

No. 09-54321

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SPRING TERM 2009

Monica PLACER, Appellant,

v.

DISCIPLES OF DIVINE DESIGN, and Elijah Adler, in his official capacity as Elder Advisor,
and Carol Provost, in her official capacity as Care Provider,
Respondents.

ON APPEAL TO THE
UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR PETITIONER

Petitioner 14
January 9, 2009

Counsel for Petitioner

QUESTIONS PRESENTED

- I. Was the religious organization known as the Disciples of Divine Design (“DDD”) negligent in relying on the laying of the hands and denying Stephen Placer (“Stephen”) medical treatment despite the severity of his symptoms?
- II. Were Elijah Adler and Carol Provost negligent in relying on the laying of the hands and denying Stephen medical treatment despite the severity of his symptoms?

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OPINION BELOW

The opinion of the United States District Court Central District of California is reported
at *Placer v. Disciples of Divine Design, et. al.*, No. 54321 (C.D. Ca, 2008).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

This court reviews a district court's conclusions of law de novo. *United States v. Yacoubian*, 24 F.3d 1, 3 (9th Cir. 1994). A district court's findings of fact are reviewed under the clearly erroneous standard. *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995).

STATEMENT OF THE CASE

Preliminary Statement

Petitioner, Monica Placer filed her complaint on September 4, 2008 for the wrongful death of her son, Stephen, in federal district court under 28 U.S.C. § 1332 based on diversity of citizenship of the opposing parties. (R. 3, 6.) She alleged that Elijah Adler, acting as the Elder Advisor, and Carol Provost, acting as the Care Provider, both under the direction of the DDD, proximately caused Stephen's death by failing to seek medical treatment. (R. 5-6.) Respondents answered the complaint and requested dismissal with prejudice. (R. 10.) On November 12, 2008 Respondents moved for summary judgment in their favor. (R. 31-32.) The district court granted Respondents' motion finding there were no issues of material facts and that Respondents' actions or inactions were consistent with their right to freedom of religion. (R. 33.) Petitioner appealed to this court, which granted review to determine if Respondents were negligent for the wrongful death of Stephen. (R. 34.)

Statements of the Facts

This case arose under tragic circumstances. While Stephen was under the care of the DDD, a religious organization with an established sect of approximately 10,000 members, he passed away. (R. 3, 4.) Although Stephen was a healthy baby, he died at 18 months from bacterial pneumonia. (R. 4, 16.) Despite numerous signs of his illness in the hours before his death, he was not taken to the hospital. (R. 28.) Instead he was treated with an extended prayer

vigil, and the laying on of hands in accordance with the beliefs of the DDD. (R. 26.) Stephen's death would almost certainly have been preventable if appropriate medical treatment (such as antibiotics and intravenous fluids) had been administered. (R. 16.) Qualified physicians would agree that almost 99% of all children with Stephen's condition would have made a full recovery. (R. 16.)

When Mrs. Placer left her child in the care of a sitter on July 25, 2008 Stephen had a slight cold. (R. 18.) Mrs. Placer had given the sitter medicine for Stephen, since she firmly believed in the power of medical science. (R. 18.) Mrs. Placer left on a flight on July 25, 2008 to visit her ailing mother in a hospital in Phoenix. (R. 18.) Mr. Farley Placer ("Mr. Placer"), Stephen's father did not believe in medicine for any purpose. (R. 5, 20.) However, Stephen had been treated at the hospital with medicine for an ear infection and had been given all the immunizations recommended at the behest of Mrs. Placer. (R. 19-20.)

After picking his son up from the sitter on July 25, 2008, Mr. Placer called the acting Elder Advisor, Mr. Elijah Adler because he was worried about Stephen's health. (R. 26.) Mr. Adler contacted Ms. Carol Provost who became the designated Care Provider for Stephen, certified by the DDD. (R. 21.) Under the tenets of the DDD, the designated Care Provider never uses medical treatment, because sickness is merely a spiritual need that can be remedied with laying on of hands and prayer. (R. 26.) Both Ms. Provost and Mr. Adler knew of Mrs. Placer's support for medical science. (R. 25, 29.) As Stephen's condition worsened, on the night of July 25, 2008, the Director of Divine Design in Idaho was called to set up an extended prayer vigil and two additional members, Prayer Providers, were sent to the Placer home to pray with Ms. Provost. (R. 27.) At all times during Stephen's sickness his mother could have been called; contact information was near the telephone. (R. 28.) Under the beliefs of the DDD it is

not necessary to consult the child's mother about a child's well-being because the father is the head of the household and has the authority to make all decisions. (R. 30.) Mr. Placer left for work on July 26, 2008 on the morning of his son's death leaving Stephen in the care of the DDD. (R. 28.) It wasn't until Mrs. Placer returned from Phoenix that she was told by Mr. Placer of Stephen's death. (R. 18.)

