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JUL 24 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 321487-III

**COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

BELEN CASTRO, a single person;

PLAINTIFF-APPELLANT

vs.

**TOPPENISH KINGDOM HALL, an affiliate of the Watchtower Bible
and Tract Society of New York, Inc. and the Watchtower Bible and
Tract Society of Pennsylvania, Inc.; WATCHTOWER BIBLE AND
TRACT SOCIETY OF NEW YORK, INC.; and WATCHTOWER
BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, INC.;**

DEFENDANTS-APPELLEES

PLAINTIFF-APPELLANT'S OPENING BRIEF

**J. J. Sandlin, WSBA #7392
Attorney for Plaintiff-Appellant**

**SANDLIN LAW FIRM, P.S.
P. O. Box 1707
Prosser, Washington 99350
(509) 829-3111/fax: (888) 875-7712
Sandlinlaw@lawyer.com**

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I. **Assignments of Error:**

The trial court committed error by granting summary judgment when there were contested questions of material fact concerning whether or not the plaintiff was molested on the defendants' premises.

II. **Facts:**

Belen Castro read the pleadings of the defendant Watchtower Bible and Tract Society of New York, Inc. ("Watchtower") and the other defendants ("Watchtower"), and she read the verified complaint which she previously signed in this action. CP 24:4-8. She read the transcript of her deposition taken on September 12, 2012. CP 24:8-9. She was fully competent and over the age of 18 years, and provided her declaration based upon her first-hand knowledge. CP 24:9-11.

She attached pages of her deposition transcript, pages 119 through 125, to her declaration, and verified they were true and accurate pages of her deposition transcript. CP 24:12-15. She certified that the testimony she provided in the attached deposition transcript pages was true and accurate. CP 24:15-16. She certified the facts contained in her complaint were true and accurate. CP 24:16-18.

The defendants did not protect Belen Castro from the predator, Virgil Bushman. CP 24:19-21. They ignored her plight, they turned away from helping her, and left her in the presence of the predator, in the Kingdom Hall facilities on those days where there were sanctioned

meetings, with Watchtower representatives present in the very same room as she was in when the predator, Virgil Bushman, continued to accost her and fondle her, molesting her. CP 24:21-25; 25:1-5. Belen Castro was not safe from the predator, in the Watchtower building facility, while Watchtower elders and other members of the Watchtower congregation were present. CP 25:2-5. The Watchtower officials should have protected her from the unwanted touching and fondling Virgil Bushman imposed upon her as a young girl (aged 11-12 years). CP 25:5-8. 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.

After the Watchtower officials were placed on notice of Virgil Bushman's misconduct, they tried to sweep it under the rug and ignore his misconduct, further exposing Belen Castro to fear and loathing of this predator and frustration with the Watchtower organization. CP 25:12-17. Nothing was done to Virgil Bushman for what he did to Belen Castro, except to merely "talk to him." CP 25:16-18. Watchtower claimed that since nobody saw this happening that Castro could not really complain about it. CP 25:18-20.

Belen Castro suffered a great deal because of this predation. CP 25:21. She had nightmares for years. CP 25:21-22. Currently she suffers because of her fear of being left alone, exposed to predators like Virgil Bushman. CP 25:22-24. She cried for months and months because the

Watchtower officials did nothing to protect her from Virgil Bushman. CP 25:24-25. She asked the trial court to hold the appellees accountable for their inaction and their failure to protect her. CP 26:1-2.

She explained to the trial court that the Watchtower defendants believed in the “two witness rule.” CP 26:4. In other words, if the incident was not witnessed by two witnesses, then it could not be proved as having actually happened. CP 26:4-7. She noted that sex molesters do not ask for an audience when molesting 11-year-old little girls. CP 26:7-8. She asked the trial court to review her deposition testimony, pages 133-145, attached to her declaration. CP 26:8-9. The nature of the defendants’ questions was compelling, because the appellees inferred that Castro must have been asking for the molestation, suggesting that she had a crush on Virgil Bushman. CP 26:9-12. She told the trial court she did not have a crush on Bushman. CP 26:12. She explained to the trial court that she wanted protection from these defendants and that she never got it. CP 26:12-14.

The appellees disputed the above facts, and strenuously argued there was no duty owed to Belen Castro. This is a case where the facts should be considered by a jury of Belen Castro’s peers, and there should be robust testing of the contested facts.

III. Issue:

Did the trial court properly consider the CR 56 requirements for granting summary judgment, or did the trial judge weigh the contested

evidence and fail to grant the plaintiff the benefit of every inference supporting liability?

IV. **Argument:**

Standard for Review:

It is well-settled law that the standard for review of a summary judgment order is *de novo*. The appellate court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 93; 140 Wn.2d 88 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

Standard for Summary Judgment:

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Bishop v. Miche*, 137 Wn.2d 518, 523; *Taggart v. State*, 118 Wn.2d 195, 198-99; 822 P.2d 243 (1992). The court considers the facts and reasonable inferences from the facts in the light most favorable to the nonmoving party. *Bishop*, 137 Wn.2d at 523; *Taggart*, 118 Wn.2d at 199. All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). "The motion should be granted only if, from all the evidence, reasonable

persons could reach but one conclusion." *Clements*, 121 Wn.2d at 249 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982)).

Here, the appellee-defendants cannot sustain their arguments in the face of material, contested questions of fact, where there is a duty owed to the plaintiff.

The Appellees' Duty of Care:

It is undisputed that the Watchtower¹ had a duty to protect the patrons of the Kingdom Hall from dangers reasonably to be anticipated. The duty imposed under these circumstances is one of reasonable care. Watchtower is required to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances. *Briscoe v. School Dist.* 123, 32 Wn.2d 353, 362, 201 P.2d 697 (1949).

