

ORAL ARGUMENT - 3/21/95
94-1233
TILTON V. HON. MARSHALL

BIRD: May it please the Court. I am Rhonda Johnson Bird. My partner Bob Wellenberger and I represent the relators, Rev. Robert Tilton & The Word of Faith World Outreach Center Church. Ron _____ also represents a real party in interest, Marty Tilton.

Christianity itself will be put on trial by the trial court unless prohibitional mandamus relief is granted. This case is equally as important and equally as controversial as a related case this court heard just last year, Tilton v. Moye. Simply stated the issue before this court today is: Did the trial court clearly abuse its discretion, violate relator's fundamental rights, or ignore two constitutions, or a federal statute so as to substantially burden relator's free exercise rights, when it issued a court order compelling production of relator's tithing records, when it permitted institution by plaintiffs of a sincerity of religious belief analysis without first requiring the government to meet its statutory burden, or by permitting claims involving damages for alleged emotional injury only to go forward simply because God did not answer plaintiff's prayers as they wished?

GONZALEZ: Mrs. Bird, excuse me. There is allegations of fraud here - serious allegations of fraud, that Rev. Tilton had no intention of praying over the requests that he received. Why does the State of Texas not have a compelling state interest to regulate fraud?

BIRD: I think that the State of Texas does have a compelling state interest to regulate fraud in a regular civil context. However, when you have constitutional rights, fundamental rights such as freedom of religion, and the other rights involved in this case, there must be a balancing test. And whenever you have a fundamental right strict scrutiny must be examined. In this case the TC has never conducted any hearing to determine if a compelling governmental interest or any other type of interest even existed.

GAMMAGE: How would these disclosures interfere with Rev. Tilton's free exercise?

BIRD: Well as far as...when you mean the disclosures are you referencing the tithing records?

GAMMAGE: Yes.

BIRD: With regards to the tithing order what has been required by the trial judge is that Rev. Tilton produce the last 7 years worth of his tithing records. Not only records indicating the churches he supported, how many churches he supported, but also the monetary amount involved.

GAMMAGE: How would this interfere with his free exercise? I assume you know the IRS if you want to claim a deduction for a charitable contribution still requires you to report the amount that you contributed. That doesn't interfere with one's free exercise. How would this?

BIRD: Well in the case of the IRS there are very strict guidelines, which the IRS must follow when it comes to tax exempt organizations, religion being one of those. And the state certainly does have an interest in regulating those types of things. But the regulation must be very, very minimal. In this particular case...

GAMMAGE: They are not talking about regulating his exercise. They are talking about disclosing

information.

BIRD: If Rev. Tilton is required to produce his tithing records, and presumably he will be if the sincerity analysis is to take place in this case, he also will be required to prove when he prayed, how he prayed, what he prayed for, that is the most sacred right in the constitution.

GAMMAGE: But this is something he was marketing. Was this his personal exercise or something he is marketing with someone else?

BIRD: This is not something he is marketing. This is something that he was preaching.

PHILLIPS: Wait a minute. I don't understand. The question was, I thought, how does this defendant being required to produce the amounts of money he gave affect his free exercise - constitutional right?

BIRD: Well basically what the plaintiffs are trying to show is that he did not tithe certain amounts as he preached, that he wasn't practicing what he was preaching.

PHILLIPS: Without getting into what it shows, a relevant question, how does the mere fact of this request impinge upon any constitutional right? We will look at relevancy later. But relevancy is not of constitutional magnitude.

BIRD: I am having difficulty focusing on precisely the question you are asking.

PHILLIPS: You say his constitutional right, free exercise of religion, is invaded by having to disclose whether he gave money to a particular charity, and how much.

BIRD: It invades his freedom of association. He may wish to have given money to some church other than his church for example. It invades his privacy rights under the 14th Amendment. He has had no due process hearing with regard to this invasion of his privacy rights because no compelling state interest, and the least restrictive means as required by the Religious Freedom Restoration Act of 1993 has not been met. No hearing has even been attempted.

PHILLIPS: Let's just talk about the constitution for now. And the question was free exercise. Is this not a free exercise issue?

BIRD: This is a free exercise issue. It is a freedom of association issue.

PHILLIPS: How?

