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MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation; KENNETH L. APANA, Individually; and Does 1 through 100, inclusive,

Defendants.

Civil No. 1CCV-20-0000390 DEO
(OTHER NON-VEHICLE TORT)
[REDACTED VERSION]

DEFENDANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAI‘I AND WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S RENEWED MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF WILLIAM S. HUNT; EXHIBITS "1" AND "2"; NOTICE OF REMOTE HEARING; CERTIFICATE OF SERVICE

HEARING VIA ZOOM
DATE: May 26, 2022
TIME: 3:00 p.m.
JUDGE: Honorable Dean E. Ochiai

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation,

Crossclaimants,

vs.

KENNETH L. APANA, Individually,

Crossclaim Defendant.

JUDGE: Honorable Dean E. Ochiai
TRIAL: September 6, 2022

DEFENDANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAI'I AND WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S RENEWED MOTION FOR SUMMARY JUDGMENT

Defendants MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII ("Makaha Congregation") and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. (collectively "the Religious Defendants") move for summary judgment against all remaining claims set forth against them in the Complaint.

1. Did Religious Defendants owe a duty to supervise a volunteer or protect Plaintiff when they were engaged in private activities in a private home and wholly unrelated to the Religious Defendants' activities?

Duty "is entirely a question of law" that this Court must decide. *Doe Parents No. 1 v. State Dept. of Educ.*, 100 Haw. 34, 57, 58 P.3d 545, 568 (2002).

2. Does HRS § 657-1.8 apply to third-parties such as Religious Defendants when a volunteer [redacted] during activities wholly unrelated to the third-party's activities?

"Interpretation of a statute is a question of law." *Gap v. Puna Geothermal Venture*, 106 Haw. 325, 331, 104 P.3d 912, 918 (2004).

If the answer to either question is no, then the Court must grant summary judgment in favor of the Religious Defendants since the facts are uncontested.

Dated: Honolulu, Hawai'i, May 20, 2022.

/s/ William S. Hunt
WILLIAM S. HUNT
JENNY J.N.A. NAKAMOTO
JOEL M. TAYLOR *(Pro Hac Vice)*

Attorneys for Defendants/Crossclaimants
MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

N.D., Plaintiff, vs. MAKAHA, HAWAII CONGREGATION OF JEHOVAH’S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES; *et al.*, Defendants.	Civil No. 1CCV-20-0000390 DEO (OTHER NON-VEHICLE TORT) **MEMORANDUM IN SUPPORT OF MOTION**
MAKAHA, HAWAII CONGREGATION OF JEHOVAH’S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES; *et al.*, Crossclaimants, vs. KENNETH L. APANA, Individually, Crossclaim Defendant.	

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This is Religious Defendants' third dispositive motion. The prior two were denied with the explanation that additional discovery might establish a dispute over a material fact. It did not. The Court's most recent order permitted the Religious Defendants to re-file after the discovery period closed by May 13, 2022.

Accordingly, Religious Defendants request summary judgment on all remaining claims set forth in the Complaint on the grounds that neither of the moving defendants owed a duty to protect Plaintiff or supervise a volunteer during activities wholly unrelated to the Religious Defendants' activities. The imposition of a duty under these facts would violate Hawai'i law and establish an onerous duty to police volunteers 24 hours a day, 7 days a week, even in the privacy of their own homes, to prevent conduct wholly unrelated to the Religious Defendants' activities. Even if Plaintiff could meet the other statutory requirements for revival of her lapsed claim (she cannot), there can be neither liability nor revival without a duty.

II. STATEMENT OF MATERIAL FACTS

As the Court knows well, this case involves alleged [redacted] over thirty years ago.[1] Plaintiff was [redacted]. Four undisputed material facts prove that the activity Plaintiff was involved in when she was injured was wholly unrelated to the Religious Defendants' activities:

[1] Religious Defendants incorporate by this reference the Statement of Material Facts set out in Section II of their Motion for Summary Judgment, together with supporting documents filed under seal on April 1, 2022 [Doc. 327] ("MSJ") at pp. 1-5, attached hereto as Exhibit "1".

1) Religious Defendants had nothing to do with the [redacted] arrangements;

2) The [redacted] were not a church activity;

3) Plaintiff arranged the [redacted] to visit with [redacted], not Mr. Apana in his role as a volunteer elder in the Makaha Congregation; and

4) No other elder was aware of the [redacted] arrangements prior to the event.

A fifth undisputed material fact establishes that HRS § 657-1.8 does not revive Plaintiff's lapsed claim: Defendant Apana was not an employee or in the employ of either of the Religious Defendants.

III. LEGAL STANDARD

Summary judgment "is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fujimoto v. Au*, 95 Haw. 116, 136-37, 19 P.3d 699, 719-20 (2001). "A fact is material [only] if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Id.*

IV. ARGUMENT

Religious Defendants seek summary judgment for two reasons, both purely legal: First, the Religious Defendants did not have a legal duty to protect Plaintiff or to supervise a volunteer during activities wholly unrelated to the Religious Defendants. Second, HRS § 657-1.8 does not revive lapsed claims involving a volunteer elder's [redacted] during activities over which Religious Defendants had no control and knew nothing about.[2] Neither does the statute revive claims for post-abuse conduct that causes

[2] Religious Defendants incorporate by this reference the arguments made in Section IV of

emotional distress.

A. The Religious Defendants did not owe a duty to protect Plaintiff during [redacted] with [redacted].

Duty requires two mutually dependent elements, a special relationship *and* foreseeability. *See Lee v. Corregedore*, 83 Hawai'i 154, 160, 925 P.2d 324, 329 (1996). The existence of a special relationship is the "threshold determination." *Id.* Physical "custody and control" is the very essence of a "special relationship." *Id.* at 161, 925 P.2d at 331 (citing *City of Belen v. Harrell,* 93 N.M. 601, 603 P.2d 711, 713 (1979); *see also Kaho'ohanohano v. DHS,* 117 Hawai'i 262, 285, 178 P.3d 538, 561 (2008); *Doe Parents No. 1 v. State Dept. of Educ.,* 100 Hawai'i 34, 79, 58 P.3d 545, 590 (2002).

On this point, "Hawaii law follows the no-duty to protect rule found in Restatement (Second) of Torts § 315 (1965)." *Touchette v. Ganal*, 82 Haw. 293, 298, 922 P.2d 347, 352 (1996).

Section 315 of the Restatement (Second) of Torts provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right of protection.

In sum, Religious Defendants did not have custody or control over Plaintiff when Defendant Apana abused her. Nor did Religious Defendants have the right or ability to control Defendant Apana [redacted] where the abuse occurred. Thus, no special relationship existed with either and there is no basis for imposing a duty on the Religious

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Exhibit "1" at pages 5-18 and in Section I of the Religious Defendants' Reply Brief in Support of the MSJ, filed April 21, 2022 [Doc. 386] ("Reply"). The Reply is attached hereto as Exhibit "2". The Religious Defendants also incorporate all exhibits in the Reply, which establish the evidence for the factual statements herein.

Defendants to protect the Plaintiff or control Defendant Apana.

