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COURT OF APPEALS
STATE OF WASHINGTON
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No. 67645-8-I
COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

N.K., and individual proceeding under pseudonym,

Appellant,

v.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF
JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole
registered to do business in the State of Washington, et al.,

Respondents.

OPENING BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

This appeal ultimately presents one question of substantive law and one question of evidence. On the law, the question is: does an organization that voluntarily assumes responsibility for the care of children in the course of its social programs create a special relationship with those children such that the organization has a duty to protect or warn the children of the risk of child molestation by its agents or third parties, particularly when the organization knows that molestation is a consistent and ongoing problem in the program? The evidentiary issue is related: is a plaintiff entitled to discovery into a church's non-privileged documents to determine if the church was aware of the risk of molestation in one of its children's programs, even if it had no knowledge of a particular perpetrator's danger? Both of these questions turn on whether Washington law allows liability to be imposed against an entity when the entity knows of the danger of sexual assault posed to children by the proverbial "darkened room," even if there is arguably no notice of danger from an individual. Here, the Boy Scout program is that "darkened room"—secretly known for decades to be a refuge for child molesters.

In this case, agents of Defendant-Respondents the Church of Jesus Christ of Latter-day Saints ("LDS" or "Church"), the Boy Scouts of America ("BSA"), and the Pacific Harbors Council of the Boy Scouts of

America (“PHC”) (hereinafter collectively “Defendants”) allowed a complete stranger—a “drifter” in Defendant BSA’s words—to assume sole control over a church Boy Scout Troop, despite the fact that these Defendants had the right to fully control the operation of that program, and despite knowing that molestation was a consistent risk in their closed society. The risk was known to the Boy Scouts because they knew from the 1930s, and at least by the 1950s, that approximately 60 child molesters (with multiple victims apiece) were discovered *each and every year* in Scouting, and because they kept detailed records on each of these abusers, including their methods, traits, and habits leading to the molestation. It is uncertain what the LDS Church knew, because the trial court refused to allow non-privileged discovery into the topic, though the Boy Scouts asserted the Church failed to follow the policies they had in place to protect kids when they allowed the “drifter” (or “flim-flam man” as their Scoutmaster described him) to volunteer as a Scout leader and hold Scout meetings in his apartment without any other adults present. For its part, the LDS Church claimed BSA had no such policies.

For over 50 years, Washington law has unquestionably recognized that negligence can be based on an organization’s failure to remedy the risk of third party sexual assault when the organization voluntarily assumes the care of the child, and when the risk is within a general field of

danger that can be reasonably anticipated. By keeping records of abusers and their methods, the Boy Scouts should have reasonably anticipated molestation, and warned N.K. against it or fixed this broken program.

At summary judgment, Defendants relied on their own internal policy technicalities to distance themselves from the abuse in this case, by claiming that they never “officially” approved the abuser’s taking unsupervised charge of the Scout troop. These arguments ignore Defendants’ complete right to control participation in Scouting, the fact that molestation was a well-known risk inherent in the Scouting program, and the fact that the Church violated the minimal policies that BSA had in place to protect children. The trial court agreed, erroneously, that N.K. needed to show the organizations had specific knowledge of the perpetrator’s particular danger in order to impose liability.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to Defendants based on Defendants’ purported lack of prior knowledge of a particular danger from the individual abuser. The trial court further erred by failing to recognize that a dangerous condition or program under the control of Defendants was a valid source of liability under Washington’s “generalized field of danger” test for foreseeability regarding a third party’s criminal act found in *McLeod v. Grant County Sch. Dist. No. 128*,

42 Wn.2d 316, 321-22, 255 P.2d 360 (1953). Given N.K.’s evidence of the significant and consistent risk of molestation in the Scouting program—to the tune of 60 molesters discovered per year, every year for decades—the conduct in this case was unquestionably within “the range of expectability” that made such danger foreseeable, and it certainly could be “reasonably anticipated” by Defendants. This is particularly true where LDS claimed BSA had no systems to protect children from abuse, while BSA claimed it had such policies and procedures but LDS violated them.

2. The trial court erred in concluding the Scout Defendants had no duty to protect N.K. from Hall because it ignored the special relationship between them and N.K., and it failed to recognize the special relationship between the Scout Defendants and Hall. These special relationships existed because they invited to N.K. to participate in Scouting, they controlled the actions of troop leaders, they had complete control of adult participation in Scouting, and they gave LDS authority to use unregistered adults, like Hall, as Scout volunteers.

3. Even if knowledge of a particular abuser’s danger is necessary for liability, the trial court erred in construing evidence of prior notice of the abuser’s danger here in favor of the moving parties/Defendants, by ignoring conflicting evidence of a report that the abuser was dangerous prior to the last instance of N.K.’s abuse.

4. Finally, the trial court erred in preventing N.K. from obtaining discovery from LDS regarding its knowledge and handling of child sexual abuse, including its knowledge that sexual predators were using its Boy Scout program to target and sexually abuse children.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. N.K. was sexually abused by a man whom the LDS church allowed to lead a Boy Scout troop. The man was not well-known to any of the church members, he had only recently moved to the area, and the official troop leader thought him suspicious from the start. Defendants also knew the Scouting program, despite being a closed-access program, had for many decades enabled child molesters to gain access to boys for purposes of sexual abuse. Knowing of this danger then, can the risk of molestation as a matter of law be viewed as “so highly extraordinary or improbable as to be wholly beyond the range of expectability”? If molestation was foreseeable, did Defendants then have a duty to warn Scouts and their families about the danger of child abuse in Scouting, to monitor and enforce protective policies and training related to adult interaction with boys, and/or to forbid unregistered individuals from participating in Scouting and enforce that prohibition? Did these duties still exist where the abuser was never formally registered as a troop leader,

and/or the Defendants were unaware of a prior history of abuse by the perpetrator? (Assignment of Error 1).

2. BSA invited boys to participate in Scout activities away from their parents under the sole supervision of the adults selected or allowed by BSA, and BSA fully and ultimately controlled the participation of adults in Scouting, including unregistered adult volunteers. Under these circumstances, did BSA develop a special relationship with N.K. and Hall such that there is a duty to warn of, or remedy, known or reasonably anticipated dangers such as the risk of molestation by volunteers? (Assignment of Error 1, Assignment of Error 2).

3. There is conflicting evidence whether Defendants received notice through their agents that a Scout volunteer had abused Scouts in the Troop. A witness first testified that he provided notice of the abuser's conduct in May of 1977 (well before the last instance of N.K.'s abuse), and the parties agree the abuser did not leave town until another report of abuse around September of 1977. The witness then changed his story, testifying the abuser left town "within two or three days" after he warned the Defendants. In light of this conflicting evidence, is there a question of material fact about when the Defendants received notice of the abuser's dangerous proclivities precluding summary judgment, even if particularized notice is required? (Assignment of Error 3).

4. N.K. alleged LDS knew or should have known of the danger of child sexual abuse, including abuse by Scout volunteers, but failed to protect him from that danger. Under these circumstances, should LDS be required to account for its knowledge and handling of child sexual abuse, including abuse by Scout volunteers?

IV. STATEMENT OF THE CASE

This child abuse case centers around a “drifter”¹ (Dustin “Dusty” Hall, a/k/a Dusty Rhodes, hereinafter “Hall”), who was allowed to assume leadership of a local Mormon church’s Boy Scout Troop by the agents of Defendants. The nominal Scoutmaster of the troop, a man appointed by the Church and approved by the Scouts, testified he never trusted this drifter “from the get-go.” Yet the Scoutmaster nevertheless allowed Hall to take sole charge of the troop only a month or so after Hall arrived in town. The official Scoutmaster was not trained in child abuse recognition or prevention when he allowed Hall to assume command of his troop.