SUMMARY OF ARGUMENT

As a minor child under the care of the DDD, Stephen had the right to conventional medical treatment and his mother had the right to be informed of her son's grave condition. The State is not constitutionally required to affirmatively protect all citizens in its jurisdiction. However, in situations where religious practices threaten a child's safety, *parens patriae* ("father of the country") operates. The principle refers to the government's duty to act on behalf of minors. Stephen was not a practicing member of the DDD but rather was an innocent child. He was forced to suffer because of the choices made by the DDD, Ms. Provost and Mr. Adler to use the Divine Design for Health treatment instead of obtaining needed medical care. Respondents were negligent in denying Stephen medical treatment given the severity of his symptoms. Moreover, Respondents were negligent in failing to make Mrs. Placer aware of Stephen's condition. Respondents assumed an affirmative duty of care for Stephen, breached that duty and the breach was the proximate cause of Stephen's death.

Respondents' reliance on the argument that their conduct is protected by the freedom of religion afforded by the First Amendment to the United States Constitution, and Article I Section 4 of the California Constitution is misplaced. The Supreme Court has continuously ruled that although freedom of belief is absolute, conduct that stems from religious beliefs is not always

protected. There is a sufficiently compelling governmental interest in protecting the welfare of children that justifies imposing liability on the DDD and its members who treated Stephen.

Mrs. Placer's complaint pleaded sufficient facts to hold Respondents liable under both the professional judgment and special relationship doctrines. The facts are sufficient to establish that the Respondents are liable for Stephen's death under any test used to establish liability and no freedom of religion defense applies.

ARGUMENT

I. THE RELIGIOUS ORGANIZATION THE DDD WAS NEGLIGENT IN RELYING ON THE LAYING OF THE HANDS AND DENYING STEPHEN MEDICAL TREATMENT GIVEN THE SEVERITY OF STEPHEN'S SYMPTOMS.

Under the Fourteenth Amendment, no state can "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV §1. The state is not required to affirmatively protect all citizens within its borders; however, the Supreme Court has held that certain circumstances can create this duty. *DeShaney v. Winnebago Dept. of Soc. Servs.*, 489 U.S. 189, 198 (1989). The California Legislature has established that there is a legal duty to provide medical assistance to ailing children, "if a parent of a minor child willfully omits, without lawful excuse, to furnish necessary . . . medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor." Cal. Pen. Code §270.

If a parent provides a minor with treatment by prayer in accordance with the practices of a recognized church, such treatment is considered "other remedial care" and is not a violation of the law. However, increasingly spiritual treatment is required to be reasonable. The DDD, with its Care Provider and Prayer Providers as agents, assumed a duty toward Stephen and given the severity of his symptoms acted unreasonably. *Rowland v. Christian*, 69 Cal. 2d 108, 111 (1968).

The DDD's negligence in denying medical care for Stephen was the proximate cause of Stephen's death and therefore liability exists. (R. 13.)

A. The DDD, Was Negligent Because It Assumed a Duty to Care for Stephen and Breached that Duty When it Failed to Procure Appropriate Medical Care.

The DDD, with its members as agents, assumed a duty to use due care in treating Stephen, breached that duty, and the breach was the proximate or legal cause of Stephen's death. *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 594 (1970).

1. The DDD, with its Care Provider and Prayer Providers as agents, assumed a duty of care for Stephen.

Under the tort of negligence, an individual or institution is liable and is under a duty to protect its members from harm when there exists a relationship of custody or control. *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 435 (1976). The DDD is the sole provider of care for its members' medical needs. (R. 26.) It publishes three documents to guide the treatment of illness, and is notified whenever a member is sick in order to dispatch a Care Provider and organize prayer vigils. (R. 11-13.) The asserted legitimacy of the DDD's treatment publications and the requirement that members not seek other treatment breeds reliance, and this reliance along with the DDD's assumption of responsibility for care creates an affirmative duty. *Parsons v. Crown Disposal Co.*, 15 Cal.4th 456, 459 (1997).

Under the *Rowland* factors, the DDD owed a duty to Stephen to seek medical treatment. The California Supreme Court set forth seven factors to consider when analyzing duty. *Rowland*, 69 Cal.2d at 113. The foreseeability of harm is the "most important" of the policy considerations governing negligence liability. *Tarasoff*, 17 Cal.3d at 434. The danger to Stephen if medical care was not obtained was foreseeable; he was listless and unresponsive, but his death could have been prevented if appropriate medical treatment had been provided. (R.

