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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

JANE DOE,

Plaintiff,

v.

THE WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a corporation; FREMONT CALIFORNIA CONGREGATION OF JEHOVAH'S WITNESSES, NORTH UNIT, a California corporation; JONATHAN KENDRICK, an individual; and ROES 1 to 10,

Defendants.

Case No.: HG11558324

DEFENDANTS WATCHTOWER AND NORTH FREMONT CONGREGATION'S CONSOLIDATED REPLY IN SUPPORT OF MOTIONS FOR JNOV AND NEW TRIAL

Date: August 13, 2012
Time: 8:30 a.m.
Dept.: 22

*****COURT LOSES JURISDICTION TO RULE ON 08/27/12*****

TRIAL DATE: May 21, 2012

I. INTRODUCTION

A thorough review of Plaintiff's opposition to Defendants' consolidated JNOV/New Trial motions reveals that Plaintiff still has not identified one shred of evidence of "malice" on the part of Watchtower to support the jury's punitive damages award. Plaintiff, for all intents and purposes, admits this fact by arguing in her opposition that the jury simply chose to ignore or disbelieve the defense witnesses when they explained the purposes of Watchtower's letter of July 1, 1989 to all bodies of elders. Plaintiff produced no other evidence on the subject of "malice." Plaintiff thus relies wholly on the July 1, 1989 letter, but by no stretch of the imagination can that letter provide evidence of malice, much less clear and convincing evidence of malice

In a similar vein, Plaintiff's opposition does nothing to disprove that her clear and oft-repeated purpose in seeking punitive damages against Watchtower was, and still is, to change Watchtower's alleged national "policy of secrecy" about child sexual abuse. The evidence is undeniable that Plaintiff's overriding theme for this case was to change Watchtower's national policy. Plaintiff herself succinctly stated in her mandatory settlement conference statement that there could be no settlement of this case until Watchtower changed its policy. Plaintiff's attempt in her opposition papers to deny this unconstitutional and improper intent is completely disingenuous.

The jury found Watchtower liable for 27% of Plaintiff's non-economic damages or $1,854,900, when added to the $130,000 in economic damages equates to liability for compensatory damages of $1,984,900. Plaintiff fails to refute the cases that clearly hold that the ratio of punitive to compensatory damages against a defendant should be based on that defendant's percentage of liability for compensatory damages. Here, the jury's punitive damages award in a ratio of more than 10.5 to 1 thus is clearly constitutionally excessive.

To exclude certain non-parties from the special verdict form was prejudicial error, as was the failure to instruct the jury of the fact that clergy or ministers were not mandated reporters during the time period relevant to this case. The defense motions should be granted.

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II. DISCUSSION

A. The punitive damages award against Watchtower must be vacated because Plaintiff presented no evidence at trial of alleged malice to support the jury's punitive damages verdict, much less clear and convincing evidence of malice.

Plaintiff devotes almost five pages of her opposition to the issue of whether there was clear and convincing evidence of malice to support the jury's verdict on punitive damages. In those five pages, Plaintiff does not identify *any* evidence admitted at trial that would support that finding. Plaintiff instead largely argues that the jury had the right to reject defense witnesses' testimony regarding the interpretation of the July 1, 1989 letter to all bodies of elders. (*See* Plaintiff's Memorandum of Points and Authorities ("Pl's Opp.") at 1:21 – 6:10.)

The *only* trial testimony cited by Plaintiff to support the punitive damages award is certain testimony by her expert witness, Anna Salter, Ph.D. (*See* Pl's Opp. at 3:6-7, which cited to Dr. Salter's trial testimony [Ex. 7 to Mr. Simons' Declaration] at 54:25-56:21 and 61:14-65:3.) Specifically, the testimony of Dr. Salter cited by Plaintiff was that "the Jehovah's Witnesses" did not meet what Dr. Salter considered to be the "applicable standard of care for organizations who [*sic*] sponsor or promote activities that involve adults and children together in their handling of the Jonathan Kendrick report of abuse in 1993[.]" (Simons Decl., Ex. 7 at 61:14 -62:17.) However, a careful review of Dr. Salter's testimony shows that she testified only about standard of care issues. At no time did she testify about the issue of malice, nor did any of her testimony justify the jury in drawing any inference of malice against Watchtower.

