

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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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

REPLY TO PLAINTIFFS' RESPONSE  
TO DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT AS  
TO PLAINTIFFS' NEGLIGENCE PER  
SE CLAIM, 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 submit their reply brief in support of their motion for summary judgment on Count II of Plaintiff's First Amended Complaint.

## I. INTRODUCTION

Plaintiffs oppose summary judgment on the basis that (1) elders, who are clergy, are mandatory reporters under Montana's child abuse reporting law; (2) the threat of abuse Max Reyes ("Reyes") posed in 2004 was imminent and required a report to police; (3) elders are agents of the Religious Defendants; and (4) because those Religious Defendants are staffed with members of a religious order, albeit located in New York, that makes those religious order members and the religious corporation Defendants that

employ them mandated reporters.

Plaintiffs miss the point. Religious Defendants' motion is that negligence *per se* does not apply in this case, as they are religious corporations which are not regulated by the statute. In their response to Religious Defendants' Motion for Summary Judgment, Plaintiffs mistakenly address the issues discussed by Religious Defendants in their *opposition* to Plaintiffs' Motion for Summary Judgment on the Sixth Affirmative Defense, namely that the elders who were involved in the judicial hearing of Reyes were subject to the exception of mandatory reporting because the communication was required to be kept confidential under the established church doctrine and practices of the Jehovah's Witnesses faith.

Religious Defendants' cross-motion for summary judgment is actually a narrower issue, and simply asks the Court to find that under the law of Montana, because Plaintiffs cannot establish all five elements of negligence *per se*, they are entitled to summary judgment on Count II of Plaintiffs' First Amended Complaint. Plaintiffs argue that even if the corporations are not mandatory reporters, they are vicariously liable because the elders in Montana were mandatory reporters. This argument fails because, as exhaustively discussed in the briefing in opposition to the Plaintiffs' Motion for Summary Judgment on Religious Defendants' Sixth Affirmative Defense, the elders themselves were excused from mandatory reporting under Montana Code Annotate § 41-3-201(6)(c). As a matter of law, Plaintiffs cannot show that the Religious Defendants violated the mandatory reporting statute.

## II. DISCUSSION

### A. Negligence Per Se Standard.

As noted in *Giambra v. Kelsey*, 2007 MT 158, ¶ 46, 338 Mont. 19, 162 P.3d 134, negligence per se is “[n]egligence established as a matter of law,” and negligence per se usually ‘arises from a statutory violation.’” (Citing *Black’s Law Dictionary* 1057 (Bryan A. Garner ed., 7th ed., West 1999)). To establish it requires that the five elements expressed in *VanLuchene v. State* be met: (1) the defendant violated the statute; (2) the statute was enacted to protect a specific class of people; (3) the plaintiff is a member of that class; (4) the plaintiff’s injury is the sort that the statute was enacted to prevent; and (5) the statute was intended to regulate members of the defendant’s class. *VanLuchene v. State*, 244 Mont. 397, 401, 797 P.2d 932, 935 (1990). A negligence *per se* theory fails as a matter of law if the plaintiff fails to establish all material elements including causation. *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 14, 344 Mont. 435, 188 P.3d 1063 (citing *Kiamas v. Mon-Kota, Inc.*, 196 Mont. 357, 362-363, 639 P.2d 1155, 1158 (1982)) (summary judgment is appropriate when plaintiff fails to establish the elements of negligence).

### B. Elders Were Exempt from Reporting under Montana Law.

Plaintiffs did not and cannot dispute the irrefutable evidence that Religious Defendants established in the briefing in opposition to Plaintiffs’ Motion for Partial Summary Judgment establishing that under the religious beliefs and practices of Jehovah’s Witnesses, the communications by Holly McGowan (“Holly”) and Peter McGowan (“Peter”) to elders in 2004 were both intended to be kept confidential, and

disseminated only to those with a specific need to know the information for the purpose of handling and resolving the sins alleged and were so treated by the elders who handled the allegations of sin against Reyes.

In their opposition to Religious Defendants' cross-motion, Plaintiffs establish that elders are clergy. That fact is not in dispute. The elders are clergy who must keep the information they received from Holly and Peter in 2004 confidential. That fact is also not in dispute and governs the issue over whether they were required to report.

Even if, as Holly and Ivy McGowan-Castleberry ("Ivy") now claim, Holly told elders in 1998 something about abuse by Reyes, that does not alter the status of her information to them. Just as it did in 2004, any alleged report to elders in 1998 would trigger the exclusion from mandatory reporting based on religious policies and practices, exempting the elders from any duty to make a report.<sup>1</sup>

**C. Even If Reyes Posed a Continued Threat of Harm, Plaintiffs' Family Knew That He Threatened His Grandchildren; the Elders Did Not.**

Plaintiffs argue, without evidence, that elders knew that Alexis was being left at Reyes' home even after Reyes had been disfellowshipped for child abuse, and even after his family all knew of his history of child abuse. But the evidence shows only that Ivy, Joni Nava-Reyes ("Joni") and Reyes knew that Ivy was leaving her children with Joni and Reyes. The irrefutable evidence submitted by Defendants shows that the elders were

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<sup>1</sup> In the interest of judicial economy, Religious Defendants incorporate by their June 7, 2018 Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment, which contains a lengthy description of the requirements for handling confidential information according to the religious beliefs and practices of Jehovah's Witnesses.

not told of the babysitting arrangement between Ivy and Joni. 11th Found. Aff. Tessa A. Keller ¶¶ 3-4, July 23, 2018 (“11th Aff. Keller”), Ex. 1: Dep. Ivy McGowan-Castleberry 95:15-20, Jan. 10, 2018; Ex. 2: Dep. Joni Navo Nunez (sic) 52:17-53:9, Feb. 23, 2018. And Joni testified that after Peter and Holly reported abuse, Joni and Reyes separated. Reyes left the family home. Ex. 2: Dep. J. Nunez 91:21-92:13. The elders had no reason to suspect that Reyes would be given unfettered access to Alexis or to Holly or to any other child after he was disfellowshipped.

