A136641

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION 3

JANE DOE
Plaintiff and Respondent,

v.

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.
and
FREMONT CONGREGATION OF JEHOVAH'S WITNESSES
Defendants and Appellants

APPEAL FROM THE SUPERIOR COURT, COUNTY OF ALAMEDA
THE HONORABLE ROBERT McGUINESS, JUDGE
Case No. HG11558324

RESPONDENT'S BRIEF

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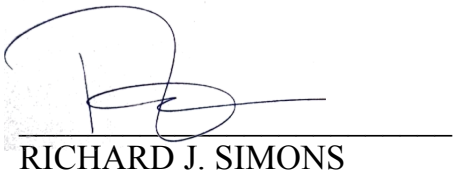
CERTIFICATE OF INTERESTED PERSONS

I know of no entity or person that must be identified under Rule 8.208(d)(1) or (2) of the California Rules of Court.

Dated: June 3, 2013



RICHARD J. SIMONS

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INTRODUCTION

Plaintiff Jane Doe (Candace Conti) was nine years old when the elders of defendant North Fremont Congregation of Jehovah's Witnesses ("Congregation") 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." For nearly two years, Kendrick took advantage of this opportunity, taking Candace to his home where he repeatedly sexually abused her.

Before Candace was abused the Congregation elders and the national Jehovah's Witnesses organization, defendant Watchtower New York ("Watchtower"), had *actual* knowledge that Kendrick had sexually abused at least one child. In 1993, Kendrick's wife Evelyn and his 13-year-old stepdaughter Andrea told the elders Kendrick had molested Andrea, placing his hands under her clothing when he thought she was asleep. The elders blamed Evelyn for this, telling her she was not performing her "wifely duties."

Despite knowing the risk Kendrick posed to other children in the Congregation, Watchtower, pursuant to its national policy embodied in Exhibit 1 (8 AA 1973), instructed the Congregation to keep Kendrick's molestation secret. The elders nevertheless continued to allow Kendrick to participate with children in all Congregation activities—including field service.

Ignoring all contrary evidence, defendants minimize their misconduct. They argue they had no special relationship with Candace and hence owed no affirmative duty to protect her. However, regardless of whether defendants owed an affirmative duty to protect plaintiff, their conduct in actively assigning her to participate in field service with a man they knew to be a child molester constituted a *mis*feasance that separately supports the verdict. Furthermore, the trial court's finding of the existence of a special relationship (and hence an affirmative duty to protect) is supported by evidence that defendants (1) exercised custody and control over Candace and (2) undertook to control Kendrick.

Defendants also argue that the affirmative duty imposed by the trial court impinges on their religious freedom. However, it is well established that a religious organization cannot insulate itself from liability by designating legally-proscribed *conduct* as "religious belief." Moreover, the duties imposed on defendants apply equally to similarly-situated secular defendants and hence do not violate the First Amendment.

Defendants assert a variety of instructional errors. First, they claim error in the trial court's refusal to instruct the jury on the requirements of California's mandatory child abuse reporting statute in effect in 1993. The claimed error is actually *evidentiary*, not instructional, because defendants contend the refused instruction was necessary to "correct" expert testimony concerning the mandatory reporting statute. Watchtower invited this error

by eliciting the allegedly improper testimony and the Congregation waived it by failing to object to the testimony. In any event, mandatory reporting responsibilities were not part of the case and thus the trial court properly instructed the jury not to consider the statute or the expert's testimony concerning it in deciding defendant's liability.

Defendants claim error in the court's decision to exclude plaintiff's parents and law enforcement agencies from the special verdict form as potential tortfeasors. However, the evidence was insufficient to raise a prima facie case of liability as to any of these nonparties.

Finally, Watchtower attacks the punitive damage award. First, it contends that the evidence was insufficient to establish malice. Substantial evidence, however, established that Watchtower consciously disregarded the risk that Kendrick, a known child molester, posed to children of the Congregation, including plaintiff. Although Watchtower knew child molesters are difficult to identify and often reoffend, it nevertheless chose to keep secret from Congregation members the fact that Kendrick had abused a child in order to protect itself from civil liability. Furthermore, it actually assigned plaintiff to perform field service with Kendrick.

Second, Watchtower contends the punitive damages were unconstitutionally excessive. The jury awarded $7,000,000 in compensatory damages and $21,000,001 in punitive damages, the latter being remitted by the judge to $8,610,000. The punitive damages were

firmly supported by the reprehensibility of Watchtower's conduct. They were not based on evidence of harm to others because no such evidence was admitted; furthermore, the jury was instructed not to consider any such harm in assessing punitive damages. Finally, the remitted amount was only three times the "base level" of compensatory damages as found by the judge (7 AA 1938)—well within constitutional limits.

Defendants fail to demonstrate any error, much less prejudicial error. Their selective and highly inaccurate reporting of the facts along, with their failure to cite relevant and controlling authority, are tacit admissions that the appeal is without merit. The judgment must be affirmed.

STATEMENT OF FACTS

A. Defendants Are Aware That Children Participate In Congregation Activities Without Their Parents.

Watchtower is the national corporation that establishes, supervises, and implements the legal and administrative policies and procedures for all Jehovah's Witnesses entities in the United States. (WNY AOB 4-5.) The men who make and approve all policies for the many corporate organizations of Jehovah's Witnesses worldwide, including Watchtower, is a group of elders in New York called the "Governing Body." (5 RT 531. (WNY AOB 4-5.)

Local congregations, such as North Fremont Congregation, are separate entities from Watchtower; nevertheless, local congregations have

no discretion to depart from Watchtower's policy mandates. (3 RT 141-142, 229-230.) Local congregation elders may not interpret those policies other than as prescribed by Watchtower. (3 RT 230-231.)

Watchtower appoints the administrators and supervisors of the individual local congregation corporations. (2 RT 139, 141.) The Congregation had about eight to twelve elders. (3 RT 139; 4 RT 405-406.) Watchtower admitted that the Congregation's elders, including Elders Gary Abrahamson, Michael Clark, and Larry Lamerdin, acted as agents of Watchtower in regard to all matters of their activities and duties. (3 RT 205-206.)

Only men are allowed to hold appointed positions within Jehovah's Witnesses, so no mothers or wives could serve as either elders or ministerial servants (the title given to the elders' helpers). (3 RT 147, 149.)

In the 1990s, the North Fremont Congregation had about 120 total members; approximately 25 percent of them were under the age of twelve. (3 RT 139-140, 189.) The Congregation supervised and sponsored numerous activities including field service; both adults and children as young as six participated together. (3 RT 139-140; 5 RT 548-550.) The elders knew that on some occasions children would participate in these activities—including field service—without their parents. (3 RT 140-143.) They also knew there would "undoubtedly" be occasions when parents

would have other Congregation members transport their children to church activities. (3 RT 145-146; 4 RT 437-438.)

Candace and her parents were active members of the Congregation; Candace had been a member "since she was a baby." (6 RT 660-661.) When she was nine and ten years old she spent 15 to 20 hours a week performing field service (5 RT 549; 6 RT 665), trying to be "the best Jehovah's Witness I can be" (6 RT 726).

Field service is the door-to-door ministry of Jehovah's Witnesses. It is preceded by a brief meeting at the Kingdom Hall, after which members go into neighborhoods to "publish" the "Good News." (3 RT 139-140, 142-143, 183-184, 184-185.) Elder Abrahamson, the Congregation's Service Overseer, supervised the assignments of partners for field service. (3 RT 184-186; 6 RT 666, 727.) Members were assigned in pairs to knock on doors in specified neighborhoods. (3 RT 184-185; 6 RT 665.)

B. Defendants Are Aware Child Abusers Are Difficult to Identify, Often Reoffend, And Thrive On Secrecy.

Watchtower published magazines called *Awake!* and *Watchtower* that were distributed to all Jehovah's Witnesses members and made available to the general public. (8 AA 2015; 3 RT 160-161; 5 RT 544-545.) The magazines' articles were approved by the Governing Body. (RT 555-556.) The Congregation's elders read and studied these publications. (3 RT 160-161, 188, 238-239; 4 RT 439.)

Beginning as early as 1985, a number of articles were published in *Awake!* and *Watchtower* concerning child abuse. (8 AA 2014 [1985], 2024 [1991], 2034 [1993], 2047 [1997].) The articles demonstrate that Watchtower, its Governing Body, and the Congregation elders all knew that sexual abuse of children was a widespread problem with as many as 27 percent of girls and 16 percent of boys being sexually molested. (8 AA 2014, 2016, 2025, 2036; 3 RT 258.) They knew it caused "overwhelming, damaging" injury, including "depression, … guilt, shame, and rage" as well as alcohol and drug abuse and post-traumatic stress disorder. (8 AA 2026-2027, 2030.)

They also knew child abusers operate in secret and take advantage of trust relationships (8 AA 2036, 2045; 3 RT 168; 4 RT 436) and that the usual child molester is not a "weird stranger" but a trusted or well-liked person who may hide in a church group and is likely to use "sophisticated and cunning tactics" (8 AA 2017, 2019, 2038; 3 RT 161-162, 168, 258-259; 4 RT 436). They warned parents that at the outset abuse is often disguised as "playful or affectionate conduct." (8 AA 2018; 3 RT 162.) They advised them to "avoid situations that leave our children vulnerable" (8 AA 2019) but acknowledged that "parents cannot always keep … a close watch on their children" and "cannot always be with them" (8 AA 2020).

Defendants knew that many child molesters reoffend—and that it was impossible to predict which would do so. (8 AA 2052.)

Defendants also knew that adults often unwittingly collaborate with child abusers by "fostering a hush-hush attitude about it." (8 AA 2037; 3 RT 165; 4 RT 439.) They recognized that silence gives a "safe haven to abusers, not their victims." (8 AA 2037; 3 RT 165; 4 RT 439.) A "conspiracy of silence," they observed, allowed gross child abuse to persist in the Catholic Church. (8 AA 2037; 3 RT 167, 169; 4 RT 439.)

C. In 1993 Defendants Learn That Kendrick Had Molested His Stepdaughter Andrea.

In 1993, two years before Kendrick began his abuse of Candace, Congregation Elders Abrahamson and Clarke learned that Kendrick had sexually molested his 13-year-old stepdaughter Andrea. (8 AA 1992, 1993; 3 RT 247.) Kendrick gave Andrea Vicodin, then, when he thought she was asleep, entered her bedroom and put his hands down her pants and under her shirt on her breast. (4 RT 342-343.) Andrea was awake enough to roll over, get up, and go into the bathroom; she then immediately told her mother Evelyn (Kendrick's wife) what had happened. (4 RT 293, 343.)

At the time, the Kendrick family belonged to the Congregation. (4 RT 291-293.) Evelyn and Andrea, however, had stopped participating. (8 AA 1992; 3 RT 194.) Nevertheless, after trying for a time to "fix it" herself, Evelyn called an elder because she believed they "were the ones to help us," "they would protect us." (4 RT 293, 294, 301.)

Soon after, Elders Clarke and Abrahamson met with Evelyn, Andrea, and Jonathan at the Kendrick home. (4 RT 294-95.) Evelyn and Andrea informed them that there was skin-to-skin contact beneath Andrea's clothes and that Kendrick had drugged Andrea with Vicodin. (4 RT 294, 295.)

At trial, the elders claimed they were not given this information. (3 RT 158, 159.) They said that at the meeting Kendrick stated he had "inadvertently" touched Andrea's breast over her bra while she was asleep on a couch. (3 RT 152, 153, 191, 216.) Evelyn disputed that Kendrick described the touching as inadvertent. (4 RT 302.) In any event, both of the elders admitted they knew Kendrick's characterization of the touching as inadvertent was a lie. (3 RT 156, 157, 216, 240-241.)

Elders Clarke and Abrahamson also admitted it was "clear" that Kendrick was a child abuser. (3 RT 218.) In keeping with the administrative procedures required upon receipt of a report of child sexual abuse, Elder Clarke immediately called Watchtower for direction and instruction. (3 RT 154, 230, 246.) Elders Clarke and Abrahamson then sent a written report to Watchtower documenting Kendrick's child abuse. (8 AA 1992, 1923; 3 RT 217, 218.)

The written report did not mention that that they believed Jonathan Kendrick had lied in describing the touching as inadvertent. (See 8 AA

1992, 1993 [Exhibit 9].) It stated that Andrea was "now using [the incident] as a tool to threaten with when she wants something." (8 AA 1992.)

