IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 19-0077

ALEXIS NUNEZ AND HOLLY MCGOWAN,
Plaintiffs and 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 and 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 and Appellants,
v.
MAXIMO NAVA REYES and IVY MCGOWAN-CASTLEBERRY,
Third-Party Defendants and Appellees.

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

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The attempt to portray Defendants as callous about child abuse and contemptuous of the law is offensive. It is undisputed that Defendants seek to obey child-abuse reporting laws. This is *not* a case of clergy abuse or cover-up—*or* abuse by a church agent—*or* abuse in connection with a church activity or property—*or* abuse while the defendant had custody or control over the victim or perpetrator. None of the elements creating a common-law duty exist here. Plaintiff Alexis Nunez abandoned her common-law claims for good reason: she had none.

The response brief paints a distorted picture of Defendants as heartless actors who knew Plaintiff was in danger but didn't care. How misleading and unfair! Watchtower and CCJW had no knowledge that Plaintiff even existed, much less that she (or any other child) was in danger. And Montana elders, who learned from Plaintiff's aunt and uncle that Maximo had abused them years earlier, had no reason to believe Plaintiff's own mother and grandmother, who knew independently about Maximo's past, would not only fail to protect her but put her in harm's way. After all, they, not Defendants, had custody and control over Plaintiff and, unlike Defendants, they had a legal duty to protect her. If Montana elders are guilty of anything, it's believing that a mother and

grandmother would protect their daughter and granddaughter. Yet in the dark portrait Plaintiff paints, Defendants, who tried to comply with Montana law (and believed they had), are the malicious ones meriting tens of millions of dollars in punishment. This Court should reject such inflammatory rhetoric and decide this appeal on the law and facts.

To be clear, this case is only about negligence per se: whether each Defendant violated the reporting statute. Plaintiff's attempt to broaden the basis for liability to implicitly include breach of common-law duties must be rejected.

The trial court granted summary judgment against Watchtower because an attorney in Watchtower's Legal Department ("New York attorney") learned about the abuse while giving legal advice and didn't report. The court held CCJW liable because elders in the Service Department ("New York elders") learned about the abuse while giving ecclesiastical advice and didn't report it. To prevail, Plaintiff must prove that the New York attorney and New York elders had a duty to report—and, to justify punitive damages, she must prove they acted maliciously in not reporting. What Montana elders knew and did is irrelevant to Watchtower's and CCJW's liability. The fact that Montana elders saw Plaintiff in the audience with her grandparents does not show that Watchtower or CCJW, both unaware of Plaintiff's existence, acted with malice.

Both liability under the reporting statute and the massive punitive damages award must be reversed.

II. RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

Plaintiff's statement of facts relies entirely on the trial transcript. But summary judgment "turns on the evidence in the record at the time of the motion." *Masters Group Int'l, Inc. v. Comerica Bank*, 2015 MT 192, ¶90, 380 Mont. 1, 352 P.3d 1101. Only "information 'on file' in [the] record when deciding the summary judgment motion" is relevant on appeal. *Hopkins v. Superior Metal Workings Sys., LLC*, 2009 MT 48, ¶9, 349 Mont. 292, 203 P.3d 803. Plaintiff's repeated invocations of what happened "at trial" cannot support summary judgment.

Further, on summary judgment, the evidence must be viewed "in the light most favorable to the non-moving party" and "all reasonable inferences" must be drawn in Defendants' favor. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶38, 345 Mont. 12, 192 P.2d 186.

The evidence "on file" did not support the summary judgment. And while the trial record is relevant to punitive damages, the jury's massive award is contrary to law and factually baseless.

III. ARGUMENT

A. All issues raised by Defendants were preserved.

Plaintiff's preservation argument is meritless. Besides punitive damages, which Plaintiff admits are properly before this Court, Defendants appeal the pretrial summary judgment order that resolved liability. Plaintiff's trial was only about damages for pre-determined liability. Nevertheless, Defendants objected "at trial."

