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Case Number 621,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KIMBERLY HECKSHER,	:	
	:	**C.A. 621,2014**
Plaintiff Below/ Appellant,	:	
	:	**On Appeal from the Superior Court of the State of Delaware in and for New Castle County, C. A. No.09C-06-236 FSS**
v.	:	
	:	
	:	
FAIRWINDS BAPTIST CHURCH, INC., a Delaware corporation; FAIRWINDS CHRISTIAN SCHOOL, a Ministry of Fairwinds Baptist Church,	:	
	:	
Defendants Below/ Appellees.	:	
	:	

APPELLANT'S OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT IN AND FOR NEW CASTLE COUNTY

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NATURE OF THE PROCEEDINGS

This is a childhood sexual abuse case under the Delaware Child Victim's Act of 2007, 10 Del.C. § 8145 (the "Act")[1] and common law. On June 24, 2009 Plaintiff/Appellant Kimberly Hecksher ("Kim") filed her complaint against Fairwinds Baptist Church and School ("Fairwinds") and Edward Sterling ("Sterling"). Discovery was severely limited by a detailed ruling of the Superior Court. (A 330-334, A 107-128). On September 15, 2011, Plaintiff filed a motion to amend the complaint to allege simple common law negligence, which was never been ruled on. (A 335-339). Fairwinds filed for summary judgment. (D.I. 121-23). Summary judgment was granted, leaving Sterling as the sole remaining defendant. (Ex. A, February 28, 2013 Opinion ("Opin.")). Plaintiff accepted Sterling's offer of judgment (D.I. 165-66, A 554) and filed her original appeal. (A 555-556). Fairwinds' motion to dismiss was granted because its rule 11 motion was still pending below. Hecksher v. Fairwinds Baptist Church, Inc., 93 A.3d 654 (Del.2014). After one day of testimony in the evidentiary hearing, Fairwinds withdrew its rule 11 motion with prejudice. (Ex. E) This is Plaintiff/Appellant's Opening Brief in support of her appeal.

[1] This is the only case under the window provision of the Act that has not yet been resolved.

SUMMARY OF ARGUMENT

1. The Superior Court erred in ruling that the School secretary's actual knowledge of her co-worker's abuse could not be imputed to her employer. The cornerstone case relied upon by the Superior Court in dismissing the case at summary judgment, Doe v. Giddings, 2012 WL 1664234 (Del. Super. May 7, 2012) (Opin, p. 10), was subsequently overruled by this Court on the precise legal grounds relied upon by the Superior Court in the present case. Doe v. State, 76 A.3d 774, 777 (Del. 2013), reargument denied (Oct. 8, 2013).

2. The Superior Court erred when it usurped the role of the jury and granted summary judgment in this matter, despite there being material facts in dispute: whether Fairwinds was or should have been aware of Sterling's sexual abuse of Kim and other students; whether Fairwinds was grossly negligent for failing to report or respond to such knowledge; and whether Fairwinds' lack of training, policies and procedures for the protection and detection of childhood sexual abuse contributed to Plaintiff's abuse.

3. The Superior Court abused its discretion in denying *sub silencio* Plaintiff's motion to amend her complaint to permit a count of negligence, when there was no prejudice to the defense.

4. The Superior Court abused its discretion in limiting Plaintiff's right to discovery of relevant evidence including the Principal's sexual abuse of a student.

STATEMENT OF FACTS

A. Rape of Plaintiff. Kim moved in with defendant Sterling, a Fairwinds employee, and his wife, secretary to the Principal of Fairwinds, Sandy Sterling ("Sandy"), when she was 12 in the Fall of 1984. (Kimberly Hecksher ("Kim") 2/22/10 Dep p.25:10-26:5, A 131; 101:12-14, A 134). Kim's mother "felt the Sterlings were a stable Christian influence." (Kim 2/22/10 Dep., p. 57:23-24, A 132, p.56-57, 61:4-8, A 131-133). Kim began attending Fairwinds Church with the Sterlings and soon thereafter the Church's school where they both worked.[2] Fairwinds was led by its founder, Pastor E.L. Britton ("E.L. Britton"), and later his son, Pastor Tim Britton ("Tim Britton").[3] Fairwinds ran "a very small school" (Sandy 2/29/12 p.50:7-8, A 398) with only between seven and 23 school employees. (Fairwinds Staff Yearbook Photos A 43-57). The School was an unincorporated ministry of Fairwinds, an independent fundamentalist Baptist church and had very strict rules governing the conduct of staff and students.[4] From about 1984 until 1993, Sterling was employed by Fairwinds as a Math, Bible, and Spanish teacher. Sterling was Kim's teacher for said subjects every year she attended Fairwinds from 9^{th}-12^{th} grade. (Kim 4/25/11 p. 94:10-95:20, A 292).

[2] Fairwinds Baptist Church, Inc. is a corporation. It runs the Fairwinds Christian School which is a division of the church. (Fairwinds' Ans. to P 1st interr.14, D.I. 22) From the fall of 1985 to 1990, grades 8-12, Kim attended the school. (Kim 2/22/10 Dep. p. 27:18-23, A 131, Sandy 6/11/12 p. 96:19-20, A 403, 115:23-118:20, A 405-406).

[3] (Sandi 9:13-10:10, A 467, DeStefano 11:12-12:9, A 440, Tim Britton 9:9-10:6, A 460).

[4] For example, Kim was disciplined at school for dancing and just for wearing her collar up. (Kim 2/22/10 p. 27:6-14, A 131).

Sterling was supervised by Principal Carlo DeStefano ("DeStefano"). (DeStefano 21:11-13, A443, 34:15-36:3, A446, E.L. Britton 23:7-15, A 423). DeStefano himself was sexually abusing a student during this time, but the Superior Court did not allow Plaintiff to pursue discovery regarding that highly relevant subject matter of the school environment and its culture of condoning sexual abuse.[5]

From the age of 13 until her 1990 graduation from Fairwinds and beyond, Kim was sexually abused and raped by Sterling between one and five times per week[6] at various locations including at the church and in the school classrooms.[7] Throughout the abuse, if Kim was struggling in a subject Sterling was teaching, he gave her "extra credit if [she] would perform sexual favors for him."[8] Sterling asserted the Fifth Amendment to all questions about his abuse of Kim, including all acts at Fairwinds, and whether he also abused Fairwinds' students Pamela Thuer, f/k/a Pam Arrowood (hereinafter "Pam"), Sherrie Phillips, Stephanie Duke, and others. (Sterling 64:2-66:19, A 411-412, 89:11-90:18, A 415, 96:20-24, A 416).[9]

[5] (O'Brien Aff., A 105-106 (filed under seal)). See (1/8/10 tr. p.33:4-37:20, A566-567, 60:11-18, A572, 8/19/11 Sched Order, p. 5, § B.3, A581).
[6] (Kim 2/22/10 p. 104:22-108:4, A 134-135, 109:24-110:12, A 136, Kim 6/16/11 p. 56:19-75:5, A 305-310, Kim 12/2/11 p. 35:20-40:2, A 369-370, Kim 12/2/11 p. 102:8-103:13, A 374; see also Ans. to Interr.'s, Interr. # 2, A 158-162).
[7] (Kim 4/25/11 p. 79:12-81:10, A 290-291, p. 95:21-104:4, A 292-294).
[8] (Kim 4/25/11 p. 93:16-95:17, A292).
[9] The Superior Court determined that a jury could draw adverse inferences against Sterling as a result. (Opin., p.2 Exhibit A).

