IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 14, 2005 Session

BARBARA J. ANDERSON, ET AL. v. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., ET AL.

Appeal from the Circuit Court for Coffee County
No. 32382 John W. Rollins, Judge

No. M2004-01066-COA-R9-CV - Filed on January 19, 2007

Two former members of the Congregation of Jehovah's Witnesses filed suit against the church and its leaders for damages associated with their expulsion from the organization. The defendants filed a Tenn. R. Civ. P. 12.02(1) motion to dismiss their complaint on the ground that civil courts do not exercise jurisdiction over internal church matters. The trial court denied the motion. On interlocutory appeal, we hold that the trial court should have dismissed all of the plaintiffs' claims because they are barred by the First Amendment's protection of purely religious matters from interference by secular courts.

Tenn. R. App. P. 9 Interlocutory Appeal by Permission; Judgment of the Circuit Court Reversed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and DONALD P. HARRIS, SENIOR J., joined.

Paul D. Polidoro, Patterson, New York; Robb S. Harvey, Eileen Burkhalter Smith, Nashville, Tennessee, for the appellants, Watchtower Bible and Tract Society of New York, Inc., et al.

Jerre M. Hood, Winchester, Tennessee; J. Edward Bell, III, Georgetown, South Carolina, for the appellees Barbara J. Anderson, et al.

OPINION

Plaintiff Barbara J. Anderson was a lifelong Jehovah's Witness. Her husband, A. Joseph Anderson, also a plaintiff, was an elder of the church. Both were members of the Congregation of Jehovah's Witnesses in Manchester, Tennessee, but were expelled or "disfellowshipped" from the church, leading to this litigation.

Mr. and Ms. Anderson filed suit against various components of the church hierarchy and some specific church leaders[1] (collectively "Church") and asserted eight claims in their complaint: (1) defamation; (2) defamation to the congregation; (3) false light invasion of privacy; (4) interference with prospective economic advantage; (5) breach of fiduciary duty; (6) fraud; (7) intentional infliction of emotional distress; and (8) wrongful disfellowshipping. They asked for $20 million in compensatory and punitive damages.

The defendants responded to the complaint with a motion to dismiss under Rule 12 of the Tennessee Rules of Civil Procedure. They argued that under Tenn. R. Civ. P. 12.02(1), the trial court must dismiss all the plaintiffs' claims for lack of subject matter jurisdiction, because the doctrine of ecclesiastical abstention bars the civil courts from interfering in the internal affairs of religious bodies. They also moved for dismissal under Tenn. R. Civ. P. 12.02(6) arguing the complaint failed to state a claim for relief. The trial court denied the motion to dismiss.

I. STANDARD OF REVIEW

The motion at issue herein was in part a Tenn. R. Civ. P. 12.02(1) motion, alleging lack of subject matter jurisdiction. Subject matter jurisdiction involves a court's authority to adjudicate a controversy brought before it. *Cawood v. State*, 134 S.W.3d 159, 163 (Tenn. 2004); *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000). The question of whether a court has subject matter jurisdiction over a particular dispute is a question of law. *Heard v. Johnson*, 810 A.2d 871, 877 (D.D.C. 2002). Consequently, this court must review the trial court's decision on that issue under a *de novo* standard, without a presumption of correctness. *Cawood*, 134 S.W.3d at 163; *Letellier v. Letellier*, 40 S.W.3d 490, 493 (Tenn. 2001); *Northland Ins. Co.*, 33 S.W.3d at 729.

In determining whether this action should have been dismissed for lack of subject matter jurisdiction, we must consider whether the trial court "had the power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong." *Stinson v. State*, 344 S.W.2d 369, 373 (Tenn. 1961), *quoting Aladdin Industries, Inc. v. Associated Transport, Inc.*, 323 S.W.2d 222, 229 (1958). Subject matter jurisdiction is dependent upon the nature of the cause of action and the relief sought. *Northland Ins. Co.*, 33 S.W.3d at 729, *citing Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994). Thus, in order to determine if a court has authority to hear and decide a particular controversy, it is necessary to identify and examine the nature or gravamen of the case.

Even though we review the trial court's decision on subject matter jurisdiction as a question of law, we must approach that analysis in the case before us in much the same way as a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim. That is because a facial challenge to the

[1] The Complaint named as defendants the Religious Order of Jehovah's Witnesses, the Watchtower Bible and Tract Society of New York, Inc., the Manchester Congregation of Jehovah's Witnesses, and numerous other divisions of the church, as well as individual elders of the Manchester congregation and spokesmen for the national organization The appellants' brief asserts that some of the named defendants "are not related to Jehovah's Witnesses in any way," including Watchtower Enterprises, LLC. Watchtower Foundation, Inc., Watchtower Associates, Ltd., and the Watchtower Group, Inc. We need not decide those issues in this appeal.

court's subject matter jurisdiction is based on the allegation that the complaint fails to allege facts that show that the court has power to hear the case.[2] *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994) (explaining the two types of attacks based on subject matter jurisdiction, facial and factual); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980); *Heard v. Johnson*, 810 A.2d. at 877.

> In deciding a facial challenge, the court considers the impugned pleading and nothing else. If a complaint attacked on its face competently alleges any facts which, if true, would establish grounds for subject matter jurisdiction, the court must uncritically accept those facts, end its inquiry, and deny the dismissal motion.

Staats v. McKinnon, No. M2005-01631-COA-R9-CV, 2006 WL 1168826 (Tenn. Ct. App. 2006) (citations omitted); see also *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995); *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929, 938 n.13 (Mass. 2002).

In the case before us, the Church argued that the complaint asserted causes of action based on an intrachurch dispute that the courts had no authority to adjudicate, thus making a facial challenge to the court's jurisdiction based on the allegations of the complaint. Accordingly, we will apply the principles governing Tenn. R. Civ. P. 12.02(6) motions. *Petruska v. Gannon University*, 462 F.3d 294 (3rd Cir. 2006); *United States v. Ritchie*, 15 F.3d at 598, citing *Scheuer v. Rhodes*, 416 U.S. 232, 235-37 (1974) (holding that in a facial attack, the court must take all of the material allegations in the complaint as true and construe them in the lights most favorable to the nonmoving party); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d at 511.

The first principle is that, for the purposes of the motion, the defendants admit the truth of all relevant and material averments contained in the complaint, but assert that such facts do not constitute a cause of action. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997); *Davis v. The Tennessean*, 83 S.W.3d 125, 127 (Tenn. Ct. App. 2001). Second, we should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn.1994).

The question is whether, viewing the factual allegations as prescribed, the plaintiffs have stated a claim that the courts have authority to hear, or, stated differently, have subject matter jurisdiction to adjudicate.[3]

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[2] A court must distinguish between motions to dismiss for lack of subject matter jurisdiction which attack the complaint on its face and those which attack the existence of jurisdiction in fact. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996).

[3] Apparently some courts would view the attack on subject matter jurisdiction made in this case as a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim, characterizing the ecclesiastical abstention doctrine as a defense to any relief. *See, e.g., Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002).

II. FACTUAL ALLEGATIONS

The following account is derived from the allegations in the complaint, which we must assume are true.

Barbara Anderson worked as a volunteer researcher at the international headquarters of the Jehovah's Witnesses in Brooklyn, New York from 1982 to 1992. Ms. Anderson alleged that during the last years of her work at international headquarters she became concerned about the organization's handling of child sexual abuse allegations. She was of the opinion that Church policies and procedures "operated to the detriment of the victim and also to the detriment of the general congregation where the alleged molester or abuser was an active member. . . ."

After she left her headquarters position, Ms. Anderson continued doing research for the organization from her home. She was also quietly assisting Jehovah's Witness abuse victims and interested parties with information and advice. In the year 2000, she began working with an elder from a congregation in Kentucky in a joint effort to change the policies of the church.

When these efforts proved to be fruitless, the elder resigned his position and decided to go public with his concerns. Producers of *Dateline*, an NBC news television program, invited the elder and Ms. Anderson to be interviewed on the program. According to the complaint, officials of the governing body of the church learned about the planned broadcast and told Joseph Anderson he could be removed as an elder if he did not prevent his wife from appearing on the show. When that warning did not achieve the desired result, they allegedly induced the elders of the Manchester congregation to charge Barbara Anderson with apostasy and to begin disciplinary proceedings against her. According to the Andersons' complaint, apostasy is defined in English common law as turning away from one's faith, and the Jehovah's Witnesses define apostasy as including stirring up unrest or causing divisions within their church.

On May 10, 2002, Ms. Anderson appeared before a judicial committee of the Manchester congregation for trial on the charges of submitting an article to an apostate journal and causing division in the church. New charges were leveled against Ms. Anderson the following week: disrupting the unity of the congregation and "undermining confidence in Jehovah's arrangements."

Ms. Anderson declined to attend the second hearing. On May 19, 2002, the elders of the Manchester congregation found Ms. Anderson guilty of causing divisions in the church and ordered that she be disfellowshipped from the church.

The *Dateline* broadcast was aired on May 28, 2002. On June 5, Joseph Anderson sent a resignation letter to Watchtower Headquarters. He too was disfellowshipped. On June 8, the *Dateline* program was broadcast a second time. Stories about the *Dateline* broadcasts were published in the *New York Post*, the *Washington Post*, and the *Tennessean*, both before and after they were aired. Reporters for these publications interviewed national and local officials of the Jehovah's Witnesses about the disciplinary proceedings against Ms. Anderson and the Kentucky elder. The

spokesmen (all of whom have been named as defendants in this lawsuit) said that the proceedings involved "various spiritual violations."

III. COURT PROCEEDINGS

Barbara Anderson filed a complaint in the Circuit Court of Coffee County, and an amended complaint was filed on June 2, 2003, with Mr. Anderson joining as an additional plaintiff. The complaint described in detail the hierarchical structure of the Jehovah's Witnesses organization and asserted that all the individuals and entities whose acts were complained of performed those acts as agents of the governing body of the Church and of the Church itself and, thus, that the Church was vicariously liable for the conduct of those acting in its name.

Mr. and Ms. Anderson recounted the events recited above and described the effect their expulsion from the church had on their lives. Because of the doctrines of Jehovah's Witnesses, disfellowship carries with it serious consequences. All members of the church are instructed to shun those who have been disfellowshipped. Shunning involves ostracizing those individuals and avoiding every kind of social interaction with them. For the Andersons, this meant losing contact with their only child and grandchild.

As stated earlier, Mr. and Ms. Anderson recited eight claims or causes of action in their complaint, all of which related to or resulted from the actions the Church took against them. In its motion to dismiss, the Church argued that the trial court was required to dismiss all the plaintiffs' claims for lack of subject matter jurisdiction because civil courts have no jurisdiction to review decisions of religious bodies on matters of religious doctrine, discipline, or governance.

The trial court denied the Church's motion to dismiss, holding that the doctrine of ecclesiastical abstention did not preclude jurisdiction over the plaintiffs' claims. While the court determined that it was appropriate to allow the lawsuit to go forward, it concluded its order with these words:

> Even in the absence of the doctrine of 'ecclesiastical abstention' which this writer wholeheartedly embraces, the litigants can rest assured that the troubled soul of this trial judge has no desire to sit in judgment on matters of internal discipline, faith, church customs, and church government of his fellow human beings. Nor to permit a jury to do likewise.

IV. JUDICIAL REVIEW OF ECCLESIASTICAL MATTERS

The Church argues that the trial court lacks subject matter jurisdiction over this action because it involves ecclesiastical matters. That argument rests upon a principle long a part of American law, which is that courts in this country do not exercise jurisdiction over purely ecclesiastical, religious, or theological disputes. "[C]ourts have no ecclesiastic jurisdiction, and do

not pass upon questions of faith, religion, or conscience." *Bentley v. Shanks*, 348 S.W.2d 900, 903 (Tenn. Ct. App. 1960); *see also Nance v. Busby*, 18 S.W. 874, 879 (Tenn. 1891).

