

**Plaintiffs' Reply to Defendants' Opposition to
Plaintiffs' Motion for Partial Summary Judgment**

Defendants pled the "Limited Exception" affirmative defense to Montana's Mandatory Reporting Statute. Plaintiffs moved for summary judgment on that affirmative defense. Thus, Defendants must offer evidence to support the affirmative defense to survive summary judgment. They have no such evidence, so instead Defendants have chosen to address other parts of the mandatory reporting statute.

I. Three Parts to Montana's Mandatory Reporting Law

There are three important parts to Montana's mandatory child abuse reporting laws. First, Montana Law defines who must report child abuse:

When the professionals and officials listed in subsection (2) know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected by anyone regardless of whether the person suspected of causing the abuse or neglect is a parent or other person responsible for the child's welfare, they shall report the matter promptly to the department of public health and human services.¹

Second, Montana Law defines what happens when institutions fail to report child abuse:

Any person, official, or institution required by law to report known or suspected child abuse or neglect who fails to do so or who prevents another person from reasonably doing so is civilly liable for the damages proximately caused by such failure or prevention.²

Third, Montana Law creates a "Limited Exception" to the mandatory reporting requirements:

¹ Montana Code Annotated 41-3-201(1)

² Montana Code Annotated 41-3-207

A member of the clergy or a priest is not required to make a report under this section if the communication is required to be confidential by canon law, church doctrine, or established church practice.³

II. Plaintiffs' Motion for Partial Summary Judgment Relates Only to Part Three

Plaintiffs moved for Partial Summary Judgment on Part Three of the Law—the “Limited Exception” affirmative defense. Defendants responded by bringing a Cross Motion for Summary Judgment on Parts One and Two of the law, claiming they are not mandatory reporters under the statute.

This reply relates to Plaintiffs Motion for Partial Summary Judgment addressing Part Three—the “Limited Exception.” Defendants’ arguments related to Part One and Part Two will be addressed in Plaintiffs Response to Defendants’ Cross-Motion for Summary Judgment.

Plaintiffs' Summary Judgment

- Part Three
- Limited Exception

Defendants' Summary Judgment

- Parts One and Two
- Mandatory Reporters

III. Defendants' Cannot Re-Define the “Confidential” Element

Defendants have admitted once again that reports of abuse are shared with the abuser. *See* Defendants’ Opposition at Page 13. This admission is enough to defeat Defendants’ affirmative defense and grant Plaintiffs Motion for Partial Summary Judgment. But, Defendants don’t stop there. They admit that their church doctrine involves sharing reports of abuse with all who “need to know,” including the molester, all witnesses, and congregation elders. *Id.* This evidence fails to prove that reports of abuse are kept “confidential.”

³ Montana Code Annotated 41-3-201(6)(c)

Defendants argue that they survive summary judgment on the “Limited Exception” because the definition of “confidentiality” can have several meanings. *See* Defendants’ Opposition at Headnote No. 2(a). Without any supporting evidence, Defendants argue that Plaintiff Holly McGowan knew her report of abuse would be shared with a number of individuals and that somehow this knowledge modifies the definition of “confidential” in the Montana statute. Lacking any evidence related to this assertion about Plaintiff Holly McGowan, Defendants cite to what other individuals “understood” about church practices. Such evidence is immaterial to Holly McGowan. But, most importantly, the statutes’ “confidential” requirement has nothing to do with Plaintiffs’ understanding about church practices. Information is either kept “confidential” or it isn’t. Because Defendants admit the communications are shared with others, the reports are not kept “confidential,” and Plaintiffs’ Motion for Summary Judgment should be granted.

IV. Timing of Abuse is Not a Component of the Limited Exception Affirmative Defense

Defendants argue that the abuse was in the past so the “mandatory reporting statute was not triggered.” *See* Defendants Opposition at Heading No. 1. This has nothing to do with whether Part Three (the “Limited Exception”) applies. This is an argument that Parts One and Two (“Mandatory Reporters”) do not apply. Clearly, Defendants cannot satisfy the Limited Exception – the issue raised in Plaintiffs’ motion – so they distract by raising a separate issue. This argument will be properly addressed by Plaintiffs in their response to Defendants Cross-Motion for Summary Judgment. Defendants’ argument cannot defeat Plaintiffs’ Motion for Summary Judgment because it doesn’t relate to Part Three—the “Limited Exception.”

