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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

BEFORE THE HONORABLE JUDGE ROBERT MCGUINESS

DEPARTMENT 22

JANE DOE, ) No. HG115588324  
)  
Plaintiff, )  
) ASSIGNED FOR ALL PURPOSES TO  
v. ) JUDGE ROBERT MCGUINESS,  
) DEPARTMENT 22  
WATCHTOWER BIBLE AND )  
TRACT SOCIETY OF NEW )  
YORK, INC., a )  
corporation, et al., )  
)  
Defendants. )  
)  
\_\_\_\_\_ )

JURY TRIAL

JUNE 6, 2012

DAY 6

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1 INDEX OF EXAMINATIONS:

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3 (NO WITNESSES WERE CALLED)

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1 INDEX OF EXHIBITS:

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4 (NO EXHIBITS WERE ADMITTED)

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1 JUNE 6, 2012

10:53 A.M.

2 PROCEEDINGS

3 THE COURT: Back on the record in the  
4 Watchtower Bible and Tract Society Inc. All counsel --  
5 counsel had a meet and confer relative to proposed jury  
6 instructions in this particular matter.

7 As a matter of process, I'm going to ask Mr.  
8 Simons, counsel for Plaintiff, to go, as I say in Latin,  
9 in seriatim, Casey instruction specifically referenced  
10 by chronology as to what the parties may be given in  
11 this matter.

12 If there is agreement as to a certain  
13 instruction being modified, just indicate, if you would,  
14 as to the defense version or to the written version that  
15 we will submit to the court on Saturday so I can see all  
16 of it.

17 And we will -- first of all, as I said, put  
18 behind door "A" the agreed-upon instructions from Casey,  
19 the agreed upon instructions as modified by your  
20 agreement.

21 And then, because of the nature of the  
22 interplay, there are a number of instructions as to  
23 punitive damages.

24 What I have proposed is: I will listen to  
25 motions, specifically defense Counsel's motion to submit

1 the testimony of Mr. Lewis and then their motion for  
2 directed verdict, and Plaintiff's response directed  
3 verdict/non-suit.

4 I will make my rulings and then we will  
5 return to the instructions and proceed accordingly.  
6 Okay?

7 MR. SIMONS: All right.

8 THE COURT: Mr. Simons, to you as to  
9 specifically agreed-upon instructions, their source and  
10 then any comments as to any specific instruction if  
11 modified by agreement of the parties.

12 MR. SIMONS: All right. Your Honor, thank  
13 you.

14 Beginning with Casey 200, 201, 202, 203, 208,  
15 the Plaintiff's's supplemental version with the  
16 videotape heard part, 210, 212, with an agreed modified  
17 version, 218, 219 --

18 MR. SCHNACK: We have 218 as modified?

19 MR. SIMONS: Yes.

20 THE COURT: And I -- thank you. I have it as  
21 modified.

22 MR. SIMONS: 219, 220, 221, 223, 400, the  
23 defense version, however, with the names changed from  
24 Jane Doe to Candace Conti.

25 I'm sorry, your Honor, 401, we deferred; is

1 that correct?

2 THE COURT: By my note, yes.

3 MR. SIMONS: Yes. Okay.

4 THE COURT: And let me state for the record,  
5 as I understand it, it is Plaintiff's position that 401  
6 contextually should be given, notwithstanding any other  
7 special instruction given on that statute, on that duty  
8 and standard of care while defense objects to the  
9 introduction of 401.

10 And I will listen to that argument when we  
11 come back.

12 MR. SIMONS: And similarly, 406, there is an  
13 issue. It is agreed to be given, but there is an issue.

14 THE COURT: And let me say for my record, the  
15 agreement in my understanding, is there is no objection  
16 as to named parties to this lawsuit, there is an  
17 issue -- I will call it a Prop 51 allocation issue -- as  
18 to un-named parties, as I understand it. Okay.

19 MR. SIMONS: 412, 413, 430, 431, which needs  
20 to be modified to fill in the party names.

21 434, which needs to be modified to change  
22 Jane Doe to Candace Conti.

23 MR. McCABE: Just so we are all clear, on  
24 431, we are going to change "negligence" to be  
25 "negligence" or "fault."

1 MR. SIMONS: Yes.

2 THE COURT: And my notes say that.

3 MR. SIMONS: Yes. Thank you.

4 1005. 1306 is the instruction that was not  
5 specifically requested until this morning with regard to  
6 sexual battery. And the parties have agreed on language  
7 as to 1306.

8 3700. 3701 as modified by the parties.

9 3703 as modified by the parties.

10 3720 as modified by the parties.

11 3900, the Plaintiff version.

12 3902, the Defendant version with Candace  
13 Conti instead of Jane Doe.

14 3903, as modified by the parties to just  
15 limit it to the one specific item.

16 3904A. 3904B.

17 MR. SCHNACK: Again, those are already  
18 modified again to exclude any reference to the claim of  
19 wage loss and future earnings.

20 MR. SIMONS: Right. The Plaintiff's versions  
21 would exclude the claim of wage loss. Counsel is  
22 correct.

23 THE COURT: All right.

24 MR. SIMONS: 3905 and 3905-A. 3925.

25 3933 is agreed to, but the issue of

1 non-parties remains unresolved.

2 3934, as modified to reflect the different  
3 theories.

4 3960 is agreed to but, again, the non-party  
5 issue is unresolved.

6 3964, 5000, 5002, 5003, 5005. 5006. 5009.

7 5010, which will be edited to reflect and the  
8 notes will be destroyed.

9 5011, at this point we would request mutually  
10 and insert jury instruction Casey instruction 114 and  
11 116. 5012.

12 The question of 5016 is before the court.

13 5017 agreed to.

14 5020 agreed to.

15 THE COURT: All right. Does defense counsel  
16 agree with that?

17 MR. SCHNACK: Yes, your Honor.

18 THE COURT: On that recitation. Thank you,  
19 gentleman.

20 All right. At this time I will invite  
21 argument. First of all, I want to ensure, counsel that  
22 I have read the motion. I have got emails which I could  
23 read. I got a copy from the Plaintiff in response. So  
24 I read all writings that have been presented to the  
25 court for a purpose of making a record and a bit of

1 argument to the defense and the moving party.

2 MR. SCHNACK: With respect to Carl Lewis,  
3 your Honor?

4 THE COURT: With respect to Carl Lewis.

5 MR. SCHNACK: Basically it is what we put in  
6 the motion, your Honor. He testified that there was no  
7 scientific or empirical evidence to support the CSAAS.  
8 And he further testified that it has no particular  
9 application to any particular case. He did that on  
10 redirect and recross. And for that reason, it can't  
11 assist the jury. And that's why we think his entire  
12 testimony should be stricken. That's the only topic he  
13 testified on.

14 THE COURT: Mr. Simons.

15 MR. SIMONS: That standard, your Honor, may  
16 be applicable in federal court. It is not the standard  
17 in the state court. And the question is helpful to the  
18 jury. And under People vs. Brown, I think that standard  
19 can come in in this case.

20 THE COURT: Clearly, it is the Court's belief  
21 that there are differences between the state law and the  
22 federal law on this. Having considered a well-phrased  
23 motion and reply, I'm going to deny that motion.

24 All right. Let's move on to the request.

25 And on my record at this juncture is a directed verdict

1 motion and, of course, plaintiff has replied directed  
2 verdict/non-suit.

3           Having said the same on my record, and at the  
4 close of the Plaintiff's case, defense made a motion for  
5 directed verdict. Let's, on our record -- who is going  
6 to handle it for defense?

7           MR. SCHNACK: I would.

8           THE COURT: Okay. Mr. Schnack. Frame it  
9 very specifically as to the nature of the motion. I  
10 will allow you to argue and Mr. Simons to reply, so I  
11 can consider the motion and make a ruling.

12           So to the defense for argument purposes.

13           MR. SCHNACK: Yes, your Honor. Just to  
14 supplement the briefing on this. This is for a directed  
15 verdict on the punitive damages claim that has been  
16 alleged against Defendant, Watchtower.

17           The standard is brief. I'm sure you're  
18 familiar with. That's the oppression, fraud or malice  
19 by clear and convincing evidence.

20           The only issue raised in the pleadings, and  
21 indeed in the evidence, was that the July 1, 1989 letter  
22 was a policy, and that that evidence, malice, oppression  
23 or fraud -- the only evidence about that letter that  
24 even rises to a level of negligence was argument of  
25 counsel. Not one witness testified that that was a

1 policy to keep child abuse secret, which is the whole  
2 basis of the claim. If you read through the Complaint,  
3 that is the basis for it.

4 And there was no evidence whatsoever from any  
5 witness. Dr. Salter, the expert, did not address that  
6 letter in her testimony. Dr. Ponton did not address it.  
7 Carl Lewis did not address it.

8 The only evidence came from the defense  
9 witnesses that were called by the Plaintiff, and none of  
10 them said it was a policy of secrecy. None of them said  
11 it was directed specifically to child sex abuse. And,  
12 therefore, it just cannot meet the standard to even  
13 submit for the punitive damages claim to the jury.

