

Harvey Barton: It is my privilege and honor to represent the appellee here today. Dr. Will McRaney is seated in the audience, a very much a product of New Orleans. He received his doctorate here at New Orleans Baptist Theological Seminary. Served as a professor here for many years. He's worked his entire professional life within the umbrella of the Southern Baptist Convention. Now, this case is about whether or not a religious entity can commit acts which if committed by a nonreligious entity would result in a tortious lawsuit and then that religious entity hide behind the ecclesiastical extension doctrine says no you can't touch us because we are a church. Now we know that not every civil court decision jeopardizes the first amendment. In fact the Constitution is designed to protect the freedom of religion. That's a great thing. But there's been many exceptions involving that, some even within interchurch fights within the church itself but there are some and particularly in this case where inter entity fights should be a matter of court's concern. Let me explain. The Southern Baptist Convention is unlike most other denominations. Most other denominations have a top down hierarchical structure where there always is an appellate process up to the head of the denomination, the pope in the case of the Catholic Church, or some other religious person who oversees the entire denomination. The Southern Baptists is not like that. Each party that is going to be talked about here today is a separate, autonomous, and independent entity. In fact, it's somewhat miraculous you might say that 47,000 independent Southern Baptist churches voluntarily come together in an armed length transaction to comprise the Southern Baptist Convention. The North American Mission Board is merely a separate entity. It is not a church as we understand that definition. It is not an entity.

Man judge: Was your client fired or did he resign?

Harvey Barton: That's a good question. I guess you would say he was fired with a separation agreement. It was a negotiated deal in which he stepped down and resident as executive director of the Maryland Delaware Baptist Convention. But he would have been fired nonetheless.

Man judge: Are we facing this large constitutional crisis? Did he resign and no termination?

Harvey Barton: When the North American Mission Board as a separate entity orchestrated his termination.

Man judge: I thought the departure waived the right to sue them.

Harvey Barton: That is question for another day from this standpoint.

Man judge: Is that because only issue before us is jurisdiction?

Harvey Barton: The only matter is subject matter jurisdiction. The district court dismissed this case before any discovery was had. There are no facts.

Man judge: Do we have the ministerial exception before us today at all?

Harvey Barton: No. Dr. McRaney never at any time was an employee of the North American Mission Board.

Man judge: That's asking us to decide that difficult question. It's only an employer-employee exception. I thought the ministerial exception court ruled against it, tried to appeal, certificate denied. The only issue

before us today is can any court judicate this dispute because of the ecclesiastical abstention doctrine. Is that correct?

Harvey Barton: It's its narrowest point that is correct. Because Dr. McRaney has nowhere else he can appeal this decision because there is no hierarchal formation in the denomination.

Man judge: What a lot of circuits have wrestled with especially with the Supreme Court decision resolving the ministerial exception as not jurisdictional what circuit do you think we should follow in terms of saying the ecclesiastical abstention doctrine is not jurisdiction. What is the case that shows this district judge was most wrong as a matter of law.

Harvey Barton: I wanted to take it a step further and say that the Yoder case in the United States Supreme Court says that the fundamental qualification for protection based on the First Amendment clause is that you first must establish whether protection or the act to be protected is in fact religious. There's no facts here on which to make that determination. The district court throughout this case dismissed this case because it might be.

Man judge: No, the District Court agreed with you exactly on that theory on the outset denying summary judgment. Then it got discovery and it appeared that it really would be looking into whether your client was fit as to be a matter of the clergy or minister or whatever they are called.

Harvey Barton: What happened was when discovery started, the North American Mission Board issued a subpoena ducitdecam of the personal files of Dr McRaney from Maryland Delaware. The lawyers for Maryland Delaware filed a motion to quash and raised that issue. The files were never produced. The court revisited this issue and said oh we can't get into this because it's going to make a determination whether or not this religious policy, religious doctrine, doctrinal definition, extension, so many discovery has never been had on that issue. None. The only facts in this case are my well pled complaint which does not raise an issue that would be protected by the ecclesiastical abstention doctrine.

Man judge: Does your complaint tie the defamation and the infliction of emotional injury to his termination?

Harvey Barton: Absolutely. It is a specific well pled complaint in which I tracked exactly what had happened. It wasn't so much as he was terminated from Maryland Delaware that this problem is about. It's after he was terminated then the North American Mission Board by their power and influence continued to interfere with his business and his ability to make a living within the confines of the Southern Baptist Convention by exercising that power and influence?

Woman judge: After he was fired, his complaint was he wasn't able to make speeches and make presentations and they wouldn't allow him to do that? Is the North American Mission Board comprised solely of ministers? Who are those people?

