

62848-8

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NO. 62848-8-I

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

THOMAS RENTZ
Appellant.

vs.

REVEREND JANN WERNER,
Respondent,
And
AQUARIAN FOUNDATION, non-party respondent to Discovery
Subpoena

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STATE OF WASHINGTON
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BRIEF OF AQUARIAN FOUNDATION, non-party APPELLEE

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I. RESPONSE TO APPELLANTS' ASSIGNMENT OF ERROR

NUMBER TWO: The Appeals court should uphold the dismissal of the case on the existing discovery.

- A. Plaintiffs represented to the court that it had all of the facts it needed before it in order to rule in this matter; its assignment of error is invited error.
- B. If plaintiffs needed additional discovery, they failed to move for a continuance per CR 56 prior to the ruling of the trial court dismissing this case.
- C. Plaintiffs did not preserve the necessary discovery issues in order to appeal the lack of discovery, having failed to provide competent evidence to the trial court of the *Snedigar* criteria.
- D. Even if plaintiffs had preserved their discovery issues, they had received substantially all of the relevant discovery.
- E. Of the remaining potential discovery from the Church files, there was no valid, surviving cause of action articulated by plaintiffs remaining at the time of the discovery motion to which Church files were relevant.
- F. Ordering the Church to produce further discovery would violate the First Amendment rights to practice and to free exercise of religion, of the members of Aquarian Foundation.

II STATEMENT OF CASE

This matter was filed on March 30, 2007, naming “Jann Werner, an individual” [who is the worldwide spiritual leader, Ecclesiastical Head, and President of the Board of Aquarian Foundation], and naming John Does 1—25 “whose identities have not been ascertained”. CP 795. The plaintiffs include a former employee minister of the Aquarian Foundation Anchorage branch, who was removed for cause in November, 2003, and a group of her followers. The complaint was amended on June 18, 2007, CP 865, and again on November 6, 2008 CP 2576—2582. No new parties or causes of action were alleged and on November 7, the court dismissed all “John Does.” RP 2. The court entered an order dismissing the “historical practices” claim of plaintiffs on September 12, 2008. CP 1384—1386, and also dismissing plaintiffs’ fraud claim on September 12, 2008. 1387—1389. The plaintiffs have not appealed the dismissal of these causes of action, and have made no claim that more discovery was needed prior to the dismissal of these causes of action. The November 6 second amended Complaint included only a cause of action for violation of Church by-laws CP 2579, violation of RCW 24.03 (principally the right of members to view financial records), and violation of “the common law rights of members of an incorporated entity. . . the right to be terminated as a member only for cause. . . an opportunity for a hearing. . .” CP

2580. There was an attempt to re-plead the fraudulent scheme/misappropriation cause of action that was previously dismissed. CP 2580.

Plaintiffs sought documents in discovery that were properly in the custody of the Church and not of Reverend Werner individually. Initially, Reverend Werner moved for an order of protection, CP 1002--1040 and first raised many of the First Amendment issues that would be advocated by the Church. The non-party Church, Aquarian Foundation, was not involved until the end of July, 2008 when counsel for Aquarian Foundation made a special appearance to respond to the discovery subpoena that was served on the Church in July, 2008. CP 2631—2641.. From the earliest requests for documents, defendant Werner, and later, the Church, filed evidence supporting the history and traditions of the Church in defending and advocating for the freedom of religion, freedom of association, and right to practice religion, for members of this Church. The history of this Church was recounted for the Court. Its members' experiences with random violence after media defamation that labeled it as a "cult" was presented through numerous declarations and prior court records. CP 1041—1044; 1059-1066; 1081—1082; CP 1237—;1239and 1247—1312. It's tradition and religious teaching that members should be completely protected from temporal concerns, such as use of their

identities in litigation, was also affirmed by declarations from Vice President Ted Bickerstaff, CP 1402—1405; Defendant Werner CP 1852--1854

Plaintiffs have admitted to the religious belief and the long standing policy of the Church not to disclose member identities. At the outset of his deposition, plaintiff Martin McDermitt refused to disclose last names of members who had knowledge, and after consultation with his counsel, agreed to use the names among the parties for identification purposes, but per Mr. Fowler “We aren’t going to publish this information outside the Church.” CP 1281—1219. In the depositions of plaintiffs, only initials of Church members, or general labels, such as “student #1” were used in deference to the religious doctrine of the Church that members’ identities are sacred and private to them. CP 1406—1728.

In July, 2008 a subpoena was served on the Church by plaintiffs, listing numerous categories of documents, which appear to be a broad net that might include each and every document in the custody of the Church. CP 2631-2640. Although plaintiffs seek to lump the Church as an entity with Reverend Werner personally, and refer liberally to defendant as “Reverend Werner and her followers”, the Church was never made a party, and separate counsel appeared regarding the interest of the Church in protecting the First amendment rights of its members. To emphasize to

the court that separate counsel represented differing and potentially conflicting interests, Church counsel Jean Schiedler-Brown filed a special notice of appearance limited to the discovery issues as they pertain to the Church, CP 2631-2640, and a separate clarifying declaration CP 2675-2676. The misleading statements of plaintiffs in this regard have survived to this appeal, , i.e., starting with the misleading caption on plaintiff's opening brief. The Church produced documents responsive to the allegations of the plaintiffs' amended complaint, but redacted unrelated information in the documents and information that identified the personal and private identification and affairs of individual non-party members. The process of reading, selecting documents responsive to the issues in the lawsuit, and redacting Board of Director minutes from the year 2000 to the present consumed 68 hours, all at the expense of the Church. CP 1401—1402.

