CASE NO. 19-60293

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILL McRANEY,

Plaintiff - Appellant

VS.

THE NORTH AMERICAN MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INCORPORATED,

Defendant - Appellee

On Appeal from the United States District Court
For the Northen District of Mississippi
Honorable Glen H. Davidson, Senior United States District Judge

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BRIEF OF APPELLANT
(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

District Court Judge:	Honorable Glen H. Davidson Senior U. S. District Judge
Magistrate Judge:	Honorable David A. Sanders
Appellant:	Will McRaney
Appellee:	The North American Mission Board of the Southern Baptist Convention, Incorporated
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STATEMENT REGARDING ORAL ARGUMENT

There is no bright line rule regarding as to when the ecclesiastical abstention doctrine applies in a tort versus religious organization conflict. The Courts must achieve delicate balance between Constitutional prohibitions of civil court intrusion into church policy as opposed to not allowing civil wrongs to be protected behind a religious cloak of immunity. While the factual record in this case is limited, Appellant believes oral argument would be helpful and perhaps persuasive in showing the error of the District Court in prematurely dismissing this claim for a lack of subject matter jurisdiction.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1291 to review all final decisions of the District Courts of the United States.

This is an appeal to the United States Court of Appeals for the Fifth Circuit from the April 24, 2019, Memorandum Opinion and Order of the United States District Court for the Northern District of Mississippi, Aberdeen Division, wherein the District Court ruled that the Court did not have jurisdiction, converted the Appellee's Motion for Summary Judgment to a Motion to Dismiss and granted same. Venue is proper pursuant to 28 U.S.C. §1294.

STATEMENT OF THE ISSUES

I. Whether the District Court was in error by dismissing the case based on a lack of subject matter jurisdiction.

II. Whether the District Court was in error by failing to apply the "law of the case" doctrine to the Motion to Dismiss following a previous denial of a Motion to Dismiss.

III. Whether the District court erred when it extended the ecclesiastical abstention doctrine beyond its intended scope without allowing additional facts in the record to support that doctrine.

IV. Whether the District Court was in error by making a fact based determination to dismiss the Complaint on the basis of lack of jurisdiction before any facts were adduced, when Mississippi law would clearly allow such an inquiry.

STATEMENT OF THE CASE

A. Course or pertinent proceedings and disposition in the court below.

An original Complaint was filed by the Appellant in Winston County Circuit Court on April 7, 2017, alleging that the Appellee committed a tort, in whole or in part, in the State of Mississippi by:

COUNT I

The Defendant NAMB is charged with intentional interference with business relationships existing between Plaintiff McRaney and BCMD by interfering with the contractual relationship existing between the two.

COUNT II

The Defendant NAMB committed slander and/or libel by intentionally defaming Plaintiff so as to damage his reputation and character resulting in his ultimate termination.

COUNT III

The Defendant NAMB is charged with intentional interference with business relationships by tortiously interfering with Plaintiff's existing relationship with a speaking engagement in Louisville, Mississippi, so as to prevent Plaintiff from speaking at the Mission Symposium.

COUNT IV

The Defendant NAMB is charged with intentional interference with business relationships by tortiously interfering with Plaintiff's ability to speak at the Pastor's Conference in Florida.

COUNT V

The Defendant NAMB is charged with intentional infliction of emotional distress by tortiously displaying an 8x10 photograph of Plaintiff in the reception area of the Defendant's home office in Alpharetta, Georgia, purposely designed to damage the reputation and character of the Plaintiff.

COUNT VI

The Defendant NAMB is charged with intentional infliction of emotional distress, slander, libel, intentional interference with business relationships resulting in actual economic damages and damages for emotional distress which justifies the imposition of punitive damages against the Defendant. Plaintiff would show that the actions of the Defendant are so outrageous, as pleaded, that he should recover punitive damages, including but not limited to, his attorney's fees.

As the Plaintiff was a resident of the State of Florida, the Defendant was home based in Georgia, and one of the torts occurred in Mississippi, the Defendant filed a Notice of Removal on May 18, 2017, removing the case to the Aberdeen Division of

the United States District Court, Northern Division. Shortly thereafter, Appellee filed a Motion to Dismiss for failure to state a claim on June 29, 2017, and supporting memorandum. An Order Staying the Case pending a Ruling on the Motion to Dismiss was entered on July 18, 2017. A response was filed by Appellant on July 20, 2017.

The District Court entered an Order Granting in part by dismissing Count IV of the Plaintiff's Complaint and denying in part the Motion to Dismiss. The Court entered an Order denying a Motion for Certificate of Appealability on February 23, 2018, and following a Rule 16 Initial Order, written discovery was begun, a routine Case Management Order was entered and the case was set for trial. The Appellee issued a Subpoena Duces Tecum for the personnel file of Appellant during his tenure as Executive Director of the Maryland/Delaware Baptist Convention (BCMD). BCMD filed a Motion to Quash with Supporting Memorandum. Appellee obtained an Order Extending Time to Respond to Discovery on November 1, 2018, and a response and Memorandum to the Motion to Quash on November 2, 2018. Thereafter, Appellee filed a Motion for Partial Summary Judgment and Supporting Memorandum on November 5, 2018. The Court entered an Order Granting the Motion to Dismiss the Subpoena Duces Tecum on November 7, 2018.

