I'm not objecting to
16 what is here because 105 is accurate the way it is
17 written.

18 MR. ROHAN: 106.

19 THE COURT: Here's the only objection I have
20 to all of these, it's just in here and not worthy of
21 the paper they're written on.

22 MR. WIGGINS: I don't know what this one
23 means, Your Honor.

24 MR. ROHAN: Your Honor, there's only a few
25 left, thank God. They're all in response to arguments

Argument Re. Findings of Fact

1 the pastor has raised.

2 THE COURT: If that's the case, this thing
3 should look like a Sears Roebuck catalog.

4 MR. WIGGINS: Well, when they violate so
5 many bylaws and breach so many things, that's the way
6 it's going to look. But I don't know what it's
7 supposed to mean. I'm not sure. I don't know what
8 they're getting at here.

9 MR. ROHAN: The disclaimers have to do with
10 the written -- I guess the best way to say this is

1 the Court has held that it's what authority they
2 actually have and not what they think they have, and
3 this is our sort of fancy-smancy way of saying that.

4 THE COURT: I'm not going to enter that as a
5 finding. I think that's a legal conclusion.

6 MR. WIGGINS: The trouble with it is you
7 have in fact --

8 MR. ROHAN: The factual part is the second
9 sentence, Pastor Barnett did not act to forbear in
0 reliance on any disclaimers made by the elders. So,
1 the fact that they may have said in the letter of
2 February 15th we're acting as a --

3 THE COURT: No, I don't even like that.

4 MR. WIGGINS: Are we taking out the whole

5 thing?

Argument Re. Findings of Fact

1 MR. KNIBB: Are you finding that the facts
2 are other than that?

3 THE COURT: No, I just feel it's totally
4 immaterial and irrelevant under the facts.

5 MR. ROHAN: In 107, what we're talking about
6 is the breach of the employment contract which you
7 have found previously.

8 THE COURT: Where do you deal with breach of
9 fiduciary duty?

10 MR. ROHAN: Breach of fiduciary duty is in
11 108, the next one. 107 is breach of contract, and 108
12 is breach of fiduciary duty. And then 109 goes into
13 some of the other factors elicited in the case law,
14 good faith and substantial evidence reasonably
15 believed to be true.

16 MR. WIGGINS: Your Honor, the argument about
17 employment contract --

18 THE COURT: I could say that in about five
19 words.

20 MR. WIGGINS: I would be happy to hear your
21 alternative.

22 THE COURT: Pastor Barnett preached his
23 employment contract, period.

24 MR. WIGGINS: Here's the problem, Your
25 Honor.

Argument Re. Findings of Fact

1 THE COURT: As pastor, if you want to put
2 that in.

3 MR. ROHAN: One of the things here is we
4 need a finding that they reasonably concluded based on
5 the information, because that's part of the Baldwin
6 vs. Sisters of Providence case. And you're finding
7 that their decision to do it was reasonably concluded
8 based on the information.

9 THE COURT: Okay.

10 MR. ROHAN: So, that's why it has to be a
11 little longer than that because it's a finding that
12 they reasonably concluded that in fact happened.

13 MR. WIGGINS: Yeah, this is really turning
14 Baldwin upside down. Baldwin relies on the fact that
15 it's an implied contract that the employer will stick
16 to the terms of the employee manual which the employer
17 wrote. What we have here is bylaws that say he can't
18 be fired. And so now we're saying well, there's some

19 implied contract that I can be fired and, you know,
20 we're going to give to the elders the discretion to
21 decide whether he breached the implied contract. It
22 turning Baldwin upside down.

23 THE COURT: I'm not sure it's based entirely
24 upon Baldwin.

25 MR. ROHAN: No, you're right. I think, You

Argument Re. Findings of Fact

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1 Honor, that your shorter one is the correct one.
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16 And now we really are at the heart of the
17 pastoral relationship with the congregation and at the
18 heart of the First Amendment where you're saying
19 there's some implied obligations of this employment
20 contract as pastor and he breached them. And now you
21 are getting into saying what makes somebody fit to be
22 a pastor and unfit to be a pastor. That's the problem
23 with it. It just can't be done. It's just another
24 way of their trying to throw in one more ground. It's
25 window dressing, because the law they are relying on

Argument Re. Findings of Fact

1 is that the bylaws make up the contract.