Harvey Barton: It is the president and various administrative officers and then I understand it there are 50 trustees that are appointed from the various churches that comprise the Southern Baptist Convention and these trustees come together to help control the hundreds of millions of dollars available to the North American Mission Board for funding of mission projects in the United States.

Woman judge: Are the 50 trustees ministers?

Harvey Barton: Yes ma'am. To the best of my knowledge, each of them are ministers. They may possibly be serving in some executive director position at the time. But most of them, all of them to the best of my knowledge, ministers.

Man judge: Are these answers in the record or is this just your understanding of how the Baptist world works?

Harvey Barton: The 50 trustees, that would not be in the record, but that's something that I know. There are things I know that are not in the record because the facts have never been developed. For example. I know the trustees as I speak right now are in a conference in Puerto Rico.

Man judge: This case has a lot of directions it can go in. But all that we have in front of us now is a district judge who said because of the ecclesiastical abstention doctrine I can't adjudicate any of them. You would contend that what circuit would say these claims, all of them, are subject to a secular court's ability to apply neutral principals. What circuit do you point to that says absolutely a court has to adjudicate this court, otherwise it never gets resolved.

Harvey Barton: I'm finding Supreme Court cases, Jonesby Wolf, state cases, Tuber V Vook. There is certainly MS law, the Smit case which would allow an injury in situations like this. We need a good fifth circuit law. What the court said in their decision was considering all the facts available to it, and not just those in the complaint, the court finds that this case would delve into church matters. There are not other facts. There is my complaint and the subpoena duces tecum that was issued for which all these motions were developed. There are a couple of affidavits. What I will show is what happened is Dr. McRaney pushed back against the North American Mission Board when they wanted to change the strategic partnership agreement. They wanted to say we want to come into each state and control where the money goes and who's hired and who's fired. Dr. McRaney says you are going to dilute our autonomy. You are going to dilute our independence and I'm not going to do that.

Man judge: That's certainly a dispute about church management. So if the doctrine has expanded from disputes over beliefs and who's a fit clergyman, to church finances and management you would be in trouble. You are saying it hasn't made that jump?

Harvey Barton: The North American Mission Board is not a church. They are an entity that controls money. This at its very source is a dispute about power and money. There is no church doctrine. There is no church polity. He is not denying church doctrine. He's not 'eying the birth of Christ or the virgin birth or the resurrection. It's none of that. It's about who's going to be in control. That has nothing to do between separate autonomous entities. You have got the North American Mission Board who bribed, threatened, coerced, intimidated and bribed the md district to fire Dr. McRaney and then gave them a mission dollar bonus for doing so. And I can prove that.

Man judge: But he ended up working a negotiated departure with a right to sue?

Harvey Barton: To sue for that tort. But what happened is the North American Mission Board committed additional torts following that. They started picking up the phone and calling Florida and calling Mississippi and threatening and saying we don't want him speaking we don't want him to anything. We're going to blackball him within the Southern Baptist Convention. In one of my paragraphs of complaint they put a picture of Dr. McRaney on their front office in Alpharetta, Georgia, for all to see. All 50

trustees, all their staff, everybody that comes in. There is no religious doctrine for them putting a picture of him up in their office for him to be declared an enemy of the Southern Baptist Convention.

Donna Jacobs: I wanted to first address Mr. Barton's opening remarks and the characterization of our defense in this case. I believe he said that the North American Mission Board has taken the position that the courts can't touch us because we are a church. And that is not at all the position of the North American Mission Board in this case. The jurisdictional issue here is a relatively narrow one. It's driven by the particular circumstances of Reverend McRaney's claims. And quite honestly Mr. Barton championed his well pled complaint and we're going to talk about the well pled complaint too because we think on its face it shows these are essentially ecclesiastical disputes.

Man judge: So the record doesn't allow us to and we shouldn't get into whether the church is a church or whether it was his employers?

Donna Jacobs: I don't think it's necessary to get into whether the North American Mission Board was Reverend McRaney's employer. Because the issue before the court at this point is not the ministerial exception but the broad ecclesiastical abstention doctrine.

Man judge: Both doctrines were new to me and difficult for me to understand. You urged the ministerial exception originally back in January or February. The court denies that. You tried to appeal it. That was denied. Then the discovery comes in to show cause order and all that is before us is the abstention doctrine question. Purley jurisdictional. We can't reach the merits an affirmative defense at this point?

Donna Jacobs: At this point no. This is strictly a jurisdictional issue at appeal.

Man judge: Your opponent asserts he was fired due because of the withholding of money. Whether you agree with that or not, do you believe if it was a finance based decision it was outside the realm of the ecclesiastical abstention.