16.) Additionally, the California Supreme Court has upheld a duty when a hospital or other care facility has created a special relationship and accepted the responsibility of attending to the needs of patients. *Meier v. Ross General Hospital*, 69 Cal.2d 420, 424-25 (1968) and *Vistica v. Presbyterian Hospital*, 67 Cal.2d 465, 471 (1967). In *Meier*, a cause of action for negligence was held to exist against both the treating physician and the hospital, and in *Vistica*, liability was imposed on the hospital alone. *Id.*

Extending the same duty of care to personal or religious organizations was suggested in *Nally v. Grace Cmty. Church*, 47 Cal. 3d 278, 283 (1988). The California Supreme Court refused to extend liability to the church, however Stephen's case is very different. Nally, an adult, chose to be under the treatment of the church, whereas Stephen at 18 months was unable to make an affirmative choice. *Id.* at 284. (R. 16-17.) Furthermore, Nally was not under the care of a church at the time of his death, whereas baby Stephen died under the direct care of the DDD. *Id.* at 283, 294. (R. 26.) Although the *Nally* court did not impose liability, here instead of being a loose connection, the "injuries [to Stephen] were both comprehensible and assessable within the existing judicial framework." *Peter W. v. San Francisco Unified Sch. Dist*, 60 Cal.App.3d 814, 824 (1976). Therefore, applying liability to the DDD for Stephen's death is within the bounds of this court. *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 265 (2003).

2. Holding the DDD liable for Stephen's death would set a standard that would ensure the protection of the rights and lives of children.

The legislature and the courts consistently impose legal obligations to provide medical care for children. *Fabritz v. Traurig*, 583 F.2d 697, 701 (4th Cir. 1978). The state should not be allowed to let children suffer at the hands of a church because of the parents' religious choices. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). The DDD taking on the care of minors must

be required (as are all others) to report any “person who, . . . willfully causes or permits . . . a child to be injured, or willfully causes or permits such child to be placed in such a situation that its person or health is endangered.” Cal. Pen. Code § 270.

Imposing liability will not tread on the teachings of specific religions, because it is a non-discriminatory application. *Nally*, 47 Cal. 3d 278, 299. No difficulty arises in identifying those to whom the duty should apply since the duty is universal. *Id.* Similar duties already exist under the Penal Code, for instance, members of the clergy are mandated reporters of child abuse. The Code refers to the duty to act whenever a reporter, “in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect.” (§ 11166, subd. (a)). When imposing a duty involves complex policy decisions like protecting the lives of children a duty can be imposed. *People v. Bautista*, 163 Cal. App. 4th 762, 774 (2008).

3. The DDD breached its duty by failing to inform Mrs. Placer about Stephen’s worsening condition despite the DDD’s awareness of her firm belief in medical care.

The DDD prevented the use of modern medical treatments for Stephen, in direct opposition to the wishes of Stephen’s mother. (R. 21.) The DDD, and its members as agents, were aware of Mrs. Placer’s belief in medical science. (R. 25, 29.) Mrs. Placer would have demanded medical care had she been aware of Stephen’s condition. (R. 19-20.) When parents do not agree on the issue of termination of life support, the court must yield to the presumption in favor of life. *Newmark v. Williams/DCPS*, 588 A.2d 1108 (Del. 1990). This presumption arises from the explicit guarantees of a right to life in the United States Constitution. U.S. Const. amend. XIV. The duty to notify a family member is a lesser burden upon the DDD than a duty to seek medical care. *Kicking the Rock and the Hard Place to the Curb*, 57 Emory L.J. 651, 676

(2008). Severe illness is a health and safety emergency where a bright-line rule could exist telling churches when and under what circumstances they must contact parents. *Kicking the Rock and the Hard Place to the Curb*, 57 Emory L.J. 651 at 676.

While under the care of the DDD Stephen's health increasingly worsened. It wasn't until after Mr. Placer left for work the morning of his son's death that the situation became dire. Mrs. Placer testified that she believed Mr. Placer would have sought conventional medical treatment for Stephen had he known of Stephen's grave on the afternoon of Stephen's death. (R. 23.) Even though Mr. Placer may have given consent to the DDD to treat Stephen, the fact that the DDD knew that Stephen's mother believed in conventional medicine and failed to contact her constitutes a breach of duty. The DDD had a duty to inform Mrs. Placer of Stephen's deteriorating physical condition before his death and knowingly acted against the wishes of his mother.

4. The DDD's failure to provide medical treatment for Stephen resulted in a breach of the DDD's duty, which was the proximate cause of Stephen's death.

If the DDD had provided Stephen with medical treatment he likely would not have died. (R. 16.) The DDD's certified Care Provider, Ms. Provost, was responsible for Stephen's care in the last moments of his life. (R. 16.) Given that the Care Provider and Elder Advisor acting as an agent of the DDD, assumed a duty, prevented Stephen from receiving medical care, and failed to contact Mrs. Placer, the DDD breached its duty which caused Stephen's death. *Richelle L.*, 106 Cal. App. 4th at 266.

