IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL LOSTEN,	:	
	:	
Plaintiff Below,	:	
Appellant,	:	
	:	
v.	:	**No. 360, 2013**
	:	
THE ORDER OF THE SISTERS OF	:	
ST. BASIL THE GREAT, *et al.*,	:	**On Appeal from the Superior**
	:	**Court of the State of Delaware,**
Defendants Below,	:	**in and for New Castle County,**
Appellees.	:	**C. A. No. 09C-06-237-CLS**
	:	

APPELLANT'S REPLY BRIEF

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Dated: December 2, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. This Court Has Personal Jurisdiction Over The Sisters Because The Complaint Alleges That They Allowed Falcone To Take Plaintiff On Overnight Trips To Delaware Despite Their Actual Knowledge That He Was Sexually Abusing Children 1

A. The Basis for "Agency-based" Jurisdiction is that Falcone was Acting as an Agent of the Sisters When He Sexually Abused Plaintiff in Delaware 1

B. Plaintiff Sufficiently Alleged Agency Between Sisters and Falcone in his Complaint 2

C. Sisters Authorized and Ratified Falcone's Trips to Delaware with Children, Including Plaintiff, and this is all that is Needed to Show that They Were Within the Scope of His Employment 2,3

D. Because Plaintiff Has Alleged Falcone's Sexual Abuse of Him was Expectable by Sisters, the Criminal Sexual Assaults Can Fall Within the Scope of Agency/Employment 3

E. It is Settled Law that Only Acts of the Perpetrator that are Expectable Can be Imputed to the Principal 7

F. Plaintiff Has Made the Required Preliminary Showing of Conspiracy Jurisdiction 13

G. Exercise of Personal Jurisdiction Comports with Due Process 14

II. Discovery Should Have Been Permitted Because Plaintiff's AllegationsWere Not Frivolous 15

CONCLUSION 18

ATTACHMENTS

UNPUBLISHED OPINIONS

Dassen v. Boland,
2011 WL 1225579 (Del. Super. Mar. 23, 2011) — Exhibit A

Naples v. Diocese of Trenton,
2010 WL 1731827 (Del. Super. Apr. 29, 2010) — Exhibit B

Screpesi v. Draper-King Cole, Inc.,
1996 WL 769344, (Del. Super. Dec. 27, 1996) — Exhibit C

Tell v. Roman Catholic Bishops of Diocese of Allentown,
2010 WL 1691199 (Del. Super. Apr. 26, 2010) — Exhibit D

Simms v. Christina School Dist.,
2004 WL 344015 (Del. Super. Jan. 30, 2004) — Exhibit E

TABLE OF AUTHORITIES

	Page
Federal Cases	
Elliott v. The Marist Bros. of the Sch., Inc., 675 F. Supp. 2d 454 (D. Del. 2009)	9,10
Graham v. McGrath, 363 F. Supp. 2d 1030 (S.D. Ill. 2005)	12
Pecoraro v. Sky Ranch for Boys, Inc., 340 F. 3d 558 (8th Cir. 2003)	12
Thompson v. Roman Catholic Archbishop of Washington, 735 F.Supp.2d 121 (D.Del.2010)	7,8,9,10
Tichenor v. Archdiocese of New Orleans, 32 F.2d 953 (5th Cir. 1994)	12
Jane Voe # 2 v. Archdiocese of Milwaukee, 700 F. Supp. 2d 653 (D. Del. 2010)	8
State Cases	
Archdiocese of Milwaukee v. Superior Court, 112 Cal. App. 4th 423 (Cal. App. 2003)	13
Dassen v. Boland, 2011 WL 1225579 (Del. Super. Mar. 23, 2011).	7,8,14
Doe v. Diocese of Tulsa, No. 08-L-10273 (Ill. Cir. Ct. July 1, 2009)	12
Doe v. Roman Catholic Diocese of Boise, Inc., 918 P.2d 17 (N.M. Ct. App. Oct. 24, 2012)	12
Doe v. State, 76 A.3d 774 (Del. 2013)	2,3,7,11,12
Does v. CompCare, Inc., 763 P.2d 1237 (Wash. App. 1988)	13
Draper v. Olivere Paving & Constr. Co., 181 A.2d 565 (Del. 1962)	4, 5
Fields v. Synthetic Ropes, Inc., 215 A.2d 427 (Del. 1965)	1
Hart Holding Co. v. Drexel Burnham Lambert Inc., 593 A.2d 535, 539 (Del. Ch. 1991)	16