Donna Jacobs: Not under the particular circumstances of this case you honor. I think it's helpful to understand what these two entities are. As Reverend McRaney alleged in his complaint, the North American Mission Board is an agency of the Southern Baptist Convention and the convention of the Southern Baptist Convention of Maryland Delaware who was Reverend McRaney's direct employer is one of 42 state conventions that cooperate with the Southern Baptist Convention. Each entity has its own board and is self-governing. But all these groups choose to cooperate for a particular reason and that is for mission strategy and specifically to grow the Southern Baptist Convention through church planting, the creation of new churches. The ministry statement of North American Mission Board is approved by the Southern Baptist Convention and it clarifies that the North American Mission Board exists for the purpose of working with churches, associations and state conventions in mobilizing Southern Baptists as a missional force to impact North America with the Gospel of Jesus Christ through evangelism and church planting. The mission board partners with these churches, associations and state conventions according to its ministry principles and those principles includes planting healthy, multiplying evangelistic Southern Baptist Convention churches, assisting in the ministry of evangelism and making disciples, appointing, supporting and assuring accountability for missionaries and providing missions education.

Man judge: Cooperative partnership – where does this get you in terms of the jurisdictional question?

Donna Jacobs: It demonstrates your honor that these are while autonomous within the meaning of the Southern Baptist Convention, entities that are working together for an inherently religious purpose, they exist to grow the Southern Baptist faith and to create new Southern Baptist churches. The Maryland Delaware Baptist Convention has its own mission statement of purpose and that statement clarifies that it exists to intentionally assist in the starting and strengthening of congregations so together we can accomplish the Great Commission as given to us by our lord. So while it is technically correct that the North American Mission Board is not a church and in that they don't hold services, the North American Mission Board and the Baptist Convention of Maryland and Delaware, both are part of and cooperate with the Southern Baptist Convention. I don't anyone would argue that Southern Baptist Convention is not a faith, a religion.

Man judge: You are saying that a cooperative of religious organizations for legal purposes are the same as a church.

Donna Jacobs: It is your honor. I don't think the ecclesiastical abstention doctrine is so narrow that you must have a church. We have a number of bodies, self-governing and autonomous yes, but to say that the Southern Baptist Convention is autonomous is not to say that Southern Baptist Convention don't adhere to common beliefs or affiliate.

Man judge: But what on the face of his complaint asks any court to resolve beliefs or doctrine. What would you point to?

Donna Jacobs: I would point to the entire basis for the complaint and that is rev mc had a dispute with the North American Mission Board about how mission strategy was going to be done between these two cooperating entities. That's very clear from every count in the complaint.

Man judge: But it would seem like his dispute was over how money should be raised and who gets it. I didn't see anything in the complaint saying that the reason he ended up leaving was because he had a belief difference.

Donna Jacobs: I think perhaps the most telling paragraph in the complaint appears on page four, second roman numeral 10. There Reverend McRaney pleads that he viewed the proposed strategic partnership as a weakening of the autonomy of the Baptist Convention of Maryland Delaware and the relinquishment of all control to the North American Mission Board in the specific area of starting new churches, including the selection, assisting and training and supporting church planters. Your honor that sounds pretty inherently religious to me. And Dr. McRaney had a different view of mission strategy from the direction that the North American Mission Board was going.

Man judge: What is the limiting principal? What if an individual was suing as a whistleblower and they alleging fraud and embezzlement? No court can look?

Donna Jacobs: No your honor, that's not our position at all. Fraud and embezzlement cases are quite different. But what we have here is a religious dispute about the direction of mission strategy between two entities.

Man judge: And you heard me ask him what is the best case that draws that line? In this day where suits against churches are vital as to grave wrongs and yet the Supreme Court has said you are right when it is

purposely an issue of doctrine and belief, then courts should stay out. What is the circuit authority that tells us what is purely doctrinal versus the whole set of disputes that people think have to be held accountable for.

Donna Jacobs: Your honor, I would point to the Kedroff US Supreme Court case as it interprets *Watson v Jones*. Kedroff quotes this statement from the *Watson* case. In this country the full and free right to entertain any religious belief, to practice any religious principal, and to teach any religious doctrine is conceded to all. The Kedroff case says that radiates the spirit of freedom for religious organizations and independence from secular control or manipulation. In short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Male judge: Circuits have really wrestled with this all over the country. What's your best circuit or state highest court case no power to adjudicate the dispute because it's managerial, it's the direction of the church, and that has to include beliefs?

Donna Jacobs: Your honor, I don't know if we have cited a highest state court or circuit court that makes that specific finding. But it is important to realize that the inherent nature of this dispute is religious. It's not that someone.

