IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

A136641

HG11558324

JANE DOE
Plaintiff and Respondent,

v.

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

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

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

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

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

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: A136641
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* James M. McCabe, Esq./CSBN: 51040 The McCabe Law Firm, APC 4817 Santa Monica Ave., Suite B San Diego, CA 92107 TELEPHONE NO.: (619) 224-2848 FAX NO. *(Optional):* (619) 224-0089 E-MAIL ADDRESS *(Optional):* jim@mccabelaw.net ATTORNEY FOR *(Name):* Fremont California Congregation of Jehovah's Witnesses, North Unit	Superior Court Case Number: HG11558324 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: The Watchtower Bible and Tract Society of New York Inc., et al. RESPONDENT/REAL PARTY IN INTEREST: Jane Doe	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Fremont California Congregation of Jehovah's Witnesses, North Unit

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 26, 2013

James M. McCabe, Esq.
(TYPE OR PRINT NAME)

▶ James M. McCabe
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes & Codes

TABLE OF AUTHORITIES
(continued)

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

I.

INTRODUCTION

Childhood sexual abuse is an abhorrent, wicked act that must not be tolerated. That does not mean, however, that trial courts can ignore law and reason to compensate abuse victims. Yet, that is what the trial court did to the Fremont Congregation of Jehovah's Witnesses even though the congregation had neither custody of the minor victim in question, nor control over the perpetrator. Indeed, the congregation was unaware of the abuse when it occurred, did not condone that abuse, and did not cover it up.

California has long held to the principle that when allegations are founded upon nonfeasance, one has no duty to protect another from the criminal acts of a third party absent a special relationship. To establish a special relationship, there must be an element of "custody or control" between the parties. As this appeal demonstrates, the undisputed evidence in the case below shows that: (1) the Plaintiff's claims against Fremont Congregation are based on nonfeasance; (2) the Plaintiff's parents

and her abuser were all rank-and-file members of Fremont Congregation; and (3) Fremont Congregation never had custody or control over the Plaintiff or her abuser, Jonathan Kendrick ("Kendrick"). Thus, Fremont Congregation owed no legal duty to Plaintiff as a matter of law.

The trial court, however, deliberately departed from those firmly entrenched principles and erroneously created a new duty for religious organizations – and by extension to all volunteer organizations – that requires them to protect a member 24 hours a day from another member's tortious or criminal acts, whether committed on or off church property. Such a result cannot stand.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Background of the Parties.

The Fremont Congregation is a not-for-profit religious corporation. Fremont Congregation is made up of men and women who attend religious services with their children at a place of worship called the "Kingdom Hall" ("Kingdom Hall" or "church"). (3 RT 142, 208-209; 5 RT 548.)[1] Most attendees actively engage in the public ministry for which Jehovah's Witnesses are known ("field service" or "field

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

ministry"), and all consider themselves "ministers." (5 RT 553; 7 RT 911, 913-14; 8 AA 2054 [Def. Exh. 131].) Fremont Congregation does not have paid clergy; activities are overseen by elders who are appointed by Co-Appellant Watchtower Bible & Tract Society of New York, Inc. ("Watchtower") to serve as congregation "elders." (3 RT 139; 7 RT 908-909.) Elders receive assistance handling mundane congregational duties from men who are appointed to serve as "ministerial servants." (3 RT 147; 4 RT 402; 7 RT 909.)

Like all other congregations of Jehovah's Witnesses, Fremont Congregation does not separate children from their parents; they do not arrange Sunday School classes, overnight trips, or any other activity that would place children in the "custody" of the elders. (3 RT 140; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT 705; 7 RT 873-874.) Rather, in all congregations of Jehovah's Witnesses, children attend meetings and participate in religious activities *with their parents*. (3 RT 143, 185-187; 4 RT 277, 421; 6 RT 705; 7 RT 874, 912.) Indeed, the Plaintiff informed the trial court that she never went to Fremont Congregation meetings or to field service without at least one of her parents. (6 RT 725-726, 737-738.)

As a child born in 1985, the Plaintiff attended religious meetings with her parents, Neal and Kathleen Conti, at Fremont Congregation. (4 RT 350, 352, 367-368; 6 RT 713.) Kendrick also attended Fremont Congregation's religious meetings and served as a ministerial servant. In November 1993, Kendrick confessed to two congregation elders, Michael L. Clarke and Gary Abrahamson, that four months earlier, in July 1993, he had touched the breast of his then 15-year-old stepdaughter,

Andrea, in the privacy of his own home. (3 RT 138-139, 151-160, 177, 180-181, 183, 207, 210-211, 214-217, 219-222, 239-240, 250-251; 4 RT 302; 7 RT 879-880.) Because of that one act, Kendrick was stripped of his position as a ministerial servant in the Freemont Congregation, and the congregation was publicly informed that Kendrick was no longer a ministerial servant. (3 RT 163, 166, 192, 218, 241, 244, 247; 5 RT 484; 7 RT 880.) Freemont Congregation elders also spoke with Andrea and her mother, Evelyn (Kendrick's wife), and ensured that they knew of their absolute right to report the incident to civil authorities.[2] (3 RT 163-164, 180-181, 190-191, 239-242, 250-251; 4 RT 293, 297, 302; 6 RT 707; 7 RT 880.) In February 1994, Evelyn and Andrea reported Kendrick's July 1993 sexual abuse of Andrea to the Fremont Police Department ("Fremont Police") and to Child Protective Services ("CPS"). (4 RT 296-297, 300-301, 303-306; 6 RT 701, 711-712; 8 AA 1983-1991 ([Pl. Exh. 5]; [Def. Exh. 94].) During the investigation that ensued, Kendrick admitted the July 1993 incident to those authorities. (6 RT 647-649.) Unbeknownst to Fremont Congregation at that time, Kendrick was then prosecuted and convicted of misdemeanor sexual battery. (4 RT 307; 6 RT 654-656.)

Pursuant to Jehovah's Witnesses' religious beliefs and practices, and based upon their Biblical view of confidentiality, the announcement made to the congregation that Kendrick was removed from his position of ministerial servant did

---

[2] Prior to 1997, ministers and clergy members were *not* mandated reporters of child abuse in California. (Stats. 1996, ch. 1081 (A.B. 3354), § 3.5, eff. Jan. 1, 1997 [amending Pen. Code § 11166.]). Thus, in keeping with church policy, the elders left it to the victim and her mother to choose whether or not to report.

not include the reason for that action. (3 RT 222-223, 243-244.) But to this day, Kendrick has never again served in any appointed position in any congregation of Jehovah's Witnesses. (3 RT 243-244; 7 RT 916.) At the time of Plaintiff's alleged sexual abuse, Kendrick was simply a rank-and-file member of the Fremont Congregation. (3 RT 163, 166, 241; 4 RT 356; 5 RT 484; 6 RT 711; 7 RT 872-873, 880; 9 RT 1054.)

B. Plaintiff's Allegations of Abuse.

Plaintiff contended at trial that Kendrick hugged her and made her sit on his lap during congregation meetings at the Kingdom Hall. (6 RT 723, 738-739, 742.) She testified that from 1994 to 1996, Kendrick committed hundreds of sexually abusive acts against her when she was at Kendrick's home (6 RT 742, 744), and one such act while they rode on a train. (6 RT 745-746.) On that latter occasion, Plaintiff stated the abuse occurred in plain view of her father, who occupied the seat facing her and Kendrick. (6 RT 745-746.)

C. No Evidence Corroborated Plaintiff's Testimony.

The Plaintiff made no allegation that Kendrick did anything more than hug her or have her sit on his lap when they were on church property or engaging in church-related activities. (6 RT 723, 738-739, 742.) But no witness – not her own parents, Fremont Congregation elders, nor fellow church members – corroborated Plaintiff's story in any way. To the contrary, Plaintiff's father, Neal Conti, denied that Kendrick ever hugged the Plaintiff at the Kingdom Hall, or that Kendrick ever had

Plaintiff sit on his lap during congregation meetings. Neal also denied that his daughter was taken to Kendrick's home alone, or that Kendrick ever abused Plaintiff in his presence. (5 RT 495-496, 499-501, 513.)

Similarly, the Plaintiff's mother, Kathleen Conti, also testified that she never saw her daughter sitting on Kendrick's lap, or saw Kendrick give her daughter "bear hugs" at the Kingdom Hall. (4 RT 368-369.) She also testified that she never allowed her daughter to go anywhere alone with Kendrick. (4 RT 357, 367-368.)

Fremont Congregation elders Gary Abrahamson, Michael Clarke, and Lawrence Lamerdin kept a watchful eye on Kendrick after the 1993 incident with his stepdaughter. (3 RT 162-163, 247-248, 250; 4 RT 406-409, 412-413, 417, 420; 7 RT 880-881.) Yet they, too, never saw Kendrick hug the Plaintiff or the Plaintiff sitting on Kendrick's lap at the Kingdom Hall (3 RT 195-196, 248-249, 253; 4 RT 420-421), nor did they ever see the Plaintiff leaving the Kingdom Hall alone with Kendrick after congregation meetings. (3 RT 196, 248, 253; 4 RT 420-421, 430.) Likewise, they never saw the Plaintiff alone with Kendrick in field ministry. (3 RT 196, 248, 253; 4 RT 420-421, 430.)