B. Actual Knowledge of Fairwinds' Employee Sandy Sterling. During the entire time Kim was a Fairwinds' student, Sandy was employed by Fairwinds as the secretary to Principal DeStefano, who supervised her.[10] Sandy was the "nerve center of the office." (DeStefano 43:17-19, A448). During the school year, Sandy worked on a daily basis in the school office in front of DeStefano's office (Sandy 2/29/12 34:13-24, A395) and during the summers, she worked from home. Every summer the School phone was patched into her home, where she would answer the telephone for the School. (Id. p.37:18-38:4, A 396). She greeted parents when they came in, took care of the students' needs. (DeStefano 43:11-22, A448, Sandy 2/29/12 p. 38:23-40:9, A 396). If a student was breaking the rules or misbehaving, Sandy would speak to him or her. (Sandy 2/29/12 p.41:4-9, A397). Sandy would go in a classroom if the teacher had an issue for various lengths of time. (Sandy 2/29/12 p. 41:10-24, A397). If a student was sick, Sandy would assist. (Sandy 2/29/12 p. 42:1-13, A397). If a student was late to school, Sandy gave a permission slip to get into class. (Sandy 2/29/12 p. 42:14-18, A397).

Sandy became aware of Sterling's abuse of Kim the night of the Junior/Senior banquet at the School. (Kim 2/22/10 p. 151:9-152:5, A 137). Kim was not yet a junior and so she was ineligible to attend the banquet.[11] Sterling took

[10] (Kim 4/25/11 p. 70:12-21, A 289, Kim 6/16/11 18:17-19:21, A 303-304, Sandy 2/29/12 p.10:4-6, A 392, p. 34:8-12, A 395, p. 36:6-8, A 395).
[11] She presently cannot recall if it was her 8th, 9th or 10th grade year. Id. at 153:19-23, A138.

Kim to the banquet as **his date** and she sat with Sterling and the other faculty and their dates.[12] All Fairwinds' teachers had to attend the banquet.[13] Principal DeStefano and Pastor E.L. Britton attended. (Sandi 54:17-24, A 472). When Kim and Sterling arrived home Sandy met them at the door, waiving a letter in her hand which she had found. (Kim 2/22/10 p. 157:7-158:21, A 139). In that letter Kim had written to Sterling "asking him to stop molesting [her] and that [she] wasn't a toy doll for him to play with," which she had buried in her drawer. [14]

When Kim was 15 or 16 she saw Sandy standing at the doorway to her bedroom while Sterling was orally raping her. (Kim 2/22/10 p. 158:22-160:6, A 139). Sandy also witnessed abuse at the School. (Kim 4/25/11 p. 65:5-67:20, A 288). "[Sterling]…[]was the basketball coach, and I was on the cheerleading team. So a lot of times after practice he would be putting all of the basketballs away, and he had cornered me against the wall and was kissing me and fondling me. And [Sandy] walked in the gymnasium. And he scurried away, and she just walked away." (Kim 4/25/11 p. 65:10-17, A 288). Sandy witnessed Sterling's abuse of Kim more than once, but she never took action and the abuse continued. (Kim 4/25/11 p. 17:3:23:19, A 281, Kim 4/25/11 17:3-24:17, A 281).

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[12] (Kim 2/22/10 p. 153:19-154:8, A138, Kim 4/25/11 p. 14:23-15:12, A280, Sandy 2/29/12 p. 68:10-20, A 400, 69:11-15, A401, Dance photo A58).

[13] (Kim 2/22/10 p.152:14-153:5, A137-138, Sandy 2/29/12 p. 68:21-23, A 400).

[14] (Kim 2/22/10 p.157:22-158:1, A 139, Kim 4/25/11 p.14:23-15:12, A 280, 24:18-35:14, A 281-284). Sterling took the Fifth Amendment when asked if Sandy was aware of his sexual abuse of Kim. (Sterling 90:3-8, A415).

Years later, Kim's husband, Eric, called Sandy and Sterling to confront them, after Kim had reported the abuse to the police.[15] Sandy told Eric, "I know all about it." (Kim 4/25/11 p. 136:12-13, A 296). "[Sandy] just said she knew all along that it was happening." (Kim 4/25/11 p. 171:20-21, A 300).

C. Fairwinds Admits That Sandy Should Have Reported the Abuse. Pastor Britton admitted that Sandy should have taken action when she became aware that Sterling was abusing Kim. (E.L. Britton 64:14-65:7, A 433-434). Principal DeStefano admitted that **all employees, even secretaries, were charged with enforcing[] policies and to report any violations of them.** (DeStefano 24:9-25:6, A 443-444). **It was the responsibility of any School employee, if they saw another employee acting inappropriately, to correct that employee in [] wrongs.** (E.L. Britton 45:23-46:7, A 429).

D. Actual Reports of Sterling's Misconduct. First, in response to interrogatories, Fairwinds stated:

> **Fairwinds is aware that on one occasion, Sherrie Phillips, then a student at the Fairwinds School complained that Ed Sterling had rubbed her back inappropriately. This complaint was made in or about 1990. []**

(DeStefano Ex. 1, p.7, A 147). DeStefano admitted that Sherrie's complaint could have been made even earlier. (DeStefano 72:2-8, A 455).[16]

[15] (Kim 4/25/11 p. 130:8-140:4, A 295-297, 165:8-167:9, A 299, 168:18-173:6, A 299-301).
[16] Sterling took the Fifth Amendment when asked whether E.L. Britton or DeStefano were aware of any sexual contact between him and Fairwinds' students while Sterling was working there, and took the Fifth when asked if Pastor Britton or Principal DeStefano had ever come to him

Second, Pam Arrowood was a Fairwinds' student from 1984 to 1990. (Pam p.4:19-22, A 377, 6:11-13, A 378). Sterling was Pam's teacher. (Pam 7:18-14, A378). The following occurred during basketball season, between December and March of 1990. (Pam 12:12-16, A379):

