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Supreme Court of Texas.
C.L. Westbrook, Jr., Petitioner,
v.
Peggy Lee Penley, Respondent.
No. 04-0838.

September 26, 2006.

Appearances:

Kelly J. Shackelford, Plano, TX, for petitioner.
Darrell L. Keith, Keith Law Firm, P.C., Fort Worth, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice Harriet O'Neill, Justice David M. Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson and Justice Scott A. Brister

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JUSTICE: The Court is now ready to hear argument in 04-0838 C.L. Westbrook versus Peggy Lee Penley

JUSTICE: May it please the Court Mr. Kelly Shackelford will present argument goes for the petitioner, petitioner has reserved 4 minutes for rebuttal.

ORAL ARGUMENT OF KELLY J. SHACKELFORD ON BEHALF OF THE PETITIONER

MR. SHACKELFORD: May it please the Court. Plaintiffs remain in claim against the Pastoral Westbrook should be dismissed. The district Court decision dismissing all of plaintiffs claims against her Church, her Elders and her Pastor with the correct decision. There are two separate issues that arise-- that people confronted with however they foresee this case. The first is their reaction to the doctrine of discipline which was some people disagree. But the second is the Judicial issue, the issue that we're here about and that is who decides the church discipline, judges our churches and I think in a crucial point is to understand that to allow law suits to proceed against churches and Pastors based upon the churches. Disciplinary actions is no different from banning the religious practice all together.

JUSTICE: Now the Plaintiff would say this is not based on the churches disciplinary actions.

MR. SHACKELFORD: Well the plaintiff simply do what if you look at the, the number of cases like the Trans case, the Williams case the other a number of Texas cases. They do what-- what happens in all this cases they simply recast the pleadings but putting separate labels on them. But every Texas cases though has rejected that.

JUSTICE: How much of this is fact based in determining Secular versus Pastoral, lets say that the original relationship had continued, my understanding is you can say that it began as a secular constant relationship.

MR. SHACKELFORD: Not, not the plea, not the allegations which stated based their laws.

JUSTICE: No, I understand that but-

MR. SHACKELFORD: Yes.

JUSTICE: - but I believe you can say it in your brief at, at the very beginning you divide in to two time periods.

MR. SHACKELFORD: Right.

JUSTICE: And you say it at the first time period it was secular -

MR. SHACKELFORD: Right.

JUSTICE: - while she was paying at the [inaudible] office. He was not a pastor that time. What if that relationship had continued to be had been become a pastor as well. Would the result be the same?

MR. SHACKELFORD: I, I don't think so, that would probably fall on the with one of the specific exceptions and, and really that goes an exact question is that goes to sort of two different approaches that are being offered to the Court of how you approach this case. Plaintiff's approach is that you would actually look at the relationship and the conduct between the pastor and the individual and, and you would actually force the Judges to seat with those facts and determine which, which facts are religious enough to be religious which one is secular and then there would be a weighing of the religious versus the secular. What we say is that kind of an analysis the Supreme Court said in at least seven different cases that kind of analysis is unconstitutional and they would give actually then mean that this would be the first because the next case would to you and the fact would be different and you will have to determine that and we go ...

JUSTICE: No I understand that but I, I guess in terms of that purely secular argument that you're making if that original-- lets just say this was based on the original relationship that you can say to the secular and the only difference in fact was the secular counseling continue but he also became a pastor and was a pastor as well. Where would you travel on there?

MR. SHACKELFORD: Well, the same you would have, let, let me I'll go through the-- I'll approach is the upset which to answer that question. Instead of drawing this lines and entangling the Court we say that lines are already been drawn in this period and that is that the general rule from [inaudible] is that cases which arise out of church discipline and this based certainly does you have all the breach and damages arise at the churches conduct. Those cases are barged jurisdiction unless its one of the exceptions. That is an intentional physical torture, purely secular conduct like sexual misconduct or commercial fraud and if you're outside of those perse-- out of those specific exceptions, what the Courts have said Watchtower does this very wealthy into the Watchtower case, also in the Tran case and in the Williams case. They say that other-- outside of that intangible or motiononal harm might occur and there might not be a remedy for. But we have decided that the damaged to the first amendment and to the Courts by dragging them into this internal disputes would be much greater and

therefore that is a harm that will forgiven.

JUSTICE: So, so you would start with the church discipline and you would say that it arises that of church discipline. Its off limits then why that's a matter of this purely secular -

MR. SHACKELFORD: Well that's ...

JUSTICE: - just like but in this case it would ...

MR. SHACKELFORD: Those, those exceptions would not-- if it arises

...

JUSTICE: If I understand your argument then it could or it, it the cause of action arises out of the church discipline which is hear the publication to the Elders according to plaintiff then even if she had a purely secular relationship at the beginning that would matter because the discipline is the, the damage in disguise.

