IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0077

ALEXIS NUNEZ and HOLLY McGOWAN

Plaintiffs/Appellees,

v.

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

Defendants/Appellants,

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/Appellants,

v.

MAXIMO REYES and IVY MCGOWAN-CASTLEBERRY,

Third-Party Defendants.

APPELLEES' RESPONSE BRIEF

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

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ISSUES PRESENTED

(1) Whether Defendants/Appellants ("Defendants") failed to preserve all issues except those relating to punitive damages based on their failure to object at trial and their stipulated agreement to the verdict form that answered "Yes" to the question of whether each of the Defendants was negligent.

(2) Whether Montana's Mandatory Reporting Law ("Reporting Law") requires clergy to report child sex abuse when two victims notify the clergy that a church member sexually abused them as children, the clergy then confront the member, he admits the abuse, and the elders know a minor child is staying with the pedophile in his home and attending church with him.

(3) Whether communications about child abuse that are disclosed to multiple people including the child molester have been kept "confidential" within the meaning of an exception to the Reporting Law.

(4) Whether the First Amendment allows courts to apply the statutory term "confidential" equally to all entities, including churches.

(5) Whether a principal is liable for its agent when the principal instructs the agent to violate the Reporting Law.

(6) Whether Montana's statute capping punitive damages at $10,000,000 for claims against large defendants (MCA § 27-1-220(3)) is unconstitutional.

STATEMENT OF THE CASE

This is an appeal from a verdict rendered by a jury in Sanders County based on Defendants' failure to comply with Montana's child abuse Reporting Law. The underlying facts in this case are undisputed. Defendants knew about child sex abuse and failed to report the abuse to authorities. The clergy who failed to report the abuse were following the policies of, and specific instructions from Defendants when they failed to report. The jury awarded $4 million in compensatory damages to the sex abuse victim and the amount has not been challenged on appeal.

At the District Court, Defendants contended their failure to report was excused, claiming an exception to the Reporting Law. Procedurally, both sides submitted competing motions for summary judgment. While the motions were pending, the parties provided the District Court with a Final Pretrial Order that contained numerous agreed facts and stipulations. With no disputed issues of material fact, the court was presented with the legal issues of whether the affirmative defense excused the Defendants' failure to report and, if not, whether vicarious liability applies when a principal's agent violates the Reporting Law. The court correctly determined the affirmative defense failed as a matter of law. Because the defense failed, it logically follows that Defendants violated the Reporting Law, rendering them liable for harm suffered by Plaintiff Alexis Nunez ("Lexi").

Because Defendants failed to object at trial, failed to make an offer of proof on issues they now raise, and stipulated to the verdict form that included "Yes" to question number 1 asking whether each of the Jehovah's Witnesses Defendants was negligent, Defendants failed to preserve all issues except those relating to punitive damages.

If this Court were to reach the issues raised by Defendants other than punitive damages, the key legal issues are (1) the definition of "confidential" as it relates to the affirmative defense, (2) whether Lexi is in the class protected by the statute, and (3) the application of vicarious liability. The District Court correctly decided these three issues and the case was properly submitted to the jury.

STATEMENT OF FACTS

Watchtower and CCJW are corporations "set up by the Jehovah's Witnesses' religion." Transcript Volume I, p. 188.[1] Jehovah's Witnesses comply with governmental laws, unless those laws conflict with the Bible. Final Pretrial Order, CR 96, p. 8, Defendants' Contention No. 27 (Appendix "App." A, p. 13).

The Jehovah's Witnesses religion includes men who serve as elders. Vol. I, p. 191. Elders are appointed and must be approved by the Service Department. CR 77, p. 3. The Service Department appointed elders and acted on behalf of

[1] All further citations to the trial transcript are by volume number ("Vol.") and page.

Watchtower until March 2001 and appointed elders and acted on behalf of CCJW since then. CR 96, pp. 18-19, Stipulations ("Stip.").

Elders are required to follow established Jehovah's Witnesses policies and practices. Vol. I, pp. 235-36. Since 2001, the policies were mandated to them by CCJW. Vol. I, p. 235. Before 2001, the policies were mandated by Watchtower. Vol. I, p. 236.

Don Herberger is an appointed elder. Vol. I., p. 244. Since 1998, Herberger has served as an elder at the Thompson Falls Congregation of the Jehovah's Witnesses, where Lexi attended when she stayed with her grandmother, Joni, and her step-grandfather, Maximo Reyes ("Reyes"). Vol. I., pp. 244-245. Watchtower provided Herberger with its policies. Vol. I., p. 247. If Herberger did not follow the policies, he could be removed as an elder. *Id.* Elders, including Herberger, were prohibited from setting any policies that were different than the ones Watchtower handed down. Vol. I, p. 248.

All elders appointed by the Jehovah's Witnesses are clergy. CR. 96, p. 3 Agreed Fact ("Agreed") No. 7; Vol. I, pp. 191-194. The elders who act on behalf of Watchtower and CCJW are part of a "religious order" who have taken a "vow of poverty." Vol. I, pp. 189-190; MCA § 15-6-201(2)(b)(iii).

In 2004, Peter McGowan, then 17 years old, notified Elder Herberger that he had been repeatedly sexually abused by Reyes, his stepfather and fellow Jehovah's

Witness. Vol. I, p. 250; Exhs. 1, 3 (admitted at Vol. I, p. 219). When he notified the elder that Reyes had molested him, Peter knew the elder would share the information with other elders. Vol. II, p. 166. Peter went to the elder because he "wanted to get the truth out about Max Reyes." Vol. II, p. 172. Peter wanted "people to know that [Reyes] had committed a wrong." *Id.* Peter notified the elders "because [Peter] didn't want other people to get abused by Max." *Id.* Peter wanted "other members of [the] community" to know the truth about Reyes. Vol. II, p. 173. When he notified the elders, Peter "wanted them to take [Peter's] information and go confront Max." Vol. II, p. 175.

Based on the "two witness" principle in the Jehovah's Witnesses religion, Herberger contacted Holly McGowan. Vol. II, pp. 65-66. Holly provided verbal and written notice to elders that she was also repeatedly sexually abused by Reyes. Vol. II, pp. 65-66; Exh. 2 (admitted at Vol. I, p. 219). Reyes "admitted he sexually abused children" to a committee of elders. Vol. I, p. 248. The elders were also notified that Reyes' wife failed to protect the victims from being molested. Vol. I, p. 232.

Herberger personally knew Lexi Nunez and her family. Vol. I, p. 245. He had Lexi in his home on more than one occasion. Vol. I, pp. 245-246. Lexi attended the Thompson Falls Congregation on the weekends when she was staying with her grandparents. Vol. II, pp. 37-38. Herberger knew Lexi attended services at the

congregation where he was an elder. Vol. I, p. 245. In 2004, when Herberger knew that Reyes was a child molester, Herberger would look out into the congregation and see that Lexi (a 7-year old child) was attending church with a pedophile. Vol. I, p. 246. After Herberger and the elders "knew that Max Reyes was a pedophile, [Herberger] looked out into the congregation at the Thompson Falls church and [Herberger] saw Lexi Nunez attending church with Max Reyes." Vol. I, p. 250. "When [Herberger] saw that, [Herberger] knew that Max had not been reported to any of the authorities as being a pedophile." Vol. I, p. 250. In 2004, "a known pedophile [was] coming to church with a child." Vol. I, pp. 258-59.

