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STATE OF MONTANA
Case Number: OP 18-0534

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP-18-0534

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

Petitioners,

v.

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY, and THE HONORABLE JAMES A. MANLEY, PRESIDING JUDGE,

Respondents.

RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

On Petition from the Twentieth Judicial District Court,
Sanders County, Montana
Cause No DV 16-84
Honorable James A. Manley

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INTRODUCTION

Defendants seek supervisory control to review certain Orders issued by Honorable James A. Manley of the Twentieth Judicial District Court. Defendants fail to establish the conditions necessary for supervisory control exist in this case. Instead, Defendants' Petition is merely a second bite at the summary judgment apple wherein they recast many of the same arguments they made to the District Court.

Defendants fail to provide the factual record upon which the District Court relied, including the Pre-Trial Order ("PTO") entered into by the parties *before* the District Court entered its Orders. Plaintiffs' Exhibits ("Exh.") 1. Defendants stipulated to several facts that they now argue are still disputed.

The issues raised in Defendants' Petition do not justify the extraordinary remedy of supervisory control.

STATEMENT OF FACTS

Plaintiffs are two women who were sexually abused as young children by Max Reyes ("Reyes") between 1994 and 2007 in Thompson Falls, Montana. Reyes was a member of the Thompson Falls Congregation of Jehovah's Witnesses (the "Congregation"). Both Plaintiffs attended services at the Congregation as children. Defendants Watchtower Bible & Tract Society and

Christian Congregation of Jehovah's Witnesses are corporations created and used by the leaders of Jehovah's Witnesses as part of Defendants' hierarchical structure to facilitate, instruct, and operate the religion.

It is undisputed that in 2004 Defendants received notice that Reyes had sexually abused young children. Defendants failed to notify authorities, choosing instead to handle the allegations internally pursuant to their own policies and procedures. Consequently, Reyes was allowed to sexually abuse Alexis Nunez for several years following the 2004 report.

Plaintiffs allege that Defendants' procedures and policies for handling reports of child sexual abuse—including their failure to report pursuant to Montana's mandatory reporter statute—were negligent. Defendants asserted as an affirmative defense that the acts of sexual abuse by Max Reyes were an unforeseeable, intervening or superseding cause.

The factual record in this case includes Defendants' own documents showing their notice of child sexual abuse. They also include the policies and procedures they have implemented to handle reports of child sexual abuse and how to manage known child molesters within a congregation.

On August 14, 2018, Judge Manley held a pre-trial conference in Thompson Falls and heard arguments on pending motions. At that conference, the parties entered into an agreed PTO. Based on the extensive factual record

and Defendants' stipulations and admissions in the PTO, Judge Manley issued the rulings that Defendants challenge.

ARGUMENT

This Court's authorities clearly establish that the "extraordinary remedy" of supervisory control is "sometimes justified" only when the petitioner establishes ***all three*** elements: "(1) 'urgency or emergency factors exist making the normal appeal process inadequate,' (2) the 'case involves purely legal questions,' *and* (3) the 'other court is proceeding under a mistake of law and is causing a gross injustice[.]" *BSA v. Mont. Eighth Judicial Dist. Court*, 2017 Mont. LEXIS 757 *4, 390 Mont. 426, 410 P.3d 171 (Published in Table Format)(emphasis added)(quoting Mont. R. App. P. 14(3)). This Court routinely declines to exercise supervisory control when all three elements are not established. *See, e.g., Id.; Sisters of Charity of Leavenworth Health Sys. v. Mont. Sixteenth Judicial Dist. Court,* 2018 Mont. LEXIS 223 (July 3, 2018).

Defendants have not established that the grounds upon which they rely involve purely legal questions. To the contrary, most of their arguments involve factual issues that will be further developed at trial through exhibits and witness testimony. Only with a full record can this Court decide whether the Orders challenged by Defendants are legally correct. *See BSA v. Mont. Eighth Judicial Dist. Court*, 2017 Mont. LEXIS 757 at *5 ("Whether the District Court was

correct in making [a factual finding on foreseeability]…does not constitute a purely legal question….We conclude … that the normal appeal process is adequate.").

In addition, Defendants misconstrue the effects of the challenged Orders. They suggest, for example, that the Court has by omission taken away their statute of limitations defense to Holly McGowan's claims. This is simply not true. Indeed, Plaintiffs' proposed verdict form includes a threshold jury question for Holly's claim, asking whether she discovered or reasonably should have discovered the relationship between the sexual abuse and her injuries more than three years before filing this lawsuit.