MR. SHACKELFORD: That's true. The-- it would matter and, and if that was one of the exceptions of. What I'm saying is if you're talking about a commercial transaction you're in a commercial fraud area. I mean-- and therefore it would take you out of the normal jurisdiction of bar. In this case, what you have is if you look at for instance at page 86 and 87 under report's record you got plaintiff admitting that there were no fees for this conduct which is the basis for law suit and in fact that fee was never discussed and the reason for that is what, what this is about is a meeting at the pastors home of 405 couples from the church, the pastor and his wife, an elder and, and his wife and other members of the church and the course at fee was never discussed or brought up because this is the pastor talking about marriage with members of the church and so that ...

JUSTICE: When we talk about the record, we're talking about billing exceptions or we're talking about -

MR. SHACKELFORD: Yes.

JUSTICE: - lessons that was actually did by the Trial Court for the purpose of making its determination?

MR. SHACKELFORD: We're talking about the bill they had offered below. In this case which already have two, these are their facts. We have their pleadings and we have their the plaintiff who actually went on the stand and offered lower jurisdictional facts and ...

JUSTICE: As a bill?

MR. SHACKELFORD: As a bill and what we're saying is it really does it matter when you just look to the pleadings or whether as under grant that it says we must look to, to other facts, jurisdictional facts. We're saying if does even really matter? Because either where you look they have an endurable problem and that is the entire breach and the entire damages come out of a pure disciplinary action and to allow that to go forward, is simply to allow the Jury, Jury to punish the church for its doctrine of discipline

JUSTICE: Lets assume you have the matter of 49 percent to the congregation at all and that all we're talking about is the disclosure of what the plaintiff calls confidential information from the pastor, I mean to the pastor its disclosure to other members of, of this Court. So we're not talking about shunned. Does that change your analysis [inaudible].

MR. SHACKELFORD: Well, I think I would have to know [inaudible] what we're talking about but I think what your Honor is saying is they, they try to go back a step and they try to say well we're not saying that the breach was in the disciplinary letter, we're saying that breach was when the pastor communicated with the elders and what we're saying is that is a superior in court part of the disciplinary process as the letter and it is the pastor and the elders talking about whether

they should take the discipline and then forming the letter that would go to the church to define its doctrine in its discipline.

JUSTICE: Well, lets, lets assume all that is fine for the purpose of this argument at what point does that role stop? What happens when the members leave the congregation because they don't want to be shunned. They don't want to take whatever limits they have, to know the church that perhaps is more forgiving.

MR. SHACKELFORD: Right. Your Honor that's, that's actually the question that came out at Court of Appeals and I know Mr. Keith conceded that the law was to that distinct that is not recognized and so it wasn't briefed that I'll, I'll give you a couple of cases that I think can answer that question. The Watchtower case the federal court this case, the whole case is about shunning were all of the conduct that torts that will being brought was for conduct that happen to be after they were a member as shown in the course would and the Court says "Its your relevant that the person is no longer a member." That that Church, that entity has a right to follow its doctrine just as that person has the freedom to live.

JUSTICE: Well at what, at what point would that harassment stopped?

MR. SHACKELFORD: Well, I think in the Watchtower case they would, they would say you know it go on forever. The shunning will go on forever. As far as being, being shunned not communicating with those having again the type of intentional or emotional harm, five things that would occur now in this case. I would point out that this letter was specifically the last step. It was the last step of Matthew 18, the first step step is when the pastor called her when he found out not to that she was on the liaison with another man begging her to come back and the next step was when she landed at the airport and she was brought to the home of the pastor by her husband there are two or three more that's a two or three more step the last step was the letter to the church and so there would be no more action.

JUSTICE: Will you says the side the point that she resigned before the letter was published.

MR. SHACKELFORD: Yes, it, it is and for non of the reason I want to, again I would encourage the if you're looking a cases on this the Watchtower case, the Brites case ads well answers that question and, and the other thing I would say is, in this case that's even you know less, lesser you going to have a calls calling normal because in this case the Plaintiff is not only a fellow member and she states they stated in their brief she was a co-founding member with all the defendants that she brought suit against and therefore a greatly the same doctrine and the same disciplinary process and the very conduct that was the focus of the disciplinary process was found that she engaged in while she was a member.

JUSTICE: Is there an any point, at any point thus the pastor have an obligation in this confession to have give a warning that let me remind you about church doctrine that [inaudible] would be given to the congregation and then we're going to shun you pursuant to our, our belief in description or do-- once you become a member of that church do you for going all, all any civil rights that you may or may not have.

MR. SHACKELFORD: Well, I-- obviously I think you know you'll be problematic for the Courts to come in and so to tell the pastor what his obligation is you know in, in conversations with, with members with regard to hid doctrine now ...

