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Case Number 311,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER NAPLES,	:	
	:	
Plaintiff Below, Appellant,	:	
	:	
v.	:	
	:	**No. 311, 2013**
THE DIOCESE OF TRENTON, a New Jersey corporation; ST. THERESA PARISH, a foreign corporation;	:	**On Appeal from the Superior Court of the State of Delaware, In and For Kent County C. A. No. 09C-04-048 JTV**
Defendants Below, Appellees.	:	

APPELLANT'S OPENING BRIEF

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Dated: October 22, 2013

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NATURE OF THE PROCEEDINGS

This is a childhood sexual abuse case under the landmark Delaware Child Victim's Act of 2007, 10 *Del. C.* § 8145 (the "CVA"). The Complaint dated April 29, 2009 alleged that McAlinden, a priest employed by the Diocese of Trenton ("Diocese") as its Catholic Youth Organization (CYO) Director, and as the Pastor of St. Theresa's Parish ("the Church") sexually abused the child Christopher Naples over the course of several years at various locations, including in the State of Delaware. (D. I. 1, A15-37).

On June 15, 2009, the Diocese and the Church moved to dismiss Plaintiff's Complaint for lack of personal jurisdiction.[1] (D.I. 14, A38-42). In response, on July 7, 2009 Plaintiff filed a motion to suspend briefing on these Defendants' Motions to Dismiss and Initiate Discovery on the Issues of Jurisdiction and Venue, for a limited period of only three months. [2] (D.I. 23, A43-45). On August 18, 2009, the court below denied Plaintiff's motion to stay briefing[3] (D.I. 29, A46) and ordered that the parties proceed without any discovery whatsoever on Defendants' jurisdictional motion. Following the conclusion of briefing and oral argument, on April 29, 2010, the Superior Court granted the institutional defendants' Motion to Dismiss stating that it lacked personal jurisdiction.[4]

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[1] (D.I. 14, A38-42)
[2] (D.I. 23, A43-45)
[3] (D.I. 29, A46)
[4] Exhibit A.

(Exhibit A). Plaintiff's lawsuit against the remaining defendant, McAlinden, continued, which eventually resulted in an offer of judgment. This offer was accepted on May 23, 2013 (D.I. 87, A47) and the judgment was entered on May 23, 2013. (Certified Copy of the Docket A1-14) (Exhibit A).

Plaintiff filed a timely Notice of Appeal on June 14, 2013. This is Plaintiff/Appellant Christopher Naples Opening Brief and Appendix in support of his appeal.

SUMMARY OF THE ARGUMENT

1. The court below abused its discretion in denying Plaintiff the right to conduct jurisdictional discovery.

2. The Diocese of Trenton and St. Theresa Roman Catholic Church of Tuckerton, New Jersey are subject to the personal jurisdiction of Delaware courts due to their actions in permitting McAlinden to take Plaintiff on overnight trips to Delaware, given their actual and/or constructive knowledge of his prior abuse of the Plaintiff.

STATEMENT OF FACTS

McAlinden was employed by the Diocese from 1967 until 2007 as a priest, including from 1985 to 1988 as the Diocese's Director of Youth Ministries.[5] (A18) It was in this context that McAlinden met Plaintiff and began to abuse him.[6] (A18). In 1988, he was transferred by the Diocese to St. Theresa's Parish where he continued to abuse Plaintiff.[7] (A19)

A. Diocese's Knowledge that McAlinden was Molesting the Plaintiff.

1. Knowledge that McAlinden was Sexually Abusing the Plaintiff.

McAlinden first met Plaintiff while McAlinden was employed as the Diocese's Director of Youth Ministry Services, where he was in charge of coordinating and running all Catholic youth activities within the entire Diocese.[8] (A18). It was in this context that McAlinden met the Christopher Naples, then a minor, at a CYO leadership conference and it was in this context that McAlinden began to abuse him. [9] (A18).

As set forth in the Complaint, in 1985 Plaintiff's father, Anthony Naples became suspicious of McAlinden when he began to take his son on frequent trips, and notified the Diocese twice about his concerns, including one time when he

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[5] Compl. ¶ 24.
[6] *Id.*
[7] *Id.* at ¶29
[8] *Id.* ¶ 24.
[9] *Id.*at ¶24, ¶ 47.

spoke to a Monsignor employed by the Diocese about his concerns.[10] (A23) Although the Monsignor promised him that he would investigate the situation and get back to him, he never did so.[11] (A22).

During this same time period, another Diocesan official, Rev. Thomas Triggs, the Associate Director of Youth Ministry Services, "frequently" saw Plaintiff stay overnight with McAlinden at the Diocesan owned Jeremiah House.[12] (A22)

2. **Actual and/or Constructive Knowledge on the Part of the Defendant Diocese that McAlinden was Taking Plaintiff to Delaware.**

"During approximately the summer of 1987, when Plaintiff was approximately 15 years old, McAlinden, while the Diocese Youth Director, took plaintiff on the Cape May-Lewes Ferry to Rehoboth, Delaware on a an overnight trip. In the hotel they overnight in, McAlinden masturbated plaintiff, forced plaintiff to masturbate him, and orally and anally raped the plaintiff."[13] (A22). By this time, the Diocese knew or should know that the McAlinden was taking Plaintiff on trips in order to abuse him.

