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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BELEN CASTRO)
)
 Plaintiff-Appellant)
)
 vs.)
)
 VIRGIL BUSHMAN and LISA BUSHMAN,)
 Husband and wife; TOPPENISH KINGDOM)
 HALL; WATCHTOWER BIBLE AND)
 TRACT SOCIETY OF NEW YORK, INC., and)
 WATCHTOWER BIBLE AND TRACT)
 SOCIETY OF PENNSYLVANIA, INC.; JOHN)
 DOES NOS. 1-10)
)
 Defendants-Respondents)

Case # 321487

**RESPONDENTS'
BRIEF**

Gaylen B. Payne, WSBA #15375
Payne, Hickel, Inc. PS
30640 Pacific Hwy South, Suite C
Federal Way, WA 98003-4889
Ph (253) 839-1730; Fax (253) 839-1941

John O. Miller III, Pro Hac Vice
Associate General Counsel
Watchtower Bible and Tract Society of New York, Inc.
Legal Department
100 Watchtower Drive
Patterson, NY 12563
Ph (845) 306-1000; Fax (845) 306-0709

Attorneys for "Toppenish Kingdom Hall" (Toppenish Congregation of Jehovah's Witnesses, Washington), Watchtower Bible and Tract Society of New York, Inc., and Watch Tower Bible and Tract Society of Pennsylvania

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II. INTRODUCTION

Appellant is Belen Castro, now an adult. She was ages eleven and twelve when she says Virgil Bushman, then thirty, sexually assaulted her. Respondents are the Toppenish Kingdom Hall, Watchtower Bible and Tract Society of New York, Inc., and Watch Tower Bible and Tract Society of Pennsylvania.

For this appeal, Castro has selected a portion of Bushman's offensive conduct, in which he assaulted her at a Kingdom Hall (church building), for the Court's consideration. No one saw or knew of the assaults. By the time Castro told someone about them, they had stopped.

Castro filed suit January 26, 2012, suing Mr. and Mrs. Bushman and Respondents. She settled with the Bushmans and dismissed them from her lawsuit on October 5, 2012. (CP 17-20)

On October 15, 2013, after depositions of Castro, her mother, congregation elders, and a police officer, the Respondents moved for summary judgment. (CP 60) On November 26, 2012, the trial court granted Respondents' summary judgment finding that Castro's evidence supported no theory of liability. (CP 47-49) Castro timely filed a Notice of Appeal on December 26, 2013. (CP 50-52)

III. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

A. The trial court properly granted summary judgment dismissing Appellant's lawsuit on grounds that Respondents had no duty to warn or protect Appellant from Bushman because they:

1. had no special relationship with Bushman;
2. had no special relationship with Appellant Castro;
3. had no knowledge of Bushman's dangerous propensity until after his abuse of Castro had already stopped; and
4. committed no negligence that caused or contributed to the abuse.

IV. STATEMENT OF THE CASE

A. Background Facts

Appellant Castro, her mother, and the Bushmans all attended the Toppenish Congregation of Jehovah's Witnesses, in Toppenish, Washington. (CP 111 lines 11 and 19) Adults and children meet together at King-

dom Halls¹. There is no separate meeting for children apart from their parents. (CP 176 lines 8-25) There is no Sunday School class, nursery school, day-care center, special school for children, or any congregation-sponsored events like picnics, summer camps, campouts or summer outings. (CP 176 lines 19-24 to CP 177 line 4; CP 205 lines 1-11; CP 206 lines 7, 9-12; CP 240 line 2 to CP 241 line 6).

Congregations of Jehovah's Witnesses have three appointed positions: elders, ministerial servants, and pioneers. The elders are teachers in the congregation. They also shepherd and "protect the flock." (CP 198 lines 6-10) Ministerial servants help elders encourage members of the congregation and help with the public ministry for which Jehovah's Witnesses are known. (CP 196 lines 20-25) Their assignments in the congregation include handling congregation accounts and being in charge of the sound department with others working under them. (CP 197 lines 1-8). They also receive "lighter teaching parts" in some congregation meetings. (CP 197 lines 12-16, 20-23) The pioneers are appointed to engage in "full-time" public ministry at least 90 hours each month. (CP 195 lines 8-14)

¹ "Kingdom Hall" is the name that Jehovah's Witnesses use when referring to the facility that a congregation uses as a place of worship.