Elders Abrahamson and Clark did not seem to be overly concerned about the incident. (4 RT 295, 296.) At the meeting, Jonathan expressed repentance for what he had done and promised he wouldn't do it again. (3 RT 190.) Although the elders knew Kendrick had lied to them and knew child molesters often falsely claim to be repentant, they believed that Kendrick was sincere in his repentance and not a threat to children. (3 RT 166, 191, 203, 204, 219.) They told Evelyn that the molestation was her fault because she had stopped sharing a bed with Kendrick and had stopped performing her "wifely duties." (4 RT 296.)

A few months later Evelyn and Andrea reported Jonathan to Child Protective Services and the Fremont Police. (4 RT 303; 6 RT 646-648.) He was ultimately convicted of a misdemeanor. (4 RT 307; 6 RT 648.)

D. Despite This Knowledge, Defendants Allow Kendrick To Continue To Participate In Congregation Activities Without Taking Steps To Protect Children From Him.

1. Pursuant to Watchtower policy, defendants do not inform congregation members that Kendrick is a child molester.

Pursuant to Watchtower's written policy, the Congregation did not share with members of the Congregation its knowledge that Kendrick had sexually abused a child. (3 RT 222, 230.) The policy was embodied in a July 1989 letter from Watchtower to the bodies of elders of all

congregations. (8 AA 1973-1978 [Exhibit 1]; 3 RT 223-225.)[1] (3 RT 223-225.) A "body of elder letter" was one method used by the Governing Body to communicate administrative policy to local congregation elders. (5 RT 542, 543.) It was undisputed that Exhibit 1 stated Watchtower's national policy on child sexual abuse. (4 RT 423, 424.)

Pursuant to this policy, reports of child sexual abuse within the Jehovah's Witnesses were required to be kept secret. (3 RT 222, 230.) Accordingly, the elders never warned any of the Congregation's members, including those with children, that Kendrick had sexually abused a child. (3 RT 222.)

The elders removed Kendrick from his position as a ministerial servant. (3 RT 166.) Ministerial servants do "administrative and physical things," such as distributing literature to the congregation, handling microphones, seating latecomers, and parking cars in the parking lot. (7 RT 909.) At the time Kendrick molested Andrea he was serving as a ministerial servant, having been recommended for that position by the Congregation elders. (3 RT 147, 221.) His appointment to ministerial servant had been approved by Watchtower. (3 RT 177, 178, 233, 234.) (WNY AOB 7.)

Although the elders announced to the Congregation Kendrick had been removed as a ministerial servant, they did not announce the reason for the removal. (3 RT 244.) Removal of a ministerial servant had occurred

[1] A copy of Exhibit 1 is attached to this brief.

several times before in the Congregation. (4 RT 281, 282.) Servants could be removed for any number of reasons unrelated to child abuse. (3 RT 148.) Removal did not in any way communicate to members the fact that Kendrick had molested a child or that he was at risk to do so again. (3 RT 147, 148; 4 RT 281, 282, 409.)

Dr. Anna Salter, a psychologist who has performed research and child sexual abuse prevention training for organizations in all 50 states, testified that defendants' failure to warn parents violated applicable standards of care for organizations "that sponsor or promote activities that involve adults and children together," (6 RT 671-672, 678, 684, 685, 687, 707.)

2. Although the elders claim to monitor Kendrick, he openly holds and hugs Candace at the Kingdom Hall.

Despite the fact that he was a known child molester, Kendrick was allowed to continue to participate in Congregation activities, including field service, home Bible study groups, and Kingdom Hall meetings; he also continued to hold the titles of "Minister" and "Brother." (3 RT 171; 7 RT 933.)

Elders Clarke and Abrahamson said they placed Kendrick on "restrictions"; they said he was instructed he could not show affection to children, put them on his lap, work with them in field service, or work with

them at the Kingdom Hall. (3 RT 166, 250.) They said he was told the elders would be watching him. (3 RT 250.)

The elders said that in fact they did watch Kendrick, monitoring his relations with children to make sure he was not "too friendly." (3 RT 165, 247-250; 4 RT 420-421.) They asserted he was not a threat to abuse children because they were "keeping an eye on him." (4 RT 435.) They said that if they had observed Kendrick getting "close" to a child they would have informed the parents. (3 RT 165.)

Although the elders claimed they never saw Kendrick violate the restrictions (3 RT 247-249, 253; 4 RT 420-421), there was evidence that he did. At the Kingdom Hall he often hugged Candace, held her hand, held her on his lap, and put his arm around her. (6 RT 663, 723, 738, 739.). In addition, he often isolated her in an open parking lot area next to the Kingdom Hall where children went to play while elders were occupied with pre- or post-meeting greetings and talk (4 RT 280, 281; 6 RT 723-725).

Nevertheless it was undisputed that the elders never informed plaintiff's parents about Kendrick. (3 RT 222.) He was never the subject of discussion at any elders' meeting after the report of his abuse of Andrea. (4 RT 408.)

3. In fact, defendants assign Candace to perform field service with Kendrick; he uses the opportunity to molest her.

Elders Clarke and Abrahamson denied that Candace or any child would ever be assigned to perform field service with Kendrick. (3 RT 171, 248.) Elder Alan Shuster, Assistant Overseer of Watchtower's Service Department, said he "believed" Watchtower had a written policy prohibiting molesters from performing field service with children; no such policy, however, was ever produced. (5 RT 526, 527; 7 RT 933-935.) Elder Abrahamson said he would never assign a child to work with an adult of the opposite sex in field service because it would not be "appropriate." (3 RT 186.) Elder Clarke acknowledged that it would have been "suicidal" to assign Kendrick to perform field service with a child knowing that he had molested Andrea; he claimed the Congregation would not have allowed it. (3 RT 248.) In fact, he claimed Kendrick was not allowed to perform field service without an elder being present. (3 RT 248.)

Nevertheless there was plenty of evidence that in fact Candace *was* assigned to perform field service with Kendrick. 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. (6 RT 726-728.) Her testimony was corroborated by Congregation member Carolyn Martinez, who saw Kendrick and Candace in field service together. (6 RT 662, 663, 666.)

Kendrick seized these opportunities to molest Candace. When their field service group began to spread out, Kendrick, saying, "Let's go play," would take Candace in his truck to his house. (6 RT 727-730.) There he would sexually abuse her; the abuse included nudity, oral sex, groping, and insertion of foreign objects into her. (6 RT 729-731.) This routine was repeated many times. (6 RT 730, 731.) Afterwards, Kendrick would take Candace and rejoin the field service group or drive her back to the Kingdom Hall. (6 RT 731.)

E. Defendants Give Improbable And Conflicting Reasons For Their Policy Of Keeping Child Abuse Secret.

Defendants proffered a number of justifications in support of their policy of keeping secret from Congregation members the fact that there was a known child molester among them. Even though defendants viewed parents as the primary protectors against child abuse (3 RT 167), and even though they knew child molesters operated in secret and could be difficult to identify (3 RT 168, 258, 259; 4 RT 436), they nevertheless took the improbable position that knowing the identity of a child molester would not place parents in a better position to protect their children (3 RT 165, 168, 169; 4 RT 438). Elder Lamerdin testified:

> Q. . . . Wouldn't the parents be able to make a better decision of who to trust to take their child somewhere if they knew that one member of the congregation was a known child molester?
>
> A. I would have to say no.

(4 RT 438.)

Elder Abrahamson took the position that providing parents with the traits and warning signs of child molesters was just as effective as telling them a molester's actual identity:

> Q. And so the best way to allow parents to protect their children in the congregation is to identify for them the individuals who are positively identified already as having sexually molested a child.
>
> Don't you agree?
>
> A. How about identifying the traits of individuals. And you can look at a person, and if he shows those traits, and then you have a suspicion, don't let your child go with that. If you have a suspicion, you are under no obligation to let your child go with that person.
>
> Q. Well, from the last Awake Magazine that we looked at, we know that one of those traits might be they are a pleasant, well-liked church group leader?
>
> A. That's true. That has happened.
>
> Q. Wouldn't it have been much more helpful to the parents in the congregation to know what to look for with Jonathan Kendrick and to protect their own children if they knew that he had sexually molested a child?
>
> A. I think this information gives them good ammunition to look at individuals to see how they line up to these situations, and if they would want to trust their children with them. And they can make a call on that.

(3 RT 168-169.)

Defendants also claimed that keeping this information secret was necessary in order to protect the privacy and confidentiality of members. Elder Clarke testified that the confidentiality they sought to protect was that

of the *victims*, not that of the perpetrator; he claimed that it was Andrea and Evelyn—not Jonathan—who requested that Jonathan's molestation of Andrea be kept confidential. (3 RT 226, 227.) But both Andrea and Evelyn disputed this. Andrea said that she did not want it kept private—that she wanted it "out," and that she told others about it soon after it happened. (4 RT 344, 345, 347.) Evelyn testified that at the meeting with the elders neither she nor Andrea asked the elders to keep the matter private, saying, "I wanted them to do something, so I wouldn't have said keep it quiet…." (4 RT 296.)

The Assistant Overseer of Watchtower's Service Department, on the other hand, testified that it was Watchtower's policy to keep reports of child sex abuse secret even if those reporting it did *not* wish it to be confidential. (7 RT 938.)

Furthermore, the report of Kendrick's abuse of Andrea was not kept confidential from everyone. At least some of the elders in the Congregation were told, as were administrators at Watchtower, a separate corporation. (8 AA 1992, 1993; 3 RT 223, 224, 241.) And if a perpetrator moved to another congregation the elders were instructed to notify that congregation's elders of the perpetrator's prior abuse. (8 AA 1995.)

Finally, defendants' position that the overriding reason for the policy was to protect the confidentiality of those involved was inconsistent with

the fact that in certain circumstances they *would* disclose the information to parents. Elder Abrahamson testified:

> Q: And did you tell anyone in the Congregation, the parents in the Congregation who have an obligation to protect their children, that Jonathan Kendrick had sexually molested a child?
>
> A: There was no need to. If we, upon observing Jonathan Kendrick, we saw him isolating a child, we saw him getting close to a child, *then we would inform the parents*.

(3 RT 165, italics added.)

F. Plaintiff Presents Substantial Evidence That The Real Reason For The Policy Of Secrecy Is So Defendants Can Avoid Litigation And Liability.

Exhibit 1 belies defendants' contentions that the purpose of keeping reports of child abuse secret was to protect the confidentiality of those involved. Nowhere does it state that the purpose was to protect either the victims or the abusers. Nowhere does it state such reports were to be kept secret regardless of the desires of the victim. (8 AA 1973-1978.)

Instead, it establishes that the real reason for this policy was to benefit *defendants* by helping them avoid litigation and liability. This theme is repeated throughout the document. Exhibit 1 cautions that those who oppose the Kingdom's work may take advantage of legal processes in order to "interfere with it or impede its progress." (8 AA 1973.) It states, "In recent years, this matter has come to be a cause for increasing concern. The spirit of the world has sensitized people regarding their legal 'rights'

and the legal means by which they can exact punishment if such 'rights' are violated." (8 AA 1974.) It warns,

> If the elders fail to follow the Society's direction carefully in handling confidential matters, such mistakes could result in successful litigation by those offended. Substantial monetary damages could be assessed against the elders or congregation.

(8 AA 1974.)

The final section of Exhibit 1, entitled "Points to Remember," reiterates this theme. It states, "Unauthorized disclosure of confidential information can result in costly lawsuits." (8 AA 1977.) It directs elders to be careful about putting things in writing and not to make statements to secular authorities without first consulting the Legal Department. (8 AA 1977.)[2]

Watchtower asserts that no witness testified that Exhibit 1 constituted a policy of secrecy. (WNY AOB 54.) But in fact Elder Clarke expressly did so. (3 RT 224.) He testified:

> Q. [B]ut parents were not separately warned that [Kendrick] had committed an act of child sex abuse?
>
> A. No. We don't do that.
>
> Q. And you don't do that because there is a policy that Watchtower New York has provided to you and provided to

[2] Indeed, Exhibit 1 even suggests that the policy of confidentiality may be important to avoid criminal prosecutions: "In some cases where the authorities are involved, certain complications could lead to a fine or imprisonment. These possibilities underscore **the need for elders to be discerning and to follow carefully directions provided by the Society**." (AA 1974, original boldface.)

you before this that says that information is not to be divulged to the congregations?

A. Yes. . . .

(3 RT 222.)

Furthermore, the elders were directed that the policy of secrecy embodied in Exhibit 1 was itself to be kept secret. It was marked "**CONFIDENTIAL**." (8 AA 1973, original emphasis.) A postscript directed that it was not to be copied or read by others and that it was to be kept in the congregation's confidential files. (8 AA 1978.)

