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, WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.

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

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: A136641
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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

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1. This form is being submitted on behalf of the following party (*name*): The Watchtower Bible and Tract Society of New York Inc., et al.

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)	
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[ ] 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: October 23, 2012

Jon R. Williams, Esq.
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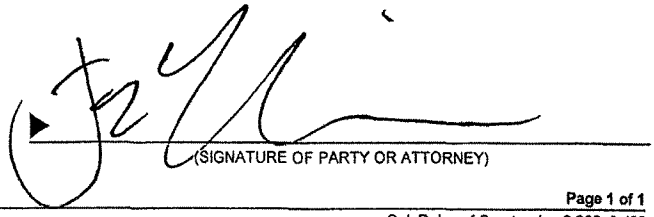
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Defendant and Appellant, WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC. ("Watchtower"), hereby files this Appellant's Opening Brief challenging: (a) the trial court's original Judgment following jury trial, entered on June 27, 2012; (b) the Amended 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

Unlike other sexual abuse cases which have generated salacious headlines and garnered broad media attention, this is *not* a case involving the sexual abuse of a child by a religious leader, a member of the clergy, or a youth leader. Rather, this case involves the sexual abuse of the child of one rank-and-file church member committed by another rank-and-file member of that same congregation. Consequently, in this case of first impression, this Court is faced with the following critical *duty* question: What legal responsibility should a religious organization have for the sexual abuse (or any other tort, for that matter) committed by one rank-and-file congregation member against another?

Without a doubt, the sexual abuse of a young child is a profound tragedy that naturally causes a civilized society to consider how to better protect its children. However, that a case involves child sexual abuse should not cause courts to quickly abandon long-standing and well-established principles of American tort law. Indeed,

imposing upon religious organizations an unprecedented duty to protect the children of congregation members from sexual abuse by other congregation members is neither the proper response nor the solution to the disturbing pandemic of child abuse. Such a duty would be virtually impossible for any religious organization to fulfill, would expose religious organizations to endless tort liability, and would lead to intolerable internal religious conflicts. Yet the trial court imposed that duty here. It made Watchtower responsible for the acts of one of its congregation members, Jonathan Kendrick ("Kendrick"), simply on the basis that Kendrick and his family had sought religious counsel from elders of a local congregation of Jehovah's Witnesses years previously arising out of Kendrick's alleged inappropriate conduct with his stepdaughter. As a result, Watchtower and a local congregation are now saddled with a massive judgment of nearly $11.5 million. Incredibly, Plaintiff confirmed during cross examination that she entered into an agreement with Kendrick (who has not been prosecuted for his heinous crimes) *not* to execute on any judgment she obtained against him, which in this case turned out to be about $4.2 million.

Consequently, Watchtower raises four fundamental grounds for reversal of the trial court's Judgment and Amended Judgment. First, Watchtower explains how (A) since Watchtower did not have a special relationship with the Plaintiff (the child of a congregation member), Watchtower did not have a duty to protect Plaintiff from sexual abuse by Kendrick, nor did Watchtower have a duty to warn Plaintiff or her

parents about Kendrick's alleged past sexual abuse of his stepdaughter. Second, Watchtower sets forth how (B) the trial court improperly excluded other parties from sharing any responsibility for the harm claimed by the Plaintiff, and as a consequence, targeted Watchtower's religious beliefs and practices on confidentiality in a way that violated Watchtower's First Amendment rights under the Free Exercise clauses of the United States and California Constitutions. Third, Watchtower describes how (C) the trial court's imposition upon Watchtower of a duty to protect with a duty to warn impermissibly entangled the jury in an examination and assessment of Watchtower's religious beliefs, further violating fundamental constitutional principles. Fourth, Watchtower demonstrates how (D) the trial court's imposition upon Watchtower of a duty to protect with a duty to warn improperly required Watchtower to label a person as a sex offender even though that person had not been convicted of a crime, in violation of well-established rights to privacy, liberty, and due process protected under both the United States and California Constitutions.

Watchtower next raises two additional grounds for reversal of the trial court's related post-trial orders concerning the Plaintiff's award of punitive damages. Specifically, Watchtower explains how (E) the trial court improperly allowed Plaintiff to proceed against Watchtower with a claim for punitive damages despite the lack of substantial evidence to support a predicate finding of malice. Finally, Watchtower describes how (F) the amount of punitive damages awarded against

Watchtower was excessive as a matter of law, especially where the Plaintiff's stated purpose in seeking those damages was to "change Watchtower's national policy," violating Watchtower's due process rights.

Accordingly, Watchtower respectfully requests this Court to reverse the trial court's Judgment, Amended Judgment and related post-judgment orders, and to direct that judgment be entered in Watchtower's favor. Alternatively, Watchtower requests this Court to direct that a new trial be ordered.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Facts of This Case.

1. Background of the Appellants.

The Governing Body of Jehovah's Witnesses ("Governing Body"), which currently is based in Brooklyn, New York, is the body of experienced Christian men who have the overall spiritual supervision and oversight of the worldwide community

of Jehovah's Witnesses. (7 RT 907; 8 AA 2054 [Def. Exh. 131].)[1] At the time of the trial, the Governing Body was composed of seven elders. (7 RT 907.)[2]

At all times relevant to this case, Watchtower was the primary legal entity used by the Governing Body to supervise the spiritual activities of Jehovah's Witnesses in the United States, and its primary office was located in New York. (7 RT 914.) Two of the departments at its offices were the Service Department and Legal Department. (5 RT 533-534; 7 RT 905-906, 932-933.) Elders in the Service Department provide spiritual assistance and direction to congregation elders (7 RT 906; 8 AA 2054), and the Legal Department provides legal advice to congregation and Service Department elders. (3 RT 154; 5 RT 534.)

There are approximately 1.2 million Jehovah's Witnesses associated with about 13,400 congregations in the United States. (7 RT 906, 909-910.) The North Fremont Congregation, located in Fremont, California, is one of those congregations. (3 RT 139.) At all times relevant to this case, congregations held religious meetings three times per week. (3 RT 235-237; 5 RT 548-551.) Most of those religious meetings were held in Kingdom Halls, which are houses of worship used by

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[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]).

[2] Elders are persons appointed according to the beliefs and practices of Jehovah's Witnesses to care for the spiritual needs of congregations. Their qualifications are set forth in the Bible. (3 RT 177-178, 233-234.)

Jehovah's Witnesses for their religious services. (3 RT 142, 208-209; 5 RT 548.) For one of those weekly meetings, congregations met in smaller groups in private homes and Kingdom Halls for in-depth Bible study. (3 RT 208, 236-237; 5 RT 548.)

Jehovah's Witnesses do not sponsor programs or activities that separate children from their parents, such as religion classes for children or overnight trips of any kind. (3 RT 140; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT 705; 7 RT 873-876.) Rather, children attend and participate along with their parents in congregation meetings and in the public ministry for which Jehovah's Witnesses are well known. (3 RT 143, 185-187; 4 RT 277, 367-368, 421; 5 RT 493, 495, 498, 549-551; 6 RT 705; 7 RT 874, 912.) As a result, neither Watchtower personnel nor the elders and ministerial servants of North Fremont Congregation have unique positions of access to children, or positions of trust with children, because families stay together during all religious programs. (7 RT 874-875.)

Congregation members are called "publishers," and all publishers are considered "ordained ministers." (5 RT 553; 7 RT 911; 8 AA 2054.) Thus, the terms "member," "publisher," and "ordained minister" all mean the same thing among Jehovah's Witnesses (5 RT 553; 7 RT 913-914); all of those terms refer to Jehovah's Witnesses, including children, who preach the good news. (3 RT 139-140, 183-184.) Before becoming a "publisher," a person first becomes an "unbaptized publisher." (7 RT 911-912; 8 AA 2054.) Unbaptized publishers generally include Bible students, including members' children, who are making spiritual progress toward becoming a

baptized publisher. (7 RT 911-912.) Subsequently, a person becomes a full-fledged congregation member on the day of his or her baptism as one of Jehovah's Witnesses. (7 RT 911.)

The spiritual oversight of each congregation is the responsibility of a local body of elders. (3 RT 139; 7 RT 908-909; 8 AA 2054.) Those elders are the congregation's spiritual teachers and leaders, and provide spiritual assistance and encouragement to congregation members through their pastoral activities. (7 RT 908-909.) Congregation elders are assisted by ministerial servants who care for ministerial duties such as operating the microphones and sound equipment at meetings, assisting members in obtaining literature, handling accounts, and serving as attendants during meetings. (3 RT 147; 4 RT 402; 7 RT 909.) None of the elders and ministerial servants, however, are paid for their service to the congregation. (3 RT 139, 178; 7 RT 913.)

To become an elder or ministerial servant, a person who meets the Biblical qualifications must first be recommended by the local congregation body of elders, and then approved by Service Department elders. (3 RT 177-178, 233-234.)

Jehovah's Witnesses commonly refer to their public ministry, which involves preaching the good news of God's Kingdom to any who will listen, as "field service" or "field ministry." (3 RT 142-143, 185; 5 RT 548; 7 RT 910.) Field service or field ministry is carried out in many forms, including going from door-to-door, and by conducting Bible studies with interested persons. (5 RT 481, 550-551.) While most

of Jehovah's Witnesses participate in some form of public ministry, participation is not required to maintain congregation membership. (5 RT 552.)