Bushman was a member of the Toppenish Congregation. (CP 8 ¶ 3.6, line 18) He was not in any appointed congregation position. (CP 110 lines 11-13 (never an elder); CP 213 lines 13-15 (never served as ministerial servant or elder; not an appointed officer in the congregation); CP 219 lines 11-15 (never an elder, ministerial servant or pioneer) and lines 20-23 (no records of Bushman ever serving as elder, servant, or regular pioneer), CP 244 line 17- CP 245 line 5 (no record of Bushman ever serving as elder, ministerial servant or regular pioneer); CP 248 lines 15-19 (Bushman was never given any responsibility or job in the congregation where he interacted with, supervised or gave custodial care to children))

The elders knew nothing negative about Bushman; (CP 222 lines 6-9 (no report that he had ever molested children); CP 248 lines 11-14 (elders had no indication he would pose a risk of harm to children)) he just was not a spiritual leader and did not meet the Bible qualifications to serve in an appointed capacity. (CP 214 lines 1-7 (from the Bible perspective he did not meet the qualifications to be recommended); CP 246 lines 6-22 (no bad behavior in the past, but had low hours in ministry and elders were worried about his spirituality))

Watch Tower Bible and Tract Society of Pennsylvania has never issued any appointments of any elders or ministerial servants, and Watch-

tower Bible and Tract Society of New York has had no input into activities of congregations since March of 2001. (CP 267 - Ashe Affidavit, points 9-10)

B. Facts Concerning the Incidents

The following facts, recited in the light most favorable to Appellant, are adopted as “true” for the purposes of this appeal.

During 2002, when Castro was eleven, Bushman began making inappropriate sexual remarks to her. (CP 7, par 3.2; CP 114 lines 13-15) Castro says he repeatedly told her he wanted to have sex (with her). (CP 118 lines 13-14) Castro did not reveal to anyone what Bushman had said to her and no one overheard him. (CP 114 line 25 to CP 115 line 7)

Of all the instances of Bushman’s offensive sexual contact about which Castro testified (CP 7, par 3.3, par 3.4; CP 116 lines 16-21; CP 117 lines 1-5 and 10-18; CP 119 lines 4-17; CP 117 line 24; CP 7, par 3.5), this appeal only complains about Bushman having grabbed Castro’s buttocks in the Kingdom Hall. (CP 143 lines 3-12 and 18-24 (Bushman grabbed her buttocks behind a large “sound block” that is in the back corner of the room; Appellant’s Opening Brief, pages 1-2)

No one ever saw what happened, even though others were often nearby. (CP 140 lines 7-11 (no one ever knew); CP 144, lines 6-12 (it was always where no one else would know about it); CP 150 lines 2-3 (Lisa Bushman did not see anything because Bushman never did anything when anyone was around))

Before Bushman molested Castro, no one had ever heard or seen anything about him that suggested that he posed any risk of harm to anyone. (CP 248 line 11 to CP 249 line 11; CP 176 lines 9-18)

Sometime after June 21, 2003, Castro told her cousin Nadia about the abuse. (CP 119 line 20 to CP 120 line 2; CP 120 lines 10-23; 94/12-16) Nadia was the first person she told. (CP 130 line 21 to CP 131 line 22) When another member of the congregation heard what had happened to Castro, that person told congregation elders. (CP 131 lines 11-19) The elders called Castro's mother, Maria Martinez, and questioned Castro in the presence of her mother. (CP 166 line 9 to CP 167 line 7).

Castro and Martinez met with the elders on July 4, 2003. (CP 132 lines 12-17) That was the first time Castro told her mother or the elders about the abuse. (CP 132 line 25 to CP 133 line 7; CP 135 line 24 to CP 136 line 2; CP 168 lines 4-14) Later that day, Mrs. Martinez told Castro's father, then the police (CP 146 lines 12-16; CP 185 lines 14-19), and then

she and Castro went to the police station where Castro gave a statement.

(CP 122 lines 5-18; CP 146 lines 7-18)

ARGUMENT AND AUTHORITIES

A. Summary judgment is reviewed de novo by the Court of Appeals.

Respondents agree with Castro that an appellate court reviews the grant of summary judgment de novo, engaging in the same inquiry as the trial court. ; *Colwell v. Holy Family Hospital*, 104 Wn.App. 606, 611, 15 P.3d 210 (Div. 3, 2001). A motion for summary judgment is sustained if no genuine issue of material fact exists, viewing the evidence in a light most favorable to the nonmoving party. CR 56(c); *Colwell, id.*²

B. Respondents had No Duty to Warn or Protect Castro because they had No Prior Knowledge or Reason to Know about Bushman's Proclivity, and No Special Relationship with either Bushman or Castro.