Therefore, Dr. Salter's testimony does *not* provide *any* evidence of "malice" on the part of a managing agent of Watchtower, as the term malice was defined in the jury instructions, and her testimony certainly does *not* meet the requisite "clear and convincing evidence" standard. For example, Dr. Salter did not testify, and no reasonable inference can be drawn from her cited testimony, that the alleged failure to meet what she considered to be the standard of care was done with "malice." She never testified that Watchtower "acted with intent to cause injury or that [the] conduct was despicable *and* was done with a knowing disregard of the rights or safety of another." (CACI 3948 [italics added].)

The jury instructions also defined "despicable conduct" as "conduct so vile, base, or contemptible that it would be looked down on and despised by reasonable people." (*Id.; see also College Hosp., 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].) Here, Dr. Salter's cited testimony also fails to provide clear and convincing evidence of such "despicable conduct." (*See Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 909-10 [punitive damages award against multiple defendants reversed where the record failed to establish clear and convincing evidence of conduct that could be described as "despicable," even where the conduct at issue amounted to bad faith]; *see also Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 174-75 [directed verdict for defendant on plaintiff's punitive damages claims affirmed where there was no clear and convincing evidence of fraud, *i.e.*, no clear and convincing evidence that defendant "intended to deprive [the plaintiff] of his property rights, or otherwise cause injury."].)

Once again, Plaintiff is left with the only evidence she offered to support her claim for punitive damages - the letter of July 1, 1989. The clear and undisputed language of that letter instructed elders to contact the Watchtower Legal Department for advice about their legal obligations and to protect victims from any further harm. That is Plaintiff's only evidence of alleged "malice" on the part of Watchtower. Yet obviously, that letter alone is not sufficient evidence of malice, much less "clear and convincing" evidence of malice.

Plaintiff's opposition also argues that the jury could "infer" from that letter of July 1, 1989, that Watchtower's policy was to avoid lawsuits. However, Plaintiff had the burden to present "clear and convincing" evidence of malice by Watchtower, not mere speculation from which the jury is required to draw inferences.

Plaintiff clearly failed to meet her high burden of proof for punitive damages. Accordingly, JNOV must be granted in favor of Watchtower, and the punitive damages award must be vacated in its entirety. Alternatively, if, *arguendo*, the Court should deny the motion for

JNOV on this issue, Watchtower is entitled to a new trial on punitive damages because there was no clear and convincing evidence of malice on the part of a managing agent of Watchtower.

B. The punitive damages award must be vacated because it is unconstitutional to award punitive damages to change Watchtower's national policy.

Before, during, and even after trial, Plaintiff openly and repeatedly argued that Watchtower's alleged "policy of secrecy" (*i.e.*, the July 1, 1989 letter to all bodies of elders) should be changed to protect *not only* Candace Conti *but also* other possible victims of alleged child abuse. In fact, Plaintiff's mandatory settlement conference statement (Schnack Decl. at Ex. J) very pointedly stated that the case was not subject to settlement until Watchtower's policy was changed "to allow parents, children, law enforcement, and congregation leaders (to) be notified of known sex abusers practicing their predatory evils on unsuspecting children and families."

Plaintiff goes on to argue that *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, prohibiting a state from imposing economic sanctions on violations of its laws with the intent of changing the tortfeasor's lawful conduct in other states, is inapplicable to this case. Plaintiff submits that *BMW* does not apply because her expert, Dr. Salter, opined that the conduct of Watchtower did not meet the standard of care. Therefore, Plaintiff asserts that Watchtower's conduct was unlawful in all states. However, no court in the United States has found that Watchtower's alleged conduct is unlawful. Furthermore, other than this Court, no court in the United States has found that Watchtower has a duty to warn congregation members of the past sexual abuse committed by a rank-and-file congregation member. Thus, if this Court allows the punitive damages award against Watchtower to stand, it will unconstitutionally sanction Watchtower, knowing that the punitive damages were based on Plaintiff's intent to change Watchtower's lawful conduct. Indeed, doing so would be the equivalent of California imposing its policies on the entire United States.

Plaintiff correctly quotes from *Johnson v. Ford Motor Company* (2005) 35 Cal.4th 1191: "Nothing the high court [*i.e.*, the U.S. Supreme Court] has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and

evaluate the defendant's harm to the plaintiff in isolation." (*Id.* at p. 1207.) Under *Johnson*, an examination of "corporate" policies goes to the reprehensibility "guidepost" when evaluating punitive damages claims.