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[10] *Id.* at ¶ 25, ¶ ¶ 73-75.
[11] *Id.* at ¶¶ 75-76
[12] *Id.* at ¶ 55.
[13] *Id.* at ¶56.

B. St. Theresa Parish's Actual and Constructive Knowledge that McAlinden was sexually abusing Plaintiff.

In 1988, Defendant McAlinden was assigned to serve as the pastor of the St. Theresa Parish ("Church") in Tuckerton, New Jersey.[14] (A19) Again by this point it was well known by the Diocese and the Church that explosive allegations of sexual misconduct had been made against McAlinden. [15] (A23). Other associate pastors and assistant priests employed by the Church were well aware that Plaintiff frequently stayed overnight with McAlinden in his room at the Church Rectory.[16] In 1988, a housekeeper employed by the Church witnessed McAlinden abuse Plaintiff in McAlinden's room in the rectory.[17] Despite such actual and/or constructive knowledge the Church allowed McAlinden to continue to work with children, which allowed McAlinden continued opportunities to sexually abuse Plaintiff. Despite all of this, the Church allowed McAlinden to continue to have the Plaintiff stay overnight in his room and allowed McAlinden to again take him to Delaware where McAlinden again sexually abused him.[18] (A22) Overall, McAlinden abused Plaintiff over 200 times from 1985 to 1996 in various locations

[14] *Id.* at ¶ 26.
[15] *Id.* at¶73-75
[16] *Id.* at ¶ 31.
[17] *Id.* at ¶ 30.
[18] *Id.*at ¶58

in Delaware, New Jersey, New York, Florida, and St. Thomas, Virgin Islands. [19] (A23)

C. McAlinden's Abuse was in the Context of His Employment

At all times relevant alleged, McAlinden was a priest employed by the institutional defendants to operate in homes, hospitals, parishes, schools and churches. Without their approval, he could perform no sacerdotal functions or function as a priest in any manner whatsoever.[20] (A24) As the Complaint states:

> McAlinden's actions of the kind the institutional defendants expected him to perform. His conduct was not unexpected by Diocese and Church. His actions occurred substantially within the authorized time and space limits placed upon him by Diocese and Church. McAlinden was actuated at least in part by a purpose to serve them. All his contacts with plaintiff were made pursuant to his routine and regular job duties.[21] (A25).

[19] *Id.* at ¶ 1, 63.
[20] *Id.* at ¶ 80.
[21] *Id.* at ¶ 85-86.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF LIMITED JURISDICTIONAL DISCOVERY.

A. Question Presented. Did the Superior Court abuse its discretion by refusing to allow limited jurisdictional discovery? This argument was preserved below in Plaintiff's Memorandum in Support of Conducting Jurisdictional Discovery, Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, and during Oral Arguments. (D.I. 23, A43-45, D.I. 30, D. I. 91).

B. Scope of Review for Rule 12(b)(2) - Personal Jurisdiction. The trial court has discretionary control over the decision to allow discovery prior to deciding a motion to dismiss under Rule 12(b)(2).[22] The standard of review with respect to pretrial discovery rulings is abuse of discretion.[23] Where "the court in reaching its conclusion overrides or misapplies the law, or the judgment exercised is manifestly unreasonable, an appellate court will not hesitate to reverse."[24]

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[22] *Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991).
[23] See *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986). "A district court's decision to deny jurisdictional discovery is reviewed for abuse of discretion." *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 455 (3d Cir. 2003). Since "the Delaware Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure," this Court finds certain "federal cases appropriate for determining the proper interpretation of the Delaware Rules of Civil Procedure." *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004) (citations omitted).
[24] *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

C. The Law. Except in the rare case where the allegations are found to be frivolous, "a court should permit limited discovery before resolving a motion to dismiss for lack of personal jurisdiction."[25] Namely, "[O]nly where the facts alleged in the complaint make any claim of personal jurisdiction over defendant frivolous, might the trial court, in the exercise of its discretionary control over the discovery process, preclude reasonable discovery in aid of establishing personal jurisdiction."[26] There is nothing here to suggest that Plaintiff's suit is frivolous.

Here, since the lower court determined that the facts alleged in the Complaint were insufficient to establish personal jurisdiction over the Diocese and Church, it should have permitted Plaintiff to complete discovery in order to allow Plaintiff an opportunity to establish jurisdiction over defendants.[27] In *Benerofe*, the Chancery Court held,

> If facts alleged in the complaint are insufficient to establish personal jurisdiction over defendants, then the trial court may allow the plaintiff to complete discovery in order to establish jurisdiction over defendant as long as plaintiff's claim of personal jurisdiction is not frivolous. If necessary, the trial court may hold an evidentiary hearing or decide the matter based on affidavits.[28]

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[25] *Tell v. Roman Catholic Bishops of Diocese of Allentown*, 2010 WL 1691199, *7 (Del.Super. Apr. 26, 2010), citing *Hart Holding Co. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del.Ch. 1991).
[26] *Hart Holding Co.*, 593 A.2d at 539; See *Toe No. 2*, C.A. No. 09C-12-033, Witham, J. (Del. Super. June 30, 2010) at 11-12 (Exhibit C).
[27] *Benerofe v. Cha*, 1996 WL 535405, * 3 (Del. Ch. Sept. 12, 1996). (Exhibit D)
[28] *Id.* (internal citations omitted).

