

INDEX OF PROCEEDINGS

	PAGE
Argument RE: Sealing of Findings and Conclusions	2204
Argument RE: Findings and Conclusions	2210
Argument on Plaintiff's motion RE: Sealing of Papers	2255

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(The following proceedings occurred on April 11, 1991.)

THE COURT: These are the proceedings in the matter entitled Donald L. Barnett, Plaintiff, against Jack A. Hicks and others, Defendants. Cause No. 88-2-04148-2, Superior Court of the State of Washington for King County. Present are Mr. Wiggins representing the Plaintiff, Mr. Rohan and Mr. Knibb representing the Defendants.

I have before me now just having been handed this set a sheaf of papers consisting of 36 pages which Mr. Rohan has marked 4/12/91 entitled Findings of Fact and Conclusions of Law. He has handed a copy to Mr. Wiggins, and I'm not sure that you are prepared to comment on this set. Are you, Mr. Wiggins?

MR. WIGGINS: Your Honor, I accept Mr. Rohan's representation that these are identical to the Findings that were served on me last Thursday with the exception of those changes that Mr. Rohan has

~~indicated in the pleading he filed yesterday, which was~~

his Reply in Support of Proposed Findings and Conclusions.

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THE COURT: That would involve paragraphs

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44 -

MR. WIGGINS: And 93.

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1 THE COURT: -- and 93.

2 MR. ROHAN: Those are the ones in dispute.
3 The other four paragraphs, Paragraphs 47, 48, 49 and
4 88, we have made the changes suggested by Mr. Wiggins.

5 THE COURT: So, let's address 44 and 93.

6 MR. WIGGINS: Your Honor, may I address one
7 other kind of broad matter which is we apparently now
8 are headed in different directions on our views of how
9 the Findings should be entered. At our last hearing
10 when we talked about sealing selected Findings, what
11 we decided at that hearing was that we would have the
12 sealed Findings be lifted out of here and would be put
13 in a separate sealed document and that there would be
14 a notation in the public Findings this Finding has
15 been sealed for each individual Finding that's sealed.

16 Now you have proposed Findings that comport with that

~~These Findings do not~~ 17 ~~understanding~~

COURT: These Findings are what?

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WIGGINS: The ones you have in your

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s that Mr. Rohan handed out today. These

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1 completely sealed. I don't want to do that. I want
2 the official Findings of Fact and Conclusions of Law
3 in this case to be open as a matter of public record
4 to the extent necessary. I want to restrict the
5 confidentiality of the Findings as much as possible.

6 THE COURT: How do you propose?

7 MR. ROHAN: Your Honor, when we talked last
8 time, we suggested that we have one document that is
9 the Findings and Conclusions that the Court signed,
10 that that entire item be sealed. And the reason for
11 that is when an appellate court is going to look at
12 this, I would hate to have to force the appellate
13 court justice to look at the sealed one and then get
14 up to Paragraph 17 and say, oh, let's look over here
15 and look at the one that's unsealed and then flip back
16 and forth.

17 So, what I suggest we do and what we've proposed
18 an order that I thought we would get to later, what
19 we're proposing is that we seal all the Findings and
20 Conclusions.

21 THE COURT: Like --

22 MR. ROHAN: This entire document would be
23 sealed. And then we would have a separate document
24 for the public and that document would contain all of
25 the paragraphs that are to be open to the public. But

1 'this way the appellate judges can look at the sealed
2 file, can look at the one document and it would be
3 much easier for them to do that.

4 THE COURT: I rather favor that approach.
5 Now, can it be worked out like this, that we use Mr.
6 Wiggins' copy as being the public because he says
7 they're the same as yours except for two areas.

8 MR. ROHAN: I don't know if he's subtracted
9 the Conclusions out or not.

10 MR. WIGGINS: You know, interestingly, I --

11 THE COURT: You see this is what --

12 MR. ROHAN: Yeah, I don't have any objection
13 to that, to a document like that being the public
14 document as long as the sealed document --

15 THE COURT: As long as there's one --

16 MR. ROHAN: There's one set that has
17 everything for the ease of the appellate court judge.
18 And I haven't looked at yours to see if all the
19 Conclusions -- I think we first have to decide what
20 Conclusions and Findings are going to be in there.
21 But if the Court agrees with our copy, the Court could
22 sign this copy today. We could then when we file it
23 seal it and Mr. Wiggins or my office could make up and
24 we can agree on that. I don't have any objection to
25 the -- Well, I withdraw that. Mr. Wiggins and I, I

1 believe, can work out what's going to be sealed and
2 what's not going to be sealed.

3 THE COURT: All right. And it would seem to
4 me that working from his set here he may not want his
5 name on, the firm name on the Findings.

6 MR. ROHAN: Right. We can go back in our
7 computer and we can strike out the ones and put in the
8 language this Finding has been sealed and send it over
9 to Mr. Wiggins and he can check it for accuracy and
10 that would be the sealed copy.

11 MR. WIGGINS: Your Honor, I would just as
12 soon these weren't on my pleading paper, quite
13 frankly, not that it gives rise to anything, but I
14 would just rather not.

15 THE COURT: I can understand that.

16 MR. WIGGINS: I guess the question I would
17 have for Mr. Rohan is whether he agrees with all the
18 ones that I have proposed pulling out and sealing so
19 that we at least have that all resolved here and now.

20 MR. ROHAN: What I would propose we do, Your
21 Honor, is that we first agree on what the Findings and
22 Conclusions are going to be because the procedure for
23 sealing is as important to us as what is sealed. If
24 the procedure that we have proposed to Mr. Wiggins is
25 followed, then we don't have any objection to the

1 material that he has sought to be sealed. If the
2 procedure is not followed, then we're going to have
3 some objection, but I don't want to bog down now.

4 I would prefer to go through the Findings and
5 Conclusions and get that done because we have a
6 proposed order on how we think it should be sealed.
7 And we spent actually most of yesterday afternoon
8 drafting that order and talking to the Clerk's office
9 at the Court of Appeals and the Clerk's office at the
10 Superior Court to determine what their procedures are
11 for sealing.

12 MR. WIGGINS: I'm in agreement that we
13 should defer the sealing question until we settle the
14 Findings and the Conclusions because if the dispute
15 over what should be sealed depends on how it's sealed,
16 let's resolve that all at the time we seal.

17 THE COURT: I think that could be done
18 pretty easily, frankly. I don't see any problem in
19 the mechanics of sealing.

20 MR. ROHAN: And the reasons for the sealing
21 also. And we're going to propose an order that lays
22 out what we believe are the reasons. I guess we can
23 argue that when we get to that. I think we're both in
24 agreement. Let's go to the Findings and Conclusions
25 and move on from there.

1 THE COURT: Now, I have and let's work from
2 this document that I've described as being marked
3 4/12/91, and I'm turning to --

4 MR. KNIBB: Page 17.

5 THE COURT: Yes.

6 MR. ROHAN: I don't know if you got our
7 brief the other day, it's Defendants' Reply in Support
8 of Proposed Findings and Conclusions. We talk about
9 44 on the first two pages and we cite there the Report
10 of Proceedings. The issue here on 44 is that in the
11 hearing we had on the 15th you indicated that you were
12 not finding as a fact the items in Paragraph 44 but
13 you were finding that this was Barnett's belief and
14 this was what he said.

15 THE COURT: That's what he said and that's
16 the way he felt about it, whether they were his
17 beliefs.

18 MR. ROHAN: And we have added the phrase
19 "indicating his belief", I believe that's what we
20 added, "that his sexual relations with church women
21 were consensual". We didn't want the appellate court
22 in looking at this, and I think the way it was worded
23 was slightly ambiguous, the appellate court could look
24 at this and feel that you found as a fact that his
25 sexual relations with church women were consensual.

1 It was my understanding and it's set forth on page
2 1003 of the Report of Proceedings that you were only
3 relating what he was saying.

4 THE COURT: What do you think of that, Mr.
5 Wiggins?

6 MR. WIGGINS: Your Honor, I believe there is
7 a big difference between saying a person believed that
8 his -- Strike that. There's a big difference between
9 saying a person testified that the sexual relations
10 were consensual and saying that the person testified I
11 believe the sexual relations were consensual. What
12 your Finding that you entered indicated was that
13 Pastor Barnett denied any threats or intimidations
14 made regarding his sexual misconduct indicating that
15 usually it was consensual. There's nothing in your
16 Finding about belief. And Mr. Rohan took that and
17 reworked it a little bit but it was still the same
18 language, indicating that usually his sexual relations
19 with church women were consensual.

20 I objected to the word "usually". That was the
21 only objection that I made and you agreed to take that
22 out. Now, they are shoe-horning his belief back into
23 this and that is a different thing. He didn't testify
24 I thought they were consensual, he said they were
25 consensual. You apparently -- And incidentally, I

1 think that the transcript is wrong on one thing here,
2 the transcript of the last Findings because I don't
3 believe that I made this statement that is attributed
4 to me --

5 THE COURT: Well, let's --

6 MR. WIGGINS: Here's the point, Your Honor.

7 THE COURT: How about this. Change the word
8 belief to position.

9 MR. WIGGINS: Well, Your Honor, that's not
10 any different. In fact, that's less, even less than
11 belief.

12 THE COURT: That's as far as I'll go because
13 I don't believe him when he says that these were
14 consensual. I believe that some of them were for a
15 period in there but not all were consensual, in the
16 usual sense of the word consensual. Sure, they did it
17 but it was because of his coercion and so forth. But
18 I want something in there that indicates that's what
19 he, the way he viewed this thing.

20 MR. WIGGINS: Your Honor, if you are going
21 to say that you believe that some of these were not
22 consensual because of coercion, I would ask for
23 specific Findings on what was coercive, what testimony
24 there was --

25 THE COURT: I'm not going to do that but I'm

1 going to do this. I'm going to strike the word belief
2 and put in position.

3 MR. WIGGINS: Your Honor, that's worse for
4 me than belief because now --

5 THE COURT: It goes in as position.

6 MR. ROHAN: Thank you, Your Honor. The next
7 one we have is 93. The changes --

8 THE COURT: Will you see that that's taken
9 out?

10 MR. KNIBB: Yes, I'll be the scribe, if
11 ~~that's okay with everyone.~~

12 MR. ROHAN: We can have our office retype
13 these and get them back so we have them today, that's
14 not a problem.

15 Paragraph 93 talks about, it's the second
16 sentence of paragraph 93 that we're dealing with. We
17 have inserted language that David Motherwell's only
18 action to disfellowship Pastor Barnett was as part of
19 the vote of the 16 members of the eldership.

20 The wording that Mr. Wiggins wants is wording to
21 the effect that Pastor Barnett did not individually
22 disfellowship Pastor Barnett -- excuse me -- David
23 Motherwell did not individually disfellowship Pastor
24 Barnett. The important part here and we think this is
25 an extremely important part of our case, all of the

1 senior elders and counselors that comprised the group
2 of 16 each had individual authority to disfellowship
3 and the Court has so found. And we agree that David,
4 and everybody agrees, or the Findings are that David
5 Motherwell voted as part of the 16.

6 To say that he did not individually disfellowship
7 Barnett could lead the appellate court to believe
8 that, and it's one of our arguments, that 16 people
9 each separately have the authority to do something.
10 The fact that they all go in a group and all raise
11 their hand at the same time together doesn't mean they
12 left their individual authority to do it at the door.
13 They still have that authority and the Court has been
14 very clear in this case that whatever authority they
15 had they were entitled to exercise it.

16 We intend to argue on appeal that even if the
17 vote of 16 is not valid because the appellate court
18 somehow finds that the January 25 agreement is not
19 valid that each of the 16, since they had the
20 authority to disfellowship, could have
21 disfellowshipped him. All this is saying is that
22 Motherwell took, his only action to disfellowship was
23 part of the vote and the Court actually found that

24
25 THE COURT: Without thumbing through here,

1 what does Mr. Wiggins say?