On March 5, 2019, the Court entered a Show Cause Order as to why this case should not be remanded to Winston County Circuit Court. Responses were filed by

both Appellant and Appellee on March 19, 2019, and on April 24, 2019, the District Court Judge entered an Order and Supporting Memorandum Opinion converting the Motion for Summary Judgment into a Motion to Dismiss for Lack of Jurisdiction and entered an Order to that effect. Appellant filed his Notice of Appeal on May 1, 2019, resulting in this appeal.

SUMMARY OF THE ARGUMENT

The final judgment issued by the United States District Court of Mississippi, Northern District, Aberdeen Division on April 24, 2019, should be reversed and remanded for several reasons:

(a) Subject matter jurisdiction is a threshold inquiry in which the Court initially ruled in favor of the Appellant.

(b) Having once ruled in favor of the Appellant and finding that the District Court did have subject matter jurisdiction, the "law of the case" doctrine should have applied until a subsequent change in the law or additional facts were addressed.

(c) Not all torts committed by a religious organization are cloaked with immunity. The Court has a duty to conduct a fact based inquiry to delicately balance the ecclesiastical abstention versus protection of civil wrongs before dismissing a case, by Applying neurtral principles, which is the law in the State of Mississippi .

STANDARD OF REVIEW

The standard of review in this case is *de novo* as it arises from a Motion to Dismiss based on lack of jurisdiction.

"In general, we review a dismissal for lack of jurisdiction subject matter *de novo*, using the same standard as applied by the district court. Dismissal is proper only when 'it appears certain that the Plaintiffs cannot prove any set of facts in support of their claim which would entitle them to relief.' A court may base its disposition of a motion to dismiss for lack of jurisdiction on (1) the Complaint alone; (2) the Complaint supplemented by undisputed facts; or (3) the Complaint supplemented by undisputed facts plus the court's resolution of disputed facts. Where, as here, the district court has relied on the third of these bases and has made jurisdictional findings of fact, those findings are for clear error. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. May 1981)." *Alan Robinson v. TCI/US West Communications, Inc.,* 117 F.3d 900 (1997) at page 904.

ARGUMENT

I. Whether the District Court was in error by dismissing the case based on a lack of subject matter jurisdiction.

Subject matter jurisdiction is a threshold inquiry which must be determined before a Court may proceed to the merits. In a case of a tort vs. the ecclesiastical abstention doctrine, this is the first issue to be resolved. The case of *Frank L. Schmidt, Sr., and Henry W. Kinney, et al. v. Catholic Diocese of Biloxi, Thomas J. Rodi and Dennis Carver,* 18 So.3d 814 (2009), states,

"Generally, civil courts may not second-guess church administrative or management decisions, or substitute their judgment in place of the church's." *id*. at 829. Appellant is not challenging the Baptist Convention of Maryland/Delaware's (BCMD) right to terminate his employment. This, his former employer, had a right to do. But, Appellant is contesting the right of the Defendant NAMB to exercise the "Golden Rule" in ensuring the termination of Dr. McRaney i.e., "He who has the gold makes the rules," and by continuing to interfere with his business after his termination. Recognizing also, that Dr. McRaney's termination from employment as a result of an inter-organizational challenge of authority, does not relieve such organizations from a judicial inquiry. In fact, case law even supports a Court's review of an intra-church related financial inquiry given the right circumstances.

> "While churches have large, almost-unfettered discretion in their administrative decision-making, they are not entitled to violate recognized duties or standards of conduct." *See Morrison*, 905 So.2d at 1242. *Morrison* recognizes a church or religious organizations's potential liability for diverting funds which have been solicited and accepted for a particular purpose, toward an unauthorized purpose. *See id.* In *Morrison*, in dictum, this Court stated that:
>
> > [E]ach cause of action asserted against a religious organization claiming First Amendment protection, must be evaluated according to its particular facts. For instance, with respect to a claim of breach of fiduciary duty, a religious organization might enjoy First Amendment protection from claims of failure to provide a certain quantity or quality of religious instruction in exchange for tithes and offerings, *but might not enjoy such protection*

> *from claims that it solicited and accepted funds to be held in trust for a specific, stated purpose, but spent the funds for an unauthorized purpose. Schmidt* at page 830.

So, given that there is no bright line rule to preclude judicial inquiries into cases where church funds are used for an unintended purpose, does not that principal set precedence for inquiries into church sanctioned torts?

The *Schmidt* Court concluded that "[w]e find that subject matter jurisdiction exists over a claim that a religious entity breeched a fiduciary duty by improperly diverting designated funds." *Id* at p. 830.

