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PREVIEW; *Nunez v. Watchtower*: The Constitutional Implications of Montana’s Statutory Cap on Punitive Damages and Negligence Per Se Under Montana’s Child Abuse Reporting Statute

Joseph E. Gresham*

The Montana Supreme Court is scheduled to hear oral arguments in this matter on Friday, September 13, 2019, at 10:00 a.m. at the Northern Hotel in Billings, MT. Bradley J. Luck will likely appear on behalf of the Petitioners. James P. Molloy will likely appear on behalf of the Respondents.

I. INTRODUCTION

This case presents the Court with two significant issues. The core issue before the Court is whether Montana’s statutory cap¹ of \$10 million on punitive damages comports with Montana’s Constitution.² The second issue before the Court is whether Petitioners Watchtower Bible and Tract Society of New York, Inc. (“Watchtower”) and The Christian Congregation of Jehovah’s Witnesses (“CCJW”) are liable to Respondent Alexis Nunez (“Nunez”), a congregant at Petitioner Montana’s Thompson Falls Congregation of Jehovah’s Witnesses (“TFC”) for failure to report sexual abuse under Montana’s child abuse reporting statute.³

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2004, two congregants informed a TFC Elder that Maximo Reyes, another congregant, sexually abused them when they were children.⁴ Subsequently, the TFC Elders contacted CCJW and the legal department at Watchtower for spiritual counsel and legal advice about the reports of Reyes’ abuse.⁵ Then, CCJW and Watchtower instructed

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¹ MONT. CODE ANN. § 27–1–220(3) (2017).

² See generally Respondent’s Response Brief at 37–47, *Nunez v. Watchtower*, (Mont. July 22, 2019) (No. DA 19-0077); Brief of Attorney General at 4–5, *Nunez v. Watchtower*, (Mont. July 24, 2019) (No. DA 19-0077).

³ See generally Petitioner’s Opening Brief, *Nunez v. Watchtower*, (Mont. May 22, 2019) (No. DA 19-0077); MONT. CODE ANN. § 41–3–201 (2017).

⁴ *Id.* at 4–8.

⁵ *Id.* at 8–10 (describing the role of each appealing party: congregations of Jehovah’s Witnesses receive spiritual counsel, hear confessions, and provide spiritual discipline from groups of local elders, like the ones at TFC. When faced with an issue, local elders seek spiritual guidance from CCJW and legal

TFC elders not to report the allegations to Montana authorities and to keep the situation confidential.⁶ TFC complied with these requests, and the abuse continued.⁷

Following a realization that TFC failed to report child abuse because of CCJW's and Watchtowers' instruction, two of Reyes' victims, Nunez and Holly McGowan, sued in Montana District Court. They then filed for summary judgment, alleging liability as a matter of law because Petitioners knew of Reyes' abuse and failed to report it, which violated Montana's mandatory reporting law.⁸ Petitioners cross-filed and contended that the failure to comply with the reporting statute was excused.⁹

At trial, the Court instructed the Jury that TFC, CCJW, and Watchtower were liable to Nunez under the doctrine of negligence per se under the mandatory reporting statute, the jury awarded her \$4 million in compensatory damages and \$31 million in punitive damages.¹⁰ Further, when reviewing the award, the District Court declared Montana's punitive damages cap unconstitutional and entered the jury's verdict in full.¹¹ Accordingly, CCJW and Watchtower appealed to the Montana Supreme Court.

III. SUMMARY OF THE ARGUMENTS

In 2003, the Montana Legislature enacted a "\$10 million or 3% of a defendant's net worth, whichever is less" cap on non-class action punitive damages.¹² Further, in order to levy punitive damages, a jury must find the defendant guilty of actual malice,¹³ then, they must evaluate the defendant's financial background and then submit the damage determination to the judge for review.¹⁴ While reviewing the reasonableness of the award, the judge takes into account nine factors

counsel from Watchtower, New York corporations set up by Jehovah's Witnesses).

⁶ Petitioner's Opening Brief, *supra* note 3, at 10.

⁷ Petitioner's Reply Brief at 1–2, *Nunez v. Watchtower*, (Mont. Aug. 14, 2019) (No. DA 19-0077).

