

DA 19-0077

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 3

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ALEXIS NUNEZ and HOLLY McGOWAN,

Plaintiffs and Appellees,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF  
NEW YORK, INC.; CHRISTIAN CONGREGATION OF  
JEHOVAH'S WITNESSES; and THOMPSON FALLS  
CONGREGATION OF JEHOVAH'S WITNESSES,

Defendants and Appellants.

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WATCHTOWER BIBLE AND TRACT SOCIETY OF  
NEW YORK, INC.; CHRISTIAN CONGREGATION OF  
JEHOVAH'S WITNESSES; and THOMPSON FALLS  
CONGREGATION OF JEHOVAH'S WITNESSES,

Third-Party Plaintiffs and Appellants,

v.

MAXIMO NAVA REYES and  
IVY McGOWAN-CASTLEBERRY,

Third-Party Defendants.

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APPEAL FROM: District Court of the Twentieth Judicial District,  
In and For the County of Sanders, Cause No. DV-16-84  
Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

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Joel M. Taylor (argued), Watchtower Bible and Tract Society of New  
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For Appellees:

James P. Molloy (argued), Gallik, Bremer & Molloy, P.C.,  
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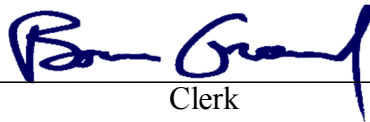
For Intervenor:

Timothy C. Fox, Montana Attorney General, Matthew T. Cochenour,  
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Argued: September 13, 2019  
Submitted: September 17, 2019  
Decided: January 8, 2020

Filed:

  
Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Watchtower Bible and Tract Society of New York, Inc., Christian Congregation of Jehovah’s Witnesses, and Thompson Falls Congregation of Jehovah’s Witnesses (collectively, “Jehovah’s Witnesses”) appeal the Twentieth Judicial District Court’s ruling that they violated Montana’s mandatory child abuse reporting statute, § 41-3-201, MCA, and its order granting summary judgment to Plaintiff Alexis Nunez on her negligence per se claim. They also appeal the court’s award of punitive damages following a jury trial. We hold that Jehovah’s Witnesses are excepted from the mandatory reporting statute under § 41-3-201(6)(c), MCA, because the undisputed material facts in the record show that Jehovah’s Witnesses canon law, church doctrine, or established church practice required that the reports of abuse in this case be kept confidential. We therefore reverse the District Court’s grant of summary judgment to Alexis and remand for entry of summary judgment in favor of Jehovah’s Witnesses. Because this issue is dispositive, we do not reach the punitive damages award or the Jehovah’s Witnesses’ other arguments.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

¶2 Peter McGowan, Ivy McGowan-Castleberry, and Plaintiff Holly McGowan are siblings. Their mother Joni married Maximo Reyes in 1994. Plaintiff Alexis Nunez is Ivy’s daughter. At all times relevant to the underlying complaint, Holly, Peter, Joni, and

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<sup>1</sup> Because the issue on appeal is the District Court’s summary judgment ruling, we confine our review to the summary judgment record.

Maximo were members of the Thompson Falls Congregation of Jehovah's Witnesses ("Thompson Falls Congregation").

¶3 In 1998, Holly told Don Herberger, a local elder at the Thompson Falls Congregation, that her step-father Maximo had inappropriately touched and fondled her. Herberger directed Holly to two other local elders, Ken Reich and Glenn Wilson, who dismissed her accusations on the grounds that they lacked a confession or second witness—which elders require to substantiate a report of abuse before taking actions against the accused—and were therefore unactionable. Without recourse, Holly returned home, where Maximo's abuse escalated to include numerous incidents of rape. His abuse continued until she was old enough to leave home.

¶4 In 2004, Peter told Don Herberger that Maximo had sexually abused him as a child. Pursuant to the "two-witness" rule, Don contacted Holly to confirm Peter's report. Holly wrote a letter corroborating the allegations and detailing Maximo's sexual abuse throughout her childhood. She concluded, "I want to thank Jehovah's shepherds for looking after his flock and for taking care of this situation." Don thereafter called Defendant Watchtower Bible and Tract Society's ("Watchtower") legal department. An attorney advised him that Montana law did not require him to report Maximo's abuse to local authorities. Having received this advice, Don did not contact local police to report Maximo's abuse.