Fremont Congregation members Bernice Munoz, Sylvia Munoz, and Pamela Figuerido likewise never saw Plaintiff at the Kingdom Hall without one of her parents, never saw Kendrick hug Plaintiff or have her on his lap, never saw Kendrick alone with Plaintiff in field service, never saw Kendrick leave the Kingdom Hall in his vehicle alone with Plaintiff, and confirmed that had they seen such

"inappropriate" conduct, they would have reported it to the elders. (7 RT 828-829, 836-837, 852-853.)

In short, no trial testimony corroborated the Plaintiff's claims of sexual abuse. Nonetheless, the uncontroverted fact remains that any acts of sexual abuse that occurred on church property involved hugs and sitting on Kendrick's lap in the presence of other congregation members. (6 RT 723, 738-739, 742.) Any other acts of abuse alleged by Plaintiff occurred either at Kendrick's home or in the presence of the Plaintiff's father. (6 RT 742, 744, 745-746.)

D. Court Proceedings.

The Plaintiff originally commenced legal action on January 28, 2011, and subsequently filed her operative First Amended Complaint for Damages on May 3, 2012. In it she asserted various causes of action for negligence in Fremont Congregation's supervision of Kendrick and its failure to protect the Plaintiff from Kendrick's acts of child abuse on and off church property. Those claims later proceeded to a 10-day jury trial before the Hon. Robert McGuiness.

Notably, during the sixth day of trial, Judge McGuiness ruled that a special relationship existed between Fremont Congregation and the Plaintiff that resulted in a duty of care to protect her from Kendrick's criminal acts of sexual abuse. (8 RT 979-985; 9 RT 1011-1012, 1032-1033, 1054.) In doing so, the trial court acknowledged that its ruling was *not* based on case law (8 RT 982), and that "imposing a duty under

the circumstances [of this case]" was "clearly an evolution of the doctrine." (9 RT 1012.)

1. Jury Instructions.

On June 11, 2012, following six days of testimony, the trial court made erroneous rulings on jury instructions, allowing special instructions related to Fremont Congregation's duty, and denying special instructions related to child abuse reporting requirements, the allocation of fault, and privileged communications. (9 RT 1010-1016, 1021-1024, 1034-1035, 1040-1041.)

The trial court incorrectly concluded that Fremont Congregation had a special relationship based upon its custody and control of the Plaintiff, and thus ruled that Fremont Congregation owed "a duty to take reasonable protective measures to protect Candace Conti from the risk of sexual abuse by Fremont Congregation of Jehovah's Witnesses, North Unit, member Jonathan Kendrick." (8 RT 979-980, 981-985; 9 RT 1011-1012, 1032-1033, 1054.) That instruction did not include limiting language to indicate the *scope* of duty being imposed, *e.g.,* the location and activities under which Fremont Congregation must protect the Plaintiff. Further, the court incorporated into that broad duty of protective care, a duty to warn and instructed 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 (8 RT 987-988; 9 RT 1054);

2. Whether or not any educational programs were made available to plaintiff, her parents, or to other Jehovah's Witnesses from the Fremont Congregation Jehovah's Witnesses, North Unit, members for the purpose of sexual abuse education and prevention (9 RT 1054); and

3. Such other facts and circumstances contained in the evidentiary record here as to the presence or absence of protective measures. (9 RT 1054-1055.)

Notably, the language of that instruction failed to express, as a matter of law, the scope of the duty owed and the concomitant warning required to satisfy that duty of protective care.

The trial court also refused Fremont Congregation's request for a jury instruction stating that ministers were not mandated reporters in 1993. (8 RT 975-979, 991.) That instruction would have correctly explained the law, and would have offset the incorrect and misleading testimony from Plaintiff's expert, Anna Salter, Ph.D., as well as Plaintiff's counsel's misleading closing argument on this critical issue. Specifically, Dr. Salter incorrectly stated that in 1993 clergy in California were "legally obligated" to report child abuse, and that California's amended 1997 law simply clarified that obligation. (6 RT 693-694, 707.) Similarly, during closing argument Plaintiff's counsel asserted that one protective measure North Fremont

Congregation elders could have taken was to report Kendrick's sexual abuse of Andrea to the authorities in 1993. (9 RT 1085-1086.)

Further, the trial court denied Fremont Congregation's request to add unnamed parties to the special verdict form and to instruct the jury on allocation of fault, even though the Fremont Police, Child Protective Services, and the District Attorney's office all had greater knowledge about Kendrick's sexual abuse history than that possessed by Fremont Congregation elders. (8 RT 961-967; 9 RT 1012-1014, 1033-1035.) Despite their superior knowledge, none of these public entities warned the public of Kendrick's criminal conviction. Moreover, the Plaintiff's parents, who had a statutory and common law duty to supervise and protect their daughter, allegedly allowed Plaintiff to spend considerable time alone with an adult man – routinely allowing that man to take their child to his home, where he lived alone. (6 RT 742, 744.) Therefore, the court's ruling on allocation deprived the jury of an opportunity to allocate fault to nonparties and thus reduce North Fremont's liability, especially as to non-economic damages which made up most of the compensatory damages the jury ultimately awarded to the Plaintiff. (11 RT 1214-1215.)

Finally, the trial court denied Fremont Congregation's request to instruct the jury that Kendrick's 1993 confession to congregation elders – that he had touched his stepdaughter's breast – was a privileged communication that cannot provide the basis for finding a breach of duty to warn. That ruling confused the jury into believing that the Fremont Congregation's elders' failure to disclose Kendrick's confession can

provide the basis for negligence. (8 RT 988-990; 9 RT 1016, 1019, 1021-1023, 1057-1058; 5 AA 1239.)

2. Verdict and Post-Verdict Proceedings.

On June 13, 2012, the jury returned its verdict in favor of the Plaintiff and awarded her $7 million in general and special damages. The jury apportioned liability 60% to Kendrick, 27% to Watchtower, and 13% to the Fremont Congregation. (11 RT 1214-1215; 5 AA 1285-1286.) The jury further awarded punitive damages against Watchtower in the amount of $21 million. (12 RT 1242; 5 AA 1299.)

On July 17, 2012, Fremont Congregation moved for a judgment notwithstanding the verdict ("JNOV") and for a new trial. (5 AA 1352-1387.) After a hearing on August 13, 2012 (13 RT 1251-1280), the trial court entered orders on August 24, 2012, denying that JNOV motion, conditionally granting the new trial motion, and amending the original Judgment. (7 AA 1936-1940.)

Fremont Congregation appeals from the trial court's original Judgment, the Amended Judgment, and all related post-judgment orders. Pursuant to Rule of Court 8.200, subdivision (a)(5), Fremont Congregation further joins in and incorporates here by reference all of the additional grounds for reversal asserted in the companion Appellant's Opening Brief filed concurrently by Watchtower.

III.

APPEALABILITY AND STANDARDS OF REVIEW

Freemont Congregation's appeal from the Judgment and Amended Judgment entered by the trial court was properly taken under Code of Civil Procedure section 904.1, subdivision (a)(1). Similarly, its appeal of the trial court's denial of its JNOV motion was also properly taken pursuant to Code of Civil Procedure section 904.1, subdivision (a)(4).

Additionally, to assist the Court in reviewing those challenges, Freemont Congregation discusses the applicable standards of review at the beginning of each sub-section of its brief that follows.

IV.

DISCUSSION

This case turns on the answer to one fundamental question: Did Fremont Congregation owe the Plaintiff a duty of care? The simple answer is "No" – because "[a] special relationship is a prerequisite" in a nonfeasance case such as this one (see *Garcia v. Superior Court* (1990) 50 Cal.3d 728, 734) and no special relationship exists under these facts.

A. The Trial Court Erred in Finding Fremont Congregation Liable for Kendrick's Abusive Acts Because the Congregation Did Not Owe the Plaintiff a Legal Duty of Protective Care.

1. Standard of Review: *De Novo.*

The tort of negligence "involves a violation of a *legal* duty, imposed by statute, contract or otherwise, owed by the defendant to the person injured. Without such a duty, any injury is an injury without wrong." (*Roman Catholic Bishop of San Diego v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564.) Duty is thus "an essential element" of every negligence claim. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 529, citing *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) The existence of a duty is a question of law. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237.) Legal questions are reviewed *de novo*. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770-771.)

2. Application to This Case.

Our Supreme Court has consistently held that "as a general matter, there is no duty to act to protect others from the conduct of third parties." (*Delgado, supra,* 36 Cal.4th at 235; see *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434-435.) Further, "one owes no duty to control the conduct of another, or to warn those endangered by such conduct." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 995.) One exception to that general "no duty to protect" rule is found in the "special relationship" doctrine. "A defendant may owe an affirmative duty to protect another from the conduct of third parties, or to assist another who has been attacked

by third parties, if he or she has a 'special relationship' with the other person." (*Morris v. De La Torre* (2005) 36 Cal.4th 260, 269.) In nonfeasance cases like this one, "[a] special relationship is a prerequisite" essential to establish liability. (*Garcia, supra,* 50 Cal.3d at 734.)

