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MONTANA TWENTIETH JUDICIAL DISTRICT COURT
SANDERS COUNTY

ALEXIS NUNEZ Plaintiff, vs. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES, and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Defendants/Third-Party Plaintiffs, vs. IVY MCGOWAN CASTLEBERRY Third-Party Defendant.	§	Cause No. DV 16-84 Hon. Elizabeth A. Best **PLAINTIFF'S MOTION TO COMPEL AND BRIEF IN SUPPORT**

207

MOTION TO COMPEL

Plaintiff Alexis Nunez, through her undersigned counsel of record, respectfully moves the Court for an Order compelling Defendants to produce certain documents and to respond to Interrogatory No. 1, as described more fully in the following brief. A proposed Order accompanies this Motion and Brief.

I. INTRODUCTION

1. Defendants' Voluntary Production of Documents and Waiver of Privilege

During the discovery phase of this case (before trial), Defendants refused to produce a certain ten-page document from their CM database on the basis that it was protected by the attorney work product and attorney client privilege. *See* 5-8-18 Privilege Log entry No. 1, Ex. A. However, during trial, Defendants chose to waive their privilege claim by voluntarily disclosing privileged content from the document. Defendants produced substantial portions of the document to Plaintiff, hopeful that Defendants could use part of the document to benefit their case while withholding the remainder of the document that harms their case. Despite their voluntary waiver, Defendants now claim all ten pages are still privileged, including the three pages they produced.

This Court has now permitted discovery regarding the CM database. *See* August 31, 2020 Rule 16 Scheduling Order at 7 ("Discovery is reopened for limited discovery only concerning documents relating to the Child Molester (CM) database."). Plaintiff served written discovery but Defendants refused to answer. *See* Defendants' 3/17/2021 Responses and Objections to Plaintiff's 2/4/21 Discovery Requests, Ex. B. Therefore, Plaintiff brings this motion to compel answers to discovery.

II. BACKGROUND

1. The Produced Pages

During the first trial in this case, counsel for Defendants produced three pages of a ten-page document to Plaintiff ("the produced pages"). *See* 9-25-18 email from Taylor, Ex. C; *see also* Ex. A. These produced pages have been filed with this Court and publicly disclosed. *See* Plaintiff's Motion to Extend Discovery Deadline, at Ex. 1 (Feb. 10, 2021). However, Defendants continue to claim the three pages are privileged—even after producing them to Plaintiff. *See* 2-25-21 email from Luck, Ex. D; Third Amended Privilege Log, Ex.E.

The three produced pages are significant. These three pages reveal that, in 2004, all Defendants knew Max Reyes (who abused the Plaintiff) was an admitted pedophile with multiple victims. *See* Three produced pages, Ex. F. In 2004, Defendants knew Reyes had Plaintiff staying in his home and attending church with him. *See* 9-24-18 Trial transcript at 258-259, Ex G.

The three produced pages include questions about whether Reyes had minors in his household. *See* Ex. F. The three produced pages reveal the legal advice given by attorneys. *Id.* Oddly, the produced pages include highlighted bullet points next to questions about the victims' ages (they were minors) and whether they were willing participants in the sexual abuse. *Id.*

Defendants waived their privilege claim when they voluntarily disclosed privileged information. And because Defendants made this voluntary disclosure the night before the final day of trial, Plaintiff has never had an opportunity to conduct discovery on the once privileged information.

2. The Withheld Pages

The remaining seven withheld pages ("the withheld pages") from the document are extremely important as well. The withheld pages prove that Defendants' star witness, Peter

McGowan, also sexually abused Plaintiff, Lexi Nunez. *See* Exhibit C ("remaining pages involve Peter Jr.'s confession . . . regarding his abuse of Alexis"). Even more importantly, the withheld pages prove that Peter McGowan confessed to Defendants about his abuse of Plaintiff. *Id.* Additionally, the withheld pages prove what Defendants knew about Max Reyes before, during, and after his abuse of Plaintiff. *Id.* ("The other 7 pages involve Peter/Alexis. Max's name is mentioned in connection with Peter."). Defendants' knowledge about Reyes is a central element in Plaintiff's negligence case. The withheld pages are not privileged and are subject to Plaintiff's discovery requests.

III. ARGUMENT

Defendants assert four primary objections to Plaintiff's discovery requests. For the reasons discussed below, Plaintiff respectfully requests that the Court overrule each of Defendants' objections and compel Defendants to respond to Plaintiff's discovery request as outlined in Section IV below.

1. Defendants Voluntarily Waived Their Privilege Claim

A privilege is waived when the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." Mont. R. of Evid. 503. During trial, counsel of record for Defendants, Joel Taylor, produced a significant part of the matter they now claim is privileged. *See* Exs. C, F. The produced pages disclosed all of the information Defendants now claim to be privileged.

Mr. Taylor chose, as a trial strategy, to waive the attorney-client and attorney work product privilege. He voluntarily produced documents by email before the final day of trial as part of his strategy for closing argument. *Id.* He was not ordered to produce the documents. He did not produce them by mistake. He voluntarily disclosed documents showing "entries from the

Watchtower Legal Department's electronic telephone record keeping system reflecting privileged communications with clients." *See* Responses to Discovery, Ex. B at 8. The produced pages revealed:

- "General Legal Advice and Direction" related to child sex abuse. *See* Ex. F.
- "Legal Reporting Advice" regarding whether elders should report child sex abuse by Max Reyes. *Id.*
- Instructions from lawyers. *Id.*

A significant part of the privileged matter was voluntarily produced the night before trial concluded. Defendants again disclosed the information in their appeal briefing. *See* App Brief at 10, Ex. H ("Thompson Falls' elders called the Legal Department and were advised by an attorney that Montana law did not require a report.") Defendants cannot selectively withhold the remaining pages.

Contrary to Defendants' argument, Rule of Evidence 504 does not apply. *See* Ex. B at 10, Resp. to Req. for Admission. Rule 504 requires that the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege. First, disclosure was never "compelled." Defendants have cited no order requiring production of the document. And Defendant never objected to or appealed an order from the Court. Therefore, Defendant cannot satisfy the "erroneous" component. Thus, both elements of part (a) are lacking. Second, Defendants cannot satisfy part (b) because they did claim the privilege, but voluntarily chose to waive it during trial. *See* Exs. A,C.

2. *The Abuse By Third Parties Disclosed in the Documents Is Relevant*

Defendants also object to Plaintiff's discovery by claiming the answers would reveal abuse committed by third parties and that such abuse is irrelevant. Ex. B. The withheld documents

reference sexual abuse committed by Defendants' key witness, Peter McGowan. The document also references abuse by Max Reyes, who Defendants made a party to this case.

Plaintiff has correctly argued to this Court that "Defendants cannot offer evidence of conduct by non-parties *to argue that Defendants are not liable for Plaintiffs' injuries*" or "*to apportion damages.*" *See* Plaintiffs Motion in Limine at 5-6. However, abuse by non-parties may be relevant for other reasons. But, most importantly, information sought in discovery "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Mont. R. of Civ. P. 26.

3. *Defendants' Vagueness Objection Is Without Merit*

Defendants also object to Plaintiff's discovery as vague and ambiguous because Plaintiff used the words "CM database." Defendants know what the CM database is, or at least what Plaintiff is referring to. The term "CM" appears at the top of the document sought. The CM Database has been discussed at several hearings. And this Court referred to the database as the "Child Molester / Child Maltreatment Database." *See* 2/22/21 Order After Status Hearing at 2. Plaintiff's terminology sufficiently describes the documents sought with particularity. The objection is without merit or legal support and should be overruled.

4. *Plaintiff's Request Are Not Overly Broad*

Finally, Defendants' objections include a blanket claim that the discovery is overly broad in time and scope. However, Plaintiff's discovery requests are all limited to parties and witnesses to this case and to the subject matter explicitly allowed by this Court. *See* August 31, 2020 Rule 16 Scheduling Order at 7. The time frame includes the time of abuse until trial. Defendants have made no showing that responsive documents are outside the time and scope of what is discoverable in this case.

IV. CONCLUSION & REQUESTED RELIEF

Plaintiff respectfully requests that the Court overrule Defendants' objections to discovery and compel Defendants to answer the following discovery requests[1]:

Request For Production 2: Produce all pages from the CM database that include references to Plaintiff Alexis Nunez.

Request For Production 3: Produce all pages from the CM database that include references to Max Reyes.

Request For Production 4: Produce the seven pages that you withheld from production as described in Exhibit B.

Request For Production 5: Produce all 10 pages of the document identified as item #1 on the privilege log attached as Exhibit C.

Request For Production 7: Produce all pages from the CM database that include references to Holly McGowan.

Request For Production 8: Produce all pages from the CM database that include references to Peter McGowan.

Interrogatory 1: Describe the CM database by providing the following information.

1. What is the name or designation the JW Defendants give to the database?
2. Generally describe the information contained in the database.
3. When was the database created?

DATED this 16th day of April, 2021.

Attorneys for Plaintiffs:

NIX PATTERSON, LLP

GALLIK, BREMER & MOLLOY, P.C.

By: _____
James P. Molloy

[1] Plaintiff disagrees with Defendants' objections and answers to Plaintiff's Request for Production Nos. 1, 6, and 9 and Interrogatory No. 2. Plaintiff hereby reserve the right to move the Court to compel responses to these requests at a later time.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon all attorneys of record and upon Ivy McGowan Castleberry via Email on this 16th day of April, 2021.

By: _____
James P. Molloy

EXHIBIT A

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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

ALEXIS NUNEZ and HOLLY McGOWAN, Plaintiffs, v. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; WATCHTOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Defendants.	Hon. James A. Manley Cause No. DV 16-84 WATCHTOWER NY'S SECOND AMENDED PRIVILEGE LOG IN CONNECTION WITH ITS RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES,

Third-Party Plaintiffs,

v.

MAXIMO NAVA REYES, MARCO NUNEZ, IVY McGOWAN-CASTLEBERRY,

Third-Party Defendants.

Defendant Watchtower Bible and Tract Society of New York, Inc. ("Watchtower") hereby submits its second amended privilege log in connection with its Responses to Plaintiffs' First Request for Production of Documents dated March 13, 2017.

	Date	Title/Type	Basis for Withholding
1.	March 16, 2004—August 24, 2015	Running log of telephone calls (10 pages) between attorneys Robert James, William Niebel, and Anthony Montoya providing legal advice and elders in the Thompson Falls Congregation, MT.	Attorney Work Product; Attorney-Client Privilege
2.	May 28, 2014	Form (5 pages) from an elder in the Thompson Falls Congregation, MT, seeking legal advice, to an attorney.	Attorney Work Product; Attorney-Client Privilege
3.	August 25, 2015	Form (3 pages) from elders in the Thompson Falls Congregation, MT, seeking legal advice, to attorney.	Attorney Work Product; Attorney-Client Privilege

	Date	Title/Type	Basis for Withholding
4.	December 2, 2015	Memorandum (2 pages) from attorney Anthony Montoya to Service Department providing legal advice.	Attorney Work Product; Attorney-Client Privilege
5.	November 29, 2016	Notes (2 pages) taken by legal counsel for WTNY from Interview with Joni Nava-Reyes and Maximo Nava-Reyes.	Attorney Work Product

DATED this 9th day of May, 2018.

Attorneys for Religious Defendants/Third-Party Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By _____
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2018, a copy of the foregoing document was served on the following persons by the following means:

_____ Hand Delivery
3 Mail
_____ Overnight Delivery Service
_____ Fax (include fax number in address)
1-2 E-Mail (include email in address)

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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

ALEXIS NUNEZ, Plaintiff, v. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; WATCHTOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Defendants.	Hon. Elizabeth A. Best Cause No. DV 16-84 RELIGIOUS DEFENDANTS' RESPONSES TO "PLAINTIFF ALEXIS NUNEZ'S FEBRUARY 4, 2021 DISCOVERY TO DEFENDANTS WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. and CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES"

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Third-Party Plaintiffs, v. IVY McGOWAN-CASTLEBERRY, Third-Party Defendant.	

Religious Defendants/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc. ("Watchtower NY") and Christian Congregation of Jehovah's Witnesses ("CCJW") provide the following responses to Plaintiff Alexis Nunez's February 4, 2021 Discovery.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Produce all pages from CM database.