BIRD: Because he must be free to privately give or not give, to privately tithe or not tithe as he deems appropriate.

PHILLIPS: What is your understanding of...what do the cases articulate is the test for whether or not free exercise of religion has been invaded by governmental action?

BIRD: If a person is potentially at risk of having to abandon the exercise of his religion as compared to being able to tithe or not tithe free of governmental interference I think that's the issue.

PHILLIPS: The test is not whether or not it requires you to act in a manner that is at odds with a fundamental _____ of your religious belief; is that the way the test has been articulated?

BIRD: Yes.

PHILLIPS: And how would disclosing _____ of giving records cause Rev. Tilton to have to act in a manner fundamentally at odds with a fundamental tenant(?)?

BIRD: It would either establish that he practices what he preaches, or that he does not. And that goes directly to the sincerity analysis.

ENOCH: Mrs. Bird you've cited the case of United States v. Ballard to support your proposition. As best as I can read in the case though it supports the proposition that you can in fact inquire as to whether the individual honestly believes his beliefs, you can inquire as to the validity of those beliefs. It seems to me that case could support the argument that inquiring as to the conduct, that is the tithing record of Rev. Tilton, goes to the issue of whether or not he honestly believes what he says he believes as opposed to attacking his beliefs. How does Ballard actually help you in your argument?

BIRD: In this particular case you are correct, the Ballard decision directly states that veracity of religion cannot be questioned. However, sincerity in certain instances can. In this particular case, the only claims made are for emotional injury. And in all of the cases dealing with an analysis of the sincerity of one's belief, there are other types of injuries involved. They are either property rights involved, or other types of injuries. In the case of Paul v. Watchtower, and this probably cites it best, the court said: Offense to someone's sensibilities resulting from religious conduct is simply not actionable in tort without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the First Amendment would be meaningless. In Ballard what was presumably permitted was a sincerity analysis when there was some type of case to look at. And in that particular case it was a mail fraud indictment, 18 counts that were being analyzed. In this situation we just have an intentional infliction of emotional distress, fraud and conspiracy claim with emotional injury only. In this particular case you can't examine sincerity without getting into an absolute witch hunt, without conducting an absolute ecclesiastical trial. And what the plaintiffs are urging in this case now even though they originally said sincerity was not an issue, they say it now so that they can get into evidence such as tithing records. And the purpose of getting into the tithing records is then to tie it into the central beliefs of this church.

GAMMAGE: Counsel I am concerned about what you said would amount to a virtual ecclesiastical trial. How is objective evidence of a person's conduct in the exercise of their personal faith an ecclesiastical trial? What they want I presume this evidence for is to measure it against his professions to other people whom he entices to send him money.

BIRD: In this case the reason would be an absolute ecclesiastical..

GAMMAGE: They are not condemning what he does or does not do per se are they?

BIRD: Yes, they are.

GAMMAGE: His exercise. What they are I think trying to condemn is his activity in regard to other people, not his relationship with God.

BIRD: No, they are condemning that. In fact they are wanting to discover if God speaks with Rev. Tilton; what Rev. Tilton says to God in his prayers.

GAMMAGE: How is that the condemnation or a trial of his faith?

BIRD: That is all they want to do is try his faith. In this particular case they want to try the

religious speech, the representations he made from the pulpit. And they want to claim those to be false, fraudulent representations. Particularly this whole case boils down to one issue, and that is the power of prayer a reality or not? Rev. Tilton will be put to the test of proving that the power of prayer works or does not work.

GAMMAGE: Isn't this basically the sincerity test that you are describing his professions from the pulpit as opposed to his personal private practices, which no one seeks to interfere with, but is he practicing what he is preaching? They are not condemning what he is practicing. But he is preaching this in order to entice us to send him money.

BIRD: Actually the briefing does condemn what he is preaching, the content of what he is saying, and what the representations are. Without certain representations there would be no lawsuit. Had these peoples' prayers been answered, the way they wished them answered, there would be no litigation.

PHILLIPS: Part of the allegation is that the defendant promised to physically pray over certain requests, to actually touch them. And the allegation is that that was not done. Do those allegations in any way...are there any constitutional prohibitions against such allegations being made, and proof of those allegations going to trial? That is no representation about whether he could or could not do certain things, or what affect they would have or whether he was sincere or not, but just promising that he would physically touch something, and physically offer a prayer, and _____ that he did not do that?

