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Candace Fisher
SANDERS COUNTY CLERK OF DISTRICT COURT
BY [signature]

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 MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS BROUGHT BY ALEXIS NUNEZ OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION OF INDIVIDUAL CLAIMS AND SUPPORTING BRIEF

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

Third-Party Plaintiffs,

v.

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

Third-Party Defendants.

Defendants, Thompson Falls Congregation of Jehovah's Witnesses ("Congregation"), Watchtower Bible and Tract Society of New York, Inc. ("Watchtower"), and Christian Congregation of Jehovah's Witnesses ("CCJW") (collectively referred to as "the Religious Defendants") move the Court for an order pursuant to Montana Rule of Civil Procedure 56, dismissing the claims of Alexis Nunez ("Nunez"). This motion is based on the grounds that the Religious Defendants are entitled to judgment as a matter of law because there is no disputed issue of material fact that (1) none of the Religious Defendants had a special relationship with Nunez that could give rise to a duty to protect Nunez from the acts of her step-grandfather Maximo Nava Reyes ("Max"); (2) none of the Religious Defendants had a special relationship with Max Reyes that could give rise to a duty to supervise him in his own home; and (3) the acts of the Religious Defendants did not cause the harm Nunez claims to have suffered. On the contrary, any harm Nunez suffered resulted from acts that did not occur

in connection with the Religious Defendants' activities but occurred in the privacy of her grandparents' home.

If the Court determines that some portion of Nunez's case survives summary judgment, the Religious Defendants move, in the alternative, that the Court dismiss the following claims:

1. Breach of fiduciary duty;
2. Vicarious liability for the acts of Max Reyes;
3. Negligence in the failure to supervise Max Reyes; and
4. Negligence *per se*.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is about incest.[1] Nunez claims she was harmed by her step-grandfather's acts, which were committed in his home during times Nunez was under the protective care and custody of her maternal grandmother. *See* 1st Am. Compl. ¶ 32, Nov. 14, 2016 ("FAC"). Nunez bases her negligence claims upon two theories: (1) that the Religious Defendants breached a duty (either a duty of ordinary care or a fiduciary duty) owed by virtue of religious affiliation, and/or (2) vicarious liability based upon agency principles. Both theories depend upon the existence of a special relationship of custody or control with either Nunez or her grandfather. The undisputed facts prove that no such relationship existed. Thus, both theories fail and the Religious Defendants are entitled to

[1] Montana Code Annotated § 45-5-507(1) includes step children and other descendants in the definition of incest.

judgment as a matter of law.

II. STATEMENT OF MATERIAL FACTS

It is undisputed that Nunez was born in Nebraska. 6th Found. Aff. Kathleen L. DeSoto ¶¶ 3-4, June 25, 2018 ("6th Aff. DeSoto"), Ex. A: Pl. Alexis Nunez's Objections & Resps. Religious Defs.' 1st & 2nd Sets Interrogs. & Reqs. Prod., Ans. Interrog. No. 1, Aug. 9, 2017; Ex. B: Dep. Joni Navo Nunez [sic] 61:13-15, Feb. 23, 2018 ("Dep. J. Nunez").[2] At all relevant times Nunez was under the legal custody of her mother, Ivy Nunez (now Ivy McGowan-Castleberry) ("Ivy). 6th Aff. DeSoto ¶ 5, Ex. C: Dep. Ivy McGowan-Castleberry 86:18-20, Jan. 10, 2018 ("Dep. McGowan-Castleberry"). Following a divorce, Ivy arranged to have her mother (Nunez's grandmother), Joni Nava-Reyes ("Joni") babysit her four children. 6th Aff. DeSoto, Ex. C: Dep. Ivy McGowan-Castleberry 95:4-14, 99:3-7. That arrangement had nothing to do with the Religious Defendants. 6th Aff. DeSoto Ex. C: Dep. McGowan-Castleberry 95:15-17; Ex. B: Dep. J. Nunez 53:4-9. Nunez claims she was repeatedly subjected to acts of child sexual abuse by Max Reyes while in her grandparents' home. 6th Aff. DeSoto, Ex. D: Dep. Alexis Nunez 77:7-10-78:1-23, Jan. 11, 2018 ("Dep. A. Nunez").

