

67645-8

67645-8

No. 67645-8-I

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

N.K., an individual proceeding under a pseudonym,

*Plaintiff/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; CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND SUCCESSORS, a foreign corporation sole registered to do business in the State of Washington; THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in the State of Washington; PACIFIC HARBORS COUNCIL, BOY SCOUTS OF AMERICA, a Washington nonprofit corporation,

*Defendants/Respondents.*

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

**BRIEF OF CHURCH RESPONDENTS**

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**ORIGINAL**

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## I. INTRODUCTION

Typically, churches are not legally responsible for child abuse perpetrated by one church member against another—just as a business is typically not legally responsible for an assault by one employee against another. Certainly, a church has no liability for abuse that arises out of a family or social relationship between the abuser and the abused. That is one teaching of Doe v. Corporation of the President,<sup>1</sup> in which this Court held that the LDS Church was not liable for sexual abuse by a Church<sup>2</sup> “high priest” against his stepdaughters.

A church can be liable only where some action by the church puts the abuser in a role from which he can commit the abuse, *and* the church knows of his proclivity to commit sexual abuse. Under the governing Washington Supreme Court case on sexual abuse,<sup>3</sup> to show that the Church owed N.K. a duty, N.K. must establish that: a “special relationship” existed between the Church and Hall; a special relationship existed between the Church and N.K.; the Church had notice that Hall

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<sup>1</sup> 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).

<sup>2</sup> For simplicity, Respondents Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints and Corporation of the President of The Church of Jesus Christ of Latter-day Saints, corporations established to carry out the LDS Church’s temporal affairs, shall be referred to as “the Church.”

<sup>3</sup> C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 724, 985 P.2d 262, 275 (1999).

posed a sexual abuse risk; and, the Church placed Hall in association with N.K. Although a plaintiff's failure to establish any factor justifies dismissal of the claim, here, all of the factors are missing.<sup>4</sup>

Dusty Hall did not commence his fondling of N.K. through any scout activity or because the Church brought them together (it didn't), but because Hall was a close, trusted friend of N.K.'s parents and was invited into their home. It was due to this social relationship—not a Church activity or position—that Hall met N.K., created the access and opportunity to abuse him, and initiated an abusive relationship in N.K.'s home. When Hall began fondling N.K. in his family's home, the Church had no special relationship with either of them. Significantly, too, Hall was a recent convert and new to the Church's congregation in Shelton. The Church did not know Hall posed any risk to sexually abuse kids—the abuse was thus unforeseeable as a matter of law. Indeed, the Church members who befriended Hall and knew him best, including N.K.'s parents, thought he was a great guy and never imagined he was dangerous. Ultimately, when the Church received a report that Hall had fondled a child, it acted immediately to protect the congregation's children and Hall fled, never to be heard from again.

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<sup>4</sup> While C.J.C. does not specify whether both kinds of special relationship need be present, surely at least one type of special relationship must exist.

Under these facts, the trial court correctly granted summary judgment to the Church on the ground that the Church did not owe a duty to N.K. This judgment should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. The Church Had No Notice That Hall Posed a Risk**

#### **1. No Notice in Alaska**

Dusty Hall joined the Church in Juneau, Alaska, less than a year before he moved to Shelton, Washington. CP 729; CP 787. There is no evidence Hall engaged in any inappropriate conduct while living in Alaska. CP 801–02; CP 770–85. Parroting a word used once by BSA, N.K. repeatedly calls Hall a “drifter.” In fact, the only evidence in the record (Hall was never deposed) is that prior to encountering N.K., Hall had moved once. Hall moved from Juneau to Shelton, Washington in the spring of 1977. CP 749–50, 799–800.

#### **2. No Notice to the Bishop in Shelton**

Hall remained in Shelton for approximately six months, until September 1977. CP 749–50. During Hall’s stay in Shelton, he began attending Bishop Gordon Anderson’s congregation, the Shelton First Ward. “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.... A bishop’s ... duties include

giving spiritual guidance and counsel to the members of the Church in their jurisdiction.”<sup>5</sup> A bishop also has two lay counselors (assistants) who have some administrative responsibilities within the ward. CP 901.

As described below, Hall fled Shelton in September 1977 when Bishop Anderson received a report that Hall had sexually abused a minor boy. Prior to this time, neither Bishop Anderson nor any other person had any reason to suspect that Hall posed a risk of sexual abuse. Bishop Anderson testified he never witnessed any unusual behavior by Hall. CP 758. Bishop Anderson’s assistant, Ed Savage, concurred and testified that “[h]e seemed like a very nice man.” CP 1312. Savage had sons in the Shelton Boy Scout troop, but did not observe any suspicious behavior by Hall. CP 1303, 1314.

### **3. N.K.’s Parents Thought Hall Was Great**

Those who knew Hall best—including N.K.’s parents—liked and trusted him. Hall became engaged to Geraldine Worthy, a single mother who also attended the Shelton First Ward. CP 864; CP 844. Worthy and N.K.’s mother were “best friends.” CP 844. N.K.’s parents were “very close” with Worthy and Hall. *Id.*

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<sup>5</sup> *Doe v. Corp. of President of the Church of Jesus Christ of Latter-day Saints*, 122 Wn. App. 556, 569 n.3, 90 P.3d 1147, 1154 (2004) (quotation marks omitted).

There is no evidence that N.K.'s parents or anyone else had the slightest suspicion that their newly-engaged friend posed a sexual abuse risk to their sons or other boys. On the contrary, N.K.'s mother testified:

Q. Prior to this revelation that Mr. Hall had inappropriately touched your friend's son, what was your impression of Mr. Hall?

A. We thought he was a nice guy. I should say, I thought he was a pretty nice guy. He put himself off as being very active in the church, and he was bringing my friend Geri a lot of happiness. And so that's – *we just thought he was great* and he was going to be good for Geri as well.

Q. *And I assume that, based on what you've just said, that there was no inkling of any sort that Mr. Hall was capable of the kind of –*

A. *No.*

....

Q. *-- behavior that he was later accused of?*

A. *No.*

CP 852–53 (emphasis added).

N.K.'s father, Richie Northup also liked Hall; they were close friends. CP 764. Indeed, according to N.K.'s father, “[e]verybody liked” Hall. CP 832–33. N.K.'s father said that Hall “hung out at my house quite a bit.” CP 833; see also, CP 846. N.K.'s mother testified that Hall came to their home “[b]ecause him and Richie [N.K.'s father] were friends.” CP 845.

N.K.'s father trusted his friend Hall. He admitted that his personal assessment of Hall was the source of that trust, not any alleged connection Hall may have had to scouting:

Q. And is it also fair to say that you trusted your kids being in his presence?

A. At that – yeah, beforehand. Yeah.

Q. All right. And that was not based on his role, if he had any role in Scouting, but just based on your own assessment of him as a person?

....

A. Yeah, because, at the time, I mean, there was – he seemed to be well liked by a lot of members of the church. And then – so, yes, I guess it was.

CP 835–36. Similarly, N.K.'s mother testified that her decision to allow N.K. to stay at Hall's apartment was not due to any connection that Hall had to Boy Scouts, but simply "[b]ecause he was becoming a friend with all of us."<sup>6</sup> CP 854.