Thus, the central question confronting this Court in this appeal is whether Fremont Congregation had a special relationship with the Plaintiff or with Kendrick which would give rise to a duty to protect the Plaintiff from Kendrick's criminal acts. Distilling that question even further requires this Court to examine whether a church has a special relationship with a church member or the child of a church member. Our Supreme Court, this Court, other Courts of Appeal, and the courts from other states have uniformly answered that question with a resounding *"no."*

Yet the trial court improperly ventured into uncharted legal territory when it determined that a special relationship existed in this case between Fremont Congregation and the Plaintiff, which gave rise to Fremont Congregation owing her a duty of care. (8 RT 987-988; 9 RT 1054-1058.) Tellingly, the trial court did not provide a basis in the law to support its ruling, but rather candidly acknowledged that there are no cases in California supporting that ruling. (8 RT 982.) Nor did the trial court detail any factual support for that ruling, as there simply is none. (*Ibid.*) This was prejudicial error.

a. A Special Relationship Is Not Created Merely by Church Membership, or By the Providing of Spiritual Counsel by a Minister.

No legal authority supports the trial court's ruling that a special relationship exists between a religious organization, church, or its clergy and a church member (or a church member's child) merely because of membership. Quite to the contrary, this Court, along with other California courts, has followed courts throughout the nation in consistently holding that there is *no special relationship* between a church or clergy and a church member. (See, *e.g., Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 297 ["Mere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm."]; *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 270 [a priest cannot be liable to a church member for breach of a duty arising out of a special relationship]; *Roman Catholic Bishop of San Diego v. Superior Court, supra*, 42 Cal.App.4th at 1568 ["there is no special relationship here creating a heightened duty of care based on a priest/parishioner relationship"].)[3]

---

[3] See *Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints* (Utah App. 2004) 98 P.3d 429, 432 [membership in church alone insufficient to establish special relationship]; *Lambert v. Word of Faith Ministries* (La.Ct.App. 1996) 673 So.2d 1150 [no special relationship existed between minister and minor children requiring minister to control conduct of third party who was a minor child]; *Bryan R. v. Watchtower Bible and Tract Soc. of New York, Inc.* (Me. 1999) 738 A.2d 839, 847 [a church has no duty to protect members of its congregation from other members]; *Meyer v. Lindala* (Minn.Ct.App. 2004) 675 N.W.2d 635, 640 ["Providing faith-based advice or instruction, without more, does not create a special relationship"]; *Berry v. Watchtower Bible and Tract Soc. of New York, Inc.* (N.H. 2005) 879 A.2d 1124, 1129 ["We decline to hold that the fact of church membership or adherence to church doctrine by the plaintiffs' parents creates

Of note on that very issue is Justice Kline's analysis in *Richelle L.*, where he reasoned that the accused priest "cannot be liable to [the victim] for breach of a duty arising out of a special relationship" because it would be equivalent to a prohibited "clergy malpractice" claim. (*Richelle L., supra,* 106 Cal.App.4th at 270.) Indeed, liability for the criminal acts of third parties has typically been limited to those cases involving the relationship between business proprietors, such as shopping centers, restaurants and bars, and their tenants, patrons, or invitees. (See, *e.g., Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [finding that it is well established that a proprietor has a "general duty of maintenance which is owed to tenants and patrons"]; *Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819, 823-824 [a proprietor who has reason to believe, from observation or experience, that the conduct of another endangers an invitee has a duty to take reasonable steps to protect the invitee]; *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 806 [imposing on a possessor of land a duty to "members of the public who enter in response to the landowner's invitation"].) Additionally, special relationships "have been found in other contexts, including those of: (i) common carriers and passengers; (ii) innkeepers and their guests; and (iii) mental health professionals and their patients." (*Delgado, supra,* 36 Cal.4th at 236, fn. 14.) But as Justice Haerle aptly observed, "the special relationship doctrine is reserved for situations in which the authorities have created a relationship of

---

a special relationship between the plaintiffs and Watchtower or [the local] Congregation."].

'dependency' with a 'vulnerable' individual[.]" (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 289 [conc. opn. of Haerle, J.].) In this case, however, the Plaintiff was not in the custody or control of Fremont Congregation when her alleged sexual abuse by Kendrick occurred.

b. An Expansion of the Special Relationship Doctrine Cannot Occur Absent Evidence of Custody or Control.

As our Supreme Court made clear in *Nally,* a person "is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship *of custody or control.*" (*Nally, supra,* 47 Cal.3d at 293 [italics added].) Thus, courts have only hesitantly expanded the field of recognized special relationships to situations involving some kind of dependency, reliance, custody or control. (See, *e.g., Melton, supra,* 183 Cal.App.4th at 535-536; *Olson v. Children's Home Society* (1988) 204 Cal.App.3d 1362, 1366.) Furthermore, before a special relationship can give rise to a duty of care, the liable party must have had the ability to protect the victim or control the wrongdoer. (See, *e.g., Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1013.)

Those immutable principles were explored by this Court in *Giraldo v. Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231. There, a transgender prisoner (with a feminine physical appearance) was placed in a cell block with male prisoners and subsequently brutally attacked and raped. This Court was therefore faced with the question of whether a prisoner had a special relationship with the prison system. In holding that such a relationship did exist, the *Giraldo* court

recognized that "a typical setting for the recognition of a special relationship is where 'the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare.'" (*Id.* at 245-246 [citations omitted].)

In stark contrast, in this case no relationship of dependency existed between the Plaintiff and Fremont Congregation. By her own account, and the testimony of both her parents, the Plaintiff was accompanied by her parents at all congregation meetings and religious activities. (6 RT 725-726, 737-738; 4 RT 357, 367-369; 5 RT 495-496, 499-501, 513.) In other words, the Plaintiff was dependent on her parents and *not* Fremont Congregation, to look after her welfare, consistent with civil law and church practices and doctrine, which does not separate children from parents in any church activities. (3 RT 140; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT 705; 7 RT 873-876.) Similarly, Fremont Congregation was not aware of Kendrick's conduct towards the Plaintiff, and Fremont Congregation lacked the ability to control Kendrick, especially in his own home where most of the criminal acts were said to have occurred. (6 RT 742, 744.)

That absence of custody and the ability to control "is fatal to a claim of legal responsibility." (*Megeff v. Doland* (1981) 123 Cal.App.3d 251, 261, [citations omitted].) Where, as here, the natural relationship between any of the parties "creates no inference of an ability to control, the actual custodial ability must affirmatively appear." (*Ibid.*)

That legal principle is no different for religious entities, as made clear by the legislative history of California Code of Civil Procedure section 340.1, explained in *Aaronoff v. Martinez-Senftner* (2006) 136 Cal.App.4th 910. *Aaronoff* dealt with an adult abuse victim who sued her father under the revival provision of section 340.1. The court ultimately ruled that the revival provision did not apply to abuse by one's parent, but rather that section 340.1 was:

> [T]argeted at third party defendants who, by virtue of certain specified relationships to the perpetrator (i.e., employee, volunteer, representative, or agent), could have employed safeguards to prevent the sexual assault. It requires the sexual conduct to have arisen through an exploitation of a relationship over which the third party has some control. In other words, the perpetrator's access to the victim must arise out of the perpetrator's employment with, representation of, agency to, etc., the third party, and the third party must be in such a relationship with the perpetrator as to have some control over the perpetrator. (*Aaronoff, supra,* 126 Cal.App.4th at 921.)

The *Aaronoff* court then clarified that its "construction of the statute is confirmed by the legislative history of the 2002 amendment . . . [where] the Senate Judiciary Committee explained that the responsible third party entity to which the legislation is directed is an entity such as 'an employer, sponsoring organization or religious organization . . . .'" (*Id.* at 922, citing Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1779 (2001-2002 Reg. Sess.) as amended May 2, 2002, pp. 4-5].) In identifying those third parties, the Judiciary Committee further clarified that "[g]eneral theories of negligence impose a duty of care where a third person or entity has assumed some responsibility, through a relationship or otherwise, for a person's

conduct or a person's safety . . . . Similarly, a school district, church, or other organization *engaging in the care and custody of a child* owes a duty of care to that child to reasonably ensure its safety." (*Ibid.* [italics added].) Thus, the Legislature has similarly recognized that third party liability for the criminal acts of others necessarily turns on either *custody* or *control* over the victim or the perpetrator.

However, as discussed above, even without evidence of custody or control, the trial court deliberately trod new ground and created a new category of special relationships – *one founded upon church membership alone*. Indeed, in doing so the trial court readily acknowledged that "imposing a duty under the circumstances here" was "clearly an evolution of the [special relationship] doctrine." (8 RT 979-980, 981-985; 9 RT 1011-1012, 1032-1033, 1054.) But such an expansion is neither justified by the facts of this case nor consistent with well-settled law, as neither the Plaintiff nor Kendrick was in the care, custody, or control of Fremont Congregation.

c. Neither *Tarasoff, Delgado,* Nor *Juarez* Support the Trial Court's Expansion of the Special Relationship Doctrine Under These Facts.