This ecclesiastical abstention doctrine (sometimes called the church autonomy doctrine, *see, e.g., Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002)), is rooted in the First Amendment to the United States Constitution, and its purpose is to prevent the civil courts from engaging in unwarranted interference with the practices, internal affairs, and management of religious organizations.[4] *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Murrell v. Bentley*, 286 S.W.2d 359, 365 (Tenn. Ct. App. 1954). Civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976); *Presbyterian Church v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. 440, 446-47 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 116; *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

"A consequence of this Nation's fundamental belief in the separation of church and state is that, under most circumstances, the First and Fourteenth Amendments preclude civil courts from adjudicating church fights that require extensive inquiry into matters of 'ecclesiastical cognizance.'" *Burgess v. Rock Creek Baptist Church*, 734 F.Supp. 30, 31 (D.D.C. 1990), *citing Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 709-10. The underlying premise is that our system of government, through the First Amendment, "has secured religious liberty from the invasion of the civil authority." *Watson v. Jones*, 80 U.S. 679, 730 (13 Wall.)(1872).

The United States Supreme Court has long held that the First Amendment requires civil courts to refrain from reviewing or interfering with decisions made by a religious body on matters of church discipline, faith, or practice. *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 941-42 (6th Cir. 1992). Over one hundred and thirty years ago, the Court described the boundaries that courts must observe when presented with disputes between religious bodies and their members:

> The rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, or custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

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[4] The First Amendment's free exercise guarantee and its prohibition against laws respecting the establishment of religion have been made wholly applicable to the states by the Fourteenth Amendment. *School District of Abington Township v. Schempp*, 374 U.S. 203, 215-216 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Courts have at times varied in their identification of the source of the ecclesiastical abstention doctrine as the Free Exercise Clause or the Establishment Clause, or both. *See Rosati v. Toledo Catholic Diocese*, 233 F. Supp 2d 917, 920 (N.D. Ohio 2002)(stating that the majority hold that the doctrine is founded in the Free Exercise Clause)..

Watson v. Jones, 80 U.S. 679 at 727. The Tennessee Supreme Court similarly held long ago that courts of this State are without jurisdiction to inquire into or supervise the decisions of religious organizations.[5] *Nance v. Busby*, 18 S.W. at 881, citing *Watson*, 80 U.S. at 727. Tennessee courts have continued to refuse to hear disputes that are perceived to be purely ecclesiastical in nature. *Travers v. Abbey*, 58 S.W. 247, 247-48 (Tenn. 1900) (holding that dispute over removal of pastor did not involve property or personal rights, related to governance of and discipline by church, and courts would not review the decisions of ecclesiastical judicatures); *Martin v. Lewis*, 688 S.W.2d 72, 73 (Tenn. Ct. App. 1985).

Thus, decisions by the governing bodies of religious organizations on matters related to doctrine, faith, or church governance and discipline are not reviewable by civil courts. *Mason v. Winstead*, 265 S.W.2d 561, 563 (Tenn. 1954) (holding that in ecclesiastical matters, church tribunals have exclusive authority without interference from the civil courts). Stated differently, courts will defer to the highest tribunal in a religious organization[6] on questions of discipline, faith, or ecclesiastical rule, custom, or law and will not interfere with such decisions. The ecclesiastical abstention doctrine prohibits secular courts from redetermining the correctness of a decision by a religious tribunal on issues of canon law, religious doctrine, or church governance. *Milivojevich*, 426 U.S. at 710. "The Constitution forbids secular courts from deciding whether religious doctrine or ecclesiastical law supports a particular decision made by church authorities." *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 470-71 (8th Cir. 1993); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991).

Because of the freedom of religion guaranteed in the Constitution, religious organizations may establish their own rules and regulations for internal discipline and government and create tribunals for adjudicating disputes over these matters. *Milivojevich*, 426 U.S. at 724. When this choice is exercised, the Constitution requires that civil courts accept such tribunals' decisions as

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[5] Because of its wording, the Tennessee Constitution's freedom of religion provision has been interpreted as possibly providing greater protection than the First Amendment to the United States Constitution. *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107 (Tenn. 1975) (stating that Tenn. Const. art. I, §3 "contains a substantially stronger guaranty of religious freedoms"); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1975) (stating that art. I, § 3 of the Tennessee Constitution is "broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience"). Nonetheless, the Tennessee Supreme Court has never articulated a higher degree of protection or more expansive protection than that of the First Amendment. *Commissioner of Transportation v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 743, 761 (Tenn. Ct. App. 2001). Instead, the Court has applied the same standards and used the same principles as those used to interpret the First Amendment's Free Exercise Clause. *Id*. We will do the same.

[6] Although the United States Supreme Court's statements regarding ecclesiastical abstention speak in terms of hierarchical church organizations, there is no reason to refuse to apply the First Amendment analysis to congregational churches or those religious organizations not hierarchical in structure. *See Heard v. Johnson*, 810 A.2d 871, 879 n.4 (D.C. Circ. 2002); *Burgess v. Rock Creek Baptist Church*, 734 F.Supp. at 31 n. 2; *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d 301, 308 (Mass. 2004); *Guinn v. The Church of Christ of Collinsville*, 775 P.2d 766, 771 n.18 (Okla. 1989). Where, as in the case before us, the religious body has adopted a hierarchical polity, it is not necessary to examine the application of the doctrine in other types of organizations.

binding. *Id.*, 426 US. at 709.[7] Decisions of the highest church tribunal are binding on civil courts in "all cases of ecclesiastical cognizance." *Watson*, 80 U.S. at 729. Claims that a religious tribunal or organization violated its own rules are not reviewable by courts. *Drevlow*, 991 F.2d at 470-71; *Travers v. Abbey*, 58 S.W. at 248 (stating that whether the proceedings were irregularly conducted was a question for church authorities, not the courts).

Non-intervention in intrachurch disputes is also based on the voluntary nature of membership in religious organizations. In the United States people have an unquestioned right to form voluntary religious associations and to organize the governance of their congregations in whatever way they deem appropriate. *Watson*, 80 U.S. at 728-29. By joining such organizations, individuals consent to their governing structures and bind themselves to submit to the organization's rules. *Id.*

> 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, 80 U.S. at 729. If secular courts were to become embroiled in ecclesiastical controversies within a religious body, those courts would be allowed, or required, to substitute their judgment for that of church governing bodies on issues of doctrine, belief, or practice.

While the First Amendment's prohibition on civil or secular courts deciding religious, ecclesiastical, or doctrinal disputes is absolute, that does not mean that religious organizations are immune from all suits. The abstention doctrine itself applies only to issues that would require the courts to examine or determine questions of religious belief or practice. "[N]ot every civil court decision . . . jeopardizes values protected by the First Amendment." *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. at 449. Consequently, religious organizations are subject to suit for many of their activities in the secular world, such as contracts with outside parties. Such suits do not involve questions of ecclesiastical cognizance.

Even where intrachurch disputes occur, as in the case before us, courts still have jurisdiction to decide some issues, as long as that resolution will not require the court to engage in extensive inquiry into religious law or doctrine. *Burgess v. Rock Creek Baptist Church*, 734 F.Supp. at 32 (stating that courts can adjudicate church disputes "under narrow circumstances.") Where a court can decide a dispute within a church without unduly entangling itself in matters of doctrine or essentially religious questions, the First Amendment may permit a court to adjudicate the matter. *Milivojevich*, 426 U.S. at 710.

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[7] "[T]he First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." *Milivojevich*, 426 U.S. at 709.

For example, where resolution of an intrachurch property dispute does not risk the prohibited court entanglement and involves only nondoctrinal matters, courts may decide such controversies. In doing so, they apply "neutral principles of law" developed for use in all property disputes. *Jones v. Wolf*, 443 U.S. 595, 604 (1979) (holding that a state is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute so long as there no need to examine a church's ecclesiastical polity or doctrine); *Presbyterian Church v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. at 449 (holding that the state has a legitimate interest in adjudicating disputes over church property but may only use neutral principles of law).

The neutral principles approach, created originally to deal with church property disputes, has been used by courts in other types of cases involving civil rights. Tennessee courts have exercised jurisdiction over actions arising from intrachurch disputes when other civil or property rights are involved. *Ward v. Crisp*, 226 S.W.2d 273, 275 (Tenn. 1949) (involving construction of trust on church property); *Crenshaw v. Barbour*, 162 Tenn. 235, 241, 365 S.W.2d 87, 90 (1931); *Rodgers v. Burnett*, 65 S.W. 408, 410 (1910). Nonetheless, they have been careful in those cases to decide only the issues dealing with the civil or property right involved using neutral principles of law. *Landrith v. Hudgins*, 120 S.W. 783, 807 (Tenn. 1908); *Nance v. Busby*, 18 S.W. at 879; *Fairmont Presbyterian Church, Inc. v. Presbytery of the Holston of the Presbyterian Church of the United States*, 531 S.W.2d 301, 306 (Tenn. Ct. App. 1975).

Regardless of the cause of action asserted, or the label given it by a plaintiff, the question is whether resolution of the claims would require that the courts become involved in ecclesiastical matters. The neutral principles doctrine "has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be." *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir.1986). Courts presiding over church disputes must be careful not to violate the protections of the First Amendment by deciding who prevails on the basis of resolution of the underlying controversy over religious doctrine and practice. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (holding that if intrachurch property dispute required interpreting and weighing church doctrine, a court could not intervene; if, however, neutral principles of law could be applied without determining underlying question of religious doctrine and practice, a court could intervene); *Burgess v. Rock Creek Baptist Church*, 734 F.Supp. at 31.

For example, even disputes over church property between rival factions within a religious organization may create the danger that the State, through the court, will determine the rights to the property on the basis of the doctrinal beliefs or interpretations espoused by each party. *See Milivojevich*, 426 U.S. at 709. Even where property rights are involved, judicial intervention is still prohibited where courts would be called upon to resolve underlying disputes over religious doctrine or practice. *Id.*, 426 U.S. at 709-10 (holding that because rights to church property were tied to decisions over bishop defrocking, courts could not decide property rights without deciding the underlying religious disputes, which was prohibited); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989); *Hutchison v. Thomas*, 789 F.2d at 396. *See also Jones v. Wolf*, 443 U.S. at 602 (1979) ("the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice"). The First Amendment "commands civil

courts to decide church property disputes without resolving underlying controversies over religious doctrine." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. at 449.

In a case involving both ownership of church property and the excommunication of one faction of a church by another, the Tennessee Supreme Court explained the difficulties courts would confront if they were to deal with matters of religious doctrine or church governance in the name of deciding other rights:

> . . . the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination must be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws . . . and would in effect, transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions.

Nance, 18 S.W. at 880. While, as a practical matter, it can sometimes prove difficult to distinguish between disputes that can be resolved by neutral principles of law and those that may involve the court in "excessive entanglement" with matters of religious doctrine and organization, courts must make that distinction so as to avoid inquiry prohibited by the First Amendment.

Based on the foregoing, it is clear that the first question in the case before us is whether the claims raised by Mr. and Mrs. Anderson can be adjudicated without inquiry into the religious doctrine and practice of the Jehovah's Witnesses and without resolution of underlying religious controversies. *Abrams v. Watchtower Bible and Tract Society of New York, Inc.*, 715 N.E.2d 798, 802 (Ill. Ct. App. 1999); *O'Connor v. Diocese of Honolulu*, 885 P.2d 361, 367 (Haw. 1994).

We undertake our examination with the understanding that "when the First Amendment casts a shadow over the court's subject matter jurisdiction, the plaintiff is obliged to plead unqualified jurisdictional facts that clearly take the case outside the constitutional bar." *Heard v. Johnson*, 810 A.2d at 882, *quoting Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith v. Beards*, 680 A.2d 419, 430 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *see also Litica Corp. v. Sweetheart Cup Co.*, 790 F. Supp 702, 706 (E.D. Mich. 1992) ("courts have required greater specificity in pleading where the case implicates conduct which is *prima facie* protected by the First Amendment."). Once challenged, the burden of establishing subject matter jurisdiction rests on the party asserting the jurisdiction. *Thomason v. Gaskill*, 315 U.S. 442 (1942).

V. CHURCH MEMBERSHIP DISPUTES

Most of the Andersons' claims stem from their disfellowshipping and the manner in which they were deprived of their memberships in the Jehovah's Witnesses. They allege the disfellowshipping itself was wrongful, and most of their other claims are based on consequences directly related to or flowing from that action. We begin with the fundamental issue of the Andersons' expulsion from the Congregation and their claims that this expulsion was wrongful.