1. Religious Defendants had no special relationship with Plaintiff.

"[S]ection 314A of the Restatement (Second) of Torts sets forth a non-exclusive list of 'special relationships' upon which a court may find a duty to protect." *Maguire v. Hilton Hotels Corp.*, 79 Haw. 110, 113, 899 P.2d 393, 396 (1995) (citations omitted). The list does not include a church-parishioner or clergy-parishioner relationship. *See* § 314A of the Restatement (Second) of Torts. Every court to consider the issue has held that membership in a religious organization does not create a special relationship. *Conti v. Watchtower Bible & Tract Soc'y of New York, Inc.*, 235 Cal.App.4th 1214, 1229 (2015). Thus, Religious Defendants had no duty to protect Plaintiff merely because her family was affiliated with the faith of Jehovah's Witnesses.

Like a school, Religious Defendants would have a "special relationship" with Plaintiff only while she was in their custody. But "the scope of such [special] relationships is bounded by geography and time." *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 374, 492 P.3d 313, 317, ¶ 17 (2021) (quotation marks omitted). Just as a "school is relieved of any duty to affirmatively protect students" when school ends and the child leaves the school's custody (*id.* at ¶ 20), the same is true of churches. *Custody* is the issue.

Here, the undisputed facts establish that Plaintiff was not in the Religious Defendants' custody and control at the time of the abuse. Plaintiff went from her own home—from her parents' custody—to her [redacted]. Plaintiff and her parents confirmed that the Religious Defendants did not [redacted]. Plaintiff's extended argument about foreseeability does not change the fact that knowledge of danger does not create a legally cognizable special relationship giving rise to a legal duty to prevent

harm. *Lee, supra,* 83 Haw. at 161, 925 P.2d at 331. A special relationship based upon custody must first exist before foreseeability even becomes relevant.

The Religious Defendants did not have a special relationship with Plaintiff. In the absence of a special relationship, the Religious Defendants did not have the duty required as an element of a negligence claim, or as the basis for reviving a claim under HRS § 657-1.8(b)(1).

2. The Religious Defendants did not have a special relationship with Defendant Apana under the circumstances in which the abuse occurred.

Assuming for the sake of this argument only that Defendant Apana was an agent of one or both of the Religious Defendants when he abused Plaintiff, Hawai‘i law is clear that a master's duty to control his servant exists only while the servant is on the job and under the employer's supervision and control. "In examining the theory of 'negligent failure to control an employee,' the Hawai‘i Supreme Court adopted the principles in Restatement (Second) of Torts § 317."[3] *Kaopuiki v. Kealoha*, 104 Hawai‘i 241, 251, 87 P.3d 910, 920 (App. 2003). Like secular entities, religious organizations are not liable for the after-hours, off-premises torts or crimes of their agents. *Id.* This is because those acts are not "so connected with the employment in time and place as to give the employer a special opportunity to control the employee." Restatement (Second) of Torts § 317.

The facts here are distinguishable from cases cited by Plaintiff where an entity has

[3] Under that Restatement section, "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment so as to prevent him from intentionally harming others … if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.

been held responsible for an employee's conduct. For instance, in *Wada v. Aloha King, LLC,* 154 F.Supp.3d 981 (D. Haw. 2015), the perpetrator was on the job at his employer's premises when he took the victim and sexually assaulted her. In *N.L. v. Bethel School District,* 186 Wash.2d 422, 378 P.3d 162 (2016), the plaintiff was in the school's custody when it allowed a known sex offender to take her off school premises. In *Brown v. USA Taekwando,* 40 Cal.App.5th 1077 (2019), the plaintiff was molested while in her coach's custody "at taekwondo events sanctioned by [the defendants]." In *Doe v. Hartz,* 52 F.Supp.2d 1027 (N.D. Iowa 1999), a parish priest assaulted the plaintiff on church property during services. In *C.J.C. v. Corp. of Catholic Bishop of Yakima,* 138 Wash.2d 699, 985 P.2d 262 (1999) (en banc), the victims had been delivered into the custody of church officials for church sponsored activities.

None of the factors leading to liability in those cases exists in this case. Here, Defendant Apana was [redacted], on his own time. He was not under the supervision and control of Religious Defendants. Likewise with Plaintiff. She left her own home and went to the Apana home. She was there as his [redacted], not because of any activity sponsored or supervised by the Religious Defendants. In fact, it would violate long-standing religious practices for the Makaha Congregation to sponsor an activity that separated Plaintiff from her parents. No one other than the two families involved in the girls' plans knew anything about the [redacted]. Under these facts, there is no basis to impose on Religious Defendants a duty to control a volunteer minister in his off-duty, after-hours private life.

In sum, there was no special relationship between Religious Defendants and either Plaintiff or Defendant Apana. Thus, Religious Defendants did not owe Plaintiff a duty of care during private [redacted] at the Apana house

B. Plaintiff's Claims are Barred by the Statute of Limitations

Plaintiff brings her claim pursuant to HRS § 657-1.8, the statutory window for reviving previously barred sexual abuse claims. (Compl. ¶ 3.) "[T]he fundamental starting point for statutory interpretation is the language of the statute itself." *Hawai'i Tech. Acad. v. L.E.,* 141 Hawai'i 147, 155, 407 P.3d 103, 111 (2017) (quotation marks omitted). "Where the statutory language is plain and unambiguous" the court must "give effect to its plain and obvious meaning." *State v. Marroquin*, 149 Hawai'i 136, 139, 482 P.3d 1097, 1100 (2021).

1. HRS § 657-1.8(1) does not revive claims where the Religious Defendants did not owe a duty to protect Plaintiff during [redacted] from acts of a volunteer minister.

The revival statute opened a wide window for claims against Defendant Apana. But a claim against legal entities like Religious Defendants can only be brought through two narrow windows, the first of which opens when:

> (1) The person who committed the act of sexual abuse against the victim was **employed by** an institution, agency, firm, business, corporation, or other public or private legal entity that **owed a duty** of care to the victim. HRS § 657-1.8(1) (emphasis added.)

Under this provision, two things must exist. The perpetrator must be "employed by" the legal entity being sued *and* the legal entity must owe the victim a duty. For reasons discussed in Section IV(A) above, Religious Defendants did not owe a duty of care to Plaintiff. That alone is sufficient to defeat revival. But the window also remained closed because Defendant Apana was not "employed by" the Religious Defendants.[4] Of course, it is a matter of statutory construction for this Court to decide whether an unpaid volunteer like Defendant Apana was "employed by" the Religious Defendants. That construction is a

[4] Religious Defendants incorporate by reference the arguments made in Exhibit "1", section IV(A)(1) on pages 5-9 and in Exhibit "2" pages 1-4.

question of law that a reviewing court will examine *de novo*. *Gap v. Puna Geothermal Venture*, 106 Hawai‘i 325, 331, 104 P.3d 912, 918 (2004).

"Where the statutory language is plain and unambiguous" the court must "give effect to its plain and obvious meaning." *State v. Marroquin*, 149 Hawai‘i 136, 139, 482 P.3d 1097, 1100 (2021). And when a word is not defined, it is "to be understood in [its] most known and usual signification" and "general or popular use or meaning." HRS § 1-14. The plain meaning of "employed by" is "to provide a job that pays wages or a salary."[5] It is undisputed that Defendant Apana [redacted]. No one testified that [redacted]. In fact, in deposition both of Plaintiff's parents agreed that [redacted]. Defendant Apana did not [redacted]. Exh. E, Admission No. 2 to Exhibit "1". He was not [redacted]. *Id.*, Admission No. 4. He did not have a [redacted]. *Id.*, Admission No. 6. Rather, he was a religious [redacted]. *Id.*, Admission Nos. 7-8. [redacted]. Exh. "G" (PMK Dep.) at 65:4-6 to Exhibit "1"; Exh. "B" (Mom's Dep.) at 18:14-16 [redacted] to Exhibit "1"; Exh. "C" (stepfather's dep.) at 18:6-8 and 16-18 [redacted] to Exhibit "1".

