IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

A136641

HG11558324

JANE DOE
Plaintiff and Respondent,

v.

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.
Defendant and Appellant.

Appeal from the Superior Court of Alameda County
The Honorable Robert McGuiness, Judge

REPLY BRIEF OF APPELLANT, NORTH FREMONT CONGREGATION OF JEHOVAH'S WITNESSES

James M. McCabe, Esq.
THE McCABE LAW FIRM
4817 Santa Monica Avenue
San Diego, California 92107
(619) 224-2848

Attorneys for Defendant and Appellant,
NORTH FREMONT CONGREGATION OF
JEHOVAH'S WITNESSES

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
I.	INTRODUCTION	1
II.	THE RECORD DOES NOT SUPPORT PLAINTIFF'S NEWLY-MINTED CLAIMS ON APPEAL	4
	A. The Record Does Not Support a Claim that the Congregation Committed Misfeasance by Assigning Plaintiff to Perform Field Service with Kendrick	4
	B. The Record Does Not Support a Finding that the Congregation Exercised Custody and Control of Plaintiff or Control of Kendrick	12
	1. Custody and Control of Plaintiff	12
	2. Control of Kendrick	14
III.	DEFENDANT DID NOT OWE PLAINTIFF A DUTY OF CARE SINCE IT DID NOT HAVE A SPECIAL RELATIONSHIP WITH PLAINTIFF OR KENDRICK	19
	A. The Finding of a Special Relationship Is a Prerequisite to Any Duty Analysis	19
	B. Membership in a Religion Does Not Create a Special Relationship Even for Minors	20
	C. The Trial Court's Duty of Care Instruction Was Not a Neutral and Generally Applicable Law	22
IV.	THE FINDING OF THE TRIAL COURT THAT APPELLANTS OWED A DUTY TO RESPONDENT, EVEN UNDER THE *ROWLAND* FACTORS, WAS ERROR	25
	A. No High Degree of Foreseeability	25
	1. What Did the Fremont Congregation Elders Know?	26
	2. What Did the Fremont Elders Do?	27

B. Degree of Certainty of Harm to Plaintiff 29

C. No Close Connection Between Fremont Congregation's Conduct and the Plaintiff's Injury 30

D. No Moral Blame Attaches to Fremont Congregation's Conduct 32

E. Policy of Preventing Future Harm 34

F. Significant Social and Financial Burden 35

G. Significant Societal Consequences 37

V. IF THIS COURT FINDS THAT A "SPECIAL RELATIONSHIP" EXISTED OR THAT THE APPELLANTS MAY HAVE ENGAGED IN MISFEASANCE, A NEW TRIAL IS REQUIRED 39

A. Assuming, Arguendo, That There Was a Special Relationship Between the Congregation and Plaintiff, the Court Below Erred in Its Instruction to the Jury Regarding "Duty" 39

B. The Trial Court's Refusal to Instruct the Jury that the Congregation Elders Were Not Mandated Reporters of Child Abuse in 1993 Was Error Also Requiring a New Trial 41

C. The Trial Court's Refusal to Allow the Jury to Allocate Fault to Non-Parties Was Severely Prejudicial and Requires a New Trial 43

D. In Allocating Liability, the Jury Should Have Only Considered if Watchtower or the Congregation Committed Misfeasance and Held them Liable for those Acts Only 46

VI. THE CONGREGATION DID NOT FAIL TO CITE CONTROLLING AUTHORITY 47

VII. CONCLUSION 49

CERTIFICATE OF COMPLIANCE 50

TABLE OF AUTHORITIES

Page

Cases

Adams v. City of Fremont
(1999) 68 Cal.App.4th 243 30, 32

Ballard v. Uribe
(1986) 41 Cal.3d 564 26, 28

Beck Development Co. v. Southern Pacific Transportation Co.
(1996) 44 Cal.App.4th 1160 11, 12

Bigbee v. Pacific Tel. & Tel. Co.
(1983) 34 Cal.3d 49 26

C.A. v. William S. Hart Union High School District
(2012) 53 Cal.4th 861 19, 20

Castaneda v. Olsher
(2007) 41 Cal.4th 1205 36

Chaney v. Superior Court of Los Angeles County
(1995) 39 Cal.App.4th 152 44

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah
(1993) 508 U.S. 520 24

Delgado v. Trax Bar & Grill
(2005) 36 Cal.4th 224 19

Gillet v. Watchtower Bible and Tract Society of Pennsylvania, Inc.
(Fla. App. 2005) 913 So.2d 618 16, 17, 24

Hansra v. Superior Court
(1992) 7 Cal.App.4th 630 15, 18

Hegyes v. Unjian Enterprises, Inc.
(1991) 234 Cal.App.3d 1103 26

In re Marriage of Slayton
(2001) 86 Cal.App.4th 653 44

TABLE OF AUTHORITIES
(continued)

Juarez v. Boy Scouts of America, Inc.
(2000) 81 Cal.App.4th 377 — 19, 22, 23, 32, 41

Koepke v. Loo
(1993) 18 Cal.App.4th 1444 — 39

Margaret W. v. Kelley
(2006) 139 Cal.App.4th 141 — 19, 38

Marshal v. Parkes
(1960) 181 Cal.App.2d 650 — 10

Megeff v. Doland
(1981) 123 Cal.App.3d 251 — 15, 41

Melton v. Boustred
(2010) 183 Cal.App.4th 521 — 26

Morris v. De La Torre
(2005) 36 Cal.4th 260 — 19

Murdock v. Commonwealth of Pennsylvania
(1943) 319 U.S. 105 — 16, 17

Nally v. Grace Community Church of the Valley
(1988) 47 Cal.3d 278 — 18, 20, 21, 38, 39

Pamela L. v. Farmer
(1980) 112 Cal.App.3d 206 — 32

Richelle L. v. Roman Catholic Archbishop of San Francisco
(2003) 106 Cal.App.4th 257 — 18, 20, 21, 22

Roman Catholic Archbishop of Los Angeles v. Superior Court
(2005) 131 Cal.App.4th 417 — 47, 48

Roman Catholic Bishop of San Diego v. Superior Court
(1996) 42 Cal.App.4th 1556 — 18, 20, 21, 23

Romero v. Superior Court of San Diego County
(2001) 89 Cal.App.4th 1068 — 44

TABLE OF AUTHORITIES
(continued)

Rowland v. Christian
(1968) 69 Cal.2d 108 19, 25, 30

Savarese v. State Farm Mut.Auto. Ins. Co.
(1957) 150 Cal.App.2d 518 11

Todd v. Dow
(1993) 19 Cal.App.4th 253 15

Watchtower Bile and Tract Society of New York, Inc. v. Village of Stratton
(2002) 536 U.S. 150 16

Wise v. Superior Court
(1990) Cal.App.3d 1008 18

Statutes & Codes

Civil Code 1431.2(a) 43

Penal Code § 11166 42

Other

Restatement Second of Torts § 320 12

Defendant/Appellant, NORTH FREMONT CONGREGATION OF JEHOVAH'S WITNESSES ("Fremont Congregation" or "the Congregation") hereby files this Reply Brief in support of its appeal challenging: (a) the trial court's original Judgment following jury trial, entered on June 27, 2012; (b) the Amended Judgment entered on September 17, 2012; and (c) the trial court's related rulings of August 24, 2012, in favor of Plaintiff, JANE DOE ("Plaintiff"), on various post-trial motions.

I.

INTRODUCTION

This case has taken on the characteristics of a chameleon. It was tried before the jury on a theory of nonfeasance, specifically that the Church Defendants failed to warn Plaintiff or her parents that Jonathan Kendrick ("Kendrick") had abused his stepdaughter in 1993. That nonfeasance theory was the thrust of Plaintiff's entire case at trial. But now faced with the clear and overwhelming legal precedent establishing that there was never a special relationship between Plaintiff and Watchtower – or Plaintiff and the Congregation – based solely on her parents' membership in the same religious organization as Kendrick, Plaintiff has completely changed her arguments on this appeal to put forth a wholly different theory of liability: "misfeasance." This she cannot do. Indeed, it is well settled that litigants must adhere to the theory on which a case was tried and may not change their positions on appeal, and this Court should not entertain such a change by Plaintiff now.

Moreover, at trial Plaintiff based her nonfeasance theory of liability on the Congregation's failure to warn her and her parents about Kendrick. She told a tale of a "policy of secrecy" based primarily on the July 1, 1989 letter from Appellant Watchtower to all bodies of elders in congregations of Jehovah's Witnesses in the United States, including the elders in the Fremont Congregation. That was the refrain repeated early and often by Plaintiff at trial to support her nonfeasance claim. Indeed, despite the absence of testimony or evidence of any kind that the letter was for the purpose of instructing congregations to keep silent about and cover up allegations of child abuse, the letter was the main focus of Plaintiff's impassioned argument for both compensatory and punitive damages. However, the record reveals that the six page, July 1, 1989 letter was about the elders' scriptural requirement of spiritual and organizational confidentiality with one two-sentence paragraph addressing child abuse. Interestingly, that same paragraph did not even mention confidentiality, but merely recommended that congregation elders who hear of an allegation of child abuse should protect the child or children from further abuse and call Watchtower's Legal Department. *That is the case Plaintiff presented to the jury*, and upon which she floridly argued that the Congregation and Watchtower failed to warn (nonfeasance) about Kendrick due to their "policy of secrecy."