Exhibit 1 by itself supports an inference that the true purpose behind the policy of keeping reports of child abuse secret was to further defendants' self-interest in avoiding legal liability for damages, and was *not* to protect the privacy or confidentiality of those involved in the abuse as claimed by defendants.

G. As A Result Of Her Molestation, Candace Suffers Severe And Permanent Emotional And Psychological Harm.

A high percentage of abused children often do not report their abuse for many years. (6 RT 688-690.) Carl Lewis, a retired law enforcement child abuse investigator and trainer, testified as an expert on Child Sexual Abuse Accommodation Syndrome. (5 RT 456.) He explained that children in the 9- and 10-year-old age range often do not know the number of times the were abused, that a victim's normal range of responses to abuse includes "helplessness" when she has no safe person to whom to disclose

the abuse, and that "far and away the most common accommodation mechanism" is to pretend nothing is wrong. (5 RT 464, 467-469.) He said delayed disclosure was a common feature of abused children. (5 RT 465, 466.)

Candace fit these patterns. She did not disclose her abuse for many years; her first instinct was to act like nothing happened. (6 RT 731.) She kept her abuse secret while it was occurring because she was afraid of Kendrick. (6 RT 718-719.) After her parents separated in 1996, she went to family counseling with LCSW Laura Fraser for eighteen months. (5 RT 589-591, 593.) Although Ms. Fraser thought Candace "felt like a child who had been abused," she was "absolutely" not surprised that Candace did not disclose the abuse. (5 RT 607, 608, 632, 633.)

Not until August 2002 did Candace, then 16, tell a physician (Dr Afruma) about the abuse; Dr. Afruma's notes for that date state, "sexual abuse from age 9-?13." (8 AA 2009.) He requested expedited counseling services because the psychiatrist "can't see her until October." (8 AA 2009.)

Although Candace was not using drugs at that time (8 AA 2012), she began to self-medicate with drugs soon after. (6 RT 715.) For several more lost years she was in and out of drug use, having neither real relationships nor steady employment. (6 RT 715, 716.)

All of the mental health experts agreed she suffered from chronic post-traumatic stress disorder (PTSD) secondary to her sexual abuse. (8 AA 2010 [Dr. Afruma]; 5 RT 563 [Dr. Harmatz]; 5 RT 578, 581, 585, 586, 588 [Dr. Walton]; 7 RT 802-806, 810, 811 [Dr. Ponton].) Dr. Ponton diagnosed Candace as suffering from major depressive disorder and concluded that her years of drug use arose in large part from Kendrick's abuse. (7 RT 811-813, 816.)

Candace's chronic PTSD is permanent; it will present episodically for her lifetime. (5 RT 585, 586; 7 RT 815, 816.)

TRIAL COURT PROCEEDINGS

Ms. Conti filed this action in 2011 (1 AA 4), initially appearing as Jane Doe. (See *Doe v. Lincoln Unified School Dist.* (2010) 188 Cal.App.4th 758, 765.) Against Watchtower and the Congregation she alleged negligent supervision and control of Kendrick, negligent failure to warn, and negligent failure to protect plaintiff and other minors participating in religious activities at the Congregation from the risk of sexual abuse by Kendrick. (1 AA 6 [¶7].)

Over defendants' objections of confidentiality and privilege the trial court compelled production the Congregation's 1993 report of Kendrick's abuse Andrea. (2 AA 492, 495.) Defendants did not seek a writ despite the judge's invitation to do so. (2 AA 495.)

The trial granted plaintiff leave to amend her complaint to allege punitive damages against Watchtower. (2 AA 497, 498.)

At the commencement of trial the court again ruled that the report of Kendrick's sexual abuse of Andrea was not confidential and was not protected by a "spiritual privilege." (1 RT 8, 9, 25, 26.) It also partially granted defendants' motion to exclude evidence of Kendrick's sexual abuse of children after he left the North Fremont Congregation in 1997. (1 RT 14.) It also excluded under Evidence Code section 352 Kendrick's 2004 felony conviction for molesting an 8-year-old child in the Oakley Jehovah's Witnesses Congregation. (1 RT 14-16.) Finally, it granted defendants' motion to exclude evidence of other lawsuits or claims against the Jehovah's Witnesses involving child sexual abuse (1 RT 33, 34), reaffirming this ruling during trial (RAB 99-101).[3]

Certain testimony was admitted only as to Kendrick's liability. (3 RT 264; 9 RT 1049.) This included Congregation member Claudia Francis's testimony (1) that she had observed "odd" conduct and heard affectionate terms used by Kendrick towards Candace and (2) that Kendrick had bought a black bra for another young Congregation girl named Brianna, saying "every young girl needs a black bra." (4 RT 324-327.) It also included Evelyn Kendrick's testimony as to Kendrick's fetish for "little girl" sexuality. (4 RT 293.)

[3] "RAB" refers to Respondent's Appendix.

The jury found unanimously that Kendrick abused plaintiff and caused her harm. (5 AA 1285; 10 RT 1216.) They found the Congregation elders and the Watchtower Service Department elders negligently caused harm to plaintiff. (5 AA 1285-1286.) And they found Watchtower guilty of malice. (5 AA 1286.) They awarded compensatory damages of $7,000,000, allocating 60 percent fault to Kendrick, 27 percent to Watchtower, and 13 percent to Congregation. (5 AA 1286.) They awarded $21,000,001 in punitive damages against Watchtower. (5 AA 1299.)

The defendants made a motion for new trial and for judgment notwithstanding the verdict. The motion for new trial was conditionally granted unless plaintiff accepted a remittitur of punitive damages to $8,610,000; the motions were otherwise denied. (AA 1936-1939.) The remittitur was accepted. (7 AA 1941.) This appeal followed.

ARGUMENT

I. DEFENDANTS' SPECIAL RELATIONSHIPS WITH PLAINTIFF AND KENDRICK IMPOSED A DUTY TO PROTECT PLAINTIFF; IN ANY EVENT, THEY COMMITTED ACTUAL *MIS*FEASANCE BY ASSIGNING HER TO FIELD SERVICE WITH KENDRICK.

A. Standard Of Review.

Duty is a question of law for the court and is reviewed de novo on appeal. (*Cabral v. Ralph's Grocery Co.* (2011) 51 Cal.4th 764, 770-71.) However findings of fact giving rise to a duty are reviewed for substantial evidence. (*Strong v. State of California* (2011) 201 Cal App.4th 1439,

1452-53 [appellate court will not "disturb" trial court's "credibility determination" of facts underlying the existence of special relationship]; see *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, fn. 4 [court determines legal questions of existence and scope of duty, trier of fact determines existence of facts giving rise to legal duty].)

B. Regardless Of Whether Defendants Owed An Affirmative Duty To Protect Plaintiff, They Committed Misfeasance By Assigning Plaintiff To Perform Field Service With Kendrick.

The rule that, absent a special relationship, an actor has no duty to control the conduct of a third person or warn of that conduct has no application where the actor's negligence consists of misfeasance rather than mere nonfeasance. (*Weirum v. RKO General, Inc*. (1975) 15 Cal.3d 40, 48-9.) Watchtower contends that the trial court did not instruct the jury on liability for misfeasance and that "doing so would have been contrary to the entire record, since there is no evidence that Watchtower interfered in plaintiff's affairs to bring a new harm to her." (WNY AOB 27.) The contention is wrong on both counts.

Contrary to Watchtower's first contention, the trial court in fact instructed on *both* misfeasance and nonfeasance:

> A person or an entity can be negligent by acting or failing to act. [¶] A person or entity is negligent if he, she, or it does something that a reasonably careful person would not do in the same situation or fail[s] to do something that a reasonably careful person or entity would do in the same situation.

(9 RT 1053, 1054; see CACI No. 401.)

Contrary to its second contention, the evidence clearly supported a finding of misfeasance. It showed that field service was a church-sponsored activity that included "publishers" as young as 6 years old (3 RT 140, 184.) When Candace's parents were occupied with her mother's mental disability Candace often participated in field service without them. (6 RT 726, 727.)

The evidence further showed that Elder Abrahamson, as Service Overseer, supervised the Congregation's field service, presiding over field service meetings, systematically assigning members to neighborhoods, and assigning field service partners. (3 RT 184-186; 6 RT 665, 666.) On numerous occasions, Kendrick was assigned to perform field service with Candace. (6 RT 665, 666, 728.) On at least some of these occasions, Kendrick took Candace to his house, molested her there, then returned her either to the Kingdom Hall or to field service. (6 RT 728-731.)

Finally, the evidence showed that Kendrick was paired with Candace despite knowledge (1) that Kendrick had previously molested his stepdaughter and had lied about it (3 RT 152-154, 156, 157, 216, 240, 241, 247; 8 AA 1992, 1993) and (2) that molesters often reoffend, act in secret, and use the trust of a religious setting to accomplish abuse (8 AA 2017, 2019, 2036, 2038, 2045, 2052; 3 RT 161, 162, 168, 258, 259; 4 RT 436).

"Misfeasance" means performing an act that makes "the plaintiff's position worse, i.e., defendant has *created a risk*." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716, italics added.) Defendants

made Candace's position worse by assigning her to field service with a man they knew was a child molester—thereby obviously creating a risk that he would seize the opportunity to molest her.

"When two independent bases exist to support a jury's verdict, one of which is lawful and one is not, a reviewing court presumes the jury's verdict rested on a lawful basis unless the record affirmatively shows otherwise." (*Gombiner v. Swartz* (2008) 167 Cal.App.4th 1365, 1376.) Assuming arguendo that defendants did not owe plaintiff an *affirmative* duty to protect or warn against Kendrick, the verdict should nevertheless be upheld on the basis of plaintiff's independent theory that defendants committed actual misfeasance by sending plaintiff into field service with Kendrick.

C. Defendants' Special Relationships With Plaintiff And Kendrick Imposed On Them A Duty To Protect Plaintiff.

Defendants attack the trial court's findings as to the facts supporting the existence of a duty, specifically the facts giving rise to a special relationship. Watchtower argues that the trial court's factual determination of a special relationship was erroneous. (WNY AOB 23.) The Congregation argues that the trial court's determination lacked "factual support." (NFC AOB 14.) These findings are reviewed for substantial evidence. (*Strong v. State of California, supra*, 201 Cal App.4th 1439, 1452-53.)

Restatement Second of Torts, section 315, states that there is no duty to control the conduct of a third person unless there is a special relation between either (a) the actor and the third person or (b) the actor and the potential victim. (See *Giraldo v. Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 245 [Sections 315-320 of the Restatement Second of Torts govern imposition of affirmative duty arising out of special relationship].) Here, there was substantial evidence that the defendants had a special relationship with both the third person (Kendrick) and the victim (plaintiff).

1. There was substantial evidence that defendants exerted custody or control over plaintiff.

Watchtower argues that it "did not place the Plaintiff in the care, custody, or control of Kendrick … for any church sanctioned event," (WNY AOB 31) and that Candace "was not entrusted to either Watchtower's or Kendrick's custody." (WNY AOB 32.) The Congregation asserts that "the record is devoid of evidence that Fremont Congregation" "put the Plaintiff in Kendrick's company" or placed her "in a zone of danger." (NFC AOB 36.) These claims misrepresent the record. There was substantial evidence that defendants exerted custody and control over Candace by assigning her to perform field service with Kendrick.

Restatement Second of Torts section 320 states that a special relationship exists where an actor voluntarily takes custody of another and

subjects her to association with persons likely to cause harm. Comment b to section 320 observes that one "who takes custody … of a child is properly required to give him the protection which the custody or the manner in which it was taken has deprived him." Comment c emphasizes the applicability of this rule where the victim is exposed to a person "likely to do him harm from which he cannot be expected to protect himself."

These principles have been applied to impose a duty to protect a child from sexual abuse in schools, homes, and day care centers. (See *Juarez v. Boy Scouts of America* (2000) 81 Cal.App.4th 377, 410 ("*Juarez*"), and cases cited therein.) The key element in these cases is taking custody or control of a child—which carries with it an obligation to care for the child's safety.

Here, substantial evidence supports the trial court's determination that Watchtower and Congregation took custody and control of Candace by assigning her into field service, thereby creating a special relationship with her. (See *Strong v. State of California, supra*, 201 Cal App.4th 1439, 1452-53 [findings of facts giving rise to duty reviewed for substantial evidence].) The trial court properly concluded that this special relationship imposed a duty on the Congregation to protect Candace from Kendrick. That duty obviously extended to Watchtower by virtue of its admission that the Congregation elders acted as its agents. (3 RT 205-206.)

2. There was substantial evidence defendants took charge of Kendrick.

"One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." (Rest.2d Torts, § 319.) To "take charge" of a person within the meaning of section 319 one must possess the ability to control that person. (*People v. Heitzman* (1994) 9 Cal.4th 189, 213.)