Herberger knew Lexi was "staying in [the pedophile's] house on the weekends." Vol. I, p. 259. When Lexi was staying at her grandparents' home Reyes was sexually abusing her. Vol. II, p. 38. Reyes sexually abused Lexi countless times during these visits, with the abuse occurring weekly. Vol. II, p. 38.

Thus, as of April 2004, the elders knew that Reyes was a pedophile and that Lexi regularly stayed at his home and attended church with him and his wife at the Thompson Falls Kingdom Hall. Pursuant to established policies, the local elders then disclosed the abuse to multiple clergy elders at CCJW and Watchtower, both located at Jehovah's Witnesses headquarters in New York. CR 96, p. 3 (Agreed Nos. 8, 12); Exhs. 1, 3, and 4. The individuals at CCJW who received written notice about the admitted pedophile were elders. Vol. I, pp. 216-18. When the elders

received the notice, they "were acting on behalf of CCJW." CR 96, p. 19 (Stip. 12). The individuals at Watchtower who received the notice about the admitted pedophile were elders. Vol. I, p. 197. When the elders at Watchtower received the notice, they were acting as "an agent for Watchtower." CR 96, p. 19 (Stip. 16).

Herberger did not keep the information Peter provided about the abuse confidential. Vol. I, p. 251. Herberger shared the information with other elders. *Id.* Herberger shared what Peter told him with Holly. Vol. II, p. 65. Herberger shared the information provided by Peter and Holly with Reyes, the pedophile. Vol. I, p. 252. Herberger also shared the information with Reyes' wife, Joni. Exhs. 1, 3.

Herberger and the other elders did not keep Reyes' admission that he was a child molester confidential. Vol. II, p. 67. Herberger contacted Holly, telling her the child molester admitted to the abuse. *Id*. Herberger shared with Holly that Reyes claimed she seduced him. *Id.* Holly was 9 or 10 when Reyes began abusing her. *Id.* Herberger questioned Holly regarding Reyes' allegation. Vol. II, p. 101. Holly denied that she seduced the pedophile, pointing out that "a 10-year-old doesn't seduce a grown man." Vol. II, pp. 67-68. Later, Herberger instructed Holly that the matter had "been handled by Jehovah and to leave it in his hands, that authorities were not needed to get involved." Vol. II, p. 68.

After Reyes admitted to sexually abusing children, he was disfellowshipped. Vol. II, p. 44. However, no one was told why this administrative action was taken.

Exh. 3. Reyes was still permitted to attend church with Lexi and participate in church services. Vol. II, p. 44. The elders acknowledged they kept the authorities, the community and the congregation in the dark about Reyes' sexual abuse of children. Exh. 3. Reyes was reinstated on June 26, 2005, at a time when he was continuing to sexually abuse Lexi. *Id.*

When a child in Defendants' religion notifies an elder that he/she has been sexually abused, the child is treated as an "accuser" and the pedophile is treated as the "accused." Vol. I, p. 253. The information is then shared with the child molester. *Id*. The information is also shared with any persons who are considered "witnesses." *Id.* The information is shared with individuals at CCJW and Watchtower. Vol. I, pp. 209-210, 253. In fact, the elders share the information with anyone "necessary to address the sin." Vol. I, p. 253. When asked at trial to identify who all the elders share information with while still claiming the information was kept *"confidential,"* the elder said it "depends on the circumstances" and that "each one is different." *Id*., pp. 253-54.

The evidence at trial established that Defendants have unwritten policies about not reporting child abuse to authorities. Vol. I, pp. 212-13. Elders must follow instructions from Watchtower. *Id.* and Vol. I, pp. 247-248. If Watchtower tells the elder not to report, the elder is prohibited from notifying law enforcement about the abuse. Vol. I, pp. 212-13. Elders are instructed by Defendants to conceal the abuse

even if the child says, "This is not me asking for confidentiality." Vol. I, pp. 212-13. Specifically, the elders are taught that "you keep your mouth shut and you don't report" the child abuse. *Id*. Elders are threatened with punishment from God if they report a child molester after being told not to report the abuse. Vol. I, p. 213.

Thus, when the local elders refused to notify authorities about the child molester, they were acting pursuant to instructions from the corporate Defendants:

> Q. Did [the elders] do everything the way they were taught to do it by the Jehovah's Witnesses as I've shown it on this board?
> A. Yes.
> Q. When they did not notify the police, that was them following policies as they were instructed, right?
> A. Yes.
> Q. These Elders right here at CCJW, when they failed to notify the police, were they following the policies just as they are taught to do?
> A. Yes.
> Q. What about Watchtower? Those guys said you don't have to report this. Were they following all the Jehovah's Witnesses policies?
> A. Yes.
> Q. Did everybody in these three organizations do exactly what the Jehovah's Witnesses want them to do?
> A. Yes.

Vol. I, pp. 236-37. *See also* Vol. I, p. 261. Shockingly, "If the same thing happened tomorrow," the elders would do the same thing. Vol. I, pp. 261-62.

STANDARD OF REVIEW

1. The interpretation of a statute is a question of law, subject to de novo review by this Court. *State v. Triplett,* 2008 MT 360, ¶ 13, 346 Mont. 383, 195 P.3d 819.

2. This Court reviews a jury verdict simply to determine whether the verdict is supported by substantial credible evidence, which is defined as evidence that a reasonable mind might accept as adequate to support a conclusion. The evidence is viewed in the light most favorable to the prevailing party with any reasonable inference that can be drawn from the facts to be construed in the prevailing party's favor. *Seltzer v. Morton,* 2007 MT 62, ¶ 94, 336 Mont. 225, 154 P.3d 903.

3. This Court may uphold a judgment on any basis supported by the record, even if the district court applied a different rationale. *Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 25, 365 Mont. 375, 286 P.3d 241.

SUMMARY OF ARGUMENT

Defendants failed to preserve error except on issues relating to punitive damages. Defendants did not object on the record to a jury instruction that determined, as a matter of law, that Defendants violated the Reporting Law and were liable for harm caused by the abuser to Lexi after 2004. Defendants also failed to object to any jury instructions given at the close of the evidence and did not object to any instructions they had offered but were not given. Most importantly, rather than objecting, Defendants *stipulated* to a verdict form that, for Lexi, determined that Defendants were negligent. Finally, although they made a motion for judgment

as a matter of law at the close of Plaintiffs' case, they did not renew that motion post-verdict, as required by Rule 50(b).

If this Court were to reach the merits of Defendants' arguments, they fail legally and factually for several reasons. First, Defendants brief is based on "imminent risk of harm" language that was removed from the Reporting Law before the events at issue in this case. Indeed, Defendants' brief makes clear that their in-house clergy lawyers made the same mistake when they incorrectly instructed elders not to report a known and admitted child abuser to the authorities.

Second, Defendants on appeal rely on an advice-of-counsel defense. Because Defendants did not plead the advice-of-counsel affirmative defense as required under Montana law, the defense fails procedurally. Of the two witnesses that attempted to raise this defense at trial, neither elder participated in the discussion with the lawyer. Additionally, Defendants did not bring the lawyer to trial to testify about why the elders were instructed not to report. As a result, the defense fails factually as well.

Third, the District Court correctly determined that Defendants violated the Reporting Law as it existed in 2004. Plaintiffs moved for partial summary judgment on Defendants' "confidentiality" affirmative defense, and Defendants cross-moved for partial summary judgment on Plaintiffs' negligence per se claim. The parties jointly submitted a Final Pretrial Order, which identified these matters as "Issues of

Law" to be decided in advance of trial. With the benefit of the Final Pretrial Order and based on undisputed facts (including facts stipulated to by Defendants), the District Court acted within its authority to decide the issues as a matter of law. In doing so, the court correctly determined that the confidentiality exception failed as a matter of law and there were not disputed liability issues.

