

HON. JAMES A. MANLEY  
20<sup>th</sup> Judicial District Court  
Lake County Courthouse  
106 Fourth Avenue East  
Polson, MT 59860  
(406) 883-7250

FILED Aug. 30 2018  
Candace Fisher  
SANDERS COUNTY CLERK OF DISTRICT COURT  
BY [Signature]  
DEPUTY

**MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY**

Cause No. DV-16-84

ALEX 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.

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,

vs.

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

Third-Party Defendant.

**ORDER ON PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT AS TO  
DEFENDANTS' THIRD-PARTY CLAIMS  
AGAINST IVY MCGOWAN-CASTLEBERRY**

**ORDER**

*Plaintiff's Motion for Partial Summary Judgment as to Defendants' Third-Party Claims Against Ivy McGowan-Castleberry* is **DENIED IN PART** and **GRANTED IN PART**.

## RATIONALE

### Issue

The controlling statute is Mont. Code Ann. § 27-1-703(4), which states, “On Motion of a party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence resulting in death or injury to a person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action.” Defendant’s negligence then must be compared to the third party’s negligence.

### **Ivy’s duty, as it pertains to her sister, Plaintiff Holly McGowan**

This Court is unaware of any statute or common law authority requiring an adult sister, or any other adult, to report abuse outside of their professional responsibility as outlined in Mont. Code Ann. § 41-3-201. As to statutory duty, Mont. Code Ann. § 41-3-201(4) allows any person to make a report, but does not require them to report.

This Court found no case law recognizing a duty of a sister or other third party to report or take other action to protect a child. *Prindel v. Ravalli County*, 2006 MT 62, 331 Mont. 338, 133 P.3d 165, is instructive on Montana law in several areas: negligence per se in ¶ 27, common law duty and creation of special relationship to prevent further harm in ¶ 34, and determining whether a defendant owes of duty of care to a plaintiff in ¶ 37. *Prindel*, at ¶ 27, discusses the requirement of violation a legally-recognized duty for a defendant to be found negligent or negligent *per se*. Ivy had no legally-recognized duty to do more than she did to protect her sister Holly. Without a duty, there can be no breach.

Defendants argued Ivy’s conduct created a “special relationship” with Holly. The “special relationship” analysis arises when a party had control of, or a duty to take control of, a perpetrator to

prevent harm to others. See, for example, *Prindel*, ¶ 34. Ivy did not have a duty to take control of the perpetrator. Nor did Ivy have legal custody or control of Holly. Ivy did not create a “special relationship” when she was told of abuse by a co-worker, then took Holly to Don Herberger’s house, who she believed was an elder in the local congregation, to report the abuse and get protection through the local congregation, or by warning Holly’s mother of what she had been told.

Courts can expand legal recognition of duty by common law. Analysis of recognizing or expanding the law regarding duty includes five factors, *Prindel*, ¶ 37. The court finds the fourth *Prindel* factor, “*the consequences to the public of imposing such a duty*” weighs against recognizing a new duty. Such a ruling would be extremely difficult to define boundaries for. It would have an unpredictable impact on families, arguably making siblings de facto guardians over minors. It would also put this Court in the position of the legislating, in an area the legislature has acted to address.

. Based on these facts, this Court finds that Defendant Ivy McGowan-Castleberry had no duty either by statute or common law that would require her to report child abuse or do more than what she did. Therefore, partial summary judgment is granted to Plaintiffs regarding alleged negligence of Ivy regarding injuries suffered by Holly.

#### **Ivy’s duty as it pertains to her daughter, Alexis Nunez**

Unlike Holly, Ivy was the mother and had legal custody of Alexis Nunez. Ivy had a common law duty to use reasonable or ordinary care to protect Alexis from foreseeable harm. A person entrusted with the physical custody or control of a child has such a recognized duty. *Johnson v. Y.M.C.A.*, 201 Mont. 36, 44-7, 651 P.2d 1245 (1982). That case involved a child under the physical protection of Y.M.C.A. A parent has at least as high a duty as a Y.M.C.A.

Whether Ivy breached her duty to provide reasonable or ordinary care in the protection of her child, Alexis, is a question of fact for a jury to decide. Therefore, Plaintiffs' motion for partial summary judgment, regarding Ivy's breach of duty owed to Alexis, is denied.

DATED this 30<sup>th</sup> day of August, 2018.

  
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Hon. James A Manley  
District Judge

cc: **James P. Molloy**, Co-Counsel for Plaintiffs Alexis Nunez and Holly McGowen  
**D. Neil Smith**, Co-Counsel for Plaintiffs Alexis Nunez and Holly McGowen  
**Kathleen L. DeSotto / Tessa A. Keller**, Co-Counsel for Defendant and 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  
**Joel M. Taylor**, Co-Counsel for Defendant and 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  
**Mathew M. Stevenson / David M. Maldonado**, Attorneys for Third-Party Defendant Maximo Nava Reyes  
**Matthew McKeon**, Attorney for Third-Party Defendant Ivy McGowan-Castleberry  
08/29/18 SCB