Man judge: You are saying on the complaint that we don't have the facts to know that. Your final remark is what is putting a picture up having to do with religion.

Donna Jacobs: I think we do know from the allegations and the complaint itself and an understanding of the nature of the two entities and their stated mission strategies. We do know what we need to know for the district court to make that determination. The plaintiff's complaint makes clear that all his claims spring from his disagreement with proposed changes in mission strategy by the North American Mission Board. In fact, Reverend McRaney acknowledged in his response to the original motion to dismiss that this cause in action had its roots from change in church policy.

Man judge: Let's say defamation came as reduced as I said I would meet with them and they say I never did. How does that implicate doctrine.

Donna Jacobs: Your honor, it speaks generally to the dispute that was going on with regard to mission strategy and the church planting and evangelism that these two entities were engaged in. And frankly for which Reverend McRaney up until his termination was the public face of that mission strategy. You are correct, count 2 alleges that he was libeled by statements that he refused to meet with the mission board officials and that that caused him to be terminated. The employment relationship and specifically Maryland Delaware's assessment of continued sustainability to direct that ministry is central to his claim.

Man judge: Both of you cited the *Marshall v Monroe* decision. Would you embrace or distinguish it?

Donna Jacobs: I would distinguish it because the statements at issue there were secular. They did not relate to church issues or the suitability for ministry. What we have here is a clear dispute about the direction of mission strategy and how that was going to be shaped, and these entities rights to choose who was going to be the public face of those beliefs and who was going to shape that mission strategy moving forward?

Woman judge: What was the message posted with the photo?

Donna Jacobs: There was no message posted with the photo and I'm glad you brought that up. The district court's opinion certainly can be read as saying that there were words on the picture. That's not what was claimed in the complaint. If you read count five it states that the photo communicates that he is not to be trusted and is public enemy number one.

Man judge: What is the purpose of the photo being put up when they are eliminated from the participating in what the organization is trying to do.

Donna Jacobs: There is nothing in the record that would tell us why it was done. But you have touched on something Judge Engleheart and that it is that these religious organizations do have a right to choose with whom they cooperate with and who they do not. As you said, he might have been persona non grata and perhaps that was the reason, but that is not in the record. But there is nothing intrinsically tortious about displaying a photo. But Reverend McRaney alleges that it communicates all of these things. That the picture communicates that he is not to be trusted and he is public enemy number one. The words in that complaint are meanings ascribed by Rev McRaney to that fact that his photo was at the reception desk and his thinking that his photo conveyed these messages illustrates his understanding that he was in a real conflict with the mission board.

Man judge: Had it ever been up before? Was it at a conference or event? Or was this in the office where they occupied. My understanding it was at an event.

Donna Jacobs: My understanding it was at the North American Mission Board home office in Alpharetta, Georgia.

Man judge: Had it been up for a while before or did it go up at time controversy erupted.

Donna Jacobs: I don't think there is anything in the record about that. The complaint alleges someone that was visiting the North American Mission Board office saw the picture, took a picture of the picture and provided it to Reverend McRaney.

Woman judge: It's ridiculous that you can't identify why you can't put it up there. Why was it even there? I don't know why you don't know the answer.

Donna Jacobs: Well, I do know it your honor but it is not in the record. And so if we are dealing with just the record we have to look at what Reverend McRaney says about it. And that is he understood it to be communicating that he was public enemy number one of the North American Mission Board that that necessarily arises out of his dispute with them about the new strategic partnership agreement and how and who was going to shape the missions strategy that was shared by the Baptist Convention of Maryland Delaware, his employer, and the North American Mission Board.

Man judge: Wouldn't this doctrine which has immense importance but subtly be required more factual development for us to know if it is beliefs versus defamation public enemy? You know facts that seem highly relevant as to whether it is on the beliefs side of the equation or the tort secular neutral principal side.

Donna Jacobs: As the district court noted even getting into some of those determinations would be validative of the ecclesiastical abstention doctrine.

Man judge: That sounds like absolute immunity.

Donna Jacobs: It is not absolute immunity your honor. But it has to do with the subject matter of this dispute.

Man judge: What is the case that extends the subject matter even if we accept your characterization, directions that a financial entity and its partner might go with.

Donna Jacobs: The ecclesiastical abstention doctrine applies to matters of internal church affairs.

Man judge: I thought the Supreme Court in every case said purely doctrinal. That's not financial.

Donna Jacobs: I don't believe it says limited as purely doctrinal. I do think it expands to internal disputes.