Here, the basis for jurisdiction over the Diocese and Church is not frivolous as Plaintiff's argument herein demonstrates. Therefore, it was unreasonable not to afford Plaintiff a brief period of limited jurisdictional discovery.

Here Plaintiff was able to file his suit was the result of the actions of the Delaware General Assembly, which followed widespread support for legislative change in Delaware's law protecting children from sexual abuse. As a result, Delaware became one of the first states to enact window legislation. The record reveals numerous reasons why the CVA is proper social welfare legislation, reflecting the public policy of the State of Delaware, including:

1. To hold accountable *institutions* which hid or enabled child abusers. (Doyle 13; A51).
2. To encourage *institutions* to make the necessary preventative changes to protect children from pedophiles. (Doyle 13; A51).

D. Analogous Case in the District of Delaware. In its decision below the court relied on the Delaware Federal District Court's decision in *Jane Voe No. 2 v. The Archdiocese of Milwaukee* and *Elliot v. Marist Bros. of the Schs., Inc.* which granted an institutional Defendant's motion to dismiss.[29] Those two cases are distinguishable from this case for several reasons. In *Jane Voe No. 2,* the individual defendant, Nickerson, was a member of the religious order Brothers of the Good Shepherd, a Roman Catholic religious order, with its principle place of

[29] *Naples v. Diocese of Trenton, et al.,* 2010 WL 1731827 (Del.Super. 2010); *Elliot,* 675 F. Supp. 2d 454, 455-456 (D.Del. 2009); *Jane Voe No. 2*, 700 F. Supp. 2d 653, 655 (D.Del. 2010).

business in Albuquerque, New Mexico.[30] Nickerson was allegedly employed by a church in Milwaukee, Wisconsin called Our Lady of Divine Providence, which is part of the Archdiocese of Milwaukee.[31] Nickerson met the plaintiff, then a minor and Delaware resident, not in the course of his work with either his Order or the Wisconsin Diocese but as a result of an introduction from a mutual friend.[32] The District Court ruled that these two religious organizations were not subject to personal jurisdiction in Delaware, because:

> Plaintiff's conclusory allegations that Nickerson was employed by moving defendants during the time periods of the alleged abuse are an insufficient basis for exercising personal jurisdiction when such assertions have been challenged. Moving defendants have produced declarations demonstrating that Nickerson was not employed by moving defendants during the relevant time period. [33]

The Court also noted that the plaintiff had alleged no facts that the moving defendants knew or directed Nickerson's action in Delaware.

In *Jane Voe No. 2*, the defendant met the plaintiff not in the context of his employment but through a mutual friend,[34] whereas here Plaintiff met McAlinden in the context of McAlinden's employment as the Diocese's director of Catholic

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[30] *Id.* at 655.
[31] *Id.*
[32] *Id.*
[33] *Id.* at *658*.
[34] *Id.* at 655.

Youth Organization.[35] (A21). It was in this context, and later as the pastor of the Church, that McAlinden repeatedly molested Plaintiff.[36] (A20-23).

In *Elliot,* the plaintiff, a resident of New Jersey, was repeatedly molested by a member of another religious order from 1977 to 1983.[37] The Court concluded that, "there are no facts asserted which demonstrate that the moving defendants knew of, directed or authorized the travel to and/or through Delaware, let alone the tortious conduct that allegedly was committed by Galligan [the perpetrator] in Delaware."[38] Critically, in *Naples*, the Diocese and the Church Parish had actual notice that McAlinden was abusing children or that there were at least credible allegations that he was abusing children. As alleged in the complaint, Plaintiff's father had a conversation with a Diocese official expressing his concerns about the amount of time McAlinden was spending with his son and that it was inappropriate.[39] (A23). Despite assurances from this Diocese official that he would conduct an investigation into McAlinden, none was done, and subsequently McAlinden took Plaintiff to Delaware where he molested him. (A22) The Diocese also was on notice from the Assistant CYO Director that Plaintiff was spending the

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[35] Compl. ¶47.
[36] *See Generally* Section "E" of Plaintiff's complaint: ¶¶ 42-72.
[37] 675 F. Supp. 2d at 455-456.
[38] *Id.* at 454, 459. This characterization of the *Elliott* complaint was incorrect, however, as there the Plaintiff had in fact alleged that the moving defendants' knew of, directed, or authorized such travel, but that case is not yet ripe for appeal.
[39] Compl. ¶75.

night with McAlinden on church property.[40] In 1988, the Diocese received a report that McAlinden was sexually abusing another child.[41] (A24) Instead of removing McAlinden from his priestly functions and making sure he had no contact with children, the Diocese merely reassigned him to St. Theresa Parish where he continued to have contact with Plaintiff and other children.[42] (A24) After he was reassigned to St. Theresa Parish McAlinden continued to abuse Plaintiff at various locations including here in Delaware.[43] (A22)

Shortly after the *Naple's* decision there were two decisions involving claims of childhood sexual abuse under the CVA and common law wherein the courts allowed limited jurisdictional discovery -- *Toe No. 2 v. Blessed Hope Baptist Church, Inc. of Harford County* (Exhibit C) and *Thompson v. Roman Catholic Archbishop of Washington* .[44] In *Toe No. 2*, the plaintiff alleged that he was molested by the school teacher at the Blessed Rock Academy.[45] Before the plaintiff began attending the school and was molested by the teacher the school moved locations from Delaware to Maryland. [46] It was in Maryland that the abuse