BIRD: Yes, your honor. In Thomas v. Review Board, the US Supreme Court stated: Courts are not arbiters of scriptural interpretation. And the term touching..

PHILLIPS: Well is it a scriptural interpretation to say I will pray over this particular paper, and then not do so.?

BIRD: No. The term touching for example, and the evidence is that he did pray over all these things. But the dispute involves whether he physically touched each piece of paper or each stack of papers when he prayed.

CORNYN: Or whether he even saw it. Isn't that part of the dispute?

BIRD: That may or may not be part of the dispute at this point. They have never developed that evidence. It has been developed in other cases, but not in this specific case. But the touching element goes to the prayer of agreement, which we briefed, and I think we have cited this touching definition from King James in one of our footnotes in the briefing. But, yes, I mean this is asking the courts to scripturally interpret what touching means in order to determine if he touched the correspondence and, therefore, prayed appropriately. And this is the precise constitutional thing which we don't think the courts can address is how he prayed, whether it was sufficient.

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RESPONDENT

RICHARDSON: May it please the Court. I want to start by saying that I think Mr. J.C. Joyce, an attorney in Tulsa, OK, said it all when he said in federal court on the record: "The right to believe what we choose to believe is absolute. We even have the right to defraud people with that belief." Mr. Tilton has also acknowledged that that's his position in trial in Dallas, Texas a few months ago.

When they talk about the touching, which is one of the issues that was raised, we

do allege that this is a case of fraud. Robert Tilton tells his audience that he prays over it and he touches the correspondence. But he goes a bit farther than that in that he shows himself on these commercial type programs. And by the way he isn't preaching from the pulpit. The allegations we are making deals with the program he calls Success in Life, which is totally different from his "Church". This Success in Life started when J.C. Joyce, and this has all been developed, when J.C. Joyce this attorney from Tulsa, OK, who represents a lot of evangelist came into the life of Robert Tilton. Robert Tilton by his own admission was broke. His church was going down the tubes when J.C. Joyce came into his life and they started this program called Success in Life. With regards to the touching issue, he goes farther than just saying: I touch all of this correspondence and pray over it. He actually shows this on television of him bending over piles of correspondence to give the impression to the listening audience that he in fact does touch and pray over this correspondence, which is about 500,000 pieces of material a month.

HECHT: If he doesn't, how is that actionable?

RICHARDSON: Because it's defrauding the people that have the right to believe that part of why they are going to be able to receive this, which Tilton says God is going to give them, part of the process is that this man actually touches my correspondence.

HECHT: So they agree that if he had their prayers would have been answered? But because he didn't they are not?

RICHARDSON: They have the right to believe that had he done what he said he would do, him saying he is a prophet of God, that this would have happened. What they are finding now is that all the links in the chain were not there.

GAMMAGE: Would you distinguish for the court please, the difference between free exercise and the right to fraud. I don't think anyone argues that the US Constitution gives everyone the absolute right to believe what they want to believe and to exercise that belief so long as it does not infringe upon other people's turf. What is the difference between Rev. Tilton's right to the free exercise of his religion, and the exercise of it in private, and his public professions to other people and evidence of how that relates to his free exercise?

RICHARDSON: I think that is when you have to get into the issue of sincerity. Does he really believe that, which he is representing to the people. And it is our position he is representing that he believes these things in order to solicit their money. And we say he doesn't believe those things, he doesn't practice those things.

GONZALEZ: So a jury is going to be asked to judge the sincerity of his beliefs. Do you based on the evidence believe that Rev. Tilton is sincere, or really believes what he says he believes?

RICHARDSON: Absolutely not.

GONZALEZ: That's not the issue?

RICHARDSON: I thought you said do I believe he is sincere?

GONZALEZ: No, no. That is the issue the jury is going to be submitted?

RICHARDSON: Right.

HECHT: How can you try that issue? I mean every pastor in the United States stands up

and says things and encourages others to profess and to believe, and many of them ask for money to support the institutions that they represent, or maybe themselves. Yet you can follow their lives and it want be hard to find most of them departing more or less from what they say. Are all those people buying a jury trial?