Nunez claims the Religious Defendants are responsible for the injuries she suffered because they knew Max had previously abused a child and voluntarily undertook a duty to "vigilantly monitor" him. FAC ¶ 39. There is no evidence that any such policy,

[2] The title of the transcript is incorrect. The reporter identified Joni as "Joni Nava Nunez" although the deponent testified that her name is Joan Whitney Nava. 6th Aff. DeSoto, Ex. B: Dep. J. Nunez 13:23-25.

if it existed, extended beyond religious activities. It is undisputed that Nunez was not harmed during religious activities. 6th Aff. DeSoto, Ex. D: Dep. A. Nunez 77:7-78:23.

Alternatively, Nunez claims a duty to protect her arose either because Max was an agent of the Religious Defendants (FAC ¶¶ 19, 46 & 47) or because she was "raised in a Jehovah's Witness Family" and occasionally "attended services" at Thompson Falls Congregation. FAC ¶ 37. However, there is no evidence that Max ever held a position of responsibility in the congregation, and Nunez admits that she was never baptized into the faith of Jehovah's Witnesses. 6th Aff. DeSoto, Ex. D: Dep. A. Nunez 53:23-25. Although Nunez considered herself to be a member of the Polson Congregation, it is undisputed that Nunez was not, and did not claim to be, a member of Thompson Falls Congregation, WTNY, or CCJW. 6th Aff. DeSoto, Ex. D: Dep A. Nunez 53:19-25.

III. APPLICABLE LAW

Montana Rule of Civil Procedure 56(b) authorizes the filing of a motion for summary judgment by a party against whom relief is sought. 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 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).

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). "A 'material' fact is a fact that 'involves the elements of the cause of action or defenses to an extent that necessitates resolution of the issue by a trier of fact.'" *Arnold v. Yellowstone Mt. Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, 100 P.3d 137 (citation omitted).

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 Co.*, ¶ 24 (quoting *Koepplin v. Zortman Mining*, 267 Mont. 53, 61, 881 P.2d 1306, 1311 (1994)).

IV. ARGUMENT

Nunez asks this Court to impose liability on Religious Defendants because her grandparents were members of the Thompson Falls Congregation and, she claims, elders in that congregation knew as early as 1998 that Max had abused another child (the co-plaintiff - Nunez's maternal aunt). FAC ¶ 37. Nunez concludes that, because of

Thompson Falls Congregation's prior knowledge, all Religious Defendants had a duty to protect Nunez from abuse by Max. Her claims fail as a matter of law.

A. The first Count for negligence fails because the Religious Defendants had no special relationship with Nunez or with Max and thus owed no duty of care.

In a negligence action, "a plaintiff must prove four elements: (1) existence of a duty; (2) breach of duty; (3) causation; and (4) damages." *United States Fid. & Guar. Co. v. Camp*, 253 Mont. 64, 68, 831 P.2d 586, 588-589 (1992). If a defendant establishes the absence of a genuine issue of material fact as to any one of the elements, summary judgment in the defendant's favor is proper. *Hatch v. State Dep't of Highways*, 269 Mont. 188, 193, 887 P.2d 729, 732 (1994). This argument addresses the element of duty, which is a question of law. *Geiger v. Mont. Dep't of Revenue*, 260 Mont. 294, 298, 858 P.2d 1250, 1252 (1993). Absent a legal duty, no negligence claim can be maintained. *Jacobs v. Laurel Volunteer Fire Dep't*, 2001 MT 98, ¶ 13, 305 Mont. 225, 26 P.3d 730.