Naples v. Diocese of Trenton,
2010 WL 1731827 (Del. Super. Apr. 29, 2010) 10,11
Screpesi v. Draper King Cole, Inc.,
1996 WL 769344 (Del. Super. Dec. 27, 1996) 5
Simms v. Christina School Dist.,
2004 WL 344015 (Del. Super. Jan. 30, 2004) 5,6
Tell v. Roman Catholic Bishops of Diocese of Allentown,
2010 WL 1691199 (Del. Super. Apr. 26, 2010) 11
Toe No.2 v. Blessed Hope Baptist Church, Inc.,
2012 WL 1413552 (Del. Super. Jan. 31, 2012) 14

State Court Orders

Foe # 1 v. Oblates, et al.,
C.A. 09C-06-305 (Del. Super. October 20, 2009) 18, 19

Hecksher v. Fairwinds,
C.A. No.09C-06-236 (Del. Super. October 13, 2009) 7

Losten v. The Order of the Sisters of St. Basil the Great, et al,
C.A. Case: 09C-06-237 (Del. Super. October 20, 2009) 18

Secondary Sources

Restatement (Second) of Agency § 228 4, 5

ARGUMENT

I. THIS COURT HAS PERSONAL JURISDICTION OVER THE SISTERS BECAUSE THE COMPLAINT ALLEGES THAT THEY ALLOWED FALCONE TO TAKE PLAINTIFF ON OVERNIGHT TRIPS TO DELAWARE DESPITE THEIR ACTUAL KNOWLEDGE THAT HE WAS SEXUALLY ABUSING CHILDREN.

A. The Basis for "Agency-based" Jurisdiction is that Falcone was Acting as an Agent of the Sisters When He Sexually Abused Plaintiff in Delaware.

Because Falone was acting as an agent of the Sisters when he committed the criminal acts of sexual abuse of plaintiff, the law treats his actions as those of the Sisters. This is basic agency law. Fields v. Synthetic Ropes, Inc., 215 A.2d 427, 432 (Del. 1965). The Sisters authorized the acts to occur because they knew that Falcone sexually abused children and did not stop Falcone from taking children, including plaintiff, on overnight trips to Delaware. **The mission of the Sisters may have been to protect and care for the children of the orphanage. (Appellees' Answering Brief ("AB"), p. 12). That is precisely why the acts of Falcone were committed within the scope of the Sisters' business.** As this Court recently stated:

> The relevant test, however, is not whether [the agent's] 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.

Doe v. State, 76 A.3d 774, 777 (Del. 2013). Here, Falcone, who resided at the

Orphanage (see Facts in Appellant's Opening Brief ("OB") at C.3), and was a child abuser (see Facts in OB at C.1), was taking Plaintiff, a resident orphan in the care of the Sisters, from the Orphanage to Delaware on authorized overnight trips alone. He was clearly acting in the ordinary course of the Sisters' business, which was to take care of the children who resided at the Orphanage, during the time when the tortious conduct – the sexual assaults - occurred in Delaware. Id.

B. Plaintiff Sufficiently Alleged Agency Between Sisters and Falcone in his Complaint. Plaintiff alleged that Falcone was a live-in caretaker of the Orphanage. "Falcon[e] was at all times a caretaker employed [by] the institutional defendants which were responsible for employing and supervising him." (Compl. ¶ 30, A22). Falcone resided at the Orphanage. (Compl. ¶¶ 19, 21,A21). Whether his duties initially consisted of caring for the children is irrelevant because the Complaint alleges (and discovery later confirmed) that the Sisters delegated to him the responsibility of "taking care" of the children, including plaintiff, alone on overnight trips to Delaware. The Sisters continued to employ him and to delegate their role of caretaking for the children to him during the eight years plaintiff resided at the orphanage, even when they knew Falcone was a child abuser. This is ratification and brings his activities of taking the children on trips to Delaware and abusing them within the scope of his employment. See OB at page 22-24.

