STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 13-CVS-8873
JANE DOE 192, Plaintiff, v. CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; MATTHEW HARDING, PRESIDENT OF THE RALEIGH STAKE; KEN CARLILE, PRESENT BISHOP OF THE RALEIGH 4TH WARD; BRYAN COPE, FORMER BISHOP OF THE RALEIGH 4TH WARD, Defendants.	**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER MOTION TO COMPEL DISCOVERY**

INTRODUCTION

This case raises claims against defendants, a religious institution of the Church of Jesus Christ of Latter Day Saints, ("LDS church") and individual leaders of that church for their actions and inactions in failing to protect from child sexual abuse the children of a mother for whom plaintiff has power of attorney. In her complaint, plaintiff, who is proceeding under a pseudonym, alleges that the defendants knew that one Jared Wilson, currently incarcerated for felony child sexual abuse, posed a threat to the minor children, that the defendants had a duty to protect the minor children, and that they breached that duty, resulting in sexual abuse of and resulting injury to the minor children.

Wilson, a lifelong member of the LDS church, turned himself in to law enforcement authorities in June, 2013, as he faced the treat of arrest for molesting minor children other than

those involved in this case.

The factual issues in this case turn on when Jared Wilson informed individual members of the Mormon Church that he was a consumer of child pornography, that he was sexually attracted to minor children, and that he had in fact abused one or more minor children. What defendants knew about Wilson's proclivities and conduct and when they knew it go to the heart of the case.

Plaintiff has requested that defendants provide complete answers to plaintiff's Interrogatory #12 ("State the date on which Jared Wilson first communicated to any defendant that he had a sexual interest in or had engaged in sexual misconduct with any minor, generally or specifically.") and Interrogatory #21 ("Identify all communications with Jared Wilson following the termination of his parental rights."). Plaintiff has also asked that defendants respond in full to plaintiff's Request for Production #43 ("Documents which reflect each Church Disciplinary action toward Jared Wilson."); and plaintiff's Request for Production #50 ("Documents sufficient to identify each person who was told, the month, day, and year when that was told, and the means by which each person was told anything related to Jared Wilson's sexual interest in children.").

Defendants have refused to comply, citing the clergy-penitent privilege and the First Amendment. Defendants have listed in a privilege log a number of documents, which they claim are protected from discovery. The parties have discussed these matters thoroughly, have exchanged letters citing case law and legal principles and have reached an impasse on these issues.

Under North Carolina case law and federal constitutional law, the defendants' objections based on the clergy-penitent privilege and the First Amendment are overbroad and are not

supported by the cases they cite. Their theory is also guaranteed to endanger children and to perpetuate abuse in the church, as they did in this case.

I. Defendants Have Overstated the Scope of the Clergy-Penitent Privilege, Which Does Not Apply to Every Communication Ever Had with or about Perpetrator Jared Wilson Over the Course of Several Years

The plain language of North Carolina law states that in child abuse cases, the only privilege permitted is the attorney-client privilege, in the context of an attorney-client relationship. This law undermines defendants' attempt to build a wall of autonomy around themselves, which would make them unaccountable to the sex abuse of children in the faith:

> No privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect, or dependency case. No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as this privilege relates to the competency of the witness and to the exclusion of confidential communications.

N.C. Gen. Stat. § 7B-310 (2013).

The clergy-penitent privilege generally is also much narrower than the defendants posit. The statute reads:

> No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

N.C. Gen. Stat. Ann. § 8-53.2. In summary, by its plain language, the North Carolina clergy-penitent privilege (1) only bars the testimony of a clergy member who has received confidential

information from someone seeking spiritual counsel; (2) may not be used in cases of child abuse; (3) does not apply to the testimony of the individual who sought the counsel; and (4) does not apply to documents obtained from the person seeking counsel. At the very least, this reasoning requires disclosure of all elements of the disciplinary actions of the church and of the documents written by Jared Wilson to the bishops, or shared with the bishops at any time, which are listed in the privilege log.

A. A Spiritual Confession Is Not a Disciplinary Proceeding and the Clergy-Penitent Privilege May Not Apply Beyond a Spiritual Confession

Defendants are arguing that a believer's confession cloaks church discipline of the confessor under a veil of pivilege. This is essentially an argument that any conversation or exchange of documents between a bishop and a member who has confessed to a crime is privileged. The LDS Church has tried in other courts to expand the confessional privilege in this manner, to no avail. See, e. g., *N.K. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, et.al.* Case No. 67645-8-1 (Washington Ct. App, July 22, 2013), pp. 25 and following. (Attached to this memorandum as Exhibit A). Defendants have thus attempted to turn every conversation between Jared Wilson and a bishop into a privileged clergy-penitent communication, when it occurred in the context of a case involving child sex abuse. Not every conversation a church member has with a bishop is protected by the clergy-penitent privilege. To qualify as a "confession" under North Carolina law, a conversation must be more than a mere exchange of information. It must be for the purpose of "...seeking spiritual counsel and advice relative to and growing out of the information so imparted." N.C. Gen. Stat. § 8-53.2.

If one takes the defendants reasoning to its logical end, it would mean that the courts would be barred from judging whether a church had fulfilled its duty of care for children in their faith. Instead, all discipline would end with a church's internal determination, and victims of sex abuse would have no recourse beyond the church, which is the very institution that created the conditions for the child's abuse in the first place. There was an era when prosecutors, the media, and the public believed that the best organization to handle sex abuse in a church was the church itself. Case after case and victim after victim have proven that private entities cannot successfully manage child sex abusers. Indeed, when a religious organization hides a pedophile in its midst, it nearly guarantees that more children will be sexually abused. Criminal law and tort law are far better protectors of children and deterrents of future bad acts by religious organizations regarding the protection of children.

B. Comparison of the Clergy-Penitent Privilege with Other Statutory Privileges

The limited scope of the clergy-penitent privilege is evident when compared to other statutory privileges. For instance, the physician-patient privilege prevents a physician from having to "disclose any information which he may have acquired in attending a patient in a professional character." N.C. Gen. Stat. § 8-53 (emphasis added). Many other statutory privileges similarly bar "disclosure" of "information." *See, e.g.*, N.C. Gen. Stat. § 8-53.3 (psychologist-patient privilege); N.C. Gen. Stat. § 8-53.5 (marital and family therapist privilege); N.C. Gen. Stat. § 8-53.7 (social worker privilege); N.C. Gen. Stat. § 8-53.11 (journalist privilege); N.C. Gen. Stat. § 8-53.13 (nurse-patient privilege). The General Assembly has thus intentionally restricted the clergy-communicant privilege to bar testimony by a member of the clergy, but not testimony from the penitent or the disclosure of documents as with other privileges.

Because evidentiary privileges interfere with the search for the truth, they are narrowly construed in this state. *See Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001) ("Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed."); *id.* at 31, 541 S.E.2d at 790 ("Like the work-product exception, the attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material. Thus, courts are obligated to strictly construe the privilege and limit it to the purpose for which it exists."); *Roadway Exp., Inc. v. Hayes*, 178 N.C. App. 165, 170, 631 S.E.2d 41, 45 (2006) ("The physician-patient privilege is strictly construed.").

The North Carolina Supreme Court announced and applied this principle to the physician-patient privilege in *Sims v. Charlotte Liberty Mutual Insurance Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962). Reviewing case law around the country, the Court observed that in "some jurisdictions the privilege statutes are strictly construed on the theory that they are in derogation of the common law; in others the courts say that the statutes are remedial and consequently should be liberally construed." *Id.* at 37, 125 S.E.2d at 330. "North Carolina is a strict constructionist." Id. Courts cannot "extend the privilege beyond the plain sense of the text of the statute." *Id.*

Narrowly construing the privilege's application to medical records, the Court held that the only parts of records that are covered by the privilege are those made by the physician or at his direction. *Id.* at 38, 125 S.E.2d at 331. "However, any other information contained in the records, if relevant and otherwise competent, is not privileged." *Id.* Therefore, even the physician-patient privilege, which is broader that the clergy-communicant privilege, does not bar disclosure of documents written by the individual seeking help.

Accordingly, the clergy-communicant privilege, if it applies at all in a case involving child abuse, only applies to the testimony of a clergy member who has provided spiritual counsel and perhaps documents made by the clergy member.

C. The Defendants' Cited Cases Do Not Support Their Creative Arguments

Defendants rely on *State v. Andrews,* 507 S.E.2d 305 (N.C. App. 1998), citing a two-pronged test: "(1) defendant must be seeking the counsel and advice of his minister; and (2) the information must be entrusted to the minister as a confidential communication." *Id.* at 308. In other words, there must be an intent on the part of the alleged "confessor" to be seeking "spiritual counsel" as opposed to psychological counsel or simply responding to questions or having an ordinary conversation.

