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MONTANA TWENTIETH JUDICIAL DISTRICT COURT
SANDERS COUNTY

ALEXIS 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/Third-Party Plaintiffs, vs. MAXIMO NAVA REYES, Third-Party Defendant.	§ §	Cause No. DV 16-84 Hon James A. Manley **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANTS' THIRD PARTY CLAIMS AGAINST MAX REYES AND MARCO NUNEZ AND DEFENDANTS' THIRD AFFIRMATIVE DEFENSE**

A. Sexually Abusing a Child is an Intentional Act

There is nothing negligent about sexually abusing a child. Defendants have not offered any evidence to support their groundless position that Max Reyes and Marco Nunez were somehow negligent by allowing themselves to sexually abuse children. Consequently, there is no genuine issue of material fact—and the Court can find as a matter of law—that Max and Marco's sexual abuse of the plaintiffs was intentional. Indeed, the Montana Supreme Court "has identified certain acts, such as hitting another person in the face with your fist, that if admitted or proven, are 'per se' intentional acts regardless of whether the actual injury inflicted was intended." *Safeco Ins. Co. of Am. v. Liss*, 2000 MT 380, ¶ 37, 303 Mont. 519, 529, 16 P.3d 399, 406. One of those "per se" intentional acts is sexual molestation of a minor. *See N.H. Ins. Grp. v. Strecker,* 244 Mont. 478, 798 P.2d 130 (1990) (affirming the District Court's finding on summary judgment that the defendants' admitted sexual molestation of his daughter was intentional as a matter of law.) Other courts agree. *See Gen. Accident Ins. Co. of Am. v. Allen*, 708 A.2d 828, 830 (Pa. Super. Ct. 1998) ("the injury to a child in sexual abuse cases is deemed to be intentional as a matter of law regardless of whether they are characterized in a complaint as resulting from intentional or negligent acts."); *Pettit v. Erie Ins. Exch.*, 349 Md. 777, 786, 709 A.2d 1287, 1292 (1998) (as a matter of law, sexual molestation cannot constitute negligence); *C.L. v. Sch. Dist. of Menomonee Falls*, 221 Wis. 2d 692, 702, 585 N.W.2d 826, 830 (Ct. App. 1998) ("the term 'negligent sexual molestation' is really an oxymoron."); *Allstate Ins. Co. v. Izzo*, CV 90-4073 (ADS), 1993 U.S. Dist. LEXIS 16421, at *60 (E.D.N.Y. 1993) ("underlying legal proceedings at issue in this case allege that the minors were subjected to sexual abuse, rape, and sodomy and these acts, criminal in nature, constitute intentional conduct, as a matter of law.") Here, it is undisputed that Max and Marco both sexually abused Plaintiffs. Thus, the Court can find as a matter of law that their acts were intentional.

The law in Montana is clear. Section 27-1-703 precludes the comparison of intentional conduct with negligent conduct. *See* 27-1-703(a), MCA (1997)*; See also Martel v. Montana Power Co.*, 231 Mont. 96, 752 P.2d 140, 143 (Mont. 1988) ("all forms of conduct amounting to negligence in any form . . . are to be compared with any conduct that falls short of conduct intended to cause injury or damage.") As a result, the intentional conduct of Max Reyes and Marco Nunez cannot be compared to Defendants' negligence in this case.

Defendants also claim that dismissal of Defendants' claims against Max Reyes and Marco Nunez and inappropriate under *Pula v. State,* 2002 MT 9, 308 Mont. 122, 40 P.3d 264. However, *Pula* did not address whether defendants properly joined third parties in a lawsuit. *Pula* addressed only the issue of whether *evidence* of third party conduct was admissible at trial. *Id. Clark v. Bell,* 2009 MT 390 is distinguishable for the same reason. Admissibility of the conduct of third-parties is a separate question than the one posed by Plaintiffs' motion and has been separately briefed in Plaintiffs' Motion *in limine*.

B. Plaintiffs No Longer Assert That Defendants Are Vicariously Liable for the Abuse by Max Reyes

As stated in Plaintiffs' prior briefing, while Plaintiffs do not concede that Max Reyes never acted as an agent of Defendants, Plaintiffs are no longer pursuing a theory of vicarious liability against the Defendants for the intentional acts of sexual abuse perpetrated by Max Reyes. Plaintiffs do still contend that Defendants are vicariously liable for the acts of their Elders in investigating and handling Plaintiffs' reports of abuse. As a result, Defendants' claim for indemnity against Max Reyes fails. Defendants' claim for indemnity as to Marco Nunez fails for the reasons stated in Plaintiffs' motion.

C. Marco Nunez Was Never Served With Process in this Lawsuit

Plaintiffs have no evidence that Marco Nunez was ever served with process in this lawsuit or that he has otherwise subjected himself to the jurisdiction of this Court. Therefore, he is not a proper party and Defendants' claims against him must be dismissed. *Gomke v. N. Mont. Hosp.*, 2009 MT 311N, ¶ 15 (dismissing a complaint for insufficient service of process under Mont. R. Civ. P. 12(b)(5)) (citing *Fonk v. Ulsher*, 260 Mont. 379, 383-84, 860 P.2d 145, 147 (1993)) ("Improper service undermines a court's jurisdiction . . . . The directions of the service of process rule are mandatory and must be strictly followed . . . .").

D. Defendants' Claims and Affirmative Defenses For Indemnity and Contribution Fail

For the reasons described above and in Plaintiffs' motion, Defendants cannot establish that they are entitled to contribution or indemnification from Reyes or Nunez—regardless of whether asserted as a claim or defense. Accordingly, Plaintiffs request that the Court grant Plaintiffs' Motion for Partial Summary Judgment as to 1) Defendants' third-party claims against Max Reyes and Marco Nunez and 2) Defendants' Third Affirmative Defense as it pertains to Max Reyes and Marco Nunez.

DATED: This 1st day of August, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all attorneys of record via Email on this the 1st day of August, 2018.

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