2 THE COURT: Okay, I'll strike the last
3 sentence and the rest of it stands.

4 MR. WIGGINS: So, it's the finding that they
5 proposed that you're leaving in here?

6 THE COURT: Yeah.

7 MR. ROHAN: 108 is the breach of fiduciary
8 duty.

9 MR. WIGGINS: Now, I have to ask what
10 materiality there could conceivably be that the elders
11 reasonably believed he had breached his fiduciary
12 duties. If you're going to find that he breached his
13 fiduciary duties, just like if you're going to find
14 that he breached his contract, we're now at a place
15 where you have to find that based on competent
16 evidence, not that the elders are finding it.

17 MR. ROHAN: No, you can find that the elders
18 reasonably believed under Baldwin that Barnett
19 breached his fiduciary duty.

20 MR. WIGGINS: The problem is fiduciary
21 duties aren't something that the elders imposed on
22 Barnett like the employment manual was imposed in the

able determination and
they think he breached a

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whether within their own reason
their own good faith whether th

Argument Re. Findings of Fact

1 fiduciary duty. That's the problem with it. The
2 fiduciary duty is a construct of law and it's a
3 construct this Court has to say what the fiduciary
4 duty is and whether Barnett breached it. Otherwise,
5 all of the protective provisions collapse into utter
6 meaninglessness.

7 MR. ROHAN: They don't because they have to
8 be supported by someone that reasonably believes and
9 they were based on evidence that was reasonably
10 believed.

11 MR. WIGGINS: Then all of these cases that
12 say a Court can't look into the reasons for
13 terminating a pastor are wrong.

14 MR. ROHAN: I don't believe it. We've
15 already crossed that bridge.

16 MR. WIGGINS: Well, we're going across it
17 again here.

18 THE COURT: Okay, 108 stays.

19 MR. ROHAN: Thank you. 109 is there that we
20 operated in good faith.

21 MR. WIGGINS: Now, wait just one second,
22 Your Honor. There's a problem here because the senior
23 elders -- Here's the problem, a couple of problems.
24 First of all, it's the Board of Senior Elders is what
25 you found and they didn't effectively disfellowship

Argument Re. Findings of Fact

6
1 him.

2 THE COURT: It doesn't say Board of Senior
3 Elders.

4 MR. WIGGINS: That's what it should say
5 because it's not the senior elders, it's the board.
6 And every time we tried to show that this was unfair
7 to Pastor Barnett because they were singling him out
8 for discriminatory treatment, you stopped us. We
9 couldn't put in any evidence of that. Our defense was
10 it wasn't in good faith and it was arbitrary for them
11 to do this because they were doing the same thing.

12 ~~You stopped us about every time. I don't think~~
13 you can put this finding in now when you kept us from
14 proving the opposite. You kept us from proving bad
15 faith. How can you find good faith when we couldn't
16 prove bad faith?

17 MR. ROHAN: Your Honor, I think that the
18 senior elders --

19 THE COURT: 9, 10, and 11 are in.

20 MR. ROHAN: We both agree --

21 MR. WIGGINS: Excuse me. The substantial
22 evidence is a term of art now. Now you're placing
23 your judicial approval on this. This is probably no
24 more than, either this is repetitious or what you
25 said --

Argument Re. Findings of Fact

1 THE COURT: I think it is. 111 is out.

2 MR. ROHAN: Because it's redundant. 112 and
3 113 we both agree on, so the next question is 114.

4 MR. WIGGINS: 114, Your Honor, the last
5 sentence says that the revision was not intended and
6 did not have the effect of reinstating anyone. Three
7 people signed those bylaws. One testified, Pastor
8 Barnett, and he was happy to see this because he
9 thought it did reinstatement him, but nobody testified
10 that it was not intended to reinstate Pastor Barnett
11 because the others couldn't testify.