¶5 Instead, Don, Glenn, and Ken formed a "judicial committee" and confronted Maximo about the allegations. After hearing from all three, the committee believed Peter's and Holly's accounts. In April 2004, the committee disfellowshipped Maximo—

banished him from the congregation—and submitted to Defendant Christian Congregation of Jehovah’s Witnesses (“CCJW”) a written report called an “S-77 Form” detailing the events leading to Maximo’s expulsion. Maximo requested the local elders to reinstate him to the congregation; a year later, in June 2005, they granted his request.

¶6 Alexis is Peter’s and Holly’s niece and Maximo’s step-granddaughter. Maximo started sexually abusing Alexis in 2002, after Holly initially reported Maximo to Don Herberger. Maximo continued to molest Alexis on a weekly basis over the next five years. During this time, though unaware of Maximo’s abuse of Alexis, the elders received Peter’s report; contacted the Watchtower legal department; formed a judicial committee to investigate the allegations; disfellowshipped Maximo; and reinstated him. They also observed Alexis accompanying Maximo to weekend services at the Thompson Falls Congregation. The elders did not contact local police. Alexis was five years old when Maximo’s abuse began and ten years old when it ended.

¶7 In 2016, Alexis and Holly sued Jehovah’s Witnesses for damages stemming from their failure to report Maximo to the authorities. Among other theories, they alleged Jehovah’s Witnesses were negligent per se under Montana’s mandatory child abuse reporting statute, § 41-3-201, MCA. In response, Jehovah’s Witnesses argued that they had no duty to report under § 41-3-201(6)(c), MCA,<sup>2</sup> which exempts clergy from the

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<sup>2</sup> At the time of Holly’s and Peter’s reports, the exception to the mandatory child abuse reporting statute was codified at § 41-3-201(4)(c), MCA (2003). This exception is now codified at § 41-3-201(6)(c), MCA. Although the numbering has changed, the relevant portions of the statute remain substantively the same. For ease of reference, we cite and refer to the current version.

mandatory reporting statute if canon law, church doctrine, or established church practice requires the communication of child abuse to be kept confidential.

¶8 The District Court granted summary judgment to Alexis on her negligence per se claim, concluding: “Defendants failed to report as mandated by Mont. Code Ann. § 41-3-201(2)(h). Defendants are liable for the harm of Alexis Nunez caused by Max Reyes after the 2004 report of abuse, as a matter of law. The question left to the jury is what is the appropriate amount of damages to award Alexis Nunez.” The plaintiffs dismissed their common law negligence claims and proceeded to a jury trial on this single claim. The jury found against Holly and awarded her nothing. Having been instructed that Jehovah’s Witnesses were liable as a matter of law to Alexis, the jury awarded her \$4 million in compensatory damages and \$31 million in punitive damages. Jehovah’s Witnesses appeal both the District Court’s summary judgment ruling that they are mandatory reporters and its failure to have the jury decide causation. Finally, they challenge the punitive damages award on statutory and constitutional grounds.

#### **STANDARD OF REVIEW**

¶9 This Court reviews de novo a district court’s grant or denial of summary judgment, applying the criteria of M. R. Civ. P. 56(c). *Stipe v. First Interstate Bank – Polson*, 2008 MT 239, ¶ 10, 344 Mont. 435, 188 P.3d 1063. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c). “A de novo review affords no deference to the district court’s decision and we

independently review the record, using the same criteria used by the district court to determine whether summary judgment is appropriate.” *Siebken v. Voderberg*, 2012 MT 291, ¶ 20, 367 Mont. 344, 291 P.3d 572. We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences from the offered proof in favor of the non-moving party. *Stipe*, ¶ 10 (citation omitted).