2. Perpetrator Kendrick's Relevant Background.

On November 11, 1993, Kendrick confessed to two North Fremont Congregation elders, Michael L. Clarke and Gary Abrahamson, that on one occasion in July 1993 at the Kendrick family home, he had inappropriately touched the breast of his then 15-year-old stepdaughter, Andrea. (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.) Elders Clarke and Abrahamson provided Bible-based counseling to Kendrick, Andrea, and her mother, Evelyn Kendrick ("Evelyn"), and told Andrea and Evelyn that they had the absolute right to report Kendrick's conduct to law enforcement authorities. (3 RT 163-164, 180-181, 190-191, 239-242, 250-251; 4 RT 293, 297, 302; 6 RT 707; 7 RT 880.) Thereafter, the North Fremont Congregation elders contacted Watchtower's Legal Department for legal advice, and Watchtower's Service Department for spiritual advice. (3 RT 154, 246.) Notably, prior to 1997, ministers and clergy members were *not* mandated reporters of child abuse under California law. (See Stats. 1996, ch. 1081 (A.B. 3354), § 3.5 [amending Pen. Code § 11166, effective January 1, 1997].) Consequently, the elders followed church policy and left it to Andrea and Evelyn to report the matter to the police if they desired to do so. (3 RT 169, 241-242; 7 RT 880.) The Watchtower Service Department expressed

agreement with the elders' recommendation to remove Kendrick as a ministerial servant. (3 RT 163, 166, 192, 218, 241, 244, 247; 7 RT 880.)

In December 1993, the North Fremont Congregation elders announced to the congregation that Kendrick was removed as a ministerial servant. (3 RT 163, 166, 241; 5RT 484; 7 RT 880.) Consistent with the religious beliefs and practices of Jehovah's Witnesses, and based upon their understanding of Bible scriptures on confidentiality, the reason for Kendrick's removal was not announced to the congregation. (3 RT 222-223, 243-244.) Since his removal as a ministerial servant in December 1993, Kendrick has never served in any appointed position in any congregation of Jehovah's Witnesses. (3 RT 243-244; 7 RT 916.)

Unbeknownst to the elders of the North Fremont Congregation, 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].) Thereafter, Andrea was interviewed by Officer Davila of the Fremont Police and a CPS caseworker. (4 RT 303-306, 348; 6 RT 646, 650-651.) Later, in early March 1994, Officer Davila interviewed Kendrick and Evelyn. (4 RT 303; 6 RT 646-648.) During his interview, Kendrick confessed that he had inappropriately touched Andrea in July 1993, and Officer Davila recommended to the Alameda County District Attorney ("District Attorney") that Kendrick be charged with a sex crime. (6 RT 647-649; 8 AA 1991.) The District Attorney then filed

charges against Kendrick and he was charged and convicted of a misdemeanor. (4 RT 307; 6 RT 654-656.)

Based on Officer Davila's investigation, the authorities learned that Kendrick was a member of the North Fremont Congregation. (6 RT 652.) However, no one from the Fremont Police, CPS, or the District Attorney's office ever informed the members or elders of the North Fremont Congregation about their investigation or the conviction of Kendrick for molesting Andrea. (3 RT 193, 251-252; 4 RT 419; 6 RT 649, 652-653, 655, 711-712.) In fact, the North Fremont Congregation elders did not become aware of Kendrick's conviction until 1998. (3 RT 193, 251; 4 RT 307-308, 410.)

3. Perpetrator Kendrick's Subsequent Abuse of Plaintiff.

Plaintiff, who was born on November 25, 1985, attended the North Fremont Congregation religious meetings with her parents, Neal and Kathleen Conti. (4 RT 350, 352, 367-368; 6 RT 713.) Plaintiff never attended North Fremont Congregation religious meetings without at least one of her parents being present. (3 RT 189-190; 4 RT 321, 333, 442; 5 RT 482, 493, 498; 6 RT 725-726, 737-738.)

The Conti family became acquainted with Kendrick through their mutual association with the North Fremont Congregation. (4 RT 353-354; 5 RT 482-483.) Plaintiff testified that Kendrick hugged her and made her sit on his lap during congregation religious meetings. (6 RT 723, 738-739, 742.) She also testified that from about 1994 to 1996, Kendrick regularly took her to his home and sexually

abused her *after* Sunday congregation religious meetings. (6 RT 742, 744.) Plaintiff further testified that Kendrick sexually abused her at his home *after* field service activity, although she made no mention of this sexual abuse at her deposition. (6 RT 728-731, 746-747, 762.) In addition, she testified that after watching a movie in Sacramento, Kendrick sexually abused her on an Amtrak train while her father, Neal Conti, was present. (6 RT 745-746.) During closing argument, Plaintiff's counsel incorrectly suggested to the jury that Plaintiff was abused by Kendrick *during* field service. (9 RT 1102, 1190.) The record demonstrates, however, that Plaintiff never testified to being molested by Kendrick during field service.

Further, Plaintiff's father denied that Kendrick ever hugged Plaintiff or had her sit on his lap during congregation religious meetings. (5 RT 495-496, 513.) He also disputed his own daughter's testimony that she was taken by Kendrick to Kendrick's home alone after congregation meetings or after field service. (5 RT 496, 513.) And Neal Conti also denied that Kendrick ever abused Plaintiff on an Amtrak train while he was present. (5 RT 499-501.)

Plaintiff's mother, Kathleen Conti, who lives with Plaintiff (4 RT 350; 6 RT 713), testified that she never saw Kendrick hug Plaintiff or put her on his lap during congregation religious meetings. (4 RT 368-369) She also testified that her daughter never went to meetings or field service without one of her parents. (4 RT 357, 367-368.)

North Fremont Congregation elders, Gary Abrahamson, Michael Clarke, and Lawrence Lamerdin, testified that they kept a watchful eye on Kendrick after the 1993 incident with his stepdaughter, even though they knew nothing of his subsequent criminal conviction. (3 RT 162-163, 247-248, 250; 4 RT 406-409, 412-413, 417, 420; 7 RT 880-881.) They, too, never saw Kendrick hug Plaintiff or have her, or any other child, sit on his lap during congregation meetings. (3 RT 195-196, 248-249, 253; 4 RT 420-421.) The elders also never saw Plaintiff leaving alone with Kendrick after congregation meetings or field service. (3 RT 196, 248, 253; 4 RT 420-421, 430.) And they never witnessed Plaintiff at meetings or in field service without at least one of her parents. (3 RT 187, 190, 248.)

North Fremont Congregation members Bernice Munoz, Sylvia Munoz, and Pamela Figuerido similarly testified that they never saw Plaintiff sit on Kendrick's lap during meetings (7 RT 828-829, 836, 852), never saw Kendrick give Plaintiff a bear hug (7 RT 829, 836, 851), never saw Kendrick leave the Kingdom Hall in vehicle with Plaintiff or drive together in same vehicle (7 RT 829, 836-837, 852), never saw Kendrick in field service alone with Plaintiff (7 RT 829, 837, 852-853), and never saw Plaintiff at Kingdom Hall without one of her parents. (7 RT 837, 852.)

4. Watchtower's Long-Standing Child Protection Policies.

Since the 1980's and throughout the 1990's, Watchtower published numerous articles in its religious journals, *The Watchtower* and *Awake!*, to educate Jehovah's

Witnesses and the public about the growing problem of child sexual abuse, the signs of such abuse, the methods of child molesters, and various protection measures parents can adopt to safeguard their children from sexual abuse. (3 RT 160-165; 6 RT 702-704; 7 RT 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).) For example, the January 22, 1985 issue of *Awake!* featured the cover series, "Child Molesting – You *Can* Protect Your Child," warning of the prevalence of child sexual abuse in society. (3 RT 258; 7 RT 884-885, 917.) It urged parents to be protectors of their children (3 RT 260; 7 RT 918), explained that child sexual abuse is more likely to be perpetrated by someone you know than by a stranger (3 RT 258; 7 RT 885, 918), taught parents how to keep their children out of dangerous situations (3 RT 259; 7 RT 919), and further informed parents how to detect and respond to possible sexual abuse. (7 RT 885; 918-919.)

Similarly, the teaching box "If Your Child Is Abused" on page 9 of the October 8, 1993 issue of the *Awake!* discussed how parents can train their children to protect themselves (7 RT 921-922), provided parents with suggestions on what to do if their child was abused (7 RT 922), and stated: "Some legal experts advise reporting the abuse to the authorities as soon as possible. In some lands the legal system may require this." (7 RT 922-923; 8 AA 2041.)

All Jehovah's Witnesses received those publications in their home by mail. (3 RT 179-180, 238, 260; 4 RT 331-332; 7 RT 830, 839, 848-849, 886-887.)

Additionally, congregation elders often used those publications to teach during congregation meetings and to provide spiritual counsel and advice to individual congregation members. (3 RT 188, 208, 235, 237-239; 5 RT 508-510, 547; 7 RT 887.) Jehovah's Witnesses also offered those publications to interested members of the public free of charge as part of their public ministry. (3 RT 239, 260; 4 RT 425-426; 5 RT 545-546; 7 RT 931, 939.)

Watchtower provided congregation elders with additional information on how to handle appropriately incidents of child sexual abuse. (3 RT 170; 4 RT 273.) This was done as part of the elders' ongoing spiritual training through Kingdom Ministry Schools held about every three years (3 RT 178-179, 234; 4 RT 273, 391), and through letters to bodies of elders. (3 RT 179.) For example, the Watchtower's July 1, 1989 letter to all bodies of elders addressed matters of legal and spiritual concern, including the misuse of the tongue and confidentiality. (3 RT 229, 255; 8 AA 1973-1978 (Pl. Exh. 1, Def. Exh. 26).) It reminded congregation elders of the long-standing policy, based upon Scripture, which requires elders to keep individuals' private information confidential. (3 RT 257; 4 RT 278.) At the same time, it informed congregation elders that "[m]any states have child abuse reporting laws" (3 RT 223-23, 254-257; 4 RT 272, 278; 7 RT 923; 8 AA 1975) and directed elders to immediately contact Watchtower's Legal Department if they receive reports of child abuse, emphasizing how "[v]ictims of such abuse need to be protected from further danger." (3 RT 255-256; 7 RT 924; 8 AA 1975.) That direction was in

harmony with Watchtower's child abuse policy which required congregation elders to comply with child abuse reporting laws and to recognize that victims of child sexual abuse and their parents had the absolute right to report such crimes to the appropriate authorities. (7 RT 922-924.) Watchtower's March 23, 1992 and February 3, 1993 letters to all bodies of elders further highlighted that it is important for elders to be kind, sensitive, and compassionate listeners when providing spiritual help to victims of child abuse. (7 RT 881-882, 925-927; 8 AA 2002-2005 (Pl. Exh. 27, Def. Exh. 32).)