Plaintiff never argued to the jury that the elders placed her in harm's way by taking custody and control of her from her parents and putting her in field service with Kendrick (misfeasance). Further, Plaintiff never even suggested to the jury that an inference could be drawn that the elders placed Plaintiff with Kendrick. If this

allegation was true, it is inconceivable that she would not have argued it to the jury. *Yet she did not.* Such an act of misfeasance (placing Plaintiff with a known child abuser) would be so much more reprehensible than the nonfeasance Plaintiff alleged at trial. Of course, this was not the center of Plaintiff's argument to the jury because the facts did not support such an argument and there was no evidence of misfeasance for Plaintiff to present.

Now on appeal, Plaintiff is confronted with the reality that the facts of this case and established law do *not* support her nonfeasance theory of liability. Plaintiff finally realizes on appeal that the law required her to prove misfeasance for her to recover from Appellants, but the facts that she brought out at trial do not support a misfeasance claim. Acknowledging for the first time the deficiencies of the evidence presented at trial, Plaintiff engages in sleight-of-hand and a mixing of the theories of misfeasance and nonfeasance throughout her brief in an obvious attempt to create a hybrid cause of action. However, examining each cause of action establishes that Plaintiff has not met her burden of proof on either theory.

II.

THE RECORD DOES NOT SUPPORT PLAINTIFF'S NEWLY-MINTED CLAIMS ON APPEAL

A. The Record Does Not Support a Claim that the Congregation Committed Misfeasance by Assigning Plaintiff to Perform Field Service With Kendrick

In the trial court, Plaintiff argued that her proposed Special Instruction 2 be given to the jury to cover an inference that the elders committed misfeasance by placing Kendrick in field service with Plaintiff. (8 RT 980-981.)[1] The court rejected Plaintiff's proposed Special Instruction 2. (9 RT 1011-1014, 1040.) Plaintiff did not object to that rejection and did not appeal the trial court's refusal to give that instruction. Therefore, the issue of misfeasance is not before this Court.

Despite this issue not being preserved on appeal, it is essential to address at the outset Plaintiff's misrepresentation of the facts about her claim that the Congregation's elders assigned her to work with Kendrick in the public ministry of Jehovah's Witnesses (*i.e.,* "door-to-door ministry," "field ministry," and "field service"). Plaintiff claims for the first time on this appeal that the elders "repeatedly assigned her to participate with Jonathan Kendrick, a man known to them as a child molester, in the Congregation's door-to-door ministry known as 'field service'"; and that there "was plenty of evidence that in fact Candace *was* assigned to perform field

[1] As with its Opening Brief, all facts in this brief are supported by reference to the companion Appellants' Joint Appendix, abbreviated as: ([volume] AA [page]); the Reporter's Transcript, abbreviated as: ([volume] RT [page]); and the exhibits identified on the record and/or admitted into evidence in the trial court, abbreviated as ([Offering Party] Exh. [number]).

service with Kendrick." (Plaintiff's Resp. Brief, pp. 1, 14.) However, a close examination of the record reveals that there is no such evidence.

Specifically, Plaintiff's "Respondent's Brief" cites to 6 RT 726-728 as support for her assertion that: "She testified that sometimes, when neither parent was available, she went to field service without them and that on some of those occasions she was assigned to perform field service with Kendrick." (Resp. Brief, p 14.) However, her testimony was very different. What Plaintiff *really* said while under oath was as follows:

Q. Were there times that you went to field service without your dad?

A. Yes.

...

Q. So if you were doing field service without either parent, how did you go?

A. Usually, you know, we would have groups, groups that would go. And it was kind of something that we had scheduled. I would go with somebody in the group.

Q. And how would you know what group to be in?

A. Those were – are you talking about the actual service meetings?

Q. Yes.

A. I think those were predetermined by the elders.

Q. And how would you know where to go for your service, your field service on any given day?

A. Those are usually prescheduled.

Q. And who would tell you where to go?

A. Well, in that room that I was talking about, usually it was on the board. Anything that was - - you know, it was just paper on the board that the service meetings were scheduled and where they would be held.

Q. And that was at the Kingdom Hall?

A. That was at the Kingdom Hall.

...

Q. Were there times that you went out in the field service with Jonathan Kendrick but without either of your parents?

A. Yes. (6 RT 727-728.)

Even Plaintiff's testimony that Kendrick sometimes volunteered to take her in field service or give her a ride does not mention the elders being involved in any way. Her actual testimony, which was directly contradicted by her father, was that her dad dropped her off or she got a ride with someone else and sometimes Kendrick. But her testimony is silent about any elder or congregation involvement in these private and personal arrangements between her parents and some other person to transfer custody and control of Plaintiff for a period of time. The logical inference is that her parents made these arrangements for their daughter. There was not even a hint of Congregation involvement. (6 RT 728.) From that testimony, it is quite apparent that Plaintiff was testifying about where the meetings for field service would take place before engaging in the door-to-door ministry, and *not* to the field service itself. Regarding the so-called "assignments," Plaintiff was again referring to the *meetings* for service:

Q. And who would tell you where to go?

A. Well, in that room that I was talking about, usually it was on the board. Anything that was – you know, it was just paper on the board that the service meetings were scheduled and where they would be held. (6 RT 727-728.)

However, even if Plaintiff had been testifying about actual assignments to work in field service, her testimony is insufficient. She *never* testified that her parents transferred custody and control of her to an elder or any other agent of the Appellants. She *never* testified that an elder directly assigned her to work with Kendrick, much less that an elder assigned her to work with Kendrick alone. For that matter, Plaintiff also *never* testified that the elders ever assigned her to go in field service with anybody. With respect to the "paper on the board," there was no testimony as to *who wrote that paper* – a congregation elder, ministerial servant, congregation member, or someone else. Nor was there any testimony that that "paper" contained an assignment for Plaintiff to go in field service with Kendrick. Her testimony was simply "it was just paper on the board that the service meetings were scheduled and where they would be held." (6 RT 728.) In other words, the "paper" told everyone where the meetings *before* field service would be held.

Additionally, Plaintiff's testimony was that she went with a group. "Usually, you know, we would have groups, groups that would go. And it was kind of something that we had scheduled." (6 RT 727.) It should be noted that Plaintiff said it was what "we" had scheduled, not what *the elders* had scheduled.

Plaintiff next contends that "[h]er testimony was corroborated by Congregation member Carolyn Martinez, who saw Kendrick and Candace in field service together." (Resp. Brief, p. 14.) But Martinez's testimony was not time specific and does nothing to help prove that Plaintiff was placed in field service with Kendrick by an elder *after* the Congregation had notice of Kendrick's abuse of his stepdaughter. (6 RT 665-666.) In actuality, Martinez did not even provide any testimony whatsoever to support Plaintiff's contention that the Congregation elders assigned her to work with Kendrick in field service. Likewise, her testimony does not say that Plaintiff and Kendrick were alone together, or that her parents had handed over custody of Plaintiff to the elders, to Kendrick, or to anyone else. (See 6 RT 666.) Instead, a careful review of that testimony reveals that Martinez simply agreed to the question posed by Plaintiff's counsel: "Would there be an elder *or someone* who would have made that assignment?" (*Ibid.* [emph. added].) And it is important to note that Martinez's testimony related to "where to go for field service," not with whom to go. (*Ibid.*) Further, it was never established that the "someone" that may have made the assignment was even an agent of the Appellants.

Even considering that testimony (as far as it goes), there is not a shred of evidence in the record that the elders or any other agent of the Appellants assigned Plaintiff to work with Kendrick in field service. That glaring lack of evidence and direct testimony actually supports the testimony of the elders, who stated that they never assigned Plaintiff and Kendrick to work together. (3 RT 185-187, 248; 4 RT 420-421.) It also supports the testimony of the elders that children are not assigned to

engage in their preaching activities with adults of the opposite sex. (3 RT 186.) Finally, it supports the elders' testimony that they never assigned Kendrick to engage in preaching activities with Plaintiff (keeping with the policy of Jehovah's Witnesses). (7 RT 927-928.)

In examining and evaluating Martinez's testimony, it is important to further note that she never said that she saw Plaintiff and Kendrick alone, or that the Congregation elders took custody and control of Plaintiff. In fact, Martinez admitted that she *never* saw Plaintiff come to field service without a parent. (6 RT 668 ["Q. Did you ever see Candace Conti come to field service without one or both of her parents? A. No."].) Therefore, the only inference that can be drawn from Martinez's testimony is that she saw Plaintiff with at least one of her parents and Kendrick in field service. If she later wound up in the custody and control of Kendrick, it would have been one of her parents (and *not* one of the elders) that handed Plaintiff over to Kendrick. Yet this also was adamantly denied by both of Plaintiff's parents. (4 RT 357, 367-368; 5 RT 482, 496, 513.) In any event, the Martinez testimony falls far short of proving Plaintiff's new claim on appeal that she was assigned by the elders to work in field service alone with Kendrick.

In Plaintiff's "Respondent's Brief," she also makes the bald assertion: "On numerous occasions, Kendrick was assigned to perform field service with Candace." citing to pages 665, 666, and 728 of the record. (Resp. Brief, p. 26.) However, as previously pointed out, there is simply no evidence to support that assertion.