**D. Members of a Religious Order in New York Have No Duty to Report Child Abuse in Montana.**

Plaintiffs claim that since the religious corporations’ work is done by staff members in New York who are members of a religious order, these individuals *must* have the duty to report child abuse in Montana. In other words, even though the statute does not apply to institutions and thus the corporations are not members of the class the statute intended to regulate, the religious corporations can be found negligent as a matter of law because they are made up of people, some of whom are elders.

Montana’s reporting law, Montana Code Annotated § 41-3-201(1) applies to the “professionals and officials” who are listed in subsection (2). That subsection includes “a member of the clergy, as defined in 15-6-201(2)(b).” Mont. Code Ann. § 41-3-201(2)(h).

Montana Code Annotated § 15-6-201(2)(b) defines “clergy” as including “an ordained minister, priest, or rabbi;” and “a member of a religious order who has taken a vow of poverty.” Mont. Code Ann. § 15-6-201(2)(b)(i), (iii). If Plaintiffs’ position that New York religious order members were included in Montana’s code, then persons

exempt from reporting under the laws of the state where they live would be compelled to learn and follow the reporting laws of another state, even though they are not subject to that state's jurisdiction. Logically, Montana's law applies to abuse that occurs there, and persons who live or at least work in Montana.

The word "institution" is not listed among the definitions of mandatory reporters. That word is only found in Montana Code Annotated § 41-3-207, "Penalty for failure to report." Subsection (1) says "Any person, official, or institution required by law to report . . ." may face a penalty. But no religious "institution" is required by law to report. Montana Code Annotated § 41-3-207 contemplates the potential that the legislature may at some point identify institutions as mandated reporters. To date, the legislature has taken no such action. As such, it is a legal fiction to suggest that institutions are mandated reporters when in fact the definition for mandatory reporters does not extend to institutions.

Plaintiffs did not sue individual elders whom they claim had a duty to report child sexual abuse. They sued multiple entities on a theory of vicarious liability. Plaintiffs argue that "the statute [§ 41-3-207] specifically states that institutions may be held liable" for a failure to report child abuse. Pls.' Br. Opp'n Defs.' Cross-Mot. Summ. J. Count II at 12, July 5, 2018. But they omit the remainder of the phrase from their recitation of the statute: an "institution **required by law to report**" may be held civilly liable for damages. Mont. Code Ann. § 41-3-207(1) (emphasis added).

Plaintiffs want the Court to ignore that *religious* institutions are *not* required by law to make a report because they are not included in the definition of "clergy" in

Montana Code Annotated § 41-3-207(2). That statute expressly incorporates only those persons “defined at § 15-6-201(2)(b)” – which lists only persons. Mont. Code Ann. § 41-3-201(2)(h). The term “institution” in § 15-6-201 is in subsection (2)(c) which describes “institutions of purely public charity.” The term “institution” does not appear anywhere in connection with religions or religious individuals. Mont. Code Ann. § 15-6-201(2)(b).

It is significant that the Montana Legislature excluded from its statutory definition the entities listed in the following subsection of Montana Code Annotated § 15-6-201(2)(c) – charitable institutions. Institutions, like these Defendants, were not incorporated into the definition of clergy under the reporting statute. Thus, the Legislature intentionally excluded institutions and only mandated reporting by individuals. Plaintiffs did not sue any mandated reporters and the reporting statute does not expose the Defendants to civil liability for a failure to report.

Statutes must be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *Osterholm v. Boston & Mont. Consol. Copper & Silver Mining Co.*, 40 Mont. 508, 520, 107 P. 499, 502 (1910). The Court “has no license to psychoanalyze the legislators” or “determine the prudence of a legislative decision.” *Rohlf’s v. Klemenhagan, LLC*, 2009 MT 440, ¶ 20, 354 Mont. 133, 227 P.3d 42 (citations omitted). Rather, the Court’s job in interpreting a statute is “simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *State v. Cooksey*, 2012 MT 226, ¶ 69, 336 Mont. 346, 286 P.3d 1174 (quoting Mont. Code Ann. § 1-2-101). The

Court cannot “rewrite a statute, by ignoring clear and unambiguous language, in order to accomplish what we may feel is a more sensible or palatable purpose.” *Cooksey*, ¶ 69.

Unlike statutes of other states (Plaintiffs refer to statutes in Michigan and Delaware), Montana’s reporting statute does not apply to the Religious Defendants.

### III. CONCLUSION

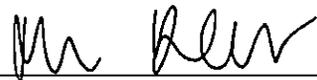
In sum, there is no violation of the reporting law, and thus there can be no negligence *per se*.

For the foregoing reasons, Defendants ask the Court to grant their Motion for Partial Summary Judgment.

DATED this 23<sup>rd</sup> 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 23, 2018, a copy of the foregoing document was served on the following persons by the following means:

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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

  
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