C. Sisters Authorized and Ratified Falcone's Trips to Delaware with

Children, Including Plaintiff, and this is all that is Needed to Show that They Were Within the Scope of His Employment. Because Sisters allowed, or authorized, and gave permission for Falcone to repeatedly take the children in their care to Delaware alone, despite knowledge that he was a child abuser, these acts within the scope of his employment. Sisters were delegating the responsibility of watching the Orphanage children to Falcone when he took charge of them for overnight trips, and this was within the scope of their business. Had they refused permission, he would not have had the ability to take plaintiff on overnight trips to Delaware, and thus could not have abused plaintiff there. Approval, authorization, and ratification are all that are needed to make acts initially outside the scope of employment within that scope. "Direction" is not necessary from principal to agent to establish an agency relationship. Certainly, control over the agent's action and authorization of actions that the tortuous act is committed during is required to establish an agency relationship, but nothing more. See Doe, 76 A.3d at 776-77.

D. Because Plaintiff Has Alleged Falcone's Sexual Abuse of Him was Expectable by Sisters, the Criminal Sexual Assaults Can Fall Within the Scope of Agency/Employment.

Sisters claim that Falcone's criminal sexual abuse of plaintiff in Delaware cannot as a matter of law be within the scope of agency/employment. For this proposition, Appellees cite Simms v. Christina School Dist., a case which involved

the continuous sexual abuse of a boy by his residential advisor at school.[1] In that case, the Superior Court determined, after defendants filed a motion for summary judgment, at the close of discovery, that there was no evidence that defendant district's employees had witnessed any inappropriate or sexually suggestive conduct by the residential advisor prior to the last incident of sexual abuse, when an walked in on him and his victim and suspected something was going on, although did not actually see any sexual activity at that time.[2] She then reported her to the Director, who immediately launched an investigation, placed the residential advisor on administrative leave and called the police.[3] The court then explained that whether acts were within the scope of employment is usually a question for the trier of fact, and noted that in Draper v. Olivere Paving & Constr. Co., 181 A.2d 565, (Del. 1962), this Court had approved the Restatement (Second) of Agency § 228, which provides:

> (1) Conduct of a servant is within the scope of employment if, but only if, (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master; and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated

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[1] 2004 WL 344015, *1-2 (Del. Super. Jan. 30, 2004).

[2] *Id.* at *3.

[3] *Id.*

by a purpose to serve the master.

Simms, 2004 WL 344015, *5 (citing Restatement (Second) of Agency § 228 (1958)). The court cited, id., the list of factors to be considered in determining if an unauthorized act is within the scope of employment:

> whether or not the act is one commonly done by such servants; the time, place and purpose of the act; whether or not the act is outside the enterprise of the master; whether or not the master has reason to expect that such an act will be done; the similarity in quality of the act done to the act authorized; the extent of departure from the normal method of accomplishing an authorized result; and whether or not the act is seriously criminal.

The court considered this Court's decision in Draper, which involved a company employee's assault of a driver, where the employee's performance of his duties immediately preceded and led to his foreseeable intentional tortuous act.[4] Draper left to the jury the determination of whether the intentional tortuous act of employee was in furtherance of and motivated in part by a desire to serve his interests or was wholly independent of the performance of his employment duties.[5] The court also discussed Screpesi v. Draper-King Cole, Inc., where in the context of determining whether a truck driver's assault of a motorist was within the scope of employment duties, the court reasoned that "it is foreseeable that a truck driver may assault another driver as a result of a dispute arising out of work-related driving and

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[4] Simms, 2004 WL 344015, at *5-6 (citing Draper, 181 A.2d at 571).