12 MR. ROHAN: Pastor Barnett himself testified
13 at page 953 that on March 4, wait a minute. "All the
14 way through the end of 1988 neither Jack Hicks nor
15 Jack DuBois or Scott Hartley ever gave you any
16 indication that they wanted you to be their pastor
17 again; isn't that true?" And he answer. Then the
18 question again on 954, "Did Scott Hartley say anything
19 to you after March 4, 1988 that indicated that he
20 wanted you to be pastor again?" Answer: "If he
21 wanted me to be his pastor, no". And I asked the same
22 question about Jack DuBois and the same question about
23 Jack Hicks. Pastor Barnett admitted there was nothing
24 after March 4 that indicated to him in any way that
25 they wanted him to be his pastor.

Argument Re. Findings of Fact

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1 MR. WIGGINS: Okay, then that's what the
2 finding ought to say. The finding ought to say
3 neither Hicks nor DuBois nor Hartley ever stated that
4 they intended to have the effect of reinstating
5 Barnett. That's what the evidence says. It doesn't
6 say that no one, that this was not intended. You see,
7 ~~you're taking an absence of a statement and turning it~~
8 into a negative statement and that doesn't follow at
9 all.

10 THE COURT: I don't think that's a negative.

11 MR. ROHAN: As the Court indicated, the vote
12 was taken in December of 1987 and it was only to
13 affect the satellite churches and there was no intent
14 at that time to reinstate anybody.

15 THE COURT: I'll stand.

16 MR. WIGGINS: Oh, yeah, 115 is clearly
17 incorrect because Mr. Motherwell and his cohorts have
18 never been made senior elders. They never have. The
19 exhibits that were put into Motherwell's testimony
20 says they abolished the office of senior elder, they
21 eradicated the difference between senior elders and
22 elders and this guy became an elder. They didn't
23 bother to amend the bylaws.

24 THE COURT: I didn't follow that but maybe.

25 MR. ROHAN: 115 is correct because since the

Argument Re. Findings of Fact

1 senior elders, there's been votes taken and the people
2 that are currently on the senior elders have voted and
3 added people as time went on. They did vote at one
4 point to change basically the name and made a
5 difference there between senior elder and elder, but
6 they are the Board of Directors and they have
7 legitimately run this corporation since December of
8 1988 when Judge Quinn.

9 THE COURT: I don't even know why it's here.

10 MR. ROHAN: Mr. Knibb actually knows more
11 about this.

12 MR. KNIBB: I can explain why it's here,
13 because Pastor Barnett challenged the standing of the
14 current senior elders to maintain this action which
15 was in effect a challenge to their office. And these
16 are facts that relate to their right to hold office
17 and the question of his right to challenge their
18 entitlement to office in this proceeding as distinct
19 from a co-warranty or other type of proceeding.

20 THE COURT: I thought the challenge was
21 because of the April 8th articles.

22 MR. KNIBB: The challenge, as I recall, was
23 that the bylaws required the concurrence or approval
24 of the pastor to any new senior elders.

25 MR. WIGGINS: That's part of it.

Argument Re. Findings of Fact

1 MR. KNIBB: And they argued that since the
2 new senior elders had not been approved by the pastor
3 that they did not effectively hold office. And these
4 relate to how they came to office, the fact that they
5 are recognized by everyone else as being in office and
6 why they have not yet filled the position of pastor
7 which remains vacant. And they all are based on the
8 cases that deal with the question of someone being
9 allowed to challenge the standing --

10 THE COURT: I didn't think the challenge was
11 in that respect.

12 MR. KNIBB: That's my understanding of it.

13 MR. WIGGINS: That was the challenge, Your
14 Honor. It's more than a challenge to their authority
15 to do this, it was a challenge that was made when they
16 were added as parties. We challenged their right to
17 even come in as parties because they weren't in those
18 positions and you let them in because --

19 THE COURT: When I asked you why, you said,
20 well, we're looking into that now. And we'll tell you
21 when it becomes necessary. And the next thing I knew
22 was this bombshell. I didn't know anything about it
23 until that time of the April 8th articles. I thought
24 that was what we were talking about.