> "[W]e do not in any way suggest that Church Defendants have improperly diverted designated funds. The only issue before us is whether our courts may exercise subject matter jurisdiction over such claims. We simply find that a religious entity is not exempt from these types of suits in a court of law." at 832.

In *Schmidt*, the Plaintiff alleged that Father Carver made intentional misrepresentations in soliciting contributions for the rebuilding of St. Paul's which was destroyed by Hurricane Katrina. The case of the Plaintiff's Complaint was one of fraud...Moreover, the First Amendment does not protect fraudulent statements that concern neither religious doctrine nor practice... Plaintiffs have asserted a common-law tort which can be decided on neutral principles of law without excessive entanglement in ecclesiastical affairs...

> "We find that subject matter jurisdiction exists over Plaintiffs' claim of intentional misrepresentation; therefore, we reverse the chancellor, and remand this issue for further proceedings consistent with this opinion. By doing so, we do not suggest that Father Carver did, in fact, act fraudulently. But " '[w]hen considering a motion to dismiss, the allegations taken in the complaint must be taken as true....'" *Scaggs v.*

GPCH-GP, Inc. 931 So.2d 174, 1275 (Miss.2006) (quoting *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So.2d 1234 (Miss.1999)). *Schmidt* at 832.

Granted, the lower court found that the "ministerial exception," which "provides that civil courts lack subject matter jurisdiction to decide cases concerning employment decisions by religious institutions concerning a member of the clergy or an employee in a ministerial position" did not apply to the case at bar. *Watson v. Jones*, 80 U.S. 679 (1871) at p. 728. But, this doctrine is also important for the following reasons. Appellant was never employed by the Defendant NAMB; never was subject to termination by the Defendant NAMB; and Appellant takes no issue with his employer, i.e., BCMD's ability to fire him unmolested. What is important in this context however, is that the firing of the Appellant would have no legal basis for the court's intervention. Of equal importance is that the torts committed by the Defendant NAMB has no ecclesiastical court to which the Appellant may appeal. Appellant's only recourse is a legal action in a court of law.

II. Whether the District Court was in error by failing to apply the "law of the case" doctrine to the Motion to Dismiss following a previous denial of a Motion to Dismiss.

Appellant is first asking this court to consider the lower court's prior decision of January 18, 2018, in which the issue of subject matter jurisdiction was determined. "[A]lthough the factual development of this case may later prove otherwise." Opinion

of January 18, 2018 at ROA. 19-60293.137. Then the court determined, "it will not apply the ecclesiastical abstention doctrine to dismiss McRaney's remaining claims at this time." *id.* This issue had been throughly briefed by the parties at Appellee's Motion [ROA. 19-60293.72-100], Appellant's Reply [19-60293.106-112], Appellee's Rebutal [ROA. 19-60293.118-122, and submitted to the Court on the Appellee's Rule 12(b)(6) Motion to Dismiss. The lower court decided in favor of the Appellant, save only the dismissal of Count IV., alleging an intentional interference with contractual relations in Florida. The lower court dismissed this Count on the legal basis that the Appellant was ultimately allowed to speak, hence no damages. No exception was taken as to the court's ruling by Appellant and the case proceeded.

The Appellee thereafter filed a Rule 56 Motion for Summary Judgment asking in part to dismiss Count I and Count II as to punitive damages based on the underlying claims in Counts I and II. Appellee asserted that they were entitled to a dismissal because of Appellant's execution of a "Separation Agreement and Release" which Appellant signed on June 8, 2015. This document was produced in response to a Motion to Quash filed by the Baptist Convention for Maryland/Delaware, Inc. ("BCMD") following a Subpoena Duces Tecum served on BCMD by Appellee. Because BCMD asserted its rights under the First Amendment Religion Clause and asked the court to dismiss the suit, Appellee also asked the court for PARTIAL

SUMMARY JUDGMENT (emphasis mine) on Counts I and II. But nowhere, did the Appellee ask for a dismissal of the claim, conceding that the "remaining claims would be these set forth in Counts III and V." The grant of Appellee's Motion for Partial Summary Judgment would have substantially narrowed the issues, but not dismissed the suit.

Then the court *sua sponte* entered an Order on March 4, 2019, that the parties should brief whether the Federal Court had subject matter jurisdiction and whether the case should be remanded. The court only stated, "The court is currently in doubt of its subject matter jurisdiction over any of McRaney's claims." March 4, 2019, Show Cause Order at ROA. 19-60293.308-310. Appellant mistakenly believed that the subject matter issue was already resolved, even if in doubt, and posited an argument as to whether remand should lie, because at that time, no additional facts had been added. In fact, the only additional fact that was added to the record was the incorrect fact that "[t]o prove those claims, McRaney has already attempted to obtain from the BCMD his entire personnel filed by Subpoena. Review of McRaney's claims would necessarily involve review of matters of religious doctrine or internal church governance, the Court denied the motion. The Court should have instead used the Rule 12(b)(1) subject-matter jurisdiction standard in determining whether the

ecclesiastical abstention doctrine applied." [ROA. 19-60293.309]. Actually, it was Appellee who issued the subpoena for the file, not Appellant McRaney.