[5] Draper, 181 A.2d at 572-73.

that a jury could find that there was 'no break in the driving and the assault.'"[6]

In Simms, the court held that the residential advisor's sexual assault of the young boy was not within the scope of his duties as a teacher because, when the teacher was abusing the young boy, "no employment related activity was even remotely taking place."[7] The court went on to explain that in its view the teacher's sexual abuse of the plaintiff was not "actuated, at all, by a purpose to serve his employer, or that his misconduct was, in any way, *expectable* by his employer."[8] This was in the context of a motion for summary judgment, after the close of discovery.[9] The case does not stand for the proposition that an employer can never be vicariously liable for sexual abuse by its employee, only that it could not under facts in that case.[10] This Court recently made it clear that an employer can be vicariously liable for sexual abuse by its employee. Doe, 76 A.3d at 774, 775.

Plaintiff has pled with specificity facts supporting his claims of assault and battery and vicarious liability or respondeat superior, particularly, that the conduct Falcone was *expectable* by his employer, Sisters, because they had knowledge of

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[6] Simms, 2004 WL 344015 at *6 (citing Screpesi v. Draper-King Cole, Inc., 1996 WL 769344, *4 (Del. Super. Dec. 27, 1996)).

[7] Simms, 2004 WL 344015, at * 7.

[8] Id. (emphasis added).

[9] Id. at * 1.

[10] Id. at * 7.

prior sexual misconduct by him.[11] In Hecksher v. Fairwinds, the Superior Court acknowledged that if sexual abuse was expected it would fall within the scope of employment/agency. (Hecksher v. Fairwinds, C.A. No.09C-06-236 FSS (Del. Super. October 13, 2009, Transcript on Motion to Dismiss, p.22-23)) (AR 22-23).

E. It is Settled Law that Only Acts of the Perpetrator that are Expectable Can be Imputed to the Principal. The cases Appellees cite for the proposition that it is "settled law" that sexual assault cannot serve as the basis of jurisdiction are either distinguishable or were incorrectly decided in view of this Court's precedent.

In Dassen v. Boland, the court explained that the "Plaintiffs here have made allegation that the Diocese knew that [the perpetrator/employee] was taking [plaintiff], or any other youngster, on any trips, much less to the State of Delaware." Dassen v. Boland, 2011 WL 1225579, * 3 (Del. Super. Mar. 23, 2011); see Id. at (explaining there was no evidence Diocese knew perpetrator/agent was taking any children on trips to Delaware or that the Diocese directed ***or authorized*** such trips) (emphasis added).[12] This distinguishes Dassen from the present case, where

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[11] Compl. ¶¶ 1, 5-9, 13, 16, 23-29, 35-39, 51, 52.

[12] The Court distinguished that case with Thompson v. Roman Catholic Archbishop of Washington, a case where the District of Delaware had allowed jurisdictional discovery, as follows:

alleged that Sisters authorized, permitted, and were aware of Falcone's trips to Delaware with the children in their care, and plaintiff in particular, making it fit squarely within the facts plead which led the District of Delaware to permit jurisdictional discovery in Thompson. Further, Dassen, citing the trial court's below, held that "Only the actions of the agent that are **directed, authorized or known** by a principal may serve as a basis to assert jurisdiction over the principal." Id. at *6 (emphasis added). Here it is clear plaintiff alleged that Sisters authorized and knew of the abuse of children and the trips to Delaware.

The District of Delaware has decided this issue inconsistently in two cases based upon pleadings that were identical in all material respects. In Elliott v. The Marist Bros. of the Sch., Inc. the court held:

Aside from plaintiff's conclusory statements in this regard, there are no facts

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For example, in *Thompson v. Roman Catholic Archbishop of Washington,* Judge Robinson permitted the plaintiffs to conduct limited jurisdictional discovery where the plaintiffs had averred that the defendant knew or should have known (a) of the molestation of the children by the named priest **and** (b) that the named priest was taking children on trips to Delaware

Dassen v. Boland, 2011 WL 1225579, *3 (Del. Super. Mar. 23, 2011) (citing Thompson, 735 F.Supp.2d 121, 129 (D.Del.2010)). Similarly, in Jane Voe # 2 v. Archdiocese of Milwaukee, the District of Delaware held that the Defendants could not be subject to agency-based personal jurisdiction because "there are no facts asserted which demonstrate that the moving defendants knew of, directed or authorized the tortious conduct that allegedly was committed by [the employee/agent]" and "plaintiff asserts no facts suggesting that moving defendants purposefully directed activities toward Delaware or otherwise engaged in conduct such that they would reasonably have anticipated being haled into court in Delaware. Therefore, the exercise of personal jurisdiction over moving defendants would not comport with due process." Jane Voe # 2 v. Archdiocese of Milwaukee, 700 F. Supp. 2d 653, 659 (D. Del. 2010). Again, Losten has asserted the requisite facts here and therefore this case is distinguishable.