1. Summary judgment is appealable after final judgment.

Defendants appeal the order granting Plaintiff summary judgment on negligence per se. CR 107. A summary judgment order is "reviewable on appeal from a final judgment." *Glacier Tennis Club at the Summit, LLC v. Treweek Constr. Co.*, 2004 MT 70, ¶31, 320 Mont. 351, 87 P.3d 431 (citation omitted). "[A]ll nonappealable intermediate orders or decisions, to which there has been a proper objection, are reviewable on appeal from the final judgment." *Ruana v. Grigonis*, 275 Mont. 441, 452, 913 P.2d 1247, 1254 (1996). "An appeal from a judgment draws into question all previous orders and rulings excepted or objected to which led up to and resulted in the judgment." Mont. R. App. P. 4(4)(a).

Issues are preserved by presenting them "to the trial court in the first place in the form of an objection, motion, or some other means of properly

presenting the issue to the trial court for decision." *Burton v. Adams*, 2002 MT 236N, ¶10, 313 Mont. 419, 63 P.3d 511 (unpublished table decision). Thus, issues raised in pretrial motions are preserved. *See also Slack v. The Landmark Co.*, 2011 MT 292, ¶19, 362 Mont. 514, 267 P.3d 6 (issues preserved by filing "a motion to dismiss or a motion for summary judgment"); *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1370 (9th Cir. 1987) (issues of law raised before trial do not need to be raised "in a motion for a directed verdict in order to preserve the question on appeal").

Plaintiff cites *State v. Reichmand*, 2010 MT 228, 358 Mont. 68, 243 P.3d 423, for the proposition that issues must be raised "at trial" to be preserved. That same case said, ***"We interpret 'trial' here…to encompass the entire proceeding in the lower court…."*** *Id*. ¶8 (emphasis added). It is "fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Id*. ¶9 (quotations omitted). "Where the trial court *was* given an opportunity to rule on the issue…then the objection has been made 'at trial.'" *Id*.

Plaintiff contends that an objection must be made *during the actual trial* even if the issue was resolved in a pretrial order. The opposite is true: a party

"need not continually renew the objection to preserve alleged errors for appeal." *Anderson v. BNSF Ry.*, 2015 MT 240, ¶77, 380 Mont. 319, 354 P.3d 1248.

Plaintiff's three cites undermine her position. In *Reichmand*, the appellant raised an issue for the first time after verdict. In *Commissioner of Political Practices v. Wittich*, 2017 MT 210, 388 Mont. 347, 400 P.3d 735, the appellant first challenged the constitutionality of a statute on appeal. And in *Siebken v. Voderberg*, 2015 MT 296, 381 Mont. 256, 359 P.3d 1073, the appellant first challenged a jury instruction on appeal. The opposite occurred here.

2. The issues raised on appeal were raised below.

The issues Defendants raise on appeal were presented to the District Court:

Issue	Preservation
Defendants are not mandatory reporters.	CR 62 at 19-20; CR 67 at 14-15; CR 87 at 7-9.
Clergy are not required to report confidential communications.	CR 62 at 9-17; CR 87 at 4-5; CR 110.
Was there "reasonable cause to believe" abuse was occurring?	CR 62 at 7-9.
Montana's reporting statute does not apply to New York clergy or attorneys.	CR 87 at 6-7; CR 95 at 6; CR 113.5 36:14-18

Issue	Preservation
Plaintiff was not among the class protected by the reporting statute.	CR 67 at 13-14.
Negligence per se does not establish proximate cause.[1]	CR 105; CR 110; Trial Tr. Vol. II 10:23-11:10, Sept. 25, 2018.

The court ruled against Defendants on these issues. Defendants also raised these issues in a Petition for Writ of Supervisory Control, which this Court denied because Defendants "failed to demonstrate that the normal appeals process would be inadequate." Order, Sept. 17, 2018 (OP 18-0534).

3. Defendants objected to key jury instructions and to the verdict form.

Plaintiff claims "Defendants did not object to any of the jury instructions given by the court." Appellees' Resp. Br. 13, July 22, 2019 ("Resp. Br."). False. Defendants' objections are in the record. CR 113. Plaintiff points to proposed instruction No. 18, which quoted the court's summary judgment order stating that "Defendants are liable" to Plaintiff and the "question left to the jury…is the appropriate amount of damages." CR 111. Defendants objected to this instruction. CR 113. The court overruled their objection because it had

[1] Some of these issues would have been briefed more thoroughly if Plaintiff had moved for summary judgment on her negligence per se claim, but the court unexpectedly granted summary judgment *sua sponte*.

