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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

ALEXIS NUNEZ and HOLLY  
McGOWAN,

Plaintiffs,

v.

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

Defendants.

Hon. James A. Manley  
Cause No. DV 16-84

RELIGIOUS DEFENDANTS'  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND CROSS-MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT

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

Third-Party Plaintiffs,

v.

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

Third-Party Defendants.

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Defendants/Third Party Plaintiffs, Watchtower Bible and Tract Society of New York, Inc. ("Watchtower"), Christian Congregation of Jehovah's Witnesses ("CCJW"), and Thompson Falls Congregation of Jehovah's Witnesses' (collectively referred to as "Religious Defendants"), pursuant to Montana Rule of Civil Procedure 56, file this Opposition to Plaintiffs' Motion for Partial Summary Judgment on the Religious Defendant's Sixth Affirmative Defense.

In addition, Religious Defendants request an Order granting partial summary judgment on the merits of Count II of the Plaintiffs' Complaint, i.e., the Claim of Negligence *Per Se*. First Am. Compl., ¶¶ 50-54, Nov. 14, 2016. A proposed Order accompanies the motion and memorandum.

Religious Defendants request oral argument.

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## I. MEMORANDUM OF POINTS AND AUTHORITIES

### A. Introduction

This is a case about incest. Plaintiffs Holly McGowan (“Holly”) and Alexis Nunez (“Alexis”) were sexually molested by their stepfather/step-grandfather, Maximo Nava Reyes (“Maximo”), while they were in the care and control of their mother/grandmother (“Joni”). Plaintiffs describe the case as one about “mandatory reporting.” Pls.’ Mot. Partial Summ. J. Re: Defs.’ 6th Affirmative Def. & Mem. Support 2, May 14, 2018 (“Pls.’ Mot.”). However, Plaintiffs did not sue any mandated reporters – they sued corporations, seeking to hold the Defendants vicariously responsible for the alleged failure of mandated reporters. Although they rely on the reporting statute in Count II of the First Amended Complaint, Plaintiffs take issue with the Religious Defendants asserting a defense based upon language in that same statute that can exempt “a member of the clergy or a priest” from making a report. Mont. Code Ann. § 41-3-201(6).<sup>1</sup> Plaintiffs’ arguments invite the Court to make a constitutionally impermissible evaluation of the manner in which congregation elders handled Holly’s accusation that Maximo had committed a serious sin. To validate the Plaintiffs’ position, this Court must violate Montana and federal constitutional protections that prohibit civil courts from evaluating matters of religious polity, internal church governance, and the manner in which it addresses unrepentant sinners.

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<sup>1</sup> Montana Code Annotated § 41-3-201 has been amended multiple times, most recently in 2017. The version of this statute that was in effect in 2004 was enacted in 2001. 2001 Mont. Laws Ch. 311 (S.B. 116). The limited exception for a member of the clergy or priest was found at subsection (4)(a) and (b). In the current version of the statute, the exception is in subsection (6).

In response to Plaintiffs' motion, the Religious Defendants will show that the decision made in 2004 by local Thompson Falls Congregation elders harmonizes with Montana Reporter law § 41-3-201(6)(c) because the elders were acting in their capacity as ordained ministers who followed "church doctrine, or established church practice" that required confidentiality under the beliefs and practices of their faith when they acted on information about Maximo that they received from Plaintiff Holly McGowan and her brother, Peter McGowan.

To support their cross-motion for partial summary judgment on Count II of the First Amended Complaint, the Religious Defendants will also show that the Mandated Reporting law does not apply to religious corporations.

**B. Summary of Undisputed Facts**

Plaintiffs limit their motion to the information Defendants acquired in 2004 and ask the court to rule that the Affirmative Defense based upon the limited exception from reporting by members of the clergy<sup>2</sup> does not apply. Pls.' Mot. 4.

In 2004, Holly's brother, Peter, disclosed confidential information to Don Herberger regarding sinful conduct involving his stepfather, Maximo that had occurred in the past. 5th Found. Aff. Kathleen L. DeSoto ¶ 3 ("5th Aff. DeSoto"), Ex. 1: Dep. Peter Edwin McGowan 7:3-5; 8:1-22, Apr. 24, 2018. During his deposition in this case, Peter relied on the clergy-penitent privilege of Montana law and refused to disclose the details of what he told Mr. Herberger. 5th Aff. DeSoto ¶ 3, Ex. 1: Dep. P. McGowan 39:1-11.