The Church argues that the freedom of religious bodies to determine their own membership is such a fundamentally ecclesiastical matter that courts are prohibited from adjudicating disputes over membership or expulsion. We agree.

Because religious bodies are free to establish their own guidelines for membership and a governance system to resolve disputes about membership without interference from civil authorities, decisions to exclude persons from membership are not reviewable by civil courts. Courts will not interfere with the "fundamental ecclesiastical concern of determining who is and who is not a . . . member." *Burgess v. Rock Creek Baptist Church*, 734 F.Supp. at 33. Membership is necessarily ecclesiastical in nature because it defines the centralizing beliefs of the organization, and the First Amendment bars courts from reviewing decisions by church tribunals on whether a particular person should be admitted, expelled, or denied membership. *Abrams v. Watchtower Society*, 715 N.E.2d at 803. That has long been the rule. "We 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." *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 258 (1842).

In *Watson v. Jones*, *supra*, the United States Supreme Court listed some examples of matters over which the civil courts exercise no jurisdiction and which are exclusively within the power of a church body to decide, including "the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. at 733. The Court clearly rebuffed any idea that civil or secular courts should hear attacks on a church tribunal's decision in such matters. *Id*., 80 U.S. at 733-34. If the courts were to inquire into allegations that the church tribunal exceeded its authority or did not follow church law or similar claims, then

> the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws . . . .

Id., 80 U.S. at 733.

The First Amendment prohibits court review of a church's decision to expel a member. *See, e.g., Glass v. First United Pentecostal Church of DeRidder*, 676 S.2d 724, 728 (La. App. 1996) (holding that court had no jurisdiction over expulsion from church based on tenet against suits among members); *Crosby v. Lee*, 76 S.E.2d 856, 859 (Ga. App. 1953) (holding that questions relating to the faith and practice of members belong to the church judicatories, to whose ecclesiastical jurisdiction members have voluntarily subjected themselves). A church decision as to the status of a person's church membership is binding and not subject to review, reconsideration, or reversal by a court. *Fowler v. Bailey*, 844 P.2d 141, 145 (Okla. 1992).

In *Serbian Eastern Orthodox Diocese v. Milivojevich, supra*, the United States Supreme Court reversed a lower court's setting aside a church decision to defrock a bishop because the lower court's judgment

> rest[ed] upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitut[ed] its own inquiry into church policy and resolutions based thereon of those disputes.

Milivojevich, 426 U.S. at 708. The same would be true of a court adjudication of a former member's expulsion from the church.

Stated another way, expulsion from a religious society is not a harm for which courts can grant a remedy. *Grunwald v. Bornfreund*, 696 F.Supp. 838, 840-41 (E.D.N.Y.1988). Church disciplinary or expulsion proceedings cannot be reviewed by courts for the purpose of granting reinstatement or other relief. *Fowler v. Bailey*, 844 P.2d at 144. The Tennessee Supreme Court determined long ago that a member of a religious organization who had been excommunicated was without remedy in the State courts. *Nance v. Busby*, 18 S.W. at 881. Our courts have continued to hold that a church's decision as to who should be granted or allowed to maintain membership is not subject to review by the courts. *See, e.g., Martin v. Lewis*, 688 S.W.2d at 74; *Bentley v. Shanks*, 348 S.W.2d at 904. The long-established rule is that courts "will not intermeddle or interfere with the internal administration of the affairs of the church, such as disciplinary cases, cases involving the exscinding of members, and the administration of rules and ordinances and the like, where the ecclesiastical body acting, or undertaking to do so, is clothed with the power and jurisdiction to act in the matter . . ." *Cannon v. Hickman*, 4 Tenn. App. 588, 591 (Tenn. Ct. App. 1927), *citing Landrith v. Hudgins*, 120 S.W. at 807.

As the United States Supreme Court has made clear in *Watson* and *Milivojevich*, those who voluntarily join a religious organization consent to its rules and governance structure, and to allow such persons to appeal to secular courts would subvert religious bodies and render the consent of members meaningless. By deferring to the highest judicatory of a religious body, courts also defer to the choice made by church members who voluntarily joined the body and agreed to its rules and governance.

Because of the inherently ecclesiastical nature of membership decisions, disputes over membership are not subject to the "neutral principles" doctrine. *Burgess v. Rock Creek Baptist Church,* 734 F.Supp. at 32. The neutral principles doctrine "has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be." *Hutchison v. Thomas*, 789 F.2d at 396. Further, membership in a church or religious organization is not a property or civil right that would make available use of neutral principles of law. *Fowler v. Bailey,* 844 P.2d at 144-45.

Tennessee recognizes no cause of action for wrongful expulsion from a religious organization. Our courts will not review such decisions, but will take as binding the decision of the church. A party aggrieved by such action has no redress in the courts, but must look instead to the organization itself. *Martin v. Lewis,* 688 S.W.2d at 74; *Bentley v. Shanks,* 348 S.W.2d at 904. Otherwise, courts would be called upon to determine the correctness of a church's decision about whether a person had complied with religious doctrine and practices. That is exactly the kind of inquiry the First Amendment prohibits. *Milivojevich*, 426 U.S. at 710. By its very nature, the inquiry as to the correctness of or circumstances surrounding a church's decision on membership "plunges an inquisitor into a maelstrom of Church policy, administration, and governance" and is barred by the First Amendment. *Natal v. Christian & Missionary Alliance*, 878 F.2d at 1578.

Consequently, we find there is clear and controlling authority that Tennessee courts have no authority to decide questions of membership or the correctness of expulsion from membership. In 1892, our Supreme Court stated it had found "no reported case where any civil court in this country has undertaken to overrule the fact of excommunication upon any ground whatever." *Nance v. Busby*, 18 S.W. at 879. We have also found no cases, in this jurisdiction or elsewhere, where a court exercised jurisdiction to adjudicate whether a church member was wrongfully expelled.

VI. ARGUMENTS THAT ABSTENTION DOCTRINE SHOULD NOT APPLY

While acknowledging that the ecclesiastical abstention doctrine limits the power of the courts to adjudicate intrachurch disputes, the Andersons argue that they have carefully worded the allegations in their complaint so as to avoid application of the doctrine in this case. They assert that the Church's actions in disfellowshipping them were fraudulent and taken for secular reasons and that the abstention doctrine is subject to an exception for fraud. Additionally, they argue that they are not challenging the validity of any Jehovah's Witness doctrine or practice, but, rather, are asking the courts to decide whether the Church's proffered religious reason actually motivated their disfellowshipping or was merely a pretext. We begin with the second argument.

A. Pretext

To determine whether the reasons given by the Church for the expulsion were pretextual, a court would necessarily have to inquire into the correctness of the disfellowshipping and whether it was consistent with the Church's religious doctrine and internal policies. This is an inquiry the courts cannot make because it would result in excessive inquiry into ecclesiastical matters in

contravention of the First Amendment. Where the church decision at issue is purely and fundamentally ecclesiastical in nature, "attempts to separate arguably impermissible discriminatory grounds for a decision from grounds stemming from church beliefs excessively entangles a court with religion." *Van Osdol v. Vogt*, 908 P.2d 1122, 1132 (Colo. 1996).

Regardless of the basis of the attack, courts cannot examine the correctness of a decision to expel a member. This is true when the claim is that the church violated its own rules or bylaws. *See Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d at 470-71; *Natal v. Christian and Missionary Alliance*, 878 F.2d at 1577 (holding that an allegation that church did not follow its own rules in discharging minister from employment was unavailing); *Martin v. Lewis*, 688 S.W.2d at 72 (reversing a trial court's judgment invalidating a vote on membership that had been based on a finding that the vote had been taken not in compliance with church law and was arbitrary). Thus, even if an expulsion or disciplinary proceeding is irregular, the church's decision is not reviewable. *Fowler v. Bailey*, 844 P.2d at 145.

Similarly, courts cannot review the fairness or correctness of a decision to expel someone from church membership. *Burgess v. Rock Creek Baptist Church*, 734 F.Supp. at 33. The ecclesiastical abstention doctrine prohibits secular courts from redetermining the correctness of a decision by a religious tribunal on issues of canon law, religious doctrine, or church governance. *Milivojevich*, 426 U.S. at 710. "The Constitution forbids secular courts from deciding whether religious doctrine or ecclesiastical law supports a particular decision made by church authorities." *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d at 470-71.

An argument that the religious reasons given were a mere pretext for some other reason asks that the court determine that the proffered religious reasons have no basis. It is clear that courts are precluded from making an inquiry that would lead to such a determination. The church decision at issue in this case is the decision to expel members, a decision protected from court review. The charges brought by the church against Ms. Anderson included apostasy, disrupting the unity of the congregation, and undermining confidence in the church's governance. The Andersons do not argue these allegations, if true, are not a reason for disfellowshipping. Whether or not Ms. Anderson's conduct merited expulsion is a question to be answered by the church to whose governance she voluntarily submitted herself. Courts cannot review the church's decision.

Where purely ecclesiastical and protected actions are involved, inquiring into pretext "inevitably encourages sophistry and leads a court nowhere. Once the church states that the decision was, even in part, doctrinal, then the court would either have to invoke the First Amendment and cease inquiry or enter into the impermissible activity of analyzing church doctrine and perhaps weighing the importance of a particular area of the doctrine." *Van Osdol,* 908 P.2d at 1128. Thus, no pretext inquiry is permitted.

In *Davis v. Church of Jesus Christ of Latter Day Saints*, 852 P.2d 640 (Mont. 1993), *overruled on other grounds, Giko v. Permann*, 130 P.3d 155 (Mont. 2006), the plaintiff asserted the church attempted to pressure her into disadvantageously settling a claim against the church

(involving personal injury based on premise liability) by, *inter alia*, threatening to excommunicate her and denying her Temple Recommend and other denominational status. The court held that those matters could not be evaluated without inquiry into the beliefs and practices of the church. *Id*. at 647-48. The court found that in order to determine if the denials were appropriate, it would have to determine whether there had been a deviation from church doctrine and whether the denial was "rooted in religious belief." In the last analysis, the court was being called on to "determine the religious basis for an ecclesiastical decision," and found that to be an intrusion into religious matters prohibited by the First Amendment. 852 P.2d at 648. We agree with the reasoning in both *Davis* and *Van Osdol*. Accordingly, an examination of the reasons for the expulsion is prohibited by the First Amendment.

The Andersons rely on several cases to support their argument that the courts can determine whether the reasons given by the Church for their disfellowshipping were pretextual. The cases cited, however, are inapplicable. They are employment cases that deal with claims of illegal employment discrimination by religious organizations. *See Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Circuit 1993) (parochial school's assertion that it had terminated employment of lay teacher for religious reasons did not insulate it from court inquiry into whether the purported religious reasons were merely a pretext for age discrimination); *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 628 (1986) (involving teacher's discharge by a religious school and the state civil rights commission's authority to investigate the teacher's claim of sex discrimination); *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993) (allowing a pretext hearing for a lay teacher's claim of discrimination); *Basinger v. Pilarczyk*, 707 N.E.2d 1149 (1997) (holding court could determine factual question of whether proffered religious reason for termination of employment of teacher was pretext for age discrimination).

The Andersons' claims do not involve employment action by the Church, nor do they involve statutorily protected employment rights, such as non-discrimination on the basis of age, gender or race.[8] Consequently, much of the analysis in the cited cases simply does not apply to the case before us. In employment discrimination cases, the burden-shifting analysis includes a pretext component. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Thus, where the statute could be applied without violating Constitutional protections, the issue of pretext was before the courts in the cited cases. That analytical framework does not apply herein.

Further, the cases relied on by the Andersons dealt with lay employees, and the statutes at issue in those cases have been applied to religious organizations only when dealing with lay employees. As general rule, religion-neutral statutes prohibiting specific types of discrimination can be applied to religious organizations where the dispute is about employees in non-pastoral jobs.

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[8] In cases involving the application of a statute to a religious organization, courts generally analyze whether the statute may be applied without violating the Establishment Clause by using a three-prong test: (1) whether the statute has a secular purpose, (2) whether its purpose or primary effect neither advances nor inhibits religion, and (3) whether it fosters an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *DeMarco v. Holy Cross High School*, 4 F.3d at 168; *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d at 328; *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1001 (D. Kansas 2004).

Heard v. Johnson, 801 A.2d at 880. The cases cited by the Andersons are inapposite to disputes arising from clearly ecclesiastical decisions. *See Minker v. Baltimore United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990).

