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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,	:	
	:	
	:	
	:	
Defendant Below/ Appellee.	:	

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

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December 23, 2014

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

A. The Difference Between Imputation of Conduct (Vicarious Liability/Respondeat Superior) and Imputation of Knowledge.

This case is about imputation of conduct, or vicarious liability/Respondeat Superior, as well as the separate legal concept of imputation of knowledge. See Wardley Better Homes & Gardens v. Cannon, 61 P.3d 1009, 1015 (Utah 2002) for a succinct discussion of the differences in the types of claims. Appellant's vicarious liability or imputation of conduct claims seek to make Fairwinds liable for its employees' grossly negligent actions taken while within the scope of employment. Appellant's separate imputation of knowledge claim seeks to impute employee Sandy Sterling's knowledge to Fairwinds, because she was acting within the scope of her employment. Her knowledge, if imputed to Fairwinds, makes it liable for gross negligence in retention and supervision of Edward Sterling.

B. Imputation of Sandy Sterling's Conduct. The lower Court correctly held that for purposes of summary judgment Sandy Sterling's knowledge of and failure to report Kim Hecksher's abuse was assumed and that this failure to report occurred while she was acting as an employee of Fairwinds. Hecksher v. Fairwinds Baptist Church, Inc., 2013 Del. Super. LEXIS 138, 3 (Del. Super. Feb. 28, 2013). It erred when it held that Sandy Sterling's failure to report was outside

of the scope of employment, as Doe v State, 76 A.3d 774 (Del. 2013), makes clear. Fairwinds completely fails to address why the Court's ruling in this regard was not error. Fairwinds does not deny *anywhere* in its answering brief the central claim of error in this case: that the trial court erred in refusing to impute Sandy Sterling's conduct to Fairwinds.[1] Because Sandy Sterling was acting as an agent of Fairwinds[2] when she committed the tortious acts of failing to report the sexual abuse of plaintiff, Fairwinds is liable for her actions. This is basic agency law. Fields v. Synthetic Ropes, Inc., 215 A.2d 427, 432 (Del. 1965). Restatement of Agency (2d) §228, upon which Doe v. State is based, addresses *actions* of employees being imputed, and clearly there is no adverse interest exception to this imputation. If criminal rape can be imputed to the Delaware State police in Doe v. State, then surely the gross negligent and/or intentional act of failure to report abuse can be imputed to Fairwinds. One is hard pressed to see how anyone could have more of an "adverse interest" to his employer than a police officer raping someone. Under Doe v. State, Sterling's actions in raping Kim Hecksher at the

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[1] See Appellant's OB, Argument I.A., Question Presented: "Did the Superior Court err in determining that Fairwinds' employee Sandy Sterling's knowledge ***and actions*** are not imputable to Fairwinds?"; see Appellant's OB, Argument I.; see subsequent discussion in Argument I.C. and II.C.5.b. regarding imputation of Sandy Sterling's conduct in failing to report the abuse; see Appellant's SJAB below, p. 27, A532.

[2] There is no difference between Fairwinds Church and Fairwinds School. Fairwinds School is simply a division of the Fairwinds Church corporation. 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,AR136). Since she was admittedly an employee of the School she was also an employee of the Church.

School and Church can be imputed to Fairwinds. Then how does it make sense not to impute the tortious actions of non-rapist Sandy Sterling?

The lower Court improperly took the question of whether Sandy Sterling was *acting* in the ordinary course of her employment when she failed to report her co-worker's abuse of a student from the jury. To hold differently in this case would be the equivalent of a reversal of the recent Delaware Supreme Court case, Doe v. State, and create uncertainty in Delaware law.

1. Statutory Duty to Report. As set forth in Appellant's Opening Brief ("OB"), Facts §§ B. and C., Arg. I.C.,II.C.5.b., Sandy Sterling's failure to report Kim's abuse was clearly in the scope of her employment. It was what she was expected to do in her job, both by statute and by Fairwinds. Fairwinds' employees, including Sandy, as "school employees," had a statutorily imposed duty to report any child abuse which they knew of to the Division of Child Protective Services. 16 Del. C. § 903 (1976). (see Schreffler, ¶ 13, A 481-482). Appellant is not arguing that this reporting statute creates a private right of action. It constitutes evidence of the standard of care, an affirmative duty to report, expected of school employees like Sandy Sterling, and thus shows that her failure to report was a gross violation or reckless violation of that standard of care. See Doe v. Bradley, 2011 Del. Super. LEXIS 21, 39-41 (Del. Super. Ct. Jan. 21, 2011) (citing cases).