In summary, while Plaintiff is portraying this case as one of misfeasance for the first time on appeal, there was no evidence presented at trial in support of that theory of liability. There was no evidence offered that the elders took custody and control of Plaintiff. There was no evidence that the elders ever assigned Plaintiff to work with Kendrick in field service. And there was no evidence offered by Plaintiff that she was ever assigned to work with Kendrick in field service alone. In fact, Plaintiff did not even produce any evidence at trial that she ever worked in field service without a parent or someone appointed by her parents to care for her.

Additionally, at trial Plaintiff never asked the jury to draw an inference that elders placed Plaintiff in field service with Kendrick. Nevertheless, she asks this Court to surmise now that the jury somehow drew that inference, and to thus uphold the verdict on that basis. But an inference that is unreasonable or is the "result of mere guess, surmise or conjecture" should be rejected by this Court. (*Marshal v. Parkes* (1960) 181 Cal.App.2d 650, 655.)

Since there is no direct connection between the supposed "fact" that Plaintiff was in service alone with Kendrick and the conclusion that an elder "sent" her into field service with Kendrick, the Plaintiff now asks this Court to conclude that the jury must have made a series of tenuous inferences in her favor. For example, Plaintiff asks this Court to conclude that the jury determined that after November of 1993:

1. On the day that any abuse occurred, contrary to the testimony of both her parents, one of them dropped Plaintiff off at a field service group.

2. On the day and at the place where Plaintiff was "dropped off," an elder was present.

3. Contrary to her parents' testimony, prior to dropping Plaintiff off, her parents did not prearrange the transfer of custody to a particular person as the elders required.

4. An elder and not "someone else" assumed custody of Plaintiff following her parents' relinquishment of custody.

5. Contrary to the testimony of multiple elders, the elder who assumed custody, specifically assigned Plaintiff to work in the same group as Kendrick.

6. Where Kendrick and Plaintiff were originally assigned to different groups, those groups were later changed by Congregation elders and Kendrick ended up in the same group as Plaintiff.

7. The elders were aware that Plaintiff was alone in Kendrick's vehicle and nonetheless allowed the two to leave the group together alone.

But at trial, Plaintiff did not ask the jury to make even one of those inferences. Consequently, it is highly improbable, not just illogical, that the jury would disregard direct evidence to the contrary and build inference upon inference to reach the conclusion that Congregation elders sent Plaintiff in field service with Kendrick when Plaintiff never asked them to do so in the first place.

As is well recognized, the "building of inference upon inference may often result in a progressive weakening of logical sequence, and lead to an ultimate conclusion which is untenable on the basis of the facts proven." (See *Savarese v. State Farm Mut. Auto. Ins. Co.* (1957) 150 Cal.App.2d 518, 520.) In this case, the "ultimate inference is [too] remote from the evidence." (*Ibid.*) Therefore, it "should be rejected." (*Ibid.*) Plaintiff simply did not meet her burden of proving that it is more likely true than not true that the elders placed Plaintiff in field service with Kendrick. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44

Cal.App.4th 1160, 1205.) Therefore, Plaintiff's attempt to change her theory of liability from nonfeasance to misfeasance on this appeal – by conjuring up a series of tenuous inferences – should be rejected by this Court.

B. The Record Does Not Support a Finding That the Congregation Exercised Custody and Control of Plaintiff or Control of Kendrick.

1. Custody and Control of Plaintiff.

For the first time in this case, Plaintiff now claims that there is "substantial evidence" of a special relationship between Plaintiff and the Congregation because the Fremont Congregation had "custody and control" of Plaintiff. As mentioned above, the trial record does not support that claim. Indeed, Plaintiff presented no evidence at trial to support her new misfeasance theory or her allegation that the elders had custody and control over her at any point, including assigning her to go with Kendrick in the field service or anywhere else.

Furthermore, Plaintiff also mistakenly relies on Restatement Second of Torts § 320 which discusses liability when one is legally required to or voluntarily takes custody of another and places that person in harm's way. In this case, there simply is no evidence that would support the conclusion that the elders or the Congregation were required by law to take custody of Plaintiff when she attended meetings for "field service" or when she may have joined a group for field service. Indeed, the most Plaintiff could herself say on that issue was: "Usually, you know, we would

have groups, groups that would go. And it was kind of something that we had scheduled." (6 RT 727.)

Additionally, Plaintiff's own father testified that Plaintiff never went to the Kingdom Hall or out in field service alone. He testified under oath as follows:

> Q. And are their occasions when she would be in field service where you, because of the other events going on in the family, were unable to participate?
>
> A. No. She would always go with me.
>
> Q. Is it your best recollection that Candace never went to any Jehovah's Witness event without you? Is that true?
>
> A. That is true. She did not go without me. (5 RT 482.)

To that end, Congregation elders only corroborated the testimony of Plaintiff's parents, confirming that they never assigned Plaintiff to accompany Kendrick in the field service without her parents. (3 RT 187; 4 RT 421-422.) Thus, even if it is true that Plaintiff went with Kendrick in field service and was abused by Kendrick on "some of these occasions," there is absolutely no evidence that the Congregation or the Congregation elders had assumed custody and control of Plaintiff on those occasions. Likewise, there is no evidence that the elders or anyone else for that matter assigned Plaintiff to be with Kendrick.

The only logical inference to be drawn from Plaintiff's own testimony is that she was in her parents' custody (as her father and Martinez testified), or a transfer of custody was made by her parents to "someone" Plaintiff never named. For a certainty, there was *no evidence* that a transfer of custody to the elders ever took

place. If her parents transferred custody of Plaintiff at their home to Kendrick or "someone," or if she ended up with Kendrick by later splitting off from the "group" with which she left the Kingdom Hall, this cannot be misfeasance on the part of the Congregation. In other words, even if Plaintiff's testimony that she was dropped off at the Kingdom Hall is accepted, that did not transfer custody and control of Plaintiff to the elders any more than dropping Plaintiff off at the shopping mall, the movie theater, or anywhere else would have transferred control and custody of her to the owners of the mall or theater. In short, there was no trial evidence that Plaintiff ever left the custody and control of her parents or the person with whom her parents entrusted her, or that she was ever in the custody and control of the Congregation.

2. Control of Kendrick.

Plaintiff now also argues that the Church Defendants had a special relationship with Kendrick and thus had a duty to control Kendrick's behavior or protect Plaintiff from him. During the trial of this case, however, Plaintiff never argued that there was a special relationship between Kendrick and the Appellants. In fact, the only ruling by the trial court was that Kendrick was *not* an agent of Appellants, since he was removed from any appointed position in 1993.[2] Moreover, the trial court did not find a special relationship between the Appellants and Kendrick, but rather between the Appellants and Plaintiff. (9 RT 1012.) It is no surprise that Plaintiff did not even ask the trial court to address the existence of a special relationship between the Appellants

[2] Plaintiff alleges her abuse began in 1994 when she was nine years old. (6 RT 739.)

and Kendrick since there is nothing in the record to support a finding of such a relationship.

The *sine qua non* of a special relationship is whether one can control another's actions. "It is fundamental that in order to take charge of a person in such a manner as will create a duty to control his conduct, one must possess the *ability* to control that person's conduct." (*Megeff v. Doland* (1981) 123 Cal.App.3d 251, 261.) "Where, as in the instant case, the natural relationship between the parties . . . creates no inference of an ability to control, the actual custodial ability must affirmatively appear." (*Ibid.*) As no custodial ability or actual ability to control existed between the Appellants and Kendrick, a special relationship could not exist. Indeed, generally speaking, members of society do not have the ability to control the actions of adult members of their family, let alone control members of society as a whole. (*See Hansra v. Superior Court* (1992) 7 Cal.App.4th 630 [mother had no ability to control the actions of an adult son who did not live with her]; *Todd v. Dow* (1993) 19 Cal.App.4th 253 [parents had no ability to control actions of adult son who did not live with them].)

Although Plaintiff would have this Court believe that the Appellants "took control of Kendrick when they determined where and with whom he was to perform field service," this is a complete misstatement of the evidence presented at trial. There was no testimony to the effect that the elders determined where or with whom Kendrick could engage in his personal ministry. To the contrary, Appellants offered testimony to show that a single, adult male is never assigned to work alone in field service with a child of the opposite sex who is not related to him. (3 RT 186.)

Similarly, Appellants introduced testimony that Kendrick was never assigned to work in field service with Plaintiff alone. (3 RT 185-187, 248; 4 RT 420.) In short, the trial record is devoid of any evidence that Appellants exercised control of Kendrick so as to create a "special relationship" between him and Appellants.

Plaintiff's argument of control ignores well-established precedent explaining the true nature of Jehovah's Witnesses ministry: that it is a personal ministry, not a required congregation function or activity. (7 RT 911, 912.) To that end, Jehovah's Witnesses "follow the example of Paul, teaching 'publicly and from house to house.' They take literally the mandate of the Scriptures: 'Go ye into all the world, and preach the gospel to every creature.' (Mark 16:15.) In doing so they are obeying a commandment of God." (*Murdock v. Commonwealth of Pennsylvania* (1943) 319 U.S. 105, 108.) Furthermore, "Jehovah's Witnesses derive their authority to proselytize via door-to-door pamphleteering from the Book of Matthew wherein Jesus instituted a house-to-house search for people to whom to preach the good news." (*Gillet v. Watchtower Bible and Tract Society of Pennsylvania, Inc.* (Fla. App. 2005) 913 So.2d 618, 621 [citing *Watchtower Bile and Tract Society of New York, Inc. v. Village of Stratton* (2002) 536 U.S. 150].) The ministry of Jehovah's Witnesses is a personal ministry motivated by love of God and neighbor, and is not done on behalf of Watchtower or any congregation of Jehovah's Witnesses. (7 RT 911, 912.)