⁸ *Id.* at 9.

⁹ Respondent's Response Brief, *supra* note 2, at 2.

¹⁰ *Id.* at 11 (The jury found against McGowan and awarded her no damages).

¹¹ *Id.* at 12.

¹² MONT. CODE ANN. § 27–1–220(3) (2017).

¹³ *Id.* at § 27–1–221(1)(2) (“A defendant is guilty of actual malice if the defendant as knowledge of facts and deliberately proceeds to act in conscious disregard of the high probability of injury to the plaintiff”).

¹⁴ *Id.* at § 27–1–221(7)(a).

and is authorized to change the award accordingly.¹⁵ The Legislature enacted the punitive damages cap in response to the perceived consequences of unfettered punitive damages, including increased costs of insurance premiums, swollen costs of litigation, and adverse effects on businesses.¹⁶ For comparison, as of 2016, only four states have statutory punitive damages caps that resemble Montana's limitations based on defendant's net worth and a specified amount.¹⁷

During the 2019 legislative session, Governor Bullock signed HB 640, which updated laws relating to childhood sexual abuse, namely Montana's child abuse reporting statute.¹⁸ The Legislature made the punishment for failure to report sexual abuse a felony,¹⁹ and applied it retroactively.²⁰ The reporting law requires professionals, including clergy, that have reasonable cause to suspect, via information about abuse obtained through their official capacity, to report sexual abuse promptly to authorities.²¹ There is an exception for clergy if the information was intended to be a part of a confidential communication between the clergy and congregant.²² Lastly, any official or institution who is obligated under the law that fails to report abuse or reasonably prevent another from doing so is civilly liable for the damages proximately caused by such failure or prevention.²³

¹⁵ *Id.* at § 27-1-221(7)(b)(i)-(ix) (“(i) the reprehensibility of defendant’s wrongdoing; (ii) the extent of the defendant’s wrongdoing; (iii) the intent of the defendant in committing the wrong; (iv) the profitability of defendant’s wrongdoing, if applicable; (v) the amount of actual damages awarded by the jury; (vi) defendant’s net worth; (vii) previous awards of punitive damages based upon the same act; (viii) potential or prior criminal sanctions against the defendant based on the same wrongful act; and (ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.”).

¹⁶ Brief of Attorney General, *supra* note 2 at 2.

¹⁷ Paige Griffith, *Why Don’t Punitive Damages Punish or Deter? Beyond the Constitution toward an Economic Solution*, 77 MONT. L. REV. 328, 341 (2016).

¹⁸ Amy Beth Hanson, *New Montana Law Ends Statute of Limitations on Child Sex Abuse*, May 7, 2019, GREAT FALLS TRIBUNE, <https://perma.cc/7KSF-3ZGY>.

¹⁹ Ch. 367, 2019 Mont. Laws § 8 (to be codified at MONT. CODE ANN. § 41-3-207(3)); MONT. CODE ANN. § 41-3-207(3) (2017) (previously, the punishments for all failures to report were misdemeanors).

²⁰ Ch. 367, 2019 Mont. Laws § 18.

²¹ MONT. CODE ANN. § 41-3-201(1)-(2) (2017).

²² *Id.* at § 41-3-201(6)(ii).

²³ *Id.* at § 41-3-207(1).

A. *Petitioners' Arguments*

Petitioners argue that Montana's \$10 million statutory cap on punitive damages is presumptively constitutional and thus the District Court should not have entered judgment in full.²⁴ Petitioners assert that, under a rational basis review,²⁵ the punitive damages cap comports with substantive due process²⁶ because it is reasonably related to legislative purposes such as limiting costs of litigation settlements or insurance premiums.²⁷ Second, Petitioners argue that the punitive damages cap satisfies equal protection²⁸ because, under a rational basis review,²⁹ there are "real differences" between class action and individual plaintiffs—namely, the legislative allowance for higher awards because harms involved in class actions affect numerous people, are more substantial, and must be divided.³⁰ Lastly, Petitioners argue that the punitive damages cap does not infringe on the right to a jury trial³¹ since there is no constitutional right to punitive damages and the Legislature may divest the jury of determining them in the first place.³² Concerning the punitive damages award, Petitioners argue that it exceeds the limit of due process, mainly because Respondent failed to adequately prove Watchtower's actions, in instructing TFC not to report, constituted malice.³³