RESPONSE: Defendants object to this request because it is vague and ambiguous in that Plaintiff defines the term "CM database" by a mischaracterization of what the documents attached as Exhibit A are: printed records from Watchtower's Legal Department's electronic telephone record keeping system reflecting privileged communications with clients. Defendants also object to this request on the grounds that it seeks records that are protected by the attorney-client privilege and attorney work product doctrine because Exhibit A contains information about confidential communications with clients, legal conclusions of attorneys, and legal advice given. Defendants also object to

this request on the grounds that it is overly broad as to time and scope and seeks information that is irrelevant and not likely to lead to the discovery of admissible evidence because the Legal Department's records reflect communications with clients who are wholly unrelated to the facts of this lawsuit. Further, this request is unduly burdensome in that it requests Responding Defendants to review its legal files involving non-parties and prepare a privilege log. The request also intrudes upon the constitutionally protected privacy rights of third parties wholly unrelated to this lawsuit. Further, as Plaintiff has already represented to the Court, "[e]vidence of conduct by non-parties is irrelevant and likely to confuse or mislead the jury. *See* Mont R. Evid. 401, 403." Pls.' Mot. Limine & Memo. Supp. 6, June 26, 2018 ("Pls.' Mot. Limine"). As Plaintiff knows, the Court has already ruled that all third-party abuse is irrelevant and not admissible (*see* Order dated September 21, 2018). Plaintiff did not appeal. This is the law of the case.

REQUEST FOR PRODUCTION NO. 2: Produce all pages from the CM database that include references to Plaintiff Alexis Nunez. (This request includes the pages previously produced and those that have been withheld.)

RESPONSE: *See* updated Privilege Log. Defendants object to this request because it is vague and ambiguous in that Plaintiff defines the term "CM database" by a mischaracterization of what the documents attached as Exhibit A are: printed records from Watchtower's Legal Department's electronic telephone record keeping system reflecting privileged communications with clients. Defendants also object to this request on the grounds that it seeks records that are protected by the attorney-client privilege and

attorney work product doctrine because Exhibit A contains information about confidential communications with clients, legal conclusions of attorneys, and legal advice given. Defendants also object to this request on the grounds that it is overly broad as to time and scope and seeks information that is irrelevant and not likely to lead to the discovery of admissible evidence because the Legal Department's records reflect communications with a client that has in no way waived its privilege. The request also intrudes upon the constitutionally protected privacy rights of third parties wholly unrelated to this lawsuit. As Plaintiff has already represented to the Court, "[e]vidence of conduct by non-parties is irrelevant and likely to confuse or mislead the jury. *See* Mont R. Evid. 401, 403." Pls.' Mot. Limine 6. Further, as Plaintiff knows, the Court has already ruled that all third-party abuse is irrelevant and not admissible (*see* Order dated September 21, 2018). Plaintiff did not appeal. This is the law of the case.

REQUEST FOR PRODUCTION NO. 3: Produce all pages from the CM database that include references to Max Reyes. (This request includes the pages previously produced and those that have been withheld.)

RESPONSE: See updated Privilege Log. Defendants object to this request because it is vague and ambiguous in that Plaintiff defines the term "CM database" by a mischaracterization of what the documents attached as Exhibit A are: printed records from Watchtower's Legal Department's electronic telephone record keeping system reflecting privileged communications with clients. Defendants also object to this request on the grounds that it seeks records that are protected by the attorney-client privilege and attorney work product doctrine because Exhibit A contains information about

confidential communications with clients, legal conclusions of attorneys, and legal advice given. Defendants also object to this request on the grounds that it is overly broad as to time and scope and seeks information that is irrelevant and not likely to lead to the discovery of admissible evidence because the Legal Department's records reflect communications with a client that has in no way waived its privilege. The request also intrudes upon the constitutionally protected privacy rights of third parties wholly unrelated to this lawsuit.

REQUEST FOR PRODUCTION NO. 4: Produce the seven pages that you withheld from production as described in Exhibit B.

RESPONSE: Defendants object to this request because the withheld documents are protected by the attorney-client privilege and attorney work product doctrine. Defendants have updated the Privilege Log to reflect the difference between the three pages produced pursuant to Judge Manley conditioning Defendants' ability to argue the exception to reporting to the jury upon the disclosure of the three pages produced on the eve of closing arguments notwithstanding the privileged nature of the documents. Defendants also object to this request on the grounds that the withheld pages are irrelevant and not likely to lead to the discovery of admissible evidence. *See also* Mont. R. Evid. 504.

REQUEST FOR PRODUCTION NO. 5: Produce all 10 pages of the document identified as item #1 on the privilege log attached as Exhibit C.

RESPONSE: Defendants incorporate by reference their responses to Request for Production Nos. 3 and 4 because the 10 pages identified as "item #1 on the privilege log"

are the same 10 pages that include reference to Max Reyes (Request for Production No. 3) and include the 7 pages withheld (Request for Production No. 4).

REQUEST FOR PRODUCTION NO. 6: Produce a copy of the questionnaire referenced on page 1 of Exhibit A.

RESPONSE: None.

REQUEST FOR PRODUCTION NO. 7: Produce all pages from the CM database that include references to Holly McGowan. (This request includes the pages previously produced and those that have been withheld.)

RESPONSE: Defendants object to this request because it is vague and ambiguous in that the term "CM database" is defined by a mischaracterization of what the documents attached as Exhibit A are: entries from Watchtower's Legal Department's electronic telephone record keeping system reflecting privileged communications with clients. Defendants object to this request because the withheld documents are protected by the attorney-client privilege and attorney work product doctrine. Defendants also object to this request on the grounds that it intrudes on the constitutionally protected privacy rights of third persons wholly unrelated to this lawsuit. This request also seeks information patently irrelevant to the claims in this lawsuit. As Plaintiff has already represented to the Court, "[e]vidence of conduct by non-parties is irrelevant and likely to confuse or mislead the jury. *See* Mont R. Evid. 401, 403." Pls.' Mot. Limine 6. Further, as Plaintiff knows, the Court has already ruled that all third-party abuse is irrelevant and not admissible (*see* Order dated September 21, 2018). Plaintiff did not appeal. This is the law of the case.

REQUEST FOR PRODUCTION NO. 8: Produce all pages from the CM database that include references to Peter McGowan. (This request includes the pages previously produced and those that have been withheld.)

RESPONSE: Defendants object to this request because it is vague and ambiguous in that the term "CM database" is defined by a mischaracterization of what the documents attached as Exhibit A are: entries from the Watchtower Legal Department's electronic telephone record keeping system reflecting privileged communications with clients. Defendants object to this request because the withheld documents are protected by the attorney-client privilege and attorney work product doctrine. Defendants also object to this request on the grounds that it intrudes on the constitutionally protected privacy rights of third persons wholly unrelated to this lawsuit. This request also seeks information patently irrelevant to the claims in this lawsuit. As Plaintiff has already represented to the Court, "[e]vidence of conduct by non-parties is irrelevant and likely to confuse or mislead the jury. *See* Mont R. Evid. 401, 403." Pls.' Mot. Limine 6. Further, as Plaintiff knows, the Court has already ruled that all third-party abuse is irrelevant and not admissible (*see* Order dated September 21, 2018). Plaintiff did not appeal. This is the law of the case.

REQUEST FOR PRODUCTION NO. 9: Produce all pages from the entire report generated on 8/24/15 as referenced at the top of Exhibit A.

RESPONSE: Defendants object to this request because the documents are protected by the attorney-client privilege and attorney work product doctrine. The 3-page report is already in Plaintiff's possession pursuant to Judge Manley conditioning

Defendants' ability to argue the exception to reporting to the jury upon the disclosure of the three pages produced on the eve of closing arguments notwithstanding the privileged nature of the documents. *See also* Mont. R. Evid. 504. Subject to and without waiving these objections: 08/24/2015, was merely the date of the last call received – *see* Privilege Log item #1d.

INTERROGATORIES

INTERROGATORY NO. 1: Describe the CM database by providing the following information.

1. What is the name or designation the JW Defendants give to the database?
2. Generally describe the information contained in the database.
3. When was the database created?

ANSWER: Defendants object to this request because it is vague and ambiguous in that the term "CM database" is defined by a mischaracterization of what the documents attached as Exhibit A are: entries from the Watchtower Legal Department's electronic telephone record keeping system reflecting privileged communications with clients. Defendants further object to this interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible information. Subject to and without waiving these objections, Defendants respond as follows:

1. These Answering Defendants give no name or designation to what the Plaintiff incorrectly describes as a database. The document attached as Exhibit A is from the Watchtower Legal Department's electronic telephone record keeping system reflecting privileged communications with clients. The CM abbreviation simply refers to the call subject type, which was child maltreatment.

2. Objection. The Interrogatory subpart seeks confidential attorney-client privileged communications, information protected by the work product doctrine, and other third-party private information about confidential legal matters.

3. Objection. The Interrogatory subpart seeks privileged, work product.

INTERROGATORY NO. 2: State your position why the documents marked as Exhibit A are described on Exhibit C as a "Running log of telephone calls (10 pages) between attorneys Robert James, William Niebel, and Anthony Montoya providing legal advice and elders in the Thompson Falls Congregation, MT."

ANSWER: Defendants object to this request to the extent it invades the attorney work product doctrine, seeks to invade the mental impressions of counsel and seeks information that is irrelevant, immaterial and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving that objection, Defendants state that Watchtower attorneys had two conversations with elders from the Thompson Falls Congregation, one in March 2004 and another in August 2015. In addition, Watchtower's attorneys had one conversation with the South Congregation, Polson, MT, in May 2014 relating to Peter McGowan. As reflected on the updated log, Attorney Montoya did not participate in any of the calls involving Maximo Nava-Reyes but provided legal advice to elders in Alabama regarding a different Max Reyes. This electronic record (1 page) was listed in error and was not responsive to any of the discovery demands in this case. *See* Privilege Log #1d. All calls were printed as one file. The log described that file as a "running log" to denote that the privileged documents comprised more than one telephone call.

REQUEST FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Admit that the documents marked as Exhibit A were voluntarily disclosed by Joel Taylor to counsel for Plaintiffs in the email marked as Exhibit B.

RESPONSE: Deny; *see* Mont. R. Evid. 504. As Plaintiff is aware Judge Manley conditioned Defendants' ability to argue the exception to reporting to the jury upon the disclosure of the three pages produced on the eve of closing arguments notwithstanding the privileged nature of the documents.

DATED this 17th day of March, 2021.

Attorneys for Religious Defendants/Third-Party Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By _____
Bradley J. Luck

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2021, a copy of the foregoing document was served on the following persons by the following means:

_____ Hand Delivery
_____ Mail
_____ Overnight Delivery Service
_____ Fax (include fax number in address)
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EXHIBIT C

Subject: FW: Watchtower Privilege Log Documents
Date: Tuesday, September 25, 2018 at 10:58:14 PM Central Daylight Time
From: JMTAYLOR@jw.org <JMTAYLOR@jw.org>
To: neilsmith@nixlaw.com <neilsmith@nixlaw.com>, rossl@nixlaw.com <rossl@nixlaw.com>, jim@galliklawfirm.com <jim@galliklawfirm.com>
CC: kldesoto@GARLINGTON.COM <kldesoto@GARLINGTON.COM>, takeller@garlington.com <takeller@garlington.com>
Attachments: WTPL Docs.pdf

Neil/Ross/Jim,

Attached are 3 pages of the Legal telememorandum wherein Max Reyes name appears. The remaining pages involve Peter Jr.'s confession the Polson Congregation regarding his abuse of Alexis (the report names Max as an abuser of Peter). As per the judge's ruling regarding other sources of abuse, Peter and Alexis' abuse is irrelevant.

-Joel T.

From: Brannan, Jared
Sent: Tuesday, September 25, 2018 11:30 PM
To: Kathleen L. DeSoto; Tessa A. Keller (takeller@GARLINGTON.COM)
Cc: Taylor, Joel
Subject: Watchtower Privilege Log Documents

Katie and Tessa,

Attached are 3 of the 10 telememo pages listed on the privilege log. The other 7 pages involve Peter/Alexis. Max's name is mentioned in connection with Peter.

Thank you.

--Jared

EXHIBIT D

Subject: RE: Nunez v. JW
Date: Thursday, February 25, 2021 at 12:38:56 PM Central Standard Time
From: Bradley J. Luck <bjluck@GARLINGTON.COM>
To: Neil Smith <dneilsmith@me.com>, Jim Molloy <jim@galliklawfirm.com>
CC: Taylor, Joel M. <jmtaylor@jw.org>, Leonoudakis, Ross <rossl@nixlaw.com>, Tessa A. Keller <takeller@GARLINGTON.COM>, Jackie D. Lawrenson <jdlawrenson@GARLINGTON.COM>, JDBRANNA@jw.org <JDBRANNA@jw.org>
Attachments: image001.png

Neil:

We oppose your motion.