Finding no reason to conclude that remand was warranted, Appellant conceded to that fact believing the case would continue in the Northern District. Even though Appellant originally filed his Complaint in the Winston County Circuit Court, he could not conceive of a reason for the remand. But likewise, Appellant never conceived that the court would reconsider its previous ruling, find without a doubt that there was no subject matter jurisdiction and dismiss the case presumably with prejudice, all without additional facts or a change in the law.

The lower court determined in its March 4, 2019, Show Cause Order at page 3, that "it has a continuing duty to assess its subject matter jurisdiction through all phases of the litigation. *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 501, 126 S.Ct. 1235, 163 L.Ed. 20 1097 (2006)." [ROA. 19-60293.310]. But this duty seems to be in direct contradiction to the doctrine of "Law of the Case" set forth in another U. S. Supreme Court Case. The "Law of the Case" doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 815-16, 108 S.Ct. 2166, 100 L.Ed. 2d 811 (1988).

In considering the court's ability to reconsider its own ruling, Appellant acknowledges Rule 54(b) that,

> "Provides that "non-final orders 'may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.'" *Galvan v. Norberg,* 678 F.3d 581, 587 (7th Cir. 2012) (quoting Fed. R. Civ. P. 54(b)); *see also id.* At 587 n.3 ("Rule 54(b) governs non-final orders and permits revision at any time prior to the entry of judgment."). "Unlike the case in which a judgment is sought to be vacated...a motion to reconsider a ruling is constrained only by the doctrine of the law of the case. And that doctrine is highly flexible, especially when a judge is being asked to reconsider his own ruling" *Pickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000) (emphases omitted). "Specifically, "the law of the case doctrine permits 'a court to revisit an issue if any intervening change in the law, or some other special circumstance, warrants reexamining the claim." *EEOC v. Sears, Roebuck & Co.,* 417 F.3d 789 , 796 (7th Cir. 2005) (quoting *United States v. Thomas*, 11 F.3d 732, 736 (7th Cir. 1993); *see also Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571-72 (7th Cir. 2006) ("The authority of a district judge to reconsider a previous ruling in the same litigation ... is governed by the doctrine of the law of the case, which authorizes such reconsideration if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous." *Bank of Waunakee v. Rochester Cheese Sales, Inc.,* 906 F.2d 1185, 1191 (7th Cir. 1990) (noting that a "basis for a motion to reconsider [is] a controlling or significant change in the law or facts since the submission of the issue to the [c]ourt") (citation omitted). *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870 (N. D. Ill., 2017) at page 874.

III. Whether the District court erred when it extended the ecclesiastical abstention doctrine beyond its intended scope without allowing additional facts in the record to support that doctrine.

Notwithstanding that there were none of the above factors allowing the court to deviate from the law of the case, the lower court converted NAMB's Motion for

Summary Judgement to a Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction. But, assuming arguendo that the lower court can reconsider its prior decision without any additional facts, the case boils down to whether a non-pastor, acting in an administrative office of a religious body, is prohibited from bringing an intentional tort claim against another religious body with whom he has never been employed? Were this a case involving two corporations, one of whom exerted their power and influence to force the termination of the other's employee, and then intentionally set about to damage that employee from business opportunities within the same sphere, say book publishing for example, then certainly a case would lie. Present here, is whether both the State and Federal Constitutions provide protection to Appellant or cloak the tortious acts of a religious organization with immunity under the ecclesiastical abstention doctrine?

May a religious organization commit intentional torts, which would be actionable if done by a secular organization, with impunity "under a cloak of religion?" The case of *Pleasant Glade v. Schubert*, 264 S.W. 3d 1, 11-12 (Tex. 2008) stated, "we do not mean to imply that 'under the cloak of religion, persons may, with impunity,' commit intentional torts upon their religious adherents." At page 12. Some courts will even carve out an exception to the "ministerial exception doctrine" for certain defamatory statements accusing a pastor of theft and/or dishonesty,

holding that such actions against a pastor is not protected by the ministerial exception as will be shown herein later.

Present here is a case in which the Appellant did not work for the Appellee. Taking as true, the factual allegations of the Complaint, the conflict between Appellant and Appellee was nothing more than a power play as to who would be in control, in which the Appellee used financial threats to gain control over an autonomous organization. There was no doctrinal schism, no heresy, nor anything which the Supreme Court said in *Watson v. Jones,* 80 U.S. 679, 20 L.Ed 666 (13 Wall. 1871), which case set out what has come to be known as the "deference rule." In 1871, the *Watson* court said,

> "Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them in their application to the case before them. *Id*. 80 U. S. At 727."

Quoting from *Presbytery of Beaver Butler of United Presbyterian Church in U. S. v. Middlesex Presbyterian Church*, 489 A. 2d 1317, 507 P. A. 255 (Sup.CT. of Pennsylvania 1985.) At page 1319.