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<sup>2</sup> The term "clergy" is defined to include "an ordained minister, priest, or rabbi" because § 41-3-201 expressly incorporates the definition of clergy found at § 15-6-201(2)(b)(i).

Peter considers his communications with Mr. Herberger, and other elders in the Thompson Falls congregation to be conversations with spiritual shepherds in the congregation that are to remain private and confidential. 5th Aff. DeSoto ¶ 3, Ex. 1: Dep. P. McGowan 45:21-46:10. There is no dispute in the fact that the abuse Peter experienced had stopped around the year 2000, several years before Peter talked to Mr. Herberger. 5th Aff. DeSoto ¶ 3, Ex. 1: Dep. P. McGowan 14:6-19.

As a result of those confidential communications with Peter, Don acted within his role of spiritual shepherd and congregation elder when he contacted Holly, who was then an adult living in Nebraska, and asked her to share what she knew about the allegations Peter had made. 5th Aff. DeSoto ¶ 4, Ex. 2: Dep. Donald John Herberger 193:19-194:9, Sept. 13, 2017. By letter dated March 19, 2004, 20-year-old Holly wrote to “the body of elders of the Thompson Falls congregation” and stated that beginning in 1994, she and Peter were regularly sexually molested by their stepfather, Maximo. Pls.’ Mot., Ex. A. As a result of this information, three elders from the Thompson Falls congregation determined that Maximo had to be expelled (disfellowshipped) from the congregation. 5th Aff. DeSoto ¶ 4, Ex. 2: Dep. Herberger 148:21-25; 5th Aff. DeSoto ¶ 3, Ex. 1: Dep. P. McGowan 30:14-25. Disfellowshipping is the most severe congregational discipline available in the faith of Jehovah’s Witnesses. Decl. Douglas Chappel Support Mot. Protective Order ¶ 52, Apr. 18, 2018 (“Decl. Chappel”).

It is undisputed that in 2004 Peter was not being abused and it had been several years since the last incident had occurred. 5th Aff. DeSoto ¶ 3, Ex. 1: Dep. P. McGowan 14:6-19. It is undisputed that in 2004, Holly was a 20-year-old parent of her own

children who lived in Nebraska. 5th Aff. DeSoto ¶ 5, Ex. 3: Dep. Holly McGowan 133:2-20, Jan. 9, 2018. It is undisputed that in 2004, Alexis lived with her mother in Polson. 5th Aff. DeSoto ¶ 6, Ex. 4: Dep. Ivy McGowan-Castleberry 95:4-14, Jan. 10, 2018; 5th Aff. DeSoto ¶ 7, Ex. 5: Pl. Alexis Nunez's Objections & Resp. Religious Defs.' 1st & 2d Sets Interrogs. & Reqs. Prod., Interrog. Resp. No. 1, Aug. 9, 2017. And, it is undisputed that in 2004 Alexis' mother was aware that Maximo had been accused of inappropriate conduct towards Holly and Peter. 5th Aff. DeSoto ¶ 6, Ex. 4: Dep. McGowan-Castleberry 98:13-24.

### **C. Applicable Law**

Montana Rule of Civil Procedure 56(b) authorizes the Court to grant summary judgment on all or part of a claim when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Berens v. Wilson*, 246 Mont. 269, 271, 806 P.2d 14, 16 (1990).

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The moving party bears the initial burden of establishing "the absence of genuine issues of material fact and entitlement to judgment as a matter of law." *Saari v. Winter Sports*, 2003 MT 31, ¶ 7, 314 Mont. 212, 64 P.3d 1038.

Once that burden has been met, the opposing party bears the burden of presenting "material and substantial evidence to raise a genuine issue of material fact." *Sullivan v.*

*Cherewick*, 2017 MT 38, ¶ 9, 386 Mont. 350, 391 P.3d 62 (citing *Bird v. Cascade Cnty.*, 2016 MT 345, ¶ 9, 386 Mont. 69, 386 P.3d 602). All reasonable inferences will be drawn from the evidence offered by the non-moving party, but the party must offer more than “mere denial and speculation.” *Knucklehead Land Co. v. Accutitle, Inc.*, 2007 MT 301, ¶ 24, 340 Mont. 62, 172 P.3d 116 (citation omitted). A party may not rely on “conclusory statements, speculative assertions, and mere denials” to defeat a motion for summary judgment. *Sullivan*, ¶ 9. Additionally, a “party cannot create a disputed issue of material fact by putting his own interpretations and conclusions on an otherwise clear set of facts.” *Knucklehead Land*, ¶ 24 (quoting *Koepplin v. Zortman Mining*, 267 Mont. 53, 61, 881 P.2d 1306, 1311 (1994)).