JUSTICE: And certainly would be in over step of the Court.

MR. SHACKELFORD: Right and, and in this case though you got we-- and we put our, we put our-- it attaches exhibits to our brief about who we are, what we believe is very clear Matthew 18 is inconsistent with [inaudible] if you talk to 101 and you were give somebody understand you require if they refused to attend to go at two or three more and so that is a, a biblical belief that many churches have and many churches follow and again I, I think the, the choice this one appeared on, that this Court is, is given is to take this approach which plaintiffs offer which, which require sitting through facts and attain when the Court and all kinds of matters which I would note they cite "No church discipline cases" in there brief, none. We cite a million of cases that, that is not the approach you simply look to the exceptions and those exceptions are very clearly drawing lines. They are not hard to understand they don't entangle the Courts.

JUSTICE: Mr. Shackelford let me ask you, let me ask you this. Just assume this facts and, and tell me how this applies. Let's say the pastor brings in Ms. Penley and says well I'm a license professional counselor you know that undermines the [inaudible] Texas, I'm also a pastor, I am , I'm wanting to get information from you to tells you in my role not as pastor but as a professional licensed counselor and, and given that is there-- what I think that would-- it goes with the facts that, that I'm not basing my advice on, on the, on the bible or on church doctrine but on my expertise as professional counselor. That status would this -- would the facts change at all, either analysis change?

MR. SHACKELFORD: I guess one of my question would are you saying that, that she's paying him fee and he saying that since he's offering Psycho-counseling not for you.

JUSTICE: Plead or no plead? I don't, I don't think that, that matter. If he just saying yes I'm your pastor but I don't want to talk to you in my role as a pastor I want to talk to you in my secular law that's a counselor.

MR. SHACKELFORD: If, if, I, I that's the tougher case of drawing the line.

JUSTICE: What, what the result be?

MR. SHACKELFORD: I think that if there was no fee, there was no commercial transaction that would therefore will not fall within any of the exceptions and all of the conduct that is going to be punished and all the damages were going to come out is out of the church disciplinary action and, and that's going to be one of the areas at this point by the church discipline cases and again its what-- that's one of those cases that I'm talking about where intangible or a motional harm will occur and it will go on remedies of times. But the damaged on the other side if every time a pastor did anything for free, he could be challenged as all somebody has to do is put a secular label.

JUSTICE: What, what I'm saying is not, not only doing it for free but, but specifically telling the-- his claims that this is not in my role as a pastor I'm not bringing religious doctrine and church doctrine I just want to talk to you as unprofessional I want to talk to in, in purely secular terms about this problem.

R. SHACKELFORD: Then you will have a mix secular and religious conduct like we're talking about.

JUSTICE: But he is saying "No, I'm not-- nobody's conduct."

MR. SHACKELFORD: But I, I'm, I'm were on-- I'm distinguishing from the, the beginning of the relationship and the end, that you, you have a mixed situation and the, and the exceptions to that you know are

clear for the intentional, physical tort, purely secular conduct again or all the way through like exceptional misconduct there's something like that.

JUSTICE: Under, under my facts the [inaudible] doctrine would apply.

MR. SHACKELFORD: I think it would on absences of payment or, or something like that I think it would 'cause I think the bright line is necessary or what's going to happen is that the churches-- courts are going to be dragged in to this situations and -

JUSTICE: Mr. Shackelford

MR. SHACKELFORD: - we have to do is plead secular.

JUSTICE: If pastor was broke head to circulate the letter not just to the members of the church but to the whole folk work community at large. Would the result changed at least to some extent on your opinion.

MR. SHACKELFORD: Obviously that's a case way beyond our facts which is sort of how far we could communicate with. All I would say on this is the cases that are out there rights now, or on the country say no, that, that it would not affect the doctrine. For instance the way this case below Williams versus Gleason. One of the arguments in that case, one of the claims that's was brought was that not only that the church discipline to on but the elders sent a letter to an outside ministry about what had happened in the church discipline and yet the Court when they said the only question for us is, is the underlying conduct, conduct that is arising out of church discipline if it is we have no jurisdiction we have to back off.

JUSTICE: I understand your argument to be based on this point on Matthew 18 discusses not just communicating the problem to two or three's of their two or three witnesses but I'm going to the church. Communicating outside of the church is also therefore outside of Matthew 18. Do you think that situation would still be covered by the [inaudible] time of the doctrine?

MR. SHACKELFORD: Once as the, the cases that I say I was saying Yes and ...

JUSTICE: No the case I want to know your opinion

MR. SHACKELFORD: I think so and the rationale is what we tend to think of when we think of church discipline. Is this is all about the church is trying to bring this person back and that's one factor and that is not the biggest factor from the Court stand point. The reason that Watson versus Jones has those three categories in non jurisdiction. Doctrine that picking up leaders and training leaders for the church and church discipline is those three items or how the church that finds itself. That is the very core and therefore to simply for the church to speak, I'm speaking for the whole church about what they believe and what they stand for.