In deciding that the secular courts may handle a dispute among members of a religious denomination over the ownership of church property *Beaver Butler* stated, "[t]hese disputes are questions of civil law and are not predicated on any religious doctrine." at 1321...

> "From this consideration has evolved what is called the 'neutral principle approach' delineated in *Presbyterian Church in the United States v. Blue Hall Memorial Church*, 393 U. S. 440, 89 S.Ct. 601, 21 L Ed. 658 (1969) where the rule was carefully announced." *id*.

While this rule primarily deals with personal property rights within a church the general thoughts apply to any civil disputes involving civil wrongs not predicated on any religious doctrine. The above cited case stated,

> "[w]hen Caesar enters the temple to decide what the temple believes, he can leave behind only his own views. The view of a court as to who are heretics among warring sects is worth nothing, and must count as nothing if our cherished diversity of religious views is to prevail." *Beaver-Butler* at 1320.

In the case at bar, the lower court can certainly resolve whether a tort has been committed by one separate and independent religious organization versus a former employee of a completely separate and autonomous religious organization as exists in the Southern Baptist Convention, without delving into ecclesiastical questions. The lower court may apply the neutral principals tests to these parties to the same degree as would be applied to non-religious associations. As espoused in the case at bar, there are no doctrinal or ecclesiastical issues dividing the parties. Consequently, Caesar may enter the temple without having to decide what the temple believes and determine if a civil wrong has been committed.

In all actually, the case at bar is stronger in terms against the ecclesiastical abstention doctrine because it involves separate religious organizations operating

voluntarily under a strategic partnership agreement defining their parameters, yet ostensibly, under the same flag. Some jurisdictions allow tort claims to be pursued by parties within the same religious organization. For example, the case of *Marshall v. Muno*, 845 P. 2d 424 (1993) in which a Presbyterian minister brought an action against the executive presbyter asserting claims of defamation, interference with contract and breach of contract. The Plaintiff alleged the Presbyter maliciously made false statements about him to his prospective new church, convincing the church not to hire him. The lower court concluded that they were without jurisdiction to determine the dispute because the First Amendment proscribes a civil court from interfering in relationships between the church and its clergy. The Appellate court affirmed the dismissal of the breach of contract claim, but reversed and remanded for trial the defamation and interference with contract claims. The *Munro* court held that "[h]owever, the claims of defamation and interference with contract should not have been dismissed by the superior court... There is no need for the court to involve itself in Marshall's (Plaintiff) qualifications." *Marshall* at p. 428.

> "In this case the core complaint is for defamation. Marshall does not claim he was wrongfully terminated. The defamation and interference with contract claims are not derivative of the contract claim. There is no difficulty in separating the contract claim from the tort claims of defamation and interference with contract." *id.*
>
> "In *Murphy v. Harty*, 238 Or. 228, 393 P.2d 206 (1964), the court found that a communication between officials of the Baptist church, relating

> the charges that led to the dismissal of a pastor, was conditionally privileged. "[I]f the evidence discloses that the Defendant did not act in good faith, but took advantage of the occasion to injure the Plaintiff in his character or standing the communications would *cease* to be privileged. *Id.* 393 P.2d at 216 (emphasis added.)" *id.*
>
> "In this case, the superior court is not divested of its jurisdiction simply because Munro made his remarks while acting in the course of his duty. That fact only provides Munro with a conditional privilege, which is waived if Marshall can prove that Munro acted with actual malice. *Restatement (Second) of Torts §§ 596 cmt. e and 599-605A (1977); see also Murphy,* 393 P.2d at 214. Determining whether Munro acted with actual malice will not require the court to delve into ecclesiastical concerns. Rather, the issue is whether Munro had "reasonable grounds for believing the defamatory statements... and... whether they were motivated by actual malice." *Id.* 217. This question can be resolved without considering Munro's church related duties and is within the court's jurisdiction." *Marshall*, at page 429.

Another analogous case from yet another jurisdiction helps define these "neutral principles" that may be applied. In *Tubra v. Cooke*, 225 P.3d 862 (Court of Appeals Oregon 2010) a former interim pastor brought a defamation claim against his employer church and two of its officials. A jury verdict awarding damages to the Plaintiff was set aside on a JNOV with the trial court concluding that the Free Exercise Clause of the First Amendment to the United States Constitution deprived it of jurisdiction to adjudicate the dispute. The Oregon Supreme Court found that the First Amendment does not bar the Plaintiff's claim and reversed. In the *Tubra* case where the interim pastor was publically accused of financial misappropriation of church funds, the fifty year old Plaintiff had been unable to find steady work as a

pastor in any church since that time. In *Tubra*, as in the case at bar, "[b]efore trial, Defendants moved for Summary Judgment, arguing *inter alia,* that the allegedly defamatory statements were protected by a 'First Amendment privilege.' That motion was denied by letter opinion, which stated in part:

> "As to the claim that the First Amendment bars this action, I believe that the governing case law, including its application in Oregon, leads to the conclusion that Plaintiff is not barred from seeking to protect his reputation on these facts. The issue here is not about doctrine or ecclesiastical processes. The First Amendment case law would be relevant if the action were for wrongful termination and the issue was whether the church organization had the power and right to end the pastorate of [Plaintiff]. However, this case is not about the power or right to terminate, it is about the statements and actions in the process of termination, including the secular process of handling money and communications regarding alleged mishandling of money." *id.* At page 866.