At the same time, BSA knew from its “ineligible volunteer” files that its Scouting program often attracted unrelated single men who sexually abused Scouts, and from at least the 1950s onward, nearly 60 abusers were discovered in Scouting yearly—each and every year over the

¹ “Thirty-three years ago, a drifter named Dusty Hall (“Hall”) came to Shelton, Washington and stayed for a few months.” CP 1113. Perhaps realizing the inherent risk in allowing a “drifter” to lead a Boy Scout Troop alone, BSA has not used the term since its original summary judgment motion.

course of decades—a course of conduct resulting in thousands of Scouts being abused. Indeed, the mere existence of this system of tracking child molesters shows BSA knew the danger from allowing strangers to supervise boys was more than reasonably anticipated, it was expected by BSA and had to be prevented. As might be expected from this history, the “drifter” sexually abused many boys—including N.K.—before being discovered, and then leaving in the dark of night.

A. Procedural History

This case was dismissed on summary judgment motions filed by BSA and LDS. Clerk’s Papers (“CP”) 702-25; 1035-1055. PHC joined in BSA’s motion. CP 892-895. N.K. supplied a joint response, and Defendants each filed a reply. CP 1111-1159; 1763-1769; 1770-1779. Defendant Pacific Harbors Council’s Joinder to BSA’s Reply in Support of its Motion for Summary Judgment and Reply, Supplemental Clerk’s Papers (“SCP”) ___. At oral argument, the trial court ruled in favor of the Defendants and dismissed all of N.K.’s claims.

In finding for BSA and PHC (the “Scout Defendants”), the trial court ruled “there [are] no issues of fact regarding the claim ... that they had no knowledge ... [that] Mr. Hall [was in] any way connected with the Boy Scouts.” Verbatim Report of Proceedings (“RP”) 25. The trial court also found there was no special relationship between the Scout Defendants and N.K., and found they had no knowledge that Hall was a danger. *Id.*

In finding for LDS, the trial court agreed a question of material fact exists regarding whether LDS had a special relationship with N.K. through Scouting. *Id.* at 25-26. However, the trial court determined it was “going to grant the motion for summary judgment based solely on the fact that ... the church was not put on any notice” of danger posed to Scouts by Hall. *Id.* at 26-27. The court stated the law as “generalized knowledge [of a dangerous situation] is not sufficient; there has to be specific knowledge ... of this particular individual’s proclivities[.]” *Id.* at 27. The trial court did not address N.K.’s proffered facts showing prior notice to Defendants of Hall’s specific danger to children, or BSA’s assertion that LDS violated the policies it had in place to protect N.K. *Id.*

The trial court had earlier refused to allow N.K. to discover whether LDS knew of the danger of childhood sexual abuse, including the danger of volunteers using its Boy Scout program to molest children. N.K. filed four motions that asked the trial court to order LDS to account for its knowledge and handling of child sexual abuse, but each was denied.

B. Summary of Relevant Facts

1. The “Drifter” Rolls into Town, Twice—with Two Different Names.

In the spring of 1977, a new convert to the LDS Church, one Dustin Hall, arrived in the small town of Shelton, Washington. CP 963; CP 1041. Yet initially, this “drifter” was not even named “Dusty Hall”—

not at first. The official Scoutmaster of the Boy Scout troop for the local LDS “ward,”² Benjamin Danford, testified that when “Hall” initially showed-up, he went by the name of “Dusty Rhodes.” CP 1733. “Rhodes” left abruptly for a month and came back as “Dusty Hall.” *Id.* Despite Hall’s “personable” nature, Danford viewed Hall as a “flim-flam man.”³ This impression was cemented by Hall’s new surname, and by his “vague” description of “what he did, who he was, and where he came from.” CP 1736-37. Danford “didn’t have good feelings about him pretty much from the get-go.” CP 1738. Yet that did not stop him from allowing Hall to assume leadership of the ward’s Boy Scout troop, Troop 155.

Upon returning with his new name, “Hall” quickly ingratiated himself with the LDS community. He was a “Pied Piper” that “[a]ll the kids liked[.]” CP 1220. Some boys thought he was “the greatest.” CP 1261. N.K.’s parents thought Hall was friendly and well-liked in the ward. CP 968; CP 1171; CP 1179. Some boys picked up on the oddness of this behavior, calling it “creepy” by “constantly trying to engage us boys and ... get too familiar with us.” CP 1270. Another called Hall “weird and touchy feely with me and the other boys.” CP 1282.

² “A “ward” is a LDS Church congregation with 300-600 members within a geographic boundary. There is a bishop for each ward who has ecclesiastical authority over the members.” *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 455 n.3., 167 P.3d 1193 (2007). By way of context, a ward is roughly equivalent to a Catholic parish, and the “bishop” is the administrative head.

³ *I.e.*, a con artist.

As detailed below, those same boys are part of nearly a dozen witnesses who testified that the creepy drifter/flim-flam man was openly allowed to lead the ward's Boy Scout troop, and the ward's leadership knew as much because they appointed him to that position.

2. N.K. Was Part of a Trusting Mormon Family Living in a Small Town.

The Shelton LDS ward was a "close, friendly group of people." CP 1210. N.K. joined its Boy Scout troop in 1976. CP 1039. N.K. and his mother believed Troop 155 was safe and they trusted its leaders:

It would have been inappropriate for [Hall] to spend time with our son if he had not been active in the church and a Scout leader of Troop 155. The only reason we allowed our son to participate in activities with him, including camping trips, sleep-overs, Scout meetings, and other Scout activities, is because he was active in the church and a leader of Troop 155. We felt comfortable with him because he was active in Troop 155 and one of its leaders.

CP 1364-66. The reliance and trust of N.K., his parents, and the other Scouts is understandable given that BSA promoted its Scout leaders as friends and role models for their Scouts. CP 1167; CP 1677-78.

Scouting was (and remains) an integral part of LDS life. It was the youth program for all LDS boys when they reached age 11. CP 1248; CP 1275. N.K. and other boys participated in Troop 155 because the church all but required its young males to participate in Scouting, and because the Defendants represented Troop 155 as a safe and fun place to learn skills

away from their parents. CP 1248; CP 1270; CP 1275; CP 1281; CP 1309. Everyone knew who the Scoutmaster was—it was a position of prominence and carried inherent credibility. CP 1249; CP 1263; CP 1270-71; CP 1276; CP 1282. It was this position that Hall would assume.

3. Hall Was At Least an “Assistant Scout Master” for the Troop, If Not Its De Facto Leader.

BSA admits that Ben Danford was the “selected, registered Scoutmaster for the LDS Shelton ward troop in 1977[.]” CP 1044. However, organizations like LDS had the authority under their agency with BSA to “choose to allow persons who are not registered to provide help to the registered Scout leaders[.]” CP 1401; CP 1665-66.

During the few months Hall was in Shelton, he was Troop 155’s *de facto* leader. Hall’s former girlfriend testified “his main hobby was Scouts.” CP 1219. Eleven witnesses testified he was openly known as the Scoutmaster, Assistant Scoutmaster, or Troop leader. CP 1174; CP 1180-81; CP 1188-89; CP 1192; CP 1213, 1220; CP 1233; CP 1249; CP 1257, 1259; CP 1271; CP 1276; CP 1282; CP 1290.

Even the “First Counselor” of the ward admitted its leaders, the Bishopric, voted to allow Hall to volunteer with the troop. CP 1314; *see also* CP 1304 (the Bishopric is the leadership of a ward, and consists of a Bishop, First Counselor and Second Counselor). BSA knew of all this

because the “LDS’s bishopric supervised the ward’s troop Scoutmaster, and was responsible for the troop itself.” CP 1039.

Hall was not simply hanging around a few Boy Scout events without Defendants’ knowledge or approval. Yet by all accounts, Hall was quite new to the community when allowed to assume control over N.K.’s Boy Scout troop. CP 1174; CP 1181; CP 1211.