Hawai‘i law expressly excludes from the definition of employment unpaid service for a religious or charitable organization: "'Employment' does not include: (1) [s]ervice for a religious, charitable, educational, or nonprofit organization if performed in a voluntary or unpaid capacity …." HRS § 386-1; *see also Vail v. Emps' Ret. Sys. of State*, 75 Haw. 42,

[5] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/employed, last visited on March 28, 2022.

60-61, 856 P.2d 1227, 1237 (1993) ("[A]n individual is an employee under the chapter while he or she is being paid …."). A court can no more interpret "employee" to mean "volunteer" than it can to interpret "volunteer" to mean "employee." The terms are not interchangeable.

In short, the "most known and usual signification" and the "general or popular use or meaning" (HRS § 1-14) of "employed by" is an employer-employee relationship. Religious Defendants are not seeking "blanket immunity" as the Plaintiff has suggested. They can still be sued in appropriate circumstances for the misconduct of volunteers, just not under the first revival window of HRS 657-1.8. Defendant Apana, who was an unrepresented party, clarified his admission in connection with an inartful Request for Admission from Plaintiff (RFA 59) to provide the only evidence that he was not an "employee" of either Defendant but was "in the service of the Makaha Congregation only." Exh. H (Dec. of Defendant Apana) to Exhibit "2".

For these reasons, Plaintiff's claim is not revived under HRS 657-1.8(1).

2. HRS § 657-1.8(2) does not revive claims where the Plaintiff is abused during a privately arranged [redacted].

The second window for revival does not apply under these facts. It requires proof that

> (2) The person who committed the act of sexual abuse and the victim were engaged in an activity over which the legal entity had a degree of responsibility or control.

HRS § 657-1.8(2).[6]

Here, there are no facts which suggest that Religious Defendants had any type of "supervision or control" over the private arrangements for [redacted]. On the contrary, Plaintiff's parents admitted that [redacted]

[6] Religious Defendants incorporate by reference the arguments contained in Section IV(A)(2) of Exhibit "1" at pages 9-15.

[redacted]. *See* Exh. C (step-dad's Dep.) at 17:12-18:11 and 24:1-15 to Exhibit "2".

The uncontested facts establish that [redacted]. *See* Exh. B (Mom's Dep.) at 43:19-24 to Exhibit "1"; Exh. C (Step-dad's Dep.) at 17:12-18:11 to Exhibit "1". Religious Defendants [redacted]. *See* Exh. "C" (Mom's Dep.) at 16:23-17:11 to Exhibit "1"; Exh. "D" (P. Main Dep.) at 54:10-18 to Exhibit "1". Indeed, Religious Defendants were [redacted]. *See* Exh. "E" (Apana Admissions to Watchtower) at Admission Nos. 44-46 to Exhibit "1"; *see also* Exh. "E" at Admission No. 11-17, 19-20 to Exhibit "1".

Accordingly, the second window to revive claims against legal entities under HRS § 657-1.8(2) never opened to revive Plaintiff's lapsed claim. Her claims against Religious Defendants are clearly barred by the statute of limitations.

C. Plaintiff's non-negligence claims lack merit and are also barred by the statute of limitations.

Plaintiff's complaint asserts claims for post-abuse conduct. Those claims lack evidentiary support and remain barred by the statute of limitations.

1. Plaintiff's Claims for Negligent and Intentional Infliction of Emotional Distress Have No Merit and are Barred by the Statute of Limitations.

Plaintiff pleads claims for negligent and intentional infliction of emotional distress based upon post-abuse conduct. Compl. ¶¶ 85-89. Plaintiff says Religious Defendants inflicted emotional distress on her by "declining to contact CPS and HPD" and "choosing instead to conduct an internal investigation under its own standards," by "failing to restrict Perpetrator's activities within the Church," and by "intimidating Plaintiff and her family from reporting Perpetrator's sexual abuse." *Id.* ¶ 86. These claims fail for multiple reasons.

First, the revival statute is limited to abuse claims, not post-abuse conduct that could not have prevented the abuse. HRS § 657-1.8(b). Second, in 1992, Religious Defendants had no duty to report abuse to CPS or HPD. Clergy were not mandatory reporters in Hawai‘i until September 15, 2020.[7] With no duty to report, a tort claim cannot be based on failure to report.

Third, there is no evidence that the Religious Defendants intimidated Plaintiff or her family to prevent them from reporting abuse to authorities. Plaintiff testified that [redacted]." Exh. "A" at 50:21-51:2 to Exhibit "1".

Even if the Religious Defendants discouraged Plaintiff from reporting the abuse to authorities (they did not), they would have been unable to prevent the report. Religious organizations can only attempt to persuade parishioners, but they do not control them.

Finally, the allegation that Religious Defendants inflicted emotional distress by "failing to restrict Perpetrator's activities within the Church" runs afoul of the First Amendment, which prohibits liability for the ecclesiastical consequences that a religious organization does or does not impose on a sinner. "[T]he civil courts exercise no jurisdiction, [in] a matter which concerns … church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 713-14 (1976). The First Amendment permits "religious organizations to establish their own rules and regulations for internal discipline and government." *Id.* at 724. "Within the context of ecclesiastical discipline, churches enjoy an absolute privilege from scrutiny by secular authority." *Hadnot*

[7] *See* L 2020, c 35, § 3 eff. 9/15/2020.

v. Shaw, 826 P.2d 978, 987 (Okla. 1992).

Religious Defendants cannot be held liable for allowing a sinner to worship with them, regardless of how heinous his sins are. *See L.L.N. v. Clauder*, 563 N.W.2d 434, (Wis. 1997) (ecclesiastical discipline is "influenced by a religious belief in reconciliation and mercy" which cannot be second guessed by secular courts).

V. CONCLUSION

Tragically, Plaintiff was abused by her [redacted]. Defendant Apana, alone, is accountable for his criminal conduct. The Religious Defendants are not legally responsible because they had neither the duty nor ability to control, protect, or monitor Plaintiff during her private [redacted] with [redacted]. Religious Defendants are entitled to summary judgment on all counts in the complaint and request that the Court so order.

Dated: Honolulu, Hawai'i, May 20, 2022.

/s/ William S. Hunt
WILLIAM S. HUNT
JENNY J.N.A. NAKAMOTO
JOEL M. TAYLOR *(Pro Hac Vice)*

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MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

N.D., Plaintiff, vs. MAKAHA, HAWAII CONGREGATION OF JEHOVAH’S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES; *et al.*, Defendants.	Civil No. 1CCV-20-0000390 DEO (OTHER NON-VEHICLE TORT) **DECLARATION OF WILLIAM S. HUNT**
MAKAHA, HAWAII CONGREGATION OF JEHOVAH’S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES; *et al.*, Crossclaimants, vs. KENNETH L. APANA, Individually, Crossclaim Defendant.	

