

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

THOMAS A. WAITE,

Plaintiff,

VS.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, a Utah corporation; CORPORAITON OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, a Utah corporation; DONALD C. FOSSUM; and STEVEN D. BRODHEAD,

Defendants.

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

,

**PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT - 1**

NORDSTROM & NEES, P.S.
ATTORNEYS AT LAW
323 South Pines Road
Spokane, Washington 99206
(509) 924-9800

1 Plaintiff, by and through his attorneys, STEPHEN L. NORDSTROM and
2 RICHARD C. EYMANN, hereby respond to the church Defendants and Donald C.
3 Fossum's Motion for Partial Summary Judgment regarding specific claims.
4

5 I. INTRODUCTORY RESPONSE

6 Defendants contend that because this Court previously ruled that Plaintiff's
7 failure to wear a seatbelt cannot be used at trial as evidence of his negligence, that
8 evidence regarding all acts or omissions by Defendant church is also inadmissible at
9 trial. Plaintiff disputes this contention.
10

11 II. FACTS

12 1. In answer to Plaintiff's Complaint, Defendant church and Defendant
13 Fossum admitted that a "special relationship" existed between Mr. Waite and the
14 church. (Defendant's Answer, paragraph 7.3).
15

16 2. Defendant church denied that the special relationship between Mr. Waite
17 and the church was fiduciary in nature. (Joint Status Certificate and Discovery Plan,
18 page 5, lines 7-8).
19

20 III. ARGUMENT

21 A. Defendant Church is not Entitled to Equal Benefit of this Court's 22 Prior Ruling. 23 24 25 26

1 “The existence of a fiduciary duty depends upon satisfactory proof of a special
2 relationship. This relationship is known as a fiduciary relationship.” *Bear Medicine v.*
3 *United States*, 241 F.3d 1208, 1218-1219 (9th Cir. 2001).
4

5 In the present case, the defendant church has acknowledged that while Mr. Waite
6 was on his mission, a “special relationship” existed between him and the church.
7 (“...admit that a ‘special relationship’ existed between Mr. Waite and the church.”
8 Defendant’s Answer, Paragraph 7.3); “...Defendant LDS Church concedes a special
9 relationship between itself and Mr. Waite. ...” (Joint Status Certificate and Discovery
10 Plan, page 5, lines 6-7). Where a special relationship exists, there is an enhanced duty
11 of care. *AAS-DMP Mgt., L.P. v. Acordia Northwest, Inc.*, 115 Wn. App. 833, 839, 63
12 P.3d 860 (2003). This duty may include foreseeing whether one may become a victim,
13 *Walker v. State*, 60 Wn. App. 624, 806 P.2d 249 (1991), rendering advice, *AAS-DMP*
14 *Mgt., L.P.*, supra, 115 Wn. App. at p. 839, providing superior knowledge or
15 information, *Miller v. United States Bank, N.A.*, 72 Wn. App. 416, 865 P.2d 536 (1994),
16 or a general duty to act in the best interest of the beneficiary party, *Davis v. Church of*
17 *Jesus Christ of Latter Day Saints*, 258 Mont. 286, 295-296 (1993). However,
18 Defendant church denies that this special relationship between Mr. Waite and the
19 church was of a fiduciary nature. (Joint Status Certificate and Discovery Plan, p. 5, lines
20 7-8).
21
22
23
24
25
26

1 When considering the church's denial of a fiduciary duty in conjunction with the
2 enhanced duties which accompany the acknowledged special relationship that existed
3 between Mr. Waite and the unequivocally stronger positioned Defendant church, there
4 are clearly questions of fact as to whether Defendant is entitled to wield the same shield
5 as the Plaintiff.

7 It should be noted that Defendant church did not address the issue of *respondeat*
8 *superior* in its memorandum, and the church's negligence arising from the motor
9 vehicle collision, which issue is separate from the fiduciary relationship question.

