

Kathleen L. DeSoto
Tessa A. Keller
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595
kldesoto@garlington.com
takeller@garlington.com

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Candace Fisher
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BY [Signature]
DEPUTY

Joel M. Taylor (*Pro Hac Vice*)
Associate General Counsel
Watchtower Bible and Tract Society of New York, Inc.
100 Watchtower Drive
Patterson, NY 12563
Telephone (845) 306-1000
jmtaylor@jw.org

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

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

ALEXIS NUNEZ and HOLLY
McGOWAN,

Plaintiffs,

v.

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

Defendants.

Hon. James A. Manley
Cause No. DV 16-84

RESPONSE TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT AS TO DEFENDANTS'
THIRD-PARTY CLAIMS AND
AFFIRMATIVE ACTION AGAINST
MAX REYES AND MARCO NUNEZ,
BY DEFENDANTS WATCHTOWER
BIBLE AND TRACT SOCIETY OF
NEW YORK, INC. AND CHRISTIAN
CONGREGATION OF JEHOVAH'S
WITNESSES

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

Third-Party Plaintiffs,

v.

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

Third-Party Defendants.

Defendants/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc. ("Watchtower NY"), Christian Congregation of Jehovah's Witnesses ("CCJW") and the Thompson Falls Congregation of Jehovah's Witnesses ("Thompson Falls Congregation") (collectively "Religious Defendants") respectfully respond to Plaintiffs' Motion for Partial Summary Judgment as to Defendants' Third-Party Claims Against Max Reyes and Marco Nunez and Defendants' Third Affirmative Defense.

I. INTRODUCTION

This case is about incest perpetrated on the Plaintiffs by several family members over a long period of time. Religious Defendants are entitled to bring claims against Maximo Reyes and Marco Nunez—the family members who abused both Plaintiffs and caused the injuries at issue in this case. There are three sound reasons for this Court to deny Plaintiffs' Motion for Partial Summary Judgment as to Defendants' Third-Party

Complaint and Third Affirmative Defense:

1. Contrary to Plaintiffs' assertions, they *do* seek to impose vicarious liability for intentional acts of child sexual abuse. Multiple subsections in Paragraph 47 of the First Amended Complaint ("Complaint") expressly identify Reyes as an agent under the control of the Defendants. The Complaint claims that liability is based in part upon the Defendants' failure to investigate, discipline, supervise, and discharge Reyes as an agent. That is a claim for vicarious liability of an agent's misconduct.
2. Plaintiffs' reliance on *Martel v. Montana Power Co., infra.* is misplaced and their reliance on an unpublished federal case (*Groves v. Greyhound Lines, Inc.*) does not prohibit comparison of the conduct in this case.
3. The Montana Legislature changed the law in 1997 to allow third-party claims against *any* person whose misconduct contributed in *any form* or to *any degree* to cause the injuries claimed in a lawsuit (Mont. Code Ann. § 27-1-705).

For each of those reasons, the Defendants ask the Court to deny Plaintiffs' Motion for Partial Summary Judgment as to Defendants' Third-Party Claims Against Max Reyes and Marco Nunez and Defendants' Third Affirmative Defense.

II. GENUINE ISSUES OF DISPUTED FACT

Plaintiffs claim that they have not pled that the Religious Defendants are vicariously liable for the acts of Maximo Nava Reyes ("Reyes"). Pls.' Mot. Partial

Summ. J. Defs.' Third-Party Claims Against Max Reyes & Marco Nunez & Defs.' Third Aff. Def. 3, June 21, 2018 ("Pls.' Mot.").¹ However, the Complaint clearly alleges Defendants' vicarious liability for Reyes' misconduct:

1) Paragraph 19 of the Complaint says: "A person holding the position of a **baptized Publisher** is an **agent** of the Congregation to which he or she belongs **and an agent of Watchtower Defendants.**" (Emphasis added.)

