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RICHARD J. SIMONS, ESQ. State Bar No. 72676  
KELLY KRAETSCH, ESQ. State Bar No. 281688  
FURTADO, JASPOVICE & SIMONS  
A Law Corporation  
22274 Main Street  
Hayward, CA 94541  
510/582-1080 Telephones  
510/582-8254 Facsimile  
Rick@fislaw.com  
KellyK@fislaw.com

Attorneys for Plaintiff  
JANE DOE

**FILED**  
ALAMEDA COUNTY

AUG 09 2012

Exec. Off/Clerk  
By Guina Baboo

SUPERIOR COURT OF CALIFORNIA - COUNTY OF ALAMEDA

JANE DOE,  
  
Plaintiff,  
  
v.  
  
THE WATCHTOWER BIBLE AND TRACT SOCIETY  
OF NEW YORK, INC., a corporation, et al.,  
  
Defendants.

No. HG11558324  
  
ASSIGNED FOR ALL PURPOSES TO JUDGE ROBERT  
McGUINNESS, DEPARTMENT 22  
  
PLAINTIFF'S SURREPLY MEMORANDUM OF  
POINTS AND AUTHORITIES IN OPPOSITION TO  
MOTIONS FOR NEW TRIAL AND J.N.O.V. OF  
DEFENDANTS WATCHTOWER NEW YORK AND  
FREMONT CONGREGATION  
  
Date: August 13, 2012  
Time: 8:30 a.m.  
Dept: 22

INTRODUCTION

In their Reply, the Church Defendants raise new arguments and authorities not cited in their initial briefing. Specifically, Watchtower makes a number of arguments which cite *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68. Because plaintiff has been deprived of the opportunity to address the new arguments and new authorities omitted from Watchtower's initial briefing, a Surreply is appropriate.

I. THE BANKHEAD DECISION DOES NOT CONTROL THE ISSUE OF RATIO IN THIS CASE.

Watchtower argues that *Bankhead v. ArvinMeritor, Inc.* is controlling, and that in that case the Appellate Court found that "this Court is required to use the net compensatory damages" in determining the issue of ratio. However, the *Bankhead* Court did not so hold. On the contrary, the parties in *Bankhead* Court neither briefed, argued, nor disputed the point. Instead, the *Bankhead*

1 parties agreed that the 2.4:1 ratio of punitive damages to the defendant's share of compensatory  
2 damages was the measure used, and the Court of Appeal only incorporated that agreement in  
3 affirming that ratio. The Court's conclusion that the assignment of a low percentage of liability  
4 reduces the amount of compensatory damages with which the punitive damage amount is compared  
5 cited no authority and did no analysis. The dicta was not necessary to its decision. (205 Cal.App.4<sup>th</sup>  
6 at 87, and at 90). An Appellate Court decision is not authority for a proposition that it did not  
7 consider, and which was not essential to its determination of the issues. (*Richmond v. Shasta*  
8 *Community Services District* (2004) 32 Cal.4<sup>th</sup> 409, 422).

9 No Due Process case has analyzed this issue and held that due process requires comparison  
10 of the plaintiff's harm with only the share of the compensatory damage award attributable to the  
11 party assessed punitive damages. Watchtower's conduct was a substantial factor in causing all of  
12 plaintiff's harm, regardless of their share of fault. The jury found that none of the plaintiff's harm  
13 would have resulted in the absence of Watchtower's conduct. (CACI 430). Therefore, it is plaintiff's  
14 harm, and not a reduced share of plaintiff's harm, which is the basis for the ratio of punitive  
15 damages.

16  
17 **II. THE BANKHEAD DECISION DOES NOT REQUIRE A MAXIMUM 2.4:1 RATIO.**

18 Watchtower further argues that *Bankhead* requires a maximum ratio of punitive damages to  
19 compensatory damages of 2.4:1. (Reply, 8:8-11). This simply misreads *Bankhead*. *Bankhead*  
20 specifically notes that the "extreme reprehensibility" of a defendant's conduct, together with other  
21 factors in evidence, can justify even a 16:1 ratio of punitive damages. (205 Cal.App.4<sup>th</sup> at 90, citing  
22 *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4<sup>th</sup> 543, at 560-569).

23 Watchtower argues that *Bankhead* requires a reduction where the compensatory damages  
24 "already includes a punitive element." (Reply, 7:12-16). However, in this case, there is absolutely no  
25 basis to conclude that the emotional distress damages included a punitive element. In view of the  
26 horrible nature of the abuse plaintiff's suffered, the length of time, and the lifetime effects, plaintiff  
27 submitted the figure of \$7 Million as a reasonable amount of compensation. The defendant  
28 introduced neither evidence nor argument to contradict this number. The jury was instructed not to

1 include punitive damages in its verdict. There is no "punitive element" about this compensatory  
2 damage award that would bring in the *Bankhead* Court's concern.