Furthermore, the fact that a congregation may arrange for a location where local Jehovah's Witnesses can meet and organize (if they desire) prior to engaging in their God-assigned ministry does not give evidence of an agency relationship or any

other relationship of control. (See 9 RT 1037-1038, 1061 [trial judge determining that Kendrick was not an agent of either of the Appellants]; see also *Gillet v. Watchtower Bible & Tract Society of Pennsylvania, Inc.*, *supra*, 913 So.2d at 620-621 [door-to-door proselytizing of one of Jehovah's Witnesses did not establish an agency relationship with the church].) Unlike an employer who can mandate that an employee be physically at the job site, Plaintiff presented no evidence that Appellants had the ability to control when, or even if, a congregation member will decide to engage in their door-to-door ministry. Preaching from door-to-door is an activity that individual Jehovah's Witnesses only engage in when they feel motivated to speak about God. (*Murdock*, *supra*, 319 U.S. at 108.)

Plaintiff argued that the Appellants had the ability to control Kendrick since the local elders "placed [him] on 'restrictions,' instructing him as to what he could and could not do" and the elders "kept an eye on him." (Resp. Brief, p. 30.) However, spiritual discipline that included removing Kendrick from a leadership position and restricting his privilege to comment at meetings or assist the elders does not establish that the elders had an ability to control Kendrick. (3 RT 166.) For example, just because the elders counseled Kendrick that he "could not . . . show affection to children, put children on his lap, work with them out in the door-to-door ministry, [or] work with children in the Kingdom Hall" does not prove that the elders had the ability to control Kendrick. It would have been in Kendrick's best interest to heed this counsel. However, even in day-to-day life, individuals regularly tell other adults what they should or should not do feeling that it is in the best interest of the

subject to follow their direction. Those demands are often ignored, evidencing the lack of an ability to control another person. Plaintiff herself says that Kendrick ignored what the elders told him, and thus demonstrates the Congregation's lack of ability to control him. (Resp. Brief, p. 13; see also *Hansra*, *supra*, 7 Cal.App.4th at 645; *Wise v. Superior Court* (1990) Cal.App.3d 1008, 1014.)

Finally, the elders' efforts to monitor Kendrick when he was in their presence at the Kingdom Hall to make sure he was not acting inappropriately with children does not establish an ability to control Kendrick at places away from the Kingdom Hall, where Plaintiff testified her abuse occurred. Any effort of the elders to protect others from Kendrick while he was in their sight on the Congregation's property does not mean that they could control him, or had custody of him. Indeed, as a practical matter, to hold that effort by a religious organization to set certain standards of conduct on its property automatically creates a "special relationship" with all those who attend is contrary to well-settled law. (See *Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278; *Richelle L. v. Roman Catholic Archbishop of San Francisco* (2003) 106 Cal.App.4th 257; and *Roman Catholic Bishop of San Diego v. Superior Court* (1996) 42 Cal.App.4th 1556.) If this were not so, religious organizations would be discouraged from taking protective measures as it would reduce their liability exposure. Thus, finding a special relationship under such circumstances would not serve to better protect children.

III.

DEFENDANT DID NOT OWE PLAINTIFF A DUTY OF CARE SINCE IT DID NOT HAVE A SPECIAL RELATIONSHIP WITH PLAINTIFF OR KENDRICK

A. The Finding of a Special Relationship is a Prerequisite to Any Duty Analysis.

The law is well-settled that a court must find that there is a "special relationship" before engaging in an analysis of whether a duty is owed. This is so even after the decision in *Rowland v. Christian* (1968) 69 Cal.2d 108. Yet in her response to this appeal, Plaintiff attempts to downplay the essential role of a special relationship as a prerequisite to duty analysis under *Rowland* by misconstruing *dicta* in *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 410-411. This Court in *Margaret W. v. Kelley R.* cited to *Juarez* and then went on to note that the Supreme Court of California "has made it very clear that the concept of 'special relationship' remains a very important analytic tool in determining duty," even after *Juarez*. (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 152 n. 12 [citing *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224 and *Morris v. De La Torre* (2005) 36 Cal.4th 260].)

Plaintiff's reliance on *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861 is similarly misplaced. In that case, the school district was found to have a special relationship with its students, and thus the duty flowed from that special relationship. (*Id.* at 869, 877.) The *C.A.* court found that the *Rowland* factors are used to determine "the scope of the duty" only *after* a special relationship

has been established. (*C.A.*, *supra*, 53 Cal.4th at 877.) Consequently, our Supreme Court has been steadfast in its position that a special relationship must be found before a court can engage in an analysis of a duty or the scope of that duty by reviewing the *Rowland* factors.

B. Membership in a Religion Does Not Create a Special Relationship Even for Minors.

California courts have consistently held that religious organizations do not have a special relationship with their congregation members, including minors, merely by virtue of their membership in the religion. (See *Nally*, *supra*, 47 Cal.3d 278; *Richelle L.*, *supra*, 106 Cal.App.4th 257; and *Roman Catholic Bishop of San Diego*, *supra*, 42 Cal.App.4th 1556.) Yet on this appeal, Plaintiff tries to distinguish that overwhelming precedent.

First, Plaintiff decries *Nally* and *Richelle L.* because neither "involved a minor plaintiff." (Resp. Brief, p. 31.) However, being a minor plaintiff does not create a special relationship. The Court in *Roman Catholic Bishop of San Diego* dealt with a 15-year-old plaintiff and still found that no special relationship existed. If a plaintiff's status as a minor was the sole criterion, then all adults that come in contact with minors would have a special relationship with them.

Plaintiff further attempts to distinguish *Roman Catholic Bishop of San Diego* by arguing that the defendants in that case had no notice that the perpetrator was a danger to minors. However, as Plaintiff must know, notice had nothing to do with that Court's determination of the "special relationship" issue. The notice issue related

only to the plaintiff's claims of negligent hiring and negligent supervision and had nothing to do with the Court's special relationship analysis. (*Roman Catholic Bishop of San Diego*, *supra*, 42 Cal.App.4th at 1568.) In any event, notice that a congregation member may be a danger to others does not create a special relationship. As the *Nally* court observed: "Mere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm." (*Nally*, *supra*, 47 Cal.3d at 297.)

In all three cases, the courts highlighted the constitutional pitfalls of creating a standard of care for religious organizations by means of a finding of a special relationship with their congregation members. (See *Nally*, *supra*, 47 Cal.3d at 299; *Richelle L.*, *supra*, 106 Cal.App.4th at 269-70; and *Roman Catholic Bishop of San Diego*, *supra*, 42 Cal.App.4th at 1568.)

To that end, the High Court in *Richelle L.* observed:

> [A] standard of care and its breach could not be established without judicial determinations as to the training, skill, and standards applicable to members of the clergy in a wide array of religions holding different beliefs and practices. Even if a reasonable standard could be devised, which is questionable, it could not be uniformly applied without restricting the free exercise rights of religious organizations which could not comply without compromising the doctrines of their faith. The application of such a standard would also result in the establishment of judicially acceptable religions. (*Richelle L.*, *supra*, 106 Cal.App.4th at 270.)

Plaintiff through her expert, Dr. Anna Salter, tried to establish that Jehovah's Witnesses did not measure up to the standard of care supposedly established by other

religions she mentioned. (6 RT 681, 685, 697-99.) Dr. Salter noted three or four religions that she claims warned their members of potential abusers in the early to mid-1990s. Is that enough to establish a standard of care for all religions? If a court or a jury were allowed to decide such a question, it would impermissibly establish judicially acceptable religious standards, and thus judicially acceptable religions in violation of the Establishment Clause. (*Richelle L.*, *supra*, 106 Cal.App.4th at 270.)

C. The Trial Court's Duty of Care Instruction Was Not a Neutral and Generally Applicable Law.

Plaintiff additionally argues that the trial court's duty of care instruction did not impact the Church Defendants' religious practice because it was a neutral and generally applicable law that would have applied equally to any organization "where adults and children participated together." (Resp. Brief, pp. 33, 34, 43.) Plaintiff attempts to draw similarities between Jehovah's Witnesses and youth-based organizations like the Boy Scouts and Girls Scouts, where a duty of care was found to exist. Plaintiff does so to support her reliance on *Juarez* in an attempt to establish that Jehovah's Witnesses had a duty to "take reasonable protective measures to protect" Plaintiff from Kendrick.

In doing so, however, Plaintiff simply ignores the evidence that Jehovah's Witnesses are *not* a youth-based organization and hopes that this Court will do the same. The record is clear that Jehovah's Witnesses do not sponsor programs or activities that separate children from their parents, such as religion classes for children or overnight trips of any kind. (3 RT 140; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT

705; 7 RT 873-876.) Plaintiff here, like the plaintiff in *Roman Catholic Bishop* "did not attend a church school, where an affirmative duty to protect students may exist." (*Roman Catholic Bishop of San Diego*, *supra*, 42 Cal.App.4th at 1567.) Plaintiff even acknowledges that Jehovah's Witnesses are not a "youth-oriented" organization. (Resp. Brief, p. 34.) The only evidence before the trial court was that Jehovah's Witnesses never separate children from their parents and never take custody of children from their parents.