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[40] *Id.* at ¶56-57.
[41] *Id.* at ¶78.
[42] *Id.* at ¶ 78.
[43] *Id.* at ¶ 58.
[44] *Toe No. 2 v. Blessed Hope Baptist Church, Inc., et al.*, C.A. No. 09C-12-033, *3, Witham, J. (Del. Super. June 30, 2010) (Exhibit C); *Thompson v. Roman Catholic Archbishop of Washington,* 735 F. Supp. 2d 121, 130 (D. Del. 2010).
[45] C.A. No. 09C-12-033, *3 (Del. Super. June 30, 2010).
[46] *Id.* at 3.

began, but the additional abuse also occurred in Delaware.[47] Although, expressing some concerns whether the plaintiff could establish jurisdiction, the Superior Court nevertheless denied the defendants' motion to dismiss so the plaintiff could conduct limited jurisdictional discovery. [48]

In *Thompson,* the plaintiff, a resident of Virginia, who had attended high school at a Roman Catholic high school in Washington, D.C. was molested in Delaware on three separate occasions by a priest who was employed at the high school, which was run by the Archdiocese of Washington, D.C.[49] The District Court stated:

> Because these plaintiffs have averred that defendant the Archbishop of Washington knew or should have known, that Dooley was sexually molesting children **and** that Dooley was taking children on trips to Delaware, plaintiffs have satisfied the minimal pleading requirements to conduct limited jurisdictional discovery as to defendant the Archbishop of Washington.[50]

While the facts of those two cases are somewhat different, there are significant similarities regarding notice on the part of the Church and Diocese. As in *Thompson*, here the Diocese and the Church were on notice that McAlinden was taking Plaintiff on overnight trips and allegations had been made that McAlinden was molesting Plaintiff. As stated earlier, in 1985 Plaintiff's father called the

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[47] *Id.* at 3-4.
[48] *Id.* at 12. After jurisdictional discovery ended, the Court concluded that that the institutional defendants were not subject to personal jurisdiction. *See Toe No. 2 v. Blessed Hope Baptist Chruch, Inc. of Harford County,* 2012 WL 1413552, * 4 (Del. Super. Jan. 31, 2012) (Exhibit C).
[49] 735 F. Supp. 2d at 125-26.
[50] *Id.* at 129.

Diocese and spoke with a Monsignor about his concerns about McAlinden spending a great deal of time with his child.[51] (A23) To Plaintiff's knowledge the Diocese never conducted an investigation, and even if it did, it continued to allow McAlinden to take Plaintiff on trips outside of the state including to Delaware multiple times. In 1988 the Diocese received a report that McAlinden was abusing another child and transferred him to St. Thomas Parish.[52] (A24). Despite knowledge that Plaintiff's father had grave suspicions of McAlinden and despite reports that he had abused other children, the Diocese allowed McAlinden to continue to take Plaintiff on trips to various places including Delaware where he molested Plaintiff.

After McAlinden was reassigned to the Church, McAlinden frequently had Plaintiff stay overnight in his room in the Church's rectory.[53] (A22). While at the Church associate priests and assistants were aware that Plaintiff frequently stayed overnight with McAlinden in his room at the Church rectory.[54] (A22). Also in 1988, a housekeeper employed by the Church walked into McAlinden's room and witnessed him molesting Plaintiff.[55] (A22). Despite this both the Church and

[51] *Id.* at ¶ 73-75.
[52] *Id.* at ¶ 78.
[53] *Id.* at ¶ 60.
[54] *Id.* at ¶ 61.
[55] *Id.* a ¶ 62.

Diocese continued to allow McAlinden to take Plaintiff's on trips including another trip to Delaware where he again abused Plaintiff.[56] (A23)

Despite all these facts that are alleged in the Complaint, the court below did not allow Plaintiff to engage even in a brief period of limited jurisdictional discovery. If it had, it is highly likely that more evidence of the defendants' knowledge of McAlinden's abuse of Plaintiff and more evidence of the institutional Defendants contacts with Delaware would have been developed.

[56] *Id.* ¶ 63.

II. THE SUPERIOR COURT ERRED IN DECIDING THAT IT DID NOT HAVE PERSONAL JURISDICTION OVER THE DIOCESE AND THE CHURCH AND BECAUSE THE COMPLAINT ALLEGES THAT THE DIOCESE AND THE CHURCH KNOWINGLY ALLOWED MCALINDEN TO TAKE PLAINTIFF ON OVERNIGHT TRIPS INCLUDING TO DELAWARE DESPITE THEIR KNOWLEDGE THAT HE WAS SEXUALLY ABUSING CHILDREN.

A. Question Presented. Did the Superior Court err in deciding that it did not have personal jurisdiction over the Diocese and the Church? This argument was preserved below in Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, and during Oral Arguments. (D.I. 30, D. I. 91)

B. Scope of Review for Rule 12(b)(2) - Personal Jurisdiction. The trial court's decision on a motion to dismiss for lack of personal jurisdiction is reviewed under a *de novo* standard.[57]

1. Plaintiff's Preliminary Burden. "[O]n a motion to dismiss for lack of personal jurisdiction, the record is viewed in a light most favorable to the nonmoving party, the allegations of the complaint are accepted as true and all reasonable inferences are considered most strongly in favor of plaintiff."[58]

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[57] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437-38 (Del. 2005).
[58] *Plummer & Co. Realtors v. Crisafi*, 533 A.2d 1242, 1247 (Del. Super. 1987), citing *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984) and *Harmon v. Eudaily*, 407 A.2d 232, 233 (Del. Super. 1979)).