It is inconceivable that every exchange between Jared and the bishops in which they discussed his history of sexual attraction to small children and sexually abusing them was a "confession" in this sense. When a conversation is prompted by the bishop, it is hard to argue that the person is "seeking" counsel. Rather, the bishop is seeking information, presumably to protect the church from a bad light. Therefore, the heavy blanket of privilege that the defendants have laid on *every* conversation between Jared and the bishops is misleading.

Moreover, when others are present, the exchange cannot be a confession in the legal sense. Each exchange must be addressed to determine whether (1) it was prompted by the bishop, which would disqualify it for the privilege; (2) it was prompted by individuals other than Jared or the bishop, which would disqualify it for the privilege; and (3) there was an intent on Jared's part to obtain "spiritual counseling" or to obtain advice unrelated to his spiritual status, the latter of which would disqualify it for the privilege. *See State v. Barber*, 317 N.C. 502, 509 346 S.E.2d 441, 445 (N.C. 1986) (clergy-penitent immunity did not apply when criminal

defendant confessed to a Sunday School teacher and member of the church who preached, but was not an ordained minister); *State v. West*, 317 N.C. 219, 223, 345 S.E.2d 186, 189 (N.C. 1986) (finding a communication between a communicant and a clergy, held in the presence of the communicant's wife, to no longer be entrusted to the clergy); *State v. Pulley*, 180 N.C. App. 54, 67-68, 636 S.E.2d 231, 241 (N.C. App. 2006) (privilege did not apply when the defendant confessed to murder in front of a priest and a non-ordained member of the church); *Waters v. O'Connor*, 209 Ariz. 380, 383, 103 P.3d 292, 295 (Ariz. App. Div. 1 2004) (immunity did not apply when defendant confessed to a volunteer music director at the church); *People v Harris*, 934 N.Y.S.2d 639, 645 (N.Y. Sup. Ct. 2011) (immunity did not apply when defendant confessed to a non-ordained church deacon); *Cox v. Miller*, 296 F.3d 89 (2d Cir. 2002) (immunity did not apply when defendant confessed to several Alcoholics Anonymous members that he had committed murder); *Commonwealth v. Stewart*, 547 Pa. 277, 287-88, 690 A.2d 195, 201 (Pa. 1997) (immunity did not protect information regarding the manner in which a religious institution conducted its affairs or information acquired by a religious institution through independent investigations because it did not involve communications with clergy members for penitential or spiritual purposes).

Indeed, the defendants are inconsistent in their claims of confessional privilege, raising a genuine issue of material fact whether they are being candid about whether the conversations with Wilson were privileged and whether their assertion of privilege is sincere. If an assertion of religious privilege is not sincere, the privilege fails. *See In re Williams*, 269 N.C. 68, 78-79 (1967); *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 907 (1992); *Morrison v. Garraghty*, 239 F.3d 648, 658 (4th Cir. 2001). Defendants invoke the privilege for all admissions from Jared Wilson about sexually abusing young children before

2010 (when Jared's wife learned about his danger to her children), but then they disclose the content of an exchange with a bishop when it serves their interests: "the first time Jared confessed to any Defendant that he had engaged in sexual misconduct was in June 2010 when he confessed to Bishop Cope, in the presence of his wife and another Church member, that he had inappropriately touched two girls in 2007." Def.'s Resp. to Pl.'s Interrog. #12. The presence of the other persons at this exchange defeats any privilege claim, but the Court should also note that defendants use "confess" in a wide variety of ways, many of which would not qualify for the privilege. Defendants should not be permitted to pick and choose among Wilson's communications with them, and be able to choose to disclose only those that serve their interests.[1]

Defendants' reliance on *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1525-26 (9th Cir. 1997) is also inapposite, as *Mockaitis* was a suit filed by a Catholic priest and archbishop invoking the federal Religious Freedom Restoration Act of 1993 ("RFRA") stemming from the state's use of a taped confession. That case is irrelevant to the present case, because RFRA was

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[1] Defendants learned that Wilson was sexually interested in children and acting on that interest before this 2010 exchange. In the Raleigh Police Department report on his sexual abuse of one of his daughter's friends, dated June 30, 2010, Bishop Cope stated that "Jared has been talking to me for some time now about his problems. He indicated to me that he had inappropriate actions with a minor." RPD Report, at 2. Wilson, in the same police report, stated that he was "addicted" to porn involving "young teenage girls" and "some were younger" and that he had "been talking to [his] Bishop about this for about a year." RPD Report, at 4. In addition, in a hearing after which his parental rights were terminated, Wilson agreed that he molested "this other child" in 2007, three years before he turned himself in. TPR trans. 84. He further agreed that he had been meeting with the Bishop "for approximately a year" before he was confronted by that child's mother, raising the possibility that he was meeting with the Bishop any time after he sexually abused that child in 2007. *Id.* at 86-87. Finally, the record states that the termination of his parental rights was based in part on an argument to the court that he had been confessing "at least two years" before he turned himself in. *Id.* at 122.

held unconstitutional in *Boerne v. Flores,* 507 U.S. 521 (1997) and North Carolina has no state RFRA.

Defendants' invocation of *Tubiolo v. Abundant Life Church, Inc.*, 605 S.E.2d 161 (N.C. App. 2004) also misses the mark. The North Carolina Court of Appeals held that the First Amendment barred plaintiffs' suit seeking an injunction enjoining the defendant from terminating their church membership as "[m]embership is a core ecclesiastical matter....where the Courts of this State should not become involved in." *Id.*at 164. The instant matter does not deal with issues of membership, but rather clergy negligently placing children in danger by failing to warn Mormons in their Stake about a child sex abuser they knew had tendencies to sexually abuse children and access to these children. Defendants' application of *Hadnot v. Shaw*, 826 P.2d 978, 989 (Okla. 1992), is similarly off-base as that case also involved plaintiffs seeking remedies for the termination of their memberships to the church. *Id* at 980. Furthermore, the court did not by any means indicate that the privilege is absolute as it was unwilling to extend the privilege to actions that occurred after the plaintiffs' excommunication stating: "In the event of withdrawal or of post-excommunication activity unrelated to the church's efforts at effectuation of valid judicature, the absolute privilege from tort liability no longer attaches. Any action at this point, if it is to be protected, must be justified by others means." *Id.* at 989.

Defendants' citation of *Totten v. United States*, 92 U.S. 105, 107 (1875), is wholly inapposite as the case involved the revelation of state secrets and had absolutely nothing to do with religion. The 1875 Supreme Court simply mentioned in dicta that confessional communications are among those categories in which privilege may be invoked. *Id.*

II. The First Amendment Does Not Shield Defendants from Their Discovery Obligations Under Neutral Principles of Tort Law, which Apply to Every Other Citizen in North Carolina

Under prevailing law, the defendants' objections based on the First Amendment are unavailing. First, the vast majority of courts including North Carolina have held that the First Amendment is no barrier to discovery or liability in a child sex abuse case. *Smith v. Privette*, 128 N.C. App 490, 494, 495 S.E.2d 395, 398 (N.C. App. 1998); *Redwing v. Catholic Bishop for Diocese of Memphis,* 363 S.W.3d 436, 452-53 (Tenn. 2012) (summarizing states rejecting First Amendment defense to tort liability for covering up child sex abuse); *Turner v. Roman Catholic Diocese of Burlington, Vt.*, 987 A.2d 960, 973(Vt. 2009); *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1225(Me. 2005) ("[C]ourts do not inhibit the free exercise of religion by applying neutral principles of law to a civil dispute involving members of the clergy."); *Malicki v. Doe*, 814 So. 2d 347, 364 (Fla. 2002) ("[W]e conclude that the Free Exercise Clause does not bar consideration of the parishioners' claims for negligent hiring and supervision as alleged in their complaint."). This is because tort laws are neutral (non-discriminatory toward religion) and generally applicable (every organization that acts negligently or recklessly for the protection of children is liable). It is well-settled that rationality review applies to neutral and generally applicable laws like the tort laws at issue in this case. *Smith*, 494 U.S. at 884-85, and such laws, which govern conduct, not belief, satisfy rationality review and even strict scrutiny and, therefore, defendants have no free exercise defense to the tort laws and the accompanying required discovery in this case. As the Fourth Circuit has explained, "If the law makes no distinction between action based on religious conviction and action based on secular views, it is a generally applicable law, neutral toward religion and not violative of the First Amendment." *Hines v. S. Carolina Dep't of Corr.*, 148 F.3d 353, 357 (4th Cir. 1998) (citing *Smith*).

A. The Free Exercise Clause Does Not Protect Defendants from Accountability for Putting Very Young Children at Risk of Sex Abuse

The First Amendment Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. State of Conn.*, 310 U.S. 296, 303-04 (1940). The Supreme Court has stated:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. Laws,' we said, 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices ... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.'