More importantly, there is a big difference between youth-based organizations and organizations that permit activities where "adults and children participate together." Youth organizations such as the Boy Scouts become the "adult caregivers" and they thus stand *in loco parentis* for the youths in their organization. In other words, they accept custody of the children from their parents as an integral part of their activities. (*Juarez*, *supra*, 81 Cal.App.4th at 410.) This was the case for the Boy Scouts in *Juarez*; they were holding overnight sleepovers where the plaintiff did not have the protection of his mother. Since the Boy Scouts took custody and control of Juarez, they had a "special relationship" with him and thus were required to stand in for his mother and protect him.

Membership in a religion does not create a similar special relationship in and of itself. This is true even though parents and children may come to worship in the same building. Since Jehovah's Witnesses do not have activities that separate children from their parents, they did not stand *in loco parentis* to Plaintiff or any other children. (3 RT 140; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT 705; 7 RT 873-876.)

In the case at bar, there is absolutely no evidence that Plaintiff's parents ever left Plaintiff with an agent of the Congregation or that an agent of the Congregation accepted custody and control of Plaintiff. These are key differences from *Juarez* and similar cases in which it was clearly established that the defendants stood *in loco parentis* to the minor plaintiff in question.

Also unlike this case, the perpetrator in *Juarez* was a scout leader, an agent of the Boy Scouts. Here it is undisputed that Kendrick was not a volunteer or an agent of the Congregation or Watchtower. (9 RT 1037-1038, 1061; *Gillet, supra*, 913 So.2d at 620-621.)

Plaintiff's also contends that Jehovah's Witnesses, which do not conduct any youth activities, should nonetheless be treated like civic and political organizations that do have such activities. However, Jehovah's Witnesses are more akin to organizations that do not conduct youth activities such as the Fremont Police Department, CPS, and the District Attorney's Office. However, notwithstanding the equivalency in the absence of youth activities, the trial court found that those entities did not have a special relationship with Plaintiff and refused to even allow those entities whose function is at least in part to protect children to appear on the special verdict form. As such, the trial court did not create a legal duty that was a neutral and generally applicable law. Rather, it created a duty that applied only to, and in fact targeted, a religious organization. Doing so violated the United States and California constitutions. (See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520.)

IV.

THE FINDING OF THE TRIAL COURT THAT APPELLANTS OWED A DUTY TO RESPONDENT, EVEN UNDER THE *ROWLAND* FACTORS, WAS ERROR

There is no evidence that the Fremont Congregation elders assigned Plaintiff to go in field service with Kendrick. Nor is there any evidence that Plaintiff and Kendrick went out in field service alone. Nonetheless, assuming *arguendo* that the jury was somehow able to cobble together inferences within inferences to conclude under Plaintiff's new theory of misfeasance that the Fremont Congregation elders assigned Plaintiff and Kendrick to field service in the same group of congregation members after November 1993, the Fremont Congregation still owed no duty of care to Plaintiff even under the traditional *Rowland* factors. Those factors include: (1) the foreseeability of harm to the one injured; (2) the degree of certainty that the plaintiff actually suffered a harm; (3) the closeness of connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with any potential resultant liability. (*Rowland, supra*, 69 Cal.2d at 112-113.)

A. No High Degree of Foreseeability

Foreseeability of harmful conduct directed at a plaintiff is a key factor in a *Rowland* analysis to determine the existence of a duty. In addition, when that conduct is criminal in nature, there must be an extraordinarily high degree of foreseeability.

(See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 532.) In order to assess whether Kendrick's alleged conduct with Plaintiff was foreseeable, it is necessary to understand what the Congregation elders knew at the time Plaintiff's abuse allegedly occurred.

In the context of duty of care, foreseeability does not mean the mere possibility of occurrence. (*Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1133 ["[C]reation of a legal duty requires more than a mere possibility of occurrence since, through hindsight, everything is foreseeable"].) Thus, the court's task in determining duty is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct. Instead the court evaluates more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may be appropriately imposed on the negligent party. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, n. 6.) "Sufficiently likely" means what is "likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct." (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57.)

1. What Did the Fremont Congregation Elders Know?

Based upon the uncontradicted trial testimony, in November 1993, Kendrick confessed that four months earlier he had touched the breast of his 13-year-old stepdaughter, Andrea. (3 RT 151-155, 158-159, 180-181, 183, 210-211, 214-217,

219-222, 239-240; 4 RT 302; 7 RT 879-880; 8 AA 1992-1993.) The elders were informed that the family had worked it out and Evelyn (Kendrick's wife) had forgiven Kendrick. (3 RT 216.) The elders informed Evelyn and Andrea that they were free to report the incident to the secular authorities. (3 RT 241; 6 RT 707.) Although there may be a divergence in the testimony as to the scope of the touching, there is no question that Kendrick's improper touching of his stepdaughter happened only once, at night, in the privacy of their own home. (3 RT 216; 4 RT 300-301.) The elders thus had *no* prior knowledge that Kendrick had sexually abused anyone or acted inappropriately with anyone while engaged in field ministry, nor has Plaintiff presented evidence or even alleged any such conduct occurred with anyone but herself.

2. What Did the Fremont Elders Do?

Plaintiff claims that on several occasions she was abused by Kendrick *after* engaging in field service. (6 RT 728.) Although Plaintiff now claims that the elders assigned her to go in the field service with Kendrick, Plaintiff herself never testified to that, nor did anyone else. While Martinez claims to have seen Kendrick and Plaintiff in field service together (6 RT 666), she also testified that she never saw Plaintiff come to field service without her parents. (6 RT 668.) And the fact that Martinez was there to see the two in field service together indicates that Kendrick and Plaintiff were not alone at that time. So what did the Fremont elders do?

The elders testified that they *never* assigned Kendrick to work in the field service with Plaintiff. (3 RT 185-187, 248; 4 RT 420-421.) And there is no testimony that the elders did otherwise. However, even if the jury was somehow able to infer that the elders did assign them to the same group for field service after November 1993, there can be no inference that the elders assigned them to work in field service *by themselves*. Rather, the uncontroverted testimony is that the elders would send the publishers out in groups to go to the neighborhoods to preach. (3 RT 143.) Indeed, Plaintiff confirmed this when she stated the following:

> Q. Did your abuse by Kendrick occur on some of these occasions?
>
> A. Yes.
>
> Q. Tell us what would happen.
>
> A. Our groups would go out, we would get our territories, and we would go out and service. And we would do door to door. And then there was times when our groups would separate even further. And we would go to, you know, laundry mats or – and things like that. And sometimes he would take me, he would take me to go do some of these things and then we would end up at his house. (6 RT 728-729.)

This begs the question: Was the Fremont elders' alleged negligent conduct "sufficiently likely to result in the kind of harm experienced that liability may be appropriately imposed" upon them. (*Ballard*, *supra*, 41 Cal.3d at 572-573, fn. 6.) That is, based on the Fremont elders' knowledge that Kendrick momentarily touched the breast of his stepdaughter in the privacy of their own home, was it "sufficiently likely" that Kendrick would sexually abuse a non-family member, when they were assigned to with the same group in field service, so as to impose upon the elders a

duty of care? The answer to that question is invariably "no."

At worst, a jury could only infer that even though the elders knew that Kendrick had committed a one-time act of child abuse, he they still assigned Kendrick and Plaintiff to field service with the same group. Assuming *arguendo* that the elders did assign Plaintiff and Kendrick to field service with the same group (again, no evidence exists that this ever happened), it is not sufficiently likely that Kendrick would have abused Plaintiff after field service – as she alleges had happened – to impose a duty. Since the congregation elders did not assign Plaintiff to work with Kendrick in the field service, and even if they did they would have been assigned as part of a group. Thus, the kind of abuse alleged by Plaintiff was not highly foreseeable, and there certainly was no extraordinarily high foreseeability.

B. Degree of Certainty of Harm to Plaintiff.

The Fremont Congregation elders did not find out about Plaintiff's accusations until *after* the abuse ended. Nor did they ever see Kendrick acting inappropriately with Plaintiff. Plaintiff claims to have been abused "several times a month over ... a two-year period,", but later when she was confronted with the evidence that Kendrick had only lived alone in his house for a very short period of time, she recanted that testimony and said the alleged abuse may have occurred five times. (6 RT 744-745.) If the abuse happened, no one – not even Plaintiff's parents – had any inkling of this conduct by Kendrick. Thus, it is clear that in light of the ever changing testimony as to the scope and quantity of abuse Plaintiff allegedly suffered, there is *very little*

certainty that such harm was based on the elders' prior knowledge. (*Rowland, supra,* 69 Cal.2d at 113.)