Without factual support, the trial court apparently assumed that Fremont Congregation had some undefined caregiving role over the Plaintiff. (8 RT 979-982; 9 RT 1011-1012, 1054-1055.) The court, however, did not explain how Fremont Congregation was a caregiver when the Plaintiff was with her parents during church-related activities, or when Kendrick was alone with the Plaintiff during non-church activities and away from church property.

The trial court apparently extrapolated that unfounded misperception into its finding of a special relationship, citing the High Court's decisions in *Tarasoff* and *Delgado*, *supra,* and this Court's prior decision in *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377:

> As to duty, I wrote in the email of counsel quotes from *Tarasoff*, which of course was a quintessential duty case, actually arising in Alameda County. But the Court's analysis of *Delgado*, which followed in *Juarez*, I did, in effect, find a special relationship of a minor child contextually under the circumstances alleged here. . . . And I'm imposing a duty under the circumstances here for the reasons related in my email, but clearly an evolution of the doctrine, perhaps the best example not involving a church was *Juarez*, as to the duty inherent to adults and their organizations vis-a-vis the taking care of children. So the duty ruling is mine for the reasons I related. (9 RT 1011-1012.)

Yet in this case, the Plaintiff made no allegation that Fremont Congregation was a caregiver or had custody or control over her or Kendrick. (2 AA 501-508.) Nor was any such evidence presented at trial. In fact, the evidence was the *opposite*. The evidence demonstrated that Fremont Congregation did not conduct separate children's activities or Sunday School classes for children. (3 RT 140; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT 705; 7 RT 873-876.) Indeed, the Plaintiff herself admitted that she would *not* attend congregation meetings without one or both of her parents. (6 RT 725-726, 737-738.) Moreover, according to Gary Abrahamson (an elder in Fremont Congregation), a parent who dropped their child off at the Kingdom Hall for others to look after would be counseled "to help them to appreciate that the

children are their responsibility. They come out with their children. They don't drop them off for someone else to care for." (3 RT 187.)

While the trial court's apparent concern for the welfare of children is noble, courts must be hesitant – even when children are involved – to impose new tort duties when doing so would involve complex policy decisions, especially when such decisions are more appropriately the subject of legislative deliberation and resolution. (See *Quigley v. First Church of Christ Scientist* (1998) 65 Cal.App.4th 1027, 1034 [rejecting the plaintiff's suggestion "to create a general duty of care owed by all persons toward children"].) The trial court erred in creating such a new duty of care under these facts.

Nothing in *Tarasoff, Delgado,* or *Juarez* compels a different result. For example, in *Tarasoff,* our Supreme Court held that mental health professionals have a duty to protect individuals who are threatened with bodily harm by a patient. That duty requires the professional to notify the police, warn the intended victim, or take other reasonable steps. (*Tarasoff, supra,* 17 Cal.3d at 431.) *Tarasoff* did *not* involve a church or child abuse, and church elders are not "mental health professionals." Moreover, Kendrick neither threatened to harm the Plaintiff nor confided in Fremont Congregation elders any intent to commit criminal acts of child abuse. In short, absolutely nothing in the record suggests that Fremont Congregation elders had any information indicating that Kendrick intended to sexually abuse the Plaintiff or any other child. Thus, other than providing general principles of the law surrounding a

duty – which support the position of Fremont Congregation and not the Plaintiff – the facts of *Tarasoff* have no bearing on this case.

Similarly, in *Delgado,* the California Supreme Court again stated that one ordinarily has no duty to protect or warn another from the criminal acts of a third party absent a special relationship. *Delgado* involved a bar patron physically attacked by another patron in the bar's parking lot when bar employees knew of a specific threat against a specific person as well as specific circumstances indicating a current danger to their business invitee. (*Delgado, supra,* 36 Cal.4th at 245-246.) *Delgado* did not involve a minor. It did not involve a church or child abuse. Fremont Congregation was not aware of Kendrick's criminal conduct towards the Plaintiff or Kendrick's intent to commit sex crimes against the Plaintiff. Thus, like *Tarasoff,* other than providing general principles of the law surrounding a duty – which again support the position of Fremont Congregation and *not* the Plaintiff – the facts of *Delgado* have no bearing on this case.

Also factually distinguishable is *Juarez*, which concerned a child abused by a scoutmaster during scouting activities while he was in the scoutmaster's care, custody, and control. Under those unique circumstances, this Court in *Juarez* reasoned that "children engaged in organized group overnight activities are at risk of foreseeable sexual abuse." (*Juarez, supra,* 81 Cal.App.4th at 404.) In doing so, this Court acknowledged that "California courts have frequently recognized special relationships *between children and their adult caregivers* that give rise to a duty to

prevent harms caused by the intentional or criminal conduct of third parties." (*Id.* at 410 [italics added].)

However, the facts here are dramatically different. First, Kendrick was *not* in any appointed position within the congregation when he allegedly abused the Plaintiff; he was simply a rank-and-file member of the congregation. Those circumstances would be akin to one Boy Scout sexually abusing a fellow Boy Scout at times and places unassociated with any scout property or activities, a factual scenario that *Juarez* clearly did not confront.

Additionally, it bears repeating that unlike the situation presented in *Juarez,* the Plaintiff, by her own reckoning, was *not* in the care, custody, or control of the Fremont Congregation at the time the abuse in question allegedly occurred. And any "abuse" at the Kingdom Hall (*i.e.,* "bear hugs" and occasionally sitting on Kendrick's lap) occurred when the Plaintiff, again by her own account, was in the custody of at least one of her parents. (6 RT 725-726, 737-738.) Therefore, any analogy to *Juarez* is woefully mistaken. Instead the trial court should have heeded this Court's explicit warning in *Juarez* that "the reach of this opinion is only intended to extend as far as the record before us today. If we have not yet made it abundantly clear, deciding the question of duty mandates a case-by-case fact and policy analysis." (*Juarez, supra,* 81 Cal.App.4th. at 409.) The trial court's failure to do so constituted error as a matter of law which this Court should now reverse.

d. Once It Is Established that There Is No Special Relationship Between the Parties, the Duty Analysis Must Stop.

This Court has recognized the critical importance of finding a special relationship in any duty analysis. Specifically, in *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141 this Court observed:

> This division has debated the role of a "special relationship" in analyzing duty for purposes of imposing liability in tort. (See *Juarez, supra,* 81 Cal.App.4th at pp. 410-411, 97 Cal.Rptr.2d 12 & fn. 10.) In *Delgado, supra,* 36 Cal.4th 224, 30 Cal.Rptr.3d 145, 113 P.3d 1159 and its companion case, *Morris v. De La Torre* (2005) 36 Cal.4th 260, 30 Cal.Rptr.3d 173, 113 P.3d 1182, the Supreme Court has made it clear that the concept of "special relationship" remains a very important analytic tool in determining duty. (*Margaret W., supra,* 139 Cal.App.4th at 152, fn. 12.)

An important analytic tool must be used skillfully, but the trial court muddled its analysis. Indeed, the court apparently conflated elements of common law duty with special relationship principles and then considered the seven factors outlined in *Rowland v. Christian* (1968) 69 Cal.2d 108. (8 RT 979-980, 981-985; 9 RT 1011-1012, 1032-1033, 1054.) However, the various reviewing courts have clearly stated that once it has been established that a special relationship does *not* exist under the "no duty to aid" rule, it is unnecessary to consider the so-called *Rowland* factors.

For instance, in *Eric J. v. Betty M.* (1999) 76 Cal.App.4th 715, 727, the abuse victim's mother married a felon convicted for molesting children. She sued the molester and some of his family members who failed to warn her of her husband's past history. Justice Sills for the Fourth District wrote that "[a]bsent a 'special

relationship,' one cannot be held liable for mere nonfeasance, such as not protecting another from a criminal attack by a third party[,]" and that "[t]he basic idea is often referred to as the 'no duty to aid rule,' which remains a fundamental and long-standing rule of tort law." (*Id.* at 727.) Thus, the Fourth District properly declined the invitation to consider the duty question using the traditional seven *Rowland* factors. To that end, Justice Sills further opined "[t]hat weighing process, however, has already been done by courts over the centuries in formulating the 'no duty to aid' rule." (*Id.* at 729-730.)

Similarly, in *Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 438, the plaintiffs were injured by a non-obvious hazardous condition at a construction site. Although the defendant subcontractor was aware of the hazardous condition, it did not create it or cause it to occur. The plaintiffs nonetheless urged this court to extend the concept of a special relationship to that situation. This Court declined to do so or to apply the *Rowland* factors because the allegations in that case – like the Plaintiff's claims here – were based upon nonfeasance. (See also *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1203 ["Because the traditional weighing process using the seven factors set forth in *Rowland v. Christian* . . . has already been done by courts over the centuries in formulating the no duty to aid rule in the context of liability for nonfeasance, it is not necessary to engage in the weighing process in a particular case"].)