Hall used his assumed role to gain access to N.K. Around April 1977, Hall introduced himself to N.K. as the troop Scoutmaster. CP 1179-80; CP 1186, 1194; CP 1197-98. Thereafter, Hall actively assumed the role of Scout leader, and he was given keys to the LDS building (the “Scout Cabin”) used for Scout activities. CP 1197-98. Many witnesses testified that Hall led meetings and sleepovers in the Scout Cabin, and N.K. recalls the Scouts “piling up by the cabin’s door, waiting for Hall to unlock it, and then letting us in.” CP 1198. Hall led other Scout outings, sleepovers, and campouts, including sleepovers at his apartment; helped the Scouts procure merit badges, pins, and awards; led the Scouts at the Tumwater Council Camporee in May of 1977; and, led the Scouts in their float for Shelton’s annual parade. CP 1174; CP 1180-81; CP 1188-89; CP 1213, 1220; CP 1233, 1236; CP 1249; CP 1257-59; CP 1271; CP 1276; CP 1282; CP 1290-91. Hall wore a Boy Scout uniform with patches that reflected his affiliation with Troop 155 and PHC. CP 1180; CP 1192; CP 1198; CP 1235.

It was not just the LDS ward community that thought Hall was the leader of N.K.'s troop. By June of 1977, the local newspaper reported that Hall created an award-winning float for Troop 155 and drove it in a local parade. CP 1357-58. After noting the float "was driven by Dusty Hall, who contributed the idea for the float[,]” the article goes on to say that “In April, Dusty Hall was named assistant scoutmaster.” CP 1358. The troop prepared the float, it was built on a truck obtained by Hall, and some of the Scouts rode in the cab of the truck with Hall. CP 1238; CP 1290-91.

Defendants suggest Hall was not a leader of Troop 155 merely because his name was not printed on the Troop's annual roster, and because Hall had not yet registered with BSA before he fled town. CP 1206. Defendants' own witnesses contradict this position by admitting the rosters and registrations for Troop 155 were only submitted at the end of the year and Hall was gone by September 1977. CP 1333. Moreover, the ward Bishop admitted that adults who volunteered with Troop 155 were only added if they were “perpetually” volunteering. CP 1342, 1344. The ward leadership, as well as former Scoutmaster Ben Danford, saw Hall participating in Scout meetings and the Bishopric voted to make him a Scout volunteer. CP 1198; CP 1282; CP 1313-14. The ward leadership knew Hall was involved with the troop during the time of N.K.'s abuse.

4. Hall Abused N.K. on Numerous Occasions, and Used His Role as a Troop Leader to Isolate and Molest N.K.

Hall sexually abused N.K. for the first time in April 1977, and would go on to abuse the boy another 20-30 times before September of 1977. CP 1187. At the time of the abuse, N.K. was twelve years old. CP 1361. As seen below, all of N.K.'s abuse is attributable to the Scout-Scoutmaster relationship created when Defendants' agents allowed Hall to assume leadership of Troop 155.

Hall first sexually abused N.K. within a few days after Hall introduced himself to N.K. as his Scoutmaster; Hall fondled N.K. while the pair watched television at N.K.'s home when his parents were gone. CP 1186. N.K. only allowed Hall in the house because Hall was his Scoutmaster. CP 1197. A few days later, Hall returned and abused N.K. a second time. CP 1187. Once the abuse started, N.K. was scared, embarrassed, and confused; he feared getting in trouble and feared Hall hurting his family. CP 1197.

Hall sexually abused N.K. on a regular basis over the following several months. The abuse occurred after Scout meetings at the Scout Cabin on church property or in the church parking lot, as well as at Hall's apartment during Scout activities. CP 1187-91. For instance, the Scout troop had a sleepover at Hall's apartment, and Hall made N.K. sleep in Hall's bed rather than in his sleeping bag, and molested him there. CP 1187-88. The abuse of Scouts was not limited to N.K., and sometimes

occurred when more than one boy was with Hall, on Scout campouts and other overnight Scout activities. CP 1174; CP 1180-81; CP 1187-88, 1193; CP 1220; CP 1236; CP 1257, 1259; CP 1291-92. Hall was allowed to take these boys on overnight trips without any other adult present.

5. The Boy Scout Defendants Knew that Scouting Posed a Concrete Risk of Molestation by Scout Volunteers.

As early as 1935, BSA recognized that it had a problem with child molesters using Scouting to abuse boys. In 1935, the head of the Boy Scouts explained in the New York Times that BSA had begun a list of child abusers in 1920, and by 1935, there had been approximately 1,000 abusers discovered in Scouting—approximately 67 abusers per year. CP 1368. Between 1960 and 1977, BSA documented at least 935 separate abusers, approximately 52 per year. CP 249-51. These numbers are not complete because BSA destroyed files of molesters who died or were too old to participate in Scouting. CP 247-48. For a historical view, it bears note that from between 1965 to 1985, BSA still has records on 1,123 discovered child molesters. CP 249-51. BSA knew it had a child molester problem in its ranks, and it created the “Red Flag” or “Ineligible Volunteer” (IV) files to track these abusers, knowing they would attempt to re-enter Scouting. Indeed, the Scout Defendants *admitted* they had to implement practices “to protect youth in Scouting programs from the risk of sexual abuse.” CP 1371; CP 1378.

By 1976, BSA knew that its system was inadequate to properly exclude abusers. Yet BSA refused to warn troop-level Scouting personnel that molestation was a danger, and consequently, individual troop leaders were not trained to watch for signs of abuse. CP 1740, 1744, 1746, 1752. Further, “BSA’s experience usually [had] been that the Scout executive learns of improper conduct only after the individual in question has dropped out of Scouting or has been removed by the responsible local BSA chartered organization.” CP 1422. Nevertheless, BSA decided to keep this problem “personal and confidential” because “of the misunderstandings which could develop if it were widely distributed”—in other words, BSA concealed the danger of molestation to protect its reputation. CP 1415. BSA issued its 1972 and 1976 Procedures to address internally the problem of sexual abuse by adult volunteers, CP 1698, but it never analyzed the patterns in its files so it could change its practices to better protect Scouts like N.K. CP 1674, 1681-82; CP 1712.

An extremely small percentage of the Perversion files from just the 1970s demonstrate the very patterns that the Scout Defendants could have seen, had the Scouts bothered to use this data they so carefully collected:

- (1) 1970 – Scout volunteer who was 24 years old, single, and with no children sexually molested three Boy Scouts in their sleeping bags on three different occasions: twice on Scout campouts and once in the abuser’s house the night before a Scout campout.

- (2) 1971 – Scout volunteer who was 22 years old sexually molested a Scout while at the victim’s home.
- (3) 1972 – Scout volunteer who was 20 years old, single, and with no children sexually molested three Scouts.
- (4) 1973 – Scout volunteer was convicted of fondling three Scouts in a hotel room while teaching them First Aid.
- (5) 1973 – Scout volunteer fondled three Scouts in his home.
- (6) 1974 – Scout volunteer arrested for fondling a Cub Scout.
- (7) 1974 – Scout volunteer who was 35 years old, single, and with no children sexually molested three Scouts. Earlier complaints had been ignored.
- (8) 1975 – Scout volunteer tried to fondle Scouts during a lesson on night stalking at a Boy Scout camp.
- (9) 1975 – Scout volunteer at a Boy Scout camp tried to fondle the genitals of Scouts at night. Sprayed mace and beat the Scouts when they tried to fight back.
- (10) 1976 – Scout volunteer arrested for molesting Scouts.
- (11) 1977 – Scout volunteer and eventual Scoutmaster, who attended Scout meetings for several months before registering and was known as the Troop mascot, arrested for child molestation, including oral sex.

CP 1432-1581. Despite these and hundreds of other examples, BSA could show no change to their practices to account for it.

As N.K.’s expert testified, the Scout Defendants knew of the need to change their practices, but they failed to do so before N.K. was abused.

CP 1587-89. For example, they knew the majority of Scouts were sexually abused in “one on one” situations, but they did nothing to stop it. *Id.*; CP 1699; CP 1712-13; CP 1716. According to Paul Ernst, BSA’s most knowledgeable person on its use of the ineligible volunteer files from 1950 into the 1980s (CP 1686-88):

(1) “Protecting youth is the main reason” for the ineligible volunteer files. He studied them “very carefully” because “that’s what these files were there for, was to protect youth, to keep people from registering who shouldn’t be registered.” CP 1690, 1699-1700; CP 1705-06.