B. The DDD Is Not Entitled to a Freedom of Religion Defense Because a Child's Life Was Endangered and there Is a Compelling State Interest That Overrides Religious Exercise.

Any imposition of tort liability that interferes with the free exercise of religion is required to “be the least restrictive means of achieving a compelling end.” *Molko v. Holy Spirit Ass'n.*, 46 Cal. 3d 1092, 1119 (1988). Although the state must have a compelling interest to limit the free exercise of members, protecting innocent children is an interest that overrides the DDD’s free exercise defense. *Id.*

1. Although freedom of belief is absolute, infringing on religious conduct is required in certain circumstances.

The Supreme Court first addressed the permissibility of limiting an individual’s freedom to practice religion in *Reynolds v. United States*. 98 U.S. 145, 163 (1878). The issue in *Reynolds* was whether the Free Exercise Clause protected the religious practice of polygamy. *Id.* at 161-62. Although the First Amendment prevents Congress from passing laws that prohibit freedom of belief, laws banning polygamy were constitutional. *Id.* at 164. The Court noted that laws “cannot interfere with mere religious beliefs and opinions” but may interfere with religious practices. *Id.* at 166.

The right to believe is not analyzed under a specific test because courts consider it “absolute” and thus abstain from involving themselves in the issue. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). As the *Cantwell* court explained, the First Amendment embraces two concepts, freedom to believe and freedom to act. *Id.* “The first is absolute but, in the nature of things, the second cannot be.” *Id.* Although the DDD has the right to believe in the power of prayer, it is not allowed to exercise those beliefs by withholding proper medical care from minors whose lives are at risk and who are unable to make their own spiritual decisions.

Exempting the DDD from a duty of care violates California Penal Code §270 and in this case, was a violation of Stephen's Fourteenth Amendment rights, making the Church a law unto itself.

The well-being of children was the focus of the Supreme Court's decision when it held that adults and children can be compelled to be vaccinated for communicable diseases even though their religious beliefs oppose vaccination. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). Nothing justifies an outright ban on religious belief, however, "the right to preserve life is the most sacred right of man" and must be jealously guarded. *Walker v. Superior Court*, 47 Cal. 3d 112, 253 (1988).

To analyze excessive entanglement the Supreme Court established the *Sherbert* test requiring demonstration of a compelling interest in order to interfere with free exercise. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). This test was all but eliminated by the Court in *Employment Division v. Smith*. 494 U.S. 872 (1990). However, Congress resurrected it in 1993 with the federal Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb (West Supp. 1994). Congress enacted RFRA with an express purpose:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb (West Supp. 1994)

By reinstating the *Sherbert* test Congress required the government to demonstrate that application of any burden on religion be (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-3(a). Four years after Congress passed RFRA the Supreme Court ruled unconstitutional RFRA's application to nonfederal jurisdictions on grounds that Congress had

exceeded its authority to override state and local law. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). Because this case concerns the state's ability to protect children, the *Sherbert* test applies, not RFRA and this court can impose tort liability on the DDD. *Id.*

2. Holding the DDD liable is the least restrictive alternative justifying liability for medical neglect.

The Ninth Circuit applied the *Sherbert* test to determine whether a former member could bring a tort action against the church. *Paul v. Watchtower Bible & Tract Society, Inc.*, 819 F.2d 875 (9th Cir. 1987). The court refused to grant relief and did not impose liability. *Id.* at 881. Paul had not demonstrated a sufficiently compelling interest, such as a “threat to the peace, safety, or morality of the community,” that would justify the burden that tort damages would place on the religious practice. *Paul*, 819 F.2d at 883-84. In contrast, withholding medical treatment from minors poses a threat to the peace, safety and morality of the community. *Jacobson*, 197 U.S. 11 at 27-28. Therefore, allowing tort liability against the DDD would not be limiting religious belief, but rather demarcating clearly the line between personal religious freedom of belief and when acting and imposing those beliefs threatens others, making the exercise unlawful.

Until recently, “the question of whether or not an individual deviated from the standard of care” for religious based treatment was not a justiciable controversy. *Lundman v. McKown*, 530 N.W. 2d 807, 817 (1997). However, recently in Minnesota, a parent brought suit against the Christian Science Church when his ex-wife put his son in the church's care. *Lundman*, 530 N.W. 2d at 817. The case went to the jury and the jury awarded the father almost \$15 million in compensatory and punitive damages for the death of his child. *Id.* The plaintiff's son had fallen ill and the mother summoned a Christian Scientist practitioner to provide her son with care. *Id.* at 808. The court found that individuals are free to believe, teach, and preach what they believe,

but found regulation necessary for the protection of children. *Lundman*, 530 N.W. at 819. The church's conduct, though rooted in religious belief, remained subject to state regulation. *Id.* at 818. There is a compelling "interest in protecting the welfare of children. *Id.* at 818. See, e.g., *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983) (state has compelling interest in chemotherapy for child over parents' religious objections).