A church can be liable to a molestation victim if the church knows of a man's proclivity to molest and places him in a role that affords him that opportunity. Or, as shown below, liability may arise if the church has

² The initial burden is on the moving party to show the absence of a genuine issue of material fact. *Greene v. American Pharmaceutical Co.*, 136 Wn. 2d 87, 100, 960 P. 2d 912 (1998). The burden then shifts to the nonmoving party to show facts essential to its case. *Ingersoll v. DeBartolo, Inc.*, 123 Wn. 2d 649, 654, 869 P. 2d 101 (1994), on the failure of which the court should grant summary judgment. *Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 770 P. 2d 182 (1989).

a special relationship with a child and general knowledge about a *general field* of potential harm from which the church fails to protect the child.

There is no duty to prevent a third party from intentionally harming another unless “a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party’s conduct.” *Petersen v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983).³ Only where a special relationship exists may such a duty arise. *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 438, 874 P.2d 861 (1994), *rev. den.* 125 Wn.2d 1006, 886 P.2d 1134 (1994), quoting *Petersen v. State*, *id.* The existence of a special relationship is a question of law. *S.H.C. v. Lu*, 113 Wn.App. 511, 524, 54 P.3d 174 (2002).

³ “The relationship between a hospital and its vulnerable patients is a recognized special relationship.” *Niece v. Elmview Group Home*, 131 Wash.2d 39 at 46 n. 2, 929 P.2d 420 (1997) (citing *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash.2d 217, 228, 802 P.2d 1360 (1991)). This special relationship imposes a duty on the hospital to protect patients from intentional harm by third parties. *Id.* This duty arises because the hospital is entrusted with the patient’s well-being. *Id.* at 50, 929 P.2d 420.

(1) Respondents had No Duty to Warn or Protect Castro Absent Notice of Bushman's Harmful Proclivities or at Least General Knowledge of a Harmful Situation.

Negligence requires duty, breach, proximate cause, and injury. *Snyder v. Med. Serv. Corp. of E. Wash.*, 98 Wash. App. 315, 323, 988 P.2d 1023 (1999), aff'd, 145 Wash.2d 233, 35 P.3d 1158 (2001).

Any duty to warn or protect another is conditioned upon foreseeability. *Christen v. Lee*, 113 Wash.2d 479, 492, 780 P.2d 1307 (1989). *Niece v. Elmview Group Home*, 79 Wash.App.660, 904 P.2d 784 (1995), aff'd, 131 Wash. 2d 39, 49, 929 P.2d 420 (“an employer generally does not have a duty to guard against the possibility that one of its employees may be an undiscovered sexual predator”); see also *Schooley v. Pinch's Deli Market, Inc.*, 80 Wash. App. 862, 869, 912 P.2d 1044 (1996), aff'd, 134 Wash.2d 468, 951 P.2d 749 (1998) (“[F]oreseeability means foreseeability from the point of view of a reasonable person who knows what the defendant's conduct will be, but who does not know the specific sequence of events that ultimately will ensue therefrom” (emphasis added)).

Washington courts have consistently held that knowledge of the risk an abuser poses is necessary to impose liability. A line of Washington

cases holds that where the defendant had no knowledge of an abuser's proclivity, his later child abuse was unforeseeable as a matter of law.

The leading Washington Supreme Court decision on special relationships and sexual abuse in a church setting is *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). *C.J.C.* held that a church is liable if: 1) a special relationship exists between the church and the abuser; 2) a special relationship exists between the church and the victim; 3) the church had notice that the abuser posed a risk of sexual abuse; and 4) the church put the abuser in association with the victim. *C.J.C.* did not clarify whether just one special relationship will suffice or both must exist. Our analysis assumes that *just one* must exist.

In *C.J.C.*, a church representative, Schultz, was told in a phone call that Wilson had previously had inappropriate sexual contact with a girl. A year later, plaintiffs' family moved to the church and plaintiffs' father became the pastor. Wilson was later made a deacon and given contact with and authority over children. *C.J.C.*, 138 Wn.2d at 720. When Wilson was appointed, Schultz was chairman of the church's deacon board. Schultz did not warn the pastor or the pastor's daughters about Wilson. Wilson

babysat and sexually abused the pastor's daughters when their father traveled on Church business. *Id.* at 725.

