EFiled: Dec 19 2014 09:55AM EST
Filing ID 56497564
Case Number 621,2014

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

KIMBERLY HECKSHER,	)	**No. 621, 2014D**
Appellant,	)	
	)	
V.	)	**Court Below: Superior Court of the State of Delaware, in and for New Castle County**
	)	**C. A. No. 09C-06-236 FSS**
FAIRWINDS BAPTIST CHURCH, INC., a Delaware Corporation; FAIRWINDS CHRISTIAN SCHOOL, a Ministry of Fairwinds Baptist Church,	)	
Appellee.	)	

APPELLEES' ANSWERING BRIEF

MARGOLIS EDELSTEIN
Herbert W. Mondros
Del. Bar No. 3308
300 Delaware Ave., Suite 800
Wilmington, Delaware 19801
(302) 888-1112 (telephone)
(302) 888-1119 (facsimile)
hmondros@margolisedelstein.com
Counsel for Appellees Fairwinds Baptist Church and Fairwinds Christian School

Dated: December 8, 2014

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

NATURE OF THE PROCEEDINGS 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 3

I. THE TRIAL COURT CORRECTLY REFUSED TO IMPUTE SANDY STERLING'S KNOWLEDGE TO FAIRWINDS. 15

A. Question Presented: Did the Superior Court err in refusing to Impute the knowledge of Sandy Sterling to Fairwinds where Sandy was (i) Appellant's foster mother; (ii) the wife of the alleged tortfeasor; and (iii) a secretary at the Fairwinds School 15

B. Scope of Review: This Court's review of a trial court's legal rulings is *de novo*. *Barley Mill, LLC v. Save Our County, Inc.*, 89 A.3d 51, 60 (Del. 2014)(citation omitted). 15

II. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF FAIRWINDS 20

Question Presented: Whether the trial court erred in granting summary judgment where there were no disputed issues of material fact and no reasonable juror could find that Fairwinds was grossly negligent. 20

III. THE SUPERIOR COURT PROPERLY DENIED APPELANT'S MOTION TO AMEND HER COMPLAINT 26

IV. APPELLANT HAS FAILED TO SHOW AN ABUSE OF DISCRETION REGARDING THE LIMITED DISCOVERY 31

TABLE OF CITATIONS

	Page(s)
Barley Mill, LLC v. Save Our County, Inc., 89 A.3d 51 (Del. 2014)	15
Christopher S. v. Douglaston Club, 275 A.D.2d 768 (N.Y. 2000)	17
Chrysler Corp. v. New Castle County, 464 A.2d 75 (Del. Super. 1983)	26
DaBaldo v. URS Energy & Constr., 85 A.3d 73 (Del. 2014)	20
Doe v. Bradley, 2011 WL 290829 (Del.Super.)	19
Doe v. Giddings, 2012 WL 1664234 (Del. Super)	15
Doe v. Indian River School Dist. 2012 WL 1980562 (Del. Super)	21,24
Doe v. State, 76 A.3d 774 (Del. 2013)	17
Draper v. Olivere Paving & Construction Co., 181 A.2d 565 (Del. 1962)	16
Eden v. Oblates of St. Francis De Sales, 2006 WL 3512482 (Del. Super.)	28, 29
Frugis v. Bracigliano, 827 A.2d 1040 (N.J.,2003)	19
In re HealthSouth Corp. S'holders Litig., 845 A.2d 1096 (Del.Ch.2003)	17
Henry v. Nanticoke Surgical Associates, *P.A.*, 931 A.2d 460 (Del. Super. Ct. 2007)	12
Hughes v. Christina School Dist., 2008 WL 73710 (Del.Super.)	21
Jardel Co., Inc. v. Hughes, Del., 523 A.2d 518 (1987)	21
Johnson v. E.I. duPont deNemours & Co., 182 A.2d 904 (Del.Super. 1962)	18
Keller v. MacCubbin, 60 A.3d 427 (Del.Super. 2013)	30
Lincoln National Life Insurance Co. v. Snyder, 722 F.Supp.2d 546 (D. Del. 2010)	17

Mann v. Adventure Quest, Inc., 974 A.2d 607 (Vt. 2009) 18

Matthews v. Booth, 2008 WL 2154391 (Del. Super.) 22

McClain v. McDonald's Restaurants of Delaware, Inc.,
2011 WL 2803108 (Del. Super.) 31

MetCap Secs. LLC v. Pearl Senior Care, Inc., Civ. No. 2129,
2007 WL 1498989, (Del. Ch. May 16, 2007) 17

Mullen v. Alarmguard of Delmarva, Inc., 625 A.2d 258 (Del. 1993) 26

Phillips v. Wilks, Lukoff & Bracegirdle, *LLC,* 2014 WL 4930693 (Del.) 32

PNC Bank v. Turner, 659 A.2d 222 (Del. Super. 1995) 25

Prather v. Doroshow, Pasquale, Krawitz & Bhaya,
2011 WL 1465520 (Del. Super.) 26

Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247 (Del. 2011) 28

Simms v. Christina School District, 2004 WL 344015 (Del.Super.) 16

Smith v. Silver Lake Elementary School,
2012 WL 2393722 (Del.Super. 2012) 21

United Vanguard Fund, Inc. v. TakeCare, Inc.,
693 A.2d 1076 (Del.) 20

10 *Del. C.* §8145 20, 28

16 *Del. C.* §903 19

16 Del. C. §1953 19

Restatement (Second) of Agency § 228 18

NATURE OF THE PROCEEDINGS

Appellant, Kimberly Hecksher, ("Appellant"), filed this civil action under the Delaware Child Victim's Act of 2007, 10 *Del. C.* §*et seq.*, on June 24, 2009, naming Ed Sterling ("Sterling"), Fairwinds Christian School and Fairwinds Baptist Church, Inc. ("Fairwinds School," and "Fairwinds Church," respectively, and collectively, "Fairwinds" or "Appellees"), as defendants.

Appellant's Complaint alleges that Sterling, who was Appellant's foster father, sexually abused her over a period of more than seven years and that Fairwinds, where Sterling worked as a teacher, was grossly negligent because it not only knew about the abuse, but approved of it, authorized it, ratified it and even intended it. The Complaint asserted causes of action against Fairwinds for assault and battery, gross negligence, breach of fiduciary duty and fraud.

On February 29, 2013, the trial court issued an Order granting summary judgment in favor of Fairwinds on all claims. Appellant appeals from that Order.

SUMMARY OF ARGUMENT

1. Appellees deny the allegations set forth in paragraph 1 of the Appellant's Summary of Argument. The trial court correctly refused to impute the alleged knowledge of Sandy Sterling – Ed Sterling's wife, Appellant's foster mother and a low level Fairwinds employee - to Fairwinds pursuant to the adverse interest doctrine and because she did not have supervisory or other authority necessary to bind Fairwinds.

2. Appellees deny the allegations set forth in paragraph 2 of the Appellant's Summary of Argument. The trial court correctly granted summary judgment in favor of Fairwinds because no reasonable trier of fact could find that Fairwinds was grossly negligent in hiring, retaining or supervising Ed Sterling based upon the material undisputed facts.