In doing so, the District Court correctly determined that the adoption of Montana's Reporting Law did not abrogate the common law doctrine of vicarious liability. The elders, both locally and at headquarters, acted at all times according to Jehovah's Witnesses' policies and practices, and did so in furtherance of the interests of the church.

Fourth, with respect to punitive damages, there was clear and convincing evidence to support the jury's conclusion that Defendants acted with malice because Defendants acted primarily out of a concern for the interests of the Jehovah's Witnesses church, and did so at the expense of victims of child abuse. By refusing to report a known and admitted child molester, Defendants allowed Reyes to continue sexually abusing Lexi, even though Defendants knew Lexi stayed at Reyes' home and attended church with him. Defendants' local elder testified at trial that if the same situation occurred today as then, they would have responded in exactly the same way—by refusing to report a known child abuser—just as they were instructed.

Fifth, the $30 million punitive damage award against Watchtower is reasonable and complies with all requirements under the United States and Montana constitutions. The $10 million limit on this award under Montana law is unconstitutional on three grounds. The limitation violates the equal protection guarantee, the due process clause, and the right to trial by jury of the Montana Constitution.

ARGUMENT

I. DEFENDANTS FAILED TO PRESERVE ALL ISSUES EXCEPT THOSE RELATING TO PUNITIVE DAMAGES.

Defendants did not object to any of the jury instructions given by the court, nor did Defendants object to the court's failure to include any of their proposed instructions. In a conference with counsel after jury selection and before preliminary instructions, the Judge stated that Plaintiffs' proposed instruction No. 18 would be given to the jury. Vol. I, p. 140. Defendants did not object, and the instruction was given as Instruction No. 4. Vol. I, p. 147 (App. C, p. 45). Defendants did not object after the instruction was given to the jury, or at any other time during or after the trial.

During the conference with counsel for settling jury instructions, the Judge expressly stated "…if you want to make a record of objections, just speak up. If I'm hearing none, I'll assume there is none." Vol. III, p. 23. Defense counsel did not object to any of the instructions given to the jury. *See* Vol. III, pp. 18-40.

In addition, Defendants stipulated to the verdict forms which, for Lexi, included "Yes" typed on the form for each of the three religious Defendants in response to Question No. 1 ("Did the negligence, if any, of those named below cause injury to Alexis Nunez?"). Vol. III, pp. 35-36, 38; CR 128 (App. B, p. 35).

It is well-established that there is a "rule of appellate procedure that in order to preserve an issue for appeal, the appellant must have raised the issue 'at trial.'" *State v. Reichmand,* 2010 MT 228, ¶ 12, 358 Mont. 68, 243 P.3d 423. This is because it "would be 'fundamentally unfair to fault the trial court for failing to rule correctly on an issue' that [an appellant] never gave it an opportunity to actually rule on." *Comm'r of Political Practices v. Wittich*, 2017 MT 210, ¶ 74, 388 Mont. 347, 400 P.3d 735 (citation omitted). With respect to jury instructions, this rule is expressly incorporated in Mont. R. Civ. P. 51. As this Court explained in *Siebken v. Voderberg,* 2015 MT 296, ¶ 30, 381 Mont. 256, 359 P.3d 1073:

> Rule 51 provides that a party may only assign as error "an error in an instruction actually given, if that party properly objected" to the instruction. M. R. Civ. P. 51(d)(1)(A). The same rule provides, '*A party who objects to an instruction…must do so on the record*, stating distinctly the matter objected to and the grounds for the objection.' M. R. Civ. P. 51(c)(1). This Court consistently has concluded that *a party is barred from challenging an instruction on appeal for reasons not raised before the trial court*.

(Emphasis added). *See also, e.g., Seltzer v. Morton,* 2007 MT 62, ¶ 54, 336 Mont. 225, 154 P.3d 561 ("[F]ailure to object to a jury instruction at trial constitutes waiver of the opportunity to raise the objection on appeal.").

Before trial, Defendants submitted a proposed verdict form. CR 110. However, after the close of evidence, Defendants stipulated on the record to an agreed verdict form. Defendants now argue the District Court erred by granting summary judgment on liability in favor of Lexi. By stipulating to a verdict form that included negligence findings against them, Defendants have clearly waived their right to challenge the pre-trial rulings on negligence per se and their sixth affirmative defense. Mont. R. Civ. P. 49; 9 MOORE'S FED. PRACTICE – CIVIL § 49.20(5). Similarly, by failing to object to any of the jury instructions given and/or not given at trial, Defendants have waived their right to challenge the jury's verdict on appeal. *Siebken, supra;* Mont. R. Civ. P. 51.

Following the close of Plaintiffs' case, Defendants moved for judgment as a matter of law based exclusively on an argument that Plaintiffs failed to prove causation. Vol. II, pp. 143-145. The District Court denied the motion. *Id.* At the conclusion of the case, Defendants made an offer of proof relating to evidence of other abusers—an issue that Defendants have abandoned on appeal. Vol. III, pp. 40-43.

Defendants now argue there was insufficient evidence to prove their failure to report caused harm to Lexi. App. Br., pp. 37-38. Although Defendants moved for judgment as a matter of law on this issue, they failed to preserve it for appeal. A "trial court's denial of a party's preverdict Rule 50(a) motion cannot form the basis

of an appeal." *Blue Ridge Homes, Inc. v. Thein,* 2008 MT 264, ¶ 345 Mont. 125, 191 P.3d 374. In order to preserve this argument for appeal, Defendants were obligated to renew their motion pursuant to Rule 50(b). By failing to do so, they have waived their argument that the jury's verdict is not supported by the evidence. *Id.* (citing *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,* 546 U.S. 394, 406 (2005)).

In sum, Defendants failed to preserve all issues they have now raised on appeal, except those relating to punitive damages. This Court need not reach the merits of their assignments of error relating to the District Court's pretrial rulings.

II. DEFENDANTS' ARGUMENTS ARE BASED ON STATUTORY LANGUAGE THAT DID NOT EXIST IN 2004.

Defendants' arguments and defenses are erroneously based upon now deleted language from an old version of the Reporting Law that existed in 1987. The key statutory language they rely upon was removed from the statute before 2004 when Defendants were notified that Reyes was a pedophile.

Defendants are represented in this appeal by their own *in-house* legal department. Defendants open their brief by praising their *in-house* legal department for instructing their clergy members not to report child sex abuse by an admitted pedophile within their church. App. Br., 2. Defendants boldly assert that their legal department "correctly advised" the clergymen not to report the documented abuse because there was no "**imminent**" threat of abuse. *Id.* Defendants then criticize the

trial court for failing to apply an "**imminent** risk of harm" standard, arguing that such failure resulted in the court incorrectly issuing a summary judgment order. App. Br., 29. Defendants' *in-house* legal department was wrong then and they are wrong now. Their lawyers failed to read and apply the correct version of the statute at issue.

Defendants mistakenly rely on language from *Gross v. Myers* (1987), 229 Mont. 509, 748 P.2d 459 that analyzed the 1987 version of the law to argue the statute requires a "present imminent risk of abuse." App. Br., 2. This lawsuit was tried in 2018 and based on events that occurred in 2004. The 1987 version of the law does not apply because the language Defendants rely upon was removed in 1997.