Plaintiff's burden is met by a "prima facie showing based on the pleadings and/or affidavits that jurisdiction is conferred by the Delaware long-arm statute."[59].

> Generally, a plaintiff does not have the burden to plead in its complaint facts establishing a court's personal jurisdiction over defendant. However, if the defendant moves to dismiss the complaint for lack of personal jurisdiction, then plaintiff bears the burden of establishing personal jurisdiction over the defendants. When ruling on a 12(b)(2) motion, the Court must decide, as a matter of fact, whether the defendant had enough connection with the state so that it does not offend traditional notions of fair play and justice for the Court to exercise jurisdiction over a defendant. If facts alleged in the complaint are insufficient to establish personal jurisdiction over defendants, then the trial court may allow the plaintiff to complete discovery in order to establish jurisdiction over defendant as long as plaintiff's claim of personal jurisdiction is not frivolous.[60]

This standard is very similar to the Third Circuit's:

> It is well established that in deciding a motion to dismiss for lack of jurisdiction, a court is required to accept the plaintiff's allegations as true, and is to construe disputed facts in favor of the plaintiff.[61]

In order to determine whether a statutory basis for jurisdiction exists, first, a plaintiff must "present factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between the party and the forum

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[59] *Id.* at 1244. (citations omitted).

[60] *Benerofe*, 1996 WL 535405 at * 3 (some internal citations omitted) (Exhibit D), citing, *inter alia*, *Hart Holding Co. Inc.*, 593 A.2d at 538, 541.

[61] *Toys "R" Us, Inc.*, 318 F.3d at 457. Since "the Delaware Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure" this Court finds certain "federal cases appropriate for determining the proper interpretation of the Delaware Rules of Civil Procedure." *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004) (citations omitted).

state."[62] This requires plaintiff to prove that his jurisdictional claims are not "clearly frivolous."[63] If this showing is made, "plaintiff's right to conduct jurisdictional discovery should be sustained."[64]

2. Remedial Legislation is to be Liberally Construed. "Under Delaware law, remedial statutes should be liberally construed to effectuate their purpose."[65] In *Sheehan* this Court squarely addressed several aspects of the CVA. In addition to twice reaffirming that it was to be "liberally construed," the Court also warned against interpretations which "miss[ ] the self-evident intent of the remedial legislation."[66]

C. Merits of Argument - The Basics – Two-Step Analysis.

> Delaware courts apply a two-step analysis in determining the issue of personal jurisdiction over a nonresident. First, [they] …consider whether Delaware's long arm statute is applicable, recognizing that 10 *Del.C.* § 3104(c) is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause. Next, the court must determine whether subjecting the nonresident defendant to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment.[67]

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[62] *Toys "R" Us, Inc.*, at 456 (internal punctuation and citations omitted).
[63] *Id.*
[64] *Id.*
[65] *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256, 1257 (Del. 2011); *accord State v. Cephas*, 637 A.2d 20, 25 (Del. 1994).
[66] *Id.* at 1256-57.
[67] *Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480-81 (Del. 1992) (citations omitted).

D. The Delaware Long Arm Statute. Even outside the context of the application of remedial legislation, this Court has held that 10 *Del. C.* § 3104(c) "is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause."[68]

1. Specific Agency Jurisdiction under 10 *Del. C.* § 3104(c)(3). Plaintiff has made a proper showing under the agency theory of jurisdiction of 10 *Del. C.* § 3104(c)(3). "[A] court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent… causes tortious injury in the State by an act or omission in this State."[69] The Delaware Superior Court has stated that "it is entirely possible for jurisdictional purposes that a defendant acts in this State *via* its agent. This can occur in two ways. Plaintiffs can show the defendant had dominion and control of the actor or plaintiffs can provide evidence of the standard principle [sic] and agent relationship."[70]

All that is required of plaintiff by 10 *Del. C.* § 3104(c)(3) is that he make a prima facie showing in his Complaint that the Diocese and the Church caused tortious injury in Delaware through an agent; i.e. that Plaintiff was acting within

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[68] *Id.* (citations omitted).
[69] 10 *Del. C.* § 3104(c)(3).
[70] *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1162, FN 3 (Del. Super. 1997) *aff'd,* 707 A.2d 765 (Del. 1998).

the scope of his employment. "If the [nonresident] moving defendants are liable under the doctrine of respondeat superior, the conduct of the abusing... [employee] is attributable to his employer and will determine the jurisdictional issue."[71]

This Court has held that where an agent of a nonresident defendant causes tortious injury in Delaware through an act in Delaware, that nonresident defendant is subject to personal jurisdiction in Delaware, pursuant to 10 *Del. C.* § 3104(c)(3). The Court noted in *Hercules Inc.* that,

> While Bank Leu did not actively participate in Levine's giving the alleged false advice, we agree with the trial court's finding that Levine's acts in Delaware are attributable to Bank Leu pursuant to the "through an agent" language of Section 3104(c). It is not an arcane concept that conspirators are considered agents for jurisdictional purposes.[72]

There was no allegation that Bank Leu, the nonresident defendant in that case, had directed Levine to give the false advice. The assertion was simply that Levine committed a tortuous act in Delaware and that was attributable to the principal, the same as plaintiff alleges here.

a. Scope of Employment.

