

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

KIMBERLY HECKSHER,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09C-06-236 FSS
)	
FAIRWINDS BAPTIST CHURCH, INC.,)	
a Delaware corporation; FAIRWINDS)	
CHRISTIAN SCHOOL, a Ministry of)	
Fairwinds Baptist Church,, Inc., and)	
EDWARD STERLING, individually and)	
in his official capacity,)	
)	
Defendants.)	

ORDER

Submitted: November 15, 2012
Decided: February 28, 2013

**Upon Fairwinds Baptist Church and Fairwinds Christian School Motion for
Summary Judgment – GRANTED.**

Under the Child Victim’s Act,¹ Plaintiff claims personal injuries stemming from years of sexual abuse by her foster father, Defendant Edward Sterling, decades ago. Defendant Sterling answered the complaint, denying all allegations and invoked his right against self-incrimination at his deposition. Therefore, the court

¹ 10 *Del. C.* § 8145.

draws an adverse inference of guilt.² Now, Plaintiff is focused on the place where Sterling worked. Defendant employer has moved for summary judgment because Plaintiff cannot prove liability.

Repeatedly, the court has lamented this almost four-year old case's pace. During the protracted and at times contentious discovery, Plaintiff took several depositions, with leave to request more. Plaintiff, however, has failed to present evidence meeting the Victim's Act's "gross negligence" standard, which applies to claims against defendants like Sterling's employer.

FACTS

1. In 1984, when she was 12 years old, Plaintiff moved in with family friends: Defendant Sterling; his wife, Sandy; and, their children. Shortly after moving in, Sterling began acting inappropriately toward Plaintiff, eventually culminating in rape. From 1984 to 1992, while Plaintiff was between the ages of 13 and 20, Sterling abused plaintiff up to five times a week. The only people who knew about Plaintiff's abuse when it occurred are Plaintiff, Defendant Sterling, and allegedly Sandy Sterling and Plaintiff's sister.

² *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (It is a "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.'").

2. While Plaintiff lived with the Sterlings, she attended Fairwinds Christian School, the Sterlings' employer: Defendant Sterling taught and Sandy Sterling was the school principal's secretary. Throughout Plaintiff's time at Fairwinds, Defendant Sterling was Plaintiff's high school math, bible and Spanish teacher. Defendant Sterling also coached basketball and Plaintiff was a cheerleader. Using his position of authority, Defendant Sterling offered Plaintiff "extra credit" in return for sexual favors. In 1992, Defendant Sterling was fired from Fairwinds for reasons unrelated to his misconduct with Plaintiff.

3. Fairwinds was a small school, having only 7 to 23 employees between 1984 and 1990. Carlo Destefano was Fairwinds' school principal. Sandy Sterling was DeStefano's secretary until 1989. Her duties included handling student files, scheduling, answering phones and dealing with minor student issues. E.L. Britton and Tim Britton were Fairwinds' Pastors during pertinent times. The pastor led the church and its school and made final employment decisions.

4. According to the school's founder, E.L. Britton, it was every employee's responsibility to correct another employee who acted inappropriately. The school viewed a teacher's morality as highly important and expected any employee to report another's moral deviations. That said, the school did not have policies in place to detect, prevent, or remedy sexual abuse. For summary judgment purposes,

the parties assume Sandy Sterling knew Defendant Sterling sexually abused Plaintiff, but made a conscious decision not to report it.

5. Plaintiff claims Defendant Sterling raped her in his classroom on less than ten occasions, after school hours. The following incidents involving Plaintiff directly are alleged to have occurred on school property and, according to Plaintiff, should have placed the school on notice of Plaintiff's abuse:

- When she was between 14 and 16, Defendant Sterling took Plaintiff as his "date" to the faculty attended, Junior/Senior Banquet. Plaintiff claims that was inappropriate.
- Sandy Sterling witnessed Defendant Sterling fondling Plaintiff in the school gym.
- Plaintiff mentioned "foreplay" to a faculty member and, based on the faculty member's reaction, felt embarrassed that she knew about sex.
- Defendant Sterling would "tap [Plaintiff] on the butt" during lunch, in front of faculty members.

Plaintiff failed to present any witnesses confirming the alleged incidents or that Plaintiff's attendance at the banquet was inappropriate. But, for present purposes the court takes Plaintiff's allegations as true.