However, Plaintiff's citation to and reliance on *Johnson* is misplaced here, because in this case Plaintiff's counsel did *not* argue that the jury should look at the national policy as evidence of Watchtower's alleged reprehensible conduct toward Plaintiff. Instead, Plaintiff's counsel repeatedly argued that Watchtower's alleged "policy of secrecy" should be *changed*, referencing *other alleged victims*. For example, in Plaintiff's motion for leave to amend her complaint to include alleged facts supporting a punitive damages claim, Plaintiff states: "[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*." (Schnack Decl., Exh. K at 11:25, 12:6-7) (italics added.) Plaintiff's counsel expressly used the plural "children," obviously staking out the position that punitive damages are proper because of the alleged policy of secrecy's effect on *children other than Plaintiff*. Similarly, during opening argument at trial, Plaintiff's counsel argued "[t]he governing body, through this policy, had made a determination that its own needs would be placed above the 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 . . . and [t]hat is what this case is about." (*Id.*, Exh. A at 41:15-21) (italics added.) Again, Plaintiff argued the connection between the alleged national policy and *other alleged victims*, not just the effect the alleged national policy had on this particular Plaintiff.

Finally, Plaintiff makes no secret that Plaintiff's oft-stated goal in making these connections is to change Watchtower's policy. While Plaintiff is correct that there was no evidence of other victims based on the Court's granting of a defense motion *in limine* to exclude such evidence, Plaintiff's counsel's arguments to the jury strongly suggested, and allowed the jury to infer, that such other victims exist. In other words, Plaintiff undeniably sought to recover punitive damages based on alleged harm to children other than herself, which violates Watchtower's constitutional due process rights.

Again, it is abundantly clear that Plaintiff's purpose was to effect a change in Watchtower's alleged national "policy of secrecy" and that she intended to do so through a large punitive damages award. However, the U.S. Supreme Court has repeatedly held that such a purpose is constitutionally improper, as discussed in Watchtower's original memorandum of points and authorities in support of the motions for JNOV and new trial. The punitive damages award must be vacated. Alternatively, if, *arguendo*, the motion for JNOV on this issue should be denied, Watchtower is entitled to a new trial on the punitive damages issue because an award of punitive damages to change national policy is unconstitutional.

C. To the extent the Court does not grant JNOV and vacate the punitive damages award, a new trial should be ordered because the punitive damages award is excessive.

In her opposition, Plaintiff erroneously states that Watchtower's argument regarding the ratio of punitive to compensatory damages is not supported by law. (Pl's Opp. at 14:26 – 15:20.) Specifically, Plaintiff incorrectly argues that the proper ratio for calculating punitive damages is "[t]he ratio of *total* compensatory damages suffered by the Plaintiff is correct and Constitutional measure of disparity, not the ratio to the individual defendant's proportionate share of non-economic damages." (Pl's Opp. at 15:2 – 4) (italics added.)

The decision of the First District Court of Appeal in *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68 is instructive and, indeed, controlling, because there the appellate court held that, while a low percentage of liability does not affect the defendant's degree of reprehensibility when calculating punitive damages, the low percentage of liability does "reduce the amount of compensatory damages with which the amount of punitive damages is compared, when considering the ratio between the two." (*Id.* at p. 87.) The Court of Appeal in *Bankhead* affirmed a 2.4 to 1 ratio of punitive damages to compensatory against the defendant, and *when calculating the ratio, the court used only the defendant's share of compensatory damages.* (*Id.* at pp. 88–90.) Therefore, contrary to Plaintiff's contention, when calculating the ratio of punitive damages to compensatory damages awarded in the instant case, this Court is required to use the net compensatory damages awarded to Plaintiff against Watchtower rather than the entire amount of compensatory damages awarded against all defendants.

Here, the jury found Watchtower 27 percent liable for the alleged harm to Plaintiff. Therefore, Watchtower's share of the non-economic damages awarded is 27 percent of $6,870,000, or $1,854,900. Adding in the $130,000 in economic damages awarded by the jury (because economic damages are joint and several), the net amount of compensatory damages for which the jury found Watchtower liable is $1,984,900. Under *Bankhead*, it is that amount "with which the amount of punitive damages is compared, when considering the ratio between the two." (*Id.*) Therefore, because the jury awarded Plaintiff $21,000,001 in punitive damages against Watchtower, the ratio of punitive damages to compensatory damages in this case exceeds 10.5 to 1, which on its face is a constitutionally excessive ratio.