THE COURT SHOULD DENY PLAINTIFFS’  
MOTION FOR SUMMARY JUDGMENT

Plaintiffs ask the Court to rule, as a matter of law, that the “Limited Exceptions” for ordained ministers in § 41-3-201(6)(b) and (c) do not apply to events that occurred in 2004 because the elders did not keep the information confidential. Pls.’ Mot. 4-6.

However, the exceptions apply if the reporting statute was triggered.

1. **Because the abuse related to Don Herberger in 2004 was in the past, the mandatory reporting statute was not triggered.**

Plaintiffs argue that Holly’s report of past abuse in 2004 triggered the Mandated Reporting statute (Mont. Code Ann. § 41-3-201(6)). However, the Montana Supreme Court has explained that the reporting statute is written in the current tense and is triggered by a reasonable suspicion that “a perceived *present* real harm or a perceived

present imminent risk of harm” exists. *Gross v. Myers*, 229 Mont. 509, 513, 748 P.2d 459, 461 (1987) (emphasis added).

In *Gross*, the plaintiff, Ms. Gross, was assured that information revealed in group therapy would be kept confidential. Relying on promised confidentiality, Gross revealed information about her husband’s past abuse of their daughters. *Gross*, 748 P.2d at 460. Believing she was obligated to report the past abuse, the therapist contacted the Department of Health and reported what Gross had revealed during the group session. *Gross*, 748 P.2d at 460. The State declined to take any investigative action, due to the remoteness of the incident. *Gross*, 748 P.2d at 460.

Gross sued, arguing the mandate to report only applied to current child abuse. *Gross*, 748 P.2d at 461. The Montana Supreme Court agreed that the “harm” the statute sought to prevent was “imminent risk of harm,” which it described as “a perceived present real harm or a perceived present imminent risk of harm.” *Gross*, 748 P.2d at 461. The Court noted that if the therapist “had reasonable cause to suspect that a child presently is threatened with harm, she must report, whether her suspicion is based upon past acts, present acts, or both.” *Gross*, 748 P.2d at 461. Because the therapist had subjective, reasonable cause to believe there was a current risk to children, the Court found it was not error to conclude the therapist was subject to mandatory reporting under those circumstances. *Gross*, 748 P.2d at 462.

The exact converse is true in this case. Peter testified that Max had not touched him inappropriately for several years before he talked to Mr. Herberger. 5th Aff. DeSoto ¶ 3, Ex. 1: Dep. P. McGowan 14:6-19. Further, Holly’s abuse ceased in 1999. 5th Aff.



DeSoto ¶ 8, Ex. 6: Pl. Holly McGowan's Objections & Resp. Religious Defs.' 1st & 2d Sets Interrogs. & Reqs. Prod., Interrog. Resp. No. 11, Aug. 25, 2017. The information related to Mr. Herberger in 2004 did not suggest that there was a present imminent risk of harm to a child. To the contrary, there was no imminent risk of harm to any children, as Holly was not only an adult, but also long removed from the home, and Peter confirmed that the abuse had stopped years ago. Accordingly, Mr. Herberger did not have a reasonable suspicion that there was a present imminent risk of harm, and thus not subject to mandatory reporting.

**2. Thompson Falls Elders were exempt from reporting requirements under the circumstances.**

Even if the Thompson Falls Elders were mandatory reporters, they are subject to the exemptions applicable to clergy. There are two distinct exemptions from Montana's reporting requirements for clergy. Mont. Code Ann. §§ 41-3-201(6)(b)-(c).

Holly argues that her communication with the Thompson Falls elders disqualified Religious Defendants and the individual elders from claiming the exception language of Montana Code Annotated § 41-3-201(6)(b), because she is the victim, not the penitent, and she made no "confession." Pls. Mot. 9. Noting that the language under § 41-3-201(6)(b) is in the singular, this section applies to a setting in which one penitent is addressing one clergymen or priest, in the manner of the Roman Catholic tradition of confession.