The trial court should have followed that analytical framework by first performing a special relationship analysis, and then – only if a special relationship is found to exist – undertaken the *Rowland* analysis to determine the *scope* of any duty. (See, *e.g., C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 877 [recognizing that the *Rowland* analysis is properly used "to decide the scope of duty" only *after first* determining that a special relationship existed in the first place]; *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213-1218 [deciding scope of duty arising from a special relationship]; *Morris, supra,* 36 Cal.4th at 271 [considering *Rowland* factors *only after* a determination that a special relationship existed]; *Delgado, supra,* 36 Cal.4th at 236 [reviewing seven *Rowland* factors *only after* making a determination that a special relationship existed].) In short, when there is no legally cognizable special relationship between the parties – as was the case here – the duty analysis simply must end.

e. Fremont Congregation Does Not Owe a Duty to Protect Plaintiff Even Under *Rowland.*

Even if this Court decides to create new law and to determine for the first time in California that a special relationship exists between a church and its members absent any custody or control, Fremont Congregation still owed no duty to the Plaintiff under a "*Rowland* factors" analysis. Those factors include: (1) the foreseeability of harm to the one injured; (2) the degree of certainty that the plaintiff actually suffered a harm; (3) the closeness of connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's

conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with any potential resultant liability. (*Rowland, supra,* 69 Cal.2d at 112-113.) As the following discussion shows, under the particular facts of this case, Fremont Congregation did not owe a duty of care to the Plaintiff even under *Rowland.*

i. No High Degree of Foreseeability.

"Foreseeability supports a duty only to the extent the foreseeability is reasonable." (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306.) "[A] duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M., supra,* 6 Cal.4th at 676.) When the harm results from criminal conduct by a third party, an extraordinarily "high degree of foreseeability" is required to impose a duty on a landowner, "in part because 'it is difficult if not impossible in today's society to predict when a criminal might strike.'" (*Melton, supra,* 183 Cal.App.4th at 532 [citations omitted].) Moreover, the "foreseeability" examination called for under a duty analysis pursuant to *Rowland* "is a very different and normative inquiry." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476.) One test to apply to the facts in determining if the harm was foreseeable is "whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may be appropriately imposed on the negligent party." (*Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 895; accord *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6.)

The negligent act of which the Plaintiff complains is that Fremont Congregation failed to supervise, manage, and control Kendrick and failed to warn her that there was some amorphous "propensity and risk" that Kendrick would sexually molest her under circumstances unknown to anyone except for perhaps Kendrick. (2 AA 503.) Thus, the question becomes whether Kendrick's alleged abuse of the Plaintiff by giving her "bear hugs," having her sit on his lap, putting his hand up her shirt, engaging in oral sex, placing objects in her vagina (6 RT 723, 728-731, 738-739, 746-747, 742) is the direct result of Fremont Congregation's failure to supervise Kendrick, or to announce to the congregation that on one prior occasion, Kendrick inappropriately touched the breast of his stepdaughter in his own home.

As such, these facts are markedly very different from *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, where the court found a high degree of foreseeability that sexual exploitation of a minor might occur. There, the defendant knew the perpetrator and victim were spending an unusual amount of time together, going on frequent one-on-one ride-alongs late at night, and engaging in frequent telephone calls, in violation of the defendant-employer's written policies. Here, Fremont Congregation was not aware that Kendrick was spending time alone with Plaintiff, nor was it either Kendrick's or the Plaintiff's employer. Fremont Congregation knew of a one-time event (*i.e.,* Kendrick momentarily touching his stepdaughter's breast), had no idea that Kendrick was subsequently prosecuted for any crime arising from that incident, and had no idea that the Plaintiff's parents were

allowing Kendrick to spend time alone with their daughter, a fact both parents deny, thereby contradicting their own daughter's testimony.

Moreover, the foreseeability that Kendrick would molest a fellow congregation member or their children was also significantly diminished by the immediate and reasonable steps congregation elders took upon learning of Kendrick's inappropriate conduct towards his stepdaughter, as well as by the way congregation meetings and field ministry were conducted. Indeed, the elders reasonably believed that congregation children were protected during those meetings because: (1) children were under the care and supervision of their parents in the Kingdom Hall;[4] (2) children were under the care and supervision of their parents during field service activities;[5] (3) members worshipped as a family, with no separate activities for children;[6] (4) the elders announced to the congregation that Kendrick was no longer a ministerial servant, which let everyone know he had a spiritual problem (3 RT 163, 166; 4 RT 409; 5 RT 484; 7 RT 880); and (5) the elders took the

---

[4] Michael Clarke testified that at congregation meetings, "children are always sitting with their parents" (4 RT 277) and Claudia Francis testified that at congregation meetings "children sit with their parents." (4 RT 321.)

[5] Gary Abrahamson testified about the precautions taken to protect children during meetings and field service: (1) single males are not assigned to work alone with single females (3 RT 186); (2) a child is not assigned to work in field service with an adult of the opposite sex (3 RT 186); (3) parents do not drop off their children for field service, and if it happened, the elders "would talk to the parent to help them appreciate that children are their responsibility." (3 RT 186-187); (4) after Kendrick's November 1993 confession of molesting his stepdaughter, elders would assign him to work in field service with an elder or another adult and did not allow Kendrick to work with children in field service. (3 RT 248.)

[6] Kathleen Conti testified that the Plaintiff never went to the Kingdom Hall by herself (4 RT 357, 367-368) and Neal Conti similarly confirmed "she [the Plaintiff] would always be with me." (5 RT 482, 496, 513.)

precaution of keeping a watchful eye on Kendrick and instructed him that he was not allowed to be alone with, have contact with, or be overly familiar with children; indeed, they never saw Kendrick do any of those things.[7] Those facts do not come close to creating the extraordinarily "high degree of foreseeability" necessary to impose a duty to protect someone from Kendrick's unknown and subsequent criminal conduct. To be sure, the supervision necessary to prevent Kendrick's abusive acts would unreasonably require Fremont Congregation to supervise Kendrick 24 hours a day, every day, on and off church property, and to usurp the parental role of Neal and Kathleen Conti when they engaged in religious activities with their daughter.

Even if, *arguendo*, this Court determines that the foreseeability contemplated in *Rowland* is established here, "foreseeability alone is insufficient to create a legal duty to prevent harm." (*Adam, supra,* 68 Cal.App.4th at 269). Instead, our Supreme Court has steadfastly instructed that "'social policy must at some point intervene to delimit liability' even for foreseeable injury," and that "policy considerations may dictate a cause of action should not be sanctioned *no matter how foreseeable the risk.*" (*Parsons, supra,* 15 Cal.4th at 476 [citations omitted].)

[7] Lawrence Lamerdin testified "we kept an eye on him [Kendrick] to make sure that everything was fine" and gave him specific instructions that he was not allowed to be around children, to work in the ministry with them, to have any contact with them, direct or indirect. (4 RT 417.) Also Gary Abrahamson testified that he was not aware of Kendrick engaging in any playful or affectionate conduct with children. (3 RT 162.)

ii. No Degree of Certainty of Harm to Plaintiff.

Fremont Congregation elders did not observe Kendrick acting inappropriately with the Plaintiff, nor did they learn of the Plaintiff's accusations until *well after* her abuse had ended. Thus, Fremont Congregation had no knowledge with respect to the second *Rowland* factor, "the degree of certainty that the plaintiff actually suffered harm[.]" (*Rowland, supra,* 69 Cal.2d at 113.) Indeed, the testimony adduced at trial never established whether anyone, including the Plaintiff's own parents, knew that Plaintiff was being harmed at any time. Specifically, Neal Conti denied that Kendrick ever hugged his daughter or that Kendrick ever had the Plaintiff sit on his lap at the Kingdom Hall. (5 RT 495-496, 513.) He also disputed his own daughter's testimony that she was taken to Kendrick's home alone after congregation meetings or after field service. (5 RT 496, 513.) He further testified he never would have allowed those things to happen, and he denied that Kendrick ever abused Plaintiff on a train in his presence. (5 RT 499-501.) The Plaintiff's mother, Kathleen Conti, testified similarly. (4 RT 368, 369.) If the Plaintiff's own parents did not know that their daughter was being harmed by Kendrick, how could the Freemont Congregation elders be expected to know that harm was occurring?

Although Fremont Congregation elders Gary Abrahamson, Michael Clarke, and Lawrence Lamerdin kept a watchful eye on Kendrick after the one-time incident with Kendrick's stepdaughter in 1993, they never saw Kendrick hug Plaintiff. (3 RT 196, 253; 4 RT 420, 421.) They also never witnessed the Plaintiff sitting on

Kendrick's lap at the Kingdom Hall, or leaving the Kingdom Hall alone with Kendrick after congregation meetings or field service. (3 RT 162-163, 195-196, 248-249, 250, 253; 4 RT 412-413, 420-421, 430.)

Only the Plaintiff testified that Kendrick acted inappropriately; no one else saw it or knew about it. Fremont Congregation had no reason to believe that Plaintiff would be injured by Kendrick's conduct, and never had any indication that harm was occurring.