#### **4. Hall's Fiancée Thought Hall Was a "Really Nice Guy"**

Others shared this favorable view of Hall. Hall's fiancée, Geraldine Worthy, testified that when the abuse came to light "everybody

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<sup>6</sup> After his mother gave that unambiguous deposition testimony, N.K. procured from her a declaration that contradicted that deposition testimony by asserting that the "only reason we allowed our son to participate in activities with [Hall] . . . was because he was active in the Church and a leader of Troop 155." Aplt. Br. at 11. This post-deposition effort to help her son's cause should be disregarded. Smith v. Stockdale, 166 Wn. App 557, 567, 271 P.3d 917 (2012).

was just appalled and shocked, couldn't believe that this really nice guy would have done something like that .... [I]t really threw everybody.” CP 872–3. Similarly, a mother with five sons in Troop 155 agreed she had no reason to suspect Hall might molest boys. CP 1264.

### **5. Danford's View**

Only one witness who was an adult in Shelton in 1977 had anything remotely negative to say about Hall (prior to, of course, the accusations of abuse). Former Scoutmaster Ben Danford said Hall showed up as Dusty “Rhodes,” left town briefly, and then returned as Dusty Hall. No other witness remembers Hall using a different name or leaving and then returning. Danford also testified that Hall “was a very personable fellow,” but that he seemed like a “flim-flam” man. CP 763.

Danford conceded his colorful, after-the-fact characterization of Hall was not based on anything specific. CP 1735. Moreover, Danford's impression of Hall had nothing to do with the risk of sexual abuse: “[I]t was a different time, then. . . . I just couldn't imagine such a thing.” CP 1750–51.

In sum, the Church's agent in Shelton, Bishop Anderson, had no reason to suspect Hall posed a sexual abuse risk.<sup>7</sup> In fact, no one did.

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<sup>7</sup> A few former scouts now say Hall made them uncomfortable. CP 1270; CP 1282. There is no evidence that they shared their concerns with Bishop Anderson.

**B. Hall's Friendship With N.K.'s Parents Gave Him Access to N.K. and an Opportunity to Abuse Him**

N.K. claims he was abused by Hall between 20 and 30 times.

CP 810. The abuse began in N.K.'s home. N.K.'s mother had invited Hall to dinner. Later that week, Hall returned to N.K.'s home and molested him for the first time.

Sometime that week he came back to our home before my parents were home, sometime in the afternoon. I believe it was towards the end of school but I don't remember exactly. It may have been summertime. Knocked on the door. My brother Shane and I were the only ones home, that I recall. I told him my mom and dad weren't home. He said, that's all right, he would wait.

CP 807–8.<sup>8</sup> N.K.'s statement regarding timing would put this event a few months after Hall moved to Shelton. CP 809.

The second incident occurred a few days later—again, in N.K.'s home, and again having no relationship to any Boy Scout activity.

CP 810–11. *Indeed, as much as half the abuse occurred in N.K.'s home.*

CP 820–21. “Generally he would come to the house. I don't recall my parents ever being home for some reason.” CP 818–19. N.K. testified that he and his younger brother were abused on these occasions (CP 819),

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<sup>8</sup> Appellant's Brief asserts that “N.K. only allowed Hall in the house because Hall was his Scoutmaster.” Aplt. Br. p. 15. That is not consistent with N.K.'s prior deposition testimony. N.K. testified that Ben Danford was his Scoutmaster. CP 995–96. Obviously, as a member of the troop, N.K. already would have known the identity of his Scoutmaster, Danford.

but N.K.'s brother denies being abused by Hall. CP 840. N.K. also recalls being abused in Hall's car (CP 821), and Hall's workplace. CP 818.

N.K. states that he was abused while on a camping trip to Ocean Shores with Hall and another boy named Paul Knight. CP 816. Knight testified that this was not a scout outing and that no other scouts attended.<sup>9</sup> CP 1291–92; see also, CP 1243.

N.K. also contends he was abused in connection with scout activities. CP 811–18. From N.K.'s own chronology, these events were a continuation of the abuse that had begun in his home.

**C. Bishop Anderson Responded Immediately to the Allegation of Sexual Abuse by Hall, and Hall Fled**

On a Sunday morning in August or September 1977, the three young boys of Hall's fiancée, Geraldine Worthy, were wrestling when one touched the other inappropriately. Worthy questioned her son: "Why would you do that?" He responded, "Well, Dusty does it to me." CP 641. She was "shocked" that Hall would do such a thing. CP 645. Worthy called Bishop Anderson. CP 642–43. The bishop assured Worthy he would take care of it. CP 867. Hall came to Ms. Worthy's house that night "and was very angry, and told me I had ruined his life.... And he

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<sup>9</sup> N.K. also claims, without citing to the record, that "Hall was allowed to take these boys on overnight trips without any adult present." Aplt. Br. at 16. Assuming by "trips" he means out-of-town excursions, the record does not reflect any such trips.

left town that night.... That was all on a Sunday, and by Monday he was gone.” CP 867. N.K.’s mother also remembers that Hall fled Shelton immediately after the abuse allegation was reported to Bishop Anderson. CP 848.

Bishop Anderson tried to locate Hall, but “he had left town already.” CP 755. He sent others to look for him, but they could not locate him: “His apartment was empty.” CP 755.

Although Hall was gone, Bishop Anderson responded immediately by informing parents and investigating whether any other boys had been abused. He called a meeting of parents in his congregation to make them aware of the allegations. CP 869, 871. N.K.’s mother recalls this meeting. CP 848. Bishop Anderson told all the parents to go home and speak to their sons. CP 851, 869. N.K.’s parents spoke to him and he denied that Hall had touched him. CP 851. The bishop paid a personal visit to N.K.’s family and N.K. again denied being molested. CP 851.

N.K. has the same memory of Bishop Anderson’s quick response and meeting with the parents of boys in the ward. CP 977. He admits he denied being abused. CP 977.

Bishop Anderson also recalls his rapid response to the shocking report of Hall’s abuse. He does not recall who told him about Hall, but he remembers it as a male Church member—not Worthy. CP 752–54, 756.

Then, he “called the parents together” and told them to talk to their children to see if any of them had been abused. CP 756–57. He met “with the parents one by one with their son present” and spoke to each boy alone because sometimes they might tell him things they would not say in front of their parents. CP 757. He met with N.K. and his parents in their home, and then with N.K. alone. CP 921. N.K. denied being abused. *Id.*

**D. Former Scouts, Including Daniel Cowles, State That Hall Fled at the Time of the Bishop’s Investigation**

Former scouts also confirm these events. One remembers “a meeting with the Bishop” at “about the time that Dusty left.” CP 1237. Another remembers “everything kind of coming out and my dad asking me about it.” CP 1293. “I don’t remember seeing Dusty Hall again after that. It seemed like he just disappeared.” CP 1293.

One scout, Daniel Cowles, signed a declaration submitted by N.K. in opposition to the motion for summary judgment. Cowles, who was 12 years old at the time, has no personal knowledge of any abuse by Hall, but states that an unnamed boy said that Hall had abused him “[p]rior to the Tumwater Council Camporee in May 1977.” (CP 1248–49.) Cowles says he told an unnamed member of the bishopric<sup>10</sup> about it at that time.

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<sup>10</sup> The reference to “one of the members of the Bishopric” refers to one of Bishop Anderson’s lay assistants.