6. When Plaintiff was a senior, between December 1989 and March 1990, Defendant Sterling made comments to student Pam Arrowood. Arrowood reported the comment to her parents. Arrowood's parents contacted the school and

had a meeting with E.L. Britton, Tim Britton and DeStefano. The school did not ignore the complaint. Sterling was issued a warning and received counseling. In 1990, another student, Sherrie Phillips, complained that Defendant Sterling inappropriately rubbed her back.³ Again, the school acted by counseling Defendant Sterling.

7. Lastly, Plaintiff claims Defendant Sterling generally made female students feel uncomfortable. Defendant Sterling had a reputation as a “creep” or “pervert.” “[Such talk] . . . was in the locker room, on the bus, and had been going on since the beginning of high school.” There is no evidence anyone reported their feelings about Sterling to the school’s management.

PROCEDURAL POSTURE

8. The Child Victim’s Act opened a two-year window allowing sexual abuse survivors to file otherwise time-barred claims.⁴ Plaintiff timely filed her complaint June 24, 2009. The five-count complaint alleges assault and battery, negligence, gross negligence, breach of fiduciary duty, and fraud. Plaintiff also requests punitive damages. On August 14, 2009, Fairwinds moved for dismissal under Superior Court Civil Rules 12(b)(6) and 9(b). The court ultimately dismissed

³ In its Response to Interrogatories, Fairwinds disclosed this occurrence, but at deposition, neither E.L Britton nor DeStefano recalled the event. For summary judgment purposes, the court accepts this allegation as true.

⁴ 10 *Del. C.* § 8145(b).

Plaintiff's breach of fiduciary duty claim and denied the motion as to the remaining claims, without prejudice.

9. On January 8, 2010, the court heard argument on Defendants' motion to stay discovery and for a protective order, which the court granted in part. The court ordered a limited, structured discovery process, specifically to determine what the school knew. The court permitted the depositions of: Plaintiff, Sandy Sterling, Pam Arrowood, and two other individuals who Plaintiff felt would be most helpful to her case. Shortly thereafter, the court scheduled trial for September 6, 2011.

10. On August 14, 2011, Plaintiff filed a motion to amend the scheduling order and to continue trial. Struggling to prove her case, Plaintiff submitted a proposed discovery order dividing discovery into phases and allowing her more time. The proposed order's "first phase of discovery" allowed Plaintiff to depose: Defendant Sterling, Sandy Sterling, Pam Arrowood and her parents, and two coaches. The proposal "permitted [Plaintiff] to follow the chain of knowledge established through this [first phase of] discovery." The second phase would consist of "broadening the sweep of discovery" and "any and all standard of care issues." The court signed the proposed order on August 19, 2011, noting that the case was "proceeding at an extraordinarily slow pace, trial in 2015, at the earliest." Nevertheless, Plaintiff spent almost a year taking the "first phases" seven

depositions, finishing them on July 16, 2012.

11. Fairwinds then moved for summary judgment on all remaining claims and for Rule 11 sanctions. Briefing was completed on October 22, 2012. The court held summary judgment argument on November 15, 2012.

STANDARD OF REVIEW

12. The Act establishes gross negligence as the standard for an employer's liability.⁵ For summary judgment here, Defendants must show that "there is no genuine issue of fact relating to the question of [gross] negligence and that the proven facts preclude the conclusion of negligence on [Defendants'] part."⁶ Plaintiff's failure to prove an essential element of her case "necessarily renders all other facts immaterial."⁷ And so, the court must first determine if Plaintiff failed to prove gross negligence.⁸

⁵ *Id.* ("If the person committing the act of sexual abuse against a minor was employed by . . . [a] public or private legal entity that owed a duty of care to the victim, or the accused and the minor were engaged in some activity over which the legal entity had some degree of responsibility or control, damages against the legal entity shall be awarded . . . only if there is . . . gross negligence on the part of the legal entity.").

⁶ *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705, 709 (Del. 2008) (quoting *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 640 (Del. 1964)).

⁷ *Burkhart v. Davies*, 602 A.2d 56, 58-59 (Del. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1989)).

⁸ *Hazel*, 953 A.2d at 709.

HIRING, SUPERVISION AND RETENTION

13. An employer may be 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.⁹ Under either negligent hiring or supervision, the basis for liability rests upon whether it was foreseeable that the employee would engage in the type of conduct that caused injury.¹⁰

14. Negligence is generally a failure to exercise care that a reasonably prudent person would under the circumstances.¹¹ Again, under The Victim’s Act, Plaintiff must prove Defendants were grossly negligent. Gross negligence is an extreme departure from the ordinary standard of care,¹² requiring more “than ordinary inadvertence or inattention.”¹³

⁹ *Simms v. Christiana Sch. Dist.*, 2004 WL 344015, *8 (Del. Super. Jan. 30, 2004) (Vaughn, P.J.).