14 I guess one final point, your Honor, is,  
15 because that is a national policy, the last part of our  
16 brief under the BMW case, you cannot effect -- try to  
17 effect national policy by awarding punitive damages in  
18 state court. And so that is a further reason why it is  
19 improper here.

20 THE COURT: And, again, I thought that was  
21 good work again.

22 MR. SIMONS: In reverse order, the BMW case,  
23 that applies to whether or not the punitive damages can  
24 be included in assessing the amount, conduct towards  
25 persons other than the plaintiff.

1           That's a separate question from whether or  
2 not despicable conduct is -- or indifference, if you  
3 will, with conscious disregard is, itself, subject to  
4 proof only by the conduct to the plaintiff.

5           Those are separate issues. So I would  
6 distinguish the BMW case in that regard.

7           Secondly, I do not think that it requires an  
8 admission by the defendant of malice in order for the  
9 jury to find malice.

10           And, in fact, in many cases malice, and  
11 particularly, and in a malice in a negligence context,  
12 as this case is recited in Plaintiff's motion to amend,  
13 negligence citations involving findings of indifference  
14 all involve cases where the defendant is not admitting  
15 malice, but that it is inferred from the other facts and  
16 circumstances in the case.

17           And in this case, I think there is more than  
18 sufficient evidence from Dr. Salter as to the timing and  
19 the events involving the Catholic Church, and the other  
20 evidence we have set forth in our written opposition  
21 from which a jury could find by clear and convincing  
22 evidence that the true purpose of this policy was  
23 protection of The Watchtower and not protection of the  
24 children.

25           MR. SCHNACK: Just briefly, your Honor, the

1 only evidence on this July 1,1989 letter was that it was  
2 very broad. It addressed subpoenas of counseling  
3 records with couples who would seek out an elder. It  
4 addressed subpoenas, criminal matters, things unrelated  
5 to child abuse.

6 The only reference to child abuse -- two  
7 things: One, there's mandatory reporting laws if you  
8 recall in that paragraph at the top, it was shown  
9 several times. One is their mandatory reporting laws of  
10 calling the Legal Department so you can comply with  
11 legal requirements.

12 And two, help protect the victims.

13 Nothing in there said cover up, hush-hush on  
14 child abuse. If he refers to conduct by Abrahamson and  
15 Clarke, they were not managing agents. They were agents  
16 of Watchtower, but not managing agents. And again, the  
17 evidence doesn't reach even the preponderance, much less  
18 the clear and convincing evidence.

19 MR. SIMONS: May I respond to that point,  
20 your Honor.

21 First of all both the managing agents, both  
22 Abrahamson and Clarke were following instructions from  
23 New York which were issued from the policies issued by  
24 the governing body. And the governing body is the  
25 managing agents, according to Mr. Shuster. I don't

1 think there is question of who the managing agents are  
2 or where the policies come from.

3 And, secondly, on the question that counsel  
4 raised with regard --

5 I'm sorry. I just lost my train of thought .

6 -- that the policy does not address child  
7 abuse by determining that information that is not  
8 confidential, such as the report of Jonathan Kendrick  
9 sexually abusing Andrea, is deemed confidential by  
10 corporate policy rather than by law.

11 That is a function of effecting through the  
12 policy of confidentiality, actual secrecy regarding the  
13 report of child sex abuse that was not received in  
14 confidence.

15 So I think that, while the policy is  
16 well-written to, perhaps, masquerade its effect and  
17 intent, the policy's actual effect and intent is  
18 different.

19 MR. SCHNACK: Might I respond, your Honor?

20 THE COURT: You may.

21 MR. SCHNACK: Two things. One, the testimony  
22 was that there was scriptural requirements to  
23 confidentiality, not that it was a legal requirement.

24 Second, there was no evidence that Watchtower  
25 told Clarke and Abrahamson to keep it confidential.

1           Again, we are dealing with two individuals  
2 who were agents, yes, but not managing agents. It is  
3 their conduct that is being measured.

4           THE COURT: All right. I have given a lot of  
5 thought to this, and history would tell you that I have  
6 granted a number of non-suits and motions for directed  
7 verdict.

8           I'm going to decline to do so in this  
9 particular case. Nobody cited to me a case -- and I'm  
10 going to find it in a minute.

11           First of all, the rule of law is that, in my  
12 reviewing and judging in this particular matter, I do  
13 adopt the standard of clear and convincing, since it is  
14 limited to the request for punitive damages.

15           Having said that, I have considered the  
16 couple weeks of testimony here, the evidence before me,  
17 and I'm going to decline to grant the motion as to  
18 punitive damages. That is not to say either party  
19 certainly can make any post-trial motions they want.

20           But the policy itself -- first of all, in  
21 Turk -- and I will get the cite in a minute -- that was  
22 a case involving apportionality. Absolutely no evidence  
23 in a bad faith case as to malice or any of the nature or  
24 arguments relating to the imposition of punitive  
25 damages.

1           And I think this type of argument or  
2 application is inherently -- unless there is just no  
3 evidence whatsoever -- and understanding the difference  
4 between the evidentiary standards, I am going to deny  
5 the motion because I think the letter, the policy, the  
6 testimony of witnesses and whatnot that there is a lot  
7 in play in this case.

8           You know, part of the readings go to whether  
9 you make a conscious and deliberate action that imperils  
10 the safety of others.

11           And inherently in a case of this nature where  
12 child abuse is alleged, that would give me great pause,  
13 relative to directing a verdict at this time in this  
14 particular case, and effectively serving the jury  
15 function here; although, it is certainly a consideration  
16 as to the Judge's call, as to whether I exercise it or  
17 not.

18           So I'm going to deny the motion for directed  
19 verdict as to punitive damages in this case.

20           It is Stewart versus Truck Insurance  
21 Exchange, which that does put on the burden to the  
22 plaintiff to meeting the standard of clear and  
23 convincing evidence.

24           There is also a lot of language in Stewart  
25 versus Truck Insurance Exchange as to the burden -- I

1 mean the admonishments as to a juries in this.

2 "When ruling on a motion for a  
3 directed verdict, the judge may not waive the  
4 evidence or determine the credibility of  
5 witnesses. All of the evidence presented by  
6 the party opposing the motion must be accepted  
7 as proved, understanding it is evidence not  
8 argument. And all evidence presented by the  
9 moving party must be disregarded."

10 Stevens versus Parke, Davis.

11 So applying the legal standard, the  
12 evidentiary standard, and whatnot, I am going to decline  
13 to order a directed verdict in this matter at this time.

14 All right. Let's go back through the open  
15 issues, and we will get to the special verdict requests  
16 at the end of our continuing discussion regarding the  
17 basic instructions.

18 Now, on my checklist, let's go to 401 for a  
19 minute.

20 And, Mr. Simons, your pitch on that. Basic  
21 standard of care: Casey.

22 MR. SIMONS: One second your Honor. I'm  
23 catching up here.

24 Your Honor, 401, it is the reasonable person  
25 standard of negligence which would apply in this case.

1 The specific standard of care and whether it was  
2 reasonable to need it or not and the specific duty and  
3 whether or not it was met are supplemental, I think, to  
4 the basic understanding of the standard of care.

5           Additionally, this would apply to any other  
6 person, so certainly if the court is inclined to include  
7 non-parties, this would be the only standard of care  
8 instruction as to those individuals, and I'm not  
9 suggesting it should.

10           THE COURT: I understood that.

11           All right. To defense counsel. Absent the  
12 non-named parties, your thoughts on giving the 401.

13           MR. McCABE: Well, one thought, your Honor,  
14 is it talks about the failure to act. And that gets to  
15 the whole question which is: Was there a duty to the  
16 warn?

17           THE COURT: I agree. I agree. And so your  
18 point is entirely and legitimately made as to whether  
19 there was a duty to warn. As directly. And you said  
20 it. All right. By the time we get down to the special  
21 instruction, I will then quote that 401.

22           All right. Where in the 3900s, there was a  
23 question about use of the table. I guess --

24           MR. SCHNACK: The life expectancy table, I  
25 think it is that one.

1 MR. SIMONS: Yes. It says 3932.

2 THE COURT: And all counsel, notwithstanding  
3 my fondness for each of you, to remain in my good  
4 graces, I want to get my instruction books back up here  
5 before you leave.

6 MR. SCHNACK: We actually stole it from the  
7 table next to us.

8 THE COURT: Well, there might be a factual  
9 issue as to how it got here.

10 Okay. Standard of care.

11 Okay. To defense counsel on this one.

12 MR. SCHNACK: Your Honor, on 3932, there is  
13 no evidence whatsoever of life expectancy for Plaintiff,  
14 Candace Conti.

15 There is no expert witness testimony, no lay  
16 testimony on it, period. So we don't believe it is  
17 appropriate to give it.

18 THE COURT: This is just one of those yin and  
19 yang circumstances in this case again. I am going to  
20 give it. I would be more attentive and understanding if  
21 there was a concern that she wouldn't live the average  
22 life span and the need for testimony as to that. But on  
23 3932, I would use the table for life expectancy. And  
24 that's my ruling.