Courts in the Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits holding this ruling and restricted cases under RFRA to those that burdened a "central tenet" of one's religion. *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996); *Graham v. Comm'r*, 922 F.2d 844, 851 (9th Cir. 1987); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995).

In order to grant summary judgment the DDD must prove prayer based treatment is a central tenet of the church. Congress most recently defined "religious exercise" in the Religious Land Use and Institutionalized Persons Act (RLUIPA) as including "any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs." 42 U.S.C. § 2000cc-1 et seq. However, adopting this broader definition will take away a significant defense from those jurisdictions governed by the earlier *Bryant v. Gomez* line of cases. Neither RLUIPA nor RFRA should protect activities that endanger youth even if motivated by religious beliefs. *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).

Already states have abandoned RFRA and RLUIPA definitions. In Nebraska, a state law requires metabolic screening of all newborns regardless of the parents' religious objections. *Douglas County v. Anaya*, 694 N.W.2d 601, 609 (Neb. 2005). The parents argued that because of their religious beliefs against withdrawal of blood the state could not interfere with their religious practice unless their child was sick. *Douglas County*, 694 N.W.2d. at 606. The

Nebraska Supreme Court unanimously upheld the metabolic screening law and found that the state had the right to require a health screening over parents' religious objections. *Id.* at 611.

California must consider, the best interests of children. It is in the best interests of society to require medical care and treatment for all minors in life-threatening situations, to impose tort liability for redress of damages, and to deny a freedom of religion defense.

II. ELIJAH ALDER AND CAROL PROVOST WERE NEGLIGENT IN RELYING ON THE LAYING OF THE HANDS AND DENYING STEPHEN MEDICAL TREATMENT DESPITE THE SEVERITY OF HIS SYMPTOMS.

A child's right to a healthy and productive life is of the utmost importance. As the Supreme Court noted in *Prince v. Massachusetts*, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." 321 U.S. at 168. The value our society places on the well-being of children is evidenced by the numerous statutes governing a child's welfare, ranging from the guarantee of free public education, to the criminalization of child neglect. *See e.g.* 20 U.S.C. §1400; *see e.g.* Cal. Penal Code §270. The importance of protecting a child is so significant that the state is permitted to intervene on behalf of the child, as *parens patriae*, and restrict the parents' control over such issues as school attendance and child labor. *Id.* at 166; *see also State v. Bailey*, 157 Ind. 324, 330 (Ind. 1901) and *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325 (1913). As the California Supreme Court noted in *In re Jasmon*, "[c]hildren, too, have fundamental rights...[they] are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." 8 Cal. 4th 398, 419 (1994). Parental rights are deemed "subordinate to the power of the State, and may be restricted and regulated." *Bailey*, 157 Ind. at 329. The power of the State also "involves the protection of the lives and health of its children as well as the obedience to its laws." *New York v. Pierson*,

176 N.Y. 201, 211 (1903). The health, safety, and wellbeing of a child are paramount to both the state and to society as a whole.

The importance of a child's life is also reflected in the ability of parents to bring a cause of action for a child's wrongful death. In order to support a negligence claim, a plaintiff must prove (1) an existence of a duty, (2) that defendants breached that duty, and (3) that the breach was the proximate cause of the injury. *United States Liab. Ins. Co.*, 1 Cal. 3d at 594. Mr. Adler and Ms. Provost assumed a duty to care for Stephen and subsequently breached that duty by failing to seek medical attention. Additionally, the relevant factors set forth by the *Rowland* court favor creating a duty of care owed by Mr. Adler and Ms. Provost. *Rowland*, 69 Cal.2d at 113. Mr. Adler and Ms. Provost's failure to procure medical attention proximately caused Stephen's death.

Respondents' reliance on the argument that their conduct is protected by the freedom of religion afforded by the First Amendment to the United States Constitution and article I, section 4 of the California Constitution is misplaced. Although the Constitution affords protection for religious beliefs and expression, it does not protect all conduct that stems from that belief. *Sherbert*, 374 U.S. at 402. The Supreme Court in *Prince v. Massachusetts*, noted that the "right to practice religion freely does not include liberty to expose . . . the child to . . . ill health or death." 321 U.S. at 166-67. In that same ruling the Supreme Court also opined that although "[p]arents may be free to become martyrs . . . it does not follow they are free, in identical circumstances, to make martyrs of their children." *Id.* at 170. Although the freedom of religious belief is absolutely protected, the freedom to act on this belief is not so protected. *Cantwell*, 310 U.S. at 303-04. Therefore, the State may regulate religiously motivated conduct in order to protect society and the well-being of children.

