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MAKAHA CONGREGATION OF JEHOVAH'S
WITNESSES, HAWAII and WATCHTOWER BIBLE
AND TRACT SOCIETY OF NEW YORK, INC.

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FIRST CIRCUIT
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION
OF JEHOVAH'S WITNESSES, a Hawaii
non-profit unincorporated religious
organization, a.k.a. MAKAHA
CONGREGATION OF JEHOVAH'S
WITNESSES and KINGDOM HALL,
MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES;
WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC., a New
York corporation; KENNETH L. APANA,
Individually; and Does 1 through 100,
inclusive,

Defendants.

Civil No. 1CCV-20-0000390 DEO
(OTHER NON-VEHICLE TORT)

DEFENDANTS/CROSSCLAIMANTS
MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES, HAWAII
and WATCHTOWER BIBLE AND
TRACT SOCIETY OF NEW YORK,
INC.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL DOCUMENTS
FROM DEFENDANTS WATCHTOWER
BIBLE AND TRACT SOCIETY OF NEW
YORK, INC. AND MAKAHA, HAWAII
CONGREGATION OF JEHOVAH'S

Hearing:

Date: January 19, 2022
Time: 11:00 a.m. (via Zoom)
Judge: Honorable Dean E. Ochiai
Trial: June 20, 2022

(caption continued on next page)

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation,

Crossclaimants,

vs.

KENNETH L. APANA, Individually,

Crossclaim Defendant.

WITNESSES., a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES AND KINGDOM HALL, MAKAHA JEHOVAH'S WITNESSES', FILED NOVEMBER 23, 2021 [DOC. 251]; DECLARATION OF THOMAS JEFFERSON; DECLARATION OF WILLIAM S. HUNT; EXHIBITS "A" - "B"; CERTIFICATE OF SERVICE

DEFENDANTS/CROSSCLAIMANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DOCUMENTS FROM DEFENDANTS WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. AND MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES., a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES AND KINGDOM HALL, MAKAHA JEHOVAH'S WITNESSES', FILED NOVEMBER 23, 2021 [DOC. 251]

I. INTRODUCTION

DEFENDANTS/CROSSCLAIMANTS MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII ("Makaha") and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. ("WTNY"), together with "Makaha", (the "Religious Defendants" or "Makaha") by and through their counsel, submit this opposition to PLAINTIFF'S MOTION TO COMPEL DOCUMENTS FROM DEFENDANTS WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. AND MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES., a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES AND KINGDOM HALL, MAKAHA JEHOVAH'S WITNESSES', filed November 23, 2021 [Doc. 251] ("Motion"). The Motion should be denied in its entirety.

There is a valid clergy privilege in place here that protects certain communications between church elders and Defendant Kenneth L. Apana (“Apana”) that has not been waived. In addition, the Motion fails to provide adequate legal and factual support of the request for an order compelling production of unredacted documents (identified in the Motion by bates number MAKAHA 000001-11 REV, WTNY-C00004-000009, WTNY-C000012). There is no legal basis to compel production of the unredacted documents. The unredacted documents sought to be produced that are privileged are available for in-camera inspection at the Court’s request. It should be emphasized that Religious Defendants have not withheld any responsive documents but have redacted those statements and communications made by co-defendant Apana which are protected by the clergy privilege since he has not waived that privilege.

II. RELEVANT BACKGROUND FACTS

A. Introduction

Plaintiff’s motion to compel certain documents completely unredacted from Defendants Watchtower Bible Tract and Makaha, Hawaii Congregations must be denied for several reasons. The documents include information subject to a well-recognized privilege protecting the confidentiality of communications made by Defendant Kenneth Apana to three elders of the Makaha Congregation in 1992 concerning allegations that he sexually abused a minor member of the congregation in his home. This privilege is set forth in HRE 506 and has three requirements, all of which are met.

B. Defendant Makaha Has Standing To Protect The Confidential Communications of Defendant Apana

First, Makaha has the duty and the right to refuse to disclose confidential communications from Mr. Apana if he objects to it doing so. Mr. Apana was sued in this case but is presently unrepresented. He testified in his deposition that he is not waiving his privilege and will not allow Makaha to disclose the statements he made and the discussion he had with the elders at the time in question. In light of that, Makaha is obligated to follow his wishes and has refused to produce the documents in question without redacting various statements made by Mr. Apana. HRE 506(b) provides that the person holding the privilege has the right to “prevent another from disclosing a confidential communication by the person

to a member of the clergy . . .” and section 506(c) provides: “The member of the clergy may claim the privilege on behalf of the communicant” as Makaha has done.

C. The Communications Were Made to a Member of the Clergy

Second, Plaintiff admits that the communications she seeks to review were made by Mr. Apana to “three elders of Makaha . . .” (Memorandum in support of Motion, p. 3). Plaintiff does not claim that the elders were not “a member of the clergy” as that term is defined by HRE 506(a)(1), which includes a “functionary of a religious organization” similar to a priest or rabbi, for example. There is nothing in Plaintiff’s motion setting forth that argument, so that requirement is also met.

D. The Communications At Issue Were Confidential

Third, the communications at issue in this motion meet the definition of “confidential” as that term is defined in HRE 506(a)(2), and Plaintiff’s attempt to rewrite the provisions of the rule should be rejected. The rule specifically provides that a communication is “confidential” and protected by the privilege if it meets two requirements: (1) that it be made privately, and (2) that the communication “not be intended for further disclosure except to other persons present in furtherance of the purpose of the communication.” The rule is that simple, yet Plaintiff’s motion attempts to add a provision that is not there, that is, claiming that the communications in question must be made “to receive clergy guidance”. (Motion, p. 8). Obviously, no such requirement is set forth in Rule 506.

Plaintiff’s motion contains many factual statements that are irrelevant and unsupported by any citation to the record, and should not be given any credence by the Court. The only fact that is relevant and material to this motion is that Mr. Apana made statements to the three elders concerning the allegations made against him. As Plaintiff admits, Makaha has produced all responsive documents concerning the inquiry by the three elders into the allegations against Mr. Apana. The only redactions are statements and quotations of communications made by Mr. Apana to the elders; everything else was produced.

The cases relied upon by Plaintiff do not support her motion under the facts in this case. The redacted documents in question demonstrate that although the proceeding was initiated by the elders due to the accusations made, Apana’s communications were

nevertheless made to the elders, as “members of the clergy” who were acting as spiritual advisors to him. As noted on Makaha document 000001 REV (Exhibit 1 to plaintiff’s motion), the proceeding opened with a prayer and the reading of a Bible verse. The unredacted portions clearly show that the redactions were of Mr. Apana’s communications to the elders during the proceeding. The same is true of the proceeding held on December 7, 1992, Makaha 000010 REV (Exhibit 3 to Plaintiff’s motion): Again it opened with a prayer and reading from the Bible. It was at this proceeding that the committee discussed the allegations that Mr. Apana had molested plaintiff N.D. some time prior to the first proceeding. Based on the evidence presented, including his answers, the committee decided to “disfellowship” him. All of the documents have been produced to plaintiff with redactions of Mr. Apana’s confidential communications.

III. LEGAL STANDARD

Rule 506 of the Hawai’i Rules of Evidence provides:

Rule 506. Communications to clergy

(a) Definitions. As used in this rule:

(1) A “member of the clergy” is a minister, priest, rabbi, Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the communicant.

(2) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the latter's professional character as spiritual advisor.

(c) Who may claim the privilege. The privilege may be claimed by the communicant or by the communicant's guardian, conservator, or personal representative. The member of the clergy may claim the privilege on behalf of the communicant. Authority so to do is presumed in the absence of evidence to the contrary.

Haw. Rev. Stat. § 626-1, Rule 506 (West).

In Rule 506’s commentary, the drafters state that the rule is effectively identical to its federal counterpart, FRE 506. The current iteration of the rule was broadened from its prior version—the commentary states:

Under the prior statute the privilege was limited to confidential communications made "according to the uses of the church or religious denomination to which [the clergyman] belongs."

There seems no good reason to limit the privilege in this way so long as confidentiality was intended by the communicant.

The present rule clarifies that uncertain point, granting the privilege to all confidential communications made to the clergyman in his professional capacity as a spiritual adviser.

Haw. Rev. Stat. § 626-1, Rule 506 (West) (Editor's Notes: Rule 506 Commentary).