1. The Religious Defendants did not owe Nunez a general duty to protect her from danger.

Nunez claims that the Religious Defendants owed her a duty of reasonable care "in matters relating to the prevention and investigation of sexual abuse by their agents." FAC ¶ 46 (emphasis added). Max perpetrated the acts of abuse. FAC ¶ 38. Thus, this claim presupposes that by virtue of his status as "a baptized Publisher" in the Thompson Falls Congregation, Max was an agent of the Congregation (FAC ¶ 32) and, by extension, due to the relationships among corporations, Max was also an agent of WTNY and CCJW. FAC ¶ 19. Such "conclusory statements do not rise to the level of genuine issues of material fact" and cannot defeat summary judgment. *Gliko v. Permann*, 2006 MT 30,

¶ 25, 331 Mont. 112, 130 P.3d 155 (quoting *Sprunk v. First Bank Sys.*, 252 Mont. 463, 466-467, 830 P.2d 103, 105 (1992)).

There is no evidence to reach the conclusion that Max was an agent of any of the Religious Defendants. Indeed, Nunez's conclusions rest upon flawed logic because membership in an organization does not automatically create agency. Under Montana law, agency is either actual or ostensible. Mont. Code Ann. § 28-10-103(1). Ostensible agency is "when the principal intentionally or by want of ordinary care causes a third person to believe another to be the principal's agent when that person is not really employed by the principal." Mont. Code Ann. § 28-10-103(1). For ostensible agency to exist, "the principal must have undertaken some act to lead the other party to believe that an agency existed, even if it did not exist in fact. *Dick Anderson Constr., Inc. v. Monroe Prop. Co.*, 2011 MT 138, ¶ 22, 361 Mont. 30, 255 P.3d 1257 (citation omitted). Moreover, "[a] belief in ostensible agency must be reasonable." *Dick Anderson*, ¶ 22 (citation omitted).

Tellingly, Nunez does not provide any facts to establish that an agency relationship flows from congregation membership. She merely concludes that agency must exist because a person must acquire Bible education (FAC ¶¶ 14-17), and pass what she characterizes as examinations of both knowledge and character/fitness. FAC ¶¶ 17-19. From those requirements she extrapolates a flawed conclusion that an agency relationship exists to support a claim that the Religious Defendants owed a general duty to protect her from harm. FAC ¶ 30. However, Nunez has no facts supporting her conclusion, and cannot show that it would be reasonable to conclude that a member of the

congregation is an agent of the congregation. Nunez additionally seeks to impose a duty related to matters involving the privacy of the home during times that have nothing to do with religious activities. 6th Aff. DeSoto, Ex. D: Dep. A. Nunez 77:7-10.

Nunez is wrong on both arguments because even if Max had been an agent of the Religious Defendants (which he was not), Montana recognizes the traditional rule that a party "is not liable for the actions of another and is under no duty to protect another from harm in the absence of a special relationship of custody or control." *Krieg v. Massey*, 239 Mont. 469, 472, 781 P.2d 277, 279 (1989) (emphasis added) (citing *Prosser and Keeton on Torts*, § 56 at 375-377 (5th ed. 1984)); *Cf.* Restatement (Second) of Torts § 314 (2nd 1979). And a principal/master is only responsible for preventing harmful conduct that "occurs upon [their] premises or with instrumentalities under [their] control." *See* Restatement (Second) of Agency, § 213 (2nd 2010).

The Religious Defendants did not have a relationship of custody or control with either Nunez or her step-grandfather. And, even assuming that agency gave rise to a duty (it did not), any duty owed would be limited to activities that occurred on the Defendants' premises or during religious activities that the Defendants controlled. The allegations in the FAC allege the abuse of Nunez by Max occurred in the Nava home, and Nunez herself confirmed as much. 6th Aff. DeSoto, Ex. D: Dep. A. Nunez 77:7-10. There is no evidence that the Religious Defendants owned that home or that they conducted religious activities there. On the contrary, Max and Joni owned the mobile home which was located on rented property.. 6th Aff. DeSoto, Ex. B: Dep. J. Nunez 14:17-15:7.