3. Appellees deny the allegations set forth in paragraph 3 of the Appellant's Summary of Argument. The trial court correctly denied Appellant's Motion for Leave to Amend her Complaint where the amendment was futile because it sought to subvert the Child Victim Act and was also dilatory and in bad faith, and would have prejudiced Fairwinds.

4. Appellees deny the allegations set forth in paragraph 4 of the Appellant's Summary of Argument. The trial court did not abuse its discretion in entering a scheduling order agreed to and filed by Appellant where that order permitted Appellant to seek leave to take further discovery and Appellant failed to do so.

STATEMENT OF FACTS

A. **Procedural History:** On June 24, 2009, Appellant filed a Complaint against Sterling, Fairwinds School and Fairwinds Church (the "Complaint") (attached hereto as Exhibit "1"). ["Cmpl."; FA00001 - FA 00012]. The Complaint alleged that Sterling, who was Appellant's foster father, and an employee of Fairwinds, sexually abused Appellant over a seven-year period beginning in 1985, when Appellant went to live with Sterling and his wife, Sandy Sterling, [Cmpl.¶ ¶11, 16, 17; FA 00003], and that Fairwinds, where Appellant attended school, was liable because it "was responsible for employing and supervising", [Cmpl. ¶24; FA 00004], Sterling and because Fairwinds knew about the abuse, approved, authorized, ratified, and intended it. [Cmpl. ¶27; FA 00005]. The Complaint purported to assert causes of action against Fairwinds for assault and battery, gross negligence, breach of fiduciary duty, and fraud. *See*, Complaint, generally.

Appellees moved to dismiss the Complaint, *inter alia*, for failure to plead gross negligence with particularity because the Complaint did not allege who at Fairwinds Appellant claimed knew about the abuse. [FA00013 – FA00072]. That motion was denied, except that the trial court dismissed Appellant's breach of fiduciary duty claim. ["October 13, 2009 Hearing Transcript and Judicial Action Form"; FA00072 – FA00083]. Appellees answered the Complaint [FA00084 – FA00096] and discovery ensued.

After Appellant's written discovery responses failed to identify any person at Fairwinds who knew the abuse except for Sterling's wife, Appellees filed a Motion to Stay Discovery [FA00097 – FA00119], a Motion for Summary Judgment [FA00120 – FA00210], and a Motion for Sanctions.

Appellant's deposition commenced on February 22, 2010 ("Hecksher 1"; FA00211 – FA000257). Early in her deposition, Appellant claimed that Fairwinds' counsel's conduct upset her, and she and her counsel walked out of the deposition. [Hecksher 1 173:2 - 24 – FA00256]. Due to Appellant's conduct,[1] her deposition was not resumed until more than a year later on April 25, 2011 ("Hecksher 2"; FA00258 – FA00301).

On August 14, 2011, Appellant filed a Motion to Amend the Scheduling Order and Continue the Trial Date. [FA00524 – FA00645]. With that motion, Appellant submitted a proposed scheduling order that had been negotiated and, with the exception of two issues, agreed to by counsel to all parties. [FA00530 – FA00534].

[1] Two months later, on April 22, 2010, Appellant, through her counsel, filed a Rule 37 Motion to Terminate or Limit Her Deposition and Revoke the *Pro Hac Vice* Status of Fairwinds' counsel. [FA00302 – FA00419]. Appellant contended counsel's "humiliating and harassing line of questioning of Appellant … caused Appellant to suffer a breakdown at her deposition." [*Id.* at 1]; FA00303). The trial court denied that motion. [May 14, 2010 Hearing Transcript and Judicial Action Form; FA00420 – FA00431 ("I've read all the supporting documents … and having read through your papers as carefully as I did, I don't think anyone behaved the way you suggested opposing counsel behaved.") Transcript 2:15-3:15; FA00421]. The trial court ordered Appellant to appear for her deposition when she was medically able to do so. [*Id.* at 7:15-8:7; FA00422]. Appellant did not make herself available for deposition until April 25, 2011. She was deposed on April 25, 2011, June 16, 2011 ("Hecksher 3"; FA00432 – FA00481) and December 2, 2011 ("Hecksher 4"; FA00482 – FA00523). Appellant complains that it took almost two years for Appellees to complete her deposition, [POB at 33 n.42], but fails to advise the Court that Appellant herself was responsible for the delay.

On August 19, 2011, the Court heard and granted Appellant's Motion to Amend the Scheduling Order, adopting Appellant's position and rejecting Appellees', on both of the disputed issues. [FA00646 – FA00653].

The Amended Scheduling Order, which Appellant challenges on appeal as an abuse of discretion, provided that Appellant's discovery would be divided into three phases (the "Amended Scheduling Order") (attached hereto as Exhibit "2"). [FA00654 – FA00658]. In the first phase, which would commence after the conclusion of Appellant's liability deposition, Appellant was permitted to develop "direct and obvious evidence" as to gross negligence, specifically, evidence of what allegedly inappropriate contact occurred between Appellant and Sterling, and what Fairwinds knew about that inappropriate conduct or Sterling's alleged inappropriate conduct with other Fairwinds students. [*Id.* at pg. 3; FA00656]. In the first phase, Appellant was permitted to depose six witnesses.[2] Appellant was also permitted, in the first phase of discovery, "to follow the chain of knowledge established through this discovery." [*Id.*; FA00656]. Thus, if a witness testified she told other persons about inappropriate conduct by Sterling, Appellant was permitted to depose those persons, to determine if those persons told the institutional defendants of inappropriate contact between Sterling and the Plaintiff.[3] [*Id.*; FA00656]. In her first

[2] Sterling, Sterling's wife, Sandy, two of the following individuals as identified by Appellant: cheerleading coach, volleyball coach, softball coach, youth leader, or youth leader's wife, Fairwinds student Pam Arrowood and Arrowood's parents. [*Id.*; FA00656]

[3] Appellant made no effort to follow the "chain," because there was no evidence that anyone knew about the abuse, and thus no chain to follow.

phase of discovery, Appellant was also permitted to take discovery into anything related to Sterling's termination for a pattern of inappropriate behavior with his students. [*Id.*; FA00656]. Appellant had six months under the scheduling order to complete her first phase of discovery. [FA00657]. The Amended Scheduling Order provided that after Appellant completed her first phase of discovery - unless Appellant sought leave of court - discovery would be stayed until further order of the Court and that Appellees would have the opportunity to file dispositive motions and re-file previously filed motions including its Rule 11 motion. [*Id.*; FA00657].