2) Paragraph 32 says that **Reyes, a baptized Publisher** in the Thompson Falls Congregation, began to sexually abuse and molest Plaintiff Holly McGowan ("McGowan") in 1994 (the abuse continued "for years" according to paragraph 33). According to paragraph 38, it was around 2002 when Reyes began to abuse Plaintiff Alexis Nunez ("Nunez").

3) Paragraph 46 states that "The Watchtower Defendants have a duty to exercise reasonable care in matters relating to the prevention and investigation of sexual abuse by their agents." (Emphasis added.)

4) Paragraph 47 outlines the various acts of negligence that Plaintiffs charge Defendants with, including (c) failure to investigate Reyes, (d) failure to respond to complaints about Reyes, (g) failure to supervise/monitor "Reyes who was their agent and under their control," and (h) retaining Reyes in the organization. (Emphasis added.)

¹ Plaintiffs add "nor have Defendants tried to prove" vicarious liability. Pls.' Mot. at 3. Because Defendants do not carry the burden of proof on that claim, this argument does not deserve a response. The record is replete with Defendants' challenges to Plaintiffs' multiple agency allegations.

5) Paragraph 56—in a separate cause of action labeled “Respondeat Superior”—states: “The Watchtower Defendants are **vicariously liable** for the torts, negligence, and damages attributed to individuals who were employees, officers, **agents** and/or were acting in the course and scope of their employment with the Watchtower Defendants at all relevant times.” (Emphasis added.)

6) Paragraph 64 seeks punitive damages based upon “sexual abuse and molestation by Reyes.”

Throughout the Complaint, Plaintiffs label Reyes as an agent of each Religious Defendants and claim liability based upon respondeat superior. That is a claim for vicarious liability, which was denied by the Religious Defendants in their Answer.

Additionally, the Religious Defendants have denied any knowledge of abuse of both Holly McGowan and Peter McGowan by Reyes prior to 2004, when the abuse had stopped. *See Answer, Demand Jury Trial & Third-Party Compl. ¶ 33, Feb. 27, 2017; 9th Found. Aff. Kathleen L. DeSoto ¶ 3, July 16, 2018 (“9th Aff. DeSoto”), Ex. 1: Dep. Peter Edwin McGowan, 14:6-19, Apr. 24, 2018.* The Religious Defendants have similarly denied any knowledge of the abuse of Alexis Nunez.

Finally, it is undisputed that the abuse suffered by Alexis and Holly, which is the direct cause of their emotional distress, was at the hands of Marco Nunez and Max Reyes, among others. There is no allegation that the Elders of the Thompson Falls Congregation ever abused either Holly McGowan or Alexis Nunez.

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III. ARGUMENT

A. Summary Judgment Standard.

Pursuant to Montana Rule of Civil Procedure 56(c)(3), summary judgment is only appropriate when “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.” If the moving party has met its burden to show this, then the burden shifts to the non-moving party to establish an issue of material fact. *Rosenthal v. Cnty. of Madison*, 2007 MT 277, ¶ 22, 339 Mont. 419, 170 P.3d 493. “However, ‘all reasonable inferences which may be drawn from the offered proof must be drawn in favor of the party opposing summary judgment.’” *Rosenthal*, ¶ 22 (citation omitted); *see also Estate of Watkins v. Hedman, Hileman & Lacosta*, 2004 MT 143, ¶ 12, 321 Mont. 419, 91 P.3d 1264. A “material fact” is one which “involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Corp. Air v. Edwards Jet Ctr. Mont., Inc.*, 2008 MT 283, ¶ 24, 345 Mont. 336, 190 P.3d 1111 (citation omitted). Summary judgment “should never be a substitute for a trial on the merits if a controversy exists over a material fact.” *Corp. Air*, ¶ 24.

B. The Plaintiffs’ Reliance on *Martel* Is Misplaced As It Does Not Preclude Religious Defendants from Asserting the Conduct of Reyes and Marco Nunez Caused the Damages the Plaintiffs Seek.