25 Okay. Let's get to the non-parties aspect

1 because that affects a few things here.

2 All right. So I presume the defense is  
3 saying to this judge --

4 First of all, to counsel for the defense, who  
5 would you like to be included for purposes of the jury's  
6 consideration as to verdict?

7 MR. SCHNACK: Kathy Conti, Neal Conti,  
8 Fremont Police Department, Child Protective Services,  
9 and the Alameda County District Attorney's office.

10 THE COURT: Mr. Simons?

11 BY MR. SIMONS:

12 Q. Your Honor, Fremont Police Department, Child  
13 Protective Services and Alameda County District  
14 Attorney's Office, I do not believe there is any  
15 evidence in the record that would support the finding of  
16 a duty breach causation as to them. So I think that the  
17 prima facia case required before it can be included on  
18 the allocation is not met there.

19 Kathy Conti, there was no evidence that she  
20 was able to take care of herself, much less anyone else  
21 during the critical time period. I don't think there  
22 was any evidence for this jury to find that she was  
23 negligent.

24 And Neal Conti was not aware that Jonathan  
25 Kendrick was a threat to molest his child. He may not

1 have been the warmest parent, but there is no evidence  
2 that he knowingly allowed his child to be molested.  
3 And, in fact, there was substantial evidence that at  
4 that time his relationship with his daughter was such  
5 that had he known, he would have protected her.

6 THE COURT: Well, I certainly agree, because  
7 I have been doing what I consider a review of the  
8 evolving Prop 51 expansions. Certainly, I would not be  
9 inclined to instruct or allow a verdict consideration as  
10 to the Police Department in Fremont or the D.A.

11 MR. SCHNACK: Can we respond to that, your  
12 Honor?

13 THE COURT: Sure.

14 MR. SCHNACK: In the same way that he  
15 contends there was no evidence by the Fremont Police,  
16 the evidence was that do not ever take any community  
17 notifications at the very same time that the elders  
18 worked on it.

19 And they worked -- they got the very same  
20 confession that the elders did. They prosecuted him  
21 criminally, and yet they took no community notification.

22 How is that any different than what they are  
23 alleging that the elders did not do?

24 THE COURT: Well, but you are now bringing in  
25 the D.A. and the police and whatnot, and it raises, I

1 think, different questions as to the duty and the  
2 analysis of the same.

3 MR. SCHNACK: I have defended public  
4 entities, your Honor. These types of claims are brought  
5 against them all the time.

6 THE COURT: I know that, but the issue is:  
7 How are they disposed of? And I assure you in this  
8 particular case based on the evidence, given that  
9 instruction.

10 MR. McCABE: Your Honor, it just goes back to  
11 the duty to warn. The police didn't have a duty to  
12 warn. The elders didn't have a duty to warn.

13 So if you take the police out of it -- he  
14 knew about the elders involved. He knew the  
15 congregation was involved. He knew that there were  
16 children in the congregation. So it was the same thing.

17 THE COURT: I'm not sure it is. At that  
18 point in time -- well, I'm going to think about it. I  
19 mean, this is a fairly sophisticated point. But that is  
20 a very -- well, I'm going to think about it a little  
21 bit.

22 Anything further from Mr. Simons.

23 MR. SIMONS: On the law enforcement agencies?

24 THE COURT: Right.

25 MR. SIMONS: Yeah. Where was the evidence of

1 standard of care that required them to notify the  
2 general community?

3 THE COURT: Well, of course it is very clear  
4 that at this juncture, all the elements would have to be  
5 established contextually within the evidence before me.

6 I can tell you, the easiest decision on this  
7 one, as far as I'm concerned, is the father. Okay. I'm  
8 not going to put him into the loop there.

9 MR. SCHNACK: If we could be heard on that as  
10 well, your Honor.

11 THE COURT: Sure.

12 MR. SCHNACK: He testified that he read all  
13 the materials that came from Watchtower that told him  
14 what to do to protect his daughter. And if he didn't do  
15 it, there was a negligence issue there.

16 THE COURT: Well, I know. And I mean, that's  
17 almost an application negligence, per se, because he's  
18 simply a parent that didn't pick up the fact that his  
19 daughter was getting molested.

20 MR. SCHNACK: As did the professionals who  
21 saw his daughter at the very same time.

22 THE COURT: Well, but I think the  
23 congregation -- well, certainly in terms of they knew  
24 and they had the confession relative to that.

25 Remind me about the mother. She was not

1 there -- it is going to be kind of a linked in with the  
2 father too. The mother was not there for the  
3 confession, so-called confession, neither was the  
4 stepmother.

5 MR. SCHNACK: We are talking about Andrea  
6 Kendrick?

7 THE COURT: Right.

8 MR. SIMONS: The victim and the mother were  
9 both there with Jonathan Kendrick and the two elders.

10 THE COURT: At the time of the elders?

11 MR. SIMONS: Yes.

12 THE COURT: Now, what is your view as to when  
13 the mother of the Plaintiff first learned as to the --  
14 well, the alleged molestation by Kendrick?

15 MR. SIMONS: Do you mean Kathy Conti?

16 THE COURT: Yes.

17 MR. SIMONS: First learned in 2003.

18 THE COURT: Okay. I will take a look at that  
19 in a minute.

20 MR. SCHNACK: Your Honor, going back again to  
21 this law enforcement agency, if you are not going to  
22 include them on a similar duty to warn, you are  
23 converting this to a clergy malpractice case. We are  
24 running back in those circles. If there is duty to warn  
25 based on information that Kendrick had abused his

1 stepdaughter and the police, the D.A., and Child  
2 Protective Services got that same information in the  
3 same time period, and they didn't warn anyone.

4           They knew she was attending church, they knew  
5 Jonathan Kendrick was involved in the church, yet they  
6 did not take any notification, whether the community  
7 notification was specific to the church, if you are just  
8 going to hold the elders responsible on duty to warn,  
9 that's a clergy malpractice case again.

10           We are running in these same circles.

11           THE COURT: Well, it has certainly been an  
12 interesting case trying to separate out from the duty  
13 analysis and responsibility of the church as to anyone  
14 else.

15           But if I can speak. If you convinced me to  
16 put the police department in on this one, then every  
17 time they deal with any clergy case, then they have to  
18 go to the congregation, I guess the congregation, to  
19 insulate themselves, and make a broad public statement.  
20 And boy, that seems to me to be an incredibly burdensome  
21 duty. And, of course, the duty concept is largely an  
22 expression of public policy as to the imposition of a  
23 duty.

24           So in the context of evaluating duty, I  
25 brought Palsgraf into this one long ago, as to the

1 limits of duty, is it more appropriate as a matter of  
2 public policy with the facts in this case that the duty  
3 extends to, effectively, the elders here under these  
4 circumstances. And were I to adopted it to the police  
5 department, to a D.A., to anyone who knew about it,  
6 because that's essentially the argument that you are  
7 making, is it doesn't need to be the police department  
8 or the D.A. or the Child Protective Services. If I  
9 accept as a matter of policy that the duty to warn  
10 extends out there, then the question is analytically,  
11 where does it cease?

12           Let me give you a hypothetical. If I'm  
13 walking down the street in Fremont, California, and I  
14 overhear somebody say to me, "I know for a fact Joe  
15 Smith molested his 15-year old stepdaughter," do I have  
16 a duty to go run to the cops and report that?

17           MR. SCHNACK: In 18 states in this nation,  
18 you do.

19           MR. McCABE: But, your Honor, if you have a  
20 special relationship -- and that's what is lacking here,  
21 and that's the same problem because the same duty that  
22 you are worried about imposing on the police, Mr. Simons  
23 wants to impose on every not-for-profit church group or  
24 any member's activity that they happen to know about, he  
25 did it once before.

1           So if you take your analogy, if I hear that  
2 somebody in my Little League operation has been arrested  
3 for a DUI, and then three years later he kills somebody  
4 in the DUI who happens to be a Little Leaguer, I should  
5 be on the hook. That's what we are doomed with.

6           THE COURT: Well, thank you. That kind of  
7 goes, because I have already ruled against you on this.  
8 You have tried to limit your responsibility --

9           And, look, good lawyers do crazy things, and  
10 I really thought this was fabulous, but forgetting  
11 defining the breadth and width of the duty, you said to  
12 me, "This must be limited to acts on church property."  
13 Actually, we argued property. But church functions. To  
14 which my immediate and quick response was, you know, if  
15 you find breach there, I don't think causation and  
16 damages, because of that breach, are limited by  
17 geography. Okay. I have already ruled that. I am  
18 going to stick with my ruling on that.

19           I will tell you what I will let you do,  
20 though. I will let you give me a five-page brief on the  
21 Prop 51 aspects and the application to this case as to  
22 the cops and whatnot.

23           I can tell you what I'm thinking -- well, I'm  
24 going to reserve my question about the parents on this  
25 one. But if I'm going to be consistent, I really

1 thought through, once there is a breach here, there is a  
2 matter of causation damages, the church is not limited  
3 to ask that it occurred on the premises. And I really  
4 thought that through, so I'm not going to change on that  
5 one.