JUSTICE: Just in time, you want to answer my question.

JUSTICE: Thank you Mr. Shckelford. The Court id ready to hear argument form the respondent.

JUSTICE: May it please the Court Mr. Darrell Keith will present argument to the respondent.

JUSTICE: Mr. Keith while your getting ready there, this record indicate when Mrs. Penley was in Tennessee.

ORAL ARGUMENT OF DARRELL L. KEITH ON BEHALF OF THE RESPONDENT

MR. KEITH: Yes your Honor she was in Tennessee and like, like September early of October 1999 of 2000 -

JUSTICE: 2000.

MR. KEITH: - excuse me you Honor.

JUSTICE: So the disclosure of the relationship to pastor Westbrook was made while he was a pastor. That is in the second phase of the relationship when he became pastor of the church and she was a member of the church not during the 1998 term period when he was functioning purely as a professional counselor.

MR. KEITH: Well, I would, I would answer that, that is partially true you honor the-- our position is that there were there, there were three relationships, counseling, professional secular counseling and then pastoral and this tempt Ms. Penley maintains than her pleadings and then fulfilled exception testimony that thus she regarded that the counselor relationship was on going the initial, the initial counseling of a secular in an office outside of the church not connected with any church [inaudible].

JUSTICE: Yeah, there's, there's

MR. KEITH: And then it it was reased then she consider that that, that that relationship continued when he suggested in-- Westbrook suggested in the fall of 2000 that going to a counseling because she believed at that time her marriage was in, was, was dead.

JUSTICE: There's no a lot of discussion about phase what, what significance is that if it was certainly a pasture on most congregations which paid by the congregation. So what difference is he make if he's getting paid to, to administer gospel administer the bible versus one some other type of secular act and as you say there are three different types of relationships.

MR. KEITH: Justice Medina in, in the required body of professional liability law duties arise from various professional client, if you know patient and other types of relationships and this a general proposition the payment of the fee along with the acceptance of the person as a client. It pays you if you will in the the medical accounts from the context is some evidence of the existence of the relationship and the duty of ordinary and reasonable care

JUSTICE: Absolutely, I understand but what happens when it ties? I mean do you, do you, do you, do you create, create a different relationship with the pastor is all remained in religious congregational context. Given a situation when you have someone who is ...

MR. KEITH: I, I believe our position is those, those who separate. We don't, we believe that this is not a case that is, that is a fraud in the virtue under religious liberties but rather it is our case with both the professional secular counts from the negligence arising from Mrs. Penley, Mrs. Penley's counsel, secular counsel relationship with Westbrook, with Westbrook and not pastoral.

JUSTICE: Do you agree that if this were defamation claim that's it would be protected by the person in that religious process.

MR. KEITH: No we actually asserted in the defamation claim early on but for strategic reasons we, we dropped that claim.

JUSTICE: What strategic because it probably would be sweat out by the person involved wasn't it?

MR. KEITH: I was certainly concerned about first amendment issues your Honor.

JUSTICE: Assert, you should that have to dig in the true and , and to get into the truth you have to get to the basis of the biblical

discipline process and that cases seem to appellant that that's, that process alone. Why should it, why should if its defamation is off limits when it changes to a negligence claim issue not beyond limits as well.

MR. KEITH: Well, without conceding the our, our granted that that there are many cases that are troublesome for Mrs. Penley, we did that claims not before the Court. Our position with regard with professional negligence claim is that from the time that Ms. Penley formed a counseling, a sacred counseling relationship with Mr. Westbrook open till the time of the elicited meeting. It would should turn from Tennessee if he's urging and she disclosed to him that she was, that she had a relationship with Mr. Penley that whom she was lack married while she was still married to Stanley that all of that was in the context of her sexual-- pardon me, her secular counseling relationship.

JUSTICE: I, I understand that argument but not what I'm we talked allot about the nature of relationship but I understand the argument to be that it, the damage is arise from the ecclesiastical acts their really were dancing on the head of the pin in terms of trying to parse the, the secular versus pastoral counseling peace that's the analogy on making its to defamation. While in defamation the publication were the damaged arises and if that is core ecclesiastical activity what I'm not saying construct reply here?

MR. KEITH: That is an excellent, an excellent question, a very important question and I believe that, that, that this answer in, in last form of answer is that Ms. Penley's claim does not depended it is not based solely upon the publication of the letter. Ms. Penley's claim is based on the negligent allegation against pastoral, against you know counselor pastor Westbrook in his counseling role in the services he rendered, the counseling he'd rendered the decision that he made in [inaudible] her to give out in for confidential information that was embarrassing to her about her relationship with Mr. Penley without worrying her that he was then going to use it in a, in a religious context and, and in, and in then disclosing confidential issue relation in his secular role to a religious official to the tort tell words and deal to he has sent the letter.