Courts have recognized the distinction between the constitutionally-protected area of employment of ministers, which is purely ecclesiastical, and the secular activities of religious organizations as employers of other types of employees. In the situation of employees without pastoral or religious duties, employment disputes can be decided without intrusion into matters of religious belief or practice. *See Young v. The Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 186 (7th Cir. 1994) (holding that Title VII may apply to religious organizations, but not to matters touching the relationship between a church and its ministers).

There is a different rule for ministers, and employment decisions affecting those with pastoral responsibilities are not subject to court review. *See Dolquist v. Heartland Presbytery*, 342 F. Supp.2d 996, 1002 (D. Kansas 2004) (listing the federal circuits that had found that the First Amendment protects churches from employment claims by ministers). It has been uniformly held that decisions as to hiring or firing of pastors, as well as other issues regarding minister employment, are protected from court inquiry because such decisions necessarily involve questions of religious practice or governance. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. at 116 ("Freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference"); *Werft v. Desert Southwest Annual Conference of United Methodist Church*, 377 F.3d 1099, 1104 (9th Cir. 2004) (holding that a minister's Title VII claims based on failure to accommodate his disability involved the employment relationship between church and minister and is therefore barred); *Bell v Presbyterian Church*, 126 F.3d 328, 331(4th Cir. 1997) ("It has thus become established that the decisions of religious entities about the appointment and removal of ministers and persons in other positions of similar theological significance are beyond the ken of civil courts"); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d at 1356 (stating "whose voice speaks for the church is *per se* a religious matter" and finding that every court confronting a minister employment dispute has held that such decisions must be left to ecclesiastical institutions); *Hutchison v. Thomas*, 789 F.2d at 396 (declining to assert jurisdiction over dispute about plaintiff's employment as a minister); *McClure v. Salvation Army*, 460 F.2d 553, 558-60 (5th Cir. 1972) (showing that minister's assignment is a matter of church governance and not subject to court review because "[m]atters touching [the relationship between a church and its ministers] must necessarily be recognized as of prime ecclesiastical concern"); *Kaufmann v. Sheehan*, 707 F.2d 355, 358-59 (8th Cir. 1983); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974); *Van Osdol v. Vogt*, 908 P.2d at 1126 (holding that minister choice is inextricably related to religious belief and "[t]he choice of a minister is a unique distillation of a belief system." *Natal v. The Christian and Missionary Alliance*, 878 F.2d at 1578; *Mason v. Winstead*, 265 S.W.2d at 563.

Because of the First Amendment, courts are precluded from inquiring into the reasons behind pastoral employment decisions. *See Dolquist v. Heartland Presbytery*, 342 F.Supp. at 1002-1003 (listing decisions). In minister choice cases, including those brought as employment discrimination

claims, courts have declined to undertake an examination of the proffered reasons for the challenged church action. *See, e.g.*, *EEOC v. Catholic University of America*, 83 F.3d 455, 461-64 (D.C. Cir. 1996) (holding that in minister employment, reasons for the decision need not be ecclesiastical in nature but only related to pastoral employment and inquiring into reasons would involve excessive entanglement with religion). In *Minker v. Baltimore Annual Conf. of United Methodist Church*, *supra*, the court held that it need not find that the factors relied on by the church were ecclesiastical in nature, but only need find that they were related to a pastoral appointment determination. *Minker*, 894 F.2d at 1357. A church may "adopt its own idiosyncratic reasons for appointing pastors." *Id.* *See also, Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999) (stating that requiring a church to articulate a religious reason for a minister employment decision is an unconstitutional interference with religion).

A church need not proffer any religious justification for its employment decisions regarding ministers because the First Amendment "protects the act of a decision rather than the motivation." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *see also Rosati v. Toledo Catholic Diocese*, 233 F. Supp.2d 917, 922 (N.D. Ohio 2002); *Young v. The Northern Illinois Conference of United Methodist Church*, 21 F.3d at 186. Once it is determined that the decision at issue is protected from court review, the nature of the claim attacking that decision is irrelevant. *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003).

The basis for all the Andersons' claims is the decision of the Church to disfellowship them, which, as explained earlier, is clearly an ecclesiastical matter. Therefore, their case is similar to the cases involving church decisions about minister employment, not to cases involving lay employees. In terms of their fundamental, core, ecclesiastical nature, church membership decisions are equivalent to and as important as minister choice.

> While the religious principles that a church espouses and the minister or priest and other officials who "govern" are certainly important, an indispensable part of any church is the collection of individuals who have joined together in worship and constitute the church's membership.

Burgess Rock Creek Baptist Church, 734 F. Supp. at 33 (holding that, for the same reasons courts do not interfere in minister choice disputes, it would not interfere with a decision on who is or is not a member of the church). *See also, Kyritsis v. Vieron*, 382 S.W.2d 553, 559 (Tenn. Ct. App. 1964) (stating that the plaintiff's defrocking was "completely analogous to that of a member having been excommunicated").

Just as in the context of minister choice, courts cannot examine the proffered religious reason for expulsion from church membership in order to determine whether it is pretextual. With either type of decision, "[r]eligious bodies must be free to decide for themselves, free from state interference, matters which pertain to church government, faith and doctrine." *Natal v. Christian and Missionary Alliance*, 878 F.2d at 1577, *quoting Dowd v. Society of St. Columbans*, 861 F.2d

761, 764 (1st Cir. 1988). The church's decision on who may be a member necessarily involves religious belief and church discipline. Even if non-religious reasons may be involved in the decision, those cannot be separated from a basic belief that a person no longer qualifies to be a member. *See Van Osdol v. Vogt*, 908 P.2d at 1128-29 (involving minister choice decision).

Regardless of the bases for a claim that a membership decision was wrongful, persons excommunicated from their church must seek redress "in the congregation itself and not in the court." *Bentley v. Shanks*, 348 S.W.2d at 904. Since there is no cause of action in Tennessee for wrongful excommunication or disfellowshipping, courts have no basis upon which to examine the reasons for excommunication. Allowing a former member, who voluntarily joined a religious organization, to attack the church's decision on such a clearly ecclesiastical matter through allegations such as those made herein would involve the court in religious matters over which it has no jurisdiction. Thus, neither this court nor the trial court can make the determination of pretext that the Andersons request.

B. Fraud

The Andersons' fraud argument has its genesis in dictum from *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), wherein the Supreme Court, in expressing the *Watson v. Jones* rule stated, "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive." 280 U.S. at 16. The Court has subsequently eliminated one of the listed grounds for an "exception," seriously called the other two into question, and has yet to apply any of them.

In *Serbian Eastern Orthodox Diocese v. Milivojevich, supra*, the Court stated that the "fraud, collusion, or arbitrariness" exception to the *Watson* rule was dictum only and recognized that the implied exception had never been fully accepted by the Court, stating, "no decision of this Court has given concrete content to or applied the 'exception'." *Milivojevich,* 426 U.S. at 712. The Court specifically repudiated the arbitrariness ground because "recognition of . . . an [arbitrariness] exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry." *Milivojevich*, 426 U.S. at 712-13.

> Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or **impermissible objectives**, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Milivojevich, 426 U.S. at 714-15 (emphasis added). Arbitrariness was the only ground for an exception at issue in *Milivojevich.*

With regard to the other parts of the "in the absence of"exception, the Court did not decide "whether 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." *Milivojevich*, 426 U.S. at 713. Thus, the Supreme Court has never definitively endorsed a fraud or collusion exception, but has merely left the issue open for possible later consideration. *Presbyterian Church v. Mary E. B. Hull Memorial Presbyterian Church*, 393 U.S. at 447 (stating that the Court may have left the door open for some "marginal civil court review of ecclesiastical determinations"); *Hutchison v. Thomas*, 789 F.2d at 395 (stating that Supreme Court did not endorse but merely "left for later consideration" any "marginal review" for fraud or collusion); *Abrams v. Watchtower Society*, 715 N.E. at 803 (stating that *Milivojevich* merely left open the possibility that *limited* review might be available in cases of fraud or collusion).

Other plaintiffs have attempted to avoid the ecclesiastical abstention doctrine by alleging their claims fell within the fraud or collusion exception. We have found no case in which a court has attempted to adjudicate a religious dispute on the basis of that exception. To the contrary, courts have refused to find such an exception either viable or applicable. For example, in *Hutchison v. Thomas*, *supra*, a case in which a minister challenged his forced retirement, the Sixth Circuit questioned whether a fraud or collusion basis for interfering in religious decisions even existed. 789 F.2d at 395. Assuming without deciding that it did, the court held that such an exception would allow court review "only . . . for fraud or collusion of the most serious nature undermining the very authority of the decision-making body." *Id*. The court found there was no showing of such "egregious" action by church authorities as to justify court interference. *Id*. *See also Heard v. Johnson*, 810 A.2d at 881 (finding no extraordinary circumstances to warrant application of a possible exception).

Where a claim is made that fraud or collusion justifies ignoring the First Amendment's prohibition on court interference in or review of religious decisions, the fact that the decision being attacked is clearly and purely ecclesiastical argues against such an exception, because it would necessarily involve the court in the same type of analysis required to determine pretext, as discussed earlier. In the case before us, the Andersons claim of fraud or collusion attacks the Church's decision to disfellowship them. It is simply another way of claiming their expulsion from membership was wrongful. We find the reasoning of *Van Osdol v. Vogt*, *supra*, applicable and persuasive. In that case a minister sued a church organization alleging illegal retaliation in violation of Title VII in the church's decision not to hire her. The court found that the reasoning of *Milivojevich* regarding the impropriety of an arbitrariness exception applied equally to a fraud or collusion exception and explained:

> In order to determine whether a church employed fraudulent or collusive tactics in choosing a minister, a court would necessarily be forced to inquire into the church's ecclesiastical requirements for a minister. The First Amendment makes such inquiry into religious beliefs impermissible. *See Kaufmann v. Sheehan*, 707 F.2d 355, 358-9 (8th Cir. 1983) (finding that even though there may be some secular aspects to the priesthood, claims for fraud or collusion that relate to a person's status as a priest are

> unrelated to secular purposes but instead go to the heart of internal matters of faith and thus, no fraud or collusion exception is available); see also *Hutchison v. Thomas*, 789 F.2d 392, 395 (6th Cir.) (refusing to find a fraud or collusion exception based on the firm policy protecting First Amendment rights that prohibits inquiry into ecclesiastical decisions absent the most unusual circumstances.)

Van Osdol v. Vogt, 908 P.2d at 1133. This reasoning applies with equal force to a decision to expel a member. Evaluation of the stated reasons for an ecclesiastical decision, such as choosing a minister or expelling a member, would require the courts to inquire into the motives of the defendants to determine whether the decision was properly made. This type of evaluation, inquiry, or determination is prohibited. *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d 301, 312 (Mass. 2004).

The allegations made by the Andersons are similar to those presented in *Abrams v. Watchtower Society*, *supra*. In that case, a former member of a Jehovah's Witness congregation accused two of its elders of conspiring to remove him from the congregation and prevent his becoming a elder by procuring false testimony against him and by telling him he had no avenue of appeal. Mr. Abrams invoked the language of *Gonzalez* and claimed that the defendants were guilty of "a conspiracy to defraud." The court ruled that "review of the alleged 'fraud' in the instant case would run counter to the principle of ecclesiastical abstention." *Abrams v. Watchtower Society*, 715 N.E. at 803. The court reasoned that maintenance of the suit would entail an extensive and forbidden inquiry into religious law and practice, or ecclesiastical administration and government, contrary to the prohibitions of the First Amendment. Court review of a church membership decision is, in and of itself, an "extensive inquiry"into religious law and practice, and, consequently, prohibited. Such an examination could produce, "by its coercive effect, only the very opposite of that contemplated by the First Amendment." *Id.*

We agree with the reasoning of the Illinois court. In order to effectively review the Andersons' claim of fraud, we would have to decide not only whether false information was used to procure their expulsion from the organization, but whether they would have been expelled in the absence of such information. In the process, we would have to examine the reasons for which Jehovah's Witnesses might legitimately expel a member, and which reasons would not be legitimate, as well as the validity of the reasons given. Such an inquiry is prohibited and would involve us impermissibly in a purely ecclesiastical decision - who may or may not be a member of this religious organization. We also agree with the statement of the court in *Van Osdol* that the inherently ecclesiastical nature of the dispute "is logically inconsistent with a fraud or collusion exception to the First Amendment's bar on judicial review" of the Church's decision to disfellowship Ms. Anderson. 908 P.2d at 1134.