Stephen's tragic death could easily have been prevented with a simple phone call to a medical professional who would have known how to treat his condition. (R. 16.) Both Mr. Adler and Ms. Provost were negligent in failing to seek medical help for Stephen, and this omission was the ultimate cause of his death. Mr. Adler and Ms. Provost can be held liable for Stephen's death and cannot hide behind the shield of a religious defense.

A. Mr. Adler and Ms. Provost Were Negligent Because They Assumed a Duty to Care for Stephen and Then Breached That Duty When they Failed to Procure Appropriate Medical Care.

A fundamental axiom of tort law is that one is liable for injuries caused by a failure to exercise reasonable care. *Thompson v. County of Alameda*, 27 Cal. 3d 741, 750 (1980). This has been codified under California Civil Code section 1714, which requires a person to exercise due care in his or her own actions in order to prevent unreasonable risk of injuries foreseeable to others. *See also McGarry v. Sax*, 158 Cal. App. 4th 983, 994-95 (2008). One generally has a duty "not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm." *Lugtu v. Cal. Highway Patrol*, 26 Cal. 4th 703, 716 (2001); *see also Rest. Torts 2d §302 and §302A*. A duty may also arise when a "special relation exists between the actor and the other which gives the other a right to protection." *Davidson v. City of Westminster*, 32 Cal. 3d 197, 203 (Cal. 1982). A special relationship exists between parties when a person assumes voluntary custody of another person, and deprives that person from receiving normal opportunities for protection. *Rest. Torts 2d §314A*. Additionally, a person who takes charge of another person who is unable to protect or help himself is under an affirmative duty to help, and may be liable for failing to exercise reasonable care. *Rest. Torts 2d §324*. To determine what constitutes reasonable care, one must look to the conduct of a

reasonable person under like circumstances and in most cases this is what determines the standard of care. *Rest. Torts 2d §283; Ramirez v. Plough*, 6 Cal. 4th 539, 546 (1993).

1. Mr. Adler and Ms. Provost assumed a voluntary duty to care for Stephen and subsequently breached this duty when they failed to seek medical attention.

Both Mr. Adler and Ms. Provost assumed a voluntary duty to care for Stephen. Stephen was 18 months old at the time of his death and was unable to make decisions for himself or care for himself. (R. 4.) Mr. Adler assumed a duty to care for Stephen after accepting the call from Mr. Placer and initiating the Divine Design for Health treatment as provided in the DDD Treatment Procedures on the evening of July 25, 2008. (R. 30.) Ms. Provost assumed a duty to care for Stephen after accepting the call from Mr. Adler to function as Stephen's Care Provider on the night of July 25, 2008. (R. 26.) Ms. Provost, as the Care Provider, communicates with, and is under the direction of, the Elder Advisor, Mr. Adler. (R. 13, 26.) Ms. Provost, as a Care Provider, also had the "sole responsibility for the physical care" of Stephen. (R. 26.) Even though Mr. Placer may have been present in the house, Ms. Provost and Mr. Adler were the ones in control of the wellbeing of Stephen.

The duty continued when Mr. Placer went to work and left his child in the sole physical care of Ms. Provost, under the direction of Mr. Adler, on the morning of July 26, 2008. (R. 28.) During this time, Stephen was not under the care or control of either of his parents, but rather was under the sole care and control of Mr. Adler and Ms. Provost. Mr. Adler and Ms. Provost owed Stephen a duty of due care because they isolated him from receiving other care.

Additionally, the factors considered in *Rowland* would also impose a duty of care on Mr. Adler and Ms. Provost to seek appropriate care for Stephen. 69 Cal.2d at 113. It is foreseeable that withholding medical treatment from a baby may lead to a dire outcome, and although the

degree of injury was not certain, the possibility of a tragic outcome was apparent. Defendants' failure to seek medical attention for Stephen was the proximate cause of his death. Every child is entitled to the right to life and failing to treat a child which ultimately leads to the child's death, is morally reprehensible and in this case should have been easy to prevent. Although implementing a duty to seek medical assistance for a child may burden some religious beliefs, the benefit is inestimable to the child who may avoid death as a result of being treated with medical attention. The consequences to the community of imposing a duty to exercise care with resulting liability for breach is also minimal compared to the benefit. The *Rowland* factors support a finding that Mr. Adler and Ms. Provost owed a duty of due care to Stephen.

Mr. Adler and Ms. Provost were aware of the seriousness of Stephen's medical condition. (R. 27.) Ms. Provost was aware of Stephen's serious condition; she called Mr. Adler on the night of July 25, 2008 to relay her concern and suggest that he contact the Director of Divine Design for Health and set up an extended prayer vigil for Stephen. (R. 27.) Ms. Provost followed the Disciples of Divine Treatment Procedures when she reported Stephen's serious condition to the Elder Advisor, Mr. Adler, and suggested he contact the Director of Divine Design for Health to initiate an extended prayer vigil. (R. 13.)