2 MR. WIGGINS: Your Honor, first of all you
3 have not found that all of the elders individually had
4 the power to disfellowship Pastor Barnett. That's not
5 a Finding. The Finding 81 to which they refer is
6 there was a practice and custom about that which is
7 based on one incident in the testimony, one incident.
8 But the Bylaws do not give any elders the authority in
9 the way they're talking about. The Bylaws don't give
10 that authority.

11 So, first of all, their entire premise is devoid
12 of any support in the Bylaws or in this record.
13 Second of all, there was a lot of testimony by
14 Motherwell in his deposition, and he was impeached

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with the fact that he said he threatened to
disfellowship Barnett unless the group did, h
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the unit. But individually did you disfellow
As a member of the unit I did. And you said

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ago when we were here presenting the
very clear to you that he was not sa
individually disfellowshipped Barnett
Now, I'm not here to reargue th

1 thought we had settled the Findings. But here is a
2 second Finding where the Defendants are rearguing,
3 they're changing the Findings here. I realize they
4 want seven ways to Sunday in which they can
5 rationalize what happened, but it didn't happen that

way.

And these Findings mean something. We settled
this. We are replowing old ground that you decided
and you decided it very clearly and Motherwell sat
there on the stand and I cannot believe that
repudiated his deposition testimony. He had no
explanation for it and he sat there and baldly
contradicted what he had said two months before trial
when he said in the deposition, no, I did not
individually disfellowship.

Now, they can claim all they want that people had
the authority, but they didn't and you haven't found
that.

THE COURT: I understand what you're saying
and that is a theory not based on the Findings but
based on the Articles and Bylaws and you can argue
that, it seems to me, on the basis of what 93 now
says.

MR. WIGGINS: But the point is, Your Honor,
that Motherwell said two contradictory things. Here

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1 in the courtroom when he knew which side he should be
2 on he said, yes, I disfellowshipped Don Barnett. In
3 his deposition when he was driven back he finally
4 admitted I did not individually disfellowship Pastor
5 Barnett because the group did and I did that, I was a
6 member of the group.

7 Now, there's a vast difference between saying 16
8 people get together and they individually
9 disfellowship and saying 16 people get together as a
10 group under the authority of the January 25 agreement
11 and they disfellowship and it's a significant change.

12 MR. ROHAN: Your Honor, this is a very
13 important finding to us and you found earlier at the
14 March 14 and March 15 hearing that Motherwell

15 ~~disfellowshipped Barnett. did not disfellowship him~~

What this
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except as part of the action of the group. What
is saying is that Motherwell's action to dis
him was as part of the group.

THE COURT: His only action to dis
him.

MR. ROHAN: Right.

THE COURT: I see no problem with that
all and I'll accept this.

MR. ROHAN: Thank you, Your Honor.

MR. WIGGINS: What's the point of saying

that at
saying

1 that?

2 THE COURT: I don't know what the point of
3 saying in the reverse is, did not individually. I'm
4 not going to find a negative. I could be here all day
5 finding negatives that they didn't do this and they
6 didn't do that and they didn't do something else. And
7 I would do that only where I have in the Findings
8 found they didn't give notice and they didn't act in
9 concert with the pastor, but I don't see anything
10 wrong with this either way, frankly.

11 MR. WIGGINS: So, you think it's the same
12 statement either way it's said.

13 MR. ROHAN: Your Honor, but you do believe
14 that Matherwell's only action to disallow his use

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MR. WIGGINS: Well, I don't believe with Conclusion of Law 6, Your Honor. And the I don't believe that is that I have objected previously to 1 through 5 as well. And my objection is primarily, I'll start with really 1 and 2. an objection here that you cannot do what you have done without excessive entanglement.

THE COURT: I understand. I've understood that for four or five months.

MR. WIGGINS: Now, I have indicated that 1 through 5 appear to be consistent with what you are saying but, of course, I have objection to those as well.

THE COURT: I would think that you would object except to all following No. 1, all the rest you would object to.

MR. WIGGINS: I think we have a more specific objection to No. 6.

THE COURT: Okay. We're down to 6.

MR. WIGGINS: All right, Your Honor, we have agreed in the past, I thought, in prior pleadings that the Court can't inquire into the reasons for disbarment. And yet here we are with a Conclusion of Law that the elders received substantial evidence reasonably believed by them to be true that was

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

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

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

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

1 from Baldwin vs. Sisters of Providence. And we
2 believe that it's part of the Court's oral decision,
3 we believe it's part of what the Court has found in
4 this case that the eldership received substantial
5 evidence, the eldership believed it to be true, and it
6 was sufficient and appropriate to take action and
7 disfellowship Pastor Barnett.

8 THE COURT: I certainly think that this is
9 an appropriate Finding as it relates to the inherent
10 power of the senior elders.

11 MR. ROHAN: Your Honor this one goes to the
12 eldership's decision and it also relates to the Court
13 was required to determine -- Well, under Baldwin, the
14 Court looks at the actions of the group taken to see
15 whether or not they meet the standard announced in
16 Baldwin. The Court is not in and of itself
17 determining whether these things, the Court is just
18 determining whether or not what the elders did was
19 correct or not correct. This Finding reflects what
20 the Court found, what the elders did in the eldership
21 meetings that they had substantial evidence, they
22 relied on it, and they reasonably believed it to be
23 true and on that basis they disfellowshipped him.

24 MR. WIGGINS: May I respond regarding
25 Baldwin because this is a critical problem that runs

1 through these Findings, Your Honor, and I would like
2 to walk through the Baldwin case because it is not
3 applicable. This is a copy of the Baldwin case and
4 I'm handing it to the Court as well as to counsel.
5 And I have a real problem with applying Baldwin to
6 this case and let me explain why.

7 Baldwin is a case where you had an at will
8 employee of Sisters of Providence Hospital, so he had
9 no contract and he could be terminated without cause.
10 However, this was an implied contract case. If you
11 look at page 129, the very beginning of the page, the
12 second paragraph, it says, "The Sisters of Providence
13 operate St. Peter Hospital in Olympia", and the second
14 sentence reads, "Under the terms of the employee
15 manual, St Peter may discharge its employees for 'just
16 cause', which is defined as 'any gross violation of
17 conduct'". And so the claim was this is an implied
18 contract based on this statement, the just cause
19 requirement in the employee manual. What this case
20 does is it wrestles with how do you deal with this
21 standard.

22 And I want to point to the specific language in
23 this case where this whole thing comes up. If we look
24 over at page 136, almost to the end of the page. Now,
25 beginning with Roman numeral III on page 136, this is

1 the operative language of Baldwin that they're talking
2 about. This is the jury instruction and they quote
3 the jury instruction for reviewing the employer's
4 determination of just cause. They quote the
5 instruction.

6 Then two lines before the bottom of the page they
7 say this. "Defendants contend this instruction was in
8 error because it allowed the jury to make an
9 independent assessment of just cause. Defendants'
10 proposed instruction incorporates both a subjective
11 and objective standard to review the employer's just
12 cause determination".

13 So, the question was does the jury, the finder of
14 fact, go back and say was there just cause here or do
15 you ask did the employer act reasonably under an
16 objective standard and in good faith under a
17 subjective standard. That's the question that's posed
18 by Baldwin. And it's posed in the context of an at
19 will employee and an implied contract.

20 And what they do is, if you look on page 37 right
21 about the middle of the page, they start off with a
22 new paragraph and they say. "As the Oregon Supreme
23 Court has noted, two issues arise when dealing with a
24 just cause provision, '(1) what is the meaning of just
25 cause; and (2) who makes the requisite factual

1 determination'", the requisite determination. Who
2 makes it? Does the employer make it or does the jury
3 or the finder of facts make it?

4 And then they go on at the bottom of the page,
5 "In addressing this issue the Oregon Supreme Court
6 stated: There is a just cause provision, but no
7 express provision transferring authority to make
8 factual determinations from the employer to another
9 arbiter. Neither is there reason to infer that such a
10 meaning was intended by the terms of the Employee
11 Handbook.... The handbook is a unilateral statement
12 by the employer of self-imposed limitations upon its
13 prerogatives.... The meaning intended by the drafter,
14 the employer, is controlling and there is no reason to
15 infer that the employer intended to surrender its
16 power to determine whether facts constituting cause
17 for termination exist.... In the absence of any
18 evidence of express or implied agreement whereby the
19 employer contracted away its fact-finding prerogative
20 to some other arbiter, we shall not infer it".

21 And so if you go down to the bottom of page 138
22 they pick right up with that and say, "The reasoning
23 of the Oregon Supreme Court is persuasive. The
24 employer unilaterally decided to place the restriction
25 of just cause upon its termination decisions. This

1 just cause provision, by its terms, had no
2 restrictions. However, the employer should not be
3 allowed to make arbitrary determinations of just
4 cause".

5 And then at the middle of page 139, they say, "We
6 hold 'just cause' is a fair and honest cause or
7 reason, regulated by good faith on the part of the
8 party exercising the power", and they go on to say
9 that. And they say the jury instruction was in error.
10 Okay, that's Baldwin.

11 Now, let's try to -- I frankly struggle with
12 applying Baldwin to the facts in this case because we
13 don't have an at will employee and we don't have an
14 implied contract with a just cause provision defined
15 by the employer. What we have here is admittedly a
16 man with an employment contract for life. We know
17 that. Everybody knows that. And so the question is
18 what do you do in that situation? Who makes the
19 determination whether he has breached his contract to
20 the extent that would justify removing him from his
21 position?

22 Now, the Defendants leap to the conclusion that
23 it has to be the elders and the eldership and they
24 leap to that conclusion based on Baldwin, but Baldwin
25 is an implied contract case. It is not a contract

1 completely different act.

2 But what I'm saying is it wasn't proper for them
3 to do this. Now, he may not be able to object to it
4 but what they did was flat out improper as a matter of
5 law for them to get together as the Board of Senior
6 Elders without notice to Pastor Barnett unless all
7 that means is -- Well, it can't mean that they
8 properly disfellowshipped him because he had been
9 disfellowshipped the day before. It can't mean that.
10 So, the Finding is wrong or the Conclusion is wrong
11 the way it's stated. The only thing that could be
12 said is that he can't object to the lack of notice or
13 something like that. That's all that could be said.

14 MR. ROHAN: Your Honor, I think the Findings
15 that you've already entered indicate that Barnett
16 waived or suspended his right to evoke the protective
17 provisions of the Bylaws.

18 THE COURT: That comes down a little later.
19 The reason I want something like this in here is to
20 indicate that I think that they had the power and they
21 procedurally went about it in the proper way.. That's
22 all I'm trying to say.

23 MR. WIGGINS: All I'm saying, Your Honor, is
24 you said they did not, that was not a continued
25 meeting. The afternoon meeting of March 4th was not a

1 disfellowshipped from Community Chapel. We don't have
2 that right.

3 MR. ROHAN: Your Honor, if I might respond.
4 The Baldwin case, counsel tries to draw a distinction
5 between an implied contract and a written contract.
6 As far as I know from when I took contract law in law
7 school, the rules governing what the remedies are and
8 how you approach an implied contract is the same as a
9 written contract. An oral contract is treated the
10 same as a written contract, it's just a matter of
11 whether you have a contract or not. Baldwin talks
12 about this is an implied contract. Implied contracts,
13 written contracts, oral contracts, they're all a
14 contract, that's all contract law.

15 Secondly, the protective provisions of the Bylaws
16 could be overruled only if Barnett breached his
17 fiduciary duty or Barnett agreed to allow people to
18 override him, the January 25 agreement. The Court is
19 required to examine the reasons for Barnett's removal
20 to see if there was a breach of fiduciary duty.
21 That's exactly what the Court did. And the Court
22 looks at the reason given by the eldership to
23 determine whether or not under Baldwin those are
24 substantial, whether or not they were reasonably
25 believed by them to be true, whether or not they were

1 taken in good faith. That's what Baldwin is talking
2 about. And Baldwin is the closest case we have.