2. Fairwinds' Expectations of Sandy Sterling to Report. Kim Hecksher does not need the statute – she has Sandy Sterling's employer's admissions regarding her job duties to prove that her failure to report was within the scope of her employment. All employees of Fairwinds' School–including the secretaries–took part in the supervision of students and school employees, *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. ((E.L. Britton 64:14-65:7,A433-434.). Principal DeStefano explained that if a secretary at the School discovered that a teacher was acting inappropriately with a student or 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,A443-444). Pastor Britton admitted that Sandy should have taken action when she became aware Sterling was abusing Kim. (E.L. Britton 64:14-65:7, A433-434). 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, A443-444). **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).

There is nothing in the record to suggest Sandy was a low level employee (she was the "nerve center of the office") (DeStefano 43:17-19, A448), but that

does not matter under Delaware law because any employee's conduct is imputed if the conduct is within the scope of employment. See Appellant's OB, Arg. II.C.5.b for cases. See Draper v. Olivere Paving & Constr. Co., 81 A.2d 565, 569 (Del. 1962) (paving company employee's assault could be imputed to his employer); Screpesi v. Draper-King Cole, Inc., 1996 Del. Super. LEXIS 555 (Del.Super. Dec. 27, 1996) (truck driver's assault could be imputed to his employer).

Even if it is not appropriate to impute Sandy Sterling's knowledge to Fairwinds, it is certainly appropriate to impute Sandy Sterling's conduct to Fairwinds. The two are not mutually exclusive, nor are they both required in order for Fairwinds to be liable.

C. Imputation of Sandy Sterling's Knowledge. Fairwinds concedes that if Sandy Sterling's knowledge[3] is imputed to Fairwinds, Appellant wins on summary judgment. (Answering Brief ("AB"), p. 15). Doe v. Giddings, [4] the case the lower court cited for the proposition that as a matter of law Sandy Sterling's knowledge and conduct were outside the scope of her employment, was

[3] Fairwinds claims that Kim Hecksher's testimony regarding her husband's statement that Sandy Sterling admitted knowing of the abuse all along is not admissible for purposes of summary judgment. Contrary to Fairwinds' argument in its statement of facts, evidence of the nonmoving party need not be in a form that would be admissible at trial in order to avoid summary judgment. Taylor v. Jones, 2002 Del. Ch. LEXIS 152, 10, 10 n.11 (Del. Ch. Dec. 17, 2002) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment); accord Williams v. Borough of West Chester, Pa., 891 F.2d 458, 466 n.12 (3d Cir. 1989); J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1542 (3d Cir. 1990); Romdhani v. Exxon Mobil Corp., 2010 U.S. Dist. LEXIS 119293, 7 (D. Del. Nov. 10, 2010).

[4] 2012 Del. Super. LEXIS 204 (Del. Super. May 7, 2012).

subsequently reversed by this Court in Doe , 76 A.3d at 776, 777. This Court found that a police officer's crime of rape can be done within the scope of his employment and thus imputed to his employer, and that whether it was is a question for the jury. Id. Fairwinds attempts to distinguish Doe v. State on the grounds that that case involved imputation of the tortfeasor's knowledge to his employer; in this case however Sandy Sterling is not the tortfeasor. (Appellee AB, p. 17). If an employee's knowledge that he is raping someone can be imputed to his employer then certainly an employee's knowledge that a co-worker is raping someone can be imputed to his employer. Under Fairwinds' analysis of Doe v. State to this case, Sterling's knowledge that he is raping Kim Hecksher in the School and Church can be imputed to Fairwinds but Sandy Sterling's knowledge of those rapes cannot be. That is illogical as Sterling's interests are more adverse than Sandy's. Doe v. State strongly supports Appellant's argument that whether Sandy Sterling's knowledge should be imputed to Fairwinds is a question for the jury.