Appellant's deposition on liability concluded on December 2, 2011. During the subsequent six months, Appellant, pursuant to the Amended Scheduling Order, took eight depositions: (i) Defendant Sterling[4]; (ii) Sandy Sterling[5]; (iii) Pam Arrowood[6]; (iv) Carlo DeStefano[7], (Pastor of Fairwinds Church and former principal of Fairwinds School); (v) Everett "E.L." Britton[8], (age 91, founder of Fairwinds and former Pastor of Fairwinds Church); (vi) Timothy "Tim" Britton[9],

[4] Beldon Edward Sterling, Jr. Deposition Transcript of May 31, 2012 ("Sterling") [FA00659 – FA00687].
[5] Sandra S. Sterling Deposition Transcript of February 29, 2012 ("Sandy Sterling I") [FA00688 – FA00711] and Sandra S. Sterling Deposition Transcript of June 11, 2012 ("Sandy Sterling II") [FA00712 – FA00741].
[6] Pamela Thuer (f/k/a Arrowood) Deposition Transcript of February 27, 2012 ("Arrowood") [FA00742 – FA00761].
[7] Carlo DeStefano Deposition Transcript of June 14, 2012 ("DeStefano") [FA00762 – FA00783].
[8] Everett L. ("E.L.") Britton, D.D. Deposition Transcript of June 14, 2012 ("E.L. Britton") [FA00784 – FA00858].
[9] Timothy ("Tim") William Britton Deposition Transcript of July 16, 2012 ("Tim Britton") [FA00859 – FA00868].

(former Pastor of Fairwinds Church); (vii) Sandi Sterling[10], (former coach and teacher at Fairwinds School); and (viii) James "Jim" Flohr[11], (former coach and teacher at Fairwinds School).

Appellant did not request leave of court to take further phase one discovery. Rather, Appellant stipulated to a briefing schedule on Appellees' motions for summary judgment and sanctions. [FA01001 – FA01003]. The Court granted the stipulated briefing schedule. [FA01004 – FA01006].

Appellees' motion for summary judgment was briefed and argued before the trial court.[12] On February 28, 2013, the trial court entered an order granting Appellees' motion for summary judgment (attached hereto as Exhibit "3"). [FA02136 – FA02147].

On February 20, 2014, Appellant filed a Notice of Acceptance of Offer of Judgment relating to a settlement between Appellant and defendant Sterling. [FA02148]. On November 3, 2014, the trial court entered its Final Order. [FA02149 – FA02150]. Appellant's November 5, 2014 Notice of Appeal was timely.[13]

---

[10] Sandi Sterling Deposition Transcript of June 14, 2012 ("Sandi Sterling") [FA00869 – FA00940].

[11] James "Jim" Flohr Deposition Transcript of June 14, 2012 ("Flohr") [FA00941 – FA01000].

[12] [Motion of Defendants Fairwinds Baptist Church, Inc. and Fairwinds Christian School for Summary Judgment FA01007 – FA01012; Opening Brief in Support of Motion of Defendants Fairwinds Baptist Church, Inc. and Fairwinds Christian School for Summary Judgment FA01013 – FA01136; Plaintiff's Answering Brief in Opposition to Fairwinds Baptist Church, Inc. and Fairwinds Christian School's Motion for Summary Judgment FA01137 – FA01977; Reply Brief in Support of Defendants Fairwinds Baptist Church, Inc. and Fairwinds Christian School Motion for Summary Judgment FA01978 – FA02135].

[13] Appellant initially filed a Notice of Appeal on March 14, 2013. Appellees moved to dismiss the appeal as untimely, and that motion was granted by this Court on April 30, 2014. [FA02151 – FA02153]. Appellant's Motion for reargument was denied by this Court on June 12, 2014.

[FA02176 – FA02177]. Appellant's Opening Brief ("POB") was filed on November 7, 2014. This is Appellees' Answering Brief.

B. **Facts** The undisputed material facts presented to the trial court after discovery were a far cry from what Appellant alleged in her Complaint. Far from showing that Fairwinds knew, approved of, intended and ratified the abuse, the only person Appellant even claimed knew about it was Sterling's wife, Sandy, who testified that she did not know about the abuse. [Sandy Sterling II at 158:15-16, 168:6-8 and 193:1-14; FA00730, 00732, 00738]. For purposes of the Motion for Summary Judgment, the following material facts were not disputed:

1. In 1984, when Appellant Plaintiff was approximately twelve or thirteen years old, Appellant's mother, unable to care for Appellant due to substance abuse and other issues, sent Appellant to live with Ed and Sandy Sterling. [POB at 2].

2. Defendant Ed Sterling was a teacher, coach, and bus driver at the Fairwinds School while Appellant was living with his family. [FA00003 ¶13]. In addition to being Appellant's foster father, Sterling was Appellant's math, bible and Spanish teacher. [POB 2-3].

3. Between 1985 and 1990, while Appellant was living with the Sterlings, Appellant attended Fairwinds School and Fairwinds Church. [POB 3]. Fairwinds

---

[FA02154 – FA02155]. The trial court held and adjourned an evidentiary hearing on Appellees' Motion for Sanctions Pursuant to Rule 11 on August 15, 2014. [FA02156 – FA02175]. Thereafter the parties resolved the Appellees' Motion for Sanctions.

permitted Appellant to attend Fairwinds without paying tuition. [Sandy Sterling II 117:11-16; FA00719].

4. Four months after Appellant moved in with the Sterlings, Sterling "touched Appellant on the butt." [POB 3]. The only persons Appellant claimed to have knowledge of this event were Appellant, Appellant's sister, whom Appellant told, and, by inference, Ed Sterling. [Hecksher 1 108:5-8; FA00239].

5. Subsequently, Sterling sexually abused Appellant from the time she was 13 to 21 years old, between one and five times per week, [POB 3] approximately between 364 and 1820 instances of sexual abuse. The last three the incidents occurred when Appellant would return from college to visit with the Sterlings. [Hecksher 1 115:4-7; FA00241].

6. Appellant conceded that at all times until well after the abuse ended, she actively and purposefully concealed Sterling's sexual abuse from everyone, including everyone at Fairwinds. [Hecksher 4 127:9 – 130, FA00514]. Notwithstanding the Complaint's allegations that Fairwinds knew, intended and approved of Sterling's sexual abuse of Appellant, by the close of discovery, the only people Appellant even claimed to have knowledge of any of instances of sexual abuse are Ed Sterling and Sandy Sterling, and Appellant herself.[14] [POB 3]. Appellant asserts that "Sterling

[14] As Appellant concedes, Sandy Sterling denies that she had knowledge of, or witnessed any sexual abuse. [Sandy Sterling II at 158:15-16, 168:6-8 and 193:1-14; FA00730, FA00732, FA00738].

was employed by Fairwinds at all times during which he sexually abused Plaintiff."[15] [POB 11].

7. Appellant told no one at Fairwinds about the abuse until long after it had concluded, and in fact, purposefully and, in fact, actively concealed it from everyone. [Hecksher 1 110:18 – 111:9, FA00240; Hecksher 4 127:9 – 130, FA00514].