C. No Close Connection between Fremont Congregation's Conduct and the Plaintiff's Injury.

Rowland requires that there be a close connection between the conduct of the defendant and the harm suffered by the plaintiff. Plaintiff argues that Kendrick should not have been allowed to remain a member of the Congregation after the one-time improper touching of his 13-year-old stepdaughter. Alternatively, Plaintiff argues that the elders should have made an announcement to the Congregation about Kendrick's conduct. But the nexus between the acts or omissions of the Fremont Congregation elders and the harm allegedly suffered by Plaintiff contemplated by a duty analysis is significantly different from that needed to satisfy a "*factual* determination of proximate cause." (*Adams v. City of Fremont* (1999) 68 Cal.App.4th 243, 269.) "Proximate causation requires simply that the act or omission of the defendant be a 'substantial [contributing] factor' to the harm suffered," whereas, in determining the existence of a duty, the Court must assess not only the fact that a causative relationship exists but it must also "quantify that connection in balance with the other *Rowland* factors." (*Ibid.*) An examination of the facts shows that there was no such close connection between Plaintiff's alleged harm and the conduct of the Congregation.

Plaintiff asserts that there "was a direct cause-and-effect connection between Congregation elders assigning Plaintiff to field service with Kendrick and his abuse

during field service," and that there "can be no doubt that it was defendants' conduct in assigning the two to perform field service together that provided Kendrick the opportunity to molest Candace." (Resp. Brief, p. 36.) As discussed above, the evidence does not support these assertions. However, even if the Court determined that there were enough assorted facts for the jury to somehow infer that the elders assigned Plaintiff and Kendrick to field service with the same group, there is still an insufficient connection between such an assignment by the elders and the abuse she claims occurred after field service.

Moreover, assuming *arguendo* that the Fremont Congregation elders did assign those two to work in field service with the same group, there were other intervening events – over which the elders had no control – that transpired between the actual assignment and the abuse. Again, Plaintiff testified that when she engaged in field service she would go out as part of a group. (6 RT 728-729.) Thus, by her own testimony, Plaintiff was never sent out in the field service *alone* with Kendrick or, for that matter, anyone else. Plaintiff then went on to relate that the abuse that she alleges to have experienced occurred after field service "when our groups would separate even further," at which time she was alone with Kendrick. (6 RT 728-729.) It is thus clear that Kendrick would not have had the opportunity to abuse Plaintiff while they were in field service as part of the group the elders allegedly formed. Rather, the only way Kendrick could have had the opportunity to abuse Plaintiff was after some unknown person or persons caused the group to separate. Thus, but for the fact that

the groups Plaintiff claimed were formed by the elders eventually separated, Plaintiff would not have been abused on those occasions.

To be sure, this is not a case in which the defendant allegedly functioned as a procurer of victims for her husband. (*Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206.) Nor is this a case in which the defendant failed to provide instructive materials and protect a child during an overnight camping trip. (*Juarez, supra*, 81 Cal.App.4th 377.) Rather, at worst, this is a situation in which the elders assigned Plaintiff and Kendrick to field service with a group of other Jehovah's Witnesses. Based upon those facts, Plaintiff cannot show that there was a close connection between the Congregation's conduct and the harm she allegedly sustained, because that abuse would not have occurred had the groups not separated.

D. No Moral Blame Attaches to Fremont Congregation's Conduct.

The Court of Appeal in *Adams, supra*, 68 Cal.App.4th at 270 pointed out that to satisfy the "moral blame" requirement of *Rowland*, there must be evidence of something more than mere negligence. In fact, a higher degree of moral culpability is necessary before imposing a duty on a party and defining the scope of that duty.

One suggested indication of a high degree of moral blame would be if a party intended or planned the harmful result to the plaintiff. In this case, however, there is absolutely no evidence that the Congregation intended or planned for Plaintiff to be harmed by Kendrick. The trial testimony, in fact, showed the exact opposite. The

Congregation elders took measures to protect children from Kendrick, and no one but Plaintiff alleges that those measures were ineffective.

Another of the possible indicia of moral blame, according to *Adams*, is that the defendant had actual or constructive knowledge of the harmful consequences of its conduct. Again, Plaintiff failed to produce any evidence of such circumstances. Further, even assuming arguendo that the elders did assign Plaintiff and Kendrick to field service with the same group, there was no evidence presented during the trial to even suggest that the Congregation elders had any knowledge (actual or constructive) of any harmful consequences arising from that conduct, inasmuch as Plaintiff and Kendrick would have been assigned with a group of other Jehovah's Witnesses engaging in the public ministry.

Similarly, there was no evidence offered at trial indicating that the Congregation elders acted in bad faith or with a reckless indifference to the results of their conduct. True, they did not act as policemen or as employees of any other governmental agency. But within the framework of their roles as spiritual shepherds and counselors, they acted appropriately.

Finally, *Adams* mentioned that moral blame might attach to a party if its conduct was inherently harmful. But here, the elders removed Kendrick from his position in the Congregation, announced that action to the Congregation members, restricted his congregation-related activity, shared with members the materials published by Watchtower to educate parents about how to prevent and protect their children from sexual abuse, and took action to protect children from Kendrick.

Additionally, as Plaintiff testified, she was always sent out in the field service as part of a *group*, and never alone or with just one other person. Based upon that trial testimony, and for all of the reasons set forth above, the conduct of the Congregation elders could not legitimately be considered "inherently harmful."

E. Policy of Preventing Future Harm.

Plaintiff presented to the court below a case based on nonfeasance. Her attorney's theme throughout his opening argument, the testimony, and his closing argument was that the Congregation elders should have warned the members of the congregation about Kendrick. Threaded throughout the tapestry of those arguments was the supposed "policy of secrecy." As such, Plaintiff convinced the lower court that warning congregation members (and possibly the entire world, depending on how extensive that duty to warn might be defined) about Kendrick would have prevented future harm. However, there was no testimony offered to support that contention.

Dr. Monica Applewhite testified that in a setting where children and parents are not separated, such as a congregation of Jehovah's Witnesses, the best weapon against child sexual abuse is education of the parents and other adults. She added that this type of education has been done by Jehovah's Witnesses, through Watchtower publications, on a continuous basis since the early 1980s. (7 RT 876-877, 896, 898.) As a practical matter, requiring a religious organization to warn congregation members about allegations of child sexual abuse against another rank-and-file member would result in the child molester never confessing his unscriptural conduct,

never receiving spiritual counsel and assistance from the spiritual shepherds (elders), and no one keeping a watchful eye on the molester. Likewise, if the child molester did confess and a warning announcement was thereafter required, the child molester would simply go somewhere else to find victims. Relatedly, such a compelled revelation of what a congregation member may confess to would undermine the centuries-old belief in the overriding importance of the minister-communicant privilege. In other words, if ministers were required to divulge information received during a penitents' conversation with them, then a chilling effect on the free exercise of religion would undoubtedly follow. Consequently, the public policy consideration of preventing future harm to children is undermined by the negative results of mandating minister to disclose confidential information by requiring generalized warnings to congregation members.

F. Significant Social and Financial Burden.

In the instant action, the court below took the unprecedented step of holding that the Appellants had a duty to protect the Plaintiff by warning the congregation members about Kendrick's molestation of his stepdaughter. However, that court did not take the required next step and define how the Defendants must give that warning. Would it be weekly, monthly, semi-annually, annually? Would the Congregation have to post a notice in its meeting place? Does the Congregation have to take attendance to make sure that all members were present for the warning? When non-members attend, do they have to be warned, too? When people move into the area

and begin attending meetings, do they have to be warned? If the allegation is denied, must the Congregation still warn? Must the Congregation warn members of neighboring congregations that the accused molester might visit? Does the Congregation have the duty to warn non-members who may visit Kendrick's home? Does that duty to warn last until the death of the accused? These are vexing questions for which neither Plaintiff nor the lower court has any answers.

In other words, the trial court created and then imposed on the Appellants the duty to warn, but failed to engage in a consideration of the *Rowland* factors, to define the scope of the duty. The incomplete list of the possible permutations of the duty to warn stated in the preceding paragraph show that the trial court was sailing into uncharted waters. Indeed, it critically failed to consider and follow the steps set out in *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214, in which our Supreme Court found that imposition of a duty must also identify a specific action the defendant allegedly should have undertaken. No such analysis was undertaken – or guidance provided – by the trial court here.

Moreover, it should not be lost on this Court that the Congregation is a religious organization whose primary function is to provide spiritual guidance and comfort to its congregation members. It is not a secular policing authority. Society has never imposed a duty on a religious organization to protect its members from the conduct of other rank-and-file members. Yet, that is what the trial court did in this case and what Plaintiff is asking this Court to affirm. If it does so, this Court will expose all charitable organizations in which children are allowed to attend to

unlimited liability for failing to fulfill this amorphous "duty to protect" and "duty to warn." Doing so would also likely result in financial ruin for any organization allowing children to participate in their activities, resulting in *less* participation by families in religious activities. This should not be a burden society should be forced to bear in an attempt to protect children when other reasonable and effective measures are available.

G. Significant Societal Consequences.

For centuries, free societies have recognized the importance of religious freedom and the ability to obtain confidential spiritual counseling. In recognition of this belief that our society has held to be so important, the law of California did not require ministers to report allegations of child sexual abuse to the authorities in 1993. In 1997, the law was changed to make ministers mandated reporters of such allegations. However, even then the law exempted penitential communications from that requirement.