In their first argument, Plaintiffs refer to *Martel v. Montana Power Company*, 231 Mont. 96, 100, 752 P.2d 140, 143 (1988) but quote only a small part of its key language.

The Court’s full statement adopted a new rule of comparative conduct:

It is more appropriate, then, as Justice Gulbrandson pointed out in his concurring and dissenting opinion in *Derenberger*, to adopt the interpretation from the state where our comparative negligence statute originated. The Wisconsin Supreme Court ruled that negligence in all its forms, gross, willful and wanton or ordinary, can be compared to and offset by each other under its comparative negligence statute. *Bielski v. Schulze* (1962), 16 Wis.2d 105, 114 N.W.2d 105, 111-114. In 1975, Montana adopted the Wisconsin statute. We hold, therefore, that all forms of conduct amounting to negligence in any form including but not limited to ordinary negligence, gross negligence, willful negligence, wanton misconduct, reckless conduct, and heedless conduct, are to be compared with any conduct that falls short of conduct intended to cause injury or damage.

Martel, 752 P.2d at 143 (emphasis added). When quoting *Martel* to this Court, Plaintiffs omit the phrase “in any form including but not limited to ordinary negligence, gross negligence, willful negligence, wanton misconduct, reckless conduct, and heedless conduct.” Pls.’ Mot. at 6 (emphasis added). Montana law allows a comparison of wanton or reckless conduct by one party with the simple negligence of another party, and Plaintiffs fail to acknowledge that the element of proof to establish intentional conduct raises questions of fact that prevent summary judgment.² Comparative negligence is a question of fact for the jury to decide. *Faulconbridge v. State*, 2006 MT 198, ¶ 99, 333 Mont. 186, 142 P.3d 777.

Plaintiffs’ reliance on *Groves v. Greyhound Lines, Inc.*, 79 F. App’x 255 (9th Cir. 2003), *amended by* Nos. 02-35771, 02-35772, 2003 U.S. App. LEXIS 25886

² See *Alexander v. Bozeman Motors, Inc.*, 2010 MT 135, ¶¶ 30-32, 356 Mont. 439, 234 P.3d 880, where the court distinguished criminal intent for conviction of a crime from intentional conduct that leads to civil liability, both of which may be imputed from surrounding facts that must be submitted to the jury for determination.

(unpublished opinion, 9th Cir. Dec. 18, 2003), a non-binding decision of the Ninth Circuit Court of Appeals, is similarly misplaced.³ First, although Montana does not have a formal rule about citing non-precedential opinions, the Montana Supreme Court has criticized parties for relying on non-cites. In *State v. Oie*, 2007 MT 328, ¶¶ 15-16, 340 Mont. 205, 174 P.3d 937, the court admonished both sides for citing unpublished opinions:

Once again we take this opportunity to stress that unpublished orders and opinions from this Court are not to be cited as precedent. Indeed, unpublished opinions begin with an unambiguous and specific directive to counsel: “the following decision shall not be cited as precedent.” These sorts of orders and opinions are unpublished for a reason. And, we admonish counsel not to cite or rely on such orders and opinions in the future. Moreover, when included in briefs, we give no regard to such citations. Our decision here disregards both *Oie*’s and the State’s improper citations.

Oie, ¶ 16.

Under the guidance of *Oie*, the Court should not even regard Plaintiffs’ reliance on *Groves*. However, should the Court consider that case, it is instructive that the Ninth Circuit merely reiterates the holding of *Martel* in concluding that all forms of negligence, even willful negligence, should be considered by the trier of fact. *Groves*, 79 F. App’x at 256. In other words, unless it can be shown that Reyes and Marco Nunez *intended* to harm Holly and Alexis, it is appropriate to compare their willful conduct with the alleged

³ While Federal Rule of Appellate Procedure 32.1 allows citation to all opinions issued on or after **January 1, 2007** that have been designated as “unpublished” or “nonprecedential,” the case Plaintiffs cite is from **2003**. It is not authorized to be cited under Ninth Circuit Rules.

negligence of the Religious Defendants.