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

The Plaintiff has *not* alleged that she was harmed by any affirmative acts on the part of Fremont Congregation. Rather, she claimed damages resulting from abuse at the hands of congregation member Kendrick because Fremont Congregation *failed to act*. No evidence supports a finding that Fremont Congregation created a situation that posed an undue risk of harm to Plaintiff. As discussed above, when claims are based on the failure to act, "an actor is under no duty to control the conduct of third parties." (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 48.)

Moreover, as clarified previously in *Melton,* by simply inviting certain attendees to a party, the defendant did not create the peril the plaintiff ultimately suffered, being assaulted and seriously injured by other party-goers. (*Melton, supra,* 183 Cal.App.4th at 540-541.) Similarly, in *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, the plaintiff alleged that the roller skating rink that sponsored an all-night party contributed to her injuries. The court held, however,

"hosting a rave party does not equate with an unreasonable risk of harm." (*Id.* at 409.)

Here, Fremont Congregation elders held religious services in a protected environment where the Plaintiff attended with her parents. Any harm that she suffered was the result of Kendrick's unknown and unforeseeable criminal acts, not because of Fremont Congregation's actions. Like the situations in *Melton* and *Sakiyama*, Fremont Congregation's "hosting" of congregation meetings did not contribute to the Plaintiff's injuries, and Kendrick's criminal activity was certainly not a "necessary component" of those congregation meetings. Kendrick, again like the scenario in *Melton* and *Sakiyama,* was just one of many attendees who acted inappropriately towards the Plaintiff, primarily off church property and unrelated to any church activity.

This is especially true where Fremont Congregation did not sponsor activities for children or otherwise separate children from their parents. (3 RT 140; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT 705; 7 RT 873-876.) Nor did Fremont Congregation encourage Plaintiff's parents to leave her with Kendrick, or with any grown man. (7 RT 874-875.) In short, no close connection exists between Fremont Congregation's conduct and the Plaintiff's claimed injuries.

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

In the legal context, "[m]oral blame has been applied to describe a defendant's culpability in terms of the defendant's state of mind and the inherently harmful nature of the defendant's acts." (*Adams, supra,* 68 Cal.App.4th at 270.) "Moral blame" as a public policy factor is more than the answer to the question "was the defendant negligent?" (See *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 10-11.) Instead, courts have required a higher degree of moral culpability such as where the defendant: (1) intended or planned the harmful result; (2) had actual or constructive knowledge of the harmful consequences of its behavior; (3) acted in bad faith or with a reckless indifference to the results of their conduct; or (4) engaged in inherently harmful acts. (*Adams, supra,* 68 Cal.App.4th at 270.)

None of those circumstances are present here. Nor did the evidence demonstrate that Fremont Congregation ignored the societal plague of child abuse. To the contrary, Fremont Congregation used materials from Watchtower's educational program, including written materials, to inform its members how to prevent such abuse. (3 RT 160-165, 188, 208, 235, 237-239; 5 RT 508-510, 547; 6 RT 702-704; 7 RT 876-878, 884-887.) As Dr. Applewhite testified, Jehovah's Witnesses did an exceptional job from the 1970's through the 1990's educating parents about child sexual abuse (7 RT 876-877, 896, 898), exceeding normal standards existing in the mid-1990's. (7 RT 884.) Further, Fremont Congregation elders implemented Watchtower's direction in the July 1, 1989 letter addressed to all

bodies of elders that, upon learning of an allegation of child abuse, elders must protect the victim from further abuse and call Watchtower's Legal Department to ensure compliance with mandatory child abuse reporting laws for ministers in their state. (3 RT 154, 246; 7 RT 924.)

This is a far cry from those situations where a defendant takes *affirmative actions*, or makes *affirmative misrepresentations*, which place the victim in a "zone of danger." For instance, in *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, the wife of a sex offender was held liable for telling the parents of three children that "it would be safe for them to play at her house." (*Id.* at 212.) The *Pamela L.* court distinguished that case from traditional "nonfeasance cases" because of the nature of the wife's affirmative misrepresentations which increased the likelihood of harm to the three plaintiffs. (*Id.* at 209-210.) In other words, the wife specifically invited the children to her home and thereby "assumed" a "special relationship" with them. (*Id.* at 211; see also *Carpenter v. City of Los Angeles* (1991) 230 Cal.App.3d 923, 931-932 [prosecutors who assured the appellant that the defendant posed no real danger owed a duty of care that required warning of subsequent threats to appellant's life].)

Here, the record is devoid of evidence that Fremont Congregation either took any *affirmative action* that put the Plaintiff in Kendrick's company or made *affirmative misrepresentations* to the Plaintiff or to her parents concerning the level of danger (or safety) that would result from association with Kendrick. As such, Fremont Congregation did not place the Plaintiff in a zone of danger by any affirmative acts.

v. Policy of Preventing Future Harm.

Fremont Congregation agrees that protecting children from sexual abuse is vitally important. But, the Plaintiff provided no evidence that requiring religious organizations to warn congregation members about other members who have committed child sexual abuse is an effective strategy for preventing future abuse.

The case of *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275 provides a close analogy. In that case, a student sued a university after two fellow students had been drinking and engaged in a speeding contest in which the plaintiff was injured. The *Baldwin* court held that the policy of preventing future harm was not a very strong one because the university officials had not "collaborated" to encourage the drinking, and there was no "direct involvement" by the university in furnishing alcoholic beverages. (*Id.* at 290.) Similarly, there was no collaboration here. Fremont Congregation did not encourage Kendrick to spend private time with the Plaintiff or to sexually abuse her; Fremont Congregation did nothing to facilitate the abuse.

Thus, while the policy of preventing future child abuse is strong, imposing the burden of that policy on defendants like the Freemont Congregation – who have no direct involvement with the conduct meant to be prevented – makes little sense, and in fact could prove to be counter-productive in the fight against child abuse. Indeed, logic dictates that child molesters will not confess to clergy members if they know that their conduct will be announced to the congregation. Without such confessions, elders would lose valuable insight allowing them to closely watch attendees who might pose a danger to other members. And child molesters who do not seek

corrective spiritual assistance will continue their practices without being discovered. If religious organizations are required to issue warnings about congregation members with a history of sexually abusing a child, those members will simply conceal that history or move to a different congregation, to a different religious organization, or to a youth organization where the history remains unknown and where they will not be monitored. This certainly does nothing to promote the policy of preventing that harm in the first place.

vi. Significant Social and Financial Burden.

"Foreseeability and the extent of the burden to the defendant are ordinarily the crucial considerations" in the duty analysis. (*Castaneda, supra,* 41 Cal.4th at 1213.) Indeed, the imposition of a duty of care to protect against criminal activity requires "balancing the foreseeability of the harm against the burden of the duty to be imposed." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146-1147 [citations omitted].) To do so, a court must "identify the specific action or actions the plaintiff claims the defendant had a duty to undertake[,]" then "the court must analyze how financially and socially burdensome these proposed measures would be[.]" (*Castaneda, supra,* 41 Cal.4th at 1214.)

Although Plaintiff did not clearly state what action Fremont Congregation should have taken to protect her, her attorney suggested three options: (1) an announcement should have been made that Kendrick had momentarily fondled the breast of his stepdaughter (9 RT 1085-1086); or (2) the elders should have made that

fact known to her and her parents personally (9 RT 1085-1086); or (3) Fremont Congregation should have barred Kendrick from attending church services (9 RT 1085-1086). However, making a public announcement or privately disclosing such confidential information violates the firmly held religious beliefs and practices of Jehovah's Witnesses and was not part of the procedures for disciplining within the church. This is especially true where at the time of that confession, Kendrick had not been convicted (or even charged) with a crime, and Freemont Congregation was unaware of any subsequent criminal prosecution until 1998. As such, neither a civil jury nor a trial judge is privileged to adjudicate whether or not the discipline process of the church was reasonable. (See Watchtower's Opening Brief, Section IV.C.) Even if the Plaintiff's suggestions could meet constitutional muster, the social and financial burdens are too great to justify the imposition of a broad duty to protect, including a duty to warn.