Petitioners argue that they preserved all issues relating to negligence per se because they objected to the jury instructions and the verdict form during the latter half of the bifurcated trial.³⁴ Otherwise, Petitioners present four arguments in favor of a reversal of summary judgment on negligence per se.³⁵ First, Petitioners argue that the reporting law does not apply because the common law bases of vicarious liability and agency do not subsume organizations like Watchtower and

²⁴ Petitioner's Opening Brief, *supra* note 3, at 46; Brief of Attorney General, *supra* note 2, at 6 (Attorney General Fox intervenes solely to defend the constitutionality of the punitive damages cap); Errata at 2, *Nunez v. Watchtower*, (Mont. Aug. 26, 2019) (No. DA 19-0077).

²⁵ Brief of Attorney General, *supra* note 2, at 15.

²⁶ MONT. CONST. art. II, § 17.

²⁷ Petitioner's Opening Brief, *supra* note 3, at 46–47; *see also* Brief of Attorney General, *supra* note 2, at 16–21.

²⁸ MONT. CONST. art. II, § 4.

²⁹ Petitioner's Opening Brief, *supra* note 3, at 49–50.

³⁰ *See* Brief of Attorney General, *supra* note 2, at 18–15.

³¹ MONT. CONST. art. II, § 26.

³² Brief of Attorney General, *supra* note 2, 22–28.

³³ Petitioner's Reply Brief, *supra* note 7, at 22–25.

³⁴ *Id.* at 4.

³⁵ *See generally* Petitioner's Opening Brief, *supra* note 3, at 13–15.

CCJW as liable under the reporting law.³⁶ Second, Petitioners maintain that they fall under the reporting law's confidentiality exemption because the information of sexual abuse was shared exclusively amongst clergy, within the confines of doctrine and established practice, and at the risk of infringing on First Amendment rights.³⁷ Third, Petitioners argue that Nunez is not among the "class of persons," protected by the reporting law because Respondents presented no evidence that CCJW or Watchtower knew "anything about her."³⁸ Finally, Petitioners argue that negligence per se does not automatically establish proximate cause under the reporting law because a jury must determine whether the violation was a proximate cause of the alleged harm.³⁹

B. Respondents' Arguments

Initially, Respondents argue that Petitioners failed to preserve all issues on appeal except those relating to punitive damages because Petitioners failed to object to jury instructions and stipulated to the verdict form that determined liability.⁴⁰

Respondents primarily argue that the punitive damages cap of \$10 million is unconstitutional because it violates three tenants of Montana's Constitution: due process, equal protection, and right to trial by jury.⁴¹ First, Respondents argue that the punitive damages cap violates due process since a "one-size-fits-all" legislative imposition fails to fulfill the purposes of the cap to deter and punish because of its failure to adequately address the net worth of wealthy defendants.⁴² Similarly, Respondents argue that, under a rational-basis test, the punitive damages cap violates equal protection because it does not equally apply the claimant's sole mechanism for deterrence and punishment, and that cost-control fails as the only justification for doing so.⁴³ Further, Respondents argue that the punitive damages cap infringes on the right to trial by jury because, under strict scrutiny,⁴⁴ the punitive damages cap usurps the

³⁶ Petitioner's Reply Brief, *supra* note 7, at 4

³⁷ *Id.* at 16–17.

³⁸ Petitioner's Opening Brief, *supra* note 3, at 33–36.

³⁹ *Id.* at 36–39.

⁴⁰ Respondent's Response Brief, *supra* note 2, at 10.

⁴¹ *Id.* at 37.

⁴² *Id.* at 39.

⁴³ *Id.* at 37–38 (arguing that the punitive damages cap violates equal protection because it does not equally address the (1) disparity in wealth between potential offenders and (2) unfairly distinguishes individual plaintiffs from class action plaintiffs).