By motion dated August 21, 2008, plaintiffs moved to compel production of all of the subpoenaed documents. CP 2590--2600

On September 12, 2008, Honorable Richard D. Eadie ordered Aquarian Foundation to produce certain documents subpoenaed by plaintiffs. The Church had not been notified of the date of the hearing on this motion, and had no opportunity to explain or argue its specific

objections to further producing documents. CP 2773-2776. The Plaintiffs and defendant were present; the order that was entered included:

- Church financial records since January 1, 2000,
- Un-redacted copies of board of director meetings' minutes and tapes,
- un-redacted copies of all documents relating to any Church disciplining of members.

The same order denied plaintiffs' request to produce membership lists. CP 68—70.

Upon learning that the court had ruled on a discovery motion on September 12, (without notice to it), CP 2773-2776, the Church filed timely alternative motions to quash the subpoena as to further production of documents CP 2601—2607, for reconsideration, CP 2612-17, and a motion for order of protection CP 2608—11. Plaintiffs responded that the motion was a delay tactic, and was already decided on the same arguments. Further, although the Court had, by that date, dismissed the fraud and traditional practices causes of action, the plaintiffs averred that some of the documents (un-redacted Board of Director's minutes and tapes of meetings, and biennial Meetings minutes, from 10—30 years ago, CP 688-689) continue to be relevant to defendant Werner's alleged practices of fixing Board elections, withholding information, and

proclaiming herself minister for life. CP 1834—1838. Plaintiffs admitted that it had received all of the discovery that was related to defendant Werner's discipline of members. CP 1838.

In depositions of plaintiffs, each plaintiff had admitted that plaintiffs possessed no facts or reasonable belief that Reverend Werner had misappropriated funds of the Church, i.e., excerpts from Plaintiff Sera Baxter's deposition included a statement at p. 48, "I don't think anyone is accusing her of siphoning off funds. Also, Plaintiff Judith Rae, at pp. 77-84 set forth the explanation that the plaintiffs thought the Church spent too much money on litigation. CP 1876—1883. At oral argument on November 7, 2008, plaintiffs' counsel admitted to the court that plaintiffs had not presented any actual and admissible evidence of fraud in the record. RP 83. That claim was dismissed and there is no appeal of the dismissal, and no claim that plaintiffs required any additional discovery to defend that motion to dismiss.

Plaintiffs disclosed in its memorandum opposing the motion for reconsideration, that plaintiffs wanted to be able to show all of the discovery to Church members. CP 1838. Church Vice President Ted Bickerstaff had explained the harm to the Church of the disruptive use of this litigation by plaintiffs to try to destroy the Church and to cause members to focus upon temporal issues instead of being able to peacefully

worship as they desired. CP 1402—1405, 2791-2795. Defendant Werner also testified to the harm to the Church, the loss of members, as a direct result of members being embroiled in litigation involving the Church. CP 1851--1854. Nancy Turner, a Trustee and former Secretary of the Board of Directors, testified how plaintiffs used any information they could obtain to disrupt Church membership, in violation of the Church's containment policy that carefully guards the private affairs of members. CP 1858—1859. She also described specific patterns of manipulation of the facts by plaintiffs which caused purposeful and damaging impacts upon the membership of the Church. CP 1860—69. Further, she quantified the burdens to the Church of any further document review and production, particularly hundreds of hours of unlabeled tapes that contained private information regarding Church members and that provided no official records for Church meetings or actions. CP 2777-2780. Vice President Bickerstaff verified the hours needed to comply with the extensive discovery requests to date. CP 2791-2795.

As to financial documents, the Church Treasurer testified regarding the limited authority of defendant Reverend Werner regarding Church expenditures and described the financial records, of which she was custodian. CP 2782-2783. On October 23, 2008, the Church complied with the court's order to compel financial records, and produced for the

plaintiffs' inspection 27 boxes of financial information. CP 775. Based upon documents that were marked as requested copies, the Church then specified 21 written objections--2 items had been previously produced; 2 items were confidential attorney communications to the Church by its counsel. Of the remaining 17 items, there was no objection to production of most of the requests if private information was redacted—namely bank account numbers, financial account numbers, tax ID numbers, social security numbers, name and addresses of members, and identification numbers—addresses or tax accounts—for Church real estate. CP 774—777.

The Church was willing to provide all of the documents requested by plaintiffs, if redacted as requested, with the exception of the attorney-client privileged letters and the 5 items specifically objected to, if an adequate protection order was entered. CP 775—777. Plaintiffs' conditional CR 56 (f) motion did not refer to any financial information, (CP 688-689) and no further argument at the dispositive motion was presented regarding the need to see other financial records. Having reviewed all of the financial records of the Church, Plaintiffs' attorney agreed with the court that plaintiffs had no evidence of fraud. RP 83.

The Church also provided evidence of record to make it clear that it was willing to produce for review the official minutes of meetings,

provided it would be compensated for the expense of reviewing them, and that identifying information regarding members and their private affairs would be redacted. CP 2645-47. The Church added to evidence of record clarifying the difference between official minutes of meetings and the plaintiffs' request, which was a fishing expedition of endless hours of tapes, some organized and some not, some labeled and some not, some of meetings of the Board and some not; the tapes are not the basis of official records of meetings, which are produced from notes taken by the secretary. CP 2777-2780.

As a result of the summary judgments entered by the Court on December 9, 2008, the Court entered an order on the same date determining that the remaining discovery issues are moot. CP 792—794.