Smith, 494 U.S. at 879. Thus, the defendants are free to believe whatever they want; however, when they commit torts that put children at risk and are sued in a court of law under these general principles of tort law and the related discovery obligations, they are subject to the same rules as any other employer.

The Free Exercise Clause is not applicable where there is no substantial burden on religious conduct, as in this case. Defendants have made no assertion that the Church of Jesus Christ of Latter-day Saints believes that its members should sexually abuse children or that its bishops should negligently or recklessly enable such abuse. It is well established that the First Amendment "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'." *Smith*, 494 U.S. at 879; see also *Malicki*, 814 So.2d at 354. Plaintiff simply seeks application of the tort laws and accompanying

procedure to the defendants in the same manner it is applied to everyone in North Carolina who negligently or recklessly endangers children.

1. First Amendment Case Law Does Not Support Defendants' Arguments about the First Amendment

The great weight of the authority rejects defendants' attempts to mold the First Amendment to avoid their obligations under North Carolina's ordinary tort law. Case after case and state after state have established that tort laws in the context of a child sex abuse case involving a church are neutral, generally applicable laws. *Givens v. St. Adalbert Church*, No. HHDCV126032459S, 2013 WL 4420776, at *5 (Conn. Super. Ct. July 25, 2013); *Redwing*, 363 S.W.3d at 455; *Turner v. Roman Catholic Diocese of Burlington*, 987 A.2d 960, 972-73 (Vt. 2009); *John Doe CS v. Capuchin Franciscan Friars*, 520 F. Supp. 2d 1124, 1136-37 (E.D. Mo. 2007); *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1194-95 (D. Colo. 2006); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1232 (Me. 2005); *In re Roman Catholic Archbishop of Portland in Or.*, 335 B.R. 815, 825 (Bankr. D. Or. 2005), citing *United Methodist Church v. White*, 571 A.2d 790, 792 (D.C.App.1990); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1240 (Miss. 2005); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1007-08 (D. Kan. 2004); *Doe v. Evans*, 814 So.2d 370, 373 (Fla. 2002); *Malicki*, 814 So.2d at 664-65; *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 279 (Cal. App. 2003); *McKelvey v. Pierce*, 800 A.2d 840, 850, 857-58 (N.J. 2002); *Rashedi v. General Bd. of Church of the Nazarene*, 54 P.3d 349, 354 (Ariz. Ct. App. 2002), *rev. denied*, No. CV-03-0049-PR, 2003 Ariz. LEXIS 100 (Ariz. 2003); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 436 (Minn. 2002); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999); *Smith v. Raleigh Dist. of the North*

Carolina Conf. of the United Methodist Church, 63 F. Supp. 2d 694, 703 (E.D.N.C. 1999); *C.J.C. v. Corporation of the Catholic Bishop*, 985 P.2d 262, 277 (Wash. 1999); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-36 (5th Cir. 1998), *cert. denied, Baucum v. Sanders*, 525 U.S. 868 (1998); *Smith v. O'Connell*, 986 F. Supp. 73, 79 (D. R.I. 1997); *F.G. v. MacDonell*, 696 A.2d 697, 702 (N.J. 1997); *Moses v. Diocese of Colo.*, 863 P.2d 310, 319-21 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); *Hutchison v. Luddy*, 414 Pa. Super. 138, 152, 606 A.2d 905, 912 (1992); *Strock v. Pressnell*, 527 N.E.2d 1235, 1237-38 (Ohio 1988); *Alberts v. Devine*, 395 Mass. 59, 75, 479 N.E.2d 113, 123 (1985). *See generally People v. Campobello*, 348 Ill. App. 3d 619, 665-66 (2004). As neutral, generally applicable laws that are not targeting religious organizations or believers, they are subject to the lowest level of review, rationality review. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

There can be no question that the protection of children serves a rational purpose. In fact, it serves a compelling interest. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 263 (2002) ("The Court has long recognized that the government has a compelling interest in protecting our Nation's children."); *Medlin v. Bass*, 398 S.E.2d 460, 466 (N.C. 1990); *United States v. Whorley*, 550 F. 3d 326, 345 (4th Cir. 2008). Without holding religious institutions accountable for child sex abuse on their watch, the state puts at risk the many North Carolina children who are cared for and engaged with their religious institutions on a routine basis.

In contrast, defendants rely on a single law review article authored by the former General Counsel to the United States Conference of Catholic Bishops and a 16-year-old federal trial court decision in Colorado to argue that tort law is not a neutral, generally applicable law subject to rationality review under the First Amendment. Letter from Raymond E. Owens, Jr., Def.'s

Att'y, to Leto Copeley, Esq., Pl.'s Att'y (May 8, 2014). Defendants also attempt to build a wall around themselves with cases that do not support their overstated claims to immunity from their legal obligations to protect children.

2. Defendants Have Once Again Relied on Inapposite Cases

Defendants rely on *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976) for the proposition that "civil courts exercise no jurisdiction" over "a matter which concerns . . . church discipline." Def. Letter, p. 3. The case does not stand for the broad proposition assigned to it by the defendants. Rather, *Serbian Orthodox* stands for the narrower proposition that in the case of *intrachurch* disputes over ecclesiastical doctrine, the courts may not choose the beliefs or precepts that the church will follow. 426 U.S. at 714-15. This is not a case that requires the court to choose the beliefs of the church in a dispute between fellow believers. Rather, this is a case about third-party harm, which requires no inquiry into beliefs. The defendants' actions are to be measured according to state tort law and whether the religious entity and its bishops *acted* contrary to that law. *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979); *see also Smith*, 494 U.S. at 885; *Gillette v. United States*, 401 U.S. 437, 450 (1971); *Cantwell*, 310 U.S. at 304; *General Council of Finance and Administration of United Methodist Church v. Superior Court of California, San Diego County*, 439 U.S. 1355, 1372-73 (1979) (Rehnquist, Circuit Justice); *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706 (2012) (holding First Amendment barred suit related to employment of ministers

invoking anti-discrimination law in employment context); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997) (holding First Amendment barred suit for purely ecclesiastical matters including employment decisions regarding ministers).

Defendants also rely on *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706 (2012), for the proposition that the First Amendment prohibits government interference with internal church decisions "that affects the faith and mission of the church itself." Def. Letter, p. 4. This is an over-reading of the Supreme Court's decision. The Supreme Court limited the "ministerial exception" to issues involving an employment dispute between a church and its clergy, or ministers, involving claims of discrimination, and unmistakably set aside issues involving contract disputes or third parties and tort, saying:

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employees.

Hosanna-Tabor, 132 S. Ct. at 710. *See also Redwing*, 363 S.W.3d at 455. *Hosanna Tabor* should play no role in this case of child sex abuse, where the bishops knew at a minimum that a member had a sexual obsession with child pornography, was sexually attracted to very young children, and had four very young children at home, yet failed to warn the plaintiff mother and member whom they knew well that her children were at risk.[2]

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[2] It is well-documented that viewing child pornography is strongly linked to pedophiles acting on urges to sexually abuse children:

> Viewing child pornography harms not only the child abused, but the defendant himself...viewing child pornography has an injurious effect on the viewer by normalizing adult/child sexuality, by dehumanizing children, and by desensitizing the viewer "to the harmful consequences of child victimization." ....The desensitization that occurs from viewing the images also continues in internet communities where possessors provide each other with a sense of community and give each other validation that their interest in children is normal. They also encourage each other to act out on their interests. This message 'erodes the societal mores which could otherwise inhibit them from satisfying that impulse.' These effects should not be ignored.

Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D.C. Colo. 1998), on which the defendants' rely, also misses the mark as the court in that suit held that the First Amendment barred plaintiff's suit for negligent hiring and retention as the claim would "require examination of church policy and doctrine[,]" as the court would be "insert[ing] itself into the process by which priests are chosen...." In the instant matter, plaintiff's claim is not one in which the court will have to insert itself into the process of hiring a priest or a minister as the claim is one of negligence, unrelated to hiring or employment decisions.