The Congregation argues that Kendrick was not in its "care, custody, or control" and that it "lacked the ability to control" him. (NFC AOB 18, 20.) The evidence, however, was decidedly to the contrary. For one thing, defendants clearly took charge of Kendrick when they determined where and with whom he was to perform field service.

In addition, the elders' own testimony established that defendants had the ability to control Kendrick. They testified they placed Kendrick on "restrictions," instructing him as to what he could and could not do. (3 RT 166, 250; see p. 13, *ante*.) They kept an eye on him and would have warned parents if he was "getting close" to a child. (3 RT 166, 247, 249; 4 RT 435.)

In short, there was substantial evidence defendants had the ability to control Kendrick and undertook a duty to protect children from him—even if they failed to adequately perform that duty. Their situation mirrors that in *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, 210-212, where the

defendant was held to have a special relationship with minors she allowed to use her pool without protecting them against her husband, whom she knew to be a molester. Here the elders brought a known child molester into association with Candace and failed to protect her.

3. Defendants' cases are inapposite.

The cases relied on by defendants are inapposite. Neither *Nally v. Grace Community Church* (1988) 47 Cal.3d 278 nor *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257 involved a minor plaintiff. In *Nally*, a wrongful death case by the parents of an adult suicide victim, the court held that unlicensed non-therapist religious counselors who exercised no custody or control over the decedent owed no duty to refer him to licensed mental health providers. (47 Cal.3d at pp. 293-295.) The court observed that the closeness of the connection between the failure to refer and the suicide was "tenuous" at best, where the religious counselors were aware that the decedent had been under the care of multiple physicians and a psychiatrist. (*Id*. at pp. 296-297.)

Richelle L. involved a suit by an adult parishioner who had an illicit sexual relationship with her priest. There was no counseling relationship between the two and no condition or characteristic of the plaintiff (such as old age or youth) rendered her particularly vulnerable. (106 Cal.App.4th at pp. 280-281.)

Roman Catholic Archbishop of San Diego v. Superior Court (1996) 42 Cal.App.4th 1556 is also factually inapposite. In that case the court affirmed summary judgment against a 15-year-old plaintiff molested by a priest. The undisputed evidence showed that the church "had no prior knowledge or reason to know the priest was a risk to engage in a sexual relationship with a minor." (*Id*. at pp. 1559, 1565.) Furthermore, there was no evidence "the church somehow placed [plaintiff] in [the priest's] custody or control." (*Id*. at p. 1567.)

Finally, in *Eric J. v. Betty M.,* (1999) 76 Cal.App.4th 715, an eight-year-old boy was molested by his mother's boyfriend. The court held that the molester's family had no duty to warn the mother of the molester's prior convictions for child sexual abuse, even though some of the molestations occurred on family members' property. The court held that no special relationship existed between the family members and the mother that would give rise to a duty to warn and that the mere fact the molestations occurred on property owned by the family members did not give rise to such a duty. (76 Cal.App.4th at pp. 727-728.)[4]

[4] The result in *Eric J.* was different for one of the defendants—the molester's sister, Dorothy. She was found to have breached a duty to the molested child by once leaving him alone in her house with her brother. (*Id.* at p. 718, fn. 2.) In the case at bar, defendants' conduct in assigning plaintiff to field work with Kendrick is much more similar to Dorothy's—although much more egregious than Dorothy's.

D. The Imposition Of A Duty To Protect Plaintiff Is Also Supported By Application Of The *Rowland v. Christian* Factors.

Many recent authorities argue that the special relationship duty analysis should be eliminated completely in favor of the traditional duty analysis set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108. (See *Juarez*, *supra*, 81 Cal.App.4th at p. 411 & fn. 10.)

Juarez involved a claim by a youth molested by a scoutmaster during camping trips and other Scout-sanctioned activities, as well as at the scoutmaster's home. (*Id.* at p. 385.) Because there was no evidence the defendants were aware of the scoutmaster's risk to abuse (*id.* at p. 395), summary judgment was upheld on the plaintiff's claims of respondeat superior liability and negligent hiring and supervision (*id*. at pp. 395-397).

Summary judgment, however, was reversed on the plaintiff's claim of negligent failure to take reasonable protective measures to prevent the abuse. (*Juarez*, 81 Cal.App.4th at pp. 397-410.) Division Two of the First District held that the *Rowland* factors supported "imposition of a duty of care on the Scouts to have taken reasonable protective measures to protect Juarez from the risk of sexual abuse by adult volunteers involved in scouting programs…." (*Id.* at p. 409.)

The Jehovah's Witnesses had many activities, including field service, where adults and children participated together. The elders were aware that children, for many reasons, might associate with other

Congregation members in their church activities. The logic of *Juarez* concerning the duty of youth-oriented groups to protect against molestation by adult volunteers applies equally to groups that sponsor and supervise activities in which adults and children participate together, even though the overall purpose of the organization is not exclusively youth-oriented.

The *Rowland* factors are appropriately applied to determine duty in cases of third party institutional liability involving child sexual abuse. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 877 & fn. 8.) Application of those factors to the case at hand overwhelmingly supports the imposition of a duty of protection.

1. Forseeability of harm.

The Congregation argues there is no high degree of foreseeability that Kendrick would molest another girl in the Congregation. (NFC AOB 28-31.) This argument utterly ignores the evidence that defendants knew (1) that persons who abuse a child are at risk to abuse again (8 AA 2052) (2) that Kendrick had abused Andrea and had lied to them about it (3 RT 156, 157, 216, 240-241), (3) that molesters use positions of trust and participate in religious organizations to cloak their intentions (8 AA 2017, 2019, 2036, 2045; 3 RT 161, 162, 168, 258, 259; 4 RT 436), and (4) that molesters are adept at acting in secret so that persons in authority cannot detect them (3 RT 168; 4 RT 436).

This knowledge made it highly foreseeable that sending Candace into field service with Kendrick put her at grave risk of being molested by him. Elder Clarke called it "suicidal" to send a known molester into field service with a child. (3 RT 248.)

The Congregation argues that there was no foreseeability because of the many precautions the elders claimed to have taken to prevent further molestations by Kendrick. (NFC AOB 31.) But the recognition such precautions were needed merely demonstrates the foreseeability of the harm posed by Kendrick.

2. Degree of certainty that plaintiff suffered harm.

Congregation's analysis of the degree of certainty of harm avoids the issue completely. (NFC AOB 32-33.) It attempts to impugn the jury's unanimous finding that Candace was abused by Kendrick and suffered harm as a result by rearguing the evidence. (NFC AOB 33 ["Only the Plaintiff testified that Kendrick acted inappropriately; no one else saw it or knew about it"].) It asserts that the elders "did not observe Kendrick acting inappropriately with the Plaintiff…." (NFC AOB 32.)

The Congregation's argument is not relevant to the question of the certainty of harm. There was no dispute that Candace suffered greatly as a result of the abuse. Every mental health care provider who testified confirmed she suffered serious harm. There was no contrary evidence.

Watchtower implies there is no certainty of harm because Candace "made no mention of this sexual abuse [i.e., the abuse during field service] at her deposition." (WNY AOB 11.) Watchtower does not mention that Candace was *not asked* about abuse during field service at her deposition. (See 6 RT 767.) Candace described her abuse during field service to defense medical examiner, Dr. Williams. (6 RT 767.) Defendants, however, chose not call Dr. Williams to testify at trial.

3. Closeness of the connection between the harm and defendants' conduct.

There was a direct cause-and-effect connection between Congregation elders assigning Candace to field service with Kendrick and his abuse of her during field service. Both Watchtower and Congregation dispute that Candace was abused "during" field service because the abuse occurred at Kendrick's home. The argument is sophistic. The evidence established that the two were assigned to perform field service together and that instead of performing field service Kendrick often took her to his home, molested her, then returned her to field service or to the Kingdom Hall. (6 RT 728, 729, 731.) 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.

4. Moral blame.

The elders sent Candace into field service with Kendrick with actual knowledge that he had previously molested another child and had lied to them about it. They also knew that molesters are likely to molest again. They acted with both actual knowledge of the risk and reckless indifference to it. They affirmatively placed Candace in a zone of danger. The moral blame is substantial.

5. Policy of preventing future harm.

"Our greatest responsibility as members of a civilized society is our common goal of safeguarding our children…" (*Juarez, supra*, 81 Cal.App.4th at p. 407.) The policy of preventing future harm is best served by imposing on organizations that sponsor and supervise activities in which children and adults participate together a duty to warn and protect against known child molesters.

6. Social and financial burdens.

Congregation paints a doomsday picture of what it terms the "extremely burdensome" responsibility of protecting its members and their children from further acts of molestation by a known child molester in their Congregation. (NFC AOB 40.) The Congregation's scenario is highly exaggerated. The actual burden and can be summed up in three minor responsibilities: (1) actually keep a "watchful eye" on the molester (which defendants claim was done anyway), (2) don't send a known child molester

out into church activities with a vulnerable child, and (3) use the power Elder Abrahamson admitted he had to inform parents of the presence of a known child molester.

7. Societal consequences.

The Congregation warns of "unbridled liability in all instances" and of infringement on the First Amendment right to free exercise of religion if a duty to protect children against a known child abuser is imposed. (NFC AOB 42-44.) It vastly overstates the nature of the duty.

On the other hand, the societal consequences of failing to impose a duty—of tolerating, protecting, and enabling known child molesters to find new victims—are clear. Sexual abuse causes devastating injuries to the victim and to all of society. Child sexual abuse has for too long been seen as a minor problem to be ignored, one unworthy of soiling the public image of important social institutions such as football programs, churches, school districts, the BBC, the Boy Scouts, swim clubs, and others.

In sum, in the circumstances presented here, *all* of the *Rowland* factors favor imposition on defendants of a duty to protect children from an individual they actually knew to be a child abuser.

II. IMPOSING A DUTY TO WARN DOES NOT VIOLATE THE CONSTITUTION.

Watchtower argues that imposing upon it a duty to warn violated its First Amendment right to freedom of religion as well as Jonathan

Kendrick's privacy, liberty, and due process rights. Both arguments are without merit.

A. The 1993 Report Was Not A Confidential Or Spiritual Communication.

1. Standard of review.

The standard of review for rulings rejecting claims of confidentiality and privilege is whether or not substantial evidence exists to support the trial court's determination that the information was not confidential. (*In re the Clergy Cases I* (2010) 188 Cal.App.4th 1224, 1240.)

2. Substantial evidence established the report was not confidential.

Watchtower argues that imposing liability for Candace Conti's molestation during field service violates their First Amendment right to free exercise of religion. It argues that "disclosing information received in confidence from Kendrick, his wife, and stepdaughter would have violated defendants' Bible-based religious beliefs, practices, and policies on confidentiality." (WNY AOB 42.) It further argues, "Maintaining the confidentiality of Congregation members is a fundamental religious precept which defendants believe is directly derived from Scripture." (WNY AOB 46.) Neither the evidence nor the law supports these arguments.

The evidence demonstrated without contradiction that the report of Kendrick's sexual abuse of Andrea was not received in confidence and was not intended to be confidential. The report of Andrea's abuse came from

Andrea and Evelyn—not Jonathan Kendrick. Although defendants characterize it as a "confession," it was not a confession; in fact, Kendrick lied about the incident, saying he had "inadvertently" touched Andrea—implying that he had done nothing intentionally wrong. (3RT 156, 157, 216, 240, 241.)

Neither Andrea nor Evelyn testified that the report was made as part of "religious-based counseling" or as a "confidential communication." In fact, both *denied* requesting the elders to keep the report private. (4 RT 296, 344, 345.) They wanted the elders to do something to stop Kendrick and protect them. (4 RT 293, 294.) When the elders did nothing, Andrea and Evelyn went to the police. (4 RT 303; 6 RT 646-648.)

Furthermore, Elders Clarke and Abrahamson did not in fact keep this "confidential" information confidential. They reported it to both the Legal and Service Departments of Watchtower, a separate corporation, receiving from them "instructions" on how to proceed administratively in the case. (8 AA 1992; 3 RT 154, 230, 246.) They also shared it with other Congregation elders. (3 RT 243.) And, when Jonathan Kendrick changed to a different Jehovah's Witness congregation, if the elders followed Watchtower policy they would have shared the information with that new congregation. (See 8 AA 1995.)

Lastly, Elder Abrahamson admitted that the elders would have shared the information with parents had they observed Kendrick getting too close to a child. (3 RT 165.)