The Religious Defendants owed no duty to protect because it had no special relationship of custody or control. *Krieg*, 781 P.2d at 279. Indeed, there is no evidence that the Religious Defendants ever had custody or control over Nunez. On the contrary, at all relevant times Nunez was under the legal custody and control of her mother, Ivy. 6th Aff. DeSoto, Ex. B: Dep. J. Nunez 52:17-53:9; Ex. C: Dep. McGowan-Castleberry 86:18-20. It is undisputed that Ivy gave temporary custody and control of Nunez to her mother, Joni, for a babysitting arrangement in Joni's home that did not involve the Congregation in any way. 6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 95:2-20.

Because the Religious Defendants owed no duty to protect, it is to no avail that Nunez lists a series of acts the Religious Defendants could have taken to prevent her from being abused. FAC ¶ 47. The Religious Defendants are entitled to judgment as a matter of law.

2. The Religious Defendants did not owe Nunez a specific legal duty to supervise Max in his home where the abuse occurred.

Nunez also asserts that the Religious Defendants owed a specific duty to supervise Max and monitor his conduct. FAC ¶ 47(g). However, even assuming *arguendo* that Max was an agent (which he was not), a master's duty to control a servant is limited to situations where (a) the servant is either upon his master's premises or is using his master's chattels **and** (b) the master knows that he has the ability to control his servant and knows of the necessity and opportunity for exercising such control. Restatement (Second) of Torts, § 317. Simply stated, a master's duty to control a servant is limited by

the scope of agency. *See Maguire v. State*, 254 Mont. 178, 182-183, 835 P.2d 755, 758 (1992) (master is not held liable for a servant's intentional acts that occur outside the course and scope of agency).

According to the First Amended Complaint, the scope of Max's purported authority involved "representing the Church in the community" through activities like "door-to-door proselytizing." FAC ¶¶ 13, 16. It is undisputed that the acts of which Nunez claims had nothing to do with religious activities. 6th Aff. DeSoto, Ex. D: Dep. A. Nunez 77:7-78:23. Thus, the question of whether Max was acting within the course and scope of his purported agency when he abused Nunez can be resolved as an issue of law. *See Bowyer v. Loftus*, 2008 MT 332, ¶ 8, 346 Mont. 182, 194 P.3d 92 ("[W]hether an act was within the scope of employment is generally a question of fact" but "it is a question of law for the court when only one legal inference may reasonably be drawn from the facts.") (citations omitted). A servant who acts entirely for his own benefit is generally held to be outside the scope of his employment and the master is relieved of liability. *Maguire*, 835 P.2d at 758 (citing *Kornec v. Mike Horse Mining*, 120 Mont. 1, 8, 180 P.2d 252, 256 (1947)).

The undisputed facts establish that Max was acting for his own benefit and <u>not</u> for the Religious Defendants when he abused Nunez in his own home when she was visiting or being babysat by Joni. Because any such acts were not "in furtherance of his [master's] interest," or "for the benefit of his [master]," they occurred outside the scope of any purported agency. *See Maguire*, 835 P.2d at 758 (internal quotations and citations

omitted). For that reason, the Religious Defendants did not have a duty to supervise Max in his home and are therefore entitled to judgment as a matter of law.

B. The second Count for negligence *per se* fails because Montana's reporting statute does not regulate corporate activities and because Nunez (who was not a resident of Montana in 1998) was not the type of victim the statute seeks to protect.

Count II of the First Amended Complaint is for Negligence *Per Se*. FAC ¶¶ 50-54. This claim requires Nunez 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) 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). Whether negligence *per se* exists is an issue of law. *Schwabe ex rel. Estate of Schwabe v. Custer's Inn Assoc.*, 2000 MT 325, ¶ 25, 303 Mont. 15, 23, 15 P.3d 903, 908, *overruled on other grounds by Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134. A negligence *per se* theory fails as a matter of law if the plaintiff fails to establish <u>all</u> material elements of negligence, including causation and damages. *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)).