## DISCUSSION

¶10 *Did the District Court err in ruling as a matter of law that Jehovah’s Witnesses violated the mandatory child abuse reporting statute, § 41-3-201, MCA?*

### The Reporting Requirement and Its Exceptions

¶11 Montana law mandates certain professionals and officials to report child abuse to the Department of Public Health and Human Services when they “know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected by anyone[.]” Section 41-3-201(1), MCA. Clergy are among the professionals required to report under the statute. Section 41-3-201(2)(h), MCA. Section 41-3-201(6), MCA, however, excepts clergy from the reporting mandate under two circumstances. Relevant here, § 41-3-201(6)(c), MCA, provides: “A member of the clergy or a priest is not required to make a report under this section if the communication is required to be confidential by canon law, church doctrine, or established church practice.”

¶12 Jehovah’s Witnesses contend they are excepted from the general mandatory reporting statute pursuant to § 41-3-201(6)(c), MCA. Alexis responds that the exception in § 41-3-201(6)(c), MCA, does not apply because the record shows that the Defendants

did not in fact keep Peter's report confidential and because Jehovah's Witnesses church doctrine imposes no requirement of confidentiality.

### **Jehovah's Witnesses' Organizational Structure and Reporting Policies**

¶13 Congregations of Jehovah's Witnesses, including Defendant Thompson Falls Congregation, consist of individuals and families who gather to worship in buildings called "Kingdom Halls." A group of men called the "body of elders" oversees the spiritual activities of each congregation. Elders provide spiritual guidance to congregants, ranging from officiating weddings and hearing confessions to providing counseling for and conducting "ecclesiastical investigations" into "serious sin." The parties agree that elders are "clergy" under Montana law.

¶14 Defendant Watchtower is a New York nonprofit corporation that supports the Jehovah's Witnesses religion by printing Bible-based literature and owning real estate to provide housing and offices for full-time "servants." Watchtower also houses a legal department to serve the United States branch of Jehovah's Witnesses. Defendant CCJW, also a New York nonprofit, facilitates communications between local congregations and the Service Department, which includes experienced elders who provide spiritual and scriptural guidance to congregation elders across the United States.

¶15 The Jehovah's Witnesses religion has established procedures for responding to allegations of serious sin, such as child molestation, within a congregation. When elders receive a report of physical or sexual child abuse, they are instructed to immediately call the Watchtower legal department in New York to determine whether the laws of their jurisdiction require them to report the abuse to authorities. According to the Jehovah's



Witnesses, elders will report child abuse to secular authorities if required by law; otherwise, they address it internally.

¶16 Absent a legal duty to report to authorities, the elders conduct an internal investigation to determine whether the allegations of abuse have merit. As mentioned above, church policy requires a second witness to corroborate the initial report of abuse according to the “two-witness” rule. Once a second witness confirms the allegations, at least two local elders will conduct an investigation or take confession. If the two elders confirm the allegations, the local body of elders will appoint two or three elders to form a judicial committee. This committee meets with the accused to determine if he is repentant; if not, the committee determines whether it is necessary to disfellowship the unrepentant sinner, the strongest form of scriptural discipline. In the event the elders disfellowship the accused, they must complete an S-77 Form titled, “Notification of Disfellowshipping Or Disassociation,” and send it to the CCJW Service Department in New York. The elders keep records related to investigations and judicial committee proceedings under lock and key at the Kingdom Hall.

¶17 Local elders inform the congregation of the fact of disfellowshipping, but not of the underlying misconduct. A disfellowshipped member may petition the judicial committee for reinstatement.

¶18 Dave Chappel is a Jehovah’s Witnesses Service Department elder designated by the Watchtower and CCJW boards of directors to serve as their representative in this litigation. Chappel testified via deposition and sworn declaration to the religion’s basic tenets and its emphasis on confidentiality, particularly in handling communications and

reports of “serious sin.” Chappel explained that the Jehovah’s Witnesses’ basic beliefs teach that confession of sin is essential to one’s salvation. Understanding that fundamental principle, he attested, explains the emphasis on confidentiality. Chappel made the following relevant assertions in his declaration:

38. As promised to congregants in publications such as *The Watchtower*, “What you discuss with an elder will remain strictly confidential. Being trustworthy is one of his qualifications.” [W]ith that promise, congregants willingly open themselves to reveal their innermost thoughts, feelings, and acts to trusted elders as they seek to mend their (or other congregants[’]) relationship with Jehovah God and heal spiritually.