3 **III. THE BANKHEAD PUNITIVES ARE ONLY TO PUNISH RATHER THAN DISCOURAGE.**

4 All of the conduct by the defendant in *Bankhead* was past conduct, which it no longer  
5 engaged in by the time of trial. The Defendant no longer employed a policy of hiding the risks of  
6 asbestos, and no longer failed to protect workers from those risks. Therefore, the recognized purpose  
7 of punitive damages to discourage future similar conduct was not applicable in that analysis.

8 In this case, however, the Court's instruction and plaintiff's counsel's argument focused on  
9 discouragement of future harm. Watchtower seeks to shoehorn the punitive nature of the *Bankhead*  
10 award into confining the purpose of punitive damages awarded by the jury in this case to punishment  
11 only. However, the Supreme Court in *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, specifically  
12 recognized the proper purposes of punitive damages include protecting citizens against future harm  
13 by "detering a wrongful corporate practice". (35 Cal.4th at 1206 and at 1212). All of the claimed  
14 prejudice and error argued by Watchtower because plaintiff's counsel referred to children, when  
15 viewed in the context of the right of the state to protect its children, are meritless.

16 **IV. BANKHEAD PROVIDES SUPPORT FOR THE JURY'S AWARD.**

17 The *Bankhead* opinion provides substantial support for plaintiff's argument that Watchtower's  
18 Motions should be denied. The Church Defendants' selective factual citations, which ignore the  
19 substantial evidence rule, are similar to the misstatements of the defendant in *Bankhead*, where the  
20 Court stated that the Appellate review was not "an opportunity for [the defendant] to make an end  
21 run" around the jury's factual findings. (205 Cal.App.4th at 86).

22 *Bankhead* also recognizes that punitive damages are proper, even where there is no evidence  
23 that the defendant intended to injure the plaintiff "or anyone else in particular", where that defendant  
24 failed to take adequate measures to protect those persons made vulnerable by its conduct. (*Id.* at  
25 '86-88). That failure in *Bankhead* justified the jury's conclusion that the defendant's conduct  
26 constituted malice. The same is true in this case.

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28 ///

1 Dated: August 9, 2012

FURTADO, JASPOVICE & SIMONS  
A Law Corporation

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4 By 

RICHARD J. SIMONS  
Attorneys for Plaintiff  
JANE DOE

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

2 STATE OF CALIFORNIA  
3 COUNTY OF ALAMEDA

ss.

4 I am a citizen of the United States and reside in Alameda County; I am over the age of eighteen years  
5 and not a party to the within entitled action; my business address is 22274 Main Street, Hayward, California  
6 94541.

7 On August 9, 2012, I served the within **PLAINTIFF'S SURREPLY MEMORANDUM OF POINTS AND  
8 AUTHORITIES IN OPPOSITION TO MOTIONS FOR NEW TRIAL AND J.N.O.V. OF DEFENDANTS WATCHTOWER NEW  
9 YORK AND FREMONT CONGREGATION** on interested parties in said action by the following means:

10  By First Class Mail By placing a true copy thereof enclosed in a sealed envelope with  
11 postage thereon, fully prepaid, for collection and mailing following the firm's ordinary business practice for  
12 deposit in the United States mail in Hayward, California, addressed as shown below:

13 Jonathan Kendrick, In Pro Per  
14 200 Honey Lane  
15 Oakley, CA 94561  
16 925/679-0411 Telephone

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

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

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

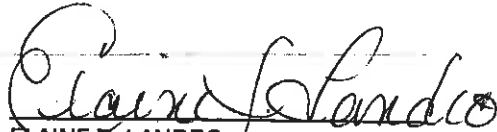
24  By Email By transmitting a true copy thereof to the email address(es) shown below:

25 James M. McCabe, Esq.  
26 The McCabe Law Firm  
27 4817 Santa Monica Avenue  
28 San Diego, CA 92107  
619/224-2848 Telephones  
619/224-0089 Facsimile  
[jim@mccabelaw.net](mailto:jim@mccabelaw.net)  
Attorneys for Defendants  
CHURCH DEFENDANTS

Robert J. Schnack, Esq.  
Jackson Lewis LLP  
801 K Street, Suite 2300  
Sacramento, CA 95814  
916/341-0404 Telephones  
916/341-0141 Facsimile  
[SchnackR@jacksonlewis.com](mailto:SchnackR@jacksonlewis.com)  
[egbertd@jacksonlewis.com](mailto:egbertd@jacksonlewis.com)  
Attorney for Defendant  
WATCHTOWER BIBLE AND TRACT SOCIETY  
OF NEW YORK, INC.

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

Executed on August 9, 2012, at Hayward, California.

  
ELAINE T. LANDRO