1. <u>The Statute</u>. Nunez claims the Religious Defendants violated Montana Code Annotated § 41-3-201, which governs the mandatory reporting of child abuse.

FAC ¶ 51. The statute requires "mandated reporters" who know or have reasonable cause to suspect that "a child" is abused or neglected to make a report to the department of public health and human services.[3] Nunez alleges that the duty to report was triggered in 1998 when Co-Plaintiff Holly McGowan ("McGowan") reported inappropriate touching to Don Herberger, who directed McGowan to elders Ken Reich and Glen Wilson. FAC ¶ 33.[4]

2. The specific class of persons the statute was enacted to protect. Title 41 of the Montana Code Annotated governs the rights of children and duties owed to children who live in Montana. Section 41-3-101(1)(a) identifies the class of persons the mandatory reporting statute was enacted to protect: "children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for the children's care and protection."

3. Nunez was not among that class of persons in 1998. It is undisputed that Nunez was born in Nebraska, did not live in Montana in 1998. The statute does not

[3] If agency could be established by mere membership, then each of the 150,000 Montana residents who joined AARP automatically became an agent of AARP Montana, which has offices in Helena. And, by the same logic, every AARP Montana member would become an agent of the national organization, headquartered in Washington DC. Even if agency could be established by membership (it cannot), to find liability the court would have to take into consideration the different rights and responsibilities that come with different categories of membership notwithstanding constitutional proscriptions against evaluating matters of religious polity. See https://states.aarp.org/about-aarp-montana.

[4] Ivy testified that after she allegedly spoke to Don Herberger in 1998, she never again discussed child abuse with elders in the Thompson Falls Congregation. 6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 57:19-23. Nunez testified that she never talked to any elder in the Congregation or in any of the religious corporations about abuse. 6th Aff. DeSoto, Ex. D: Dep. A. Nunez 70:10-25.

extend protections beyond the borders of Montana. Therefore, Nunez was not among the class of persons the statute was enacted to protect.

4. The Type of Injury. There is no doubt that Montana Code Annotated § 41-3-201 was enacted to prevent child abuse, which is the type of harm that Nunez claims to have suffered.

5. The Statute Did Not Regulate the Conduct of Corporations. Montana Code Annotated § 41-3-201(2)(h) requires "a member of the clergy, as defined in 15-6-201(2)(b)" to make a report to the department of public health and human resources when he or she "know[s] or [has] reasonable cause to suspect, as a result of information they receive in their professional capacity, that a child is abused or neglected." Mont. Code Ann. § 41-3-201(1). Those individuals identified in § 15-6-201(2)(b) are limited to:

> (i) an ordained minister, priest, or rabbi;
> (ii) a commissioned or licensed minister of a church or church denomination that ordains ministers if the person has the authority to perform substantially all the religious duties of the church or denomination;
> (iii) a member of a religious order who has taken a vow of poverty; or
> (iv) a Christian Science practitioner.

Mont. Code. Ann. § 15-6-201(2)(b)(i)-(iv). Notably, religious corporations are not subject to regulation by this statute – the statute regulates the conduct of individuals, i.e., ministers, priests or rabbis.

Thus, Nunez cannot establish that the Religious Defendants are in the class of defendants the statute was intended to regulate or that she was among the class of persons Montana Code Annotated § 41-3-201 was intended to protect in 1998 when the alleged

violation occurred. Therefore, the claim for negligence *per se* fails and the Religious Defendants are entitled to judgment as a matter of law.

C. The third Count for "respondent superior" fails because vicarious liability is not actionable as an independent claim.

As a third Count against the Defendants, Nunez claims liability under the doctrine of respondeat superior. FAC ¶¶ 55-57. However, "'*respondeat superior*' is not a free-standing or independent tort cause of action; rather it is a doctrine of the law of agency by which the consequences of one person's actions may be attributed to another person." *Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 64, 342 Mont. 29, 179 P.3d 481. As noted above, a principal's liability is derivative from the negligent acts of the agent who is acting within the scope of his agency. *Maguire*, 835 P.2d at 758.