Watchtower's August 1, 1995 letter to all bodies of elders similarly directed elders to admonish individuals who committed child sexual abuse in the past to never be alone with children, and not to hug or be overly familiar with children. (7 RT 927-928; 8 AA 2006-2007 (Pl. Exh. 29, Def. Exh. 44).) Additionally, Watchtower's March 14, 1997 letter to all bodies of elders directed elders regarding what to do when an individual who has committed child sexual abuse in the past moves to a new congregation. Specifically, it required elders in the former congregation to inform the elders in the new congregation about the individual's history of child sexual abuse. (7 RT 929-930; 8 AA 1994-1996 (Pl. Exh. 12, Def. Exh. 50).) That letter also confirmed Watchtower's long-standing policy that a known child molester does not qualify to be appointed to a position of responsibility in any congregation. (7 RT 929; 8 AA 1994.) All of Watchtower's publications and letters to bodies of elders on

the subject of child sexual abuse comprise Watchtower's policy on that subject. (4 RT 273; 7 RT 922-923, 929, 931.)

B. Court Proceedings.

Plaintiff filed a First Amended Complaint for Damages, dated May 3, 2012, against Watchtower and the North Fremont Congregation (collectively "Appellants") asserting claims including, but not limited to, negligence regarding child abuse allegedly committed against her by Kendrick. (2 AA 501-508.) Plaintiffs claims against Appellants proceeded on that operative pleading.

1. Trial.

During his opening statement and closing argument, the Plaintiff's attorney portrayed Watchtower's July 1, 1989 letter to all bodies of elders as a nefarious "policy of secrecy" that allowed child molesters to hide who they were from congregation parents so that Watchtower could avoid lawsuits. (3 RT 88-89, 98; 11 RT 1231-1233.) Further, Plaintiff and her attorney openly admitted before and during trial that their purpose of bringing Plaintiff's claims was to "effect a change" in Watchtower's *national* child abuse policy. (11 RT 1233-1234, 1239-1240.) That purpose was manifested in various ways, including:

- Plaintiff's Mandatory Settlement Conference Statement openly admitted that until Jehovah's Witnesses' alleged "policy of secrecy" regarding the identity of known child molesters in local congregations changes, "the case is not subject to settlement." (2 AA 312.)

- Plaintiff's motion for leave to amend her complaint to include facts supporting a claim for punitive damages states that "[a]ll of the disputed conduct involved following the policies of, and instructions of [Watchtower]," and that "[Watchtower's] implementation and maintenance of the secrecy policy epitomizes despicable conduct carried on with a willful and conscious disregard of the rights or safety of children." (1 AA 49-50.)

- At trial Plaintiff testified that she told the elders she wanted to change the alleged policy of secrecy, and that she would not have brought this lawsuit had they agreed to change that alleged policy. (6 RT 764-765.)

- During closing arguments, Plaintiff's attorney argued that punitive damages were necessary to effect a change in Watchtower's alleged policy of secrecy. (9 RT 1090-1091.)

Allen Shuster, an elder and assistant overseer of the Service Department in New York, testified that the July 1, 1989 letter was sent to all bodies of elders in the United States, and covered many issues, including confidentiality and child abuse. (7 RT 923.) He confirmed that the letter informed elders that many states have child abuse reporting laws and they should therefore call Watchtower's Legal Department immediately when they receive reports of child abuse. It also stressed that "[v]ictims of such abuse need to be protected from further danger." (7 RT 924; 8 AA 1975.) On the subject of confidentiality, that letter reminded elders that congregation members have an expectation of privacy and that it is important for elders to obey the Bible's mandate regarding confidentiality. (7 RT 906, 913; 937-938.) As North Fremont elders Clarke and Lamerdin testified, Watchtower's policy that requires elders to keep spiritual communications with congregation members confidential is long-standing and based on Scripture. (4 RT 278-279, 284, 289, 422-

423.) Commenting on why elders do not announce even reports of child abuse received in confidence, elder Clarke testified: "Why would anyone come to us with their problems if they knew that after they came to us we were going to announce it?" (3 RT 230.)

Watchtower's trial expert, Monica Applewhite, Ph.D., testified that the wording of Watchtower's policy on confidentiality closely mirrored the concerns expressed by other religious organizations and reflected in the codes of ethics for the National Association of Social Workers, the American Counseling Association, and Child Welfare League of America. (7 RT 881-884.) On the other hand, Plaintiff's expert, Anna Salter, Ph.D., misled the jury by testifying that in 1993 – the year the North Fremont elders learned that Kendrick sexually abused his stepdaughter, Andrea – clergy in California were legally obligated to report child abuse to the authorities, and that California's 1997 amendments to its child abuse reporting law simply "clarified" that previously existing reporting obligation. (6 RT 693-694, 707.) As explained above, however, church clergy and elders were not "mandatory reporters" in California until 1997.

Moreover, during closing argument, Plaintiff's attorney argued that in 1993, the North Fremont Congregation elders should have announced to the congregation that Kendrick was removed as a ministerial servant because he sexually abused a child. (9 RT 1085-1086.) In doing so, Plaintiff's attorney also misled the jury about Jehovah's Witnesses beliefs and practices on confidentiality. He argued that

Kendrick's confession to the elders was not really a confession because he allegedly lied and it was not like a confession to a Catholic priest in a booth. (9 RT 1192.) The trial court further allowed Plaintiff's counsel to argue that Kendrick's confession did not have "the privilege attached to it," was not really confidential, and that "confidential" in this case was "an excuse to keep secret child sex abuse." (9 RT 1192-1193.)

2. Jury Instructions.

On June 11, 2012, the trial court made its final rulings on the instructions to be provided to the jury, including, over Watchtower's objections, instructions related to Watchtower's "duty to protect," allocation of fault, privilege, and child abuse reporting. (9 RT 1010-1016, 1021-1024, 1034-1035, 1040-1041; 5 AA 1239.) In doing so, the court denied Watchtower's requests to instruct the jury on several critical points:

- That Appellants had no duty to warn congregation members of Kendrick's abuse of Andrea (8 RT 974-975; 9 RT 1041; 5 AA 1239), and
- That ministers were *not* mandatory reporters in California in 1993. (8 RT 975-979, 991; 9 RT 1021-1023.)

The trial court also denied Watchtower's request to add the North Fremont Police, CPS, the District Attorney, and Plaintiff's parents to the special jury verdict for purposes of allocation of fault. (8 RT 961-967; 9 RT 1012-1014, 1033-1035.)

Over Watchtower's objection, the trial court further ruled that based on *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377 and *Rowland v. Christian* (1968) 69 Cal.2d 108, Watchtower had a "special relationship" with Plaintiff (8 RT 981-985; 9 RT 1032-1033) which gave rise to "a duty to take reasonable protective measures to protect Candace Conti from the risk of sexual abuse by . . . Kendrick." (8 RT 979-980; 9 RT 1011-1012, 1054.)

The trial court also ruled, over Watchtower's objection, that it would instruct the jury that in determining whether Watchtower took reasonable protective measures, it "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 . . . 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; 5 AA 1239.)

Over Watchtower's objection, the trial court further instructed the jury that the issues of privileged communications and mandatory child abuse reporting were issues for the court to determine, not the jury. (8 RT 988-990; 9 RT 1016, 1019, 1021-1023, 1057-1058; 5 AA 1246.) Watchtower objected to the court's privileged communications instruction on grounds that it was not needed, it was incomplete, and it would confuse and mislead the jury respecting the reasonableness of Watchtower's

claim of confidentiality based on church doctrine and policy regarding the reasons for not warning congregation members about Kendrick's prior abuse of his stepdaughter. (9 RT 1016-1020.) Watchtower similarly objected to the court's mandatory child abuse reporting instruction on the ground that it would confuse and mislead the jury into believing that perhaps the North Fremont Congregation did have a legal duty to report Kendrick's abuse of Andrea to the authorities in 1993, as Dr. Salter had testified, even though California had no such reporting duty for clergy in 1993. (9 RT 1021-1022, 1096-1097.)

3. Verdict and Post-Verdict Proceedings.

On June 13, 2012, an Alameda County Superior Court jury returned a compensatory damages verdict in favor of Plaintiff and against Appellants and Kendrick for $7.0 million in general and special damages, finding Kendrick 60% at fault, Watchtower 27% at fault, and North Fremont Congregation 13% at fault, and further finding that Watchtower alone acted with malice. (11 RT 1214-1215; 5 AA 1285-1286.) The next day, the jury further awarded Plaintiff $21,000,001 in punitive damages exclusively against Watchtower. (12 RT 1242.)

On July 17, 2012, Appellants jointly moved for judgment notwithstanding the verdict ("JNOV") and a new trial. (5 AA 1352-1387.) After a hearing on August 13, 2012 (13 RT 1251-1280), the trial court entered its post-trial orders on August 24, 2012, denying Watchtower's JNOV motion and conditionally granting a new trial on the punitive damages awarded against Watchtower unless the Plaintiff accepted

judgment in her favor on punitive damages claim in the amount of $8,610,000. (7 AA 1936-1940.) Subsequently, the Plaintiff accepted the reduced punitive damage amount, and the court entered an Amended Judgment on September 17, 2012, in the total gross sum of $11,488,000 against Watchtower and the local congregation. (7 AA 1941-1942.)

III.

APPEALABILITY AND STANDARDS OF REVIEW

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

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

IV.

DISCUSSION

A. As Watchtower Did Not Have a Special Relationship with the Plaintiff, It Did Not Have a Duty to Protect Plaintiff from Sexual Abuse by Kendrick, Nor to Warn the Plaintiff or Her Parents About Kendrick's Alleged Past Sexual Abuse of His Stepdaughter.