(2) Likewise, Ernst’s job “was to try to prevent these people from being involved in scouting again and hurting any other youth.” CP 1716.

(3) BSA “dealt with them all the time” because “every decision we made on anything was related to the safety of scouts. That was our most important job.” CP 1691.

(4) BSA knew between 1972 and 1978 that adult leaders were sexually abusing Scouts, but it was not “something [they] considered very heavy.” CP 1695.

(5) BSA knew from its files that the majority of sexual abuse occurred in “one on one” situations, but BSA never shared that information with anyone else. It also never reviewed the ineligible volunteer files to see if its informal “two-deep” policy was working, even though BSA knew that policy was needed to protect Scouts from abuse. CP 1699-1700; CP 1713, 1716, 1718.

Despite knowing of the patterns of danger and means by which that danger could be avoided, the Scout Defendants chose to do nothing, and allow the rape and molestation of young boys to continue.

6. There Was No Dispute that the Bishopric Members and Scoutmaster Danford Were Agents of Defendants, and Defendants Entirely Control Scout Participation.

The Defendants relied on their own internal policy technicalities to distance themselves legally from Hall, by claiming some sort of “official” appointment was needed before they can be held liable for Hall’s participation as a Scout leader. LDS argued that because its formal “calling” process was not used, then it could not be liable for what Hall did as a Scout leader. CP 1772-73. BSA and PHC asserted that because Hall was not formally registered with BSA, then they could not be liable for what Hall did as a Scout leader. CP 1765-66. Neither of these factual situations explains how Defendants’ complete right to control the content of and participation in Scouting is supplanted when their agents allow a stranger to take control of a group of boys.

Instead, Scoutmaster Danford and the Bishopric members were the agents of all of the Defendants, these agents had the right and duty to exclude adults from the Scouting program, and the Defendants retained the absolute right to control who participated in Scouting. The members of the Bishopric ran the ward on behalf of LDS and were undeniably agents of the Church. DP 1304. BSA admitted that it had the “obvious”

right to set the standards for Troop 155, its leaders, and volunteers. CP 1040; CP 1416-18. In arguing to the United States Supreme Court that BSA had a right to exclude homosexuals from leadership positions, the Court noted the Scouts' "official position":

"Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

"A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership." App. 453-454.

Thus, at least as of 1978—the year James Dale entered Scouting—the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders.

Boy Scouts of Am. v. Dale, 530 U.S. 640, 651-52, 120 S. Ct. 2446, 2453, 147 L. Ed. 2d 554 (2000). Defendant BSA argued as a matter of constitutional right that it alone had the right to determine its membership.

As a practical matter, Defendants completely controlled who was allowed to participate in N.K.'s troop. "BSA could accept or reject the registration of any leader or boy at its discretion. BSA and/or the Tumwater Council also provided training and education regarding how the Scouting program was to operate." CP 1643-44. In turn, BSA "expected each local scouting unit to select and manage its leadership, and to submit, for all its adults ... [including] those participating in significant activities

... registration applications to the appropriate council,” which would “review the application, request additional information if needed, and then forward the applications to BSA, which would check the names of the applicants against those names in the I.V. files.” CP 1388-89, 1397-98.

Ultimately, BSA decided who could volunteer with Troop 155. CP 1719-20. BSA instructed Danford and LDS to select the “the best available volunteers” who were “of good character,” and BSA instructed Danford and LDS on how they were supposed to safely run Troop 155. CP 1399; CP 1599. As BSA admitted, Danford was “its selected, registered Scoutmaster,” BSA made Danford and LDS responsible for N.K.’s safety, and BSA made Danford and LDS supervise the troop on its behalf. CP 1044; CP 1134-37; CP 1621-22; CP 1732, 1735, 1749.

One of the ways that Scouts were supposed to be protected was by having two adult leaders present at all Scout activities, but LDS did not follow that policy with Hall. CP 1134-35; CP 1399; CP 1716, 1718.

BSA retained the right to control LDS’s action (or inaction) with respect to allowing adult participation in Scouting. LDS claimed its practices were “those set forth by BSA.” CP 1642; CP 1675. BSA and PHC, on the other hand, claimed LDS violated those policies:

Had it come to the knowledge of BSA and PHC that Darrell “Dusty” Hall was holding meetings for Troop 155, BSA and PHC would have discouraged such conduct. ...

Had it come to the knowledge of BSA and PHC that Darrell “Dusty” Hall was holding sleepovers at his home for Troop 155, BSA and PHC would have discouraged such conduct.

CP 1141; CP 1371; CP 1377-78. If BSA and PHC could “discourage” behavior by the local troop, they had the right to control the troop leadership that was allowing Hall to lead the troop. In fact, as BSA personnel testified, “the [church] ... worked for the local council” and the local council “would report to the National Council.” CP 1694.

In the end, BSA consented to the Church’s conduct, as shown by its collecting fees from N.K., the Church, and the rest of Troop 155 as a way to pay for its operating expenses. CP 1199; CP 1324-25; CP 1678.

7. Defendants’ Agents Received Warning that Hall was Molesting Boys in May of 1977.

Prior to the “Tumwater Council Camporee” in May 1977, a Scout in Troop 155 informed fellow Scout Daniel Cowles that Hall had sexually abused him. CP 1249. Cowles took this information to a member of the Bishopric, but nothing was done. *Id.* Cowles asserts it was *definitively prior to May 1977*, because he was threatened at the May 1977 Camporee for disclosing the information. *Id.* Hall remained a leader of Troop 155. *Id.* Hall continued molesting N.K. and other boys after this disclosure.

Months later, in September 1977, Hall’s fiancée informed Bishop Anderson that Hall was sexually abusing her son. He assured her the church would “take care of it because he was an assistant Scoutmaster”;

Bishop Anderson called a meeting with the parents of Scouts and told them of the allegations. CP 1173-74, 1175; CP 1206. Hall disappeared from Shelton the very next morning in *September*. CP 1172.

In the second declaration of Mr. Cowels, which LDS obtained after his first declaration was submitted in response to their summary judgment motion, he said that Hall left “[w]ithin two or three days” after he told the Bishopric. CP 1809. This second account cannot be squared with the above timeline, or with other evidence in the record. Yet the trial court did not address this prior notice issue in its decision.

8. The Trial Court Prevented N.K. From Obtaining Discovery on the Church’s Knowledge and Handling of Child Sexual Abuse, Including Abuse by Scout Volunteers.

N.K. alleges LDS (1) knew or should have known of the danger of childhood sexual abuse, (2) knew or should have known that sexual predators were using their Boy Scout program to target and abuse children like N.K., and (3) failed to take reasonable steps to protect him from that danger. CP 6-7. LDS denied these allegations. CP 13.

To prove his theory of the case, N.K. sought discovery regarding LDS’s knowledge and handling of sexual abuse prior to his abuse, including abuse by Scout volunteers. CP 499-504; CP 508-11; CP 523-24; CP 532-41. N.K. filed no less than four motions to compel LDS to account for this information, but each was denied.

N.K. initially noted a CR 30(b)(6) deposition and asked LDS to produce a witness to testify about these subjects. CP 180-81. LDS moved for a protective order, CP 164-74; CP 379-385, and N.K. opposed it. CP 207-219. The trial court granted the motion, concluding information regarding LDS's knowledge and handling of child sexual abuse was not discoverable, was unduly burdensome, and/or was privileged. CP 413-14. Though it included no findings of fact, the order prevented N.K. from asking about anything prior to 1975 and limited N.K. to discovery "specific to the complaint herein." CP 414. N.K. moved for reconsideration, CP 419-33; CP 483-89, the Church opposed it, CP 470-475, and N.K.'s motion was denied. CP 461.