V. **Defendants' "Secrecy" Argument Shows that the Affirmative Defensive Must Fail**

Defendants further argue that Plaintiff "had no reason to think 'confidentiality' would mean 'secrecy'." See Defendants' Opposition at Heading No. 2(a)(iii). Defendants' can't offer proof that they kept the report "confidential" so they claim Holly McGowan consented to some different meaning of the word "confidential." The parties cannot consent to modify the terms of a statute intended to protect children. Therefore, this argument can be ignored.

But, going even further, Defendants blame the victim saying that, "she could have reported the abuse." See Defendants' Opposition at 17. This argument ignores that Plaintiffs Holly McGowan is not a mandatory reporter, but is instead a victim of childhood sex abuse.

Defendants' attempts to change the terms of the statute illustrates that Defendants have failed to offer evidence of the elements of the affirmative defense as it is actually written. Therefore, the affirmative defense fails as a matter of law.

VI. **Enforcement of Plaintiffs Claims Does Not Require Judicial Evaluation of Bible-Based Doctrine**

Defendants cite *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) to argue that this Court is powerless to apply Montana statutory law as to each Defendant in this case because they are a religious organization.⁴ See Defendants'

⁴ This is just another example of Defendants taking contradictory positions depending on the issue. In other pleadings, Defendants claimed "Plaintiffs have sued four corporations that do not encompass an international religious organization." See Defendants' Reply in Support of Defendants' Motion for a Protective Order at 5. Yet, Defendants' argument here is that they deserve protection as a "religious organization." See Defendants' Opposition at 17.

Opposition at Page 17. That, of course, is not what *Serbian* says or what the law is in this State or in this Country. Indeed, in interpreting *Serbian*, the United States Supreme Court later added:

There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes. But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intra-church disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.

Gen. Council on Fin. & Admin. v. Cal. Superior Court, 439 U.S. 1369, 1372-73, 99 S. Ct. 35, 38 (1978) (citations omitted).

Although freedom of religious belief is absolute, freedom of religious conduct may be subject to regulation for the protection of society. *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 297, 852 P.2d 640, 647 (1993) (citing *Cantwell v. Connecticut* (1940), 310 U.S. 296, 303-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218. The safety of the children of Montana is at issue and the State of Montana has an obvious and compelling interest in protecting the children of this State. Just because Defendants are a religious organization does not mean they are immune to the laws of this State.

Furthermore, this issue does not require the Court to determine that "the doctrine of confidentiality as taught and applied in congregations of Jehovah's Witnesses does not merit the same protections afforded other faiths" See

Defendants' Opposition at 18. It simply requires the Court to determine if the Jehovah's Witnesses kept reports confidential or not under the law of the State of Montana. While Section 41-1-3-201 does not define "confidential" as it is used in the statute, this Court is entitled to consider its plain and ordinary meaning. *See Bates v. Neva*, 2014 MT 336, ¶ 15, 377 Mont. 350, 354, 339 P.3d 1265, 1268 ("When the legislature has not defined a statutory term, we consider the term to have its plain and ordinary meaning.") (quoting *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666). This is not a dispute over church doctrine or belief, but over liability for the negligence acts of those in positions of authority within the church. As an Oregon Federal District Court explained:

Courts may not, without justification, force religious bodies to abandon their religious beliefs or doctrines in favor of purely secular rules or rule on the appropriateness or correctness of those beliefs or doctrines. However, the mere consideration of religious authorities in an action involving the church and third parties does not necessarily amount to an infringement of the churches religious freedom. A court may look to such evidence to establish the basic purposes or policies of the religion as merely a guide to determining whether a plaintiff has a viable action against the church.

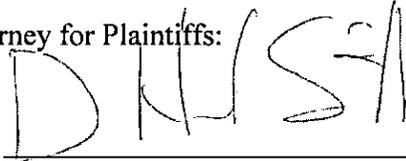
M.K. v. Archdiocese of Portland, 228 F. Supp. 2d 1168, 1170-71 (D. Or. 2001)

Simply put, the issues presented by this case do not require the Court to interfere in theological matters. The resolution of this dispute does not require an extensive inquiry by the Court into religious law, policy, or doctrine. The issues presented simply require an evaluation by the Court whether the church has kept information confidential or not under Montana law. As described above, the facts show that they obviously did not.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all attorneys of record via Email on this the 21st day of June, 2018.

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