However, the duty to use reasonable care only extends to such risks of harm as are foreseeable. See, e.g., *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982). Thus, "the concept of foreseeability limits the scope of the duty owed." *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989); see also *Hansen v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483 (1992); 16 David K. DeWolf & Keller W. Allen, Wash. Prac., Tort Law and Practice § 1.14 (1993). In order to establish foreseeability, "the harm sustained must be reasonably perceived

¹ "Watchtower" is used to denote the appellee-defendants, namely, Toppenish Kingdom Hall, an affiliate of the Watchtower Bible and Tract Society of New York, Inc. and the Watchtower Bible and Tract Society of Pennsylvania, Inc.; Watchtower Bible and Tract Society of New York, Inc.; and Watchtower Bible and Tract Society of Pennsylvania, Inc.

as being within the general field of danger covered by the specific duty owed by the defendant." *Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975). Whether the general field of danger should have been anticipated by defendants is normally an issue for the jury; it can be decided as a matter of law only where reasonable minds cannot differ. *Christen*, 113 Wn.2d at 492; *Rikstad v. Holmberg*, 76 Wn.2d 265, 270, 456 P.2d 355 (1969). Here, reasonable minds can differ concerning the general field of danger.

The Watchtower had a duty to protect plaintiff from a foreseeable harm. *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). The Watchtower is "subject to the same duties of reasonable care as would be imposed on any person or entity in selecting and supervising its [congregation], or protecting vulnerable persons within its [physical establishment], so as to prevent reasonably foreseeable harm." *Id.* at 722. This duty exists because, "as a matter of public policy, the protection of children is a high priority." *Id.* at 722; *see also La Lone v. Smith*, 39 Wn.2d 167, 172, 234 P.2d 893 (1951) ("One may normally assume that another who offers to perform simple work is competent. If, however, the work is likely to subject third persons to serious risk of great harm, there is a special duty of investigation"); *Scott v. Blanchet High School*, 50 Wn. App. 37, 38-39, 74 P.2d 1124 (1987) (schools must take reasonable care in hiring teachers and must rely upon a

process that is sufficient “to discover whether an individual is fit to teach.”).

Where a special relationship exists, a duty to protect against the intentional or criminal acts of third parties arises. CJC, 138 Wn.2d at 721, citing *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 200, 943 P.2d 286 (1997), and *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997). A special relationship between the defendant and the intentional tortfeasor may give rise to a duty to control the tortfeasor’s conduct for the benefit of third persons. *Id.* A special relationship between the defendant and the victim may give rise to a duty to protect the victim against foreseeable harms, including harms intentionally caused. *Id.* Thus, a school has a duty to protect students within its custody from reasonably anticipated dangers, an innkeeper has a duty to protect its guests, and a hospital its patients. *Id.* Similarly, even where an employee is “acting outside the scope of employment, the relationship between the employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to the employee from endangering others. *Id.* Here, the Watchtower had a duty to protect its patrons from unwelcome predatory misconduct imposed upon its children in its facilities.

In adopting this standard of care regarding churches, the Court in CJC cited the reasoning set forth in a New Hampshire Supreme Court case, *Marquay v. Eno*, 139 N.H. 708, 662 A.2d 272 (1995). The CJC

Court noted that in *Marquay* none of the complaints took place on school premises or during school hours. Nevertheless, the New Hampshire Supreme Court recognized the existence of a duty as a matter of law. The Court recognized that a principal's negligent failure to control its agent is not necessarily limited to conduct performed within the scope of employment or during work hours, so long as there is a causal connection between the plaintiff's injury and the fact of the agency relationship. *CJC* 138 Wn.2d at 723. Likewise, the Watchtower must control its congregation members to protect the children who are present in the defendants' building facilities. Here, the defendants failed to protect Belen Castro, she was molested at the defendants' facilities in Toppenish, and the defendants-appellees should be held accountable for this breach of duty.

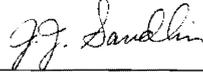
V. **Conclusion**

This is an appeal of a summary judgment order where the trial court failed to acknowledge the appellant-plaintiff had established her claims, where those claims were contested by the appellees, citing competing facts. The trial court apparently balanced the competing evidence and ruled that the appellees' evidence was more credible than the contested evidence submitted by Belen Castro. This is the only explanation that justifies the entry of a summary judgment dismissing the appellants' claims. However, this is not an appropriate use of CR 56, as the appellant has been denied her right to a jury trial concerning the

contested facts she has presented to the trial court. The summary judgment order should be reversed and this action should be remanded for trial on the merits.

Respectfully submitted this 22nd day of July, 2014.

SANDLIN LAW FIRM, P.S.



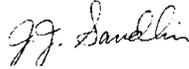
J.J. SANDLIN, WSBA #7392, for Defendant-Appellant
Belen Castro

Certificate of Service

I declare under penalty of perjury that a true copy of this Appellant's Opening Brief was faxed to the Clerk of the Court of Appeals, fax number (509) 456-4288 on the 22nd day of July, 2014, and that a true copy of said document was mailed to the appellees' counsel, Attorney Gaylen B. Payne, Payne & Hickel, P.S., 30640 Pacific Highway South, Suite C, Federal Way, Washington 98003 [Ph (253) 839-1730, Fax (253) 839-1941] and Attorney Calvin A. Rouse, PHV, Associate General Counsel, Watchtower Bible and Tract Society of New York, Inc., Legal Department, 100 Watchtower Drive, Patterson, NY 12563-9204 [Ph (845) 306-1000, Fax (845) 306-0709] on July 22, 2014..

Dated this 22nd day of July, 2014.

SANDLIN LAW FIRM, P.S.



J. J. SANDLIN, WSBA #7392, for appellant-plaintiff
BELEN CASTRO