6 I will let you brief, and you can email to me  
7 tomorrow, and I will try to do what I can from  
8 Sacramento. I will respond to them on Saturday morning.  
9 As far as my thinking -- and I haven't thought it  
10 through -- was that I was going to keep it between the  
11 parties here. But I will -- I will give you ten pages,  
12 because it is a very interesting issue.

13 I can tell you, I'm not going to change my  
14 mind as a judge in terms of geography on this in terms  
15 of breach. But I will consider on the failure to warn  
16 aspects whether the cops, the D.A. and whatnot, I guess  
17 should be included contextually and analytically.

18 MR. SCHNACK: If you are not going to read it  
19 until Saturday, can we have until Friday noonish?

20 THE COURT: Sure. I am not going to leave a  
21 lot of dangling participles here. And that affects  
22 several jury instructions.

23 All right. Let's move on for a moment to  
24 special instructions. Now, I'm not sure I have seen all  
25 of these. But I have seen: Sexual misconduct outside

1 the scope of the agency.

2 Let me read that into the record:

3 "Criminal sexual misconduct falls  
4 outside of the course and scope of the agency  
5 and should not be imputed into the principle.  
6 A person is otherwise responsible for harm  
7 caused by the wrongful conduct of his agent  
8 while the agent is acting within the scope of  
9 the authority given to him."

10 All right. Any response from Plaintiff on  
11 that?

12 MR. SIMONS: Yes. I think its confusing and  
13 unnecessary because we do have instructions with regard  
14 to who is an agent and the scope of their agency by our  
15 modifications of the 3700 series on that topic.

16 This, being more generic, runs the risk that  
17 people are going to wonder what to do. If we want to do  
18 a specific instruction, as the court has indicated it  
19 does, that Kendrick's sexual abuse, if any, of Candace  
20 Conti is not imputed or an agency relationship, I think  
21 that would be the way to address that issue, otherwise,  
22 this issue is addressed by 3700.

23 THE COURT: I'm a little hamstrung, because I  
24 haven't seen your modified instructions on agency. I do  
25 want to give an instruction about criminal sexual

1 misconduct not being imputed. Okay. I think we can  
2 keep that pretty simple.

3 MR. SCHNACK: Your Honor, we have no  
4 objection to what he suggests in making it specific to  
5 Kendrick.

6 THE COURT: Right. I should make it even  
7 simpler by just simply saying: The criminal and sexual  
8 misconduct of Jonathan Kendrick falls outside the course  
9 and scope of agency and should not be imputed to -- and  
10 you can say "defendant's" here or "principle."

11 MR. SCHNACK: I would mention the defendants  
12 by name.

13 MR. SIMONS: I agree.

14 THE COURT: I do too, and make that simple.

15 MR. SCHNACK: Could we also have a special  
16 instruction that Jonathan Kendrick is not an agent of  
17 either of the entity defendants?

18 THE COURT: I was just going to go to that.  
19 That's Number 2. And I have no objection to that. Just  
20 keep it simple.

21 MR. SIMONS: Well, yeah the instruction as  
22 proposed is --

23 THE COURT: I can tell you, it is too wordy  
24 for my taste.

25 And the wording instructions on this stuff,

1 you heard what I said about the first one, and I would  
2 be as simple on Number 2 as basically saying  
3 that Jonathan Kendrick was not and is not the agent of  
4 the named entities.

5           You know, keep it simple without explanation.  
6 I always try to walk through the jury's shoes on these  
7 things.

8           MR. SIMONS: My concern is there may be  
9 circumstances where he could be considered to be an  
10 agent, for example, if he is in field service where they  
11 collect money that goes to Watchtower New York, and he  
12 robs a house, and there is all kinds of scenarios that  
13 have nothing to do with this. So I don't want to make  
14 it overbroad. I want to say when he sexually molests  
15 somebody, he is not an agent.

16           MR. SCHNACK: But there is no evidence that  
17 Mr. Kendrick ever did that.

18           MR. SIMONS: Right.

19           THE COURT: Good argument by Mr. Simons, but  
20 my evidentiary record doesn't have him going out of the  
21 agency. I will entertain being very simple on these  
22 things. I think you are right. I want it very simple.  
23 I don't want it predicated, and if I have to write it  
24 myself, I will do it. But it should be only one or two  
25 sentences each.

1                   MR. SCHNACK:  What would you prefer, your  
2 Honor?  Do you want us to submit something or would  
3 you --

4                   THE COURT:  I want you to talk about it after  
5 this little discussion.  I'm really only going to give  
6 two lines, name the defendants, the sexual misconduct is  
7 not imputed, and he was not the agent of the defendant  
8 entities based upon his conduct here.  Whatever way you  
9 want to word it is fine with me.

10                   All right.  Special relationship.  I fully  
11 understand the dynamic there.

12                   MR. SCHNACK:  We preserved our record that  
13 we, the defense, wants --

14                   THE COURT:  You may, and I technically denied  
15 it.  So you have your record.  You presented Special  
16 Jury Instruction Number 3.  The court declines to give  
17 that.

18                   Special Jury Instruction Number 4.  That will  
19 contextually ride on what I do with other entity  
20 parties, but it does highlight.  And look -- I could  
21 have taken this case and put it out in bold for a tort  
22 class and a candidly tort question.

23                   The request and the dealing, the dealings  
24 of -- I mean, a lot of things follow from putting in  
25 play as effectively, un-named parties to this action,

1 people like the parents.

2 MR. SCHNACK: Your Honor, and that goes to  
3 what Neal and Kathy Conti are alleged to have done.

4 THE COURT: Or not done for that matter,  
5 because it just goes right back to 400 in terms of  
6 failure to take action.

7 MR. SCHNACK: Because if the jury believes  
8 that the parents allowed her to leave with Kendrick,  
9 that puts them on the verdict form.

10 MR. SIMONS: Well, I disagree with that most  
11 strenuously.

12 THE COURT: Well, Mr. Simons, you don't need  
13 to say that, because it is really kind of a spin we have  
14 been spinning ever since we started discussing the  
15 breadth and the width and the duty argument. And so far  
16 we have done pretty well with that. Because, I believe  
17 when you mentioned Palsgraf -- you know, this just  
18 continues to raise, where does the buck stop in terms of  
19 issues like this for definition of imposition of the  
20 duty. I fully understand the nature. So I will reserve  
21 the request at this time, pending my ruling as to the  
22 duty aspects as to -- and your briefs as to the un-named  
23 parties.

24 Now, add 1 -- I know I have read it. I'm  
25 going to deny that as to being responsible only for

1 abuse on church property or during a church-sponsored  
2 activity.

3           Number 2, that will go to our ultimate  
4 standard of care instruction, the duty to warn.

5           All right. Now, is Special Number 1,  
6 Plaintiff Special Number 1, duty to protect?

7           MR. SIMONS: Yes. I think there are two,  
8 however, supplemental or additional requests from  
9 defense.

10           THE COURT: Okay. I was going to ask that.  
11 I think there were additional mentions from the  
12 Plaintiff, too in terms of what I'm looking at here.

13           MR. SIMONS: Yes.

14           THE COURT: So let's go to the defense first.

15           MR. SCHNACK: Let me find the supplemental.

16           THE COURT: And that's what I'm doing. There  
17 is a lot of stuff that has been delivered to me.

18           MR. SCHNACK: Here they are. I have them.  
19 Should I just read them into the record.

20           THE COURT: Why don't you do that because I'm  
21 looking for them. I'm not sure where they are. And I  
22 have them all segregated up here.

23           MR. SCHNACK: These were the supplemental  
24 special jury instructions that the defense proposed.

25 One reads:

1                   "Defendant Watchtower and Defendant  
2 North Fremont Congregation can be found  
3 negligent only if you find that they failed to  
4 act reasonably to prevent Plaintiff from being  
5 injured by Kendrick; one, on church property;  
6 or two, during a church-sponsored activity."

7                   THE COURT: Denied. Go ahead.

8                   MR. SCHNACK: Second one reads:

9                   "I direct you that under California  
10 and United States law, elders have no legal  
11 duty to warn or inform other members of the  
12 congregation that a child molester attends  
13 religious meetings or participates in  
14 church-sponsored activities. Therefore, you  
15 cannot find either Defendant Watchtower Bible  
16 and Tract Society New York, Incorporated, or  
17 Defendant North Congregation of Jehovah's  
18 Witnesses Fremont, California, liable based  
19 upon the elders' failure to warn or inform  
20 plaintiff or the congregation that Jonathan  
21 Kendrick was an alleged child molester or had  
22 committed an act of child sexual abuse."

23                   THE COURT: I will reserve on that pending  
24 the final definition of duty.

25                   MR. McCABE: Your Honor, we have a proposal.

1 But Dr. Salter testified that she believed the 1993 the  
2 law made elders mandatory reporters. And that's clearly  
3 not the law.