IV. ARGUMENT

A. The Communications Were Made Confidentially and With Spiritual Intent

The plaintiff's contention that the subject communications were not made confidentially is incorrect because Mr. Apana's remarks were made in a confidential setting, and he intended them to remain confidential. The plaintiff admits that the confidentiality referred to must necessarily flow from the maker of the statement to the clergy member. However, the plaintiff attempts to equate the setting of Mr. Apana's communications to the elders in what the Jehovah's Witnesses call a "judicial committee" to a judicial proceeding in court, whereas the rule and the intent of the rule's drafters, evidenced by the commentary, emphasize that the focus of the privilege inquiry is on the substance of the communication itself and the communicant's intent. Mr. Apana stated in his deposition that he intended his redacted statements in these documents to remain private and he specifically refused to allow them to be unredacted (Deposition of Kenneth Apana, October 18, 2021, at p. 122:11-21, attached hereto as Exhibit "A"). Furthermore, the actions of the elders who engaged with Mr. Apana in the inquiry (as evidenced by the documentation the plaintiff now seeks), and the contents of the documents themselves, demonstrate adherence to both the wishes of Mr. Apana to keep his communications private and the spiritual nature of the proceedings. All of the redactions the plaintiff seeks to unredact capture the private nature of Mr. Apana's communications to clergy and the religious setting in which those communications took place.

B. The Clergy Communications Privilege Should Be Broadly Construed

The Utah Supreme Court recognized this fundamental idea of privilege for confidential clergy communications, and like Hawai'i, Utah favors an expansive view:

[A] constricted interpretation of the privilege does not take into account the **essential role that clergy in most churches perform in providing confidential counsel and advice to their communicants in helping them to abandon wrongful or harmful conduct, adopt higher standards of conduct, and reconcile themselves with others and God.** Indeed, even when confession is part of an essential sacrament, as in the Catholic Church, clergy must still give confidential guidance concerning the moral faults of their parishioners pursuant to their responsibility to give spiritual and religious advice, counsel, and admonishment. In counseling parishioners in religious and moral matters, clergy frequently must deal with intensely private concerns, and parishioners may be encouraged, and even feel compelled, to discuss their moral faults....

Scott v. Hammock, 870 P.2d 947, 952 (Utah 1994); *see also Kruglikov v. Kruglikov*, 29 Misc. 2d 17, 217 N.Y.S.2d 845, 847 (N.Y. Sup. Ct. 1961) (holding that a rabbi could not be compelled to testify regarding marriage counselling sessions conducted prior to divorce proceedings); *Snyder v. Poplett*, 98 Ill. App. 3d 350, 53 Ill. Dec. 761, 764, 765 424 N.E.2d 396, 399, 400 (1981) (communications between clergymen and laymen originating in confidence were privileged); *Pardie v. Pardie*, 158 N.W.2d 641, 645 (Iowa 1968) (statements made to minister regarding family problems were privileged).

In *Scott*, an adopted daughter brought an action alleging that her adoptive father had abused her in various ways during her childhood. The daughter served a deposition subpoena on the office of the church's bishop, requesting production of documents disclosing or relating to excommunication of her adoptive father and any communications containing references to her adoptive father's abuse of adopted children.

The Utah Supreme Court upheld the United States District Court's holding that the communications were privileged under Utah's statutory clergy-penitent privilege.¹ It concluded that (1) nonpenitential communications between lay person and cleric are privileged under Utah law if they are intended to be confidential and are made for the purpose of seeking spiritual counseling from the cleric acting in her professional role and pursuant to the discipline of her church, and (2) the term "confession" in the clergy-penitent

¹ The plaintiff filed her claim in the U.S. District Court for the District of Utah. The plaintiff objected to that court's ruling, and the District Court certified to the Utah Supreme Court the question of "whether nonpenitential communications between a layperson and a clergyman are privileged under Utah law." *Scott v. Hammock*, 870 P.2d 947, 949 (Utah 1994).

privilege statute need not be construed to apply only to penitential communications. Broad construction of that term is necessary to take into account the essential religious role clergy play in dealing with parishioners' wrongdoings. *Id.* at 956.

The facts here are also similar to those of a Michigan case, *People v. Bragg*, 296 Mich. App. 433, 824 N.W.2d 170, (2012), where the court held that the clergy communications privilege applied. In *Bragg*, the defendant was accused of sexually assaulting a minor during a weekend sleepover. The victim told her mother who brought it to the attention of the pastor. The pastor told the mother to bring the defendant to the church as soon as possible for a meeting. The pastor met with the defendant and defendant's mother in his office where he elicited the defendant's confession. The Michigan Court of Appeals concluded that the defendant confessed to the pastor, who was acting in his professional character. *Id.* at 433, 824 N.W.2d at 174.

Michigan's clergy communication privilege, codified as MCL 767.5a, is similar to Rule 506 in that both are substantially based on Federal Rules of Evidence Rule 506, and contain similar language. The court articulated the same rule stated in *Scott v. Hammock*, *supra*, for the clergy communication privilege as follows: (1) The communication must serve a religious function, allowing the clergyman to provide guidance, counseling, forgiveness and discipline; (2) the clergyman must speak with the abuser in his or her "professional character" as a clergyman; and (3) the communication was made in the course of discipline enjoined by the religious organization.² *People v. Bragg, id.*, at 463–64, 824 N.W.2d at 187.

In *Bragg*, the court first determined that the communication between the defendant and the pastor served a religious function—it enabled the pastor to provide guidance, counseling, forgiveness, and discipline to the defendant. The pastor testified that he wanted to get help for the defendant and that necessitated that he get the defendant to admit his actions. *Id.* at 462, 824 N.W.2d at 187. Second, the court determined that the pastor spoke with defendant in his "professional character" as a pastor because the pastor explicitly stated that he interrogated defendant in that role, and after the confession, they prayed together. The court further noted that but for the pastor acting in that professional character, the

² According to the *Bragg* court, "when considering whether a communication would be considered confidential under the discipline or practices of a specific religion, **we are bound to accept the guidance provided by the clerical witness without embarking on a fact finding mission.**" *Bragg*, 296 Mich. App. at 459, 824 N.W.2d at 185 (emphasis added).

communication would not have occurred. Because of the pastor’s authority, he was able to summon defendant and his mother to the church and expect their attendance. During the private meeting, they did not discuss secular topics, but spoke only of the victim’s accusation that defendant had committed a sin and criminal act against her. *Id.* at 462–63, 824 N.W.2d at 187. Finally, in deferring to church doctrine, the court determined that the communication was made in the course of discipline enjoined by the Baptist Church based on the pastor’s testimony that stressed the importance of confidential communication being essential to create trust between congregants and their minister. *Id.* at 463, 824 N.W. 2d at 187.

Here, the confidential communication between Mr. Apana and the three elders served a religious function, enabling the elders to hear Mr. Apana’s explanation and provide guidance, counseling, and, after consideration, discipline through “reproval,” stripping Mr. Apana of his position as elder, and eventually disfellowshipping³ him from the congregation. Second, they met with Mr. Apana in their capacity as elders meeting with a “Brother” in the congregation. Contrary to the plaintiff’s assertion, whether the clergyman initiates the conversation is irrelevant to the confidential privilege analysis. *See id.* at 465, 824 N.W.2d at 188.

C. Plaintiff Mistakenly Focuses On Documents Contemplating Further Disclosure

Although the plaintiff leans heavily on the assertion that no confidentiality was intended because Mr. Apana was informed that circumstances may require later public announcement, the fact that the documents contemplated disclosure of an ecclesiastical determination has no bearing on whether they were confidential or not. This case is on all fours with the decision of the Montana Supreme Court in *Nunez et al. v. Watchtower Bible and Tract Society of New York, Inc. et al.* (A copy of that decision is attached hereto as Exhibit “B”). In *Nunez* the Montana Supreme Court reversed a judgment entered for the plaintiff in a factual situation very similar to this one. Although the crux of that case was whether the elders had a duty under Montana statutes to report the alleged abuse to the authorities,⁴ the Court’s decision also covered the issue of whether the accused’s

³ Disfellowshipping is similar to excommunication – it removes one’s status as a congregant and engenders shunning of the disfellowshipped person by congregants.

⁴ That issue is not relevant or material to this case since Hawai`i statutes did not require a religious organization to report sexual misconduct it became aware of in 1992.

communications made to elders in a judicial hearing like this one were protected by the clergy privilege. The Court held that they were protected.