> asserted which demonstrate that the moving defendants knew of, directed or authorized the travel to and/or through Delaware, let alone the tortious that allegedly was committed by Galligan in Delaware.[] Finally, plaintiff asserts no facts suggesting that moving defendants purposefully directed activities toward Delaware or otherwise engaged in conduct such that they would reasonably have anticipated being haled into court in Delaware. Therefore, the exercise of personal jurisdiction over moving defendants not comport with due process.

Elliott v. The Marist Bros. of the Sch., Inc., 675 F. Supp. 2d 454, 459 (D. Del. 2009).[13] Yet in Elliott the plaintiff had averred in his complaint that the defendants were aware that the perpetrator/agent, Galligan was taking plaintiff to Delaware (Compl. ¶ 34, AR 42) and that they authorized those trips, and that taking children on trips was part of Galligan's job duties. (Compl. ¶¶ 34,37,39,57, AR 42-42-43, 45). Elliott alleged that the institutional defendants had longstanding prior knowledge that Galligan was sexually abusing children generally (Compl. ¶¶ 1,97, AR 37, 51) and plaintiff specifically. (Compl. ¶¶ 14,44,43, AR 39, 43).

In Thompson, *the same Court reached the opposite conclusion based on the same material alleged facts.* Thompson was molested in Delaware on three occasions by a priest who was employed at the high school, which was run by the Archdiocese of Washington, D.C.[14] 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

[13] This case is currently on appeal.
[14] 735 F. Supp. 2d at 125-26.

> trips to Delaware, plaintiffs have satisfied the minimal pleading requirements to conduct limited jurisdictional discovery as to defendant the Archbishop of Washington.[15]

Yet in Elliott, where plaintiff had made the exact same averments as Thompson regarding the Defendants' knowledge of the perpetrator/agent's abuse of children and taking children on trips to Delaware, the Court denied jurisdictional discovery. These are clearly inconsistent decisions, and plaintiff submits that the Thompson decision was the correct one, and analogous in all material aspects to the facts alleged in the present case.

In Naples, plaintiff requested jurisdictional discovery when Defendants filed their motion to dismiss based on lack of personal jurisdiction (D.I. 23 in Naples, AR 57-59), which the Court denied. (D.I. 29 in Naples, AR 60).16 Thus analyzing the case solely on the pleadings the Court held:

> 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**. Therefore, this Court finds that the long-arm statute does not reach defendants.

Naples v. Diocese of Trenton, 2010 WL 1731827, * 4 (Del. Super. Apr. 29, 2010). The The Court further held that "There is no indication that Defendants could have

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[15] Id. at 129.

[16] Denial of jurisdictional discovery in that case was clearly erroneous as the plaintiff's jurisdictional allegations were not clearly frivolous, and this is the subject of another pending

reasonably anticipated being haled into court in Delaware or that suit in Delaware would be fair and reasonable." Id. Here, Losten asserted that Sisters knew of and authorized the travel to Delaware and the tortuous conduct that occurred there. Thus Naples is distinguishable.

Tell was incorrectly decided in light of this Court's holding in Doe v. State. Tell Tell held that as a matter of law sexual abuse can never be within the scope of agency. Tell v. Roman Catholic Bishops of Diocese of Allentown, 2010 WL 1691199, *11-12 *11-12 (Del. Super. Apr. 26, 2010).[17] This is contrary to this Court's holding in Doe, where the Court held that where expectable and where done in the context of carrying out the employer's ordinary business, sexual assaults could be within the scope of employment. Doe, 76 A.3d at 777. Clearly, Delaware law permits exercise of personal jurisdiction over a Defendant on the basis of the crimes committed by its

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appeal before this Court.