Six months later, N.K. moved to compel LDS to produce a CR 30(b)(6) witness "who will testify about [the Church's] knowledge and handling of child sexual abuse between 1975 and 1977, including whether it knew that sexual predators had a long history of using its Boy Scouts program to target and molest children." CP 566-78; CP 686-696. Alternatively, N.K. asked the trial court to order LDS to respond to his written discovery regarding the same subjects. CP 567.

In its response, CP 581-95, LDS admitted that "we agree that reports of sexual abuse *outside* the disciplinary council are not privileged," CP 588-89 (emphasis in original), and it admitted that it had records regarding sexual abuse from the years 1975-1977. CP 677. Despite those

admissions, the trial court denied N.K.'s motion. CP 700-01. It concluded information regarding LDS's knowledge and handling of child sexual abuse, including abuse by Scout volunteers, was protected by the state clergy-penitent privilege or the First Amendment, was irrelevant and not discoverable, and was not limited in scope to its prior orders. CP 701.

N.K. moved for reconsideration, noting he "has tried to get this information in just about every way, shape, and form possible, including two sets of written discovery and two CR 30(b)(6) depositions, but [LDS] has refused." CP 1093-1105. The trial court refused. CP 1958.

N.K. also filed a motion to compel written discovery from LDS "regarding its knowledge and handling of child sexual abuse between 1971 and 1977, including the files that it revealed for the first time in response to N.K.'s separate motion to compel a CR 30(b)(6) witness on this topic." CP 1810-21; CP 1952-57. N.K. explained his need for the evidence was highlighted by the issues raised in LDS's pending motion for summary judgment. CP 1811. For a third time, N.K. repeated that he "has tried to obtain this evidence in just about every way possible" but LDS refused to produce it, and he noted he was bringing the motion "to ensure he has made every possible effort to obtain evidence regarding COP's knowledge and handling of sexual abuse." CP 1811.

Before ruling on N.K.'s motion, the trial court granted LDS's motion for summary judgment. CP 1947-49. Then, after LDS filed its

opposition to N.K.’s motion to compel, CP 1928-41, the trial court denied the motion because it had granted LDS’s motion for summary judgment. CP 1988. N.K.’s summary judgment opposition brief explained he was unable to provide a full and complete response because LDS had “successfully resisted providing more evidence regarding that knowledge.” CP 1146.

V. ARGUMENT

A. **Standard of Review**

An order granting summary judgment is reviewed *de novo*. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 206, 11 P.3d 762 (2000). Summary judgment is proper only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). The court must view “the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party.” *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

B. **First Assignment of Error—Knowledge of a Dangerous Condition in a Youth Program is Sufficient to Impose Negligence Liability on Entities Controlling that Program.**

The trial court erred in finding that Defendants cannot be held liable for failing to protect N.K. from a “generalized” danger found in the Scouting program because such acts were not foreseeable absent knowledge of the particular perpetrator’s danger. Washington law is clear

that when one voluntarily takes charge of a child, that party must take steps to warn of reasonably anticipated risks within a “general field of danger,” or take steps to remedy any such danger. Washington has never provided defendants who are responsible for protecting children with immunity from generalized dangers of criminal activity just because the defendants are unaware of danger from a specific criminal. Rather, the Washington Supreme Court has stated that any such requirement would “unjustifiably restrict” a tort victim’s recovery. No subsequent precedent has curtailed this broad imposition of liability for dangerous conditions.

1. An Entity May be Liable for Reasonably Anticipated Third Party Criminal Acts Within a General Field of Danger.

Washington law does not permit a party to take charge of children and then ignore known dangers from potential criminal acts simply because crime itself is a rare occurrence. When common sense or a party’s knowledge would make one concerned about third party criminal conduct against a child under the party’s control, it is irrelevant whether there was any indication that the particular criminal was a danger to the child. Yet the trial court ruled that it is not reasonably foreseeable that allowing a stranger sole control of a group of boys might result in the man molesting them. Such a finding is not supported by the facts or the law.

“Foreseeability is normally an issue for the jury, [and] it will be decided as a matter of law where reasonable minds cannot differ.”

Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). In the central case involving a dangerous condition leading to the assault of a child, the Washington Supreme Court held that “intervening criminal acts may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon.” *McLeod*, 42 Wn.2d at 321.

a) ***McLeod Holds that Entities Can be Liable for Dangerous Conditions.***

In *McLeod*, the defendant school district argued it could not be held liable for failing to supervise children or secure a darkened, single-entry room under the bleachers because criminal conduct in the room could not be anticipated. The Court strongly disagreed. Rather, when some students used the room to isolate and gang-rape a younger student, knowledge of the individual rapists’ potential for danger was irrelevant:

Our attention is called to the fact that *there are no allegations that the two boys alleged to have raped appellant had known vicious propensities*. It is further asserted, as a matter of common knowledge of which we should take notice, that grade school children of both sexes play together without supervision and without resulting acts of rape. ...

It seems to us, however, that counsel unjustifiably restrict the issue when they ask us to focus attention upon the specific type of incident which here occurred—forcible rape. Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, *the question is whether the actual harm fell within a general field of danger which should have been anticipated*.

McLeod, 42 Wn.2d at 321–22 (emphasis added) (internal citations omitted). Even if Defendants are correct in ignoring N.K.’s evidence of prior warning about Hall, there is no need under *McLeod* for there to be any knowledge of Hall’s danger at all—the known and obvious danger of the Scouting program itself is enough to bring sexual abuse within the “general field of danger” needed for a jury to consider liability.

Further, the risk of third party criminal harm need not be likely—in fact it is just the opposite. “The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be ***unusual, improbable and highly unexpected***, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability.” *Id.* at 322 (emphasis added). The Court reversed summary judgment because foreseeability was a matter for the jury:

The general field of danger was that the darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency between school boys and girls. If the school district should have reasonably anticipated that the room might be so used, then the fact that the particular harm turned out to be forcible rape rather than molestation, indecent exposure, seduction, or some other act of indecency, is immaterial. Had school children been safeguarded against any of these acts of indecency, through supervision or the locking of the door, they would have been protected against all such acts.

Id. Under *McLeod* then, knowledge of a situation's danger is as compelling as knowledge of an individual's danger, at least where one has assumed control over the safety of a child, and ultimately whether such danger was foreseeable was a jury question. *Id.* at 324.

The *McLeod* court was also clear in stating that the compulsory nature of school attendance was not a determinative factor:

One who ... *voluntarily* takes the custody of another under circumstances such as to ... *subject him to association with persons likely to harm him*, is under a duty of exercising reasonable care so to *control the conduct of third persons as to prevent them from intentionally harming the other* ... if the actor ... knows or should know of the *necessity and opportunity* for exercising such control.

Id. at 320, *quoting* Restatement (Second) Torts, 867, § 320(b) (emphasis added). As noted above, BSA knew that child abuse happened consistently in Scouting,⁴ and it went so far as to create a sophisticated

⁴ BSA attempted to make some type of *de minimus* argument that the thousands of abusers discovered in Scouting were negligible considering the number of volunteers involved during these years. CP 1053. BSA claims that there were 18 million adult volunteers in Scouting in the six decades of Scouting before N.K.'s abuse. *Id.* Given that the numbers of abusers *discovered* per year was consistent between the 1920-1935 period and the 1965-1985 period (both periods showing approximately 60 abusers discovered per year), that would yield a total of 3,600 discovered abusers, for a rough annual percentage of abusers of 0.02%.

Placed in context, in 2008, there were approximately 800 million commercial airline passengers. http://www.faa.gov/about/plans_reports/media/flight_plan_2009-2013.pdf. If there were an equivalent number of passenger injuries in air travel as there were historically in Scouting, that would mean that *every year*, 160,000 people would be hurt or killed in airline accidents—a total of 492 fully loaded 747s, or 667 fully loaded 787 Dreamliners, per year falling from the skies or off runways. It is absurd to suggest that the public would not consider air travel unreasonably dangerous if this happened for even one year.

(though inadequate) tracking system to prevent just such occurrences, making the danger not only anticipated, but predictable and expected.