The version of the statute at issue in *Gross* substantially differs from the version in effect in 2004. The 1987 version required a report when there was an "abused or neglected child," which was defined as "harmed or threatened with harm." MCA § 41-3-102(2) (1987) (App. F., p. 97). "Threatened with harm" was defined in the statute as "imminent risk of harm." *Id.* at § 102(6) (App. F., p. 98).

In 1997, the legislature removed the "harmed or threated with harm" language and defined "abused or neglected" to mean "**has suffered** abuse or neglect." MCA § 41-3-102(2) (1997)(App. E., p. 89)(emphasis added). Also, "reasonable cause to suspect" was defined as "cause that would lead a reasonable person to believe that child abuse **may have occurred or is** occurring based on all the facts and

circumstances known to the person." *Id.* at § 102(14)(App. E., p. 91)(emphasis added). The same statutory definitions existed in 2004 when the elders were notified that Reyes was a child abuser. MCA §§ 41-3-102(3), (20) (2003)(App. D, pp. 80, 82).

Defendants' assertions that "the reporting statute is triggered by evidence of present abuse, not past abuse" are wrong. App. Br., 29. The 2003 statutes specifically include references to past abuse. Defendants relied on the wrong version of the statute, and as a result, their arguments and criticism of the District Court are fatally flawed.

III. DEFENDANTS' ADVICE-OF-COUNSEL DEFENSE FAILS AS A MATTER OF LAW AND FACT.

Defendants erroneously claim on appeal that their attorneys correctly advised them not to report the abuse. Stretching the argument even further, Defendants claim the flawed advice excuses their conduct.

An advice-of-counsel defense is waived if it is not asserted as an affirmative defense in a responsive pleading. *Ammondson v. Northwestern Corp.,* 2009 MT 331, ¶ 57, 353 Mont. 28, 220 P.3d 1 ("We therefore hold that advice-of-counsel, when used as an affirmative defense, must be plead in accordance with M.R.Civ.P. 8(c)."). Defendants did not assert the defense in their responsive pleadings. CR. 8. It fails as a matter of law. No further analysis is required.

Should this Court excuse Defendants' failure to plead the defense, it fails on the merits. Defendants did not present any evidence at trial to establish the basis for the attorney's instruction not to report the abuse. Douglas Chapel, Defendants' corporate representative, testified he had no independent knowledge of why legal told the elders not to report. Vol. I, p. 228. Similarly, Herberger testified he was not part of the discussion with the attorney so he had no knowledge of why they were instructed not to report. Vol. I., p. 256. A party relying on an advice-of-counsel defense must waive the attorney-client privilege and present testimony to explain the basis for the advice. *See, e.g., Lamb v. Dist. Ct.,* 2010 MT 141, ¶ 6, 356 Mont. 534, 234 P.3d 893; *Hill v. Burlingame* (1990), 244 Mont. 246, 250, 797 P.2d 925.

Defendants argue they acted in good faith reliance upon the attorney's instruction. It was their burden, however, to present testimony from the attorney at trial to explain the basis for his instruction. As established above, it is clear from Defendants' arguments on appeal that the attorney's instructions were wrong because he relied on an obsolete version of the Reporting Law. Thus, because Defendants presented no evidence at trial to explain the basis for the attorney's instruction, their advice-of-counsel defense also fails factually.

IV. IN ADDITION TO FAILING TO PRESERVE THEIR ASSIGNMENTS OF ERROR FOR APPEAL, DEFENDANTS' ARGUMENTS FAIL ON THE MERITS.

A. THE DISTRICT COURT CORRECTLY DETERMINED THAT DEFENDANTS VIOLATED MONTANA'S REPORTING LAW.

Defendants' vicarious liability argument is based on the flawed premise that because corporations are not specifically identified as mandatory reporters, they cannot be liable for the acts taken by their agents. The District Court correctly concluded that vicarious liability still exists in Montana and was not abrogated by the mandatory reporter law. *See Drinkwalter v. Shipton Supply Co*. (1987), 225 Mont. 380, 384, 732 P.2d 1335 ("Absent a clear indication of the legislature's intent to abrogate existing common law remedies, we must construe new statutory remedies as existing in addition to, rather than instead of, the common law remedies."); *see also Lee v. Detroit Med. Ctr.*, 775 N.W.2d 326, 335 (Mich. App. 2009)("[A] well-settled common-law principle, such as the doctrine of vicarious liability, cannot be abolished by implication."). In addition, "[n]othing in the nature of vicarious liability…requires that a judgment be rendered against the negligent agent. Rather, to succeed on a vicarious liability claim, a plaintiff need only prove that an agent has acted negligently." *Al-Shimmari v. Detroit Med. Ctr.*, 731 N.W.2d 29, 36 (Mich. 2007). If a truck driver is negligent per se by driving through a red light and causing an accident, the driver's employer is clearly vicariously liable. The same is true here.

Under Defendants' construction of the Reporting Law, Lexi could only claim damages from the local elders who, pursuant to direct instructions from the Jehovah's Witnesses' headquarters, failed to report Reyes as a pedophile. The

organizations would, as a matter of law, be immune from any liability for the acts of their agents who acted at all times at the direction of, in furtherance of the interests of, and for the benefit of, the organizations.

When clergy "know or have reasonable cause to suspect" that a child is abused, "they shall report the matter promptly to the department of public health and human services." MCA § 41-3-201. "Any person, official, or institution required by law to report known or suspected child abuse or neglect who fails to do so or who prevents another person from reasonably doing so is civilly liable for the damages proximately caused by such failure or prevention." MCA § 41-3-207.

The jury was correctly instructed that "If you find that the Watchtower NY and/or CCJW defendants had the ability to control Thompson Falls Elders and did control the Thompson Falls elders, you may determine that the Thompson Falls elders acted as agents of the corporate defendants." CR. 125, Inst. 20B (App. C, p. 66). The uncontroverted evidence at trial established that the elders in Thompson Falls acted at all times according to instructions received from Watchtower and CCJW. In doing so, they were acting in furtherance of the interests of, and for the benefit of, the corporate defendants. The same is true of the elders at CCJW and Watchtower who instructed the local elders not to report Reyes as a child abuser.

In arguing against vicarious liability, Defendants make multiple false statements about this Court's ruling in *Newville v. Dep't of Family Servs.* (1994),

267 Mont. 237, 883 P.2d 793. Defendants state that the district court in *Newville* "refused to instruct a jury that a ***police department*** had a duty to report abuse." App. Br., 18. Defendants then incorrectly state that, "This Court ***affirmed*** because the statutory duty applied only to the police officers and not ***the department*** itself." *Id.* This is not the holding in *Newville.* The "Department" this Court referred to was not the police department. It was the Department of Family Services. *Newville*, 267 Mont. at 241, 883 P.2d at 795 ("Plaintiffs now seek a new trial solely against the State of Montana Department of Family Services (the Department).").

In *Newville,* this Court actually held the opposite of Defendants' citations. This Court held the Department **did have a duty** to report the abuse:

> We conclude that the plain language of this statute **required the Department to report** the Rax incident to the Gallatin County Attorney. This was not done.

Newville, 267 Mont. at 262, 883 P.2d at 808.

> When the Department of Family Services receives a report of child abuse, it is **required to report** the incident to the County Attorney where the child resides.

Id.

> [T]he statute quoted above **requires the Department subsequently to report** it to the County Attorney.