DECLARATION OF WILLIAM S. HUNT

I, William S. Hunt, declare under penalty of law that the following is true and correct:

1. I am an attorney with the law firm of Dentons US LLP and an attorney of record for Defendants MAKAHA CONGREGATION OF JEHOVAH’S WITNESSES, HAWAII (“Makaha”) and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. (“Watchtower”, together with Makaha, the “Religious Defendants”).

2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.

3. I am personally aware of the proceedings in this case and have personally participated in all phases of litigation.

4. This Declaration is made in support of the Religious Defendants' Renewed Motion For Summary Judgment.

5. Attached as Exhibit "1" is a true and accurate copy of the Religious Defendants' *Motion for Summary Judgment; Memorandum in Support of Motion; Declaration of William S. Hunt; Exhibit Abstract; Exhibits "A" – "G"*, filed under seal on April 1, 2022 [Doc. 327].

6. Attached as Exhibit "2" is a true and accurate copy of the Religious Defendants'' *Reply in Support of Their Motion for Summary Judgment filed on April 1, 2022*, filed April 21, 2022 [Doc. 386].

I declare under penalty of perjury under the laws of the State of Hawai'i that the foregoing is true and correct.

Executed in Honolulu, Hawai'i, on May 20, 2022.

/s/ William S. Hunt
WILLIAM S. HUNT

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MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

FILED UNDER SEAL
Pursuant to the *Order Granting Defendants' Ex Parte Motion to File Under Seal (1) Defendants Makaha Congregation of Jehovah's Witnesses, Hawai'i and Watchtower Bible and Tract Society of New York, Inc.'s Motion for Summary Judgment and (2) Exhibits "A"-"G" to Defendants Makaha Congregation of Jehovah's Witnesses, Hawai'i and Watchtower Bible and Tract Society of New York, Inc.'s Renewed Motion for Summary Judgment*, Dkt. 325, filed on April 1, 2022.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; *et al.*,

Defendants.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; *et al.*,

Crossclaimants,

vs.

KENNETH L. APANA, Individually,

Crossclaim Defendant.

Civil No. 1CCV-20-0000390 DEO
(OTHER NON-VEHICLE TORT)

EXHIBIT 1 IN SUPPORT OF *DEFENDANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAI'I AND WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S RENEWED MOTION FOR SUMMARY JUDGMENT* FILED MAY 20, 2022

WILLIAM S. HUNT 1259-0
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MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation; KENNETH L. APANA, Individually; and Does 1 through 100, inclusive,

Defendants.

Civil No. 1CCV-20-0000390 DEO
(OTHER NON-VEHICLE TORT)

DEFENDANTS/CROSSCLAIMANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT FILED ON APRIL 1, 2022 [Dkt. 329]; DECLARATION OF WILLIAM S. HUNT; EXHIBIT "H"; CERTIFICATE OF SERVICE

Hearing:
Date: April 26, 2022
Time: 9:00 a.m. (via Zoom)
Judge: Honorable Dean E. Ochiai

Trial: June 20, 2022
Judge: Honorable Dean E. Ochiai

EXHIBIT 2

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation,

Crossclaimants,

vs.

KENNETH L. APANA, Individually,

Crossclaim Defendant.

DEFENDANTS/CROSSCLAIMANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT FILED ON APRIL 1, 2022 [Dkt. 329]

Plaintiff's opposition exposes the weaknesses in her claims. It is replete with unfounded claims about the Religious Defendants[1] designed only to distract this Court from the undisputed facts and the law. We shall ignore Plaintiff's slander and get straight to the point.

There are only two questions of law: First, does "employed by" a "legal entity" include volunteers? Second, did Religious Defendants owe Plaintiff a duty? If the court answers either in the negative, Religious Defendants are entitled to summary judgment.

I. ARGUMENT

Again, there is no genuine issue of material fact the Religious Defendants are entitled to summary judgment on two grounds: (1) statute of limitations, and (2) no duty.

A. Plaintiff's Claims Are Barred by The Statute of Limitations.

Plaintiff argues that HRS § 657-1.8 is a remedial statute and that the court cannot "draw arbitrary distinctions based on the structure of an entity, but rather [must] allow all victims to be equally heard." (Pl's Opp. at 9.) The Legislature drew distinctions, and they're not arbitrary. It opened the window for victims to sue *perpetrators* without any conditions, but said a plaintiff can sue a "legal entity" only if (1) the perpetrator was "employed by" the entity and the entity "owed a duty of care to the victim," or (2) the perpetrator and victim "were engaged in an activity over which the legal entity had a degree of responsibility or control." *See* HRS § 657-1.8(b). The Plaintiff asks this Court to ignore those limitations and simply say "all victims" get to sue *anybody*.

1. Religious Defendants did not have "responsibility or control" over Plaintiff's sleepovers with her friend.

Plaintiff's opposition is silent regarding the second window, which concedes the point. Plaintiff does not and cannot argue that Religious Defendants had any "responsibility or control" over sleepovers at her friend's house that Religious Defendants knew nothing about.

2. Apana[2] was not "employed by" Religious Defendants and they did not owe Plaintiff a duty of care.

Plaintiff relies on the first window. It opens if the perpetrator was "employed by" a defendant who "owed a duty of care [.]" HRS § 657-1.8. Neither condition exists here.

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[1] "Religious Defendants" refers to Defendants/Crossclaimants Makaha Congregation of Jehovah's Witnesses, Hawaii and Watchtower Bible and Tract Society of New York, Inc.
[2] "Apana" refers to Defendant Kenneth Apana.

a. Apana was not "employed by" Religious Defendants.

Plaintiff argues that "Apana also admitted that as an Elder, he was "in the service and/or employ" of the Church." (Pl. Opp. At 3). Beyond the confusing disjunctive nature of that request for admission and the misleading term "the Church," Apana's purported admission was limited to being "in the service and/or employ of Makaha Kingdom Hall" - not Watchtower. (Ex. 17 to Pl. Opp., Response to RFA 59.) **Regardless of this Court's view of the phrase "employed by" Plaintiff has submitted no evidence to establish that Apana was a volunteer or "employed by" defendant Watchtower (because he was neither).** On that basis alone, Watchtower is entitled to summary judgment. Moreover, as explained below, the phrase "employed by" is outcome determinative as to Makaha Congregation as well.

Plaintiff argues that Religious Defendants' "rel[y] on a definition of 'employee' found in the worker's compensation statute …." (Pl's Opp. at 10). Not true. Religious Defendants rely on the plain meaning of "employed by" as shown by its common usage (*e.g.*, dictionary definition) and its consistent usage throughout the Hawai'i Revised Statutes. Motion at 6-8. Unless the statute defines it differently, in every instance where Hawai'i statutes say "employed by," "employee," "employer," or "employment," it refers to "a job that pays wages or salary."[3] Of course, the Legislature "has a broad power to define terms for a particular legislative purpose," and when it does so, courts "are bound to follow legislative definitions of terms rather than commonly accepted dictionary … definitions." *State v. Kanter*, 53 Hawai'i 327, 329, 493 P.2d 306, 308 (1972). But in the absence of a legislative definition, "[t]he words of a law are generally to be understood in their most known and usual signification" and their "general or popular use or meaning." HRS § 1-14.