A claim for derivative liability fails because the imposition of liability upon a principal under the doctrine of respondeat superior requires:

> [T]he servant or agent must have been acting in the "course of his employment," in "furtherance of his employer's interest," or "for the benefit of his master," "in the scope of his employment," etc. But a servant who acts entirely for his own benefit is generally held to be outside the scope of his employment and the master is relieved of liability.

Maguire, 835 P.2d at 748 (quoting *Kornec*, 180 P.2d at 256).

The plaintiff in *Maguire* (Margaret Maguire) was the mother of an autistic and severely mentally handicapped adult patient (Mary Glover) who was raped by an employee at the Montana Developmental Center ("MDC") while she was a resident of the MDC. *Maguire*, 835 P.2d at 757. The district court granted summary judgment to Maguire and Glover on the issue of liability, based on Restatement (Second) of Agency

§ 214, which provides that a master or principal is vicariously liable for the wrongdoing of servants when the duty to the injured party is non-delegable. *Maguire*, 835 P.2d at 758. The Montana Supreme Court reversed, declining to extend liability to include the intentional, criminal acts of employees under § 214. *Maguire*, 835 P.2d at 760.

The Court first discussed the general rule that an employer is subject to liability for the wrongful act of an employee only when the wrongful act is committed within the scope of the actual employment. *Maguire*, 835 P.2d at 758. The Court then noted that it had "limited application of the non-delegable duty exception to the respondeat superior doctrine to instances of safety where the subject matter is inherently dangerous", such as elevator operations and dangerous construction sites. *Maguire*, 835 P.2d at 759. The Court concluded that to create such a major exception to the respondeat superior doctrine by extending liability to the employer of a caretaker who violated the law would be a "significant extension of Montana law" and was best left to the legislature. *Maguire*, 835 P.2d at 759.

To the extent Nunez's claim for respondeat superior seeks to impose liability on the Religious Defendants for Reyes' intentional misconduct, this claim fails as a matter of law. To the extent it was intended to apply to the purportedly negligent acts of congregation elders, it is duplicative of the first Count. In either event, the Religious Defendants are entitled to judgment as a matter of law.

D. The fourth Count for breach of fiduciary duty fails because the Religious Defendants had no special relationship with Nunez.

As a fourth Count, Nunez claims a breach of a fiduciary relationship with the Religious Defendants. FAC ¶¶ 58-61. Whether a fiduciary duty exists between two parties is a question of law. *Gliko*, ¶ 24. *Gliko* resolved an inconsistency in precedent to expressly:

> [R]eaffirm that whether a fiduciary duty exists between two parties is a question of law, not fact, and may be resolved on summary judgment when no genuine issues of material fact remain. Likewise, whether a 'special relationship' exists between two parties such as would give rise to a fiduciary duty is a question of law, not fact, for the relationship and the duty are two sides of the same coin.

Gliko, ¶ 24.

Nunez asks this Court to interject a legal duty into the religious context because her family "placed their trust and confidence in the [Religious] Defendants that they would protect the Plaintiffs from harm." FAC ¶ 59. But, as noted earlier, civil law does not impose upon a defendant the responsibility to protect anyone off the defendant's property and outside the scope of the third person's activities. *Krieg*, 781 P.2d at 279; Restatement (Second) of Agency § 213. Superimposing or interjecting a civil duty into the pastoral relationship context violates constitutional protections granted to the Religious Defendants.

Elsewhere in the First Amended Complaint, Nunez alleges a relationship with the Religious Defendants based upon common religious affiliation. FAC ¶¶ 37 and 59. Although Count IV claims in conclusory fashion that the relationship "was fiduciary in nature" because the defendants "placed themselves in a position of trust and confidence with Plaintiffs," the allegations of this Count are devoid of supporting facts. FAC ¶¶ 58-61. Nunez admitted in her deposition that she was never baptized into the faith of

Jehovah's Witnesses. 6th Aff. DeSoto, Ex. D: Dep. A. Nunez 53:23-25. Moreover, Nunez also admitted that when she was in Montana, she considered herself to be a member of the Polson Congregation, not the Thompson Falls Congregation. 6th Aff. DeSoto, Ex. D Dep. A. Nunez 53:21-22.