I will check with co-counsel and get back to you on response time.

Brad

From: Neil Smith <dneilsmith@me.com>
Sent: Thursday, February 25, 2021 8:58 AM
To: Bradley J. Luck <bjluck@GARLINGTON.COM>; Jim Molloy <jim@galliklawfirm.com>
Cc: Taylor, Joel M. <jmtaylor@jw.org>; Leonoudakis, Ross <rossl@nixlaw.com>; Tessa A. Keller <takeller@GARLINGTON.COM>; Jackie D. Lawrenson <jdlawrenson@GARLINGTON.COM>; JDBRANNA@jw.org
Subject: [EXTERNAL] Re: Nunez v. JW

This Message originated outside your organization.

Brad,

Let me know how much time you need for discovery.

Also, please see attached 3 pages of documents that were produced to us. Do you oppose a motion asking the court to find that these documents are no longer privileged?

From: "Bradley J. Luck" <bjluck@GARLINGTON.COM>
Date: Thursday, February 25, 2021 at 9:07 AM
To: Jim Molloy <jim@galliklawfirm.com>
Cc: "Taylor, Joel M." <jmtaylor@jw.org>, "Smith, J. Neil" <dneilsmith@me.com>, "Leonoudakis, Ross" <rossl@nixlaw.com>, "Tessa A. Keller" <takeller@GARLINGTON.COM>, "Jackie D. Lawrenson" <jdlawrenson@GARLINGTON.COM>, "JDBRANNA@jw.org" <JDBRANNA@jw.org>
Subject: RE: Nunez v. JW

Jim:

In working up a Motion for Summary Judgment it appears we need to formally have you serve the Amended Complaint so we are sure we have the proper operative pleading. Can you do that?

We are working on discovery responses and would appreciate additional time.

Hope all is well over there.

Thanks.

Brad

- - -

Bradley J. Luck // Partner

Garlington, Lohn & Robinson, PLLP
Montana's Attorneys Since 1870
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A Professional Limited Liability Partnership

EXHIBIT E

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Attorneys for Defendants/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc., Christian Congregation of Jehovah's Witnesses, and Thompson Falls Congregation of Jehovah's Witnesses

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

LEXIS NUNEZ, Plaintiff, v. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; WATCHTOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Defendants.	Hon. Elizabeth A. Best Cause No. DV 16-84 WATCHTOWER NY'S THIRD AMENDED PRIVILEGE LOG

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Third-Party Plaintiffs, v. IVY McGOWAN-CASTLEBERRY, Third-Party Defendant.	

Defendant Watchtower Bible and Tract Society of New York, Inc. ("Watchtower NY") hereby submits its Third Amended Privilege Log in connection with Plaintiff's February 4, 2021, discovery requests.

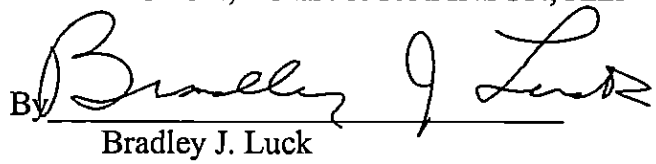
	Date	**Title/Type**	**Basis for Withholding**
1.	March 16, 2004—August 24, 2015	Running log of telephone calls (10 pages)	Attorney Work Product; Attorney-Client Privilege
1a.	March 16, 2004	Telememo (4 pages) between attorney Robert James and elders in the Thompson Falls Congregation, MT. (Page 4 of the telememo contained no data, simply an empty comments field.)	Attorney Work Product; Attorney-Client Privilege
1b.	May 16, 2014	Telememo (3 pages) between attorney William Niebel and elders in the South Polson Congregation, MT.	Attorney Work Product; Attorney-Client Privilege
1c.	August 20, 2015	Telememo (2 pages) between attorney William Niebel and elders in the Thompson Falls Congregation, MT.	Attorney Work Product; Attorney-Client Privilege

	Date	Title/Type	Basis for Withholding
1d.	August 24, 2015	Telememo (1 page) between attorney Anthony Montoya and elders in Alabama (upon further review, this matter involved a different Max Reyes and was listed in error on the previous privilege log).	Attorney Work Product; Attorney-Client Privilege
2.	May 28, 2014	Form (5 pages) from an elder in the Thompson Falls Congregation, MT, seeking legal advice, to an attorney.	Attorney Work Product; Attorney-Client Privilege
3.	August 25, 2015	Form (3 pages) from elders in the Thompson Falls Congregation, MT, seeking legal advice, to attorney.	Attorney Work Product; Attorney-Client Privilege
4.	December 2, 2015	Memorandum (2 pages) from attorney Anthony Montoya to Service Department providing legal advice.	Attorney Work Product; Attorney-Client Privilege
5.	November 29, 2016	Notes (2 pages) taken by legal counsel for WTNY from Interview with Joni Nava-Reyes and Maximo Nava-Reyes.	Attorney Work Product

DATED this 17th day of March, 2021.

Attorneys for Religious Defendants/Third-Party Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By 

Bradley J. Luck

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2021, a copy of the foregoing document was served on the following persons by the following means:

_____ Hand Delivery
_____ Mail
_____ Overnight Delivery Service
_____ Fax (include fax number in address)
1-3 E-Mail (include email in address)

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EXHIBIT F

M Nava Maximo		Age 66	Report 08/24/2015	Status Inactive
05/15/1949 10/17/93	#128215	Thompson Falls	City Thompson Falls	State MT
0O8S.0PUWE	Confirmed No		Reported No	CSA Yes

Facts Sheet [CM]
Attorney-Client Privileged

No need to report	Michael Burnett, 46850 (Matthew Moore, SSM, 46851)
Legal Robert James	Service SDJ
Date entered 03/16/2004 10:14 AM	By M. Bernard Thomas
Congregation #128215 Thompson Falls Thompson Falls MT	
Coord. Riech, Kenneth / 406-826-3582	Sec'y Wilson, Glenn A. / 406-827-9519
Callers Kenneth Riech	(h) 406) 826-3582 evenings, weekends
	(w) 406) 822-4378 days
	(m) 406) 546-9395 days

Accused

Sex/Age of minors in household

Comments and Specific Direction

Questionnaire sent? ● No ○ Yes	**Conf. Comm. Statement sent?** ● No ○ Yes
When?	When?
To whom?	To whom?
Liability Opinion	Completed Statement

The elders should verify with Peter McGowan that he does not want the matter to be reported. They should also try to ascertain if he feels he is any further danger.
The caller was transferred to the Service Department for further theocratic direction.

No need to report

Legal Reporting Advice:
Based on the information provided and the law, the elders have no duty to report this matter to the authorities.

General Legal Advice and Direction

General Legal Advice and Direction:
Please take note of the following additional legal advice and direction. As noted in the letter to all bodies of elders dated February 15, 2002, child abuse is a crime. Never suggest to anyone that they should not report an allegation of child abuse to the police or other authorities. If asked, make it clear that whether or not to report the matter to the authorities is a personal decision for each individual to make and that there are no congregation sanctions for either decision. That is, no elder will criticize or punish anyone who reports such an allegation to the authorities. The body of elders should review the branch's policy of confidentiality as found in the letter of July 1, 1989. Further, elders should follow the direction in the letters to all bodies of elders of March 23, 1992, August 1, 1995, and review the articles on child abuse cited therein. If any elders receive a subpoena to testify or for the production of documents, they should immediately contact the Legal Department. If the authorities or anyone else questions any elders, they should inform the person that they are ministers and cannot disclose confidential information. Then simply take the name of the person, name of his office and telephone number, and let him know that you or your attorney will get back to him. Do not tell the person who your attorney is. The elders should then call the Legal Department immediately.

If this becomes a congregation judicial matter, there is no legal objection to the elders handling this as any other case of serious wrongdoing. Remember to treat the victim with extreme thoughtfulness and kindness. The family should be urged to take positive steps to prevent further abuse. The body of elders should monitor the situation carefully for the protection of other potential victims. Call the Legal Department again if any elder hears of the alleged abuse from any other person, learns of a new victim, or learns other new and significant information. If you need theocratic direction, please contact the Service Department.

Follow-Up

Follow-up by

Follow-up date

Description

VICTIM PROFILE [CM]
Attorney-Client Privileged

Confirmed ○ No ○ Yes Consent ● No ○ Yes CSA ○ No ● Yes Report ● No ○ Yes

First Name **Holly** Middle ◉Last **McGowan** Suffix

Sex Female née Age 10. Age now 20

Congregation #128215 Thompson Falls Thompson Falls

◉Congregation status Publisher

Father's status Publisher Mother's status Publisher

If not with parent(s), relationship to person: None Other's status: None

Relationship of accused to victim: stepfather Same home ● No ○ Yes

About the Allegations

What specific acts are alleged? The accused fondled the victim's breasts and perhaps her genitals.

How often?

Categories ☒ Sexual ☐ Neglect ☐ Emotional ☐ Sexting ☐ Physical ☐ Verbal ☐ Financial ☐ Unknown

When alleged acts occurred 1994-1997

◉Victim a willing partipant?

Where (location) did alleged acts occur? In the family's home.

When did any elders find out? (Date(s)) 3/14/2004

How did any elders find out? (Source(s)) The victim's brother revealed it to the elders in a confidential, personal discussion.

Elders [calling] spoken to accused? ○ No ● Yes If Yes, ○ Confessed ● Denied ○ Other

Reported to authorities? ● No ○ Yes

Who else knows of the The biological mother and the elders.

allegations?	
Efforts to protect victim?	The victim is now an adult.

Comments

Follow-Up

Follow-up by

Follow-up date

Description

VICTIM PROFILE [CM]
Attorney-Client Privileged

Confirmed ○ No ○ Yes Consent ● No ○ Yes CSA ○ No ● Yes Report ● No ○ Yes

First Name **Peter** Middle Last **McGowan** Suffix

Sex Male née Age 7 Age now 17

Congregation #128215 Thompson Falls Thompson Falls

Congregation status Publisher

Father's status Publisher Mother's Publisher status

If not with parent(s), relationship to person None Other's status None

Relationship of accused to victim stepfather Same home ○ No ● Yes

About the Allegations

What specific acts are alleged? The accused fondled the victim's genitals.

How often?

Categories ☒ Sexual ☐ Neglect ☐ Emotional ☐ Sexting ☐ Physical ☐ Verbal ☐ Financial ☐ Unknown

When alleged acts occurred 1994-1997

Victim a willing partipant?

Where (location) did alleged acts occur? In the home.

When did any elders find out? (Date(s)) 3/14/2004

How did any elders find out? (Source(s)) The victim confided in an elder.

Elders [calling] spoken to accused? ○ No ● Yes If Yes, ○ Confessed ● Denied ○ Other

Reported to authorities? ● No ○ Yes

Who else knows of the allegations? The victim's biological mother and elders.

The elders plan on meeting with the accused judicially.

EXHIBIT G

need to confess?'" And your answer was, "It was not."

A. Correct.

Q. Did I read that correctly?

A. You did.

Q. Thank you, sir. I'm going to move through this real fast. In 2004 a judicial committee was formed, correct?

A. Yes.

Q. A judicial hearing was held, right?

A. Yes.

Q. The judicial committee made the decision to dis-fellowship Max?

A. Yes.

Q. The judicial committee made the decision not to call the authorities?

A. We did not call the authorities.

Q. Who made that decision?

A. The committee never -- that really wasn't part of the judicial hearing.

Q. You were not part of the judicial hearing?

A. No, I was. The topic of whether to call the authorities or not.

Q. Well, somebody had to make the decision -- I mean 2004 a known pedophile coming to church with a child, correct? Is that true?

A. They were there in the Kingdom Hall, yes.

Q. If we put the jury in your shoes and explained to them what you know, in 2004 you know -- "I'm looking out in the congregation, known pedophile with a child who is coming to church with him." You know that, right?

A. Yes.

Q. You know that Lexi is staying in his house on the weekends, right?

A. I didn't pay much attention but we assumed that that would be the case, yes.

Q. Because you would pick them up on the weekends and sometimes take them to your house, right?

A. I don't recall that.

Q. Who made the decision -- who decided "I'm not going to call the authorities"?

A. We were given direction that we were not mandated to call the authorities. Each elder could then decide for himself whether he needed to call or not.