JUSTICE: To understand that line petition is the second amended petitions is that correct?

MR. KEITH: Yes Sir.

JUSTICE: But it seems really that the, the only specific wrongful conduct alleged is the publication of the letter.

MR. KEITH: Well our pleadings are, are, are broader than now that is the Court of Appeals Acknowledged we, we asserted a long standing relationship, we asserted that, there, there, there was negligence in, in providing the, the proper services and adequate services in counseling and explaining out that in the record in the billing, billing view record test when it was Ms. Penley she, she testified that Westbrook made an ignition in that, in that last meeting in October that he had still dropped the ball in his counseling and having pursued more counseling of with her husband to try to save the marriage. In addition she testified that in one point in time he had urged her to continue to counseling, she was telling him to admit the marriage is dead and she want it out and he told her whether it wouldn't be necessarily good for the married it would only be good for the children. He has an obvious conflict of interest to his work , his, his swear in three half of his relationships with her in the counseling context he's wearing his professional counseling path for which he was licensed by the foreign state of Texas to provide that counseling that

was the origins of their relationship and she testified that it was continued. The important thing I think is that the in the court below the rest for of to the position it was, it was unclear at the end of the hearing, at the end of the hearing his counsel took position favor taking his true declaims pleadings and that the plaintiffs pleadings of focus solely upon the second relationship and we broadly plead the [inaudible] that relation I'm giving you some of the examples under the testimony that would form the basis of the plaintiff familiar anguish of damages that she suffered even before the letter was served with public.

JUSTICE: To keep your to explain the number of facts and the information of testimony the, the question as I understand it was whether you plead a different claim this disclosure confidentiality certainly you're not suggesting that anything in Miranda says that you can pursue claims that are plead, you're not suggesting that?

R. KEITH: Of course we're not your Honor.

JUSTICE: So your position is what you said in the petitions I commend the petition is broad enough to cover this things.

MR. KEITH: Yes your Honor, its been, its, its reasonably favorable that the, the release of confidential information that are has been its authorities as part of our claim. That our pleadings are also broad enough to compose the integrity of his counseling services that I have pointed out with specificity the testimony that Ms. Penley gave with underscore to support those times, those times

JUSTICE: HE would never admitted, is that correct?

MR. KEITH: It was not, it was not admitted but Westbrook in the course of this appeal you know he's walking back and forth between the pleadings and the bill.

JUSTICE: Is that evidence that really accord can, can consider it was, it was not admitted in the evidence is it really before us?

MR. KEITH: I think that if it, it appears to me strongly argued that, that Westbrook is trying to have it both ways. He, he wants to use bill exception testimony but it is favorable and avoid it when it is not and he goes back and forth between the pleadings as Mr. Shackelford don't indicated he felt that between more that we were trying that was authorized during the Miranda and it seems to me that what, what has a, has occurred is that Westbrook in its that's basically raising jurisdictional fact issues that were you know readily apparent before the trial court would appear to the raised on appeal and I think that's what we were engaged in. The difference ...

JUSTICE: One of the, one of the question that was on the record and that is asking the recall there was a communication to Ms. Penley from the church that's this doctrine apply that if they were in this kind of relationship she's have risk of having being exposed among the church congregation of whether or [inaudible].

MR. KEITH: Well, Ms. Penley signed papers agreeing to file at the constitutional and by-laws and statement of admission of the church and that would include her to submission to the disciplinary process of the church with regard to you Honors question about whether there are some implication before that, our pleadings again take the position that in the course of for secular counseling relationship with Westbrook that she was not made aware I mean, if we pay the total secular calls of action of the testimony ...

JUSTICE: Well, my question, my question is that her signature agreeing through the by, by the disciplinary processes that bring this whole case within the we just put intentional.

MR. KEITH: I, I do not believe so because she wasn't involve in

the secular counseling relationship with Westbrook throughout and that's but let you know [inaudible] testimony she's [inaudible] about that then she was called back to his home the Court considers the evidence she was not led leave her testimony she didn't-- she thought she was coming back to group sex-- secular group married counseling session and, and not a religious ...

JUSTICE: Let me you a few questions right, I'll ask you a few questions we got a very lively bench and we want answers to this pleading. There's a bigger reference as to whether or not she signed that letter whether or that's even submit again does Mr. Shackelford stated in his argument she was a co-founder of this organization. Her-- at that status does it create a difference as to whether or not she's a co founder or she just a regular member of the congregation or not she's a deacon or a elder what difference if they thus that make end the fact that mister what if Mr. Westbrook is not licensed in anything else other than pastoring a congregation what significance of any with that line?