As in this case, it was alleged that the accused, a congregant, had sexually abused children over a period of years. He was interviewed by a judicial committee of three elders who also heard from other witnesses. As here, the committee disfellowshipped the accused after completing their inquiry and reported that decision to the Service Department in New York, as was done here. The Court held that such reporting was part of the “confidential process” required under the Church’s procedures and by Church doctrine. As in this case, the other local elders and the congregation were not informed of the nature of the allegations that lead to disfellowship. The Court specifically held that Defendant’s witnesses testified that “. . . its process for addressing these reports is strictly confidential, notwithstanding the involvement of numerous church clergy and congregants. ‘It is not within this Court’s power to question [the religious institution’s] determination’”. Citing *Rasmussen v. Bennett*, 228 Mont. 106 at 112, 741 P.2d at 759 (1987). The same is true of the procedure followed in this case, as set forth in the attached declaration of elder Thomas Jefferson at paragraphs 34 and 36 and 40-45.

Charissa W. v. Watchtower Bible and Tract Society of New York, et al, No. 26-22191) (Cal.Napa Co. Super. Ct. Sept 29, 2005), cited by Plaintiff, is inapplicable here for at least two reasons. First, unlike the California trial court, Hawai`i does not consider whether a confidential communication was initiated by the communicant or the clergy, or whether the communication was prompted by a desire to confess or an investigation prompted by the clergy. Second, unlike California, Hawai`i does not consider the dissemination of a clergyman’s reports about his confidential communication with a congregant to elders in the national headquarters office to be a violation of the communicant’s expectation that the communication be kept private. Jehovah’s Witnesses consider elders’ ability to communicate with elders at headquarters as a necessary and beneficial part of their communication with the congregant, and unlike California, Hawai`i agrees.

Likewise, the plaintiff misapplies *Conti v. Watchtower Bible and Tract Society of New York* to compel production when the privilege inquiry calls for scrutiny of the communicant’s statement and confidential intent. In *Conti*, the court held that the privilege did not apply where the confession was made in a group setting, a family meeting with a

group of elders. However, as the plaintiff states, the *Conti* court recognized the fundamental importance of the clergy privilege. The court observed:

However, the public policy to protect the confidentiality of penitential communications that underlies the privilege and reporting statutes militates strongly against imposition of the duty claimed here to inform congregations of such communications. When the **clergy** member privilege was codified in Evidence Code section 1034, the California Law Revision Commission commented: “The extent to which a clergyman should keep secret or reveal penitential communications is not an appropriate subject for legislation; the matter is better left to the discretion of the individual clergyman involved and the discipline of the religious body of which he is a member.” (Cal. Law Revision Com. com., 29B pt. 3B West’s Ann. Evid. Code (2009 ed.) foll. § 1034, p. 60). Courts should likewise be wary to intrude in this realm.

Conti, id., 234 Cal.App. 4th at 1230, 186 Cal. Rptr 3d at 40. That same consideration should guide this Court’s decision about the confidential communications in the case at bar.

Again, the overarching consideration is that communications that are intended to be confidential and are made for a religious purpose are privileged. Mr. Apana made statements just to the elders who, as the documentation affirmatively states, intended to keep the communications between them and Mr. Apana confidential. For example, in the August 6, 1992 letter, the elders state, “At this time, there is no widespread knowledge of the incidents in question. For this reason, there are no plans at this time to publicly announce that he was reproved.” MAKAHA 000004 REV. The setting in which the confidential communication was made was a spiritual one, as evidenced by the opening of the discussions with prayer and a reading of scripture. Accordingly, the claim of privilege must be upheld.

As the Court held in *Nunez*, the clergy communications privilege embodied in Rule 506 applies to all documents that divulge communications that Mr. Apana intended to be confidential and that were made in a private setting. The privilege therefore extends to the documents between Watchtower and Makaha and documents between another local congregation and Jehovah’s Witness organizations’ Service Department since they were meant to remain confidential pursuant to Church practice and policy, as Mr. Jefferson sets forth in his declaration, *supra*.

The plaintiff's reliance on *McFarland, v. W. Congregation of Jehovah's Witnesses, Loraine, Ohio, Inc.*, is also misplaced. The facts of *McFarland* are distinguishable. In *McFarland*, the appellate court determined that letters between Watchtower and the Bodies of Elders were not protected by the clergy-penitent privilege because, despite being made within the organization, they were not made for issuing spiritual advice but for secular purposes. Specifically, the letters provided instructions to elders at thousands of local congregations.

In the documents at issue, no instructions were issued to other congregations. The information sought by opposing counsel pertains to Apana's actual statements made in confidence to the elders and a reproof concerning his ecclesiastical position within the congregation. Further evidence contained in the documents supports the spiritual nature of the proceedings—for example, the Notification of Disfellowshipping or Disassociation indicates that “works befitting repentance” (a term in Matthew 3:8 and Luke 3:8) is a consideration to be given credence by the elders. MAKAHA 000011 REV. Furthermore, the form of the documentation is inconsequential because the clergy communication privilege inquiry properly concerns the communicant's statements. Any document that contains information intended to be confidential by the communicant is privileged as to those communications.

The facts of this case are also distinguishable from *Com. v. Stewart*, 547 Pa. 277, 690 A.2d 195 (1997), relied on by Plaintiff. In *Stewart*, the court held that the application of the privilege distills to a single inquiry: whether the communicant disclosed information in confidence to a member of the clergy in his or her capacity as confessor or spiritual advisor. *Com. v. Stewart, id.*, 547 Pa. at 287-88; 690 A.2d at 200. There, the Diocese attempted to claim that the communications between the Bishop and his priests were confidential under the privilege. The Diocese filed an affidavit in support of its claim of privilege that only referred to the hierarchical structure of the Roman Catholic Church and in general terms to the Bishop's duties. The affidavit failed to indicate whether the precise information subject to the discovery request was acquired by the Bishop or Diocesan representatives secretly and in confidence while acting in their capacity as confessors or spiritual advisors. The court therefore held that since the communication did not contain information in confidence to a

member of the clergy acting in their capacity as spiritual advisor, the privilege did not apply.
Id. 547 Pa. at 289–90.⁵

V. CONCLUSION

For the reasons set forth above, the Religious Defendants respectfully request that this Court deny the Motion.

DATED: Honolulu, Hawai`i, January 11, 2022.

/s/ William S. Hunt

WILLIAM S. HUNT

JENNY J.N.A. NAKAMOTO

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MAKAHA CONGREGATION OF
JEHOVAH'S WITNESSES, HAWAII and
WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.

⁵ Plaintiff cites two cases that are wholly irrelevant to the instant issue. In *Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc.*, the defendant did not comply with a court order to produce documents that it had argued were confidential under the clergy privilege. 246 Cal. App. 4th 566, 201 Cal. Rptr. 3d 156 (2016). The court held that the defendant's clergy privilege claim was premature because, as it had not yet produced a privilege log or identified any specific confidential communications, it had not met its burden to show that the preliminary facts supported application of the privilege. *Id.* at 596–97, 201 Cal. Rptr. 3d at 181. The defendants cited *Conti*, but while the court agreed with *Conti* in principle, it did not reach the *Conti* issue because the defendants failed to meet their preliminary burden of producing a privilege log or identifying specific confidential communications. *Id.* at 597, 201 Cal. Rptr. 3d at 182. That is certainly not the case here.

In *Padron v. Watchtower Bible & Tract Soc'y of New York, Inc.*, the issue was the production of various documents concerning an investigation into allegations of sexual abuse by the accused. The decision is not applicable to this case since here Defendants have produced all documents requested, but have simply redacted the confidential communications of Mr. Apana protected by the clergy privilege.

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Does 1 through 100, inclusive,

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Crossclaim Defendant.

Civil No. 1CCV-20-0000390 DEO
(OTHER NON-VEHICLE TORT)

**DECLARATION OF THOMAS
JEFFERSON**

DECLARATION OF THOMAS JEFFERSON

I, THOMAS JEFFERSON, JR., declare under the penalty of perjury:

1. I am over 21 years of age, of sound mind, and competent to make this declaration.
2. I provide this declaration in support of the Opposition to Plaintiff's Motion to Compel the production of documents filed by Watchtower Bible and Tract Society of New York Inc. ("Watchtower").
3. I am familiar with the operations of Watchtower have been authorized by its Boards of Directors to submit this declaration.
4. Watchtower is a 501(c)(3) not-for-profit corporation organized under the religious corporation laws of the State of New York with offices in Patterson, New York.
5. The corporate purpose of Watchtower includes supporting the faith of Jehovah's Witnesses as they carry out Jesus commands at Matthew 24:14 and Matthew 28:19-20, to preach the good news of God's Kingdom.
6. Throughout the world, spiritual and organizational assistance is provided to Jehovah's Witnesses by some 87 branches (akin to regional/national offices). The United States branch is one of them. Each branch is under the oversight of a branch committee. The United States Branch Committee (hereinafter "U.S. Branch Committee") provides spiritual and organizational assistance to over 13,000 congregations of Jehovah's Witnesses in the United States and a few surrounding islands (the "U.S. Branch Territory"). The U. S. Branch Committee is not incorporated.