[17] Sisters note that in this case, unlike Tell, employment of Falcone by Sisters is in dispute. However, plaintiff clearly alleged that Falcone was Sisters' employee in the Complaint. (Compl.¶¶ 4,8,10, A19-20; Compl. ¶ 30, A22). Judge Scott in the underlying opinion indicted he was accepting all allegations as true. D.I.65 - Opinion and Order, Exhibit A to Appellant's opening brief on appeal, p. 7. However the Court later erroneously stated that plaintiffs had not alleged that Falcone was employed by Sisters. Id. p. 11, n.37. In subsequent discovery plaintiff has clearly shown Falcone was a live-in employee of Sisters who was supervised by Sister Augustine, who was in charge of the Orphanage. (Sister Kotyk Interr. Resp. Nos. 10,23,24,27,28,41, AR 61-78 S. Bernarda Resp. to Interr. Nos. 10,17,18,21, 22,24, AR 83, 85, 86, S. Losten Aff. ¶¶6-10,13,14, AR 95, S. Popovich 20:5-12, cite, 21:5-10, AR 115; 22:23-24:14 (the Orphanage boys went on trips with Falcone), AR 117-119, M. Losten 30,31, 56:12-16, 98:13-17, 99:17-23, 119:13-120:12, AR 193, 199, 212, 213, 218, 220, 127:15-128:7, Plaintiffs Resp. to Interr. Nos. 28,31-32, AR 235-236). Thus it is plaintiff's position that Falcone's employment by the Sisters cannot reasonably be disputed.

employees when they are expectable.[18] If the crimes were expectable, the employer should have taken some action to stop them from occurring, and if it did not, it is only fair that the employer be held responsible.

In out-of state cases cited by Appellees, the Court's reasoning in permitting exercise of personal jurisdiction over the Defendants is applicable here. The California Court of Appeal found "Having sent [the perpetrator] into California knowing he was a convicted child abuser and a pedophile, the Milwaukee Archdiocese reasonably could expect to be haled into court in California to answer for the consequences of its actions." Archdiocese of Milwaukee v. Superior Court, 112 Cal. App. 4th 423, 438 (Cal. App. 2003). Similarly here, having regularly

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[18] Defendant also cites out of state cases which can be distinguished from the present case. (Appellees' AB at p. 19-20). For example, in Pecoraro v. Sky Ranch for Boys, Inc. there does not appear to be an allegation that the perpetrator was employed by the Diocese nor that the Diocese had reason to expect that he would abuse plaintiff. Pecoraro v. Sky Ranch for Boys, Inc., 340 F.3d 558 (8th Cir. 2003). Tichenor v. Archdiocese of New Orleans, 32 F.3d 953 (5th Cir. 1994) was decided on summary judgment presumably after discovery had been taken. Id. at 957-58. The Court concluded that the priest was on vacation when the sexual abuse took place, Id. at 959, that the sexual abuse was wholly unrelated to his employment, Id. at 960, and that there was no evidence that the moving defendants knew or should have known of the priest's abuse of boys. Id. at 960-61. In Graham v. McGrath, 363 F. Supp. 2d 1030,1034 (S.D. Ill. 2005), "[t]here [was] nothing in the record before the Court to find that McGrath had the express or implied authority to commit the alleged acts of sexual misconduct against Graham." In Doe v. Diocese of Tulsa, No. 08-L-10273, Slip op. p.22 (Ill. Cir. Ct. July 1, 2009 (Ex B. to Appellees' AB), the Court, after discovery, found that "there is no evidence to support the plaintiffs' allegations that the Diocese and its agents knew that the perpetrator was going to Chicago [the site of the abuse] in 2001" and had gone on vacation and thus, the perpetrator's sexual abuse did not create a basis for long-arm jurisdiction in Illinois over the Diocese or Bishop. Finally, in Doe v. Roman Catholic Diocese of Boise, Inc., 918 P.2d 17, 23, the Court determined that the perpetrator priest who had committed the sexual assault in another state was not an agent or employee of the moving Defendant as he had left employment with them for another Diocese.

permitted and authorized Falcone to take boys into Delaware on overnight trips knowing he was a child abuser, the Sisters reasonably could expect to be haled into court in Delaware to answer for the consequences of its actions. In Does v. CompCare, Inc., it was the perpetrator who requested authorization from his employer, the Diocese, to spend time in Washington. 763 P.2d 1237, 1239 (Wash. App. 1988). It was the Diocese's authorization and approval, not direction, of the perpetrator's stay in Washington which made the exercise of jurisdiction Id. at 1239-44.