To the extent that the plaintiffs based their discovery motions on purported membership rights to view documents, they admitted in depositions and in their complaint, that they were not members. Mr. McDermitt had not been a member since 2004 when he was expelled. CP 1413.

On October 22, 2008, plaintiffs filed a 2-page "Plaintiff's Conditional CR 56(f) Motion" CP 688-689. The motion referred solely to "tapes and minutes regarding the 10 – 30 year old events that Werner discusses in her briefs." It was not noted for hearing. It was not supported

by any evidence, or any reference to any of the voluminous evidence of record. It stated, referring to the “tapes and minutes”, “and Plaintiffs believe the evidence is not relevant—this matter can be decided on summary judgment on the current record” CP 688-689. Plaintiffs’ self-described reason for filing the 2-page document was “in order to protect their record.”

At the dispositive hearing on November 7, 2008, plaintiffs, through their counsel, represented to the court that “just about” all of the issues are decided by reading the by-laws. ROP 13. Plaintiffs’ counsel stated that if the court disagrees with the plaintiffs’ interpretation of the by-laws—that the members have the ultimate say over who will be on the governing board of directors of the Church—then it should grant summary judgment to defendant Reverend Jann Werner. ROP 20. He concluded on behalf of plaintiffs that interpretation of the by-laws is a legal question for the court. ROP 21.

The court quizzed plaintiffs’ counsel as to whether there were adequate facts before it to make a decision, if the by-laws could be interpreted in more than one way; he responded that plaintiffs would need copies of the bi-ennial meetings to demonstrate historical practice, but that if the court ruled as a matter of jurisdiction, it would pre-empt all discovery issues. RP 22—24; 33.

At another point, the trial court questioned plaintiffs' counsel as to what additional information of help to the court would Church Board minutes provide, and plaintiffs' response was that the by-laws by themselves will allow the court to determine the question of jurisdiction, that is, whether or not the Church is a hierarchy or congregational. RP 66—68; 71.

The parties agreed that the court has jurisdiction over a properly pled cause of action regarding a property dispute or fraud even if it is a hierarchy. RP 72.

At no point did Mr. Fowler ask for a continuance of the summary judgment and jurisdictional motions before the trial court in order to complete discovery, at no point did he specify for the court what discovery he needed that was critical to a material fact before the court. Mr. Fowler, for plaintiffs, affirmatively stated at oral argument that , based upon the court's order dismissing the matter, all discovery issues are moot. RP 94

ARGUMENT—Summary of Aquarian Foundation's position on the issues on appeal.

Because Aquarian Foundation was never made a party to this action, its interest as a respondent is primarily to the discovery requests made of it.

Aquarian Foundation has an actual interest in the court's determination regarding whether or not the Church is a hierarchical or a congregational Church. However, the Church will not file a motion to present an amicus brief on this issue unless it perceives that it has a differing perspective that would be of service to the Court, after receiving the Brief of Defendant/Appellee Werner. Additionally, the final section of this brief treats a survey of case law relevant to this issue, as they relate to the discovery issues.

Therefore, the Church's brief primarily discusses the discovery issues, which were the issues of direct interest to it, and regarding which it represents the existing Church members as a distinct non-party class whose interests are not the same as those of defendant/Appellee Werner.

Appellant's second assignment of error requests this court to remand this matter to the trial court decision and order that the discovery matters be ruled upon. This non-party Church presents its brief on behalf of its current members, who have important Constitutional rights to protect. Furthermore, this Church has historically protected the privacy of its members as a moral and religious belief and as a steadfast Church policy. These issues can be resolved based upon state law and procedure, and if not, based upon applicable analysis of the constitutional principles.

A. Plaintiffs represented to the trial court that it had all of the facts it needed before it in order to rule in this matter; plaintiffs' second assignment of error on appeal, requesting reversal and remand to complete discovery, is invited error.

At the dispositive hearing on November 7, 2008 plaintiffs' counsel told the court that "just about all the issues are decided by reading the by-laws." RP 13. Moreover, plaintiffs had filed their dispositive motions in October, representing that the court could rule as a matter of law that there were no issues of material fact. CP 148—238. Furthermore, plaintiffs had defended motions to dismiss the fraud and historical practices causes of action, without requesting additional discovery or a continuance. CP 1384-6.

Although plaintiffs' counsel told the court on November 7, (when the court asked whether it had all the facts needed to make a decision if the by-laws were subject to more than 1 interpretation) that he believed plaintiffs would need copies of the biennial minutes to demonstrate historical practice, RP 22-24; 33; the plaintiffs' cause of action regarding historical practice had already been dismissed 2 months earlier on September 12. CP 1384—1386.

Plaintiffs maintained at the November 7 hearing that the court could decide the jurisdictional issues with the current discovery before it. RP 66—68

Plaintiffs did not ask the court to clarify whether it had considered only the by-laws, or whether it had also considered the hundreds of pages of deposition and declaration testimony in the record in deciding to dismiss; the order granting summary judgment dismissal, approved by plaintiffs, that was signed on December 9, 2008 itemized all of the documents that were before the court. Plaintiffs also agreed with the court that its ruling made the discovery requests moot. RP 94. Plaintiffs made no further motions and requested no further actions from the court that would preserve any remaining issues or portions of plaintiffs' case that may not have been ruled upon.

Plaintiffs' brief now seeks to change arguments and ask the court to re-open the issues for plaintiffs to have another bite at the apple. This request must be denied based upon the doctrine of invited error:

The rule is well settled that a party cannot successfully complain of error for which he is himself responsible or of rulings which he has invited the trial court to make. 3 Am Jur. 427, section 876.