Watchtower cannot "put the genie back in the bottle" by claiming information neither received in confidence, kept in confidence, nor believed to be confidential can be made confidential now simply by labeling it "religious-based." A similar argument was rejected in *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417 ("*RCALA*"). There the Catholic Church sought to overturn a referee's findings and to quash subpoenas issued by the district attorney for records of priests who had sexually abused children. The Church argued that its religious beliefs required the records be kept secret (*id*. at pp. 427-428) and that disclosure would violate the Church's First Amendment right of free exercise of its religion (*id*. at p. 430.)

The Court of Appeal rejected the arguments, observing that the freedom to believe is absolute, but the freedom to act is not. "'Conduct remains subject to regulation to protect society.' [Citation.]" (*RCALA, supra*, 131 Cal.App.4th at p. 430.) The First Amendment, the court said, does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the basis that to do so would violate a religious belief. (*Ibid*.) Reviewing United States Supreme Court cases, the Court stated that laws which burden a particular religious practice but are of

neutral and general applicability do not require justification by a compelling state interest. (*Id*. at p. 431.) The law does not permit anyone to become "a law unto himself" by designating otherwise proscribed conduct as religious belief. (*Id*. at pp. 431-432.)

The *RCALA* court also rejected the argument that production of the priest's records violated the First Amendment's Establishment clause. (131 Cal.App.4th at pp. 434-436.) There is no religious doctrine aspect to the issue of child molestation. (*Ibid*.) Some entanglement between church and state is unavoidable, and as long as it is not excessive it does not violate the constitutional protections religions accept. (*Id.* at pp. 435-436.)

In *Clergy Cases I*, *supra*, the Court of Appeal held that psychiatric counseling records of individual perpetrator-priests of the Franciscan Order must be disclosed publicly over constitutional privacy and therapist privilege concerns. The Court observed that "members of the Catholic Church throughout California have a compelling interest in knowing what treatment the Individual Friars received for their predatory proclivities, and whether it was adequate to protect young parishioners whom they may have encountered in their ministries." (188 Cal.App.4th at p. 1236.) The "compelling social interests in the disclosure of information relating to sexual predators of children" outweighed any constitutional privacy interests. (*Id*. at p. 1235.)

First Amendment protection of religious belief does not protect the practice of polygamy (*Reynolds v. U.S.* (1878) 98 U.S. 145, 164-166) or child pornography (*New York v. Ferber* (1982) 458 U. S. 747, 774). Like child molestation, such practices were never expected by the Framers to be entitled to First Amendment religious protection, as they were never part of established religious practice. As stated in *RCALA, supra*, the issue whether children were molested by priests who worked for the Archdiocese "has no comparable religious doctrine aspect." (131 Cal.App.4th at p. 435.)

Legal commentators have agreed. (See Hamilton, *"Licentiousness" in Religious Organizations* (2010) William & Mary Bill of Rights Journal 953, 967-968.) (See RAB 55-56.)

A defendant's obligation to warn or protect children against molestation by a known child abuser involved in activities sanctioned or sponsored by the defendant is secular, neutral, and not based on religious doctrine. It applies equally and neutrally to both secular and religious defendants. It does not require a jury to interpret religious doctrine or evaluate religious beliefs. In the case at hand, the duty would be the same even if the defendant were the Girl Scouts sending adults and children out to sell cookies or a political group sending them into a neighborhood to solicit signatures on a petition. Imposition of the obligation does not violate the First Amendment.

The argument that the California Constitution, article I, section 4, is violated by a finding of duty in this case is also without merit. The same argument was rejected in *RCALA*, whether based on the compelling state interest test or a lesser standard. (131 Cal.App.4th at pp. 437-440.) Indeed, the language of Section 4 itself recognizes that its protections do not "excuse acts that are licentious or inconsistent with the peace or safety of the State." (Cal. Const., art. I, § 4.)

B. Imposing A Duty To Warn Of Kendrick's Admitted Prior Acts Would Not Violate His Constitutional Rights.

Watchtower argues that imposing "a duty upon defendants to warn members of the congregation that Kendrick had molested a minor" in the absence of their knowledge of his criminal conviction "would violate the fundamental constitutional rights of citizens to privacy, liberty, and due process, and deprive citizens of procedural safeguards…." (WNY AOB 48-52.) The argument is without merit.

As noted earlier, *In re the Clergy Cases I, supra*, 188 Cal.App.4th 1224, upheld the public release of psychological evaluations and progress reports concerning Franciscan friars alleged to have committed child abuse, rejecting a claim that the release violated constitutional privacy interests. (*Id.* at pp. 1234-1236.) The court held that compelling social interests in the disclosure of information relating to "sexual predators of children" outweighed the friars' constitutional privacy interests. (*Id*. at p. 1235.) It

concluded that members of the Catholic Church had a compelling interest in knowing the treatment the friars had received and "whether it was adequate to protect young parishioners." (*Id.* at p. 1236.)

The cases cited by Watchtower are inapposite. They all deal with the governmental disclosure of child abuse by an individual who disputes the government's finding of child abuse. None stands for the blanket proposition that disclosure of such information violates the due process, privacy, or liberty rights of the individual. (See *Humphries v. County of Los Angeles* (9th Cir. 2009) 554 F.3d 1170, 1200-1201 [California statute violated due process rights of parents who continued to be listed as child abusers on central index even after being found factually innocent of child abuse]; *Valmonte v. Bane* (2nd Cir. 1994) 18 F.3d 992, 1003-1004 [county's procedure for identifying child abusers on central register violated due process because of demonstrated high risk of misidentification]; *Bohn v. Dakota County* (8th Cir. 1985) 772 F.2d 1433, 1439 [Minnesota statute requiring mandatory reporting of suspected child abuse to and maintenance of records by county authorities did not violate due process]; *Doe v. Poritz* (N.J. 1995) 662 A.2d 367, 372-373 [upholding New Jersey's "Megan's Law"].)

Here, Watchtower has made no showing, either factually or legally, that requiring it to warn parents that Kendrick had inappropriately touched a child would have violated any constitutional right of Kendrick.

III. THE INSTRUCTIONS ON DUTY TO WARN, THE MANDATORY REPORTING STATUTE, AND ALLOCATION OF FAULT TO OTHERS WERE NOT PREJUDICIALLY ERRONEOUS.

A. Standard Of Review.

The propriety of the giving of a jury instruction is a question of law that is reviewed de novo. (*Cristler v .Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) If an instruction is found to be erroneous, reversal is required only when "'it appears probable that the improper instruction misled the jury and affected its verdict. [Citation.]' [Citation.]" (*SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 863; *Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263.)

In determining whether a jury was likely misled the court must evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-581; *Spriesterbach*, *supra*, 215 Cal.App.4th at p. 263.)

B. The Duty-To-Warn Instruction Was Not Erroneous And Even If It Was The Error Was Waived And Was Harmless.

Congregation contends the trial court erred in instructing the jury as follows:

> In determining whether or not Watchtower Bible and Tract Society of New York, Inc. and Fremont Congregation of Jehovah's Witnesses, North Unit, took reasonable protective measures, you may consider the following:
>
> 1. The presence or absence of any warning;

> 2. Whether or not any educational programs were made available to plaintiff, her parents, or to other Jehovah's Witnesses from the Fremont Congregation of Jehovah's Witnesses, North Unit, members for the purpose of sexual abuse education and prevention; and
>
> 3. Such other facts and circumstances contained in the evidentiary record here as to the presence or absence of protective measures.

(8 RT 987, 988; 9 RT 1054.)

Congregation argues that this instruction was "impermissibly vague regarding the *scope* of the duty" because it "did nothing to clarify" "what a reasonable and proper warning would or should look like." (NFC AOB 46-47, italics added.) The argument is without merit; in any event, any claimed error was (a) waived by a failure to request clarifying instructions and (b) plainly harmless.

1. **The instruction was properly phrased.**

Whether based on their special relationship with Candace, with Kendrick, or with both, or based instead upon general principles of duty arising from a *Rowland v. Christian* analysis, the language of the duty instruction is fairly and accurately phrased. Defendants had a duty to protect Candace from molestation by Kendrick that arose from or occurred during church-sponsored events that their joint agents supervised.

2. **In any event, any defect in the instruction was waived by defendants' failure to request a clarifying instruction.**

Assuming arguendo that the challenged instruction was defective for failing to clarify what a proper warning would be or to otherwise define the

scope of the duty, defendants waived the right to assert that error on appeal. "It is settled that a party may not complain on appeal that an instruction correct in law is too general or incomplete unless he had requested an additional or qualifying instruction." (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948, cits. omitted, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) Defendants do not contend that the instruction is *incorrect*, only that it fails to adequately clarify the contours of a required warning. Because they requested no additional or qualifying instructions to cure this alleged infirmity the claimed error has been waived.

3. Moreover, because it was undisputed that defendants gave *no warning at all*, any error in failing to instruct on the scope of an adequate warning was obviously harmless.

Assuming arguendo the instruction was erroneous as claimed the error was obviously harmless. First, it was undisputed that defendants never gave a warning of any sort. Consequently, the jury was never called upon to determine "what a reasonable and proper warning … should look like." A failure to instruct on this point therefore could not possibly have affected the verdict.

Second, there was substantial evidence that defendants committed both a misfeasance (by affirmatively assigning plaintiff to perform field service with Kendrick) and a nonfeasance (by failing to protect plaintiff). Nothing in the record, however, suggests that the jury's finding of

negligence was based only on the latter theory. An instruction erroneous on a particular issue is considered harmless "where on another controlling issue or cause of action the verdict or judgment is sustained by the evidence." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 433, pp. 487-488; see *Gombiner v. Swartz, supra*, 167 Cal.App.4th at p. 1376; [if verdict supported by lawful basis and unlawful basis, court will presume it rested on lawful basis unless record affirmatively shows otherwise].) Here, the jury was properly instructed on—and substantial evidence supports—defendants' negligence for misfeasance and. Consequently, any error in the duty-to-protect instruction was rendered harmless.

C. The "Mandated Reporter" Instructional Error Is Actually A Claim Of Evidentiary Error That Was Invited By Watchtower, Waived By The Congregation, And Was Harmless.

Defendants contend the trial court erred in refusing to instruct the jury that clergy members were not required by statute to report child sex abuse to the authorities in 1993. They claim such an instruction was necessary in order to "correct" testimony by plaintiff's expert, Dr. Anna Salter, which (so the argument runs) "confused the jury." (NFC AOB 48-49; WNY AOB 21.) Dr. Salter explained that although California's 1993 mandatory reporting statute did not specifically address the clergy it nonetheless mandated reporting by "people who were involved with children"—which could include the clergy; the clergy was not specifically included in the statute "until a later period of time." (6 RT 693.)

Defendants contend this testimony was improper because "it was not the expert's job to tell the jury what the relevant law required" but was instead "exclusively the province of the trial court to tell the jury what the relevant law required." (NFC AOB 49.)

In short, defendants' *true* complaint is not instructional error but evidentiary error—i.e., that Dr. Salter's testimony should not have been admitted. Defendants admit that the only purpose of the instruction they sought was to correct this error. (NFC AOB 48-49.)

Defendants, however, are precluded from asserting such error because (1) *Watchtower*—not plaintiff—elicited this testimony and thus invited the error and (2) the Congregation failed to object to it or move to strike it, thereby waiving its right to challenge it on appeal. (See 6 RT 693-694.)

Under the doctrine of invited error, a party who by its own conduct induces the commission of error may not claim on appeal that the judgment should be reversed because of that error. (*Transport Ins. Co. v. TIG Ins. Co* (2012) 202 Cal.App.4th 984, 1000) "[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.) Here, because Watchtower chose to ask the questions, it should not be heard to complain merely because it did not like the answers. Watchtower invited the alleged

error by introducing the evidence it now claims should not have been admitted.

Furthermore, the Congregation waived the error. Failure to timely object to evidence bars a party from challenging its admissibility on appeal. (Evid. Code, § 353; *Fry v. Pro-Line Boats, Inc.* (2008) 163 Cal.App.4th 970, 974.) Indeed, during colloquy concerning the defendants' proffered instruction, the trial judge commented, "[I]f somebody had objected to the discussion about what the law was at that time, *I would have granted it*…." (9 RT 1022, italics added.) (See *Ferris v. Gatke Corp.* (2003) 107 Cal.App.4th 1211, 1225, fn. 7 [trial judge felt blindsided by party's failure to make timely objection on procedural issue].)

In any event, any error in admitting this testimony was rendered harmless by the instruction the judge ultimately gave. It charged that the mandatory reporting statute was irrelevant to the jurors' determination of the case and they were not to consider it:

> Whether there was a statutory duty to report to lawful authorities a purported incident of child abuse…is a matter of law for determination by the trial Court. Your deliberations are to be based solely upon the evidence presented and instructions given without any consideration whatsoever as to whether there was any statutory duty to report …."