Defendants' reliance on *Word of Faith World Outreach Ctr. Church v. Morales*, 787 F. Supp. 962, 968 (W.D. Tex. 1992), is also misplaced as the case involved the issues of whether the church had engaged in deceptive trade practices, with no relevance to a case involving negligence resulting in child sex abuse. It was also subsequently reversed and remanded by the Court of Appeals for the Fifth Circuit, 986 F.2d 962 (1993), as the District Court did not have

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J. Elizabeth McBath, *A Case Study in Achieving the Purpose of Incapacitation-Based Statutes: The Bail Reform Act of 1984 and Possession of Child Pornography*, 17 WM. & MARY J. WOMEN & L. 37, 65-66 (2010); *see also* Michael L. Bourke and Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24:3 J. OF FAM. VIOLENCE 183–93 (Apr. 2009), *available at* http://www.olemiss.edu/depts/ncjrl/pdf/I%20C%20A%20C/2012%20-%20October%2015-16/B%20-%20The%20%27Butner%20Study%27%20Redux.PDF; Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE 201 (2005), *available at* http://link.springer.com/article/10.1007/s11194-005-4605-y#page-1; Megan Westenberg, *Establishing the Nexus: The Definitive Relationship Between Child Molestation and Possession of Child Pornography As the Sole Basis for Probable Cause*, 81 U. CIN. L. REV. 337, 360 (2012); Michael C. Seto and James M. Cantor, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115:3 J. OF ABNORMAL PSYCHOL. 610-615 (2006), *available at* http://www.olemiss.edu/depts/ncjrl/pdf/I%20C%20A%20C/2012%20-%20October%2015-16/A%2020Child%20Pornography%20Offenses%20Are%20a%20Valid%20Diagnostic%20Indicator%20of%20Pedophilia.PDF; Candice Kim, *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*, 1 CHILD SEXUAL EXPLOITATION PROGRAM UPDATE 1 (2004), *available at* http://www.ndaa.org/pdf/Update_gr_vol1_ no3.pdf; Megan Westenberg, *Establishing the Nexus: The Definitive Relationship Between Child Molestation and Possession of Child Pornography As the Sole Basis for Probable Cause*, 81 U. CIN. L. REV. 337, 360 (2012); Kenneth B. Lanning, *Child Molesters: A Behavioral Analysis*, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN (2010), *available at* http://www.missingkids.com/en_US/publications/NC70.pdf.

jurisdiction over the issues under the *Pullman* abstention doctrine and because the federal constitutional issues were potentially moot.

Defendants also invoke *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cr. 1979), for the proposition that "compelled disclosure [of religious school's financial information] has the potential for substantially infringing the exercise of First Amendment rights." The case does not stand for the broad proposition assigned to it by the defendants. Rather, the *Surinach* decision involved a law in Puerto Rico that empowered the Secretary of the Department of Consumer Affairs to demand all financial information from schools, including Catholic schools, with no clear and legitimate end use of the information known, which resulted in extensive and unjustified entanglement into religion. *Id.* at 77. The regime in Puerto Rico established the possibility of a fishing expedition into religious affairs for no good reason. The case is simply inapposite to this case, where the law is addressed at a particular social evil, the sex abuse of children, and is necessary to hold entities responsible to report suspected child sex abuse, including the crime of possessing child pornography, and to protect the children in their care. Defendants also rely on *Rayburn v. Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985), for the proposition that the First Amendment exempts churches from certain employment laws due to the intrusiveness of discovery that would be involved in enforcement. Again, the case is inapposite and is a precursor for the *Hosanna-Tabor* Court's distinction between employment discrimination and tort laws. The *Rayburn* Court dealt with an employment discrimination claim by a woman who applied for an associate pastor position. Indeed the Court later recognizes "[o]f course churches are not – and should not be – above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the

decision does not involve the church's spiritual functions." *Id.*

Even if this Court were to find that North Carolina tort law related to the sexual abuse of children is not neutral and generally applicable, but rather somehow targets religious institutions for liability for sex abuse, and strict scrutiny were to be applied under the First Amendment, plaintiff should prevail. North Carolina has a compelling interest to protect the safety of children. *Standley v. Town of Woodfin*, 186 N.C.App 134, 159, 650 S.E.2d 618, 635 (N.C. App. 2007). Furthermore, the interrogatories cannot be any more narrowly tailored to determine whether and when the church negligently failed to prevent Jared from abusing the victims, all age 7 or younger at the time of the abuse.

B. The Establishment Clause

Any claim by the Defendant that the Establishment Clause grants constitutional immunity over child sex abuse tort law or the required discovery in this case is without merit. Indeed, absolving the Defendant of its obligations under the discovery rules would constitute a violation of the separation of church and state by handing a religious defendant a benefit accorded no other employer. *Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *see also* Finlator *v, Powers*, 902 F.2d 1158, 1162-63 (4th Cir. 1990). And the expansion from the confessional privilege to a privilege for disciplinary proceedings as well would violate the Establishment Clause, because it would be a privilege the wholly immunizes the church from its legal obligations, a right that is accorded to no other entity.

The parameters of the Establishment Clause of the First Amendment are well established: state action does not violate the Establishment Clause if such action (1) has a secular purpose; (2) has a primary effect which neither advances nor inhibits religion; and (3) does not foster excessive state entanglement with religion. *Lemon v. Kurtzman.* 403 U.S. 602, 612-13 (1971).

The first two prongs of this test are not even arguably implicated in this case. At issue here is application of the North Carolina tort and discovery rules. These laws have a secular purpose, and their primary affect neither advances nor inhibits religion. Rather, plaintiff seeks only to apply the civil law to these defendants in conformity with "neutral principles of law" as previously sanctioned by the United States Supreme Court. See *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

The *Lemon* Court was concerned that state action may result in administrative and political entanglement. Administrative entanglement typically involves comprehensive, discriminating and continuing state surveillance of religion. *Id.* at 619-22. Of particular concern is the danger that government action may have "self-perpetuating and self-expanding propensities." *Id* at 624. This generally occurs when the state grants regulated aid to groups affiliated with religious institutions, thus requiring ongoing monitoring. See, e.g., *Columbia Union College v. Clarke*, 159 F.3d 151, 162 (4th Cir. 1998); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1400-01 (9th Cir. 1994). The only state action in this case is the ordinary judicial involvement in a tort case involving an employer who has put children at risk. There is no threat or necessity of the state's on-going monitoring of the defendants' actions. Thus, no excessive entanglement is at issue in this case. *Vernon*, 27 F.3d at 1400-01; see also *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (holding that Establishment Clause not implicated in applying the accounting provisions of the Fair Labor Standards Act to the operational aspects of a religious school); *NLRB v. Hanna Boys Center*. 940 F.2d 1295, 1304 (9th Cir. 1991) (finding no entanglement where the national labor relations board's jurisdiction over a church-owned school required government involvement only with respect to specific claims filed on behalf of specific employees); *U.S. v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979). Indeed,

the point of tort laws involving child sex abuse and organizations are to deter the organization from failing to protect children in the future, or deterrence. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. b (1971) ("...a number of policies, such as the deterrence of tortious conduct and the provision of compensation for the injured victim, underlie the tort field"); Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181 (2012); John S. Brennan, The First Amendment Is Not the 8th Sacrament: Exorcizing the Ecclesiastical Abstention Doctrine Defense from Legal and Equitable Claims for Sexual Abuse Based on Negligent Supervision or Hiring of Clergy, 5 T.M. COOLEY J. PRAC. & CLINICAL L. 243, 283 (2002); Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115 (1993).

Furthermore, granting immunity from the North Carolina discovery rules to church employers but not to secular employers would itself raise grave establishment clause issues in a case involving the sexual abuse of children. Such a law would have no secular purpose and would certainly have the primary effect of advancing religion by immunizing church defendants from tort liability for the public harm that they have caused through shielding their discovery obligations, in violation of the first two prongs of the *Lemon* test and bedrock First Amendment principles. As the Florida Supreme Court has explained, "to hold otherwise and immunize the church defendants from suit could risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment." *Malicki,* 814 So.2d at 365; *see also Redwing,* 363 S.W.3d at 450.

Defendants rely on *United Methodist Church, Bait. Annual Conference v. White*, 571 A.2d 790, 792 (1990), for the proposition that "[t]he First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery and trial under certain

circumstances in order to avoid subjecting religious institutions to defending their religious beliefs and practices in a court of law." The case in fact does not stand provide an argument for the defendants in this case. Rather, *United Methodist* dealt with a former minister suing his former church for wrongful discharge based on their interpretation of church doctrine, which is as strong a case as there is in favor of the ministerial exception and again irrelevant to a child sex abuse case. Yet again, defendants attempt to shoehorn a child sex abuse case into a ministerial exception theory, even though the courts have made it clear that they are apples and oranges.

Conclusion

Plaintiff's motion to compel discovery should be granted. Defendants should be required to respond in full to Plaintiff's Interrogatories and Request for Production on or before December 14, 2014.

Respectfully submitted, this the 8th day of December, 2014.