3 We relied on a number of other cases about just
4 cause for dismissal. This is not the only one we
5 relied on. This one though articulates the Washington
6 standard for what is just cause. That's what they
7 talk about at page 139 of the opinion. Nothing in
8 Baldwin suggests you apply a different rule if there
9 is an express contract versus an implied contract.
10 And in our experience as lawyers, I think we would all
11 agree that that distinction doesn't make a difference,
12 but this is a very important Finding in terms of that.

13 THE COURT: Well, in answer to you, Mr.
14 Wiggins, I have stuck with my decision that I
15 previously made. I recognize your objection to it. I
16 follow your reasoning but I'm going to maintain that
17 Conclusion.

18 MR. ROHAN: Thank you, Your Honor.

19 MR. WIGGINS: That answers the Baldwin
20 problem in this context but we're going to run into
21 this problem again on fiduciary duty.

22 THE COURT: Yeah.

23 MR. WIGGINS: We still have a question about
24 this "take action to disfellowship Pastor Barnett".
25 That's the First Amendment problem and whether they

1 think they can fire Pastor Barnett for some secular
2 duty is one thing, but disfellowshipping him under the
3 bylaws based on the religious standards in the Bylaws
4 is not something any of us should be talking about.

5 THE COURT: But that's what they did. I
6 didn't do it, they did, and I find that they had that
7 evidence before them and they did what they did. They
8 acted in good faith and not capricious. That's what
9 they did.

10 MR. ROHAN: Thank you, Your Honor.

11 THE COURT: And I feel that I have that

12 ~~power to find that they did do it.~~

13 ~~MR. ROHAN: Thank you, Your Honor. We're up~~

14 ~~to No. 7, I believe.~~

15 ~~THE COURT: No, we'll go on the same~~

16 MR. WIGGINS: Well, Your Honor, may I speak
17 to the good faith issue. We've talked about good
18 faith a little bit here. I pointed out in my
19 objections that we challenged the good faith of the
20 elders particularly on the ground that they themselves
21 were involved in similar conduct. They were not
22 acting in good faith in hypocritically casting stones
23 at Pastor Barnett for the same conduct they were
24 themselves involved in and you excluded that testimony
25 and I am objecting to the entry of a Finding of good

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faith when our hands were tied.

THE COURT: I understand.

MR. ROHAN: So, 7 stays. I think the next objection or series of objections are 8 to 15.

MR. WIGGINS: Well, I have the same objection about the First Amendment, but I have a couple of specific objections to this series 8 through 15. First No. 9 Your Honor which is each of the 16

~~members of eldership had authority to disfellowship.~~

Your Findings don't support that. Your Findings are that there was a custom and practice but that is not the same as authority and the Bylaws did not give each of the 16 members of the eldership authority.

THE COURT: I'll hear what you have to say on this.

MR. ROHAN: Your Honor, 9 is a very critical Finding to us.

THE COURT: I know.

MR. ROHAN: The Findings you have already entered, Finding 21 identifies the 16 members. We all agree on that. Finding 81 says that they had and they exercised authority to disfellowship, each of the 16 individuals had the authority to disfellowship, that's in Finding 81. What this is making is the legal conclusion that they in fact did have that authority

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1 based on Finding No. 81. It's very important. It
2 goes along with the argument we advanced earlier in
3 ~~regard to Finding 81. All of them had the authority~~
4 to disfellowship. They were all either counselors or
5 senior elders or elders. That was the custom and the
6 practice of the church, that was followed in the
7 church.

8 And the cases -- This doesn't even involve the

9 ~~First Amendment whatsoever because the courts state~~
10 that you can rely on the custom and practice of the
11 church and what they're doing. Here the custom and
12 the practice of the church was that elders, senior
13 elders, and counselors could disfellowship. The
14 Bylaws don't even say the pastor can disfellowship,
15 but certainly the pastor has that power and the Court
16 so found in Finding 81, that the pastor had the power
17 to disfellowship. But the pastor is not given the
18 power to disfellowship under the Bylaws, all he's
19 given is the power to concur unless he delegates it to
20 his designee.

21 So, under their argument, counselors would have
22 the right to disfellowship but the pastor wouldn't.
23 That's an anomaly. And certainly the pastor has by
24 custom and practice the power to disfellowship as well
25 as the senior elders, the elders, and counselors and

1 all of them exercised that power and there was
2 considerable testimony as to that. And I could go
3 over, I have the testimony on that.

4 MR. WIGGINS: Your Honor, I'm just looking
5 at Finding 81 that Mr. Rohan says holds that the
6 elders had authority and it doesn't say that. What
7 the Finding says is that it was the custom and
8 practice at Community Chapel that senior elders,
9 elders, and counselors had and exercised the power to
10 disfellowship. It was the custom and practice.

11 Now, we cited a case to you that, and I'm at a
12 loss to find it right at the tip of my fingertips, it
13 was either in our objections to the proposed Findings
14 or Conclusions or in our trial brief, but was a case
15 that arose in Louisiana, I think, and that case
16 involved a situation where the members of the
17 congregation had the power to vote on the elders. And
18 for ten years the members of the congregation had
19 never voted on the elders. Only the elders themselves
20 had replaced themselves. And the Court said a
21 practice does not ratify that. It might mean the
22 people who are already in there are de facto elders
23 because nobody objected. But if somebody pops up and
24 says, no, the congregation has to vote on the elders,
25 and that's what the bylaws say, that's the way it has

1 to be done.

2 And so the fact that some member of this
3 congregation on one occasion might have been
4 disfellowshipped by an elder who was not his
5 counselor, that was the testimony, does not lead to
6 the conclusion that, therefore, any one of these
7 people could walk up to Don Barnett and disfellowship
8 him. There is nothing to justify that.

9 As far as Pastor Barnett's authority to
10 disfellowship, testimony was equally clear that power
11 of a counselor to disfellowship was a delegation from
12 Pastor Barnett. That was the whole thing. He is over
13 the spiritual jurisdiction of the church. Everything
14 in the spiritual jurisdiction of the church was
15 ultimately under him. Of course, he had the power to
16 disfellowship. But the elders and senior elders
17 didn't.

18 MR. ROHAN: Your Honor, the Bylaws say the
19 counselors have the power to disfellowship. They do
20 not say that Pastor Barnett has the power to
21 disfellowship. Pastor Barnett's power to
22 disfellowship is the same power that the senior elders
23 had of which he is a co-equal on the Board of
24 Directors as well as the elders and this is power that
25 it was the custom and practice of the church and it

1 wasn't just one incident. There were people that
2 testified that elders, senior elders, and counselors
3 had the power to disfellowship and this is one of the
4 most important Conclusions of Law that is in the
5 Findings. And it is well supported by Finding of Fact
6 No. 81 that talks about custom and practice.

7 THE COURT: I'm ready to accept it.

8 MR. ROHAN: Thank you, Your Honor.

9 I believe the next one I have would be No. 10.

10 MR. WIGGINS: Your Honor, might I say
11 something, I don't believe it's a legitimate reason to
12 ask for a Conclusion of Law or a Finding of Fact
13 because it's important to win your case.

14 THE COURT: I know that. They are all
15 important to him and they're all important to you as
16 far as I'm concerned.

17 MR. WIGGINS: Some are more important than
18 others.

19 MR. ROHAN: I think No. 13 is your next
20 objection.

21 MR. WIGGINS: That's correct.

22 THE COURT: I think all of these fly in the
23 face of what you have said and the objections that you
24 have, I recognize that.

25 MR. WIGGINS: Well, Your Honor, it's a

1 little, what I'm saying is a little more fundamental
2 than that. I recognize I've lost this case and you're
3 going to enter Findings and Conclusions against me.
4 That's what happens in a trial. The loser doesn't get
5 the Findings and Conclusions that he wants. But my
6 point is that when we're arguing for a particular
7 Finding or a Conclusion, it's not a reason to enter a
8 Finding or Conclusion that, gee, I might not win my
9 appeal if I don't get this Finding. The reason is
10 that's the evidence or that's the law, those are the
11 reasons.

12 MR. ROHAN: I would agree with that, Your
13 Honor.

14 MR. WIGGINS: I think we're on 13. And the
15 reason I objected to this Conclusion of Law is that it
16 says senior elders properly disfellowshipped Barnett
17 removing him from the church.

18 Now, the disfellowship occurred at a meeting for
19 which he had no notice and you have said that that was
20 all right for a couple of reasons, that basically he
21 can't complain about the lack of notice, one being
22 your Conclusion that he was disfellowshipped the prior
23 day and, therefore, he was out anyway, the other being
24 that he had ejected them from the parsonage and that
25 they then went on and met without him and did a

1 completely different act.

2 But what I'm saying is it wasn't proper for them
3 to do this. Now, he may not be able to object to it
4 but what they did was flat out improper as a matter of
5 law for them to get together as the Board of Senior
6 Elders without notice to Pastor Barnett unless all
7 that means is -- Well, it can't mean that they
8 properly disfellowshipped him because he had been
9 disfellowshipped the day before. It can't mean that.
10 So, the Finding is wrong or the Conclusion is wrong
11 the way it's stated. The only thing that could be
12 said is that he can't object to the lack of notice or
13 something like that. That's all that could be said.

14 MR. ROHAN: Your Honor, I think the Findings
15 that you've already entered indicate that Barnett
16 waived or suspended his right to evoke the protective
17 provisions of the Bylaws.

18 THE COURT: That comes down a little later.
19 The reason I want something like this in here is to
20 indicate that I think that they had the power and they
21 procedurally went about it in the proper way.. That's
22 all I'm trying to say.

23 MR. WIGGINS: All I'm saying, Your Honor, is
24 you said they did not, that was not a continued
25 meeting. The afternoon meeting of March 4th was not a

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continued meeting of the morning meeting. They didn't
give notice to him which they were required to do.
That's what's not a proper meeting. And you said he
can't object to that for a procedural reason.

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and all the
matter.

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THE COURT: The Supreme Court said
proper that they couldn't amend the Bylaws
rest of those things, but this is another
This is a disfellowship procedure.

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MR. ROHAN: Thank you, Your Honor.

b 14 -- 16.

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MR. ROHAN: I believe we're up to

Pastor

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MR. WIGGINS: Well, 15 really.

argued the

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Barnett waived his right to concur in
disfellowshipping decisions. And I have
waiver issues.

at bothers

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THE COURT: I know you have. That
me, just the word waiver. The law of waiver
something else again and I'm not sure. Would
explain that, Mr. Rohan.

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MR. ROHAN: I'm looking for the
that's based on.

at, Your

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MR. KNIBB: If I may speak to the
Honor. We previously briefed the point where
who has a right, such as Pastor Barnett did
in disfellowshipping, repeatedly fails to e

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d, to concur

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exercise

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1 that right that he may be deprived of later asserting
2 his right to do that through his own use of that
3 right.

4 And as I recall, and I don't have the case here
5 now, there were cases where, for example, the
6 corporation required two signatures on a check but
7 they consistently had checks written with only one
8 signature. And then when the bank accepted a check

9 that had only one signature on it and they complained,
10 the Court found that they had waived the right to
11 insist on two signatures.

12 THE COURT: Are you sure they expressed it
13 in terms of waiver?

14 MR. KNIBB: I'm 95 percent sure, yes.

15 MR. ROHAN: Your Honor, Finding 80 states
16 that as of September 25, 1987 Pastor Barnett delegated
17 his power to concur in disfellowshipping to
18 Motherwell. Motherwell retained this power through
19 March 4, 1988. So, you've made a specific factual
20 finding that Motherwell had the power to concur in the
21 disfellowshipping. Clearly that would be an absolute
22 waiver by Pastor Barnett.