8. No witness except Appellant testified that he or she knew Sterling was sexually abusing Appellant.

9. During the period of time Appellant was a student at Fairwinds, the Pastors were Fairwinds founder, E.L. Britton, Tim Britton, and Carlo DeStefano, who supervised Sterling. [Sandy Sterling II 142:14 – 143:7; FA00726]. Each testified that he had no knowledge of any sexual abuse of Appellant by Sterling. [E.L. Britton 56:15-60:20, FA00840-FA00844; Tim Britton 26:14 – 27:4, FA00866; DeStefano 50:4-13, FA00775].

10. Fairwinds School teachers and coaches, Jim Flohr and Sandi Sterling, both testified they had no knowledge of Sterling's sexual abuse of Appellant. [Flohr 52:3-17 – FA00993; Sandi Sterling 25:22 – 26:11, FA00894 – FA 00895].

[15] The Court should not accept this statement as true, as it is demonstrably false. Sterling was terminated by Fairwinds in 1992. [Sandy Sterling I 63:7 – 65:15; FA00704 – FA00705]. Appellant admits that Sterling continued to sexually abuse her until she was 21 years old, which age she attained in 1994. [Hecksher 1 at 115-16; FA00241].

11. Appellant's fellow Fairwinds student, Pam Arrowood, testified she did not know Sterling was abusing Appellant, and hence did not tell anyone at Fairwinds that Sterling was abusing Appellant. [Arrowood 50:23–51:3; FA00755].

12. Appellant also submitted the affidavits of fellow Fairwinds students Steve Duke and Stephanie Duke. [FA02178 – FA02179; FA02180 – FA02181, respectively]. Neither knew Sterling was sexually abusing Appellant and did not tell anyone at Fairwinds about that abuse. *Id.*

13. According to Appellant, Sterling would give her extra credit if she performed sexual favors for him. [POB 3]. Appellant does not assert that anyone except she and Sterling (by inference), had knowledge of this arrangement.

14. Until 1989, Sandy Sterling was a secretary at the Fairwinds School. [Sandy Sterling I 35:8-10; FA00697]. At all relevant times, Sandy Sterling was the wife of Ed Sterling. [Sterling 50:21-23; FA00672].

15. Appellant accompanied Sterling to the Fairwinds Junior/Senior Banquet when Appellant was between 14 and 16 years old. [POB 4]. Fairwinds teachers and staff knew about this, and did not view it as unusual or a red flag. [DeStefano 52:13-18; FA00775].

16. After the banquet, Sandy Sterling found a letter at her home that Appellant had written to Sterling asking that Sterling stop sexually abusing her. [Cmpl. ¶20; FA00004]. Appellant does not allege that anyone except herself, Ed

Sterling and Sandy Sterling have knowledge of the letter or its substance. Sandy Sterling denied seeing any letter. [Sandy Sterling I at 69:19-21; FA00706].

17. Appellant testified that Sandy Sterling witnessed Sterling performing oral sex on her when she was 15 or 16 years old, and that Sandy Sterling witnessed Sterling kissing and fondling her in the school gymnasium. [POB 5-6]. Appellant does not allege that anyone at Fairwinds, other than Sandy Sterling, had knowledge of this, and there is no such evidence anywhere in the record. Sandy Sterling denies any knowledge of Sterling's sexual abuse of Appellant. Contrary to Sandy Sterling's testimony, for purposes of the motion for summary judgment, Appellees conceded Sandy Sterling's knowledge. Sometime in 2001-2003, long after the abuse had ceased, Appellant alleges Sandy Sterling told Appellant's husband that Appellant got what she deserved. [POB 6].[16]

18. Sterling told Fairwinds student Pam Arrowood, that if there were any two people left on earth that he could pick, it would be he and Arrowood. [POB 6]. Arrowood told her parents of Sterling's comment and they in turn told Fairwinds. [Arrowood 10:17 – 11:3; FA00745]. Arrowood, her parents, Sterling and Pastors E.L. Britton, Tim Britton and DeStefano met, and discussed the comment. [Arrowood 11:3-5; FA00745]. Sterling was counseled about the incident. [Tim Britton 20:4 – 21:9; FA00864-FA00865].

---

[16] No Affidavit from Appellant's husband was submitted. This Court and the trial court should not consider inadmissible hearsay when deciding a motion for summary judgment. *Henry v. Nanticoke Surgical Associates*, *P.A.*, 931 A.2d 460, 462 (Del. Super. Ct. 2007) (citation omitted).

19. Sterling was terminated from his employment at Fairwinds in December 1992 after he objected to the manner in which Pastor DeStefano intended to discipline his son for writing crude statements on a blackboard. [Sandy Sterling I 63:7 – 65:15; FA00704 – FA00705].

20. Appellant testified that Sterling would "tap Plaintiff on the butt" during lunch period, when Fairwinds faculty were present. [17] [POB 8].

21. At an unspecified date during cheerleading or health class Appellant asked faculty member Renee Factor ("Mrs. Factor") about "foreplay before sex." [Hecksher 2 69:10-22; FA00275]. Appellant asserts that Mrs. Factor "started blushing and got awkward," [POB8], but made no effort to depose Mrs. Factor.

22. Fairwinds student Sherrie Phillips ("Phillips") complained that Sterling had rubbed her back inappropriately. [Hecksher 2 54:9-11; FA00271]. Pastor E.L. Britton and Pastor DeStefano counseled Sterling concerning this incident. [POB 22]. Phillips was not deposed and did not submit an affidavit.

23. Sterling made female students uncomfortable, and had a reputation among students as a "creep" and a "pervert" [POB 8-19]. No student testified that he or she told anyone at Fairwinds of Sterling's reputation, and there is no evidence that Fairwinds had any knowledge of this reputation.

[17] No Fairwinds employee testified that they ever saw Sterling tap Appellant on the butt during lunch or at any other time. Appellant may testify to what happened in the presence of Fairwinds' faculty but not as to what the faculty saw or knew.

24. During the 1980s, Fairwinds School, a private Baptist School, had no official policies concerning sexual abuse of students. [POB 10].

ARGUMENT

I. THE TRIAL COURT CORRECTLY REFUSED TO IMPUTE SANDY STERLING'S KNOWLEDGE TO FAIRWINDS.

A. **Question Presented**: Did the Superior Court err in refusing to Impute the knowledge of Sandy Sterling to Fairwinds where Sandy was Appellant's foster mother; the wife of the alleged tortfeasor; and a secretary at Fairwinds School.

B. **Scope of Review:** This Court's review of a trial court's legal rulings is *de novo. Barley Mill, LLC v. Save Our County, Inc.*, 89 A.3d 51, 60 (Del. 2014)(citation omitted).