Practical realities similarly underscore the extremely burdensome nature of a duty to protect with its duty to warn. Here, an announcement was made to the congregation that Kendrick was no longer serving as a ministerial servant. (3RT 163, 166, 222-223, 241, 243-244; 5 RT 484; 7 RT 880.) To Jehovah's Witnesses, that announcement was sufficient to let congregation members know Kendrick had a spiritual problem and Fremont Congregation elders had serious concerns about Kendrick. (3 RT 166; 4 RT 409.) Nevertheless, Plaintiff's own father, who knew that Kendrick was no longer serving as a ministerial servant because Kendrick's congregational activities and his congregation duties were greatly curtailed, admitted

that he did not know if he was at the congregation meeting when that announcement was made. (5 RT 484.) It follows that, had the elders made a detailed announcement as to Kendrick's wrongdoing instead, the Plaintiff and her family may never have heard it. Thus, the idea of even how that announcement could be required raises more vexing questions than it answers:

- To ensure every member is aware of important information contained in an announcement, would *one* announcement during a congregation meeting be sufficient?
- Would weekly, monthly, or annual announcements be required?
- Would elders be required to announce each week that Kendrick engaged in wrongdoing in 1993?
- Would an announcement be required every time a new member or family joins the congregation?
- Or would the congregation have to put a written announcement up on the information board in the back of the Kingdom Hall?
- Would families with minor children have to be notified in person or by a written notice?
- Would Fremont Congregation have a duty to protect or warn families with children in other congregations if it learns that Kendrick, or any confirmed child abuser, occasionally attends these other congregations' meetings for worship to visit relatives or for other reasons?
- Would Fremont Congregation have a duty to protect or warn families with children who attend other congregations but whom Kendrick, or another confirmed child abuser, might occasionally visit at their homes for reasons unrelated to the congregation?
- Would Fremont Congregation have a duty to protect or warn families with children even if they received an unconfirmed allegation of child abuse against a congregation member?
- Would Fremont Congregation have a duty to protect and warn families with children about a minor who is alleged to have engaged in sexual misconduct with a younger minor?

- How would Fremont Congregation be able to prove that they took reasonable protective measures or gave a warning when an alleged victim sues 20 years after abuse and alleges that Fremont Congregation breached its duty to protect with its duty to warn?
- When would the duty to protect or warn cease?

From a financial burden standpoint, the duty to protect imposed by the trial court required Fremont Congregation to protect children from the risk of abuse by a rank-and-file congregation member 24 hours a day, 7 days a week. Thus, even if Fremont Congregation issued warnings to congregation members about the risk of abuse by individuals who are alleged to have committed child abuse in the past, Fremont Congregation would still incur an enormous financial burden for lawsuits resulting from the unprecedented duty to protect children around-the-clock, even off church property and during activities unrelated to the church.

Such a broad duty also places an intolerable social burden on Fremont Congregation in violation of its constitutionally protected religious beliefs and practices regarding confidentiality and internal church discipline. Those beliefs and practices are based on Fremont Congregation's understanding of the Bible, which requires that congregation elders keep strictly confidential the sensitive and private matters they learn in confidence from congregation members. It also burdens and impacts directly the ability of congregation members to obtain spiritual advice and counsel without their most sensitive and private matters being made public. Indeed, confidentiality benefits the spiritual health of the congregation as a collective body. To that end, Freemont Congregation elder Clarke testified that "[the congregants]

have to be comfortable coming to us to talk with us about their problems so we can offer them Scriptural help, spiritual guidance. If they feel that we are going to blab it to our wi[ves], or to announce it from the platform, we wouldn't get too many people coming to us. So confidentiality is important for a minister." (3 RT 254.) Accordingly, the duty imposed by the trial court would simply create unviable conflicts within religious organizations and would harm the minister-congregant relationship in practically every denomination. In the words of Elder Clarke: "Why would anybody come to us [elders] with their problems if they knew that as soon as they came to us we were going to announce it? Why would anybody confess to a Catholic priest if they knew that after they confessed it was going to be announced at [M]ass next week. It is ludicrous." (3 RT 230.)

vii. Significant Societal Consequences.

The significant societal consequences flowing from the trial court's decision also presents compelling reasons against imposing a duty to protect with a duty to warn. Such a duty would forever saddle all religious organizations with unbridled liability in all instances where they discover any activities by any congregation member which may or may not pose harm to other congregation members, or which may or may not be criminal in nature. Indeed, if a congregant has a drinking problem and seeks spiritual advice from church elders to combat that problem, but later drives drunk after leaving a social function (unrelated to the church) and injures another congregant, that church would be liable under the trial court's duty formulation.

Similarly, if a congregant has financial problems and seeks spiritual advice, but later steals from another congregant, that church would also be liable under the trial court's duty ruling. As those two examples aptly illustrate, the potential financial liability to the church is limitless, making it all but impossible for the Freemont Congregation, or any other church, to continue its operations in the face of such unbridled, yet undetermined, liability for the torts of any of its members. No organization, religious or otherwise, could be expected to operate from a sound financial position in the face of such limitless liability, especially where there would be no insurance available to cover those risks.

The consequence of such a duty would therefore be to force the Freemont Congregation – and any church for that matter – to immediately excommunicate any member who *even potentially or allegedly* engaged in any conduct which may or may not later result in criminal or tortious activity against another member at some undetermined point in the future. But as the law correctly recognizes, civil courts are ill-suited to tell any group (religious or otherwise) who it should or should not include, and the First Amendment specifically excludes such government intervention in the right every American has to associate with whomever they chose. Indeed, as recognized in the recent decision of *Melton, supra,* 183 Cal.App.4th at 540-541, limiting who a person can and cannot associate with in an effort to prevent harm from the criminal acts of others is too "socially burdensome" to justify tort liability for those criminal acts. Likewise, limiting a church's choices about who may or may not attend religious services creates a heavy social burden, not to

mention an infringement of First Amendment protections. Civil courts cannot impose liability by case law, nor can legislators by statute prescribe who a religion may invite to attend meetings and participate in its religious activities. (See *Paul v. Watchtower Bible and Tract Society of New York, Inc.* (9th Cir. 1987) 819 F.2d 875, 880-881 [Free Exercise Clause protects religious organizations from civil tort liability related to the religious practice of "shunning"].)

In short, the trial court's creation of a duty to protect the Plaintiff – 24 hours a day, 7 days each week – from the tortious or criminal acts of other rank-and-file members unduly burdens the free exercise of religion to which the Fremont Congregation, and any other religious organization, are undoubtedly entitled. Adherence to that new duty would also impose unwarranted financial and social burdens on churches of all denominations, as well as similarly situated social and nonprofit organizations. Consequently, those organizations would ultimately have reduced resources for the vast array of charitable and social services they provide to society, or would have to cease those activities altogether in the face of unbridled liability, all of which would have a detrimental effect on society. This Court should not tolerate such a result.

In sum, even if this Court concluded it was appropriate to apply the traditional *Rowland* factors to determine whether Fremont Congregation owed the Plaintiff a duty of care, applying the facts of this case to those factors compels the very same result: no such duty of care can be justified. Accordingly, this Court should reverse

the trial court's imposition of such a duty and the resulting Judgment and Amended Judgment against Freemont Congregation and Watchtower.

B. A New Trial is Required Because the Trial Court's Jury Instructions Prejudiced the Outcome.

1. Standards of Review: *De Novo* and Prejudice.

A new trial is required, even if this Court creates a new category of special relationship duty, because the trial court nevertheless erred in giving prejudicial jury instructions which prevented a fair trial. The propriety of jury instructions is a legal question subject to *de novo* review. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 845-846.) As this Court is surely aware, "a [trial] court's duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision." (*Thompson Pacific Construction, Inc., v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 553.) However, when those instructions are erroneous or incomplete, the reviewing court "must examine the evidence, the arguments, and other factors to determine whether it is *reasonably probable* that instructions allowing application of an erroneous theory *actually* misled the jury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 581, fn. 11.) A "reasonable probability" in this context "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) Furthermore, in conducting that examination, the reviewing court must view the evidence *in the light most favorable to the appellant*, assuming on appeal that the jury might have believed the evidence

upon which the instruction favorable to the appellant were predicated. (See *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.)

2. Application to This Case.

a. Scope of Any Duty to Warn Instruction.

Over Freemont Congregation's repeated objections, the trial court issued novel jury instructions regarding Fremont Congregation's legal duty to warn and to take protective actions for its members. Because those instructions were impermissibly vague regarding the *scope* of duty being imposed, they gave the jury improper guidance and created substantial prejudice.

In pertinent part, the trial issued the following instruction with regard to a duty to warn:

> 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.)

Yet that charge gave no direction to define what a reasonable and proper warning would or should look like.[8] The Plaintiff's attorney argued during closing that Fremont Congregation should have told her parents that Kendrick was removed as a ministerial servant because he molested a child. (9 RT 1085-1086.) Yet, as discussed above, numerous and complex questions arise concerning the scope, content, and frequency of the "warning" she claims she was owed, an issue the court's instruction did nothing to clarify.

California has required sex offenders to register with local law enforcement for over 50 years. But when Kendrick abused his stepdaughter, California did *not* require the criminal justice system or any other government agency to warn citizens of future harm from such criminals. Moreover, when that prior abuse took place, California neither provided public access to information about convicted child abusers nor required ministers to report incidents of child abuse to the police. And even knowing what they did about Kendrick's conduct toward his stepdaughter, there was no specific, credible threat made to any other particular individual which would have required an obligation to warn. (See, *e.g., Thompson v. County of Alameda* (1980) 27 Cal.3d 741; see also *Duffy v. City of Oceanside* (1986) 179 Cal.App.3d 666, 674.) Yet the jury was allowed to speculate what such a warning would look like, completely untethered to even the special relationship duty defined by the trial

[8] As our Supreme Court made clear in *Parsons, supra,* 15 Cal.4th at 476-477 part of the court's responsibility in evaluating whether a duty was owed is defining *what that duty would be.*

court. Consequently, the jury was given no relevant guidance on how to determine whether Fremont Congregation *breached* that duty, undermining their entire determination on that critical issue.

b. Mandatory Reporter Instruction.