1. Standard of Review: *De Novo.*

In order to establish negligence, Plaintiff must demonstrate a duty on the part of the defendant, breach of that duty, causation and damages. (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 876.) At issue here is the question of *duty*, which "is a question of law for the court, to be reviewed *de novo* on appeal." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770-771; see also *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 385 ["The issue whether a duty exists is a question of law to be determined by the court, and is reviewable de novo"].)

2. Application to This Case.

The trial court erroneously determined, as matter of law, that there is a special relationship between a national religious organization, Watchtower, and the child of a local congregation member. That improper determination prompted the trial court to instruct the jury that Watchtower had a duty to protect a congregation member's child, the Plaintiff, from sexual abuse by another congregation member, Kendrick. Based upon the trial court's unprecedented duty-to-protect instruction, the jury found

Watchtower liable for not protecting Plaintiff from sexual abuse by a rank-and-file congregation member.

Notably, no reported California case has imposed a similar duty upon a religious organization to protect the child of a congregation member from the sexual abuse committed by another congregation member. Instead, California courts have consistently held that no special relationship exists between a religious organization and a congregation member. Because the trial court disregarded that authority, its Judgment and Amended Judgment against Watchtower should be reversed by this Court.

a. Absent a Special Relationship, Watchtower Cannot Be Liable for the Sexual Abuse of a Local Congregation Member's Child Committed by Another Congregation Member.

"[O]ne 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 v. Grace Community Church* (1988) 47 Cal.3d 278, 293.) The Supreme Court has traditionally and faithfully followed this common law "no duty to protect" rule. As it explained in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435, "when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or the potential victim."

Recent California Supreme Court decisions have only affirmed that well-established rule. (See, *e.g., Delgado v. Trax Bar and Grill* (2005) 36 Cal.4th 224, 235 ["[A]s a general matter, there is no duty to act to protect others from the conduct of third parties"]; *Morris v. De La Torre* (2005) 36 Cal.4th 260, 269 [same]; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129, quoting *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203 ["'As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct'"].)

The Court of Appeals has similarly applied the "no duty to protect" rule to child sexual abuse cases. For example, in *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, a 15-year-old girl brought a negligence action against a church because of sexual abuse by a parish priest. The Fourth District confirmed in that case:

> 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. Where, as here, a "complaint alleges injuries resulting from the *criminal acts of third persons* . . . 'the common law, reluctant to impose liability for nonfeasance, generally does not impose a duty upon a defendant to control the conduct of another, or to warn of such conduct, unless the defendant stands in some *special relationship* either to the person whose conduct needs to be controlled, or to the foreseeable victim of such conduct.'" (*Roman Catholic Bishop, supra,* 42 Cal.App.4th at 1564 [citations omitted; emph. in orig.].)

Similarly, in *Eric J. v. Betty M.* (1999) 76 Cal.App.4th 715, a minor was molested by his mother's boyfriend on premises owned by the boyfriend's family members. No one in the family warned the minor's mother about her boyfriend's prior convictions for child molestation. Writing for the court, Presiding Justice Sills affirmed 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." (*Eric J., supra,* 76 Cal.App.4th at 727.)

As our High Court explained in *Tarasoff,* "[t]his rule derives from the common law's distinction between *malfeasance* and *nonfeasance*, and its reluctance to impose liability for the latter." (*Tarasoff, supra,* 17 Cal.3d at 435, fn. 5.) "Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, *i.e.*, defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention." (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 49.) In *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, Justice Kline similarly explained why courts are reluctant to impose liability for nonfeasance, quoting Professor Francis S. Bohlen's classic 1908 essay on the duty to aid others:

> "In the case of active misfeasance the victim is *positively worse off* as a result the wrongful act. In cases of passive inaction plaintiff is in reality no worse off at all. His situation is unchanged; he is merely deprived of a protection which, had it been afforded him, would have benefited him. In the one case the defendant, *by interfering with plaintiff or his affairs, has brought a new harm upon him, and created a*

> *minus quantity, a positive loss*. In the other, by failing to interfere in the plaintiff's affairs, the defendant has left him just as he was before; no better off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury nor created any new injurious situation. There is here a loss only in the sense of an absence of a plus quantity. It is this latter difference which in fact lies at the root of the marked difference in liability at common law for the consequences of misfeasance and non-feasance." (*Adams, supra,* 68 Cal.App.4th at 304 [dis. opn. of Kline, P. J.], quoting *The Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. Pa. L.Rev. 217, 220-221.)

Similarly, in *Garcia v. Superior Court* (1990) 50 Cal.3d 728, the Supreme Court previously explained that the existence of a special relationship is an essential "prerequisite" in a nonfeasance case. There, although the Supreme Court found misfeasance (affirmative misrepresentations), it explained that in the case of a nonfeasance claim, "[a] special relationship is a prerequisite for liability based on a defendant's *failure to act.*" (*Id.* at 734 [emph. in orig.].)

In the present case, the trial court did *not* instruct the jury that it must find Watchtower liable for *misfeasance*. Indeed, doing so would have been contrary to the entire record, since there is no evidence that Watchtower interfered in Plaintiff's affairs to bring a new harm to her. Rather, the trial court instructed the jury that it could find Watchtower liable for *nonfeasance*, a failure to protect or to warn. In so doing, the trial court misapplied California's long-standing "no duty to protect" law, which necessarily required the existence of a special relationship between Watchtower and the Plaintiff, or between Watchtower and Kendrick, in order to find

liability for its alleged failure to act. But California does not recognize a special relationship between a national religious organization and local congregation members (or their children). For example, in *Roman Catholic Bishop, supra,* 42 Cal.App.4th 1556, no special relationship was found to exist between a parish priest and his 15-year-old parishioner, who was his victim. To that end, the *Roman Catholic Bishop* court reasoned:

> [T]here is no special relationship here creating a heightened duty of care based on a priest/parishioner relationship. In the context of a claim for negligent counseling, our Supreme Court explained in *Nally v. Grace Community Church*, *supra*, 47 Cal.3d 278, 298, that the Legislature has exempted clergy from licensing requirements applicable to other counselors. That exemption is in recognition "that access to the clergy for counseling should be free from state imposed counseling standards, and that 'the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations.' [Citation.]" (*Id.* at 1568.)

Similarly, in *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, this Court held that there was no special relationship between the church member and the priest or Archdiocese. There, an adult church member filed a tort action against a church priest and the Archdiocese because the priest improperly exploited a confidential counseling relationship to initiate a sexual relationship with her. Relying on *Nally, supra*, this Court in *Richelle L.* rejected the church member's argument that because a special relationship had been found in cases involving physicians and attorneys, she similarly stood in a special relationship with the priest.

As Presiding Justice Kline explained: "California cases involving physicians and attorneys [citations] are inapposite, because the malpractice claims that may be made against physicians, psychotherapists, and attorneys cannot be made against members of the clergy. There is no such thing in the law as clerical malpractice." (*Richelle L., supra,* 106 Cal.App.4th at 269.)

Similarly, with respect to the Archdiocese, this Court in *Richelle L.* further reasoned:

> Appellant does not attempt to hold respondent Archdiocese vicariously liable under the theory of respondeat superior, but directly liable for breach of a fiduciary duty and for negligence in hiring and supervision. In order to prevail against the Archdiocese, however, appellant must show, among other things, that she suffered an injury the law recognizes. For the reasons we have explained, appellant cannot make such a showing; accordingly, there is no need to inquire whether the Archdiocese can be subjected to any duty. (*Id.* at 282-283.)

Since a local priest does not stand in a special relationship with a parishioner, *Richelle L.* implicitly also ruled that the Archdiocese had no special relationship to a church member for the same reasons. (*Ibid.*)

Notably, the perpetrators in *Roman Catholic Bishop* and *Richelle L.* were both priests, in positions of church leadership. *Kendrick, the perpetrator in this case, was simply a rank-and-file congregation member* when he sexually abused Plaintiff. (3 RT 163, 166, 241; 4 RT 356; 5 RT 484; 6 RT 711; 7 RT 872-873, 880; 9 RT 1054.) He held no position of leadership or authority within the Freemont Congregation

when he sexually abused the Plaintiff. Thus, the holdings of *Roman Catholic Bishop* and *Richelle L.* – that no special relationship exists between a church member and her priest – makes it eminently clear that there can be no special relationship between Watchtower (the national religious organization of Jehovah's Witnesses) and Plaintiff, who was the child of another local rank-and-file congregation member. In short, the trial court clearly erred when it incorrectly determined, as a matter of law, that a special relationship existed between Watchtower and Plaintiff.

b. The Trial Court's Misplaced Reliance on *Juarez v. Boy Scouts of America* Requires Reversal.

In finding a special relationship and imposing a duty on Watchtower, the trial court relied primarily on this Court's prior decision in *Juarez v. Boy Scouts of America, Inc., supra,* 81 Cal.App.4th 377. But the facts of *Juarez* are unique, and differ so fundamentally from the facts of this case that such reliance cannot be justified. Specifically, *Juarez* involved a perpetrator who was a scoutmaster, *a person in a position of leadership or authority*, into whose care, custody, and control a "youth organization" had placed the children for an overnight campout. (*Id.* at 385-386, 397, 404, 411.) Moreover, in *Juarez,* the victim "was repeatedly molested by his scoutmaster . . . and that numerous incidents took place during officially sanctioned scouting events, such as overnight campouts." (*Id.* at 397.)

In stark contrast, Kendrick was simply a congregation member, and was in no position of leadership or authority within the congregation at the time he abused the

Plaintiff. (3 RT 163, 166, 241; 4 RT 356; 5RT 484; 6 RT 711; 7 RT 872-873, 880; 9 RT 1054.) Watchtower was not a "youth organization" and had not been entrusted with the care, custody, or control of the Plaintiff, and consequently, did not place the Plaintiff in the care, custody, or control of Kendrick for any overnight camping trip, or for any church sanctioned event. (3 RT 140, 185-187; 4 RT 277, 321, 421; 5 RT 495, 547; 6 RT 705; 7 RT 873-876, 878-880, 912.) Indeed, Plaintiff testified that Kendrick abused her at his home *after* Sunday congregation meetings (6 RT 742, 744), *after* field service activity (6 RT 728-731, 746-747), and on a train during a *personal* visit to Sacramento with Kendrick and her father. (6 RT 745-747.)