The Andersons assert that, regardless of the approach of other jurisdictions, Tennessee courts have recognized the fraud or collusion exception. In actuality, Tennessee courts have simply quoted the language from *Gonzalez* or *Milivojevich* in cases where no such exemption was even alleged.

They have never attempted to further define it or applied it to allow inquiry into ecclesiastical matters.

Whether or not a fraud exception actually exists, the mere use of the word "fraud" in an allegation is not sufficient to avoid the ecclesiastical abstention doctrine. In Tennessee, the common law tort of fraud consists of an intentional misrepresentation of a material fact or producing a false impression in order to mislead another or to obtain an undue advantage over him; and, the misrepresentation must have been made with knowledge of its falsity and with a fraudulent intent, must be related to an existing fact which is material, and the plaintiff must have reasonably relied on the misrepresentation to his injury. *Brown v. Birman Managed Care, Inc*., 42 S.W.3d 62, 66-67 (Tenn. 2001). The Andersons' allegations do not meet these elements.

In fact, their claim attacks a membership decision by the church's governing bodies. No property rights are implicated since there is no right to belong to a particular religious organization in disregard of that organization's rules, governance, or desire. No other secular concerns are involved. The Andersons' claim that fraudulent means were used to have them excluded from church membership is simply a restatement of their allegation that the religious reasons given by the Church were a pretext and not the real reasons. Thus, the Andersons' claim is that Church officials disfellowshipped them for reasons other than their violation of the tenets of the Church, which is the same as saying the Church had "bad motives" or "impermissible objectives" As demonstrated in the earlier quotation from *Milivojevich*, that type of argument does not provide a basis for judicial review. *Milivojevich*, 426 U.S. at 715.

Church membership decisions are simply not subject to review by secular courts. Just as a direct challenge to the correctness of such a decision is beyond the authority of the courts to hear, courts are also precluded from considering indirect arguments that the decision was otherwise "wrongful." Accordingly, we conclude that the Andersons have failed to allege any basis for the court to ignore the First Amendment protections of the Church's decision to remove them from membership.[9]

VII. CLAIMS RELATED TO DISFELLOWSHIPPING AND SHUNNING

Several of the Andersons' claims are based on direct results of their having been disfellowshipped and shunned. The Andersons state that they do not challenge the validity of any religious practice of the Church. However, they assert that church officials committed various state law torts "in the process of" wrongfully disfellowshipping them. Obviously, as even the Andersons acknowledge, most of their claims are closely linked to the disfellowshipping that they claim was wrongful and that we have determined we cannot review. That linkage is critical to our analysis of the subject matter jurisdiction question.

[9] For the same reasons no fraud exception applies herein, the Andersons' separate claim of common law fraud must be dismissed.

As we stated above, the doctrines of the Jehovah's Witnesses and their reading of scripture require that their members ostracize individuals who have been disfellowshipped. While there is no question that this practice has resulted in a painful experience for the Andersons, the law does not provide a remedy for such harm. For example, in other contexts, family members sometimes become estranged from each other for various reasons on their own volition, and the law does not recognize a basis for suit for the pain caused by such estrangement. Courts are not empowered to force any individual to associate with anyone else. Subject to some exceptions not applicable here, the Constitutional right of freedom of association permits individuals to associate with, or not to associate with, whomever they may wish. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

The Andersons do not directly challenge the practice of shunning and do not specifically rest any cause of action on that practice. However, many of the injuries for which they seek relief are a direct result of the shunning. Shunning is religiously based conduct, a religious practice based on interpretation of scripture, and is subject to the protection of the First Amendment. *Paul v. Watchtower Bible and Tract Society of New York*, 819 F.2d 875 (9th Circuit 1987), *cert. denied*, 484 U.S. 926 (1987); *Sands v. Living Word Fellowship*, 34 P.3d 955 (Alaska 2001). No tort liability can be imposed for shunning alone.[10] *Id.*

The fundamental reason why the claims arising from shunning are not subject to judicial inquiry is that shunning is a part of the Jehovah's Witnesses belief system. Individuals who choose to join the Church voluntarily accept the governance of the Church and subject themselves to being shunned if they are disfellowshipped. The practice is so integrally tied to the decision to expel a member that it is beyond judicial review for the same reasons as the membership decision. Conduct that is inextricably tied to the disciplinary process of a religious organization is subject to the First Amendment's protection just as the disciplinary decision itself. *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d at 313-14. Thus, the religious practice of shunning does not, in and of itself, support a cause of action that is recognized by the courts.

The Andersons' claims of intentional infliction of emotional distress and interference with business relationships arise directly from or are a direct result of the shunning. The bar to review of the ecclesiastical decision to terminate a person's membership in a church extends to additional claims that derive from that decision or are inextricably linked to it. *Burgess*, 734 F. Supp. at 34

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[10] In *Paul*, the Ninth Circuit recognized that, whether or not the religious conduct complained of would be otherwise tortious, the church defendants had "an affirmative defense of privilege – a defense that permits them to engage in the practice of shunning pursuant to their religious beliefs without incurring tort liability." 819 F.2d at 879. The court first examined the history of shunning among the Jehovah's Witnesses and some earlier Christian groups and the scriptural rationale for ostracizing former members. The court found that the practice of shunning was an important part of the belief system of the Jehovah's Witnesses and was privileged religious expression protected by the Free Exercise Clause. *Id*., 819 F.2d at 883. The court then held that because the protected practice of shunning did not present a threat to public peace, safety or morality, state intervention by placing a direct burden on the free exercise of religion was not allowed. *Id.* In *Sands*, the court also applied the test for whether conduct is protected by the First Amendment and determined that the practice at issue was religiously based; that it did not pose a substantial threat to public safety, peace or order; and that there was no competing state interest of the highest order at stake. Consequently, the shunning that was the basis of the suit was protected, and dismissal of the emotional distress claim was proper. 34 P.3d at 959.

(holding that plaintiff's claims of outrageous conduct based on church's actions in preventing the plaintiff from exercising rights of members when she was no longer a member were inextricably linked to the claims that her membership was wrongfully terminated and thus not justiciable).

Regardless of the label given the claim by the plaintiffs, the question is whether a court must delve into ecclesiastical questions in order to resolve it. *Natal*, 878 F.2d at 1577. If the harm alleged is the direct result of a religious practice or decision that courts cannot examine, there is no remedy available in the courts for such harm. We think that is the situation with the two claims alleging harm directly caused by the disfellowshipping and shunning. Because the practice of shunning is not actionable in and of itself, its consequences do not provide a basis for a legal remedy, no matter what cause of action may be asserted.

In Tennessee, intentional infliction of emotional distress is also called outrageous conduct. *Lyons v. Farmers Insurance Exchange*, 26 S.W.3d 888 (Tenn. Ct. App. 2000). To prevail on such a claim, the defendant's conduct must of a type that is so outrageous and extreme that it cannot be tolerated by civilized society and it must result in serious mental injury. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Medlin v. Allied Investment Co.*, 398 S.W.2d 270, 275 (Tenn. 1966).

Because the emotional distress alleged in this case arose from the disfellowshipping and concommitant shunning, to resolve this claim a court would need to examine the correctness of the disfellowshipping. This we cannot do. Since the conduct of Church officials in this case in fact arose from a constitutionally-protected religious practice and ecclesiastical decision, the courts cannot address the claim without violating the First Amendment. *See DeCorso v. Watchtower Bible and Tract Society of New York*, 829 A.2d 38 (Conn. App. 2003)(when church elders convinced woman to remain in abusive relationship with her husband, they did not commit either negligent or intentional infliction of emotional distress).[11] Since the alleged distress was a result of actions that are inextricably part of the church's membership proceedings, adjudication of this claim is precluded. *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d at 313.

According to the Amended Complaint, Joseph Anderson operated a plumbing business that was heavily dependent on repeat customers, many of whom were Jehovah's Witnesses, and he also had prospective business relationships with other members. Being disfellowshipped had a detrimental impact on his business. He claimed that the defendants barred all Jehovah's Witnesses from patronizing his business out of an improper motive, resulting in a loss of income, and thus that they were guilty of the tort of interference with prospective business advantage.

[11]There is a serious question as to whether the conduct complained of in this case rises to the level required to establish outrageous conduct. Since we have decided that this claim is not subject to court determination because it is inextricably related to and a consequence of the membership decision, we need not determine whether the allegations state a claim for relief.

The Supreme Court has only recently recognized a cause of action for tortious interference with business relationships. *Trau-Med of America, Inc. v. Allstate Insurance Co.*, 71 S.W.3d 691 (Tenn. 2002)(overruling *Nelson v. Martin*, 958 S.W.2d 643 (Tenn. 1997)). The court described the elements of the tort as follows:

> (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means.

958 S.W.2d at 701

Obviously, a court could not determine whether the element of improper motive or means was present without examining the correctness or validity of the decision to disfellowship the Andersons. As explained earlier, such an examination is outside the jurisdiction of the courts. Further, the Jehovah's Witnesses enjoy a constitutionally-protected right to direct their members to shun former members, and shunning by its nature necessarily precludes most business relationships between those who are in good standing with the church and those who are not. Thus, if the courts were allowed to enforce a remedy for economic damages that inevitably occur from shunning, they would be placing an impermissible burden upon a protected activity.

The Andersons' claims of emotional distress and interference with business relationships derive from the decision to expel them from membership and are inextricably linked to that decision. They are therefore, subject to the ecclesiastical absention doctrine's bar.

VIII. BREACH OF FIDUCIARY DUTY

Ms. Anderson's breach of fiduciary duty claim alleges that, prior to her expulsion from the Church, she had reposed great trust and confidence in the Church's leaders "to provide advice on secular matters as well as spiritual guidance that would be in her best interest and the best interest of the faith" and that this trust created a fiduciary duty on the part of those leaders. She further alleges they breached this duty by failing to provide advice and counseling and, instead, taking action against her for the wrong reasons.[12] As a consequence, she says, she suffered great emotional distress.

[12]Ms. Anderson has alleged breach of a fiduciary duty, and that type of duty must arise from a fiduciary relationship as recognized in law. For a discussion of the differences between fiduciary relationship, confidential relationship, and special relationship, which also trigger some legal consequences, *see Berry v. Watchtower Bible and Tract Society of New York, Inc.*, 879 A.2d 1124, 1128-31 (N.H. 2005); *Richelle L. v. Roman Catholic Archbishop*, 130 Cal. Rptr.2d 601, 607-612 (Calif. Ct. App. 2003). Because we resolve this issue on the basis of subject matter jurisdiction, we need not examine whether the allegations made in the complaint establish a fiduciary relationship under Tennessee law.

Analyzing the specific allegations, it is clear that they are simply another attack on the disfellowshipping. The alleged breach of duty was the "wrongful" disfellowshipping. Essentially, Ms. Anderson asks us to hold that a decision to expel someone from a church can constitute a breach of some legal duty owed to the expelled member, regardless of church officials' duty of loyalty to the church or obligation to follow the tenets of the church. In the circumstances of this case, we decline to do so and, in fact, are precluded from reaching such a conclusion. In order to examine where the official's duty lies, we would be required to resolve issues of church law and religious doctrine.

Because courts cannot review a church membership decision, which is inherently ecclesiastical, they cannot impose a remedy such as damages for tortious conduct on that decision. Additionally, we cannot second guess the Church's decision or inquire into its correctness under church law. That prohibition precludes examination of a claim that the Church's leaders were under a duty not to expel a member when the Church asserts the expulsion was based on its beliefs and practices. Finally, when examined closely, Ms. Anderson's underlying assertion is that her disfellowshipping was not in her best interest or that of the Church. Again, this is an issue not subject to resolution by civil courts. Ms. Anderson's breach of fiduciary duty claim must be dismissed for the same reasons the Andersons' wrongful disfellowshipping claims must be dismissed.

Ms. Anderson argues on appeal that breach of fiduciary duty "is commonly alleged against church clergy who take tortious action against their members for personal and secular purposes and against churches who try to cover up the tortious conduct." In actuality, few such claims have survived dismissal, and most arose in the context of an improper sexual relationship involving a pastor.[13] None arose from a decision to expel someone from a church.