An important factor in determining whether an award of punitive damages falls within a constitutionally permissible ratio when compared to compensatory damages is whether the compensatory damages awarded include a punitive element. In *Bankhead*'s discussion of the range of constitutionally permissible ratios, the Court of Appeal cites to *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 718-19, to explain that a jury's substantial award of emotional distress damages already includes a punitive element and, therefore, the maximum constitutionally permissible ratio in *Roby* was 1 to 1. (*Bankhead*, 205 Cal.App.4th at p. 88.)

As noted above, in *Bankhead* the jury awarded punitive damages in a ratio of 2.4 times the amount of compensatory damages; *Bankhead* was a personal injury asbestos case in which the net compensatory damages awarded to the plaintiff against defendant/appellant ArvinMeritor was $1,845,000 with a punitive damages of $4,500,000. The Court of Appeal in *Bankhead* commented that the defendant "ArvinMeritor's conduct was highly reprehensible." (*Id.* at p. 90.) *Bankhead* further held that the gross award of $2,500,000 in non-economic damages to the plaintiff "is high enough that it appears to include a punitive component. The inclusion of a punitive element in emotional distress damages reduces the permissible ratio of punitive to compensatory damages." (*Id.*, citing *Roby v. McKesson Corp., supra*, 47 Cal.4th at 718-20). *Bankhead* then affirmed the 2.4 to 1 ratio of punitive damages to the net compensatory damages awarded against ArvinMeritor. (*Bankhead, supra,* 205 Cal.App.4th at p. 90.)

In the instant case, the fact that the vast majority – over 98 percent - of compensatory damages were for non-economic damages ($130,000 in economic damages versus $6,870,000 in non-economic damages) demonstrates that the jury clearly included a punitive element in the non-economic damages, as held by *Roby* and *Bankhead*. Indeed, even if one considers only the net non-economic damages awarded against Watchtower of $1,854,900, it still demonstrates a punitive element in the non-economic damages awarded by the jury. Thus, it is beyond dispute that the more than 10.5 to 1 ratio of punitive damages to compensatory damages awarded against Watchtower is constitutionally impermissible. Under *Roby* and *Bankhead*, the constitutionally permissible ratio for the instant case would be a ratio of one-to-one up to 2.4 to 1, and it necessarily follows that an award of punitive damages, if any, constitutionally cannot be more than the range of $1,894,900 up to $4,547,760.

Therefore, a new trial is warranted to cure the grossly and constitutionally excessive award of punitive damages against Watchtower. Also, for the reasons discussed in Defendants' opening brief on the motions for JNOV and new trial, should the Court find the punitive damages and/or the non-economic damages awarded in this case excessive and order a new trial solely on the issue of damages, Defendants request remittitur pursuant to Civil Code section 662.5(b) and ask the Court to reduce the punitive and non-economic damages awards to amounts the Court independently determines to be fair and reasonable.

D. The failure to instruct the jury that clergy or ministers were not mandated reporters during the relevant time period was prejudicial error.

Plaintiff's opposition fails to even address the particular testimony of Dr. Salter that misled and confused the jury about whether clergy or ministers were mandated reporters under California law during the relevant time period. As cited in Defendants' opening brief, Dr. Salter's testimony was ambiguous at best, if not disingenuous, and Dr. Salter did indeed suggest that clergy *were* mandated reporters in 1993. (Schnack Decl., Exh. D at 71:3 – 72:15.) Dr. Salter said the mandated reporting law as it read in 1993 "*Didn't exclude ministers or clergy*." (*Id.* at 71:19-25) (italics added.) Further, when asked a second time to admit that "clergy and ministers were not required to report until January 1 of '97 in California," Dr. Salter

responded, "Clergies [*sic*] and *ministers were not singled out. I think there was a question about whether the case law applies to them.*" (*Id.* at p. 72:9-14) (italics added.)

Thus, Dr. Salter was allowed to mislead and confuse the jury, particularly because the Court's duty instruction to the jury included reference to the presence or absence of any warning about Jonathan Kendrick by the North Fremont Congregation elders. The confusion created by Dr. Salter could have been avoided by giving Defendants' requested instruction on mandated reporting, which made clear that clergy were not mandated reporters until January 1, 1997.