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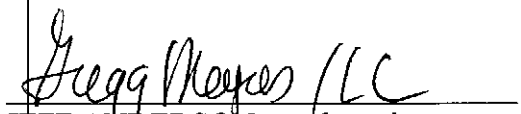

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record by electronic mail, properly addressed as follows:

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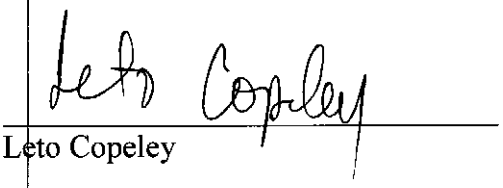

Leto Copeley

EXHIBIT A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

N.K., an individual proceeding under a pseudonym, Appellant, v. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole registered to do business in the State of Washington; CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND SUCCESSORS, a foreign corporation sole registered to do business in the State of Washington; THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in the State of Washington; and PACIFIC HARBORS COUNCIL, BOY SCOUTS OF AMERICA, a Washington nonprofit corporation, Respondents.	No. 67645-8-I DIVISION ONE PUBLISHED OPINON FILED: July 22, 2013

BECKER, J. — Appellant NK[1] was molested in 1977 by a volunteer scout leader with a church-sponsored Boy Scout troop in Shelton, Washington, when

[1] NK is an adult proceeding by pseudonym.

NK was 12 years old. Thirty-two years later, NK brought negligence claims against the church, the Boy Scouts of America (BSA), and the local boy scouting council, for failing to protect him. These claims were dismissed on summary judgment on the ground that the defendants owed no duty to protect NK from a danger of which they were unaware.

We reverse as to the church and remand for trial. The church had a protective relationship with NK. From this relationship, a duty arose to take reasonable precautions to protect children in the church's care from foreseeable hazards, a category that may include the risk of child sex abuse by scout leaders. This duty does not depend on the church having prior knowledge that its volunteer scout leader was a molester. In any case, there is evidence that church officials did become aware of the volunteer's dangerous propensities several months before he left town. We also reverse orders that limited NK's discovery from the church in time and scope.

As to the scouting defendants, we affirm. There is no evidence that they had a special relationship either with NK or with the adult volunteer who molested him.

FACTS

The facts are set forth in the light most favorable to NK, the nonmoving party on summary judgment. This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

In 1977, NK was a 12-year-old boy living in Shelton. NK and his family belonged to the Church of Jesus Christ of Latter-Day Saints (LDS). The church is organized into geographic areas called "stakes." Subunits of stakes are called "wards." NK's family belonged to the Shelton ward, which was part of the Olympia stake. The Shelton ward of the church encouraged boys in the congregation to participate in Boy Scouts. The church sponsored Boy Scout Troop 155.

A ward's leadership is referred to as the "bishopric," which consists of a bishop and a first and second counselor. In 1977, the Shelton ward's second counselor was the chairman of the ward's Boy Scout Committee. A troop has to have a scout committee and officers in order to be chartered by the national Boy Scout organization.

Scoutmasters for Troop 155 are "called" to the position by the bishopric, and then presented to the congregation, where they can be either affirmed or opposed. In 1977, Ben Danford was called and affirmed by the congregation as the official scoutmaster. He was registered on the official troop roster. There was no official assistant scoutmaster.

In the early spring of 1977, a stranger named Dusty Rhodes came to Shelton from Juneau, Alaska. Danford, who met him at the time, thought the stranger seemed untrustworthy. "Rhodes" left town, only to reappear a few months later under the new name of Dusty Hall. Danford testified that Hall was "personable," but he gave only a "vague" explanation of "what he did and who he

was and where he came from." Hall worked as a truck driver. He had no children of his own. He had only recently converted to the LDS church. The friends he made in Shelton included NK's parents. Soon, he became engaged to Geraldine Worthy, the best friend of NK's mother. Worthy was a single mother of three young children.

Hall offered to volunteer with the scouting troop. The bishopric met and decided to accept him as a volunteer. Hall quickly assumed substantial responsibilities for the troop's activities, though he was never officially registered with BSA. NK recalls Hall being introduced to him as his new scoutmaster. The other boys and families of the troop and Worthy, Hall's fiancée, also knew him as a scoutmaster. Hall held scout meetings every week. Some meetings were held in the gym, and some were in the church's scouting cabin. There were two keys to the scouting cabin; the bishop had one, and Hall had the other. Hall also took the scouts on camping trips and helped them get their merit badges.

According to NK, Hall began sexually molesting him in the early summer of 1977, about a week after they met. The first two incidents occurred at NK's home. NK testified that the only reason he ever let Hall into his house when his parents were not there "was because he was one of our Scout leaders." The third incident occurred during a troop sleepover at Hall's apartment. Other incidents occurred during scouting campouts, in the church scout cabin after scout meetings, in Hall's car in the church parking lot, or at Hall's workplace. In all, Hall molested NK 20 to 30 times, approximately on a weekly basis. Hall also

molested at least two of NK's fellow scouts during scouting events and sleepovers. One scout who was not molested stopped participating in Troop 155 because Hall made his family feel uncomfortable.

On a Sunday at the end of the summer, Worthy learned from her six-year-old son that Hall had molested him. Worthy reported the abuse to the bishop the same day. The bishop told her not to call the police and that he would "take care of it." The bishop tried to contact Hall. Hall gathered his things from Worthy's home and left town the same night. The bishop called church members in Juneau and made other efforts to contact Hall, but Hall could not be located and he never returned.

The bishop held a meeting with the parents of the scouts and asked them to discuss Hall with their sons. Questioned by his parents and then by the bishop, NK denied that Hall had molested him. He did not tell friends or siblings about it either.

NK filed this complaint in November 2009 against BSA, a congressionally-chartered national organization, and Pacific Harbors Council of Boy Scouts of America, one of numerous local councils chartered across the country by BSA. The complaint also named two church defendants: Corporation of the President of The Church of Jesus Christ of Latter-Day Saints and Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints. The two church defendants, who filed a joint answer and are jointly represented, are corporations established to carry out the temporal affairs of the LDS church, a

world-wide religious organization with over thirteen million members.

NK alleged that each defendant owed him a duty to protect him from the criminal acts of Hall. He claimed that they failed in their duty in various ways: by failing to check into Hall's background, by allowing him to supervise the children in isolated settings without another adult present, and by failing to train scoutmasters or warn scouts and their families about the danger of sexual abuse in scouting.

In August 2011, the court granted dismissal to all defendants on summary judgment for absence of duty. NK assigns error to the orders of dismissal and also to certain orders imposing limits on discovery from the church.

DUTY

The existence of a legal duty is a question of law considered on appeal de novo. Sheikh, 156 Wn.2d at 448. A duty to protect another from sexual assault by a third party may arise where the defendant has a special relationship with the tortfeasor which imposes a duty to control the third person's conduct, or it may arise where the defendant has a special relationship with the other which gives the other a right to protection. Niece v. Elmview Group Home, 131 Wn.2d 39, 43, 929 P.2d 420 (1997), citing RESTATEMENT (SECOND) OF TORTS § 315(a) & (b).

The defendants contend none of them owed NK a duty of protection because they did not possess prior specific knowledge that Hall posed a threat to boys. The requirement for prior specific knowledge of the tortfeasor's dangerous propensities applies to the first type of special relationship identified in Niece but

not to the second. For example, in the relationship between parole officer and parolee, where the parole officer has information showing that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to control the parolee to prevent him or her from doing harm. Taggart v. State, 118 Wn.2d 195, 219-20, 822 P.2d 243 (1992). But the existence of a duty predicated on a protective relationship requires knowledge only of the "general field of danger" within which the harm occurred. McLeod v. Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953).

In McLeod, a young student was raped by older students in a dark unlocked room beneath school bleachers. The court held that the victim's suit against the school district could go forward even though school officials were unaware of the "vicious propensities" of the older students. McLeod, 42 Wn.2d at 321. The question was whether the harm fell within a "general field of danger" which should have been anticipated.

> [W]e believe that here the general field of danger was that the darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency between school boys and girls. If the school district should have reasonably anticipated that the room might be so used, then the fact that the particular harm turned out to be forcible rape rather than molestation, indecent exposure, seduction, or some other act of indecency, is immaterial. Had school children been safeguarded against any of these acts of indecency, through supervision or the locking of the door, they would have been protected against all such acts.

McLeod, 42 Wn.2d at 322. See also J.N. v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 871 P.2d 1106 (1994).

Niece is similar. The plaintiff, a vulnerable elderly patient in a private

group home, was sexually assaulted by an employee. The employee had no criminal history, and the group home had no knowledge of his dangerous propensities. Niece, 131 Wn.2d at 42. The court recognized a special protective relationship between the group home and the patient, similar to that in McLeod. Niece, 131 Wn.2d at 43-44. The court held that the group home could be found liable "as long as the possibility of sexual assaults on residents by staff was within the general field of danger which should have been anticipated." Niece, 131 Wn.2d at 50.