Similarly, Defendants argue that the Court ruled that CCJW and Watchtower are mandatory reporters. This, too, is incorrect. The Court found that Defendants are vicariously liable for their agents' failures to report. It is undisputed that agents for each Defendant received notice of the 2004 abuse and that these agents were all clergy as defined under Montana law. Each Defendant has stipulated to the agency of its actors. Based on that agency relationship, the corporate defendants are vicariously liable. Again, this Court cannot determine the correctness of the challenged Order without having a fully developed factual record before it, because it is not a purely legal issue.

The only purely legal issue Defendants raise is whether the Court properly dismissed their claims for contribution against Max Reyes and Marco Nunez. The intentional act of abusing a child is not negligence. The Court correctly determined under established Montana law that intentional conduct cannot be compared to negligent conduct for purposes of apportionment of fault or contribution. Notably, in doing so, the Court allowed the third-party claim against Ivy McGowan-Castleberry to proceed to trial. Defendants' ("Defs.") App. B.

Defendants have not satisfied their burden of establishing the existence of all three requisite elements for the extraordinary remedy of supervisory control. The Petition should be denied and this case should proceed to trial so a complete record can be developed. All the arguments advanced by Defendants can be preserved for appeal if Plaintiffs prevail at trial.

A. The District Court Properly Ruled on Plaintiffs' Negligence Per Se Claim and Defendants' Affirmative Defenses.

1. The District Court Properly Ruled that the Harm to Alexis Nunez was Foreseeable.

Defendants' argument that Max Reyes's sexual abuse of Alexis Nunez was not foreseeable lacks merit. As described above, the Court determined based on as substantial factual record that "the Plaintiffs were members of the class sought to be protected by the statute, and the perpetrators and harm were

exactly what was sought to be protected against. Foreseeability is therefore established by statute." Defs. App. C at 3. Defendants do not—and cannot—argue that the mandatory reporter statute is not intended to protect children from abuse. Instead, Defendants misapply Montana law to argue that the harm to Alexis was not foreseeable because Alexis was not a "community member."[1] Pet. at 11.

The issue of whether Alexis Nunez was a foreseeable plaintiff or not is a question of ***duty***—not causation. *Lopez v. Great Falls Pre-Release Servs.*, 1999 MT 199, ¶ 28, 295 Mont. 416, 422, 986 P.2d 1081, 1087 ("In analyzing foreseeability in the duty context, we look to whether or not the injured party was within the scope of risk created by the alleged negligence of the tortfeasor--that is, was the injured party a foreseeable plaintiff?"). "Where a duty is established by statute, we look to the class of people the statute intended to protect to determine whether the plaintiff is a member of that class. If so, he is a foreseeable plaintiff." *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 22, 342 Mont. 335, 343, 181 P.3d 601, 607 (citations omitted). Furthermore, "*it is well-settled that neither the specific plaintiff nor the specific injury need be foreseen.*" *Id.* at ¶ 26.

[1] It is undisputed that the abuse occurred in the State of Montana. Further, Defendants admitted that Alexis Nunez would visit religious services at Thompson Falls Congregation from 2002 to 2007. Exh. 1, Defs. Contentions, ¶ 70.

The statute at issue was enacted to protect children from abuse. Here, it is undisputed that Plaintiffs were minor children who participated in the Thompson Falls congregation. Exh. 1, Defs. Contentions at ¶ 70; Pet. at 3. Thus, the District Court correctly determined that "Plaintiffs were members of the class sought to be protected by the statute, and the perpetrators and harm were exactly what was sought to be protected against." Defs. App. C. The Court was therefore within its power to determine as a matter of law that it was foreseeable that as a result of Defendants' negligence, Max Reyes would abuse other children.

2. <u>The District Court Was Within Its Power to Determine Causation</u>.

Defendants contend the District Court "usurped the fact-finder's job by ruling on the foreseeability element of causation . . ." and determining proximate cause. Pet. at 7. Defendants essentially argue that it is never proper for a trial court to determine causation. However, this Court has repeatedly held that "[i]f there is no room for a reasonable difference of opinion as to whether the action of a party other than the defendant is the intervening cause of the plaintiff's injury, summary judgment based on proximate cause is proper." *Estate of Strever v. Cline* (1996), 278 Mont. 165, 178, 924 P.2d 666, 673-74; *see also Graham v. Mont. State Univ.* (1988), 235 Mont. 284, 290, 767 P.2d 301, 304 This Court's holding in *Fisher v. Swift Transp. Co.* is particularly instructive:

> "[I]f one of the reasons that makes a defendant's act negligent is a greater risk of a particular harmful result occurring, and that harmful result does occur, the defendant is generally liable." Specifically, we consider "whether the intervention of the later cause is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated." In sum, "a defendant's liability for his wrongful act will not be severed by the intervening act of a third party if the intervening act is one that the defendant might reasonably foresee as probable or one that the defendant might reasonably anticipate under the circumstances."
>
> The issue of whether an intervening cause was foreseeable or not is a question of fact that is normally properly left to the fact-finder for resolution. However, where reasonable minds may reach but one conclusion, foreseeability may be determined as a matter of law for summary judgment purposes.