Q. So every one of them decided "I'm not going to call the authorities"?

A. In this case, yes.

Q. You've heard us discuss the 1998 report that Holly will describe that she made. Did you hear me talk --

A. I've heard this, yes.

EXHIBIT H

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0077

ALEXIS NUNEZ and HOLLY McGOWAN,

Plaintiffs/Appellees,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES,

Defendants/Appellants.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES,

Third-Party Plaintiffs/Appellants,

v.

MAXIMO NAVA REYES and IVY McGOWAN-CASTLEBERRY,

Third-Party Defendants/Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the Twentieth Judicial District Court,
Sanders County, Montana
Cause No. DV 16-84
Honorable James A. Manley

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

Other Authorities

Rules

I. STATEMENT OF ISSUES

1. Did the District Court err in granting summary judgment on Alexis Nunez's negligence per se claim?

2. Was there sufficient evidence of "actual malice" to justify the jury's award of punitive damages?

3. Did the District Court err in holding the statutory cap on punitive damages unconstitutional under the Montana Constitution?

4. Does the punitive damages award against Watchtower Bible and Tract Society of New York, Inc. ("Watchtower"), violate federal constitutional standards?

II. STATEMENT OF THE CASE

This case involves a $35 million verdict—$31 million in punitive damages—for negligence per se against entities associated with Jehovah's Witnesses for allegedly failing to comply with Montana's child abuse reporting statute. Jehovah's Witnesses recognize that Scripture "[o]bligates them to be obedient to the law," including reporting statutes. Trial Tr. Vol. 1, 241:9-16, Sept. 24, 2018. If the law says clergy must report abuse, they report it. Montana's reporting statute requires clergy to report abuse *unless* the information is "confidential." Here, after confidentially learning of years-old

abuse, elders of a local Montana congregation sought advice from legal counsel to know whether they had a legal duty to report. The attorney advised them, correctly, that they had no such duty.

This brief demonstrates that, contrary to the judgment below, Defendants did not violate the reporting statute. And even if they did, there is no evidence they acted with the "actual malice" necessary to justify punitive damages, and especially not the unlawful and shockingly excessive award of $31 million in punitive damages.

The facts are simple. In 2004, siblings Peter McGowan, age 17, and Holly McGowan, age 20, confided to elders in the Thompson Falls Congregation of Jehovah's Witnesses that *years earlier* their stepfather, Maximo Reyes, had sexually abused them. Desiring to obey the law, the elders called legal counsel at Watchtower for advice on reporting obligations. With no "imminent" threat of abuse, and with the communications to the elders having been "confidential," legal counsel correctly advised that under Montana's reporting statute they had no duty to report.

Not until a decade later did anyone know that Maximo was also sexually abusing Peter and Holly's niece, Alexis. In 2016, Alexis sued the Thompson Falls Congregation, Christian Congregation of Jehovah's Witnesses ("CCJW")

(a New York nonprofit corporation that assists Jehovah's Witnesses), and Watchtower (the faith's New York entity that retains the attorney who gave legal advice to congregation elders).

District Court proceedings were marred by a series of critical legal errors. Alexis did not move for summary judgment on her negligence per se claim for Defendants' alleged violation of the reporting statute. The District Court erroneously granted it anyway, despite her admission that there were "genuine fact issue[s]." Dist. Ct. R. ("CR") 77 at 14.

The court erroneously held that the attorney *in New York* violated Montana's reporting statute and that Watchtower was vicariously liable. The court erroneously held that elders at CCJW *in New York* violated Montana's reporting statute and that CCJW was vicariously liable. The court erroneously ignored this Court's black-letter law by holding that Alexis did not have to prove that failing to report was the proximate cause of her injuries. And the court erroneously upheld the jury's staggering award of $31 million in punitive damages—one of the largest in Montana history—despite zero evidence of "actual malice" and notwithstanding Montana's statutory cap on punitive damages (brushed aside as unconstitutional).

This Court should reverse the judgment below because of these and other fatal errors.

The elders of Jehovah's Witnesses obey child abuse reporting laws. As shown below, Montana's reporting statute did not require a report in this case. Whatever protection common-law duties might have provided, contrary to the judgment below the reporting statute cannot be the basis of liability. And even assuming the attorney who advised congregation elders misinterpreted the reporting statute, a good-faith misinterpretation of a statute is not "actual malice" and does not justify $31 million in punitive damages.

III. STATEMENT OF FACTS

These facts are from the record that existed when the District Court granted summary judgment. As necessary, facts from trial are set forth in the punitive-damages section.

Ivy McGowan-Castleberry, Holly, and Peter are siblings. CR 68, Ex. B: 16:10-23. Their mother is Joni Reyes and their stepfather is Maximo Reyes. CR 85, Ex. 1: 134:19-20. Appellee Alexis Nunez is Ivy's daughter. CR 4.

A. Maximo Abuses Holly, Peter, and Alexis

In 1998, Ivy learned that her stepfather Maximo had sexually abused her sister Holly. CR 88, Ex. 1: 94:18-22. Ivy spoke with her mother, Joni, about

Holly's abuse; thus, Alexis's mother and grandmother both knew by 1998 that Maximo had abused Holly. CR 88, Ex. 1: 96:2-7.

Around 2002, despite knowing that Maximo had abused Holly, Ivy had Joni babysit Alexis and her siblings. CR 88, Ex. 1: 95:2-96:1. Ivy "was really hoping" that Maximo's abusing Holly "had been a one-time incident." CR 88, Ex. 1: 96:10-22. Joni did not believe Maximo had abused Holly. CR 88, Ex. 2: 53:10-23. Both women were wrong, and sadly Maximo abused Alexis almost weekly while Joni babysat. CR 77, Ex. AA: 72:1-73:12, 74:16-24. In 2003, Ivy moved, the babysitting stopped, and the abuse became less frequent. CR 77, Ex. AA: 74:25-76:17.

In 2003, Holly, now an adult living in Nebraska, told Joni that Maximo had abused her in the 1990s. CR 88, Ex. 2: 89:18-25. In 2004, 17-year-old Peter also told Joni that Maximo had abused him years earlier. CR 88, Ex. 2: 49:7-18; 89:11-17. Joni confronted Maximo, who admitted touching Peter but denied any "sexual motivation." CR 88, Ex. 2: 51:7-15; 90:11-20. Maximo decided to leave the home "so Peter can stay." CR 88, Ex. 2: 91:12-92:13. But Peter also left the home. CR 88, Ex. 2: 92:10-13.

B. Thompson Falls Congregation of Jehovah's Witnesses

Joni, Maximo, Peter, and Holly (before she moved) were members of the

Thompson Falls Congregation of Jehovah's Witnesses. Ivy's daughter Alexis sometimes attended congregation meetings with her grandmother Joni. CR 77, Ex. AA: 66:2-22. Alexis had no other connection with the congregation. The congregation had no involvement in Joni babysitting Alexis. CR 85, Ex. 2: 52:17-53:9.

Congregations of Jehovah's Witnesses receive spiritual oversight and pastoral care from a group of local elders who are "clergy" under Montana law. CR 77, Ex. B ¶¶7-9; Ex. C ¶7. Elders give spiritual counsel, hear confessions, and provide spiritual discipline for serious sins, sometimes resulting in a member being disfellowshipped (expelled). CR 77, Ex. B ¶¶7-14; Ex. A ¶¶6-9; Ex. C ¶8. Under established Jehovah's Witnesses doctrine and practice, elders must maintain the confidentiality of all spiritual communications with members and other elders. CR 77, Ex. A ¶ 9; Ex. B ¶8; Ex. C ¶8; Ex. D ¶10; Ex. E ¶21.

C. Confidential Spiritual Communications and Discipline

In 2004, Peter confided in Don Herberger, a Thompson Falls Congregation elder, that Maximo had abused him years earlier. CR 51 at 3; CR 63, Ex. 1: 14:6-15:3. Peter entrusted this information to Herberger so the elders could take spiritual action against Maximo. CR 63, Ex. 1: 45:21-46:10. Peter believed his conversation with Herberger was confidential. CR 63, Ex. 1:

39:1-11, 46:3-8. Undisputed testimony established that "[i]t is a religious belief and practice of Jehovah's Witnesses ... that elders must maintain in strict confidence any church communications connected with spiritual counsel and advice" and that "[c]ongregation members expect that their communications with elders will remain confidential."[1] CR 77, Ex. E ¶¶21-22.

Established Jehovah's Witnesses doctrine and practice require either a confession or two witnesses before spiritually disciplining an accused member. CR 77, Ex. FF: 38:2-7. Herberger contacted Peter's sister, Holly. CR 63, Ex. 2: 193:19-194:9. Holly wrote a confidential letter to the elders saying Maximo had also abused her years earlier. CR 51, Ex. A; CR 63, Ex. 8: 99:17-101:7. Herberger believed Holly confided in him "because of the position I have in the congregation as a spiritual shepherd." CR 63, Ex. 2: 196:17-19.

When one of Jehovah's Witnesses commits a gross sin, established Jehovah's Witnesses doctrine and practice require a "judicial committee" of elders to spiritually discipline the sinner. CR 77, Ex. B ¶10; Ex. C ¶10, Ex. D ¶20. Jehovah's Witnesses believe confession of sin is essential to salvation and that confidentiality promotes confession. CR 51, Ex. E ¶20. As

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[1] Notwithstanding this belief, elders report suspected child abuse to authorities when required by law. Trial Tr. Vol. I: 200:14-15.

required by their ecclesiastical practices, the elders confidentially confronted Maximo. CR 51, Ex. C: 133:3-9. Maximo denied most of the allegations, but the elders believed the victims and disfellowshipped him (expelled him from membership). CR 63, Ex. 2: 148:21-25; Ex. 1: 30:14-25.

This process of ecclesiastical discipline is confidential. Under established Jehovah's Witnesses doctrine and practice, "all spiritual communications taking place during an investigation or judicial committee, are considered extremely private and strictly confidential by all present, including the accused congregant and elders." CR 77, Ex. B ¶10.

D. Local Elders Obtain Confidential Spiritual Advice from CCJW and Confidential Legal Advice from Watchtower

Congregation elders throughout the United States receive spiritual guidance from elders at CCJW in New York. CR 77, Ex. C ¶7; Ex. G ¶7; Ex. H ¶4. CCJW, a New York non-profit corporation headquartered in New York, supports the religion of Jehovah's Witnesses. CR 77, Ex. G ¶¶5-7. Congregation elders confidentially communicate with elders at CCJW to receive spiritual counsel and guidance. CR 77, Ex. T ¶33. Under established Jehovah's Witnesses doctrine and practice, "[a]ll such spiritual communications must be kept private and strictly confidential." CR 77, Ex. T ¶33.

When a congregant is disfellowshipped, congregation elders send a confidential "notice of disfellowshipping" to elders in the Service Department at CCJW who review it to ensure the decision was supported by Scripture and to provide additional spiritual counsel. CR 77, Ex. B ¶11; Ex. P ¶¶14-15. Under established doctrine and practice, "[a]ll such spiritual communications between congregation elders and elders in the Service Department must be kept strictly confidential." CR 77, Ex. B ¶9; Ex. C ¶¶9-11. "[T]he religious beliefs of these elders [in the Service Department] require that any confidential communications that they may have with congregation elders must be kept strictly confidential." CR 77, Ex. D ¶13. The confidential notice from the Thompson Falls' elders stated that Maximo was disfellowshipped for sexually abusing his stepchildren. CR 51, Ex. B.

Watchtower, a New York nonprofit corporation that supports Jehovah's Witnesses, maintains a legal department. CR 77, Ex. Z: 39:7-40:8. While congregation elders turn to CCJW's Service Department elders for confidential *spiritual* guidance, they call Watchtower's Legal Department for confidential *legal* advice. CR 51, Ex. C: 52:10-15. CCJW is not owned or operated by, and does not own or operate, Watchtower. CR 77, Ex. I ¶4. At all relevant times

CCJW (not Watchtower) communicated religious policies and procedures to local elders. CR 77, Ex. I ¶7; Ex. Q ¶¶5-9.

Under church policy, congregation elders call the Legal Department "immediately" whenever they "receive reports of physical or sexual abuse of a child." CR 25, Ex. A. Thompson Falls' elders called the Legal Department and were advised by an attorney that Montana law did not require a report. CR 63, Ex. 2: 148:10-12; CR 51, Ex. D: 18:2-14.