23 THE COURT: Well, I don't consider it a
24 waiver as much as I do a delegation, but let me think
25 about that.

1 MR. WIGGINS: If I might speak to this, I'm
2 not familiar with cases that talk about a waiver by a
3 course of conduct as Mr. Knibb describes. What I am
4 familiar with is the classic definition of waiver
5 that's been used by the Supreme Court in Bowman vs.
6 Webster and subsequent cases.

7 THE COURT: That's what bothers me about the
8 use of the word waiver to express what happened here
9 on this occasion.

10 MR. WIGGINS: And a voluntary and
11 intentional relinquishment of a known right. The
12 problem with saying this, what I have always
13 understood this to refer to is the idea that he waived
14 his right to concur in disfellowship when he signed
15 the January 25 agreement. That's what I always
16 thought they were talking about. And my objection to
17 that was that he certainly didn't. There's no
18 indication that he had any intention to do that or
19 that he knowingly did that at the time that he signed
20 the January 25 agreement. He testified to the
21 contrary.

22 All of the evidence even from Mr. Motherwell is
23 there was no discussion of disfellowshipping at that
24 time, there was discussion of discipline at that time.
25 Even Mr. Motherwell admits that in discussions with

1 Pastor Barnett that one of them may have used the word
2 "teeth" in the context that the elders had no teeth in
3 doing that.

4 And so the evidence is pretty clear he didn't
5 waive his right. He did not knowingly and voluntarily
6 relinquish a known right. That's the problem I've
7 always had with the waiver idea.

8 Now, if they want to argue that it fell into
9 disuse, if they want to argue that it's delegated, I
10 guess the response I would have regarding delegation
11 is that we'd have to look at Exhibit 37, the
12 memorandum, which is not written by Pastor Barnett,
13 it's written by Jack Hicks. And Mr. Hicks said they
14 talked to Pastor Barnett about it but it's certainly
15 never written in the context of --

16 THE COURT: What do you say?

17 MR. ROHAN: Well, Your Honor, Mr. Knibb had
18 a suggestion that in terms of, we're going now on the
19 waiver cases, that we have the opportunity over the
20 noon hour to go back and look at those and come back
21 and talk about them.

22 THE COURT: Okay, the breach of contract
23 series.

24 MR. WIGGINS: Right. Your Honor, the
25 problem with all of this is they, when you talk about

1 this, Pastor Barnett's position as a contract, you
2 really denigrate his position. It was not just a
3 contract. He had positions that were written into the
4 Articles and Bylaws. It was more than a contract.
5 So, we can't ever really talk about this just in terms
6 of breach of contract.

7 But I frankly think this whole breach of contract
8 is a make wait argument because, and it's a
9 meaningless argument. The thing that the Supreme
10 Court said is they're sending this back for breach of
11 fiduciary duty, our trial on breach of fiduciary duty.
12 And when they amended their complaint to spell out
13 five different theories to support the termination of
14 Pastor Barnett, I objected then that it really wasn't
15 within the scope of the case and you allowed them to
16 do it saying it really didn't add anything to add all
17 of these allegations.

18 But if we're going to talk breach of contract,
19 then this brings us to two points. One is the Baldwin
20 case. Then we're back to the non-applicability of the
21 Baldwin case to the breach of contract issues like
22 this because we're no longer talking about an at will
23 employee and an implied contract. And the difference
24 between an implied contract and an expressed contract
25 is not same as the difference between a written

1 contract and an oral contract. A written contract or
2 an oral contract is an express contract. An implied
3 contract is governed by different laws.

4 Now, my real objection, my primary objection here
5 to Conclusion 18, Pastor Barnett materially breached
6 each of these obligations. The Findings that you have
7 entered you have entered, as you indicated earlier
8 this morning, under a Baldwin standard. You didn't
9 find that he did things, you found that the eldership
10 had sufficient evidence for them to reasonably believe
11 that he had done things. Those are the findings
12 through and through. And I object to Baldwin but if
13 we're going to do something with Baldwin, we better be
14 consistent about it.

15 THE COURT: They need not be consistent, as
16 I see them. Maybe the Supreme Court says Baldwin
17 doesn't apply to this particular issue or shouldn't
18 have applied in the first case.

19 MR. WIGGINS: That's what I would expect,
20 but the case was tried under Baldwin. It was
21 presented that way and the Findings are basically
22 Baldwin Findings. And now to come up in Conclusion 18
23 and enter a Finding by the Court that Pastor Barnett
24 materially breached his obligations under the contract
25 is different than the Baldwin standard. Now you are

1 sitting in the position of decision maker.

2 THE COURT: How about that?

3 MR. ROHAN: Well, the whole reason for the
4 breach of contract thing is Pastor Barnett's claim
5 that the Articles and Bylaws, the protective
6 provisions, so the breach of contract theory addresses
7 the argument that his power is absolute. In order to
8 find a breach of contract, it has to be found that he
9 had obligations under the contract which the Court
10 found I think from looking at the documents
11 themselves. The Court looked at the wording of the
12 Articles and said according to the Articles or the
13 Bylaws that he had a duty I think it was to act as
14 Pastor Barnett in a godly manner.

15 THE COURT: Is that something that I should
16 be doing instead of either the senior elders or the
17 eldership?

18 MR. ROHAN: I think in terms of the breach
19 of contract it's something you should be doing because
20 you're finding there's a contract and you're finding
21 that based on the evidence that you have before you
22 that clearly the pastor violated that contract by his
23 conduct. I don't think there's any question in the
24 Court's mind, given the Court's statement in the oral
25 opinion that this was the most flagrant action the

1 Court has seen, that there in fact was a breach of the
2 contract and the Court is entitled to find a breach of
3 that contract.

4 THE COURT: I feel uncomfortable making a
5 Finding that this was a material breach of his duty
6 and, therefore, the elders had a right to terminate.

7 MR. ROHAN: Your Honor had before you the
8 testimony of witnesses --

9 THE COURT: I know there was plenty of
10 evidence, but the right to --

11 MR. ROHAN: And this goes to the duties that
12 you found he had under the contract which was you said
13 he had the duty to perform his office in good faith,
14 that he had to carry out the duties of a pastor and
15 minister faithfully, and that he couldn't engage in
16 conduct which violates the Bylaws and abide by his
17 fiduciary duty. Those were his contract with
18 Community Chapel.

19 And you found based rightfully on the evidence
20 that in fact he had breached each of those duties by
21 his conduct and I think that is a Finding that you are
22 entitled to make because it is the method of

23 eliminating. It's to counter the argument that Pastor
24 Barnett says somehow these lifetime protective
25 provisions are in there and they're fixed in concrete,

1 and clearly the Courts don't hold that. The Baldwin
2 case doesn't hold that. Queen City, I think it's
3 Queen City Marine Fisheries or whatever, in that case
4 there was a five-year contract and the individual --

5 THE COURT: I'm trying to skirt the
6 Constitutional prohibition against the Courts
7 involving themselves with church matters.

8 MR. WIGGINS: Your Honor, might I talk to
9 this briefly? We kind of came to a turning point in
10 the road early in the trial when we tried to limit the
11 evidence that was presented to competent evidence that
12 could be presented to you, and instead what came in at
13 the Defendants' behest and at their insistence was all
14 kinds of hearsay allegations piled on hearsay that
15 came in because they were presented in the eldership
16 hearing. And then those were the basis, all that
17 stuff became the basis for Findings of Fact that the
18 elders had substantial evidence to reasonably believe
19 that Don Barnett had done certain things. And that's
20 the way this case was tried.

21 But now we are shifting gears into the Court
22 saying Pastor Barnett materially breached each of
23 these obligations but there are not Findings that you
24 have found that. They are only Findings that the
25 evidence is sufficient for the elders -- The elders

1 heard substantial evidence that was enough for them to
2 conclude that he had done certain things. That's the
3 problem with this.

4 And it is a Constitutional problem, too, because
5 here we are at the heart of a Court saying a pastor

6 ~~breached his contract because he wasn't a good pastor.~~

7 ~~He did bad things as the pastor and that is totally~~

8 ~~untenable and I think you properly are trying to skirt~~

9 ~~that because it just can't be done.~~

10 ~~MR. ROHAN: Your Honor, might we take our~~

11 morning recess so Mr. Knibb and I can talk about this?

12 THE COURT: Yes.

13 (Short break taken.)

14 MR. ROHAN: Thank you for allowing us the
15 break. We have discussed this. We find that the
16 Court's concerns are correct. We will rewrite the
17 findings to indicate that the --

18 THE COURT: The Findings or the Conclusions?

19 MR. ROHAN: The Conclusions, that the
20 eldership, that the Court finds under the Baldwin case
21 and the other cases that it was the eldership, that
22 the Court determined that the eldership did that and
23 we will rewrite those and bring those back.

24 THE COURT: Okay. Now, what we're talking
25 about start at about from 18, 18 and 19.

1 MR. ROHAN: We will bring back language on
2 all of those.

3 MR. WIGGINS: So, all three basically,
4 you'll rework 18, 19, and 20.

5 THE COURT: And split them up so we get the
6 same number.

7 MR. ROHAN: Yes.

8 MR. WIGGINS: I guess my only observation is
9 that No. 19 refers to those material breaches and I
10 think if this is rewritten in the Baldwin sense it
11 should tie in to whatever Conclusion 18 says so that
12 something like these findings by the elders or these
13 Conclusions by the elders or something like that.

14 MR. ROHAN: That's why we would like to take
15 the time.

16 THE COURT: I think that's the way they
17 should be approached.

18 Okay, let's go to No. 21.

19 MR. WIGGINS: Your Honor, I have several
20 different objections to this. One is again the
21 Baldwin question whether this is, the breach of
22 fiduciary duty is something that the elders find and
23 then it's supported by substantial evidence. I guess
24 that's what Conclusion 30 is, it's a Baldwin type
25 Conclusion.

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MR. ROHAN: Yes.

MR. WIGGINS: All right. But the more fundamental problem, of course, in my mind with these conclusions is that they still have never cited any case that imposed fiduciary duties on a pastor in his role as pastor. You can find the cases that we talk about, the counseling cases, but there's not a secular analogy to a pastor. There's not a rule that applies across the board secular and religious saying anyone who functions in the role of a counselor is subject to fiduciary duties. You can't then say anyone who functions in the role as pastor is subject to fiduciary duties because there's no secular counterpart to that. So, there are no secular fiduciary duties you can impose on a pastor. It just can't be done.

And it's very significant that they have cited absolutely no authority to do that. They have not cited any case that has ever imposed fiduciary duties on a pastor in the pastor's role as pastor. They have cited some corporate officer fiduciary duty cases but they're not apropos because they are not dealing with fiduciary duties on a pastor. That's the problem with the whole fiduciary duty area.

And my understanding of your ruling denying my

1 motion for reconsideration was that there has to be a
2 point at which a pastor's conduct becomes so egregious
3 that there has to be a right to get rid of the pastor.
4 That was my understanding of your ruling. And I don't
5 know that I agree with that but certainly there is
6 one -- There might be a possibility of doing that if
7 you had criminal conduct but we don't have any
8 criminal conduct in this case. And so the analogies
9 to the pastor murdering somebody and going to prison
10 are just not at all applicable here.

11 The legislature has said that adultery is not a
12 crime. There's nothing that he did that was criminal
13 in this case. And so I don't think we have reached
14 ~~that egregious point of behavior and I don't think it~~
15 would be called fiduciary duty anyway for the
16 Constitutional reasons I've spelled out.

17 MR. KNIBB: Your Honor, if I may respond on
18 our behalf on this.

19 THE COURT: I don't know that you need
20 respond. I am going to accept these and rule
21 favorably to the elders on these various grounds that
22 we have gone through. Just as an explanation or as a
23 gratis comment, if I were hearing this case as a final
24 authority so to speak without regard to appellate
25 review, this is the one that I would hang my hat on.