⁴⁴ *Id.* at 40 (citing *Snetsinger*, *infra* note 57, at 450 (holding that "strict scrutiny applies if a suspect class or fundamental right is affected."))

jury's duty to assess appropriate damages to punish and deter egregious conduct.⁴⁵ Considering the award of punitive damages, Respondents argue Petitioners failure to report, even after knowledge of the abuse, constitutes malice and that the award is reasonable and comports with due process.⁴⁶

Additionally, Respondents argue that the District Court was correct in granting summary judgment on negligence per se. First, Respondents argue that Petitioners are liable under theories of vicarious liability and agency because the reporting law does not abrogate common law.⁴⁷ Also, Respondents point out that at all times relevant to the underlying acts, Petitioners acted according to Jehovah's Witnesses' policies and practices and did so in furtherance of the interests of their church.⁴⁸ Second, Respondents argue that the confidentiality exception to the reporting law does not apply because there was broad disclosure of the abuse and no requirement to keep such information confidential.⁴⁹ Third, Respondents argue that Nunez is a member of the class of protected persons under the reporting law, because they had evidence that Petitioners had reason to suspect Reyes' abuse.⁵⁰ Lastly, Respondents argue that all Petitioners were the proximate cause of Nunez's harm because they knew of Reyes' propensities and did nothing to stop him.⁵¹

IV. ANALYSIS

A. *Montana's \$10 Million Statutory Cap on Punitive Damages*

If the Court decides to address whether the punitive damages cap is constitutional, then its decision will likely hinge on review of the caps' constitutional implications regarding substantive due process, equal

⁴⁵ *Id.*

⁴⁶ *Id.* at 12–13.

⁴⁷ *Id.* at 12.

⁴⁸ *Id.*

⁴⁹ *Id.* at 30–31.

⁵⁰ *Id.* at 26–30 (citing *Gross v. Myers* 748 P.2d 459 (Mont. 1987) (where a report was deemed reasonable when mandatory reporter was notified of and reported abuse out of concern for abuser's grandchildren)).

⁵¹ *Id.* at 24–26.

protection, and right to a jury trial.⁵² First, under a rational basis review,⁵³ whether the punitive damages cap satisfies substantive due process depends on the Court's prioritization of the cap's purpose; whether it is there primarily for cost-control purposes,⁵⁴ or to deter and punish egregious conduct.⁵⁵ Punitive damages, by statute, are levied "for the sake of example and for the purpose of punishing a defendant."⁵⁶ The Respondent advances this argument and will likely prevail. Next, the Court will likely find that the equal protection issue requires a strict scrutiny analysis because the punitive damages cap imposes different burdens on different classes of persons.⁵⁷ Here, "real differences" aside,⁵⁸ the Court will likely note that, according to the plain text of the statute, individual plaintiffs are restricted in their recoveries, but class action plaintiffs are not.⁵⁹ Lastly, the Court has reasoned that because they implicate a fundamental right, laws that restrict the jury's authority are subject to strict scrutiny.⁶⁰ Further, statute enumerates that, "liability for punitive damages must be determined by the trier of fact."⁶¹ Here, the Court might reason the punitive damages cap is a seizure of a jury's duty to determine damages to effectively deter and punish offenders.⁶²

Outside the constitutional implications, the Court will likely consider whether the award was "grossly excessive," as both parties address the reasonableness of the award.⁶³ In *Seltzer v. Morton*,⁶⁴ the Montana Supreme Court avoided reviewing the constitutionality of the punitive damages cap, but held that a reduced \$20 million jury punitive damages award to \$9.9 million was reasonable under the guideposts established by the U.S. Supreme Court in *BMW of North America, Inc. v.*

⁵² See generally *Montana Cannabis Industry Ass'n v. State*, 368 P.3d 1131 (Mont. 2016) (establishing a plenary standard of review when reviewing the constitutionality of state statutes); Griffith, *supra* note 17, (analyzing the punitive damages cap in a Montana context, especially its economic and constitutional implications).

⁵³ Brief of Attorney General, *supra* note 2 at 15.

⁵⁴ Petitioner's Opening Brief, *supra* note 3, at 46–47; See also Brief of Attorney General, *supra* note 2, at 16–21.

⁵⁵ Respondent's Response Brief, *supra* note 2, at 39.

⁵⁶ MONT. CODE ANN. § 27–1–220(1) (2017).