A second declaration signed by Cowles clarified the first and stated that he does not recall when he heard about the abuse of the other boy or whom he told (except that it wasn't Bishop Anderson). However, he confirmed that Hall left town almost immediately afterward:

I do not recall the month or year I learned that a boy was molested by Dusty Hall, but I do know that I learned it during an overnight scout camping trip. After the boy told me he was molested by Dusty Hall, I told that to a man I believe was in the bishopric. I do not recall who it was, but it was not the bishop. *Within two or three days after my conversation with that person, Dusty Hall left Shelton and did not return.*

(CP 1809, emphasis added.)

There is *no evidence* that Bishop Anderson learned about the allegations against Hall until right before Hall fled town.

**E. Hall Was Not the Scoutmaster or Assistant Scoutmaster But an Unofficial Volunteer Who Helped Out With Troop 155**

**1. Hall Was Not Appointed To Lead the Scout Troop**

N.K. claims “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.” Aplt. Br. at 11. N.K. provides no record cite to support this statement. Simply put, it is false.<sup>11</sup>

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<sup>11</sup> Equally false is N.K.’s statement that “[e]ven witnesses testified [Hall] was openly known as the Scoutmaster, Assistant Scoutmaster or Troop Leader.” Aplt. Br. at 12. Many of the citations provided are for the testimony of witnesses who deny the statement that N.K. attributes to them: N.K.’s mother did not know if he had any official role or whether he “just helped out,” CP 1147; N.K.’s father

It is common for an LDS Church congregation to sponsor a Boy Scout troop. The Shelton First Ward sponsored Troop 155. CP 529. The bishop “calls” a member of the congregation to be the Scoutmaster. CP 527–28, 794. “We have a practice in the Church of having those who are called to service be sustained in front of the Church members at Sunday service.” CP 1807. Hall was not called to be Scoutmaster or Assistant Scoutmaster.<sup>12</sup> In fact, Bishop Anderson did not call him to *any* position. CP 759; see also, CP 751.

N.K. acknowledged that Danford, not Hall, was the Scoutmaster in 1977, and that the troop met with Danford “[e]very week.” CP 995–96. This was confirmed by numerous witnesses and Scout records. As Worthy said, “Anybody that was in the ward would have known that Ben [Danford] was the Scoutmaster.” CP 1210; see also, CP 746–48, 764–66,

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did not know what role Hall had, CP 1180; Worthy said Hall may have been just “someone willing to help,” CP 1219; Annette Curran, the mother of scouts, was “not sure” of Hall’s role, CP 1157; former scout Paul Knight said Hall was not a leader but a “volunteer,” CP 1287; and, former scout Meleki Manu said he did not know “whether Dusty Hall was ever officially the Assistant Scoutmaster.” CP 1807.

<sup>12</sup> The only evidence that Hall held the title of Assistant Scoutmaster is a newspaper article. CP 1357–58. As the Church argued to the trial court, CP 708, the article is double hearsay—the statements to the reporter from an unnamed source and the article itself—and should be disregarded. Stewart v. Wachowski, 574 F. Supp. 2d 1074, 1090 (C.D. Cal. 2005) (holding that statements of belief by unknown declarants reiterated in a newspaper article constituted hearsay within hearsay). Inadmissible hearsay may not be considered on a summary judgment motion. Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

793, 834, 859–60. Danford was “called” by the bishop to fill that position. CP 931. Danford was officially registered with BSA as the Scoutmaster. CP 107, 112; see also, CP 746, 859–60. In contrast, Hall’s name does not appear on the rosters of adults and scouts maintained by the Pacific Harbors Council.<sup>13</sup> Id.

N.K. asserts that “the Scoutmaster nevertheless allowed Hall to take sole charge of the troop.” Aplt. Br. at 7. But N.K. does not support this claim with any cite to the record. Danford testified that Hall was not attending meetings and was not called to assist. CP 764–66. Moreover, the statement makes no sense alongside N.K.’s other arguments—if Danford considered Hall an untrustworthy “flim flam man,” he hardly would have surrendered control of the troop to him.

## **2. Hall Helped Out the Troop as an Unofficial Volunteer**

Several witnesses testified that Hall “helped out” with scouting. It is not unusual for adults to help out with scouts on an informal basis. CP 788–89. Scoutmaster Danford testified that Hall “helped out, but he

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<sup>13</sup> N.K. claims the rosters of boys and adults participating in scouting that were created annually by Pacific Harbors Council cannot be relied upon because they were created at the end of each year. Actually, they were created at the end of each year for the coming year, CP 953, and then were updated throughout the year. For example, the handwritten addition of “Connie Jo Manu” dated “3/30/77” is close in time to when Hall arrived in Shelton. CP 112. Despite such updating, Hall’s name does not appear on the roster for the year expiring December 31, 1977. Id.

wasn't there on an official basis or anything." CP 1730–31. Ed Savage, Bishop Anderson's assistant, remembers that Danford was the Scoutmaster and that Hall "seemed like a very nice man, and he was willing to help with the Scouts." CP 1312. N.K.'s father testified that Hall helped with scouts, like other men in the congregation. CP 1180. N.K.'s mother had a similar memory. CP 1174. Hall's fiancée likewise could not remember if Hall held any formal position with scouts or if he just volunteered to help. CP 1211.

Former scouts confirm the Church did not appoint Hall to any scout position. Paul Knight, one of the scouts, testified that Danford was the scoutmaster and that Hall was just "a volunteer." CP 1287. Meleki Manu's likewise testified that Hall was not a formal scout leader but rather an adult who spent some time helping the troop. CP 1807. Manu also recalled Hall attending only "one or two" scout meetings, and that Hall did not go on campouts other than the scout Jamboree. Id.

The undisputed evidence shows that Bishop Anderson did not "call" Hall to lead the troop. To be sure, Hall helped out with the troop as N.K. emphasizes, but it was not as an appointed Scoutmaster.

**F. The Church Was Not Aware of BSA's I.V. Files**

BSA's 30(b)(6) witnesses confirmed that BSA did not share the I.V. files with the Church or with troop sponsors and did not warn the

Church more generally about any concerns about sexual abuse in Boy Scouts. CP 1678, 1695. BSA issued no warnings about single males without children volunteering to help in scout troops. CR 1372–73. N.K.’s expert testified that “BSA did not warn Scouts, their parents, or sponsoring organizations that an adult volunteer should not be allowed to spend alone time with Scouts.” CP 1588. Because he had no prior known misconduct, Hall was not in the I.V. files. CP 36, 105.

**G. The Church Did Not Violate BSA Policy**

Plaintiff argues that “[o]ne 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.” Aplt. Br. at 22. The citations N.K. provides do not support the statement, and it is not true.

N.K. cites a BSA interrogatory answer stating that “[a]s of 1977, BSA advised chartered organizations to have ‘two deep’ leadership for their troops, to ensure continuous, effective leadership for the troop.” CP 1399. This advice did not preclude one-on-one contact by scout leaders with scouts, and had nothing to do with preventing sexual abuse. Rather, it referred to the optimal arrangement of having a Scoutmaster and Assistant Scoutmaster lead a troop. BSA stated its reasons for such advice in the troop committee guidebook: (1) “[i]f for some reason the

Scoutmaster must be replaced, a trained leader . . . is available;” and (2) to “help relieve the load on the Scoutmaster.” CP 1613.