Given the fundamental factual differences between *Juarez* and this case, the trial court simply erred by relying on *Juarez* to find that there was a special relationship between Watchtower and Plaintiff. This is especially true where even in finding liability in *Juarez*, this Court cautioned against using its decision to impose duties of care upon other charitable organizations:

> We do not intend our decision to serve as a manifesto by which lower courts are to impose duties of care upon all forms of charitable organizations engaged in volunteer youth programs, requiring them to take steps to prevent or minimize the chance that group leaders will engage in intentional misconduct against the youths participating in their programs. (*Juarez, supra,* 81 Cal.App.4th at 409.)

To be sure, this Court in *Juarez* took great pains to emphasize how its finding of a special relationship and concomitant duty was limited to the specific facts of that case:

> [W]e wish to make special note 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. (*Id.* at 409.)

And even in doing so, this Court showed understandable reluctance, but ultimately found a duty in light of the perpetrator's position of leadership within the Boy Scouts, the mission of that "youth organization" generally, and the relationship the victim had to the Scouts:

> [W]e are reluctant to rely on the special relationship doctrine per se as the analytical underpinning for our conclusion that a duty of care was owed by the Scouts to Juarez. However, we note that cases exploring this alternative theory of tort duty have found a special relationship, giving rise to a duty to protect children against a known risk that they might be sexually molested. One jurist has described the special relationship between the child participant and youth organization in terms particularly pertinent to this case: "The mission of youth organizations to educate children, the naïveté of children, and the insidious tactics employed by child molesters dictate that the law recognize a special relationship between youth organizations and the members such that the youth organizations are required to exercise reasonable care to protect their members from the foreseeable conduct of third persons." [Citation.] (*Ibid.*)

But the very facts which drove that imposition of a duty of care in *Juarez* are simply *not* present in this case: Watchtower is *not* a "youth organization," Kendrick was *not* in a position of authority or leadership, and the Plaintiff was *not* entrusted to either Watchtower's or Kendrick's custody and control. Thus, the trial court was simply putting the proverbial square peg in the wrong analytical hole when it relied

on *Juarez* to impose upon Watchtower a seemingly boundless duty to protect congregation members' children – *over whom it had no custody or control* – from sexual abuse by another congregation member not in any position of leadership or authority, and who perpetrates his crimes off church property and unrelated to church activities. In so doing, the trial court clearly failed to heed this Court's explicit caution against extending its reasoning in *Juarez* well beyond its limited and unique facts. Instead, the trial court was bound to follow the reasoning of the *Roman Catholic Bishop* and *Richelle L.* decisions, and should have concluded that no special relationship existed between Watchtower and the Plaintiff. Its failure to do so compels this Court's reversal now.

c. The Trial Court's Imposition of a Duty Cannot Be Justifiably Based Upon Traditional *Rowland* Factors.

To the extent that the trial court also relied upon *Rowland v. Christian, supra,* 69 Cal.2d 108, to impose on Watchtower a broad duty to protect the Plaintiff from sexual abuse by Kendrick, it further erred. California Supreme Court cases decided after *Rowland* have uniformly confirmed that *Rowland* did not change the traditional common law "no duty to protect" rule. (See, *e.g., Morris v. De La Torre* (2005) 36 Cal.4th 260, 269; *Delgado, supra,* 36 Cal.4th at 235-236; *Nally, supra,* 47 Cal.3d at 293.) Indeed, *Rowland* did not change the long-standing common law rule in California that absent a special relationship, there is no duty to protect, warn, or aid another.

To that end, Presiding Justice Kline's dissenting opinion in *Adams v. City of Fremont, supra,* 68 Cal.App.4th 243 explains why *Rowland* is inapplicable when the "no duty to protect" rule applies:

> The imposition of tort liability on the basis of such a "special relationship," or because the duty was voluntarily assumed, has nothing to do with *Rowland v. Christian* (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496], as the majority claims, because *that case does not concern exceptions to a general rule of no duty.* (See discussion, *post,* at p. 308 et seq.) [¶] . . . [¶] The chief reason I believe *Rowland* is irrelevant to the question of duty in this case, as I have said, is that the police, like everyone else, have no duty to rescue. The issue in this case is whether there is any applicable exception to a general no-duty rule, which is unrelated to the question presented in cases to which *Rowland* properly applies. (*Id.* at 292, 311 [emph. added] [dis. opn. of Kline, P. J.].)

Instead, the *Rowland* analysis is relevant only to define the *scope* of a duty which otherwise is found to exist. As recently as March 8, 2012, the California Supreme Court made the following instructive comment regarding the *Rowland* multi-element duty assessment: "We have previously used this analysis to decide the *scope* of duty arising from a special relationship. [Citation.]" (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 877, fn. 8 [italics added].) Thus, *if* the case at hand involved facts to support a special relationship between Watchtower and the Plaintiff, then an exception to the "no duty to protect" rule would apply, and only then would the *Rowland* multi-element duty assessment be properly utilized to decide the *scope* of Watchtower's duty to protect. But, as

discussed above, the facts of this case simply do not support a special relationship between Watchtower and the Plaintiff in the first place. Thus, the trial court's alternate reliance upon *Rowland* to create an exception to the "no duty to protect" rule was simply misplaced.

Nevertheless, assuming *arguendo* that the trial court properly considered the duty question in this nonfeasance case under the multi-element duty assessment outlined in *Rowland*, then Presiding Justice Sills' opinion in *Eric J. v. Betty M., supra,* 76 Cal.App.4th 715 (affirming that there is no duty to protect absent a special relationship) is further instructive:

> That weighing process, however, has already been done by courts over the centuries in formulating the 'no duty to aid' rule. We need only add that any result other than the one we reach today under the facts of this case would create intolerable conflicts of interest within families. (*Id.* at 729-730.)

Similarly, imposing a duty upon Watchtower – a national religious organization – to protect the child of one congregation member from sexual abuse by another congregation member would create even greater intolerable conflicts within a religious organization. To be sure, for all of the additional reasons articulated in North Freemont Congregation's Opening Brief (which Watchtower fully joins in here under Rule of Court 8.200, subd. (a)(5)), it would make Watchtower the virtual insurer for the acts of every one of Jehovah's Witnesses simply by virtue of their membership in that religious organization. Nothing in *Rowland* was meant to either impose or justify such wide-ranging liability.

In short, the sexual abuse of a young child is a despicable act. But the resulting heartbreak cannot be wiped away by assigning fault where it does not belong. Based upon established law and the compelling facts of this case, there was simply no legal basis for the trial court to find a special relationship between Watchtower and the Plaintiff, or for imposing upon Watchtower a duty to protect the Plaintiff from sexual abuse by Kendrick. Consequently, the trial court's Judgment and Amended Judgment against Watchtower must be reversed in full.

B. The Trial Court Improperly Excluded Other Parties from Sharing Any Responsibility for the Harm Claimed by the Plaintiff, and As a Consequence, Targeted Watchtower's Religious Beliefs and Practices on Confidentiality In a Way That Imperils Watchtower's First Amendment Rights Under the Free Exercise Clauses of the United States and California Constitutions.

1. Standard of Review: *De Novo.*

The construction and application of a statute by a trial court to a specific set of facts presents a pure issue of law subject to this Court's *de novo* standard of review. (*Rothschild v. Tyco International (US), Inc.* (2000) 83 Cal.App.4th 488, 493; see also *Roslan v. Permea, Inc.* (1993) 17 Cal.App.4th 110, 113 [finding that the trial court erred as a matter of law by not allowing the allocation of fault – as required by Civil Code section 1431, *et seq.* – as between potentially responsible, but unnamed parties].)

2. Application to This Case.

As this Court is well aware, in June 1986, the voters of California approved an initiative measure, the Fair Responsibility Act of 1986 (Civ. Code §§ 1431 to 1431.5) – popularly known as, and hereafter referred to as, "Proposition 51." Proposition 51 modified the traditional, common law "joint and several liability" doctrine, limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1192.) Subsequently, in *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, our Supreme Court confirmed the rationale of Proposition 51 as follows:

> The express purpose of Proposition 51 was to eliminate the perceived unfairness of imposing all the damage on defendants who were found to share [only] a fraction of the fault. ([Civ. Code] § 1431.1, subd. (b).) In this context, the only reasonable construction of section 1431.2 is that a defendant[s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault *as compared with all fault responsible for the plaintiff's injuries*, not merely that of defendant[s]' present in the lawsuit. (*Id.* at 603 [internal quotes omitted] [emph. in orig.].)

It is undisputed that by March 1994 members of the Fremont Police, CPS, and the District Attorney's office had been told that Kendrick had abused his minor stepdaughter. Yet none of those governmental entities, who are charged with protecting the public, including children, warned Plaintiff or her parents about Kendrick. Nevertheless, the trial court refused to allow the jury, either in the Special

Verdict form or in the instructions provided to the jury, to allocate any fault to those governmental entities for Plaintiff's later sexual abuse by Kendrick. Refusing to do so was clearly error. (See *Roslan, supra,* 17 Cal.App.4th at 113 [trial court erred by not including in the special verdict forms defendants who had settled before trial and by refusing to permit the trial defendant to present evidence of one settling defendant's culpability, requiring the matter be remanded so that the jury could apportion liability among the "universe of tortfeasors"].)

Indeed, a case similar to this one drives that point home. *Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 Cal.App.4th 318 involved the issue of allocation of the alleged negligent conduct of not only the named defendants, but also of two public entities, the California Highway Patrol and the Los Angeles County Sheriffs Department. The Court of Appeal in *Bly-Magee* held it was appropriate for the trial court to include on the verdict form the phrase "other persons" so that the jury could "apportion damages among the defendants and the 'universe of tortfeasors.' [Citations.]" (*Id.* at 325.) The *Bly-Magee* court also discussed that counsel for the defendant Budget Rent-A-Car could have argued that the "other persons" to whom or to which the jury should allocate fault included the public entities of the California Highway Patrol and the Los Angeles County Sheriffs. (*Id.* at 326.)