The defendants suggest that McLeod and Niece have been superseded by our Supreme Court's more recent decision in C.J.C. v. Corporation of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999). One of the three appeals consolidated in C.J.C. was Funkhouser v. Wilson, 89 Wn. App. 644, 950 P.2d 501 (1998), aff'd in part and remanded, 138 Wn.2d 699, 985 P.2d 262 (1999). In Funkhouser, two young members of a Baptist congregation were molested by Wilson, a church deacon. The abuse did not take place on church premises or during church-sponsored activities, but the church had received a report of a previous molestation by Wilson before they decided to make him a deacon. The Supreme Court concluded the trial court erred by dismissing the case on summary judgment for absence of duty. This conclusion was supported by "the conjunction of four factors present in the case":

> [W]e find the conjunction of four factors present in the case before us decisive to finding the existence of a duty is not foreclosed as a matter of law: (1) the special relationship between the Church and deacon Wilson; (2) the special relationship between the Church and the plaintiffs; (3) the alleged knowledge of the risk of harm

> possessed by the Church; and (4) the alleged causal connection between Wilson's position in the Church and the resulting harm.

C.J.C., 138 Wn.2d at 724.

The defendants here argue that under C.J.C., a plaintiff must prove each of these four factors as a conjunctive test in order to establish a duty on the part of an organization to prevent abuse of children by a third party, including a duty arising from a special relationship with the child victim. They are mistaken. The first two C.J.C. factors—(1) the organization's special relationship with the tortfeasor and (2) its special relationship with the victims—are well-settled *alternative* grounds from which a duty can arise. RESTATEMENT (SECOND) OF TORTS § 315 (1965), cited in Niece, 131 Wn.2d at 43. "As a general rule, there is no duty to prevent a third party from intentionally harming another unless a special relationship exists between the defendant *and either the third party or the foreseeable victim* of the third party's conduct." Niece, 131 Wn.2d at 43 (emphasis added and internal quotation marks omitted), quoting Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 227, 802 P.2d 1360 (1991).

It is true that in C.J.C., the court emphasized that the church possessed actual notice that the deacon was a child molester. But the reason for this emphasis was because the allegations were of molestation occurring at the deacon's home, when he was babysitting. "The molestation of these plaintiffs did not occur on church property nor during church-sponsored activities. Defendants did not recommend Wilson as a babysitter." C.J.C., 138 Wn.2d at 730 (Madsen, J., concurring/dissenting). These circumstances removed the case from the

ambit of cases like McLeod and Niece, where the defendants had custody of the plaintiff when the abuse occurred.

The four factors adopted by the C.J.C. court to support the existence of a duty on the part of the Baptist church apply where the alleged abuse occurred at times and places when the institutional defendant did not have custody of the child. See Marquay v. Eno, 139 N.H. 708, 662 A.2d 272 (1995), applying RESTATEMENT (SECOND) OF TORTS § 302B cmt. e, para D (1965) (actor has brought into contact with the victim "a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct"), cited in C.J.C., 138 Wn.2d at 723. Nothing in the C.J.C. court's analysis eroded the authority of protective relationship cases like McLeod and Niece that apply in circumstances where the sexual assault occurs at a time and place where the vulnerable victim is in the custody and care of the institutional defendant. In fact, before discussing the four factors mentioned above, the C.J.C. court recognized, as an issue of first impression, that a church's duties to its youth are the same as a school's if the molestation occurs during church activities, when the children are in the "custody and care" of the church:

> The children of a congregation may be delivered into the custody and care of a church and its workers, whether it be on the premises for services and Sunday school, or off the premises at church-sponsored activities or youth camps. As in other agency relationships, a church chooses its officials, directs their activities, and may restrict and control their conduct. In many respects, the activities of a church, and the corresponding duties legitimately imposed upon it, are similar to those of a school. As a matter of public policy, the protection of children is a high priority. In general,

> therefore, we find churches (and other religious organizations) subject to the same duties of reasonable care as would be imposed on any person or entity in selecting and supervising their workers, or protecting vulnerable persons within their custody, so as to prevent reasonably foreseeable harm.

C.J.C., 138 Wn.2d at 721-22.

The C.J.C. court cited both Niece and McLeod with approval. We conclude that Niece and McLeod are consistent with C.J.C. and they remain good law. To establish the element of duty arising from a special protective relationship, NK did not have to prove the church had prior specific knowledge that Hall posed a threat.

A duty arising from a protective relationship, as in Niece and McLeod, is limited by the concept of foreseeability. Niece, 131 Wn.2d at 50. The duty "is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." McLeod, 42 Wn.2d at 320. The church contends sexual abuse by an adult volunteer was unforeseeable.

Foreseeability is a question for the jury[2] unless the circumstances of the injury are "so highly extraordinary or improbable as to be wholly beyond the range of expectability." Niece, 131 Wn.2d at 50 (internal quotation marks omitted), quoting Johnson v. State, 77 Wn. App. 934, 942, 894 P.2d 1366 (1995);

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[2] Typically when there is a jury question as to whether an injury is within the general field of danger which the defendant should reasonably have anticipated, the issue is presented in the "Proximate Cause-Superseding Cause" pattern instruction. WPI 15.05.

McLeod, 42 Wn.2d at 323. A sexual assault is not legally unforeseeable "as long as the possibility of sexual assaults . . . was within the general field of danger which should have been anticipated." Niece, 131 Wn.2d at 50.

The court held in Niece that sexual abuse by staff at a group home may be a foreseeable hazard against which reasonable precautions should be taken. Niece, 131 Wn.2d at 51. The court found this to be demonstrated by the prior sexual assaults that had occurred at the group home, an earlier policy at the home against unsupervised contact with residents, expert testimony that such contact was unwise, and legislative recognition of the problem of abuse in residential care facilities. Niece, 131 Wn.2d at 50-51. The church suggests that in this case, there is inadequate support for foreseeability of child sexual abuse because none of the above factors identified in Niece are present.

BSA has long known of sexual abuse occurring in scouting. The files of ineligible volunteers maintained by BSA since 1920 include allegations of pedophilia and "perversion" by adult volunteers. In fact, a BSA procedural manual concerning the files states that the "perversion" cases were the majority of the cases on file.

What knowledge the LDS church had is not as well established. The record does not, for instance, show that the church was given the information about the history of molestation in scouting that was known within BSA. According to a BSA employee who oversaw the set up and maintenance of the ineligible volunteer files, BSA did not inform parents or troop committees about

the existence of the perversion files. Scoutmaster Danford testified that he never received any training from the Boy Scouts about the dangers of sexual abuse. The church contends that the absence of such evidence is fatal to NK's claim against the church.

The general field of danger was that scouts would be sexually abused if a stranger newly arrived in town was permitted to supervise them one-on-one in isolated settings. Whether considered from the standpoint of negligence or proximate cause, such a risk cannot be described as so highly extraordinary or improbable as to compel deciding the issue of foreseeability as a matter of law. See McLeod, 42 Wn.2d at 323-24. A defendant's actual knowledge of the particular danger "is not required if the general nature of the harm is foreseeable under the circumstances." Travis v. Bohannon, 128 Wn. App. 231, 240, 115 P.3d 342 (2005). Therefore, even if there was no evidence that the church knew about specific past incidents of child sexual abuse in scouting, we would decline to decide as a matter of law that sexual abuse by adult scout volunteers was unforeseeable by the church.

The record contains evidence that the danger of sexual abuse by an adult volunteer was one the church reasonably should have anticipated. By 1977, BSA was advising all chartered organizations to maintain "'two deep' leadership for their troops." A church witness from the Juneau branch testified that the church "always had the rule of two adults" in scouting events. Although BSA claims the policy was to ensure continuous leadership for a troop, a reasonable

inference is that it was intended to prevent sexual abuse by adults. And as discussed below, we are reversing discovery rulings that prevented NK from developing other evidence bearing on the question of what the church knew about the dangers of sexual abuse in scouting.

Whether a duty exists, then, depends in this case on whether the defendants had a special relationship with the boys in Troop 155 that gave them a right to protection. "The duty to protect another person from the intentional or criminal actions of third parties arises where one party is entrusted with the well being of another." Niece, 131 Wn.2d at 50 (internal quotation marks omitted), quoting Lauritzen v. Lauritzen, 74 Wn. App. 432, 440, 874 P.2d 861 (1994). Examples of special protective relationships are listed in Hutchins, 116 Wn.2d at 228. Often in these cases, "the party that has been found to have a legal duty was in a position to provide protection . . . because he or she had control over access to the premises that he or she was obliged to protect." Lauritzen, 74 Wn. App. at 440-41. For school pupils, in particular, the essential rationale for imposing a duty "is that the victim is placed under the control and protection of the other party, the school, with resulting loss of control to protect himself or herself." Hutchins, 116 Wn.2d at 228. These considerations explain why the C.J.C. court held that when children are delivered into the "custody and care" of a church for church-sponsored activities, the church has the same duty owed by a school or other institution entrusted with the custody and care of vulnerable individuals.