RICHARDSON: I think in trying to answer your question, and I honestly don't know if I can, I think what we have here is not...this is a business, the Success in Life is a business. That is all it is. It is hiding under the veil of religion. And my position has been from day one involved in these cases, and I have said to every court we have been before, and I say it to this court, I represent some people that feel like they have been defrauded. If this court finds that that type of conduct is protected by the Supreme Court of the US so be it, I've got other things to do. And I don't know all of the answers to all of these questions. I had some confusion myself. But I do believe that this man is defrauding citizens of this country. I believe he has defrauded my clients, and I am doing what I can to try to do something about it.

GAMMAGE: Is exercise of his religious faith an interference with that exercise? With the requirement to disclose what he actually does in the exercise of his faith, his personal private exercise, would the requirement to disclose evidence of that exercise be an interference with it?

RICHARDSON: In my opinion, yes, it does. All there was to it. In regards to the tithing records he publicly discloses who he claims to give the tithing to, to give money to mission fields. He publicly discloses. So I think he is taking that out of the private sector and put it into the public. Now our question is show us the evidence. That's part of why we believe in you Robert Tilton, because you tell us that you give money to these mission fields all over the country, and you tell us that you practice what you are telling us to practice in order to give what God has for us. We would like to see evidence of that. If you have it we would like to see it. And secondly, what we are asking for here is nothing more than what Robert Tilton might be asked for in a divorce case, and the spouse divorce lawyer would be entitled to receive. It has nothing to do with religion.

HIGHTOWER: Counsel you started out awhile ago to say that you are only talking about his tv program as opposed to a church operation. I don't believe I followed through how you have broken the two apart.

RICHARDSON: Robert Tilton started the tv program about 10 years ago called Success in Life. It is totally disassociated from his church activity. It is not a ministry from his pulpit. It's a tv show that has gone nationwide. And he represents that he is of course The Word of Faith pastor.

HIGHTOWER: Things that you are complaining about are all related to this tv program?

RICHARDSON: Yes, sir absolutely.

HIGHTOWER: What he says and what he has done in relation to the tv program?

RICHARDSON: Yes. It has nothing to do with what he's said or done at his church behind his pulpit.

GONZALEZ: Mr. Richardson in that connection if the prayers of your clients had been answered in the manner in which they wished those prayers to have been answered you would not be here today?

RICHARDSON: I would have to say it is probably true.

HECHT: Can you help me distinguish between your case and a case where an ordinary minister stands up and says: "I tithe, and you should too," and it turns out he doesn't?

RICHARDSON: I think the only way I can try to answer that is to say that Robert Tilton tells the people God has spoken to me about you, and he writes...what happens...let me tell you a little bit about how this happens. He has a tv show. He has testimonials. They are sensationalized: God's done all these wonderful things for Mrs. Elliott here, and call this number. So they call the number and they get the folks names and address, and immediately they send them this letter that has all of these testimonials in it that God did all these wonderful things because Jane sent her \$1,000. Now he is tying it to the money because Jane vowed her \$1,000. And he will say maybe you aren't getting your miracle because you only vowed \$1,000. God wants you to vow \$5,000, or \$10,000. So he is tying it to the money aspect as part of the rationale of why you are going to get your miracle. So he gets all of these people out here to start sending their money in under the representations that he has made, and then it doesn't happen. And they say this man is a fraud and a con artist. Because if he is a prophet of God as he says he is, and these things he says are true and correct, I did what he asked me to do, and the miracle didn't happen, so this man is a con artist and a fraud.

HIGHTOWER: He never says though that he guarantees these things does he?

RICHARDSON: No, sir.

HIGHTOWER: He just says he is going to ask God to do these things. But he doesn't make a commitment on God's behalf that it will take place?

RICHARDSON: Nobody needs a guarantee from a prophet of God.

HECHT: And that's what the case is about?

RICHARDSON: Right.

OWEN: You are saying the issue is whether he is in fact a prophet of God; is that what you are saying the issue is?

RICHARDSON: No, I am saying he is making false misrepresentations, but he is gaining their confidence by telling these people he is a prophet of God.

OWEN: You are going to try the issue as to whether he is a prophet of God; is that your position?

RICHARDSON: No.

OWEN: What issues specifically are you going to try?