1. Low Level Employee's Knowledge Can be Imputed. Fairwinds argues that Sandy Sterling was just a low level employee and so her knowledge should not be imputed, but the level of employee is not of significance. In an opinion written when he was serving as Vice-Chancellor Steele explained the different concepts of imputing knowledge versus imputing actions to a corporation and how low level

employees' knowledge and actions could be so imputed. E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., 1996 Del. Super. LEXIS 48 (Del. Super. Ct. Feb. 22, 1996).

> The policies in question were written to cover fortuitous property damage, hence the language "neither expected nor intended." Expected or intended property damage does not become fortuitous simply because a "low-level" DuPont employee causes it.

Id. at 7.

> The Court explained the law of imputation of employees' knowledge:
>
> Delaware law states the knowledge of an agent acquired while acting within the scope of his or her authority is imputable to the principal. *J. I. Kislak Mtg. Corp. v. William Matthews Bldr., Inc.,* Del. Super., 287 A.2d 686, 689 (1972), *aff'd,* Del. Supr., 303 A.2d 648 (1973). Similarly, knowledge of an employee is imputed to the employer. *Bradford, Inc. v. Travelers Indemnity Co.,* Del. Super., 301 A.2d 519, 523 (1972). This imputation occurs even if the employee does not communicate this knowledge to the principal/ employer. *Vechery v. Hartford Accident and Indem. Insur. Co.,* Del. Super., 49 Del. 560, 121 A.2d 681, 684 (1956).

Id.

> This is consistent with *respondeat superior/vicarious liability*:
>
> DuPont urges the Court focus on the acts of those "employees at a certain level of responsibility."18B Am. Jur. 2d Corporations § 1673, at 524 (1985). I agree in as much as DuPont is held liable for the acts by those employees responsible for the property damage which occurred. That is, any DuPont employees, regardless of their titles or positions, whose duties included waste management or chemical dumping and whose acts therefore created the conditions which ultimately led to the property damage at issue, are deemed to have the degree of knowledge sufficient to impute that knowledge to DuPont. Just as DuPont, under agency law, could not escape liability for the acts of those employees who created the damage, if those actors intended or expected property damage, indemnification could never have been contemplated to be available for the consequences of their actions.

Id. at 8 (emphasis added). Duties matter, not title or positions. The Court also held that the knowledge must appear relevant in view of the employee's duties for imputation to occur. Id. Based on Fairwinds' admission that reporting was required by Sandy Sterling in her job, as explained above, based on Sandy Sterling's admission that she would have reported the abuse (Sandy 6/11/12 p. 99:20-100:11, A404, 135:15-136:1, A407), and based on the law that required her to report abuse, her knowledge of the abuse of a student by an employee was clearly relevant in view of her duties as a school employee.

2. Adverse Interest is a Question for the Jury. For the proposition that Sandy Sterling's adverse interest should preclude imputation of her knowledge to Fairwinds, Appellee cites Lincoln National Life Insurance Co. v. Snyder, 722 F.Supp.2d 546 (D.Del. 2010). There, plaintiff sued its own employee and others for, *inter alia*, fraud in procuring a life insurance policy from it. The court found for purposes of a motion to dismiss that the knowledge of that defendant employee, who allegedly actively misrepresented information to procure an illegal policy from his employer, was not imputed to the principal. The court explained this was consistent with Delaware public policy of:

> holding accountable one who transacts his business through another for what the other does or does not do in conducting that business. The principal should bear the burden rather than a third party who has dealt with the agent to the third party's detriment.[] Where the third party, in this case [defendant trust], has allegedly dealt with [defendant employee] to his benefit rather

than detriment, the principal should not bear the burden of the agent's fraud or misrepresentation.

Lincoln Nat'l Life Ins. Co., 722 F. Supp. at 556.[5] Here, the third party is Appellant, an innocent victim who dealt with Sandy Sterling to her detriment, not to her benefit as in Lincoln.