Moreover, to the extent the Plaintiffs seek to dismiss the claims against Marco Nunez and Reyes in their entirety, regardless of the negligence/intentional conduct issue, it is inappropriate under *Pula v. State*, 2002 MT 9, 308 Mont. 122, 40 P.3d 364, in which the Montana Supreme Court specifically allowed evidence of conduct of third parties to establish causation. In this case, the Religious Defendants maintain that the conduct of Max Reyes and Marco Nunez, who abused their female relatives while they were entrusted to their care by other family members, caused the damages claimed by Holly and Alexis. Under Montana law, Religious Defendants are permitted to argue causation and should be permitted to have the jury consider the conduct of Max Reyes and Marco Nunez when determining if Plaintiffs are entitled to damages.

C. Under Montana Law, It Is Appropriate to Compare the Conduct of Marco Nunez and Max Reyes with the Conduct of the Religious Defendants.

1. Contribution.

Plaintiffs correctly identify the statute by which comparison of tortfeasors is governed to achieve an equitable apportionment of liability, but improperly conclude that it does not allow comparison of different degrees of culpability.

In 1997, the Montana Legislature adopted Montana Code Annotated § 27-1-703(1) (1997) (Temporary),⁴ which allows a “right of contribution from any other person whose

⁴The 1997 temporary statute resolved the nonparty substantive due process issues raised in *Plumb v. v. Fourth Judicial District Court*, 279 Mont. 363, 927 P.2d 1011 (1996) by removing the ability of a defendant to assign liability for a plaintiff’s damages to a third party without giving that third party the opportunity to defend himself. If a

negligence may have contributed as a proximate cause to the injury complained of.”

Montana Code Annotated § 27-1-705(1) (1997) (Temporary) explains: “The purpose of 27-1-703 and this section is to substitute several liability for the former law providing for joint and several liability The purpose of several liability is to allocate responsibility based on fault to all parties to an occurrence, rather than only to the parties to the litigation, and to ensure that the liability of each party to an occurrence is allocated in direct proportion to that party’s fault.”⁵ Subsection (9) explains: “For purposes of this section, “fault” means an **act or omission that proximately caused or contributed to injury or damages** sustained by a person seeking recovery **and includes negligence in any of its degrees**” (Emphasis added.)

defendant pleads the fault of another person, including a settled or released person, that person may intervene in the action to defend against the claims (the settled or released person would do so to protect his reputation, e.g.). Mont. Code Ann. § 27-1-703(6)(f). But if a settling or released nonparty chooses not to appear, then the plaintiff could find him or herself faced with a disproportionate assignment of liability to the unnamed, unrepresented, nonparticipating third person – one of the ills that *Plumb* held unconstitutional. *Plumb*, 927 P.2d at 1020.

⁵ The word “occurrence” does not appear to be defined in the statutory scheme. In connection with the Plaintiffs’ allegations of harm caused by child sexual abuse, all of which occurred within the family circle, the jury must be allowed to consider how these Plaintiffs were exposed to sexual abuse by various family members, when information was circulated within that family circle about the danger and when similar acts committed over time contributed to a common injury. Ongoing incest within a family meets the broad definition of “occurrence” and all persons who contributed to the Plaintiffs’ psychological injury should be included in the apportionment for those injuries. This is especially true when Holly admits that she was first abused in 1994 (Compl. ¶ 32), that digital penetration began by 1995 and at least four years of abuse had transpired before the Religious Defendants learned about Holly’s situation in 1998—a fact that is heavily disputed. 9th Aff. DeSoto ¶¶ 4-5, Ex. 2: Dep. Holly McGowan 84:14-24, Jan. 9, 2018; Ex. 3: Dep. Donald John Herberger 136:23-137:1, Sept. 13, 2017.