If the Legislature wanted to included "without compensation" in the definition of employee, they would have done so explicitly. The Legislature did not. Plaintiff points to the State Tort Liability Act, which defines "Employees of the State" as "officers and employees of any state agency, members of the Hawaii national guard, Hawaii state defense force, and persons acting in behalf of a state agency in an official capacity, temporarily, whether with or without compensation." HRS § 662-1. This proves the point that the Legislature did not intend to always include volunteers in the definition of employee.

Plaintiff points to a dictionary definition of "employ" meaning to "use." That definition makes sense when talking about "employing" (*i.e.*, "using") language, methods, tools, or time.

[3] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/employed.

But we're talking about employing people. As stated by one court in rejecting the argument that a volunteer firefighter was "employed" by a city:

> The plain and ordinary definition of "employ" in the context of the workplace is "[t]o engage the services of; put to work." (citation omitted). Outside the workplace, "employ" may have a broader definition that includes a broad sense of "use." For instance, one may employ language wisely and arguments tactically or a person may employ his time assiduously. In the workplace, however, ... one is employed for wages or salary. The American Heritage Dictionary's definition of "employee" is "[a] person who works for another in return for financial or other compensation." (citation omitted).

Angell v. Union Fire Dist. of So. Kingstown, 935 A.2d 943, 946-47 (R.I. 2007). Thus, we can comfortably repurpose the words of the Hawai'i Supreme Court from a different context to say here that Apana "was not employed by the [Religious Defendants] but was a mere volunteer" in the Makaha Congregation. *See Anduha v. County of Maui*, 30 Hawai'i 44, 47 (1927).

A court could no more interpret "volunteer" to mean "employee" than it could interpret "employee" to mean "volunteer." Case law overwhelmingly supports the standard meaning the terms".[4] In *Slattery v. Cuomo*, 531 F. Supp. 3d 547 (N.D.N.Y. 2021), the plaintiffs challenged a New York law that prohibited discrimination "on the basis of the employee's … reproductive health decision making …." *Id*. at 557. The plaintiffs argued vagueness because "employee" and "employer" were undefined. *Id.* at 569-570. The *Cuomo* court rejected the argument, relying on the dictionary definition of employee as "'a person working for another person or a business firm for pay'" and employer as "'a person who employs, esp. for wages.'" *Id*. at 572 (quoting The Random House Dictionary of the English Language (Unabridged Ed., 1979)). "A reasonable person would understand that the statute limits protections to those actually *employed by* an organization, not those who *volunteer* to assist that group." *Id*. (emphasis added).

In *Graves v. Women's Professional Radio Ass'n, Inc.*, 907 F.2d 71, 72 (8th Cir. 1990), the *Graves* court turned to the dictionary for the definitions of "employer" and "employee" for purposes of Title VII, which unhelpfully defined "employee" as "an individual employed by an employer." After quoting the dictionary, the court concluded, "Central to the meaning of those

[4] *See Cartaya v. United States Dep't of Agriculture*, Case No. 6:18-CV-02042, 2022 WL 226808, *3 (D. Or. Jan. 26, 2022) ("An individual cannot be a volunteer if the individual is employed by the public agency …."); *Krueger v. Iowa Rails to Trails, Inc.*, 435 N.W.2d 391, 392 (Iowa App. 1988) ("[W]hile Krueger was employed by a 'volunteer' organization, he was nonetheless an employee who received remuneration for his services and, under no set of facts could he ever be considered a 'volunteer' ….").

words is the idea of compensation in exchange for services …. Compensation … is not a sufficient condition, but it is an essential condition to the existence of an employer-employee relationship." *Id*. at 73.

In short, the "most known and usual signification" and the "general or popular use or meaning" (HRS § 1-14) of "employed by" is an employer-employee relationship, not a volunteer. Religious Defendants are not seeking "blanket immunity," as Plaintiff alleges. They can still be sued in appropriate circumstances for misconduct by volunteers, just not under the first revival window, upon which Plaintiff solely relies, because it requires that the perpetrator be "employed by" the defendant.

And this makes good sense. The Legislature likely had in mind some common differences between employees and volunteers when it limited the revival statute to employees. For example: An organization's relationship with employees is different than with volunteers. Employers have more control over employees than volunteers. Employees typically have regular work hours and guidelines about time away; volunteers' schedules are typically flexible and they are not reprimanded for missing work. There were many reasons for the Legislature to limit this first retroactive window to claims where the perpetrator was "employed by" the defendant.

Finally, Plaintiff says Apana admitted he was an employee of the Makaha Congregation, raising a fact issue about employment. However, Apana who as the Court is aware is unrepresented, clarified that he was not an employee; he was in the service of the Makaha Congregation only. Exhibit "H" (Dec. of Defendant Apana), ¶¶6-7. Plaintiff's RFA 59 used the disjunctive "service and/or employ", and Apana has clarified which of the two options he was admitting. *Id.* at ¶ 8-9.

Because Apana was a volunteer for Makaha Congregation and was not "employed by" either of the Religious Defendants, Plaintiff's claim is not revived.

b. The Religious Defendants Did Not Owe A Duty of Care to Plaintiff During Her Sleepovers with Her Friend.

Even if Apana had been "employed by" Makaha Congregation, Plaintiff could not prove the second requirement – that Religious Defendants owed her a duty of care. HRS § 657-1.8. Plaintiff acknowledges that such a duty exists only "where there is a special relationship with either the victim or the perpetrator." (Pl's Opp. at 12).

i. Religious Defendants did not have a "special relationship" with Plaintiff.

Plaintiff argues that Religious Defendants had a special relationship with her based on foreseeability "because they received reports of multiple reports [sic] of sexual assaults

perpetrated by Apana." (Pl's Opp. at 14). But "duty is comprised of two mutually dependent elements," a special relationship *and* foreseeability. *Lee v. Corregedore*, 83 Hawai'i 154, 160, 925 P.2d 324, 330 (1996). The existence of a special relationship is "a threshold determination." *Id*. "Therefore, without a special relationship and foreseeability, an actor would not be legally required to affirmatively act to prevent [the harm]." *Id*. **Despite Plaintiff's extended discussion about foreseeability, it alone does not create a special relationship.** "[M]ere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm." *Id*. at 165 (quotation marks omitted). *See also* Restatement (Second) Torts § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). And "if there is no special relationship, then there is no duty." *Sang v. Clark*, 130 Hawai'i 282, 294, 308 P.3d 911, 923 (2013)(citation omitted).

Every court to consider the issue has held that membership in a religious organization does not create a special relationship. Plaintiff attempts to distinguish these cases, including *Conti v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 235 Cal.App.4th 1214 (2015), on the ground that they did not involve clergy molesting a parishioner. But these cases establish that Religious Defendants did not have a special relationship *with Plaintiff*, who was no more than a parishioner. No court anywhere has held that a church, school, or any similar organization has a "special relationship" with a child except when that child is in the organization's custody and control.