4 THE COURT: I agree.

5 MR. McCABE: It is outside her province to  
6 make that statement. And I think we have to have an  
7 instruction that the law for clergy for mandated  
8 reporters did not come into effect in California until  
9 January 1st, 1997.

10 MR. SIMONS: That was not her testimony. Her  
11 testimony was persons in groups -- persons in youth  
12 groups as advisors and supervisors had a duty to report.  
13 And it could be construed that clergy would be included  
14 in that, since they didn't consider that they were  
15 involved in that, and we had to specifically name them  
16 to get them to do it. And that's a little different.

17 THE COURT: Well, it goes to your request for  
18 me to take judicial notice, which I am prepared to deal  
19 with. But I don't want to get off center right now of  
20 the instructions. I will deal with that when I go right  
21 to the request for judicial notice and deal with that.  
22 Okay. I'm prepared to deal with that when I have  
23 thought that through.

24 I did interpret her testimony, and I will  
25 review the testimony as to the duty to report

1 circumstances. What your view or testimony was that she  
2 inferred to the jury that the clergy had a duty to  
3 report in 1993?

4 MR. SCHNACK: Absolutely.

5 MR. McCABE: Yes, sir. And she said the 1997  
6 law made that clear by specifically naming...

7 MR. SCHNACK: I believe the court has the  
8 obligation to instruct on the law.

9 THE COURT: Well, I was just thinking of the  
10 irony of all this in my work in this case. And noting  
11 the objection, depending upon which side the ball lands  
12 on this.

13 If that were her testimony -- I'm going to  
14 clean up the record. Okay. I am going to review it in  
15 a minute -- if she said there was a duty.

16 In the same vein, I would clear up any  
17 inference as to privilege being involved in this case at  
18 all.

19 And if you had seen my conduct at all these  
20 other jury trials, I do that with the greatest  
21 reticence -- but I'm an activist about it. I don't want  
22 the jury mislead by anybody in terms of these cases.

23 So I'll look forward to hearing everyone  
24 about Dr. Salter and the duty to report.

25 When did she testify? On what day?

1           MR. SIMONS: Dr. Salter was here on Monday  
2 morning. So that would have been June 4.

3           MR. SCHNACK: And it would have been during  
4 my cross-examination of her that she testified to that.

5           THE COURT: I can make everybody's job a  
6 little easier on that. If that's what she testified to  
7 and inferred, I will clean that up. But I'm not going  
8 to answer your question yet as to the statute. Okay.  
9 And that's a different application and a certain  
10 argument under the circumstances.

11           MR. SCHNACK: I believe the court reporter  
12 had a question. Do you want that portion of her  
13 testimony, then, printed out?

14           THE COURT: That would be nice just so that I  
15 don't have to look for that myself.

16           But that was, I think, easier to relate to a  
17 jury as to duty to report and when and the nuance of  
18 communication and inference and judicial rulings. That  
19 was no easy job to this judge, but that was easier than  
20 the other one.

21           MR. SIMONS: Although, we did have  
22 Dr. Applewhite testify that no one had any duty to  
23 report anything before 1998.

24           THE COURT: Well, and they did.

25           MR. McCABE: She did not testify to that.

1 MR. SCHNACK: She did not testify to that.

2 THE COURT: Well, they both -- you know, I  
3 get the cases brought to me, and they are both talking  
4 about standard of care and duty. But the answer is I'm  
5 going to clean that up if that existed.

6 MR. SIMONS: There is one other twist to  
7 this, your Honor, which is Dr. Applewhite based her  
8 opinions upon the law, not requiring anyone to report or  
9 community notification, whereas Dr. Salter said, "I  
10 don't base my opinion on the law, I base my opinion on  
11 what the standard of practices were."

12 MR. SCHNACK: And we can disagree about what  
13 she testified to as well, because that's not what she  
14 said.

15 THE COURT: We can. But I'm going to have  
16 that little printout just to see if she said that. And  
17 then, again, without attributing it to her, I'm just  
18 going to simply -- because this jury has taken a lot of  
19 notes. I could see somebody writing that down and  
20 relying on it.

21 MR. SIMONS: And I would, from the  
22 Plaintiff's side, feel the jury would be being misled if  
23 they were told or left with the impression that youth  
24 supervisors and administrators in 1993 had no duty to  
25 report. That would be a misstatement of the Penal Code.

1           THE COURT:  And I'm not even sure I'm going  
2 to wrestle with that.  I'm just going to try to limit it  
3 to clergy.  Okay.

4           Let's go to -- and I will give you my  
5 preliminary thoughts, subject to the extension of duty  
6 argument.

7           I think we have taken care of all the  
8 requests for defense at this point.  Am I correct?

9           MR. SCHNACK:  I believe so, with the addition  
10 of Mr. McCabe's motion.  Yes.

11          THE COURT:  Okay.

12          (Brief Break)

13          THE COURT:  We are back on the record.  The  
14 Plaintiff requested Special Instruction Number 1.  It is  
15 framed, "A duty to protect."  And of all that I reviewed  
16 in this case in terms of proposed instructions, this is  
17 the closest to what I have been thinking in terms of  
18 dealing with --

19                 First of all, I believe it should be framed  
20 as "A duty to protect," rather than otherwise.  And, of  
21 course, at line 13, the presence or absence of any  
22 warning, again, will basically be in play as to other  
23 defense and/or circumstances, but I will say on the  
24 record in terms of what I have been thinking about for  
25 the last few days, this is the closest to the way I have

1 been considered framing "the duty."

2 I understand the argument about clergy  
3 malpractice. And I'm going to consider the same  
4 contextually in terms of these arguments as to duty to  
5 others, obviously including warning or not. And so I'm  
6 going to leave that there.

7 Number 2 from the Plaintiff is the duty to  
8 protect. What I did like about that, and why I have  
9 been centering on one as a basic starting spot is the  
10 inference in 2 is, you know, Houston or Juarez, that  
11 there was that status of being placed in a position of  
12 trust, which in this case would have been a ministerial  
13 servant rather than congregant. And Juarez, for  
14 instance, was a scout leader.

15 And this case, my first appearance was  
16 different because -- and this was the nuance of the  
17 case -- we have largely gotten rid of punishment on  
18 constitutional grounds.

19 So I am more inclined to frame the duty to  
20 protect very much like and substantially like Number 1  
21 rather than Number 2, because I think this case is  
22 different.

23 I mean, in the congregation, the elders took  
24 action. They removed him from a position of trust and  
25 responsibility. They did not remove him from the

1 congregation. That, I understand.

2 So when I come back at you and reply on  
3 Saturday, I'm going to be working diligently on Number 1  
4 to see how I end up on how to define the duty including  
5 whether to warn or not.

6 MR. SIMONS: I should be the first to speak?

7 THE COURT: You should.

8 MR. SIMONS: Your Honor, it does not mention  
9 trust.

10 THE COURT: I understand.

11 MR. SIMONS: But it does say placing the  
12 person in a function or environment which contact with  
13 children is inherent. That would apply not only to  
14 ministerial servant, but in this case it would apply to  
15 field service. And there is evidence that the elders  
16 sent Kendrick to field service with Candace Conti.

17 MR. SCHNACK: There is not.

18 THE COURT: Well, the defense is on one side  
19 of the table, I think.

20 MR. SCHNACK: Well, just a version of the  
21 evidence that there is no testimony that the elders sent  
22 him on field service with Candace. There is no evidence  
23 whatsoever.

24 THE COURT: Well, you know, it is kind of  
25 like that directed verdict. You know, the inferences

1 are that he was doing field service, based on testimony,  
2 and that provided him --

3 MR. SCHNACK: Your Honor, there is also no  
4 special relationship that has been established between  
5 Candace Conti and either of the entity defendants. And  
6 we have briefed that, and --

7 THE COURT: Everybody has briefed that ad  
8 infinitum. And, basically, I have come down, in these  
9 cases under these circumstances, understanding the  
10 evolution of special relationship doctrine, largely  
11 started with land owners and others, effectively, I'm  
12 finding that there is a relationship, a special  
13 relationship that gives right -- and it is a  
14 statement -- kudos to Mr. Simons -- I thought his brief  
15 on that issue was spot on -- understanding -- two  
16 things -- and I'm going to make it very clear on the  
17 record, the defense has very appropriately said, "Hey  
18 judge, there is not a single case in the State of  
19 California that you are aware of --"

20 And candidly, after incredibly diligently  
21 researching it online, it specifically holds that there  
22 is a duty to warn here.

23 Okay. And I understand that. And I  
24 understand the constitutional umbrella of arguments and  
25 whatnot.

1           But what is the consequence of finding  
2 otherwise?

3           Sounds of silence are deafening. I think we  
4 all understand. So...

5           MR. SCHNACK: If I could be heard briefly,  
6 too, your Honor. Juarez was very different. And that's  
7 what this proposed one is, on Juarez, commented that the  
8 Boy Scouts had these educational materials, but  
9 because -- the only reason summary judgment was reversed  
10 was because they had not been provided to the plaintiff  
11 and his family in Spanish.