N.K. also mistakenly cites the deposition testimony of a BSA witness Paul Ernst, and it too does not support the statement in N.K.’s brief. Ernst denied knowing when BSA adopted the policy of not having adults alone with scouts. CP 1716, 1718. However, the date the policy came into effect was suggested by the leading question of N.K.’s lawyer: “If I told you that was around 1985, 1986, in that area there, would that sound reasonable to you?” CP 1718. Despite that assistance, Ernst still could not recall. In sum, there is no evidence the Church violated any BSA policy barring adults from being alone with scouts.

Finally, N.K. falsely claims that the Church “asserted the Scout defendants were negligent” and that “Scout Defendants asserted LDS was negligent.” Aplt. Br. at 38. No such “finger pointing” occurred. Not surprisingly, N.K. failed to provide any citations to the record where such allegations were purportedly made.

### III. ARGUMENT

#### A. The Trial Court Properly Granted Summary Judgment to the Church

##### 1. There Is Generally No Duty to Prevent Sexual Abuse Absent Notice That the Abuser Poses a Risk

“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). Whether a duty exists is a question of law. Fuentes v. Port of Seattle, 119 Wn. App. 864, 868, 82 P.3d 1175, 1177 (2003). There are three elements of duty: “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 (1980).

Notably, “Washington courts have been reluctant to find criminal conduct foreseeable.” Nivens v. 7-11 Hoagy’s Corner, 133 Wn.2d 192, 205 n.3, 943 P.2d 286 (1997). “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. This is an expression of the policy that one is normally allowed to proceed on the basis that others will obey the law.” Kim v.

Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 195, 15 P.3d 1283 (2001)  
(quotation marks and citations omitted).

## **2. No Duty Exists Absent Prior Notice**

When a sexual abuse plaintiff seeks to hold the defendant liable for negligently failing to prevent the 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); Kaltreider v. Lake Chelan Cmty. Hosp., 153 Wn. App. 762, 767, 224 P.3d 808 (2009) rev. granted 168 Wn.2d 1039 (2010); 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, 445, 167 P.3d 1193, 1212–13 (2007); Peck v. Siau, 65 Wn. App. 285, 827 P.2d 1108 (1992).

## **3. The Key Supreme Court Case: C.J.C.<sup>14</sup>**

In C.J.C., a church representative, Schultz, received a phone call that the eventual molester, Wilson, had inappropriate sexual contact with a girl. A year later, plaintiffs' family moved to the congregation when plaintiffs' father became the pastor. Subsequently, Wilson was made a

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<sup>14</sup> Although N.K. is now relying primarily on the McLeod case addressed below, in the trial court N.K. relied primarily on C.J.C. N.K.'s counsel stated during oral argument, "[f]or the last fifteen years, C.J.C. has been the guide in terms of what the law here is in Washington State. . . ." RP 14.

deacon, which gave him contact with and authority over children. C.J.C., 138 Wn.2d at 720. At the time of this appointment, Schultz was first chairman of the church's deacon board. Schultz did nothing to warn the pastor or his three daughters about Wilson. Plaintiffs' family even used Wilson for babysitting when the father traveled on Church business. Id. at 725. Wilson sexually abused the girls, who later brought suit against the church.

Plaintiffs in C.J.C. argued the church owed plaintiffs a duty to protect them "against foreseeable harms perpetrated by a Church official whom the Church '*placed in authority* and in close relationship to church children, *knowing of the danger.*'" Id. at 722 (emphasis added). In responding to this argument, the Supreme Court cited with approval a case from the New Hampshire Supreme Court addressing 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.*" Marquay v. Eno, 139 N.H. 708, 719 662 A.2d 272 (1995), quoted in C.J.C., 138 Wn.2d at 723. Knowledge that a particular employee is "peculiarly likely" to commit misconduct overcomes the normal presumption that people will obey the law and imposes a duty of protection.

C.J.C. thus held that where a special protective relationship exists, whether a duty exists depends on whether church officials “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 (emphasis added).

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.

Id. (emphasis supplied).

C.J.C. emphasized the narrow reach of its holding, going so far as to state that, in some cases, even the presence of knowledge would not be enough to give rise to a duty based on the acts of an agent.

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 (emphasis added). In this passage, C.J.C. acknowledged its “limited” holding marks the outer bounds of duty to prevent intentional harm. The facts presented here are well beyond this boundary. Finding a duty here would make churches and other community organizations

insurers against the intentional conduct of their members, contrary to the stated intention of the Supreme Court in C.J.C.

**4. This Case Satisfies None of the C.J.C. Factors**

Here, the absence of the factors cited in C.J.C. requires a finding that the Church did not owe N.K. a duty. While the absence of one factor—knowledge that Hall posed a risk—justifies a finding of no duty, in this case N.K. fails to establish any of the C.J.C. factors.

**a. No Knowledge of Risk of Harm**

Bishop Anderson testified, without contradiction from any witness, that he did not know Hall posed any sort of risk. Hall's own fiancée and closest friends, in particular N.K.'s parents, thought he was a terrific person. To the adults in the congregation, and certainly to Bishop Anderson, he was an ostensibly normal man who was engaged to marry a woman in the community.

N.K.'s parents became close friends with Hall. They trusted him and were shocked at the allegations of sexual abuse. They let their son spend time alone with Hall "[b]ecause he was becoming a friend with all of us." CP 854. N.K.'s mother was best friends with Hall's fiancée, Gerri Worthy, and the couples socialized together. Worthy trusted Hall enough to allow him to spend time alone with her three sons and even have a sleepover with at least one of them at Hall's apartment. CP 1206–07.

None of them—much less Bishop Anderson at the Church—had any inkling that Hall had dangerous propensities.

N.K.’s *only* evidence that the Church had notice of Hall’s sexual abuse risk is the first declaration of the former scout, Daniel Cowles, which states that prior to May 1977 an unnamed boy in the troop said that Hall had abused him and that Cowles, in turn, had told an unnamed member of the bishopric. But in his second declaration, Cowles clarified that he could not remember the year or month that he learned of the abuse—quite understandable after thirty-five years—and stated that “within two or three days after my conversation with that person, Dusty Hall left Shelton and did not return.” CP 1809. While N.K. contends that Cowles’ declarations are inconsistent, it is not uncommon for witnesses to submit additional declarations to correct or clarify statements in a prior, attorney-drafted declaration.<sup>15</sup>

Cowles’ clarifying declaration is entirely consistent with, and further corroborates, the testimony of other witnesses. First, Cowles’ testimony that Hall fled after the report of Hall’s abuse came to light is consistent with the testimony of Bishop Anderson, N.K.’s mother, and Worthy. CP 755–56, 848, 867–69. The same witnesses—and N.K.

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<sup>15</sup> Cf., Kurtz v. Detroit, T. & I.R. Co., 238 Mich. 289, 293, 213 N.W. 169, 171 (1927) (“It is a rule of law that testimony by way of correction of a misstatement does not make an issue of fact”).

himself—also confirm that at the time of Worthy’s report regarding Hall, Bishop Anderson took immediate action to inform parents and interview scouts. Given the undisputed evidence of the bishop’s response to the allegation, there is every reason to view Cowles’ second declaration for what it is—a correction that is accurate.<sup>16</sup>

Second, Cowles’ statement that he made a report regarding Hall to a member of the bishopric days before Hall left Shelton dovetails with Bishop Anderson’s recollection of receiving a report about Hall’s abuse from someone other than Geri Worthy.<sup>17</sup>

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<sup>16</sup> If Cowles’ collective testimony is viewed as unclear, then there is no probative value to his recollection and N.K. has still failed to make out his *prima facie* case on the issue of notice to the Church. Cf., Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764, 767 (1962) (“If there is nothing more tangible to proceed upon than two or more equally reasonable inferences from a set of facts, and under only one of the inferences would the defendant be liable, a jury will not be allowed to resort to conjecture to determine the facts”); In re Catholic Bishop of N. Alaska, 414 B.R. 552, 561 (Bankr. D. Alaska 2009) (“A genuine issue of material fact is not created where the only issue of fact is which of two conflicting versions of a witness’s testimony is correct”); HCA, Inc. v. Am. Protection Ins. Co., 174 S.W.3d 184 (Tenn. App. 2005) (“contradictory statements of a witness in connection with the same fact have the result of cancelling each other out”); Olney v. Carmichael, 96 A.2d 37, 39 (Md. 1953) (“[I]f any witness’s testimony is itself so contradictory that it has no probative force, a jury cannot be invited to speculate about it or to select one or another contradictory statement as the basis of a verdict.”)