C. **Merits of the Argument.** While Plaintiff alleged in her Complaint that Fairwinds School and Fairwinds Church knew about, approved of, acquiesced in, and ratified Ed Sterling's sexual abuse of Appellant, at conclusion of discovery the evidence told a very different story. As the trial court observed, "apart from Plaintiff, Defendant Sterling and Sandy Sterling, no member of Fairwinds knew about Plaintiffs abuse." [MSJ Order ¶16]. Thus, the case came down to whether the knowledge of Sandy Sterling, (who herself denied such knowledge) could be imputed to Fairwinds. The trial court correctly refused to impute the alleged knowledge of Sterling's wife to Fairwinds, finding that: . "Sandy Sterling had compelling, personal reasons for harboring her husband's misconduct and not informing the school. Under these extraordinary circumstances, Sandy Sterling's knowledge is not imputable to the school." *Id.* at ¶17 (citing *Doe v. Giddings,* 2012 WL 1664234 (Del. Super). The

trial court continued: "There is no evidence that Sandy Sterling's failure to inform on her husband was motivated by anything but loyalty to him. There is nothing from which a jury could conclude Sandy Sterling was trying to protect the school." *Id.*

The trial court correctly refused to impute the alleged knowledge of Sandy Sterling to Fairwinds. As Ed Sterling's wife, Sandy was personally motivated to conceal that alleged knowledge from her employer because of the stigma and the fact that reporting it was contrary to her own and her family's pecuniary interests. Sandy Sterling had no employment affiliation with the Fairwinds Church, and the record is clear that she had no supervisory authority over students or teachers in her employment at the Fairwinds School. Under these circumstances, the trial court properly decided the issue of Fairwinds' vicarious liability as a matter of law. *See Simms v. Christina School District,* 2004 WL 344015 at *5 (Del.Super.)(citing *Draper v. Olivere Paving & Construction Co*., 181 A.2d 565, 569 (Del. 1962)(scope of employment "question is ordinarily one for decision by the jury, *unless the contrary is so clearly indicated by the facts that the court should decide it as a matter of law.*")(emphasis added)).

The trial court relied upon *Doe v. Giddings*, 2012 WL 1664234 at *2 (Del.Super.), where the plaintiff alleged that an on-duty officer of the Delaware State Police raped her while she was detained on shoplifting charges. *Id*. at 1. The trial court granted the State's motion for summary judgment finding that the cop's conduct was not foreseeable. This Court reversed, holding that a factual dispute remained as

to whether the officer was acting within the scope of his employment when the alleged assault took place. *Doe v. State,* 76 A.3d 774 (Del. 2013).

Appellant makes much of this Court's reversal of the *lower* court's decision in *Giddings,* [POB at 14-15], but *Giddings* is distinguishable. Unlike this case, *Giddings* involved imputation of the actual knowledge of the tortfeasor agent to the principal, and did not implicate the adverse interest doctrine. Here, Appellant seeks to impute the alleged knowledge of Sandy Sterling, denied by Sandy, of her tortfeasor husband's misconduct, to Fairwinds. Sandy was not the tortfeasor. Her loyalty was to her husband, and her interest to her principal, Fairwinds, was adverse. As the trial court observed, Sandy had a strong personal motivation to conceal any knowledge of her husband's misconduct from Fairwinds.

Under Delaware law, the knowledge of an agent will not be imputed to its principal where the agent's personal interests are adverse to those of the principal. "Under agency law, the knowledge of an agent is generally imputed to his principal *except when the agent's own interests become adverse.*" *Lincoln National Life Insurance Co. v. Snyder*, 722 F.Supp.2d 546, 555 (D. Del. 2010)(emphasis in original)(quoting *MetCap Secs. LLC v. Pearl Senior Care, Inc.,* Civ. No. 2129, 2007 WL 1498989, at *10 (Del. Ch. May 16, 2007) (emphasis added) (citing *In re HealthSouth Corp. S'holders Litig.,* 845 A.2d 1096, 1108 n. 22 (Del.Ch.2003)).[18]

---

[18] Courts in other jurisdictions facing this type of scenario have refused to impute knowledge. *See,* e.g., *Christopher S. v. Douglaston Club*, 275 A.D.2d 768 (N.Y. 2000) (refusing to impute knowledge possessed by two board members regarding improper sexual behavior by one member's

Here, common sense dictates that Sandy Sterling was motivated to conceal an inappropriate relationship between her husband and foster daughter. Beyond protecting her family and her family's livelihood, a reasonable person would also bury this knowledge out of personal shame and embarrassment. Sandy Sterling's relationship to both Edward Sterling and Appellant rendered her incapable of discharging any duty of disclosure to Fairwinds, her principal.

Nor did Appellant set forth sufficient facts to show that Sandy Sterling was required to monitor Fairwinds' students and teachers as needed for vicarious liability principles to apply. The first step of vicarious liability, as defined by Restatement (Second) of Agency § 228, is determining whether the conduct of an employee "is of a kind [s]he is employed to perform." *Johnson v. E.I. duPont deNemours & Co.,* 182 A.2d 904, 906 (Del.Super. 1962)). Simply stated, Sandy was not required or authorized to discipline staff or students. Sandy had no responsibility to monitor or discipline staff, such as Edward Sterling. Appellant attempts to focus on broad contact Sandy may have had with students in an effort to bind Fairwinds. Sandy could not unilaterally discipline students for infractions, and she could only monitor a classroom on an emergency basis. Her responsibilities to handle incoming phone

---

son under the adverse interest exception because, upon learning of the abuse, "each board member completely abandoned any obligation owed to the Club … in favor of his perceived overriding obligations to his own son and family and the children directly involved in the prior incident); *Mann v. Adventure Quest, Inc.,* 974 A.2d 607, 614 (Vt. 2009)(no personal knowledge imputed to youth camp of employee's sexual assaults of youth campers because his personal interest in abusing the campers and concealing the same was inconsistent with his duty of loyalty to the employer-youth camp).

calls or schedule appointments for the principal is irrelevant to the issue of whether she had authority to supervise and manage Fairwinds' students or teachers. All of Sandy's acts cited by Appellant fail to create a question of fact as to Sandy Sterling's binding authority. Her knowledge cannot be imputed to Fairwinds by way of vicarious liability principles.[19]

For all the foregoing reasons the trial court did not err in refusing to impute the knowledge of Sandy Sterling to Fairwinds. The judgment of the trial court should be affirmed.

---

[19] Appellant suggests in a footnote that Sandy Sterling had a duty under Delaware law in effect at that time, to report Ed Sterling's sexual abuse to the state, and further that her failure to do so is imputed to Fairwinds. [POB at 13 n.23 (citing *Frugis v. Bracigliano*, 827 A.2d 1040, 1044 (N.J.,2003), and 16 *Del. C.* 903)]. *Frugis* is a simple negligence case decided by a New Jersey Court, applying New Jersey law, and has no application here. Title 16 *Del. C.* § 903, as it read during the relevant time period, provided, in pertinent part:

> Any physician, and any other person in the healing arts including any person licensed to render services in medicine, osteopathy, dentistry, any intern, resident, nurse, school employee, social worker, psychologist, medical examiner or any other person who knows or reasonably suspects child abuse or neglect shall make a report in accordance with § 904 of this title.

Id. (16 Del. C. 1953, § 1002; 58 Del. Laws, c. 154; 60 Del. Laws, c. 494, § 1).[19] In all events, it is clear that this statute does not create a private right of action for the benefit of those who allege to have been injured by a failure to report unprofessional physician conduct or known suspected child abuse. *Doe v. Bradley,* 2011 WL 290829, 17 (Del.Super.). Nothing in the statute suggests that the knowledge of a school employee is or may be imputed to the school, and Plaintiff provides no Delaware authority for that premise.

II. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF FAIRWINDS

Question Presented: Whether the trial court erred in granting summary judgment where there were no disputed issues of material fact and no reasonable juror could find that Fairwinds was grossly negligent.

Scope of Review: This court reviews *de novo* the trial court's decisions on summary judgment. *DaBaldo v. URS Energy & Constr.,* 85 A.3d 73, 77 (Del. 2014). This Court will: "… review the grant of a summary judgment *de novo* both as to the facts and the law in order to determine whether or not the undisputed facts entitled the movant to judgment as a matter of law." This analysis requires the Court "to examine the record to determine whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law." *United Vanguard Fund, Inc. v. TakeCare, Inc.,* 693 A.2d 1076, 1079 (Del.).

Merits of Argument: No reasonable juror could conclude from the undisputed material facts presented to the trial court that Fairwinds was grossly negligent in hiring, retaining or supervising Sterling. All of Appellant's claims against Fairwinds would have been time-barred but for the enactment of the Delaware Child Victim's Act of 2007, 10 *Del. C.* §8145 (the "CVA"). Under the CVA, the claims of a victim of sexual abuse may survive against the employer of the accused "*only* if there is a finding of *gross negligence* on the part of the legal entity." 10 *Del C. §*8145(b). Gross

negligence involves "more than ordinary inadvertence or inattention." *Jardel Co., Inc. v. Hughes*, Del., 523 A.2d 518, 530 (1987). It "requires a showing of negligence that is a 'higher level' of negligence representing extreme departure from the ordinary standard of care." *Smith v. Silver Lake Elementary School*, 2012 WL 2393722 at *2 (Del.Super. 2012) (citing *Hughes v. Christina School Dist*., 2008 WL 73710 at *4 (Del.Super.), and a showing of a "gross deviation" or "wanton conduct." *See also Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987) (gross negligence is the failure to perceive a risk of such a nature and degree that the failure to perceive such risk constitutes a gross deviation from the standard of care exercised by a reasonable person). No reasonable juror could conclude from the evidence in this case that Fairwinds consciously ignored any known or foreseeable risk to Appellant or was otherwise grossly negligent in hiring or supervising Sterling.

Grossly Negligent Hiring: Appellant contends that Fairwinds was grossly negligent in hiring and supervising Sterling. "An employer is liable for negligent hiring or 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." *Doe v. Indian River School Dist.* 2012 WL 1980562, at 4-5 (Del. Super)(quoting *Simms v. Christina Sch. Dist.,* 2004 WL 344015 (Del.Super.).

"The deciding factor is whether the employer had or should have had knowledge of the necessity to exercise control over its employee." *Id.* (quoting *Matthews v.*

Booth, 2008 WL 2154391 (Del. Super.)). Under either theory, the basis for liability rests upon whether it was foreseeable that the employee would engage in the type of conduct that caused the injury. *Id.* (citation omitted).

It was not disputed below that Fairwinds did not conduct a formal background check on Sterling before it hired him. Pastor DeStefano candidly testified that no such investigation was done, but he noted that Sterling had been a Church employee for a period of time prior to becoming a teacher, and Fairwinds knew Sterling from that experience. Nor is it disputed that there was nothing negative in Sterling's past that Fairwinds would have discovered even if it had done a state-of-the-art background investigation of Sterling. Even if Fairwinds had delved more deeply into Sterling's background it would not have discovered any indication that Sterling had a propensity to carry on sexual relationship with a student *See, Indian River School Dist.* 2012 WL 1980562 at 4-5 (granting summary judgment as to negligent hiring claim on similar facts); *Simms*, 2004 WL 344015 at *8 (Del.Super.)(same). Accordingly, the trial court's order granting summary judgment should be affirmed.

Grossly Negligent Supervision and Retention: The trial court's grant of summary judgment as to Appellant's claim that Fairwinds was grossly negligent in supervising and retaining Sterling should also be affirmed. Like her negligent hiring claim, a claim for negligent supervision requires proof that the injury was foreseeable. *Doe*, 2012 WL 1980562 at 6. There is simply no evidence in the record from which a reasonable finder of fact could conclude that Fairwinds knew or should

have known that Sterling was sexually abusing Appellant. Rather, the undisputed evidence is that Appellant not only did not tell anyone at Fairwinds that Sterling was sexually abusing her, but she purposefully concealed it from everyone at Fairwinds.[20]

Appellant is the only witness who testified that he or she had any knowledge of Sterling's alleged sexual abuse. The only person Appellant even claimed knew about the abuse was Sterling's wife, who was a secretary at the Fairwinds School, who denied such knowledge, who was loyal to her husband, not Fairwinds, and who, in any event had no authority to bind Fairwinds. *See* discussion, *supra.*

Appellant nevertheless attempted to build a gross negligence case on a handful isolated incidents from which no reasonable finder of fact would conclude that it was foreseeable to Fairwinds that Sterling was sexually abusing Appellant. Those incidents are as follows: (1) Fairwinds student, Pam Arrowood, told her parents that Sterling had told her that "if there were only two people left on earth, he would want it to be he and Arrowood." Ms. Arrowood's parents complained to Fairwinds officials, a meeting was convened with the parents, Fairwinds administration and Sterling. Believing his comment to be an isolated incident, Fairwinds counseled Sterling about his comment. This incident could not have put Fairwinds on notice that Sterling was sexually abusing Appellant. (2) Sterling took Appellant as his

[20] [Hecksher 2, at 110-11 ("Q: During that time frame [age 13 to 21] did you ever tell anyone [beside the one incident you told your sister] that you were being sexually abused by Ed Sterling?" "A: No.") FA00285; Hecksher 2, at 14 (Q: I understand that prior to the year 2000, you didn't tell anybody at the Fairwinds School or at the Fairwinds Church that Mr. Sterling was sexually abusing you. Is that correct?" "A: No, I didn't.") FA00261].