Appellee also cites In re HealthSouth Corp. S'holders Litig., 845 A.2d 1096, 1108, n.22 (Del. Ch. 2003), then Vice-Chancellor Strine found that "[w]hen corporate fiduciaries -- such as HealthSouth managers -- have a self-interest in concealing information -- such as the falsity of the financial statements that they had helped prepare -- their knowledge cannot be imputed to the corporation" in a case where the corporate fiduciaries had "pled guilty to crimes centering on the intentional falsification of HealthSouth's financial statements." In re HealthSouth Corp. S'holders Litig., 845 A.2d 1096, 1102 (Del. Ch. 2003).

These cases can be distinguished from our present case because in those cases, the knowledge of the agents who were actively defrauding their principals

[5] Similarly, the out of state cases that Fairwinds cites can be distinguished. In Christopher S. v. Douglaston Club, 275 A.D.2d 768, 770 (N.Y. App. Div. 2d Dep't 2000), "Both board members testified, inter alia, that in order to save embarrassment to all families involved in the prior incident, information concerning Zachary R.'s conduct was intentionally withheld from the Club." and the Court found that the Board members'duties had nothing to do with what they learned about the Board members' son. In Mann v. Adventure Quest, Inc., 974 A.2d 607, the Supreme Court of Vermont reversed the superior court's grant of summary judgment to the insurer because it could not determine as a matter of law whether the sexual abuser and Executive Director of a corporation controlled and dominated it such that his knowledge of his own criminal actions could be imputed. Id. at 614.

was not imputed in cases between the principals and the defrauding employee. Here, Appellant seeks to impute employee Sandy Sterling's knowledge, not the knowledge of Edward Sterling. Sandy Sterling testified she had no adverse interest to her employer, (See Appellant's OB, I.C.) and there is no record evidence of her having an adverse interest, so whether she had an adverse interest should be decided by the jury.[6] For purposes of summary judgment, Judge Silverman has stated that "Uncontroverted evidence offered in support of a motion for summary judgment must be accepted as true." Hercules Inc. v. Aetna Cas. & Sur. Co., 1998 Del. Super. LEXIS 124, 7 (Del. Super. Jan. 14, 1998). It is an uncontroverted fact based on the record below that Sandy Sterling had no adverse interest.

3. Public Policy Precludes Holding Sandy Sterling Had an Adverse Interest as a Matter of Law. It is also against public policy, as revealed by the legislature's enactment of the Child Victim's Act ("CVA")[7] and 16 Del. C. § 903,

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[6] In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1463 (D. Ariz. 1992) ("The record generally does not support a finding that the adverse agent doctrine shields Bretonneau as a matter of law,"); Chamberlain Group, Inc. v. Nassimi, 2010 U.S. Dist. LEXIS 45624, 19 (W.D. Wash. May 10, 2010) (issue of fact as to whether adverse interest exception applied where agent was aware of fraud).

[7] The record of the passage of the CVA reveals numerous reasons why the CVA was intended to encourage survivors to come forward and file a lawsuit:

1. To give survivors of childhood sexual abuse an opportunity to seek judicial relief. (Peterson 104, AR28; Turlish 15, AR35).

2. To help identify and bring to public account past and present active pedophiles. (McBride 2, Hamilton 2 -3, AR3).

to hold as a matter of law that a female school employee has an interest in protecting a marriage to a child rapist which outweighs her interest in everything else: the abused child's welfare, one's interest in obeying the law, in being a good employee, and in being a good church member. Sandy Sterling admitted to two affairs during her marriage, one during part of the time the abuse is alleged, so how important was her marriage to her at this time? (Sandy June 11, 2012 p. 130:20-131:6,AR167). Again, all of this is a question for the jury.

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3. To disclose information to the public, "bring out into the open" and shine "daylight" onto the cover up of sexual abuse of children. (Valihura 41; AR41).

4. To hold accountable institutions which hid or enabled child abusers. (Doyle 13, AR5).

5. To provide an incentive for victims to come forward. (McBride, Hamilton 2, AR3).

6. To prevent future sexual abuse by identifying and exposing pedophiles. (Lavelle 72, AR49; Abrams 144-146, AR67; Quill 11-12, AR89; Hamilton 66, AR103).