> It is, of course, fundamental that an employer is liable for the torts of his employee committed while acting in the scope of his employment. Restatement (Second) of Agency, § 219. The liability thus imposed upon the employer arises by reason of the imputation of the negligence of the

[71] *Tell,* 2010 WL 1691199 at * 9 (Exhibit B).
[72] 611 A.2d at 481.

> employee to his employer through application of the doctrine of *respondeat superior*.[73]

In order for the Diocese and THE Church to be liable for McAlinden's acts in Delaware, he must have been acting within the scope of his employment. As this Court recently held:

> The question of whether a tortfeasor is acting within the scope of his employment is fact-specific, and, ordinarily, is for the jury to decide. The phrase, 'scope of employment,' is, at best, indefinite. It is nothing more than a convenient means of defining those tortious acts of the servant not ordered by the master for which the policy of law imposes liability on the master. Under the *Restatement of Agency (2d)* § 228, conduct is within the scope of employment if, (1) it is of the kind he is employed to perform; (2) it occurs within the authorized time and space limits; (3) it is activated, in part at least, by a purpose to serve the master; and (4) if force is used, the use of force is not **unexpectable**.[74]

As to the first element, recognizing that any criminal act or sexual assault is not going to be what the tortfeasor/employee was hired to do, this Court explained:

> The relevant test, however, is not whether Giddings' sexual assault was within the ordinary course of business of the employer, ... but whether the service itself in which the tortious act was done was within the ordinary course of such business.... . Stated differently, the test is whether the employee was acting in the ordinary course of business during the time frame within which the tort was committed.[75]

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[73] *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427, 432 (Del. 1965).
[74] *Doe v. State*, 2013 WL 5006496, *1 (Del. Sept. 12, 2013) (citations and internal punctuation omitted) (emphasis added) (Exhibit E).
[75] *Id.* at * 2 (internal punctuation omitted).

Here, McAlinden, as both the Diocese's director of youth services and later as the pastor of the Church took Plaintiff to Delaware where he sexually abused him. As the director of the Diocese's youth services and as pastor of the Church, it was expected that McAlinden would be involved in youth activities and would be involved in trips with the youth of the Diocese and the Church. He was clearly acting in the ordinary course of the Diocese and the Church's business, which was to take care of the children who were part of the Diocese and the Church.

As to the second factor, the Diocese and the Church, authorized or at the very least failed to stop McAlinden from taking these trips.

As to the third and fourth factors, this Court has explained that this is usually a question for the jury.

> The third factor—whether Giddings was activated in part to serve his employer—has been construed broadly as a matter for the jury to decide.[] If the act of cutting someone's throat can be considered a service to the employer paving company on the theory that the employee was controlling traffic, then a sexual assault can be considered a service to the police on the theory that part of what Giddings was doing was transporting a prisoner. Finally, to be within the scope of employment, any force used must be "not unexpectable." Several other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks.[] The record does not establish the Giddings' conduct was unforeseeable.[76]

[76] *Id.* at * 2 (citations omitted); *accord Doe v. Roman Catholic Diocese of Savannah,* Case No. 2011-CP-27—00659, pp. 10-11 (S.C.C.P. Feb. 14, 2013)(Exhibit H) ("While the Defendants contend that a ground for its motion is that the actions of Priest Brown were personal and not those as its agent, that ground is not appropriate at the motion stage. 'If there are any facts tending to prove an agency relationship, the question is one for the jury. *Reid v. Kelly*, 274 S.C. 171, 262 S.E.2d 24 (1980)." (citing *Gamble v. Stevenson*, 405 S.E.2d 350, 352 (Ct. App. 1991)).

Similarly here, the Diocese and the Church knew of suspicions and concerns regarding McAlinden's sexual interest in boys, and also knew he was taking Plaintiff on overnight trips. In the course of this authorized activity McAlinden sexually assaulted him, something that was clearly not unforeseeable by the Diocese and the Church. Thus, the court below should have determined that Plaintiff had made a more than sufficient showing that McAlinden was acting within the scope of employment when he sexually abused Plaintiff and as such the abuse should be attributed to the Diocese and the Church.

b. Ratification. Of course, even if McAlinden's abuse of Plaintiff in Delaware was not part of the scope of his job duties originally, the Diocese and the Church ratified and adopted the abuse by their acquiescence and failure to repudiate. Ratification has long been recognized under Delaware law:

> The effect of a subsequent ratification is that it relates back and gives validity to the unauthorized act or contract, as of the date when it was made and affirms it in all respects as though it had been originally authorized. The act is legalized from its inception. Accordingly when the ratification occurs there is no further necessity of showing previous authority. The principle is tersely explained in the proposition that a ratification is equivalent to an original authorization.[77]

[77] *Hannigan v. Italo Petroleum Corp. of Am.*, 47 A.2d 169, 173 (Del. 1945) (internal citations and punctuation omitted).