> It was after a basketball game. I had my bookbag in Mr. Sterling's classroom. So he had to go back with me to unlock the door…And he made the comment, **if there were any two people left on earth that he could pick, it would be him and I**. [] I went home, shared the event with my mom. And, of course, my mom was furious. She had called the school right away. Well, the next day. And we had gone in for a meeting. It was **Pastor E.L. Britton, Carlo DeStefano and Pastor Tim Britton**. And Ed Sterling was in the meeting as well…My mom and my stepdad, Bill. And they basically just kind of said it was a misunderstanding. They talked it up that, you know, it was exaggerated. **And my mom told him, look, if you don't do something about this, I'm pulling my daughter out of the school. And that's what she did. They chose to back him and then I ended up switching my senior year…[] I just think it was one of those things they just kind of pushed under the rug and didn't want to deal with it.**

(Pam 10:11-12:11, A 379; see also Pam 35:8-48:13, A 383-386). This was an advance by Sterling. (Pam 13:15-17, A 380). This was inappropriate sexual innuendo. (Pam 52:4-53:2, A 387-388). Pam's parents reported exactly what Sterling had said to her to E.L. Britton, Tim Britton, and DeStefano. (Pam 14:23-19:15, A 380-381). As a result of the Fairwinds' authorities' refusal to let Sterling go and support of him, Pam left the School before Senior year. (Pam 43:8-48:13,

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with complaints, asked him if he had sexually abused students, or had investigated his conduct. (Sterling 66:20-69:24, A412-413).

A 385-386). People at Fairwinds assumed she had left because of Sterling. (Pam 60:19-61:17, A 389-390).

Continuing, Sandi Sterling ("Sandi") was a kindergarten teacher at the School from about 1970 until 2008. (Sandi 5:3-6:12, A 466). (This is not the same person as secretary and wife of Sterling, Sandy Sterling. Sandi Sterling is Sandy Sterling's sister in law). Fairwinds' students Pam and Stephanie Donovan (now Stephanie Duke) told her that Sterling had said things that made them uncomfortable. She believes they were juniors at the time. (Sandi 30:8-35:22, A468-469). (For Pam, this would have been in the 1989-90 school year, (Pam 35:1-16, A383); for Stephanie, the 1990-91 school year. (Steph Duke Aff. ¶ 3, A 103). However, since Pam was no longer at the school in 1990-91 it was likely 1989-90. The students told Sandi the following at lunch:

> One was that he had said to one of them that: **If there was a desert island, you would be the one that I would choose to be on the island with.** And the other one as young lady asked to go to the restroom in the class. She raised her hand and he asked her if there's a problem. She said 'I need to go to the restroom.' **If I can understand him to say, 'Is this a woman thing?' She was embarrassed that he would even bring that up**.

(Sandi 33:12-22, A 469, 35:16-22, A 469). Sherry Miller, another student, was with Pam at the time. (Sandi 52:4-53:1, A 471-472). Sandi's response was "Kind of didn't believe it, but…" (Sandi 36:23, A 469). She told no one in authority. (Sandi 37:11, A 470). She did not follow up. (Sandi 39:20-40:3, A 470). Pam and

Sherry left that school year because "they felt that Mr. Sterling should be punished." (Sandi 53:2-9, A 472).

E. Observations of Other Fairwinds' Employees. "[S]everal times during lunch all of the faculty and staff would sit at the lunch table in the lunch room. And Sterling would tap [Kim] on the butt in front of the other faculty." (Kim 4/25/11 p. 44:2-5, A 285). The faculty included "Jim [Flohr], Greg Shire, Chip Keller…[] Jerry Factor."[17]

F. Sterling's Inappropriate Behavior Was Widely Known. Student Tammy [Britton], the granddaughter of the founder/pastor of the church and niece of the former principal, Carlo DeStefano, stated "that [Sterling] really creeps her out because he would ask her several times what perfume she was wearing and that she smelled, really, really good."[18] Student Stephanie Duke stated that "during class [Sterling] had leaned over and whispered and asked her whether her knee highs---whether her pantyhose went all the way up to her waist or stopped at her thighs."[19] Kim "would see him interacting with other females within the school. His demeanor was inappropriate. His proximity was inappropriate…[]it was a

[17] (Kim 4/25/11 p. 44:9-12, A 285, Kim 12/2/11 110:5-112:13,A375). Kim also made a comment to Fairwinds' employee Renee Factor, where Kim mentioned foreplay happening before sex. Then "the room got kind of quiet and [Renee Factor] started blushing and got awkward and looked over at me and asked questions how I knew about that word. And I just kind of realized I knew too much for my age and felt shamed and blew it off by saying I might have seen it in a magazine." (Hecksher 4/25/11 p. 69:20:70:1, A 289, 69:8-70:6, A 289).
[18] (Kim 4/25/11 p. 59:3-10, A 286, id. p. 58:21-61:8, A 286-287).
[19] (Kim 4/25/11 p. 61:19-62:1, A 287, 61:9-63:21, A 287).

general, very common knowledge [among students]." (Kim 4/25/11 p. 64:4-11 A 287).[20] Pam stated –

> There was lots of talk and conversation beforehand and it always was about Ed Sterling. He is a pervert. All kind of comments. The way he looked at girls. Just very uncomfortable. So hearing that [he made an advance on her] wasn't a surprise.

(Pam 19:16-21:1, A 381-382).[21] Student Stephanie Duke explained:

> Ed Sterling made [her] uncomfortable when he talked to [her] in the classroom. He stared at [hers and other females'] chest[s] and made comments that [she] smelled good. [She] did not want to be alone with him. In fact, if [she] thought [she] would have to be alone with him in the classroom, [she] asked another male student to wait for [her].

(Steph Duke Aff., ¶ 6,7, A 103-104).[22]

G. Lack of Policies and Procedures. There was no policy nor any rules instituted at the school to prevent or detect sexual abuse of students. (DeStefano 11:4-11, A 440). Appropriate boundaries between male employees and female students were not addressed. (Sandy 2/29/12 p. 49:23-50:15, A 398). The nerve

[20] Kim explained "My heart of hearts, if students that are under 18 sense something and feel something about a man who only interacts with females and makes them feel uncomfortable, if children feel that way, then an adult should be well aware of that as well." (Kim 4/25/11 164:19-23, A 298).

[21] This discussion among students about Sterling had been going on since 1987. Pam talked about Sterling with other students who agreed that he made inappropriate looks and comments to girls, and she observed him making such looks, gestures and comments to female students (Pam 20:14-22:18, A 381-382). Sterling's "inappropriate looks, gestures, were obvious." (Pam 24:8-10,A382). If Kim had shared with her that Sterling was sexually abusing her, it wouldn't have surprised her. (Pam 53:5-23, A 388).

[22] Student Steve Duke explained "When Ed would walk the aisles in the classroom to check class work, Ed Sterling would place his hands on the shoulders of female students and told them how good they smelled and looked." (Steve Duke Aff., ¶8, A 101-102).

center of the school, Sandy Sterling, was never aware, while she was an employee of Fairwinds, that she was required by Delaware law to report to the authorities if she suspected a student was being sexually abused. (Sandy 2/29/12 p. 53:5-54:2, A 399).

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FAILING TO IMPUTE FAIRWINDS' EMPLOYEE SANDY STERLING'S KNOWLEDGE AND ACTIONS TO FAIRWINDS.