<sup>17</sup> To be clear, the Church has no reason to doubt that Worthy did, indeed, discuss Hall’s abuse of her son with Bishop Anderson. With the passage of thirty-five years, Bishop Anderson did not recall it. Crediting both of their recollections, as well as Cowles’ clarified statement regarding the timing of his report, it thus appears the bishop received two reports about Hall at nearly the same time.

In sum, there is no reason to believe that Bishop Anderson received a report of Hall's alleged abuse prior to September 1977, and failed to respond. All of the deposition testimony shows that when the bishop learned about Hall, the bishop responded and Hall fled.

**b. No "Special Relationship" Between the Church and Hall**

The relationship between Hall and the Church's local scout troop was informal and ad hoc, in contrast with the church official who perpetrated the abuse in C.J.C. To become Scoutmaster for a troop sponsored by an LDS ward, one must be called by the bishop and "sustained" before the congregation. CP 794; 1807. Bishop Anderson testified without contradiction that the Church did not "call" or appoint Hall to be Scoutmaster, Assistant Scoutmaster, or any other position. CP 759. This is confirmed by the historical rosters of leaders and scouts maintained by Pacific Harbors Council. CP 107, 112. N.K. admitted that Danford was the Scoutmaster. CP 995-96. While N.K. contends Hall was a scout leader, N.K. does not recall ever seeing him be sustained. CP 988.

There is no dispute Hall helped with scouts, and he may even have helped out a lot. But whatever his level of involvement, he did it as an informal volunteer, just as fathers and others routinely do for organizations that depend on adult volunteers, especially in a small, rural

town. This status is legally important. Unlike C.J.C., where the abuser was a deacon of the church, Hall had no such position.

A special relationship exists between an entity and a third party “only upon a showing of a ‘definite, established and continuing relationship between the defendant and the third party.’” Taggart v. State, 118 Wn.2d 195, 219, 822 P.2d 243, 255 (1992). There was no such relationship between the Church and Hall; he was simply a member of the congregation. In characterizing his involvement, he was akin to the parent who informally assists the coach of a little league team by going to all the practices, working with the kids, and ferrying them to practices and games. Former scout Meleki Manu said that he looked at Hall as a “leader” merely because “he was an adult who did things with the troop.” CP 1807. Merely “doing things” with the troop did not create a special relationship between Hall and the Church.

**c. The Church Did Not Bring Hall Into Contact With N.K.**

The Church did not “negligently cause[] the harm by placing its agent into association with the plaintiffs.” C.J.C., 138 Wn.2d at 724. The abuse began in N.K.’s home. Hall became acquainted with N.K., and began showing up at the house when N.K.’s parents were gone, because of the close, personal relationship between Hall and N.K.’s parents. Both

parents denied that the trust they had in Hall had anything to do with any role he might have had in scouts. CP 835–36, 852–53. Unlike the deacon in C.J.C. who had been placed into a position of authority over children, the Church did not place Hall into a relationship with N.K.—his parents did.

**d. No Special Relationship Between the Church and N.K.**

It is happenstance that the abuse that began in N.K.'s home allegedly continued in scouting contexts. The facts alleged by N.K. constitute a classic example of abuse by a trusted family friend. N.K. seeks a windfall through the fortuity that some of it allegedly occurred during scouting.

Again, at the time of the earliest alleged instances of abuse, N.K. was in his home, was not engaged in scout activity, and was abused by a man who gained access to N.K. not because he supposedly was a Scoutmaster but because he was a new friend of the family. N.K.'s status as a scout was neither the means of Hall's initial access to N.K. nor pertinent to the establishment of the abusive relationship. ***Absent his involvement in scouting, N.K. still would have been abused in his own home***—by his account, ten to fifteen times (i.e., nearly half of the alleged 20–30 acts of abuse). Hall had no difficulty creating opportunities to

abuse N.K. outside of any scout activity. Scouting was merely another location where the on-going abuse happened to be perpetrated.

If a stepfather repeatedly sexually abuses his child in the home and subsequently sexually abuses the child during church or school-sponsored activities, does this mean a special relationship exists between the entity and the child, such that the entity is potentially liable for “failing to protect” the child? We think not, and by the same logic there was no special relationship between the Church and N.K.

**5. Washington Cases Have Consistently Held That Knowledge of the Perpetrator’s Risk to Abuse Is Necessary to Impose Liability**

A line of Washington cases holds that where the defendant had no knowledge of the abuser’s proclivity toward sexual abuse, such abuse was unforeseeable as a matter of law and thus summary judgment was affirmed.

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 of this Court 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 where “no prior knowledge of Dr. Nakata’s behavior by the Clinic or any of its shareholders or staff.”)

In Doe, this Court again recognized that the absence of knowledge of the perpetrator’s dangerous propensities supported dismissal of the plaintiffs’ claims. Doe, 141 Wn. App. 407. In Doe, the victim was abused by her stepfather, a “high priest” in the LDS Church. The Court held that the Church did not owe a duty for two reasons, both of which are 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 444–45. In Doe, the victim’s mother invited the perpetrator into the family’s home. Similarly, here, here N.K.’s parents invited Hall into their home.<sup>18</sup> Second, “the LDS Church, unlike the church in C.J.C., had not

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<sup>18</sup> Plaintiff tries to distinguish Doe by arguing that “there was no evidence the Church had anything to do with Doe’s mother meeting the man who was to molest her.” Aplt. Br. at 36. But the same is true here: N.K.’s parents had a social relationship with Hall.

been warned that Taylor had previously abused children or made inappropriate advances towards them.” Id. at 445.

In Kaltreider, 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 a case cited by N.K., 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 harms, including sexual abuse by staff. Distinguishing Niece, Kaltreider stated that the plaintiff “was not completely impaired.” Kaltreider, 153 Wn. App. at 766. This Court then 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, 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 alleged that while they were at the hospital, a special relationship existed, and the hospital failed to protect them as the abuser laid the groundwork for the 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.

Two recent federal cases against BSA have also rejected the very theory N.K. advances here.

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 worker'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).

Plaintiff attempts to distinguish these cases as merely showing “that knowledge of an abuser’s danger *permitted* liability,” but that such knowledge was not required. Aplt. Br. at 32. To the contrary, the absence of such knowledge, and the absence of similar prior sexual misconduct at the defendants’ facilities, was determinative.

