

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

FILED July 23 2018
Candace Fisher
SANDERS COUNTY CLERK OF DISTRICT COURT
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 PLAINTIFF ALEXIS
NUNEZ'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO
DEFENDANTS' FOURTH
AFFIRMATIVE DEFENSE AND
CROSS MOTION FOR SUMMARY
JUDGMENT AS TO FORESEEABILITY
OF MAX REYES' ABUSE, 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' Fourth Affirmative Defense and Cross Motion for Summary Judgment as to Foreseeability of Max Reyes's abuse of Alexis Nunez.

I. INTRODUCTION

Religious Defendants allege in their Fourth Affirmative Defense that the abuse of Plaintiff Alexis Nunez ("Alexis") by Maximo Reyes was an unforeseeable, superseding and intervening cause. Plaintiffs ask the Court to grant summary judgment on that defense, and find that, as a matter of law, it was foreseeable to Religious Defendants that

a child who did not live in the community would be abused by her step-grandfather when sporadically visiting him. Plaintiffs also have filed a cross motion for summary judgment as to foreseeability of Max Reyes's abuse. These motions are two sides of the same coin: Plaintiffs ask the Court to find, as a matter of law, that it was foreseeable to Religious Defendants that Max Reyes would abuse Alexis. The Court should deny these motions and grant Religious Defendants' previously filed Motion for Summary Judgment as to the claims brought by Alexis.

Alexis has no evidence that the elders of the Thompson Falls Congregation knew she stayed with her grandmother, Joni, in Thompson Falls, or even that Max Reyes was in the home on the occasions when Alexis was also at the home. It is undisputed that the babysitting arrangement that resulted in Alexis being in the home with Max Reyes was arranged by her mother, Ivy McGowan-Castleberry, and it is further undisputed that the elders had no knowledge of such an arrangement. The lack of elders' involvement in the babysitting arrangement raises a fact question about their knowledge about Max's access to Ivy's children, including Alexis, and precludes summary judgment in Alexis's favor on the issues of foreseeability and intervening cause.

II. FACTUAL BACKGROUND

It is undisputed that Alexis was born in Nebraska. 6th Found. Aff. Kathleen L. DeSoto ¶¶ 3-4, June 25, 2018 ("6th Aff. DeSoto"), Ex. A: Pl. Alexis Nunez's Objections & Resps. Religious Defs.' 1st & 2nd Sets Interrogs. & Reqs. Prod., Ans. Interrog. No. 1, Aug. 9, 2017; Ex. B: Dep. Joni Navo Nunez (sic) 61:13-15, Feb. 23, 2018 ("Dep. J.

Nunez”).¹ At all relevant times Alexis was under the legal custody of her mother, Ivy Nunez (now Ivy McGowan-Castleberry) (“Ivy”). 6th Aff. DeSoto ¶ 5, Ex. C: Dep. Ivy McGowan-Castleberry 86:18-20, Jan. 10, 2018 (“Dep. McGowan-Castleberry”). Following a divorce, Ivy arranged to have her mother (Nunez’s grandmother), Joni Nava-Reyes (“Joni”) babysit her four children. 6th Aff. DeSoto, Ex. C: Dep. Ivy McGowan-Castleberry 95:4-14, 99:3-7. That arrangement had nothing to do with the Religious Defendants. 6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 95:15-17; Ex. B: Dep. J. Nunez 53:4-9. Alexis claims she was repeatedly subjected to acts of child sexual abuse by Max Reyes while in her grandparents’ home. 6th Aff. DeSoto ¶ 6, Ex. D: Dep. Alexis Nunez 77:7-10-78:1-23, Jan. 11, 2018 (“Dep. A. Nunez”). It is undisputed that Alexis was not harmed during religious activities. 6th Aff. DeSoto, Ex. D: Dep. A. Nunez 77:7-78:23.

Alexis attended Jehovah’s Witnesses services in the Thompson Falls Congregation when she stayed with her grandmother, but she did not consider herself to be a member of the Thompson Falls Congregation. 10th Found. Aff. Kathleen L. DeSoto ¶ 6, July 20, 2018 (“10th Aff. DeSoto”), Ex. 4: Dep. A. Nunez 66:8-22. Joni babysat Alexis at her house in Plains on the weekends for a short period when Ivy moved back to Montana from Nebraska. 10th Aff. DeSoto ¶ 4, Ex. 2: Dep. J. Nunez 52:17-23. The Thompson Falls Congregation was not involved with that arrangement, Joni did not tell them about

¹ The title of the transcript is incorrect. The reporter identified Joni as “Joni Nava Nunez” although the deponent testified that her name is Joan Whitney Nava. 6th Aff. DeSoto, Ex. B: Dep. J. Nunez 13:23-25.

it, and Joni agreed it was not the Thompson Falls Congregation's business. 10th Aff. DeSoto, Ex. 2: Dep. J. Nunez 52:23-53:9. Ivy knew that Max had molested Holly McGowan but chose to allow Alexis to stay in the home with Max and Joni anyway.