Going far beyond mandatory reporting to secular authorities, which was not required in 1993, the trial court imposed on the Appellants the duty to notify (in some unknown fashion) congregation members of potential child abusers. If upheld, this duty will have a chilling effect on those in need of spiritual counseling and guidance. For example, it would require any minister who was told of a congregant's alcohol or drug addiction to warn anyone who might be injured by that person. Taken to its logical conclusion, if a religious organization happened to know that a congregation

member had drug or financial problems, it would be obligated to warn all other members not to socialize or conduct financial affairs with that other congregant, lest that organization could be held liable to anyone injured or harmed. The same would be true for any Little League organization. Or professional association. Or political party.

Obviously, the duty imposed by the trial court on the Appellants in this case, if left intact, will have very significant societal consequences. The most likely and immediate impact of such a duty would be to chill the free exercise of religion, as well as to exclude children from many organizations. In other words, if organizations can be held liable for harm caused to a child who is outside of their custody and control simply because they allowed the child to participate their activities together with adults, then such a duty would discourage those organizations from allowing children to participate their activities in the first place. (See *Margaret W.*, *supra*, 139 Cal.App.4th at 162.)

Additionally, requiring the Congregation elders to monitor the time, manner, and means by which congregation members engage in their personal ministry not only runs afoul of the protections afforded under the U.S. Constitution, but would simply be impossible, inasmuch as congregation members may engage in the ministry *whenever* and *with whomever* they choose – often at times in which the elders have no knowledge.

Finally, the California Legislature has acted to advance the "public policy goal" of "encourag[ing] private assistance efforts." (*Nally*, *supra*, 47 Cal.3d at 298.)

In cases involving a potential duty to protect, extending liability "to voluntary, noncommercial and noncustodial relationships is contrary to the trend in the Legislature." (*Ibid.*) Furthermore, "while professionals may have a duty to warn or take precautions to prevent injury to known, or even unknown, victims of their dangerous patients, this duty is based upon special professional expertise and is not extended to nonprofessionals attempting to assist friends or subjects with problems." (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1457.)

For these reasons, the finding of the court below that the Appellants had a duty to protect Plaintiff and to "warn" cannot withstand scrutiny, even under *Rowland,* and must therefore be reversed.

V.

IF THIS COURT FINDS THAT A SPECIAL RELATIONSHIP EXISTED OR THAT THE APPELLANTS MAY HAVE ENGAGED IN MISFEASANCE, A NEW TRIAL IS REQUIRED

A. Assuming, Arguendo, That There Was a Special Relationship Between the Appellants and Plaintiff, the Court Below Erred in Its Instruction to the Jury Regarding "Duty."

The jury instruction on duty was that the Congregation and Watchtower had a duty to protect the Plaintiff. It left the jury to its own devices in figuring out the scope of that duty. How were they to protect her? What were they to do to protect her? Where did that duty end, or was it wherever Plaintiff may go? Was it to be co-extensive with her parents' legal duty to protect their child? All of those questions were left unanswered by the trial court, and the jury was forced to guess. Perhaps the

reason the trial court failed to define that "duty" is because it is a duty that never existed before the trial court's ruling.

In her Respondent's Brief, Plaintiff first misleads this Court by stating that Appellants waived that instructional error of the trial court by failing to object to the relevant jury instruction. But the Congregation and Watchtower repeatedly objected to the proposed jury instruction in the trial court. (4 RT 267-268; 6 RT 749; 8 RT 967, 972, 973; 9 RT 1010-1016, 1023-1024, 1032-1033, 1040; 4 AA 857.) Thus, its challenge to that instruction is well preserved.

Plaintiff next cavalierly argues that the trial court's error on this issue was harmless, since it was undisputed that no warning was given by the Congregation or Watchtower. But such an argument completely side-steps the fact that the lower court failed to give the jury the guidance it required in reaching a sound and proper verdict. Indeed, the trial court allowed the jury to speculate that the Congregation and Watchtower had a duty to protect Plaintiff from sexual abuse by Kendrick 24 hours a day, 7 days a week, 365 days a year. This would be at Congregation meetings, at school, at her home, or anywhere Kendrick might find her. A duty to protect Plaintiff in this fashion would result in liability for any sexual abuse by Kendrick. This would include liability for any sexual abuse by Kendrick taking place while Plaintiff was in the custody and control of her parents, as she alleged during the trial. (6 RT 745-746.)

Further, if this Court concludes that the jury could have found that Appellants had custody and control of the Plaintiff at some point, it would have been important

for the jury to determine when those instances of custody and control occurred and if Plaintiff was abused on those occasions. This is important because assuming *arguendo* that a special relationship can be established between Plaintiff and Appellants based on custody and control, such a special relationship would have to be limited in time. The special relationship would only exist when Appellants stood *in loco parentis* to Plaintiff. (*Juarez*, *supra*, 81 Cal.App.4th at 410.) Yet the jury's verdict does not define when, if ever, that happened.

Further, any duty to protect Plaintiff would not have included a duty to warn her parents since there is no evidence in the record that Plaintiff was "an identifiable and foreseeable victim." (*Megeff*, *supra*, 123 Cal.App.3d at 257.) As such, in allocating liability on the Church Defendants, the jury should have been instructed that these defendants can only be liable for abuse that occurred while Plaintiff was in their custody and control, and not in the custody and control of her parents.

The instruction on duty given to the jury by the trial court was improper and resulted in great prejudice to the Congregation and Watchtower. It was not harmless error, as Plaintiff asserts, but requires reversal of the judgment in this case or a new trial.

B. The Trial Court's Refusal to Instruct the Jury that the Congregation Elders Were *Not* Mandated Reporters of Child Abuse in 1993 Was Also Error Requiring a New Trial

During trial, one of Plaintiff's experts, Dr. Salter, gave incorrect testimony about whether the Congregation elders had a duty to report an allegation of child

abuse to the authorities in 1993 when they first learned of Kendrick's touching of his stepdaughter. Dr. Salter testified that the elders *were* required to report such an allegation – despite the fact that the mandatory reporting laws did not require clergy to report in 1993. (6 RT 694-695.)

For its part, the lower court recognized that the testimony by that Plaintiff's expert was incorrect, since ministers did not become mandated reporters until January 1997. (8 RT 975-976; Penal Code § 11166.) However, the court refused the requests of the Congregation and Watchtower to give a corrective instruction to the jury. Instead, the trial court informed the jury that the parties had a "difference of opinion" on the issue of whether ministers were mandated reporters in 1993 and that the issue would be decided by the court. Doing so was not enough.

Indeed, the trial court's failure to properly instruct the jury on the law, especially when it knew that the jury had been misled by the testimony of Plaintiff's expert, was clearly error. The prejudice to the Congregation resulting from that error is equally clear. Allowing the jury to believe that the Congregation had a duty to report the 1993 incident between Kendrick and his stepdaughter to the secular authorities gave the jury the impression that the Congregation ignored its legal obligations. Conversely, informing the jury that the Congregation had no legal duty to report to the secular authorities would have assisted the jury to understand the lack of any compelled reporting, and to clarify that elders are not police, but spiritual shepherds with a completely different role. Although Plaintiff incorrectly contends that the Congregation never objected to Dr. Salter's insinuation that the elders were

mandated reporters in 1993, the Appellants clearly objected to that mischaracterization of the law and the trial court even agreed that she implied that the elders had a legal duty to report abuse to the authorities in 1993. (8 RT 975.) The trial court then promised it would "clean up the record," but never clarified that elders did not have a duty to report in 1993. (8 RT 976.) Such inaction by the trial court and its concomitant failure to simply inform the jury of what the law required (instead of leaving that question to some amorphous "dispute" between the parties) prejudiced the Appellants.

C. The Trial Court's Refusal to Allow the Jury to Allocate Fault to Non-Parties Was Severely Prejudicial and Requires a New Trial

The Congregation and Watchtower requested that, pursuant to California Civil Code 1431.2(a) ("Proposition 51"), the jury be given the opportunity to allocate fault to non-parties whose conduct contributed to the harm allegedly suffered by the Plaintiff. Appellants suggested that the jury would be well within its rights to attribute a percentage of Plaintiff's damages, if any, to her parents, the North Fremont Police Department, Child Protective Services, and the Office of the District Attorney for Alameda County. But the trial court refused to allow any such allocation.

In support of that ruling, Plaintiff argues on this appeal that there was no evidence on which to base any liability against those non-parties. Plaintiff further points out that her parents were unaware of Kendrick's past abuse of his stepdaughter and cannot be held liable without such prior knowledge. (Resp. Brief, pp. 54-56.) However, none of the cases cited by Plaintiff in support of that argument deal with the

legal obligations of a parent to be the primary protector of his or her child. (See *Chaney v. Superior Court of Los Angeles County* (1995) 39 Cal.App.4th 152; *Romero v. Superior Court of San Diego County* (2001) 89 Cal.App.4th 1068.) They are completely distinguishable on that basis alone.

Indeed, the "Legislature has clearly indicated that it considers the failure [of a custodial parent] to provide adequate supervision of a child to be a serious and urgent matter." (*In re Marriage of Slayton* (2001) 86 Cal.App.4th 653, 656-57.) If Plaintiff's parents were negligent in their supervision of their daughter and that negligence contributed to her abuse by Kendrick, then they shared in the liability. Accordingly, they should have been included on the verdict form.