⁵⁷ *Snetsinger v. Montana Univ. System*, 104 P.3d 445, 449–50 (Mont. 2004).

⁵⁸ Brief of Attorney General, *supra* note 2, at 18–15.

⁵⁹ MONT. CODE ANN. § 27–1–220(3) (2017).

⁶⁰ *Kloss v. Edward D. Jones & Co.*, 554 P.3d 1, 12 (Mont. 2002) (Nelson, J., concurring).

⁶¹ MONT. CODE ANN. § 27–1–221(7).

⁶² *Id.* at § 27–1–220(1).

⁶³ See Petitioner's Opening Brief, *supra* note 3, at 51–54; Respondent's Response Brief, *supra* note 2, at 41.

⁶⁴ 154 P.3d 561 (Mont. 2007).

Gore.⁶⁵ The *Gore* guideposts consider three things: (1) the degree of reprehensibility of the underlying conduct; (2) the ratio between compensatory and punitive damages; and (3) sanctions for comparable misconduct when determining whether or not an award is “grossly excessive.”⁶⁶ First, the Petitioners’ contend that the conduct was “at most, good-faith nonfeasance,”⁶⁷ and Respondents argue that the failure to report satisfies the required test of reprehensibility.⁶⁸ Paired with reports demonstrating the lengths to which Jehovah’s Witness officials have gone to protect the church interests,⁶⁹ the Court may find it challenging to consider Petitioners’ actions merely a “good-faith nonfeasance,” and will be more likely to rule the underlying conduct reprehensible. On the second guidepost, it is likely the Court will side with Respondents. Even though *Campbell* and *Gore* show ratios that were deemed outside the “limit of the due process guarantee,”⁷⁰ here, the damages will likely be deemed reasonable given the harm to Nunez and the deemed reasonable *Seltzer* ratio of 9.9:1.⁷¹ Lastly, this Court is the best entity to analyze the third guidepost.⁷² Facially, the conduct in question is Petitioners’ failure to report sexual abuse to Montana authorities and the criminal penalty is now a felony.⁷³ If this Court focuses on the underlying conduct alone, the failure to report, Petitioners are likely to prevail on this front. However, if this Court zooms out to include the multiple years of abuse to multiple victims,⁷⁴ and the

⁶⁵ 517 U.S. 559 (1996).

⁶⁶ *Id.* at 574–584.

⁶⁷ Petitioner’s Opening Brief, *supra* note 3, at 54.

⁶⁸ *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

⁶⁹ See generally Daniel Avery, U.S., *New Law Could Open Floodgates on Decades of Child Sexual Abuse with Jehovah’s Witnesses*, Mar. 22, 2019, NEWSWEEK, <https://perma.cc/8DS9-UNAT>; Douglas Quenqua, Family, *A Secret Database of Child Abuse*, Mar. 22, 2019, THE ATLANTIC, <https://perma.cc/HGW5-ESLR>.

⁷⁰ *Campbell*, *supra* note 68, at 429 (holding that an award of \$145 million in punitive damages on a compensatory damages award of \$1 million violated due process); *Gore*, *supra* note 65, at 582 (holding that an award of \$2 million in punitive damages on \$4,000 of compensatory damages was “grossly excessive”).

⁷¹ Petitioner’s Opening Brief, *supra* note 3, at 52 (noting a different approach than Respondents to what the ratio *actually* is—either 7.5 to 1 according to Respondents, or 9.4 to 1 according to Petitioners).

⁷² *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 441 (explaining that the “third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of the appellate courts”).

⁷³ Ch. 367, 2019 Mont. Laws § 8 (to be codified at MONT. CODE ANN. § 41–3–207(3)).

⁷⁴ Petitioner’s Opening Brief, *supra* note 3, at 4–5.

prolonged failure to report,⁷⁵ the outcome on the third guidepost will likely favor Respondents.

Recently, Montana juries have handed down punitive damages in excess of the punitive damages cap, but the Court has ultimately avoided the question of constitutionality.⁷⁶ Here, both parties touch on all three constitutional bases that Montana attorneys utilize and advance cogent arguments about the reasonableness of the award.⁷⁷ Because these positions have been recently addressed at the trial level, it is likely the Court will finally resolve the issue of whether the punitive damages cap is constitutional, and if not, at least look at the reasonableness of the award upon adjustment to comport with the cap.

