

Kathleen L. DeSoto
Tessa A. Keller
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595
kldesoto@garlington.com
takeller@garlington.com

FILED June 27, 2018
Candace Fisher
SANDERS COUNTY CLERK OF DISTRICT COURT
BY [Signature]
DEPUTY

Joel M. Taylor (*Pro Hac Vice*)
Associate General Counsel
Watchtower Bible and Tract Society of New York, Inc.
100 Watchtower Drive
Patterson, NY 12563
Telephone (845) 306-1000
jmtaylor@jw.org

Attorneys for Defendants/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

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 IN LIMINE BY
DEFENDANTS WATCHTOWER BIBLE
AND TRACT SOCIETY OF NEW
YORK, INC., CHRISTIAN
CONGREGATION OF JEHOVAH'S
WITNESSES, AND THOMPSON FALLS
CONGREGATION OF JEHOVAH'S
WITNESSES TO EXCLUDE ALL
REFERENCES TO THE AUSTRALIAN
ROYAL COMMISSION

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/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc. ("Watchtower NY"), Christian Congregation of Jehovah's Witnesses ("CCJW") and the Thompson Falls Congregation of Jehovah's Witnesses ("Thompson Falls Congregation") (collectively "Religious Defendants"), move this Court *in limine* to preclude any evidence, statements, testimony, or arguments regarding or referencing the Australian Royal Commission's Report ("Foreign Report"). 7th Found. Aff. Kathleen L. DeSoto, ¶ 4, June 26, 2018 ("7th Aff. DeSoto"), Ex. B: Dr. Corwin Rep. at 11, May 21, 2018.

I. MEMORANDUM OF POINTS AND AUTHORITIES

A. Basis for Excluding Evidence

1. Montana Rule of Evidence 402 provides that evidence which is not relevant is not admissible. Unless evidence pertains to a fact "that is of consequence to the determination of the action" (and thus relevant as defined by Montana Rule of Evidence

401), the evidence is inadmissible.

2. Even if evidence is relevant, it may be excluded under Montana Rule of Evidence 403 on the grounds of prejudice, confusion or waste of time.

3. *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 852 P.2d 640 (1993), held that the First Amendment to the United States Constitution bars an inquiry into whether certain religious conduct conformed to the standards of a particular religious group.

4. The First Amendment to the United States Constitution preserves the freedom of religion under the establishment clause and the free exercise clause.

5. Article II, section 5 of the Montana Constitution preserves the freedom of religion under the establishment clause and the free exercise clause.

II. APPLICABLE LAW

A motion in limine is the proper way to prevent the introduction of evidence which is irrelevant, immaterial or unfairly prejudicial. *Feller v. Fox*, 237 Mont. 150, 153, 772 P.2d 842, 844 (1989), overruled on other grounds by *Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134. Relevant evidence is defined as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mont. R. Evid. 401. Evidence that tends to logically establish a fact in issue is relevant, and evidence that fails to do so is not relevant. *Monaco v. Cecconi*, 180 Mont. 111, 120, 589 P.2d 156, 161 (1979). "Evidence which is not relevant is not admissible." Mont. R. Evid. 402.

Moreover, even if evidence is determined to be relevant, it is properly “excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .” Mont. R. Evid. 403.

III. ARGUMENT

A. Any Reference to the Foreign Report Would Violate Settled Evidentiary Rules and Constitutional Principles

Plaintiffs’ expert, David L. Corwin, MD (“Corwin”), interviewed Holly McGowan and Alexis Nunez on March 25, 2018, and April 1, 2018, respectively. Corwin thereafter provided Plaintiffs with reports that indicate that his “opinions [were] based, in part, upon the . . . Australian Royal Commission into Institutional Responses to Child Sexual Abuse Report Case Study 29.” 7th Aff. DeSoto, Ex. B at 1. Corwin fully endorsed the Commission’s finding and in connection with Plaintiff Holly McGowan’s report, he stated: “I agree with the Commission’s Conclusions,” and he thereafter concluded by stating “the failure of her religious Elders to hear and to protect her was a betrayal on the same level as the sexual abuse by Max.” 7th Aff. DeSoto, Ex. B at 8.