The *C.J.C.* plaintiffs claimed that the church owed a duty to protect them "against foreseeable harms perpetrated by a Church official whom the Church had '*placed in authority* and in close relationship to church children, *knowing of the danger.*'" *Id.* at 722 (italics added). The Supreme Court agreed, citing *Marguay v. Eno*, 139 N.H. 708, 662 A.2d 272 (1995), a New Hampshire Supreme Court case that is discussed in Appellant's brief.

Marguay addressed a school's liability for off-site sexual abuse of students by school employees. Such liability hinges on whether the defendant "has brought into contact or association with the victim a person whom the actor *knows or should know to be peculiarly likely to commit intentional misconduct.*" *Marguay, id.*, 139 N.H. 708, 719 662 A.2d 272 (1995) (italics added); see *C.J.C.*, 138 Wn.2d at 723. Knowledge that an employee is "peculiarly likely" to commit misconduct overcomes the normal presumption that people will obey the law, and imposes a duty of protection.

Relying on *Marguay*, C.J.C. held that where a special protective relationship exists, a duty arises if the church “negligently caused the harm by placing its agent into association with the plaintiffs when the risk was, or should have been, known.” *Id.* at 724.

In particular, we find the conjunction of four factors present in the case before us decisive to finding the existence of a duty is not foreclosed as a matter of law: (1) the special relationship between the Church and deacon Wilson; (2) the special relationship between the Church and the plaintiffs; (3) the alleged knowledge of the risk of harm possessed by the Church; and (4) the alleged causal connection between Wilson's position in the Church and the resulting harm.

C.J.C., *Id.* at 724.

C.J.C. emphasized the narrow reach of its holding. The presence of knowledge alone will not always give rise to a duty to warn.

We caution that our holding is limited. *We do not suggest that a principal is an insurer against all harm occasioned by its agents* simply because the work situation fortuitously provides an opportunity to perpetrate the harm. *Nor do we decide that knowledge of potential harm alone is sufficient to give rise to a duty to warn in all cases.*

Id. at 727 (italics added).

In *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108 (1992) a teacher had two sexual encounters with a student on school grounds. The student and his parents sued the school district for negligent hiring, supervision, and retention. *Id.* at 288. Division Two upheld summary judgment in the school district's favor because there was no evidence that the district knew about the teacher's conduct or any previous misconduct.

[T]he district will be liable only if the wrongful activities are foreseeable, and the activities will be foreseeable *only if the district knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence* [T]here is nothing in the record to so indicate

Id. at 293 (emphasis added). See also, *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993) (summary judgment affirmed in favor of medical clinic which had "no prior knowledge of Dr. Nakata's behavior by the Clinic or any of its shareholders or staff."). Like the case at bar, the abuse occurred on-site with no knowledge by defendant of any prior risk posed by the teacher, and no knowledge of any general condition that posed a potential risk of harm to the student. As we shall see below, the absence of a general condition of risk matters.

In *Doe v. Latter-Day Saints* (“LDS”), 141 Wn.App. 407, 167 P.3d 1193 (Div. One, 2007), the court held that the absence of knowledge of the perpetrator’s dangerous propensities merited dismissal of the plaintiffs’ claims. *Doe*, 141 Wn. App. 407. The plaintiff was abused by her stepfather, a “high priest” in the LDS Church. The Court held that the Church owed no duty for two reasons, both applicable here: “The first is the lack of a causal connection between the LDS Church and Taylor’s presence in the family home. Taylor, although a high priest, was not placed by the LDS Church in the plaintiffs’ home.” *Id.* at 445. In *Doe*, the victim’s mother invited the perpetrator into the family’s home. Second, “the LDS Church, unlike the church in *C.J.C.*, had *not been warned* that Taylor had previously abused children or made inappropriate advances towards them.” *Id.* at 445. Like *C.J.C.*, (but unlike the facts in the case at bar) the abuse occurred off site.

In *N.K. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 257 Wash.App. 517, 307 P.3d 730 (Wash.App. Div. 1, 2013) the Court had the opportunity to consider imposing liability despite absence of notice of the harmful proclivities of the molester. The Court declined to impose such a duty. However, *N.K.* is important for its holding that if a special relationship exists between a de-

fendant and a plaintiff, giving rise to the right to protection, then specific knowledge that a molester poses a threat is not required. The sort of knowledge that *is* required in that case is of the *general field of danger* within which the harm occurred (citing *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wash.2d 316, 321, 255 P.2d 360 (1953), discussed below).

N.K. also held that a church exposes itself to liability when it allows its youthful members to be supervised by a person known to have a history of sexual misconduct.