E. No Evidence of Notice of Risk to Alexis

When, in 2004, Peter and Holly told congregation elders that Maximo had abused them years earlier, neither gave the elders any reason to believe they or their niece, Alexis, was at risk. Holly was an adult living in Nebraska and Peter had moved out. CR 88, Ex. 2: 92:10-13. Joni was no longer babysitting Alexis. Alexis's mother Ivy testified that between 2003 and 2007, Alexis was rarely around Maximo. "[I]t was definitely extremely diminished time that they were with my mom and even less that they were around Max." CR 63, Ex. 4: 99:8-100:24. Alexis did not tell anyone Maximo had abused her until 2012. CR 68, Ex. D: 79:24-80:3. Peter was not aware Alexis had been abused until this lawsuit. CR 63, Ex. 1: 7:9-15. Holly "had no idea at that time about

Alexis." CR 63, Ex. 3: 126:16-17. Ivy did not discover that Maximo had abused Alexis until Alexis was 19. CR 63, Ex. 4: 93:24-94:13.

F. Course of Proceedings

Alexis and Holly filed suit against Watchtower, CCJW, and the Thompson Falls Congregation alleging claims for negligence, negligence per se, breach of fiduciary duty, and vicarious liability. CR 4. In an order denying a motion filed by Defendants, the District Court *sua sponte* granted summary judgment to Alexis on her claim for negligence per se, holding that each Defendant violated Montana's mandatory sexual abuse reporting statute. App. 1 (CR 107). Before trial, Plaintiffs voluntarily dismissed all other claims. Trial Tr. Vol. 1: 141:23-142:9.

After a three-day trial, the jury found against Holly and awarded her nothing. App. 2 (CR 128). Having been instructed that Defendants were liable to Alexis, the jury awarded her $4 million in compensatory damages and apportioned fault: 80% Watchtower, 15% CCJW, 4% Thompson Falls Congregation, and 1% Ivy (Alexis's mother). App. 2 (CR 128). The jury found that CCJW and Watchtower acted with "malice" and awarded $30 million in punitive damages against Watchtower and $1 million against CCJW. App. 3 (CR 129).

Defendants moved to reduce the punitive damages based on Montana's statutory cap, MCA § 27-1-220(3). CR 130. The District Court found § 27-1-220(3) unconstitutional and entered judgment for the full amount. App. 4, 5 (CR 137, 138).

IV. STANDARDS OF REVIEW

1. The District Court's grant of summary judgment to Alexis on negligence per se is reviewed de novo. *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶1, 344 Mont. 435, 188 P.3d 1063.

2. The jury's determination that there was clear and convincing evidence that Watchtower and CCJW acted with malice is reviewed to determine if there is "substantial credible evidence" to support it. *Magart v. Schank*, 2000 MT 279, ¶4, 302 Mont. 151, 13 P.3d 390.

3. This Court conducts a "plenary" review of the District Court's declaration that MCA § 27-1-220 violates the Montana constitution. *In re A.S.*, 2004 MT 62, ¶9, 320 Mont. 268, 87 P.3d 408.

4. This Court conducts a "plenary" review of the constitutionality of the punitive damages award under the United States Constitution. *Id.*

V. SUMMARY OF THE ARGUMENT

A. The District Court erred in granting summary judgment to Alexis on negligence per se.

The District Court committed four reversible errors in holding that as a matter of law Defendants violated the reporting statute:

First, the reporting statute applies only to certain "professionals and officials," not institutions or organizations. MCA § 41-3-201. Thus, Defendants could not violate the statute and cannot be liable for negligence per se. And because reporting is done to avoid criminal liability and serve the State's purposes, not to benefit a principal or employer, Defendants cannot be vicariously liable.

Second, clergy are not required to report abuse they learn about through a "communication" that is "confidential" under "church doctrine, or established church practice." MCA § 41-3-201(6)(c). Undisputed evidence established that Jehovah's Witnesses doctrine and practice required the elders to maintain the confidentiality of the communications at issue. The District Court's ruling contradicts the reporting statute and infringes on the First Amendment right of Jehovah's Witnesses to handle confessions of sin and ecclesiastical discipline in confidence.

Third, a report is mandatory only when the enumerated reporters have "reasonable cause to suspect" a "present imminent risk of" abuse. *Gross v. Myers*, 229 Mont. 509, 513, 748 P.2d 459, 461 (1987). Alexis conceded that there were "genuine fact issue[s] as to whether ... Defendants had a reasonable cause to suspect that there was a present imminent risk of harm to a child." CR 77 at 14. The District Court granted summary judgment anyway.

Fourth, the elders with CCJW and the Watchtower attorney who learned about the abuse all live in New York. Their duty to report is governed by New York law, not Montana law. A state "has no authority to mandate reports by adults or agencies in other states." *People v. Lewis*, 183 Cal. Rptr. 3d 701, 706 (Ct. App. 2015). Clergy are not mandatory reporters under New York law. Attorneys are not mandatory reporters under Montana or New York law.

For two additional reasons, the District Court erred in granting summary judgment to Alexis on negligence per se:

First, Alexis had to prove that "the [reporting statute] was enacted to protect a specific class of persons; [and] that [she] is a member of the class." *Stipe*, ¶14. The "class of persons" protected by reporting statutes is the child or children about whom a report is or should have been made. The District Court

erroneously held that Defendants were liable to *Alexis* under the reporting statute for failing to report the abuse of *Peter and Holly*.

Second, the District Court erroneously held that proximate cause is established as a matter of law once negligence per se is proved. CR 105. "A negligence per se theory, however, does not relieve a plaintiff from proving causation." *Stipe*, ¶14. Proximate cause should have been decided by the jury.

For these reasons, the District Court erred in granting summary judgment to Alexis on negligence per se.

B. The jury lacked sufficient evidence to award punitive damages against Watchtower and CCJW.

Before punitive damages can be awarded for negligence per se, a plaintiff must prove by clear and convincing evidence that the defendant acted with "actual malice," meaning he intentionally or recklessly violated the statute. *Stipe*, ¶¶22-23. The District Court erroneously held that the Watchtower attorney and the CCJW elders in New York had a duty to report under Montana law and that Watchtower and CCJW were vicariously liable for their failure to report. But even if correct, Alexis submitted no evidence that the attorney or the elders acted with malice. Watchtower and CCJW reasonably believed they had no duty to report under Montana law.

C. The District Court erred in ruling that the statutory cap on punitive damages violates the Montana Constitution.

A cap on punitive damages need only be rationally related to a legitimate legislative interest to pass muster under the Montana Constitution. Recognizing that such interests exist, this Court has held "the legislature may, at its will, restrict or deny the allowance of such damages." *Meech v. Hillhaven W.*, 238 Mont. 21, 47, 776 P.2d 488, 504 (1989) (citation omitted).

D. The punitive-damage award against Watchtower violates the U.S. Constitution.

Three "guideposts" determine whether a punitive-damages award is grossly excessive: (1) the reprehensibility of the conduct at issue, (2) the ratio between punitive and compensatory damages, and (3) the difference between the punitive damages and available civil penalties. Watchtower's failure to report was not reprehensible—New York attorneys providing legal advice to Montana clergy have no duty to report. The 9:1 ratio of punitive to compensatory damages here exceeds constitutional boundaries, especially because substantial compensatory damages were already awarded. *See infra* p. 53. Finally, failure to report is a misdemeanor punishable by a $500 fine. A $30,000,000 fine is more fitting for a serious felony. These guideposts confirm

that the $30,000,000 award of punitive damages against Watchtower was "grossly excessive."

VI. ARGUMENT

A. The District Court erred in granting summary judgment on negligence per se.

In an order denying Defendants' motion for partial summary judgment, the trial court granted summary judgment to Alexis on negligence per se, leaving only "the appropriate amount of damages" to the jury. App. 1 (CR 107). The Court's one-page preemptive order (one paragraph on this issue) was stunning. Alexis had not moved for summary judgment on negligence per se. On the contrary, in response to Defendants' motion, she conceded that there were "genuine fact issue[s] as to whether ... Defendants are negligent per se." CR 77 at 14. The District Court's ruling misapplied the law, ignored disputed facts, and usurped the jury's role.

1. The District Court erred in ruling as a matter of law that Defendants violated the reporting statute.

"A plaintiff must establish five elements to bring a negligence per se claim. . . . " *Stipe*, ¶14. The first is "that the defendant violated a particular statute." *Id.* For four reasons, the District Court erred in ruling as a matter of law that each Defendant violated the reporting statute.

a. Defendants are not mandatory reporters.

As institutions, Defendants cannot violate the reporting statute. Only specified "[p]rofessionals and officials" are required to report. MCA § 41-3-201(2). No entities, institutions, or organizations are identified as mandatory reporters. In *Newville v. State Department of Family Services*, 267 Mont. 237, 883 P.2d 792 (1994), the District Court refused to instruct a jury that a police department had a duty to report abuse. This Court affirmed because the statutory duty "applied only to the police officers" and not the department itself. *Id.* at 807-08.

Alexis argued below that Defendants are each vicariously liable for their respective agents' failing to report. Hr'g Tr. at 33:4-11, Aug. 14, 2018 (CR 113.500). That argument is contrary to the plain language of the reporting statute: "Any person, official, or institution *required by law to report* known or suspected child abuse or neglect who fails to do so ... is civilly liable for the damages proximately caused by such failure or prevention." MCA § 41-3-207(1) (emphasis added). Because Defendants were not "required by law to report," they are not civilly liable under the reporting statute. And this Court should not use common law to add to the list of mandatory reporters or to create

vicarious liability. *See* MCA § 1-1-108 ("there is no common law in any case where the law is declared by statute").

Further, Alexis's vicarious liability argument, which the District Court accepted, misses a critical difference between negligence and negligence per se. All negligence requires breach of a duty. *Massee v. Thompson*, 2004 MT 121, ¶30, 321 Mont. 210, 90 P.3d 394. Montana's common-law rule is that there is "no duty to protect another from harm in the absence of a special relationship of custody or control." *Krieg v. Massey*, 239 Mont. 469, 472, 781 P.2d 277, 279 (1989). When a statute imposes a duty that does not exist under the common law, "the duty being a creature of statute, its scope is defined by the statute creating it." *Rodriguez v. Sandhill Cattle Co.*, 427 S.W.3d 507, 509 (Tex. App. 2014). Here, the reporting statute imposes a duty only on specified "professional and officials," not on their employers or principals. Only the actor who violates the statutory duty is guilty of negligence *as a matter of law.* This is especially clear where liability is based on a failure to act and no duty to act exists absent the statute. Where no common-law duty is owed, a court

should not extend statutory liability, even vicariously, to a defendant who owed no duty.[2]

Further, vicarious liability attaches when an agent acts "in furtherance of his employer's interest," or "for the benefit of his master." *Kornec v. Mike Horse Mining*, 120 Mont. 1, 8, 180 P.2d 252, 256 (1947). Montana's reporting statute imposes a duty on certain "professionals and officials" but not on institutions.[3] The statutory duty is personal to them, and individuals report child abuse out of personal concern or to avoid personal criminal liability, not to advance their employer's interests. It follows that there can be no vicarious liability for an employee's failure to report.

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[2] This Court narrowly reads statutes that abrogate the common law by, for example, creating liability where it would not exist at common law. *See Nehring v. LaCounte*, 219 Mont. 462, 466, 712 P.2d 1329, 1332-33 (1986) (refusing to impose statutory liability where "at common law, no right of action existed against a seller of alcoholic beverages in favor of those injured by the intoxication of the purchaser"); *Drinkwalter v. Shipton Supply Co., Inc.*, 225 Mont. 380, 384, 732 P.2d 1335, 1338 (1987) ("Absent a clear indication of the legislature's intent to abrogate existing common law remedies, we must construe new statutory remedies as existing in addition to, rather than instead of, the common law remedies.").

[3] Other states impose reporting obligations on institutions. *See* Mandatory Reporters of Child Abuse and Neglect at 3 https://www.childwelfare.gov/pubPDFs/manda.pdf#page=3&view=Institutional%20responsibility%20to%20report.

The Arkansas Supreme Court rejected vicarious liability based on an employee's reporting duty, holding that "it is individuals ... who are listed as mandatory reporters," not institutions, and because reporting is done to avoid criminal liability, not to benefit an employer, it does not create vicarious liability. *Cooper Clinic, P.A. v. Barnes*, 237 S.W.3d 87, 92 (Ark. 2006). The same holds true here. Other claims, such as ordinary negligence, might provide an avenue for relief. But an entity or organization that cannot violate the reporting statute and owes no duty to the plaintiff under the statute cannot be vicariously liable for another's violation of the statute.[4] The District Court's ruling should be reversed.

b. The reporting statute does not require clergy to report if established church doctrine or practice requires confidentiality.