The need for the jury to consider the conduct of all potentially responsible parties is clear when examining the damages alleged, which include: emotional scars and post-traumatic stress disorder (Compl. ¶¶ 42, 43), mental anguish, mental impairment/disfigurement, psychological pain, and loss of enjoyment and quality of life. Compl., Prayer ¶¶ 1(c)-(j). Throughout their Complaint, Plaintiffs complain about childhood sexual abuse. *See, e.g.*, Compl. ¶¶ 38-39, 41, 47(c)-(h), 52 & 64.

The jury must decide who caused those damages. It should be able to consider the conduct of Max Reyes, who was the physical perpetrator of many years of sexual abuse on both Plaintiffs in the home he shared with their mother. It should be able to consider the conduct of Marco Nunez who also abused both Plaintiffs.⁶ Before any willful act of abuse came a series of negligent acts that failed to prevent the abuse.⁷ Although

⁶ Abuse by Marco started before abuse by Maximo Reyes and, in Holly's case, continued *after* abuse by Reyes stopped. *See* Dep. McGowan 82:9-12 (Marco touched her before Reyes touched her), Dep. McGowan 138:12-15 (Marco's acts progressed to be digital penetration and attempted rape); Dep. McGowan 109:8-19 (abuse by Reyes continued until she was 15 "around 2000"); Dep. McGowan 141-144 (last abuse by Marco was around 2000/2001 when he again attempted to rape Holly). Ivy McGowan-Castleberry facilitated abuse by inviting Holly to live with her and her children (including Alexis) after Marco returned from prison and was living in the same house.

⁷ Reyes and Nunez were negligent since they knew they were sexually attracted to minors, had previously engaged in sexual contact with minors, used their access to the Plaintiffs to create the potential for further sexual misconduct with them, failed to take protective measures to limit or stop their contact with them, failed to notify the victims' parents and others about the dangers they posed to the Plaintiffs, failed to seek professional help to deal with their sickness, failed to get and use responsible adult chaperones when in the presence of minors, failed to abstain from all contact and situations that could involve unsupervised, one-on-one private contact with Plaintiffs, and in Ivy McGowan-Castleberry's case, failed to intervene and monitor their contact with

Plaintiffs attribute all injury to the Defendants based upon a failure to prevent the abuse that caused their injuries, others were in a superior position to prevent the abuse. Thus, under the wording of the statutes quoted above, the third-party claims against Maximo Reyes, Marco Nuñez and Ivy McGowan-Castleberry are proper. Preventing allocation of liability to *all* co-tortfeasors would (1) violate the Defendants' substantive due process rights, (2) prevent reduction of liability based upon the actions of a negligent (or worse) nonparty and (3) require the Defendants to assume the liability of others who caused the damages.

In *Clark v. Bell*, 2009 MT 390, 353 Mont. 331, 220 P.3d 650, the Court differentiated the attempt to apportion *damages*, which is governed by *Truman v. Montana Eleventh Judicial District Court*, 2003 MT 91, 315 Mont. 165, 68 P.3d 654, and which requires showing that the damages sought to be apportioned are divisible and apportionable to a reasonable degree of medical probability, from the submission of evidence of prior or subsequent events to show that the defendant is not the cause or the sole cause of an injury, which is what the Religious Defendants seek to do here. The Court noted:

Truman did not disturb the basic right to challenge causation, here, by testing the opinions of the plaintiff's experts by reference to relevant evidence on cross-examination. *Truman* affirmed that "a defendant is permitted to submit relevant evidence of subsequent accidents to negate allegations that he is the cause or sole cause of an injury."

Plaintiffs, provided continued access to and facilitated contact with Plaintiffs even after she knew of abuse, failed to call the police when she knew of the abuse, inter alia.

Clarke, ¶ 23 (quoting *Truman*, ¶ 31). In *Clarke*, the Court permitted evidence that the actions of the defendant were not the cause of the plaintiff's damages, and the Montana Supreme Court noted that the issue of causation properly went to the jury. *Clarke*, ¶ 27.