Neither the Defendants nor the trial court addressed *McLeod* in any way. Instead, they made the erroneous leap that because some Washington cases since *McLeod* have held that knowledge of an abuser's danger *permitted* liability when the abuser used a dangerous situation created by a defendant, this formed an affirmative limitation on the scope of an organization's liability for failing to remedy or supervise a dangerous situation. None of the Washington state court cases cited by Defendants stand for any such principle.

b) Other Washington Caselaw on Dangerous Conditions or Individuals.

In efforts to distinguish this case from *McLeod's* holding that liability can be based on knowledge of a dangerous condition, Defendants cite to *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 41, 929 P.2d 420 (1997); *Kaltreider v. Lake Chelan Cmty. Hosp.*, 153 Wn.App. 762, 224 P.3d 808 (2009), *rev. granted* 168 Wn.2d 1039 (2010)⁵; *Smith v. Sacred Heart Med. Ctr.*, 144 Wn.App. 537, 184 P.3d 646 (2008); *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn.App. 407, 167 P.3d 1193 (2007); and particularly on two federal

⁵ LDS below mistakenly cited this case as having been denied review.

district court cases decided on motions to dismiss: *Boy 7 v. Boy Scouts*, CV-10-449-RHW, 2011 WL 2415768 (E.D. Wash. June 13, 2011), and *Boy 1 v. Boy Scouts*, C10-1912-RSM, 2011 WL 1930635 (W.D. Wash. May 19, 2011).⁶ Yet none of these cases precludes liability when an institution ignores a known dangerous situation that results in third party harm to a child entrusted to the care of the institution.

C.J.C. stands for two significant propositions here. First, an organization creates a special relationship with children when it takes charge of them away from their parents. 138 Wn.2d at 721-22. Second, even abuse away from situations controlled by the organization can give rise to liability when the victim and perpetrator are brought into contact by the organization, or where the organization has reason to know the perpetrator poses a danger. *Id.* at 724 (there is “a duty to prevent intentionally inflicted harm where the defendant is in a special relationship with either the tortfeasor *or the victim*, and where the defendant *is or should be aware of the risk*”) (emphasis added). “The risk” identified in *C.J.C.* was posed by a known child molester, but *C.J.C.* in no way *limits* liability to situations where an individual is the danger. *See id.* at 727.

Significantly, *C.J.C.* reinforced a broad interpretation of the scope of liability in its core holding, expanding liability to abuse that took place

⁶ Both of these trial court orders are on appeal.

off-premises and outside of the agent's time and space of agency. *Id.* This holding cannot be squared with Defendants' crabbed interpretation of *C.J.C.* as limited to danger from agents alone, especially when *McLeod* makes apparent that liability can exist even where the organization has no knowledge of a third party's particular danger, nor any control over them.

Niece v. Elmview Group Home similarly holds that while liability can be predicated on prior knowledge of an abuser's danger, knowledge of a dangerous situation is no less a basis for liability. Rather, the high Court approvingly quoted this Court's earlier ruling in *Niece*, which stated, "there is no reason to differentiate between foreseeable harms **caused by potentially hazardous physical conditions (McLeod), visitors (Shepard) or staff.**" *Niece*, 131 Wn.2d at 62 n.4 (emphasis added). Indeed, the Court went further, holding that "a group home for developmentally disabled persons has a duty to protect its residents from **all** foreseeable harms." *Id.* at 47 (emphasis in original). This was because the adult residents were unable to defend themselves. Children share this inability to defend themselves against sexual predators. *C.J.C.*, 138 Wn.2d at 726. Thus, no difference exists in basing liability on a known dangerous individual or known dangerous condition, under both *Niece* and *McLeod*.

Similarly, *Kaltreider*, *Smith*, and *Doe* nowhere purport to hold that liability can **only** be predicated on knowledge of an individual's danger. *Kaltreider* involved an adult alcohol treatment patient who consensually

commenced a sexual relationship with a nurse. 153 Wn.App. at 764. The two had sexual contact at the facility, and arranged to meet after the plaintiff's discharge. *Id.* When the nurse balked, the plaintiff sued. *Id.* The patient was an adult of sound mind, there had been no prior misconduct by the nurse, and there was no argument that the treatment program fostered sexual assaults by the staff, so this Court upheld summary judgment for the facility. Still, this Court noted that “[i]n determining whether sexual misconduct by a staff member is foreseeable, ***this court may look to whether there were prior sexual assaults at the facility*** or by the individual in question.” *Id.* at 767 (emphasis added).

Smith also involved adults, though they were psychiatric patients. 144 Wn.App. at 540. Even so, they claimed no mental or physical disability that would have triggered a duty of care for those unable to care for themselves such as that found in *Niece* or *McLeod*. *Id.* at 545-46. Moreover, the abuse occurred after the patients were discharged and after the perpetrator had been removed from his job. *Id.* at 541. It is therefore not surprising that no liability was found in *Smith*—discharged adults engaging in consensual sex with a former employee was not activity within the control of the facility. But *Smith* cannot be seen as binding in a case involving a minor placed in a dangerous situation controlled by Defendants, and not warned about known dangers.

Finally, *Doe* involved a directed verdict on a negligence claim by a girl abused by her stepfather against the LDS Church for fostering a relationship between her mother and her eventual stepfather—a man who sexually molested her after marrying her mother.⁷ 141 Wn.App. at 407. The plaintiff alleged the Church had a special relationship with her as a child member and a consequent duty to protect her from abuse. *Id.* at 445. However, there was no evidence the Church had anything to do with *Doe*'s mother meeting the man who was to molest her. *Id.* Nor did the Church know of any dangerous situation over which they had any control, or of the stepfather's potential for danger. *Id.* In short, *Doe*'s denial of negligence liability bears almost no factual resemblance to this case.

Contrast these Washington state cases with the Washington federal district court's interpretation of Washington law found in *Boy 1*, C10-1912-RSM, 2011 WL 1930635, and *Boy 7*, CV-10-449-RHW, 2011 WL 2415768. In both cases, which are on appeal, the complaints were dismissed on FRCP 12(b)(6) motions for failure to state a claim. In *Boy 1*, the district court found that abuse in Scouting was not foreseeable because even though "BSA had been made aware of thousands of instances of sexual abuse taking place within their organization ... Washington has yet

⁷ This Court in *Doe* nevertheless upheld the verdict for the claim of outrage against the Church where their bishop failed to report the stepfather to law enforcement after the plaintiff told him that her stepfather was touching her. *Doe*, 141 Wn.App. at 432 ("Bishop Hatch's advice caused emotional distress ... , and, in fact, prevented her from seeking further help in stopping the abuse").

to impose liability on a church for the abuse of a member of the congregation at the hands of a church worker absent evidence that the church knew or should have known of that worker's deviant propensities.” *Boy 1*, 2011 WL 1930635, *6. But that is true only in the most superficial of senses: *McLeod* involved a school, not a church. The control alleged in *Boy 1* (“over-night outings, camping events, and trips away from parents,” *id.* at *5) is indistinguishable from the control a school exercises over students, and *McLeod* takes pains to note that special relationships are formed when an entity voluntarily takes control of children. *McLeod*, 42 Wn.2d at 320.

Because the federal cases were decided on pleading motions, it is particularly odd that *Boy 1* began its discussion of foreseeability with an assumption of a special relationship, but then distinguished the dangerous condition case of *Niece* because of the lack of the very relationship it says that it is assuming. *Boy 1*, at *7 (“Absent specific allegations that Plaintiffs were unable to avail themselves of their ordinary source of protection, and were relying entirely on BSA, specifically, for protection when the abuse occurred, the reasoning of *Niece* is inapposite”). Likewise in *Boy 7*, liability based on foreseeability was rejected because “Plaintiff has not alleged that he was in BSA’s custody or that BSA had control over the premises when the alleged abuse occurred.” *Boy 7*, 2011 WL 2415768, *3. Yet N.K. has presented facts of precisely such custody and

control here. N.K. has produced evidence that he was in Scouting, under Defendants' complete control and protection, when at least some of the abuse occurred. *Niece* is not inapposite in this case, and applying the holdings of *Boy 1* and *Boy 7* to this case cannot be sustained under any view of Washington foreseeability law.