Don Herberger, an elder of the Thompson Falls Congregation, testified that Alexis was not a member of the Thompson Falls Congregation and that he did not know where Alexis lived, whether Alexis was around Thompson Falls or what she was doing. 10th Aff. DeSoto ¶ 7, Ex. 5: Dep. Don Herberger 149:4-12; 183:8-184:2, Sept. 13, 2017.

III. DISCUSSION

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. Because It Was Not Foreseeable by the Thompson Falls Congregation That Max Reyes Would Have Access to Alexis in the Private Home of Her Grandparents, the Court Should Deny Alexis’s Motions and Grant the Religious Defendants’ Previously Filed Summary Judgment Motion on Alexis’s Claims.

Generally, the issue of whether an intervening cause was foreseeable is normally properly left to the fact-finder for resolution. *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, ¶ 42, 342 Mont. 335, 181 P.3d 601. It may be resolved on summary judgment only where reasonable minds may reach but one conclusion after all reasonable inferences are drawn in favor of the nonmoving party. *Fisher*, ¶ 42.

Alexis argues that because the Jehovah’s Witnesses have taken steps to train and educate their congregations in the United States about child molesters and encouraged them to take precautions against allowing known child molesters to be in contact with children in church activities and events, it must be foreseeable as a matter of law that Max Reyes would molest Alexis in his home. Alexis claims that it is “undisputed” that the Thompson Falls Congregation knew Max had grandchildren that would stay at his house. However, as established above, the only “fact” the Thompson Falls Congregation knew is that Joni would occasionally bring Alexis to Sunday service with her. There is no evidence that the Thompson Falls Congregation had knowledge that Joni was babysitting Alexis in her home, overnight, or that Max was in the home when Alexis was present. To the contrary, Don Herberger testified that he did not know anything about

that arrangement, did not know where Alexis lived or what she was doing.

Quite simply, what *is* undisputed is that the Thompson Falls Congregation had no knowledge of Alexis's comings and goings, including that she was staying at the home where Max lived. The "facts" relied upon by Alexis are simply her statements that she occasionally attended Sunday services with her grandmother in Thompson Falls, which is not evidence of knowledge on the part of the Thompson Falls Congregation.

Under Montana law, "an unforeseeable superseding or intervening cause cuts off the chain of causation so as to absolve the named defendant." *Faulconbridge v. State*, 2006 MT 198, ¶ 85, 333 Mont. 186, 142 P.3d 777. "[W]hen reasonable minds could reach but one conclusion, the question of foreseeability may be determined as a matter of law." *Faulconbridge*, ¶ 86 (quoting *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 39, 296 Mont. 25, 987 P.2d 351). *See also Estate of Strever v. Cline*, 278 Mont. 165, 178-179, 924 P.2d 666, 674 (1996) (while normally a superseding criminal act raised a question of fact more properly left to the jury, the Court approved a finding that intervening criminal acts cut off liability as a matter of law).

In this case, Religious Defendants submit that the Court actually should find as a matter of law that the molestation of Alexis, which occurred in her grandparents' home, was not reasonably foreseeable. Alexis did not live in her grandparents' home, was not born in Montana, was not a member of the Thompson Falls Congregation, and did not live in Thompson Falls. There is no evidence that the Thompson Falls Congregation had any knowledge that Alexis was staying at the home of Max and Joni, nor that it had any

knowledge the decision to allow Alexis to stay at the home was made by Ivy, Alexis's mother, who knew full well that Max had molested her sister. If the Court disagrees that it was not foreseeable as a matter of law, it should still deny the Plaintiffs' motion and cross motion, as there are genuine issues of fact, regarding whether it was foreseeable, for the jury to determine. *Estate of Strever*, 924 P.2d at 674.

IV. CONCLUSION

For the foregoing reasons, Religious Defendants ask the Court to deny Plaintiff's motion for partial summary judgment on Religious Defendants' Fourth Affirmative Defense and cross motion for summary judgment as to foreseeability of Max Reyes's abuse.

DATED this 20th day of July, 2018.

Attorneys for Religious Defendants/Third-Party Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By Kathleen L. DeSoto
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2018, a copy of the foregoing document was served on the following persons by the following means:

 Hand Delivery
 3, 5 Mail
 Overnight Delivery Service
 Fax (include fax number in address)
 1-2, 4 E-Mail (include email in address)

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 "Jackie Gauthier", is written over a horizontal line.