A. Questions Presented. Did the Superior Court err in determining that Fairwinds' employee Sandy Sterling's knowledge and actions are not imputable to Fairwinds? This issue was preserved in Plaintiff's summary judgment answering brief ("SJAB") p.4-6, A 509-511, 26-29, A 531-534), and at oral argument. (11/15/12 hrg. p. 21:1-34:10, A 489-492).

B. Scope of Review. "This Court reviews de novo a trial court's grant of a motion for summary judgment, both as to the facts and the law." DaBaldo v. URS Energy & Const., 85 A.3d 73, 77 (Del. 2014).

C. Merits of the Argument. As stated in Facts § B, Fairwinds' employee Sandy had actual knowledge of the abuse of Kim by her co-worker Ed Sterling and did nothing about it. Fairwinds' employees, including Sandy, as "school employees," had a statutorily imposed duty to report any child abuse to the Division of Child Protective Services which they knew of or in good faith suspected. 16 Del. C. § 903 (1976). (see Schreffler, ¶ 13, A 481-482). Failure to report was an extreme departure from the standard of care for school personnel.[23]

[23] See Frugis v. Bracigliano, 827 A.2d 1040, 1052 (N.J. 2003) (finding that the failure of school personnel to report principal's "rocking his body back and forth into children in a sexually-suggestive, inappropriate way...standing alone, was evidence of negligence" and vicariously imputable to the school district).

Indeed, even Principal DeStefano testified that he would have expected Sandy to report the abuse of Kim to the legal authorities or to him personally. (DeStefano 24:9-25:6, A 443-444). Despite all of this, and assuming Sandy knew about the abuse and failed to report it, the court below found that Sandy's knowledge and actions were not imputable to Fairwinds solely because she had "compelling personal reasons for harboring her husband's misconduct and not informing the school." (Opin., p.10). It cited to Doe v. Giddings, 2012 WL 1664234 (Del. Super. May 7, 2012) (Opin, p. 10), where the Superior Court granted summary judgment in favor of the employer for its employee's rape on the theory that the rape arose from a personal motivation and thus was not in the scope of employment. Id. at *2-3. This Court subsequently reversed that decision in Doe, 76 A.3d at 777. This Court found that a police officer's rape can be imputed to his employer and this was a question for the jury.[24] Here this Court should also find that the secretary's actual knowledge of and failure to report abuse of a student is imputed to her employer.[25] "[T]he test is whether the employee was acting in the ordinary course of business during the time frame within which the tort was

[24] Doe, 76 A.3d at 775 ("**The trial court granted summary judgment to the State based on its conclusion that no reasonable jury could find that the officer was acting within the scope of his employment.[] There are other factors used to determine whether one is acting within the scope of employment, and the jury must make that decision**.").(emphasis added).

[25] Primarily, this is because Sandy's tortious actions were "1) []the kind [s]he was employed to perform; (2) it occur[ed] within the authorized time and space limits; (3) it [was] activated, in part at least, by a purpose to serve the master." Doe, 76 A.3d at 776; See Facts,§ B, explaining her job duties.

committed." Doe, 76 A.3d at 777. "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." Id. "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." Doe, 76 A.3d at 776. The Superior Court erred when it took this question out of the jury's hands based on *its* opinion as to Sandy Sterling's purportedly personal motivation for failing to report Kim's sexual abuse without any record evidence whatsoever. Contrary to the lower court's theory, Sandy testified that her personal motivation would not have precluded her from reporting Kim's abuse. Sandy testified that she would have reported Kim's abuse by her husband as she had no interest in seeing her husband abuse Kim or any student. (Sandy 6/11/12 p. 99:20-100:11, A 404, 135:15-136:1, A 407). It is the jury that determines the credibility and motivations of a witness's testimony.[26]

> "**Motivation**, intention, and credibility are intensely factual determinations influenced by various factors [] which are **appropriately assessed by the finder of facts**.[] **This Court cannot engage in weighing the evidence, determining the credibility of witnesses or making independent factual findings.**[27]

[26] "You are the sole judges of each witness's credibility.[]" DE Pattern Jury Instructions 23.9. Juries are recognized as the "sole trier of fact responsible for assessing the credibility of witnesses, resolving conflicting testimony and drawing inferences from proven facts." Young v. Frase, 702 A.2d 1234, 1237 (Del. 1997). "It is the sole province of the jury to determine witness credibility, resolve any conflicts in the testimony and draw any inferences from the proven facts." Austin v. State, 45 A.3d 148, * 2 (Del. 2012).

[27] Boscov's Dep't Store v. Jackson, 2007 WL 542159 (Del. Super. Feb. 12, 2007) (emphasis added).

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN ISSUES OF FACT REMAINED.

A. Questions Presented. Did the Superior Court err in granting the Defendant's motion for summary judgment when numerous disputes of material fact remained? This issue was preserved in Plaintiff's SJAB (A 499-535) and in oral argument. (11/15/12 Summary Judgment Hearing Transcript, A 484-496).

B. Scope of Review. The standard of review on appeal from a grant of summary judgment is de novo. DaBaldo, 85 A.3d at 77.

C. Merits of Argument.

1. Standard of Review on Motion for Summary Judgment.

It has long been established that issues of negligence are generally not appropriate for resolution by summary judgment. Ebersole v. Lowengrub, 180 A.2d 467, 469 (Del. 1962). Summary judgment is granted only when the record shows no genuine issue of material fact. Doe v. Cahill, 884 A.2d 451, 462-63 (Del. 2005). The burden of proof is on the Defendant to prove there is no issue of genuine material fact. Id. The trial court should accept all undisputed facts and the non-moving party's version of disputed facts. Merrill v. Crothall-Am., Inc., 606 A.2d 96, 99-100 (Del. 1992). "[I]f the parties are in disagreement concerning the factual predicate for the legal principles they advance," summary judgment must be denied. Id. at 99-100. "[I]f it appears desirable to inquire more thoroughly into the

facts in order to clarify application of the law, summary judgment is not appropriate." Doe, 884 A.2d at 463. "The role of the trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues." Merrill, 606 A.2d at 99.

2. Gross Negligence v. Negligence. An employer is liable for negligent supervision where "the employer is negligent in giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity." Simms v. Christina Sch. Dist., 2004 WL 344015, *8 (Del.Super. Jan.30, 2004) (citations omitted). In such a case, the employer, through the acts of its agents who are negligent (or grossly negligent) in the supervision, is vicariously liable for that negligent or grossly negligent supervision. While gross negligence is a higher level of negligence, it is still much less than "wanton conduct [which is equivalent to reckless or I don't care attitude] [which] requires behavior which is more egregious than conduct constituting gross negligence."[28]

3. Standard of Care. The highly unusual unique scheduling order in

[28] Morris v. Blake, 552 A.2d 844, 847 (Del. Super. 1988); see Id. at 848.

this case did not permit discovery on standard of care until Phase 2 of Discovery which was after the summary judgment deadline. (Sched. Order, § B.1,B.2, A 330-334). Evidence of the standard of care, however, is necessary to determining whether there is gross negligence.[29] Despite these limitations, Plaintiff secured evidence that Fairwinds violated its own standard of care.

