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 7 Christ of Latter-Day Saints and Successors

**ELECTRONICALLY FILED 04/26/07**

8  
9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 DA-DAZE-NOM MANZANARES,

12 Plaintiff,

13 vs.

**CASE NO. 07-CV-00076-LRH-RAM**

14 ELKO COUNTY SCHOOL DISTRICT, and  
 GARY LEE JONES, SR., as agent for ELKO  
 15 COUNTY SCHOOL DISTRICT, and GARY LEE  
 JONES, SR., individually, and CORPORATION  
 16 OF THE PRESIDING BISHOP OF THE  
 CHURCH OF JESUS CHRIST OF LATTER-  
 17 DAY SAINTS, a foreign corporation registered to  
 do business in the State of Nevada;  
 18 CORPORATION OF THE PRESIDENT OF THE  
 CHURCH OF JESUS CHRIST OF LATTER-  
 19 DAY SAINTS AND SUCCESSORS, a foreign  
 corporation registered to do business in the State  
 20 of Nevada; and Does 1-5, and XYZ Corporations  
 1-5.

**DEFENDANTS 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 AND SUCCESSORS'  
 MOTION TO DISMISS**

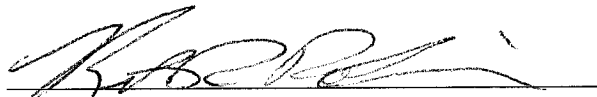
21 Defendants.  
22 \_\_\_\_\_/

23  
 24 Defendants Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-  
 25 Day Saints and Corporation of the President of The Church of Jesus Christ of Latter-Day Saints  
 26 and Successors (collectively referred to herein as "LDS") hereby move this Honorable Court  
 27 pursuant to Fed. R. Civ. Proc. 12(b)(6) for an Order dismissing Plaintiff's sixth and eighth claims  
 28 against LDS with prejudice.

1 This Motion is made and based upon the attached Memorandum of Points and  
2 Authorities, the pleadings and papers on file herein.

3 DATED this 26th day of April, 2007.

4 ROBISON, BELAUSTEGUI, SHARP & LOW  
5 A Professional Corporation  
6 71 Washington Street  
7 Reno, Nevada 89503

8 By:   
9 KENT R. ROBISON  
10 CLAYTON P. BRUST  
11 JENNIFER L. BAKER  
12 Attorneys for Defendants  
13 Corporation of the Presiding Bishop of The Church  
14 of Jesus Christ of Latter-Day Saints and  
15 Corporation of the President of The Church of Jesus  
16 Christ of Latter-Day Saints and Successors

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. ALLEGED FACTS**

15 This case arises out of the alleged sexual improprieties between Plaintiff and Defendant  
16 Gary Lee Jones, Sr. ("JONES"). Plaintiff alleges in her Complaint that during the 2001-2002  
17 school year, JONES established a relationship with her and induced her to engage in various  
18 sexual acts with him. Complaint at p.5, ¶¶ 15, 16.

19 Plaintiff alleges that at the time JONES engaged in this behavior, he was employed by the  
20 Elko County School District and was acting as the Branch President for LDS.<sup>1</sup> Complaint, Doc.  
21 # 1-1, at p.5, ¶ 16. Plaintiff further (vaguely) alleges that LDS was informed of JONES'  
22 inappropriate conduct with the Plaintiff but failed to take action to report the conduct to the law  
23 enforcement authorities. Complaint, Doc. # 1-1, at p.5, ¶ 17.

24 According to the Complaint, the following events occurred. On or about August 26,  
25

26 \_\_\_\_\_  
27  
28 <sup>1</sup>The term "Branch President" is applied to periodic leaders of small, usually rural, congregations in the LDS Church and does not denote an employment relationship.

1 2002, JONES' relationship with Plaintiff was brought to the attention of Plaintiff's family. As a  
2 result, Plaintiff attempted to commit suicide. Complaint, Doc. # 1-1, at p.5, ¶ 18. Plaintiff was  
3 hospitalized until approximately January 7, 2003. Complaint, Doc. # 1-1, at p.5, ¶ 18. JONES  
4 was arrested on charges of sexual abuse of a minor and pled guilty to statutory sexual seduction  
5 of Plaintiff. Complaint, Doc. # 1-1, at p.5, ¶ 19.