The plaintiff in *N.K.* was a 12-year-old boy scout molested by his scout leader. He sued for negligence and failure to protect him. Defendants won summary judgment, but that was reversed and remanded for trial as against the church, based upon the *protective relationship* that the church had with *N.K.* There was evidence that church officials had become aware of the scout leader's dangerous propensities some months before he abused *N.K.*

Commenting on *C.J.C.*, *N.K.* declined to rule that all four *C.J.C.* factors must be proven in order to impose liability:

The defendants here argue that under *C.J.C.*, a plaintiff must prove each of these four factors as a conjunctive test in order to establish a duty on the part of an organization to prevent abuse of children by a third party, including a duty arising from a special relationship with the child victim. They are mistaken. The first two *C.J.C.* factors—(1) the

organization's special relationship with the tortfeasor and (2) its special relationship with the victims—are well-settled alternative grounds from which a duty can arise. Restatement (Second) of Torts § 315 (1965), cited in *Niece*, 131 Wash.2d at 43, 929 P.2d 420. “As a general rule, there is no duty to prevent a third party from intentionally harming another unless a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party’s conduct.” *Niece*, 131 Wash.2d at 43, 929 P.2d 420 (emphasis added and internal quotation marks omitted), quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash.2d 217, 227, 802 P.2d 1360 (1991).

N.K., *supra*, 257 Wash.App at 528 & 307 P.3d 736.

N.K. further distinguished *C.J.C.*, where the abuse occurred at a private home, whereas the abuse of *N.K.* had occurred on school property “at a time and place where the vulnerable victim is *in the custody and care of the institutional defendant.*” *N.K.*, *supra* (italics added). Significantly, the “care and custody” factors are absent in the case at bar.

In *Kaltrieder v. Lake Chelan Community Hospital*, 153 Wn.App. 762 (Division Three, 2009), plaintiff was admitted for inpatient alcohol treatment at the defendant hospital. She later sued after a nurse repeatedly fondled her genitals. Division Three of this Court first distinguished *Niece v. Elmview Group Home*, 131 Wn.2d 39,929 P.2d 420 (1997). Plaintiff in *Niece* had been sexually assaulted in a group home by one of its employees. Plaintiff had cerebral palsy with “profound” cognitive and physical limitations. “Given *Niece*’s total inability to take care of herself, *Elmview* was responsible for every aspect of her well being.” *Id.* at 50. *Niece* thus

found the defendant group home owed a duty to protect Niece from foreseeable harm, including sexual abuse by staff. Distinguishing *Niece*, *Kaltreider* found that the plaintiff “was not completely impaired.” *Kaltreider*, 153 Wn. App. at 766. The Court also held that the nurse’s actions “were not foreseeable.” *Id.*

In 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. Here, LCCH did not have knowledge of prior misconduct at the hospital or by Mr. Menard. ... Without evidence that Mr. Menard’s conduct was known or reasonably foreseeable to LCCH, there was no duty to protect.

Id. at 767.

In *Smith v. Sacred Heart Medical Center*, 144 Wn.App. 537 (Division Three, 2008), plaintiffs were admitted to the psychiatric unit of defendant’s hospital. While there, a nursing assistant hugged and kissed one plaintiff and hugged another, and suggested they have sex. After plaintiffs had been discharged, and after the nursing assistant had left his job, plaintiffs went to the nursing assistant’s home and had sex. Plaintiffs that while they were at the hospital a special relationship existed and the hospital failed to protect them while the abuser laid the groundwork for later sexual encounters. Division Three of this Court disagreed and affirmed the dismissal of the claims on summary judgment. Foreseeability must be shown

by “something more than just speculation and a possibility.” *Smith*, 144 Wn. App. at 546. *Smith* thus held that plaintiff’s claim was “legally insufficient ... absent some showing that [the hospital] knew or should have known of the potential for sexual abuse.” *Id.* at 546-47.

Washington has yet to impose liability on a church for the abuse of a member of the congregation at the hands of a worker absent evidence that the church knew or should have known of *that worke''s deviant propensities*.

Boy 1, et al. v. Boy Scouts of Am., 2011 WL 1930635 *6 (W.D. Wash. May 19, 2011) (emphasis added). Accord, *Boy 7 v. Boy Scouts of Am.*, 2011 WL 2415768 *3 (E.D. Wash. June 13, 2011).