The reasonable person standard is an objective standard of what a reasonable person would do in the like circumstances. *Rest. Torts 2d §283*. Although a reasonable person may not seek medical care for a child suffering from what appears to be a cold, a reasonable person would certainly seek medical attention for a small child who was warm to the touch, very listless and could not eat or drink. (R. 27.) Although it was the custom of the DDD to refuse medical treatment, this should not be regarded as controlling because a reasonable person would not deny a child medical attention. *Rest. Torts 2d §295A*.

Mr. Adler and Ms. Provost were aware of the severity of Stephen's physical condition and should have immediately contacted a medical physician. Mr. Adler and Ms. Provost assumed a duty to care for Stephen and breached this duty by failing to seek medical attention for him, as a reasonable person in similar circumstances would have done.

2. Mr. Adler's and Ms. Provost's negligence in failing to seek medical care was the proximate cause of Stephen's death.

Had the caregivers sought medical attention for Stephen he likely would not have died. Almost 99% of children in Stephen's condition would have made a full physical recovery had they received appropriate and timely medical treatment. (R. 16.) Both Mr. Adler and Ms. Provost were aware of the severity of Stephen's medical condition, yet failed to seek medical treatment. (R. 27.) Both Mr. Adler and Ms. Provost were in a position of power and authority to recommend that Stephen seek conventional medical treatment; both were also in a position to seek the medical treatment for Stephen themselves. By failing to take the obvious step of seeking medical attention, Mr. Adler and Ms. Provost were negligent and their failure to procure medical treatment proximately caused Stephen's death. Had Stephen received medical attention, he would not have died.

3. Mr. Adler and Ms. Provost breached their duty to inform Mrs. Placer about Stephen's worsening condition.

Stephen, at only 18 months old, was unable to make decisions regarding his own treatment and was thus under the discretion of his parents. (R. 4.) Parents have the right and obligation to act on behalf of their child and to protect their rights. *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 335 (1997). Parental rights are vested in both the mother and the father in that each has parental rights and responsibilities. *Hodgson v. Minnesota*, 497 U.S. 417,

483 (1990)(J. Kennedy concurring). Mr. and Mrs. Placer both have parental rights because they are still married.

Mrs. Placer has made the majority of the decisions regarding Stephen's health and medical treatment in the past. (R. 19-20.) Therefore she should have also been involved in the decision making of how to treat Stephen in the time at issue. *In re Baby K*, 832 F.Supp. 1022, 1030 (1993). When one parent wishes to continue medical treatment while the other parent asserts "the nebulous liberty interest in refusing life-saving treatment on behalf of a minor child, the explicit right to life must prevail." *Id.* at 1031. Mrs. Placer's parental rights and her desire to treat Stephen's illness with modern medicine should have prevailed over how Mr. Adler and Ms. Provost chose to treat him. Mrs. Placer had the right to be aware of her son's condition so she could make the decision of the most appropriate course of action to treat her son. Mr. Adler and Ms. Provost had a duty to inform Mrs. Placer about her son's deteriorating physical condition shortly before his death. Mr. Adler and Ms. Provost breached their duty to inform Mrs. Placer about her son's worsening physical condition and had they informed her of Stephen's condition she would have sought immediate medical attention for him and he would not have died.

Both Mr. Adler and Ms. Provost were aware that Mrs. Placer did not believe in the Divine Design for Health and that she would have sought traditional medical care for Stephen. (R. 25, 29.) It would have been easy for Ms. Provost to contact Mrs. Placer via telephone and Ms. Provost was aware of how to contact Mrs. Placer, but she failed to do so. (R. 28.) Although informing Mrs. Placer of Stephen's worsening condition may have jeopardized their spiritual treatment, they had a duty to inform Stephen's mother about his physical condition.

California Family Code § 6550(b) demonstrates the importance that California places on the rights of parents to make decisions for their children over the right of the caregiver who has

physical custody of the child. It notes that “[t]he decision of a caregiver to consent to or refuse medical or dental care for a minor shall be superseded by any contravening decision of the parent . . . provided the decision of the parent . . . does not jeopardize the life, health, or safety of the minor.” Cal. Fam. Code § 6550(b)(Lexis 2008). This requirement of parental consent regarding guardians suggests that any medical decisions made by a temporary caregiver should also be subject to parental approval. Had Mr. Adler and Ms. Provost communicated with both of Stephen’s parents, Mrs. Placer would have sought immediate medical care for Stephen and he would not have died.

B. Mr. Adler and Ms. Provost’s Conduct Is Not Protected by the Right to Free Exercise of Religion Because Although Religious Belief is Absolutely Protected, Religiously Motivated Conduct is Subject to Regulation by the State.