RICHARDSON: The issues we want to try is the fraud issue. For example: he says...his own lawyer has been stated as saying, J.C. Joyce, that Robert Tilton prays over and touches all of the correspondence. And if he doesn't do that he has committed fraud, and should be dealt with. That was early on in all this discovery some 2 years ago.

OWEN: What is the issue you are going to try?

RICHARDSON: The issue we will try is the fact that Robert Tilton made false misrepresentations

to the folks in the listening audience by telling them that he was doing things that he wasn't doing.

OWEN: Specifically what?

RICHARDSON: Well one good example is the touching of the correspondence, reading over it, which he doesn't do. If I had time to tell you how this all works, I think I could help you understand this and I will try to do it quickly. The folks send a letter in.

OWEN: Tell me what would be your issue to the jury? I have read your briefs. Tell me what the jury issue would be?

RICHARDSON: Well the issue of course is going to be is Robert Tilton a fraud.

OWEN: On what specific evidence? Can you _____ them off for me. What would you say are the fraudulent misrepresentations specifically?

RICHARDSON: Well he tells them that he leads them to believe that he wrote the letter that they received. We know for a fact he didn't write the letter they received. The correspondence that goes back...

HIGHTOWER: Who wrote the letter?

RICHARDSON: He has ghost writers.

HIGHTOWER: In his employee? Somebody in his employee wrote it?

RICHARDSON: He hires someone from California or wherever somebody writes these letters.

HIGHTOWER: If someone in our office writes a letter that we signed is that a misrepresentation, because we didn't type it ourselves?

RICHARDSON: I am not talking about typing it. I am talking about he writes a letter and says God spoke to me this morning about you Justice Hightower; and he told me that he wants to do these wonderful things in your life when I spoke to him this morning; and what you need to do is send some money. He didn't even write that letter. And yet he is telling that God spoke to him about you. That is fraud. That is fraud.

GONZALEZ: Mr. Richardson before you continue enumerating the issues that you are going to submit to the issue in response to Justice Owen's question, with regards to touching before you leave that subject, the way you define touching may be different from...but you only have one definition and that is physically touching, and that is the only thing touching means to you or to your clients; is that correct?

RICHARDSON: Probably true, yes.

GONZALEZ: So if there are some clergy or people of the faith that have a different definition of it, that encompasses a broader definition of touching you say that the jury is going to have to pass on whether those clergy are right or whether your definition is correct?

RICHARDSON: I am saying that if that is the case this man ought to tell the people that are listening to him, because he knows that they think touching is what I am saying touching is, and that's touching. And also the letters he leads them to believe that he reads every letter that comes in. Well we know that is

ridiculous, but little Mrs. Jones out here doesn't know he gets 500,000 letters a month. And that he's got a group of people up in Tulsa, OK that he has never seen or talked to, that has form letters over here, that they get a letter in and they scan it, and they pull a form letter over here that's got Robert Tilton's signature on it that he didn't even write himself, and sends it back to them.

GONZALEZ: Would you answer the rest of the question for Justice Owen and for me as to what other issues you are going to ask the jury to pass on?

RICHARDSON: Well I feel a little bit like a duck out of water, because I am more a trial lawyer rather than a technician. But the facts of the case that are at issue is the fact of fraud. And then of course the evidence that will be presented are the things that I started enumerating a few moments ago, such as the fact that he tells them that he reads their letters, which he doesn't do, he doesn't even see most of them, that they are all sent to him, which they aren't. We have learned now that actually what he gets in many instances is nothing more than a computer list with a name on it, and marriage counseling or healing something of that nature. We say that the entire program is nothing more than a commercial event, that is couched in the terms of religion. They are taking advantage of people.

GONZALEZ: You are saying he is a charlatan? You are saying he is a fraud?

RICHARDSON: Right.

GONZALEZ: That's your whole case?

RICHARDSON: Yes.

SPECTOR: Is there any allegation that the money that was sent is used in a certain way? You mentioned missions.

RICHARDSON: Yes, ma'am. For example in one case, the case we've already tried, it was represented to the people that their money would be used if they would let them do a testimonial, which they end up sensationalizing. And that's what this lawsuit is all about. And we have already tried against Robert Tilton in federal court in Dallas. We got a successful verdict. And the same issue as there, this man's a fraud and a con artist.