In *McLeod v. Grant County School District No. 128*, 42 Wn.2d 316, 255 P.2d 260 (1953), a 12-year-old girl was raped by two 15-year-old fellow students in a dark room accessed by an unlocked door under the bleachers in the school gymnasium. *Id.*, 42 Wn.2d at 318. The school “had appointed one of its teachers to supervise the activities of the students while they were occupying the gymnasium, for the purpose of protecting any student from being harmed by another student.” *Id.* The student cried out for help but the teacher who was supposed to be supervising them was not in the gym. *Id.* The trial court granted defendant’s demurrer, and the Washington Supreme Court reversed 5-4.

The court stated that the defendant's duty was a function of the relationship between the parties and the nature of the risk. The court explained the unique, parent-like relationship between school districts and students: "It is not a voluntary relationship. The child is compelled to attend school. He must yield obedience to school rules and discipline formulated and enforced pursuant to statute. ... The result is that the protective custody of teachers is mandatorily substituted for that of the parent." *Id.* at 319. This creates a unique duty, *id.* at 320, which this Court recently described as a "heightened duty." *Schwartz v. Elerding*, 166 Wn. App. 608, 270 P.3d 630,636 (2012) ("Given the special relationship between the school district and the plaintiff, McLeod recognized that a heightened duty was owed.").

The court then rejected the school district's argument that rape is so shocking that it is unforeseeable. "[T]he question is whether the actual harm fell within a general field of danger which should have been anticipated." *McLeod*, 42 Wn.2d at 321. The court said:

[W]e believe 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., 42 Wn.2d at 322 (emphasis added).

Understandably, the court was not inclined to find the absence of a duty simply because the harm was rape rather than some other act of “indecency.” However, the court never explained why indecency of any sort was foreseeable among teen school children. In addition, the court did not address the now well-established doctrine that criminal acts are generally unforeseeable. *Nivens*, 133 Wn.2d at n.3 (“Washington courts have been reluctant to find criminal conduct foreseeable”). Nonetheless, *McLeod* is consistent with *N.K.*, and we think that the Washington Supreme Court would continue to follow the precedents set by them.

In applying the *C.J.C.* criteria tempered by *McLeod* and *N.K.*, we first examine whether a duty of care existed. “The existence of a duty is the threshold question in negligence analysis.” *Joyce v. State Dep’t. of Corr.*, 116 Wn. App. 569,586, 75 P.3d 548 (2003). Duty is a question of law. *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 868, 82 P.3d 1175, 1177 (2003).

Duty has three elements: “its existence, its measure, and its scope.” *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 448, 243 P.3d 521 (2010) (quotation marks omitted). “So the duty question breaks down into three inquiries: Does an obligation exist? What is the measure of care required? To whom and with respect to what risks is the obligation owed?” *Id.* Foreseeability limits the scope of the duty owed. *Christen v. Lee*, 113 Wn.2d 479, 492 780 P.2d 1307 (1980).

“The general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties.” *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (quotation marks and citations omitted).

When a sexual abuse plaintiff seeks to hold a defendant liable for negligently failing to prevent a criminal act by a third party, a duty attaches only if the defendant had prior notice of the assailant’s potential to abuse. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 724,985 P.2d 262, 275 (1999)(bold added); *Kaltreider v. Lake Chelan Cmty. Hosp.*, 153 Wn. App. 762, 767, 224 P.3d 808 (2009), *rev. granted* 168 Wn.2d 1039 (2010) *appeal withdrawn*, 2011 Wash. LEXIS 177 (Wash. 2011) (“In 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.”; *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407,445, 167 P.3d 1193, 1212-13 (2007) (“[T]he LDS Church, unlike the church in *C.J.C.*, had not been warned that Taylor had previously abused children or made inappropriate advances toward them.”); *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108 (1992) (activities that harm students are foreseeable only if the school district knows or in the exercise of reasonable care should know of the risk that results in their occurrence, which is not found here).

The facts in *Castro* are well below the *C.J.C./McLeod* threshold that creates a duty to warn. *Castro* presented no evidence that anyone, including the congregation agents (elders, ministerial servants and regular pioneers) and including her own mother, knew or had reason to suspect that Bushman posed any risk of harm to *Castro* or to anyone else. Any proclivity he had to molest was unknown. What he did to *Castro* was unobserved.

However, *Castro* says “The security was so lax that even with the Watchtower officials in the very same room, Virgil Bushman would come up to Belen *Castro*, grab her buttocks, and fondle her. CP 25:8-11.” (Also see Appellant’s Opening Brief, p. 2) *Castro* appears to raise for the first

time on appeal a claim of the duty of a church to provide adequate security for the safety of its attendees, despite absence of the existence of even a “general field of danger.”