Id. Most importantly, this Court did not "affirm" as Defendants assert. To the contrary, this Court held that "Instruction No. 30 was a correct statement of the law and was **improperly refused.**" *Id.* Ultimately, this Court held "the Department is

not immune from tort liability for its failure to protect [the child] in this case." *Newville,* 267 Mont. at 270, 883 P.2d at 812.

Furthermore, the express language of MCA § 41-3-207 imposes civil liability on any institution that "prevents another person" from reporting a child abuser. The uncontroverted evidence at trial established that the agents of Watchtower and CCJW expressly instructed the local elders not to report Reyes as a pedophile, even though the local elders knew that Lexi was regularly being cared for in the home where Reyes lived and regularly attended church with him. The local elders, pursuant to those instructions and in furtherance of the interests of CCJW and Watchtower, then failed to report Reyes.

Defendants' reliance on *Cooper Clinic, P.A. v. Barnes,* 237 S.W.3d 87 (Ark. 2006) is misplaced. First, the Arkansas statute differs substantively from section 41-3-207. The statute, unlike section 41-3-207, did not include liability based on an institution's actions in preventing another person from reporting a child abuser. Second, the Arkansas court determined that the physician who failed to report the abuse was not acting in furtherance of the clinic's interests. *Cooper Clinic,* 237 S.W.3d at 93. In contrast, the elders in this case were each acting in furtherance of their principals' interests and in accordance with their strict policies and instructions by not reporting the pedophile.

Defendants also argue that Montana's Reporting Law cannot apply to church officials in New York. This is wrong factually and legally. Defendants have agents operating in the State of Montana. The events at issue occurred in Montana. The elders in New York were instructing agents to act in Montana. The local elders were agents of Defendants acting in Montana.[2] In addition, the District Court's determination that Watchtower and CCJW were liable was not based solely on the failure of their elders in New York to report. It was based on principles of vicarious liability for actions occurring in Montana and on a plain reading of Montana's Reporting Law, which provides that an institution may be civilly liable for preventing a person from reporting child sex abuse. [3]

B. THE EVIDENCE ESTABLISHED THAT DEFENDANTS' FAILURE TO REPORT WAS A PROXIMATE CAUSE OF THE DAMAGES LEXI SUFFERED.

The undisputed evidence at trial established that the sexual abuse suffered by Lexi caused serious and permanent harm. That harm was a consequence of the Defendants' deliberate decision not to comply with the Reporting Law despite

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[2] To support their argument, Defendants provide an incomplete quote from the *Bigelow* case. The full sentence states, "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected *when they travel to that State." Bigelow v. Virginia,* 421 U.S. 809, 824 (1975)(emphasis added). In contrast, here the relevant events giving rise to the duty to report occurred *in Montana.*

[3] Watchtower and CCJW argue that Montana's punitive damages cap applies, while also arguing that Montana's Reporting Law cannot be applied to them.

knowledge that Reyes sexually abused children and that Lexi was regularly staying with him and attending church with him. Defendants neither offered nor attempted to offer any evidence to dispute Lexi's evidence of causation.

At trial, Defendants attempted to introduce evidence that Lexi was abused by others. Recognizing the District Court correctly excluded the evidence, Defendants have now abandoned the issue on appeal. Defendants now argue that Plaintiff had a burden to prove that if a report had been made, the report would have resulted in action by the authorities that would have prevented Reyes from abusing Lexi. This argument makes no sense. The law presumes that governmental officers will perform their official duties. *See, e.g., Witter v. Phillips County* (1941), 111 Mont. 352, 358, 109 P.2d 56; *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)("'[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties.'")(citations omitted).

The jury was instructed on causation and necessarily found causation when they awarded compensatory damages to Lexi. There is no plausible argument that sexual abuse of a minor does not cause serious and permanent harm. The Defendants offered no proof at trial to dispute that sexual abuse causes harm, and point to nowhere in the record where the Court excluded any such evidence. Even if this Court were to conclude the District Court erred procedurally in its pretrial ruling, it

is harmless error because the evidence at trial clearly established causation. This Court may uphold a judgment on any basis supported by the record, even if the district court applied a different rationale. *Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 25, 365 Mont. 375, 286 P.3d 241.

C. LEXI IS AMONG THE CLASS OF PERSONS PROTECTED BY THE REPORTING STATUTE.

Montana law clearly states that anyone who violates the Reporting Law is "civilly liable for the damages proximately caused by such failure or prevention." MCA § 41-3-207. Defendants argue they "cannot be held liable to Alexis *under the reporting statute* without evidence that Defendants had reason to suspect that *she* was being abused and failed to report." App Br., 36. There is no support in Montana law for applying such a limitation to the clear language of the Montana statute. But, even if it were so limited, there was evidence that Defendants had reason to suspect Reyes was abusing Lexi.

Defendants again misconstrue *Gross*. They cite to a sentence from *Gross* stating "[t]he primary purpose of the statute is the protection of the child" and claim without any support that this "mean[s] the child being abused." App. Br., 35-36. Far from supporting Defendants' position, *Gross* stands for the proposition that a mandatory report may be based upon past abuse of another child. In *Gross*, the mandatory reporter was a group therapist. *Gross*, 229 Mont. at 510, 748 P.2d at 460. A participant in the group therapy revealed to the therapist that her husband had

abused their daughters 16 years earlier. *Id.* Even though the daughters were over 19 and didn't live at home, the therapist correctly reported the abuse of the daughters to the authorities. *Gross*, 229 Mont. at 511, 748 P.2d at 460. The *Gross* court found it important that the primary purpose in making the report was a "concern for [the] grandchildren" and that the therapist's training and experience lead her "to the opinion that child sexual abuse is a chronic behavior which, without therapeutic intervention, is subject to repetition, even after long lapses of time." *Gross*, 229 Mont. at 513, 748 P.2d at 461.

In *Gross* the mandatory reporter was notified by the wife that the husband had sexually abused his children in the past. *Gross*, 229 Mont. at 511, 748 P.2d at 460. In this case, the mandatory reporters were notified about a man who sexually abused his step-children in the past. In *Gross*, the report was deemed reasonable because of the concern that the abuser may repeat the behavior with his grandchildren. *Gross*, 229 Mont. at 513, 748 P.2d at 461. In this case, the mandatory reporters knew the admitted abuser's granddaughter was staying in his home and attending church with him. If the report was reasonable in *Gross*, a reasonable person should have reported in this case as well.

Even under the heightened standard of the 1987 version of the statute (discussed above), the *Gross* Court concluded that, "the facts establish that the [therapist] had reasonable cause to suspect that a child may have been the subject of

abuse or neglect." 229 Mont. at 514, 748 P.2d at 462. G*ross* establishes that the class of protected persons includes the grandchild when the mandatory reporter receives a report of past abuse concerning the abuser's children. Because she was the grandchild and the known abuse involved the children, Lexi is in the protected class.

The Arkansas Court of Appeals arrived at the same conclusion in *Griffin v. State,* 454 S.W.3d 262 (Ark. App. 2015). A teacher was convicted of failure to report child sex abuse. *Id.* at 265. The victim was over 18 at the time the teacher learned of the abuse, which had ended more than a year earlier. The teacher argued she had no duty to report because the victim was no longer a child as defined by the statute. *Id.* at 267. The court rejected the argument, holding that "by its plain language, the statute includes the situation here, where [the teacher] discovered that [the child] had been subjected to child maltreatment when she was in high school and under the age of eighteen." *Griffin,* 454 S.W.3d at 268. The Court also rejected the same argument advanced by Defendants in this case by concluding:

> …Griffin contends that it would be an absurd result if the statute were interpreted to require mandated reporters to make a hotline report where the victim is now an adult…[T]he State correctly notes that the purpose of the [reporting act] is not only to protect a maltreated child, but also *to protect "any other child under the same care who may also be in danger of maltreatment."*

Id. (citation omitted; emphasis added).