55. The requirement that elders keep information and spiritual communications confidential is based on Scripture and has been explained in the official publications of the Jehovah’s Witnesses. . . .

56. Congregation members trust elders to keep all spiritual communications strictly confidential. This applies to all members, not just those accused of or confessing serious sin.

57. Revealing confidential communications to those not entitled to hear them could call into question an elder’s qualifications.

### **Analysis**

¶19 Alexis contends in part that because the decision to report child abuse to local authorities ultimately lies within the discretion of each elder, confidentiality is optional, not required. Jehovah’s Witnesses respond that established church practice requires confidentiality as instructed by the Bible. But, Jehovah’s Witnesses add, they may decide not to penalize an elder if he chooses to disclose reports of abuse as a matter of personal conscience because ultimately the violation of church canon is a matter the elder must resolve with God.

¶20 As Alexis points out, Don Herberger conceded at his deposition that he could have reported Maximo to the authorities upon receiving Holly's or Peter's report. When asked whether it would have been up to him, he responded, "Well, it would be up to – Yes." But Dave Chappel's testimony clarifies that disclosing reports of abuse to secular authorities, while ultimately within each elder's discretion, constitutes a breach of church canon or practice. As he stated in his declaration: "While not every breach of confidentiality by an elder will result in his removal, each elder is accountable before God, the ultimate judge, for his adherence to the Bible's command to maintain confidentiality." Chappel elaborated in his deposition:

Q: [I]s it permissible for the elder to report?

A: He would then make that decision on his own if he went on ahead and reported it, and Romans 14:12 says that each of us will render an account for himself to God.

Q: So it's up to him.

A: It's his responsibility. He has to answer to Jehovah God for his actions.

¶21 Chappel's testimony makes plain that disclosing confidential information constitutes a breach that could result in an elder's removal. Even if the Jehovah's Witnesses do not remove the elder from his position, the elder will be accountable before his "ultimate judge." Thus, an elder's discretion to report child abuse to local authorities informs how Jehovah's Witnesses deal with a breach of confidentiality, not whether confidentiality is required in the first place.

¶22 Indeed, Chappel's insistence that church doctrine requires confidentiality is supported by the testimony of almost every other witness in the summary judgment

proceedings. Don Herberger testified that he received Peter's report of Maximo's abuse "in a trust of confidentiality." Peter, who declined during his deposition to disclose the particulars of his conversations, testified that he expected those conversations would remain private and confidential; that he confided in Don as a spiritual shepherd; and that he spoke to Don "personally" and not "as a judicial matter." Glenn Wilson, who chaired the judicial committee that disfellowshipped Maximo, testified that Jehovah's Witnesses' entire disciplinary and judicial committee process was confidential, including the one at issue. And Joni Reyes, Peter's and Holly's mother, testified that the process by which the local elders investigated and disfellowshipped Maximo based on Peter's report was confidential.

¶23 Holly's testimony aligns with Chappel's characterization of church doctrine. When she wrote her letter to the elders, she thanked them for "taking care of the situation." At her deposition, she testified that, by writing that letter, she "was opening it up and trying to . . . make [Maximo's abuse] known so it can be stopped, not just for myself but for others." She explained that by "others" she meant other children within the Jehovah's Witnesses religion. Her letter and testimony reflect her expectation that the elders would handle the matter internally.

¶24 Alexis did not present evidence in the summary judgment proceedings to dispute these material facts. Instead, she contended—as she does on appeal—that the broad dissemination of Peter's report—to multiple local elders, family members, and the New York-based Watchtower and CCJW—is inconsistent with confidentiality. Dave Chappel explained in his declaration, however, that the participation of multiple congregation

elders and members in the investigation and judicial committee proceedings is part of the confidential process:

40. From time to time, congregation elders communicate with experienced elders in the Service Department in New York to receive spiritual counsel and guidance about the application of Bible principles to issues concerning the congregation and its members. . . . All such spiritual communications are kept private and strictly confidential in accordance with the Scriptural beliefs and practices of Jehovah’s Witnesses.