Plaintiff argues that Religious Defendants read a "physical custody requirement" into the special relationship analysis. (Pl's Opp. at 15). But physical "custody and control" is the very essence of a "special relationship." *See*, *e.g.*, *Lee*, 83 Hawai`i at 161 (citing *City of Belen v. Harrell*, 93 N.M. 601, 603 P.2d 711, 713 (1979) ("When one party is in the custodial care of another … the custodian has the duty to exercise reasonable and ordinary care for the protection of the life and health of the person in custody."); *see Kaho'ohanohano v. DHS*, 117 Hawai'i 262, 285, 178 P.3d 538, 561 (2008) ("in most cases the 'special relationship' requires that the actor have custody of the other") (quotation marks omitted). Thus, when a person takes "custody" of a child "'under circumstances such as to deprive the [child] of his [other] normal opportunities for protection,'" the custodian is under a duty "'to protect [him or her] against unreasonable risk of physical harm.'" *Doe Parents No. 1 v. State Dept. of Educ.*, 100 Hawai'i 34, 79, 58 P.3d 545, 590 (2002) (quoting Restatement (Second) Torts § 314(A)). Because a child, while in school, is

deprived of the protection of his or her parents or guardian, the school is "properly required to give him or her the protection" the parents would have provided. *Id*. (quotation marks and brackets omitted).

Like a school, a religious organization owes a duty to children only while they are in its custody and control. Plaintiff's sleepovers at her friend's house were not sponsored or supervised by Religious Defendants. She was not in Religious Defendants' custody or control.

Citing *N.L. v. Bethel School District*, 186 Wash.2d 422, 432, 378 P.3d 162 (2016), and *Brown v. USA Taekwondo*, 40 Cal.App.5th 1077 (2019), Plaintiff argues that legal entities can "bear[ ] responsibility for acts of sexual abuse perpetrated by an employee or agent … even where the abuse occurred somewhere other than the entities' premises." (Pl's Opp. at 13). But custody is the issue, not the precise location of the abuse. In the *N.L.* case, the plaintiff was in the school's custody when it allowed a known sex offender to take her off school premises. The court explained that "while the district's *duty* to exercise reasonable care might end when the student leaves its custody … the district's *liability* for a breach of duty while the student was in its custody" would not be "cut off merely because the harm did not occur until later." *N.L.*, 186 Wash. 2d at 432, 378 P.3d at 167. And in *Brown*, the plaintiff was molested by her coach while in his custody "at taekwondo events sanctioned by [the defendants]." *Brown*, 40 Cal.App.5th at 1086.[5]

If Plaintiff had been in Religious Defendants' custody and, as a result of their negligence, Apana had taken her from their custody and abused her, these cases might be relevant. But that is not what happened here. Plaintiff went from her own home to her friend's home for a sleepover. Religious Defendants had nothing to do with it, did not know about it, and had no control over it.

ii. Religious Defendants did not have a "special relationship" with Apana.

A similar analysis applies with respect to an alleged special relationship between Religious Defendants and Apana as an elder. Even if a Religious Defendant had a special relationship with Apana while he was performing his responsibilities as an elder in the Makaha Congregation, "special relationships … have defined boundaries." *Brown,* 40 Cal.App.5th at 1092 (quotation marks omitted). "[A]n employer's duty to control the conduct of his employee"

[5] It is worth noting that the California Supreme Court granted review of *Brown* to clarify that the law in California is the same as Hawaii. Foreseeability does not create a special relationship. Before the imposition of duty based upon a multi-factor balancing test that includes foreseeability, there must first be a special relationship based upon custody and control. *See Brown v. USA Taekwondo*, 11 Ca.5th 204, 483 P.3d 159 (2021).

exists only "when the acts complained of are so connected in time and place with the employment as to give the employer a special opportunity to control the employee." *Costa v. Able Distributors, Inc.*, 3 Hawai'i 486, 490, 653 P.2d 101, 105 (App. 1982).

As expressed in the Motion, "[i]n examining the theory of 'negligent failure to control an employee,' the Hawai'i Supreme Court adopted the principles in Restatement (Second) of Torts § 317." *Kaopuiki v. Kealoha*, 104 Hawai'i 241, 251, 87 P.3d 910, 920 (App. 2003). Plaintiff's opposition ignores Restatement (Second) of Torts § 317. It states:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment so as to prevent him from intentionally harming others … if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.

All of these elements are necessary but none exists in this case. Apana was not "upon the premises" of Religious Defendants or using their chattel at the time of the abuse. He was in his own home, on his own time. Plaintiff was not part of any activity sponsored or supervised by Religious Defendants. Plaintiff conveniently ignores the cases cited by Religious Defendants where courts refused to hold religious organizations liable for after-hours, off-premises misconduct by their agents, including *R.A. v First Church of Christ*, 748 A.2d 692 (Pa. Sup. Ct. 2000), which has facts remarkably similar to this case.[6]

Moreover, under Restatement (Second) Torts § 317, foreseeability is necessary, but alone does not create a duty. In *Lewis v. Bellows Falls Congregation of Jehovah's Witnesses*, 95 F. Supp. 3d 762 (D. Vt. 2015), the plaintiff, Lewis, alleged that True, an elder, "molested her on his personal property, not on property belonging to the Congregation or Watchtower." *Id*. at 768. Lewis argued that "the Congregation had a duty to protect her from True because it was aware of True's prior abuse of minor congregants," but as the court explained, "[u]nder the plain language

[6] *See, e.g.*, *Roman Catholic Bishop of San Diego v. Sup. Ct.*, 42 Cal.App.4th 1556, 1567 (1996) (no liability where priest took 15-year-old parishioner "from her home to various public places and hotels" and abused her); *Meyer v. Lindala*, 675 N.W.2d 635, 640 (Minn. App. 2004) (church had no duty to prevent abuse of minor parishioner that occurred "at [her] residence, on a snowmobile, and in an automobile" and not on church property or during church functions); *Doe v. Corp. of the President of The Church of Jesus Christ of Latter-day Saints*, 98 P.3d 429, 432 (Utah App. 2004) (no duty where abuse did not occur "on [church] property, during a [church] sponsored activity, or in connection with [the perpetrator's] position as a High Priest or scout leader").

of § 317 … mere foreseeability is insufficient to establish a duty to control if the servant is not on the master's premises or using a chattel of the master." *Id*. Thus, the court concluded that there "is no 'special relationship' between the Congregation and True giving rise to a duty when he is not on the Congregation's premises or carrying out the Congregation's business, and therefore the Congregation had no duty to control True when he was babysitting a child outside Congregation activities." *Id*. The same holds here with Apana.

The reason is easy to see. A company that hires a driver with a history of drunk driving has a duty to make sure he's sober when he drives for the company; it has no duty to make sure he does not stop at the bar after work on his way home. *See Niece v. Elmview Group Home*, 131 Wash.2d 39, 48, 929 P.2d 420, 426 (1997) ("[T]he relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.").

Plaintiff argues that Apana's "own admissions state that he was subject to Defendant's [singular] control while employed by them [plural]." (Pl's Opp. at 17). He was not "employed by" Religious Defendants; rather, he was a volunteer in the service of Makaha Congregation. In any case, Apana admitted no such thing. He specifically denied that he was "encouraged and allowed … to conduct services for the church at [his] home" and he denied that he "performed elder services … at [his] home." (Pl's Opp. Ex. 17 at 6). He was clearly not under Religious Defendants' control at the time the abuse occurred.

Plaintiff suggests that Hawai'i courts apply a multifactor test to determine whether a duty exists, and Plaintiff spends several pages analyzing those factors. (Pl's Opp. at 12-17). But as noted earlier, without a "special relationship," foreseeability and the other factors are irrelevant. "[I]f there is no special relationship, then there is no duty."[7] *Sang*, 130 Hawai'i at 294, 308 P.3d at 923 (citation omitted).