SPECTOR: I don't understand your answer. Does he say that the money will be used...

RICHARDSON: He told the people there that the money that would be raised by them doing this testimonial would be used to build a clinic. And then hire psychiatrist to help people that have been sexually abused, as this lady said she had been sexually abused, and that they would help his organization by doing this testimonial. And the truth is who knows what happened with the money.

GAMMAGE: Counsel, if you are not permitted to examine whether or not Mr. Tilton does what he tells people he is going to do, and if you are not permitted to examine the objective exercise of his personal faith and compare it if you will to what he professes publicly to people that he entices money from, is Mr. Tilton's Oklahoma lawyer right: in addition to the absolute right of the free exercise of his religious faith is he entitled to defraud people in the name of that? Do people have no recourse against charlatans that do what you are describing?

RICHARDSON: If you rule against us that's in my opinion exactly what _____.

GAMMAGE: So the constitution protects that type of behavior?

RICHARDSON: Right.

GAMMAGE: That type of fraud? That type of misrepresentation? That type of enticement?

RICHARDSON: Exactly. To rule against this case is to make that decision.

GAMMAGE: And they call it the exercise of religion?

RICHARDSON: Right.

PHILLIPS: Counsel I am still confused about the extent to which you are going to try Mr. Tilton's personal faith and his subjective belief. You said here today in response to questions that the sincerity of his belief is an issue in this case. You have told us that have you not?

RICHARDSON: I said that I think we are entitled to look at that issue.

PHILLIPS: But on page 4 of your brief to this court, you said that opposing counsels have blatantly misstated and mischaracterized your claims and position. Plaintiffs do not question Tilton's sincerity of religious belief, but rather question whether Tilton even considers his conduct to be of a religious nature. Do you stand by this distinction that's in footnote 5 of your brief? What is that distinction?

RICHARDSON: No, I don't stand by it. I didn't write it, and I don't stand by it.

GAMMAGE: Ghost written?

RICHARDSON: Ghost written.

GONZALEZ: Is that actionable? Can somebody sue you for fraud?

RICHARDSON: Maybe this court can sue me.

OWEN: I would like an answer to Justice Spector's question. You referred us to another case. We are talking about this case, the evidence in this case. Is there any representation in this case that money will be spent in any particular fashion?

RICHARDSON: Well the folks that I represent listen to the presentations all the time that Robert Tilton made, and they heard him. I can't stand here today and tell you that they say they heard him say that he was going to give money to the mission fields, because I have never asked them that question. So I am not going to stand here and represent that I have. But I know he represents that. He says it on tv. He talks about all the money he gives to the mission fields. And that is why we asked for the record is we would like to see if in fact he does.

PHILLIPS: And those are statements on the Success in Life program? He doesn't talk about mission fields during his church service?

RICHARDSON: I don't know if he does nor not because I have never been there. But I know he talks about them in the Success in Life program.

ENOCH: We have talked about the representations that have been made and you argue that the touching, and the reading are misrepresentations. But as a fact your clients all claim that what they sought: one sought to regain physical custody of her children; and one sought I think it was the restoration

of health, and neither of those came to pass. And they sue Rev. Tilton because he represented to them that if they performed certain conduct, if they did certain conduct, that the Lord would be pleased with their conduct, and that the Lord would hear their prayers. Isn't that the basis of what he was telling them to do, and the basis for why they should?

RICHARDSON: I would probably go even a little further your honor in saying that for example in the case of the Hives(?) on getting their children back, that it was represented to them that if they would...

ENOCH: Attach the prayer cloth to the children's clothes...

RICHARDSON: Right. He even sent them a prayer cloth and said cut it up in little pieces and attach it to some new clothing and send to your children, and that way God will be able to bring about this miracle of you getting your children back.

ENOCH: The tragedy of these cases is pretty marked. But isn't the final analysis your statement to this court, that the essence of your case is to prove that the misrepresentations that were made were Robert Tilton's and not God?

RICHARDSON: Right.

ENOCH: And aren't we in a position of entertaining whether or not God was doing this?

RICHARDSON: Maybe.