The trial court also erred when it refused to instruct the jury that ministers and clergy members were *not* mandated reporters of child sex abuse under California law until January 1, 1997, which was more than *three years after* Kendrick inappropriately touched his stepdaughter in 1993. (8 RT 975-979, 991; 9 RT 1021-1023; see Stats. 1996, ch. 1081 (A.B. 3354), § 3.5, eff. Jan. 1, 1997 [amending Pen: Code 11166].) As a result, the jury did not have the proper understanding that Fremont Congregation elders were *not* mandated reporters when they learned of Kendrick's 1993 sexual abuse of his stepdaughter. This was significant because the trial court's concomitant duty instruction directed the jury to consider the presence or absence of any warning about Kendrick in determining whether Fremont Congregation took reasonable precautions to protect the Plaintiff from the risk of sexual abuse by Kendrick.

By refusing to give Fremont Congregation's requested instruction that clergy were not mandated reporters until January 1, 1997, the court allowed the jury to be misled about the elders' legal reporting obligations. The failure also allowed the jury to give improper credence to misleading statements by Plaintiff's expert and counsel

that led to the incorrect conclusion that Fremont Congregation breached a legal duty and was negligent for its failure to warn.

Specifically, incorrect statements about the elders' reporting duty were made by Plaintiff's expert, Anna Salter, Ph.D. She confused the jury by suggesting that in 1993, clergy *were* legally obligated to report under the California mandated child abuse reporting law, and that the 1997 amendments to that law (adding clergy as mandatory reporters) simply "clarified" clergy's already existing reporting obligations. (6 RT 693-694, 707.) Plaintiff's counsel's closing argument compounded the jury's confusion by stating that Fremont Congregation elders *were* mandated reporters in 1993, thus suggesting that the elders had a legislatively imposed duty to report Kendrick to the authorities. (6 RT 693-694, 707.)

The trial court had the opportunity to clarify the multiple misstatements regarding the issue of the elders' legal duties under the relevant law in 1993. However, the court simply gave a limiting instruction that alerted the jury to the fact that the parties' respective mental health experts had a "difference of opinion" on that important *legal* issue. (8 RT 975-979, 991; 9 RT 1021-1023, 1057, 1058.) But it was not the experts' job to tell the jury what the relevant law required, and it was not the jury's job to determine which expert was correct regarding what the law required. Rather, it was exclusively the province of the trial court to tell the jury what the relevant law required. Its failure to do so – and to instead abdicate that responsibility to the jury – caused Freemont Congregation certain prejudice, as it allowed the jury

to impose a legal duty, and to make its determination based upon that legally imposed duty, contrary to what the relevant law actually required.

c. Allocation of Fault Instruction.

Civil Code section 1431.2(a) ("Proposition 51") provides that "the liability of each defendant for non-economic damages shall be several only and shall not be joint." The purpose of Proposition 51 was to eliminate the unfairness and cost of the so-called "deep pocket rule," which exploited relatively blameless defendants who are "perceived to have substantial financial resources[.]" (Civ. Code § 1431.1.) Our Supreme Court has held that a defendant's liability for non-economic damages "cannot exceed his or her proportionate share of fault *as compared with all fault responsible for plaintiff's injury,* not merely that of defendants present in the lawsuit." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603 [italics added, citations omitted].) Thus, the trial court, pursuant to Proposition 51, should have allowed a jury to allocate fault to all nonparties, but refused to do so.

Specifically, the trial court refused the jury instruction Fremont Congregation requested (and a corresponding special verdict form) to permit the jury an opportunity to allocate fault to "other persons," *i.e.,* those whom the jury might have found to have contributed to the Plaintiff's claimed damages. (*Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 Cal.App.4th 318, 325; *see also Roslan v. Permea, Inc.* (1993) 17 Cal.App.4th 110, 113.) For example, Fremont Congregation requested that the Plaintiff's parents be included on the Special Verdict form. (8 RT 961-967; 9 RT

1012-1014, 1033-1035.) But the trial court refused to do so because it did not believe that the Plaintiff's parents had any knowledge that Kendrick had in the past momentarily touched the breast of his stepdaughter. (*Ibid.*) But a parent's duty to protect their children does not hinge upon such knowledge. "In California, parents have a duty 'to exercise reasonable care, supervision, protection, and control over their minor children'" and even to prevent attacks. (See *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 746; *People v. Rolon* (2008) 160 Cal.App.4th 1206, 1219 ["aiding and abetting liability can be premised on a parent's failure to fulfill his or her common law duty to protect his or her child from attack."].)

The jury had ample evidence to conclude that both of the Plaintiff's parents contributed to her damages. For instance, Watchtower publications distributed to all congregation members provided instruction for parents to protect children from sexual abuse, including the key mandate to personally supervise children at all times. (3 RT 160-165, 260; 6 RT 702-704; 7RT 876-878, 884-887; 8 AA 2014-2023 (Pl. Exh. 59, Def. Exh. 17), 2024-2033 (Pl. Exh. 60, Def. Exh. 29), 2034-2046 (Pl. Exh. 64, Def. Exh. 37), 2047-2052 (Pl. Exh. 65, Def. Exh. 49).) Yet, the Plaintiff testified that her parents allowed her to go alone with Kendrick to his home numerous times, over a two to three year period, which, if true, provided an unreasonable opportunity for Kendrick to sexually abuse Plaintiff. Moreover, if the Plaintiff's testimony is to be credited – as apparently it was by the jury – she further testified that she was molested by Kendrick in the presence of her father on an Amtrak train, while her father did nothing to protect her. (6 RT 745-746.) A Special Verdict and

corresponding instruction that included the Plaintiff's parents would have permitted the jury to express an opinion as to whether it was reasonable for Plaintiff's parents to allow their young daughter to go off alone with an adult male to his home where he lived by himself on literally hundreds of occasions. Failure to give that instruction and related Special Verdict constituted prejudicial error.

Additionally, as is detailed in Watchtower's companion Opening Brief, the North Fremont Police, Child Protective Services, and the District Attorney all had information superior to that possessed by Fremont Congregation elders, yet none warned the public or anyone at Fremont Congregation of Kendrick's subsequent confession and criminal conviction. To the extent that Fremont Congregation bears any responsibility for failing to disclose information about Kendrick's confessed offense even before criminal charges were filed, the jury should have been allowed to also consider whether those agencies also bear equal or greater responsibility for failing to disclose information about the incident which resulted in Kendrick's criminal conviction. The trial court should have allowed the jury to allocate liability accordingly.

Its failure to do so severely prejudiced Fremont Congregation. A miscarriage of justice resulted because the jury was forced to allocate more fault to Fremont Congregation than could otherwise be reasonably warranted. Additionally, the trial court's failure to allow allocation of fault to the parents, law enforcement, and other entities placed a greater burden on a small Christian congregation than the law imposes even on those other individuals and organizations--both of which already

have established duties in the law to protect children. On this basis alone, this matter should be remanded for a new trial, even if this Court finds that Fremont Congregation owed a duty to Plaintiff, so that the jury can properly apportion liability among the "universe of tortfeasors." (*Bly-Magee, supra,* 24 Cal.App.4th at 325 [citations omitted].)

V.

CONCLUSION

Since Fremont Congregation did not have custody or care of Plaintiff, control over Kendrick, or knowledge of the abuse when it occurred, and it did not condone or cover up the abuse, this Court should reverse all aspects of the trial court's Judgment and Amended Judgment, and direct a new judgment be entered in Fremont Congregation's favor on all of the Plaintiff's claims. Alternatively, this Court should order that the lower court conduct a new trial and give complete and proper instructions on duty of care, duty of mandatory reporters, and allocation of fault.

Respectfully submitted,

THE McCABE LAW FIRM

Date: 03/26/13

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

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

Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing is proportionally spaced, has a typeface of 13 points, is at least one-and-a-half lined spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2010), contains 13,608 words.

Date: 03/26/13

James M. McCabe

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

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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

On **March 26, 2013**, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

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

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

Richard J. Simons, Esq. Kelly I. Kraetsch, Esq. Furtado Jaspovice & Simons 6589 Bellhurst Lane Castro Valley, CA 94552	*Attorney(s) for Plaintiff and Respondent: Jane Doe*
Robert J. Schnack, Esq. Jackson Lewis 801 K Street, Suite 2300 Sacramento, CA 95814	*Attorney(s) for Defendant and Appellant: The Watchtower Bible and Tract Society of New York Inc.*
Jon R. Williams, Esq. Boudreau Williams LLP 666 State Street San Diego, CA 92101	
Hon. Robert McGuiness Alameda County Superior Court 1221 Oak Street, Dept. 22 Oakland, California 94612	*Trial Court*
Supreme Court of California 350 McAllister Street San Francisco, CA 94102 **Brief via electronic submission**	*Supreme Court*

On the above date:

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

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

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

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

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

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

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

Executed on **March 26, 2013**, at San Diego, California.

Chenin Andreoli

Chenin M. Andreoli