To be sure, if Plaintiff's testimony is to be believed, her father witnessed Kendrick abusing her on a train and did nothing because he was drunk. (6 RT 745-746.) In addition, he was present in the Congregation's Kingdom Hall while Plaintiff was squirming to get off Kendrick's lap and away from him. Plaintiff said that he allowed Kendrick to take her to Kendrick's home on hundreds of occasions. Of course, Plaintiff then later recanted that testimony and said it may have been only five times. (6 RT 744-745.) In any event, Plaintiff's father is also accused by her of dropping her off by herself at a meeting for field service to be given into the custody of some other adult and eventually, in some unexplained fashion, fall into the hands of Kendrick.

Similarly, Plaintiff's mother, who testified as a witness for her, denied ever letting Plaintiff sit on Kendrick's lap at any meetings, or allowing her to be taken

away from meetings by Kendrick to his home. (4 RT 367-369.) During her testimony, she recounted an incident at her home where Plaintiff complained that Kendrick had hurt her and an incident in her home where Kendrick had touched her inappropriately. Yet, if Plaintiff's testimony is found to be credible, her mother did nothing to protect her from Kendrick and allowed the abuse to occur over a period of several years. Notably, one reason mentioned by the lower court for not allowing the jury to allocate blame to Plaintiff's mother was that she was unable to care for Plaintiff due to her drug and alcohol abuse. (8 RT 961-962.) However, neither the lower court nor the Plaintiff has cited any legal precedent allowing a parent to be absolved of responsibility to protect her child by reason of such a voluntary disability. Applying the same rationale, the Congregation elders would be absolved of any similar duty if they, too, were abusers of alcohol or drugs. It is readily apparent that Plaintiff's parents should have been included on the jury's verdict form for purposes of allocating fault.

With respect to the various public entities involved, the same conclusion is also compelled. The evidence was undisputed that the North Fremont Police Department ("police") investigated Kendrick's molestation of his stepdaughter in early 1994. Child Protective Services ("CPS") was also involved in that investigation. Kendrick was subsequently prosecuted by the Alameda County District Attorney's Office ("DA") and convicted of a misdemeanor. But the Congregation elders were not informed about these criminal proceedings against Kendrick until several years later. (3 RT 193, 251.)

As a result of their extensive, professional investigation, the police, CPS, and the DA had much more detailed information about the incident in the Kendrick home in 1993 than did the Congregation elders. It was their task and obligation to the community to investigate crime and protect the public. It was the elders' task to shepherd the Congregation members, including Kendrick, by giving spiritual advice and counsel.

Yet, the police, CPS and the DA never incarcerated Kendrick to keep him away from children, they never warned the public about him, and they never let the members of Kendrick's congregation know about his molestation of his stepdaughter. If they thought that Kendrick was a danger to children, they let him loose.

By refusing to allow the jury to allocate fault to the police, CPS, and the DA, the trial court imposed a duty on the Congregation and Watchtower that it did not impose on those other entities, unfairly targeting a religious organization for separate and distinct treatment.

D. In Allocating Liability, the Jury Should Have Only Considered If Watchtower or the Congregation Committed Misfeasance and Held them Liable for those Acts Only

Plaintiff never asked the jury to draw an inference that the elders assigned her in field service with Kendrick and she was abused because of that act of misfeasance. In contrast, she did ask the jury to infer that the reason the July 1, 1989 letter was sent to all bodies of elders was not the reason the Appellants gave, but to maintain a "policy of secrecy" and to protect against child abuse lawsuits. Nonetheless, Plaintiff

asks this Court to assume that the jury did in fact infer that the elders placed her in field service with Kendrick. Even if that is the case, a new trial would be required to determine the issue of misfeasance.

This is so because if the Appellants committed misfeasance it would have had to be on specific days and times, none of which were established in the record. The Appellants would not have had an around-the-clock duty to protect Plaintiff under a theory of misfeasance and thus would not have been responsible for acts of abuse that did not flow from that misfeasance. Indeed, the evidence is clear that Kendrick also had access to Plaintiff at times and places unconnected to the Appellants, such as on a train with her father and out in her neighborhood roller skating. (2 RT 324.)

The Appellants could not be held liable for abuse that happened under those circumstances. Further, as discussed above, the misfeasance had to arise out of an elder placing her in service alone with Kendrick, and could not be simply a failure to prevent other people from allowing Plaintiff to go in field service with Kendrick since that would be nonfeasance. Therefore, the jury should have been so instructed to take those critical distinctions into consideration in allocating liability to the Appellants.

VI.

THE CONGREGATION DID NOT FAIL TO CITE CONTROLLING AUTHORITY

Finally, Plaintiff claims in her brief that "defendants fail to cite controlling authorities relied on by the trial court." This claim misleads this Court. It is true that cases mentioned by Plaintiff on page 70 of her brief were not in either of the

Appellants' Opening Briefs. However, only *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417 (*RCALA*) was actually relied upon by the trial court. The trial court cited to *RCALA* when he ruled, over the Appellants' objection, that communications between the Congregation elders and Kendrick were not privileged. The Appellants did not cite *RCALA* on appeal because they are not appealing that evidentiary ruling by the trial court.

Any other cases Plaintiff claims that the Appellants improperly failed to address were cited by her attorney, not by the trial court. Therefore, Plaintiff's claim that the Appellants failed "to discuss controlling law" is without merit.

VII.

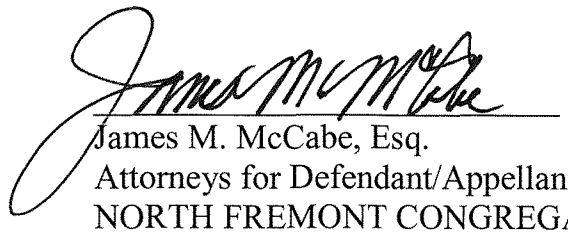
CONCLUSION

Based on the foregoing and as further detailed in its Opening Brief, Fremont Congregation reprises its request for this Court to reverse all aspects of the trial court's Judgment and Amended Judgment, and direct a new judgment be entered in its favor on all of the Plaintiff's claims. Alternatively, Fremont Congregation asks this Court to order that the lower court conduct a new trial and give complete and proper instructions on duty of care, duty of mandatory reporters, and allocation of fault.

Respectfully submitted,

THE McCABE LAW FIRM

Date: 8/30/13



James M. McCabe, Esq.
Attorneys for Defendant/Appellant
NORTH FREMONT CONGREGATION OF
JEHOVAH'S WITNESSES

CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)

Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing is proportionally spaced, has a typeface of 13 points, is at least one-and-a-half lined spaced, and based upon the word count feature contained in the word processing program used to produce this brief (Microsoft Word 2010), contains 12,784 words.

Date: 8/30/13

James M. McCabe

Jane Doe v. The Watchtower Bible and Tract Society of New York Inc. et al.
Court of Appeal of the State of California
First Appellate District, Division Three
Court of Appeal Case No.: A136641
Alameda County Superior Court Case No.: HG11558324

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 666 State Street, San Diego, California 92101.

On **August 30, 2013**, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

1) **REPLY BRIEF OF APPELLANT, NORTH FREMONT CONGREGATION OF JEHOVAH'S WITNESSES**

In a sealed envelope, postage fully paid, addressed as follows:

Richard J. Simons, Esq. Kelly I. Kraetsch, Esq. Furtado Jaspovice & Simons 6589 Bellhurst Lane Castro Valley, CA 94552	*Attorney(s) for Plaintiff and Respondent: Jane Doe*
Robert J. Schnack, Esq. Jackson Lewis 801 K Street, Suite 2300 Sacramento, CA 95814	*Attorney(s) for Defendant and Appellant: The Watchtower Bible and Tract Society of New York Inc.*
Jon R. Williams, Esq. Boudreau Williams LLP 666 State Street San Diego, CA 92101	
Mario F. Moreno, Esq. Legal Department 100 Watchtower Drive Patterson, NY 12563	
Hon. Robert McGuiness Alameda County Superior Court 1221 Oak Street, Dept. 22 Oakland, California 94612	*Trial Court*

Supreme Court of California 350 McAllister Street San Francisco, CA 94102 **Brief via electronic submission**	*Supreme Court*

On the above date:

__X__ (BY □ U.S. MAIL/BY □ EXPRESS MAIL) The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Boudreau Williams LLP's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.

____ (BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE) I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or driver authorized by the express carrier or delivered the sealed envelope to an authorized carrier or driver authorized by the express carrier to receive documents.

____ (BY FACSIMILE TRANSMISSION) On _____, at San Diego, California, I served the above-referenced document on the above-stated addressee by facsimile transmission pursuant to Rule 2008 of the California Rules of Court. The telephone number of the sending facsimile machine was 619-231-8181; see attached Service List for a list of the telephone number(s) of the receiving facsimile number(s). A transmission report was properly issued by the sending facsimile machine, and the transmission was reported as complete and without error.

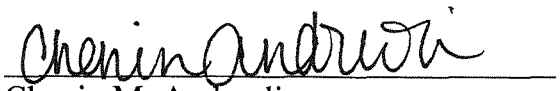
____ (BY PERSONAL DELIVERY) by causing a true copy of the within document(s) to be personally hand-delivered by _____ to the attached Service List, on the date set forth above.

____ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person at the e-mail addresses listed. I did not receive, within a reasonable time after the transmission, any was unsuccessful.

__X__ (STATE ONLY) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

____ (FEDERAL ONLY) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **August 30, 2013**, at San Diego, California.



Chenin M. Andreoli