"already determined" Defendants were liable. Trial Tr. Vol. I 140:21-23, Sept. 24, 2019. Plaintiff argues that Defendants should have objected during a conference with the judge *after* the evidence was submitted to the jury. Resp. Br. 13. To what end? Defendants had objected and the instruction had already been given. Trial Tr. Vol. III 18:8-10; 22:10-24, Sept. 26, 2018.

Plaintiff argues that "Defendants stipulated to the verdict form," which confined the issue to damages. Resp. Br. 14. Defendants submitted their own proposed verdict form (CR 110) that did not stipulate to liability, preserving the objection. *See Story v. City of Bozeman*, 242 Mont. 436, 445, 791 P.2d 767, 772 (1990) (objection to verdict form preserved "by proposing a special verdict form including the issue which [was] rejected"), *overruled on other grounds by Arrowhead Sch. Dist. v. Klyap*, 2003 MT 294, ¶54, 318 Mont. 103, 79 P.3d 250.

4. Arguments Defendants don't make on appeal.

Plaintiff argues that Defendants waived "their argument" that "there was insufficient evidence to prove" proximate cause. Resp. Br. 15. Defendants didn't make that argument. The court refused to present proximate cause to the jury. Trial Tr. Vol. I 140:18-23. And Defendants never raised an "advice-of-counsel" defense. Resp. Br. 18.

B. The court erred in granting summary judgment on negligence per se.

Montana elders would have been mandatory reporters absent the

statutory exception. The statute, however, does not extend extraterritorially or vicariously.

1. The statute does not apply to New York attorneys or clergy.

Montana "has no authority to mandate reports by adults or agencies in other states." *People v. Lewis*, 183 Cal. Rptr. 3d 701, 706 (Ct. App. 2015). Plaintiff asserts that Montana law applies to Watchtower and CCJW because they "have agents operating in the State of Montana." Resp. Br. 24. She cites nothing in support.

Even if Montana law reached into New York, Plaintiff does not dispute that *attorneys* are not mandatory reporters. Accordingly, *there is no basis for holding Watchtower vicariously liable for the attorney's non-report*.

Plaintiff's last-ditch argument is that "local elders" were agents of Watchtower and CCJW. Resp. Br. 24. This was not established—Plaintiff never attempted to prove it—and it cannot be the basis for this Court to affirm.

2. Defendants cannot be held vicariously liable for violating the reporting statute.

Plaintiff concedes that the statute applies only to specified "[p]rofessionals and officials." MCA § 41-3-201(2). Her claim hinges on vicarious liability. Resp. Br. 19-24.

Plaintiff argues that common-law vicarious liability "was not abrogated by the mandatory reporter law." Resp. Br. 19-24. That is not the issue. The reporting statute abrogated the common law's no-duty-to-protect rule. *See Krieg v. Massey*, 239 Mont. 469, 472, 781 P.2d 277, 279 (1989) ("no duty to protect another from harm in the absence of a special relationship of custody or control").

The statute created a new duty to report as an exception to the common law. But it imposed liability only for specified professionals, officials, and one institution, the Department of Family Services. It did not provide for vicarious liability. The trial court's ruling expanded liability (and further abrogated the common law) beyond the plain language of the statute. This Court construes statutes that abrogate the common law narrowly. *See Nehring v. LaCounte*, 219 Mont. 462, 466, 712 P.2d 1329, 1332-33 (1986).

Plaintiff argues that "Defendants' reliance on *Cooper Clinic, P.A. v. Barnes*, 237 S.W.3d 87 (Ark. 2006) is misplaced" because "unlike section 41-3-207" the Arkansas statute "did not include liability based on an institution's actions in preventing another person from reporting a child abuser." Resp. Br. 23. Here, the court held Defendants liable because they "failed to report as

mandated by Mont. Code Ann. § 41-3-201(2)(h)" not for *preventing* a report. CR 107.