2008 MT 105 at ¶ 42 (citations omitted).

More specifically, **this Court has determined that a District Court's determination that the criminal acts of a third party were foreseeable is not purely a legal question that justifies supervisory control so the normal appeal process is adequate.** *BSA v. Mont. Eighth Judicial Dist. Court*, *supra* at * 5 (emphasis added).

In this case—when analyzing causation— the relevant question is whether the act of the alleged intervening third-party (Max Reyes) was foreseeable. For example, in *Cusenbary v. Mortensen*, an injured bar patron sued a bar owner under Montana's dram shop act when he was injured by a drunk driver that had been over-served at Defendant's tavern. 1999 MT 221, ¶ 24, 296 Mont. 25, 32,

987 P.2d 351, 355. This Court held the actions of the drunk driver were not an intervening or superseding cause because "if one furnishes alcoholic beverages to such a person, it is reasonably foreseeable that the person will thereafter engage in drunken behavior that may endanger others." *Id.* Thus, the question of intervening cause did not turn on the specific identity of the plaintiff but on the act of the intervening third-party. *Id.* at ¶ 31 ("The intervening cause in the present case (Wells' drunken driving) is the reasonably foreseeable result of the original negligence complained of (Mortensen's serving of alcohol to Wells who was already intoxicated))."

The relevant inquiry for the purposes of an intervening cause analysis is whether Max Reyes's sexual abuse of a child is a reasonably foreseeable result of Defendants' negligent policies and procedures for handling reports of child abuse internally rather than reporting them to authorities. The District Court based its ruling on a substantial factual record that the criminal acts of Max Reyes after April of 2004 were foreseeable.

It is undisputed that as of 2004, Defendants knew that Max Reyes was an admitted child abuser. Exh. 1, Defs. Contentions at ¶¶ 54, 57, 59, 60. Further, since at least 1997, Defendants have known that child molesters present risks to other children. Several of Defendants' own documents discuss the risks that child molesters present to children and acknowledge that "experience has shown

that such an adult may well molest other children." Exh. 3 at 4, 6, 7. Nevertheless, Defendants never reported Max Reyes to authorities. As a result, he was allowed to abuse Alexis Nunez for years following the 2004 report. Thus, the factual record in this case clearly supports the District Court's ruling that Max Reyes's abuse of Alexis Nunez was foreseeable.

Moreover, with respect to Plaintiffs' negligence per se claim, this must be the result. If mandatory reporters were able to escape liability for failure to report by blaming the abuser as an intervening cause, the statute would be eviscerated and rendered meaningless. The statute contemplates foreseeable harm to children by third parties.

Based on these facts, the District Court properly concluded that reasonable minds could come to but one conclusion: it was foreseeable that Max Reyes would continue to sexually abuse children. A foreseeable act cannot be an intervening or superseding cause. Disarmed of this defense, the causal chain connecting Defendants' negligence to Plaintiff's injuries remains unbroken and therefore proximate cause is established.[2]

[2] The Court did not deprive Defendants of their ability to assert third-party claims for negligence against Alexis Nunez's mother Ivy McGowan-Castleberry. Exh. 2

3. The District Court Did Not Remove Defendants' Statute of Limitations Defense.

Defendants misinterpret the Court's ruling as depriving them of their statute of limitations defense to Holly's claims by implication. Plaintiffs do not believe that is what the Court intended. Indeed, Plaintiffs' proposed verdict form includes a threshold jury question for Holly's claim, asking whether she discovered or reasonably should have discovered the relationship between the sexual abuse and her injuries more than three years before filing this lawsuit. Plaintiffs acknowledge that Defendants are still entitled to present their affirmative defense of statute of limitations in Holly McGowan's case.

B. The District Court Correctly Found Undisputed Evidence of Agency.

Despite explicit stipulations by Defendants, they now argue that disputed facts still exist regarding the issue of agency.