Corwin’s reference to and reliance on the Foreign Report is improper because the Foreign Report is irrelevant under Montana Rule of Evidence 402 as none of the Religious Defendants were the subject of the Foreign Report. Furthermore, none of the Religious Defendants participated in the Commission. In effect, Plaintiffs seek to introduce and rely on conclusions from a quasi-legislative body in another continent to establish liability and duty for United States based entities.

Assuming arguendo, that the Foreign Report contained relevant information, its

probative value is outweighed by the potential for unfair prejudice, and confusion in violate of Montana Rule of Evidence 403. The Foreign Report contains hearsay testimony, for which no exception exists and any use of the Foreign Report would violate the Religious Defendants' constitutionally protected right to religious freedom and freedom from State-established religion. If the Foreign Report is referenced or relied upon for any testimony, the Religious Defendants will be denied due process in that they will be unable to cross-examine the authors of the Foreign Report.

It is important to note that a Royal Commission is not a judicial body and cannot prosecute. Their findings are not binding on any other body and they have no authoritative legal value in Australia. They are a forum for inquiry and allow individuals to express their opinions¹. A Royal Commission is an ad hoc advisory committee established by a foreign government to investigate any subject the administration chooses. Not even the Australian government is bound to accept the advice of any Royal Commission.²

///

¹ See, e.g. Royal Commission — A Brief Background, published November 24, 2015, by Mathisha Panagoda, <https://www.codea.com.au/publication/royal-commissions-a-brief-background/>.

² See, e.g. *Powers of a Royal Commission* published by the Australian government that explains the commission's "coercive powers" but make no mention of traditional rights included in the concept of due process such as adequate notice, the right to be heard, right to representation, right to rebuttal, right to confront your accuser, or right of cross examination.

<https://www.dss.gov.au/.../Fact%20Sheet%20on%20Royal%20Commissions%20ACC>
Last accessed June 19, 2018.

Notably, neither Corwin nor Plaintiffs were participants in the Australian proceedings (because it did not involve U.S. matters). Dep. Holly McGowan, 127:4 - 128:19, Jan. 9, 2018. Thus, Corwin's reliance on the Foreign Report for his expert conclusions violates Montana and Federal Constitutional protections. The United States Supreme Court recently restated a long-standing principle reminding all that religions deserve protections. This is especially true when the hostile expression emanates from an "official source." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-11, 2018 U.S. LEXIS 3386, at *32 (June 4, 2018) ("official expressions of hostility to religion" are "inconsistent with what the Free Exercise Clause" of the First Amendment requires.)

IV. CONCLUSION

Accordingly, the Plaintiffs should be precluded for submitting any evidence, statements, testimony, or arguments regarding or referencing the Australian Royal Commission's Report.

DATED this 26th day of June, 2018.

Attorneys for Religious Defendants/Third-Party
Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By Kathleen L. DeSoto
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2018, a copy of the foregoing document was served on the following persons by the following means:

_____	Hand Delivery
<u>3, 5</u>	Mail
_____	Overnight Delivery Service
_____	Fax (include fax number in address)
<u>1-2, 4</u>	E-Mail (include email in address)

1. James P. Molloy
Gallik, Bremer & Molloy, P.C.
P.O. Box 70
Bozeman, MT 59771-0070
jim@galliklawfirm.com
Corrie@galliklawfirm.com
Attorneys for Plaintiffs

2. D. Neil Smith
Nix, Patterson & Roach, LLP
1845 Woodall Rodgers Fwy., Ste. 1050
Dallas, TX 75201
dneilsmith@me.com

Ross Leonoudakis
Nix, Patterson & Roach, LLP
3600 N. Capital of Texas Hwy, Ste. B350
Austin, TX 78746
rossl@nixlaw.com
Attorneys for Plaintiffs

3. **PERSONAL & CONFIDENTIAL**
Maximo Reyes
P.O. Box 566
Plains, MT 59859

4. Matthew A. McKeon
McKeon Law Firm, PLLC
257 W. Front St., Ste. A
Missoula, MT 59802
matthew@mckeonlawoffice.com
Attorneys for Third-Party Defendant Ivy McGowan-Castleberry

5. **COURTESY COPY TO:**
Hon. James A. Manley
20th Judicial District Court
106 Fourth Ave. E.
Polson, MT 59860

Julie Ludwig