REBUTTAL

CORNYN: Counsel if a fraud case can theoretically be tried I think as you conceded at the beginning of your argument, and all of us are having difficulty separating fraud allegations that you concede can be tried from other allegations, that perhaps cannot, why doesn't your client have an adequate remedy by appeal after a record is made in this case and we can see what the evidence is as opposed to a mandamus when we don't know what the evidence is going to be?

BIRD: Well first of all I don't concede that a fraud action against my client under these facts is appropriate. The reason being if people, as Justice Spector asked, if people gave money for a specific purpose whether it is the Jim Baker case or if there is a specific promise that if you give me \$10.00 this will go for the support of needy people, or something like that, then perhaps there might be an action for fraud because the person is being duped out of that money. Perhaps. I don't know that there will necessarily be an action but perhaps there could be. Or if there is a specific economic injury perhaps there could be an action for fraud. But in this case where you have emotional injury only I submit that you cannot have an action for fraud. And Paul v. Watchtower is very clear on that.

CORNYN: So if they had made a claim for the amount of money they sent, that they would not have sent, but for fraudulent misrepresentations?

BIRD: If they made some type of contract claim that they didn't get the benefit of their bargain, they were trying to buy prayer, and if the money had been sent and the prayer had been made and then the miracle didn't happen, and they could link it all up as Mr. Richardson says, it is very crystal clear you can do that, that would be one thing. He is not sued for a return of any donation, any tithe, any gift, any contribution. He is sued for hurt feelings, for emotional injury.

CORNYN: And why isn't there an adequate remedy by appeal is my basic question?

BIRD: Because this is an infringement on his practice of religion. Even one second of denying religious liberty in this country can never be repaired. Having an award against him, appealing it, having it reversed is not going to help anything.

GAMMAGE: How does this deny his religious liberty? How would regular trial, regular appeal deny him free exercise of his religious faith?

BIRD: It's already had that effect as a result of just the pleadings being filed, the spurious allegations being made. Donations to his church have gone down. Members have left the church.

GAMMAGE: How does that interfere with his personal exercise of his religious faith.

BIRD: Because the exercise of his religious faith is to spread the word of God to as many people as he possibly can through whatever means necessary. When donations go down, he can't afford air time. So he can't broadcast. Therefore he is reduced to smaller one on one type things, or just in his church. He is not being able to do the number one thing Christians are told to do, which is witness and spread the word of God to others. That is an incredible infringement on his rights and on the church's rights.

GAMMAGE: How does this interfere with his free exercise of his religion and his God given instruction to be an evangelical? How does this interfere with that? I mean he may not have the audience that he personally wants, but maybe it's the one God wants him to have.

BIRD: Well I won't predict what God may want, because that's what Mr. Richardson is

claiming in this case. But his personal religious liberty is being restricted when he's not in a position to go out. For example, right now he's not in a position to preach what he wants to preach.

GAMMAGE: When he is cutoff from other people's money he can't exercise his religion?

BIRD: No, in this particular case if this court permits this case to go forward he cannot exercise his religion unless he is prepared to prove his religion. He must prove that if you pray, that God answers miracles. He has to prove it. That is absolutely incapable of proof.

GAMMAGE: Is this what they are asking him to show? Or are they asking for evidence of what he really does?

BIRD: What they are asking is to go into court to put on as much evidence as they can about personal issues, things which otherwise are irrelevant in order to effectively shift the burden before a jury so that he has to prove his religion, his faith in his religion, and his adherence to his religion.

GAMMAGE: Counsel for the other side that if Mr. Tilton were going through a divorce right now, and most of the evidence that they are trying to solicit here or gain access to here were requested in a divorce case he would be compelled to disclose it in a divorce case. And that is as far as what is done with the money is concerned. Whether he tithes I presume is valid evidence in a divorce case when it comes to dividing property between the parties.

BIRD: Even in a divorce case there has to be a balancing test done. No balancing test has been done in this case. And there is no divorce going on. And that is not an issue.

HECHT: Is there a distinction between this case and the one that was tried in the United States district court in the northern district?

BIRD: Absolutely. That was a contract claim - a pure contract claim.

HECHT: Was an effort made to halt that trial on the basis that it infringed upon Mr. Tilton's fundamental constitutional rights?

BIRD: It was not, other than by filing motions for summary judgment, but no appellate review was sought.