Even if the reporting statute applied to Defendants, directly or vicariously, it did not require a report in this case. Clergy are "not required to make a report" if they learn about abuse through a "communication" that is

[4] Imposing vicarious liability would create liability against clinics, hospitals, schools, municipalities, the State, and other employers of mandatory reporters. There is no evidence the Legislature intended the reporting statute to expand liability that broadly.

"confidential" under "church doctrine, or established church practice."[5] MCA § 41-3-201(6)(c).[6]

The undisputed evidence proved the confidentiality of the communications at issue under established Jehovah's Witnesses doctrine and practice. CR 77, Exs. A-F, H, J, N, P, T, U. As one elder testified, without contradiction, "all spiritual communications taking place during an investigation or judicial committee, are considered extremely private and strictly confidential by all present, including the accused congregant and elders." CR 77, Ex. B ¶10.

Suggesting that the exemption only applies to penitential confessions by perpetrators, Alexis argued below that the communications from Peter and Holly were not "confidential" because they were victims. CR 51 at 9. This argument has no merit. The reporting statute protects *all* confidential communications regardless of their source.

Alexis also argued that Peter's and Holly's communications to

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[5] It was undisputed that elders in the Thompson Falls Congregation were clergy under MCA § 41-3-201. CR 51, Ex. C: 61:16-20.

[6] This brief cites to the current version of the reporting statute. While numbering has changed, no relevant substantive changes have been made since 2004.

congregation elders were not "confidential" because they were disclosed as part of the process of investigating and imposing ecclesiastical discipline on Maximo. CR 51 at 6-8. But "confidential" does not mean a communication can never be disclosed. Confidential disclosures to authorized persons are entirely consistent with the confidentiality of a communication, as seen by how the word "confidential" is used throughout the Montana Code.

Confidential can simply mean "not public." *See, e.g.*, MCA § 61-7-114(2) ("all accident reports and supplemental information filed as required by this part are confidential and not open to general public inspection").

Confidential can mean disclosure is limited to those authorized to receive the information. MCA §§ 44-5-103(3), 44-5-303(1) ("confidential criminal information" is restricted "to those authorized by law to receive it"). The reporting statute itself authorizes disclosure of information generated from a report to many people, *including the alleged perpetrator*, yet declares such information "confidential" and requires those who receive it to "maintain the confidentiality of the records." MCA § 41-3-205.

Confidential can mean disclosure is limited to parties to a proceeding, even between adversarial parties. MCA § 26-1-813(3) ("all mediation-related communications ... are confidential").

Confidential can mean information is limited to parties with an interest in it. Adoption proceedings are confidential "and must be held in closed court without admittance of any person other than interested parties and their counsel." MCA § 42-6-101(1).

In the context of a reporting statute, the Minnesota Supreme Court held that disclosures of abuse within group therapy remain "confidential" because "[t]he participants in group psychotherapy sessions are not casual third persons who are strangers to the [psychiatrist-patient] relationship." *State v. Andring*, 342 N.W.2d 128, 133 (Minn. 1984).

The communications at issue here likewise qualify as "confidential." Undisputed evidence established that the elders had a religious obligation to maintain the confidentiality of these communications. CR 63, Ex. 2: 196:1-25; Ex. 8: 77:15-18, 85:18-24, 99:2-101:7; Ex. 9: 53:23-35. Peter and Holly understood that their disclosures would be kept within the confidential confines of the judicial-committee process.[7] CR 63, Ex. 1: 39:1-11, 45:21-46:10; Ex. 2: 196:1-25. Their mother understood that the process through which Maximo was disfellowshipped was confidential. CR 88, Ex. 2: 50:2-25. The elders at

[7] Holly confirmed at trial that she understood that this process was confidential. Trial Tr. Vol. 2: 99:3-100:7.

CCJW in New York maintained the confidentiality of the communications between them and congregation elders. CR 77, Ex. DD.

The Legislature's decision to broadly protect such communications is no surprise. The law has long recognized that confidentiality between parishioners and their clergy is essential. Thus, "[a]ll fifty states have enacted statutes 'granting some form of testimonial privilege to clergy-communicant communications.'" *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) (citations omitted). In nearly half of the states, clergy are not mandatory reporters. And in most states where they are mandatory reporters, including Montana, an exception is made for confidential communications.[8] Given this widespread respect for confidentiality between parishioners and clergy, and because every faith community has different practices, it is not surprising that the Legislature would make clergy mandatory reporters but broadly exempt all communications that their doctrine and beliefs require them to keep confidential.[9]

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[8] *See* Mandatory Reporters of Child Abuse and Neglect at 3 https://www.childwelfare.gov/pubPDFs/manda.pdf#page=3&view=Institutional%20responsibility%20to%20report.

[9] A study on the effects of mandated clergy-reporting statutes suggests that failing to protect the confidentiality of disclosures to clergy may be detrimental to a state's efforts to uncover and prevent abuse. *See* Frank E.

In this case, the only person outside the confidential ecclesiastical process who learned about the communications was the Watchtower attorney who provided legal advice. But the local elders' confidential communication with an attorney was itself privileged and confidential and did not alter the confidentiality of the underlying communications. A communication does not lose its privilege "if the disclosure itself is privileged." Mont. R. Evid. 503. To hold otherwise would prevent clergy who learn about abuse from seeking legal advice regarding their reporting obligations.

Further, by apparently accepting Alexis's argument that communications to Jehovah's Witnesses elders are not "confidential" because of the manner in which Jehovah's Witnesses handle ecclesiastical discipline, the District Court's ruling creates constitutional problems. The exception in the reporting statute for confidential communications to clergy was written broadly to avoid discriminating between different religious beliefs and practices. A narrower exception that protected confidential communications in only some faith traditions would violate the "clearest command of the Establishment Clause"

Vandervort & Vincent J. Palusci, *Effects of Clergy Reporting Laws on Child Maltreatment Report Rates*, Univ. of Mich. Law School, APSAC Advisor 26, no. 1 (2014): 16-26.

that "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

"It is the duty of courts, if possible, to construe statutes in a manner that avoids unconstitutional interpretation." *State v. Mathis*, 2003 MT 112, ¶8, 315 Mont. 378, 68 P.3d 756. This Court faced a similar issue when it interpreted Montana's clergy-parishioner privilege, which provides that "[a] clergyman ... cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." MCA § 26-1-804. In *State v. McKinnon*, 1998 MT 78, ¶21, 288 Mont. 329, 957 P.2d 23, this Court noted that other jurisdictions with similar language had adopted different interpretations. The Washington Supreme Court limited it to penitential confessions. *Id.* ¶22. The Utah Supreme Court applied it to any communication made for the purpose of receiving spiritual guidance or advice. *Id.* ¶23.

This Court explained that "under the federal First Amendment and under Article II, Section 5 of the Montana Constitution, all persons are guaranteed the free exercise of their religious beliefs and all religions are guaranteed governmental neutrality." *Id.* ¶24. To "minimize the risk that § 26-1-804,

MCA, might be discriminatorily applied," and to maximize "the federal and Montana constitutional protections of religious freedom," this Court adopted Utah's "broader" interpretation. *Id.*

Here, the District Court's interpretation of the reporting statute creates the constitutional problems this Court avoided in *McKinnon*. If the trial court's constricted interpretation of "confidential" prevailed, religions with more traditional approaches to confession and sin (such as the Catholic confessional) could maintain confidentiality while other religions could not.

The trial court's misinterpretation is also inconsistent with the statutory scheme. The Legislature created *two* exceptions. One protects confessions and statements the *speaker* considers confidential. MCA § 41-3-201(6)(b). Another protects communications the *religious organization* considers confidential. MCA § 41-3-201(6)(c). By honoring the religious organization's beliefs, the Legislature minimized the possibility of a discriminatory interpretation and maximized protection for religious freedom. This Court should follow *McKinnon* in interpreting the reporting statute.

In sum, under Montana law, a member of the clergy is "not required to make a report ... if the communication is required to be confidential by canon law, church doctrine, or established church practice." MCA § 41-3-201(6)(c).

Undisputed evidence proved that established Jehovah's Witnesses doctrine and practice required the elders to maintain the confidentiality of the communications at issue. They did not have a duty to report and the District Court erred in holding otherwise. Summary judgment should have been granted to Defendants—not *sua sponte* to Alexis.

c. The reporting statute requires a report only when a mandatory reporter has "reasonable cause" to believe there is a "present imminent risk" of abuse. Alexis admitted this was a disputed issue of fact.

The reporting statute is triggered by evidence of present abuse, not past abuse. MCA § 41-3-201(1). This Court has held that a reporting duty exists only when the mandatory reporter has "reasonable cause to suspect" a "present imminent risk of harm." *Gross*, 748 P.2d at 461. "Reasonableness" is a quintessential jury issue. *See Craig v. Schell*, 1999 MT 40, ¶67, 293 Mont. 323, 975 P.2d 820.

The elders were given no reason to believe there was a "present imminent risk of harm" to Peter or Holly, or anyone else. Peter and Holly both disclosed that they had been abused years earlier, and there was no present risk. Neither knew Alexis was being abused and neither said anything to the elders about that possibility. Alexis *conceded* that there were "genuine fact issue[s] as to whether ... Defendants had a reasonable cause to suspect that there was a

present imminent risk of harm to a child." CR 77 at 14. The District Court's order granting summary judgment to Alexis ignores Plaintiff's concession. Indeed, it does not address this issue at all. The District Court erred by taking this issue from the jury.

d. The District Court erred in granting summary judgment against CCJW and Watchtower because Montana's reporting statute does not apply extraterritorially to New York clergy or attorneys.

The elders at CCJW in New York provided confidential ecclesiastical guidance to local elders. Defendants argued that "[t]he laws of New York [not Montana] govern the conduct of elders who reside in New York." CR 95 at 6. The District Court's ruling tacitly disagreed.

The Supreme Court has long recognized "constitutional barriers" by which "all the States are restricted in their orbits of lawful authority." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). "Laws have no force of themselves beyond the jurisdiction of the state which enacts them. . . ." *Huntington v. Attrill*, 146 U.S. 657, 669 (1882).

Hence, the California Court of Appeal has held that "California has no authority to mandate reports by adults or agencies in other states." *Lewis*, 183 Cal. Rptr. 3d at 706. Likewise, Montana has no authority to mandate reports by people in other states. That limitation does not change merely because a

Montana resident may be at risk. "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected. . . ." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

Clergy are *not* mandatory reporters under New York law. *See* N.Y. Social Service Law § 413(1)(a). Montana has no power to "punish ... conduct that was lawful where it occurred" and cannot "impose its own policy choice" on other States. *BMW of N. Am. v. Gore*, 517 U.S. 559, 571-573 (1996). The District Court erred by holding that elders at CCJW in New York are subject to Montana's reporting statute and that they violated that statute here.

The District Court also erred in holding that the attorney at Watchtower had a duty to report under Montana law. Like the elders at CCJW in New York, the attorney was governed by New York law, not Montana law. And, in any case, attorneys are not mandatory reporters under New York *or* Montana law.

Alexis suggested that this attorney was also an elder. CR 77 at 14. He *may* have been, though that was never proved.[10] In any case, a duty to report

[10] Evidence at trial proved the attorney might not have been an elder. Trial Tr. Vol. 1: 196:21-197:1.

arises only when mandatory reporters receive reportable information "in their professional or official capacity." MCA § 41-3-201(1). Thus, clergy have a duty to report only when they receive information about abuse in their capacity as clergy. The Watchtower attorney received the information as an attorney and did nothing more than provide legal advice. That is why the "separate communications that elders have with Watchtower's Legal Department" are "not covered by the minister-communicant privilege" but "by the attorney-client privilege." CR 29 at 10 n.4. *If* the attorney was also an elder, he did not learn about the abuse in that capacity and had no duty to report. *See People v. Burnidge*, 687 N.E.2d 813 (Ill. 1997) (confession of abuse to a clergyman who was also a psychologist did not have to be reported); *S. Doe v. Milwaukee Cnty.*, 712 F. Supp. 1370, 1377 (E.D. Wis. 1989), *aff'd,* 903 F.2d 499 (7th Cir. 1990) (registered nurse who learned about abuse as a family friend did not have a duty to report); *Doe v. Willits Unified Sch. Dist.*, 2010 WL 2178943, at *2 (N.D. Cal. May 27, 2010) (teacher who learned about abuse as a parent "and not in her professional capacity ... as a teacher ... was under no legal obligation to report"); *Garney v. Mass. Teachers' Ret. Sys.*, 14 N.E.3d 922, 932-33 (Mass. 2014) (same).