Plaintiff suggests that it was Religious Defendants "affirmative actions" that caused the harm – active misfeasance, not mere nonfeasance. (Pl's Opp. at 14). It is true that "anyone who does an affirmative act is under a duty to others to exercise the care of [a] reasonable [person] to protect [others] against an unreasonable risk of harm to them arising out of the act." *Lee*, 83 Hawai'i at 162, 925 P.2d at 332. Thus, every person who drives a car has to do carefully to

[7] Other factors can limit a duty *notwithstanding the existence of a special relationship*. But "these factors do not serve as an alternative basis for imposing duties to protect" in the absence of a special relationship. *Brown v. USA Taekwondo*, 483 P.3d 159, 169 (Cal. 2021). "[A] 'special relation' … is required to give rise to a duty …." *Kaho'ohanohano*, 117 Hawai'i at 287.

avoid, hitting pedestrians. But in this case, the injury was caused by a third party and Religious Defendants are accused only of failing to prevent it. It is crystal clear that "[w]hether a person owes another a duty reasonably to protect the other from foreseeable harm by a third person" depends on a "'special relationship' between the defendant and the plaintiff, or between the defendant and [the] third person." *Doe Parents No. 1*, 100 Hawai'i at 71, 58 P.3d at 583.

Plaintiff argues that Religious Defendants had a special relationship with Apana because they "provided Apana with the title" of elder and "parents of minor female children in the congregation" view an elder as "a person of authority and trustworthiness …." (Pl's Opp. at 16). But the religious beliefs of Plaintiff's parents have nothing to do with whether a special relationship exists. People might have profound respect for doctors, teachers, police officers, and so forth. That respect does not create a legal duty, especially when it arises from religious beliefs that civil courts cannot evaluate. Moreover, for purposes of this motion, agency is not a disputed issue. Religious Defendants do not dispute that Apana was an agent of the Makaha Congregation and that, while acting as an agent in the performance of religious duties, a special relationship existed. But the abuse did not occur while Apana was performing religious duties. As noted, Hawaii has adopted Restatement (Second) Torts § 317 to establish when a defendant can be liable for actions that are outside the scope of employment, as sexual assault assuredly is. Those requirements are not met here.

Plaintiff cites *Wada v. Aloha King, LLC*, 154 F. Supp. 3d 981 (D. Haw. 2015), but in that case the perpetrator, while on the job and at his employer's premises, took the victim and sexually assaulted her.[8] Plaintiff cites *Doe v. Hartz*, 52 F. Supp. 2d 1027 (N.D. Iowa 1999), but in that case a parish priest assaulted the plaintiff on church property during services. Plaintiff cites *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 985 P.2d 262 (1999) (en banc), but it confirms what Religious Defendants have said, that a church has a special relationship with children when they are "delivered into its custody …, whether it be on the premises for services and Sunday school, or off the premises at church sponsored activities or youth camps." *Id*. at 274. Those circumstances do not exist here. Plaintiff cites *Funkhouser v. Wilson*, 89 Wash.App. 644, 950 P.2d 501 (1998), but there the abuse occurred because the victim was "entrusted to the care" of the church-volunteer perpetrator whose "leadership role" in the church gave him access to the victims. The facts of these cases are all materially different from ours, where Plaintiff was

[8] The "special relationship" analysis in *Wada* focuses on foreseeability, but that is contrary to Hawai'i law, and *Wada* cites no support.

the friend of Apana's daughter and the abuse occurred during privately arranged sleepovers. Foreseeability alone cannot establish a duty, and it is not part of the "special relationship" analysis.

B. Plaintiff's "Hindering Prosecution" Claim Is Barred by The Statute of Limitations and Meritless.

Plaintiff's "hindering prosecution" claim does not fit through the revival window for the same reasons explained above. Moreover, it never could be subject to the window. It is not a civil cause of action *for the sexual abuse of a minor*. *See* HRS § 657-1.8(b) (emphasis added). Hawai'i has never recognized a *civil* claim based on the *crime* of hindering prosecution, and never would because there is no evidence the Legislature intended to create such a claim. *See Hunt v. First Ins. Co. of Hawai'i Ltd.*, 82 Hawai'i, 363, 922 P.2d 976 (App. 1996) (no private right of action from statute without legislative intent). Finally, Plaintiff fails to present any evidence that Religious Defendants did anything that violates the hindering prosecution statutes.

C. Plaintiff's Claims for Negligent and Intentional Infliction of Emotional Distress are Meritless and Barred by the Statute of Limitations.

The revival statute does not save Plaintiff's emotional distress claims for the reasons discussed above. Moreover, as to legal entities, the revival statute only resurrects claims "for the sexual abuse of a minor" that are based on "sexual acts that constituted or would have constituted a criminal offense under part V or VI of chapter 707." HRS § 657-1.8(a). The statute revives claims for damages caused by the "sexual acts," not for damages caused by tangential conduct that allegedly causes emotional distress, and not for conduct that occurs *after* the abuse ends. Plaintiff does not allege that Apana abused her after Religious Defendants were told that Apana had abused her.

II. CONCLUSION

The Religious Defendants are entitled to summary judgment because the revival statute did not include volunteers and no legal duty existed when the abuse occurred.

DATED: Honolulu, Hawai'i, April 21, 2022.

/s/ William S. Hunt
WILLIAM S. HUNT
JENNY J.N.A. NAKAMOTO
JOEL M. TAYLOR (*Pro Hac Vice*)
Attorneys for Defendants/Crossclaimants
MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation; KENNETH L. APANA, Individually; and Does 1 through 100, inclusive,

Defendants.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation,

Crossclaimants,

vs.

KENNETH L. APANA, Individually,

Crossclaim Defendant.

Civil No. 1CCV-20-0000390 DEO
(OTHER NON-VEHICLE TORT)

DECLARATION OF WILLIAM S. HUNT

DECLARATION OF WILLIAM S. HUNT

I, William S. Hunt, declare under penalty of law that the following is true and correct:

1. I am an attorney with the law firm of Dentons US LLP and an attorney of record for Defendants MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII ("Makaha") and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. ("Watchtower", together with Makaha, the "Religious Defendants").

2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.

3. I am personally aware of the proceedings in this case and have personally participated in all phases of litigation, including discovery and oral depositions.

4. This Declaration is made in support of the Religious Defendants' Reply in Support of Their Motion for Summary Judgment.

5. Attached as Exhibit "H" is a true and correct copy of the Declaration of Kenneth L. Apana dated April 4, 2022, my office received from Mr. Apana on April 7, 2022.

I declare under penalty of perjury under the laws of the State of Hawai‘i that the foregoing is true and correct.

Executed in Honolulu, Hawai`i, on April 21, 2022.

/s/ William S. Hunt
WILLIAM S. HUNT

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

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Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation; KENNETH L. APANA, Individually; and Does 1 through 100, inclusive,

Defendants.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation,

Crossclaimants,

vs.

KENNETH L. APANA, Individually,

Crossclaim Defendant.

Civil No. 1CCV-20-0000390 DEO
(OTHER NON-VEHICLE TORT)

DECLARATION OF KENNETH L. APANA

EXHIBIT "H"

DECLARATION OF KENNETH L. APANA

I, KENNETH L. APANA, declare under the penalty of law that the following is true and correct:

1. I make this declaration based on my own personal knowledge. I am over 21 years of age, of sound mind, and competent to make this declaration.