Washington law makes no distinction between knowledge of a dangerous individual and knowledge of a dangerous condition when one has taken responsibility for caring for children or others incapable of protecting themselves. N.K. was abused by a man who Defendants allowed to assume a position of trust in two organizations for which N.K. was supposed to have the deepest respect, obedience, and trust. Hall used his position to isolate N.K. and molest him during Scout activities. While LDS asserted the Scout Defendants were negligent for not warning them or telling them how to protect N.K., and while the Scout Defendants asserted LDS was negligent for ignoring their policies that did exist, the trial court ignored their finger pointing and concluded Defendants bear no responsibility for allowing a "drifter" to take sole charge of the young boy. This was fundamental error and the trial court should be reversed.

2. Child Molestation in Scouting Was Unquestionably Anticipated, and Defendants Had Taken Several Inadequate Steps to Prevent Such Acts.

As discussed above, a party that cares for children must safeguard them from known or reasonably anticipated danger from third party

criminal acts, irrespective of whether the caregiver knows of a particular perpetrator's danger, and irrespective of whether the caregiver wields any direct control over the third party. *McLeod*, 42 Wn.2d at 321-22. In another case, "evidence of numerous crimes taking place on [a college] campus each year ... prevents a ruling that [a forcible rape] was unforeseeable as a matter of law." *Johnson v. State*, 77 Wn.App. 934, 943, 894 P.2d 1366 (1995). Indeed, it was eminently foreseeable here that child molesters would resort to Scouting to acquire victims.

The record shows that roughly one child molester per week was discovered in Scouting for decades upon decades. For nearly threescore years prior to N.K.'s abuse, approximately one molester was discovered in Scouting per week, 52 weeks a year, for each of those years. Throughout the two decades leading up to N.K.'s abuse, the same approximate number of molesters was discovered, a number now recognized as incomplete because of deaths and age. These were not simply "bad years" or fluke occurrences, this was a constant, obvious problem with the Scouting program—a problem such that a system was created to prevent child molesters from re-entering elsewhere.

In other words, the Scout Defendants knew that Scouting was so tempting to child molesters that unless steps were taken against that "general harm," the molesters would simply enter Scouting in another locale. Molestation was the acme of "reasonably anticipated" conduct

here. And “foreseeability is a question for the jury unless the circumstances of the inquiry are so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 193, 252 P.3d 914 (2011) (citations and internal quotation marks omitted)

C. Second Assignment of Error—Defendants Created a Special Relationship with N.K. and Hall by Inviting N.K.’s Participation in Scouting and by Exercising the Right to Control the Participation of Adults in the Program.

To impose liability against an entity where a third party commits an intentional or criminal act, “a special relationship [must] exist[] between the defendant and either the third party or the foreseeable victim of the third party's conduct.”⁸ *M.H.*, 162 Wn.App. at 190 (internal quotation omitted); *see also Niece*, 131 Wn.2d at 43 (same).

The trial court erred in concluding the Scout Defendants had no duty to protect N.K. because it ignored the special relationship that existed between them and N.K. During and after Scout meetings alone with Hall, on Scout trips, and on trips with others that were arranged because of Scouting, N.K. was in the custody and control of the Scout Defendants and their agents. N.K. relied on those agents to safeguard him during Scout activities. This relationship, alone, created a duty to protect N.K.

⁸ At oral argument, Defendants’ counsel attempted to argue that the imposition of duty would require a special relationship between the entity and both the perpetrator *and* the victim. Such a theory has no support under Washington law.

from reasonably anticipated third party criminal conduct. *C.J.C.*, 138 Wn. 2d at 320 (an entity that voluntarily takes custody of a child has a duty to protect the child from reasonably foreseeable harm).

Moreover, although the trial court found a special relationship existed between Hall and LDS, it refused to find a special relationship between Hall and the Scout Defendants because it concluded they lacked awareness that he was participating in Scouting. This is demonstrably false because the Scout Defendants authorized their Scoutmaster and LDS agents to choose and supervise Scout volunteers, including unregistered volunteers, and there is substantial evidence that the Scoutmaster and Bishopric knew Hall was volunteering with the Troop; in fact, one of the Bishopric members admitted the ward's leaders voted to allow Hall to volunteer with the Troop. The trial court erred in finding the Scout Defendants had no duty to protect N.K. from Hall where there is ample evidence that they had a special relationship with Hall. *M.H.*, 162 Wn.App. at 190.

D. Third Assignment of Error—The Trial Court Ignored Evidence of a Question of Fact Concerning Defendants' Prior Notice of Hall's Danger.

N.K. introduced evidence that Defendants knew Hall posed a danger of molestation prior to the May 1977 "Camporee." CP 1249. Mr. Cowels asserts that it was *definitively prior to May 1977*, because he was threatened at the May 1977 Camporee for disclosing the information. CP

1249. Hall was not otherwise exposed as a molester until September of 1977, when his fiancé complained Hall molested her son. CP 1206.

Apparently after conversing with Defendants’ counsel, Mr. Cowels changed his story to allege that Hall left “[w]ithin two or three days” after Cowels told the Bishopric about the abuse. CP 1809. Mr. Cowels never tries to explain how his accuracy at fixing the date, and the threat he recalls at the May Camporee, could have taken place if he did not disclose his story of abuse until September. There is no evidence that Hall left anytime before September, and the newspaper account from June places Hall firmly in Shelton, and in the Troop leadership. CP 1357-58.

“[K]nowledge of an agent acting within the scope of authority is imputed to the principal.” *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231, 239, 189 P.3d 253 (2008). As noted above, the leadership of Troop 155 were all agents of Defendants, particularly when it came to excluding people from participating in Scouting.

E. Fourth Assignment of Error—Evidence of the Church’s Knowledge and Handling of Child Sexual Abuse, Including Abuse by Scout Volunteers, Is Discoverable and Not Privileged.

The trial court erred in preventing N.K. from obtaining discovery regarding LDS’s knowledge and handling of child sexual abuse, including abuse by Scout volunteers. Parties who seek redress in Washington courts have a “broad right of discovery.” The trial court ignored that right when

it prevented N.K. from effectively pursuing his claim by limiting him to discovery regarding LDS's knowledge of abuse by Hall and no one else. Finally, neither the state clergy-penitent privilege nor the First Amendment protects LDS's knowledge and handling of the sexual abuse of children, particularly where LDS admitted that "we agree that reports of sexual abuse outside the disciplinary council are not privileged."

This Court reviews discovery orders for abuse of discretion, and will reverse if the orders do not reflect what is legally right and equitable. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006).

1. Limiting N.K. to Evidence Regarding Hall Prevented Him From Showing the Full Extent of the Church's Knowledge of a Dangerous Condition.

In an earlier case involving child sexual abuse by a Scout volunteer, the Washington Supreme Court upheld a trial court order that required BSA to produce its ineligible volunteer files for the same reason N.K. sought discovery from LDS. The Court agreed the files were discoverable as to whether the defendant (1) knew or should have known of the danger of childhood sexual abuse, and (2) failed to take reasonable steps to protect the plaintiff from that danger. *T.S.*, 157 Wn.2d at 421, 424-25; *see also C.J.C.*, 138 Wn.2d at 721-22 (an abuse survivor must prove the defendant failed to protect him from foreseeable harm).

The legal issues in *T.S.* were essentially identical to the legal issues in this case. As here, the plaintiffs alleged BSA and others failed to take

reasonable steps to protect them and other children from sexual abusers and covered-up its misconduct. *Id.* at 418-19. As here, the plaintiffs sought discovery of documents “regarding sexual abuse or abuse kept or maintained by [the defendant],” which numbered between 2,000-10,000 files. *Id.* at 419-20. And as here, the defendant argued the files were “irrelevant” because they did not pertain to the man who abused the plaintiffs, compliance would be “unduly burdensome,” and “most importantly ... the files and related information are highly confidential” in that they pertained to third parties. *Id.* at 420.