1 This is the claim that I believe without question the
2 elders had a right to do what they did under the
3 circumstances and facts of this case, the provisions
4 of the Articles and the Bylaws to whatever degree they
5 are contrary notwithstanding. And to me, there has to
6 be a point at which the conduct of a pastor can be
7 called into question by the people who have managerial
8 control, that that managerial control cannot be
9 hamstrung by the minister under this type of
10 accusation and these facts and that the managerial
11 controlling authority has a right to terminate.

12 Now, it's not my finding that I am so incensed by
13 this but I can certainly understand -- Strike that.
14 That may be due to the shallowness of my religious
15 beliefs, I don't know. I think that I'm deep in my
16 religious beliefs but maybe I'm not. But I don't want
17 to put myself in the place of these elders. I think
18 that they had every right to do what they did in light
19 of what was going on here and not because he was
20 missing sermons or that he was squandering his money
21 or that he was, as the complaints are in some of the
22 Ann Landers columns, may indicate discredit on him.
23 This was what these elders believed to be intolerable
24 and required drastic action, and because of the
25 relationship that Pastor Barnett had with the church

1 and congregation and the manner in which he was using
2 that relationship and the purposes for which he was
3 using that relationship. And I think they had an
4 inherent right. Where it came from I don't know, but
5 they had to take action and the action they took I
6 feel was within their authority.

7 Now, I think that is all embodied in this series
8 of Conclusions, 21 to 30. Conclusions 21 to 30 may go
9 beyond what I have just said, I don't know.

10 MR. KNIBB: I think they simply spell it
11 out.

12 THE COURT: They dissect what I have said
13 and put it in place. That is where I think the crux
14 of this case lies.

15 MR. ROHAN: Thank you, Your Honor. That
16 brings us up to --

17 MR. WIGGINS: May I --

18 THE COURT: And I recognize the points that
19 you make and I'm not saying that I don't find merit
20 and basis upon which you argue these things. I
21 certainly do and I wish that this was some of tort
22 case or something that I had a better handle on but
23 that's the way I feel about it.

24 MR. ROHAN: Thank you, Your Honor. That
25 brings us up to 31, the April '88 amendments.

1 THE COURT: Now, individually some of these
2 can be excepted to as being inappropriate to the
3 breach of fiduciary duty, but I don't think -- but I'm
4 going to leave them in there anyway.

5 MR. WIGGINS: Well, Your Honor, I appreciate
6 your explanation, that helps to clarify in my own mind
7 your analysis of this case and I do appreciate that.
8 I'm trying to struggle through to make sure there's no
9 individual thing I should say about one of these or
10 the objection I had.

11 THE COURT: Well, your exception and
12 objection to each and every one of them is I think
13 preserved and recognized.

14 MR. WIGGINS: Well, the only point that I
15 would make at this time, Your Honor, to focus on any
16 individual Finding in light of what you just said is
17 No. 27. And this reads due to his breach of fiduciary
18 duty, Pastor Barnett was not entitled to invoke the
19 protective provisions. Well, it is really due to,
20 under your analysis as I understand it, the elders'
21 conclusion or finding that he had breached his
22 fiduciary duty.

23 THE COURT: I suppose if you wanted to word
24 this in a different way it would be just as accurate
25 and probably more accurate to say due to his breach of

1 fiduciary duty, the elders were entitled to exercise
2 their right to terminate Pastor Barnett who was not
3 entitled to invoke the privilege, the protective
4 provisions in this article, in some manner or other.

5 MR. WIGGINS: Well, the specific language
6 that I'm looking at "due to his breach of fiduciary
7 duty" because your Finding is that the elders were
8 justified in concluding based on the evidence
9 presented to them that he breached his fiduciary duty.
10 And if that is what this language means, the problem
11 with the language is it seems to say you're finding a
12 breach of fiduciary duty as opposed to the elders

~~13 finding the breach of fiduciary duty.~~

14 THE COURT: Not read in context with 26.

15 MR. WIGGINS: All right, Your Honor. Thank
16 you, I see that now.

17 I believe that's the only other objection I
18 wanted to make to these Conclusions on fiduciary duty.
19 With regard to number No. 31, the effect of the April
20 1988 amendments, this appears to be what you have
21 concluded. With regard to No. 32, I'm just renewing
22 the prior arguments I've made but this seems to be
23 consistent with what you previously said.

24 MR. ROHAN: So, Your Honor, what we will do
25 then is we will go back to I think it's 18, 19, and 20

2 We have two other matters I believe now --

3 THE COURT: Let me bring up a matter that
4 want to at this point, and I think the only reason I
5 doing it is for record purposes. I am in receipt of
6 letter from Kathryn A. Ellis to which she has attached
7 an affidavit asking for attorney's fees for
8 representing a witness, Sharon Snell.

9 MR. ROHAN: Are you also in receipt of our
10 letter?

11 THE COURT: I am likewise in receipt of your
12 letter. I understand, Mr. Rohan, that you have
13 arranged with Ms. Ellis to satisfy her demand; is that
14 right?

15 MR. ROHAN: We've settled the matter with
16 her, yes, and she withdrew her motion.

17 THE COURT: I want to file this with whoever
18 is keeping the file.

19 Okay. Now, the next thing I want to do is locate
20 the exhibits and I must say that I have not been able
21 to locate my index to the exhibits that I had at one
22 time.

23 MR. ROHAN: There is an index in each of the
24 multi-volume transcripts.

25 THE COURT: Yeah, but I'm looking for a li

1 of exhibits.

2 MR. ROHAN: There is a list.

3 THE COURT: I gave each one of you a list, a
4 copy of what I had.

5 MR. WIGGINS: I have a list here from the
6 court reporter's transcript, Your Honor. Would you
7 like to refer to that? You may have that copy, Your
8 Honor.

9 THE COURT: And I'll head it up official
10 exhibit list of this case and it will have to be --

11 MR. ROHAN: Who has the original exhibits?

12 THE COURT: I do. I think I do.

13 MR. WIGGINS: I think I might have them.

14 (Off-the-record discussion.)

15 MR. ROHAN: We got Mr. Wiggins' motion
16 earlier this week. We prepared a proposed order
17 sealing the record that differs from Mr. Wiggins. I
18 sent a copy to Mr. Wiggins last night and he this
19 morning handed Mr. Knibb and I a copy of a reproposal
20 on his part. I would like to go through and state why
21 we would like our order entered.

22 THE COURT: Tell me first the differences.

23 MR. WIGGINS: Your Honor, this really is my
24 motion, the sealing motion.

25 THE COURT: Do you want to go first?

1 MR. WIGGINS: I'd kind of like to explain my
2 position, yes. And this is the original, this is the
3 original of the order that I gave to Mr. Rohan and Mr.
4 Knibb this morning.

~~THE COURT: Okay. Let me read the order.~~

By the way, you have filed your original motions, have
you not?

MR. ROHAN: No, we have not yet filed

anything.

THE COURT: Okay. What do you mean by any
party in paragraph 3?

MR. WIGGINS: The parties to the lawsuit,
Your Honor.

THE COURT: Okay.

MR. WIGGINS: Your Honor, I brought this
motion on this because the parties agreed in the
arbitration agreement that we would seal portions of
the record that are necessary to preserve
confidentiality and to protect matters of a private
nature.

THE COURT: I realize that.

MR. WIGGINS: And that was the agreement. I
used the term seal advisedly because that is the word
we agreed on. Now, I want to be real candid about
this. There's a great deal of public interest in this

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1 case and the reason that we are here is because we
2 were concerned when we appeared in Superior Court
3 there were reporters there every time and we were very
4 concerned. We wanted to get it in a forum where we
5 could have a more confidential type proceeding and
6 that is the reason that we agreed on this sealing
7 procedure.

8 And we recognize that at some point in order to
9 accomplish the parties' agreement to appeal that
10 documents would have to go to the appellate court and
11 then there will be a whole issue at the appellate
12 court level about how the appellate court will deal
13 with sealed documents. And I'm confident they will
14 look at sealed documents to the extent that they find
15 that necessary to review this case. There's no doubt
16 in my mind of that.

17 However, I want the sealing to be as, I want it
18 to be squarely within the provisions of what's
19 authorized by the court rules. And I want it to be as
20 strong as possible because we're currently dealing
21 with the parties sitting here in this room, but it is
22 possible that we may come to a point at which a member
23 of the media, their attorney goes into Court and tries
24 to get access to materials, and I want this as
25 protected as well as possible.

14
1 So, what I have done in proposing the Sealing
2 Order is to go to the general rules which provide for
3 sealing. And this is a fairly recent rule and it's a
4 very specific rule on when you can seal civil records
5 in civil cases and the circumstances are compelling
6 circumstances where justice so requires. That is when

7 you can seal. That's what I would like the order to
8 recite. I don't think it needs to recite anything
9 else. I think if the Court finds compelling
10 circumstances, that is enough. I don't think we need
11 to recite the materials which are recited in Mr.
12 Rohan's order --

13 THE COURT: I haven't read this.

14 MR. WIGGINS: Okay, but he has some
15 recitations, I don't think we should have that.

16 When we talk about sealing, when we agreed on
17 sealing, I knew this rule was here, this General Rule.
18 And we agreed to this arbitration agreement and I had
19 this rule in mind because, of course, any agreement
20 that parties enter into is construed in accordance
21 with applicable law and the parties are presumed to
22 know the law. And General Rule 15, it's at the
23 General Rules, if you have a rule book, it's on page
24 14 is the section that I'm looking at. It tells what
25 the Clerk does when there's an Order to Seal.

1 What the Clerk does is they enter on the docket
2 ordered sealed for the docket entry, that's all it
3 says. They remove the documents, the material in the
4 file, and seal them and return them to the file under
5 seal. If the file is made available for examination,
6 they remove the sealed records from the file before
7 the rest of the file is made available and they
8 replace the sealed records after the examination.
9 That's what sealing is. Now, that's what I thought it
10 was because that's what the rule says.

11 Now, Mr. Rohan's proposed order proposes a
12 radically different procedure and this is a very
13 different part. Let me tell you the language I would
14 like you to look at. On Mr. Rohan's order, if you
15 look at page 2, paragraph 3, this is what they are
16 proposing and I'll just pause and give you time to
17 read this.

18 MR. ROHAN: I think it would be helpful if
19 you read the whole order, Your Honor.

20 THE COURT: Okay.

21 MR. WIGGINS: Your Honor, in other words,
22 they are proposing an order that doesn't seal the file
23 and we agreed that the materials be sealed and that's
24 what I'm asking for. Now, I think they have a
25 legitimate point here in wanting to clarify that for

1 purposes of appeal sealed documents can be transmitted
2 up to the Court of Appeals. I think that's
3 legitimate. So, what I have put into my order on page
4 2 of my order, paragraph 3, I have picked up, I think
5 it is exactly the language that they had because I
6 agree, that's what should happen.

7 Now, the next paragraph that I have proposed,
8 paragraph 4, all parties and counsel are prohibited
9 from making public the contents of any sealed
10 material. See, here's why I put that in. When we
11 were here a month ago, we had a go-around about
12 putting a sealed document that's already sealed and
13 attaching it to something and putting it in.

14 THE COURT: I have a of it.

15 MR. WIGGINS: That's right. And you were
16 very clear at that point when we dealt with sealing
17 the records you wanted something in the order that
18 prohibited the parties from making sealed records
19 public. And so I have put this in here.

20 Now, I'm afraid that this kind of loose procedure
21 that they are proposing, it comes closer and closer to
22 allowing breaches. I want this sealed as sealed as we
23 can get it so that the appellate court can still use
24 it.