Ms. Anderson cites only one case in which a claim for breach of fiduciary duty against church officials has survived early dismissal, *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993). That case involved a sexual relationship between a priest and a married woman who was known to be psychologically fragile. The bishop learned of the relationship, met with the woman, gave her absolution, and instructed her to tell no one of the affair except her husband. The woman later filed a suit which included claims for breach of fiduciary duty and negligent hiring and supervision. She claimed that under the pretext of counseling her, the bishop was actually acting to protect the career of the priest, did nothing to help her, and caused her to suffer severe psychological symptoms and the dissolution of her marriage.

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[13]The fact that a defendant religious organization did not and could not assert that such improper sexual conduct was part of its religious beliefs or practices also distinguishes these cases from a dispute over such fundamentally ecclesiastical matters as church membership. *See, e.g., Doe v. Evans*, 814 So.2d 370 (Fla. 2002); *F.G. v. MacDonnell*, 696 A.2d 297 (N.J. 1997); *DeStefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (holding that claims could be considered because they arose from purely secular conduct and were not defended on the basis of a sincerely held religious belief or practice). In the case before us, the Church's decision to expel the Andersons is defended on the basis of religious tenets and is an essentially religious decision.

It is clear that the conduct involved in *Moses* had nothing to do with expelling a church member. The *Moses* court's discussion of whether the bishop owed a fiduciary duty to the plaintiff is nonetheless helpful to our discussion. The court in *Moses* first recognized that the relationship between a clergyman and parishioner was normally one involving trust and reliance, but further held that in order to be liable for a breach of fiduciary duty, the superior party must "assume a duty to act in the dependent party's best interest," *Moses*, 863 P.2d at 322, language which is parroted in Ms. Anderson's allegations. The *Moses* court also found, however, that there must be an assumption of duty and that "[o]nce a member of the clergy accepts the parishioner's trust and **accepts the role of counselor**, a duty exists to act with the utmost good faith for the benefit of the parishioner." *Moses*, 863 P.2d at 323 (emphasis added).

Cases examining a breach of fiduciary duty claim in the context of a religiously-based relationship have made it clear that the clergy-parishioner relationship alone is not sufficient to establish a fiduciary duty.[14] *See Ahern v. Kappalumakkel*, 903 A.2d 266, 270-71 (Conn. Ct. App. 2006) (listing and reviewing holdings on the issue). Simply being a member of a congregation does not create a fiduciary relationship with the clergy or other officials of that religious organization. *Berry v. Watchtower Bible and Tract Society of New York, Inc.*, 879 A.2d 1124, 1131 (N.H. 2005). There must exist "something more," *e.g.*, an additional or special relationship, usually that arising from formal counseling. *Ahern*, 903 A.2d at 198-99 (declining to find a *per se* fiduciary relationship between all clergy and their congregants and requiring "something more" to demonstrate a justifiable trust on one side and resulting superiority and influence on the other).

In *Doe v. Hartz*, 52 F.Supp.2d 1027 (N.D. Iowa), the court dismissed the breach of fiduciary duty claim because the plaintiff simply alleged a clergy-parishioner relationship, not a counseling relationship. The court stated that "courts permitting breach of fiduciary duty claims against members of the clergy have . . . required something more than a priest-parishioner relationship." 52 F.Supp. at 1065. The plaintiff in *Doe* alleged that the parish priest "as a member of the clergy, had a [fiduciary] duty to act in her best interests." The court concluded that the priest's status as a clergyman was insufficient in and of itself to establish a fiduciary relationship.

Other courts have found a fiduciary relationship to exist, but only because a counseling relationship was shown to exist. *See, e.g.*, *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 (5th Cir.) (permitting breach of fiduciary duty claim against clergyman because the claims arose out of a counseling relationship, not just a clergy-parishioner relationship). The counseling relationship that has been found to be a pre-requisite must involve something other than, or additional to, spiritual advice and counsel. That is because courts have declined to impose a duty of care on religious or spiritual advisors in view of the problems and constitutional obstacles in establishing a standard of care and determining breaches of that standard. Such an exercise would necessarily involve judicial inquiry into the training, skills, and standards, including adherence to and interpretation of basic

[14]Because of our resolution of the issue, we need not examine whether the elders and other church officials named as defendants herein are clergy for purposes of clergy-parishioner relationship issues.

religious beliefs and practices, of many different religions and religious organizations. *Richelle L. v. Roman Catholic Archbishop*, 130 Cal. Rptr. at 608-09.

> Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of a particular denomination or ecclesiastical teachings of the religious entity.

Nally v. Grace Community Church, 763 P2d 948, 960 (Cal. 1988). It is for these reasons that no court has recognized a common law tort cause of action for clergy malpractice.[15] For the same reasons, as well as others, the clergy-parishioner relationship does not, in and of itself involve a fiduciary relationship that creates a fiduciary duty recognized in law. Ms. Anderson has not alleged any special relationship beyond congregation member and congregation leaders.

A similar line of reasoning has reached the same result regarding allegations that church officials breached a fiduciary duty to a member. That reasoning was clearly set out in *Teadt v. Lutheran Church Missouri Synod*, 603 N.W.2d 816, 822-23 (Ct. App. Mich. 1999) (involving various tort claims arising out of sexual relationship between parishioner and minister), wherein the court quoted from *Langford v. Roman Catholic Diocese of Brooklyn*, 677 N.Y.S.2d 436 (1998), as follows:

> [I]n order for [the] plaintiff's cause of action to meet constitutional muster, the jury would have to be able to determine that a fiduciary relationship existed and premise this finding on neutral facts. The insurmountable difficulty facing plaintiff, this court holds, lies in the fact that it is impossible to show the existence of a fiduciary relationship without resort to religious facts. In order to consider the validity of [the] plaintiff's claims of dependency and vulnerability, the jury would have to weigh and evaluate, inter alia, the legitimacy of [the] plaintiff's beliefs, the tenets of the faith insofar as they reflect upon a priest's ability to act as God's emissary and the nature of the healing powers of the church. To instruct a jury on such matters is to venture into forbidden ecclesiastical terrain.

677 N.Y.S.2d at 439.

The *Teadt* court found, similarly, that the plaintiff in that case could not establish the elements of a fiduciary relationship without resorting to the pastor-parishioner relationship. Religion was the foundation of the relationship and, consequently, her claims were essentially claims of clergy malpractice, which necessarily invoke free exercise protection. *Teadt*, 603 N.W.2d at 822-23.

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[15] *See Dausch v. Ryske*, 52 F.3d 1425, 1432 n. 4 (7th Cir. 1994)(listing state cases rejecting such a cause of action); *Jacqueline R. v. Household of Faith Family Church, Inc.*, 118 Cal. Rptr. 264 (Cal. Ct. App. 2002); *F.G. v. McDonnell*, 696 A.2d 697, 703 (N.J. 1997); *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 911 (Neb. 1993).

Similarly, in *Richelle L. v. Roman Catholic Archbishop, supra*, the court found that the plaintiff's claim that a confidential relationship existed with a pastor was based entirely on her piety and her assertion that she was a deeply religious member of the pastor's congregation, thereby rendering her vulnerable to him. The court held that such claims could not be adjudicated without reference to the nature of her religious beliefs and the doctrine of her church. 130 Cal. Rptr.2d at 617. *See also Langford v. Roman Catholic Diocese of Brooklyn, supra* (holding that it was impossible to show a fiduciary relationship between the priest and the plaintiff on the basis alleged without resorting to religious questions).

Ms. Anderson's argument would imply that the church leaders had a duty not to exercise its governance against her, even though she had voluntarily agreed to be a member of the church, abide by its rules, and be subject to its governance. If we accepted Ms. Anderson's argument, we would have to hold that every sincerely believing Jehovah's Witness is in a fiduciary relationship with those who rank above them in the church hierarchy and, thus, that every decision to disfellowship a member would be subject to attack on the basis of breach of that relationship. For the reasons set out earlier, such an attack would involve an impermissible intrusion by the courts into the guarantees of religious freedom found in the First Amendment. The breach of fiduciary claim as alleged in this case is inextricably linked to the expulsion decision and is, therefore, protected from court inquiry by the First Amendment.

IX. DEFAMATION CLAIMS

Three of the Andersons' claims sound in defamation and allege that the defendants wrongfully disseminated information about them, resulting in unwarranted damage to their reputations. First, the Andersons make a claim for defamation to the congregation and base this claim solely on the fact that the elders of the Manchester congregation stated to its members that Barbara Anderson and Joseph Anderson had been disfellowshipped. Of course, those statements were true, but the plaintiffs contend that "the Defendants knew that the congregation would understand this statement as tantamount to a statement that Plaintiffs had committed serious spiritual violations that warranted disfellowshipping and that they were unrepentant sinners; they also knew that, understood in this manner, the statements were false and defamatory."

The Andersons' other claims for defamation and for false light invasion of privacy are both based upon publication of information to the general public. They contend that remarks made by senior officials of the church to the media falsely implied that Ms. Anderson was guilty of immoral acts, thereby damaging her reputation.

The Church contends the ecclesiastical abstention doctrine or privilege shielded the defendants from any defamation claims. They argue in the alternative that even without the shield of ecclesiastical privilege, the trial court should have dismissed the defamation claim under Tenn. R. Civ. P. 12.02(6) for failure to state a claim.

A. Legal Principles

Courts faced with defamation claims by a church member or former member against the church or its officials have taken varying approaches in analyzing the claims.[16] Regardless of the analysis used, however, a majority of courts have held that defamation claims by church members against the religious organization itself and its officials are not justiciable under the Free Expression and Establishment Clauses. 109 A.L.R.5th 541 § 2. *See also, Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 1194. 1199 (W.D. Ky. 1994) (noting "substantial federal authority" for declining jurisdiction over defamation claims against religious organizations).

In the context of the motion to dismiss for lack of subject matter jurisdiction based on the First Amendment's protection of ecclesiastical decisions, the most pertinent analysis is one that focuses on the nature of the claim in light of the prohibition on court entanglement in or interference with disputes that are fundamentally religious. Where religious belief or practice is implicated, some claims that could be adjudicated if they arose in a secular context are not subject to court intervention because they do not present the kind of compelling state interest to overcome freedom of religion concerns. *Minker*, 894 F.2d at 1357, citing *Gonzalez*, 280 U.S. at 16; *Heard v. Johnson*, 810 A.2d at 883. Imposing the burden of tort liability for engaging in church discipline proceedings must be balanced with the state's interest in allowing the civil claim. *Paul v. Watchtower Bible and Tract Society of New York, Inc*., 819 F.2d at 881-83. Although some state restriction of activity by religious bodies, including court interference, is allowed, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

> Under most circumstances, defamation is one of those common law claims that is not compelling enough to overcome First Amendment protection surrounding a church's choice of pastoral leader. When a defamation claim arises entirely out of a church's relationship with its pastor, the claim is almost always deemed to be beyond the reach of civil courts because resolution of the claim would require impermissible inquiry into the church's bases for its action.

Heard v. Johnson, 810 A.2d at 883. The same reasoning applies to other purely ecclesiastical decisions.

The decision of who is or is not a member of a religious organization is, like minister choice, fundamentally a purely religious decision and enjoys the same protection from court review or intervention. Consequently, defamation and other tort claims arising entirely out of a decision to expel a member are generally beyond the jurisdiction of civil courts. *Hadnot v. Shaw*, 826 P.2d 978, 987 (Okla. 1992) (holding that church disciplinary or expulsion proceedings are not subject to civil court review, including claims of defamation arising from those disciplinary proceedings).

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[16] Some have applied common law or statutory privileges; some have examined the allegations for failure to state a claim under state law; and some have applied versions of the Establishment Clause test, the Free Exercise test, or a combination.

While religious organizations and their officials are not totally immune from liability for torts such defamation, *Masden v. Erwin*, 481 N.E.2d 1160 (Mass. 1985)(involving a defamation claim arising out of termination of an employee who had no pastoral duties), identification of the precise nature of the interests at stake and of the inquiry the courts would have to undertake is necessary.