THE FAITH OF JEHOVAH'S WITNESSES

7. As an elder in the faith of Jehovah's Witnesses since 1981, I am familiar with the Scriptural beliefs and practices of Jehovah's Witnesses and with the Scriptural precedent for those beliefs and practices.

8. I have served in the U.S. branch since 1975, and I have worked in the Service Department since 2008. My service involves providing spiritual guidance and assistance to elders in congregations of Jehovah's Witnesses in the United States.

9. The basic beliefs of the faith of Jehovah's Witnesses explain why confession of sin is so essential to one's eternal salvation. (James 5:14-16, 19; Proverbs 28:13; 1 John 1:9; Ezra 10:11; Numbers 5:7; Joshua 7:19) And understanding that fundamental principle explains why Jehovah's Witnesses place great value on confidentiality.

Organization of Congregations

10. Congregations of Jehovah's Witnesses are composed of individuals and families who gather together to worship in buildings called "Kingdom Halls." Congregations in the United States are usually named after the city or town where they hold meetings, and typically have between 75 and 125 members.

11. Congregations of Jehovah's Witnesses are small so that elders can assist each congregation member to keep his or her faith in Jehovah God strong.

12. A rank-and-file congregation member is called a "publisher." Congregations usually have both baptized and unbaptized publishers but only a baptized publisher is considered a congregation member and one of Jehovah's Witnesses. In accord with the beliefs and practices of Jehovah's Witnesses, any person baptized as one of Jehovah's Witnesses is considered an ordained minister of God (regardless of age or gender), in that they individually accept as a personal obligation Jesus' command to preach to others about God's Kingdom. —Matthew 28:19-20).

13. Congregation members are not approved to represent the congregation or any corporation when they engage in their personal ministry. Congregation members use personal time for their personal ministry and do not receive any compensation for their efforts.—1 Corinthians 9:16.

Role of Elders

14. Each congregation has a group of men called a “body of elders” that oversees the spiritual activities of the congregation. Among other responsibilities, elders are authorized to hear confessions, render spiritual assistance to congregation members, and officiate at weddings and funerals.

15. Elders offer their time in caring for all of their spiritual responsibilities and do not receive any compensation for their efforts.

16. Before elders are appointed, they must meet the Scriptural qualifications outlined in the Bible. —1 Timothy 3:1-7; Titus 1:5-9

17. Elders oversee congregation meetings that are held to strengthen the faith of congregation members and others in attendance. (Acts 15:32.) Elders also provide pastoral care for local congregation members.

18. As discussed in greater detail below, in accord with the Scriptural beliefs and practices of Jehovah’s Witnesses, elders frequently provide spiritual shepherding, which includes encouragement, counsel and guidance to congregation members concerning personal and spiritual matters.—Acts 20:28

19. Similarly, as part of their responsibility to maintain the spiritual and moral cleanliness of the congregation, elders at times conduct what are referred to as ecclesiastical “investigations” when they receive information that a congregation member committed a gross sin and has thereby damaged his or her relationship with God.

RELEVANT RELIGIOUS BELIEFS AND PRACTICES

Spiritual Shepherding (Counseling)

20. Jehovah's Witnesses believe in the universal principle of Christianity, that "all sorts of people" have the moral right and human need to turn to God and be saved by repenting from a past sinful course. (James 4:17; 1 Timothy 2:3,4; Acts 3:19) They believe that anything not in harmony with God's personality, standards, ways and will constitutes a sin, and that "there is no man who does not sin." (1 Kings 8:46; 2 Chronicles 6:36) But since many people want to improve their conduct and be approved by God, elders stand ready to help congregation members understand the application of Bible principles to their conduct.

21. Jehovah's Witnesses believe that when a person is spiritually weak and has difficulty praying, elders can provide comfort by praying with that person and helping him or her see how Bible principles apply. (James 5:14, 15) To obtain comfort and assistance in regaining spiritual health, congregation members commonly seek Scriptural counsel and disclose private information, some of it highly sensitive, that allows the elders make personalized petitions to God in prayer in their behalf.

22. Because open and free communication between congregation members and elders is essential to providing spiritual encouragement, counsel and guidance, the religious beliefs and practices of Jehovah's Witnesses place an emphasis on privacy and confidentiality. (Proverbs 25:9) As promised to congregants in publications such as *The Watchtower*, "What you discuss with an elder will remain strictly confidential. Being trustworthy is one of his qualifications. —Compare Exodus 18:21; Nehemiah 7:2." (*The Watchtower*, March 1, 1997, page 28) With that promise, congregants willingly open themselves to reveal their innermost thoughts, feelings, and acts to trusted elders as they seek to mend their (or other congregants) relationship with Jehovah God and heal spiritually.

23. The trust and confidence that congregation members have in elders arises from the sincerely held Scriptural belief that elders are spiritual shepherds who provide both comfort to them

during their distress and the Scriptural guidance needed to obtain God's Holy Spirit and blessing to successfully avoid or overcome sinful behavior. (Acts 20:28) According to the Scriptural beliefs and practices of Jehovah's Witnesses, information an elder receives from a congregation member who requests or needs spiritual encouragement, counsel and guidance is confidential. (Proverbs 11:13; 25:9) Elders do not unnecessarily discuss with others a congregation member's private requests for assistance in applying Bible principles, a congregation member's confession of sin, or any spiritual encouragement, counsel or guidance an elder believes the congregation member needs.

24. From time to time, congregation elders communicate with experienced elders in the Service Department to receive spiritual counsel and guidance about the application of Bible principles to issues concerning the congregation and its members. These communications are made to elders in the Service Department in the Service Department elders' capacity as spiritual advisors. Just as elders in congregations sent questions to the apostles and older men during the first century (see, e.g., Acts 15:2), congregation elders today, turn to experienced elders in the Service Department at the branch office to help them decide how to handle a spiritual matter. All such spiritual communications must be kept private and strictly confidential in accordance with the Scriptural beliefs and practices of Jehovah's Witnesses.

25. A congregation member's struggle to make needed changes in life in accordance with his understanding of Bible principles would be made more difficult or compromised altogether by the absence of such privacy and strict confidentiality needed for communication about troubling thoughts and feelings of guilt, a frank and open confession or discussion of sinful conduct.

Counsel for Serious Sin

26. Based on the religious beliefs and practices of Jehovah's Witnesses, *serious* sins are *gross* deviations from Bible standards. A person may fall into the *practice* of serious sin. See 2 Kings 17:16, 21; Isaiah 1:4; 1 Corinthians 6:16-18; and 1 John 3:4.

27. Christianity stands for the Christ-like principle that anybody, including those who practice serious sin, can be helped to repent and find salvation.—1 Corinthians 6:9-11 (“sexually

immoral, idolaters, adulterers, ... thieves, greedy people, drunkards, revilers, and extortioners, ... is what some of you were. But you have been washed clean.”); 2 Corinthians 7:8-11 (“you were saddened into repenting ... in a godly way ... produc[ing] repentance leading to salvation ... [and] righting of the wrong!”).

28. Thus, the ability to confidentially divulge serious sin, even the practice of such sin, to elders to begin the process of repentance and of regaining one’s good standing before Almighty God, is crucial to such person’s eternal salvation.

29. Based on the Scriptural beliefs and practices of Jehovah’s Witnesses, elders act as spiritual shepherds when they meet with congregation members who either confess or are alleged to have committed a “serious sin,” as defined in the Bible.—James 5:14, 15 (“call the elders of the congregation [and] let them pray over him ... if he has committed serious sins, he will be forgiven.”); See also Galatians 6:1 (“try to readjust such a man”); Proverbs 11:14 (“success through many advisers”)

30. Based on the religious beliefs and practices of Jehovah’s Witnesses, at least two elders are needed to conduct an investigation involving a congregation member who is alleged to have committed a “serious sin” or to take and confirm a confession of such sin. If those two elders confirm that the member has in fact committed a serious sin, the congregation’s body of elders will appoint three or more elders to form a “judicial committee” for the purposes outlined below.—Deuteronomy 17:6; Deuteronomy 19:15; Matthew 18:15-17; 2 Corinthians 13:1; 1 Timothy 5:19

31. Jehovah’s Witnesses believe that investigations by at least two elders and judicial committees of at least three elders provide better, more complete spiritual counsel and guidance based on the collective experience, knowledge, and judgment of multiple elders, than would be provided by just one elder. (Proverbs 11:14: “When there is no skillful direction, the people fall, but there is salvation in the multitude of counselors.”) Before an individual becomes one of Jehovah’s Witnesses, he is made aware of these practices. (*Organized to Accomplish Our Ministry* (1989), pages 145-48)

32. Based on the Scriptural beliefs and practices of Jehovah's Witnesses, the elders who meet with a congregation member as a judicial committee hear the basic facts about the sinful conduct, determine its extent and whether there were any mitigating factors, and decide whether the sinner is repentant before God. (Psalm 51:17; Psalm 86:5; Acts 26:20.) In short, elders serving on a judicial committee try to help a person who has committed a serious sin begin the process of recovering spiritual health and help the congregation to remain spiritually and morally clean.—Jude 21-23.