"date" to a banquet held by Fairwinds. No witness, however, believed that it was unusual for Appellant, who was Sterling's foster child, to attend the banquet with Sterling. (3) Sterling had a reputation as a "pervert" among Fairwinds students, would frequently stare at female students and touched Plaintiff's behind in the lunchroom. Plaintiff could not, however, produce a student or other witness who told anyone at Fairwinds they believed Sterling to be a pervert. Nor is there any witness who testified he or she saw Sterling touch Plaintiff, or anyone else inappropriately. One female student reported to a teacher that she was embarrassed when Sterling responded to her request to use the restroom by asking if she was experiencing "a woman thing." [Sandi Sterling 33: 21; FA00902]. These isolated comments, spread over a significant period of time, which are not directly or even closely linked to sexual abuse or to the Appellant would not convince any reasonable juror that Fairwinds should have known that Sterling was sexually abusing his foster-daughter. The facts in this case are a far cry from those in *Doe v. Indian River School District*, 2012 WL 1980562, at 4-5 (Del. Super), where this Court denied a defense motion for summary judgment on Plaintiff's claim that the district was grossly negligent in supervising a sexually abusive teacher.[21] Even the facts in *Simms,* were more

[21] In *Indian River,* (i) an employee informed the Superintendent and two members of the Board that she felt the teacher could carry on a relationship with a student; (ii) School officials knew the teacher exchanged text messages with female students; (iii) Assistant Principals knew female students adjusted their clothing to request favors from the teacher who would grant special privileges to those who would do so; (iv) multiple faculty members, witnessed girls spending inappropriate amounts of time alone in the teacher's office with the door closed; (v) the district knew the teacher was engaged in an ongoing, sexual relationship with a married teacher and had

egregious than those here and there, the Superior Court granted summary judgment in favor of the school district defendants and held that the school district could not be liable for negligence, let alone gross negligence. In *Simms,* as here, it had no knowledge, or reason to believe that the tortfeaser would sexually abuse a student.

No reasonable juror could have found that Fairwinds should have foreseen Sterling's abuse of Appellant, or that Fairwinds was grossly negligent. The trial court's grant of summary judgment should be affirmed.

---

engaged in sexual relations on school property; (vi) the District received sexual harassment complaints from employees regarding the teacher; (vii) one school board member was informed that the teacher told a female student she was "sluttish looking"; and (viii) School employees testified their complaints about the teacher were ignored. *See Id.* at 2-4.

III. THE SUPERIOR COURT PROPERLY DENIED APPELANT'S MOTION TO AMEND HER COMPLAINT

Question Presented: Did the trial court abuse its discretion in denying Appellant's motion to amend her Complaint, where the amendment would have been futile, subverted statutory law, and was in bad faith, dilatory and prejudicial?

Scope of Review: A trial court's denial of a plaintiff's motion to amend the complaint is reviewed by this Court for abuse of discretion. *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993).

Merits of Argument: The trial court did not abuse its discretion in denying Appellant's motion to amend her complaint. Superior Court Rule 15(a) provides a party with the right, among other things, to state additional claims. *Mullen*, 625 A.2d at 263. Notwithstanding this right, a trial court may permit or deny an amendment based on its sound discretion. *PNC Bank v. Turner*, 659 A.2d 222, 225 (Del. Super. 1995)(citations omitted). Generally, a trial court must "exercise its discretion in favor of granting leave to amend" when there is no prejudice to the non-moving parties. *Mullen*, 625 A.2d at 263. Even in the absence of prejudice, a trial court may deny a motion to amend a pleading when there is evidence of bad faith, dilatory tactics, or the amendment lacks viability. *See Chrysler Corp. v. New Castle County*, 464 A.2d 75 (Del. Super. 1983); *Prather v. Doroshow, Pasquale, Krawitz & Bhaya*, 2011 WL 1465520, 4 (Del. Super.). The trial court did not abuse its discretion in denying Appellant's motion to amend.

When she moved to amend her complaint, Appellant's case had been on file for more than two years. Written discovery and Appellant's deposition had utterly failed to generate any evidence to support a gross negligence claim against Fairwinds. Appellant herself admitted she made every effort to conceal her abuse from everyone at Fairwinds, and the only person she even claimed knew about it was Sandy Sterling.

Because there was no evidence to support her gross negligence claim against Fairwinds, Appellant changed course. To support her gross negligence claim, Appellant alleged that she had been raped by Mr. Sterling between one and five times per week for a seven-year period, for a total of between 364 and 1820 incidents. Her proposed simple negligence claim, was predicated on her claim that she had recently recalled a single additional incident in which she claimed Sandy witnessed Ed Sterling kiss her in the Fairwinds School gymnasium. That single new memory formed the basis of Appellant's request for leave to amend her complaint to allege a simple negligence claim against Fairwinds.

1. Appellant's Amendment Would Have Subverted the CVA and Was Futile as Matter of Law

When enacting the Child Victim Act, the Delaware General Assembly deliberately prescribed a distinct *mens rea* floor for historical claims of sexual abuse against entities which would otherwise be barred by the statute of limitations. The relevant provision of the Child Victim Act ("CVA") provides:

> … If the person committing the act of sexual abuse against a minor was employed by ... [a] legal entity … damages against the legal entity shall be awarded under this subsection *only if there is a finding of gross negligence on the part of the legal entity*.

10 *Del. C.* § 8145(b) (emphasis added). "The General Assembly, in Section 8145, made a policy decision to set gross negligence as the floor – not the ceiling – for invoking the statute's applicability. The plain language of the statute sets the specific mental state of gross negligence as the prerequisite for revival of all unspecific causes of action." *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1257 (Del. 2011).

2. Appellant's Reliance on Traumatic Amnesia and *Eden* is Misplaced.

In her motion to amend the complaint, Appellant claimed that her recent diagnosis of "traumatic amnesia" provided a basis for her to amend her Complaint, and argued that "claims based on her repressed memories did not begin to run until sometime after February 22, 2010." [POB A00336.] Relying upon *Eden v. Oblates of St. Francis De Sales*, 2006 WL 3512482, *4 (Del. Super.), Appellant claims her repressed memory renders her injury "inherently unknowable" such that the statute must be tolled. Appellant's injury here was not inherently unknowable because, by 1997, she was aware and had knowledge of Mr. Sterling's serial abuse which occurred from 1984 through 1991. Appellant's reliance upon *Eden* is misplaced.

The Plaintiff in *Eden* alleged that a priest had sexually abused him 901 times over a nine year period in the 1970s and 1980s. Eden reported the last incident of

sexual abuse in 1985 to his parents, but claimed in his original complaint that he had suppressed the memory of the 900 prior instances. *Eden* predated the CVA and the then two-year statute of limitations would have barred all Eden's claims, so Eden invoked the discovery rule exception to the statute of limitations for inherently unknowable injuries. The court applied that exception, and allowed Eden's claim to be predicated on 900 of 901 sex abuse incidents.