A number of courts have held that defamation claims arising out of minister employment or discipline disputes are outside the subject matter jurisdiction of the courts because all matters touching the relationship between pastor and church are of ecclesiastical concern and not subject to court review, regardless of assertions that the statements at issue are not based on religious doctrine or practice.[17] *Hutchison v. Thomas*, 789 F.2d at 396; *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 F.Supp. at1199; *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286 (D. Minn. 1993). The First Amendment protects matters arising from the pastor-church relationship from secular court inquiry and review, including defamation claims related to disciplinary or employment decisions. *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929, 936 (Mass. 2002). The same reasoning applies to defamation claims arising out of church disciplinary or expulsion proceedings involving a member, since the church-member relationship is a fundamentally ecclesiastical matter.

As the distinctions among the Andersons' claims would suggest, some courts have examined defamation claims arising out of church disciplinary or similar proceedings depending, in part, on the context of the challenged statements. "In cases involving defamation torts by church officials, Tennessee courts must look at whether the slanderous or libelous statements were made during the course of an ecclesiastical undertaking." *Ausley v. Shaw*, 193 S.W.3d 892, 859 (Tenn. Ct. App. 2005). Generally, disputes based on otherwise defamatory statements made in the context of a religious disciplinary proceeding are not resolvable by the courts. *Ausley v. Shaw*, 193 S.W.3d at 859; *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d at 936 (holding that letter accusing minister of misconduct started and was an inextricable part of church's internal disciplinary procedure and, therefore, protected by the First Amendment).

In *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), the court held that statements, although perhaps offensive and incorrect, made at church meetings and in letters to church leaders discussing an internal church personnel matter and giving doctrinal reasons, fell squarely within the areas of church governance and doctrine protected by the First Amendment because the dispute was an ecclesiastical dispute about "discipline, faith, internal organization, or ecclesiastical rule, custom or law" and not a purely secular one. *Id.*, 289 F.32d at 658, *quoting Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997). *See also Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d at 313-14 (holding that statements made in an ecclesiastical complaint, investigation, and proceeding regarding the plaintiff who was excommunicated derived solely from actions that are inextricably part of the church disciplinary process and claims based on those statements were outside the jurisdiction of the courts).

[17] The statements at issue in the case before us do contain references to religious beliefs and scripture, so there is no question that ecclesiastical matters are at issue.

In a membership expulsion situation, statements made within the congregation and based on ecclesiastical doctrine are protected by the guarantee of free exercise of religion. *Rasmussen v. Bennett*, 741 P.2d 755, 758-59 (Mont. 1987) (involving defamation claims by disfellowshipped members based on statements made as part of proceedings which the church defended as true according to church doctrine). "Within the context of ecclesiastical discipline, churches enjoy an absolute privilege from scrutiny by the secular authority," including claims of defamation during or arising from those disciplinary proceedings. *Hadnot v. Shaw*, 826 P.2d at 987 (involving excommunicated member's claims regarding communication of the fact and cause of expulsion from membership).

> The right to express dissatisfaction with the disobedience of those who have promised to adhere to doctrinal precepts and to take ecclesiastically-mandated measures to bring wayward members back within the bounds of accepted behavior, are forms of religious expression and association which the First Amendment's Free Exercise Clause was designed to protect and preserve.

Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 779 (Okla. 1989). As to internal disciplinary proceedings, courts will not dictate to a congregation or church officials that they may not freely speak their minds. *Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America*, 860 F.Supp. at 1199.

When a person voluntarily joins a religious organization and submits to its governance, that person consents to the final decision by that organization's tribunals without recourse to civil courts. That consent includes consequences of church discipline that flow from the expulsion process. *Hadnot v. Shaw*, 826 P.2d at 987-88. But, "[t]he First Amendment's protection of internal disciplinary proceedings would be meaningless if a parishioner's accusation that was used to initiate those proceedings could be tested in a civil court." *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d at 937. In other words, where a lawsuit alleging defamation would require court adjudication of the same issues decided by the church tribunal, and therefore a determination of the correctness of the church's disciplinary or membership decision, the ecclesiastical abstention doctrine requires dismissal for lack of subject matter jurisdiction.

The protection afforded by the First Amendment to church disciplinary proceedings applies to statements made after the church's decision if the statements or actions are merely implementation of, still part of, inextricably related to, or a consequence of the decision. "Within the concept of protected implementation are not only the religious disciplinary proceeding's merits and procedure but also its end product - the expulsion sanction." *Hadnot v. Shaw*, 826 P.2d at 987-88. Thus, the church's communication of the fact and reason for excommunication are protected from judicial inquiry and review. *Id.* Announcing an expulsion or disfellowshipping to the members of a church is part of the disciplinary proceedings, particularly where instruction to church members regarding the expelled party is part of the church's belief and practice.

In *Kyritsis v. Vieron*, 382 S.W.2d 553 (Tenn. Ct. App. 1964), this court ruled on a claim brought by a former Greek Orthodox priest who had been "unfrocked," who alleged libel based on

a letter by the Archbishop, to be read in all the churches in the Greek Archdiocese of North and South America, announcing the action against the priest. The letter, which was copied verbatim in the opinion, concluded "[w]e hereby direct, therefore, that you have no association with the unfrocked Theodore Kyritsis, who is considered alien to our Church, and a danger to the salvation of our souls." This court ruled that whether the church was within its rights in unfrocking the plaintiff was a question that would require the court to impermissibly judge the ecclesiastical actions and decisions of the Greek Orthodox Church and, because the defamation claim was inextricably linked to the question of the defrocking, it was also not subject to judicial review. *Id.*, 382 S.W.2d at 559.

Thus, the act of informing the members of the church of disciplinary or expulsion actions is as much within the rights protected by ecclesiastical abstention as is the church's right to take such actions, even though it may carry some kind of negative implication about the expelled member. Statements to church members in regard to disciplinary actions against other members are privileged for the same reasons that the membership decision is protected. *See Kliebenstein v. Iowa Conference of Methodist Churches*, 663 N.W.2d 404, 407 (Iowa. 2003); *Rasmussen v. Bennett*, 741 P.2d at 758. Accordingly, the Andersons' defamation to the congregation claims must be dismissed.

With regard to statements made outside the church membership, the question is still whether the specific allegedly defamatory statements arise from or are inextricably related to the protected religious decision. Statements made or repeated outside the context of the actual church disciplinary proceeding or beyond the church membership or authorities do not necessarily enjoy the full protection afforded those that are confined within the church community. *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d at 513 n.12; *see also Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d at 314, *quoting Hiles*.

As one court put the matter, courts could not entertain an excommunicated church member's defamation claim if the statements made in the context of a disciplinary proceeding in which she was accused of causing dissension in the church had been divulged solely to other members of the church. *Kliebenstein*, 663 N.W.2d at 406. The fact that the letter containing the allegedly defamatory statements was published outside the congregation "weaken[ed] the ecclesiastical shield." *Id.*, 663 N.W.2d at 407. *See also Ausley v. Shaw*, 193 S.W.3d at 896 (holding that allegedly defamatory statements referring to the former minister as a "witch doctor," a "voodoo preacher," and a "dog" made outside the confines of the church and in front of people from the community who were not church members were not so closely entangled with the church's decision to fire the minister as to preclude court inquiry).

Courts have taken differing approaches to public statements about the reasons for a person's expulsion from a religious organization. The question is often whether the public statement was part of, arising from, or inextricably related to the expulsion proceedings. Some courts have examined the nature of the underlying dispute and determined that if the statements at issue arose in an ecclesiastical context or were part of a Constitutionally protected religious decision such as pastoral choice or membership decisions, they were protected by the First Amendment. *See, e.g., Bryce v.*

Episcopal Church in the Diocese of Colorado, 289 F.3d at 657-58 (holding that the dispute at the core of the case was an ecclesiastical one and protected by the First Amendment).

A mere statement that a person has been expelled from church membership, even though disseminated to the public, is generally not actionable, either because it is a true statement, or because a defamation action based on such a statement arises from the church's disciplinary decision. *See Glass v. First United Pentecostal Church of DeRidder*, 676 So.2d 724, 726 (Ct. App. La. 1996)(applying state law privilege and relying on the general rule that statements affirming that an individual had been expelled from membership in a church were not defamatory absent "a charge of extravagant words of irreligious or immoral conduct.") Some courts have recognized the common law conditional privilege that attaches to communications between church members and church authorities regarding church governance and its extension to defamatory implications that are published to the public generally, absent malice, improper motive, or no reasonable belief the statements were true. *See* Am.Jur.2d § 208.

In *Hiles v. Episcopal Diocese of Massachusetts, supra*, the court examined a claim that the church official had "republished" the details of an allegedly defamatory letter that resulted in disciplinary action against a minister in a press release.[18] The court found that the record did not contain the press release, that the church's bylaws allowed waiver of confidentiality of disciplinary matters "as pastorally appropriate," and that there was no showing by the minister that the church official who issued the press release was acting outside the purview of the church's procedures, to which the plaintiff minister had agreed when ordained and by which he was bound.

> There may be any number of reasons why [the defendant church officials] might have notified the media by providing to them what appears to have been the least amount of information about [the minister's] temporary inhibition. . . . Because this was a matter that required the exercise of discretion in the administration of the Church's disciplinary process, the Superior Court judge correctly declined jurisdiction of the negligence claims.

Hiles, 77 N.E.2d at 940.[19]

Having reviewed various analytical approaches to claims such as the ones before us, we conclude that the most appropriate approach is to focus on the central question that is always at the core of an intrachurch dispute where the ecclesiastical abstention doctrine is raised. Regardless of how stated or applied, the overriding rule remains that courts cannot intrude into purely religious decisions. Thus, as with any other claim brought in the context of an intrachurch dispute, the

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[18] Although this discussion took place in the context of a "negligence" claim, it is nonetheless relevant to a defamation claim.

[19] Additionally, the court noted that several newspaper articles appeared in the record, but that they said nothing except that the minister had been suspended from his priestly duties pending an investigation of allegations of sexual misconduct. The court made no ruling with regard to statements in these articles.

question is whether the defamation claims can be determined without running afoul of the First Amendment. That means, can the specific defamation claim alleged herein be adjudicated "without extensive inquiry . . . into religious law and polity" and "without resolving underlying controversies over religious doctrine," *O'Connor v. The Diocese of Honolulu*, 885 P.2d at 368, *quoting Milivojevich*, 426 U.S. at 709-10. That includes inquiry into religious law, court examination of religious belief, or court review of the correctness of the church tribunal's decision. If, to resolve the particular claim brought, a court would need to resolve underlying controversies over religious doctrine, then the claim is precluded.[20] *Milivojevich*, 426 U.S. at 709-10.

Where the allegedly defamatory statements refer to or are based upon religious doctrine or church governance, resolution of the truth or falsity of those statements, a determination critical to a defamation action, would require courts to inquire into and resolve issues of church teachings and doctrine, clearly matters of ecclesiastical cognizance. *O'Connor v. Diocese of Honolulu*, 885 P.2d at 368. In *O'Connor*, the plaintiff alleged that the church continued, after his excommunication, to publish false and defamatory material about him in a diocesan newspaper, including accusing him of ecclesiastical violations, schism, and of misrepresenting the Catholic faith in his own publications and radio show. The court determined that the question of whether the alleged statements were false could only be answered by examining church teachings and doctrine. *Id*. Since the allegations would require determination of matters obviously within the realm of religious doctrine and policy, adjudication of them was beyond the jurisdiction of the courts. *Id*.

In examining a defamation claim arising from the termination of a minister's employment, one court explained:

> "Questions of truth, falsity, malice, and the various privileges that exist often take on a different hue when examined in the light of religious precepts and procedures that generally permeate controversies over who is fit to represent and speak for the church." . . . Examining such controversies is precisely the kind of inquiry that is forbidden to civil courts . . . .

Heard v. Johnson, 810 A.2d at 884, *quoting Downs*, 683 A.2d at 812. The same light illuminates church membership controversies. Similarly, a Tennessee court has stated:

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[20] Where defamation claims have survived dismissal when faced with claims of ecclesiastical abstention, the court has generally made a determination that resolution of the specific allegation would not risk prohibited entanglement. For example, *Drevlow v. Lutheran Church Missouri Synod*, *supra*, the court found that a minister's defamation claim based on allegations the church circulated a personal information file about him that contained false information about his wife was not precluded by the First Amendment because the church had not offered any religious reason for its actions regarding the file and, consequently, the court would not become entangled in religious controversy. *Drevlow*, 991 F.2d at 472. Similarly, in *Kliebenstein*, *supra*, the court allowed the defamation claim to go forward, reversing summary judgment for the church, only because it determined that the question of whether a term used in a letter initiating expulsion proceedings against a church member, but disseminated beyond the church membership, was defamatory could be decided without intruding into religious doctrine. *Kliebenstein*, 663 N.W.2d at 407.