¹⁰ *Doe #7 v. Indian River Sch. Dist.*, 2012 WL 1980562, *4 (Del Super. Apr. 11, 2012) (Young, J.).

¹¹ *Id.*

¹² *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990).

¹³ *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).

15. Plaintiff fails to present any evidence of negligence, much less gross negligence in Fairwinds’s decision to hire Sterling. There is no evidence that had Fairwinds conducted a pre-hire investigation, anything would have been discovered placing it on notice that Defendant Sterling would sexually abuse a student. Defendant Sterling did not have a criminal record. Before working for the school, he was a “visitation director” with the church. DeStefano testified that the previous working relationship with Sterling was the basis for his hiring at Fairwinds. Plaintiff fails to present any evidence placing Fairwinds on notice that Defendant Sterling might sexually abuse a student.¹⁴

16. Plaintiff also fails show that Fairwinds was grossly negligent in supervising Defendant Sterling. Again, apart from Plaintiff, Defendant Sterling and Sandy Sterling, no member of Fairwinds knew about Plaintiff’s abuse. The two reported instances regarding Defendant Sterling’s inappropriate behavior toward others were not ignored. If it might be said that Fairwinds should have been more stern, it cannot reasonably be said that there was gross negligence. The school did not ignore those complaints, but confronted and counseled Defendant Sterling. As for the banquet Plaintiff attended, witnesses did not recall it and testified that Plaintiff’s

¹⁴ See *Simms v. Christiana Sch. Dist.*, 2004 WL 344015, *8-9 (Del. Super. Jan. 30, 2004) (Vaughn, P.J.).

attendance would not have been unusual. For the most part, Plaintiff only offers rumors and “locker room talk” to show that the school knew or should have known that Defendant Sterling might sexually abuse a student. And, even the rumors did not accuse Defendant Sterling of actual crimes.

17. Plaintiff relies greatly on Sandy Sterling’s knowledge that her husband sexually abused Plaintiff. Plaintiff argues that Sandy Sterling’s knowledge is imputed to Fairwinds, whether or not she told school management.¹⁵ But, 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.¹⁶ 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.

¹⁵ Pltf.’s Ans. Brief at p. 26, quoting *E.I. duPont de Nemours & Co. v. Admiral Ins. Co.*, 1996 WL 111133, *2 (Del. Super. Feb. 22, 1996) (“ . . . the knowledge of an agent acquired while acting within the scope of his or her authority is imputable to the principal. Similarly, knowledge of an employee is imputed to the employer. This imputation occurs even if the employee does not communicate this knowledge to the principal/employer.”).

¹⁶ *See Doe v. Giddings*, 2012 WL 1664234 (Del. Super. May 7, 2012) (Ableman, J.) (“When a servant’s tortious action arises from a personal need or motivation not engendered by anything connected with the employment, the servant is outside the scope of employment and the master may not be held liable.”)

18. Plaintiff claims that Fairwinds's failing to investigate and interview other students in response to the Arrowood complaint was grossly negligent. Plaintiff speculates that had Fairwinds interviewed other students, "[Fairwinds] would have realized that numerous students were very uncomfortable around Sterling, thought he was a pervert, looked at and touched them inappropriately." Plaintiff, however, has no evidence that students would have aired their feelings if they had been asked.

19. As to that, 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 then following the "chain of knowledge." Instead, much like counsel's in-court declarations, Plaintiff now claims in conclusory fashion that even with the limitations on discovery, "the record is filled with evidence." Yet, Plaintiff fails to show any.

20. Viewing the evidence in the light most favorable to Plaintiff, including the two documented incidents in which the school reprimanded Defendant Sterling, Plaintiff fails to show that Fairwinds was grossly negligent in retaining Defendant Sterling. This is not a case, viewing the evidence favorably to Plaintiff, where the employer knew its employee had abused his foster child on school property and ignored it or, worse, covered it up. The only way Plaintiff comes close to

establishing liability is by holding Defendant Sterling's wife's silence against Defendants.

Therefore, Defendants' Fairwinds Baptist Church and Fairwinds Christian School motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Herbert Mondros, Esquire
Raeann Warner, Esquire