But that language cannot be construed to limit what is "confidential" as described in § 41-3-201(6)(c) to mirror the customs and practices of the Roman Catholic Church,

which require the priest to maintain anything heard in the confessional as a confidence and not revealed to a third party. The clergy-penitent privilege originated in the Canon law of the Roman Catholic Church, and its Canon law makes “the seal of the confessional [] inviolable.”<sup>3</sup> But to pass Constitutional muster, the law must be applied to all religions.

For this reason, the Montana legislature provided a second ground for ordained ministers (clergymen) to claim an exemption from the duty to report child sexual abuse. Section 41-3-201(6)(c) exempts an ordained minister from reporting if the communication is required to be confidential by canon law, church doctrine, or established church practice. Plaintiffs incorrectly argue that “[n]o canon law, church doctrine, or established church practice within the Jehovah’s Witnesses *required* that the communication made by Holly McGowan [to the body of elders] be kept confidential.” Pls.’ Mot. 8 (emphasis in original). That argument is based on Plaintiffs’ own definition of the term “confidentiality,” without consideration of the religious beliefs and practices of Jehovah’s Witnesses.

**a. Confidentiality and Jehovah’s Witnesses.**

**i. “Confidentiality” has several meanings.**

Plaintiffs suggest that Religious Defendants will argue confidential means “they do not report the abuse to law enforcement.” Pls.’ Mot. 7. Defendants have made no such argument. Indeed, there are multiple definitions of confidentiality. For instance, as

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<sup>3</sup> R. Michael Cassidy, *Sharing Shared Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy Penitent Privilege*, 44 Wm. & Mary L. Rev. 1627, 1638 (2003).

outlined in the reporting statute, the Catholic model for confessions is one example of what one religion deems is confidential. But there are many others, all of which relate to an expectation of privacy.<sup>4</sup>

An obvious example is the privilege relating to communications between doctor and patient.<sup>5</sup> The patient may disclose confidential information about sensitive/private health to the physician with the expectation of privacy, but by doing so the patient understands the physician's medical staff, insurance carriers, social workers, and secretarial staff may in the course of rendering services to the patient, learn about the confidential communication. It is unlikely the patient expects the physician to treat the disclosure as a secret. Rather, it is in the patient's best interests that the physician shares the information with certain individuals and institutions who have a common interest and

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<sup>4</sup> The Montana Constitution recognizes the right to privacy (article II, section 10), even when the public also has a right to know what is done by behind closed doors by public bodies and state agencies (article II, section 9). The need to strike a balance between the two interests is subject to continuing interpretation and litigation. Montana statutes have various provisions for "confidentiality." (*See, e.g.*, Crim. Justice Info. Act, Public Crim. Justice Info. Mont. Code Ann. § 44-5-103(13), Confidential Crim. Justice Info. as defined at § 44-5-103(3), Confidentiality of Victims defined at § 44-5-311.) Even the mandated reporting statute provides for exceptions due to an expectation of confidentiality. *See* Mont. Code Ann. § 41-3-205, Confidentiality — disclosure exceptions (recognizing that individuals with authority and common interests have a lawful need to know otherwise confidential information).

<sup>5</sup> Montana Code Annotated § 26-1-805, Doctor-patient privilege states: "Except as provided in Rule 35, Montana Rules of Civil Procedure, a licensed physician, surgeon, or dentist may not, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient that was necessary to enable the physician, surgeon, or dentist to prescribe or act for the patient. A communication described in 45-9-104(7) is not a privileged communication."

a need to know. However, that does not change the fact that the physician treats the patient's medical information as confidential.

**ii. Jehovah's Witnesses' doctrine and practice on confidentiality.**

Like many religions, Jehovah's Witnesses have internal processes to accommodate confession of sin and assist wrong-doers to attain repentance. Those arrangements are based in the Holy Scriptures and are practiced in congregations of Jehovah's Witnesses in the United States. Congregations of Jehovah's Witnesses are modeled on the Scriptures and the example of first-century congregations, which were cared for by a body of elders. For this reason, the process of confession of sin and attaining repentance involves more than one elder. James 5:14-16.