The Delaware Chancery Court has said,

> Ratification may be express or implied, and intent may be inferred from the failure to repudiate an unauthorized act, from inaction, or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act. The "affirmance" required to create ratification of an unauthorized signature on a negotiable instrument may arise by the retention of benefits with knowledge of the unauthorized acts, or such affirmance may arise from conduct which can be rationally explained only if there were an election to treat a supposedly unauthorized act as in fact authorized.[78]

The Chancery Court has also said,

> [W]here the conduct of a complainant, subsequent to the transaction objected to, is such as reasonably to warrant the conclusion that he has accepted or adopted it, his ratification is implied through his acquiescence.[79]

[78] *Dannley v. Murray*, 1980 WL 268061, *4 (Del. Ch. July 3, 1980) (citations omitted) (Exhibit F).

[79] *Nevins v. Bryan*, 885 A.2d 233, 254 (Del. Ch. 2005) (internal punctuation and citations omitted); see also Restatement (Second) of Agency § 94, cmt. a (1958) ("Silence under such circumstances that, according to ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent can be inferred.").

c. The Complaint Adequately Makes the Required

Preliminary Showing. As set forth in the facts above, the *Naples* Complaint more than adequately alleges agency jurisdiction over the Diocese and the Church:

- In 1985, the Diocese received two reports from Plaintiff's father that he was suspicious of McAlinden's close relationship with his son and suspected that the relationship was sexual and inappropriate;[80] (A19)

- From 1985 through 1988, Rev. Thomas Triggs, Associate Director of Youth Ministry Services, witnessed Plaintiff's frequent overnight stays at McAlinden's residence at the Jeremiah House, while McAlinden was the Diocese's Director of Youth Ministry Services;[81] (A19)

- McAlinden was an employee and agent of the Diocese during this time period of the abuse;[82] (A19)

- Despite knowledge of concerns about McAlinden, the Diocese allowed McAlinden to take Plaintiff to Delaware where he repeatedly molested Plaintiff.[83] (A22)

- In 1988 a report concerning McAlinden's sexual abuse of another child was made to agents or employees of the Diocese, resulting in McAlinden's transfer from Director of Youth Ministry to the Church[84] (A24)

- Defendants ratified McAlinden's abuse, bringing it within the scope of his job duties, by failing to take any remedial actions whatsoever to stop it, warn parents, report it to authorities or protect children, including plaintiff. [85] (A27)

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[80] Compl. ¶ 25
[81] *Id.* at ¶ 26.
[82] *Id.* at ¶ 24.
[83] *Id.* at¶56-59.
[84] *Id.* at ¶78.
[85] *Id.* at ¶ 93.

- Associate priests and assistant pastors employed by the Church were aware that Plaintiff frequently stayed overnight with McAlinden in his room at the Church Rectory.[86] (A 19)

- A housekeeper employed by the Church witnessed McAlinden abuse the Plaintiff at the Church.[87] (A22)

- After he was transferred to the Church, McAlinden continued to have Plaintiff spend the night with him. Other associate priests and assistant pastors were aware of this.[88] Despite such knowledge, the Diocese and the Church allowed McAlinden to take Plaintiff back to Delaware where he was again molested McAlinden.[89] (A22)

Accordingly, it is clear that Plaintiff has presented facts which more than suggest that the Diocese and the Church "had dominion and control of... [McAlinden] and/or plaintiff that can provide evidence of the standard principle and agent relationship [between the Diocese and/or the Church and McAlinden].[90]" As a result Plaintiff has met his burden of establishing personal jurisdiction under the agency theory.

d. The Erroneous Ruling Below. The trial court held that:

> Naples fails to assert facts that demonstrate the Diocese and St. Theresa's knew of directed, or authorized the travel to and/or through Delaware. Furthermore, Naples fails to allege any facts that the Diocese and St. Theresa's knew of, directed, or authorized the tortious conduct that allegedly was committed in Delaware.[91] (Exhibit A).

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[86] *Id.* at ¶ 31.
[87] *Id.* at ¶ 62.
[88] *Id.* at 61.
[89] ¶58-59.
[90] *Boone,* 724 A.2d at 1156, FN 3 (Del. Super. 1997*) aff'd*, 707 A.2d 765 (Del. 1998).
[91] Judge Scott's order, p.9-10.

However, since Plaintiff did assert that the Diocese and the Church knew of or should have known of the child abuse being perpetrated by McAlinden and knew of or should have known of, permitted, and authorized McAlinden to take Plaintiff to Delaware, it is clear from the Complaint that the Diocese and Church knew of or should have known that McAlinden was abusing Naples in Delaware, yet continued to allow him to take Naples and other children on overnight trips. As this Court has specifically held in the personal jurisdiction context:

> It is a basic principle of law, indeed a matter of common sense, that a defendant has "reason to know" when he or she possesses information from which a person of reasonable intelligence *or of the superior intelligence of the actor* would infer that the fact in question exists, or that such person would govern his or her conduct upon the assumption that such fact exists.[92]

Here, common sense dictates that the Diocese and the Church's knowledge that McAlinden was abusing children generally renders it reasonably foreseeable that Plaintiff would be sexually abused when McAlinden took him on solo overnight trips to Delaware - trips which the Diocese and the Church authorized.

2. Conspiracy Jurisdiction.

a. The Law. This Court has held that a Delaware court can obtain jurisdiction nonresident as a result of a conspiracy,

[92] *Hercules,* 611 A.2d at 484.