Hundreds of appellate and Supreme Court cases cite this rule over the past 100 years.

Holdings in recent civil cases have stated that an assignment of error on appeal will not be considered if the party asserting the error materially contributed to it. *In re Marriage of Blakely* 111 Wn. App 351 (2002); An

appellant cannot raise on appeal a theory that is contrary to its position at every earlier stage of the proceeding. *Deaconess Medical Center v. Dept. Revenue* 58 Wn. App 783 (1990); A party cannot obtain relief on appeal invited by its own act or omission. *Wright v. Miller* 93 Wn. App 189 (1998) In *Prater v. Kent* 40 Wn. App 639, 699 P.2d 1248 (1985), counsel told the court that there was no objection to dismissal of a cause of action, but later appealed the dismissal. Review was denied based upon invited error. Here, reading the November 7 transcript as a whole, after numerous inquiries by the court, counsel never advocated that the court needed to make additional decisions, never told the court that it was missing specific evidence in order to make a ruling, and never asked for a continuance to place added evidence before the court. Counsel approved the order which listed all of the evidence the court relied upon. Plaintiffs(who, as long-term previous members of the Church would have had the ability to do so) never entered any declarations directly refuting the representations about Church beliefs and practices that were filed by defendant, which did further explain the few examples of Church practices addressed in the depositions of plaintiffs. Counsel never told the court that there were facts that would be contested, or what those facts would be. He agreed that the court's ruling made discovery requests moot. RP 94. This statement meant that, given the record before the court, plaintiffs did not believe that

there were additional material facts that the court should consider. Now, plaintiffs cannot ask the court to review this case from the perspective that there may have been other facts, or the trial court should have looked at other facts. Plaintiffs were complacent with the procedures used by the trial court and the trial judge gave plaintiffs many chances to raise objections to the order of proceedings. Although plaintiffs contend it made a “conditional” motion for continuance, there was no motion for continuance made, not even verbally, on November 7, 2008. Failure to move for a continuance is invited error and precludes review on that basis. *Cotton v. City of Elma* 100 Wn. App 685 (2000). A party who participates in a hearing without objecting to the procedure cannot later bring an appeal based upon deficiencies in the procedure. *Kempf v. Puryear* 87 Wn. App 390 (1997).

When a party only asks the court to review the record before it, it cannot later appeal the failure to review other items not in the record. *Kendall v. Public Hospital District* 118 Wn. 2d 1 (1990).

An element of the invited error doctrine is that the trial court accepted and adopted the proposed view of the law. *Guntle v. Barnett* 73 Wn. App 825 (1994). Here, if plaintiffs thought the court should clarify what parts of the record it had relied upon in making its ruling, it should have so requested. If plaintiffs thought, after learning the basis upon which the

court had ruled, that more data was needed, it should have brought a CR 56 (f) motion. Plaintiffs cannot now ask the court to have a chance to redo the case, after thousands of pages of record and hours of hearings, in order to argue an alternative theory.

B. If plaintiffs needed additional discovery, they failed to move for a continuance per CR 56(f) prior to the ruling of the trial court dismissing this case.

CR 56(f) states:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The requirements of this rule are not just perfunctory. The rule requires a proper motion supported by affidavit. *Lundburg v. Carlson* 108 Wn. App 749 (2001) The rule correctly requires competent evidence setting forth each of 3 different prongs of proof: 1) the moving party has a good reason for the delay in obtaining the evidence; 2) the moving party must specify what evidence will be established through the discovery, and 3) the evidence sought must raise a genuine issue of material fact. *Briggs v. Nova Servs.* 135 Wn. App 955, where a CR 56(f) motion that failed to specify the evidence and establish that it raised a material issue of fact was

found deficient. A deficiency in only 1 of the 3 prongs for a CR 56 (f) motion is sufficient for its denial. *Gross v. Sunding* 139 Wn. App 54 (2007). Here, plaintiffs failed to specify the evidence needed or to show how the evidence would raise a material issue of fact as to any of elements of the plaintiffs' causes of action. (*Briggs* also distinguishes other cases in which the court excused new counsel from some of the procedural formalities of the motion, i.e., *Cogle v. Snow* 56 Wn. App 499, 484 P.2d 554(1990).)

The evidentiary requirement of CR 56 (f) is specific. Thus, telling the court that discovery is still outstanding without explaining how the response to specific discovery will be pertinent to a material fact is not specific, and stating that more time is needed to obtain a witness statement without explaining why it was not obtained earlier, is not sufficient reason. *Vant Leven v. Kretzler* 56 Wn. App 349, 783 P.2d 611 (1989) Here, the case was filed in March, 2007 and the dispositive motions were heard in November, 2008. There is no explanation why plaintiffs waited to begin to seek records from the Church until July, 2008. Numerous summary judgment motions had already been filed by that date, and plaintiffs had never defended on the basis of inadequate evidence. Failure to establish a sufficient reason for not obtaining evidence earlier is fatal to a CR 56(f) motion. *Carr v. Deking* 52 Wn. App 880 (1988) Any motion filed by

plaintiffs under CR 56 (f) must be deemed insufficient to satisfy the exacting requirements of this rule.