Even if vicarious liability were proper, Plaintiff failed to establish it. Plaintiff argues that (1) Montana elders were agents of all three Defendants; and (2) Montana elders and New York elders failed to report. Resp. Br. 21, 23-24.

The first argument was not—and could not have been—the basis for summary judgment. Defendants stipulated before summary judgment that the New York attorney was a Watchtower agent and the New York elders were CCJW agents. No evidence suggested, and Plaintiff never attempted to establish, that the *Montana* elders were agents of either. The second argument fails because the Montana elders had no duty to report due to confidentiality and the New York elders and attorney had no duty in the first place.

Consider the arguments Plaintiff did and did not make and the court's rulings:

a. Plaintiff did not plead that *Montana* elders were agents of CCJW or Watchtower. CR 4.

b. Plaintiff's opposition to Defendants' motion for partial summary judgment did not argue that Montana elders were agents of CCJW or Watchtower. CR 62, 77. She argued that Montana elders knew about the

abuse, "Elders at [CCJW] and at the Legal Department [Watchtower]" also knew about the abuse and "[n]one of these clergy members reported the abuse." CR 77 at 14. Thus, Plaintiff's argument was that all Defendants were liable because their respective agents failed to report. CR 77.

Plaintiff's opposition did baldly assert that "local elders are agents of Defendants as well." CR 77 at 14. *This was the only time Plaintiff made this conclusory contention*. She did not move for summary judgment on this issue and never tried to establish it as an undisputed fact.

c. In response to another summary judgment motion filed by Defendants (that did not address agency), Plaintiff again contended that "elders of the Service Department and Legal Department were acting on behalf of Defendants CCJW and Watchtower respectively." CR 86 at 6.

d. During the hearing on these motions, the court asked whether Plaintiff contended that Defendants were directly or vicariously liable for failure to report. Plaintiff confirmed she was relying on vicarious liability to hold the local congregation responsible for Montana elders and CCJW responsible for New York elders:

> So, for example, Your Honor, the Elders, the local Elders at Thompson Falls are clergymen that knew about the abuse. And we are using vicarious liability to make the local congregation

> liable...[CCJW] have clergymen in their service department who knew about this, and we're saying CCJW is vicariously liable.

CR 113.500 at 33:3-9.

e. In an order *denying* Defendants' motion for summary judgment, CR 67, the court s*ua sponte granted* summary judgment to Plaintiff on negligence per se. The order contains no legal reasoning. It summarily states that "agents of Defendants" learned about the abuse and "Defendants failed to report as mandated by MCA § 41-3-201(2)(h)" and thus "Defendants are liable." CR 107. "[A]gency is a matter, not to be presumed, but to be proven, and the burden of proving it must be borne by the party who asserts it." *Calkins v. Oxbow Ranch*, 159 Mont. 120, 123, 495 P.2d 1124, 1125 (1972) (citation omitted).

The record did not support a finding that Montana elders were agents of CCJW or Watchtower. On the contrary, the only evidence before the court was that Montana elders were Congregation agents, Service Department elders were CCJW agents, and Legal Department attorneys were Watchtower agents. These facts were stipulated in the Final Pretrial Order submitted to the court before summary judgment. CR 96.

f. Plaintiff understood that the court had not concluded that Montana elders were agents of CCJW and Watchtower. After the court's summary

judgment surprise, Defendants filed a Petition for Writ of Supervisory Control. Pet. Writ Supervisory Control & Mot. Stay Proceedings, Sept. 11, 2018 (OP 18-0534). In opposition, Plaintiff argued that Montana elders were agents of the Congregation, Service Department elders "were acting on behalf of CCJW," and "[t]he attorneys they contacted were acting on behalf of Defendant Watchtower NY." Resp. Pet. Writ Supervisory Control at 17, Sept. 14, 2018 (OP 18-0534) (internal quotes and citations omitted). Plaintiff concluded her argument:

> Elders at the local congregation knew of the abuse. Elders at the Service Department of the Branch Office were notified of the abuse. None of these clergy members reported the abuse. Their failure to report child abuse violates the mandatory reporting statute.

Resp. Pet. Writ 14-15.

