IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES E. SHEEHAN,	:	
	:	
Plaintiff Below,	:	**No. 730, 2009**
Appellant,	:	
	:	
v.	:	
	:	**APPEAL FROM THE SUPERIOR**
OBLATES OF ST. FRANCIS de SALES;	:	**COURT IN AND FOR NEW CASTLE**
OBLATES OF ST. FRANCIS de SALES,	:	**COUNTY**
INCORPORATED, a Delaware	:	
corporation, and SALASIANUM	:	**C.A. No. 07C-11-234-CLS**
SCHOOL, Inc. a Delaware	:	
corporation,	:	
	:	
Defendants Below,	:	
Appellees.	:	
	:	

BRIEF OF *AMICUS CURIAE*
FORMER PHILADELPHIA DISTRICT ATTORNEY LYNNE ABRAHAM, THE NATIONAL CHILD PROTECTION TRAINING CENTER, THE NATIONAL CENTER FOR VICTIMS OF CRIME, CHILD PROTECTION PROJECT, THE JEWISH BOARD OF ADVOCATES FOR CHILDREN, INC., STOP THE SILENCE: STOP CHILD SEXUAL ABUSE, INC., BISHOPACCOUNTABILITY.ORG, AMERICANS AGAINST ABUSES OF POLYGAMY, FOUNDATION TO ABOLISH CHILD SEX ABUSE, AND THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS IN SUPPORT OF APPELLANT/CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL AND REPLY BRIEF ON APPEAL

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DATED: AUGUST 9, 2010

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STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY OF *AMICUS CURIAE*

Former Phila. D.A. Lynne Abraham. For more than three years, from 2002 to 2005 as Philadelphia's District Attorney, I led the effort to uncover the involvement of over one hundred priests and their superiors in the Archdiocese of Philadelphia, in the sexual abuse of minor children, and the subsequent cover-up of hundreds of cases of such abuse. As a result of the Philadelphia Grand Jury's published Report,[1] many of Pennsylvania's laws, including the criminal statute of limitations, mandatory reporter requirements and other laws were strengthened to protect children. However, as every person who professionally deals with sexual abuse upon children understands, child sexual abuse victims typically cannot bring themselves to "tell" about these crimes for years, even decades, when the civil statute of limitations has long since expired. The victims in this Investigation were well into adulthood when they testified; therefore they were left with no legal recourse to bring civil causes of action, compel discovery, or to take a case to a finder of fact. For this reason, the Grand Jury also recommended the passage of legislation allowing a one-year "civil window." It is for the sake of justice, and for all such victims wherever situated, that a civil "window" statute was, is, and remains one of my interests and goals, and why I strongly support and join this Amicus Brief.

[1] Report Of The Grand Jury, *In Re* County Investigating Grand Jury, Court Of Com. Pl., First Judicial District Of Pa., Crim. Trial Div., Misc. No. 03-00-239 (2003), http://www.philadelphiadistrictattorney.com/images/Grand Jury Report.pdf

The National Child Protection Training Center ("NCPTC")—together with its affiliate, the National Association to Prevent Sexual Abuse of Children ("NAPSAC")—supports the survivors of abuse, and work to change laws and institutions to change the culture which permits abuse. NCPTC was founded in 2003 through funding from the Department of Justice Office of Juvenile Justice and Delinquency Prevention Program. Both organizations are non-profits. NCPTC serves as a national clearinghouse for child protection professionals by providing technical assistance, addressing legal issues, and researching and publishing of materials on child abuse. NCPTC also provides training to frontline professionals throughout the country. NCPTC has an interest in promoting societal awareness of child abuse.

The National Center for Victims of Crime ("National Center"), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center—among other efforts—advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly interested in this brief because of its commitment to victims of sexual assault and child abuse.

Child Protection Project ("CPP") is a 501(c)(3) and recognizes that many heinous abuses occur when religious organizations seek and hide behind specific religious exemptions under the law. Child sexual abuse victims often have no recourse to justice because of arcane

statute of limitations laws. We support the removal of the statute of limitations for the crime of child sexual abuse as good public policy. Religions must be good corporate citizens and held to the same standard as secular organizations when dealing with children in their care. These exemptions allow religious organizations to hire people to work with children without performing character background checks routinely required of secular groups and with disastrous results for the children and families in their care. Often religious organizations will provide faith healing only, allowing children and others to suffer or die from preventable illnesses.