Castro has presented no legal authority to support this claim, and thus has waived it in this appeal. *Skagit County Public Hosp. Dis. No. 1 v. State, Dept. of Revenue*, 242 P.3d 909 (Wash. App. Div. 2, 2010)(an assignment of error is waived if no argument or citation to authority is presented in support of that assignment); *In re Welfare of L.N.B.-L.*, 237 P.3d 944 (Wash.App. Div. 2, 2010)(an appellant waives an assignment of error when she presents no argument in support of the assigned error.); *Yakima County v. Eastern Washington Growth Management Hearings Board*, 192 P. 3d 12 (Wash. App. Div. 3, 2008)(if a party raises an issue but fails to provide an argument relating to the issue in his brief, he waives any challenge to the alleged issue).

Despite Castro’s waiver of this issue, Respondents have searched for and found no legal authority to support a theory requiring security at its religious meetings, even if there *were* a special relationship and notice of some general field of danger that should have been anticipated. Respondents are not a commercial establishment with a history of criminal conduct that would give rise to a duty to protect customers from reasona-

seeable harm and criminal conduct, e.g., *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) (relationship between business and business invitee constitutes special relationship because invitee enters business premises for economic benefit of business). *Nivens* described the duty of a business to its invitee:

If the place or character of [the] business, or ... past experience, is such that [the business owner] should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he [or she] may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Nivens, 133 Wn.2d at 205 (quoting Restatement (Second) of Torts § 344).

Nivens **rejected** the requirement that special security be provided. Commenting on *Nivens*, a recent Division One decision observed:

Although, in *Nivens*, our Supreme Court established that the absence of foreseeability of criminal conduct precludes liability of the business owner premised upon such conduct, the court refrained from analyzing the foreseeability of the assault therein “because *Nivens* did not base his case on a general duty of a business to an invitee.” 133 Wn.2d at 205. Rather, *Nivens* had asserted only that businesses owe to their invitees a distinct duty to provide **security personnel** to protect against the criminal conduct of third parties, an argument rejected by the court. *Nivens*, 133 Wn.2d at 207.

Dews v. So, 167 Wash.App. 1010 (Wash App. Div. One, 2012), fn 2 (not reported in P 3d)(bold added).

Respondents are religious organizations, one of which (Toppenish) has a Kingdom Hall (church) with no criminal history and no “customers”

or business invitees, only those who voluntarily attend free religious services. If special security is not required at an ordinary commercial place, then none is required in a place of worship.

Castro presented no evidence of a special relationship between her and Respondents. She was never in the congregation's custody or care. She went to congregation meetings with her mother, and her mother never entrusted her to the care of the congregation or to any appointed person of the congregation. While the offensive activity about which Appellant complains occurred on Kingdom Hall property, it was done by a fellow congregation member, not by one in a special relationship with Respondent. There was no evidence presented that Respondents and Bushman had a special relationship because there was none. Bushman was not appointed to serve the congregation in any capacity. He was never placed in a role that gave him access to or supervision over children. Thus, even under the reduced *C.J.C.* factors expressed in *N.K.*, Respondents are not liable to Castro. The facts do not support a finding of a special relationship between Respondents and Castro.

There was no evidence presented of prior knowledge about any general harmful condition that could give rise to a duty to protect anyone with whom Respondents might have a special relationship because no

such evidence exists. Finding a duty here would make Respondents insurers against the unforeseeable, intentional conduct of a congregation member, a result that the *C.J.C.* Court did not condone. None of the four *C.J.C.* factors is met. Neither of the two *N.K.* or *McLeod* factors is met. This Court should uphold summary judgment.

C. Appellant Has Shown No Other Basis for Negligence

Castro asserts a theory of liability on appeal that the church's discipline of Bushman was inadequate. (Appellant's Brief, p. 2) and Complaint (CP 8, ¶ 3.6). As discussed below, civil courts may not encroach upon a church's First Amendment rights by intervening in matters of church discipline.

1. The First Amendment Proscribes Interference in Matters of Church Discipline Such as Whether Bushman Was, or Should Have Been, Disfellowshipped – or Disfellowshipped Sooner - from the Toppenish Congregation

Paragraph 3.6 of Appellant's Complaint asserts that Movants were

negligent for failing to timely “disfellowship”⁴ defendant Virgil Bushman. This aspect of Castro’s claim challenges the Toppenish congregation’s discipline of Bushman. Congregation discipline is a non-justiciable ecclesiastical matter.