The limited discovery allowed by the Superior Court revealed Principal DeStefano's testimony that if a secretary at the School discovered that a teacher was acting inappropriately with a student, was sexually abusing a student, he would expect the secretary to tell him, even if she witnessed this conduct outside of the School. (DeStefano 24:17-25:6, A 443-444).

Discovery also revealed that Principal DeStefano considered Fairwinds' educational standards better than public schools in Delaware. (DeStefano 36:20-24, A 446). Fairwinds admitted that, once hired, it was inappropriate for Fairwinds' employees to sexually abuse the students, to make a come on or sexual comments to a student, ask for a date, flirt with students, touch any of the children in an inappropriate manner including pat students on the butt, rub a female student's back, or make a comment that would lead the female to think he was

[29] See Hughes v. Christina Sch. Dist., 2008 WL 73710 (Del. Super. Jan. 7, 2008) ("[G]ross negligence requires a showing of negligence that is a higher level of negligence representing an extreme departure from the *ordinary standard of care*.") (emphasis added).

hitting on her, hug a student, insinuate romantic feelings for a student.[30] If a School employee did something inappropriate the School would discipline that employee. (E.L. Britton 35:17-22, A 426).

After reviewing the discovery and based on her education and experience, Plaintiff's educational standard of care expert Carol C. Schreffler explained the standard of care in Delaware schools and appropriate actions Fairwinds should have taken if it were acting like a reasonable, competent Delaware school. (see Schreffler report, ¶¶ 7,8,A 474).[31] She opined as to the expected actions of school employees given the knowledge the staff of Fairwinds had. She then compared this to what the Fairwinds' employees actually did, (Schreffler report, ¶¶ 12-14, A 479-484), concluding that Fairwinds' employees greatly deviated from the standard of care in how a reasonable school employee would respond to the available information about Sterling and Kim. She concluded that "school administration and teachers of the Fairwinds Church School acted with deliberate indifference and were incompetent and violated the professional standard of care

[30] (DeStefano 16:10-18:8, A 441-442, E.L. Britton 34:1-35:9, A 426, 36:18-37:6, A 426-427, 44:11-45:3, A 428-429).

[31] In Thomas and Jane Doe # 7, the courts quoted Carol Schreffler in their Opinions with respect to the norms of school administration. (Thomas v. Bd. Of Educ. of Brandywine Sch. Dist., 759 F.Supp.2d 477, 502 (D.Del. 2010); Jane Doe # 7 v. Indian Rover School District, C.A. No. K09C-12-042 RBY *6 (Del. Super. April 11, 2012). She was also qualified in Sheehan as an expert on the educational standard of care, in a case involving a private school. (See Sheehan Order Denying Defendants' Motion in Limine to Exclude Schreffler, A 99-100).

related to the safety and [well-being] of children under their care." (Schreffler ¶ 14, A 482-483). Fairwinds offered no evidence to contradict Plaintiff's expert.

4. Wanton Violations of the Standard of Care.

a. Pam's Complaint. Pam's complaint is detailed at Facts, § D. Pastor Tim Britton took student Pam's complaint. (DeStefano 44:14-46:16, A 448-449). Tim Britton denied that Pam made the type of complaint that she testified she had made. He admitted, however, that the conduct that she testified about would have sent a red flag up. He also admitted that a comment such as Sterling made to Pam would have raised concerns that Sterling would be inappropriate with female students, "**Absolutely**.[]" (Tim Britton 22:24-23:17, A 462). When asked if it was a sexual advance, DeStefano responded, "I guess, possibly." (DeStefano 61:1-13, A 453). Moreover, Pastor E.L. Britton recalled that Pam had suggested Sterling was flirtatious with her. (E.L. Britton 51:3-19, A430, see 51:3-54:18, A430-431).

Fairwinds' interrogatory responses in this matter, to which DeStefano swore, state that Fairwinds was aware of Pam's complaint and as a result, Tim Britton counseled Sterling. (DeStefano Ex. 1, p. 7, A 147). **Yet in his deposition DeStefano testified that he was not aware if Tim Britton counseled Sterling**. (DeStefano 48:6-13, A449, 68:23-71:9, A 454-455) (emphasis added). Tim Britton also could not remember any details and did not know what the complaint was about, (Tim Britton 20:4-16, A 461, 22:2-24:15, A 462), although he had

conversations with Sterling before. (Tim Britton 20:17-21:3, A 461-462). Nothing was written down and Fairwinds was not sure when the complaint occurred. (Tim Britton 19:23-20:3, A 461, 24:20-25:11, H 462-463).

This all begs the question how could Fairwinds swear that it counseled Sterling if no one was aware of it? And yet the Court below cherry-picked from contradictory testimony and decided Fairwinds had responded appropriately by counseling Sterling. (Ex. A, Opin., p.9, ¶ 16). This was a clear violation of this Court's direction that the trial court in deciding summary judgment must accept "the non-moving party's version of disputed facts." Merrill v. Crothall-Am., Inc., 606 A.2d 96, 99-100 (Del. 1992). Schreffler opined that it would have been appropriate for Fairwinds to investigate by interviewing students and staff. (Schreffler ¶ 11, A 477-479). No students besides Pam were interviewed. (Tim Britton 19:2-22, A 461). Had they done so, they would have realized that numerous students were very uncomfortable around Sterling, thought he was a pervert, looked at and touched them inappropriately. Facts, ¶¶ D, F, Schreffler rept. ¶ 12, A 479-481). Pam and her family thought Sterling's behavior had been so egregious that Pam transferred schools during her Senior year because Fairwinds did not fire Sterling. Fairwinds *did not* handle this complaint swiftly and deftly – there is no evidence they handled it at all or confronted the actual

issue of Sterling making an advance or come-on to his student, they instead swept it under the rug. (Pam 10:11-12:11, A 379; see also Pam 35:8-48:13, A 383-386).