Plaintiff now argues that "[t]he 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.'" Resp. Br. 21 (quoting CR 125). That is irrelevant and misleading because the court had already instructed the jury that Defendants were liable to Plaintiff. That instruction governed Defendants' potential liability to the other

plaintiff, Holly, whose claim the jury rejected. The verdict provides no support for Plaintiff's new theory that Montana elders were agents of Watchtower and CCJW. To the contrary, the instruction confirms that the court had not already determined on summary judgment that Montana elders were agents of Watchtower and CCJW.

The jury's verdict also refutes Plaintiff's agency argument. The jury apportioned fault 80% to Watchtower, 15% to CCJW, and 4% to the Congregation and awarded $30 million in punitive damages against Watchtower and $1 million against CCJW. The jury must have understood that there was not a single source of fault (*e.g.*, local elders) but rather different degrees of fault based on different actions of each Defendant's respective agents.

3. The undisputed summary judgment evidence proved that the reporting statute's exception applied to the communications the Montana elders received.

Clergy are "not required to make a report" if they learn about abuse through a "communication" that is "confidential" under "church doctrine or established church practice." MCA § 41-3-201(6)(c). Plaintiff argues that Defendants "kept none of the communications confidential." Resp. Br. 31. She claims "confidential" means *shared with no one*. But she offers no support.

As Defendants noted, "confidential" appears in numerous statutes and rules. Appellant's Opening Br. 23-24, May 22, 2019 ("Appellant's Br."). It means different things in different contexts—similar to levels of "classified" government information: Confidential, Secret, or Top Secret.[2] Plaintiff's argument suggests the Legislature intended a "Top Secret" level of confidentiality that protects the Catholic model of one-on-one confessions but nothing else. But that is contrary to the statute's plain language.

Under one exception, clergy are not required to report "a statement or confession" that the speaker "intended to be a part of a confidential communication" unless the speaker "consent[s] to the disclosure by the member of the clergy" MCA § 41-3-201(6)(b).

The exception applicable here states, "A member of the clergy…is not required to make a report…if the communication is required to be confidential by canon law, church doctrine, or established church practice." *Id*. The Legislature declined to draw a single line that would protect some religious beliefs but not others. Instead, it deferred to each religious organization's doctrine and established practice. Some faiths use confidential information

[2] *Classified Information in the United States*, Wikipedia, https://en.wikipedia.org/wiki/Classified_information_in_the_United_States (last edited June 3, 2019).

more broadly than others. It depends on their doctrine and polity. *See Jane Doe v. Latter-Day Saints*, 90 P.3d 1147 (Wash. Ct. App. 2004) (record of "disciplinary council" for member who committed child abuse was privileged because *all 18 participants* "were ordained clergy members functioning in a clerical capacity").

Here, the undisputed evidence proved that Montana elders shared the communications only as allowed by doctrine and established practice, no further. Plaintiff concedes that the Montana elders followed established church practice. Resp. Br. 35.

In protecting both Catholic and non-traditional methods of addressing sin, the Legislature rejected a one-size-fits-all approach that would have discriminated against non-traditional faiths in violation of the religion clauses of the First Amendment. U.S. Const. amend. I.

Plaintiff argues that "[s]imply keeping information secret from law enforcement should not satisfy the confidentiality requirement." Resp. Br. 32. If Jehovah's Witnesses allowed spiritual communications to be shared with everyone but the police, this argument might have merit. The undisputed evidence proved, however, that such communications cannot be shared with anyone but those essential to the ecclesiastical process.

Plaintiff contends that Defendants failed to present evidence of confidentiality *at trial*. Resp. Br. 32. The issue was not in dispute at trial. The court had already granted summary judgment despite undisputed evidence of ecclesiastical confidentiality. CR 77, Exs. A-U. That was reversible error.

