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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.

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 2 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

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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
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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 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

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 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