12           THE COURT: That was a part of it. Also, you  
13 remember, that was a summary judgment grant, candidly,  
14 against the judge of this county, who is now an  
15 appellate justice, not related to me.

16           But there was also broad comments about on  
17 the reversal they knew or should have known about Mr.  
18 Juarez and his proclivity.

19           This case -- and this is a move for  
20 plaintiff -- is different from Juarez because defendants  
21 here knew. It wasn't knew or should have known, and  
22 Juarez basically flipped the judge because should have  
23 known.

24           Now, what is different here, and I fully  
25 acknowledge the same as the judicial officer is, we are

1 not dealing with the Boy Scouts, we are dealing with  
2 religion.

3           And so a lot of my rulings here, I have had  
4 to be very, both, respectful and trite and act upon and  
5 respond to arguments that separate out the application  
6 of church and state.

7           At a certain point -- you know, the first  
8 time you said that, I made that decision about whether  
9 it was a penitential communication. I would have loved  
10 to have somebody go up -- although, I think there is an  
11 inference what would happen -- but go up to the start  
12 and better define the separation -- and this is a case  
13 that really based the question in a number of ways.

14           But I have come down where I am using what I  
15 call just kind of basic fundamental duty analysis. One  
16 of my favorite quotes is "This case does have a coat  
17 like Joseph's in the Bible." And it has got a lot of  
18 colors to it. And part of my responsibility is to  
19 separate the colors where applicable.

20           So, yeah, I knew of Juarez well before I got  
21 involved in this case. And I have reread it three times  
22 for application. And I don't actively disagree with  
23 what you said, but to me Juarez said a lot more,  
24 understanding it was a motion for summary judgment view.

25           MR. SIMONS: Your Honor, I believe that

1 Juarez does included the Roman Catholic Church as  
2 defendant and does discuss the church's liability and  
3 does say they didn't have notice and therefore --

4 THE COURT: It does. And that was one of the  
5 very strong reasons why I'm coming down where I'm coming  
6 down, because I think notice gets rid of a lot of  
7 academic discussion.

8 MR. SCHNACK: Which would apply equally to  
9 the police department and these other agencies we are  
10 talking about.

11 THE COURT: And I'm going to bully on the  
12 point, because it is -- it's not an easy analysis, but  
13 without seeking to appear as glib. That's why I jumped  
14 right into Palsgraf, because I didn't see the orbit out  
15 there as to where does one draw the line as defendants  
16 in these cases and duty to report.

17 And I don't need to repeat myself, but I am  
18 concerned about, basically, putting on everybody in the  
19 State of California duty to report analytically, if not  
20 practically.

21 MR. SIMONS: If I may offer one more comment  
22 that may have already occurred to everyone, but just in  
23 abundance of caution.

24 Juarez does not change anything.  
25 Unilaterally, it applies to all cases. But what it does

1 say is the Rowland versus Christian analysis is the  
2 framework to apply it to other cases.

3 THE COURT: Nice work, Mr. Simons, because I  
4 certainly took that out of Juarez also, which by the  
5 way, I read Juarez after I read your trial brief with  
6 Rowland v. Christian and restatements.

7 But as I went down the line of legal research  
8 here, I was pleased to see the settlement reference to  
9 Rowland v. Christian and the restatement.

10 MR. McCABE: Your Honor, I know a record was  
11 made, and I got a drift, I think, of where you are going  
12 with Plaintiff's Number 1, but there is still some other  
13 problems we haven't talked about I wanted to point them  
14 out.

15 THE COURT: Please.

16 MR. McCABE: First one is volunteers.

17 THE COURT: I have it highlighted.

18 MR. McCABE: The second part is the presence  
19 or --

20 THE COURT: I already have that circled.

21 MR. McCABE: Okay. There is no evidence  
22 Mr. Kendrick was a volunteer for either of the  
23 defendants.

24 THE COURT: Well, representative of my jagged  
25 way of thinking, because I have already highlighted that

1 from my way of thinking. If we do not describe him as a  
2 volunteer -- I'm going to open this up. I'm having a  
3 very open discussion with very good lawyers, what would  
4 be the description? Because if you saw my sheet here,  
5 it says question as to description.

6 MR. McCABE: Members or others. He is only a  
7 member.

8 MR. SCHNACK: I think rank and file member.

9 MR. McCABE: He is not a member of  
10 Watchtower, he is a member of the North Fremont  
11 Congregation.

12 THE COURT: Well, I can tell you, I already  
13 underlined your "volunteer" and have a question, I  
14 guess, as to the appropriate characterization.

15 MR. SIMONS: I scratched out the word  
16 "volunteers" in my proposed one and wrote "persons."

17 THE COURT: Well, if I were you, I would take  
18 the suggestion of "members," but you know, we are having  
19 an open discussion here.

20 MR. SIMONS: And I have scratched out  
21 "persons" and put in "members."

22 THE COURT: Oh, my goodness. If I keep you  
23 through lunch, I can get you all to agree to anything I  
24 suggest.

25 All right. And Mr. McCabe, do you have other

1 thoughts.

2 MR. McCABE: We would leave out the  
3 classification all together and just say "by Kendrick."

4 The other thought I had, moving along as to  
5 the Roman Numeral 1, the presence or absence of any  
6 warning.

7 THE COURT: Well, that's crucial. And I have  
8 that with about three stars to it.

9 MR. McCABE: It just highlights and points  
10 the jury into a direction which I don't know as of  
11 yet -- I don't know what instruction they are going to  
12 have on that particular subject. But there are  
13 certainly a lot of other things you can do other than  
14 warn. And there is evidence in this case that those  
15 things happened, that the elders admonished  
16 Mr. Kendrick, told him to stay away from children and  
17 watched him like a hawk thereafter. So there is a  
18 longer litany of things that could be put in here.

19 THE COURT: If I were in your shoes, I would  
20 look at Number 4, "Such are the facts and circumstances  
21 contained in the evidence," because I think you have to  
22 have a logical starting spot as to duty what is the  
23 nature of duty to do what.

24 What I liked about this was presence -- the  
25 reason was the jury is going to consider here, and the

1 presence or absence of any warning. Candidly, I liked  
2 that. Before I even saw this or looked at it, I was  
3 playing with it, and I would have done something like  
4 that.

5 "For such other facts and circumstances  
6 contained in the evidence," that can be broad a little  
7 bit.

8 So you can play with this as far as I'm  
9 concerned, because I want the jury to weigh. I'm going  
10 to find a duty here. And I'm going to let them consider  
11 everything that should be considered in determination of  
12 breach.

13 We are doing as well as we could under a very  
14 complex circumstance. I'm not going to get the request  
15 for judicial notice yet.

16 I have other supplemental requests from the  
17 Plaintiff, but I think we agreed on three -- oh, no.  
18 And I can assure you, I'm going to -- and I have invited  
19 you to do so also, but I am getting the sense as to 3.  
20 As to being entirely neutral and making the jury  
21 understand that a penitent communication is a question  
22 of privilege decided ultimately by me, and not giving  
23 them any inference that should affect them in any way.

24 MR. SCHNACK: Was the result of the search  
25 that the word "privilege" was never mentioned with

1 expect to penitent --

2 THE COURT: It was actually mentioned twice,  
3 by contextually different than Mr. Simons believed.

4 I think Mr. Shuster said it was a privilege  
5 to do something. I think he was asked whether he was  
6 paid money. And I think he said something to the  
7 equivalent it was a privilege to serve.

8 MR. SIMONS: He did.

9 THE COURT: And I'm saying that out of  
10 respect for Mr. Shuster. We are not into evidence  
11 privileges at this point. But in terms of what Madame  
12 Reporter told me, it was not used as a make way for not  
13 disclosing.

14 MR. SIMONS: Well, he did not use the word  
15 "privilege." Apparently, Mr. Clarke did not -- do we  
16 have Mr. Clarke's testimony?

17 THE COURT: Yes.

18 MR. SIMONS: Because I'm trying to remember  
19 whether or not -- I don't believe Mr. Shuster's  
20 deposition was on the same day as Mr. Clarke's  
21 testimony.

22 THE COURT: Not according to what I have here  
23 in terms of what is in the record.

24 MR. SIMONS: So did we search Mr. Clarke's  
25 testimony from May 29th?

1 THE COURT REPORTER: I searched every day for  
2 the word "privilege."

3 MR. SIMONS: What he said is, it is just like  
4 a Catholic priest receiving confession in a confession  
5 booth.

6 THE COURT: All right. I wanted to be fair  
7 here. Is that Clarke?

8 MR. SIMONS: I think it was Clarke.

9 MR. McCABE: It was Clarke. He was just  
10 trying to make an analogy illustration.

11 THE COURT: That's the line we are walking.  
12 All right.

13 MR. SIMONS: So on the Court's thinking on  
14 this, your Honor, how do we avoid allowing the jury to  
15 either be:

16 A, determining itself whether or not these  
17 specific communications were confidential or not?

18 And then:

19 B, how do we determine whether or not the  
20 jury is notified that they are not confidential under  
21 the law?

22 THE COURT: Well, the second prong of your  
23 concern, I don't think is that difficult, when I would  
24 tell them that the application and consideration of the  
25 determination of privilege is exclusively provided to

1 the Court.