The relationship between the church and the scouts in Troop 155 is similar to the relationship in McLeod between the Grant County School District and its students. Scouting was part of the church youth program. The church selected the scoutmasters and adult volunteers for Troop 155. The church chapel was the registered meeting place for the troop. The church actively encouraged children of the congregation to participate in scouting, and it paid for the boys' participation in the troop. NK's mother testified that the reason she let her son spend time alone with Hall was "because the church held him out as a youth leader who could be safely trusted with our children." Cf. C.J.C., 138 Wn.2d at 725 (placing Deacon Wilson into a position of trust over children "not only brought him into close connection with the children of the congregation, it allegedly inspired confidence to place the plaintiffs in his care"). The church owned a scouting cabin where the boys participated in meetings and scouting activities, away from the custody and protection of their parents. NK testified that Hall sometimes brought him to the cabin outside of meeting times and molested him there. Hall also molested him after scout meetings. The scouting cabin and the other opportunities scouting provided to Hall for isolating his victims are analogous to the darkened room under the bleachers where the rape occurred in McLeod.

The church, noting that the first two incidents of molestation occurred in NK's own home when his parents were away, prefers to characterize Hall's criminal acts as abuse by a trusted family friend rather than being attributable to

lack of reasonable care by the church. If NK had been abused only in his own home, the facts would be more like in Funkhouser and, under C.J.C., arguably NK could not establish a special relationship without proof that the Church had reason to know Hall was a molester. But Hall molested NK while both were engaged in scout activities. The fact that NK's parents failed to recognize Hall as a danger does not eliminate the responsibility of the church to exercise reasonable care when children are involved in church-sponsored activities. Just as the protective custody of the school "is substituted for that of the parent," J.N., 74 Wn. App. at 57, the church was substituting for the parent when it had custody of NK. See also Travis, 128 Wn. App. at 241-43 (student was injured while working with a hydraulic log splitter during school-sponsored "Workday"; fact that student's mother gave consent was at most concurrent negligence, not a superseding cause that would relieve the school district of liability). The evidence indicates that the reason NK's parents trusted Hall to be alone with NK is that the church had put its imprimatur upon Hall as an accepted troop leader. We conclude the church had a protective relationship with young NK that, under McLeod and Niece, gave rise to a duty to protect him from foreseeable harms.

We reach the opposite conclusion as to the scouting organizations. BSA and Pacific Harbors Council did not have a custodial responsibility for the troop members. Their relationship to NK was not analogous to the relationship between school and pupil in McLeod.

NK contends a duty of protection under McLeod and Niece was

adequately established for BSA and the local council by evidence of their control over the program and their right to exclude participants. Both BSA and the local council provided training and education regarding how the scouting program was to operate, and both were involved in screening volunteers. BSA would reject the registration of any person whose name appeared in BSA's ineligible volunteer files. BSA distributed a handbook that encouraged boys to trust scout leaders, required registration forms with information about each scout's rank, and collected dues from individual scouts. BSA provided the church with scouting policies and rules, and expected them to be enforced. BSA reserved the right to reject volunteers, leaders, and scouts deemed to be unfit. BSA officials could have excluded Hall from volunteering if they had known about him. The local council also had a degree of control over the activities of Troop 155. The local council convened the larger scale camping outings that occurred each year, stayed in touch with the troop's scoutmaster about fundraising activities and the annual campouts, and facilitated the chartering and registration process for Troop 155.

BSA, of all the defendants, had the most extensive knowledge of the history of sexual abuse in scouting and was in the best position to warn scouts, parents, and local troops of the danger that adults who prey on children may work their way into scouting as volunteers unless reasonable precautions are taken at the local level. But the ability to warn and the right to exclude are not enough to establish a special protective relationship. NK does not cite authority,

and we have found none, that has allowed a case to proceed on the theory of a protective relationship in the absence of a custodial relationship between the organization and the victim. Without a custodial relationship, typically involving on-the-ground control of day-to-day operations, an institutional defendant is not in a position to provide protection from physical danger as a school or church group does for children, or to monitor personal care as a hospital or nursing home does for disabled patients. Because their relationship to the scouts in Troop 155 was not custodial, we conclude BSA and the Pacific Harbors Council did not have a protective relationship with NK.

In addition to the special protective relationship theory, NK alleges that all defendants owed him a duty because they had a special relationship with Hall which imposed upon them a duty to control Hall's conduct. See Niece, 131 Wn.2d at 43, citing RESTATEMENT (SECOND) OF TORTS § 315(a). This duty does depend on proof that the defendant was aware of the tortfeasor's dangerous propensities. As to the scouting defendants, the record does not contain evidence raising an inference that either BSA or Pacific Harbors Council were even aware of Hall's existence. Therefore, those two organizations did not have a special relationship with Hall imposing a duty to control his conduct.

As to the church, however, there is evidence of awareness of Hall's dangerous propensities. A church exposes itself to liability when it allows its youthful members to be supervised by a person known to have a history of sexual misconduct. C.J.C., 138 Wn.2d at 724; M.H. v. Corp. of Catholic

Archbishop of Seattle, 162 Wn. App. 183, 192, 252 P.3d 914, review denied, 173 Wn.2d 1006 (2011). The church claims that it did not have any negative information about Hall until just before he left town at the end of August or early September of 1977. Bishop Gordon Anderson recalled receiving only one report of abuse by Hall. He testified that he responded to it immediately by trying to contact Hall, meeting with the scouting families, and investigating whether any of the scouts suffered abuse. Bishop Anderson said that the report concerned a boy who was molested at a birthday party sleepover. He described it as being organized for a boy "who wanted to have a bunch of boys over to sleep out in a tent." Bishop Anderson said he received the report from "a priesthood brethren" who telephoned and told him he needed to investigate Hall. However, Worthy said she reported to Bishop Anderson that Hall had molested her six-year-old son during two overnight visits to Hall's apartment. She also said that Hall disappeared for good the day after she reported this to the bishop. Worthy's account differs enough from the "priesthood brethren" report that a jury could conclude the bishop received two different reports and that the call about the sleepover occurred some time before Worthy's report mobilized the bishop's investigation.

The inference that the church knew about Hall's misconduct for weeks or months before taking action is further supported by a declaration by Daniel Cowles, Jr., who was a scout in Troop 155 at the same time as NK. The declaration states that during a Boy Scout campout, one of the boys in the troop

told Cowles about being sexually molested by Hall. Cowles' declaration says he reported the allegation to one of the members of the bishopric before the local council Camporee in May 1977. He remembers making the report *before* the May 1977 Camporee because "at the Camporee a man threatened me and told me that I shouldn't tell anyone else." NK submitted the declaration by Cowles as part of his evidence in opposition to the church's motion for summary judgment.

A week later, the church filed a second declaration by Cowles in which he stated that he does not recall precisely when he made the report concerning Hall, but that Hall left town "two or three days after." If this declaration is accurate, Cowles made his report not in May, but several months later, just before Hall left town.

The church argues that the second declaration merely "clarified" the first one. The two declarations are not that easily reconciled. Presented with both, a rational jury could believe Cowles' first declaration to be an accurate recollection and the second a false recantation. Credibility is for the fact finder to decide. Meadows v. Grant's Auto Brokers, Inc., 71 Wn.2d 874, 881, 431 P.2d 216 (1967). We conclude the record manifests the existence of a genuine dispute as to when the church first received actual notice that Hall was a danger to children. To the extent NK alleges tort theories that may depend on proof of the church's awareness of Hall's prior sexual misconduct with children, including the theory affirmed in C.J.C. with regard to Deacon Wilson, the record provides such proof.

NK argues at length in his reply brief that Danford, the registered

scoutmaster, was negligent in permitting Hall to become a de facto scoutmaster, and that the scouting defendants are vicariously liable because Danford was their agent with the authority to exercise BSA's right to exclude participants who are deemed unfit for scouting. Vicarious liability is a different theory than duty arising from a special relationship. Niece, 131 Wn.2d at 48. Although the word "agent" appears throughout NK's opening brief, only his reply brief cites authority on the law of agency and expressly sets forth a legal framework for vicarious liability as a theory independent from duty arising from a special relationship. Because the agency theory is argued for the first time in NK's reply brief, we do not consider it. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

DISCOVERY

NK contends the limitations imposed by the trial court on discovery from the church were too restrictive.

Parties seeking redress in Washington courts have a broad right of discovery. Lowy v. PeaceHealth, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012). An appellate court reviews a trial court's discovery order for an abuse of discretion. T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

In general, NK asked the church to disclose unprivileged information concerning the church's knowledge and handling of previous allegations of child sex abuse in the church in the decades leading up to 1977. In general, the court

limited discovery to information about what the church knew about Hall in particular, having apparently concluded that broader knowledge about the risk of child sex abuse was irrelevant. This analytical error undermines the discovery orders NK has challenged on appeal.