6  
7 On February 13, 2007, Plaintiff, now an adult, filed her Complaint against JONES, the  
8 Elko County School District and LDS. Plaintiff asserts therein ten (10) claims for relief. Of the  
9 ten (10), six (6) of the claims are against LDS. This Motion to Dismiss seeks dismissal of  
10 Plaintiff's Sixth and Eighth Claims For Relief, failure to report and intentional infliction of  
11 emotional distress.

12  
13 **II. LEGAL ARGUMENT**

14 **A. Legal Standard For Motion To Dismiss.**

15 In considering a motion to dismiss, the Court asks only whether the pleadings are  
16 sufficient to establish a claim - not whether the Plaintiff could find evidence to support the  
17 pleadings. *E.g., In re Glen Fed., Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9<sup>th</sup> Cir. 1994). Therefore,  
18 for purposes of the motion, the Court accepts as true all material allegations in the complaint and  
19 construes those allegations in the light most favorable to the non-moving party. *NL Indus., Inc.*  
20 *v. Kaplan*, 792 F.2d 896, 898 (9<sup>th</sup> Cir. 1986) (citing *North Star Int'l v. Ariz. Corp. Comm'n*, 720  
21 F.2d 578, 580 (9<sup>th</sup> Cir. 1983)). Dismissal is warranted if it appears to a certainty that the Plaintiff  
22 would not be entitled to relief under any set of facts that could be proven. *Id.*

23  
24 Even under this stringent standard, LDS is entitled to dismissal of Plaintiff's Sixth and  
25 Eighth Claims For Relief. In evaluating these pendent state law based claims against LDS, this  
26 Court must apply Nevada substantive law. *Hillery v. Rushen*, 720 F.2d 1132, 1138 n.5 (9<sup>th</sup> Cir.  
27 1983). Under Nevada law, Plaintiff cannot succeed on her Sixth or Eighth Claims For Relief  
28

1 under any set of facts that could be proven. Dismissal of these claims is therefore appropriate.

2 **B. Plaintiff's Sixth Claim For Relief For Failure To Report Should Be**  
3 **Dismissed.**

4 In her Sixth Claim For Relief, Plaintiff asserts a claim for failure to report pursuant to  
5 NRS 432B.220. Plaintiff alleges that LDS failed to report JONES' sexual involvement with the  
6 Plaintiff despite having reasonable cause to "suspect" the sexual involvement. Complaint at  
7 p.13, ¶ 60. Plaintiff alleges that this allowed JONES to abuse Plaintiff over an extended period  
8 of time and caused her damages. Complaint, Doc. # 1-1, at p.13, ¶¶ 61-62. The claim seeks  
9 damages pursuant to NRS 432B.220. However, NRS 432B.220, the statute relied upon by  
10 Plaintiff as the basis of this claim, is a regulatory statute that is not enforceable by Plaintiff  
11 because it does not allow a civil right of action.  
12

13 Federal law is clear. The issue of whether a federal statute implies a private right of  
14 action requires a determination of whether Congress intended to create a federal right. *Gonzaga*  
15 *Univ. v. Doe*, 536 U.S. 273, 283 (2002). This questions is answered definitively in the negative  
16 when the statute does not by its terms grant any private rights to an identifiable class. *Id.* at 284.  
17 For a statute to create a private right of action, it must manifest an intent by Congress to create  
18 not just a private right, but also a private remedy. *Id.* at 284. The same analysis should be  
19 applied to the construction of a Nevada state statute.  
20

21 The Nevada statute in this case, NRS 432B.220, does not provide a private civil right of  
22 action for failure to report. Nor does any other Nevada statute. This Court has previously  
23 examined NRS 432B.220 and the question of whether there exists a civil right of action for its  
24 violation. *Doe v. Nevada*, 356 F.Supp.2d 1123 (D. Nev. 2004). In *Doe*, this Court was presented  
25 with the issue of whether the plaintiffs should have been permitted to amend their complaint to  
26 add claims for negligence based on the defendant's failure to report suspected child abuse  
27  
28

1 pursuant to NRS 432B.220 and another separate reporting statute, NRS 388.521. The defendant  
2 argued that an amendment would be futile because the reporting statutes do not provide a private  
3 right of action.