The *Tubra* case went on to expound,

> "However, the First Amendment does not completely bar relief sought by a plaintiff against a church in a civil action. *See, e.g., Jones v. Wolf,* 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) (applying "neutral principles" of law to resolve church property dispute where there was no need to examine church doctrine); *Presbyterian Church v. Hull Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969) ("[N]ot every civil court decision * * * jeopardizes values protected by the First Amendment."); *Meshel v. Ohev Sholom Talmud Torah,* 869 A.2d 343, 357 (D.C.2005) (applying "neutral principles" approach to parties' contract dispute). Nor does it bar every employment-related suit involving a religious organization. *See, e.g., Minker v. Baltimore Annual Conf.,* 894 F.2d 1354, 1359-60 (D.C.Cir.1990) (allowing claim arising from oral contract between church and pastor if claim was provable without inquiring into church doctrine); *EEOC v. Pacific Press Pub. Ass'n,* 676 F.2d 1272, 1279 (9th Cir.1982) (First Amendment does not

bar Civil Rights Act from being applied to editorial secretary in church publishing house); *Marshall v. Munro,* 845 P.2d 424, 428 (Alaska 1993) (defamation claim by pastor against another church official allowed where the allegedly defamatory statements did not require court to examine qualifications required of pastors).” At page 869.

“Citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), we explained that "[t]he fundamental qualification for protection based on the Free Exercise Clause of the First Amendment is that that which is sought to be protected must be `religious.'" *Christofferson,* 57 Or.App. at 239, 644 P.2d 577.” *id.* At page 870.

“Following the approach taken by the court in *Founding Church of Scientology v. United States,* 409 F.2d 1146 (D.C.Cir.1969),we concluded that the trial court was required to determine the religious character of the alleged misrepresentations only if it could do so as a matter of law—that is, only if the sole conclusion that could be drawn from the evidence was that the alleged misrepresentations were purely religious. *Christofferson,* 57 Or.App. at 238, 644 P.2d 577.” *id.*
"[i]t is clear that a religious organization, merely because it is such, is not shielded by the First Amendment from all liability for fraud. * * * If the statements involved here do not concern the religious beliefs and practices of the [religious organization], the Free Exercise Clause provides no defense to plaintiff's action.” *id.*

Id. at 241, 644 P.2d 577 (citation omitted). Finally, even if the statements are made on behalf of a religious organization and have a religious character, are they nonetheless made for a "wholly secular" purpose? *Id.* at 242, 644 P.2d 577. On that point, we explained that some ideas—such as "the nature of a supreme being" and "the value of prayer and worship"—"must always and in every context be considered religious as a matter of law," but that others are "religious only because those espousing them make them for a religious purpose." *Id.* at 243-44, 644 P.2d 577.[7] *See also Checkley v. Boyd,* 170 Or.App. 721, 731, 14 P.3d 81 (2000), *rev. den.,* 332 Or. 239, 28 P.3d 1174 (2001) (applying *Christofferson* analysis and holding that the defendants' free exercise defense did not provide a basis for dismissal of the plaintiff's intentional

> infliction of emotional distress claim because some of the plaintiff's allegations— such as allegations that the defendants had accused the plaintiff of physically abusing, stealing from, and neglecting his brother—would not "always and in every context" be considered religious in nature).” *Tubra* at page 870.

So, yes, there is a “delicate balancing” exercise that must be performed as deduced in the *Tubra* decision, but courts have recognized that the First Amendment is not absolute. Some actions committed by a church are not shielded, i.e., a defamatory charge of child molestation.

> “[w]e fail to understand how a defamatory statement accusing a pastor of theft is any more (or less) a matter of church ‘discipline, faith, internal organization, or ecclesiastical rule, custom, or law[,]’ *Serbian,* 426 U.S. at 713, 96 S.Ct. 2372, than is a defamatory statement accusing a pastor of child molestation.
> As in *Christofferson,* the court in *Heard* struggled to strike a balance
>
> between the constitutional protection against civil courts adjudicating disputes involving religious beliefs and practices, while at the same time holding religious groups accountable for tortious behavior based on nonreligious conduct. We conclude that *Christofferson* offers the more tenable approach for achieving the appropriate balance between those competing interests. *See Wallulis,* 323 Or. at 348, 918 P.2d 755 ("[T]he question of whether or not a defamatory statement is privileged, either absolutely or conditionally, depends upon the balance that the court strikes between competing interests." (quoting *Lee,* 273 Or. at 105, 539 P.2d 1079)).” *Tubra,* at page 356, 357.