49. Based on the Scriptural beliefs and practices of Jehovah’s Witnesses, all spiritual communications taking place during an investigation or a judicial committee proceeding, or in furtherance of the congregation’s ongoing spiritual assistance to a wrongdoer, are considered private and confidential. *The presence or participation of two or more elders in an investigation or judicial committee does not affect the elders’ confidentiality obligations.* Furthermore, any records created in connection with these matters are kept under lock and key at the Kingdom Hall and are accessible to elders only, all of whom operate under the same duty to maintain confidentiality.

(Emphasis added.)

¶25 The summary judgment record demonstrates that Jehovah’s Witnesses have an established process for receiving and investigating reports of child abuse within their congregations; that they consider this process confidential; and that the process necessarily involves multiple elders and congregation members, including the accused, CCJW elders who provide spiritual guidance, and local elders who conduct the investigation. This process “does not affect the elders’ confidentiality obligations.” Reviewing the summary judgment record de novo, we conclude that the undisputed material facts demonstrate the Jehovah’s Witnesses maintain confidentiality pursuant to

church doctrine, canon, and/or established practice when they receive and internally address reports of child sexual abuse.

¶26 Nonetheless, Alexis argues that allowing each religion to define “confidential” as it sees fit will eviscerate the mandatory reporting statute. But her restrictive definition of confidentiality contravenes the plain language of the reporting statute and the intent of the Legislature and would raise potential constitutional concerns.

¶27 As we interpret the terms of § 41-3-201(6), MCA, “the intention of the legislature is to be pursued if possible.” Section 1-2-102, MCA. The statute does not expressly define “confidential.” In 1991, the Legislature amended the reporting statute. It inserted subsection (2)(h) to include clergy in the list of mandatory reporters. It simultaneously inserted the clauses, now contained in subsections (6)(b) and (6)(c), exempting clergy from reporting under certain conditions.

¶28 Under § 41-3-201(6)(b), MCA, clergy are not required to report known or suspected child abuse if the knowledge results from a congregation member’s confidential communication or confession and if the person making the statement does not consent to disclosure. This exception tracks closely Alexis’s definition of confidential—that is, a communication between two people that prohibits disclosure unless the communicant consents. But the Legislature did not so narrowly circumscribe the exception. In adopting § 41-3-201(6)(c), MCA, it indicated its intent to accommodate definitions of confidentiality beyond that contained in subsection (6)(b). When a statute has “several provisions or particulars,” courts are, if possible, to adopt a construction that “will give effect to all.” Section 1-2-101, MCA. To give effect to both provisions, we

conclude that Alexis’s restrictive definition of confidentiality is an incomplete construction of the mandatory reporting statute.

¶29 This Court’s task is to interpret what is contained in the reporting statute as written by the Legislature. We do not opine whether that body could have made a different policy choice that would afford greater protection to child victims. The Legislature is the appropriate body to entertain such policy arguments. *See, e.g., Bank of Am. v. Ivey*, 2010 MT 131, ¶ 10, 356 Mont. 388, 234 P.3d 867. *See also In re Marriage of Boharski*, 257 Mont. 71, 80, 847 P.2d 709, 715 (1993) (Hunt, J., dissenting). Legislative history confirms the body’s deliberate policy choice when adding the reporting exceptions. During the House Judiciary Committee hearing on House Bill 391—the bill proposing the 1991 amendments to the mandatory reporting statute—both the bill sponsor and committee members expressed their intention to avoid interference with the practice of religion. 1991 Mont. Laws ch. 785, § 1; Hearing on HB 391 Clergy to Report Child Abuse *Before the House Committee on Judiciary*, 52nd Leg., Reg. Sess. 1 (Jan. 30, 1991). As introduced, the bill included clergy among mandatory reporters and added only the provision that “[s]ubsection (2)(h) is not intended to interfere with the practice of religion.” After hearing concern from numerous clergy members that the bill would entangle the State in the affairs of the church, the bill was amended to add the specific exceptions now contained in subsections (6)(b) and (6)(c). Senate Standing Committee Report on HB 391, *Senate Committee on Judiciary*, 52nd Leg., Reg. Sess. 1 (March 16, 1991); Minutes of Free Conf. Committee on HB 391, 52nd Leg., Reg. Sess. 1 (April 10, 1991).