33. Based on the beliefs and practices of Jehovah's Witnesses, all spiritual communications taking place during an investigation or a judicial committee proceeding, or in furtherance of the congregation's ongoing spiritual assistance to a wrongdoer, are considered private and confidential. The presence or participation of two or more elders in an investigation or judicial committee does not affect the elders' confidentiality obligations. Furthermore, any records created in connection with these matters are kept under lock and key at the Kingdom Hall and are accessible to elders only, all of whom operate under the same duty to maintain confidentiality.

Spiritual Discipline

34. If a congregation member who has committed a serious sin repents, the elders on the judicial committee prayerfully determine what Bible-based instruction, restrictions, and spiritual discipline are appropriate. They administer reproof either in private or in public "before onlookers" who have knowledge of the situation, to instill in the sinner and in any such onlookers a wholesome fear of displeasing God by continuing in a sinful course. (2 Samuel 12:13; 1 Timothy 5:20.) To serve as a reminder to the repentant sinner and to the congregation of the repentant sinner's ongoing process of regaining spiritual recovery, restrictions on the sinner's conduct in the congregation are imposed on such actions as commenting at meetings or participating in meeting parts. The elders help the wrongdoer to "keep making straight paths for [his] feet" thereafter. (Hebrews 12:13.) In due course, the judicial committee will lift the imposed restrictions if the individual's progress to spiritual recovery is manifest.

35. If the elders conclude there is a need to do so, a simple announcement is made to the congregation so that members know that the wrongdoer committed a serious sin but has demonstrated a repentant attitude. The type of serious sin committed is not divulged to the congregation or anyone else.

Disfellowshipping Congregation Members

36. If a congregation member who committed a serious sin is unrepentant despite the elders' efforts to help the wrongdoer, the judicial committee prayerfully determines whether it is necessary to expel the unrepentant wrongdoer from the congregation in compliance with the Scriptures. (1 Corinthians 5:11-13 ["stop keeping company...not even eating with such a man...Remove the wicked person from among yourselves."]; 1 Timothy 1:20 ["handed them over to Satan"]). Based on the beliefs and practices of Jehovah's Witnesses, the decision to "disfellowship" is the strongest form of Scriptural discipline authorized by the Bible.

37. In all cases of disfellowshipping (during the relevant time period of this Complaint), the elders on the judicial committee create a confidential spiritual record of their action and forward a notice of disfellowshipping (S-77) to Watchtower. Watchtower would not open the notice of disfellowshipping; instead the sealed envelope would be delivered to an elder in the Service Department for confidential review. Only elders authorized by the Branch Committee with a need to know (for religious reasons) have access to the notice.

38. When a congregation member is disfellowshipped, an elder makes a simple announcement at a congregation meeting. Based on the beliefs and practices of Jehovah's Witnesses, such an announcement puts congregation members on notice to stop any spiritual association with that person. The type of wrongdoing committed by the disfellowshipped person is not divulged.

Maintaining Confidentiality

39. The requirement that elders keep information and spiritual communications confidential is based on Scripture and has been explained in the official publications of Jehovah's Witnesses.—Proverbs 25:9; *The Watchtower*, April 1, 1971, pages 222-224; *Our Kingdom Ministry*, July 1975 page 3; *The Watchtower*, December 15, 1975, pages 764-66; *The Watchtower*, September 1, 1983, pages 21-26; *The Watchtower*, September 15, 1989, pages 10-15; *The Watchtower*, September 1, 1991, pages 22-27; *The Watchtower*, November 15, 1991, pages 19-23.

40. Congregation members trust elders to keep all spiritual communications strictly confidential. This applies to all members, not just those accused of or confessing serious sin.

41. Revealing confidential communications to those not entitled to hear them could call into question an elder's qualifications.

42. While not every breach of confidentiality by an elder will result in his removal, each elder is accountable before God, the ultimate Judge, for his adherence to the Bible's command to maintain confidentiality.

43. If an elder disclosed confidential information, his credibility and effectiveness as an elder would be compromised and it could have a chilling effect on the congregation members seeking spiritual encouragement, counsel and guidance from elders. Because free and open communication between congregation members and their elders is essential to the spiritual welfare of the members and of the congregation as a whole, the importance of privacy and confidentiality is difficult to overstate.

44. Because congregations are relatively small, each person in a congregation knows each other person in the congregation by name and family. An elder's disclosure of confidential information could readily embarrass a member, cause severe emotional distress, and even damage

the reputations of the member and others in the family. In turn, an elder's own relationship with God would be harmed by his causing embarrassment, distress or damage to a member. — Hebrews 13:17 (“those taking the lead among you ... will render an account to God.”)

I declare under penalty of perjury of the laws of the State of Hawaii that the foregoing is true and correct.

Executed on ____ January 10, 2022 in Wallkill, New York.


Thomas Jefferson, Jr. *Declarant*

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation; KENNETH L. APANA, Individually; and Does 1 through 100, inclusive,

Defendants.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation,

Crossclaimants,

vs.

KENNETH L. APANA, Individually,

Crossclaim Defendant.

Civil No. 1CCV-20-0000390 DEO
(OTHER NON-VEHICLE TORT)

**DECLARATION OF
WILLIAM S. HUNT**

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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N.D.,) CIVIL NO:
) 1CCV-20-0000390
Plaintiff,) (Non-Motor Vehicle Tort)
)
vs.)
)
MAKAHA, HAWAII CONGREGATION)
OF JEHOVAH'S WITNESSES, a)
Hawaii non-profit)
unincorporated religious)
organization, a.k.a. MAKAHA)
CONGREGATION OF JEHOVAH'S)
WITNESSES and KINGDOM HALL,)
MAKAHA CONGREGATION OF)
JEHOVAH'S WITNESSES;)
WATCHTOWER BIBLE AND TRACT)
SOCIETY OF NEW YORK, INC.,)
a New York corporation;)
KENNETH L. APANA,)
Individually; and Does 1)
through 100, inclusive,)
)
Defendants.)
)
-----)
AND ALL RELATED ACTIONS.)

VIDEOTAPED VIDEOCONFERENCE
DEPOSITION OF KENNETH APANA

Taken on behalf of the Plaintiff N.D.,
remotely via videoconference at 9:01 A.M. HST, on
Monday, October 18, 2021, pursuant to Notice.

BEFORE: APRIL D. GEDNEY, RPR, CLR
Hawaii CSR No. 470
California CSR No. 11756

EXHIBIT A

1 MR. TAYLOR: And I don't know if Jimmy
2 has redirect or not, but there are some Hawaii
3 specific directions about reviewing the transcript
4 that perhaps Jenny could advise.

5 MR. ROGERS: Well, I'm not going to -- I
6 don't want to give any other advice on this except
7 that you'll have a chance to review.

8 -o0o-

9 FURTHER EXAMINATION

10 BY MR. ROGERS:

11 Q. What you said to the church, comments
12 that you made, are you okay about allowing that to
13 be read, to be redacted -- unredacted?

14 A. I don't understand. Say again.

15 Q. Are you okay about unredacting certain
16 portions of the record where it was talking about
17 your comments to the church?

18 A. You mean the places that are marked,
19 you're asking me --

20 Q. Yeah.

21 A. -- if it's okay? No.

22 Q. Okay.

23 MR. ROGERS: I don't have anything else.

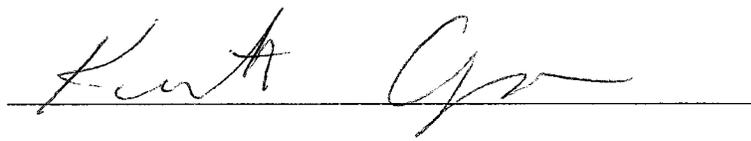
24 MS. NAKAMOTO: Mr. Apana, this is Jenny
25 speaking. You do have 30 days from the date that

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W I T N E S S C E R T I F I C A T E

I, KENNETH APANA, hereby certify that I have read the foregoing typewritten pages 1 through 125, inclusive, and corrections, if any, were noted by me, and the same is now a true and correct transcript of my testimony.