25 And then I don't know exactly how the appellate

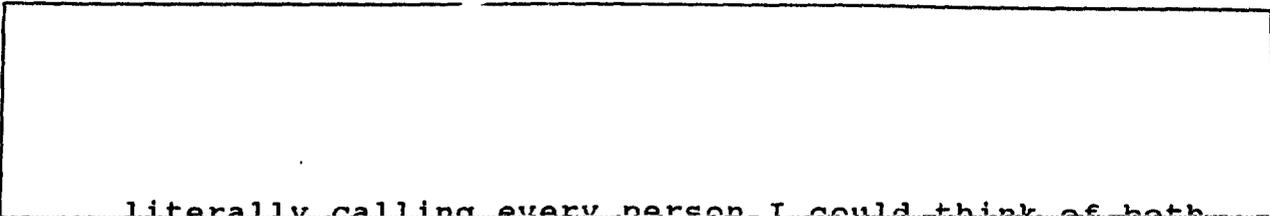
1 court is going to deal with this, so I have put
2 paragraph 5 in here. See, I don't want, here's what I
3 don't want. I don't want a pleading to just pop out
4 into the public part of the appellate court file --

5 THE COURT: In a brief or something.

6 MR. WIGGINS: Yeah, in a brief or something
7 that just willy-nilly refers to sealed materials. I
8 don't know exactly how that should be handled but I
9 want an opportunity to have the appellate court tell
10 us how to handle it.

11 And Mr. Rohan's order, by contrast, basically his
12 paragraph 4 simply allows the parties to do anything
13 here. Now, I'm trying to accomplish the same thing
14 but make it clear that it has to be the appellate
15 court controls how that's going to happen. And I
16 don't have any problem with that. But I'm concerned
17 about both aspects of his. I'm concerned about the
18 newspapers coming in and saying, gee, this is not
19 truly sealed. I don't know what arguments they might
20 make, but I want to keep this as sealed as we can
21 within the confines of Rule 15. And I'm concerned
22 about any loose procedure that would make it easier
23 for a slip-up to occur, an accident to occur. That's
24 why I want this the way I proposed this.

25 MR. ROHAN: Your Honor, we spent yesterday



literally calling every person I could think of both

Court of Appeals and at the King County Clerk's
 and I talked to three individuals at the, two
 als at the County Clerk's office at King
 and I talked to Ann Norris at the Court of

 individual who is in charge of sealing
 at the King County Courthouse is a gentleman
 name of Bill Morgan. Bill Morgan explained to
 they do factually in King County and it's a
 ter procedure than what they used to do.
 n a document is sealed, the Clerk will take
 ed material and they keep a whole separate
 h is called the Confidential Records Area,
 y it's in our order. They carry that and
 the sealed documents in that Confidential
 Area.
 a they have a separate file which is the
 le. A member of the public comes up, asks
 file, he gets the index of the file. It will
 nents sealed. And if he gets the public file,
 get all the public files. But anything that
 ed to be sealed is kept in the Confidential
 Area. So, this is -- And the Clerk stressed
 at most of the problems with sealing have to

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1 do with the fact that the attorneys that draft the
2 Sealing Orders don't draft them correctly,
3 understanding the procedures they have and, No. 2, the
4 ~~parties don't adequately identify what materials should be~~
5 sealed and not sealed.

6 So, what I have done is taken what has been
7 explained to me as the process down there and say that
8 they will keep it in that Confidential Records Area so
9 it's clear that they'll do that. And I think that
10 solves our problem because they physically keep these
11 documents separate from the other and it's certainly
12 not going to be with the news media.

13 The problem we have with the Court of Appeals is
14 that I don't think this Court, and I beg the Court's
15 pardon, but I don't think this Court is in a position
16 to direct the Court of Appeals what they're to do or
17 not do. Mr. Wiggins' order says the parties, in his
18 paragraph 5 at page 2, states the parties may use or
19 refer to sealed material in appellate court
20 proceedings but only pursuant to procedures directed
21 by the appellate court. That puts the burden on me to
22 go to the appellate court and move for whatever
23 procedures they are. My understanding is if parties
24 want the materials sealed in the appellate court, and
25 Mr. Wiggins is a far more experienced appellate lawyer

1 than I, but the parties have to move in the appellate
2 court for that.

3 THE COURT: I would suppose.

4 MR. ROHAN: And what I would suggest is that
5 we agree that one of us or both of us will file a
6 motion immediately upon the Notice of Appeal which I
7 assume will be filed immediately by Mr. Wiggins and
8 that he move in the appellate court. But I do not
9 believe it's appropriate for this Court to tie our
10 hands and say but only pursuant to procedures directed
11 by the appellate court when that means that we have to
12 then move and try to establish procedures as opposed
13 to putting the burden on Mr. Wiggins.

14 And I think he can move immediately in the Court
15 of Appeals because the record is not going to be
16 transferred up there tomorrow. It's going to take
17 some time. First of all, we have to take the files
18 physically, bring them down to the courthouse. We
19 have to give the Clerk a stack of stuff that's going
20 to be this high of sealed stuff and another stack of
21 stuff that's going to be this high of unsealed stuff.
22 They're going to have to file them and we're going to
23 have to put in our request that they be copied and
24 transmitted to the Court of Appeals. And I think that
25 gives Mr. Wiggins adequate time to file a motion with

1 the Court of Appeals and ask that the records up there
2 be sealed.

3 My concern on this whole thing, I agree with Mr.
4 Wiggins we should have them sealed. We're not going
5 to object to having any of the ones he wants sealed,
6 assuming the procedure we have is followed. I don't
7 have any objection to it because it will be done in a
8 way that an entire document will be sealed, what we
9 talked about this morning, and I think what the Court
10 agreed to.

11 The important thing in terms of your order is
12 that Mr. Wiggins in his brief asking you to seal the
13 records has suggested that one of the reasons for
14 sealing them is so that the Court of Appeals, that
15 there will be a separate record of the sealed stuff so
16 somehow the Court of Appeals won't be able to look at
17 the sealed stuff before they rule on Mr. Wiggins's
18 arguments, and I don't understand because I don't do
19 that much appellate practice how that can be done. I
20 assume he could do a motion on the merits or something
21 like that. That's why I believe the entire record of
22 any one document that's sealed, if a part of it is
23 sealed the whole thing should be sealed. And I think
24 it's easier for the appellate court.

25 But we don't want Mr. Wiggins to be able to argue

1 that if he doesn't get an order out of the Court of
2 Appeals directing what can be put in the briefs and
3 what can't because I'm willing to file my briefs under
4 seal. I don't have any problem with that. If he
5 wants all the briefs filed under seal, that's fine
6 with me.

7 THE COURT: Is that a proper procedure?

8 MR. ROHAN: Currently the Court of Appeals
9 has no procedure, so it's a case-by-case basis, it's
10 whatever the parties request.

11 THE COURT: Is there such a thing as sealed
12 briefs?

13 MR. ROHAN: From what I understand, you can
14 ask at the Court of Appeals to have a closed hearing
15 on a motion or an oral argument can be closed in the
16 Court of Appeals.

17 THE COURT: Bob Lindsey is right down the
18 hall. I'll check with him.

19 MR. ROHAN: But the only people that can
20 order that, I mean, the Court of Appeals has to order
21 whatever procedures. They're their files at that
22 point and it's their argument. I don't believe that a
23 Superior Court Judge, and again, begging the Court's

24 pardon, can order that we can refer to them only
25 pursuant to procedures directed by the Court of

1 Appeals. I think it's up to the Court of Appeals to
2 decide everything on that point.

3 And in terms of our order, our Paragraph 4 which
4 says, I want our Paragraph 4 and the reason I want it,
5 it's on page 3 of our order which is in your right
6 hand, left hand, our Paragraph 4 states nothing shall
7 restrict any party from referring to or quoting from
8 materials sealed just to make it clear that this order
9 that you're doing doesn't mean that I'm precluded
10 from, I mean, I cannot have my hands tied by not being
11 able to refer to a Finding. Some of the Findings are
12 going to be sealed. I have to be able to refer to any
13 Finding I want to in support of my argument to the
14 Court of Appeals. This clarifies that.

15 I'm willing to accept a change to this that would
16 say unless ordered to the contrary by the Court of
17 Appeals or by any appellate court to make it clear
18 that it's up to the appellate court to do that, but I
19 don't think the trial court should do that. And I
20 think we want this in here so nobody argues at a later
21 time, well, they were sealed. Mr. Rohan or Mr.
22 Wiggins doesn't argue, well, Your Honor, they're
23 sealed so if they're sealed that means Mr. Rohan can't
24 refer to them here in the Court of Appeals. And I'm
25 afraid that's exactly the argument we're going to get.

1 And I may not be right.

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

18 THE COURT: Page 1?

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

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

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MR. ROHAN: And I believe this order should reflect the reason. It also comports with Rule 15, GR 15, because it does find proof of compelling circumstances for each of the provisions of the order. So, it does comport with GR 15 but it explains in fact to the appellate court why we're doing this, and the reason we're doing this is because the parties have agreed to this.

And I think that the other items in here about

ly the kind of access somebody should attorney for my clients, should have sealed files. My client should have sealed files, if they want to look at to put in a provision here that the may not be disclosed by us publicly. problem with that. So, paragraph 4

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access are exact have. I, as the access to the se access to the se them. I'm happy sealed materials

couldn't disclose it, of Mr. Wiggins' order. be other than at this proceeding.

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I don't have any n

THE COURT: I certainly didn't expect the terms that we're developing here simply by parts of the record.

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means we It would can of wor sealing p Sealing is they agree don't want

MR. WIGGINS: Your Honor, I didn't either. s sealing. And what they are -- You know, ed that we would seal the records. Now, they t to seal the record, they want to say we'll

1 throw it into the Confidential Records Section but
2 it's not going to be sealed.

3 MR. ROHAN: That's how they seal it down in
4 King County.

5 MR. WIGGINS: Your Honor, the General Rule
6 says what the Clerk has to do. I suppose they would
7 say the Clerk can do anything because it's practice,
8 just like they say that anybody can disfellowship
9 Pastor Barnett because it's practice. That isn't so.
10 The General Rule says what they are supposed to do.
11 They are supposed to put it in a sealed envelope.
12 That's the whole idea behind sealing. And saying
13 we're going to segregate -- I didn't talk to this
14 Bill Morgan, so I don't know whether in fact they put
15 things in sealed envelopes before they put them into
16 ~~this Confidential Records Area. I would guess that~~
17 they do.

18 MR. ROHAN: I don't know what they do.

19 MR. WIGGINS: That's what the General Rule
20 says they're to do. We agreed to seal. I want to
21 seal. I'm really surprised at the argument that
22 somehow they are excused from what they agreed to do.
23 They agreed to seal and sealing is sealing. You can't
24 seal something by just putting it in a different room.

25 ~~MR. ROHAN: Your Honor, there's a practical~~

1 problem here which is if we deliver -- The amount of
2 documentation that's going to be sealed is enormous.

3 THE COURT: I suppose.

4 MR. ROHAN: If it's all put in envelopes,
5 that means we deliver them in envelopes, we deliver
6 them down to the Clerk at the Superior Court. Then
7 two weeks later we each give our list of the
8 transcript we want sent up to the Court of Appeals.
9 So, they unseal all of those files and then ship them
10 back up to the Court of Appeals. So procedurally --
11 And I don't know whether they seal them first. I
12 think actually when they seal them they put them in
13 the Confidential Records Area in a file. I don't
14 believe they put them in envelopes. I don't know
15 that. I don't believe they put them in envelopes
16 because I think for them to deal with them just
17 creates so much more trouble because then you don't
18 know what's in any envelope. And this is a monster.
19 I have no objection to --

20 The problem here is what we're looking for and
21 the only reason we're arguing about that is that we
22 want to make sure the entire record gets to the Court
23 of Appeals. We want to make sure that the record gets
24 to the Court of Appeals in such a way that all the
25 judges can see the entire document without having to

1 look at one document, have them look at the Findings,
2 get up to Finding 17 and then look at a sealed one.
3 And the Court has indicated that the appellate court
4 judges, unless you put it right there in front of them
5 they're disinclined to do things like that. I think
6 we should make it as easy for the appellate court
7 judges as possible.