So in *Tubra*, as in the case at bar, how can the court determine if the actions of a religious organization are purely religious matters versus whether such actions were

done for purely secular reasons without further exploring the facts of the case? And particularly, when the lower court is in doubt itself as to these facts.

> "If the organization is of a religious character, and the alleged defamatory statements relate to the organization's religious beliefs and practices and are of a kind that can only be classified as religious, then the statements are purely religious as a matter of law, and the Free Exercise Clause bars the plaintiff's claim. In defamation law terms, those statements enjoy an absolute privilege.
> If, however, the statements—although made by a religious organization—do not concern the religious beliefs and practices of the religious organization, or are made for a nonreligious purpose—that is, if they would not "always and in every context" be considered religious in nature—then the First Amendment does not necessarily prevent adjudication of the defamation claim, but the statements may nonetheless be qualifiedly privileged under established Oregon law." *id*.

IV. Whether the District Court was in error by making a fact based determination to dismiss the Complaint on the basis of lack of jurisdiction before any facts were adduced, when Mississippi law would clearly allow such an inquiry.

Simply put, taking the Appellant's claims as set forth in his Complaint as true, it would appear that the actions by the Appellee were done for purely non-religious reason...that is control and power and retaliation against any who oppose. Let the termination Dr. McRaney stand as an example for any other autonomous Southern Baptist Church and Convention who dares to stand up to the power and might of the North American Mission Board. The only religious overtone Appellant can glean

from all this is a Biblical story as old as the hills itself - David versus Goliath. But even that fight was about power and control at its heart.

Appellant urges the court to look carefully at his response to Appellee's original Motion to Dismiss, filed on July 20, 2017. [ROA. 19-60293.106-112.] This response focuses more closely on Mississippi law. While this brief expands the research to encompass all the jurisdictions of the United States that may provide relevant case law, Appellant understands that it is the case law from his own backyard that often proves decisive. Accordingly, attention is given to the following case from Oklahoma where the courts had a delicate balancing act not to dissimilar from the case at bar.

Appellant was awestruck by the intricate dissection necessary to resolve the following case. In *Guinn v. The Church of Christ of Collinsville,* 775 P.2d 766 (Oklahoma 1989), a former female member of a religious congregation brought a personal injury action against church elders for the intentional infliction of emotional distress in continuing to denounce her as a fornicator even after she had withdrawn from church membership. Here, it was necessary for the court to balance between pre-withdrawal conduct versus Defendant's post withdrawal conduct.

> "For purposes of First Amendment protection, religiously-motivated disciplinary measures that merely *exclude* a person from communion are vastly different from those which are designed to *control and involve*. A church clearly is constitutionally free to exclude people without first

> obtaining their consent. But the First Amendment will not shield a church from civil liability for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not consented to undergo ecclesiastical discipline." *Guinn,* at page 781.

In *Guinn*, as in the case at bar, there was pre-termination conduct by the Appellee and post-termination conduct. The Appellant, after his termination, was still affiliated with the Southern Baptist Convention as a whole. He was not, however, subject to any church body for discipline or any other purpose. For his entire career, Appellant had associated himself with various aspects of the Southern Baptist Convention in one form or another. For what reason was he now being banned by the independent churches in two various states? Had he preached false doctrine or had he run afoul of a branch of the Southern Baptist Convention that wanted to control all of the various state organizations? *Guinn* went on to opine,

> "In order to protect the Collinsville Church and other area Churches of Christ from Parishioner's adverse influence, those congregations were made aware of the transgressions she admitted to having committed. In *Redgate v. Roush,* the court dealt with a Church of Christ member, sometimes acting as pastor, who sued the elders of the Wilmington Church of Christ for defamation. Because he preached sermons which contravened the church doctrine, the elders of that church withdrew fellowship from him and circulated articles in the church paper which warned of his unworthiness as a Church of Christ member and pastor...
>
> While *Redgate* involved a congregation's concerns with the credentials of a person who might have attempted to continue preaching within the affected denomination, the case at bar involves a congregation's concern with the sins of a person who is no longer a church member. In *Redgate* the congregation had a legitimate and reasonable concern for the

transgressor's actions; in the case at bar it did not. In *Redgate* the congregation had a common interest in being informed about the questionable conduct of one among them who expressed the desire to continue ministering to them or to one of their neighboring assemblies. Here, Parishioner expressed no interest in continuing her association with the Collinsville or any other Church of Christ. She removed herself from membership and thus posed no threat of continued adverse influence on any Church of Christ congregation...