7. To learn and expose the truth about institutions which hid or enabled child abusers through discovery of their records. (Turlish 16-17, AR35).

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

A. Gross Negligence. A reasonable juror could certainly conclude, looking at the evidence presented below in the light most favorable to the Appellant, that Fairwinds was grossly negligent in supervising Sterling[8], where Appellant's ultimate burden of proof is merely *more likely than not*, or preponderance of the evidence, not clear and convincing or beyond a reasonable doubt. See Hercules Inc. v. Aetna Cas. & Sur. Co., 1998 Del. Super. LEXIS 124, 10 (Del. Super. Ct. Jan. 14, 1998) (explaining implication of plaintiff's burden on summary judgment standard). That means 50.0000001%, or just a tip of the scales, in favor of Appellant. Appellant only needs to prove to the jury that Fairwinds' conduct (through its agents) was a "gross deviation from what a reasonably prudent and careful person would do in the same situation" (Vai jury charge, p.10,A187), not the higher mens rea of reckless or wanton conduct. Appellee does not cite any case that says gross negligence is the equivalent of "wanton conduct" or "conscious disregard" although it claims they are equivalent in its answering brief. (p. 21). This Court has explained:

> Gross negligence, though criticized as a nebulous concept, signifies more than ordinary inadvertence or inattention. It is nevertheless a degree of negligence, while recklessness connotes a different type of conduct akin to the intentional infliction of harm. ...[] **where reckless (wanton) or wilful conduct is required,** either as a threshold for recovery, as in claims based

[8] Appellant is not arguing negligent hiring and did not argue it below.

> on the premises guest statute or as a prerequisite for the recovery of punitive damages, as in this case, **even gross negligence will not suffice.**

Jardel Co. v. Hughes, 523 A.2d 518, 530 (Del. 1987) (emphasis added); accord Hughes v. Christina Sch. Dist., 2008 Del. Super. LEXIS 7, 11-12:

> [w]anton conduct occurs when a person, with no intent to cause harm, performs an act so unreasonable and dangerous that he knows or should know that there is an eminent likelihood of harm which can result. It is the 'I don't care attitude'."...[] such conduct "is more egregious than conduct constituting gross negligence.

In addition to Sandy Sterling's conduct there was plenty of other evidence of grossly negligent conduct by Fairwinds' employees, discussed below.

B. Fairwinds was on Notice of Sterling's Inappropriate Behavior and Failed to Respond. Pastor Tim Britton admitted that the conduct of Sterling that Pam Arrowwood testified she had complained about would have sent a red flag up to him. (Tim Britton 22:2-22, A462). 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, A462).

Whether Sterling was actually counseled for making an advance on student Pam once Pastors E.L. Britton, Tim Britton, and Principal Carlo DeStefano learned of it is a material fact in dispute. Pastor Tim Britton took student Pam's complaint. (DeStefano 44:14-46:16, A448-449). Fairwinds' interrogatory responses, 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, A147). **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, A454-455) (emphasis added). Tim Britton also could not remember any details and did not know what the complaint was about, (Tim Britton 20:4-16,A461, 22:2-24:15,A462). 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). In response to the complaint that Tim Britton thought Pam had made, which was *not* the actual complaint she made, Tim Britton testified "But I do know there was just a discussion with him about, you know, be very professional and, you know, don't get personal in the lives, you know, or about your -- if you have a dream of somebody, or you know." (Tim Britton 20:6-11,A461). So at best there is evidence that Tim Britton may have told Sterling that he shouldn't get personal in a student's life, but there's absolutely no evidence that anyone counseled, reprimanded, or disciplined Sterling for the actual comment that Pam complained about which was a sexual advance.

Sherrie Phillips' complaint, that Sterling had rubbed her back inappropriately, was notice to Fairwinds that Sterling had done something **"very inappropriate"** to a female student (see DeStefano 17:18-22, A442). It would have raised a **red flag** (Tim Britton 30:23-31:21, A464) and was **"tremendously inappropriate."** (Tim Britton 31:16, A464).