The Superior Court stated during the January 8, 2010 hearing on Fairwinds' Motions that it expected to see "an affidavit from somebody who said 'At some point before one of these alleged rapes took place, I told Principal DeStefano [] that Sterling was making advances,' 'Sterling did inappropriate things with the Plaintiff, his daughter,' 'I saw these things, I told the school about it, and they told me it was none of my business. That sort of allegation would pretty much end our conversation right now and the case would be moving forward rapidly on all fronts.'" (January 8, 2010 Trans., p. 9:5-12, A112). Here Plaintiff had just that sort of allegation.

b. Sherrie Phillips' Complaint. Student Sherrie Phillips' complaint, that Sterling had rubbed her back, was notice to Fairwinds that Sterling had done something **"very inappropriate"** to a female student (see DeStefano 17:18-22, A 442, see Facts, § D). This type of behavior would have raised a **red flag** (Tim Britton 30:23-31:21, A 464) and was **"tremendously inappropriate."** (Tim Britton 31:16, A 464). DeStefano **denied that he counseled Sterling**, despite swearing that he and Tim Britton had done so in response to this complaint in his answers to interrogatories. (DeStefano 49:2-6, 51:7-9, A 450, 65:12-66:8, A 454 DeStefano Ex. 1, p. 7 and verification, A 147) (emphasis added). Tim Britton

denied knowledge of this complaint and so Appellant is hard pressed to see how DeStefano could have sworn that he and Tim Britton counseled Sterling about it. (Tim Britton 25:12-16, A 463, 26:3-7, A 463). It was the responsibility of a School employee, if they saw another employee acting inappropriately, to correct that employee in those wrongs. (E.L. Britton 45:23-46:7, A 429). Yet Fairwinds did nothing in response to this complaint of **Sterling touching a female student inappropriately**. (DeStefano 51:7-9, A 450, Tim Britton 25:12-16, A 463, 26:3-7, A 463, E.L. Britton 68:1-13, A 434). Schreffler stated: "Any competent school principal would have investigated yet another complaint against Ed Sterling by interviewing teachers, students and staff to find out what they knew. Once again, Principal DeSt[e]fano ignored warning signs that Ed Sterling was a child abuser and he failed in his responsibilities to protect the children under his care." (Schreffler, ¶ 12, A 481).

In its Opinion the court found that Fairwinds had "counseled" Sterling despite Plaintiff's evidence that Fairwinds had <u>not</u> counseled him, discussed above. (Opin. ¶ 16-Ex. A). The court later referred to them as "two documented incidents in which the school reprimanded [] Sterling." (Opin. ¶ 20-Ex. A). The court clearly did not accept Plaintiff's version of the disputed facts as to if and how Fairwinds responded to these complaints. <u>Merrill</u>, 606 A.2d at 99-100. The Superior Court clearly accepted DeStefano's interrogatory responses over

Plaintiff's version and read more into them then there was. This despite evidence that DeStefano also abused a student. This was a clear violation of the standard of review.[32]

c. Reports to Sandi Sterling. Sandi received two complaints from female students about Sterling making them feel uncomfortable, as stated above in Facts, § D. Yet she also did nothing about it. This was wanton conduct by her which is imputed to Fairwinds. (See Schreffler ¶ 14, A 482-483). Inexplicably, the Superior Court failed to address this evidence at all in its Opinion.

d. Junior/Senior Banquet and Observations of Staff. Sterling took Kim to the banquet as his date, was escorted by him, and sat with Sterling and the faculty at Fairwinds.[33] This was disturbing conduct. (Schreffler, ¶ 13, A 481-482).

Kim explained that Jim Flohr, Greg Shire, Chip Keller, and Jerry Factor observed Sterling tapping her on the butt at lunch time several times. (Facts, § E). This was clearly inappropriate conduct as defined by Fairwinds, and these employees' knowledge and failure to report/investigate should be imputed to

[32] Further, the court seemed to require evidence from Plaintiff that if the students were interviewed they would have honestly communicated the inappropriate behavior they had observed. However, the Defense presented no evidence they would not have responsibly told the truth, and the court below could not point to anything in the record that all these Fairwinds students would have lied in response to questioning. The reasonable inference is they would have answered truthfully to what they personally observed.

[33] (Kim 2/22/10 p. 152:14-154:8, A138, Kim 4/25/11 p. 14:23-15:12, A 280, Sandy 2/29/12 p. 68:10-20, A400, 69:11-15, A 401, Sandy 2/29/12 p. 68:21-23, A 400, Sandi 54:17-24, A 472) (Facts, § B).

Fairwinds. (Tim Britton 31:9-12, A 464, E.L. Britton 35:2-4, A 426, see Schreffler, ¶ 12, A481).

Further, Kim made a comment to staff member Renee Factor about "foreplay" which was highly inappropriate and unusual for a young student in a school like Fairwinds to have knowledge of. (Facts, § E).

Although the Superior Court mentions these incidents (Opin. ¶ 5-Ex. A), it failed to address why they are not evidence of gross negligence. It dismissed the banquet incident by saying "witnesses [referring to Fairwinds' employees] did not recall it and testified Plaintiff's attendance would not have been unusual." (Opin. ¶16-Ex. A). However, Plaintiff had her testimony and Sandy Sterling's testimony (Sandy 161:7-19, A 408) that it did occur, and testimony from an expert saying it was *disturbing conduct*. The court must accept Plaintiff's version of disputed facts. Merrill, 606 A.2d at 99-100. The failure to do so was error.

e. Lack of Policies and Procedures. "During the 1980's teachers in public schools each year received in-service training regarding the abuse of children and their responsibility, under Delaware State law, to report any suspicion of child abuse to the police or the Delaware Division of Family Services." (Schreffler, ¶ 10, A 477). Since the mid 1970's all Delaware public school teachers, administrators and staff have received training regarding the physical and sexual abuse of children and have been made well aware of their responsibility to report any form of

suspected child abuse to proper authorities. (Schreffler, p. 10, A 482). Schreffler concluded "[I]t is incredibly evident that Principal DeSte[f]ano and other officials at Fairwinds Baptist School were incompetent and failed to institute **any** standards for [] supervision of staff, nor did they implement any basic procedures for the protection of the children under their care." (Schreffler ¶ 11, A 477-478). "DeStefano neglected to implement the training he and his staff needed to protect students and keep them safe."(Id.). The Superior Court acknowledged this (Opin ¶ 4-Ex. A), but did not discuss why it was not gross negligence.

5. Knowledge and Actions of Employees are Imputed to Fairwinds.

a. Knowledge of Defendant's Employees is Imputed to Employer.

> [K]nowledge of an agent acquired while acting within the scope of his or her authority is imputable to the principal. Similarly, knowledge of an employee is imputed to the employer. This imputation occurs even if the employee does not communicate this knowledge to the principal/ employer.[34]

Thus, the knowledge and actions of these numerous Fairwinds' employees who knew or should have known of Sterling's sexual abuse and harassment of students, and/or violated the educational standard of care, is imputed to the Fairwinds.

[34] E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., 1996 WL 111133, *2 (Del.Super. Feb. 22, 1996) (internal citations omitted); accord Knetzger v. Centre City Corp., 1999 WL 499460, *4 (Del.Ch. June 30, 1999); J.I. Kislak Mortg. Corp. of Del. v. William Matthews Builder, Inc., 287 A.2d 686, 689 (Del.Super. 1972).

b. Wrongful Acts of Employees are Imputed to Employer. This court has explained that the "general rule is that if the principal is the master of an agent who is a servant, the fault of the agent, if acting within the scope of employment, will be imputed to the principal by the doctrine of respondeat superior."[35] "Liability for an agent's culpable conduct imputes to the principal if the act falls within the scope of the agent's authority." Grand Ventures, Inc. v. Whaley, 622 A.2d 655, 665 (Del.Super.1992), aff'd, 632 A.2d 63 (Del. 1993); Doe, 76 A.3d at 776. These same principles of imputation of tortuous conduct have been applied in cases against schools.[36]

The record here includes evidence of the standard of care in supervising employees in Delaware schools. Carol Schreffler, an expert educator, agrees with this standard of care and finds it was violated.