25 MR. WIGGINS: Your Honor, at the time that

Argument Re. Findings of Fact

1 the motion to amend the bylaws was made, we had not --
2 or the motion to add Mr. Motherwell --

3 THE COURT: Well, if I'm wrong, say I'm
4 wrong.

5 MR. WIGGINS: Yeah, you're wrong, I guess.
6 At that time we had not received the copies of the
7 bylaws we needed to show that he was not validly
8 added. That was the problem we had. And you said,
9 well, he says that he's a member of the Board of
10 Senior Elders, come in and you can fight about it
11 later. And we fought about it later on summary
12 judgment and we came up with these very same reasons,
13 that he was not --

14 First of all, the senior elders purported to
15 eradicate the distinction between elders and senior
16 elders and then they made this man an elder. They
17 didn't make him a senior elder, they made him an
18 elder. That's not authorized by the bylaws.

19 Secondly, the bylaws say that the pastor has to
20 approve any new members of the Board of Senior Elders.
21 This guy doesn't even call himself a senior elder.

22 THE COURT: I know. If the bylaws still
23 exist in their original form.

24 MR. WIGGINS: Well, it's not just that. We
25 know what the bylaws were. The April 8, 1988 bylaws

Argument Re. Findings of Fact

1 or whatever the date was in April and the same
2 provisions are still in there.

3 MR. ROHAN: The bylaws were amended in
4 December of 1988 by ratifying the earlier decision of
5 the DuBois, Hicks, and Hartley.

6 MR. WIGGINS: That wasn't an amendment to
7 the bylaws. That was the whole thing. The whole

~~... this is the county income, that's what~~

has thrown them out, now we're going to go back and do
it again and make sure. And they tried to get Barnett
to come to a meeting so they could add another layer
of Byzantine complexity here and it didn't work and so
now we're left with not much there. But the point is
this guy has never been made a senior elder under the
bylaws of Community Chapel. We challenged his ability
to maintain the action when he came in. You let him
in saying we could litigate it. We argued this on
summary judgment. We argued it at the time of trial
and he just hasn't. And he doesn't even call himself
a senior elder. He calls himself an elder. This is
the first time I seen he called himself a senior
elder.

THE COURT: I don't know what evidence there
is pro or con.

~~MR. WIGGINS: The evidence says that Mr~~

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Argument Re. Findings of Fact

1 Motherwell testified and identified the minutes of the
2 Board of Senior Elders by which all this occurred.
3 It's one of the exhibits. And we stepped through it.
4 And what happened was there was a vote that the senior
5 elders called in the elders and they sat around and
6 they decided they would do away with the distinction
7 between elders and senior elders. Then they voted
8 this guy in to be an elder. And there's some more
9 minutes to add other people.

10 But the point is there wasn't a pastor. No
11 pastor ever voted on anybody and none of the people
12 who now are elders were ever voted on by the pastor.
13 Now, why do I carp about the pastor? The significance
14 of that is that's the only time the people of
15 Community Chapel have any say in the appointment of
16 members to the Board of Senior Elders. Because if a
17 new pastor is going to be added, the congregation has
18 to approve of it. It is the one that keeps this board
19 from being a totally self-perpetuating board, because
20 the new pastor has to be approved. He has to be
21 approved by the people.

22 THE COURT: Let me cut you short. Whether
23 he remains or is an elder I think depends upon the
24 outcome of this lawsuit.

25 MR. ROHAN: That's correct.

Argument Re. Findings of Fact

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THE COURT: If Barnett is put back in as original pastor, I would imagine that all of these elders would be out.

MR. WIGGINS: But, Your Honor, here's where there's a difference. The bylaws say that a pastor has to approve, that's the key. And it doesn't matter whether Pastor Barnett gets back in or not, a pastor did not approve this man. They could have added another pastor.