In fact, a report would have violated the attorney's ethical duties. *See*

N.Y. R. Prof. Conduct 1.6(a) ("A lawyer shall not knowingly reveal confidential information. . . .").

Summary judgment against CCJW and Watchtower should be reversed.

2. The District Court erred in holding that Alexis is among the "class of persons" protected by the reporting statute.

To prevail on negligence per se, Alexis had to prove not only that Defendants violated the reporting statute, but "that the [reporting statute] was enacted to protect a specific class of persons" and "that [she] is a member of the class." *Stipe*, ¶14. She argued, and the District Court agreed, that the "class of persons" protected by the reporting statute is children generally. CR 105. The Michigan Court of Appeals, addressing this exact argument, "surveyed jurisdictions" and found "no authority" to support it. *Marcelletti v. Bathàni*, 500 N.W.2d 124, 127 (Mich. Ct. App. 1993). In *Marcelletti*, the plaintiff, whose child was abused by a babysitter, sued a physician who failed to report previous abuse of another child by the same babysitter. The court held that the "statutory reporting duty, with its attendant civil liability," did not run "to any other person than the allegedly abused child." *Id.* at 127. Liability is "based on the failure to report the suspected abuse of *that* child." *Id.* at 128.

In other words, the "class of persons" protected by reporting statutes is "the child about whom the reporting party is in a position to observe or to know

anything regarding known or suspected abuse or neglect." *P.S. v. San Bernardino City Unified Sch. Dist.*, 94 Cal. Rptr. 3d 788, 796 (Ct. App. 2009). "[T]he mandatory duty to report extends only to the child who is the object of suspected abuse." *Arbaugh v. Bd. of Educ.*, 591 S.E.2d 235, 241 (W. Va. 2003).

In *Ward v. Greene*, 839 A.2d 1259 (Conn. 2004), the plaintiff contended that the class protected by Connecticut's reporting statute was "*all* of the children of the state." *Id.* at 1266. The court rejected that argument and held that the protected class is "children who have been abused or neglected and are, or should have been, the subject of a mandated report." *Id.* at 1269. The reporting statute does not "require[] the reporter to provide additional information about other children known to the reporter to be in the care of the suspected abuser." *Id.* at 1268.

Similarly, in *Curran v. Walsh Jesuit High School*, 651 N.E.2d 1028 (Ohio App. 1995), the court held that Ohio's reporting statute "is not ... designed to protect the public at large" but "a specific child who is reported as abused or neglected." *Id.* at 1030 (internal quotation and citations omitted). And the Utah Supreme Court held that Utah's reporting statute creates a duty to "identified children" who are suspected of being abused and did not create a

duty "to protect children who are never identified as being in need of protection." *Owens v. Garfield*, 784 P.2d 1187, 1191 (Utah 1989). *See also Lurene F. v. Olsson*, 740 N.Y.S.2d 797, 800 (Sup. Ct. 2002) ("The mere provision of a civil remedy for 'damages proximately caused' by a failure to comply with mandatory reporting statutes does not ... signal an intention by the Legislature to impose liability for harm suffered by individuals other than the subject child.").

A review of Montana's reporting statute leads to the same conclusion. Its purpose is to engage the "protective services of the state" to prevent "further abuse" to "these children," meaning children about whom a report is made. MCA § 41-3-101(2). The reporter must provide the abused child's name and address and describe the abuse. MCA § 41-3-201(1), (7). An investigation can be made at "the home of the child involved," or "any other place where the child is present." MCA § 41-3-202(1). Information gathered can be shared only with certain officials and specified people who are "responsible for the child's welfare." MCA § 41-3-205(3)(d). Thus, the "specific class of persons" protected by the reporting statute is the child or children about whom a report was or should have been made. *See Gross*, 748 P.2d at 461 ("The primary

purpose of the statute is the protection of the child," meaning the child being abused).

If Alexis's argument were adopted, a mandatory reporter "that fails to report suspected child abuse affecting one child ... could be held liable, perhaps years later, to any other children abused by the same person .... Neither legislative intent nor public policy would support such a broad extension of liability." *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 595 (Cal. 1989).

The District Court found Defendants liable to Alexis because they did not report that Peter and Holly had been abused years earlier. Even assuming for the sake of argument that clergy confidentiality doesn't exist, Defendants still cannot be held liable to Alexis *under the reporting statute* without evidence that Defendants had reason to suspect that *she* was being abused and failed to report. She made no such claim and there was no such evidence. The trial court erred as a matter of law.

3. The District Court erred as a matter of law by holding that negligence per se subsumes proximate cause.

The District Court erred in holding that negligence per se establishes proximate cause per se. CR 105. The District Court explained that "if the child is victimized by the same perpetrator who wasn't reported," then causation and

foreseeability are "merged into the duty question" and established "as a matter of law" by violation of the reporting statute. Trial Tr. Vol. 2 at 10:23-11:10, Sept. 25, 2018.

That is not the law. "[A]s this Court has often stated, liability does not become fixed upon a showing of negligence *per se*; rather, there must be a determination of whether the violation was the proximate cause of the alleged injuries." *Schwabe v. Custer's Inn Assocs.*, 2000 MT 325, ¶27, 303 Mont. 15, 15 P.3d 903 (internal quotations and citations omitted), *overruled on other grounds, Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134. "A negligence per se theory, however, does not relieve a plaintiff from proving causation ...." *Stipe*, ¶14. The reporting statute itself says a mandated reporter is "civilly liable" only for damages "proximately caused" by a failure to report. MCA § 41-3-207(1). Thus, the District Court plainly erred as a matter of law by holding that negligence per se relieves the plaintiff of the burden of proving proximate cause.

Nor could the District Court have ruled that the undisputed facts established that if Defendants had reported, Alexis would not have been abused. For one, Alexis submitted no evidence of what would have happened if a report had been made.

Sexual abuse cases are often based on breach of a duty to warn. Alexis's mother Ivy and Joni, her grandmother and babysitter, both knew about the danger Maximo posed. Yet both exposed Alexis to him. It cannot be said that failure to report prevented them from learning about the abuse and thus caused the abuse.

This leaves the speculative possibility that State authorities might have taken some action that would have protected Alexis. As the Connecticut Supreme Court explained, whether a report will ultimately benefit children "other than the child who has been abused or neglected depends entirely on administrative processes outside the control of the mandated reporter." *Ward*, 839 A.2d at 1270.

If Defendants had reported the abuse of Holly and Peter, the department of health would have "ma[d]e a determination regarding the level of response required and the timeframe within which action must be initiated." MCA § 41-3-202(1). Given that the abuse was years earlier and neither Peter nor Holly was still at risk, the department may not have acted at all.

Police are only notified if the department determines an investigation is warranted. *Id.* Had police been notified in 2004, there is no guarantee a prosecution, conviction, or imprisonment would have resulted, or any other

action that might have protected Alexis. When Peter and Holly's biological father reported the abuse to police in 2007, nothing happened. When Holly reported it to the police in 2015, nothing happened. Trial Tr. Vol. 2: 74:13-75:11; 105:10-106:2.

Had the District Court not erroneously relieved Alexis of the duty to prove proximate cause, she could have attempted to prove that if, in 2004, Defendants had reported Peter's and Holly's abuse, something would have been done to prevent Maximo from continuing to abuse her. Defendants could have rebutted that evidence. And the jury could have resolved the dispute. No evidence on this issue was presented because the District Court usurped the province of the jury and erroneously held that proximate cause was established as a matter of law. *Whitehawk v. Clark*, 238 Mont. 14, 19, 776 P.2d 484, 487 (1989) (proximate cause is an issue of fact). That decision should be reversed.

B. The jury lacked sufficient evidence of actual malice to award punitive damages against Watchtower and CCJW.

The jury awarded $30,000,000 in punitive damages against Watchtower and $1,000,000 against CCJW. App. 3 (CR 129). The only basis for these massive awards was the alleged violation of the reporting statute. Alexis abandoned her other claims.

Punitive damages require proof of "actual malice," which arises when the

defendant "intentionally disregards facts that create a high probability of injury to the plaintiff" and then "act[s] in conscious or intentional disregard" or "with indifference to the high probability of injury to the plaintiff." MCA § 27-1-221(2). The plaintiff must prove "[a]ll elements" of actual malice by "clear and convincing evidence," meaning "evidence in which there is no serious or substantial doubt" about the conclusion. *Id.* § 27-1-221(5).

When liability is based on a statutory violation, the plaintiff must prove that the defendant "intentionally or recklessly violate[d] [the] statute." *Stipe*, ¶23. Thus, Alexis had the burden of proving by clear and convincing evidence that Watchtower and CCJW each violated the reporting statute—not any other alleged but abandoned common-law duty—with actual malice. She failed to meet that burden.

1. No evidence that Watchtower acted with malice.

The evidence at trial established that it is the policy of Jehovah's Witnesses to comply with child abuse reporting laws. Trial Tr. Vol. 1: 241:9-16. Alexis submitted no contrary evidence. Local elders usually are not lawyers and reporting laws are complicated, especially as applied to clergy.[11]

[11] "Although doctors, social workers, and teachers are typically subject to blanket mandates, clergymen are usually covered by more nuanced legal requirements." Vandervort et al, *supra* at p. 16.

Thus, elders are instructed to call the Watchtower Legal Department when they learn about abuse. *Id.* 210:4-11; 254:5-12. "[T]he legal department tells them what the law is." *Id.* 213:12-13. Here, the Legal Department advised local elders that Montana law did not require a report. *Id.* 227:9-12; 254:2-258:2. Most importantly, the lawyer did not report the abuse himself, which was the basis for Watchtower's liability for negligence per se. That is the sum of the evidence submitted at trial related to Watchtower.

Alexis submitted *no evidence* about the attorney who gave the advice, *no evidence* the attorney acted with malice in advising local elders, *no evidence* the attorney or Watchtower knew anything about any risk to Alexis, and *no evidence* the attorney violated the reporting statute with malice.

At trial, the District Court recognized that the conversation between the local elders and the Watchtower attorney was privileged. *Id.* 274:8-17. Ironically, the District Court allowed the imposition of punitive damages for failing to report a communication that the court itself recognized was privileged.

In its order reviewing the jury's punitive damages award, the District Court faulted Defendants for "present[ing] no testimony or evidence at trial to explain the basis upon which Watchtower determined that the local Elders did

not need to report the sexual abuse of children by Max Reyes."[12] CR 137 ¶16. But Alexis—not Defendants—had the burden of presenting clear and convincing evidence of actual malice.

Moreover, the District Court did not enter summary judgment against Watchtower for giving bad legal advice. Rather, the District Court held Watchtower vicariously liable for negligence per se because its attorney-agent allegedly violated the reporting statute. There is no evidence the attorney ever considered the possibility that Montana law might apply to him—it did not. And there is no evidence he acted maliciously in not reporting.[13]

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[12] The District Court adopted, nearly verbatim, the Findings of Fact proposed by Alexis regarding the appropriateness of the jury's punitive damages award, many of which are not supported by the record and depart from the basis on which Watchtower was held liable, *i.e.*, negligence per se for failure to report. *Compare* CR 132 *with* CR 137. This Court has "voiced stern disapproval of a court's wholesale adoption of proposed findings and conclusions." *Norwood v. Serv. Distrib., Inc.*, 2000 MT 4, ¶39, 297 Mont. 473, 994 P.2d 25.

[13] Underscoring Watchtower's good faith is the fact that it previously sought a written opinion from the state regarding the scope of the reporting statute. CR 135, Ex. A. The Montana Department of Public Health and Human Services responded by explaining that "[t]here is no duty to report abuse if the victim is now an adult but the abuse took place when the victim was a minor." *Id.* at Ex. B-1. An institution determined to maliciously violate the law does not go out of its way to seek authoritative legal advice.

2. No evidence that CCJW acted with malice.

Evidence presented at trial showed that CCJW establishes policy for local congregations based on the Bible, including policies regarding confidentiality. Trial Tr. Vol. 1: 207:10-209:16, 235:24-25. Elders at CCJW received written notice that Maximo had abused Peter and Holly. *Id.* 216:10-217:13; 224:5-226:5. A year later, CCJW was informed that the matter was not reported to authorities and that congregation members were not aware of his abuse. *Id.* 232:11-233:20. That is the sum of the evidence presented at trial regarding CCJW.