4 This Court ultimately allowed the plaintiffs to amend their complaint; however, in so  
5 doing, this Court specifically stated that “**[t]he reporting statutes advanced in Plaintiff’s**  
6 **amended complaint do not in themselves create a private right of action[.]**” Finding that the  
7 failure to report thereunder could be used only as evidence of a duty and breach in a negligence  
8 action, this Court permitted the amendment for those purposes alone. *Doe* at 1126. This Court  
9 recognized that there does not exist a private right of action pursuant to NRS 432B.220.  
10

11 Plaintiff may provide evidence (if any exists) of LDS’ alleged failure to report JONES’  
12 involvement with the Plaintiff in accordance with NRS 432B.220 as support for her negligence  
13 claim. Plaintiff may not, however, assert a separate claim for relief against LDS for Failure to  
14 Report pursuant to NRS 432B.220.  
15

16 Dismissal is appropriate when the plaintiff’s claim is based on a statute that does not  
17 provide a private right of action. *E.g., Skokomish Indian Tribe v. U.S.*, 410 F.3d 506, 519 (9<sup>th</sup>  
18 Cir. 2005). As specifically held in *Doe*, even if LDS did fail to comply with the statutory  
19 reporting requirements (a disputed allegation), Plaintiff does not have a private right of action for  
20 a failure to report. Plaintiff cannot, under any interpretation of the facts alleged in her  
21 Complaint, succeed on her Sixth Claim For Relief and recover damages for a failure to report.  
22 This claim should therefore be dismissed with prejudice.  
23

24 **C. Plaintiff’s Eighth Claim For Relief For Intentional Infliction Of Emotional**  
25 **Distress Should Be Dismissed.**

26 Plaintiff’s Eighth Claim For Relief for intentional infliction of emotional distress  
27 (“IIED”) should also be dismissed. Under Nevada common law, a claim for IIED requires a  
28

1 showing that: (1) LDS engaged in extreme or outrageous conduct; (2) LDS did so with either the  
2 intent to cause or with reckless disregard for causing emotional distress; and (3) as a proximate  
3 result, the plaintiff suffered several or extreme emotional distress. *Jordan v. State ex rel Dept. of*  
4 *Motor Vehicles and Public Safety*, 121 Nev. 44, 110 P.3d 30, 52 (2005).

5  
6 In her Complaint, Plaintiff has not alleged any specific conduct against LDS that could  
7 reasonably constitute extreme or outrageous conduct. The extent of Plaintiff's allegations  
8 regarding LDS in the Eighth Claim For Relief and the preceding paragraphs incorporated  
9 thereinto are that:

10 (1) LDS approved JONES as a Branch President (Complaint, Doc. # 1-1, at p.4, ¶  
11 13);

12  
13 (2) JONES gained Plaintiff's and Plaintiff's family's permission and support to  
14 counsel Plaintiff while working for LDS and that JONES' relationship with Plaintiff was  
15 established in JONES' capacity as Branch President (Complaint, Doc. # 1-1, at p.4, ¶ 14; p.5, ¶  
16 15; p.11, ¶ 46);

17  
18 (3) JONES induced and directed Plaintiff to engage in various sexual acts while  
19 acting in the course and scope of his agency with LDS (Complaint, Doc. # 1-1, at p.5, ¶ 16; p.11,  
20 ¶ 47);

21 (4) LDS was informed of JONES' inappropriate conduct with the Plaintiff but did not  
22 take action to protect Plaintiff or report the conduct to the law enforcement authorities  
23 (Complaint, Doc. # 1-1, at p.5, ¶ 17);

24  
25 (5) LDS empowered JONES to perform his duties as Branch President and knew that,  
26 as a result, JONES would be in a position of trust and confidence with community families,  
27 including Plaintiff (Complaint, Doc. # 1-1, at p.11, ¶ 44);