The Jewish Board of Advocates for Children, Inc. ("JBAC") is a New York nonprofit, tax-exempt corporation, founded in 2008, whose primary goals include the protection of children from sexual, physical, and all forms of abuse, particularly in religious institutions, such as schools and houses of worship. JBAC advocates before legislatures and courts, seeking new laws and judicial decisions that will provide religious community children with the highest legal protection possible. Members are primarily drawn from the American Orthodox Jewish community, and include rabbis, attorneys, doctors, and other community leaders who are greatly anguished at the clergy sex abuse scandal in our Nation. JBAC's interest in this case is that it believes religious institutions should be held accountable for tortious conduct. The Torah, or Bible, requires the payment of damages when a tort is committed, Exodus 21: 22-27. The Talmud elucidates that, "an eye for an eye...tooth for a tooth" means monetary compensation. Child sex abuse victims deserve compensation,

and excessively short and unfair statutes of limitations should be extended.

Stop the Silence: Stop Child Sexual Abuse, Inc. ("Stop the Silence") is a 501(c)(3), non-profit organization that aims to expose and stop CSA and help survivors heal worldwide. Our overarching goals are to: 1) help stop child sexual abuse (CSA) and related forms of violence; 2) promote healing of victims and survivors; and 3) celebrate the lives of those healed. Stop the Silence has an interest in this case pending before the Delaware Supreme Court because it will impact survivors of sexual abuse not only in Delaware but throughout the United States and elsewhere.

BishopAccountability.org is a 501 (c)(3) corporation that maintains a library in Waltham MA and a large online archive of documents, reports, and newspaper articles about the sexual abuse of children by persons employed by religious institutions, and the mismanagement by religious leaders of abuse allegations. Our collection of newspaper articles covers sexual abuse in all religions and denominations worldwide. Our document and report collections focus on sexual abuse and mismanagement by employees of Roman Catholic dioceses in the United States and Ireland, including the Diocese of Wilmington, but the institutional problems revealed by those documents and reports are common to all religious organizations and to corporations and institutions generally. We also maintain a database of Catholic priests, brothers, nuns, deacons, and seminarians who have been accused of abuse. Our holdings and database are often used by law enforcement personnel in their efforts to protect children from future

abuse. Our collection offers ample documentation of the barriers that victims of child sexual abuse encounter in coming forward, the beneficial effects of the California window legislation, and the growing awareness in recent years that institutions have covered up the sexual abuse of children by their personnel and thereby created risk for children in the future.

Americans Against Abuses of Polygamy ("AAAP") is a non-profit, conservative feminist, human rights organization dedicated to educating the public on the human rights abuses inherent within the cultural practice of polygamy worldwide and within the United States, and the potential dangers of decriminalization of the felony practice. AAAP believes that for too long predators have hidden behind a cloak of spiritual authority, and religious institutions have avoided legal responsibility for acts of violence or sexual assault committed by their officeholders. AAAP believes the institutions that harbor these malefactors must be held financially responsible for damages inflicted on their victims.

Foundation to Abolish Child Sex Abuse ("FACSA"). Our mission is to influence state and federal governments, courts, the criminal justice system and the media to: 1) Protect children from sexual abuse; 2) Hold those who sexually abuse children accountable; 3) Hold institutions which condone and enable the sexual abuse of children accountable; and, 4) Help child sex abuse victims find justice.

The Survivors Network of those Abused by Priests ("SNAP"), is a not-for-profit agency and is the oldest and largest self-help support group run by and for survivors. The mission of the organization is to

heal the wounded and protect the vulnerable. We provide peer counseling in person, on the telephone, and by mail. SNAP also hosts conferences and gatherings and provides education and advocacy about clergy sexual abuse. SNAP works to reform secular and church laws and structures to better safeguard children. Founded in 1988, the organization now has groups meeting in 65 cities in the United States with over 10,000 members. SNAP has an interest in this case as many perpetrators of its members still pose a risk to children and the ruling in this case may impact the ability to expose those perpetrators.