Man judge: It thought it originated where a church had its own internal tribunals, the tribunal rules on it, it is belief related and then the Supreme Court is saying don't second guess a church tribunal. But here we don't have a tribunal. No one has adjudicated it. We don't know if it's belief related. It's early. It may well be. You know the Supreme Court's Hosanna decision. That clearly stated the ministerial exception is not a jurisdictional correct. Has any court said since that decision said that the ecclesiastical abstention doctrine is jurisdictional?

Donna Jacobs: I'm not aware specifically of one after Hosanna Taper that says specifically the ecclesiastical abstention doctrine is jurisdictional as opposed.

Man judge: When I put all of the pieces of the jigsaw puzzle it doesn't look like this is jurisdictional. Courts can't even consider it. My guesswork about facts to determine if it's belief is precisely because the courts stopped before looking at all. If the doctrine is not jurisdictional then both doctrines may be there for you to prevail on, ministerial exception abstention, but not at this point. It's premature.

Donna Jacobs: I don't we have to speculate and imagine about the facts. Because I do think it is clear from the complaint that Reverend McRaney was in a dispute about the direction of missions strategy that his employer and a cooperating entity were engaging in. And those entities determined because of his disagreement with that mission strategy he was not the appropriate person to continue to be the public face of that mission strategy.

Man judge: Was he even terminated which seems to be the predicate for all his claims?

Donna Jacobs: My understanding is there was a vote to terminate him and then he was offered the option of entering into this separation agreement. He was going to be fired. Mr. Barton pointed out that the Southern Baptist Convention is unlike other religions because there is not this hierarchal structure. This case does not present questions of deference to church courts. The North American Mission Board is not asserting that an interest church dispute has been decided by their church authority and it certainly does not claim to be that higher authority. But an argument that because the Southern Baptist Convention is congregational and doesn't have church courts means that it is okay for the state to intervene would provide less constitutional protection to congregational religions like the Southern

Baptist Convention than it does to hierarchal religions like the Roman Catholic Church. And that would violate the principal of neutrality, that the first amendment mandates neutrality between religion and religion as well as religion and non-religion.

Man judge: Would you tell us about the photograph?

Harvey Barton: In my complaint I said it only communicated the idea that there were no words associated with it. A friend of Dr. McRaney did take a picture of it and did give it to him. But certainly his photo was not put up there as a hero of the faith.

Man judge: How long been up there?

Harvey Barton: I have no other facts that go with that other than the photo was placed up there after he was terminated.

Woman judge: But you are using word communicator. What is basis of using that word?

Harvey Barton: If a leading pastor in the Southern Baptist Convention and walks up to the offices of the North American Mission Board in Alpharetta and sees the picture of Dr. McRaney on the table in the front desk of the foyer and says I know Dr. McRaney, he used to be a professor at New Orleans Baptist Theological Seminary and be over Maryland Delaware. What's his picture for. They are gonna tell you because he pushed back.

Woman judge: Do you have any evidence who there are?

Harvey Barton: They is the North American Mission Board and specifically Kevin Ezell who is the president of that board who is the one who made the call we know for certain to the director of the conventions in Florida and said we don't want him speaking at your symposium. And that director pushed back and said no we are going to allow to speak anyway, which he did, and that is why the district judge dismissed that portion of the complaint. And I agree with that. Here is where we are. The Yoder case did cite favorably to the second circuit and this is what the second circuit said in the case of the founding Church of Scientology vs the US. It is clear that a religious organization merely because it is such is not shielded by the first amendment for 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. When the church acts like the church, then I agree the first amendment is set up to protect the churches from intrusion by civil courts and by the government. But when the church stops acting like the church and acts like the world and acts like any other corporate entity that is out there threatening, intimidating, coercing and bribing other individual entities in a tortious interference to interfere with somebody's ability to make a living in this world, the civil courts need to step in and say that's not right. That's not what the law allows. And one case I cited too, the analogy was made that said Caesar can well enter in to the temple and determine whether the dispute is religious in nature or not without violating the first amendment. That's all we are asking for here is the right to go on and starting looking into the facts of this case. If it comes back and he was fired because of religion doctrinal differences, we lose. But that's not what this case is about. It's about power and control by one entity over another and now it's by a major entity. You want to add a biblical scenario to it, Goliath verses David. A small individual whose fighting back, who pushed back.

Man judge: The Hosanna case you are familiar with, you heard my question at the very end, do you know of any court, state or federal who applied the ecclesiastical doctrine since the Hosanna decision.

Harvey Barton: I do not. We are just asking for the right to continue with discovery in this case to prove that is not a matter of religious doctrine. It is a case of power and control by one entity over another that has no religious overtones whatsoever. And we can do that without violating constitutional principles.