THE COURT: I can understand why they can't get a pastor. They can't get anybody, because who knows how long it will take to get this thing determined whether or not who they hire is going to be a pastor.

MR. WIGGINS: All they have to do is say here's the person we pick to be the pastor and ask the

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imagine that this thing is
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MR. ROHAN: Your Ho
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THE COURT: I can i
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Argument Re. Findings of Fact

1 MR. WIGGINS: I agree with that, but that
2 doesn't change what the bylaws say.

3 THE COURT: I think he is a bona fide living
4 breathing presently serving senior elder.

5 MR. KNIBB: That's what these proposed
6 findings intended to say.

7 THE COURT: It doesn't say that.

8 MR. WIGGINS: No, it doesn't, it says
9 something very different. And it says some things
10 that aren't supported by the evidence. They never
11 called him a senior elder.

13 senior elder.

14 MR. ROHAN: He signed t
15 elder.

16 MR. WIGGINS: Your Hon
17 thing --

18 THE COURT: End of find
19 discussion.

20 MR. KNIBB: Your Honor,
21 we need a finding in here about w
22 have a pastor because that's rele
23 argument about him holding office
24 approved by a pastor. The facts
25 the facts which the cases say are

Argument Re. Findings of Fact

1 determining whether a, quote, de facto, unquote,
2 officer can hold office. And it further relates to
3 whether Pastor Barnett even has standing, if you will,
4 to question his title to hold that office. That's why
5 these findings are here.

6 MR. WIGGINS: But the problem is, there are
7 problems with these findings, too. He didn't say that
8 they have tried to find a pastor and all that.

9 THE COURT: Gentlemen, I have to sign these.
10 The name that goes on this thing is mine, and as they

11 say about Hills Brothers coffee, you get a little
12 picky when your name goes on the paper. And I'm
13 getting a little picky here and I'm going to say that
14 the senior elders now serving are acting. What else
15 do you want to call them? Bona fide, acting elders,
16 senior elders, end of remarks.

17 MR. KNIBB: Can I understand where this goes
18 and what it's in lieu of?

19 THE COURT: Pardon?

20 MR. KNIBB: Where does this go and what's it
21 in lieu of?

22 THE COURT: Under 115.

23 MR. KNIBB: Is that in lieu of everything?

24 THE COURT: Yes.

25 MR. ROHAN: Shouldn't there be a statement

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1 that the --

2 THE COURT: And are authorized to continue
3 to defend this action and prosecute Defendants'
4 counter-claim.

5 MR. ROHAN: Fine. One item that we were
6 going to come back to, Your Honor, now that we have
7 finished these findings is No. 86 which is on page 29.
8 And this goes into page 29, numbers 86. The
9 importance of this is that the bylaws state that the
10 pastor or his designee have to concur in the
11 disfellowshipping. And while the Court has found an
12 emergency existed, David Motherwell and John Harold
13 and Jack Hicks all testified that in Exhibit 37 Pastor
14 Barnett delegated that authority.

15 THE COURT: I'm going to find that they did
16 too. Next.

17 MR. WIGGINS: I would like to ask the Court to reserve
18 evidence on that?

19 THE COURT: 79, gentlemen.

20 MR. ROHAN: That's right, you reserved
21 hearing on that. That was on confidentiality.

22 MR. WIGGINS: Your Honor, there's another
23 one that we reserved on that I'd like to talk about
24 little earlier than this.

25 THE COURT: By doing what, by their

Argument Re. Findings of Fact

1 appearance at the congregation?

2 MR. ROHAN: Yes. So, you find 79.

3 MR. WIGGINS: Okay, Your Honor, now we have
4 one on -- Let's see, I had my proposed 72.1 that you
5 deferred.

6 THE COURT: And yours said they did
7 breach --

8 MR. WIGGINS: No, this is a different
9 finding, Your Honor. This one has to do with --

10 THE COURT: Let's finish this one.

11 MR. ROHAN: 79 you are finding; is that
12 right?

13 THE COURT: I marked out the first sentence
14 and find the balance. Okay, the next one, Mr.
15 Wiggins?

16 MR. WIGGINS: Your Honor, the next one was
17 my proposed 72.1 which is also deferred. It's in my
18 findings, Your Honor, my proposed findings.