Eden is distinguishable from the instant case on multiple factual and legal grounds. First, *Eden* was decided before the passage of the CVA, at a time when the only way for victims of historical child abuse to avoid the statute of limitations was to assert that their causes of action were inherently unknowable due to traumatic amnesia. The CVA specifically prescribed a gross negligence *mens rea* standard for entities, and opened a narrow two-year window for the bringing of such claims. Appellant filed her case pursuant to the CVA, and should not be permitted to claim now that some isolated incident of relatively minor abuse was inherently unknowable. Second, the facts in *Eden* are entirely different from the facts here. The *Eden* Court allowed the plaintiff's claim to be predicated on 900 out of 901 incidents of sexual abuse. The last incident could not form the basis of her claim because it was known to the plaintiff in 1985, who reported it to his parents at around that time. *Eden* at *4. Here, Appellant remembered the vast majority of the alleged abuse, including incidents both before and after the "newly remembered" incident. Even Appellant's proffered expert stated, "Ms. Hecksher states that *she continuously remembered the*

abuse, but that the memory of being discovered kissing Mr. Sterling by Mrs. Sterling only came recently….*Overall Ms. Hecksher did not have any significant gaps in her memory, and never had a time when she forgot the circumstances of being sexually abused*." [David T. Springer, M.D. Evaluation – attached hereto as Exhibit "4".] Unlike the plaintiff in *Eden*, who blocked out all but the last single incident of sexual abuse from his memory, Appellant remembered the full continuum of abuse from 1984 through 1991 when filing her Complaint. *Eden* does not support Appellant's Motion, and Fairwinds respectfully requests that the Court decline Appellant's invitation to extend *Eden* to the facts of this case.[22] [23] [24]

3. Appellant's Amendment Was Dilatory, Made in Bad Faith, and Would Unfairly Prejudice Fairwinds

Appellant's epiphany about the single isolated incident of gymnasium kissing allegedly came after her February 22, 2010. Yet she did not seek leave to amend until September 15, 2011 almost seventeen full months after the recollection. In *Hess v. Carmine*, 396 A.2d 173 (Del. Super. 1978), the court held that an amendment

---

[22] The trial court noted that this theory "seems like an awfully big stretch." [Exhibit "5" January 8, 2010 Hearing Tr. at 20-21].

[23] Expert testimony in support of the theory of "traumatic amnesia" has been excluded by the Superior Court as "unreliably established in the scientific community. *Keller v. MacCubbin*, 60 A.3d 427, 433 (Del.Super. 2013). Moreover, while Appellant's counsel used that term liberally in her motion for leave to amend, and diagnosed Appellant with this phenomenon in the proposed amended complaint, her psychiatrist, Dr. Springer, never diagnosed Appellant with traumatic amnesia and that term appears nowhere in his 19-page report.

[24] Appellant's proposed amendment is also futile because Sandy's alleged knowledge of the incident cannot be imputed to Fairwinds pursuant to basic principles of principal-agent authority. *See* Discussion, *supra,* Section I.

"should be made as soon as the necessity for altering the pleading becomes apparent." Appellant has failed to articulate any reason for the delay. Appellant's Motion for Leave to Amend her Complaint was properly denied because it was dilatory.

Furthermore, Fairwinds would have been prejudiced by the filing of an amended complaint asserting a futile simple negligence claim at this late date in discovery. *See e.g.*, *McClain v. McDonald's Restaurants of Delaware, Inc.*, 2011 WL 2803108 (Del. Super.). It would have been tremendously prejudicial and unfair for Fairwinds to be forced go to trial before an undoubtedly confused jury on hundreds or thousands of rapes subject to a gross negligence standard, and a single kissing/fondling incident on a simple negligence standard. Appellant's effort to amend her Complaint to assert a simple negligence claim against Fairwinds, in derogation of the Child Victim's Act gross negligence requirement, was a thinly veiled, bad faith, dilatory, and futile effort to revive her moribund case.

For all the foregoing reasons, the trial court's implicit denial of Appellant's motion for leave to amend should be affirmed.

IV. APPELLANT HAS FAILED TO SHOW AN ABUSE OF DISCRETION REGARDING THE LIMITED DISCOVERY

A. **Question Presented:** Whether the trial court abused its discretion in entering a Scheduling Order that (i) was stipulated to by Appellant; and (ii) specifically permitted Appellant to follow the chain of evidence related to gross

negligence and seek leave of court to take additional discovery, and Appellant did not seek leave of court.

B. **Standard of Review:** This Court will review the trial court's pretrial discovery rulings for abuse of discretion, and may not substitute its own notions of what is right for those of the trial court, if the lower court's judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness. *Phillips v. Wilks, Lukoff & Bracegirdle*, *LLC,* 2014 WL 4930693, 4 (Del.) (cited authorities omitted).

C. Merits of the Argument:

The Complaint made conclusory allegations that Fairwinds knew about and intended that Sterling sexually abuse Appellant, and approved of that abuse. After written discovery failed to identify any person at Fairwinds who even knew of that abuse, and after more than two years had passed since the filing of the complaint[25] with no further amplification of Appellants' claims, the trial court properly issued an amended scheduling order. That order attached hereto as Exhibit "2", - agreed to and submitted by Appellant - permitted Appellant to take discovery designed to develop "direct and obvious evidence as to Fairwinds' gross negligence." Specifically, Appellant was permitted to take discovery into what allegedly inappropriate contact occurred between Appellant and Sterling on school grounds; what Fairwinds knew about Sterling's inappropriate conduct with Appellant or any other Fairwinds student;

[25] The extensive procedural history that preceded the entry of the scheduling order is set forth *supra.*

and the reasons for Sterling's termination by Fairwinds. The scheduling order also permitted Appellant to "follow the chain of knowledge established through this discovery." Thus, if a witness testified that she told other persons about inappropriate conduct by Sterling, Appellant was permitted to depose those persons, to determine if those persons told the institutional defendants of inappropriate contact between Sterling and the Appellant.

Not one witness testified he or she knew of she told other persons about Sterling's abuse of Appellant. The scheduling order also permitted Appellant to seek leave of court to take additional discovery. [*See* Amended Scheduling Order at pg. 6]. She did not seek leave of court to take further discovery. Nor could she point to any discovery she might have taken that might prove fruitful.[26] The trial court's scheduling order properly precluded further discovery into such collateral matters unless and until Appellant could produce evidence that Fairwinds knew about Sterling's abuse of Appellant. Because Appellant never produced that evidence, that discovery was not permitted. As the trial court observed:

> … Plaintiff protests that the court's "unique" scheduling order limited her discovery. Plaintiff took almost a year to depose seven "witnesses." Actually, the court did not prevent Plaintiff from deposing her best witnesses and following the "chain of knowledge." Instead, much like counsel's in-court declarations, Plaintiff now claims in conclusory fashion that even with the limitations of discovery, the record is "filled with evidence." Yet Plaintiff fails to show any.

[26] Rather, consistent with her fishing expedition, of Cyndi O'Brien, who claimed that the principle of Fairwinds disciplined her in a way that she felt was inappropriate, that affidavit did not even mention Plaintiff or Sterling. [POB A105-A106].

[Order at pg. 11].

Appellant had ample time to take discovery and had the right under the existing scheduling order to seek leave to take further discovery. The trial court's court exercised its discretion based upon conscience and reason, and not capriciousness or arbitrariness. The judgment of the trial court should be affirmed.

CONCLUSION

For the reasons set forth above, Fairwinds respectfully requests that the Superior Court's Order granting for summary judgment be affirmed.

Respectfully submitted,

MARGOLIS EDELSTEIN

/s/Herbert W. Mondros
Herbert W. Mondros, Esq.
(Del. Bar No. 3308)
300 Delaware Ave., Suite 800
Wilmington, Delaware 19801
(302) 888-1112 (telephone)
(302) 888-1119 (facsimile)
hmondros@margolisedelstein.com

Counsel for Appellees Fairwinds Baptist Church, Inc. and Fairwinds Christian School

Dated: December 8, 2014