8 And my third concern is that this Court not tie
9 my hands or the Court of Appeals' hands before we get
10 to the Court of Appeals and argue about whether we can
11 refer to sealed materials in briefs or not. I don't
12 think this Court can -- I don't know how this Court
13 has the power at this point as proposed by Mr.
14 Wiggins' orders that I in my brief in front of the
15 Court of Appeals or the Supreme Court cannot refer to
16 anything that's in the transcript or any Finding.

17 THE COURT: Well, as to that, I can imagine
18 what weight and authority the appellate court is going
19 to give that order, that part of the order, because
20 they're going to say, well, that's fine, Judge
21 Deierlein. Glad to hear from you. But it's matters
22 now before us and we'll do with it as our procedures
23 require or call for. So, I'm not frightened by
24 signing that part of the order because I know what

1 MR. ROHAN: But that puts the burden on me
2 then to go up there as opposed to Mr. Wiggins where
3 the burden should properly be.

4 MR. WIGGINS: Let me address that, Your
5 Honor.

6 THE COURT: I don't -- Whoever wants them
7 is going to have to get them, as I see it.

8 MR. ROHAN: All right, let me propose,
9 excuse me, Mr. Knibb has proposed some language here.
10 If we say the parties may use or refer to sealed
11 materials in the appellate court proceedings without
12 further order of proof of compelling circumstances
13 unless the appellate court directs otherwise, that
14 leaves it right up to the appellate court.

15 MR. WIGGINS: Here's the problem, Your
16 Honor. We all have agreed to seal.

17 MR. KNIBB: But it depends on what you mean
18 by sealing.

19 MR. WIGGINS: Excuse me, but the General
20 Rule tells you what it means to seal a document and
21 we've all agreed on that and this rule was in effect
22 at the time we agreed to that. And now you don't just
23 go up to the Court of Appeals. Here's the problem.
24 Already they have gone up to the Supreme Court and in
25 a motion to the Commissioner they have attached sealed

1 documents in that motion. I don't want that to happen
2 again and you don't want that to happen again and you
3 said so. I know that the Court will have some way
4 that they want to deal with sealed documents. I don't
5 know what it is, but they'll have some way of doing
6 it.

7 But as to where the burden should lie, if
8 somebody wants to use sealed materials, I think we're
9 both going to have eventually a proposal to give to
10 the appellate court and appellate court will make a
11 decision on that, that's fine. But there are going to
12 be motions filed in this case and they may come pretty
13 fast. Putting something in a motion that's filed in
14 the Court of Appeals and just willy-nilly attaching it
15 to a motion makes it a matter of public record. You
16 just can't do that.

17 THE COURT: As I told you here, both of you
18 much earlier, my acquaintance with this case came from
19 reading Judge Dore's dissent in the published report
20 of the case and that told me all figuratively
21 speaking. I was amazed that there was a quest for
22 such secrecy when apparently it was public knowledge
23 and anybody that cared to go out and look at the book
24 could find out what was going on.

25 MR. WIGGINS: But, Your Honor, that really

1 isn't true that anybody could go look at the court
2 file and find out --

3 THE COURT: Oh, I mean the reported case.

4 MR. WIGGINS: But it doesn't have the same
5 weight as testimony. That is a dissent by one judge.
6 Who knows where he got the, quote, facts he put into
7 that. And I should be more guarded in saying this.

8 MR. ROHAN: Two judges.

9 MR. WIGGINS: I don't know, but we have now,

10 we were going to seal all of this

11 that were confidential.

12 You're arguing the wrong issue,

13 ned. I'm convinced they should

14 Now, the question is how do we

15 in order.

16 the problem I think that I have

17 serious problem and Mr. Wiggins

18 s that I do not believe this Court

19 don't believe this Court should

20 on at this point that we or Mr.

21 ed in any of our briefs in the

22 using material that is in the

23 sions, and the transcripts, et

24 has said the motions are going to

10 the agreement that was

11 and he told you things

12 This court

13 as far as I'm concern

14 be, quote, sealed. I

15 seal them and in what

16 MR. ROHAN:

17 and this is my most s

18 just alluded to it is

19 has the power and it

20 make any determination

21 Wiggins are restricted

22 appellate court from

23 Findings, the Conclus

24 cetera. Mr. Wiggins

1 come fast and furious.

2 THE COURT: Does he say that?

3 MR. ROHAN: He says that on Paragraph 5 but
4 only pursuant to procedures directed by the appellate
5 court which means that if he files a motion tomorrow
6 or Monday or at the end of the day today, which is
7 possible, that I would not be able to respond to that.
8 If I have to see the materials, I would not be able to
9 respond to that and I would not be able to respond and

de this Finding because some of the
ng to be sealed.
incredulous that anybody would
at I as a lawyer representing my
of the appellate courts in this state
e to use the Findings and Conclusions
any argument that I choose to make in

~~Mr. Rohan - motion and find it~~

Sealing is not meant to deny to the
the Court of Appeals or the Supreme
that this Court has considered for
~~revisions. Outlets within:~~

and then I'm going to be held in
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a. It puts me in an impossible
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say the Court made
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situation. I cannot

1 MR. WIGGINS: Your Honor, that's exactly
2 what sealing means. If you do seal a document, you
3 can't go willy-nilly referring in a brief in the
4 Supreme Court or any court unless some judge says,
5 yes, you can do it, and here are the circumstances,
6 here's the way you can do it. Now, Mr. Rohan has
7 agreed to seal these documents and if he wants to --
8 And I readily concede --

9 THE COURT: Wait. What's the matter with
10 Paragraph 5?

11 MR. ROHAN: The problem with Paragraph 5 is
12 it says the parties may use or refer to materials in
13 appellate court proceedings but only pursuant to
14 procedures directed by the appellate court. Mr.
15 Wiggins is going to argue when he gets up to the
16 appellate court that GR 3015 is clear that says you
17 have to show compelling circumstances.

18 MR. WIGGINS: I object to any statement
19 about what I'm going to argue. Mr. Rohan doesn't know
20 that.

21 MR. ROHAN: Well, okay, I don't know what he
22 is going to argue because I'm not a mind-reader, but
23 GR 15 states that the only way you can unseal a file
24 is if you show compelling circumstances. So, then the
25 burden is going to be on me in the Court of Appeals to

1 show compelling circumstances why I have to refer to
2 one of your Findings. That is an incredible burden.
3 There is no way in God's earth that we ever agreed to
4 that.

5 THE COURT: Let me ask you, Mr. Wiggins, how
6 would you respond to Mr. Rohan?

7 MR. WIGGINS: Your Honor, Mr. Rohan has just
8 answered an argument that I hadn't contemplated making
9 and he has raised a point that I had never thought of
10 which is he is now arguing the way he might argue in
11 my shoes but it wasn't the way I was going to argue.
12 I hadn't even thought of this.

13 I don't have any problem with putting a statement
14 ~~in those that the seal is not intended to require~~

15 compelling circumstances or showing of compelling
16 circumstances for use of these materials by the
17 appellate court because the appellate court is going
18 to have to decide what materials it wants to refer to
19 and how it's going to do it. But the point here is
20 whether I go over to the appellate court and file a
21 motion or not, the way Mr. Rohan's record reads, Mr.
22 Rohan can go over Monday or whenever the appeal is
23 started and file a motion and attach all kinds of
24 sealed things to it and do exactly what he did in the
25 Supreme Court before and that would make it public.

1 MR. ROHAN: Your Honor, I will agree and
2 state on the record that I will file anything in the
3 Court of Appeals under seal if I refer to any of the
4 sealed material prior to Mr. Wiggins filing a motion
5 on this thing. But I think the burden should be on
6 Mr. Wiggins within a certain time period to make his
7 motion in front of the Court of Appeals to direct a
8 procedure on dealing with sealed materials so that we
9 don't have this argument. But I do not believe that
10 my client should be put at a grave disadvantage in
11 this case of not being able to refer to sealed
12 materials but I'm willing to file them under seal in
13 the Court of Appeals. I'll put them in a big
14 envelope, I'll stamp it, I'll mark it, and I'll give
15 it to the Court of Appeals and say please file this
16 under seal.

17 MR. WIGGINS: Now, I'm incredulous. You
18 know, we agreed to this. We agreed to it and yet he
19 now wants to shift the burden to me to establish
20 something we have already agreed to.

21 MR. ROHAN: Your Honor, we never agreed and
22 I cannot imagine Your Honor would think that we agreed
23 that any documents that are to be sealed, including
24 the Findings and Conclusions, cannot be looked at by
25 the appellate court.

1 MR. WIGGINS: That's not what I said.

2 THE COURT: This is ridiculous because
3 they're going to give my order of sealing short shrift
4 if they feel that they ought to see what went on down
5 here, whether I tell them not to or tell them to do
6 it, either way.

7 MR. ROHAN: Then I think the language should
8 read, we can take the first part of Mr. Wiggins's
9 Paragraph 5, the parties may use or refer to sealed
10 materials in appellate court proceedings, it should
11 say without further order of proof of compelling
12 circumstances. Mr. Wiggins already agreed that we
13 don't have to show compelling circumstances. But it
14 should state unless the appellate court directs
15 otherwise. So, then the appellate court looks at this
16 as a clean slate --

17 THE COURT: What's the matter with that?

18 MR. WIGGINS: Your Honor, he is now putting
19 the burden on me to undue something that should be
20 done that we have agreed to do. The materials are
21 sealed.

22 MR. ROHAN: Your Honor, I will agree on this
23 record that we can seal any material that Mr. Wiggins
24 wants in the Court of Appeals and that includes we can
25 seal all of the briefs and everything else. I just

1 want to be able to refer to them when I'm making my
2 argument in the briefs. I want to be able to put them
3 in the briefs and to be able to argue anything I want
4 whether it's sealed or not sealed in this case and I
5 don't think that's -- As an advocate, I think I'm
6 entitled to that right and I think my client is
7 entitled to that.

8 MR. WIGGINS: Your Honor, Mr. Rohan wants to
9 leave it up to the Court of Appeals to do everything
10 but now he is telling us how the Court of Appeals
11 should decide to do it.

12 MR. ROHAN: No, I'm willing to state on the
13 record I'm willing to do that, that I'm m not trying
14 to stand in your way, Charlie, and try to immediately
15 take all the sealed material, rush over to the Court
16 of Appeals and put it in a brief.

17 (Short break taken.)

18 THE COURT: Mr. Wiggins has raised the
19 question as to what is meant as to Paragraph 3.

20 MR. KNIBB: What do we mean by Paragraph 3?
21 That the Court retains jurisdiction. I thought it's
22 fairly standard in language in a case in equity where
23 the Court has made a declaratory judgment, the Court
24 typically retains jurisdiction.

25 THE COURT: I thought I had jurisdiction

1 even though that paragraph would not be there.

2 MR. ROHAN: We retain jurisdiction on the
3 Order of Reference.

4 MR. WIGGINS: I don't know whether an Order
5 of Reference to try a matter gives you continuing
6 jurisdiction. I just don't know. And I don't know,
7 I've never thought whether this was an action of law
8 or an action of equity, to tell you the truth. And so
9 I don't even know, these are kind of new thoughts that
10 are popping up here and I don't want to expand or
11 contract any powers in you that are there by virtue of
12 what we've already done. And when the case goes on
13 appeal as a matter of law your authority is
14 restricted.