Thus, at the very minimum, had the trial court in this case followed *Bly-Magee's* guidance, it should have instructed the jury about non-party liability and allowed Appellants' proffered use of a Special Verdict form that allowed the jury to

allocate fault to the "other persons or entities" or "nonparties" referenced above. (*Id.* at 326.)

Including others in the verdict form was mandated by Proposition 51, which is intended in every case to shield a defendant from any share of noneconomic damages beyond that attributable to his or her own comparative fault, and instead to apportion such damages among the "universe" of tortfeasors. (*Dafonte, supra,* 2 Cal.4th at 602-603.) Moreover, the "Directions for Use" for CACI Verdict Form 402 (Negligence – Fault of Plaintiff and Others at Issue) states that it is for the jury to "specify the liability and causation of each nonparty actor." (See also CACI 406; *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1198-1199 [trial court erred in failing to consider Proposition 51 where multiple products caused plaintiff's injuries].)

Again, the testimony and evidence in this case was uniformly that the Fremont Police Department, CPS, and the District Attorney did *not* do those very same things that the Plaintiff alleges the elders from the North Fremont Congregation should have done, *i.e.,* they did not inform the congregation or local community about Kendrick's July 1993 incident of inappropriately touching his minor stepdaughter. Those entities that Appellants requested to be added to the Special Verdict form are already recognized as owing a broad duty to protect the public. Thus, the jury should have been allowed to consider their respective breaches of those duties, and the role they may have played in causing the Plaintiff's damages.

Additionally, the Plaintiff's parents had a statutory duty to protect the Plaintiff from Kendrick's conduct, and there is ample and undisputed evidence that they also were informed by the Appellants about steps they could have taken to protect the Plaintiff from child abusers. (3 RT 238-239, 260; 5 RT 509-510; 6 RT 702-704; 7 RT 830, 839-841, 848-849, 876-878, 884-887, 918-919, 921-923.) The evidence of Kathleen Conti's drug and alcohol abuse and her emotional state do not relieve her from that parental duty. (4 RT 355-356, 364-365; 5 RT 478, 485-486, 488-489.) In any event, from those facts and evidence, the Appellants submit that the jury could have reasonably found that one or both of Plaintiff's parents was responsible to some degree for the very same damages the Plaintiff claims to have suffered as a result of the conduct of the Appellants. Thus, under well-settled California law, the jury should have been given the opportunity to allocate fault to those nonparties through jury instructions and the verdict form.

3. The Court's Targeting of Religiously Motivated Conduct.

In addition to ignoring the mandate of Proposition 51, by not allowing the jury to allocate fault to nonparties, the trial court also violated the Appellants' free exercise of religion protected by the First Amendment of the United States Constitution and its California counterpart. It is most certainly true that a church is not spared from complying with "a neutral, generally applicable law [which is] applied to religiously motivated action." (See *Employment Dept. of Human Resources of Ore. v. Smith* (1990) 494 U.S. 872, 881.) However, by holding that

only the Appellants could potentially be held liable for a failure to inform, *the trial court singled out the Appellants for special treatment* and did not follow a standard that is generally applicable to *all* potential tortfeasors, both named and unnamed. Instead, it specifically excluded from the jury's consideration the comparative fault of government entities and other nonparties (including the Plaintiff's parents), thereby impermissibly targeting only "religious conduct for distinctive treatment." (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 534.)

"The Free Exercise Clause 'protect[s] religious observers against unequal treatment,' . . . and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." (*Id.* at 542-543 [citation omitted].) That holding has no less effect when a court targets the failure to inform based upon information gathered during a communication that Appellants' Bible-based belief required to be held confidential, but at the same time exempts government officials and other individuals from a similar duty to inform when they became aware of the identical information.

To be sure, the trial court's rulings and jury instructions on duty and allocation of fault clearly targeted and substantially burdened Appellants' religiously motivated decision not to violate their beliefs on confidentiality by revealing a confidence to congregation members. That the jury was allowed to allocate fault for failure to warn

only to Appellants – the religious entities – and *not* to the governmental entities that knew of Kendrick's past sexual abuse, clearly demonstrates that those rulings and jury instructions were *not* neutral and generally applicable.

Protecting children from sexual abuse is certainly a compelling state interest. But where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (*Babalu*, *supra,* 508 U.S. at 546-547.)

The trial court's ruling imposed on Appellants a broad, virtually impossible duty to protect with a duty to warn. That duty was twofold. First, it essentially required Appellants to provide the children of all congregation members with 24-hours-per-day, seven-days-per-week protection from possible abuse by a rank-and-file congregation member, Kendrick. Second, it required Appellants to warn the congregation about Kendrick, when the elders did not even know whether he had been charged with, let alone convicted of, a crime. Yet disclosing information received in confidence from Kendrick, his wife, and stepdaughter would have violated Appellants' Bible-based religious beliefs, practices, and policies on confidentiality. (3 RT 222-223, 229-230, 243-244, 257; 4 RT 278-279, 284, 289,

422-423; 7 RT 906, 913; 937-938.) And even if it were possible for Appellants to warn, they would face the increased risk of lawsuits for breach of confidentiality, false light, invasion of privacy, and defamation.

Based upon the foregoing, the trial court's imposition upon Appellants of an unprecedented duty to protect with a duty to warn was an extraordinary burden on Appellants' religious beliefs, practices, and policies on confidentiality. It was *not* narrowly tailored and it was *not* the least restrictive means of achieving the state's interest. Revealingly, no law has been passed by the Legislature imposing upon religious organizations such a special duty to protect or warn, and the trial court similarly should not be allowed to impose that duty by judicial fiat.

In sum, the trial court violated Appellants' rights protected by the Free Exercise Clause of the First Amendment of the United States Constitution. Its rulings and jury instructions on duty and allocation of fault targeted religion, were underinclusive, were not neutral and generally applicable, were not narrowly tailored, and were not the least restrictive means to achieve the state's interest. As such, they cannot – and should not – be condoned by this Court.

The result is the same under the California Constitution, which states in relevant part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." (Cal. Const., art. I, § 4.) When a law substantially burdens a religious belief or practice, California's free exercise clause also requires strict scrutiny review. (*Catholic Charities of Sacramento, Inc. v. Superior Court*

(2004) 32 Cal.4th 527, 562.) Accordingly, for the same reasons discussed above, the Appellants' rights under the free exercise clause, Article I, section 4 of the California Constitution were similarly violated.

C. The Trial Court's Imposition Upon Watchtower of a Duty to Protect with a Duty to Warn Impermissibly Entangled the Jury in an Examination and Assessment of Watchtower's Religious Beliefs, Violating Fundamental Constitutional Principles.

1. Standard of Review: *De Novo.*

Whether Appellants' religious tenants should have been submitted as part of the jury instructions for negligence requires *de novo* review by this Court. (See *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1129.) This is especially true where those instructions impermissibly intrude upon constitutionally protected activities or interests. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6 [reviewing court's task is to determine *de novo* whether there is a reasonable likelihood the jury applied the trial court's remarks or instructions in an unconstitutional manner].)

2. Application to This Case.

Both the United States and California Constitutions prohibit the making of any law respecting the establishment of religion. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." (U.S. Const., 1st amend.) Similarly, the California Constitution provides

that "[t]he Legislature shall make no law respecting an establishment of religion." (Cal. Const., art. I, § 4.)

The California Supreme Court has recognized that significant Establishment Clause concerns arise when a court attempts to create a duty of care designed to govern religious practices and activities. For example, in *Nally, supra,* 47 Cal.3d 278, the High Court held that a duty should not be imposed on clergy when engaged in spiritual counseling, stating that "the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations. [Citation.]" (*Id.* at 298.) To that end, the *Nally* court reasoned:

> Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity. (*Id.* at 299.)

Thus, the California Supreme Court in *Nally* made clear that California courts must avoid becoming entangled in the religious beliefs and practices of clergy or religious organizations. Similarly the United States Supreme Court has long maintained that "civil courts exercise no jurisdiction" over disputes "which concern[] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them . . . ." (*Watson v. Jones* (1871) 80 U.S. 679, 733.) To that end, the High Court has

made abundantly clear that under the doctrine of "ecclesiastical abstention," it is beyond the purview of a secular court to evaluate matters concerning religious beliefs, practices, and internal government.

Despite those clear principles, the jury in this case was allowed to inquire into whether the Appellants properly adhered to their own religious tenets and beliefs in *not* warning the Plaintiff or other congregation members about Kendrick's prior sexual abuse of his stepdaughter. Thus, the trial court in this case impermissibly injected an examination of the beliefs, practices, and internal government of Jehovah's Witnesses. Maintaining the confidentiality of congregation members is a fundamental religious precept which Appellants believe is directly derived from Scripture. (3 RT 222-223, 230, 243-244, 257; 4 RT 278-279, 284, 289, 422-423; 7 RT 906, 913; 937-938.) But neither a court nor a jury may evaluate disputed evidence concerning adherence to the religious beliefs, practices, and internal government of Jehovah's Witnesses without becoming entangled in a religious controversy in violation of Appellants' First Amendment rights. (See *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 709.)

In this case, the trial court instructed the jury that Appellants had a duty to take reasonable protective measures "to protect" Plaintiff from sexual abuse by Kendrick. (8 RT 979-980; 9 RT 1011-1012, 1054; 5 AA 1239.) It also specifically allowed the jury to consider the "presence or absence of any warning" when weighing whether Appellants breached this duty to protect Plaintiff. (8 RT 987-988;

9 RT 1054; 5 AA 1239.) Thus, by those instructions, the trial court invited and encouraged the jury to determine whether Appellants' alleged failure to warn – which was motivated by Appellants' practice of their religious beliefs concerning the confidentiality of their congregation members – was reasonable or breached that duty. By giving those instructions, the trial court impermissibly required the jury to consider and evaluate many religious-oriented factors: (1) the Appellants' reasons for not warning; (2) the Appellants' religious beliefs, practices, and policies on confidentiality; and (3) the validity of the Scriptural basis for such religious beliefs and practices on confidentiality. It then further required the jury to evaluate and determine, in view of Appellants' religious beliefs, practices, and policies on confidentiality and the Scriptural basis therefore, whether Appellants acted reasonably or breached the court-imposed duty to protect the Plaintiff from sexual abuse by Kendrick.