4. The statutory changes affect only one of Defendants' arguments.

Plaintiff asserts that "Defendants' *arguments* and *defenses* are erroneously based upon now deleted language from an old version of the Reporting Law that existed in 1987." Resp. Br. 16 (emphasis added). That is misleading. *One* of the issues presented below was whether Defendants had reasonable cause to suspect a "present imminent risk of abuse." That phrasing came from *Gross v. Myers*, 229 Mont. 509, 748 P.2d 459 (1987), which both parties and the District Court cited to and relied on. Plaintiff conceded there were "genuine fact issue[s] as to whether…Defendants had a reasonable cause to suspect that there was a present imminent risk of harm to a child." CR 77 at 14. Defendants relied on that concession in their opening brief on appeal, not recognizing that *Gross* relied on statutory language that had been amended. Accordingly, Defendants withdraw that argument. But these statutory changes do not affect whether (1) institutions can be held liable for violation of the reporting statute, (2) the confidentiality exception applies, (3) the reporting

statute applies extraterritorially or to attorneys, (4) Plaintiff was among the class of persons protected by the reporting statute, (5) Plaintiff should have been required to prove proximate cause, or (6) Defendants acted with malice.

C. Plaintiff is not among the "class of persons" protected by the statute.

Plaintiff says she is among the class protected by the statute because it says the violator is "civilly liable for the damages proximately caused by" failing to report. Resp. Br. 26. Two courts in states with nearly identical language have rejected this argument for unlimited liability. *See Marcelletti v. Bathani*, 500 N.W.2d 124, 127 (Mich. Ct. App. 1993); *Lurene F. v. Olsson*, 740 N.Y.S.2d 797, 798 n.2 (Sup. Ct. 2002).

Plaintiff argues that even if the protected class is limited to children suspected of being abused, "there was evidence that Defendants had reason to suspect Reyes was abusing Lexi." Resp. Br. 26. On summary judgment, Plaintiff presented no evidence that CCJW or Watchtower knew anything about her. And the evidence of what *Montana elders* knew about Plaintiff was, at best, disputed. Appellant's Br. 10-11.

Plaintiff argues that "*Gross* establishes that the class of protected persons includes" children other than those who are or should be the subject of a report.

Resp. Br. 28. *Gross* did not address this issue[3] and its language suggests the opposite: "[t]he primary purpose of the statute is the protection of the child" suspected of being abused. *Gross,* 748 P.2d at 461.

Plaintiff cites *Griffin v. State*, 454 S.W.3d 262 (Ark. Ct. App. 2015). It does not address the scope of liability for violating a reporting statute. And its holding relies on language not in Montana's reporting statute. *Id*. at 268.

Plaintiff cites *Lopez v. Great Falls Pre-Release Services,* 1999 MT 199A, 295 Mont. 416, 986 P.2d 1081, *overruling recognized by Emanuel v. Great Falls School District*, 2009 MT 185, 351 Mont. 56, 209 P.3d 244, which is a common law duty case, not a statutory negligence per se case. *Id*. ¶¶26-27.

D. The court committed reversible error in holding that Plaintiff did not have to prove proximate cause.

Plaintiff argues that "[t]he undisputed evidence at trial" established that the harm she suffered "was a consequence of the Defendants' deliberate decision not to comply with the Reporting Law." Resp. Br. 24-25. Because summary judgment had been granted, the issue was not presented to the jury.

[3] *Gross* addressed whether a mandated reporter was immune from liability when her patient sued for breach of confidentiality. The court said the therapist acted reasonably despite having no duty to report. A dissenting judge disagreed and would have allowed damages.

And trial evidence is irrelevant to summary judgment anyway. *See Hopkins*, ¶9.

Plaintiff argues that proximate cause should be presumed because "[t]he law presumes that governmental officers will perform their official duties." Resp. Br. 25. But the reporting statute gives government officials substantial discretion. Plaintiff's proposed presumption is at odds with reality.

Ignoring the summary judgment record again, Plaintiff argues that "[t]he jury was instructed on causation and necessarily found causation when they awarded compensatory damages to Lexi." Resp. Br. 25. The jury was not instructed on causation. It was instructed that "Defendants are liable" to Plaintiff and that its job was to determine damages. CR 125, Instr. Nos. 4, 22.

Ignoring both the summary judgment record and the opening brief, Plaintiff argues that "Defendants offered no proof at trial to dispute that sexual abuse causes harm." Resp. Br. 25. Obviously, Defendants would never dispute that. The question is whether Defendants' failure to report was the *proximate cause* of Plaintiff's injuries, or whether (for instance) the proximate cause was the negligence of her adult family members. That question should have been submitted to the jury. *Martel v. Mont. Power Co.*, 231 Mont. 96, 103, 752 P.2d 140, 145 (1988) ("[T]he trial court should inform the jury that…a violation of

law is of no consequence unless it contributed as a proximate cause to an injury.").