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[35] Fields v. Synthetic Ropes, Inc. 215 A.2d 427, 432 (Del. 1965). See Draper v. Olivere Paving & Const. Co., 181 A.2d 565, 569-70 (Del.1962). See also Wilson v. Joma, Inc., 537 A.2d 187, 189 (Del. 1988) (identifying criteria for determining whether conduct of servant is within scope of employment); Fisher v. Townsends, Inc., 695 A.2d 53, 58 (Del. 1997).

[36] See Baker v. Oliver Machinery Co., 1981 WL 376973 (Del. Super. March 30, 1981) (District could be liable for the negligence of a teacher, its non-managerial employee, in failing to properly supervise a student); Robinson v. Christina Sch. Dist., 1994 WL 682468, *2 (Del. Super. Nov. 17, 1994) (holding that negligence of agent of School District could impute liability to the District); Thomas v. Bd. Of Educ. of Brandywine Sch. Dist., 759 F.Supp.2d 477, 501 (D.Del. 2010) (permitting gross negligence action against school district where evidence employees of that District "failed to suspend [perpetrator teacher], failed to interview students and parents, failed to investigate [teacher]'s insubordination, failed to exercise effective oversight, failed to warn students, failed to increase [teacher]'s classroom monitoring, failed to report [teacher]'s behavior to the appropriate authorities, and failed to follow the District's own policy"); Frugis, 827 A.2d at 1052 (failure to report suspicion of child abuse by school employees vicariously imputable to school district).

Fairwinds' employees – the Pastors or Principal DeStefano - were expected to discipline Sterling. But all employees of School–including the secretaries– took part in the supervision of students and school employees and *all employees* of Fairwinds were expected to report suspicions of sexual abuse of students and were expected to know that reporting of such was a duty. (See Arg., I.C.). Numerous employees – Sandy, Sandi, Tim Britton, DeStefano, and E.L. Britton- either had or should have had that suspicion --based on what they personally observed or would have learned after reasonable investigation following revelation of red flags or other reports. All employees, including the Principal's secretary Sandy Sterling, were charged with enforcing these policies, and reporting violations of them. (DeStefano 24:9-25:6, A 443-444). It was the responsibility any School employee, if they saw another employee acting inappropriately, to correct that employee in those wrongs. (E.L. Britton 45:23-46:7, A 429). Thus, it was within the scope of employment for all School employees to report Sterling's abuse and/or inappropriate conduct towards students. Fairwinds' employees' knowledge and conduct, as described in Statement of Facts, is imputed to the Fairwinds, the employer. This imputation makes Fairwinds liable for these employees' knowledge and conduct. (See Facts). The Superior Court failed to explain why the knowledge and actions of Tim Britton, DeStefano, E.L. Britton, [Flohr], Shire, Keller, Factor, and Sterling's sister-in- law were not imputed.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION TO AMEND HER COMPLAINT TO ADD A COUNT OF NEGLIGENCE WHEN THERE WAS NO PREJUDICE TO THE DEFENSE.

A. Questions Presented. Did the Superior Court abuse its discretion in denying Plaintiff's motion to amend? This was preserved below in Plaintiff's motion to amend, (A 335-339), oral argument on the motion to amend (A367), letters filed, (A 342-343) and SJAB (A506, fn. 1).

B. Scope of Review. The standard of review for denial of a motion to amend is abuse of discretion. Mullen v. Alarmguard of Delmarva, Inc., 625 A.2d 258, 263 (Del. 1993).[37]

C. Merits of Argument. During her second day of deposition, on April 25, 2011, for the first time, Plaintiff explained that not until after her first deposition on February 22, 2010 did she recall (for the first time) a particular instance of sexual abuse at the school by Sterling which Sandy Sterling walked in on. (Hecksher 4/25/11 at 65:5-23, A288). Plaintiff was then evaluated by psychiatrist Dr. Springer who opined that Plaintiff's memory of being abused in school by Sterling was "recovered" (Springer p. 16, A 326) and that she suffers from repressed memories or traumatic amnesia. (Id.). After receiving his report, on September 15, 2011, Plaintiff filed a motion to amend pursuant to Rule 15(a) to

[37] "In the absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend." Id.

add a count of negligence as to Fairwinds for abuse recalled in the last two years, and thus, timely pursuant to 10 Del. C. § 8119. (A 335-339). The court never ruled on the motion, thus, it was denied *sub silencio*. See Hosack v. Hosack, 973 S.W.2d 863, 865, 872 (Mo. Ct. App. 1998).

Where claims of injury based on sexual abuse are inherently unknowable due to memory repression, the statute of limitations is tolled as those claims.[38] The statute of limitations for Plaintiff's claims based on her repressed memories did not begin to run until some time after February 22, 2010. Delaware law is clear that each act of sexual abuse is a separately actionable and independent legal wrong.[39] Thus, Plaintiff's claim of sexual abuse based on recovered memory as articulated at her April 25, 2011 deposition and any other memories that she is repressing were actionable under the common law.[40]

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[38] See Eden v. Oblates of St. Francis de Sales, 2006 WL 3512482, * 5 (Del. Super. Dec. 4, 2006); Vai v. Catholic Diocese of Wilmington, Inc., et al., C.A. 08C-06-044-JTV (Del. Super. October 14, 2009) (p.1-2)) (denying summary judgment as to Plaintiff's common law negligence claims and his claims under the Act) (A 96); see Vai jury instructions, p.4-5 (A 181-182).

[39] Eden v. Oblates of St. Francis de Sales, 2006 WL 3512482, *4-5 (Del.Super. Dec. 4, 2006) ("Eden 1") (differentiating between one act of sexual abuse which was not repressed, and 900 other acts of abuse which were repressed and finding the latter timely under the time of discovery rule); Eden v. Oblates of St. Francis de Sales, 2007 WL 3380049, *2 (Del.Super. Mar. 30, 2007) ("Eden 2") (rejecting the transactional theory of sexual abuse - that a series of acts of sexual abuse should only be considered one act); Whitwell v. Archmere Acad., Inc., 2008 WL 1735370, *5-7 (Del.Super. Apr. 16, 2008) (analyzing Eden 1, also explicitly rejected the transactional theory and found the individual act approach consistent with Delaware Supreme Court precedent as well as the Restatement (Second) of Judgments); Vai v. St. Elizabeth's Roman Catholic Church, C.A. No. 08C -06-044-JTV (Del.Super. Nov. 30, 2010) (Tr. of Jury Charge at 31-32) ("each act of alleged child sexual abuse is a separate and distinct legal wrong") (A241-242); Vai, supra, (same) (Formal Charge to Jury at 4-5), (A181-182); Waterhouse v. Hollingsworth, No. 12C-10-123 JAP (Del. Super. Oct. 10, 2013).