Regardless, no special relationship giving rise to a fiduciary duty arises from purely ecclesiastical relationships. Indeed, the imposition of a legal duty based upon an ecclesiastical relationship would violate the First Amendment to the United States Constitution and article II, section 5 of the Montana Constitution. The article *The Church Autonomy Doctrine: Where Tort Law Should Step Aside* explains:

> Courts have recognized that the problem with claiming breach of fiduciary duty against clergy or churches under most circumstances is the impossibility of defining the nature and scope of the alleged duty of care without intruding into the constitutionally protected autonomy of religious organizations.
>
> Shoehorning clerics and congregants into a fiduciary relationship with legal duties violates the church autonomy doctrine because, in determining the nature of such context-specific relationships, the judicial analysis "inevitably require[s] inquiry into the religious aspects of the [clergy-parishioner] relationship" in order to establish "the duty owed by [a cleric] to [his or her] parishioners." Plaintiffs sometimes specifically allege a fiduciary duty based on the trust and confidence they placed in their cleric because of his or her spiritual authority and their own devotion to church teachings. These are precisely the types of allegations civil courts refuse to consider. "However consequential [such a relationship] may be in a religious context, it provides no basis to support liability in a civil context.

Robert S. Marx Lecture, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. Cin. L. Rev. 431, 464 (2012). This Court should not find that a legal duty arose from any trust and confidence Nunez claims to have placed in the Religious Defendants because of religious affiliation.

Indeed, any finding that a fiduciary relationship exists between Nunez and the Religious Defendants based upon religious affiliation is subject to reversal on constitutional grounds because a fiduciary duty imposes a legally enforceable obligation to act for the benefit of another on matters within the scope of the relationship. The "very process of inquiry" into the ecclesiastical relationship improperly intrudes into ecclesiastical matters and entangles the Court into mattes of religion. *NLRB v. Chi. Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by [the Court in adjudicating such claims] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); *United States v. Ballard*, 322 U.S. 78, 87 (1944) (secular courts have no role in questioning the verity of religious beliefs).

Nunez also takes issue with the fact that Max's congregation membership was reinstated after it had been revoked. FAC ¶ 40. To the extent this constitutes a claim that the congregation's treatment of a repentant sinner (Max) violated the rights of another congregation member (Nunez), that claim is nothing more than a thinly disguised claim of clergy malpractice. The Religious Defendants found no Montana case that permits a claim for clergy malpractice. The Montana Supreme Court has been leery of extending tort liability based on ecclesiastical decisions. *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 300, 852 P.2d 640, 648 (1993), *overruled on another point by Gliko, supra* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free

exercise of religion."). Other courts have soundly rejected claims for clergy malpractice. *See e.g., Dausch v. Ryske*, 52 F.3d 1425 (7th Cir. 1994) (per curiam); *Schmidt v. Bishop*, 779 F. Supp. 321, 327-328 (S.D.N.Y. 1991).

Nunez cannot provide facts to establish a fiduciary relationship with the Religious Defendants. Indeed, if any relationship existed, it was based exclusively on religious affiliation. Religious affiliation does not give rise to a fiduciary duty and the Religious Defendants are entitled to judgment as a matter of law.