MR. KEITH: I think for co-founder stasis is not of, is not relevant or important to deciding issue of this case

JUSTICE: Certainly it gives you a notice of what the more than I would take the abs ...

MR. KEITH: She certainly is familiar with the, with the constitution and by-laws in their, in the disciplinary proceeding but she-- her case is that she was seating were the Counsel and her relationship with Mr. Westbrook that started as a friend when they were co-members of the praising church from which they left it from the main church.

JUSTICE: But the question, the question is not stand that unclear focusing on which stand are clear. If you agreed in advance that the [inaudible] if I cross the line very serious thus this going to be published to the church if I don't object, i don't repent and if that can be-- if this could all been published to the church regardless of what she told somebody in counsel how is she damaged because it came from counseling rather than from her husband.

MR. KEITH: Well, her marriage perhaps could have been saved through a proper counseling or with proper counseling

JUSTICE: But I'm-- wait what would-- we're not going to-- this Court is not going to give in to business aside it was best way to save the marriage that's church is to alleged but the legislator does. The question is if she has a incentive to the damage in the first place, first she have start for she ever denied that how can she be damaged because that damage she has said it to , the process she has said it to [inaudible] came from a source she did not expect.

MR. KEITH: Because Westbrook had a duty that come along of his faith and by statute he stated as a license professional counselor top provide services to her in a forms of ordinary reason of prudence under the same or similar circumstances and from, and from that the time of his initial counseling until the time of the last reading only that period of time we contend there was negligent counseling on his part but it calls to contributed to cause of the married problem and [inaudible] damages before the letter was ever published.

JUSTICE: Didn't she, didn't she agree by joining a church in the Matthew 18 been a real long time and you joined the church with Matthew 18 with your co-founder or I'm seating on the back row. That's the deal if they say thus this kind of church and if you did this kind of behavior we won't tell everybody in here that and if you join under those circumstances how then you sue anybody because what you agreed to

explicitly actually happens.

MR. KEITH: Well, Justice Brister I think she has a right to bring an action against Westbrook because it was in, it wasn't wearing his pastoral hat during the times of this communications relation she believed that she was talking to him in a confidential setting as her merit secular married counselor and not as her pastor and she didn't believe she was at risk that he would take that information disseminate in fact according to her testimony he indicate to her that he wouldn't cause her any harm.

JUSTICE: Well, let me ask you this, in my understanding is that the counseling that she-- were he playing that, that breach of confidence occur wee the, were the simply relation was given was during court counseling through a church group, is that right at his home. So under your theory every couple that participated in that was undergoing pastors counseling but for her who years before he had secular counseling-- I it was, it was at a group session through the church with her pastor for ...

MR. KEITH: Our, our-- No it was not pastoral counseling. It is our position that Westbrook loose his secular prof-- keep in mind that was not allowed to conduct any discovery the positions -

JUSTICE: No, how do say that [inaudible] I just want to make sure if you agree -

MR. KEITH: - nor could cross examine Westbrook at the, at the evidence with him

JUSTICE: - that, that there were it was group counseling in which this rest and that everyone else in that group is undergoing pastoral counseling.

MR. KEITH: It is our position in our, in our pleadings at least the inferential certainly in her testimony in bill that Westbrook moved to his secular profession counseling practice from an office in the street shopping center to his home and then after that, and that in, in that, that counseling was not probably successful the marriage still deteriorating she didn't benefit from it. Then after she had a fair up with her husband and have-- was very destruct Westbrook suggested group married counseling session with other people who were members of the church but were having married problems and they would conduct the group secular professional counseling sessions that is our position.

JUSTICE: Are those other, are those other people shunned as well?

MR. KEITH: They're not believe they were the subject of the, of the, of the letter. Their might have been something apologized your Honor, I don't [inaudible] individuals form the group session were authors or coauthors of the letter.

JUSTICE: Was there any, was there any allegation on the underlying case that you have [inaudible] reason I supposed to pastor to following their belief and that's maintained.

MR. KEITH: I'm sorry I don't, I don't

JUSTICE: I want to know, you said there was no other group or have no other individual are shunned as Ms. Penley was, duly indication that there was intact a retaliation against Mrs. Penley for any reason other outside of the context of Matthew 18.

MR. KEITH: Not in part [inaudible] on other than perhaps Westbrook, if I had been alot of discovery, if I'm allowed discovery this case that is we believe one clearly is that his come back was retaliator in this view it is secular counseling position to impart information to the religious leaders of the church for reasons apart from religious basis

JUSTICE: If you called it court with secular counseling.

MR. KEITH: Yes its group married counseling

JUSTICE: Okay, they, they are all church members who participated right?

MR. KEITH: That is correct your Honor.

JUSTICE: The content that comes from the purely secular in content in topics in with their discussion of religious beliefs and intents.