[40] See Eden 1, supra (differentiating between acts which were repressed and an act which was

Under Rule 15(a), Plaintiff's motion should have been granted. "Delaware law allows for liberal amendment of pleadings, unless there is serious prejudice, undue delay or bad faith." McClure v. Catholic Diocese of Wilmington, Inc., 2008 WL 495863 at *1 (citations omitted). "Rule 15(a) afford the parties the right, *inter alia*, to state additional claims…" Mullen, 625 A.2d at 263. The party objecting to a motion to amend has the burden to show it would suffer prejudice. McClure, 2008 WL 495863 at *1. An example of sufficient prejudice to deny leave to amend is when "an amendment is sought the morning of trial." Id. Even where prejudice can be demonstrated, the court must balance the hardships and examine the effect of the amendment not being allowed on the party seeking it. Id. Here, Fairwinds did not demonstrate any prejudice, as discovery had just begun. A revised scheduling order was entered prior to the motion and defendants had just asked for a fourth day of Plaintiff's deposition. Fairwinds had plenty of time to explore Plaintiff's repressed memories. Discovery was not closed until six months after Plaintiff's deposition was completed. Moreover, Plaintiff suffered severe

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not); Vai, supra, (Tr. of Jury Charge at 31-32) ("it is legally possible that Plaintiff's claim ... may be barred as to one or more alleged acts of child sexual abuse because such act or acts were known or knowable to the Plaintiff ... and the Plaintiff's claim ... may be timely as to one or more alleged acts of child sexual abuse because such acts or acts were inherently unknowable due to repressed memory") (A242). In Vai the jury instructions make clear that questions 2-3 of the verdict form addressed abuse which had been repressed, while question 4 addressed abuse which had not been repressed. See Vai, supra, (Verdict Form at ¶ 2-4 –(A277-278)); Vai, supra (Formal Charge to Jury at 4-5, 8-9) (A181-182,185-186); Vai, supra (Tr. of Jury Charge at 30-35, A 240-245).

prejudice as negligence is a lower standard for liability. There is clearly evidence of negligence in this record. See Opin., ¶¶4-7,16-Ex. A.[41]

[41] The Superior Court determined that Plaintiff failed to present any evidence of negligence with respect to her hiring claims but only that Plaintiff failed to present evidence of gross negligence with regard to her supervision claims. Id. ¶ 16.

IV. THE SUPERIOR COURT ABUSED ITS DISCRETION IN LIMITING PLAINTIFF'S RIGHT TO DISCOVERY.

A. Questions Presented. Did the Superior Court abuse its direction in limiting Plaintiff's right to discovery of relevant evidence and precluding discovery on the standard of care? This argument was preserved in Plaintiff's summary judgment answering brief. (SJAB A 488-525, Rule 56 aff., A 497-498, and 11/15/12 tr, p.6-10, A 485-486).

B. Scope of Review. The Superior Court's pretrial discovery rulings are reviewed for abuse of discretion. Mann v. Oppenheimer & Co., 517 A.2d 1056, 1061 (Del. 1986).

C. Merits of Argument. The Superior Court's unusual and highly specific rulings dramatically circumscribed the normal discovery process in this case. (Sched Order, A 330-334, 1/8/10 hrg, A 109-128).[42] Comparing this case's scheduling order to other scheduling orders in cases filed under the Act demonstrates its unusualness. (Ex. B). This significantly prejudiced Plaintiff's

[42] The Superior Court claims that Plaintiff filed her motion to amend the scheduling order because she was "[s]truggling to prove her case." (Opin. ¶ 10). It was mistaken. Plaintiff filed her motion to amend because the **Superior Court had specifically ordered that Plaintiff's deposition had to be completed before Plaintiff could take her limited discovery.** (see Jan. 8, 2010 transcript, p. 47:1-14, A121, and Sched. Order, ¶ A.1, A 330-331). Plaintiff was not able to begin taking even the few permitted depositions until her liability deposition was complete. Plaintiff was deposed on four separate days between Feb. 22, 2010 and December 2, 2011. **Thus it took almost two years for defendants to complete one deposition which was a condition precedent to Plaintiff taking *any* depositions**

ability to fully discover her case. (See Rule 56 Aff., A 497-498). [43] She could not depose all of the employees who witnessed inappropriate conduct because she was limited to six depositions. Comparing deposition discovery with the discovery in other abuse cases demonstrates the prejudice from the limits imposed here. (Ex. C). Plaintiff could not explore Principal DeStefano's abuse of a student, even though he supervised Sterling and Sandy.[44] Principal DeStefano's abuse of another child during his teacher, Sterling's abuse of Kim is yet more evidence of Fairwinds' motive for a cover up of Kim's abuse and for their inaction against Sterling. If DeStefano had moved against Sterling it could have exposed his wrong doing, either by Sterling or his wife coming forward in retaliation or simply by bringing this issue to the forefront. It must be remembered DeStefano was Sandy's direct supervisor. Moreover, DeStefano was not just someone the Church could easily fire or discipline -he was family -he was the son-in-law of the founder and leader of the church and he later replaced his brother in law as the head of the church which he is today. This also may explain why he was so quick to minimize any Fairwinds' knowledge of abuse and contradicted his earlier sworn interrogatory answers. Despite all of the above the court below refused to allow ***any*** discovery on this issue. "Generally, parties may obtain discovery of any matter not

[43] Although Plaintiff believes she has been able to show gross negligence, at a minimum the case should be remanded for full discovery.

[44] As Plaintiff suggested at the summary judgment hearing further discovery was relevant to the issue of why Sandy did not report abuse. (11/15/12 tr. p. 36:1-9, A 492).

privileged which is relevant to the subject of the pending action. [] Federal authority indicates that Plaintiffs must have access to the relevant materials through discovery before summary judgment can be granted, especially when the information is exclusively within defendant's control." Mann, 517 A.2d at 1061. The witnesses who worked at Fairwinds were exclusively within Fairwinds' control as Plaintiff is not allowed to talk to them. See R.Prof. Conduct 4.2. The Superior Court mentions that it did not prevent Plaintiff from deposing her "best witnesses" but Plaintiff didn't know who her "best witnesses" were without speaking with them. The court's discovery discretion is "guided by the rule that discovery should be permitted unless the court 'is satisfied that the administration of justice will be impeded by such an allowance.'" Mann, 517 A.2d at 1061. The Superior Court abused that discretion.

Wherefore, Plaintiff requests that this Court reverse the Superior Court's decision on summary judgment, permit Plaintiff's filing of her amended complaint and permit full discovery.

Respectfully submitted,

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