(9 RT 1057, 1058.)

In effect, this instruction was a belated admonishment to the jury not to consider expert testimony (including Dr. Salter's) on the mandatory

reporting statute—and it was belated only because *defendants* failed to request it sooner. It effectively placed defendants in the same position they would have been in had they requested an admonishment at the time the testimony was given. They were entitled to no more.

Moreover, in point of fact Dr. Salter's testimony was factually correct and hence did not need "correcting." Although defendants' record does not include it, plaintiff requested judicial notice of the 1993 version of Penal Code section 11165.7, subdivision (a), a request the trial court eventually denied. (RAB 102-103.) The plain language of the 1993 version specifically included obligations to report on the part of "administrators and employees" involved in "contact and supervision of children" or in "public or private" "youth programs." The law did not exclude ministers or members of the clergy who fell within these more general categories.

The Congregation also erroneously claims—without a supporting record cite—that its instruction was required because plaintiff's counsel argued in closing that the Congregation elders were mandatory reporters. (NFC AOB 49.) In fact, no such argument was ever made.

In any event, any conceivable instructional error on this point was harmless. The testimony devoted to mandatory reporting was minimal. The jury did not request a rereading of any instructions, no other instruction on duty or negligence referred to the mandatory reporting issue, plaintiff's counsel did not argue the issue, and the jury's 11-1 verdict on negligence

(11 RT 1216-1217) was not close. (See *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1055 [10-2 verdict "not particularly close"].) There is absolutely no indication that the jury was misled or that it found liability against either defendant based on its failure to report Kendrick's molestation of Andrea. None of the factors for assessing prejudice of instructional error is met. (See *Soule v. General Motors Corp., supra*, 8 Cal.4th at pp. 580-581.)

D. The Evidence Was Insufficient To Permit The Jury To Allocate Fault To Law Enforcement Agencies Or Plaintiff's Parents.

1. Defendants' burden of proof.

Defendants claim prejudicial error in the trial court's refusal to instruct on the allocation of fault to "other parties" and to include on the special verdict form Candace's parents (Neil and Kathleen Conti) and law enforcement agencies who were aware in 1994 of Kendrick's molestation of Andrea.

A nonparty may be included on a special verdict form as a person to whom fault may be allocated only if a prima facie case has been presented establishing that person's legal duty, breach of the duty, and causation of the injury. (*Ford v. Polaris Industries, Inc.* (1997) 139 Cal.App.4th 755, 778-780; *Chakalis v. Elevator Solutions, Inc.* (2012) 205 Cal.App.4th 1557, 1569-1570.) The burden is on defendants to present a prima facie case. (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369-70.)

2. There was no evidence plaintiff's parents had actual knowledge of Kendrick's propensity to abuse children, which is required for imposition of a duty.

Defendants claim that plaintiffs' parents owed plaintiff a legal duty to protect her from Kendrick's abuse. (WNY AOB 40; NFC AOB 51.) They point out that the parents had received *Awake!* and *Watchtower* articles on child abuse which informed them of steps they could have taken to protect plaintiff from child abusers. (WNY AOB 40; NFC AOB 51.) They contend actual knowledge by the parents of Kendrick's propensity to molest children was not required.

The contention is without merit. In fact, a prima facie case against parents for failing to protect their child against abuse by a third party requires proof of *actual* unambiguous knowledge of the perpetrator's assaultive propensities. (*Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1080; *Chaney v. Superior Court* (1995) 39 Cal.App.4th 152, 157-158; see also *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 719-721, citing *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1216; *Juarez, supra*,. 81 Cal.App.4th at p. 396; *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 152, 159-160 [host of sleepover had no duty to prevent rape of teenager where host had no actual knowledge of assaultive propensity of boys teenager left with].)

The fact that Neil and Kathleen Conti allowed Kendrick to drive their daughter places at times when they were absorbed with Kathleen's

mental health disability fails to establish their actual knowledge of Kendrick as a molester and hence fails to support imposition of a duty on them to protect Candace from Kendrick. It is in fact consistent with Elder Abrahamson's unsurprising testimony that parents would sometimes get other Congregation members to drive their children to an event the parents were unable to attend. (3 RT 145, 146.) This evidence supports the need for elders to warn parents of a child molester in the small congregation.

The authorities cited by defendants are inapposite. Although Watchtower contends plaintiff's parents violated a "statutory duty," it cites no authority in support. (See WNY AOB 40.) The Congregation cites only two criminal cases, *People v. Swanson-Bierabent* (2003) 114 Cal.App.4th 733 and *People v. Rolon* (2008) 160 Cal.App.4th 1206, neither of which applies. In both, a parent was convicted of aiding and abetting child abuse based upon evidence of the parent's contemporaneous *actual* knowledge of the abuse. In *Swanson-Bierabent*, the evidence showed that the victim's mother was watching when her boyfriend molested the victim. (114 Cal.App.4th at pp. 741-742.) Similarly, in *Rolon*, a mother not only watched the father throw their child against a wall and punch him in the chest, she actually helped cover up the child's death by helping to burning the body. (160 Cal.App.4th at pp. 1210-1211.)

Defendants also argue that Neil Conti was negligent because he "was present" when Kendrick abused Candace on an Amtrak train and did

nothing to protect her from it. (NFC AOB 51; WNY AOB 11.) The Congregation, misquoting the record, claims this occurred "in plain view" of Mr. Conti. (NFC AOB 5, citing 6 RT 745-746.)

In fact, the evidence established only that plaintiff was "running from table to table or something" when Kendrick grabbed her and stuck his hand up her shirt while Mr. Conti was sitting "across the way from us" on the other side of the table. (6 RT 745-746.) Plaintiff did not say her father was watching them or even looking in their direction. Nor did the evidence show whether his view was clear or whether it may have been obstructed by the table or by Mr. Kendrick himself. Plaintiff testified only to where he was sitting.

Furthermore, even if Mr. Conti had seen Kendrick stick his hand up plaintiff's shirt, the evidence failed to establish that this could be perceived only as intentional, unambiguous sexual conduct as opposed to, for example, an inadvertent act.

In short, the evidence was insufficient to establish Mr. Conti's actual knowledge of unambiguous sexual conduct on the part of Kendrick. (See *Santillan, supra*, 202 Cal.App.4th at pp. 719-720.)

3. There was no evidence of a special relationship that would support imposition of a duty on the law enforcement agencies.

Watchtower and Congregation argue that the Fremont Police Department, Child Protective Services, and the Alameda County District

Attorney were at fault because each knew in 1994 that Jonathan Kendrick had abused his stepdaughter and did not warn plaintiff or her parents. (WNY AOB 37.) Both claim that the failure to include these agencies on the verdict form was a violation of the First Amendment, because it "*singled out the Defendants for special treatment*." (WNY AOB 41, original italics; NFC AOB 52.)

Absent a "special relationship," law enforcement or other public agencies have no duty to warn citizens of an individual who presents a danger to others. (*Denton v. City of Fullerton* (1991) 233 Cal.App.3d 1636, 1640-1641.) In *Denton*, the Court of Appeal held that police officers aware of a sexual assault in an apartment complex laundry room had no duty to warn residents of the risk of sexual assaults on the property. *Denton* relied on *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, where it was held that, absent a threat "to a readily identifiable victim or group of victim," county employees had no duty to warn neighbors that a juvenile released from detention might constitute a danger to them. (*Id.* at p. 758.)

Here, there was no evidence that any public entity had any relationship at all with Candace or her parents or that they placed her in Kendrick's custody of Mr. Kendrick. The trial court properly observed that under these circumstances imposing a duty on law enforcement agencies would be "incredibly burdensome." (8 RT 966-967.)

Watchtower's argument that it is being treated differently than law enforcement agencies in violation of the First Amendment is without factual or legal support. First, unlike the law enforcement agencies, Watchtower's liability was based not only on its failure to protect plaintiff but also on its affirmative negligence in assigning plaintiff and Kendrick to perform field service together. Second, Watchtower's duty to protect Candace arose from its special relationships with her and with Kendrick; in contrast, as set forth earlier, the law enforcement agencies had no special relationship with either of these individuals. There was no disparate treatment.

Defendant's reliance upon *Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 Cal.App.4th 318, is misplaced. There, law enforcement officers and agencies were properly included on the verdict form because the plaintiff claimed she was assaulted by another while incarcerated. (*Id.* at p. 321.) Obviously, the fact that the plaintiff was under the officers' and agencies' custody and control by virtue of her incarceration gave rise to a special relationship and hence to a duty. (See *Giraldo v. Dept. of Corrections and Rehabilitation, supra*, 168 Cal.App.4th 231, 250-251.)

IV. THERE IS NO EVIDENTIARY OR CONSTITUTIONAL BASIS TO VACATE OR FURTHER REDUCE THE PUNITIVE DAMAGE AWARD.

A. Substantial Evidence Established Watchtower Was Guilty Of Malice In Keeping Kendrick's Abuse Secret And In Assigning Plaintiff To Field Service With A Known Child Molester.

1. Standard of review.

A jury's finding of malice is reviewed for substantial evidence. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 821.) Under that standard

> the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below. We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.

(*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, internal cits. & quotation marks omitted; see *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678 [party claiming insufficiency of evidence assumes a "'daunting burden'"].)

2. Trial court proceedings.

The jury found by clear and convincing evidence that Watchtower was guilty of malice. (5 AA 1286.) Watchtower moved for a new trial and judgment notwithstanding the verdict, arguing that the evidence of malice was insufficient and that the $21,000,001 award of punitive damages was excessive. (5 AA 1357, 1366-1370.) The trial court upheld the jury's finding of malice but conditionally granted a new trial unless plaintiff

accepted a reduction of the punitive damages to $8,610,000. (8 AA 1936-1939.)

3. Substantial evidence supported the finding of malice.

Watchtower's argument that no substantial evidence supports the jury's finding of malice essentially credits its theory of the evidence and ignores plaintiff's. In fact, the evidence easily supports the finding of malice.

"Malice," in the context of punitive damages, means "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294, subd. (c)(1); *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 765-766 [evidence of malice sufficient where it showed defendant had responsibility to warn of drug side-effect but failed to warn despite knowing such failure could cause harm].) It is well established that malice may be proved by circumstantial evidence. *(Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 923, fn. 6; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 787 [circumstantial evidence admissible to establish motive since direct evidence on such facts rarely available].)

Here, substantial evidence established that Watchtower knew that child abusers are difficult to identify, operate in secrecy, frequently reoffend, and can cause "overwhelming" injury. (Statement of Facts, § B, *ante*.) It also established that Watchtower, upon being informed that

Kendrick had abused his stepdaughter, directed the elders to keep this information secret from Congregation members pursuant to its national policy as embodied in Exhibit 1. (Statement of Facts, § D1, *ante*.) And it established that Watchtower's purpose in doing so was to evade liability for damages. (Statement of Facts, § F, *ante*.)

Based on this evidence, the jury could justifiably conclude that Watchtower, knowing there was a risk Kendrick might molest a child of the Congregation and thus cause overwhelming injury to the child if parents were not warned about Kendrick, nevertheless consciously chose not to warn in order to promote its own self-interest in keeping incidents of child abuse quiet. In short, there was substantial evidence that Watchtower willfully and consciously disregarded the rights and safety of the Congregation's children and engaged in despicable conduct.

Watchtower contends that the "primary thrust" of Exhibit 1 "was to remind elders of Scriptural direction concerning confidential communications." It argues that another purpose was "to protect victims of child abuse and comply with all applicable legal obligations." (WNY AOB 55.) The jury, however, was entitled to reject these contentions and conclude that the true purpose of Exhibit 1 was to insulate the Jehovah's Witnesses from adverse legal claims. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585 [it is for jury to determine which of multiple inferences is to be

accepted and reasonable inference from circumstantial evidence may be accepted over direct evidence to contrary].)

The evidence supported an inference that the "primary" if not *sole* purpose of Exhibit 1 was not to provide "Scriptural direction" but was instead to promote defendants' own monetary interest in avoiding legal liability for damages. (See Statement of Facts, § F.) Its opening sentence provides, "We are writing to help all of you as individual elders be aware of a growing concern regarding the handling of your duties that may involve *legal* issues or questions." (8 AA 1973, italics added.) It states, "Improper use of the tongue by an elder can result in serious legal problems for the individual, the congregation, and even the Society." (8 AA 1973.)

Furthermore, elders were directed to keep the contents of Exhibit 1 a secret. (See 8 AA 1973 ["**CONFIDENTIAL**"], 1978 [postscript].) Why would it be necessary to keep "Scriptural direction concerning confidential communications" secret from Congregation members? Wouldn't they also benefit spiritually from this information?