28 (6) JONES sought and gained the trust, friendship, admiration, and obedience of

1 Plaintiff in furtherance of his duties as Branch President (Complaint, Doc. # 1-1, at p.11, ¶ 45);

2 (7) LDS failed to report the sexual misconduct as required by NRS 432B.220, despite  
3 having reasonable cause to suspect child abuse or neglect, thereby allowing JONES to abuse  
4 Plaintiff over an extended period of time (Complaint, Doc. # 1-1, at p.13, ¶ 61);

5 (8) LDS failed to supervise JONES, resulting in JONES' sexual involvement of  
6 Plaintiff (Complaint, Doc. # 1-1, at p.14, ¶ 66).

7  
8 In order to state a claim for IIED, the plaintiff must allege that the specific defendant  
9 against whom the claim is asserted (LDS) acted with the specific intent or reckless disregard for  
10 causing emotional distress. *Id.* As is clear from Plaintiff's allegations, LDS did not engage in  
11 any of JONES' allegedly outrageous acts alleged in the Complaint.

12  
13 Moreover, as a general principle, LDS cannot be held vicariously liable for JONES'  
14 intentional conduct in allegedly abusing Plaintiff. Under Nevada law, an employer cannot be  
15 held liable for harm or injury caused by the intentional act of an employee if the conduct: (1) was  
16 truly an independent venture of the employee; (2) was not committed in the course of the very  
17 task assigned to the employee; and (3) was not reasonably foreseeable under the facts and  
18 circumstances of the case considering the nature and scope of his employment. NRS 41.745(1).

19  
20 The Nevada Supreme Court examined a similar set of facts in *Wood v. Safeway, Inc.*, 121  
21 Nev. 724, 121 P.3d 1026 (2005). *Wood* involved a janitorial service employee who sexually  
22 assaulted an employee of one of the janitorial service's customers where he was sent to clean.  
23 The employer was held not responsible under a respondeat superior claim because: (a) the  
24 employee janitor was not acting on behalf of the employer or out of a sense of duty to the  
25 employer when he sexually assaulted the woman; (b) the assault was a truly independent venture  
26 of the employee; and (c) the assault was not reasonably foreseeable.

27  
28 *Wood* defines "foreseeability" of an intentional act (for respondeat superior purposes) as

1 when the employer has reasonable cause to anticipate the act and the probability of injury  
2 therefrom. As in *Wood*, JONES' intentional sexual abuse of Plaintiff was not foreseeable. As a  
3 matter of law, JONES' intentional conduct cannot impose liability on LDS, even if JONES is  
4 assumed to be an "employee" of LDS.  
5


6 Plaintiff cannot, even accepting the Plaintiff's allegations as true, succeed on her claim  
7 for IIED against LDS. Accordingly, her Eighth Claim For Relief for IIED should be dismissed.

8 **III. CONCLUSION**

9 For the foregoing reasons, LDS respectfully requests that this Court enter an order  
10 dismissing Plaintiff's Sixth Claim For Relief for failure to report and Eighth Claim For Relief for  
11 intentional infliction of emotional distress as against LDS.  
12

13 DATED this 26th day of April, 2007.

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18 By:   
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25 Corporation of the President of The Church of Jesus  
26 Christ of Latter-Day Saints and Successors  
27  
28



**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, and that on this date I caused a true copy of **Defendants 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 and Successors' Motion to Dismiss** to be served on all parties to this action by:

placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.

personal delivery/hand delivery

facsimile (fax)

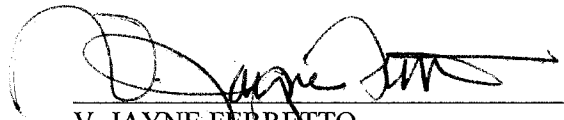
Federal Express/UPS or other overnight delivery

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Elko County School District

Dated this 26<sup>th</sup> day of April, 2007.



V. JAYNE FERRETTO  
Employee of Robison, Belaustegui, Sharp & Low