Moreover, the issue of whether Lexi 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, 986 P.2d 1081 ("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 created by statute, this Court "look[s] 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, 181 P.3d 601 (citations omitted). Furthermore, "*it is well-settled that neither the specific plaintiff nor the specific injury need be foreseen*." *Id.* at ¶ 26 (emphasis added).

The District Court did not incorrectly hold that "negligence per se subsumes proximate cause." App. Br. 36. Instead, the Court correctly held that Reyes' abuse was not an intervening cause, finding that "the perpetrators and harm were exactly what was sought to be protected against." CR 105. Importantly, the court's ruling on intervening cause isn't challenged on appeal.

Here, it is undisputed that Plaintiffs were minor children who participated in the Thompson Falls congregation. 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." CR

105, p. 3. The District Court therefore acted within its authority to determine as a matter of law that it was foreseeable that as a result of Defendants' negligence, Reyes would abuse other children.

D. THE DISTRICT COURT CORRECTLY DETERMINED THE EXCEPTION FOR CONFIDENTIAL COMMUNICATIONS DID NOT APPLY BASED ON THE FACTS IN THIS CASE.

Defendants asserted an affirmative defense to the Reporting Law, claiming an exception excused their failure to report. CR 8, p. 9. Plaintiffs moved for a partial summary judgment, seeking a ruling that the affirmative defense failed as a matter of law. CR 51.

When Plaintiffs filed the motion, it was undisputed that Defendants' clergy members received verbal and written notification that a church member had sexually abused children but Appellants did not report the abuse. CR 51, Exhs. A, B, C, D, F, G, H, and I. Defendants responded by filing a counter-motion for summary judgment and now contend that "Summary judgment should have been granted to Defendants" on this issue. App. Br., 29.[4] At trial, the evidence remained undisputed.

Defendants' affirmative defense fails on the merits. The claimed exception states that a member of the clergy "is not required to make a report under this section

[4] As previously noted, when the District Court ruled on the pending motions, it had the benefit of the Final Pretrial Order jointly submitted by the parties. Cr. 96. In addition to the stipulated and agreed facts, the Final Pretrial Order identified issues of law to be decided in advance of trial, including the issues raised in the pending motions for partial summary judgment. CR 96, pp. 17-18 (App. A, pp. 22-23).

if the ***communication*** is ***required*** to be ***confidential*** by canon law, church doctrine, or established church practice." MCA § 41-3-201(6)(c). The key element Defendants must prove is a *requirement of confidentiality*.

The following facts are established in the Statement of Facts: Defendants received several communications notifying them of child sex abuse. They kept none of the communications confidential. First, they received a notification of abuse from Peter McGowan. Defendants shared his communication with Holly McGowan and with Reyes, the man that sexually abused Peter. Second, Defendants received a notification of abuse from Holly McGowan. Defendants shared her communication with Peter and with Reyes, her abuser. Third, Defendants shared the communications with Joni, Reyes' wife. Fourth, after Reyes was told about the communications from Peter and Holly, Reyes also notified the Defendants by admitting to sexual abuse. Defendants shared Reyes' communication with Peter and Holly. While admitting to the abuse, Reyes accused Holly of seducing him, even though Holly was only ten years old at the time. The elders shared this communication and forced Holly to defend the accusation. Finally, the local elders shared information with multiple elders at headquarters. The facts proved the elders engaged in broad disclosure of the communications, inconsistent with *confidentiality*.

Defendants did not keep the communications confidential because no canon law, church doctrine, or established church practice within the Jehovah's Witnesses *required* that the communications be kept confidential. Indeed, Defendants' single exhibit offered at trial states that, "We have long instructed elders to report allegations of child abuse to the authorities where required by law to do so." Exh. A (admitted at Vol. II, p. 191). If such a canon, doctrine, or practice regarding confidentiality existed, we would have expected to see written documentation of it offered at trial.

Lacking proof of the affirmative defense, Defendants claim they satisfy the "confidential" requirement by keeping the information secret from *some* people (including law enforcement), while ignoring that they broadly disclose the information with *other people*. Defendants have never defined with whom elders share information with while still claiming the information is "*confidential,"* responding at trial that it "depends on the circumstances" and that "each one is different." Vol. I, pp. 253-54. The best definition they offered in response to summary judgment is that the information is shared with those "who have a need to know." CR 62, p. 13. If Defendants' arguments were accepted by this Court, their failure to report child abuse to the proper authorities would also be their defense for failing to report child abuse. Simply keeping information secret from law enforcement should not satisfy the confidentiality requirement.

Recognizing the weakness of their argument, Defendants next contend that "constitutional problems" will be created if Defendants are not permitted to define *confidential* as they see fit. "Although freedom of religious belief is absolute, freedom of religious conduct may be subject to regulation for the protection of society." *Davis v. Church of Jesus Christ of Latter-Day Saints* (1993), 258 Mont. 286, 297, 852 P.2d 640, 647 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)).

Defendants' reliance on *Larson v. Valente,* 456 U.S. 228 (1982) to support their constitutional claims is misplaced. In *Larson*, the statute was held unconstitutional because legislative history showed that the "rule's capacity—indeed, its express design—to burden or favor selected religious denominations led the Minnesota Legislature to discuss the characteristics of various sects with a view towards 'religious gerrymandering.'" *Larson,* 456 U.S. at 255 (citations omitted). There are no such similar facts in this case.

The District Court correctly applied the *confidential* requirement to Defendants without prejudice to their religious beliefs. Yet, Defendants impermissibly seek an unconstitutional preferential treatment, insisting they should be able to define the term however they see fit. If every religion is permitted to define for itself the meaning of "confidential," the Reporting Law will be eviscerated in its application to clergy.

E. THERE WAS SUBSTANTIAL CREDIBLE EVIDENCE TO SUPPORT THE JURY'S FINDING OF MALICE.

The jury found that both Watchtower and CCJW acted with malice. CR 128**,** Nunez Question 4. (App. B, p. 36). In doing so, the jury was properly instructed on the statutory definition of malice, as well as the heightened requirement of clear and convincing evidence.[5]

There is substantial credible evidence to support the jury's determination that Defendants acted with malice. The conduct at issue demonstrates, *at a minimum*, an indifference to or a reckless disregard of the health or safety of others. In 2004, Peter and Holly McGowan notified Elders of the Thompson Falls Congregation that they had been repeatedly sexually abused by Reyes. Pursuant to policies, agents of Watchtower and CCJW instructed the local elders not to report this information to authorities. Even after they knew Reyes was a child abuser, Herberger knew Lexi was staying with Reyes and attending the Thompson Falls Kingdom Hall with Reyes and his wife. Herberger testified at trial that if he were presented today with the same situation as that which existed in 2004, he would handle it the same way.

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[5] CR 125, Instruction 31: "…[A] defendant is guilty of malice if it has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and defendant either: (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff." *See also* Instruction 30.

The manner in which the local elders were instructed to respond after being notified that Reyes abused children is consistent with the policies and practices that have been adopted and implemented by CCJW and Watchtower. By instructing the local Elders not to report the sexual abuse by Reyes, Watchtower and CCJW intended that the sexual abuse would be kept secret and not disclosed to authorities as required by Montana law. Each of the agents of Watchtower and CCJW did exactly what the Jehovah's Witnesses wanted and instructed them to do in responding to the notice that Reyes was a child molester. In doing so, Watchtower and CCJW placed the interests of the Jehovah's Witnesses institution above the safety of a young child. As a consequence, Lexi Nunez suffered severe trauma that will affect her for her entire life.