2           The first prong is one I shared as to  
3 concerns for everybody here as to how and what they will  
4 do.

5           I don't want any -- what I'm trying to  
6 avoid -- and I'm a pretty good wordsmith, but I want to  
7 do it when I'm well rested and analytical -- is any  
8 inference that they would get that because the  
9 confidential communication is not privileged, that  
10 somehow that is a breach --

11           Okay. I can say it better I'm sure. But I  
12 think you get my drift .

13           -- is a breach of duty. That's what I want  
14 to really work in separating out.

15           MR. SIMONS: A breach of duty to Kendrick?  
16 I'm not sure where it is going.

17           THE COURT: No. To the Plaintiff. The  
18 inference. That's why -- that wasn't clear. I want to  
19 deal with it. I want to deal with it. I want to deal  
20 with any expert who said what the law was on the  
21 reporting, I want to clean that up. And I just want  
22 that as clean as I can present to a jury, leaving them  
23 in a neutral fashion to weigh, themselves, the  
24 reasonableness, the duty and any argument based on  
25 breach.

1           And that's my goal and that's simple as I can  
2 say it. And it is not a simple thing to say.

3           Do we agree that the deposition substance  
4 evidence is fine? I believe we do.

5           MR. SIMONS: Yes.

6           MR. SCHNACK: I believe there was a Casey on  
7 that that we agreed --

8           THE COURT: Yeah, Casey 208 is modified.

9           All right. Now, that, I think, takes care of  
10 the instruction question.

11           So let's kind of rehearse where we are.

12           And look, I'm going to deal with the request  
13 for judicial notice. And that is a very interesting  
14 circumstance, too.

15           But before I do that: Here is where I  
16 believe we are. Effectively, for the presentation of  
17 several instructions yet, we need to consider the  
18 addition of un-named, un-served parties that you are  
19 going to brief. That is going to dovetail into  
20 Plaintiff's Supplemental 1.

21           I'm going to direct you to meet and confer,  
22 based upon my ruling to strike the verdict as to several  
23 punitive damages instructions that are in play here.

24           I would welcome any language so I can make my  
25 record, but as to having heard my remarks, any further

1 presentation as a matter of instruction as to --

2 Let's talk about the limiting instruction.

3 Try to do the limiting instruction as to the testimony  
4 as to Kendrick's criminal conduct, the grooming of a ten  
5 year old. There were four that I had on my notebook.

6 MR. SCHNACK: I can list at least five for  
7 you.

8 THE COURT: I get to be the judge of that.  
9 It is the number 5, I believe.

10 MR. SCHNACK: The black bra incident.

11 THE COURT: That's the grooming of the 10  
12 year old, so we are on board there.

13 MR. SCHNACK: Kendrick rollerblading with  
14 Candace.

15 THE COURT: That's not agreed. That's  
16 another time.

17 MR. SCHNACK: Kendrick being seen in a photo  
18 with children.

19 There was no evidence that was conveyed to  
20 the elders.

21 MR. SIMONS: That's correct.

22 THE COURT: I was just reflecting and  
23 thinking about that. Okay.

24 MR. SCHNACK: Kendrick buying gifts for  
25 children.

1 THE COURT: I agree. Absolutely. Okay.

2 MR. SCHNACK: And Kendrick holding Candace on  
3 his lap at a Bible study in 1991 or 1992. That was from  
4 Carolyn Martinez.

5 MR. SIMONS: That's a little different. The  
6 elders were at the Bible study.

7 MR. McCABE: There was no evidence, though.

8 THE COURT: I haven't heard evidence of who  
9 was there.

10 MR. SIMONS: Well, the testimony of -- who  
11 was it? The elder's wife who said that the Contis, that  
12 they hosted -- no actually, I think it might have been  
13 Mr. -- I'm not sure who said, "Oh, yes, the Bible study  
14 group met at my house for a year or two years, and then  
15 we stopped having it at our house." That might have  
16 been...

17 MR. SCHNACK: Carolyn Martinez said it was at  
18 her house.

19 MR. SIMONS: Well, somebody else said it was  
20 at their house for a year or two, and the elders were  
21 always there, and her husband was an elder.

22 THE COURT: There was a disconnect as to  
23 when. That's the problem with it.

24 Okay. So I heard six, not five.

25 MR. SCHNACK: Black bra, rollerblading,

1 photo, buying gifts, holding plaintiff on his lap at the  
2 Bible study.

3 THE COURT: Five. Okay.

4 MR. SIMONS: Photo.

5 THE COURT: And basically the content of the  
6 limiting instruction refers specifically to that  
7 evidence and its use and purpose, which is to be limited  
8 to the jury's determination and consideration of any  
9 liability of Jonathan Kendrick.

10 MR. SIMONS: The one exception I have to that  
11 is the things where Claudia Francis said, "I thought it  
12 was weird at the time but I didn't connect the dots  
13 until I heard."

14 THE COURT: Right.

15 MR. SIMONS: Which does go to causation.

16 THE COURT: I agree with that.

17 MR. SIMONS: So I don't want to be precluded  
18 from arguing that people saw things that if they had  
19 known would have had more significance.

20 MR. McCABE: She didn't connect the dots  
21 until she heard about it in 2004.

22 MR. SIMONS: Yeah. And she learned Kendrick  
23 was a molester.

24 THE COURT: Right. I will let the jury  
25 listen to that.

1           MR. SCHNACK: That defeats the limiting  
2 instruction, your Honor.

3           THE COURT: It is going to be very specific  
4 as to Kendrick and those incidents. Okay. Anything you  
5 propose, I will make my decision as to the exact nature.

6           MR. SCHNACK: My suggestion is if he is  
7 allowed to argue that, that goes counter to the limiting  
8 instruction.

9           MR. SIMONS: No. It doesn't go counter to  
10 the part where it limits to whose liability it is, it  
11 does go to causation, which is a different issue.

12          THE COURT: Well, it certainly is a different  
13 issue.

14          MR. SIMONS: It doesn't go to negligence, it  
15 goes to causation.

16          THE COURT: Well, causation goes to  
17 liability. I mean you have the duty --

18          MR. SIMONS: Right. But it is relevant to  
19 causation, it is just not relevant to negligence. So  
20 the limit cannot be -- you can't consider it that people  
21 who saw nothing suspicious, but didn't know the  
22 background, and if they had, may have done something  
23 differently. That's a little bit of a stretch.

24          THE COURT: Well, here we go again.

25          MR. SCHNACK: Causation is a part of

1 liability. I don't see how it separates the two. And  
2 if he is allowed to argue that these five things that we  
3 listed can be used to prove causation, then the limiting  
4 instruction is worthless.

5 MR. SIMONS: Well, it is not worthless, it is  
6 just limited to the issues that the evidence is not  
7 relevant to, and that would be negligence.

8 MR. SCHNACK: As to the liability of  
9 Kendrick. It only goes to the liability of Kendrick.  
10 It can't go to the liability of the entity defendants  
11 and causations of elements of that.

12 THE COURT: I suspect -- I don't think you  
13 can separate duty and liability for purposes of  
14 instruction.

15 MR. SIMONS: Evidence is frequently limited  
16 to a purpose, and in this case it would be limited to  
17 the purpose for which we are talking about, and that's  
18 negligence.

19 THE COURT: I'm going to consider it. But  
20 I'm troubled in terms of whether they can really  
21 effectively split the entity. It is like when you read  
22 the legal duty stuff we read in this case, and just as  
23 the client says, legal duty is public policy on the  
24 left, and then causation based on the right as to legal  
25 duty, which I thought was a very smart writing.

1           But then, of course, as we are all taught in  
2 law school, we have the causation itself is an element  
3 of the tort, not generally separated out.

4           So, again, I will make it pretty simple. I  
5 will make a simple ruling after some considerable  
6 thought on the limitations. But you have got the acts  
7 nicely lined up.

8           I'm concerned with -- I'm going to deal with  
9 it now -- about the back door aspects of some of this  
10 stuff.

11           I want to listen to Mr. Simons in terms --  
12 and I have got to frame it, because when you asked me  
13 yesterday to take judicial notice of the text of  
14 California Penal Code Sections 1116517(a) and 11166 as,  
15 far as the Court is concerned, it is almost mandatory I  
16 take judicial notice of a statute.

17           However, I'm going to listen to you as to  
18 what you are trying to do and why.

19           But let me read you this, because it was when  
20 I was trying to explain how meticulous I try to be on  
21 those occasions.

22           "When the Court has reviewed certain  
23 source material and decided to take judicial  
24 notice of some fact, it should convey that  
25 fact to the jury if it relates to a matter

1           that would otherwise have been for  
2           determination by the jury."

3           Okay. So we had a very quick reparteed,  
4 because I didn't know what you wanted to do with it, but  
5 clearly, I was going to be difficult, relative to it  
6 being used as negligence, per se, under the state of the  
7 law at that time and how it subsequently changed.