DATED: NOV 18, 2021, 2021.
Kona, HAWAII.
(City) (State)


KENNETH APANA

Case: N.D. vs. MAKAHA, HAWAII CONGREGATION
Civil No.: 1CCV-20-0000390
Deposition taken on: Monday, October 18, 2021
Taken by: APRIL D. GEDNEY, RPR, CLR
Hawaii CSR No. 470
California CSR No. 11756

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C E R T I F I C A T E

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

I, APRIL D. GEDNEY, RPR, CLR, Certified Shorthand Reporter, do hereby certify:

That on Monday, October 18, 2021, at 9:01 A.M. HST, appeared via videoconference KENNETH APANA, the witness whose deposition is contained herein; that prior to being examined, he was by me duly sworn or affirmed;

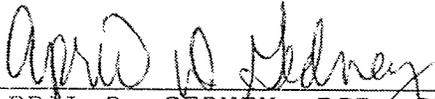
That the deposition was taken down by me in machine shorthand and was thereafter reduced to typewriting; that the foregoing represents, to the best of my ability, a true and correct transcript of the proceedings had in the foregoing matter.

That pursuant to Rule 30(e) of the Hawaii Rules of Civil Procedure, a request for an opportunity to review and make changes to this transcript:

- Was made by the deponent or a party (and/or their attorney) prior to the completion of the deposition.
- Was **not** made by the deponent or a party (and/or their attorney) prior to the completion of the deposition.
- Was waived.

I further certify that I am not an attorney for any of the parties hereto, nor in any way concerned with the cause.

DATED this 26th day of October 2021 in Honolulu, Hawaii.



APRIL D. GEDNEY, RPR, CLR
Hawaii CSR No. 470
California CSR No. 11756

DA 19-0077

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 3

ALEXIS NUNEZ and HOLLY McGOWAN,

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

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 and Appellants,

v.

MAXIMO NAVA REYES and
IVY McGOWAN-CASTLEBERRY,

Third-Party Defendants.

APPEAL FROM: District Court of the Twentieth Judicial District,
In and For the County of Sanders, Cause No. DV-16-84
Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Bradley J. Luck, Tessa A. Keller, Garlington, Lohn & Robinson, PLLP,
Missoula, Montana

Joel M. Taylor (argued), Watchtower Bible and Tract Society of New
York, Inc., Patterson, New York

EXHIBIT B

For Appellees:

James P. Molloy (argued), Gallik, Bremer & Molloy, P.C.,
Bozeman, Montana

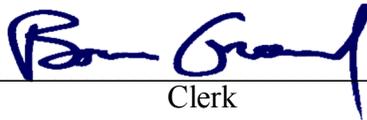
D. Neil Smith, Ross Leonoudakis, Nix Patterson, LLP, Dallas, Texas

For Intervenor:

Timothy C. Fox, Montana Attorney General, Matthew T. Cochenour,
Acting Solicitor General, Jon Bennion, Chief Deputy Attorney General,
Helena, Montana

Argued: September 13, 2019
Submitted: September 17, 2019
Decided: January 8, 2020

Filed:


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Watchtower Bible and Tract Society of New York, Inc., Christian Congregation of Jehovah’s Witnesses, and Thompson Falls Congregation of Jehovah’s Witnesses (collectively, “Jehovah’s Witnesses”) appeal the Twentieth Judicial District Court’s ruling that they violated Montana’s mandatory child abuse reporting statute, § 41-3-201, MCA, and its order granting summary judgment to Plaintiff Alexis Nunez on her negligence per se claim. They also appeal the court’s award of punitive damages following a jury trial. We hold that Jehovah’s Witnesses are excepted from the mandatory reporting statute under § 41-3-201(6)(c), MCA, because the undisputed material facts in the record show that Jehovah’s Witnesses canon law, church doctrine, or established church practice required that the reports of abuse in this case be kept confidential. We therefore reverse the District Court’s grant of summary judgment to Alexis and remand for entry of summary judgment in favor of Jehovah’s Witnesses. Because this issue is dispositive, we do not reach the punitive damages award or the Jehovah’s Witnesses’ other arguments.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 Peter McGowan, Ivy McGowan-Castleberry, and Plaintiff Holly McGowan are siblings. Their mother Joni married Maximo Reyes in 1994. Plaintiff Alexis Nunez is Ivy’s daughter. At all times relevant to the underlying complaint, Holly, Peter, Joni, and

¹ Because the issue on appeal is the District Court’s summary judgment ruling, we confine our review to the summary judgment record.

Maximo were members of the Thompson Falls Congregation of Jehovah's Witnesses ("Thompson Falls Congregation").

¶3 In 1998, Holly told Don Herberger, a local elder at the Thompson Falls Congregation, that her step-father Maximo had inappropriately touched and fondled her. Herberger directed Holly to two other local elders, Ken Reich and Glenn Wilson, who dismissed her accusations on the grounds that they lacked a confession or second witness—which elders require to substantiate a report of abuse before taking actions against the accused—and were therefore unactionable. Without recourse, Holly returned home, where Maximo's abuse escalated to include numerous incidents of rape. His abuse continued until she was old enough to leave home.

¶4 In 2004, Peter told Don Herberger that Maximo had sexually abused him as a child. Pursuant to the "two-witness" rule, Don contacted Holly to confirm Peter's report. Holly wrote a letter corroborating the allegations and detailing Maximo's sexual abuse throughout her childhood. She concluded, "I want to thank Jehovah's shepherds for looking after his flock and for taking care of this situation." Don thereafter called Defendant Watchtower Bible and Tract Society's ("Watchtower") legal department. An attorney advised him that Montana law did not require him to report Maximo's abuse to local authorities. Having received this advice, Don did not contact local police to report Maximo's abuse.

¶5 Instead, Don, Glenn, and Ken formed a "judicial committee" and confronted Maximo about the allegations. After hearing from all three, the committee believed Peter's and Holly's accounts. In April 2004, the committee disfellowshipped Maximo—

banished him from the congregation—and submitted to Defendant Christian Congregation of Jehovah’s Witnesses (“CCJW”) a written report called an “S-77 Form” detailing the events leading to Maximo’s expulsion. Maximo requested the local elders to reinstate him to the congregation; a year later, in June 2005, they granted his request.

¶6 Alexis is Peter’s and Holly’s niece and Maximo’s step-granddaughter. Maximo started sexually abusing Alexis in 2002, after Holly initially reported Maximo to Don Herberger. Maximo continued to molest Alexis on a weekly basis over the next five years. During this time, though unaware of Maximo’s abuse of Alexis, the elders received Peter’s report; contacted the Watchtower legal department; formed a judicial committee to investigate the allegations; disfellowshipped Maximo; and reinstated him. They also observed Alexis accompanying Maximo to weekend services at the Thompson Falls Congregation. The elders did not contact local police. Alexis was five years old when Maximo’s abuse began and ten years old when it ended.

¶7 In 2016, Alexis and Holly sued Jehovah’s Witnesses for damages stemming from their failure to report Maximo to the authorities. Among other theories, they alleged Jehovah’s Witnesses were negligent per se under Montana’s mandatory child abuse reporting statute, § 41-3-201, MCA. In response, Jehovah’s Witnesses argued that they had no duty to report under § 41-3-201(6)(c), MCA,² which exempts clergy from the

² At the time of Holly’s and Peter’s reports, the exception to the mandatory child abuse reporting statute was codified at § 41-3-201(4)(c), MCA (2003). This exception is now codified at § 41-3-201(6)(c), MCA. Although the numbering has changed, the relevant portions of the statute remain substantively the same. For ease of reference, we cite and refer to the current version.

mandatory reporting statute if canon law, church doctrine, or established church practice requires the communication of child abuse to be kept confidential.

¶8 The District Court granted summary judgment to Alexis on her negligence per se claim, concluding: “Defendants failed to report as mandated by Mont. Code Ann. § 41-3-201(2)(h). Defendants are liable for the harm of Alexis Nunez caused by Max Reyes after the 2004 report of abuse, as a matter of law. The question left to the jury is what is the appropriate amount of damages to award Alexis Nunez.” The plaintiffs dismissed their common law negligence claims and proceeded to a jury trial on this single claim. The jury found against Holly and awarded her nothing. Having been instructed that Jehovah’s Witnesses were liable as a matter of law to Alexis, the jury awarded her \$4 million in compensatory damages and \$31 million in punitive damages. Jehovah’s Witnesses appeal both the District Court’s summary judgment ruling that they are mandatory reporters and its failure to have the jury decide causation. Finally, they challenge the punitive damages award on statutory and constitutional grounds.