Substantial evidence established that, in deciding to keep secret the presence of a known child molester, Watchtower willfully and consciously disregarded the safety of its child members and subordinated that safety in favor of promoting its own interest in avoiding potential civil liability. Such evidence is no less a valid basis for punitive damage liability than evidence that a manufacturer willfully and consciously chose to keep secret an

injury-causing defect in one of its products. (See *Johnson & Johnson v. Superior Court, supra*, 192 Cal.App.4th at p. 767.)

In asserting an absence of malice Watchtower points to its conduct in advising victims concerning reporting violations and in educating parents concerning the scourge of child molestation. (WNY AOB 55-56.) This evidence, however, was irrelevant to plaintiff's claim of malice. Plaintiff claimed malice based on the failure to warn about Kendrick—not on a failure to report him to authorities or to educate parents generally about child abuse. In any event, as the trial judge concluded, "The net effect of defendant's decision not to disclose was to imperil the safety of each child in a small congregation and thoroughly undermine defendant's teachings and understanding of child molesters and the methods of dealing with them as reflected in their writings distributed to the congregants on a national basis." (8 AA 1938.)

Finally, separate and apart from Exhibit 1, the evidence that defendants assigned Candace to perform field service even though they knew he had molested his stepdaughter also supports the finding of malice. The elders obviously knew that assigning a child to perform field service with Kendrick would pose a grave risk to the child. (3 RT 248 [such an assignment would be "suicidal"].) Although the Congregation elders testified that Kendrick was never assigned to perform field service with a child and indeed was not allowed to perform it without an elder (3 RT 186,

248), the jury necessarily rejected this testimony in favor of plaintiff's evidence that in fact she was assigned to field service with Kendrick. (6 RT 662-663, 666, 726-727, 728.)

The jury was also entitled to conclude that Elder Abrahamson, who oversaw field service assignments for the Congregation and was admittedly an agent of Watchtower, was a "managing agent" for the purpose of assigning field service partners. (See *Major v. Western Home Insurance Co.* (2009) 169 Cal.App.4th 1197, 1220-21.) Although Elder Shuster testified he "believed" Watchtower had a written policy against assigning molesters performing field service with children, the policy was never produced. (5 RT 526-527; 7 RT 933-935.) The jury was therefore entitled to conclude that Watchtower had no such policy (see *Breland v. Taylor Engineering & Manufacturing Co.* (1942) 52 Cal.App.2d 415, 425-426), and thus entitled to further conclude that the policy on this subject was left to the local congregation elders responsible for field service assignments. Finally, the fact that Candace was assigned to perform field service with Kendrick on multiple occasions supported an inference that defendants' policy permitted a child to be assigned to field service with a known child molester.

In short, substantial evidence supported a finding that assigning Candace to field service with Kendrick constituted malice.

B. The Remitted Punitive Damage Award Was Not Excessive And Did Not Violate Due Process Standards.

Watchtower argues that the reduced punitive damage amount of $8,610,000 is unconstitutionally excessive for two reasons. (WNY AOB 58, 59.) First, it asserts that the compensatory award "itself is so astronomically high" that it likely was punitive. (WNY AOB 58, 59, citing *Simon v. San Paolo U.S. Holding Company, Inc.* (2005) 35 Cal.4th 1159.) Second, it argues that punitive damages may not be based on a national policy, even where that policy has caused injury to the plaintiff before the court. (WNY AOB 59-61.) Neither argument has merit.

1. Standard of review.

Whether an award of punitive damages is constitutionally excessive is reviewed de novo. (*Simon v. San Paolo U.S. Holding Co. Inc.* (2005) 35 Cal.4th 1159, 1172.) However, the court's obligation to conduct a due process review of punitive damages does not create an opportunity for the defendant to make "an end run" around the jury's factual findings. (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 86.) Thus, the reviewing court conducts its de novo review with deference to the jurors' role as the determiner of the facts. (*Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1560.)

2. The jury was properly permitted to consider that the harm to plaintiff resulted from a national policy; the punitive damage award was not based on harm to persons other than plaintiffs.

Watchtower argues that any and all reference to a national policy as a basis for punitive damages is an unconstitutional due process violation, because it awards damages for harm to persons other than the plaintiff. (WNY AOB 59-61.)

In *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1202-1203, the California Supreme Court recognized that evidence "describing out of state transactions" may be relevant to the determination of the degree of reprehensibility. The court specifically recognized the distinction between punishing a defendant for harm to others, which is improper, and a consideration of the defendants' conduct in the context of "a business practice or policy," where the individual plaintiff can demonstrate that the conduct toward her warrants a stronger penalty to deter continued or repeated conduct of the same nature. (*Id.* at p. 1206, fn.6.)

Any fair reading of *Johnson v. Ford Motor Co.* must recognize a state's legitimate interest in punishing or deterring a defendant whose national policy or practice harms a state resident; accordingly, admission of evidence of national policies on the issue of reprehensibility is obviously proper. (*Bullock v. Philip Morris USA, Inc*. (2008) 159 Cal.App.4th 655, 693-694.)

Here, the trial court did *not* admit evidence of harm to persons other than plaintiff. It limited the admissibility of evidence of Kendrick's sexual "grooming" of another girl from the Congregation to Kendrick only. (9 RT 1049.) Furthermore, the trial court excluded both general and statistical evidence of the abuse of other Jehovah's Witnesses children. The court specifically instructed that "punitive damages may not be used to punish a defendant for the impact of its alleged misconduct on persons other than Candace Conti." (9 RT 1229, 1230.) Nothing in the record suggests that the jury failed to follow this instruction or that it awarded punitive damages to punish Watchtower for harm to others.

3. The reprehensibility of Watchtower's conduct amply justified the 3:1 punitive-to-compensatory damages ratio.

The U. S. Supreme Court set forth five factors to be considered in evaluating reprehensibility for punitive damage purposes. (*State Farm Mutual Auto Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419.) Applied here, these factors show: (1) there was physical, not just economic, harm; (2) there was evidence of reckless disregard and indifference to children exposed to abusers, including Candace; (3) there was vulnerability (youth) of the victim, albeit not financial vulnerability; 4) the conduct was not repeated as to Kendrick but was part of a national policy; and 5) the decisions to keep secret Kendrick's risk to abuse and to assign him to field service with Candace were intentional, even though the molestation was not

intended. As in *Amerigraphics, supra*, consideration of comparable civil penalties is inapplicable. (182 Cal.App.4th at pp. 1565-1566.)

Here, the trial court fully analyzed the factors of reprehensibility in its new trial order and concluded they justified a 3:1 ratio. (7 AA 1937, 1938.)[5] Three of the factors support a higher punitive damages ratio, and two are equally weighted. In *Amerigraphics,* the presence of only one factor of the five was held to support a punitive-to-compensatory damages ratio of 3.8:1. (*Amerigraphics, supra*, 182 Cal.App.4th at p. 1567.)

In some cases compensatory damage awards have been deemed punitive in nature, resulting in a reduction of the ratio of punitive-to-compensatory damages for due process purposes; none of those cases, however, remotely resembles the case at hand. For example, in *State Farm, supra*, there was no physical assault or trauma and the emotional distress claimed against the insurance company arose from the same conduct that supported the punitive damages—refusal to pay the claim. (538 U.S. at p. 426.) In *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, there was no physical harm and the compensatory damage awards overlapped each other.

[5] Because the jury expressly found an agency relationship between Watchtower and the Congregation, the trial court ruled that the "base level" for Watchtower's compensatory damages should be 40 percent (Watchtower's 27 percent plus the Congregation's 13 percent) of the total compensatory damages of $7,000,000, or $2,800,000. (7 AA 1938.) The defendants do not challenge this ruling on appeal. The remitted punitive damage amount is 3.07 times this base level.

Furthermore, in *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 90, the court upheld a 2.4:1 ratio despite acknowledging that the emotional distress award was "high enough that it appears to include a punitive component."

Here the reprehensibility of the conduct and the undisputed severity of the injury are far more compelling than in *Bankhead*. Plaintiff was subjected at a very young age to repetitive sexual abuse during which she was trapped inside the perpetrator's vehicle and forcibly taken to his home (6 RT 729-731.) She suffered chronic, permanent PTSD, substance abuse, and depression as a result. (5 RT 563, 578, 581, 585, 586, 588, 7 RT 794, 802-808, 810, 811.)

Defendants did not dispute these injuries. In view of them, the compensatory damages were reasonable and not inherently punitive in nature. The 3:1 ratio was within due process standards.

V. DEFENDANTS' FAILURE TO FOLLOW THE RULES OF COURT PREJUDICES THEIR APPEAL.

Rule 8.204(a)(1)(2)(C) of the California Rules of Court requires an appellant's opening brief to provide a summary of the significant facts limited to matters in the record. The opening briefs of both Watchtower and the Congregation violate this rule. Each omits critical facts, including the fact that the elders assigned Jonathan Kendrick and Candace Conti together

in field service, the expert testimony of Dr. Salter and Carl Lewis, and the testimony of Carolyn Martinez and Evelyn Kendrick.

Furthermore, defendants fail to cite controlling authorities relied on by the trial court. (See, e.g., RAB 1-3, 6, 7, citing *RCALA*; 6 AA 1607, 1608; 7 AA 1810, citing *Johnson v. Ford Motor Co.*; RAB 105, citing *Wilson v. Ritto, Denton v. City of Fullerton* and *Thompson v. County of Alameda*; RAB 106, citing *Romero v. Superior Court* and *Chaney v. Superior Court*.)

Defendants' tactics are not unlike those in *Kleveland v. Siegel & Wolensky LLP* (2013) 215 Cal.App.4th 534, 539-540, where misrepresentation of the record and refusal to discuss established case law without explanation or justification justified sanctions. Here, defendants' omission of critical evidence and failure to discuss controlling law is a tacit acknowledgment that their appeal has no merit.

CONCLUSION

For the reasons stated above, the judgment should be affirmed in full.

Dated: June 3, 2013

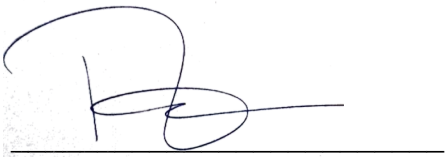
FURTADO, JASPOVICE & SIMONS
A Law Corporation

By _____
RICHARD J. SIMONS
Attorneys for Plaintiff/Respondent
JANE DOE

WORD COUNT CERTIFICATE

Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing brief is proportionally spaced, has a typeface of Times New Roman 13 points, is double-spaced, and contains 16,076 words based upon the word count feature contained in the word processing program of Microsoft Office Word 2007 used to produce this brief.

Dated: June 3, 2013



RICHARD J. SIMONS

WATCHTOWER
BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

25 COLUMBIA HEIGHTS, BROOKLYN, NEW YORK 11201-2483, U.S.A. PHONE (718) 625-3600

July 1, 1989

TO ALL BODIES OF ELDERS IN THE UNITED STATES

CONFIDENTIAL

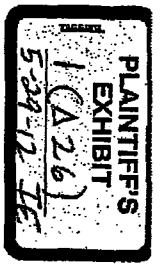
Dear Brothers:

We are writing to help all of you as individual elders be aware of a growing concern regarding the handling of your duties that may involve legal issues or questions. **Due to its importance, the presiding overseer should arrange for a special meeting of the body of elders to read and consider this letter carefully.**

In spreading the Kingdom message, it is appropriate that we be bold and outspoken. Jesus commanded that "what you hear whispered, preach from the housetops." (Matthew 10:27) Even when worldly authorities demand that we keep silent, we reply as did the apostles: "We cannot stop speaking about the things we have seen and heard." (Acts 4:20) The Christian congregation will continue to declare the Kingdom message boldly until Jehovah says the work is done.

Elders share the obligation to shepherd the flock. However, they must **be careful not to divulge information about personal matters to unauthorized persons.** There is "a time to keep quiet," when "your words should prove to be few." (Ecclesiastes 3:7; 5:2) Proverbs 10:19 warns: "In the abundance of words there does not fail to be transgression, but the one keeping his lips in check is acting discreetly." Problems are created when elders unwisely reveal matters that should be kept confidential. Elders must give special heed to the counsel: "Do not reveal the confidential talk of another." (Proverbs 25:9) Often the peace, unity, and spiritual well-being of the congregation are at stake. Improper use of the tongue by an elder can result in serious legal problems for the individual, the congregation, and even the Society.