The absolute freedom of religious belief guaranteed by the First Amendment to the United States Constitution and article I, section 4 of the California Constitution does not extend to the freedom of religiously motivated conduct. *Sherbert*, 374 U.S. at 402. Religiously motivated conduct may be subject to restriction to “prevent grave and immediate danger to interests which the state may lawfully protect.” *People v. Woody*. 61 Cal. 2d 716, 719 (1964). In 1903 the Court of Appeals for New York noted the distinction between the protection afforded to religious beliefs and religious conduct that is not protected, especially when children’s health and safety was involved. *New York v. Pierson*, 176 N.Y. at 211. The court also noted that the “peace and safety of the state involves the protection of the lives and health of its children as well as the obedience to its laws.” *Id.* The Supreme Court then held in 1905 that a child may be compelled to be vaccinated, against their religious objections, because the right to religious freedom does not include the right to expose a child to danger. *Jacobson v. Massachusetts*, 197 U.S. at 26-27. Under the RFRA, the state may not substantially burden religious freedom unless there is a

compelling state interest and the burden is the least restrictive means of furthering that interest. 42 U.S.C. §2000bb-1(b) (West Supp. 1994).

1. The State's interest in protecting the lives of children far outweighs the imposition on the practice of the DDD and holding caregivers liable for negligence is the least restrictive alternative available to protect a child.

The State has a compelling interest to protect the lives of the children within its jurisdiction. As the Supreme Court noted in *Prince v. Massachusetts*, our democratic society rests upon the health and growth of our children. 321 U.S. at 168. The Supreme Court also noted that although parents are free to become martyrs of their religious beliefs, "it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full legal discretion when they can make that choice for themselves." *Id.* at 170. The Supreme Court of California noted that the interest of protecting the lives of children is "plainly adequate" to justify individuals to be liable for omissions, "regardless of the severity of the religious imposition." *Walker v. Superior Court*, 47 Cal. at 139. The court also recognized that parents "have *no* right to free exercise of religion at the price of a child's life." *Id.* It is clear, from both the United States Supreme Court and the California Supreme Court, that the state's interest in preserving the life of a child clearly constitutes a compelling state interest that warrants a burden on the free exercise of religion.

Additionally, procuring medical treatment would have been in the best interest of Stephen. In determining whether medical treatment should be ordered, a court will look at the harm the child will likely face if not treated, the effectiveness of medical treatment, the risk associated with treatment and the effect on the child. *In re Eric B.*, 189 Cal. App. 3d 996, 1005 (1987). Here medical treatment was necessary to treat Stephen's bacterial pneumonia, the treatment (antibiotics, intravenous fluids, and respiratory therapy) did not pose a serious threat to

Stephen, and the medical community generally agrees that this treatment has a high rate of success. (R. 16.) Stephen should have been treated with medical care and had that happened, he likely would not have died.

Holding individuals responsible for their negligent omissions to act is the least restrictive alternative means, which may include criminal liability or reporting requirements. Although these individuals could also be held criminally liable, this would require the state to act—and also spend the state’s limited resources—rather than allowing the private parties to litigate. Alternatively, the state could require a reporting requirement, but this would not have the same preventative effect as holding the parties liable for their omissions.

2. The United States Supreme Court has repeatedly upheld the governmental interests in restricting the free exercise of religion.

The Supreme Court has repeatedly found the governmental interest in regulating a religious practice to outweigh the burden imposed on the free exercise of religion. *See Prince v. Massachusetts*, 321 U.S. 158 (child labor law upheld against guardian of Jehovah’s Witness distributing religious materials), *Reynolds v. United States*, 98 U.S. 145 (Congress could apply prohibition of polygamy to Mormons), *Jacobson v. Massachusetts*, 197 U.S. 11 (requiring children to be vaccinated), *United States v. Lee*, 455 U.S. 252 (1982) (requiring Amish to participate in Social Security system). These cases represent both a compelling state interest and offer the least restrictive means for accomplishing this goal. The present case exemplifies a compelling state interest—protecting the life of a child—while providing a manageable way to accomplish this goal. Holding Mr. Adler and Ms. Provost liable for the wrongful death of Stephen is consistent with past rulings by the Supreme Court in regulating religious conduct that is detrimental to society.

CONCLUSION

Respondent's motion for summary judgment must fail. This Court should find Respondents liable for the wrongful death of Stephen because they owed him a legal duty and subsequently breached this duty by failing to procure medical treatment. Respondents can be held liable because neither the United States Constitution nor the California Constitution absolutely protect religiously motivated conduct. This Court should prevent Respondents from future practices of Divine Design for Health treatment of a child. Additionally, Petitioner is entitled to compensatory damages for the death of her son in the amount of one million, eight hundred thousand dollars and any other relief as this Court deems just and proper.

Dated: January 9, 2009

Respectfully submitted,

Petitioner 14
Counsel for Petitioner