CCJW's vicarious liability was based on the District Court's conclusion that elders in New York with CCJW violated the reporting statute.[14] Alexis presented *no evidence* identifying the elders in New York who reviewed the Notice of Disfellowshipping, *no evidence* they believed they might have a duty to report under Montana law, and *no evidence* they maliciously disobeyed the

[14] As Alexis's counsel explained at the summary judgment hearing, "We are saying they are [liable] based upon the principle of vicarious liability. So, for example, Your Honor, the Elders, the local Elders at Thompson Falls are clergymen that knew about the abuse. And we are using vicarious liability to make the local congregation liable. [CCJW] have clergymen in their service department who knew about this, and we're saying CCJW is vicariously liable." Hr'g Tr. at 33 (CR 113.500).

law. These New York elders merely provided spiritual advice based on the faith's ecclesiastical canons.

What, then, explains the punitive damages awards against Watchtower and CCJW? Arguing for punitive damages, Alexis's counsel departed from the actual basis for liability—violation of the reporting statute—and urged the jury to punish CCJW and Watchtower for their religious guidance to local elders regarding confidentiality and the "two-witness" rule. They have "policies on keeping secrets," he argued. (So do lawyers, doctors, therapists, and many others.) "Those policies come from the very top. And that tells you what a very powerful organization this is." Trial Tr. Vol. 3: 57:8-11. Watchtower was most at fault, he argued, because "they are the ones that threatened the Elders with punishment from God if they called the authorities after they told them not to." *Id.* 59:24:60:2. "[R]eligion is a very powerful thing," he warned. They "control you with the fear of God" and "that's how things like this happen and that's what happened in this case." *Id.* 73:7-11.

Alexis may try to make a similar argument on appeal to preserve the punitive damages. But this argument—a blatant appeal to religious prejudice—was inappropriate for two reasons. First, Watchtower and CCJW were not held liable because of their beliefs and policies, but only for not reporting. Second,

the First Amendment shields CCJW and Watchtower from liability for their religious beliefs regarding sin, confession, repentance, and confidentiality, or for how they impose ecclesiastical discipline. Branding those beliefs and the spiritual guidance provided to local elders based on these beliefs as actual malice transgresses the right of religious organizations "'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (citation omitted). The First Amendment gives religious organizations the right "to establish their own rules and regulations for internal discipline and government." *Id.* at 187 (internal quotation and citation omitted). To punish a religious organization for its religious beliefs plainly violates the First Amendment.

There is a final reason Alexis's claim of malice fails. Even if this Court rejects the arguments in section A.1. above, those reasonable arguments provided a good-faith basis for CCJW and Watchtower to believe they had no duty to report. Massive punitive damages based on "actual malice" should not be imposed for acting in accordance with a good-faith interpretation of a statute.

There is no evidence, much less clear and convincing evidence, to support the award of punitive damages against Watchtower and CCJW. If

liability is upheld, the punitive damages award must be reversed.

C. The statutory cap on punitive damages is constitutional.

Montana law provides that "[a]n award for punitive damages may not exceed $10 million or 3% of a defendant's net worth, whichever is less." MCA § 27-1-220(3). The District Court ruled that this statute violates the Montana Constitution. App. 5 (CR 138).

A statute is presumptively constitutional "and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt." *Fallon Cnty. v. State*, 231 Mont. 443, 445, 753 P.2d 338, 339 (1988). The challenging party bears the burden and "[i]f any doubt exists, it must be resolved in favor of the statute." *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶13, 302 Mont. 518, 15 P.3d 877.

1. Montana's statutory cap on punitive damages satisfies substantive due process.

Unless a statute implicates a fundamental right, it need only be "reasonably related to a permissible legislative objective" to satisfy substantive due process. *Raisler v. Burlington N. Ry.*, 219 Mont. 254, 263, 717 P.2d 535, 541 (1985). Punitive damages are not a fundamental or even vested right. "There is no vested right to exemplary damages and the legislature may, at its

will, restrict or deny the allowance of such damages." *Meech*, 776 P.2d at 504 (quotation marks omitted).

One purpose of § 27-1-220(3) is to prevent the threat of punitive damages from driving up litigation settlements. Another is to protect against higher costs for insurance premiums and other products. *See Minutes of Hearing on SB 363 Before the S. Comm. on the Judiciary*, 58th Leg., Reg. Sess. (Mont. Feb. 2003) (statement of Senate Sponsor, Sen. McNutt). This Court has previously recognized that "promoting the financial interests of businesses in the State or potentially in the State to improve economic conditions in Montana constitutes a legitimate state goal." *Meech*, 776 P.2d at 504.

Capping punitive damages is "reasonably related" to these objectives. *See Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 442 (Ohio 2007) ("The general goal of making the civil justice system more predictable is logically served by placing limits that ensure that punitive damages generally cannot exceed a certain dollar figure."). One can quibble about the limits the Legislature chose. But "this Court's role is not one of second guessing the prudence of the conclusions reached." *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶37, 353 Mont. 265, 222 P.3d 566. Section 27-1-220(3) cannot

be struck down "simply because [the Court] may not agree with the legislature's policy decisions." *Satterlee*, ¶34.

Importantly, the legislature holds "plenary power ... in determining the availability of punitive damages." *Meech*, 776 P.2d at 504. The Legislature's "plenary power" to decide when punitive damages are available "refutes [the] argument that [a statutory cap] unconstitutionally limits such damages." *Id.*

"[C]ourts have routinely rejected substantive due process challenges to statutory damages caps." *Wackenhut Applied Tech. Ctr., Inc. v. Sygnetron Protect. Sys., Inc.*, 979 F.2d 980, 984 (4th Cir. 1992) (upholding Virginia law capping punitive damages at $350,000); *Arbino*, 880 N.E.2d at 440-43 (upholding statute capping punitive damages at two times compensatory damages); *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807, 824-25 (Alaska 2005) (upholding statute capping punitive damages at three times compensatory damages); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 18 (N.C. 2004) (same). Such caps "ensure[ ] that the defendant may still be punished" while "strik[ing] a balance" that "ensur[es] that lives and businesses are not destroyed in the process." *Arbino*, 880 N.E.2d at 443.

2. Montana's statutory cap on punitive damages satisfies equal protection.

The District Court ruled that that § 27-1-220(3) "denies equal protection in that it sets up unequal classes: a favored class (class action plaintiffs) and a disfavored class (all individual plaintiffs)." CR 138.

Equal-protection claims entail a three-step analysis. *Satterlee*, ¶15. A court must (1) "identify the classes involved and determine whether they are similarly situated," (2) identify the appropriate level of scrutiny, and (3) apply that level of scrutiny. *Id.* ¶¶15-18.

(1) The relevant classes are individual plaintiffs and class action plaintiffs awarded punitive damages. *See* MCA § 27-1-220(3). Real differences separate them. Class actions involve numerous plaintiffs who must divide any punitive-damage award. *See In re NFL Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016) (class settlement resolving 20,000 concussion-related tort claims). Class actions also often involve harm for which higher punitive damage awards are justified because they affect numerous people. *See Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476 (Mass. 2004) (certification of a state-wide class of cigarette smokers).

(2) Rational-basis review applies. "A statutory limitation on recovery is a classic economic regulation ... which must be upheld if it is reasonably

related to a valid legislative purpose." *Meech*, 776 P.2d at 502 (quotation marks and brackets omitted).

(3) Under rational-basis review, the statute must only "bear a rational relationship to a legitimate governmental interest." *Satterlee*, ¶18. In *Meech*, the plaintiff argued that a Montana statute limiting the recovery of punitive damages for wrongful-employment discharge violated his constitutional right to equal protection because other types of plaintiffs were not so limited. *Meech*, 776 P.2d at 502. This Court rejected that challenge because the state's economic interests in limiting punitive damages for this type of plaintiff were legitimate and its means were rationally related. *Id.* at 502-05.

Another rational basis for capping punitive damages is to ensure compliance with federal constitutional standards. Section 27-1-220(3) protects the constitutional right to be free from "grossly excessive" punitive damage awards. *Gore*, 517 U.S. at 575. *See Wackenhut*, 979 F.2d at 985 ("a statutory cap is one factor that might be considered in insulating a punitive damages award against a constitutional attack").

Section 27-1-220(3) does not violate substantive due process or equal protection. The trial court erred in refusing to apply it.

D. The punitive-damage award against Watchtower violates the U.S. Constitution.

The $30 million punitive damages award against Watchtower is "grossly excessive" and thus violates the Fourteenth Amendment. *Gore*, 517 U.S. at 562. "In determining whether that line has been crossed," this Court considers "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity, or ratio, between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized in comparable cases." *Seltzer v. Morton*, 2007 MT 62, ¶151, 336 Mont. 225, 154 P.3d 561.

Far from being reprehensible, Defendants' failure to report was entirely defensible. Defendants had good-faith reasons to believe there was no duty to report. *See Gore*, 517 U.S. at 580 (nondisclosure "less reprehensible" when "there is a good-faith basis for believing that no duty to disclose exists").

Moreover, liability was based on failure to act, not on malicious action. Defendants' non-report was no more reprehensible than Ivy's failure to protect her daughter Alexis from Maximo. The jury awarded only 1% of the fault to Ivy, who knew the danger Maximo posed yet left Alexis with him. Joni not only knew and failed to report Maximo, but allowed him unsupervised access to Alexis. Yet the same non-report by a stranger in New York with no direct

knowledge supposedly justified one of the largest punitive-damage awards in Montana history.

Watchtower and CCJW were held liable for the same failure to report, yet the jury assessed $30 million in punitive damages against Watchtower and $1 million against CCJW. How is Watchtower's conduct more reprehensible than CCJW's? Relative reprehensibility matters in determining whether a punitive-damages award is grossly excessive. *See TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 496 (1993) (describing "comparative analysis" to ensure award is not excessive).

The second guidepost is the disparity between compensatory and punitive damages. The trial court miscalculated Watchtower's ratio at 7.5:1. App. 5 (CR 138). Because Watchtower is responsible for 80% of the compensatory damages, the ratio was actually 9.4:1.

The Supreme Court has held that a 4:1 ratio is "close to the line of constitutional impropriety." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). The Court explained that "[w]hen compensatory damages are substantial" even a 1:1 ratio "can reach the outermost limit of the due process guarantee." *Id.* Alexis was awarded $4 million in compensatory damages, a "substantial" amount. *See id.* at 429 (describing $1 million in

compensatory damages as substantial); *Seltzer*, ¶189 (describing $1.1 million as substantial). Any ratio higher than 1:1 pushes constitutional boundaries.

The final guidepost is the difference between the punitive-damages award and civil penalties authorized for comparable conduct. Montana law imposes no civil penalties for comparable conduct. The Legislature determined, however, that punitive damages should never exceed $10 million. While this "does not establish a civil penalty for any particular conduct," it "does represent a legislative judgment regarding penalties in civil cases generally, and thus warrants ... consideration." *Seltzer*, ¶194.

"[I]t is also appropriate to consider potential criminal penalties for the conduct at issue because these indicate the seriousness with which a state views the wrongful conduct." *Id.* ¶192. Failure to report is a crime only for specified professionals and officials. Most, including Alexis's own family members, face no criminal sanction at all. A mandated reporter who fails to report commits a misdemeanor, MCA § 41-3-207(2), and faces imprisonment "not to exceed 6 months in the county jail or a fine not to exceed $500, or both." MCA § 46-18-212. A $30 million penalty is more commensurate with a serious felony than a misdemeanor. *Cf. Seltzer*, ¶193 (noting "serious criminal penalties" for

the "felony" conduct at issue included a $50,000 fine and imprisonment up to 10 years).

Under these guideposts, the $30,000,000 punitive damage award against Watchtower is "grossly excessive." The conduct at issue was, at most, good-faith nonfeasance. The ratio of 9.4:1 exceeds constitutional bounds. The $30 million punitive damages award is three times more than what the Legislature believes should be awarded in *any* case and 60,000 times more than the authorized criminal fine for the conduct at issue. *Id.* ¶199. Assuming any punitive damages should be awarded, the amount should resemble the award against others who committed the same nonfeasance ($0 to $1 million).

VII. CONCLUSION

Because Defendants had no duty to report under Montana's reporting statute—and because that was the only basis for liability—this Court should reverse and remand with instructions to enter judgment in Defendants' favor. Alternatively, there are at least disputed issues of fact that require reversal of summary judgment on negligence per se.

If summary judgment on negligence per se is affirmed, the jury's award of punitive damages should be reversed because Alexis failed to prove that Watchtower and CCJW acted with malice. If punitive damages are upheld, the

statutory cap is not unconstitutional and should be applied. The punitive damages against Watchtower should then be reduced further because even $10 million is "grossly excessive."

DATED this 22nd day of May, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2016 is 11,172 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 22nd day of May, 2019.

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