NK noted a deposition under CR 30(b)(6) to obtain live testimony concerning any records maintained by the church dating back to 1950 about individuals who had been accused of "engaging in inappropriate conduct with minors" in the church or in scouting, as well as any policies and procedures in effect between 1950 and 1985 for uncovering sexual abuse of children, investigating allegations, or protecting children from abuse. In December 2010, the court issued a protective order limiting such discovery to the years 1975 through 1980.

In April 2011, NK moved to compel the church to disclose information on 24 topics NK identified in a second CR 30(b)(6) deposition notice. The topics included the church's records, investigation, and knowledge of any allegations of child sexual abuse in the church congregation or in boy scouting between the years of 1975 and 1977. The church resisted this discovery request on relevance grounds summarized as follows in a letter sent to counsel for NK:

> [T]he topics are irrelevant. Many of the topics ask for information about "allegations of childhood sexual abuse by a church member." This topic would thus include, for example, cases of incest, cases in which a relative abused a minor, cases in which a neighbor or acquaintance abused a minor, etc. Such events . . . would be of no plausible relevance here. . . . [F]or a negligence claim to be brought against the church, Washington law regarding foreseeability requires . . . the church to have had notice of sexual misconduct by Mr. Hall prior to the abuse of N.K. The deposition topics are not directed at knowledge of Mr. Hall's activities.

The court denied NK's motion with respect to 21 out of the 24 topics. The court again accepted the argument that to be relevant to NK's negligence claim against the church, the evidence had to concern the church's knowledge of a threat posed by Hall specifically.

The court erred in imposing these limitations because specific knowledge of Hall's dangerous propensities is not required to prove a duty arising from a protective relationship such as the church had with NK. The question is whether abuse by Hall was within the general field of danger that should have been anticipated. The church contends it was completely unaware of any danger posed by allowing troop members to be alone with an unvetted and unsupervised adult volunteer. The information requested by NK is highly relevant to the issue whether the danger was reasonably to be anticipated and the related issue whether the church failed to take reasonable steps to protect NK from that danger.

In view of the relevance of information about how much the church knew about the problem of child sex abuse, either generally or through its involvement in specific incidents, there is no tenable basis for the limitation on the temporal

scope of discovery to the one or two years before Hall arrived in Shelton. Cf. T.S., 157 Wn.2d at 418 (affirming, against BSA's challenge concerning the proper test to be used where privacy interests are allegedly at stake, an order permitting discovery of BSA's ineligible volunteer files over several decades leading up to the alleged abuse). The temporal limitation is reversed.

During the dispute over NK's motion to compel the CR 30(b)(6) deposition, church witness Paul Rytting disclosed for the first time that the church's risk management division "currently has some records relating to acts of sexual abuse that allegedly occurred in the years 1975-1977 (such as the records generated by this case)." The church successfully resisted NK's motion to compel discovery of the risk management records, arguing that they were created in the course of litigation that occurred after 1977 and were therefore beyond the temporal limitation imposed by the trial court. The limitation on discovery of the risk management documents generated after 1977 is also reversed. If, for example, a scout victim came forward in 2005 and claimed that his parents told a church leader in 1976 that a scoutmaster was molesting him, such information would be relevant to what the church knew in 1976 about abuse in scouting.

The trial court also erred in accepting the church's argument that the topics of NK's inquiry are protected by clergy-penitent privilege. Privileges from discovery are to be narrowly construed. Trammel v. U.S., 445 U.S. 40, 50-51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980); C.J.C., 138 Wn.2d at 717.

The church's argument relies on Jane Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, 122 Wn. App. 556, 90 P.3d 1147 (2004), review denied, 153 Wn.2d 1025 (2005). Jane Doe involved a claim by two women that their stepfather, an LDS church member, had abused them when they were children and that the church breached a duty of care by failing to report the abuse after their stepfather confessed it in a proceeding of a church disciplinary council. The trial court ordered the church to produce a record of the proceeding. On discretionary review, the only issue was whether the participants in the disciplinary council "were ordained clergy members or necessary for the communication to occur." Jane Doe, 122 Wn. App. at 562. This court held that production of the record was barred by the clergy-penitent privilege because the disciplinary council was ecclesiastical in nature, its purpose was to permit the accused to "repent and reestablish a covenant with God," and all the participants were ordained clergy as defined by the church. Jane Doe, 122 Wn. App. at 559, 564-66.

Here, the church claims that any information it might possess related to the church's knowledge of accusations and investigations of child sexual abuse would be contained in "records of church disciplinary proceedings." The church argues that any such information is protected under Jane Doe.

Jane Doe bars production of a record of a confessional proceeding because it contains privileged communications. It does not necessarily bar production of other information that may be in the disciplinary files pertaining to

what happened before and after the proceeding. The church's description of the disciplinary files indicates that they contain information that does not fall into the category of privileged communications, for example, information about the event that caused the church to convene a penitential council. The manager of confidential records for the LDS church, Gregory Dodge, testified, "Most commonly, a member's confession is the event that triggers the council." Assuming (without deciding, because it has not been briefed) that the privilege applies to a confession to a nonclergy member before a disciplinary council is convened, there must be some cases in which the event that triggers the meeting of a disciplinary council is an accusation rather than a confession. Indeed, in Jane Doe, the council was convened because Jane Doe disclosed the abuse to a friend, who disclosed it to a bishop, who reported it to a stake president, who convened a stake disciplinary council. Jane Doe, 122 Wn. App. at 559.

If the disciplinary files contain information in the relevant time period concerning similar accusations or complaints, such as a letter or documentation of a telephone call or other personal contact, and such allegations are then used to start an investigative or disciplinary process, this information must be disclosed even if it is stored in a file with a record of confession of the type described in Jane Doe.

The church's interrogatory responses state that bishops keep "an open-door policy" for purposes of receiving any congregation member's concerns, including reports of abuse. Leaders of the church's children and youth programs

are asked to bring such concerns to the bishop, and the church members who are aware of crimes are encouraged to report them to police. The church's General Handbook of Instructions for the "Church Judicial System" states that "*Before* deciding whether to convene a Church court," the member should be interviewed. (Emphasis added.) If the member denies the accusation, the bishop or stake president should "conduct an investigation to obtain further evidence." These materials suggest the existence of documents outside the scope of the clergy-penitent privilege that would be responsive to NK's request for information about allegations and investigations.

The church argues, however, that it is impossible to find out whether disciplinary files contain nonprivileged information because, according to Dodge, the files are maintained only to document "the ecclesiastical relationship" between the member and the church. Dodge states that a discipline file "records that person's spiritual standing in God's kingdom, whether he or she is a member of the Church in good standing, and whether the member is worthy to partake of the Church's sacred sacraments and otherwise participate in the Church." According to Dodge, the only persons allowed to review these records are those who "have an ecclesiastical reason for doing so, for example, the Bishop or the Stake President in charge of the ward in which the member or former member resides." The church argues that the very act of searching, conducted for the church by an attorney or risk manager, would "violate the sanctity of these sacred, privileged communications." Indeed, it appears that no one inside or

outside the church, including Dodge, has yet examined any disciplinary files to see if they are responsive to NK's request. Dodge speaks only hypothetically of what "would be" in such files: "Other documents in every discipline file would be correspondence with the member advising the member when and where the council will be held, and a post-council letter advising the member of the outcome."

The church's argument here is similar to the argument our Supreme Court rejected in Lowy when it held that the statutory privilege for quality assurance records did not prevent a hospital from conducting an internal review of information generated by a quality improvement committee in order to locate unprotected information. Lowy, 174 Wn.2d at 773. In other words, a privilege cannot be used "as a shield to obstruct proper discovery of information" generated internally by the institution. Lowy, 174 Wn.2d at 777-78 (internal quotation marks omitted), quoting Coburn v. Seda, 101 Wn.2d 270, 277, 677 P.2d 173 (1984). Adopting the church's position, to paraphrase Lowy, would permit and even encourage a church to require that all reports and correspondence concerning accusations, investigations, and incidents of sexual abuse or other crimes be deposited in the disciplinary files where they could remain insulated from discovery. See Lowy, 174 Wn.2d at 781. On remand, an effective way must be devised for the church to review the disciplinary files and extract from them any nonprivileged information.

The church also raises First Amendment concerns. To the extent the

church may be arguing that nonprivileged information in the disciplinary files is shielded by the First Amendment, we disagree. "The First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles." C.J.C., 138 Wn.2d at 728. This basic principle should guide the trial court in reconsidering the discovery orders at issue in this appeal and in deciding new discovery issues that may arise on remand.

The order granting summary judgment to BSA and Pacific Harbors Council is affirmed. The order granting summary judgment to the church defendants is reversed. The protective orders and the orders denying the motions to compel pertaining to discovery requested from the church are reversed and remanded for reconsideration consistent with this opinion.

Becker, J.

WE CONCUR:

Appelwick, J.

Cox, J.