Doug Chappel, Religious Defendants' representative ("Chappel"), provided information about Jehovah's Witnesses' definition of confidentiality in the context of handling accusations of serious sin, including the accusation Holly made against Maximo. In paragraphs 55-60 of his Declaration, Chappel explained:

55. 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 22-24; *The Watchtower*, November 15, 1991, pages 19-23.

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.

58. 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.

59. 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.

60. 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.”)

Decl. Chappel ¶¶ 55-60.

All elders and congregation members in the faith of Jehovah's Witnesses expect communications regarding an accusation of serious sin, as well as intra-faith processes designed to assist the sinner to repentance, will be discussed privately among individuals who have a need to know, *i.e.*, the accuser (Holly), the accused (Maximo), any witnesses (Peter) and congregation elders. The information is not disclosed to all congregation members because it is confidential, shared only with those with a Scriptural need to know.

Holly's sister, Ivy McGowan-Castleberry (“Ivy”) had first-hand experience with confidentiality in the congregation. She was disfellowshipped in 2004. 5th Aff. DeSoto

¶ 6, Ex. 4: Dep. McGowan-Castleberry 63:7-11. In addition to her own experience, Ivy also knew how the congregation viewed confidentiality because her father was disfellowshipped from the congregation. 5th Aff. DeSoto ¶ 6, Ex. 4: Dep. McGowan-Castleberry 31:7-32:13. Ivy testified that a judicial committee hearing was typically conducted by two or three elders (5th Aff. DeSoto ¶ 6, Ex. 4: Dep. McGowan-Castleberry 31:21-24) and a hearing was “done privately” (5th Aff. DeSoto ¶ 6, Ex. 4: Dep. McGowan-Castleberry 32:8-13). Ivy explained that if the judicial committee made a decision to disfellowship a person, an announcement was read to the congregation, but “[w]hat they were disfellowshipped for is not shared with the congregation.” 5th Aff. DeSoto ¶ 6, Ex. 4: Dep. McGowan-Castleberry 97:23-25. Ivy’s testimony is consistent with what Mr. Chappel said in his Declaration.

Holly’s brother, Peter, refused to answer questions in deposition that would disclose the content of conversations he had with Don Herberger, a Thompson Falls elder. Peter explained that he considered his particular communication to be protected by the clergy-penitent privilege because it was confidential information shared with an elder about matters that affected his spirituality. 5th Aff. DeSoto ¶ 3, Ex. 1: Dep. P. McGowan 39:1-11.

Holly’s mother, Joni, testified that the details of a judicial committee hearing would be “confidential” and the contents of the meeting would not be discussed with other members of the congregation; doing so would be a breach of confidentiality. 5th Aff. DeSoto ¶ 9, Ex. 7: Dep. Joni Navo Nunez 24:25-25:1-17, Feb. 23, 2018.

Concerning her husband’s judicial committee proceeding, she testified that the meetings

were not open to the public and that according to the faith of Jehovah's Witnesses the meetings were confidential. 5th Aff. DeSoto ¶ 9, Ex. 7: Dep. J. Nunez 50:12-25.

The Thompson Falls elders who participated in Max's judicial committee had similar expectations in harmony with "established church practices," which were based in Scripture. Glen Wilson ("Glen") testified that Holly's 2004 letter to the Thompson Falls Body of Elders was viewed as confidential. 5th Aff. DeSoto ¶ 10, Ex. 8: Dep. Glenn Wilson 99:2-101:1, Sept. 14, 2017. As a confidential communication, he was required by established practice to discuss the letter with members of the body of elders to determine if a judicial committee should be formed. 5th Aff. DeSoto ¶ 10, Ex. 8: Dep. Wilson 85:18-24. But, according to established church practice, Glen could not reveal the contents of the letter to anyone outside the body of elders. 5th Aff. DeSoto ¶ 10, Ex. 8: Dep. Wilson 99:16-21. Because that correspondence related to a judicial committee matter, it was considered "confidential." 5th Aff. DeSoto ¶ 10, Ex. 8: Dep. Wilson 77:15-18. The other deponents expressed a similar understanding of confidentiality. A former elder who was identified by the Plaintiffs in their First Amended Complaint, Stephen Pieper ("Pieper"), testified that it was important to follow this practice on confidentiality. 5th Aff. DeSoto ¶ 11, Ex. 9: Dep. Stephen Paul Pieper 53:23-25, Sept. 15, 2017.