Plaintiff's counsel only further compounded the jury's confusion and misled the jury by arguing during closing that they had heard two expert opinions regarding whether the North Fremont Congregation elders were mandated reporters in 1993 and that there was thus a question about whether the elders had a duty to report Kendrick to the authorities. Specifically, Plaintiff's counsel argued to the jury in pertinent part as follows: "the question about the laws and mandated [] reporting and there is questions back and forth about, and you have heard two experts testify about that." (*Id.*, Exh. F at 107:6-10.) This clearly misled the jury for two reasons. First, Plaintiff's counsel knew that there was no question on this legal issue because the law clearly did not make ministers or clergy (or elders) mandated reporters in 1993. Second, contrary to Plaintiff's counsel's argument that the jury had heard two experts testify about this question, a careful review of all the testimony in this case confirms that Defendants did not present any testimony on this issue because the law was clear: *elders were not mandated reporters in 1993*. The only expert testimony on this issue was the confusing and misleading testimony of Dr. Salter which erroneously, if not disingenuously, suggested that the elders were mandated reporters in 1993. Defendants' expert did not testify on this subject at trial.

Further, Plaintiff cannot have it both ways, saying in her opposition that Dr. Salter did not create confusion and then arguing in closing that there was an alleged question between the experts about whether the elders were mandated reporters, especially when the law was clearly contrary to Dr. Salter's testimony on this issue. The requested instruction would have made it clear to the jury that clergy – the elders - were not mandated reporters in 1993. Thus, the failure to give the requested mandated reporter instruction created prejudicial error.

E. The failure to allow the jury to allocate fault to non-parties was prejudicial error.

The undisputed evidence established that in February and March 1994, the Fremont Police Department, Child Protective Services, and the Alameda County District Attorney's Office had the same, if not *more*, information concerning Jonathan Kendrick's touching of his step-daughter in July 1993 than the North Fremont Congregation elders obtained in November 1993. Further, the evidence was undisputed that the Fremont Police Department and Child Protective Services knew that Mr. Kendrick attended the North Fremont Congregation. Despite having that information, and despite those governmental agencies having the responsibility to protect minors, those agencies took no steps whatsoever to warn congregation members about Kendrick. As discussed in Defendants' opening brief, there was ample evidence from which the jury could have allocated fault to those entities. The failure to allow the jury to even consider whether to allocate fault to any or all of them is prejudicial error that requires a new trial.

Further, if Plaintiff's evidence at trial was to be believed, one or both of her parents, Neal and Kathleen Conti, allowed Kendrick to: (a) improperly and forcibly hug her and forcibly sit her on his lap at the Kingdom Hall numerous times; and (b) allow Kendrick to take Plaintiff from the Kingdom Hall to his home after Sunday services hundreds of times from 1994 to 1996, where he would sexually abuse her. As noted in the opening brief, Plaintiff even testified that Kendrick abused her in her father's presence on an Amtrak train. For those reasons, among others, there was ample evidence from which the jury could have allocated fault to one or both of Plaintiff's parents. The failure to allow the jury to even consider whether to allocate fault to either them is prejudicial error that requires a new trial.

III. CONCLUSION

For each of the independent and alternative reasons discussed in Defendants' opening brief and in this reply, the Court should grant Watchtower's motion for JNOV on punitive damages, as well as Defendants' motions for new trial and request for remittitur.

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DATED: August 9, 2012

JACKSON LEWIS LLP

By _____
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Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc.

DATED: August 9, 2012

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PROOF OF SERVICE
JANE DOE v. WATCHTOWER, et al.

CASE NO. HG11558324

I am employed in the County of Sacramento, State of California. I am over the age of 18 and am not a party to the within action; my business address is 801 K Street, Suite 2300, Sacramento, California 95814.

On August 9, 2012, I served the following document(s) described as **DEFENDANTS WATCHTOWER AND NORTH FREMONT CONGREGATION'S CONSOLIDATED REPLY IN SUPPORT OF MOTIONS FOR JNOV AND NEW TRIAL** on all interested parties to this action as follows:

☒ by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **BY MAIL:** By placing a true copy thereof in a sealed envelope addressed as above, and placing it for collection and mailing following ordinary business practices. I am readily familiar with Jackson Lewis LLP's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposition for mailing in affidavit.

☐ **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to be delivered to _____ for delivery to the above address(es).

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

☐ [Federal] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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

Lori Gilmette

SERVICE LIST
JANE DOE v. WATCHTOWER, et al.

CASE NO. HG11558324

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