It is also disputed as to whether anyone at Fairwinds counseled, reprimanded, or disciplined Sterling for rubbing student Sherrie Phillips' back inappropriately. 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, A147, and verification, A154) (emphasis added). Tim Britton denied knowledge of this complaint. (Tim Britton 25:12-16, A463, 26:3-7, A463, 30:23-31:3, A464).

Finally and very significantly, Sterling took the Fifth Amendment when asked whether Pastor E.L. Britton or Principal DeStefano were aware of any sexual contact between he 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 with complaints, asked him if he had sexually abused students, or had investigated his conduct. (Sterling 66:20-69:24, A412-413).

For purposes of summary judgment, all reasonable inferences should be given to the plaintiff, and the Court should infer that these managerial employees were or should have been aware of the abuse and failed to counsel Sterling about these complaints, thus were grossly negligent. Instead, the lower court and Fairwinds turn the standard for summary judgment on its head and determine, as a

matter of law, that for purposes of summary judgment, Sterling was counseled and that was the appropriate response of a reasonable School supervisor.

The Court should also let the jury decide if they believe Kim Hecksher when she claims that four faculty members witnessed Sterling patting her on the behind. The jury should decide whether the student complaints (which included that Sterling had told the young female student "If there was a desert island, you would be the one that I would choose to be on the island with" (Sandi 33:12-22, A 469, 35:16-22, A 469)) that were made to teacher Sandi Sterling should have prompted some response and what it should have been. The Court should allow the jury to decide if a teacher bringing a young student as his date to a banquet is a red flag that something is inappropriate in the relationship. (See Appellant's OB, Facts §§ D.-G. and Argument II. for full record citation to Fairwinds' grossly negligent conduct).

Whether Fairwinds knew or had reason to know Sterling would abuse a student, whether Fairwinds actually counseled Sterling, and whether Fairwinds responded in a grossly negligent manner to what it was aware of, are all questions for the jury, not the Court.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT DENIED, BY FAILING TO RULE ON, PLAINTIFF'S MOTION TO AMEND HER COMPLAINT WHEN THERE WAS NO PREJUDICE TO THE DEFENSE.

A trial court must "exercise its discretion in favor of granting leave to amend" when there is no prejudice to the non-moving parties. The trial court articulated no reason for failing to rule on plaintiff's motion to amend when plaintiff filed it, orally argued it, sent follow up letters, and reminded the trial court in her summary judgment answering brief.[9]

A. Appellant's Proposed Amendment was Not Futile. Appellant's recovered memory of an instance of sexual abuse that she had "repressed"[10] was not insignificant to her and was actionable. Delaware law is clear that each act of sexual abuse is a separately actionable and independent legal wrong.[11] The fact

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[9] (See Motion to Amend,A335-339, Response, A 344-366, JAF from oral argument, A367, supplemental letters filed (AR150-164), SJAB p. 1 and note 1 referencing Plaintiff's negligence claim, A506).

[10] Dr. Springer, in his report accompanying Appellant's Motion to Amend, clearly states that Kim Hecksher recovered a memory during her April 25, 2011 deposition which she had previously "repressed." (Spring report, p. 16-17, A326-27). Traumatic amnesia and repressed memory are interchangeable. See Order in McClure v. Diocese of Wilmington, C.A. 06C-12-235 CLS (Del. Super. April 7, 2009), AR125-126.

[11] Eden v. Oblates of St. Francis de Sales, 2006 Del. Super. LEXIS 492, 15 (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 Del. Super. LEXIS 518, 7-8 (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, 17-20 (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

that the Child Victim's Act ("CVA") was enacted has nothing to do with the law on repressed memory upon which plaintiff's motion to amend is based, which is based on the time of discovery rule. See Keller v. Maccubbin, 2012 Del. Super. LEXIS 229 (Del. Super. Ct. May 16, 2012) (permitting claim of repressed memory for abuse occurring before CVA when it would have been time barred as of the enactment of CVA).[12] If the CVA had been intended to preempt the discovery rule the legislature would have made that clear, as Eden v. Oblates of St. Francis de Sales, which first held that repressed memories tolled the statute of limitations in such a case, was decided well before the CVA's enactment. 2006 Del. Super. LEXIS 492, 16 (Del. Super. Dec. 4, 2006). "A Legislature is presumed to be aware of existing law." Giuricich v. Emtrol Corp., 449 A.2d 232, 239 (Del. 1982). The Vai case went to the jury on two theories: negligence, because Vai alleged repressed memories, and gross negligence, because Vai had filed during the CVA's look back period. (see Vai jury instructions, p. 4-5, A181-82, p.8-10, A185-87).[13]