**B. Niece Is Distinguishable: While the Facility Did Not Have Notice About the Abuser Himself, Prior Sexual Assaults at the Same Facility Made the Risk of Sexual Assault Foreseeable**

N.K. relies heavily on Niece, but this case is distinguishable for several reasons. First, as pointed out in Kaltreider, Niece involved the unique custodial relationship between a group home and patients with severe mental disabilities who were “totally unable to protect themselves and are thus completely dependent on their caregivers for their personal safety.” Niece, 131 Wn.2d at 46; see also id. at 50 (the group home “was responsible for every aspect of her well being”). Cf. Kaltreider, 153 Wn. App. at 766 (“Here, unlike in Niece, Ms. Kaltreider was not completely impaired.”); Smith, 144 Wn. App. at 545, (“This case is distinguishable from Niece . . . the patient in Niece was totally helpless”); Boy 7 at fn. 3

(discussing Niece in the context of alleged abuse of scouts and stating “Kaltreider is the more analogous case.”)

Second, Niece is distinguishable because while the defendant had no notice that Niece’s abuser posed a specific risk, the prior history of sexual abuse of patients at that facility, plus other factors, made it foreseeable that abuse by any staff member was a foreseeable risk: (1) there had been “prior sexual assaults on residents by another Elmview employee;” id. at 42; (2) in response to these assaults, the facility had promulgated a policy against unsupervised contact between male staff and female residents, which policy was specifically intended to protect residents from the type of assault suffered by the plaintiff; (3) at the time of the assault on plaintiff Niece, the defendant facility had revoked the policy; (4) plaintiff’s expert had offered the opinion that unsupervised contact with residents violated the standard of care; and (5) then-existing state law recognized the problem of sexual abuse in residential care facilities for the developmentally disabled. Id. at 50–51. ***Not one of these factors is present here.*** There had been no prior sexual abuse of scouts in Shelton;<sup>19</sup> there was no Church policy forbidding one-on-one contact

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<sup>19</sup> There is no evidence that there were any prior complaints of sexual abuse involving the Shelton ward. CP 499–500.

between adults and those participating in Church programs;<sup>20</sup> N.K. offered no testimony that the Church's actions in 1977—when Jimmy Carter was President and society's understanding of sexual abuse was woefully incomplete—violated any existing standard of care; and N.K. does not cite any law in 1977 that would have given the Church notice of a sexual abuse problem in scouting or youth programs in general.

**C. N.K.'s Reliance on McLeod Is Misplaced**

**1. In McLeod, the School Did, in Fact, Foresee the Risk of an Intentional Assault**

Consistent with the rule that an institutional defendant is not liable for a sexual assault absent knowledge of the assailant's risk to abuse, N.K.'s Complaint pleads that the Defendants should have known that Hall posed a risk:

LDS Defendants and Boy Scout Defendants brought Hall into contact with Plaintiff despite the fact that they should have known Hall was particularly likely to sexually abuse Plaintiff. . . .

CP 6–7. Lacking essential evidence for the claim he pleaded, Plaintiff retreats to a general-field-of-danger theory he did not plead. He now

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<sup>20</sup> N.K. contends that the Church violated a BSA policy prohibiting one-on-one contact between scout leaders and scouts. Setting aside the issue that Hall was not the Scoutmaster, N.K. is incorrect. As discussed above, BSA policy in the 1970s did not forbid adults from being alone with scouts. Supra, at 16–17.

relies almost primarily on a single case: McLeod v. Grant County School District No. 128, 42 Wn.2d 316, 255 P.2d 260 (1953).

In McLeod, 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. at 318. Significantly, 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. (emphasis added). 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 by a 5–4 vote.

The court stated that the defendant’s duty was a function of the relationship between the parties and the nature of the risk. As to the former, 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. The Court explained that 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 stated:

[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. at 322 (emphasis added).

Understandably, the court was not inclined to find the absence of a duty 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”).

We believe McLeod is best understood through the key fact addressed at the outset and alluded to in the excerpt above: a teacher was assigned to supervise the gymnasium “for the purpose of protecting any student from being harmed by other students.” Id. at 318. Given that purpose, it is evident that the school had, in fact, foreseen the risk that absent teacher supervision a student could be harmed by the intentional act of another student. Viewed in this way, McLeod is simply akin to Niece: in both cases, the defendant recognized a risk of intentional harm to the population that included the plaintiff, instituted a policy to protect against the risk, and then failed to follow through on the policy. McLeod would have been a very different case if the assailant had been someone the school did not foresee to be a risk to student safety, for instance, a school teacher. In that case, the legal presumption that people will not intentionally harm another would be fully in force, and would have resulted in the holding of the Peck case previously discussed.

**2. Even If McLeod Applied Here, Hall’s Abuse of N.K. Was Not Within the General Field of Danger**

Even if McLeod were applied, the trial court would still have been correct in granting the Church’s motion for summary judgment. *There is no evidence that the Church was aware that sexual abuse by an adult volunteer was within the general field of danger.* CP 1153–55. In fact,

in pressing his claim against BSA, N.K. repeatedly argued facts that undermine his argument against the Church:

- “BSA never sent the church information about the ineligible volunteer files.” CP 1128.
- “BSA never informed troop committees (or parents) about the problem of adults using Scouts to sexually abuse children, including the fact that most abuse was happening in ‘one on one’ situations.” CP 1129–30.
- “Despite BSA’s knowledge that sexual predators were using the Scouting program to target and molest children at an alarming rate, BSA never warned ... the local church about that danger ....” CP 1136.<sup>21</sup>

N.K. repeatedly argues the same thing on appeal. Aplt. Br. at 1, 2, 3, 7, 8, 9, 16, 17, 31, 39. Thus, not only is N.K.’s legal theory wrong, but even if it applied, the very evidence he relies on shows that sexual abuse by a volunteer helping out with scouts was not in the general “field of danger” the Church should have anticipated.

**D. Some of N.K.’s Arguments Fail for Lack of Proximate Cause**

N.K. faults the Church for allowing Hall to volunteer in scouts without formally registering with BSA. Aplt. Br. at 5. But, requiring Hall

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<sup>21</sup> The Church cites these allegations not because the Church believes BSA was negligent—BSA presented evidence below that the incidence of abuse in scouting was very low—but simply to point out that N.K. cannot have it both ways. He cannot simultaneously argue BSA failed to tell the Church about the risk of sexual abuse in scouting, yet maintain that this risk, unknown to the Church, was within the “general field of danger” the Church should have anticipated.

to register with BSA would not have prevented the abuse. Hall had no I.V. file that would have precluded registration.<sup>22</sup>

N.K. also argues that the Defendants had a duty to warn parents about the risk of abuse in scouting. Aplt. Br. at 3. But, as just discussed the Church had no knowledge of the alleged risk. Supra, at 16, 38. N.K. argues that BSA failed to share information about the supposed risk with local charter organizations such as the Church. Thus, N.K. concedes “[i]t is uncertain what the LDS Church knew” about the risk. Aplt. Br. at 2. Significantly, too, it is pure speculation to say that a generalized warning about the supposed danger of abuse in scouting would have prevented the abuse where N.K.’s parents had a personal relationship with Hall and trusted him.<sup>23</sup>

**E. The Trial Court Did Not Abuse Its Discretion in the Discovery Rulings**

“A trial court has broad discretion under CR 26 to manage the discovery process and, if necessary, to limit the scope of discovery.”