The requirement that the CR 56 (f) motion specifically cite the expected discovery facts and how the expected facts support a material element of the causes of action is very specific. For example, discovering additional information about insurance coverage that would not have provided coverage for an accident is not a material fact. *Mutual of Enumclaw v. Archer* 123 Wn. App 728 (2004); knowledge of accident history of a roadway would not be material to whether a county had a chance to remedy the road *Olson v. City of Bellevue* 93 Wn. App 154 (1998); and a witness's knowledge regarding her own paternity would not be a material fact to establish whether her actions as executor of a probate was fraudulent. *Pitzer v. Union Bank* 141 Wn. 2d 539 (2000) The importance of these cases is that the evidence that a party wants to gain must be direct and material. It cannot be collateral, background, somewhat of interest, a fishing expedition, or information with which to establish credibility. The Church produced all of the direct evidence regarding this case pursuant to the original subpoena served in July, 2008, and no causes of action remained at the November 7 hearing with elements to which the remaining documents sought by plaintiffs would be material.

Counsel for plaintiffs claimed that if the court went beyond the by-laws then plaintiffs would need to discover the minutes of the biennial meetings to verify how the Church had actually been managed in the past. However, a general statement such as this is not a sufficient showing of a material fact upon which the litigation depends, especially when no plaintiffs filed any declarations in opposition to the affirmative proof of how the Church had operated that was filed by defendant. In *Smith v. Myers* 90 Wn. App 89 (1998), a similar request was made to a court for deposition of a person who could verify “accident details and violation of safety standards.” This was rejected as not material, particularly because there was no showing that evidence received would contradict the evidence already of record.

Furthermore, plaintiffs failed to assert their intent to move for a continuance when the court entered its dispositive oral ruling, and did not interpose any such motion during the month between the oral ruling, November 7 through December 9, 2008. If evidence is critical to a case, the court will presume that a party would use the intervening time to supplement the record. Failure to do so between the oral ruling and the written order creates a presumption that the party either has no good reason for the delay, or the proposed evidence is not really critical to its

case. In *Manning Carpets v. Hazelrigg* 84 Wn. App 899 (1999), the court's commentary was:

Counsel had several weeks between the oral grant of summary judgment and entry of the order on the motion to file affidavits or otherwise complete the record. Yet, despite their right to do so, they failed to either depose Hazelrigg or to at least show why it had not been possible to do so. They also failed to state what material evidence would be established through the additional discovery.

84 Wn. App at 903.

Likewise, if a court's colloquy raises an issue regarding whether or not a party needs to complete discovery, a party that wants to appeal the matter is expected to preserve the issue and make sure that the trial court knows what the party's objections are and what additional rulings and clarifications are needed. For example, in *Colwell v. Holy Family* 104 Wn. App 606 (2001), a similar situation arose in which the court refused, on appeal, to recognize that a CR 56 (f) motion had been advocated at the trial court level:

At the close of the summary judgment hearing, the Colwells' attorney stated:

If this court is disposed, in the alternative, to granting the motion for summary judgment, then I would say the appropriate thing to do, at this point, is not to dismiss a case that on its face has merit to it. It has asked the plaintiffs, or the defendants, in this case, to point to those issues that they think are at issue or not at issue and allow the plaintiffs an opportunity to rebut them with the experts that the court now knows it has.

The Colwells contend the above statement is a request for additional time to respond to Holy family's objection to Ms. Ellis's declaration. . .

. . .

Here, from the report of proceedings, it is not clear that the Colwell's attorney was asking for a continuance. After counsel's above statement, the judge stated:

All right. I'm going to go ahead and take a look at the matter again in light of the arguments that you just made [referring to the parties' summary judgment arguments]. But I spent a considerable period of time on this file so I suspect I'll be able to put out a memorandum decision on Monday. Okay.

If counsel contemplated a continuance, surely after the above colloquy some request for clarification or ruling would have been expected. . .

104 Wn. App. At 614-615.

Here, after plaintiffs were repeatedly asked by the court whether it had a complete record before it, if counsel contemplated needing a continuance, surely after such prompting he would called attention to his un-noted, "contingent" CR 56(f) motion. Although the granting or denial of a CR 56(f) motion is discretionary, it is a question of law whether such a motion was ever properly made. In this record, filing a two-page document among thousands of pages that have been filed, and not specifically noting up a motion, briefing the motion, presenting appropriate evidence in support of the motion, complying with CR 56(f) criteria, or arguing the motion, is a defect too great to ignore. As a matter of law, the appeals court must find that no such motion was made and that

it is not going to hold the trial court decision in abeyance in order to send the case to the trial court for a decision on a CR 56(f) motion.

C. Plaintiffs did not preserve the necessary discovery issues in order to appeal the lack of discovery, having failed to provide competent evidence to the trial court of the *Snedigar* criteria.

Snedigar v. Hodderson 114 Wn .2d 153, 786 P.2d 781 (1990), established a 3-part test in Washington State when discovery is resisted because of a claimed Constitutional protection.

First, the party resisting discovery must identify a Constitutional Right and some probability that it will be invaded or chilled by the demanded discovery. Here, the Church documented a long history of actual persecution of Aquarian Foundation members, and a religious teaching by the Church that the privacy of members shall be protected. CP 1041-4;1059-66; 1081-22;1237-39;1247-1312. More importantly, cases subsequent to the *Snedigar* decision have refined the reasoning of why broad-brush discovery requests will offend the constitutional rights of persons exercising their First Amendment rights of Freedom of Association. In *Right-Price v. Community Council* 105 Wn. App 813 (2001), the court reviewed a line of cases that had been cited with approval in *Snedigar*, and concluded that when a party requests “membership lists, minutes of meetings, and all financial records” and other broad classes of documents generated by an organization,

particularly one that is not politically popular, “we would be naïve not to recognize that disclosure of this information would chill the members’ First Amendment rights.” 1105 Wn. App at 824,825. Thus, the Washington Court has accepted a presumption over the necessity to provide actual proof of a chilling effect, acknowledging that privacy and anonymity are often essential to the free exercise of First Amendment rights. *Accord, Talley v. California* 362 U.S. 60, 80- S.Ct.536, 4 L. Ed. 2d 559 (1960).