In this case, Religious Defendants seek to have the alleged causes of Plaintiffs' damages joined in one action, demonstrate the relative percent of cause of damages done by each person, and improve the chance that a jury will only ascribe to the Religious Defendants' the share (if any) that actually resulted from their actions and not hold these Defendants liable for *all* of Plaintiffs' damages from child abuse that were caused by the actions or failure to take action of others who could have prevented the molestation.

2. Indemnification.

Plaintiffs cite the statute for contractual indemnity, Montana Code Annotated § 28-11-301. This is not a case of contractual indemnity. It is one of equitable indemnity. *Durden v. Hydro Flame Corp.*, 1999 MT 186, ¶¶ 12, 25-26, 295 Mont. 318, 983 P.2d 943 ("Indemnity . . . shifts the entire loss from the one who has been required to pay it to the one who should bear the loss The right to indemnity is an equitable principle, based on the general theory that one compelled to pay for damages caused by another should be able to seek recovery from that party."). Under equitable indemnity, Religious Defendants seek to shift any loss ascribed to them to those who actively and actually harmed the Plaintiffs.

Plaintiffs argue that they have not sued Max Reyes or Marco Nunez, and have not

sued the Religious Defendants in respondeat superior. As shown above, Plaintiffs are wrong on the second assertion as they have in fact sued Defendants in respondeat superior for the willful misdeeds of Max Reyes. And Defendants' liability arising for passive negligence under that theory stems completely from his willful molestation of the Plaintiffs. Defendants' claim for equitable indemnity from Reyes is supported by the Plaintiffs' own assertion in their First Amended Complaint and the law.

Under the present common-law indemnity scheme in Montana, Defendants have the right to sue those whose failure to act or whose active fault has caused some part of the Plaintiffs' injuries and/or has resulted in Defendants' liability. For that reason, Defendants urge the Court to permit them to proceed to seek apportionment, contribution and indemnity against the Third-Party Defendants.

IV. CONCLUSION

The Plaintiffs blame two New York corporations and an unincorporated congregation for all their damages stemming from abuse at the hands of Maximo Nava Reyes, Marco Nunez and others. There are no allegations that any Religious Defendant abused either Plaintiff, and there is an abundance of evidence from the Plaintiffs themselves that the abuse long predated any knowledge by the Thompson Falls Congregation that Reyes abused Holly McGowan. Montana law allows, and equity

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requires, that each contributor to Plaintiffs' damages be brought into the lawsuit so the jury can fully and fairly determine causation.

DATED this 16th day of July, 2018.

Attorneys for Religious Defendants/Third-Party
Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By 
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, a copy of the foregoing document was served on the following persons by the following means:

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1. James P. Molloy
Gallik, Bremer & Molloy, P.C.
P.O. Box 70
Bozeman, MT 59771-0070
jim@galliklawfirm.com
Corrie@galliklawfirm.com
Attorneys for Plaintiffs

2. D. Neil Smith
Nix, Patterson & Roach, LLP
1845 Woodall Rodgers Fwy., Ste. 1050
Dallas, TX 75201
dneilsmith@me.com

Ross Leonoudakis
Nix, Patterson & Roach, LLP
3600 N. Capital of Texas Hwy, Ste. B350
Austin, TX 78746
rossl@nixlaw.com
Attorneys for Plaintiffs

3. **PERSONAL & CONFIDENTIAL**
Maximo Reyes
P.O. Box 566
Plains, MT 59859

4. Matthew A. McKeon
McKeon Law Firm, PLLC
257 W. Front St., Ste. A
Missoula, MT 59802
matthew@mckeonlawoffice.com
Attorneys for Third-Party Defendant Ivy McGowan-Castleberry

5. **COURTESY COPY TO:**
Hon. James A. Manley
20th Judicial District Court
106 Fourth Ave. E.
Polson, MT 59860

A handwritten signature in cursive script, appearing to read "Jacquelyn", is written over a horizontal line.