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<sup>22</sup> See Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 477–78 (Tex. 1995) (breach of alleged “duty to investigate, screen, or supervise volunteers” was not proximate cause of abuse because the abuser’s DWI convictions, if discovered, would not have precluded abuser’s presence at the club or caused the club to anticipate his subsequent sexual assaults).

<sup>23</sup> See Patrick v. Sferra, 70 Wn. App. 676, 684–85, 855 P.2d 320 (1993) (gift of ex-racehorse without warning “that ex-racehorses are particularly dangerous” was not proximate cause of injury where plaintiff was convinced she could safely ride this particular horse so that warning would not have dissuaded her).

Nakata v. Blue Bird, Inc., 146 Wn. App. 267, 191 P.3d 900 (2008). An order limiting discovery is reviewed for abuse of discretion. Id. “[A] court abuses its discretion when it exercises that discretion in a way that is ‘manifestly unreasonable, or ... for untenable reasons.’” Id. (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

**1. N.K.’s Recitation of the Facts and Rulings Is Not Correct**

Plaintiff’s characterization of the discovery disputes bears little resemblance to the record. The following points are particularly salient:

- As he did in the trial court, N.K. steadfastly ignores the sworn testimony showing that on the issue of what the Church knew about sexual abuse in 1977, the Church had no responsive information except that which might be contained in records that this Court has held to be protected by the clergy-penitent privilege. CP 588.
- As to the first motion relating to discovery against the Church, the trial court did not “conclud[e] that information regarding LDS’s knowledge and handling of child sexual abuse was not discoverable.” Aplt. Br. at 25. The court merely limited the *time frame* of the requests.
- The Church did not argue below that “non-privileged information became privileged when added to its disciplinary files.” Aplt. Br. at 46. The Church explained that such information “does not exist,” CP 589, and that the disciplinary files contain only confidential statements *made during the disciplinary proceeding*, including the perpetrator’s confession. CP 585–86, 589, 682.
- The Church did not argue that “it violates the First Amendment for a secular court to order a religious entity to account for its knowledge of childhood sexual abuse.” Aplt. Br. at 47. The Church argued that the First Amendment protects its right to

follow Church doctrine by maintaining the confidence of the disciplinary files and using them solely for ecclesiastical and not risk-management purposes. CP 590–91.

**2. In Its Order Granting the Church’s Motion for Protective Order, the Trial Court Merely Limited the Temporal Scope of Discovery**

On November 19, 2010, Plaintiff issued a Notice of Videotaped CR 30(b)(6) Deposition to the Church Defendants. CP 179. The first three topics designated in the notice were specific to the Church’s knowledge about Hall. CP 180. The Church Defendants did not object to these topics, and N.K. took these depositions. Other topics demanded the Church designate a witness to testify on policies and procedures relating to sexual abuse “between 1950 and 1985.” CP 180–81. The Church moved for a protective order to narrow the temporal scope of the topics, which would have required the Church to designate persons with knowledge on these topics back to the days of the Truman administration. CP 168. The trial court granted the Church’s motion and limited the time frame to 1975 to 1980. CP 413–14. After this ruling, N.K.’s attorneys, for reasons unknown, never took the depositions as limited in time by the order.

N.K. incorrectly states that the trial court held that “LDS’s knowledge and handling of child sexual abuse was not discoverable.” Aplt. Br. at 25. The above-listed topics were disputed only because of

their extremely broad temporal scope.<sup>24</sup> While the trial court's order included a handwritten notation that "Plaintiff may propound interrogatories to defendant for information relevant to records and/or information specific to the complaint herein," nothing in the order precluded the depositions from proceeding. CP 168. The court's decision to limit the timeframe and to avoid the burden on the Church of having to appoint someone to testify on "policies and procedures" sixty years ago was not "manifestly unreasonable" and should be upheld on appeal.

**3. The Trial Court Correctly Applied This Court's Prior Decision on the Church's Disciplinary Files and Thus Denied N.K.'s Motion to Compel**

On April 28, 2011—one week before the fact discovery cutoff—Plaintiff issued a second CR 30(b)(6) notice to the Church Defendants listing 24 subjects. CP 532–35. The first three topics asked about records during 1975–77 of investigations of sexual abuse, and the Church sent a letter to N.K.'s counsel advising that such records do not exist. CP 547. The rest of the deposition topics sought specific information about investigations of child sexual abuse in 1975–77. Again, the Church advised it had no records from which such testimony could be offered. The Church also advised it "does not consider church disciplinary files to

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<sup>24</sup> The Church also successfully moved to strike topics in the Deposition Notice that did not expressly pertain to sexual abuse. N.K. does not challenge these rulings.

be ‘investigations,’ and we do not understand you to be asking about them. As you know, the Court of Appeals in Doe v. COP held such files to be subject to the clergy-penitent privilege.” CP 548.

N.K. filed a motion to compel. The Church opposed the motion, demonstrating that it had no records or information of reports of sexual abuse during 1975–77 outside of the privileged disciplinary council context. The Church’s risk manager, Paul Rytting, testified:

With regard to the request to designate someone to testify about the number of investigations of sexual abuse during 1975–77, ***the Church has no responsive information.*** The Church does not consider confidential records of disciplinary councils to be investigations. If those records were deemed investigations, they would be the only information the Church possesses on the subject.

CP 677 (emphasis added); see also, CP 680.

Rytting further explained that the Church’s Risk Management Division was created in 1979, and that the first lawsuit against the Church for sexual abuse was not brought until 1989. CP 677. Since that time, the Risk Management Division had, of course, created files regarding these later-filed claims. However, “these records were not created contemporaneously with the events in question but, rather, were created in response to claims and suits by victims and alleged victims ***years after the alleged abuse occurred.***” CP 677 (emphasis added). In regard to

investigations *during* 1975–77—the subject of the deposition topics—the Risk Management files contained no such records.

The trial court denied N.K.’s motion to compel for four reasons: “such topics are (a) protected by the state clergy-penitent privilege; (b) protected by the First Amendment to the United States Constitution; (c) irrelevant and not reasonably designed to lead to the discovery of admissible evidence; and (d) not limited in scope pursuant to this court’s previous discovery orders.” CP 700–01. Given that it followed this Court’s precedent, the trial court clearly did not abuse its discretion.

**a. The Trial Court Correctly Barred Discovery of the Disciplinary Files**

The Church’s Manager of Confidential Records, Greg Dodge, testified:

[T]hese [disciplinary] records are commonly generated as part of the process of an individual member’s repentance for transgressions, and they are maintained for purely ecclesiastical purposes. The Church maintains these records in the strictest confidence ....

CP 680. Dodge described in detail the process of seeking forgiveness through Church discipline and the information—including the perpetrator’s confession and other penitential communications—that comprises the confidential disciplinary file. CP 680–85. Dodge testified the Church maintains the files to record “the ecclesiastical relationship between the member and the Church,” including “whether he or she is

worthy to partake of the Church's sacred sacraments and otherwise participate in the Church." CP 683. The files are strictly confidential even within the Church—"a person employed by the Church's Risk Management Division has no access to these records." CP 684.