The cases interpreting the First Amendment to the United States Constitution bar courts from entangling themselves in ecclesiastical controversies. In *Watson v. Jones*, 80 U.S. 679, 728-29, 20 L. Ed. 666, 676 (1871), the court articulated a Constitutional protection referred to as the “doctrine of ecclesiastical abstention”:

All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.*

(*Watson, id.* (italics added).)

Washington courts follow the federal ecclesiastical abstention doc-

⁴ In the Jehovah’s Witness religion “disfellowshipping” is the excommunication, shunning, or expulsion of a congregation member who is unrepentant for serious sins he has committed.

trine. (See, e.g., *Erdman v. Chapel Hill Presbyterian Church*, 175 Wn.2d 659, 680, 286 P.3d 357, 369 (2012); *Neimann v. Vaughn Community Church*, 154 Wn.2d 387, 113 P.3d 463, 473 (2005); *Presbytery of Seattle, Inc. v. Rohrbaugh*, 79 Wn.2d 367, 373, 485 P.2d 615 (1971); *In re Elliott*, 74 Wn.2d 600, 446 P.2d 347 (1968); *Erdman v. Chapel Hill Presbyterian Church*, 156 Wn. App 827, 234 P.3d 299 (App. Div. 2, 2010), reversed in part on other grounds, 175 Wn.2d 659 (2012); and *Korean Presbyterian Church of Seattle Normalization Committee v. Lee*, 75 Wn. App. 833, 880 P.2d 565 (App. Div. 1, 1994).)

The elders' discipline of Virgil Bushman, including the nature and timing of that discipline, is purely religious. It is jurisdictionally off-limits to courts. (*Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020 (1975); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449, 89 S.Ct. 601 (1969).) Thus, this part of Castro's complaint is non-justiciable.

CONCLUSION

Respondents urge the Court to sustain summary judgment. Appellant Castro has raised no issue of material fact, nor demonstrated that the trial court failed to properly apply the law to the facts that were before the court. Rather than balance competing evidence, as Castro claims, the court

below properly applied the law to the facts, and found no sustainable cause of action.

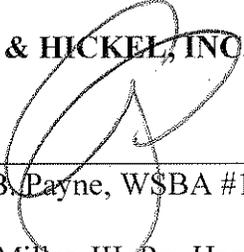
Castro presented no evidence that any of the Respondents had any prior knowledge of any harmful proclivity of the alleged abuser on which to base a duty to warn or protect her. She presented no evidence of any special relationship the Respondents had with Bushman, nor any evidence of any special relationship they had with her. Thus, even had Respondents had knowledge of some general field of danger or condition, they would have no duty to protect Castro. In fact, Castro offered no evidence of even a general field of danger or generally dangerous condition. Respondents have no duty to insure against unforeseeable criminal acts of congregants.

Finally, the ecclesiastical abstention doctrine makes Castro's complaint about the timing and substance of Respondent's internal, religious discipline of Bushman non-justiciable.

This Court should sustain the ruling below and dismiss this appeal.

Respectfully submitted this 19th day of August, 2014.

PAYNE & HICKEL, INC. PS

By 
Gaylen B. Payne, WSBA #15375

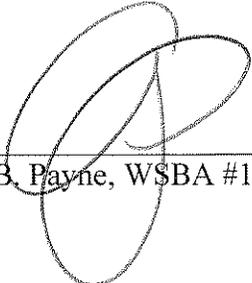
John O. Miller, III, Pro Hac Vice
Associate General Counsel
WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.
LEGAL DEPARTMENT

Attorneys for Respondents Toppenish Kingdom
Hall, Watchtower Bible and Tract Society of New
York, Inc., and Watch Tower Bible and Tract
Society of Pennsylvania, Inc.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that a true copy of this Respondents' Brief was mailed to the Court of Appeals, Division III, 500 N Cedar St Spokane, WA 99201; and to Appellant's counsel, J. J. Sandlin, Sandlin Law Firm, P.S., P.O. Box 1707, Prosser, Washington 99350, fax number (888) 875-7712.

Dated this 19th day of August, 2014.
At Federal Way, Washington


Gaylen B. Payne, WSBA #15375

RESPONDENTS' BRIEF
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A Professional Service Corporation
30640 PACIFIC HIGHWAY SOUTH
FEDERAL WAY, WASHINGTON 98003
Ph (253) 839-1730 Fax (253) 839-1941

Law Offices of
PAYNE
&
HICKEL