2. I am a defendant and crossclaim defendant in the above captioned action, bearing Civil No. 1CCV-20-0000390 DEO.

3. I became one of Jehovah's Witnesses in 1974.

4. In July 1990, I began serving as an elder in the defendant Makaha Congregation of Jehovah's Witnesses ("Makaha Congregation").

5. In August 1992, I was removed as an elder in the Makaha Congregation and I have not served as an elder since that time in any congregation of Jehovah's Witnesses.

6. I have never been paid or received any wages, salary, or monetary compensation for my voluntary services while I was an elder and a member of the Makaha Congregation.

7. My association with Jehovah's Witnesses from 1974 to present, has always been, and continues to be voluntary.

8. As an unrepresented defendant/crossclaim defendant in this action, in response to Plaintiff N.D.'s First Request for Admission to Defendant Kenneth L. Apana, Request No. 59, I admitted that when I was an elder of the Makaha Congregation, I was in the service of the Makaha Congregation.

9. Because of the compound wording of Request No. 59, I submit this declaration to clarify and confirm that the extent of my admission in response to that request is limited to having been in the service of Makaha Congregation, as I have never been in the employ, employed by, or an employee of the Makaha Congregation.

I declare under penalty of perjury of the laws of the State of Hawaii that the foregoing is true and correct.

Executed on April 4, 2022 in Kailua-Kona, Hawai'i.

KENNETH L. APANA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing document was served on the following parties listed below by electronic service through the JEFS E-Filing System:

MARK S. DAVIS, ESQ.	mdavis@davislevin.com
LORETTA A. SHEEHAN, ESQ.	lsheehan@davislevin.com
MATTHEW WINTER, ESQ.	mwinter@davislevin.com

The undersigned further certifies that on this date the foregoing document was served on the following parties listed below by U.S. mail, postage prepaid:

JAMES S. ROGERS, ESQ. *(Pro Hac Vice)*
LAW OFFICES OF JAMES S. ROGERS
1500 Fourth Avenue, Suite 500
Seattle, WA 98101

Attorney for Plaintiff

KENNETH L. APANA
P.O. BOX 331
KONA, HI 96745

Pro Se Defendant/Crossclaim Defendant

DATED: Honolulu, Hawai`i, April 21, 2022.

/s/ William S. Hunt
WILLIAM S. HUNT
JENNY J.N.A. NAKAMOTO

Attorneys for Defendants/Crossclaimants
MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

NOTICE OF ELECTRONIC FILING

An electronic filing was submitted in Case Number 1CCV-20-0000390. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: 1CCV-20-0000390
Title: N.D. vs. Makaha, Hawaii Congregation of Jehovah's Witnesses
Filing Date / Time: THURSDAY, APRIL 21, 2022 04:22:13 PM
Filing Parties: William Hunt
Jenny Nakamoto
Case Type: Circuit Court Civil
Lead Document(s):
Supporting Document(s): 386-Reply
Document Name: 386-DEFENDANTS/CROSSCLAIMANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT FILED ON APRIL 1, 2022 [Dkt. 329]; DECLARATION OF WILLIAM S. HUNT; EXHIBIT "H"; COS

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:
Recorded Proceeding 1st Circuit *(CTAVAppeals.1cc@courts.hawaii.gov)*
Jenny Jun Nee Ayako Nakamoto *(jenny.nakamoto@Dentons.com)*
William S. Hunt *(william.hunt@dentons.com)*
First Circuit Court 7th Division *(7thdivision.1cc@courts.hawaii.gov)*
Matthew Caulfield Winter *(mwinter@davislevin.com)*
Loretta A. Sheehan *(lsheehan@davislevin.com)*
Mark S. Davis *(mdavis@davislevin.com)*

The following parties need to be conventionally served:
James Steven Rogers
ALL PARTIES-RE DOCKET ONLY-NOT PARTY RE SERVICE REQUIREMENT
Kenneth L Apana
Christian Congregation of Jehovah's Witnesses

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

N.D., Plaintiff, vs. MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; *et al.*, Defendants.	Civil No. 1CCV-20-0000390 DEO (OTHER NON-VEHICLE TORT) **NOTICE OF REMOTE HEARING and CERTIFICATE OF SERVICE**
MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; *et al.*, Crossclaimants, vs. KENNETH L. APANA, Individually, Crossclaim Defendant.	

NOTICE OF REMOTE HEARING

TO: MARK S. DAVIS, ESQ.
LORETTA A. SHEEHAN, ESQ.
MATTHEW WINTER, ESQ.
THOMAS M. OTAKE, ESQ.
HANNAH H. MATSUNAGA, ESQ.
JAMES S. ROGERS, ESQ. (*Pro Hac Vice*)
DEBORAH SILBERMAN, ESQ. (*Pro Hac Vice*)
Attorneys for Plaintiff

KENNETH L. APANA
Defendant *Pro Se*

NOTICE IS HEREBY GIVEN that DEFENDANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAI'I AND WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S RENEWED MOTION FOR SUMMARY JUDGMENT shall come on for hearing before the Honorable Dean E. Ochiai, Judge of the above entitled court, via ZOOM video conferencing on **May 26, 2022 at 3:00 p.m.**, or as soon thereafter as the matter can be heard.

If you fail to appear at the hearing, the relief requested may be granted without further notice to you.

All parties are directed to appear at least **10 minutes** prior to the scheduled start time.

The Zoom meeting ID is: **895 888 6479**. No password is required.

Self-represented parties unable to appear by video may call **888-788- 0099 (U.S. toll-free) or 646-558- 8656** to participate by telephone. You must enter the above noted Zoom meeting ID when prompted. You must also notify the assigned judge's chambers that you intend to participate by telephone at least **48 hours** before the hearing and you must provide the court with the telephone number that you will be using to dial-in for the hearing.

Attorneys and self-represented parties must enter a user name that sets forth their full name, otherwise you will not be admitted into the hearing. Attorneys must also include the suffix "Esq."

All attorneys and parties shall dress appropriately for the hearing. **Recording court proceedings is strictly prohibited unless permission is granted by the court.** The court may impose sanctions for failure to comply with this notice.

Dated: Honolulu, Hawai'i, May 20, 2022.

/s/ William S. Hunt
WILLIAM S. HUNT
JENNY J.N.A. NAKAMOTO
JOEL M. TAYLOR *(Pro Hac Vice)*

Attorneys for Defendants/Crossclaimants
MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing document was served on the following parties listed below by electronic service through the JEFS E-Filing System:

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MATTHEW WINTER, ESQ.	mwinter@davislevin.com
THOMAS M. OTAKE, ESQ.	totake@davislevin.com
HANNAH H. MATSUNAGA, ESQ.	hmatsunaga@davislevin.com

The undersigned further certifies that on this date the foregoing document was served on the following parties listed below by U.S. mail, postage prepaid:

KENNETH L. APANA
P.O. BOX 331
KONA, HI 96745

Pro Se Defendant/Crossclaim Defendant

Dated: Honolulu, Hawai‘i, May 20, 2022.

/s/ William S. Hunt
WILLIAM S. HUNT
JENNY J.N.A. NAKAMOTO
JOEL M. TAYLOR *(Pro Hac Vice)*

Attorneys for Defendants/Crossclaimants
MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.