> In order to determine whether or not defendant was within his rights and justified in publishing and circulating the letter announcing that [plaintiff] had been unfrocked, and, therefore, whether or not defendant is or was guilty of any libel or slander of complainant, it would be necessary to pass on the ecclesiastical actions and decisions of the Greek Orthodox Church; and this the courts of Tennessee are without power to do. In particular, the questions of whether or not the statements made by defendant are true and whether or not such statements are privileged must, in the last analysis, depend on the validity or correctness of decisions of the Greek Orthodox Church.

Kyritsis v. Vieron, 382 S.W.2d at 559.

One court likened a statement of religious belief to statements of opinion, which are not actionable as defamatory because the First Amendment's freedom of speech provision bars defamation claims based on statements that are expressions of ideas or opinions and that "cannot be reasonably interpreted as stating actual facts about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). In *Sands v. Living Word Fellowship*, 34 P.3d 955 (Alaska 2001), the court held that statements that the plaintiff was a "cult recruiter" and that his church was a "cult" were not actionable in defamation because they were pronouncements of a religious belief and opinion not factually verifiable. *Id.* at 960. "Other courts in similar contexts have also refused to decide the meaning of religious terms in religious disputes. *See Hartwig v. Albertus Magnus College*, 93 F.Supp.2d 200, 218-19 (D. Conn. 2000) (declining to decide the meaning of 'priest'); *Klagsbrun v. Va'ad Harabonim*, 53 F. Supp.2d 732, 741 (D.N.J. 1999) (declining to decide the meaning of 'bigamist')." *Sands*, 34 P.3d at 960 n.24.

Religious belief, opinion, and interpretation are subject to an additional constitutional protection. While statements of opinion in general, such a political opinion, are not actionable,[21] statements of religious opinion are doubly protected by the First Amendment. They are not

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[21] The law of defamation generally exempts opinions, even when not based on religious belief. *Milkovich v. Lorain Journal, Inc.*, 497 U.S. at 20; *see also Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14 (1970) (finding that the use of the term "blackmail" to describe the plaintiff's negotiating tactics was not slander when spoken in a heated city council meeting, and not libel when published in newspaper articles accurately reporting the public debate because "the word was no more than rhetorical hyperbole, a vigorous epithet by those who considered [the defendant's] negotiating position extremely unreasonable"); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 286 (1974) (holding that a union publication describing the plaintiff non-union member as a scab, and therefore "a traitor to his God, his country, his family, and his class" was not actionable because use of words like "traitor" in that case could not be construed as representations of fact, but rather as "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join"). While there is no wholesale defamation exemption to every statement that might possibly be labeled "opinion," *Milkovich v. Lorain Journal, Inc.*, 497 U.S. at 18, a statement of opinion is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 566 (1977)). Conversely, "where there is no false representation of fact, one may not recover in actions for defamation merely upon the expression of an opinion which is based upon disclosed, nondefamatory facts, no matter how derogatory it may be." *Windsor v. Tennessean*, 654 S.W.2d 680, 685 (Tenn. Ct. App. 1983). Such statements of opinion are not provable as either true or false.

amenable to proof of their truth or falsity, and secular courts have no jurisdiction to determine their truth or falsity.

The jurisdictional question in the case before us, then, must be decided by determining whether the specific allegations of defamation made herein can be adjudicated without the court becoming excessively entangled in religious doctrine, being the arbiter of religious belief, determining the correctness of scriptural interpretation, or otherwise making a clearly ecclesiastical decision.

B. The Claims Herein

To establish a claim for defamation in Tennessee, a plaintiff must establish that the defendant published a statement with knowledge that it was false and defaming to the plaintiff, with reckless disregard for the truth of the statement, or with negligence in failing to ascertain the truth of the statement. *Sullivan v. Baptist Memorial Hospital*, 995 S.W.2d 569, 571 (Tenn. 1999); *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978). Defamation may also exist where incomplete statements of true fact create a false and defamatory impression through innuendo, or where words not defamatory on their face are shown to be so in light of extrinsic evidence. *See Pate v. Service Merchandise Co., Inc.*, 959 S.W.2d 569, 574 (Tenn. Ct. App. 1996); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978). Similarly, the recently-recognized tort of false light invasion of privacy includes an element of falsity and requires that the defendant have knowledge of or act in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *West v. Media General Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (adopting the definition found in RESTATEMENT (SECOND) OF TORTS § 652E).[22] For purposes of resolving the subject matter jurisdiction issue, the distinctions among the torts is not relevant, but the uniform requirement of falsity is.

The Andersons assert that some of the defendant church officials made statements to the general public through the mass media that defamed Barbara Anderson. Thus, by claiming that the Church's statements about their disfellowshipping were defamatory, the Andersons necessarily claim that the statements were false. However, their complaint does not quote in full any of the public statements that include language alleged to be defamatory, nor were copies of the allegedly defamatory articles or tapes of the broadcasts attached to their complaint.[23]

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[22]The court noted that there was a great deal of overlap between that tort and simple defamation, but concluded that there were situations that did not cause the sort of damage to an individual's reputation required for a defamation claim, but which nonetheless constituted an invasion of privacy by placing that individual's life or actions in an undesirable false light. 53 S.W.3d at 646. The court addressed the concern that one publication may result in multiple recoveries by adopting the RESTATEMENT'S provision that "If, in addition to false light, a plaintiff also asserts an alternative theory of recovery under libel, 'the plaintiff can proceed upon either theory or both, although he can have but one recovery for a single incident of publicity.'" 53 S.W.3d 647.

[23]The articles and reports in question were made a part of the record when the Church defendants filed them as exhibits in support of their motion to dismiss. The Andersons argue that neither this court nor the trial court can (continued...)

Some of the allegations, however, do include some of the specific words used. One allegation states that one of the named defendants stated to a newspaper reporter that Ms. Anderson, along with three other church members, "were to be summoned before congregation tribunals on charges of 'various spiritual violations' for the purpose of determining whether they should be 'disfellowshipped' for 'spiritual violations.'" Another allegation states that the named defendant stated to another reporter that "the local judicial proceedings against these members 'may focus on sins unrelated to public comments on sexual abuse' within the Jehovah's Witnesses' organization."

The complaint further alleges that the defendant who made these statements knew that Ms. Anderson "had not committed any spiritual violations and that no grounds for disfellowshipping existed" and that he also knew that the congregational tribunals were being conducted as part of the Church's plan to destroy the credibility of Ms. Anderson so as to frustrate her efforts to "prevent the church from sheltering child abusers."

Another allegation claims that a Church spokesman in an interview with a newspaper reporter explained that 1 Corinthians, chapter 5,verses 11-13, provided the scriptural basis for the Church's practice of disfellowshipping members such as Ms. Anderson who are unrepentant about certain sins. The complaint further alleged that a local television reporter stated on air that one of the named defendants had told here that the scriptures used to disfellowship were found in First Corinthians, 5th chapter. The reporter showed on TV the letter that Ms. Anderson received from the Church stating that she was disfellowshipped for "causing divisions." In the complaint, Ms. Anderson

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[23](...continued)
consider those materials because they are outside the pleadings and the Church's motion is one to dismiss under Tenn. R. Civ. P. 12.02(6). *See Trau-Med of America v. Allstate Insurance Co.*, 71 S.W.2d at 694. In that situation, consideration of matters outside the pleadings converts the motion to one for summary judgment, Tenn. R. Civ. P. 12.02, and the trial court herein did not treat the motion as one for summary judgment. However, this argument ignores the fact that the motion at issue was one to dismiss for subject matter jurisdiction made under Tenn. R. Civ. P. 12.02(1). On a Rule 12.02(1) motion to dismiss for lack of jurisdiction, the court may consider documents outside the pleadings to determine if jurisdiction exists, and consideration of such matters will not cause the Rule 12.02(1) motion to be considered a motion for summary judgment. *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947); *Osborn v. United States*, 918 F.2d 724, 728 n. 4 (8th Cir. 1990); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990); *Luellen v. Henderson*, 54 F. Supp.2d 775, 777 (W.D. Tenn. 1999); *Carson v. Daimler-Chrysler Corp.*, W2001-03088-COA-R3-CV, 2003 WL 1618076 (Tenn. Ct. App. Mar. 19, 2003)(no Tenn. R. App. P. 11 application filed). When a defendant asserts lack of subject matter jurisdiction and submits material outside the pleadings, the motion must be considered a factual attack, and the burden of proving jurisdiction shifts to the plaintiff, and the court must weigh the evidence and determine whether jurisdiction exists. *See Osborn v. United States*, 918 F.2d. at 729; *Luellen v. Henderson*, 54 F. Supp.2d at 777. At least one court has applied these principles to arguments that damage to reputation and other tort claims were beyond the court's jurisdiction due to the ecclesiastical abstention doctrine and has dismissed the claims because the plaintiff failed to meet his burden. *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d at 515-16 (holding that because the defendants moved to dismiss for lack of subject matter jurisdiction, and because they supplied supporting affidavits, the burden fell to the plaintiff to prove jurisdictional facts, and the court would address the merits of the jurisdictional claim by resolving the factual disputes between the parties). Because we can resolve the subject matter jurisdiction issue on the basis of the complaint's allegations alone, we need not explore these procedural niceties further.

contended that "by applying the Apostle Paul's statements regarding shunning the wicked man because of his sins as found in 1 Corinthians 5," the defendants falsely labeled her as wicked. [24]

Thus, according to the complaint itself the statements alleged to be defamatory refer to religious reasons for disfellowshipping and shunning in general, and reference was made to sins and spiritual violations that could have referred specifically to Ms. Anderson. According to the complaint, in the Congregation of Jehovah's Witnesses, such violations include stirring up unrest, creating dissension, or causing doubt about the Church. These were the charges brought against Ms. Anderson and the reason given for her expulsion from the church. In order to determine whether the statements at issue were defamatory, a court would be required to determine, among other things, if they were false. We cannot see how such an inquiry could be conducted and adjudication made without encroaching on religious matters. Additionally, to determine the falsity of the statements, a court would need to examine the correctness of the decision of the Church tribunal that she had committed violations meriting expulsion. This we cannot do.

The last two paragraphs of the complaint's section on the defamation claims are revealing. They include statements that "Plaintiff has not had a falling away of her faith, but is most concerned about the welfare of her religion" and the problems she perceives in the Church's handling of child sexual abuse reports. Further, she states that she "is not taking issue with her church's doctrine regarding disfellowshipping with resultant shunning, . . . but is asking for relief for wrongful disfellowshipping . . . due to the church's hierarchy being motivated to disfellowship Plaintiff by reasons unrelated to the dictates of their religion."

These statement make clear that, in essence, the defamation claims are simply a restatement of the Andersons' basic claim that the disfellowshipping of Ms. Anderson was wrongful and not because of her violation of any Church tenets, but, instead, for other reasons related to her activities. We have already determined that the wrongful disfellowshipping and related claims based on the same argument are precluded from court adjudication. The same reasons and legal principles dictate that the defamation claims are likewise outside the courts' authority to adjudicate.

X. CONCLUSION

Based on the reasons set out, we reverse the trial court's actions in denying the defendants' motion to dismiss for lack of subject matter jurisdiction based upon the First Amendment's protection of decision of church tribunals on religious questions. We hold that all of the plaintiffs'

[24] The two verses of scripture that Church spokesmen referred to as the basis for the practice of shunning exhort believers to remove the wicked from "among yourselves." They also urge the faithful to quit mixing in company with "anyone called a brother that is a fornicator or a greedy person or an idolater or a reviler or a drunkard or an extortioner."

claims, as alleged in the complaint, are barred by the ecclesiastical abstention doctrine. Accordingly, the amended complaint is dismissed. Costs on appeal are taxed to the appellees, Mr. and Mrs. Anderson.

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PATRICIA J. COTTRELL, JUDGE