While we as Christians are ready to forgive others who may wrong us, those in the world are not so inclined. Worldly persons are quick to resort to lawsuits if they feel their "rights" have been violated. Some who oppose the Kingdom preaching work readily take advantage of any legal provisions to interfere with it or impede its progress. Thus, elders must especially guard the use of the tongue. Jesus faced opposers who tried to "catch him in speech, so as to turn him over to the government." (Luke 20:20) He instructed us to be "cautious as serpents and yet innocent as doves" in such situations. (Matthew 10:16) Where such a threat exists, our position as elders should be in line with David's words: "I will set a muzzle as a guard to my own mouth, as long as anyone wicked is in front of me."--Psalm 39:1.



In recent years, this matter has come to be a cause for increasing concern. The spirit of the world has sensitized people regarding their legal "rights" and the legal means by which they can exact punishment if such "rights" are violated. Hence, a growing number of vindictive or disgruntled ones, as well as opposers, have initiated lawsuits to inflict financial penalties on the individual, the congregation, or the Society. **Many of these lawsuits are the result of the misuse of the tongue.** As elders, remember that ill-advised statements or actions on your part can sometimes be interpreted legally as violating others' "rights."

The need for elders to maintain strict confidentiality has been repeatedly stressed. Please see *The Watchtower* of April 1, 1971, pages 222-4, and September 1, 1987, pages 12-15. The September 1977 *Our Kingdom Service*, page 6, paragraph 36, and the *ks77* textbook, page 65, also provide helpful direction and counsel. That material strongly emphasized the elders' responsibility to avoid revealing confidential information to those not entitled to it.

The legal consequences of a breach of confidentiality by the elders can be substantial. If the elders fail to follow the Society's direction carefully in handling confidential matters, such mistakes could result in successful litigation by those offended. Substantial monetary damages could be assessed against the elders or congregation. In some cases where the authorities are involved, certain complications could lead to a fine or imprisonment. These possibilities underscore **the need for elders to be discerning and to follow carefully directions provided by the Society.**

I. WHAT TO DO IN SPECIFIC CASES

A. Judicial Committee Matters

Judicial committees must follow carefully the Society's instructions in carrying out their duties. (Note *ks77*, pages 66-70; *ks81*, pages 150-70.) Anything submitted in writing to the committee by the alleged wrongdoer or by witnesses should be kept in strict confidence. If it is necessary to continue at a later time a committee hearing, the members of the committee should submit to the chairman any personal notes they have taken. The chairman will keep these notes in a secure place to prevent breaches of confidentiality. The notes may be returned to the individual elders when the hearing resumes. Upon conclusion of the case, the chairman should place only necessary notes and documents, a summary of the case, and the S-77 forms in a sealed envelope for the congregation file. Nothing should be preserved outside of this sealed envelope (including unnecessary personal notes) by any elder on the committee. Obviously, no committee will ever allow judicial proceedings to be tape recorded or allow witnesses testifying before the committee to take notes.

B. Child Abuse

Many states have child abuse reporting laws. When elders receive reports of physical or sexual abuse of a child, they should contact the Society's Legal Department immediately. Victims of such abuse need to be protected from further danger. See "If the Worst Should Happen," *Awake!* January 22, 1985, page 8.

C. Search warrants and Subpoenas

1. A search warrant is a court order authorizing the police to search premises to locate evidence that may be used in a criminal prosecution. No elder should ever consent to the search of a Kingdom Hall or any other place where confidential records are stored. However, armed with a search warrant the police do not need consent and may even use force to accomplish their task. Likely before obtaining a search warrant, the police or other governmental officials will make inquiries regarding confidential records, make request to obtain the records, or indicate that they will seek a search warrant if the elder(s) involved does not cooperate. In any such situation, the Society's Legal Department should be called immediately.

At any time an elder is confronted with a search warrant (whether given advance notice or not), the elder should first ask to read the warrant. After reading it he should ask if he can call for legal guidance and then call the Society's Legal Department. If for some reason the Legal Department cannot be contacted, the elders involved should make every effort to obtain the assistance of a local attorney for the purpose of protecting the confidentiality of the records. It may be impossible to stop determined officers from conducting the search authorized by the warrant. Conscientious elders will want to do all they reasonably and peaceably can to preserve the confidentiality of the congregation in harmony with the principle set out in Acts 5:29.

2. Subpoenas are demands for records or for the appearance of an individual at a trial or deposition to give testimony. Subpoenas may be issued by a court or in some cases by a governmental agency or an attorney. If an elder receives a subpoena, he should contact the Society's Legal Department immediately. Never turn over records, notes, documents, or reveal any confidential matter sought by subpoena without receiving direction from the Legal Department.

D. Crimes and Criminal investigations

In some cases the elders will form judicial committees to handle alleged wrongdoing that also could constitute a violation of Caesar's criminal laws (e.g., theft, assault, etc.). Generally, a secular investigation into a matter that is a concern to the congregation should not delay conducting a judicial hearing. To avoid entanglement with the secular authorities who may be investigating the same matter, the strictest confidentiality (even of the fact that there is a committee) must be maintained.

If the alleged wrongdoer confesses to the sin (crime), no one else should be present besides the members of the committee. When evidence supports the accusation but genuine repentance is not displayed resulting in a decision to disfellowship, this should be handled in the normal course regarding advice of appeal rights and announcements to the congregation. In cases of serious criminal wrongdoing (e.g., murder, rape, etc.), or where the criminal conduct is widely known in the community, the body of elders should contact the Society before proceeding with the judicial committee process.

E. When Servants and Publishers Move

A considerable number of publishers, including **elders and ministerial servants move from one congregation to another.** Sometimes the circumstances surrounding their departure are unsettled. Some appointed brothers may be experiencing problems that have brought their qualifications into question. It is not uncommon for a body of elders to hold back in giving counsel, allowing a brother to move without discussing his problem. Thereafter, they decline to recommend his reappointment in his new congregation. Often such a brother protests, requiring extensive correspondence between the bodies of elders. Much personal, and sometimes embarrassing, information must then be passed on. Such mishandling of things greatly increases the potential for serious repercussions. Problems can be avoided by the body of elders assuming its responsibility to inform a brother that he will not be favorably recommended, fully explaining the reasons why. **Every effort should be made to resolve any difference before he leaves, eliminating any need for controversy involving his new congregation.** The body should assign two elders to meet with him before he moves, letting him know whether they are recommending him to the new congregation.

This would likewise apply to publishers who move at a time when their personal conduct requires investigation by the elders. **If serious accusations of wrongdoing have been made against an individual and he moves to another congregation before matters are finalized, usually it is best for the elders in the original congregation to follow through in handling matters, if possible and if distance permits.** They are acquainted with the individual and the circumstances surrounding the alleged wrongdoing; this ordinarily puts them in the best position to get the facts and to handle the case. Handling matters in this way will eliminate the need to reveal confidential information unnecessarily about the private lives of individuals.

F. When Lawsuits Are Threatened

If the congregation or the elders (in their capacity as elders) are threatened with a lawsuit, the Society's Legal Department should be contacted immediately. No statements should be made by any member of the body of elders about the merits or validity of an actual or threatened lawsuit without authorization from the Society.

G. Child Custody

Elders may learn that a publisher is facing a dispute over child custody in a divorce proceeding. If the parental rights of such is challenged on the basis of our Christian beliefs, or on the assertion that our beliefs are harmful to a child's best interests, the elders should immediately write to the Society's Legal Department. In a rare emergency, a telephone call may be necessary. The Legal Department will assess the facts and determine the degree of its involvement, if any. Elders have no authority to make any promises about the Society's paying legal fees or handling specific cases. There is no need to contact the Society if there is no indication that the beliefs and practices of Jehovah's Witnesses will be attacked in a child custody dispute.

When you write to the Society's Legal Department about a specific case, please provide the following information:

1. The names of the parents and their attorneys.

2. The number of children involved and their ages.

3. A brief description of the facts, including the presence of any apostates.

4. An assessment of the Christian parent's spiritual condition-Is he or she new in the truth? Active? Inactive? Balanced?

5. The status of the legal proceedings-Has the matter gone to trial? Has the trial date been set? If so, when?

II. POINTS TO REMEMBER

A. Appreciate the Importance of Maintaining Confidentiality

Elders must exercise extraordinary caution when it comes to handling confidential information about the private lives of others. Do not mistakenly minimize the gravity of a breach of confidentiality. Unauthorized disclosure of confidential information can result in costly lawsuits. Even if a lawsuit turns out favorably, valuable time and energy that could have been devoted to Kingdom interests will be lost.

B. Do Not Make Statements to Secular Authorities Until You Receive Legal Advice from the Society

You are not legally required to make immediate responses to secular authorities about matters that could involve the disclosure of confidential information. Voluntarily allowing the Kingdom Hall or confidential records to be searched, where no search warrant is produced, could infringe on the legal rights of the congregation or of others. No statements should be made until you have an understanding of your legal position from the Society's Legal Department.

C. Be Extremely Careful with Written Material

All material related to judicial matters should be kept in a safe place, accessible only to elders. **Final reports on the handling of judicial matters should be placed in a sealed envelope in the congregation file.** A judicial committee should avoid sending to an individual any kind of correspondence that accuses him of specific wrongdoing. (Note *ks77*, pages 68-9.) **Nothing should be put in writing to any disfellowshipped person to advise him of his status or the reasons for it without specific direction from the Society.** The rules and procedures of Jehovah's Witnesses do not require such written disclosures. Anything in writing submitted to a judicial committee should be kept in strict confidence. If a judicial committee disfellowships an individual, he should be informed **orally** of the action taken and of the right to appeal. If the wrongdoer refuses to attend the hearing, two members of the judicial committee should attempt to contact the individual at his home and inform him orally of the decision. If this is not possible, the two elders may be able to inform him by telephone.

D. Guard the Use of Your Tongue

Think before you speak. Do not discuss private and judicial matters with members of your family, including your wives, or with other members of the congregation. Be extremely careful not to inadvertently disclose private information when others are present, such as when speaking on the telephone with others listening in or nearby. (Note *ks77*, page 65.) At times, complicated judicial cases may necessitate consultation with an experienced, mature elder in another congregation or with the circuit overseer. Unless the circuit overseer is the elder consulted, only the pertinent details should be discussed and names should not be used.

Elders bear a heavy responsibility in ministering to the needs of the Christian congregation, and observing confidentiality as they do so. (1 Corinthians 16:13) We trust that the information in this letter will help you carry this burden. Please be assured of our love and prayers, and may Jehovah continue to bless you as you shepherd his flock.-1 Peter 5:1-3.

Your brothers,

Watchtower B. & T. Society
OF NEW YORK, INC.

P.S. Due to the importance of the information that is presented herein it is suggested that the body of elders jointly read and consider this letter as soon as possible after its receipt in the congregation. Please do not make any copies of this letter, nor should it be read by others. It should be kept in the congregation's confidential files for any future reference that may be required by the body of elders.

PROOF OF SERVICE (C.C.P. 1013a 2015.5)

I am a citizen of the United States and reside in Contra Costa County; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6589 Bellhurst Lane, Castro Valley, CA 94552.

On June 6, 2013, I served the within RESPONDENT'S BRIEF and RESPONDENT'S APPENDIX on interested parties in said action by the following means:

[X] By First Class Mail By placing a true copy thereof enclosed in a sealed envelope with postage thereon, fully prepaid, for collection and mailing following the firm's ordinary business practice for deposit in the United States mail in Discovery Bay, California, addressed as shown below.

[ ] By Hand-Delivery By causing a true copy thereof, enclosed in a sealed envelope, to be delivered by hand to the address(es) shown below.

[ ] By Overnight Delivery By causing a true copy thereof, enclosed in a sealed envelope, to be delivered by hand to the address(es) shown below.

[ ] By Facsimile Transmission – By transmitting a true copy thereof by facsimile transmission from facsimile number (510) 582-8254 to the interested parties to said action at the facsimile number(s) shown below. The facsimile transmission was reported as complete and without error.

[X] By Email By transmitting a true copy thereof to the email address(es) shown below.

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(Brief and Appendix)

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

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Mario Moreno, Esq. Watchtower Bible & Tract Society of New York, Inc. Legal Department 100 Watchtower Drive Patterson, NY 12563-9204 ***(Brief and Appendix)***	*Pro Hac Vice* *WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.*
Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797 ***(Brief Only, Via Electronic Submission http://www.courts.ca.gov/7423.htm)***	*Supreme Court*
The Honorable Robert McGuiness, Judge c/o Clerk of the Superior Court of California, County of Alameda ***(Brief Only)*** 1221 Oak Street, Department 22 Oakland, CA 94612	*Trial Court*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 6, 2013, at Discovery Bay, California.

ELAINE T. LANDRO