B. Appellant was Not Dilatory. Appellant's counsel only learned of

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wrong") (A241-242); Vai, supra, (same) (Formal Charge to Jury at 4-5), (A181-182); Waterhouse v. Hollingsworth, 2013 Del. Super. LEXIS 463, 4 n.5 (Del. Super. Oct. 10, 2013).

[12] In Keller v. Maccubin, which Fairwinds cites, the Superior Court eventually dismissed the claim after a Daubert Challenge on one aspect of the plaintiff expert's proposed testimony, under the facts of that case. Keller v. Maccubbin, 60 A.3d 427, 433 (Del. Super. 2013). It has no bearing on the general acceptance of repressed memory claims as valid under Delaware law nor the ability of expert testimony to establish it.

[13] Finally, Sandy Sterling's failure to report this abuse, as well as her knowledge, can certainly be imputed to Fairwinds. See Discussion, supra, Argument I.

plaintiff's recovered memory of abuse on April 25, 2011. Plaintiff procured a doctor's report on the existence of plaintiff's repressed memories as scientifically valid on August 2, 2011 and conferred with the Defense as to the proposed amendment. Appellant filed the motion to amend on September 15, 2011.

C. There Was No Prejudice to Fairwinds. In Vai v. St. Elizabeth's Church, a case filed after the enactment of the CVA, then President Judge Vaughn charged the jury that if act(s) of abuse were repressed or inherently unknowable to Vai until two years before the filing of his complaint, the jury could consider Vai's negligence claim as to those acts, but as to all other acts, the jury must consider Vai's gross negligence claim only. (Vai jury instructions, p. 4-5, A181-82, p.8-10, A185-87). The jury had no difficulty doing so. (Verdict Sheet, A277-278).

There was no prejudice to Fairwinds as discovery had just begun and Appellant's deposition was not even over yet.[14] Clearly plaintiff was prejudiced in that she had to prove gross negligence as opposed to simple negligence, and plaintiff's motion to amend should have been granted, not ignored.

[14] The party objecting to a motion to amend has the burden to show it would suffer prejudice. McClure v. Catholic Diocese of Wilmington, Inc., 2008 Del. Super. LEXIS 509, 2 (Del. Super. Jan. 9, 2008). An example of sufficient prejudice to deny leave to amend is when "an amendment is sought the morning of trial." Id.

IV. THE SUPERIOR COURT ABUSED ITS DISCRETION.

Appellant filed her motion to amend the scheduling order (AR139-149) because the Superior Court ordered that Plaintiff's deposition had to be completed before Plaintiff could take limited discovery. (1/8/10 tr., p.47:1-14, A121, and Sched. Ord., ¶ A.1, A330-331). A month before the trial, Defendants were not finished taking plaintiff's deposition, therefore Appellant had not been allowed to begin taking her own discovery.[15] In Sheehan over 30 depositions were taken, in Vai about 16. Ex.C to Appellant's OB. In Jane Doe #7/Hughes, out of 20 fact witness depositions taken, (AR168-202) in only one did a Defendant employee testify she suspected the perpetrator could carry on a relationship with a student. The nature of sex abuse cases – sex abuse is secretive and the defendant employs most of the fact witnesses – require the broad discovery permitted, and usually allowed, under Rule 26. After all, it is Appellant who bears the ultimate burden of proof, and should not be arbitrarily hamstrung in attempting to prove her case.

Respectfully submitted,
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[15] Appellant could not move for additional discovery at the end of Phase I of the Discovery Scheduling Order. See 8/19/11 Scheduling Order, § B.1.4, p.3-4, A332-333.