In reviewing a jury's verdict:

> This Court "must exercise the greatest self-restraint in interfering with the constitutionally mandated processes of jury decision."…We do not substitute our judgment for that of the jury – i.e., we do not repeat the jury's tasks so as to determine whether we would have rendered the same verdict had we been in the jury's position….[O]ur task on review is simply to determine whether the verdict is supported by substantial credible evidence, which is defined as evidence that a reasonable mind might accept as adequate to support a conclusion.

Seltzer v. Morton, 2007 MT 62, ¶ 94, 336 Mont. 225, 154 P.3d 561 (citations omitted). As the District Court correctly determined in its review of the punitive

damage award, substantial credible evidence supports the jury's finding of malice. CR 137, p. 6.

Defendants assert that good faith reliance on instructions from an attorney cannot constitute malice. App. Br., 45. Having failed to present any evidence at trial to explain the basis for the attorney's incorrect conclusion and instructions, Defendants obviously did not convince the jury of this defense (and, as previously established, it also failed as a matter of law). Additionally, based on the evidence, the jury concluded that when the agents of Watchtower and CCJW instructed the local elders not to report Reyes as a child abuser, they were acting pursuant to the policies of the organizations, and to protect the interests of the organizations, at the expense of a young child who was being repeatedly sexually abused by a church member.

In order to find that Defendants acted with malice, the jury had to conclude that Defendants were negligent. Negligence is a lesser included element of malice. Negligence is the failure to use reasonable care. CR 125, Instruction 13. A person is negligent if he/she fails to act as an ordinarily prudent person would act under the circumstance. *Id.* One cannot disregard or act with indifference without also being negligent. Additionally, the jury was instructed that their *malice* finding must be based on clear and convincing evidence. CR 125, Instruction 30. Because the jury found Defendants Watchtower and CCJW acted with malice under the heightened

clear and convincing standard, the jury implicitly found that Defendants were negligent. Defendants cannot complain that the jury did not determine negligence when the jury found they acted with the higher malice standard.

V. MONTANA'S $10 MILLION PUNITIVE DAMAGE LIMIT IS UNCONSTITUTIONAL.

Montana's $10 million limit on punitive damages violates Article II, Sections 4 (equal protection), 17 (due process of law), and 26 (right to a trial by jury) of the Montana Constitution. The statutory cap of $10,000,000 is arbitrary and does not rationally relate to the dual purposes of punitive damages: to punish the defendant, and to deter the conduct at issue. Plaintiffs do not challenge the 3% punitive damage limit.

A. THE $10 MILLION CAP VIOLATES EQUAL PROTECTION.

MCA § 27-1-220(3) improperly classifies plaintiffs into favored and disfavored classes in violation of Mont. Const. art. II, §4, which provides, "No person shall be denied the equal protection of the laws." Specifically, plaintiffs who bring individual lawsuits, like Lexi did here, are treated less favorably than plaintiffs who bring class action lawsuits.[6] Also, plaintiffs who sue very large corporations are treated less favorably than plaintiffs who sue smaller corporations. Plaintiffs suing small corporations will be less likely to have their punitive damages award

[6] MCA §27-1-220(3) "does not limit punitive damages that may be awarded in class action lawsuits."

reduced due to the arbitrary $10 million cap because the 3% cap is more restrictive on punitive damages against small corporations. Thus, MCA § 27-1-220(3) places Lexi in a disfavored class. If the $10 million cap on punitive damages is applied without regard to a defendants' net worth, juries cannot effectively punish and deter defendants with billions of dollars in assets.

The $10 million cap fails under strict scrutiny because there is no narrowly tailored, compelling state interest that justifies treating individual plaintiffs differently from class plaintiffs. Nor is there any compelling state interest that justifies treating plaintiffs who sue wealthy defendants differently from plaintiffs who sue smaller companies that would be punished and deterred by a $10 million punitive damages verdict. While local Montana companies may have to pay 3% of their net worth in punitive damages, defendants with huge wealth will pay a much lower percentage if the $10 million cap remains.

The punitive damages cap fails under middle-tier scrutiny for the same reasons. The State has no interest in classifying plaintiffs based on arbitrary distinctions (i.e. class action plaintiffs, size of the defendant), and that distinction is in no way more important than the fundamental reason for punitive damages—a plaintiff's right to punish and deter wrongdoers.

Moreover, MCA §27-1-220(3) is not rationally related to any governmental interest. Cost-control alone cannot justify discrimination. *Heisler v. Hines Motor*

Co. (1997), 282 Mont. 270, 282, 937 P.2d 45, 52. A statute cannot pass the rational basis test when it creates arbitrary classes on the sole mechanism a claimant has to enforce the legislature's twin goals of punishment and deterrence. *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶ 44, 249 Mont. 449, 982 P.2d 456.

B. THE CAP VIOLATES DUE PROCESS.

The $10 million cap also violates Mont. Const. art. II, § 17, which provides "[N]o person shall be deprived of life, liberty, or property without due process of law." Applying the one-size-fits-all legislative imposition of a $10 million limit is arbitrary and not rationally related to the stated purposes of punitive damages. For some defendants, the limit may serve the fundamental purpose of the statute by discouraging unlawful, malicious, and harmful conduct. For defendants of great wealth, it would not be the same significant deterrent.

The $10 million limit imposes a strict monetary cap without regard to the facts or the parties' net worth. In contrast, the 3% of net worth limit treats all defendants, large and small, the same.

Watchtower's net worth exceeds $1.59 billion. CR 96, p. 3 (Agreed 15) (App. A., p. 8). Thus, the punitive damages award against Watchtower ($30 million) equates to approximately 1.89% of its net worth. The arbitrary cut-off of $10 million dollars is an inconsequential penalty for large net-worth defendants, like Watchtower, and does not effectively deter or punish wrongful conduct.

C. THE CAP VIOLATES THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

Mont. Const. art. II, § 26 guarantees every citizen of Montana the right to a trial by jury. Because it is a fundamental constitutional right, laws that restrict the jury's authority are subject to strict scrutiny. *See Snetsinger v. Mont. Univ. System,* 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. Here, the jury—not the legislature—is in the best position to determine the proper amount of punitive damages because it objectively heard all the evidence at trial. The Montana statutory cap usurps the jury's duty to assess damages appropriate to punish and deter egregious conduct.

The jury's verdict in this case comports with federal due process because the award here is a 1:7.5 (compensatory to punitive damages) ratio, which is well within the federal due process guidelines. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Additionally, the award is within Montana's 3% of net worth limit. With a net worth in excess of $1.59 billion, Watchtower would neither be meaningfully punished nor deterred by a $10 million punitive damage award.

For these reasons, this Court should hold that Montana's $10 million statutory cap on punitive damages violates Article II, §§ 4 (equal protection), 17 (due process of law), and 26 (right to a trial by jury) of the Montana Constitution.

VI. THE JURY'S PUNITIVE DAMAGE AWARD WAS REASONABLE.

In attempting to convince this Court to reduce the punitive damages award, Defendants incorrectly portray their conduct as nothing more than "at most, good-faith nonfeasance." App. Br., 54. To the contrary, Defendants' conduct caused a young girl to continuously be sexually abused by a known and admitted child molester for at least three years after Defendants were made aware that Reyes was a pedophile.