19 THE COURT: I'm looking. Wiggins wants to
20 come back to I have here.

21 MR. WIGGINS: Right. If you look at page 44
22 of my objections, I have a proposed finding.

23 THE COURT: What does it say?

24 MR. WIGGINS: It says that this had to do
25 with Pastor Barnett telling the elders that under the

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1 bylaws he was in charge of all the worship services
2 and ordering them not to say anything at the worship
3 services about the special status or eldership
4 hearing. And I found the evidence that supports that
5 and I'd like to relate it to the Court.

6 First of all, it's on 398 and 399. This was one
7 of those tapes that Mr. Rohan played in
8 cross-examination. And Mr. Rohan put this evidence
9 in, we didn't put any evidence in. Mr. Rohan played
10 an excerpt from the tape and this is Pastor Barnett in
11 one of these sermons and the excerpt from the tape.
12 And I'm reading what he says.

13 He's talking about this meeting on the 25th
14 before the worship service on the 26th. I said, this
15 is line 12 on page 398, I said I got to go, my time is
16 up. I have an appointment at 6:00 and I feel like I'm

17 rushing. And he said come back Monday at 1:00 and w
18 will given you a chance to continue and we will
19 continue to discuss it. And I said okay. I said, n
20 I don't know why I said this because I wasn't really
21 thinking they would do it. I was shocked that they
22 would do it, but I said it anyway. I said okay. I
23 not. I forbid you to bring this before the church
24 because we haven't even discussed this yet. And
25 remember that I'm in charge of all the services

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1 whether I am present or not according to the bylaws
2 and we will do everything in a legal manner. So,
3 after we discussed it, see if we can come to some
4 unity of agreement, see what a person means by his
5 statements and why somebody thinks it is wrong and
6 take it down to the meeting. At the end of that the
7 senior elders will have a legal meeting with me
8 present and we will vote. If I'm out-voted, then you
9 do according to whatever you vote.

10 Now, that was what Pastor Barnett said. Mr.
11 Rohan played that tape and that's what he said, that
12 Pastor Barnett said on the tape. He prohibited them
13 from bringing this up.

14 Now, again, on page 1549 of the transcript,
15 Pastor Barnett says the same thing just as directly.

16 MR. ROHAN: Your Honor, even if this is
17 true, I don't see where any of this is material.

18 MR. WIGGINS: Here's where it's material,
19 Your Honor. He tells them don't reveal this at the
20 worship service. He's in charge of the worship
21 service whether he's present or not. They get up and
22 do it. And here he is and everybody is just outraged

~~that he would then himself be angry at them for~~ 23

violating his direct orders in contradiction of the
bylaws. That's where it's material. It puts that

24

25

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1 context. He told them not to do it and they got up
2 and did it anyway and they violated the bylaws when
3 they did that.

4 THE COURT: What number are we talking about
5 here?

6 MR. WIGGINS: We're on page 44 of my
7 objection. It's an additional finding that I'm
8 proposing, Your Honor, and it would fit in after --
9 I've numbered it 72.1 because I think it would fit in
10 after Finding 72.

11 MR. ROHAN: Your Honor, I do not see how
12 this is material at all. I do believe somebody
13 testified, and I'll tell you I have not read the
14 transcript verbatim and I've looked for it. But the
15 back of my mind tells me that somebody stated that --
16 Oh, Oh, Thiel. Thiel testified that the only thing
17 Barnett said on the 25th at the end of the meeting
18 was, "Thanks a lot, Jack" and "Goodbye". And that's
19 what Thiel testified to. And Thiel's testimony on
20 this point, if I can put my finger on Thiel's
21 testimony -- 1457 and 58, Thiel says, "Barnett did
22 not say he wanted to meet again on Monday the 29th.
23 The elders were stunned".