But what standard of care was the jury to use in deciding whether the Appellants' conduct was reasonable? A Catholic standard? A Methodist standard? A Jewish standard? An Atheist standard? Such an inquiry and evaluation by the jury clearly fostered the very entanglement with religion the ecclesiastic abstention doctrine was meant to avoid, and required the jury to "necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity" (*Nally*, 47 Cal.3d at 299) in violation of Appellants' rights under the Establishment Clauses of the United States and California Constitutions. This

Court should conclude, as a matter of law, that the trial court's evaluation and examination of Appellants' religious tenets was an inquest that the trial court should have scrupulously avoided and that its failure to do so requires reversal of the trial court's judgment.

D. The Trial Court's Imposition Upon Watchtower of a Duty to Protect with a Duty to Warn Improperly Required Watchtower to Label a Person As a Sex Offender Even Though That Person Had Not Been Convicted of a Crime, in Violation of Constitutional Rights to Privacy, Liberty, and Due Process.

1. Standard of Review: *De Novo.*

As discussed above, whether a constitutional violation results from government action presents a question of law for this Court's *de novo* standard of review. (See *Board of Administration, supra,* 52 Cal.App.4th at 1127-1129.)

2. Application to This Case.

The trial court imposed a duty upon Appellants to warn members of the congregation that Kendrick had molested a minor once the North Fremont Congregation elders became aware of that molestation, *even though at that time Kendrick had neither been charged or convicted of any crime arising from that conduct.* That duty was imposed upon Appellants as a religious organization, yet even law enforcement authorities have not been authorized by the Legislature to disclose information about a person accused of child molestation in the absence of a criminal conviction.

The national standards for sex offender registration and notification were comprehensively revised when Congress enacted Title I of the Adam Walsh Child Protection and Safety Act of 2006 and the Sex Offender Registration and Notification Act (SORNA). (42 U.S.C. § 16901, *et seq.*) By definition, the federal government clearly limits the public dissemination of information about a sex offender to "an individual who was convicted of a sex offense." (42 U.S.C. § 16911, subd. (1).) Likewise, California's "Megan's Law" properly requires the systematic dissemination of information *only upon conviction* of specific Penal Code section offenses, and only then, after the defendant has had the procedural benefit of notice and an opportunity to be heard. (Pen. Code §§ 290, *et seq.*; see *In re Rodden* (2010) 186 Cal.App.4th 24, citing *People v. Cajina* (2005) 127 Cal.App.4th 929, 933.) To be sure, even a confession to the police does not authorize them to disseminate information regarding a child molester; a conviction is required. (Pen. Code § 290.46, subd. (a)(2).) Similarly, the California Legislature has delegated the duty of disseminating information and warnings to the public about sex offenders to law enforcement agencies, and *not* to religious organizations. (Pen. Code § 290.46, subd. (a)(1).)

North Fremont Congregation elders Abrahamson and Clark testified that in November 1993, congregation member Kendrick told them during religious counseling that he touched his 15-year-old stepdaughter's breast in about July 1993. (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.) However, at that time, Kendrick had not been convicted of any crime, as the police did not investigate Kendrick's sexual abuse of his stepdaughter until March of 1994. (4 RT 303, 307; 6 RT 646-649, 654-656; 8 AA 1983-1991.) Moreover, the congregation elders' *undisputed testimony* was that they were not told of Kendrick's conviction until 1998, which was at least two years after Kendrick had already abused the Plaintiff. (3 RT 193, 251; 4 RT 307-308, 410; 6 RT 742, 744.)

Thus, the trial court imposed a legal duty to warn, based upon the congregation elders' receipt of confidential information from Kendrick and his family about the incident with his stepdaughter, which clearly exceeded state warning or notification standards. Indeed, the California Legislature never contemplated imposing a duty on religious organizations that would violate the fundamental constitutional rights of citizens to privacy, liberty, and due process, and deprive citizens of procedural safeguards inherent in the judicial or adjudicatory process.

Moreover, a public notification scheme requiring religious organizations to label their congregants as child sex offenders based upon anything less than a criminal conviction would result in some citizens being stigmatized based on false or erroneous allegations of child sexual abuse. Such a notification scheme would violate citizens' fundamental constitutional liberty and due process protections, and would be directly contrary to the law. (*See Humphries v. County of Los Angeles* (2009) 554 F.3d 1170, 1186 ["being labeled a child abuser . . . is 'unquestionably

stigmatizing' [and] there is [n]o doubt . . . that being falsely named as a suspected child abuser . . . is defamatory"]; *Valmonte v. Bane* (2nd Cir. 1994) 18 F.3d 992, 1000 [finding a protectable liberty interest where listing on an abuse registry potentially damages reputation by branding as a child abuser]; *Bohn v. Dakota County* (8th Cir. 1985) 772 F.2d 1433, 1436, fn. 4 [reputation of parents were protectable liberty interests when found by county to be child abusers, exposing them to public opprobrium]; *Doe v. Poritz* (N.J. 1995) 662 A.2d 367, 419 [holding that the public notice provisions of New Jersey's Megan's Law triggered procedural due process protection under both the federal and state constitutions].)

Here, it was the trial court, rather than the Legislature, that imposed upon Appellants a duty to warn based upon something less than a criminal conviction. However, the creation of such duty is not validated because California's judiciary, rather than its Legislature, creates it. Whether created by the Legislature or the judiciary, the constitutional infirmity is identical. (*See BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 572 [equating "legislatively authorized fines" with "judicially imposed . . . damages"].)

In short, California's judiciary cannot require religious organizations (like Appellants) to do that which the State itself is constitutionally prevented from requiring. (See *Lebron v. National R.R. Passenger Corp.* (1995) 513 U.S. 374 [holding that it was impermissible for government to create a private corporation to evade its constitutional duty to abide by the First Amendment]; *West v. Atkins* (1988)

487 U.S. 42 [concluding that North Carolina could not contract with private physicians to attempt to avoid its constitutional duty to provide adequate medical treatment to prison inmates].) Yet by imposing upon Appellants a duty to warn congregation members that another congregation member had committed child sexual abuse in the past, even though the accused had not been convicted of any related crime, the trial court improperly exceeded legislative protocols that protect the fundamental constitutional rights of citizens to privacy, liberty, and due process protected by the United States and California Constitutions. Such a duty is not only impermissibly broad, it is also constitutionally infirm.

E. The Trial Court Improperly Allowed Plaintiff to Proceed Against Watchtower with a Claim for Punitive Damages Despite the Lack of Substantial Evidence to Support a Predicate Finding of Malice.

1. Standard of Review: Substantial Evidence.

Whether the Plaintiff proved the requisite malice by clear and convincing evidence to support an award of punitive damages is governed by the substantial evidence test. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 821.) Yet while that resolution of fact is within the sole province of the trial court, the question of whether "substantial evidence" supports the judgment is one of law within the province of the appellate court. (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1515-1516.) It is for this reason that in determining whether a judgment is supported by substantial evidence, reviewing courts may not defer to the

trial court's decision entirely. "[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336 [internal citations omitted].) Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial." (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872.)

Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585.) In short, substantial evidence is not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial. An appellate court need not blindly seize any evidence in order to affirm the judgment. Indeed, the Court of Appeal was not created merely to echo the determinations of the trial court. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.)

2. Application to This Case.

The Plaintiff's claim for punitive damages was based exclusively on her mischaracterization of Watchtower's July 1, 1989 letter to all bodies of elders, which Plaintiff's counsel repeatedly styled as a "policy of secrecy" with respect to child abuse. (3 RT 88-89, 98; 6 RT 764; 8 RT 956; 9 RT 1090-1091; 12 RT 1231-1234, 1239-1240.) *The Plaintiff offered no other evidence to support her assertion of malice.* Yet even affording that evidence the maximum weight to which it could be entitled, it is woefully insufficient to demonstrate malice, let alone by the requisite "clear and convincing" standard. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [malice sufficient to sustain an award of punitive damages requires "despicable conduct" in addition to "willful and conscious disregard" of the plaintiff's interests]; *Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal.App.3d 949, 958 [evil motive is a central element of malice]; see also, Civ. Code § 3294, subd. (a).)

Specifically, no witness testified that the July 1, 1989 letter was a "policy of secrecy." Watchtower's representative, Service Department elder Allen Shuster (7 RT 906), testified that this letter addressed "a variety of subjects . . . such as search warrants and subpoenas, crimes, criminal investigations, when serv[ants] and publishers move, lawsuits, the issue of confidentiality and also child abuse." (7 RT 923.) To enhance the protection of its worshippers' confidential communications, Watchtower wanted to emphasize to elders that they must follow the Bible's mandate

regarding confidentiality. (4 RT 278-279, 283-284; 7 RT 906, 913, 937-938.) Consequently, the primary thrust of the July 1, 1989 letter was to remind elders of Scriptural direction concerning confidential communications. (3 RT 226, 229-230; 4 RT 278-279, 284, 289, 422-423; 5 RT 535.) But that letter served another purpose, as it was also intended to help the elders, who are untrained in secular law, to protect victims of child abuse and comply with all applicable legal obligations they might encounter in the performance of their spiritual and congregation duties. (3 RT 255-256; 4 RT 424; 7 RT 924.) In pertinent part, that letter stated:

> Many states have child abuse reporting laws. When elders receive reports of physical or sexual abuse of a child, they should contact the Society's Legal Department immediately. *Victims of such abuse need to be protected from further danger.* (8 AA 1975 [emph. added].)