Indeed, every party or witness familiar with the structure or functioning of the congregations of Jehovah's Witnesses who testified in this case agreed that Jehovah's Witnesses' teachings on confidentiality give congregation members an expectation of confidentiality with respect to their communication with elders concerning a matter

involving serious sin. When an accusation of serious sin, such as the one Holly made against Maximo, is received, the elders follow internal processes to help the sinner repent. And that necessarily involves sharing information with the accused sinner. Although the definition and practice of confidentiality within the faith of Jehovah's Witnesses does not mirror the religious practices of the Roman Catholic Church concerning the seal of confession, the practices of Jehovah's Witnesses concerning confidentiality is "church doctrine, or established church practice" as required by § 41-3-201(6)(c).

**iii. Holly had no reason to think "confidentiality" would mean "secrecy."**

Holly's March 19, 2004, letter was addressed "To the body of elders of the Thompson Falls congregation"—and not to one elder. The last sentence of the first paragraph says, "This is my written testimony. . . ." These words indicate that Holly understood the judicial arrangement and the concept of confidentiality within congregations of Jehovah's Witnesses. Holly voluntarily took advantage of the congregation arrangement and shared information with multiple persons and did not view it as "secret." In closing her letter to the body of elders, Holly wrote: "I want to thank Jehovah's shepherd for looking after his flock and for taking care of this situation." Pls.' Mot., Ex. A. Holly was baptized into the faith in 2000 and understood the congregation's judicial arrangement and the definition of confidentiality as understood by the faith of Jehovah's Witnesses. 5th Aff. DeSoto ¶ 5, Ex. 3; Dep. H. McGowan 60:8-12.

The fact that Holly now strategically regrets that none of the elders made a report



to the authorities, does not mean that the congregation, through its elders, is not entitled to the protection provided in the exemption of § 41-3-201(6). In fact, she testified that the congregation elders violated “a moral duty” by failing to report the abuse. 5th Aff. DeSoto ¶ 5, Ex. 3: Dep. H. McGowan 127:13-15. She recognizes that she could have reported the abuse but declined to do so. 5th Aff. DeSoto ¶ 5, Ex. 3: Dep. H. McGowan 133:5-6; Mont. Code Ann. § 41-3-201(4) (“Any person may make a report under this section if the person knows or has reasonable cause to suspect that a child is abused or neglected.”).

**b. Judicial evaluation of Bible-based doctrine of confidentiality is unconstitutional.**

**i. The Elders followed their faith’s procedures.**

Holly complains that the elders mishandled the information she gave them because “they notify headquarters and they notify the child abuser” but still view the information as confidential. Pls.’ Mot. 10. Such intra-faith disclosure pursuant to established church practices harmonizes with Montana’s reporting statute. Indeed, Chappel testified about the faith’s Bible-based judicial committee arrangement and the internal processes that require the elders to keep that information confidential. Decl. Chappel ¶¶ 55-60. No civil court is authorized to look into those ecclesiastic arrangements and second guess the internal disciplinary processes and decisions of a religious organization. Neither can the civil court determine whether the congregation elders should have used a different arrangement, or if they properly followed the direction of their faith. *Serbian E.*

*Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976).

**ii. The faith's definition of confidentiality governs.**

Holly argues that "Defendants did not keep the notification of child abuse confidential in this case. To the contrary, they followed a procedure that requires them to reveal the information to others." Pls.' Mot. 6. However, this is a misstatement. When the elders spoke to Maximo about Holly's accusations against him, they were following the direction of the faith and speaking to an accused who was in need of spiritual assistance. *See, e.g.,* Galatians 6:1; James 5:16. As Chappel explained, the Thompson Falls elders were following their Scripturally-based protocol for handling an allegation of serious sin. Decl. Chappel ¶¶ 42-49.