B. *Negligence Per Se*

If the Court determines the issues concerning negligence per se are preserved on appeal, which may be difficult given the disparity between the parties' procedural contentions, four disputes between the parties will be reviewed. First, the parties disagree as to whether common law doctrines of agency and vicarious liability apply to Watchtower and CCJW. An agency relationship arises when a principal manifests assent to another person that the agent shall act on the principal's behalf and subject to the principal's control.⁷⁸ In determining agency, the Court will likely look at the facts that TFC Elders, CCJW Elders, and Watchtower attorneys all interacted with one another under Jehovah's Witness practices and doctrine and did so primarily concerned with furthering principals CCJW and Watchtower's interests. Following an agency determination, vicarious liability still exists for principals under the reporting law because, even though agents were the negligent actors, their principal is not immune from tort liability for failure to protect a victim.⁷⁹ Here, the law,⁸⁰ is clear that civil liability is imposed

⁷⁵ *Id.* at 6–9.

⁷⁶ See *Masters Group International, Inc. v. Comerica Bank*, 352 P.3d 1101 (Mont. 2015) (Holding that a choice of law conflict precluded the District Court from rendering the punitive damages cap unconstitutional); Order on Motion to Dismiss at 1, *Olson v. Hyundai Motor Co.* (Mont. Jan. 14, 2015) (No. DA 14-0500) (case dismissal due to settlement between the parties where punitive damages cap was declared unconstitutional at District Court); Joint Motion to Dismiss at 2, *Kelly Logging, Inc. v. First Interstate Bank* (Mont. Sept. 15, 2015) (No. DV 12-928) (case dismissal due to settlement between the parties where punitive damages cap was declared unconstitutional at District Court).

⁷⁷ Griffith, *supra* note 17, at 343.

⁷⁸ RESTATEMENT (THIRD) OF AGENCY § 1.01 (Am. Law Inst. 2006).

⁷⁹ *Newville v. Department of Family Servs.* 883 P.2d 793, 812 (Mont. 1994).

⁸⁰ MONT. CODE ANN. § 41–3–207 (2017).

on any institution that “prevents another person” from reporting a child abuser, especially when agents knew of Reyes’ history of abuse, and watched Reyes’ attend church with Nunez, whom he continued to abuse.⁸¹

Generally, in order to be considered confidential under the reporting statute, a communication is required to be confidential by canon law, church doctrine, or established church practice.⁸² Here, since there was broad disclosure of the abuse (including to Reyes’ wife and other victims), and there was no showing that keeping information about a congregant’s child abuse was *required* by canon,⁸³ the Court will likely dismiss Petitioners’ argument that the failure to disclose communications is exempted because of confidentiality. Third, Petitioner is indeed within the “class of persons” protected by the reporting law because of previously established vicarious liability and the fact that every party knew of Reyes’ history of abuse. Fourth, and finally, the Court will look to the fact that all parties involved knew of Reyes’ capabilities of sexually abuse young children, thus establishing Petitioners’ proximate cause for the harm of any child within this context. On all four fronts, the Court is likely to hold Petitioners liable for Respondents’ harm, because their primary concern was to act in furtherance of the interests of the church, not to protect Nunez.⁸⁴

V. CONCLUSION

As demonstrated by the Court’s repeated avoidance on the issue of the constitutionality of Montana’s punitive damages cap, this case presents an excellent opportunity for the Court to silence or empower juries and trial judges across Montana as they make determinations about punitive damages. On the negligence per se front, the Court will likely flesh out the religious confidentiality exception to the reporting law and establish that vicarious liability applies to institutions involved in collective efforts to withhold information about child sexual abuse from Montana authorities. Ultimately, the Court’s decision will shape punitive damage determinations and reporting law litigation on a negligence per se basis for years to come.

⁸¹ Respondent’s Response Brief, *supra* note 2, at 22–24.

⁸² MONT. CODE ANN. § 41–3–201(6)(c) (2017).

⁸³ Respondent’s Response Brief, *supra* note 2, at 30–33 (emphasis added).

⁸⁴ *Id.* at 12.