> If the plaintiff can make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy."[93]

The Court went on to conclude that "such participation is a substantial contact" and as a result a Delaware court can assert jurisdiction over such a defendant.[94]

In *Computer People, Inc. v. Best Int'l Group, Inc.*, the Chancery Court stated,

> The conspiracy theory of jurisdiction is not, strictly speaking, an independent jurisdictional basis, but rather, is a shorthand reference to an analytical framework where a defendant's conduct that either occurred or had a substantial effect in Delaware is attributed to a defendant who would not otherwise be amenable to jurisdiction in Delaware.[95]

Specific to the childhood sexual abuse context, the Delaware Superior Court has allowed jurisdictional discovery based on conspiracy count. See, Toe No. 2 v. Blessed Hope Baptist Church, Inc., of Harford County, C.A. No. 09C-12-033, Witham, J. (Del. Super. June 30, 2010) at 11-12 (Exhibit C).

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[93] *Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc.*, 449 A.2d 210, 225 (Del. 1982).
[94] *Id.*
[95] 1999 WL 288119, *5 (Del. Ch. Apr. 27, 1999) (footnote omitted) (Exhibit G); *accord Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 976 (Del. Ch. 2000).

b. The Complaint Adequately Makes the Required

Preliminary Showing. As set forth in the facts above, the Complaint more than adequately alleges conspiracy theory jurisdiction over the Diocese and the Church.

(i) – (ii). Existence of and Defendants' Membership in the Conspiracy. These first two factors are established by:

- The institutional defendants' knowledge that McAlinden was abusing Plaintiff, including that the Diocese conspired with the Church to keep McAlinden's abuse of children a secret.

(iii). A Substantial Act or Effect in Furtherance of the Conspiracy Occurred in Delaware. This factor is established by McAlinden's sexual abuse of Plaintiff in Delaware, which furthers the conspiracies by: (1) allowing McAlinden to continue to sexually abuse young children; and (2) and the Diocese and the Church's decision not to exercise proper care to keep Plaintiff and other children safe from McAlinden.[96] (A25-27)

(iv). Diocese and Church Knew or Had Reason to Know of the Abuse in Delaware. This factor is established by institutional defendants' knowledge that Plaintiff was abusing children generally (Facts at C.1) and also by their knowledge that he was taking Plaintiff on overnight trips. (Facts at C.2).

[96] *See generally*, Plaintiff's Reckless and Gross Breach Duty Section of Brief, ¶¶ 87-99.

(v). The Act in Delaware was a Direct and Foreseeable Result of the Conduct in Furtherance of the Conspiracy. The fifth factor is established by the fact that the sexual abuse of a child is a direct and reasonably foreseeable consequence of allowing a known child abuser to take that a child alone on an overnight trip with the abuser. If the child abuser is abusing children on Church property, then surely he will abuse them when he gets them away on an overnight trip alone. That is just common sense.[97]

(vi). Plaintiff Has Met His Burden. Accordingly, it is clear that Plaintiff has presented a "prima facie showing based on the pleadings and/or affidavits that jurisdiction is conferred by the Delaware long-arm statute."[98]

E. Due Process is Not Violated. Due process requires that a defendant has "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign."[99] Furthermore, "it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[100] This "gives a degree of predictability to the legal

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[97] *See Hercules*, 611 A.2d at 484 ("It is a basic principle of law, indeed a matter of common sense, that a defendant has 'reason to know' when he or she possesses information from which a person of reasonable intelligence *or of the superior intelligence of the actor* would infer that the fact in question exists, or that such person would govern his or her conduct upon the assumption that such fact exists.").

[98] *Crisafi*, 533 A.2d at 1244 (citations omitted).

[99] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal punctuation and citations omitted).

[100] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[101] The Court Below held that:

> Plaintiff has failed to assert facts supporting a finding that Defendants purposefully availed itself of the protections of the forum state's or if it could reasonably anticipate being haled into court in the forum state.[102] (Exhibit A)

However, that ruling was erroneous. It is evident that due process would not be violated by finding personal jurisdiction over the institutional defendants because the factual record establishes that the Diocese and the Church had fair warning that their actions would subject them to Delaware law. The Diocese and the Church allowed and/or failed to stop their employee McAlinden, about whom they had received reports he was abusing children, to take a young boy alone on overnight trips. In so doing, the Diocese and Church had fair warning that they could be subject to Delaware law and could reasonably anticipate being held accountable here for their failure to protect Plaintiff and other children from sexual abuse herein Delaware.

> Additionally, this Court has held that
>
> a defendant who has so voluntarily participated in a conspiracy [as to be subject to personal jurisdiction in Delaware on the basis of conspiracy jurisdiction] with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting

[101] *Id.*
[102] Exhibit A.

activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.[103]

Therefore, whether the Diocese and Church are subject to Delaware jurisdiction via 10 *Del. C.* § 3104(c)(3) or the conspiracy theory of jurisdiction, or both, due process is not violated.

CONCLUSION

For the aforementioned reasons, plaintiff has made the necessary showing to allow him to conduct jurisdictional discovery. Additionally, under the facts alleged in the Complaint, Delaware has personal jurisdiction over the Diocese and the Church. Therefore, Plaintiff asks that this Court reverse the Superior Court's ruling and allow this case to proceed with discovery.

Respectfully submitted,

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[103] *Istituto Bancario Italiano SpA,* 449 A.2d at 225 (Del. 1982).