MR. KEITH: According to the record is it is now which is large with bill no there was, there was no biblical, biblical references, biblical teachings, preaching form the bible or Christian the concepts specifically addressed to course of this circuit in Sanders case which I have briefed and argued to this Court points out that even if there were biblical or Christian conceptual reference in a counseling session were of you might have the mixture of pastoral and secular in here we were saying that was not mixed that's, that's Westbrook position but we're claiming not mixed that is not determined it does not raise fact that she from from the Jury to consider based upon proper instructions form the trial court.

JUSTICE: Well, but the converse is, the converse is true as well, even if biblical references are not made during the counseling that doesn't make it non pastoral the case you said and that works per place. My understanding is the cases as you getting away from that sort of analysis all together because I get you into what happens in the counseling and kind a [inaudible] form the process.

MR. KEITH: The presence or absence of the biblical references in teaching of Christian concepts are just there not conclusive evidence but there are some of the evidence for the Jury to take into consideration in deciding or the Court if necessary in deciding question of the nature of the relationship. Were in here we have the pastor who happens to be a professional counselor as well.

JUSTICE: Any further questions?

JUSTICE: If I may ask one. Mr. Keith its your position for example the trial court if we determine that the discipline if damage is out, if, if, if that should be the determination is it your position that there is damage in the secular counseling that calls to a mental anguish and that the trial court could restrict some how that -

MR. KEITH: Yes.

JUSTICE: So that you would only allowed discovery on that the internal counseling that, that somehow affected her.

MR. KEITH: Yes.

JUSTICE: Okay, so I have depart from the disclosure of anyway involving the church.

MR. KEITH: Yes, yes Justices Johnson that is our position

JUSTICE: Justice Wainwright.

JUSTICE: What is your opinion Mr. Keith on whether pastor Westbrook would have breached his obligation to the congregation if about coming in the knowledge of some matter that should be disciplined under Matthew 18 that he didn't follow Matthew 18. They believed he would have would have violated his obligation to the church that he have not pursued that continued under Matthew 18 as ...

MR. KEITH: In the context of defendant facts your Honor?

JUSTICE: Yes this case.

MR. KEITH: I think that, that underscores that his negligence is not addressing his conflicted interest, if he really believes that I have may just cross-examine but if he really believes that he was wearing two hats at the same time that he was counseling [inaudible] they depended in to disclose of relationship and intended to use it then I think that he had, he had-- if he had that conflict then he

violated his duty to Penley and in fulfillment, fulfilling his duty to the church that's a matter that things gets into the church in ecclesiastical manners and I don't know I think the church could seek the discipline within the church law structure but I don't think its a violation of a civil law duty to which the courts could be turned to for we look for relief at hat point.

JUSTICE: Thank you Mr. Keith. No further questions. We're ready for rebuttal.

MR. KEITH: Thank you your Honor.

JUSTICE: May it please the Court Mr. Kelly Shackelford represent the rebuttal for the petitioner.

JUSTICE: Mr. Shackelford is quick procedural question the Chief Justice asked Mr. Keith whether the hearing testimony was properly before us they been admit in this Court, this Court what's your [inaudible] on that?

REBUTTAL ARGUMENT OF KELLY J. SHACKELFORD ON BEHALF OF PETITIONER

MR. SHACKELFORD: Your Honor I, I think the answer is it doesn't really matter whether that is before the Court or not. Because what's really going on here was that all the damages and the breached are wrong as the church disciplinary process.

JUSTICE: Now what about the argument, my understanding is that their claiming damage separate apart from the publication to the elders. Is that an area that is to be carried about subject to special exception, had one genral rules as negligence beyond separate apart from obligation? Can we decide that here if in fact that's alleged or must that go back to special exceptions?

MR. SHACKELFORD: No your Honor there's no need to, to remand or using this special, special exception. The reason why is that the, the entire breach, the entire damages I have reasoned out of disciplinary process. When we pushed on that issue to say well it was the letter, the only pushed back that we got it from their brief and I believe that's on page 26 of the brief only pushed back that the appellant was oh no, no, no it also arose out of the communication form the pastor to the elders. So they says this pull back decision was that we can adjudicate this case because we can look at a communication between the voice of the church , teh pastor and the leadership of the church, the elders or within an internal church communication involving in church disciplinary process they told us every case that call that worked the "obsession doctrine" This is that case because when we pushed on where do this damages coming from that was the only pull back position.

JUSTICE: That's the footnote in of your brief you say "a cause strip script implies" what does that meaning this context I don't understand what strip script means ion this context.

MR. SHACKELFORD: Your Honor the, the, the, the truth is thatyou should have said the script is stripping across.

JUSTICE: Well I don't undeerstand taht either.

MR. SHACKELFORD: Well, Your Ho nor the reason the-- well that means is that this is an area a core area [inaudible] that -

JUSTICE: Then what?