The Church established the first prong of the *Snedigar* test. Plaintiffs then have the burden to establish the second prong, that identifies a specific evidence-based suspicion that un-produced records of the Church would contain facts that are relevant and material to support its case. Although plaintiffs had received all of the discovery relating to the specific requests on its subpoena that related to its allegations in the complaint, (i.e., all of the documents regarding discipline in the Church by Reverend Werner, CP 1838) its submittals relied upon only the by-laws and Articles of Incorporation of the Church. Notably, Plaintiffs’ counsel had the opportunity to view the approximately 300,000 financial documents. CP 775-777. Yet, in Plaintiffs’ responses to the Summary judgment motions to dismiss the fraud and misappropriation causes of action, there was no reference to any of those documents as relevant or material to plaintiffs’ case. In fact, in depositions, each plaintiff admitted

that they had no reasonable belief that there was fraud or misappropriation. CP 1876-1883. Those causes of action were dismissed and the dismissal is not appealed.

Similarly, Plaintiffs never specified what in the hundreds of hours of “tapes, and minutes, regarding 10—30 year old events” would be likely to support the part of the case, jurisdiction and violation of by-laws, that is on appeal. While the Church documented the sensitive nature of the items requested, and the hours and hours of time needed to review them, CP 2645-7, 2777-80, plaintiffs never specified the elements of its cause of action and the material facts needed to support it. “litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity. . . .the interest in disclosure will be regarded as relatively weak unless the information goes to the “heart of the matter”, or is crucial to the case of the litigant seeking discovery.” *Snedigar*. Plaintiffs maintained, in its “Contingent CR 56 (f) Motion” that any further facts were irrelevant and that the court could make its decision on the present record. Plaintiffs’ only explanation of the reason to want further discovery was “to preserve its record.” Inviting the court to make its decision without the facts and then filing an obscure paper to “preserve a record” can hardly be said to satisfy the materiality prong. In *Right-Price a*

general attempt at explaining the possible relevance of subpoenaed records was deemed inadequate and speculative.

Furthermore, the same cases cited above, hold that failure to describe alternative attempts to obtain the same information is fatal to a discovery motion to obtain documents of a sensitive and Constitutional nature. Plaintiffs never indicated that alternative discovery had been tried. This is the third, and mandatory prong, ignored by plaintiffs.

Even more powerful is the case of *Eugster v. City of Spokane* 11 Wn. App. 799 (2004), because that case specifically discussed the *Snedigar* line of cases in reference to the case of *Rhinehart v. Seattle Times, Inc.* 59 Wn. App 332, 798 P.2d 1155 (1990). The Church, Aquarian Foundation, was a litigant in the *Rhinehart* case, in which the court ruled that the Church did not prove that there was a chilling effect when an order of protection was entered. However, *Eugster* resolved the two lines of cases by ruling that a protection order is inadequate to protect innocent, non-party members from sweeping discovery requests that could be presumed to create a chilling effect on their rights.

Here, the Church and its members are innocent, non-parties. By the sweeping nature of the requests by plaintiffs, a chilling effect is presumed. A protection order is not adequate to limit a chilling effect from a fishing expedition of this magnitude. Accordingly, plaintiffs must

tailor their requests and substantiate exactly what facts will support the ultimate fact and legal elements of their theories. This was not done.

Even if it had been done, plaintiffs would then need to convince the court that the rights of the innocent, non-party Church members' rights should be subordinated to the sweeping requests of plaintiffs. No reasonable person would find that it is, on this record.

The implication in plaintiff's brief that the case is subject to incomplete discovery that would change the result is unsupported by fact and by law, but rather by wishful thinking.

D. Even if plaintiffs had preserved their discovery issues, they had received substantially all of the relevant discovery.

The Complaint principally alleged certain abuses by Reverend Werner. It challenged her discipline of members, alleged that she misappropriated funds, alleged that she received beneficial contracts, and alleged that she required members to swear an oath of allegiance to her personally. The Church produced 100% of documents in its control regarding Reverend Werner's discipline of members, letters of allegiance to her, contracts with her or the members of the board of Directors, and all financial records regarding all of the payments, in whatever form, made to her from the Church. CP 2631-40.

The Church produced all information that has direct relevancy to the substantive allegations in the Complaint. CP 2631-2640.

The Church allowed counsel to review over 100,000 financial documents. CP 774—777.

Plaintiffs defended summary judgment motions regarding fraud, misappropriation of funds, and violation of historical practices, without maintaining that further discovery was needed, without moving for a continuance, and without defending by using any of the thousands of documents they had access to in the responses to subpoena. Plaintiffs have not appealed the dismissal of any of those causes of action.

The only discovery that plaintiffs have listed that they believe have relevance to any cause of action are the 10—30 year old tapes and minutes referenced in the purported CR 56 (f) motion, that was never noted for argument. How stale information from 10-30 years ago, all outside the statute of limitations, will support plaintiffs' cause of action, when all of the discovery received that is recent and that is specific to plaintiffs' claims did not support their causes of action, is a mystery.