STANDARD OF REVIEW

¶9 This Court reviews de novo a district court’s grant or denial of summary judgment, applying the criteria of M. R. Civ. P. 56(c). *Stipe v. First Interstate Bank – Polson*, 2008 MT 239, ¶ 10, 344 Mont. 435, 188 P.3d 1063. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c). “A de novo review affords no deference to the district court’s decision and we

independently review the record, using the same criteria used by the district court to determine whether summary judgment is appropriate.” *Siebken v. Voderberg*, 2012 MT 291, ¶ 20, 367 Mont. 344, 291 P.3d 572. We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences from the offered proof in favor of the non-moving party. *Stipe*, ¶ 10 (citation omitted).

DISCUSSION

¶10 *Did the District Court err in ruling as a matter of law that Jehovah’s Witnesses violated the mandatory child abuse reporting statute, § 41-3-201, MCA?*

The Reporting Requirement and Its Exceptions

¶11 Montana law mandates certain professionals and officials to report child abuse to the Department of Public Health and Human Services when they “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[.]” Section 41-3-201(1), MCA. Clergy are among the professionals required to report under the statute. Section 41-3-201(2)(h), MCA. Section 41-3-201(6), MCA, however, excepts clergy from the reporting mandate under two circumstances. Relevant here, § 41-3-201(6)(c), MCA, provides: “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.”

¶12 Jehovah’s Witnesses contend they are excepted from the general mandatory reporting statute pursuant to § 41-3-201(6)(c), MCA. Alexis responds that the exception in § 41-3-201(6)(c), MCA, does not apply because the record shows that the Defendants

did not in fact keep Peter's report confidential and because Jehovah's Witnesses church doctrine imposes no requirement of confidentiality.

Jehovah's Witnesses' Organizational Structure and Reporting Policies

¶13 Congregations of Jehovah's Witnesses, including Defendant Thompson Falls Congregation, consist of individuals and families who gather to worship in buildings called "Kingdom Halls." A group of men called the "body of elders" oversees the spiritual activities of each congregation. Elders provide spiritual guidance to congregants, ranging from officiating weddings and hearing confessions to providing counseling for and conducting "ecclesiastical investigations" into "serious sin." The parties agree that elders are "clergy" under Montana law.

¶14 Defendant Watchtower is a New York nonprofit corporation that supports the Jehovah's Witnesses religion by printing Bible-based literature and owning real estate to provide housing and offices for full-time "servants." Watchtower also houses a legal department to serve the United States branch of Jehovah's Witnesses. Defendant CCJW, also a New York nonprofit, facilitates communications between local congregations and the Service Department, which includes experienced elders who provide spiritual and scriptural guidance to congregation elders across the United States.

¶15 The Jehovah's Witnesses religion has established procedures for responding to allegations of serious sin, such as child molestation, within a congregation. When elders receive a report of physical or sexual child abuse, they are instructed to immediately call the Watchtower legal department in New York to determine whether the laws of their jurisdiction require them to report the abuse to authorities. According to the Jehovah's

Witnesses, elders will report child abuse to secular authorities if required by law; otherwise, they address it internally.

¶16 Absent a legal duty to report to authorities, the elders conduct an internal investigation to determine whether the allegations of abuse have merit. As mentioned above, church policy requires a second witness to corroborate the initial report of abuse according to the “two-witness” rule. Once a second witness confirms the allegations, at least two local elders will conduct an investigation or take confession. If the two elders confirm the allegations, the local body of elders will appoint two or three elders to form a judicial committee. This committee meets with the accused to determine if he is repentant; if not, the committee determines whether it is necessary to disfellowship the unrepentant sinner, the strongest form of scriptural discipline. In the event the elders disfellowship the accused, they must complete an S-77 Form titled, “Notification of Disfellowshipping Or Disassociation,” and send it to the CCJW Service Department in New York. The elders keep records related to investigations and judicial committee proceedings under lock and key at the Kingdom Hall.

¶17 Local elders inform the congregation of the fact of disfellowshipping, but not of the underlying misconduct. A disfellowshipped member may petition the judicial committee for reinstatement.

¶18 Dave Chappel is a Jehovah’s Witnesses Service Department elder designated by the Watchtower and CCJW boards of directors to serve as their representative in this litigation. Chappel testified via deposition and sworn declaration to the religion’s basic tenets and its emphasis on confidentiality, particularly in handling communications and

reports of “serious sin.” Chappel explained that the Jehovah’s Witnesses’ basic beliefs teach that confession of sin is essential to one’s salvation. Understanding that fundamental principle, he attested, explains the emphasis on confidentiality. Chappel made the following relevant assertions in his declaration:

38. As promised to congregants in publications such as *The Watchtower*, “What you discuss with an elder will remain strictly confidential. Being trustworthy is one of his qualifications.” [W]ith that promise, congregants willingly open themselves to reveal their innermost thoughts, feelings, and acts to trusted elders as they seek to mend their (or other congregants[’]) relationship with Jehovah God and heal spiritually.

55. The requirement that elders keep information and spiritual communications confidential is based on Scripture and has been explained in the official publications of the Jehovah’s Witnesses. . . .

56. Congregation members trust elders to keep all spiritual communications strictly confidential. This applies to all members, not just those accused of or confessing serious sin.

57. Revealing confidential communications to those not entitled to hear them could call into question an elder’s qualifications.

Analysis

¶19 Alexis contends in part that because the decision to report child abuse to local authorities ultimately lies within the discretion of each elder, confidentiality is optional, not required. Jehovah’s Witnesses respond that established church practice requires confidentiality as instructed by the Bible. But, Jehovah’s Witnesses add, they may decide not to penalize an elder if he chooses to disclose reports of abuse as a matter of personal conscience because ultimately the violation of church canon is a matter the elder must resolve with God.

¶20 As Alexis points out, Don Herberger conceded at his deposition that he could have reported Maximo to the authorities upon receiving Holly's or Peter's report. When asked whether it would have been up to him, he responded, "Well, it would be up to – Yes." But Dave Chappel's testimony clarifies that disclosing reports of abuse to secular authorities, while ultimately within each elder's discretion, constitutes a breach of church canon or practice. As he stated in his declaration: "While not every breach of confidentiality by an elder will result in his removal, each elder is accountable before God, the ultimate judge, for his adherence to the Bible's command to maintain confidentiality." Chappel elaborated in his deposition:

Q: [I]s it permissible for the elder to report?

A: He would then make that decision on his own if he went on ahead and reported it, and Romans 14:12 says that each of us will render an account for himself to God.

Q: So it's up to him.

A: It's his responsibility. He has to answer to Jehovah God for his actions.

¶21 Chappel's testimony makes plain that disclosing confidential information constitutes a breach that could result in an elder's removal. Even if the Jehovah's Witnesses do not remove the elder from his position, the elder will be accountable before his "ultimate judge." Thus, an elder's discretion to report child abuse to local authorities informs how Jehovah's Witnesses deal with a breach of confidentiality, not whether confidentiality is required in the first place.

¶22 Indeed, Chappel's insistence that church doctrine requires confidentiality is supported by the testimony of almost every other witness in the summary judgment

proceedings. Don Herberger testified that he received Peter's report of Maximo's abuse "in a trust of confidentiality." Peter, who declined during his deposition to disclose the particulars of his conversations, testified that he expected those conversations would remain private and confidential; that he confided in Don as a spiritual shepherd; and that he spoke to Don "personally" and not "as a judicial matter." Glenn Wilson, who chaired the judicial committee that disfellowshipped Maximo, testified that Jehovah's Witnesses' entire disciplinary and judicial committee process was confidential, including the one at issue. And Joni Reyes, Peter's and Holly's mother, testified that the process by which the local elders investigated and disfellowshipped Maximo based on Peter's report was confidential.

¶23 Holly's testimony aligns with Chappel's characterization of church doctrine. When she wrote her letter to the elders, she thanked them for "taking care of the situation." At her deposition, she testified that, by writing that letter, she "was opening it up and trying to . . . make [Maximo's abuse] known so it can be stopped, not just for myself but for others." She explained that by "others" she meant other children within the Jehovah's Witnesses religion. Her letter and testimony reflect her expectation that the elders would handle the matter internally.