MR. SHACKELFORD: - its a jusrisdictional.

JUSTICE: Well but what are we supposed script those?

MR. SHACKELFORD: Well, your Honor what, what we supposed to

script when scripning is that you're asking is this situation from beginning to the end purely secular.

JUSTICE: Well, of course it gets involved as understanding many issues involving religious doctrine including blood transfusions, to some extent if it involves a minor, services or perhaps sneaks in during your, your worship congregations I believe it's okay to use any type of form of drug to expand their mind and study religion course can be involved in those type of cases all which made you could cause harm to its congregation why can't the Court here involved in the case were indulged in alleged mental anguish at that of time defamation at that time.

MR. SHACKELFORD: Well, your Honor that there's a distinct between intentional physical tort and a tort that gives rise to merely emotional damage is [inaudible] ...

JUSTICE: Do you sneaks perhaps in the, in the congregations not to intent for somebody to get hurt, its intent that you if you have a way of relief if they protected.

MR. SHACKELFORD: Well, your Honor we, when everybody, someone joins the church their joining the least system of that church. Now we may look at those belief systems saying "We don't agree with those or we don't like those beliefs those are not mainstream."

JUSTICE: The words are lying in random this is, is not a matter of the same type of action, where did, where did the Courts draw out a line.

MR. SHACKELFORD: Well Courts draw a line and say that we're not going to give it all in at cases that arise at the church discipline. We're not get involved in, in this sort of you know the following of Matthew 18 or the following of the church doctrine, we're going to abstain from those because everyone is it was engaging in this search of searching case by case analysis which is for

JUSTICE: The past recording to your analysis that pastor Westbrook had simply been a fellow parishioner counseling her, her counseling and he goes on of this-- her situation and he-- what he not-- and he went to the church and said I've learned to this situation wherein church next to each other, I need to do something about it and does-- he goes to her and she goes to [inaudible] so she goes to two or three and they go to [inaudible] she doesn't she won't accept injustices situation. In that circumstance can this, can the Courts get involved in her claim that he had properly disclosed.

MR. SHACKELFORD: Well I think one of the facts that you didn't know is, is this going to be at a commercial fraud type of case.

JUSTICE: No we got exact same situation that we have here he just a fellow parishioner suing next to her and the church dispute. He learns about it in a secular she's begging for counsel he finds out about it go to the church he's sitting next door and realizes now we got a disciplinary problem and I know about it. He feels an obligation under his church disciplinary rules he goes to her she says I'm, I'm not going to play a teaching to just like financially it gets two or three and they go through she won't [inaudible] just like this all we have is not a pastor but rather a fellow parishioner and he feels that the disciplinary process requires him to do that. Can this Court get involved in those circumstances or thus she have other pleadings on jurisdictional matter as we are here. What would be your position on that?

MR. SHACKELFORD: Well I know those facts your Honor we were talking about is a, is a commercial relationship and that's going to be treated different we have to-- that the problem here is we have to draw this

clean and clear liens because

JUSTICE: That's what I'm trying to do plain and clear or there you out on the pleadings on jurisdiction if those, if,if pastor Westboard is only a fellow parishioner or if she out or thus she get to pursue teh claim?

MR. SHACKELFORD: If all the damages and the causations all rise out of the two disciplinary process then I believe that, that would be protected unless he made some other arrangement with her that would be strictly [inaudible]. Tahnk you.

JUSTICE: Further questions?

JUSTICE: [inaudible] You talk about the relevance in pleading [inaudible] in case like this?

MR. SHACKELFORD: Well, your Honor there are, there are atleast [inaudible] circuits have address this issue all agreed in the Tenth Circuit, that this Circuit, the eleventh Circuit, Fourth Circuit all agreed that Smith did nothing to alter the opponents document it is as it was in 1971 today is was in it.

JUSTICE: [inaudible]

JUSTICE: There's a school of thought that the term ecclesiastical extension is may not be the best term. That it suggest that the Courts had jurisdiction but should abstain at certain cases. That schoolof thought also suggests that church autonomy is better labelled to consider this types of disputes unde. What do you think?

MR. SHACKELFORD: Your Honor I think church at time is better labelled I know we used the position doctrine but after having some discussions of some active scholars in this area that are much more intelligent than I am the church at time the doctrine I believe is to be appropriate label of the Court should used to be consistent through the juris prudence of the state.

JUSTICE: All right wait did you cite that one or, or its the ecclesiastical extension that we're talking this hour be the appropriate one.

MR. SHACKELFORD: No,no your Honor the church at time [inaudible]

JUSTICE: Okay.

JUSTICE: Thank you Mr.Skackelford the process that it end. Court will now take a brief recess.

JUSTICE: All rise.

2006 WL 6005723 (Tex.)