While we agree that First Amendment freedoms could be jeopardized by the imposition of tort liability for every religious act which offends, we are equally certain that some religiously motivated acts are actionable because they fall outside the scope of First Amendment protection and that those acts would indeed be the proper subject of secular judicature. The Elders' postwithdrawal disciplinary measures were imposed without Parishioner's consent and were thus undeserving of First Amendment protection. Imposing tort liability upon the Elders for their unprotected acts does not threaten our constitutionally shielded religious freedoms. We hold that Parishioner, an unwilling, nonconsenting subject of a church's disciplinary actions, has an actionable claim against the Elders and the Church of Christ for the tort of intentional infliction of emotional distress...

We have determined that when Parishioner withdrew from the Church by her September 25 letter she effectively revoked any consent upon which the Elders could have based a defense of "absolute privilege" to share Parishioner's private life with the Collinsville congregation. "Conditional privileges" to publicize personal matters about another person's life are not based on or derived from that person's consent. There are certain "occasions" which give rise to a conditional privilege to publicize private facts about another person. If the publication is made on a privileged occasion and the privilege is not abused, the "publisher" is not liable." at page 782, 783.

The court concluded that "We have determined that Parishioner cannot recover for the disciplinary actions of the Elders which occurred prior to her withdrawal from

the church. Conversely, Parishioner may recover only for those postwithdrawal acts of the Elders which are proven to have been tortious." *id*. at 786.

"On remand, the trial court may consider the postwithdrawal tortuous acts as not immune from secular judicature." *id.*

Now this argument has come full circle back to whether the court has subject matter jurisdiction or not. Appellant concedes that if the federal lower court lacks subject matter jurisdiction then so would the State court. And, in making this jurisdictional determination, the Federal court should look first, but not exclusively, in their own back yard. Appellant still believes that the best case to justify his position is *Roman Catholic Diocese of Jackson, Mississippi v. Morrison*, 905 So.2d 1213 (Miss. 2005). Accordingly, Appellant once again urges the court to look at his response to the Motion to Dismiss. And, while trying not to be cumulative in the two arguments, it is necessary to again cite to portions of the *Morrison* case to solidify Appellant's argument. *Morrison* began by considering as here, the jurisdictional issues. "Our review of relevant state and federal case law cautions us that an analysis of the jurisdictional issue, unless precisely focused, can easily become side tracked and lost in tangential First Amendment issues neither relevant nor helpful in deciding the matter before us." at 1223. In *Morrison*, a mother and three children brought an action against the Roman Catholic Diocese, for among other things, sexual abuse of

the children by a former priest. In affirming the lower court in part, the Supreme Court of Mississippi said several things that are of vast importance to this appeal.

> *"Watson* is cited by the Diocese as the origin of, and authority for, the Doctrine of Church Autonomy. This Doctrine, later found to be a constitutional imperative in *Kedroff,* is strongly advanced by the Diocese, whose arguments suggest bright-line abstention by civil courts in virtually all matters and disputes arising within the church. The Diocese cites over one hundred cases in its brief, providing numerous examples of governmental and judicial abstention in cases involving various kinds of disputes within religious organizations. However, we do not read any of these cases to say, and we are not so easily persuaded, that the Doctrine of Church Autonomy suggests blanket protection of the Church from all accountability in our civil courts. As with everything judicial, there are exceptions, tests, and limits."

Looking therefore, to what would Mississippi courts do, specifically Winston County Circuit Court, the following discussions from *Morrison* should be outcome determinative.

> "In *Mabus,* we upheld the trial court's grant of summary judgment on several negligence causes of action. *Mabus* was a review of a trial court's grant of summary judgment, rather than (as here) a challenge to subject matter jurisdiction. However, had *Mabus* been framed in terms of a jurisdictional challenge, it would have been a factual rather than facial challenge."

> "We held in *Mabus* that allowing the case to go forward would 'excessively entangle this Court into the investigation and evaluation of religious tenets.' *Id.* at 764. That determination was made based upon the record of facts before us, rather than a blanket determination that our circuit court lacked jurisdiction. Our holding on the negligence claims in *Mabus* was limited to its facts. This Court has never held that, as a

> jurisdictional matter, religious institutions may not ever be held liable in our civil courts for their active negligence. Our decision in *Mabus* was motivated by the record presented to us, not by an absence of subject matter jurisdiction." *Morrison*, at page 1241.

It would seem therefore, that at the very least, since there is no bright line rule, facts should be developed to see if the court has an absence of subject matter jurisdiction. What happened in the case at bar is a far cry from the plethora of cases concluding that there are valid, neutral laws and tests to determine if the conduct of a religious organization was governed by sincerely held religious beliefs or they should be held to the same standard as non-religious organizations when committing tortious conduct on third parties.

Appellant asserts that the Appellees are not entitled to protection under the ecclesiastical abstention doctrine and that this case should be reversed and remanded for a trial on its merits.

CONCLUSION

Appellant prays that this court will find that the lower court has jurisdiction to hear the case under applicable law and existing facts and that the case will be sent back to the trial court for a trial on the merits.

This the 29th day of July, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, the undersigned certifies that this brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

1. This brief contains **7460** words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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THIS, the 29th day of July, 2019.

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