Neither Holly nor a civil court can determine that Jehovah's Witnesses teachings on confidentiality are invalid simply because they do not have the same views as the Roman Catholic Church. To require all faiths to embrace the Catholic definition of confidentiality based on one-on-one confession under the seal of the confessional is a blatant violation of article II, section 5 of the Montana State Constitution, which provides: "The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

In addition, accepting Holly's argument invites the court to evaluate and determine that the doctrine of confidentiality as taught and applied in congregations of Jehovah's Witnesses does not merit the same protections afforded other faiths under Montana Code Annotated § 41-3-201(6). This conclusion would violate settled constitutional protections. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). Contrary to the direction of *Lemon* and its progeny, Holly's argument invites the court into "an excessive

entanglement with religion” because the court must evaluate and conclude that the doctrine of confidentiality as defined and practiced in congregations of Jehovah’s Witnesses cannot be given the same legal weight as other faiths. The United States Supreme Court explained in its June 5, 2018 decision that such “official expressions of hostility to religion” are “inconsistent with what the Free Exercise Clause” of the First Amendment requires. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111, 2018 U.S. LEXIS 3386, at \*32 (June 5, 2018).

For these reasons, this Court should deny Plaintiffs’ motion for partial summary judgment.

**CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT II**  
(Negligence *per se*)

The Religious Defendants are entitled to judgment as a matter of law on Count II of the First Amended Complaint, which is a claim of negligence *per se*. Whether negligence *per se* exists is an issue of law. *Schwabe v. Custer’s Inn Assocs.*, 2000 MT 325, ¶ 23, 303 Mont. 15, 15 P.3d 903. This claim requires Plaintiffs to prove five elements: (1) the defendant violated a particular statute; (2) the statute was enacted to protect a specific class of persons; (3) the plaintiff is a member of that class; (4) the plaintiff’s injury is of the sort the statute was enacted to prevent; and (5) the statute was intended to regulate members of defendants’ class. *VanLuchene v. State*, 244 Mont. 397, 401, 797 P.2d 932, 935 (1990); *Nehring v. LaCounte*, 219 Mont. 462, 468, 712 P.2d 1329, 1333 (1986). A negligence *per se* theory fails as a matter of law if the plaintiff fails to establish all material element including causations. *Stipe v. First Interstate Bank-*

*Polson*, 2008 MT 239, ¶ 14, 344 Mont. 435, 188 P.3d 1063 (citing *Kiamas v. Mon-Kota, Inc.*, 196 Mont. 357, 362-363, 639 P.2d 1155, 1158 (1982)) (summary judgment appropriate when plaintiff fails to establish the elements of negligence).

In this case, Plaintiffs cannot establish that Montana's reporting statute was intended to regulate members of Defendants' class. The statute regulates individuals who are "professionals"—these defendants are religious corporations.

**c. The Religious Defendants are not mandated reporters.**

**i. Religious corporations and unincorporated associations are not mandated reporters.**

Montana Code Annotated § 41-3-201(2) designates specific "professionals and officials" as mandated reporters. The list includes "members of clergy, as defined at § 15-6-201(2)(b)." Mont. Code Ann. § 41-3-201(2)(h). Section 15-6-201(2)(b) defines "clergy" as individuals, including "an ordained minister, priest, or rabbi," "a commissioned or licensed minister," "a member of a religious order who has taken a vow of poverty," or "a Christian Science practitioner." Mont. Code Ann. § 15-6-201(2)(b)(i)-(iv). Religious corporations and unincorporated associations are not included in that definition.

Thus, Montana's reporting statute applies to individual ministers but not to religious corporations or unincorporated associations. These Religious Defendants are not members of the class that the statute was intended to regulate.

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## II. CONCLUSION

As a matter of law, Plaintiffs are not entitled to an Order for partial summary judgment on the Religious Defendant's Sixth Affirmative Defense because Montana's reporting statute provides an exception for ordained ministers who keep information confidential. To the extent the Defendants are vicariously liable for the conduct of the elders who decided to keep information confidential according to the religious beliefs and practices of Jehovah's Witnesses, § 41-3-201(6)(c) provides a valid affirmative defense. And, as a matter of law, Religious Defendants are entitled to an Order dismissing Count II (Negligence *Per Se*) because the Defendants—religious corporations—are not members of the class of persons § 41-3-201 was intended to regulate.

DATED this 7<sup>th</sup> day of June, 2018.

Attorneys for Religious Defendants/Third-Party  
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By Kathleen L. DeSoto  
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## CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2018, a copy of the foregoing document was served on the following persons by the following means:

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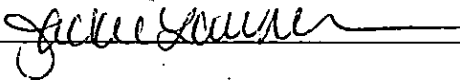
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