¶30 Jehovah’s Witnesses point out that imposing a narrow definition of confidentiality impermissibly could discriminate between different religious beliefs and practices, protecting confidentiality of reports made in a confession from a parishioner to priest, like the traditional Catholic practice, while offering no protection to a congregant’s disclosures to a committee of elders using a process like that followed by the Jehovah’s Witnesses. “It is the duty of courts, if possible, to construe statutes in a manner that avoids unconstitutional interpretation.” *State v. Mathis*, 2003 MT 112, ¶ 8, 315 Mont. 378, 68 P.3d 756 (citation omitted). The Establishment Clause ensures that “one religious denomination [will] not be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244, 102 S. Ct. 1673, 1683 (1982). A broader construction of the definition thus is in keeping with a jurisprudential “sensitivity to and respect for this Nation’s pluralism, and the values of neutrality and inclusion that the First Amendment demands.” *Am. Legion v. Am. Humanist Ass’n*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

¶31 Finally, both the state and federal constitutions prohibit this Court “from considering whether certain religious conduct conformed to the standards of a particular religious group.” *Davis v. Church of Jesus Christ of Latter-Day Saints*, 258 Mont. 286, 297, 852 P.2d 640, 647 (1993) (citation omitted), *overruled in part on other grounds by Gilko v. Permann*, 2006 MT 30, ¶ 24, 331 Mont. 112, 130 P.3d 155. In *Davis*, we held that judicial consideration whether there had been a deviation from “true” Mormon doctrine warranting plaintiff’s excommunication would require courts to investigate and interpret religious practices and beliefs, which, in the absence of a constitutionally



compelling interest, violates free exercise. *Davis*, 258 Mont. at 298, 852 P.2d at 648. *See also Rasmussen v. Bennett*, 228 Mont. 106, 112, 741 P.2d 755, 759 (1987) (holding that the Court lacks power to question the Watchtower Society’s determination that Rasmussen was not scripturally free to remarry under the Jehovah’s Witnesses doctrine). In determining whether Jehovah’s Witnesses satisfy § 41-3-201(6)(c), MCA, we therefore are mindful not to scrutinize the process they followed after Peter’s disclosure for compliance with their own church doctrine and practice—or to commit such scrutiny to a fact-finder at trial. *See Davis*, 258 Mont. at 297-99, 852 P.2d at 647-48.

¶32 Here, as in *Davis* and *Rasmussen*, we decline to conduct further inquiry into the validity of Jehovah’s Witnesses’ tenets and doctrines, including its canon and practice for adherence to a requirement of confidentiality in handling child abuse reports. Jehovah’s Witnesses representatives testified that its process for addressing these reports is strictly confidential, notwithstanding the involvement of numerous church clergy and congregants. “It is not within this Court’s power to question [the religious institution’s] determination.” *Rasmussen*, 228 Mont. at 112, 741 P.2d at 759.

¶33 We hold accordingly that the undisputed material facts in the summary judgment record demonstrate as a matter of law that Jehovah’s Witnesses were not mandatory reporters under § 41-3-201, MCA, in this case because their church doctrine, canon, or practice required that clergy keep reports of child abuse confidential, thus entitling the Defendants to the exception of § 41-3-201(6)(c), MCA. The reporting statute as written accommodates Jehovah’s Witnesses’ definition and practice of confidentiality.

## CONCLUSION

¶34 The District Court erred in ruling that Jehovah's Witnesses were under a mandatory duty to report Peter or Holly McGowan's disclosure of Maximo's abuse and thus were negligent per se for violating § 41-3-201, MCA. We reverse and remand for entry of summary judgment in favor of Jehovah's Witnesses.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH  
/S/ DIRK M. SANDEFUR  
/S/ LAURIE McKINNON  
/S/ JAMES JEREMIAH SHEA  
/S/ INGRID GUSTAFSON  
/S/ JIM RICE