15 THE COURT: Oh, yes, but I mean between now
16 and the time of appeal.

17 MR. ROHAN: Right and going back to our
18 arbitration agreement, we have chosen you as the
19 arbitrator in this case and have not agreed to any
20 proceedings in this case that would involve another
21 Superior Court Judge.

22 THE COURT: Anything beyond entry --

23 MR. WIGGINS: See, let me bring up a
24 practical concern here. I don't even know what might
25 come up, but suppose something comes up where they

1 claim that Pastor Barnett has violated this judgment
2 somehow, I don't know. I can't even conceive of what
3 it is. And then say, well, we have to go back before
4 Judge Deierlein. Well, I don't know if we do or not.
5 Maybe we could go back before any King County Judge, I
6 just don't know.

7 MR. ROHAN: But to go back to any other
8 judge without having to explain the whole record would
9 be a monster.

10 MR. KNIBB: The reason that I put this in
11 here was to eliminate any doubts in light of the
12 reference about Your Honor's ability to hear any
13 subsequent matters that might come up. I do think
14 this is a proceeding in equity rather than law, for
15 whatever significance that may have.

16 THE COURT: Well, I suppose that is a good
17 enough reason to either put it in or put it in in
18 reverse saying that this ends the jurisdiction of the
19 undersigned as to any matters that may come up in the
20 future.

21 MR. KNIBB: We don't want that.

22 THE COURT: Well, no, but I mean that would
23 certainly --

24 MR. KNIBB: It would clarify it.

25 THE COURT: Yes. Either I have jurisdiction

1 or I don't and whatever you gentlemen choose is
2 satisfactory.

3 MR. WIGGINS: Well, all deference to Your
4 Honor, I don't know that I want to have continuing
5 jurisdiction here and I think it is probably a
6 substantial enough question that I'd have to get my
7 client's consent to it, which I don't have. I'm not
8 authorized to make that kind of agreement.

9 THE COURT: Can you contact them?

10 MR. ROHAN: Your Honor, I think the
11 agreement we have for arbitration says the parties
12 agree to use you as an arbitrator.

13 MR. WIGGINS: Would you read the paragraph,
14 please.

15 MR. ROHAN: It starts off the parties make
16 this agreement in order to transfer this case from the
17 Superior Court into private arbitration. The parties
18 agree to use the Honorable Walter Deierlein as an
19 arbitrator provided he can try this matter, et cetera,
20 et cetera. If he cannot, the parties agree in good
21 faith to choose another arbitrator. The intent of
22 this entire agreement --

23 THE COURT: Didn't you chose Shellan?

24 MR. ROHAN: As the first alternate. If he
25 wasn't available, we agreed to choose another one.

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But this agreement clearly states that the parties have agreed that we're going to continue an arbitration for this entire matter other than in terms of appellate matters which are addressed separately and I think that means that we have already agreed that this matter will be subject to your continuing review because we have not agreed in any way, shape, or form to go back into regular Superior Court.

MR. WIGGINS: Your Honor, the way this order is couched or this agreement is couched -- Actually,

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We probably ought to be looking at the Order of Referral. I don't think now that I have it with me,

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doubt that the effect of the Order of Referral is that even this agreement is for ongoing jurisdiction. All contemplated there would come a time when you would file the Findings and Conclusions and that would become a final judgment. Now, I certainly for my client I have agreed to perpetual jurisdiction over this matter, I just don't think I can't say jurisdiction can't be exercised to feel so embarrassed to feel so

THE COURT: Lest you feel embarrassed to discuss this in my presence, please don't feel so embarrassed.

MR. ROHAN: Maybe we should all take a break now and come back.

20 1 THE COURT: I thought I saw that just this
2 morning. I know I saw the agreement.

3 MR. ROHAN: I have a copy of the agreement,
4 if you want it, Your Honor. Are you looking for the
5 record of reference?

6 THE COURT: Yeah, I did have it too.

7 MR. ROHAN: The Order of Reference or the
8 agreement?

9 THE COURT: The Order of Reference.

10 (Off-the-record discussion.)

11 MR. WIGGINS: Your Honor, I don't need to
12 break, I know that I don't want this language in here.
13 Just listening to all of this and listening to the
14 Order of Reference and thinking about what we were
15 ~~intending to do when we agreed to this. We intended to~~

16 take this matter into arbitration before you because
17 we wanted a more confidential hearing. I don't think
18 there was any intent that there be ongoing
19 jurisdiction for further matters, quite frankly, and
20 as I say, I'm not even inclined, I don't need to ask
21 my client whether that's what he wanted. I know that
22 I don't think it should be in there.

23 MR. ROHAN: We will look, we want to look at
24 the referenced statute that may have some answer on
25 that.

1 THE COURT: You might want to run a copy of
2 this stipulation.

3 MR. ROHAN: We have a copy back in our
4 office.

5 MR. WIGGINS: We kind of --

6 THE COURT: That matters not at all to me.

7 MR. WIGGINS: I beg your pardon?

8 THE COURT: I'm satisfied with that.

9 MR. ROHAN: You're satisfied that --

10 THE COURT: If he does not want continuing
11 jurisdiction.

12 MR. WIGGINS: That you would not put it in.

13 THE COURT: Unless the arbitration statute
14 gives me some further ongoing jurisdiction beyond the
15 award or judgment.

16 MR. KNIBB: Well, Your Honor, that raises
17 some practical problems because the moment you sign
18 this judgment that would mean we have to all leave,
19 that you couldn't continue to resolve the issues about
20 the Motion for Assets. You couldn't sign a separate
21 sets of Findings that's been expurgated to remove the
22 sealed portions and things of that matter. I
23 anticipate some housekeeping problems with a strict
24 application.

25 THE COURT: Let's take care of those first,

1 the Order of Sealing.

2 MR. WIGGINS: Right.

3 MR. ROHAN: And we're going to make some
4 calls.

5 MR. WIGGINS: Well, let's go back to the
6 Order for Sealing for the moment. I suggested we
7 divide it into two parts. One is whether they're
8 physically put into envelopes and you directed us to
9 call and find out down at King County, and I don't
10 think it makes a difference what their practice is, I
11 want the order to say seal and I don't want to say
12 just put it in the Confidential Documents Room. I
13 don't want that. I don't care if it says you can seal
14 them and put them in the Confidential Document Room
15 but I don't think we need to say that.

16 The second thing I think we ought to look at is
17 this question about appeal and whether there should be
18 anything in this order regarding whether anyone can
19 refer to sealed documents on appeal. I'll tell you
20 where I'm coming from on this, Your Honor.

21 THE COURT: First off, I assume I'm going to
22 have to be confirmed someplace.

23 MR. ROHAN: Actually, no. Under the statute
24 I think we're dealing with --

25 THE COURT: The judgment I entered --

1 MR. ROHAN: We'll have to look at that
2 because we were confused at one point as to which
3 statute we were going under and we have resolved that
4 and we're going under the one that's the Order of
5 Reference.

6 MR. WIGGINS: I think that Mr. Rohan is
7 right, that your award is not going to be confirmed as
8 an arbitrator's award. I think you just file the
9 Findings of Fact and Conclusions of Law.

10 THE COURT: The second part of your Order of
11 Sealing deals with how and who may use the sealed
12 material.

13 MR. WIGGINS: That's correct, Your Honor.

14 THE COURT: At an appellate level.

15 MR. WIGGINS: Here's how I got to that
16 point, if I might. You made it very clear last month
17 that you would say that nobody can make anything
18 public, none of the parties or counsel could make
19 anything public. Well, in my own mind if one of us
20 goes over to the Court of Appeals and files a motion
21 in the Court of Appeals and staples on to it a sealed
22 document, that becomes public unless we do something
23 to prevent its becoming public.

24 THE COURT: I seal it and attach it as a
25 sealed document; is that right?

1 MR. WIGGINS: Or have some order from the
2 Court of Appeals as to how we're going to do this.
3 And so I thought by putting this paragraph 5 in we
4 were really making it clear that you weren't going to
5 hold any party in contempt for referring to something
6 in the appellate court provided they did it pursuant
7 to the appropriate appellate procedures or whatever
8 procedures the Court of Appeals wants. That's what
9 I'm trying to accomplish here.

10 THE COURT: Now, Mr. Rohan says that puts
11 the burden on him to have that released or whatever by
12 the Appeals Court. I think that can be overcome by a
13 clause that would say on appellate matters that either
14 party may use the sealed documents they feel are
15 necessary to bring the matter to the attention of the
16 appellate court without showing compelling, necessity?

17 MR. ROHAN: Circumstances.

18 THE COURT: Circumstances, without the need
19 for showing compelling circumstances. Now, isn't that
20 sufficient?

21 MR. WIGGINS: As long as it is still subject
22 to some kind of proviso such as pursuant to procedures
23 directed by the appellate court either party may use
24 or refer to sealed material without a showing of
25 compelling circumstances.

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THE COURT: Without the necessity of showing.

MR. ROHAN: Your Honor, the problem again here is that we're going to get motions apparently, Mr. Wiggins at least anticipates motions fairly quickly. I don't think the burden should be on me and I don't know what motions he's going to have because I don't at the present plan any motions. I'm going to be sort of behind the eight ball in responding to this thing and I think the burden should be on Mr. Wiggins to file them.

THE COURT: Why are you going to be behind the eight ball?

MR. ROHAN: Because if it's written this way, only pursuant to procedures directed by the appellate court, we're not going to have any procedures by the appellate court. I have to file a motion in the Court of Appeals immediately to allow me to use --

THE COURT: Now, you remind me of why I wanted to talk with --

MR. ROHAN: With Judge Windsor, right. And I think in addition to the appellate court proceedings this should also refer to subsequent court proceedings in this court so that in King County, if their motion

1 comes up in King County let's say you have lost
2 jurisdiction and we have another judge that doesn't
3 know anything about it, I would hate to be in front of
4 another judge and not be able to show him a complete
5 set of the Findings and Conclusions. But I think we
6 could deal with that by saying --

7 THE COURT: Well, that part could be dealt
8 with.

9 MR. ROHAN: Right. Because I think we could
10 say any briefs that refer to that material would be
11 filed under seal and you could order that in this case
12 because you are operating as a Superior Court Judge.

13 ~~in any subsequent court proceedings in Superior~~
14 Court where we would refer to any of the sealed
15 materials, we would be allowed to refer to them as
16 sealed materials but the entire brief would have to be
17 sealed.

18 MR. WIGGINS: Mr. Rohan is suggesting
19 something that may solve all of these problems which
20 is why not use the same procedure, have the same order
21 that he's referring to for Superior Court for the
22 appellate court and say something like, and I'm kind
23 of saying this off the top of my head --

24 THE COURT: Let's go off the record.

25 (Off-the-record discussion.)

1 (Luncheon break taken.)

2 MR. ROHAN: Page 44, we only made one
3 change, the word position, that's on page 17. And the
4 next one starts at paragraph 18 on page 33 and -- Oh,
5 I'm sorry, 15, we start with 15 on page 33.

6 MR. KNIBB: Should I go ahead?

7 THE COURT: We now turn to the judgment,
8 don't we?

9 MR. KNIBB: There were several reserved
10 questions about the Conclusions. In Conclusion 15 --

11 MR. ROHAN: On page 33 is where we told you
12 we would come back after lunch.

13 THE COURT: Oh, yes.

14 MR. KNIBB: We have rewritten Conclusion 15.
15 If you'll recall, in the previous version it said
16 something to the effect that Pastor Barnett --

17 THE COURT: He had waived.

18 MR. KNIBB: He had waived. I'm still
19 satisfied that waiver is correct and I have brought in
20 copies of cases that we had cited in our trial brief
21 to that effect, and I'm willing to share them with the
22 Court, if you would like.

23 THE COURT: I think you can argue that on
24 the basis of this Conclusion.

25 MR. KNIBB: We felt there wasn't any need to