The purported issue of remaining discovery to be had in this case is only a reflection of plaintiffs' realization of the weakness of the merits of this appeal. The appeals court should not consider that there is significant discovery outstanding that would create a basis for remanding this matter.

E. Of the remaining potential discovery from the Church files, there was no valid, surviving cause of action articulated by plaintiffs, remaining at the time of the discovery motion to which Church files were relevant.

Plaintiffs have not appealed the dismissal of their fraud and misappropriation of funds causes of actions. These are the only two causes of action that the parties agreed the court would have jurisdiction over. RP 72. These are the only 2 causes of action to which the financial documents could have been relevant.

Plaintiffs have not appealed the dismissal of their historical practices cause of action. This is the only cause of action to which requested un-redacted minutes of meetings would have been relevant.

Plaintiffs have urged to the court in their purported “contingent” CR 56 (f) motion, and in their argument before the court, RP 71, that the by-laws and Articles of Incorporation contain sufficient and complete facts to determine the jurisdictional question before the court and the remaining alleged common law rights in member-organizations.

F. **Ordering the Church to produce further discovery would violate the First Amendment right to practice and the First Amendment free exercise of religion, of the members of Aquarian Foundation.**

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. CONST. AMEND. I. This seemingly straightforward

pronouncement has generated volumes of interpretational jurisprudence. At its core, the First Amendment recognizes two spheres of sovereignty when deciding matters of government and religion. The religion clauses are designed to “prevent, as far as possible, the intrusion of either [religion or government] into the precincts of the other,” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), and are premised on the notion that “both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.” *Aguilar v. Felton*, 473 U.S. 402, 410 (1985) (quoting *McCullum v. Bd. of Ed.*, 333 U.S. 203, 212 (1948)). The First Amendment’s limitations on government extend to its judicial as well as its legislative branch. See *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190, 191 (1960).

The First Amendment permits hierarchical religious organizations to establish their own rules for internal discipline and to create tribunals for adjudicating disputes over these matters. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976); see also *Gates v. Seattle Archdiocese & Soc. of Jesus*, Wn. App. , 10 P.3d 435

(2000). Churches are afforded great latitude when they impose discipline on members or former members. *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 883 (9th Cir. 1987). When ecclesiastical tribunals are created, civil courts must accept the decisions of these tribunals as binding. *Milivojevich*, 426 U.S. at 725. See also: *United States v. Ballard*, 322 U.S. 78, 86-88 (1943) (holding that even fraud charges must be adjudicated without deciding religious questions.)

Government action may burden the free exercise of religion in two quite different ways: by interfering with an individual's observance or practice of a particular faith, see, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), and by encroaching on the church's ability to manage its internal affairs, see, e.g., *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996).

. According to the Ecclesiastical abstention Doctrine, civil courts may not re-determine the correctness of the interpretation of canonical text or some decision relating to the government of religion policy. Rather, the civil courts must accept as given

whatever the religious entity decides. In other words, where resolution of an issue before the civil court depends upon question of doctrine, ecclesiastical law, rule or custom, or church government, and the question has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive. *Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wn.2d 367, 485 P.2d 615 (1971).

It is a core tenet of First Amendment jurisprudence that, in resolving civil claims, courts must be careful not to intrude upon internal matters of church governance:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular

courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872). Accordingly, the autonomy of a church in managing its affairs and deciding matters of “church discipline . . . or the conformity of the members of the church to the standard of morals required of them” has long been afforded broad constitutional protection. *Id.* at 733.

Serbian Orthodox Church Diocese v. Milivojevich et al., 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976), involved the review of a decision by the Illinois Supreme Court reversing a determination by the governing body of the Serbian Orthodox Church as "arbitrary" under the "fraud, collusion, or arbitrariness" exception announced in *Gonzalez v. Archbishop*, 280 U.S. 1, 16, 50 S.Ct. 5, 7 (1929). The Supreme Court rejected the Illinois court's application of the exception, holding that a court could not second-guess a Church's decision-making process.

The Supreme Court had established in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727, 20 L.Ed. 666 (1872), that decisions of the proper church tribunals on ecclesiastical matters, although affecting civil rights, were final and binding on civil courts. Subsequently, dictum in *Gonzalez v. Archbishop*, 280 U.S.1, 16, 50 S.Ct.5, 7 (1929) suggested a possible exception to the *Watson* rule: the decisions of ecclesiastical tribunals might be subject to civil court review as the products of "fraud, collusion, or arbitrariness." See *Serbian Orthodox Church Diocese v. Milivojevich*, 426 U.S. at 711-12, 96 S.Ct. at 2381.

[W]hether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness" exception--in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations--is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church adjudicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious

controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.

426 U.S. at 713, 96 S.Ct. at 2382 (footnote omitted).

The Supreme Court has recognized an exception to the doctrine of church autonomy when neutral principles of law may be applied to resolve disputes over ownership of church property. These exceptions, though, have been narrowly drawn for reasons aptly expressed by the Supreme Court in *Watson* over a century ago, and more recently in *Milivojevich*, and *Jones v. Wolf*. 433 U.S. 595 (1979).

If civil courts undertake to resolve essentially religious controversies, “the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern” *Milivojevich*, 426 U.S. at 710 (quoting *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969)).

Washington law allows courts to regulate secular matters in church disputes by civil or criminal law, provided that neutral principles of law are applied. See, e.g., *Southside Tabernacle v. Pentecostal Church of God, Pacific Northwest Dist., Inc.*, 32 Wn. App. 814, 817-20, 650 P.2d 231 (1982).