In addition to the 3% of net worth limit, Watchtower is also adequately protected from an excessive punitive damage award under the due process clauses of the United States and Montana Constitutions, as construed and applied by the United States Supreme Court in *Campbell* and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and by the Montana Supreme Court in *Seltzer v. Morton*, 2007 MT 62, 336 Mont. 225, 154 P.3d 561. The jury awarded Alexis Nunez $4,000,000 in compensatory damages. The ratio between the punitive damage award and compensatory damages is 7.5 to 1 ($30,000,000 to $4,000,000). This is a single-digit ratio that comports with due process. *See Campbell, BMW of North America, Inc.*, and *Seltzer*, *supra*.

In *Campbell*, the U.S. Supreme Court set forth three guideposts determining whether a punitive damages award is reasonable: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm

suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 416-17. The most important indicator of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. *Id*. at 419.

The trial court properly determined "[t]he conduct of Watchtower and CCJW was particularly reprehensible." CR 137, p. 4, ¶ 22. In *Campbell*, the U.S. Supreme Court instructed courts to determine the reprehensibility of a defendant's conduct by considering the following five factors: (1) whether "the harm caused was physical as opposed to economic;" (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;" (3) whether "the target of the conduct had financial vulnerability;" (4) whether "the conduct involved repeated actions or was an isolated incident;" and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell,* 538 U.S. at 419.

The harm caused to Alexis Nunez was unquestionably physical, as opposed to economic. "Alexis suffered severe and permanent injuries as a result of the sexual abuse inflicted by Max Reyes." CR 137, p. 4, ¶ 17. "Expert psychiatrists for both the Plaintiffs and Defendants substantiated that childhood sexual trauma is a

substantial factor in causing a multitude and variety of problems for victims that affect them for the remainder of their lives." *Id.,* ¶ 18.

As previously established, the conduct at issue in this case clearly establishes that Defendants acted with, *at a minimum*, an indifference to or a reckless disregard for the health and safety of others, including Lexi Nunez. Defendants did nothing to protect Lexi or to report Reyes to the authorities. The testimony from Defendants' agent Herberger that he would have done nothing differently today clearly demonstrates a reckless disregard for the health and safety of vulnerable children who are members of the Jehovah's Witnesses. The same is true of the conduct of the Watchtower and CCJW agents who, at all times, acted with the primary purpose of protecting the institutions rather than vulnerable victims of child abuse.

The targets of Defendants' misconduct are church members like Lexi who do not have the financial ability to thoroughly investigate other church members and leaders to determine whether there is any risk of sex abuse. The church-going members are financially vulnerable when compared to the financial net worth of Defendants.

The conduct at issue involved repeated actions and was not an isolated incident. CR 137, pp. 2-5. Lexi was repeatedly sexually abused by Reyes from 2004 until approximately 2007. *Id*., ¶ 4. Holly and Peter were also repeatedly sexually abused by Reyes. Vol. II, pp. 65-66; Exhs. 1, 2 and 3. Reyes told a committee of

elders that "he admitted he sexually abused children." Vol. I, p. 249. And, the elders were notified that Reyes' wife failed to protect the victims from being molested. Vol. I, p. 232. Thus, the abuse suffered by Lexi was not an isolated incident and was well known to Defendants.

Defendants had multiple opportunities to intervene and report Reyes' conduct to the Montana authorities. Instead, Defendants encouraged a pattern of secrecy to protect the church's reputation over the safety of young and vulnerable children, including Lexi. CR 137, ¶ 22. This failure by Defendants enabled Reyes to continue abusing Lexi.

Finally, the District Court found that "evidence at trial established that CCJW and Watchtower acted with malice in the manner in which they directed the local Elders to deal with the reports of sexual abuse by Max Reyes in 2004, as malice is defined by MCA § 27-1-221." CR 137, p. 4, ¶ 20. The Court held the "[j]ury's finding that Watchtower and CCJW acted with malice as defined by Montana law, and as set forth in the instructions given to the Jury, is supported by clear and convincing evidence as required by Mont. Code Annot. § 27-1-221(5)." CR 137, p. 6, ¶ 2.

Having met all five factors of the reprehensibility test set forth in *Campbell*, the Court must next examine the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages. *See Campbell*, 538 U.S. at 418.

Defendants argue the punitive damages award is unconstitutional because "[a]ny ratio higher than 1:1 pushes the constitutional boundaries." App. Br., 53. This is simply incorrect. The U.S. Supreme Court has affirmed a punitive damage award 526 times greater than actual damages. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). In *TXO*, the Court affirmed a $10,000,000 punitive award despite there being only a $19,000 compensatory award. *Id*. at 446. In addition, this Court has rejected Defendants' simple mathematical, ratio approach. *Marie Donier & Assocs. v. Paul Revere Life Ins. Co.*, 2004 MT 297, ¶ 65, 323 Mont. 387, 101 P.3d 742 ("We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award")(*quoting Gore*, 517 U.S. at 582). Moreover, this Court has previously upheld a punitive damages award that was nine times compensatory damages. *Seltzer*, 2007 MT at ¶¶ 147, 199 (finding a $9.9 million punitive damages award to be constitutional where the compensatory damages were $1.1 million).

The ratio between compensatory and punitive damages is not the only factor to examine. In this case, Watchtower stipulated its net worth to be in excess of $1.59 billion. Thus, the punitive damage verdict against Watchtower equates to approximately 1.89% of its net worth. Whether the 1:7.5 compensatory to punitive damages identified by the trial court, or the 1:9.4 ratio identified by Defendants is

accurate, both ratios are within the single-digit guidelines described by the U.S. Supreme Court in *Campbell*. *Campbell*, 538 U.S. at 425 ("Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution….").

Defendants acknowledge there are no civil penalties for comparable conduct, but argue that criminal penalties should be considered. App. Br., 53-54. However, "[w]hen used to determine the dollar amount of the award…the criminal penalty has less utility." *Campbell*, 538 U.S. at 428. Defendants acknowledge, "[a] $30 million penalty is more commensurate with a serious felony than a misdemeanor." App. Br., 53. Significantly, the criminal penalty associated with a mandated reporter not reporting known child sexual abuse is now, in fact, a felony punishable by up to five years in prison or a fine not to exceed $10,000. *See* MCA 41-3-207(3).[7]

The punitive damages award entered in this case comports with all United States and Montana Constitutional requirements. The jury's verdict is constitutional and should be upheld.

[7] HB 640, which changed MCA § 41-3-207 from a misdemeanor to a felony, was signed by the Governor on May 7, 2019. The law became effective as of that date and applies retroactively. http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20191&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=640&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=

CONCLUSION

This Court should hold that Defendants waived all issues other than those relating to punitive damages by failing to preserve the issues for appeal. If the Court reaches the merits of the issues, because liability was established both factually and legally, this Court should affirm the jury's verdict against Defendants for violation of the Reporting Law.

Because the evidence established that Defendants acted with malice and the amount of punitive damages was within constitutional guidelines, this Court should affirm the jury's award of punitive damages.

The $10 million limit on punitive damages is unconstitutional. This Court should affirm the jury's verdict of $30 million in punitive damages against Watchtower, which is substantially less than the 3% of net worth statutory limit.

RESPECTFULLY SUBMITTED this 22nd day of July, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Time New Roman text typeface of 14 points; is double spaced, and the word count, calculated by Microsoft Office Word 2016 is 11,322 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 22nd day of July, 2019.

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