8           So certainly you want the debate on judicial  
9 notice. I do that every time the lawyer asks me to take  
10 judicial notice of a statute.

11           Now, how is it going to relate to  
12 something -- and I might add, that was People versus  
13 Archerd, how is it going to relate to something that  
14 this jury is going to determine?

15           MR. SIMONS: The credibility of conflicting  
16 expert opinion.

17           THE COURT: You know, as soon as they started  
18 talking about that stuff, I knew I was going to get to  
19 this.

20           Okay. Well, I'm going to try to avoid a  
21 conflict in terms of what the law was at the time.  
22 Okay. And that is, I think, a conflict that needs to be  
23 addressed.

24           I have a very specific concern if I started  
25 putting in front of a jury specific statutes that

1 inform, if not, in fact, they start using it as a basis  
2 as though it was negligence per se because the statute  
3 says.

4           Everything I'm doing in this case is like  
5 separating fine wheat from fine chaff or mercury pouring  
6 through my hands.

7           MR. SIMONS: Can it be part of the judicial  
8 notice instruction that you are not to consider this  
9 statute on the issue of evidence but limited to the  
10 issue of credibility of conflicting expert testimony on  
11 the issue of standard of care, or some other explanatory  
12 duty?

13           THE COURT: I think that is difficult to do.  
14 And I haven't -- every time I have experts inferentially  
15 doing this, we have the same problem, which is the  
16 problem we are dealing with here now, which is putting  
17 in play -- and you know it is -- I'm not chiding you at  
18 all on this. I expected this discussion earlier today.  
19 But I'm very concerned if it gets bootstrapped more than  
20 it should be.

21           MR. SCHNACK: Your Honor, I think to keep it  
22 simple, the easiest thing to do, the clergy, they were  
23 or were not mandated reporters at the relative time  
24 period. And the answer is clearly they were not. And  
25 if that is going to be an instruction, that's what it

1 should be.

2 MR. SIMONS: That's not the conflict of the  
3 evidence, though.

4 THE COURT: We have gone full circle on that  
5 in terms of what the conflict of the evidence is. And I  
6 wanted to avoid conflict. I want to clean the record up  
7 if there was testimony that if there was a duty to  
8 report, and I'm going to clean that up.

9 MR. SIMONS: The conflict in the evidence --  
10 and, your Honor, we objected to Applewhite testifying on  
11 the basis of law to begin with.

12 THE COURT: I understand.

13 MR. SIMONS: So once she gets to testify that  
14 based on what the law is, there were no reporting  
15 requirements for anyone until 1998, and that's just not  
16 right.

17 And that's why we get to Salter saying --  
18 well, how that was interpreted may differ, but you were  
19 included in reporting requirements. That was her  
20 testimony as I recall it, basically.

21 MR. SCHNACK: They asked specifically about  
22 clergy. You will have to wait for the transcript.

23 THE COURT: And that's what I'm going to do.

24 MR. McCABE: Talks about community  
25 notification.

1 MR. SIMONS: That was covered by both.

2 MR. SCHNACK: The mandated reporting that was  
3 struck from Opinion Number 8, that was the part that was  
4 deleted from her testimony based on --

5 THE COURT: I'm always sensitive to these  
6 issues. Okay. Anything else?

7 If I keep you here until 1:00 o'clock, can we  
8 get it all resolved?

9 MR. SCHNACK: What about the verdict forms?

10 THE COURT: Where are we? Because I'm not  
11 sure I have seen the latest.

12 MR. SCHNACK: Well, I think we submitted one  
13 this morning.

14 MR. SIMONS: This one here? I haven't seen  
15 the cleaned up one.

16 MR. SCHNACK: So just for us to further meet  
17 and confer on punitive damages instructions and the  
18 limiting instructions regarding Kendrick? Those two  
19 items?

20 THE COURT: You did a verdict form.  
21 Actually, you have done two, because I saw a prior one.  
22 So this morning or sometime this morning --

23 MR. SCHNACK: We have added the police  
24 department and some other entities to it. That's the  
25 substantive change.

1                   MR. SIMONS:  And I think -- well, I don't  
2 know if you want to talk about it.  One of the issues  
3 about the verdict form that the defendant submitted this  
4 morning is it doesn't actually ask about whether the  
5 defendants were negligent or not, it asks about Gary  
6 Abrahamson, Michael Clarke, Gary Lamerdin.  Not the  
7 defendants in this case.

8                   MR. SCHNACK:  Corporations only act through  
9 agents.  I think that's the only way you can have it.

10                  THE COURT:  Well, I can give you this little  
11 ad hominem.  I have been pretty rigorous in scrunching  
12 down these verdict forms and getting rid of more players  
13 than -- I wanted less, so we get rid of possibilities of  
14 very inconsistent verdicts, particularly in a case like  
15 this.  But I will take a look at that stuff.  Remind me,  
16 though.

17                   I haven't seen yours, but I have seen the  
18 prior one.  And so when I resolve the question as to  
19 these other un-named defendants, hopefully that will  
20 take care of a huge issue there.

21                   And I believe I got one with your original  
22 papers.  But I will tell you all that in a case more  
23 complex than this, we started out with 37 pages and we  
24 came up with two and a half pages on a verdict form, and  
25 that's where I'm going with this.

1           MR. SIMONS: Mine is seven questions.

2           There is a bit of a problem with regard to  
3 whether -- well, how to separate the negligence of  
4 Mr. Abrahamson and Mr. Clarke that is not only in the  
5 course and scope of their duties with Fremont, but is,  
6 by admission, within the course and scope of their  
7 duties as agents with Watchtower.

8           So it would be -- and that's kind of joint  
9 negligence, if you will. You can't allocate the fault  
10 between the defendants. They are both a hundred percent  
11 responsible for that.

12           THE COURT: Right.

13           MR. SIMONS: Versus an allocation of fault  
14 for any other conduct which the agents may have engaged  
15 in, not in the course and scope of their agency with  
16 both defendants. And it is an interesting intellectual  
17 issue.

18           THE COURT: Well, isn't the admission that  
19 they were acting in the course and scope? I mean is  
20 there any argument what they undertook was outside the  
21 course and scope? Not in the evidence before me or what  
22 I heard to be the admission. So is there any real  
23 concern that -- certainly a jury could find on the  
24 evidence that one may be more responsible than the other  
25 in terms of what they did, but when the dust settles,

1 does that really matter?

2 MR. SIMONS: Because I proposed there is one  
3 line of percentage on the verdict form for the  
4 defendants because all of the conduct of the elders is  
5 all to do within the course and scope of the agency with  
6 both entities.

7 THE COURT: And you picked up on what I just  
8 said.

9 MR. SCHNACK: Except that in the  
10 instructions, you are going to see it also references  
11 negligence of elders in the Service Department. And I  
12 think Mr. McCabe might object to being lumped with  
13 those.

14 MR. McCABE: Absolutely.

15 MR. SCHNACK: And that's an instruction that  
16 they, apparently, have agreed to.

17 MR. SIMONS: Yes. And so that's the  
18 non-issue about some of it is overlapping and some of it  
19 is not. How do you segregate that, intellectually?

20 THE COURT: Well, I could do it probably  
21 intellectually, but more important to me is practically.  
22 All right.

23 MR. SCHNACK: We could eliminate the elders  
24 of the Service Department from the instruction, and we  
25 could argue that from there.

1           THE COURT: All right. Bring at me anything  
2 you want to do before 9:00 on Saturday. I will be very  
3 active in replying. I am a little bit concerned about  
4 getting all this done. Tell me what weekend plans are  
5 everybody.

6           Well, we are going to use our computers as a  
7 basis for communication.

8           MR. SIMONS: By Saturday if we have a final  
9 set of instructions and a final set of special verdict  
10 form, you know, I can have it all prepared.

11          THE COURT: Well, I can tell you, I'm just  
12 going to be ready -- I'm looking forward to those  
13 limiting instructions. I'm looking forward to any  
14 further choices or changes you want to make in the  
15 supplemental Plaintiff's on the duty. And then I'm  
16 looking forward to your briefs in terms of expansion to  
17 the un-named parties. And then I'm going to be -- I  
18 have heard enough argument.

19          MR. SIMONS: That may answer the question I'm  
20 about to impose. May I submit a page or two or on the  
21 variations, if you will, of limiting instructions,  
22 sometimes limiting only to a specific issue as to --

23          THE COURT: Sure.

24          MR. SIMONS: And just a page or two.

25          THE COURT: I will just tell you, I will

1 consider what you write.

2 (Proceedings were adjourned at 12:31 p.m.)

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REPORTER'S CERTIFICATE

I, KATHRYN LLOYD, CSR No. 5955, Certified Shorthand Reporter, certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witnesses were put under oath by the court clerk;

That the testimony of the witnesses, the questions propounded, and all objections and statements made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

That the foregoing is a true and correct transcript of my shorthand notes so taken.

I further certify that I am not a relative or employee of any attorney of the parties, nor financially interested in the action.

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

Dated this \_\_\_\_ day of \_\_\_\_\_, 2012.

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KATHRYN LLOYD, CSR 5955