Defendants have stipulated to the following facts in the PTO:

- In 2004, elders at the Thompson Falls Congregation notified the Service Department elders that Max Reyes committed serious sin involving the sexual abuse of Peter and Holly McGowan. ***When the elders at the Service Department received that notice, the elders were acting on behalf of CCJW.*** (¶ 12).
- The Legal Department ***acts as an agent of Watchtower NY.*** ¶16
- Between 2001 and 2014, when elders were appointed, that was done ***on behalf of CCJW***. (¶ 8).
- Between 2001 and 2014 the appointment of elders in congregations of Jehovah's Witnesses in the United States were ***ratified by CCJW***. (¶ 7).
- When the Service Department monitored the functioning and organization of local congregations, the Service Department was acting ***on behalf of:***

...***CCJW*** after March 2001. (¶ 10).

- CCJW stipulates that actions taken by the U.S. Branch (and its Service Department) since March 2001 on its behalf or on its letterhead ***are ratified by*** CCJW. (¶ 1).
- Since March of 2001, CCJW stipulates that any actions taken by the service department on its behalf are ratified by CCJW. CCJW ***does not seek to disclaim*** any act taken by the service department on its behalf. (¶ 2).
- Since March 2001, all communications from the U.S. Branch (and its Service Department) to local congregations about how to handle reports of child abuse were done ***on behalf of CCJW*** and were ***ratified by CCJW***. (¶ 5).

See Exh. 1, Stipulations at pp. 18 - 19.

The evidence supporting the District Court's agency finding is not only sufficient, it is overwhelming. Defendants stipulated to the facts of agency in the PTO filed with the Court before it issued the orders they now challenge. The Court had the benefit of Defendants' admissions in the PTO signed by their attorneys.

This case involves two instances when clergy members were notified that children were being abused: 1998 and 2004. The district court property found that, "**Regarding the report in 2004**, this court finds no genuine issue of material fact as to whether a report was made to members of the clergy, agents of Defendants." Defs. App. B at 3. Defendants argue that the District Court was in error because "CCJW began operations in 2001." Pet. at 13. However, the District Court's order that Defendants challenge relates to events in 2004, after CCJW began operations.

The evidence is undisputed that elders at Thompson Falls received a letter from Plaintiff McGowan in 2004. Exh. 4. In that letter, Holly disclosed "sexual abuse received from my stepfather" and described details of the abuse. The local elders at Thompson Falls conducted an investigation in accordance with instructions from Defendants Watchtower and CCJW. Exh. 1, Defs. Contentions ¶¶ 29, 42, 43, 57-62. During that investigation, Max Reyes admitted to sexually abusing a child. *See Id.*, Agreed Fact ¶ 11. The local elders contacted other elders that run the legal department, who "act[] as an agent of Watchtower NY." *See Id.* at 18, Stip. ¶ 16. Then, the local elders notified elders that run the Service Department "on behalf of CCJW." *Id.*, Stip. ¶¶ 2, 12. "CCJW received written notice that Max Reyes had committed gross sin involving the sexual abuse of Holly McGowan and Peter McGowan." *Id.* Agreed Fact ¶ 8. No one reported the child molester to authorities.

All those working for all Defendants meet the definition of clergy in the Montana mandatory reporter law. Exh. 5 at 13-14; *see* Exh. 1, Agreed Fact ¶ 7; Exh. 6, WTNY and CCJW Corporate Representative Douglas Chappel July 12, 2018 Deposition Tr., 89:19-23 ("Q. Is it fair to say that everybody that does work for Watchtower and CCJW are people that have taken a vow of poverty? A. The members of both corporations are under that vow, yes."). *See* Mont. Code Annot. § 15-6-201(2)(b) ("Clergy" includes "a member of a religious order

who has taken a vow of poverty.").

Defendants stipulate that "Congregation elders were agents of Congregation" in 1998 and 2004. *See* Pet. at 13. Therefore, agency regarding receipt of the 2004 report as to the Thompson Falls Congregation is established as a matter of law.

With respect to CCJW, Defendants have stipulated that when the Service Department **elders** received the 2004 notice, "the **elders** were acting on behalf of CCJW." Exh. 1, Stip. ¶¶ 2, 12. Thus, agency regarding receipt of the 2004 report as to CCJW is established as a matter of law.

Elders are directed to contact the Legal Department when elders learn of allegations of child sexual abuse. *Id.* Defs. Contention ¶ 59. In 2004, elders contacted the legal department and notified them of about the 2004 reports of child abuse. *Id.* The attorneys they contacted "were acting on behalf of Defendant Watchtower NY." *Id.* Therefore, agency regarding receipt of the 2004 report as to Watchtower NY is established as a matter of law.