This Court previously held that these precise files are protected by the clergy-penitent privilege. In Jane Doe v. Corp. of the President of Church of Jesus Christ of Latter-day Saints, 122 Wn. App. 556, 90 P.3d 1147 (2004), the plaintiff (represented by the same lawyers representing plaintiff here), requested broad access to the Church's disciplinary records. The trial court pared the request down to a single record related to the perpetrator and ordered that it be produced. This Court reversed:

Under LDS Church doctrine, an essential prerequisite to being saved is that an individual repent for his transgressions. When an LDS Church member is accused of a serious transgression such as sexual abuse, a stake disciplinary council must intervene and help the Church member repent and re-establish a covenant with God. Formal church discipline is administered by a disciplinary council and can result in probation, disfellowshipment, or excommunication .... LDS Church procedures require that an RCDA [report of church disciplinary action] be prepared and sent to the Church headquarters in Utah when the discipline is disfellowshipment or excommunication.

Id. at 560. This Court thus concluded, “Roe’s RCDA is protected by the clergy-penitent privilege.” Id. at 568. Other courts agree.<sup>25</sup>

N.K. claims the Church “argued [that] non-privileged information became privileged when added to its disciplinary files” and that the Church cannot cloak such information in the privilege by putting it in the disciplinary file. Aplt. Br. at 46. The Church made no such argument. Rather, the Church explained that records of reports of abuse made outside of a disciplinary council “do not exist.” CP 589. The disciplinary files contain information confidentially conveyed to clergy within the confines of the disciplinary council. The only other information in a disciplinary file would be a letter to the transgressor informing him when and where the council will be held, and a post-council letter advising the transgressor of the outcome, such as that he was excommunicated. CP 682.

**b. The Constitution Precludes N.K. From Arguing Liability Based on the Disciplinary Files**

The trial court also agreed that the Church’s disciplinary files are protected by the First Amendment and Article I, section 11 of the Washington Constitution. CP 590–91. Numerous courts have recognized

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<sup>25</sup> See Scott v. Hammock, 133 F.R.D. 610, 619 (D. Utah 1990); Scott v. Hammock, 870 P.2d 947, 953 (Utah 1994); Hadnot v. Shaw, 826 P.2d 978 (Okla. 1992); State v. Archibeque, 221 P.3d 1045 (Ariz. App. 2009) (all holding that confidential communications to LDS clergy are privileged).

that churches have a constitutional right to maintain certain confidences.<sup>26</sup>

“[T]he history of the nation has shown a uniform respect for the character of sacramental confession as inviolable by government agents interested in securing evidence of crime from the lips of criminal.” Mockaitis v. Harclerod, 104 F.3d 1522, 1532 (9th Cir. 1997).

Plaintiff argued that the disciplinary files could “show that COP knew or should have known by 1977 that sexual abuse of children was a foreseeable harm ... [and that] COP failed to exercise reasonable care to protect Plaintiff from that danger because it knew or should have known that its policies and procedures were ineffective ....” CP 573. In other words, N.K. sought to argue that the Church had failed to utilize the disciplinary files for risk management purposes. But, as the Church explained, disciplinary files are confidential and are used for strictly penitential purposes—access to them is limited to the transgressor’s clergymen. CP 683. Church doctrine precludes access to the files by

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<sup>26</sup> See Hadnot, 826 P.2d at 989 (“The church’s immunity from disclosure rests neither on a statute nor a code of evidence. Rather its shield is of a constitutional dimension.”); Mullen v. United States, 263 F.2d 275, 280 (D.C. Cir. 1958) (Fahy J., concurring, joined by Edgerton, J.) (sound policy concedes to religious liberty the rule that secrets acquired in performance of spiritual function should not be disclosed in judicial proceedings); Griffin v. Coughlin, 743 F. Supp. 1006, 1028 (N.D.N.Y. 1990) (free exercise clause recognizes need for privacy in confidential communications with spiritual advisor); Cimijotti v. Paulsen, 230 F. Supp. 39, 41 (N.D. Iowa 1964) (compelled disclosure of statements made in recognized and required church proceeding would violate free exercise of religion), aff’d 340 F.2d 613 (8th Cir. 1965) (per curiam); Scott, 870 P.2d 947 (clergy-penitent privilege protected by free exercise of religion).

others, including the Church's risk managers. CP 684. They are not reviewed, analyzed, or otherwise used for risk-management purposes.

The Constitution forbids N.K. from making the argument that files the Church maintains for purely ecclesiastical purposes—and treats as absolutely confidential—should have been used instead for a secular risk management purpose. The Church has a right to create and maintain disciplinary files according to its doctrines without civil interference. “[C]ivil courts exercise no jurisdiction” over “a matter which concerns ... church discipline ...” Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713–14 (1976).

**c. The Disciplinary Files Are Irrelevant**

N.K.'s 30(b)(6) notice sought information about abuse by any Church member, anywhere. CP 1870–71. The disciplinary files likely include confessions of abuse of family members and in other contexts that have nothing to do with scouting or the complaint in this case.<sup>27</sup> These files are not reasonably likely to lead to discovery of admissible evidence because they would shed no light on Hall's propensity to abuse.

N.K. puts misplaced reliance on T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 421, 138 P.3d 1053 (2006). The sole issue in that case was

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<sup>27</sup> The Church did respond to broad discovery requests regarding allegations of abuse related specifically to Troop 155 and to the Shelton First Ward. CP 499, 501–02, 526.

whether, on a discovery motion concerning BSA's IV files, the trial court should have applied a balancing test developed in cases seeking discovery of a political party's minutes. The Supreme Court held that the trial court was not required to apply the balancing test—it did not address either the privilege or relevance issues presented here.

**d. The Disciplinary Files Are Not “Investigations”**

The Church does not consider the files generated as part of the process of repentance to be an “investigation.” CP 677. Because the disciplinary files are not “investigations,” but rather records of confessions, they were outside the scope of the discovery request.

**4. The Trial Court Correctly Denied N.K.'s Last Motion to Compel**

N.K. filed a final motion just prior to the summary judgment hearing. N.K. sought the Risk Management records created after 1989. It was essentially a motion for reconsideration as N.K. had sought such documents in his reply brief on the prior motion. CP 187–88. On August 16, 2011, the court denied the motion “because of the prior court order granting summary judgment and on that basis only.” CP 2029.

N.K.'s motion was without merit: (1) the documents, created long after 1975–77, were not within the scope of the prior Deposition Notice; (2) the records deal with a vast array of allegations of sexual abuse, including non-scouting contexts, having no relevance to this case,

CP 1936–37, and (3) they are essentially claims files that contain mostly privileged information such as correspondence with legal counsel related to the claims. CP 1937–38. The trial court did not abuse its discretion.

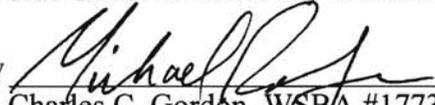
#### IV. CONCLUSION

Dusty Hall met N.K. and began abusing him through Hall’s social relationship with N.K.’s parents. Hall was not appointed to any position with the scout troop, and no action by the Church caused Hall to become associated with N.K. Most significantly, the Church did not know Hall posed a risk to sexually abuse kids. Therefore, the trial court correctly applied C.J.C. and granted summary judgment in favor of the Church.

RESPECTFULLY SUBMITTED this 21st day of May, 2012.

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The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be served upon the following via the methods indicated:

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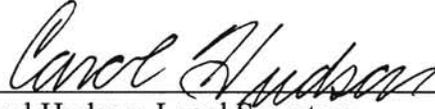
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STATE OF WASHINGTON

DATED this 21st day of May, 2012, at Seattle, Washington.

A handwritten signature in cursive script that reads "Carol Hudson". The signature is written in black ink and is positioned above a horizontal line.

Carol Hudson, Legal Secretary  
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