Plaintiff argues that if the court erred on this issue, "it is harmless error because the evidence at trial clearly established causation." Resp. Br. 25-26. Harmless error has no application here. Unless no reasonable juror could reach a different conclusion, the non-moving party has a constitutional right to a jury trial. *See Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶88, 342 Mont. 29, 179 P.3d 481.

E. The punitive damages judgment should be reversed.

1. There was no evidence of malice.

Plaintiff claims that Defendants have an unwritten policy of not reporting child abuse to authorities. Resp. Br. 8. That statement contradicts the trial record. The written policy itself is contained in Trial Exhibit A. Plaintiff intentionally confuses how Jehovah's Witnesses address the *sin* of abuse versus the *crime* of abuse. The ecclesiastical process requires two witnesses, but elders report whenever the law requires it. No contrary evidence exists.

Without citing the record, Plaintiff contends there was sufficient evidence of malice to justify punitive damages because "Watchtower and CCJW instructed the local elders not to report." Resp. Br. 34. CCJW did not instruct

Montana elders about reporting. Advice about the reporting statute came from Watchtower's attorney. CR 96. And the attorney did not instruct the elders "not to report;" he informed them that they were "not mandated by Montana law to report this." Trial Tr. Vol. I 254:2-255:6; Vol. II 199:13-21.

Plaintiff says Defendants "failed to present any evidence at trial to explain the basis for the attorney's incorrect conclusion and instructions." Resp. Br. 36. Plaintiff bore the burden of proving malice. And Watchtower was held liable because its attorney-agent failed to report, not for giving allegedly incorrect legal advice. No evidence exists that the New York attorney did anything more than provide an honest interpretation of the law. Awarding punitive damages for this is absurd.

When liability is based on a statutory violation, to get punitive damages the plaintiff must prove malice—that the defendant "intentionally or recklessly violate[d] [the] statute." *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶23, 344 Mont. 435, 188 P.3d 1063. Plaintiff provides no evidence that Watchtower and CCJW acted with malice in not reporting. The jury's punitive damages award should be reversed.

2. Statutory caps are constitutional.

Caps on punitive damages don't implicate fundamental rights. They

need only be "reasonably related to a permissible legislative objective." *Raisler v. Burlington N. Ry.*, 219 Mont. 254, 263, 717 P.2d 535, 541 (1985). Montana's cap is, as explained in Defendants' opening brief. The cap does not violate due process or equal protection. *See Meech v. Hillhaven W.*, 238 Mont. 21, 47 776 P.2d 488, 504 (1989).

Nor does it deny the right to a jury trial, an argument Plaintiff did not make below and that cannot be addressed for the first time on appeal. *Flathead Cnty. v. Sure Seal Dust Control*, 1999 MT 15N, ¶14 (unpublished table decision).

3. Unbridled punitive damages are unconstitutional.

Plaintiff argues that the massive punitive damages award comports with due process because Watchtower's conduct was reprehensible since it "did nothing to protect Lexi." Resp. Br. 43. Watchtower was held liable for failure to report, not for violating a common-law duty to protect. Plaintiff voluntarily dismissed that claim.

Plaintiff claims the "conduct at issue involved repeated actions and was not an isolated incident." Resp. Br. 43. The court ruled that the failure was a single act. CR 111. The court acknowledged that Plaintiff did not establish that Defendants have *ever* been held liable for failure to report. CR 137.

Plaintiff's arguments regarding the ratio of punitive-to-compensatory damages ignore the Supreme Court's analysis. Even a 1-to-1 ratio "can reach the outermost limit" of due process when substantial compensatory damages are awarded. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Here, the jury's verdict far exceeds constitutional bounds.

IV. CONCLUSION

This Court should reverse the summary judgment order and the punitive damages verdict.

DATED this 14th day of August, 2019.

/s/ Bradley J. Luck
Attorney for Defendants/Appellants

CERTIFICATE OF COMPLIANCE

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DATED this 14th day of August, 2019.

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