F. Plaintiff Has Made the Required Preliminary Showing of Conspiracy Jurisdiction.

Plaintiff avers that for the reasons explained in his opening brief, he made a prima facie showing that jurisdiction was proper. It is true "conspiracy was not raised in plaintiff's brief below, but was fairly presented to the trial court during oral argument on the motion to dismiss below. Thus, the Court should have least permitted discovery on the issue, as the Court did in Toe #2 v. Blessed Hope Baptist Church, Inc., et al., C.A. No. 09C-12-033, Witham, J. (Del. Super. June 30, 2010) at 11-12 (Exhibit K to plaintiff's OB).[19]

[19] The Superior Court eventually determined, after discovery was taken, that the evidence did not support exercising jurisdiction based on conspiracy. Toe No.2 v. Blessed Hope Baptist Church, Inc. of Harford Cnty., 2012 WL 1413552, * 4 (Del. Super. Jan. 31, 2012). Dassen was not identical to this case. In Dassen, the Court allowed some limited discovery, refused additional discovery that plaintiff requested, because plaintiff in that case, unlike plaintiff in this case "made no allegation that the Diocese knew that Brown was taking Dassen, or any other

G. Exercise of Personal Jurisdiction Comports with Due Process. As plaintiff explained in his opening brief, it was the Sisters' approval (in Maryland) of Falcone's overnight trips to Delaware with orphan boys, whom the Sisters were aware Falcone was abusing, that makes it "expectable" that they should be sued in Delaware. Their conduct in allowing Falcone to take the orphans to Delaware makes it reasonable that they should be haled into Court in Delaware. The Sisters could have prevented Falcone from taking the boys to Delaware – had they done that then it might be unreasonable for them to expect to be sued for his Delaware crimes against the boys. The allegations, and the record, being that they allowed him to do so despite knowing he was a child molester, it is not unfair that Sisters be held to account for their conduct in Delaware where they facilitated and authorized his commission of these crimes.

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youngster, on any trips, much less to the State of Delaware." Dassen v. Boland, 2011 WL 1225579, *3 (Del. Super. Mar. 23, 2011). The Court determined that conspiracy personal jurisdiction over the Diocese of Savannah was not appropriate because the evidence produced reflected disagreement, not agreement, over how to handle the perpetrator and the Diocese had no reason to know of any effect in Delaware of the alleged conspiracy. Id. at *7. Again, the allegations of this case – and evidence adduced so far – support the opposite conclusions here.

II. DISCOVERY SHOULD HAVE BEEN PERMITTED BECAUSE PLAINTIFF'S ALLEGATIONS WERE NOT FRIVOLOUS.

While the trial court does have discretion as to whether to permit jurisdictional discovery, this discretion is limited. Discovery should only be denied where the allegations in the complaint would make any claim of personal jurisdiction over the defendant frivolous. Hart Holding Co. v. Drexel Burnham Lambert Inc., 593 A.2d 535, 539 (Del. Ch. 1991).

It was and is the plaintiff's position that if the trial court accepted his pleadings as true and did not consider extraneous matters, his pleadings were sufficient to overcome Sister's motion to dismiss. However, if for any reason the Court deems plaintiff's pleading inadequate to establish a prima facie case, then plaintiff requests the Court order that jurisdictional discovery be permitted and the issue decided on a fair evidentiary record.

Only after the Sisters were dismissed, plaintiff was able to take limited discovery, in connection with his case against the remaining defendants, the Archdiocese and Parish. (See OB, Statement of Facts C.1, F). As set forth in Plaintiff's OB, Statement of Facts C.1 and F, even this limited discovery which was targeted at proving the Archdiocese's and Parish's negligence, not jurisdiction, has uncovered evidence regarding the Sisters' knowledge of Falcone's child abuse and their knowledge and approval of trips to Delaware. Thus plaintiff's allegations in

complaint were not frivolous.