Milivojevich involved an intra-church dispute over control of the property and assets of the Serbian Eastern Orthodox Diocese for the United States and Canada. *Milivojevich*, 426 U.S. at 698-99. The Supreme Court rejected the Illinois Supreme Court's purported reliance on neutral principles of law in its holding that the Diocesan reorganization and Milivojevich's removal as Bishop were invalid, and outlined the broad autonomy our Constitution affords churches in deciding matters that touch upon religious doctrine. See *id.* at 720-26. Emphasizing that the First Amendment severely limits the role of civil courts in resolving "religious controversies that incidentally affect civil rights," *id.* at 711, the Court mandated judicial deference to the church if ownership determinations involve underlying questions of religious doctrine. *Id.* at 709-10 (citing *Presbyterian Church*, 393 U.S. at 449). Importantly, the Court noted that the principle of judicial deference is not limited to disputes over church property, but "applies with equal force to church disputes over church polity and church administration." *Id.* at 710.

The Supreme Court again addressed an intra-church dispute over property ownership in *Jones v. Wolf*, 443 U.S. 595. The Court

held that states may adopt neutral principles of law as a means of adjudicating such disputes without running afoul of First Amendment concerns, so long as resolution of ownership entails no inquiry into religious doctrine. 443 U.S. at 602-05. Called upon to decide which faction of the formerly united church congregation was entitled to possession of a specific parcel of land, the Court stated that civil courts have general authority to resolve such questions given the “obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.” Id. at 602. Even so, the Court emphasized that the First Amendment severely circumscribes the role civil courts may play in resolving such disputes; if interpretation of the instruments of ownership would require the court’s resolution of a religious controversy, the court must defer to ecclesiastical resolution of the doctrinal issue. Id. at 604.

A church’s decision to discipline members for conduct considered outside of the church’s moral code is an inherently religious function with which civil courts should not generally interfere. See *Watson*, 80 U.S. (13 Wall.) at 727. Courts have no

jurisdiction to “revise or question ordinary acts of church discipline” and “cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.” Id. at 730. This is because “the judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals.” Id. at 731.

The following cases decided the court could not decide a secular issue without the entanglement of religious doctrine or policies:

Paul v. Watchtower Bible & Tract Soc’y of N.Y., Inc., 819 F.2d 875, 881 (9th Cir. 1987) (noting that imposing tort liability for shunning on a church would “in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings,” the “intangible or emotional harms” that plaintiffs suffered as a result of her

shunning “are clearly not of the type that would justify the imposition of tort liability for religious conduct. No physical assault or battery occurred”).

Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468, 470-71 (8th Cir. 1993) (holding minister’s claim that the Synod violated its bylaws by removing his name from list of eligible ministers not justiciable by secular courts); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356-58 (D.C. Cir. 1990) (holding the application of age-discrimination law in the minister’s lawsuit against his church violative of the Free Exercise Clause); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493-95 (5th Cir. 1974) (holding application of Civil Rights Act to pastor’s claim of racial discrimination would encroach upon the church’s right to be free from secular interference and to decide for themselves matters of church government); *McClure v. Salvation Army*, 460 F.2d 553, 560-61 (5th Cir. 1972) (holding application of Title VII to the employment relationship between the Salvation Army and its ordained minister would involve a review that would cause improper state intrusion on matters of church governance).

Washington State law recognizes the Ministerial Exception. In *Fontana v. Diocese of Yakima*, 138 Wn. App. 421 (2007), the court held that the ministerial exception precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees. The court explained:

Division One of this court has recognized the ministerial exception. *Elvig v. Ackles*, 123 Wn. App. 491, 496-97, 98 P.3d 524 (2004). "Secular courts must avoid controversies between a church and its minister "because the introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state." *Id.* at 497 (quoting *Gates v. Catholic Archdiocese of Seattle*, 103 Wn. App. 160, 166, 10 P.3d 435 (2000)). Moreover, "[a]n investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty . . . could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

A very wide variety of issues are prohibited to be determined by the court system by the ecclesiastical abstention doctrine. See *Serbian Eastern Orthodox Diocese*, 426 U.S. at 718 (civil court could not reach defrocked bishop's contention that defrocking was not conducted in accord with church constitution, as such is impermissible under First and Fourteenth Amendments); Cf.

Murphy v. I.S.K. Con. of New England, Inc., 409 Mass. 842, 571 N.E.2d 340, 346-47 (1991) (where proof of outrage tort requires reading the Krishna scriptures to show harm to plaintiffs from their teachings, the conduct of teaching is inseparable from the holding of the Krishna beliefs and is absolutely privileged).

The complaints of plaintiffs fit squarely within the ministerial exception, because plaintiffs are the followers of a de-frocked minister. The complaints would require inquiry into the internal religious practices of Aquarian Foundation. Essentially, plaintiffs complain that they were ecclesiastically disciplined and that Reverend Werner failed to recommend one of them to run for the Board of Directors.

The causes of action that fit within the fraud exception were dismissed and this dismissal is not appealed.

After 2 opportunities to amend their complaint, plaintiffs have failed to identify any issues that would demonstrate a property right to which neutral principles of law could be applied.

Because the court has no jurisdiction over the remaining purported causes of action of plaintiffs, there is no basis to remand for continuing discovery in this matter.

CONCLUSION: The trial court decision should be affirmed in all aspects, without any remand for further discovery.

DATED this 30 day of July, 2009.

A handwritten signature in cursive script, appearing to read "Jean Schiedler-Brown".

Jean Schiedler-Brown, WSBA #7753

Attorney for Aquarian Foundation