E. The fifth Count for exemplary and punitive damages fails because Nunez is not entitled to compensatory damages.

As a separate claim, Nunez seeks exemplary and punitive damages pursuant to Montana Code Annotated § 27-1-221. FAC ¶ 65. That statute is subject to the preceding section, Montana Code Annotated § 27-1-220, which permits an award of punitive damages "in addition to compensatory damages." In accord with this express statutory language, a valid compensable claim is a predicate to such an award. As a matter of law, punitive damages are unavailable absent a valid claim for compensatory damages. *Folsom v. Mont. Pub. Emples. Ass'n*, 2017 MT 204, ¶ 51, 388 Mont. 307, 400 P.3d 706 ("punitive damages are not available as a matter of law absent an award of compensatory damages on a predicate cause of action from which the actual malice or actual fraud arose"). Because each of the previous Counts fails as a matter of law, this separate claim fails as well.

Even if this Court determines that some part of Nunez's claim survives summary judgment, there is no "clear and convincing" evidence of malice on the part of the

Religious Defendants that would warrant an award of punitive damages. Nunez claims that the sexual abuse she suffered resulted from the Religious Defendants' "conscious or intentional disregard or with indifference to the high probability of injury . . . ." FAC ¶ 63. But the dangerous condition that resulted in her injury was known to the two people who were in the best position to protect Nunez – her mother Ivy and her grandmother Joni.

In this regard, the undisputed evidence shows that Ivy and Joni were fully aware of the danger to which they exposed Nunez beginning in 2002. FAC ¶ 38. Nunez's mother, Ivy, knew in 1998 that there was an accusation against Max. 6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 94:18-22. Ivy testified that in the late summer of 1998 she received information from a co-worker who said she had seen Max with his hands up Holly McGowan's shirt, fondling her breasts. 6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 44:7-45:24. Holly confirmed the report. 6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 45:25-46:2. And Ivy allegedly passed on the information to Joni. 6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 46:9-11. However, Ivy did not shut down contact between Nunez and Max, and instead, took Nunez to Max's home and dropped Nunez off into Joni's care and custody on Friday evenings, leaving her there until Sunday. 6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 95:2-14.

In that private babysitting arrangement that did not involve the Religious Defendants (6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 95:15-96:1), Ivy put her own need for a babysitter ahead of the risk of leaving Nunez in the care of a babysitter who lived with a man Ivy knew had been accused of abusing another child.

6th Aff. DeSoto, Ex. C: Dep. McGowan-Castleberry 95:2-96:1. By contrast, the Religious Defendants had nothing to do with that private babysitting arrangement and did not have any knowledge of it. Thus, even if the congregation knew that Max had previously abused a child in 1998, it did not know that Nunez was in peril in 2002. There are no facts to support an allegation that any of the Religious Defendants acted with malice. And, even though there is a dispute as to whether Thompson Falls Congregation elders knew that Max had abused Holly in 1998, there is no evidence that Watchtower or CCJW received any such information until after Nunez had been harmed. Thus, the claim of callous disregard is far attenuated as it applies to those New York religious corporations.

V. CONCLUSION

For the reasons set forth above, each of Nunez's claims fail as a matter of law. Therefore, Nunez is not entitled to compensatory damages and cannot be awarded punitive damages in addition thereto. Additionally, there is no clear and convincing evidence that the Religious Defendants acted with conscious disregard for Nunez's rights, or with malicious intent. Thus, the Religious Defendants are entitled to judgment as a matter of law. Wherefore, each of the Religious Defendants requests the Court to enter Summary Judgment in its favor or, in the alternative, for summary adjudication as to each independent Count I – Negligence (¶¶ 45-49), Count II – Negligence *Per Se* (¶¶ 50-54), Count III – Respondeat Superior (¶¶ 55-57), Count IV - Breach of Fiduciary Duty (¶¶ 58-61); and Count V – Malice - Exemplary and Punitive Damages (¶¶ 62-65).

DATED this 25th day of June, 2018.

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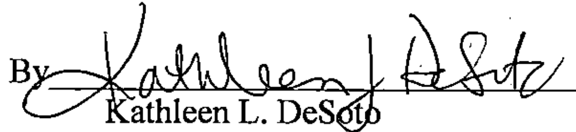

By ______________________
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, a copy of the foregoing document was served on the following persons by the following means:

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