This discovery has also shown portions of Sister Laura Palkas's affidavit, which was attached to Sisters' Motion to Dismiss, to be inaccurate. (Thus, Appellees' contention at page 5, note 3, that plaintiff has not been able to controvert a single fact in that affidavit is not accurate). For example, as explained, supra, p. 15, fn. 17, it is clear that Falcone was a live in employee of the Sisters who did have responsibilities for caring for the orphanage children. (See S. Popovich depo. p. 18:23-19:1, AR 113-114, 22:23-24:14, AR 117-119, 25:1-26:1,AR 120-121 S. Losten Aff. ¶¶ 6-10, AR 95, M. Losten 127:15-128:7, AR 220) (Falcone regularly took the orphanage children on trips to Delaware and other places). This directly contradicts Sister Palka's affidavit testimony that "[Falcone] had no child care or recreational duties." (S. Palka Aff., ¶¶ 13,17 B010-12). Further, Sister Palka claimed the Sisters did not conduct activities or derive income from Delaware. (Palka Aff. ¶¶ 13-15). Stephan Popovich and Stephen Losten testified that the Sisters collected alms door to door in Wilmington every week. (S. Losten Aff. ¶ 12, AR 95, and S. Popovich depo. p. 18:4-20:3, AR 113-115). Thus, further discovery specific to the issue of jurisdiction over Sisters would undoubtedly uncover additional evidence supporting jurisdiction and refuting Sister Palka's affidavit.

The trial court's Order dismissed this case on the basis of lack of personal

jurisdiction without affording plaintiff a chance to do jurisdictional discovery. This is the Order from which plaintiff appeals. The trial court held a hearing on the briefing schedules for several motions based on personal jurisdiction and merits that were filed in two cases, Foe # 1 v. Oblates of Saint Francis de Sales, C.A. 09C-06-09C-06-305 and this case. (See Foe # 1 transcript, 10/20/09, and Losten transcript, 10/20/09) (Foe #1, AR 239-250, Losten AR 251-262). It was the same trial judge holding both consecutive conferences and the same defense counsel, Michael Migliore from Stradley Ronon Stevens & Young, was present, and representing all the defendants. The issues were almost identical – the hearings were with regard to briefing schedules on motions to dismiss and motions to stay discovery. During the Foe conference plaintiff requested jurisdictional discovery as to what the Foe defendants knew about the Foe perpetrator/agent's trips to Delaware. (Foe # 1 transcript, p. 8:9-12, AR 246). The Court explained that it would take all pleadings as true and that discovery was not necessary. (Id. p. 8:13-17, AR 246). The Court noted that no discovery would take place in the Losten Judicial Action Form only, it was clear that the Court had decided not to permit jurisdictional or merits in either case until resolution of the defense motions to dismiss. (JAFs in Foe # 1 Losten, AR 263-264). It was in this context that plaintiff avers that his request for jurisdictional discovery was fairly presented to the trial court. Plaintiff cited to the Court's ruling related to jurisdictional discovery in his brief below in response to

Sisters' motion to dismiss. (Plaintiff's AB to Motion to Dismiss, p. 2, AR 269) ("...this Court stated during the briefing scheduling conference in this case and Foe # 1, when it denied discovery on jurisdictional and merits issues for the purposes of these motions, 'This is a motion to dismiss. I am not going to convert this to a for summary judgment. So, based on the pleadings, I think [plaintiff] get[s] the benefit of the doubt.' (See Tab B, p.8)". Thus, discovery was completely barred after the motion to dismiss was decided, and only then was plaintiff able to conduct discovery against the remaining defendants, which did support plaintiff's in the complaint.

CONCLUSION

In a situation where an institution's employee is a known pedophile and nevertheless is permitted by his employer to take orphans, whom the employer is charged with caring for, away from the institution and to the State of Delaware, this Court should, consistent with Delaware public policy reflected in the Child Victim's Act and this Court's longstanding mandate that jurisdiction under the Long Arm Statute be conferred to the maximum extent possible, exercise personal jurisdiction over that institution.

Respectfully Submitted,

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