Thus, all Defendants' agents received notice that a serial child molester was within their organization. Elders at the local congregation knew of the abuse. Elders at the Service Department of the Branch Office and at the Legal Department were notified of the abuse. None of these clergy members reported the abuse. Their failure to report child abuse violates the mandatory reporting

statute.

C. The District Court Correctly Ruled that Defendants' Clergy Members are Mandatory Reporters.

Defendants moved for summary judgment asserting they could not be negligent per se based on mandatory reporting law, making the same arguments they have raised to this Court. Defendants argued that the statute only identifies "individuals" as mandatory reporters and they are "corporations."

Plaintiffs responded by arguing that Defendants could be vicariously liable for their employees or agents that are clergy members. By analogy, traffic laws apply to drivers, not employers or corporations. But, employers may be vicariously liable based on negligence per se when such laws are violated and result in harm to others.

The District Court correctly concluded that vicarious liability still exists in Montana and was not abrogated by the mandatory reporter law. *See Lee v. Detroit Med. Ctr.* (2009), 285 Mich. App. 51, 66, 775 N.W.2d 326, 335 ("[A] well-settled common-law principle, such as the doctrine of vicarious liability, cannot be abolished by implication.").

D. The District Court Correctly Ruled that the Statutory Exception to Montana's Reporting Law Does Not Apply to Defendants.

Defendants argued that a member of the clergy "is not required to make a report under [the mandatory reporter law] if the communication is required to be

confidential by canon law, church doctrine, or established church practice." Mont. Code Annot. § 41-3-201(6)(c). They assert that the District Court incorrectly rejected this exception to the mandatory reporter law.

Defendants raised this exception as an affirmative defense. As such, Defendants had the burden of proof. Plaintiffs moved for summary judgment, establishing that Defendants had no evidence to support their defense. *See* Exh. 7. Plaintiffs focused on Defendants' inability to offer proof regarding the "confidentiality" element of the affirmative defense. *Id.*

In 2004, Defendants received reports from two victims that a member of the church had sexually abused them. Plaintiffs offered undisputed evidence that Defendants followed church policy and shared this information with, among others, the church member that abused them. *Id.*

Significantly, Defendants did not dispute that they disclosed the information. Instead, Defendants argued that they were permitted to define the term "confidential" in accordance with their own religious beliefs and that the court was constitutionally prohibited from deciding otherwise. One can only imagine the ramifications of this argument if religious organizations could implement policies to defeat laws intended to prevent the sexual abuse of minors.

Defendants' assertion that they "provided ample evidence that what Holly and Peter told the elders was 'confidential' as defined in the statute" is unsupported and incorrect. *See* Pet. at 18. Defendants provided no such evidence.

As such, the Court was left with the question of whether information from one person has been kept confidential if it is disclosed to another person. The Court correctly determined that the "confidentiality" element was not satisfied. Therefore, the affirmative defense failed as a matter of law. The District Court also correctly rejected Defendants' argument that the United States Constitution prevented the Court from ruling on this affirmative defense.

E. The District Court Correctly Ruled That Marco Nunez and Max Reyes were Not Proper Third-Parties to this Case.

Defendants advance the same baseless argument that the District Court correctly rejected. Defendants again claim that Max Reyes and Marco Nunez were somehow negligent by allowing themselves to intentionally sexually abuse children. Pet. at 19. There is nothing negligent about sexually abusing a child.

The law in Montana is clear. Section 27-1-703(a) of the Montana Code Annotated precludes the comparison of intentional conduct with negligent conduct. *See Martel v. Montana Power Co.* (1988), 231 Mont. 96, 752 P.2d 140, 143 ("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 District Court correctly ruled that the intentional conduct of Max Reyes and Marco Nunez cannot be compared to Defendants' negligence in this case. Defs. App. A.

CONCLUSION

The issues raised in Defendants' Petition do not justify the extraordinary remedy of supervisory control. The District Court properly applied the law. Plaintiffs respectfully request that this Court decline jurisdiction to consider Defendants Petition for Writ of Supervisory Control.

RESPECTFULLY SUBMITTED this 14th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionately spaced Time New Roman typeface of 14 points, is double-spaced, and the work count calculated by Word is 3,944, excluding the table of contents, table of authorities, certificate of service, and certificate of compliance.

Dated this 14th day of September, 2018

/s/ James P. Molloy
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I hereby certify that I caused the foregoing Response to be served upon the following by United States Mail, first class postage prepaid, and by emailing the same on September 14, 2018.

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