The trial court rejected those arguments, and the Court agreed the records were relevant to whether BSA “was aware or should have been aware of the extent of the pedophilia threat during the period at issue here (1971 to 1983) and whether [BSA’s] policies and procedures were timely and effective responses to the threat.” *Id.* at 421-22, 24-25.

The trial court erred in allowing LDS to withhold similar evidence because it is relevant to the duty it had to protect N.K. from foreseeable harm. Although BSA and PHC maintained LDS violated BSA’s (minimal and insufficient) policies and procedures for protecting N.K. from being sexually abused, the trial court’s order prevented N.K. from showing the full extent of LDS’s knowledge of a dangerous condition.

Moreover, the trial court erred in concluding LDS met its burden of showing a protective order was needed, particularly in light of N.K.’s

substantial need for the information. CR 26(c); *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn. App. 412, 423-24, 204 P.3d 944 (2009) (party requesting a protective order should show specific prejudice or harm will result if no order is issued).

LDS made no showing that N.K.'s requests were "unduly burdensome," or that the information was protected by the attorney/client privilege or work product doctrine. CP 164-74; CP 379-385; CP 581-595; CP 1928-41. The trial court's order is also silent on any such facts. CP 413-14; CP 700-01; CP 1987-88. On the other hand, N.K. explained why he had a substantial need for this evidence, CP 213-17; CP 366-68; CP 572-73; CP 693-95; CP1102-03; CP 1818-20; CP 1952-62, as reflected by the trial court's decision to grant LDS's motion for summary judgment.

2. The Church's Knowledge and Handling of Child Sexual Abuse Outside of the Confessional is Not Privileged, Particularly Where the Church Admitted as Much.

The trial court erred in concluding LDS's knowledge and handling of child sexual abuse was privileged because neither the state clergy-penitent privilege nor the First Amendment protects all such information.

a) The State Clergy-Penitent Privilege Does Not Apply Because the Church Admitted N.K. Sought Non-Privileged Information.

In response to N.K.'s motion to compel information LDS learned outside of a confessional setting, CP 566-578 and CP 686-96, LDS admitted such information is not privileged: "we agree that reports of

sexual abuse *outside* the disciplinary council are not privileged.” CP 588-89 (emphasis in original). Despite that admission, the trial court denied N.K.’s motion because it concluded the information was protected by the state clergy-penitent privilege and/or the First Amendment. CP 700-01.

Although the trial court did not explain its reasoning, LDS had argued non-privileged information became privileged when added to its disciplinary files. This argument is wrong because privileges are narrowly construed to protect certain relationships, and they cannot be used to shield non-privileged information. *In re Firestorm 1991*, 129 Wn.2d 130, 141, 916 P.2d 411 (1996) (facts are never privileged); *Trammel v. United States*, 445 U.S. 40, 50-51 (1980) (privileges must be strictly construed).

For example, if a child complains to a Mormon teacher that he is being sexually abused, the teacher reports the abuse to a Bishop, and the Bishop holds a disciplinary council, the original facts (e.g., the child’s complaint to a teacher) do not become privileged. To hold otherwise would allow any defendant to shield non-privileged facts by much later telling it to a lawyer, or filing it in a “privileged” folder.

LDS’s argument to the contrary highlights why its reliance on *Doe v. Corporation of the President*, 122 Wn. App. 556, 90 P.3d 1147 (2004), is misplaced. In *Doe*, the plaintiff sought the entire disciplinary file of a perpetrator who confessed during a disciplinary hearing, including the

confession. Because the entire proceeding was privileged, the Court held the record of it was also privileged. *Id.* at 558-62.

Unlike *Doe*, N.K. did not seek all of LDS's confessions or the resulting disciplinary files. Instead, N.K. asked LDS to account for information it learned *outside* of the disciplinary council, which LDS admitted is not privileged. Moreover, unlike the defendant in *Doe*, LDS made no effort to explain why it could not account for this non-privileged information, or the information that it identified for the first time in a declaration from its risk manager. CP 581-95; CP 676-78.

b) The First Amendment Does Not Protect LDS's Knowledge and Handling of Child Sexual Abuse.

No court has ever held that it violates the First Amendment for a secular court to order a religious entity to account for its knowledge of childhood sexual abuse, and neither LDS's briefing nor the trial court's order explained how that was possible here. CP 581-595; CP 700-01.

While LDS failed to explain how its religious beliefs or practices would be burdened by accounting for its knowledge of sexual abuse, Washington has a compelling state interest in protecting children. *C.J.C.* 138 Wn.2d at 712-13 (1999) (a "primary concern" of the legislature is to provide a remedy for abuse survivors). Likewise, the Washington Supreme Court has rejected LDS's argument that the First Amendment prevents a secular court from holding it liable for failing to protect

children: “So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles.” *C.J.C.*, 138 Wn. 2d at 727-28.

The vast majority of courts in this country have also rejected the trial court’s order regarding the First Amendment. *Ambassador College v. Geotzke*, 675 F.2d 662, 664 (5th Cir. 1982) (religious organization has same discovery obligations as other litigants); *In re Catholic Archbishop of Portland in Oregon*, 335 B.R. 815 (2005) (“the dispute is not over church doctrine or beliefs, but over liability for misconduct by those in the church’s employ”); *People v. Campobello*, 810 N.E.2d 307, 317 (“[w]e reject the Diocese’s attempt to conjure a right to secrecy, and with it immunity from the State’s subpoena power, simply by pointing to the veil it has cast over itself”); *Alberts v. Devine*, 479 N.E.2d 113, 123 (Mass. 1985) (“This litigation in no sense involves repetitious inquiry or continuing surveillance that would amount to the excessive entanglement between government and religion that the First Amendment prohibits.”); *Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super 1992) (“such action... poses no threat of governmental interference with ... religion....”).

The trial court erred in concluding information LDS learned outside of a disciplinary council is privileged.

VI. CONCLUSION

Despite *McLeod* and the remainder of Washington law, Defendants nevertheless contend that *none* of them face any liability for allowing a stranger to assume unsupervised access of a Boy Scout Troop of young boys. The trial court agreed, and ruled that as a matter of law, *none* of the Defendants could be held accountable for allowing a stranger to walk-in off the streets and begin leading the troop, either because BSA and PHC did not know their agents allowed a stranger to lead the troop, or because the Defendants did not know the stranger had abused children in the past. However, BSA and PHC control who can be a Scout leader, and with their permission, the LDS Church selects and controls who can lead or interact with its Boy Scout troop. At some point, someone had to be able to stop an unknown “drifter” from supervising a group of young boys entrusted to the care of the Defendants. If taken at face value, the trial court’s decision would go so far as to reject liability for a day care where children are molested by a stranger off the street who was allowed to start supervising children by himself. Such a decision lies far from sound jurisprudence, and cannot be supported under Washington law.

The trial court ignored long-standing Washington law regarding the duty to protect children from foreseeable dangers; the trial court ignored conflicting evidence regarding specific knowledge regarding the Defendants’ notice of the danger posed by Hall; the trial court ignored

evidence demonstrating BSA had a specific problem with its program and failed to take steps to implement improvements; and, the trial court ignored evidence that LDS failed to adhere to Boy Scout policies and procedures when it let a drifter take sole control of a Scout troop.

The trial court's ruling of summary judgment in favor of Defendants should be reversed in its entirety, and the case remanded to proceed to trial. The trial court's denial for discovery of LDS's knowledge and handling of child sexual abuse, including abuse by Scout volunteers, should also be reversed, and LDS ordered to produce discovery regarding the same.

Respectfully submitted this 6th day of March, 2012.

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CERTIFICATE OF SERVICE

I, Bernadette Lovell, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Pfau Cochran Vertetis Amala PLLC, 403 Columbia Street, Suite 500, Seattle, WA 98104, attorneys for Plaintiff/Appellant.

C. On March 6, 2012, I caused a copy of the foregoing Opening Brief of Appellant to be served upon the following via Fax Mail Hand-Delivery Legal Messenger.

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