24 THE COURT: Yeah, but if the tape was
25 introduced.

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1 MR. ROHAN: This is Barnett after the fact.
2 This is the tape on the 6th, right?

3 MR. WIGGINS: Here is Mr. Rohan putting --
4 It's the tape on the 6th, it's March 6th that Barnett
5 said this. It was just a week afterwards. He says
6 this and Mr. Rohan played this in to impeach Pastor
7 Barnett. Mr. Rohan put this into evidence, Your
8 Honor. That's what he said at the time.

9 MR. ROHAN: Here's what Mr. Thiel says.
10 "Was there any discussion about resuming the meeting?"
11 "When Barnett left the committee at the end of his
12 tirade on the 25th, he was in a state of rage and I
13 remember Jack Hicks saying something to me and it
14 seems to me it had to do with getting together, as I
15 recall distinctly Don's words being, 'Thanks a lot,
16 Jack', and he marched out the door. That was the last
17 thing that was said. Therefore, there was no date set
18 for getting back together".

19 Part of what Pastor Barnett says in this thing
20 is, well, I told him we'd all get together on Monday
21 and everybody says at this meeting, and he goes on at
22 the next page saying that, "they wanted to continue to
23 talk about Jerry's grievance. Barnett kept looking at
24 his watch". And I just don't think that testimony by
25 Pastor Barnett is credible.

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10 1 MR. WIGGINS: Your Honor, this is Pastor
2 Barnett's statement to his congregation in 1988. It's
3 his testimony in 1991. It's his consistent testimony.
4 They didn't ask Jack Hicks this question. They asked
5 Mr. Thiel. Mr. Thiel, the one thing that struck me
6 about Mr. Thiel --

7 THE COURT: You don't have to characterize
8 these people, I saw them all.

9 MR. WIGGINS: All right. It's part of the
10 reason that Pastor Barnett was so angry on Sunday,
11 February the 28th. He is in charge. This is his
12 church.

13 THE COURT: I know and we have a finding
14 that he is in charge of the worship services.

15 MR. WIGGINS: That's right.

16 THE COURT: And now the only question is did
17 he forbid these people or request them or whatever not
18 to mention the proceedings.

19 MR. WIGGINS: And Mr. Rohan himself
20 undertook to put that in, not just to put it in but to
21 put in the tape recording so we would all hear Pastor
22 Barnett say those words himself. Mr. Rohan, I have to
23 say, he thought that was significant and he played the
24 tape as an admission of Pastor Barnett.

25 And then Barnett again says the same thing here

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1 in this later statement. It was very important to
2 Pastor Barnett. It may not have been important to
3 Greg Thiel, but it was very important to Pastor
4 Barnett. And Thiel doesn't say it didn't happen.

5 THE COURT: I'm going to find in No. 72 --

6 MR. KNIBB: Might I suggest that you put it
7 in 76 if you are going to put something in. We say
8 there that on February 26 pursuant to a decision by
9 the entire eldership certain of the elders addressed
10 the congregation. If you were going to say something
11 about this, you could insert it right there, after the
12 clause pursuant to the decision by the entire
13 eldership and contrary to the directions of Pastor
14 Barnett, if that's what you are intending to say.

15 THE COURT: It was in 77 that I made the
16 finding that Barnett should be in charge of the
17 services.

18 MR. ROHAN: It's already in there.

19 MR. WIGGINS: That's in there but not that
20 he told them not to do this, that's the point. And I
21 don't care whether it goes in 72, 75, 76, or 77 but I
22 think it ought to be in there.

23 THE COURT: 79 looks like the place.

24 MR. ROHAN: What language do you want in
25 there?

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11 1 THE COURT: Following the one sentence that
2 now constitutes 79, "This disclosure of facts
3 developed in the eldership meeting were contrary to
4 the specific request of Pastor Barnett to keep
5 confidential such matters.

6 Gentlemen, what do we do now?

7 (End of transcript.)
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