¶24 Alexis did not present evidence in the summary judgment proceedings to dispute these material facts. Instead, she contended—as she does on appeal—that the broad dissemination of Peter's report—to multiple local elders, family members, and the New York-based Watchtower and CCJW—is inconsistent with confidentiality. Dave Chappel explained in his declaration, however, that the participation of multiple congregation

elders and members in the investigation and judicial committee proceedings is part of the confidential process:

40. From time to time, congregation elders communicate with experienced elders in the Service Department in New York to receive spiritual counsel and guidance about the application of Bible principles to issues concerning the congregation and its members. . . . All such spiritual communications are kept private and strictly confidential in accordance with the Scriptural beliefs and practices of Jehovah’s Witnesses.

49. Based on the Scriptural beliefs and practices of Jehovah’s Witnesses, all spiritual communications taking place during an investigation or a judicial committee proceeding, or in furtherance of the congregation’s ongoing spiritual assistance to a wrongdoer, are considered private and confidential. *The presence or participation of two or more elders in an investigation or judicial committee does not affect the elders’ confidentiality obligations.* Furthermore, any records created in connection with these matters are kept under lock and key at the Kingdom Hall and are accessible to elders only, all of whom operate under the same duty to maintain confidentiality.

(Emphasis added.)

¶25 The summary judgment record demonstrates that Jehovah’s Witnesses have an established process for receiving and investigating reports of child abuse within their congregations; that they consider this process confidential; and that the process necessarily involves multiple elders and congregation members, including the accused, CCJW elders who provide spiritual guidance, and local elders who conduct the investigation. This process “does not affect the elders’ confidentiality obligations.” Reviewing the summary judgment record de novo, we conclude that the undisputed material facts demonstrate the Jehovah’s Witnesses maintain confidentiality pursuant to

church doctrine, canon, and/or established practice when they receive and internally address reports of child sexual abuse.

¶26 Nonetheless, Alexis argues that allowing each religion to define “confidential” as it sees fit will eviscerate the mandatory reporting statute. But her restrictive definition of confidentiality contravenes the plain language of the reporting statute and the intent of the Legislature and would raise potential constitutional concerns.

¶27 As we interpret the terms of § 41-3-201(6), MCA, “the intention of the legislature is to be pursued if possible.” Section 1-2-102, MCA. The statute does not expressly define “confidential.” In 1991, the Legislature amended the reporting statute. It inserted subsection (2)(h) to include clergy in the list of mandatory reporters. It simultaneously inserted the clauses, now contained in subsections (6)(b) and (6)(c), exempting clergy from reporting under certain conditions.

¶28 Under § 41-3-201(6)(b), MCA, clergy are not required to report known or suspected child abuse if the knowledge results from a congregation member’s confidential communication or confession and if the person making the statement does not consent to disclosure. This exception tracks closely Alexis’s definition of confidential—that is, a communication between two people that prohibits disclosure unless the communicant consents. But the Legislature did not so narrowly circumscribe the exception. In adopting § 41-3-201(6)(c), MCA, it indicated its intent to accommodate definitions of confidentiality beyond that contained in subsection (6)(b). When a statute has “several provisions or particulars,” courts are, if possible, to adopt a construction that “will give effect to all.” Section 1-2-101, MCA. To give effect to both provisions, we

conclude that Alexis’s restrictive definition of confidentiality is an incomplete construction of the mandatory reporting statute.

¶29 This Court’s task is to interpret what is contained in the reporting statute as written by the Legislature. We do not opine whether that body could have made a different policy choice that would afford greater protection to child victims. The Legislature is the appropriate body to entertain such policy arguments. *See, e.g., Bank of Am. v. Ivey*, 2010 MT 131, ¶ 10, 356 Mont. 388, 234 P.3d 867. *See also In re Marriage of Boharski*, 257 Mont. 71, 80, 847 P.2d 709, 715 (1993) (Hunt, J., dissenting). Legislative history confirms the body’s deliberate policy choice when adding the reporting exceptions. During the House Judiciary Committee hearing on House Bill 391—the bill proposing the 1991 amendments to the mandatory reporting statute—both the bill sponsor and committee members expressed their intention to avoid interference with the practice of religion. 1991 Mont. Laws ch. 785, § 1; Hearing on HB 391 Clergy to Report Child Abuse *Before the House Committee on Judiciary*, 52nd Leg., Reg. Sess. 1 (Jan. 30, 1991). As introduced, the bill included clergy among mandatory reporters and added only the provision that “[s]ubsection (2)(h) is not intended to interfere with the practice of religion.” After hearing concern from numerous clergy members that the bill would entangle the State in the affairs of the church, the bill was amended to add the specific exceptions now contained in subsections (6)(b) and (6)(c). Senate Standing Committee Report on HB 391, *Senate Committee on Judiciary*, 52nd Leg., Reg. Sess. 1 (March 16, 1991); Minutes of Free Conf. Committee on HB 391, 52nd Leg., Reg. Sess. 1 (April 10, 1991).

¶30 Jehovah’s Witnesses point out that imposing a narrow definition of confidentiality impermissibly could discriminate between different religious beliefs and practices, protecting confidentiality of reports made in a confession from a parishioner to priest, like the traditional Catholic practice, while offering no protection to a congregant’s disclosures to a committee of elders using a process like that followed by the Jehovah’s Witnesses. “It is the duty of courts, if possible, to construe statutes in a manner that avoids unconstitutional interpretation.” *State v. Mathis*, 2003 MT 112, ¶ 8, 315 Mont. 378, 68 P.3d 756 (citation omitted). The Establishment Clause ensures that “one religious denomination [will] not be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244, 102 S. Ct. 1673, 1683 (1982). A broader construction of the definition thus is in keeping with a jurisprudential “sensitivity to and respect for this Nation’s pluralism, and the values of neutrality and inclusion that the First Amendment demands.” *Am. Legion v. Am. Humanist Ass’n*, ___ U.S. ___, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

¶31 Finally, both the state and federal constitutions prohibit this Court “from considering whether certain religious conduct conformed to the standards of a particular religious group.” *Davis v. Church of Jesus Christ of Latter-Day Saints*, 258 Mont. 286, 297, 852 P.2d 640, 647 (1993) (citation omitted), *overruled in part on other grounds by Gilko v. Permann*, 2006 MT 30, ¶ 24, 331 Mont. 112, 130 P.3d 155. In *Davis*, we held that judicial consideration whether there had been a deviation from “true” Mormon doctrine warranting plaintiff’s excommunication would require courts to investigate and interpret religious practices and beliefs, which, in the absence of a constitutionally

compelling interest, violates free exercise. *Davis*, 258 Mont. at 298, 852 P.2d at 648. *See also Rasmussen v. Bennett*, 228 Mont. 106, 112, 741 P.2d 755, 759 (1987) (holding that the Court lacks power to question the Watchtower Society’s determination that Rasmussen was not scripturally free to remarry under the Jehovah’s Witnesses doctrine). In determining whether Jehovah’s Witnesses satisfy § 41-3-201(6)(c), MCA, we therefore are mindful not to scrutinize the process they followed after Peter’s disclosure for compliance with their own church doctrine and practice—or to commit such scrutiny to a fact-finder at trial. *See Davis*, 258 Mont. at 297-99, 852 P.2d at 647-48.

¶32 Here, as in *Davis* and *Rasmussen*, we decline to conduct further inquiry into the validity of Jehovah’s Witnesses’ tenets and doctrines, including its canon and practice for adherence to a requirement of confidentiality in handling child abuse reports. Jehovah’s Witnesses representatives testified that its process for addressing these reports is strictly confidential, notwithstanding the involvement of numerous church clergy and congregants. “It is not within this Court’s power to question [the religious institution’s] determination.” *Rasmussen*, 228 Mont. at 112, 741 P.2d at 759.

¶33 We hold accordingly that the undisputed material facts in the summary judgment record demonstrate as a matter of law that Jehovah’s Witnesses were not mandatory reporters under § 41-3-201, MCA, in this case because their church doctrine, canon, or practice required that clergy keep reports of child abuse confidential, thus entitling the Defendants to the exception of § 41-3-201(6)(c), MCA. The reporting statute as written accommodates Jehovah’s Witnesses’ definition and practice of confidentiality.

CONCLUSION

¶34 The District Court erred in ruling that Jehovah's Witnesses were under a mandatory duty to report Peter or Holly McGowan's disclosure of Maximo's abuse and thus were negligent per se for violating § 41-3-201, MCA. We reverse and remand for entry of summary judgment in favor of Jehovah's Witnesses.

/S/ BETH BAKER

We Concur:

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/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing document was served on the following parties listed below by electronic service through the JEFS E-Filing System:

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