Notably, the content of that letter also harmonizes with trial testimony that Watchtower was concerned about the worldwide problem of child abuse and instructed elders to follow the law and to protect victims. And the elders involved in this case only confirmed that they followed the letter's instruction by calling the Watchtower Legal Department for legal advice regarding reporting obligations. (3 RT 154, 169, 241-242, 246, 255; 7 RT 880, 924.) In addition, those same elders testified that, pursuant to that policy, they informed victims and their parents that they had the *absolute right* to report an allegation of abuse to the authorities if they so desired. (3 RT 239-242, 250-251; 4 RT 293, 297, 302-303; 6 RT 707; 7 RT 880, 937.) Such counsel also comported with the October 8, 1993 issue of *Awake!,*

published by Watchtower, which similarly informed parents that some experts recommend reporting child abuse to the authorities to protect children. (3 RT 238, 242; 7 RT 922-923; 8 AA 2041.)

Watchtower's representative confirmed that Watchtower abhors child sexual abuse because it is an "egregious sin." (7 RT 915, 916.) Watchtower's expert, Monica Applewhite, Ph.D., testified that for an organization like Jehovah's Witnesses that does not separate children from their parents for religious instruction or other activities, the best method of protecting children is to give parents information about the prevalence of sexual abuse, the warning signs of abuse, the need for parents to protect their children, and how to meet that need. (7 RT 876-877.) Dr. Applewhite further opined that Jehovah's Witnesses have done an exceptional job in this regard from the 1970's through the 1990's. (7 RT 876-877, 896, 898.) In addition, Dr. Applewhite testified that, during the mid-1990's, Jehovah's Witnesses well exceeded the standard of care for educating parents about sexual abuse. (7 RT 879.) Moreover, she testified that the wording of Watchtower's policy on confidentiality in the July 1, 1989, letter to all bodies of elders closely mirrored the concerns expressed by other religious organizations and as reflected in the codes of ethics for the National Association of Social Workers, the American Counseling Association, and Child Welfare League of America. (7 RT 881-882.)

In short, all evidence adduced at trial regarding the July 1, 1989 letter demonstrated *the absence of any malice, despicable conduct, evil motive, recklessness, or wickedness on the part of Watchtower.* There was no evidence that Watchtower was deliberately indifferent to victims of abuse, whereas there was testimony that Watchtower was concerned for such victims, and balanced such concerns by countervailing, yet reasonable Scriptural direction about protecting confidentiality. On the other hand, to support her claim of malice, the Plaintiff relied exclusively on the July 1, 1989 letter, which through colorful and repeated arguments was characterized by her counsel as some nefarious plot to keep child sexual abuse secret. But as this Court is surely aware, argument of counsel is not evidence. (See CACI 5002 ["What the attorneys say during the trial is not evidence. . . . What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence."].) Counsel's characterization of the July 1, 1989 letter does not change its substance and is not sufficient to demonstrate malice, especially by a heightened clear and convincing standard. (*Hoch v. Allied-Signal Inc.* (1994) 24 Cal.App.4th 48, 60-61; see also *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 482 [scrutinizing the substantiality of the evidence proffered on the issue of malice to determine it would not satisfy the higher "clear and convincing" evidentiary burden required for a finding of malice].)

F. The Amount of Punitive Damages Awarded Against Watchtower Was Excessive As a Matter of Law, Especially Where the Plaintiff's Stated Purpose in Seeking Those Damages Was to "Change Watchtower's National Policy," Violating Watchtower's Due Process Rights.

1. Standard of Review: *De Novo.*

As our Supreme Court has confirmed, appellate review of whether the amount of punitive damages is so excessive as to violate due process is *de novo.* (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172-1183 ["we are to review the award *de novo*, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. . . . This exacting appellate review is intended to ensure punitive damages are the product of the application of law, rather than a decisionmaker's caprice"] [citations and internal quotations omitted].)

2. Application to This Case.

As Watchtower has previously explained, there was an utter absence of malice demonstrated at trial. Therefore, its conduct was not reprehensible at all, let alone enough to support even the remitted punitive damages amount of $8,610,000 fashioned by the trial court as part of its ruling on Watchtower's new trial motion. (7 AA 1936-1940.) Moreover, although Watchtower maintains that both the Plaintiff's compensatory and punitive damages awards are each excessive in their own right, Watchtower does not simply claim that the *ratio* of compensatory damages to that

award of punitive damages is beyond constitutional limits. (See *State Farm Mut. Auto Insurance Co. v. Campbell* (2003) 538 U.S. 409, 425; *Simon, supra,* 35 Cal.4th at 1182-1183.) Rather, Watchtower asserts that the compensatory award, comprised mainly of general damages, itself is so astronomically high that it likely already contained a punitive element. (*Simon, supra,* 35 Cal.4th at 1182-1183.)

But what is equally (and perhaps more) troubling about the excessive punitive damages awarded in this case is that they appear to include an award for *harm to others*, and not just the harm alleged in this case by the Plaintiff. Indeed, at all times, the Plaintiff's stated purpose for pursuing punitive damages was to effect "a change in Watchtower's national policy" purportedly expressed in its July 1, 1989, letter to all bodies of elders in the United States.[3] Yet the United States Supreme Court has repeatedly held that seeking punitive damages for that purpose is improper. (*BMW of North America, supra,* 517 U.S. at 585 ["While each State has ample power to

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[3] For example, during his opening statement, Plaintiff's counsel referenced Watchtower's July 1, 1989 letter and stated: "The governing body, through this policy, had made a determination that its own needs would be placed above protection of children and an indifference to children like Candice who were placed at risk by the presence of known sexual abusers within the congregations and the secrecy that surrounded it. That is what this case is about." (3 RT 98.)

During the trial, the Plaintiff testified that she told the elders she wanted to change Watchtower's alleged "policy of secrecy" and that she would not have brought this lawsuit had Watchtower agreed to change its policy, referring to Watchtower's July 1, 1989 letter. (6 RT 764-765.)

And in closing arguments, the Plaintiff's counsel argued that punitive damages were necessary to effect a change in Watchtower's policy of secrecy, again referring to the July 1, 1989 letter. (9 RT 1090-1091; 12 RT 1231.)

protect its own [citizens], none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation"]; *State Farm, supra,* 538 U.S. at 420-421 [award of punitive damages reversed where plaintiff used case as a platform to expose and punish defendant for perceived deficiencies in its national operations; "as a general rule . . . a State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction"]; *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353-354 [clarifying that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . *i.e.,* injury that it inflicts upon those who are, essentially, strangers to the litigation"].)

By admittedly using punitive damages as a device to "change national policy," the Plaintiff asked the jury to do what the United States Supreme Court has emphatically declared cannot be done: to punish a defendant for injury or alleged harm that it may have inflicted upon "strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at 353-354.) The trial court did so without allowing Watchtower any "opportunity to defend against the charge" by showing why one victim's case (the Plaintiff's) is different from another's (all others she asserted have been harmed, or might be harmed in the future, by Watchtower's alleged "conspiracy of silence"). (*Ibid.*) Even though the trial court ultimately reduced the jury's punitive damages award from its original amount of $21,000,001 (a breathtaking sum

awarded exclusively against Watchtower), the fact remains that allowing any punitive damages to be awarded in this case for harm caused to any other alleged "victims" added "a near standardless dimension to the punitive damages equation." (*Id.* at 354.) How many such victims are there? How seriously were they injured? Under what circumstances did their injuries allegedly occur? "The trial will not likely answer such questions as to nonparty victims [and] [t]he jury will be left to speculate." (*Ibid.*) Nothing the trial court did in reducing that punitive damages award to $8,610,000 could answer those critical questions either.

It is clear from the record that Plaintiff used her punitive damages claim to punish Watchtower with the goal of changing Watchtower's purported *national policy* expressed in its July 1, 1989 letter to all bodies of elders in the United States. Based upon the reasoning and holding of the United States Supreme Court decisions in *BMW*, *Campbell*, and *Philip Morris*, doing so was clearly improper and violated Watchtower's due process rights. Thus, the punitive damages award of $8,610,000 must be reversed and vacated in its entirety.[4]

[4] Pursuant to Rule of Court 8.200, subd. (a)(5), Watchtower 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 the North Freemont Congregation.

V.

CONCLUSION

Based upon the foregoing, Watchtower respectfully requests this Court to reverse all aspects of the Judgment and Amended Judgment rendered in this matter by the trial court, and to direct that a new judgment be entered in Watchtower's favor on all of the Plaintiff's claims. Alternatively, Watchtower asks this Court to order that a new trial be held on those claims and that the trial court give complete and proper instructions on duty, allocation of fault, and mandatory reporting.

Respectfully submitted,

WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC., LEGAL DEPARTMENT
Mario F. Moreno, Esq.
(*Pro Hac Vice Pending*)

BOUDREAU WILLIAMS LLP

Date: 03/20/13

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

Pursuant to the California Rule of Court, Rule 8.204, subd. (c), I certify that the foregoing brief is proportionally spaced, has a typeface of 13 points, is double-line spaced, and based upon word count feature contained in the word processing program used to produce this brief (Microsoft Word 2010), contains 15,352 words.

Date: 03/20/13

Jon R. Williams

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, WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC.**
2) **JOINT APPELLANTS' APPENDIX (8 Vols.)**

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 **Brief + Appendix**	*Attorney(s) for Plaintiff and Respondent: Jane Doe*
James M. McCabe, Esq. The McCabe Law Firm, APC 4817 Santa Monica Avenue, Suite B San Diego, CA 92107 **Brief + Appendix**	*Attorney(s) for Defendant and Appellant: Fremont California Congregation of Jehovah's Witnesses, North Unit*
Hon. Robert McGuiness Alameda County Superior Court 1221 Oak Street, Dept. 22 Oakland, California 94612 **Brief only**	*Trial Court*
Supreme Court of California 350 McAllister Street San Francisco, CA 94102 **Brief only 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