11 B. **Defendants' Liability is Predicated on Secular Conduct and Does Not**
12 **Involve the Interpretation of Church Doctrine or Religious Beliefs.**

14 Defendant makes the broad statement that "religious training and policies are
15 protected by the First Amendment," (Defendant's Memorandum, p. 6, lines 2-3). But the
16 church provides no support or factual discussion that tortious conduct such as being a
17 cause in fact of the motor vehicle collision or activities associated with that conduct
18 somehow constitutes religious training or policy. Rather, Defendants rely solely on
19 *Turner v. Church of Jesus Christ of Latter Day Saints*, 18 S.W.3d 877, 889 (Tex. App.
20 Dallas 2000), and that court's all encompassing swath, that, "[t]he entire missionary
21 program, including the training program, is a religious activity." *Id.* However, *Turner*
22 did not involve a motor vehicle collision and that court was not asked to address training
23
24
25
26

1 regarding traffic safety and rules of the road, driver's education, highway safety training,
2 or whether missionaries were provided training regarding the specific laws of the state.

3
4 It is difficult to conceive of more secular issues than a motor vehicle collision or a
5 corporation's duty regarding the vehicular safety of those individuals whom it governs, or
6 others who may be adversely affected by those whom it governs. It is also difficult to
7 believe that a court would allow any church, including the Mormon church with a force
8 of 58,000 missionaries, most of whom begin their missions at age 19 (*Turner*, 18 S.W.3d
9 at 882), to claim something akin to diplomatic immunity if it failed to properly instruct its
10 missionaries regarding secular traffic safety and rules of the road. Yet, Defendants
11 contend, "This court cannot examine the church's policies and rule on the effectiveness
12 of its missionary training program. ... ," even though the issue is traffic safety and rules
13 of the road. (Defendant's Memorandum, p. 8, lines 10-12). However, as previously
14 noted in Plaintiff's own memorandum in support of partial summary judgment, the
15 Supreme Court of the State of Washington does not agree.

16
17 Issues that are secular in nature are not barred by the First Amendment. This
18 proposition was specifically addressed in *S.H.C. v. Sheng-Yen Lu*, 113 Wn. App. 511, 54
19 P.3d 174 (2002), rev. den. by *S.H.C. v. Lu*, 149 Wn.2d 1011, 69 P.3d 874 (2003).

20
21
22
23 *Our (Washington state) supreme court then considered whether the claims*
24 *against the church were barred by the First Amendment. The court stated*
25 *that "[t]he First Amendment does not provide churches with absolute*
26 *immunity to engage in tortious conduct. So long as liability is predicated*
27 *on secular conduct and does not involve the interpretation of church*

1 *doctrine or religious beliefs, it does not offend constitutional principles.”*
2 *The court held that because these principles were not offended by the case*
3 *before it, there was no constitutional bar to the claim. (footnote citation*
4 *omitted)*

13 Wn. App. at 520 (footnote citation omitted).

IV. CONCLUSION

7 Defendant church owes the Plaintiff an enhanced duty of care, and therefore does
8 not stand in the same shoes as the Plaintiff. Further, the issues before the Court are
9 secular in nature, and are not precluded by the First Amendment. Defendant's Motion for
10 Partial Summary Judgment should be denied.

12 DATED this 22nd day of May, 2007.

13 NORDSTROM & NEES, P.S.

14 By: s/Stephen L. Nordstrom
15 STEPHEN L. NORDSTROM, WSBA #11267
16 Co-Counsel for Plaintiff

17 EYMANN ALLISON HUNTER JONES, P.S.

18 By: Telephonically Approved 5/22/07
19 RICHARD C. EYMANN, WSBA #7470
20 Co-Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Stephen L. Nordstrom, hereby certify that on the 22nd day of May, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following participants:

Brian T. Rekofke
Witherspoon Kelley Davenport & Toole
422 W. Riverside Avenue, Suite 1100
Spokane, WA 99201-0302

Andrew C. Smythe
Paine Hamblen Coffin Brooke & Miller
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3503

s/Stephen L. Nordstrom
STEPHEN L. NORDSTROM