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MONTANA TWENTIETH JUDICIAL DISTRICT COURT
SANDERS COUNTY

ALEXIS NUNEZ and HOLLY McGOWAN, Plaintiffs, vs. 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/Third-Party Plaintiffs, vs. MAXIMO NAVA REYES, Third-Party Defendant.	§ §	Cause No. DV 16-84 Hon James A. Manley **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS' THIRD-PARTY CLAIMS AGAINST IVY McGOWAN-CASTLEBERRY**

In their Response, Defendants argue that the abuse by both Marco Nunez and Max Reyes supports their contention that Ivy owed Holly a legal duty of protection. Because Plaintiffs contend that Marco Nunez is not a proper third party to this case—and therefore cannot be a basis for Ivy to owe a duty to Holly—Plaintiffs have addressed Defendants' arguments as to each abuser separately.

A. Marco Nunez Is Not a Proper Third Party In This Case and Therefore Cannot Be a Basis for Ivy To Owe a Duty To Holly

Defendants continue to conflate the issues of third-party practice and admissibility of evidence to negate causation. Defendants mistakenly argue that "proof" of Marco Nunez abuse justifies their third-party claims against Marco Nunez (and by extension Ivy McGowan-Castleberry.) Resp. at 10. That is a misunderstanding of the law in Montana. Indeed, the case cited by Defendants, *Truman v. Mont. Eleventh Judicial Dist. Court,* stands only for the proposition that evidence of subsequent accidents may be admissible to negate causation. 2003 MT 91, 315 Mont. 165, 68 P.3d 654. *Truman* does not say that the parties involved in those subsequent accidents should all be joined in one lawsuit. *See Id.*

For the reasons described in Plaintiffs' motions, Marco Nunez is not a proper third-party to this case. His conduct was not a proximate cause of the injuries inflicted on Plaintiffs by Defendants and Max Reyes. Furthermore, as far as Plaintiffs are aware, Marco Nunez was never served with process in this lawsuit and therefore is not a party.[1] The law is clear in Montana that defendants are prohibited from attempting to apportion fault to the conduct of a non-party. *Id.* at 2003 MT 91, ¶ 31, 315 Mont. 165, 173, 68 P.3d 654, 660 ("Assignment of liability to a non-party

[1] Additionally, Marco Nunez has not filed an answer in this case. Further, Defendants have not served Marco Nunez with any discovery or taken his deposition.

without affording that party the opportunity to defend against liability, risks an unreliable and disproportionate assignment of liability, and places the burden of defending the non-party on the plaintiff.") Thus, it is improper for Defendants to seek relief—apportionment, contribution or indemnification—from Ivy for damages based on Nunez's conduct.

Whether evidence of Marco's abuse is admissible is a separate issue. That issue is fully briefed to the Court in Plaintiffs' Motion in Limine No. 3. The answer to that question, admissibility of evidence, however is has no impact on whether or not Ivy owed a legal duty to Holly. Therefore, Defendants' attempts to use Marco's abuse to create a legal duty is improper and should be denied.

1. Ivy McGowan-Castleberry Did Not Owe a Duty to Holly to Protect Her From Marco Nunez

Even if this Court were to determine that Marco Nunez is a proper third-party, Defendants fail to prove that Ivy owed a legal duty to protect Holly from Marco. Defendants simply offer the fact that Holly stayed at Ivy's house for a short period of time. However, Defendants do not establish that Ivy had any custody or control over Holly. *See Krieg v. Massey*, 239 Mont. 469, 473, 781 P.2d 277, 279 (1989) (a landlord tenant relationship does not establish a custodial relationship or special circumstance sufficient to impose a duty to prevent suicide). And at no point was Ivy the legal guardian of Holly.

B. Ivy Did Not Owe Holly a Duty to Protect Her From Max Reyes

Defendants do not argue that Ivy had any common law or statutory duty to Holly McGowan as her sister to protect her from Max Reyes. Instead, Defendants allege that Ivy assumed a duty to protect her sister Holly by taking her to Don Herberger's house to report the abuse by Max. Thus, Defendants' *only* evidence in support for their Response is a fact they have testified under oath

never happened. Response at 4, n. 1; Exhibit A, Don Herberger Depo 136:12-22. Thus, For Defendants to even attempt to prove that Ivy owed a duty to Holly, they have to admit that Ivy took Holly to Don's house. Defendants cannot deny facts exists as a defense, and then use them as a basis to support their negligence claims against Ivy. Thus, the Court should grant Plaintiffs' motion on this basis alone.

Nevertheless, Defendants' argument fails because Ivy did not affirmatively take the safety of Holly in her own hands by taking Holly to Don Herberger's house. Unlike Defendants, Ivy did not seek to take the place—or assume the duties—of law enforcement. Rather, Ivy did what she was taught to do by Defendants. Ivy testified at her deposition:

> *What I think is really important to understand about Jehovah's Witnesses, and especially when you have been raised from infancy and been heavily indoctrinated with the ideas and the beliefs that the church, is that if you -- when you take a matter like that to the police, that it opens up the entire congregation for having the congregation's name and Jehovah's name drug through the mud. . . . And so you're taught from a very young age that the very best way to handle any type of a situation is to take it to the elders, not to outside authorities, not to outside providers that would be able to assist with it, but it should be handled by the elders.*

Ivy McGowan-Castleberry Depo at 48:16-49:9

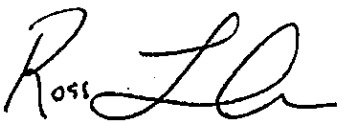
Thus, Ivy never assumed a duty to protect Holly. Rather, she took her to the people she was taught would protect her—the elders. This is a perfect example of the level of control that Jehovah's Witnesses have over information within their congregations and how they keep allegations of wrongdoing internal.

Defendants' argument is essentially that because Ivy was an adult when she found out about the abuse, she was required to report Holly's abuse to the police—in other words, a mandatory reporter. However, Montana's Mandatory Reporter Statute does not require that all adults report child abuse. *See* Mont. Code. Annot. §41-3-201. Nor was Ivy Holly's legal guardian. Simply put, Ivy did not assume any legal duty to protect Holly.

Further, Defendants offer no support for their argument that Ivy "took custody or control" over Holly by driving her to Don Herberger's house. Simply giving someone a ride cannot be sufficient to establish a custodial or special relationship. And as discussed above, Defendants deny this ever happened in the first place. They shouldn't be allowed to now use it as a basis to establish an essential element of their negligence claim against Ivy.

DATED: This 6th day of August, 2018

Attorney for Plaintiffs:



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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 6th day of August, 2018.

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Ross Leonoudakis

EXHIBIT A

BY MR. LEONOUDAKIS:

Q. How did -- How did you learn that Max had been accused of sexually abusing Holly McGowan, for instance?

A. They made an accusation that he had done so.

Q. Who's "they"?

A. Well, Holly, in this case, you mentioned her.

Q. Okay. So Holly -- When's the first time Holly came to you and made an accusation that Max Reyes had sexually abused her?

A. Sometime in 2004. Early 2004, I want to say.

Q. You don't remember a time in 1997 or 1998 when Holly came to you and made a report of -- of Max sexually abusing her?

A. That never happened.

Q. And you never told Joni, Holly's Mom, that she had come to you and made a report?

A. That never happened, so how could I tell her?

Q. Okay. And, so, it's your testimony that a ministerial servant never went to reprimand Holly in any way with respect to that early report in 1997?

A. That -- Never heard of anything like that.

Q. Okay. So it's your testimony that the first time you learned from Holly that Max was sexually abusing her was in 2004; is that right?