ARGUMENT

The Defendants in this case have challenged the constitutionality of Delaware's "window" legislation[2], Del. Code Ann. tit. 10, § 8145 (2010), which changed one element of the law governing child sex abuse: the timing of bringing a civil lawsuit. It did not alter the

[2] "Window" is a term that has been widely used to describe legislation that eliminates the statutes of limitations for a set period of time. Before Delaware enacted the window, such legislation was enacted and upheld to address child sex abuse in California and Minnesota. Melanie H. v. Defendant Doe, No. 04-1596-WQH-(WMc), slip op. at 25 (S.D. Cal. Dec. 20, 2005) available at Exhibit 1; Deutsch v. Masonic Homes of California, Inc., 80 Cal. Rptr. 3d 368, 378-9 (Cal. Ct. App. 2008); Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 414, 418-420 (Minn. 2002); K.E. v. Hoffman, 452 N.W.2d 509, 512-14 (Min. Ct. App. 1990). In addition to the window at issue in this case, the Delaware General Assembly recently enacted a window to address sexual abuse in a healthcare setting. 18 Del.C. § 6856(3)(b)(2010).

Windows also have been enacted to address mass torts in Delaware, New York, Minnesota, and California. Mergenthaler v. Asbestos Corp. of America, Inc., 534 A.2d 272, 276-277 (Del. Super. Ct. 1987); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1079-80 (N.Y. 1989); In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 811-812 (E.D.N.Y. 1984); Indep. Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990); 20th Century Ins. Co. v. Superior Court, 109 Cal. Rptr. 2d 611, 633 (Cal. Ct. App. 2001).

timing of criminal prosecution, the burdens on the parties, or the penalties for defendants that create the conditions for the sexual abuse of children. Failing to protect children in one's care was a tort[3] and sexual abuse a crime[4] when the relevant acts took place in this case.

Acts of the General Assembly enjoy a presumption of constitutionality, and there is "a measure of self-restraint upon courts sitting in review over claims of unconstitutionality." New Castle Cnty. Council v. State, 688 A.2d 888, 891 (Del. 1996). Defendants have failed to carry their burden of overcoming the presumption in favor of constitutionality. Lowicki v. Unemployment Ins. Appeal Bd., 460 A.2d 535, 539 (Del. 1983); Wilmington Med. Ctr, Inc. v. Bradford, 382 A.2d 1338, 1342 (Del. 1978); Whitwell v.

[3] See, e.g., Melson v. Allman, 244 A.2d 85, 87-88 (Del. 1968); Draper v. Olivere Paving & Constr. Co., 181 A.2d 565, 572-73 (Del. 1962); Beaston v. James Julian, Inc., 120 A.2d 317, 321, 318 (Del. 1956); Durney v. St. Francis Hosp., 83 A.2d 753, 758 (Del. Super. 1951).

[4] The Delaware Criminal Code of 1953 listed various offenses relating to the sexual abuse of children. Inflicting pain or suffering upon, neglecting, or contributing to the delinquency of a child was punishable by a $100 fine which if not paid could result in 3 months jail time and possible additional probation. 7 Del. Code Ann. tit. 11, § 431 (West 1953). Rape, carnal knowledge and abuse of a female under age seven was a felony punishable by death. Only upon specific finding of mercy by the jury could judge opt for minimum sentence e of at least 3 years in prison. 7 Del. Code Ann. tit. 11, § 781 (West 1953). Harboring a male or female under 18 years for sexual purposes, or in a house of ill fame, carried a fine of up to $1,000 or up to 7 years in prison, or both. 7 Del. Code Ann. tit. 11, § 821 (West 1953). Lewdly playing with a child under 16 years old was punishable by a $500 fine and up to 3 years in jail, or both. This section was amended in 1949 to include children under 16 of both sexes. 7 Del. Code Ann. tit. 11, § 822 (West 1953). Sodomy was deemed a "crime against nature" and was a felony punishable by a fine of up to 1,000 and up to 3 years in jail. There is no mention of age and either party could be indicted for the offense. 7 Del. Code Ann. tit. 11, § 831 (West 1953).

Archmere Acad., Inc., 2008 Del. Super. LEXIS 141, at *2-3 (Del. Super. Ct. Apr. 16, 2008).

Section 8145 was given ample consideration in both Houses of the General Assembly, and it was passed by a unanimous vote in each House. In addition, it enjoyed broad public support. Most states, like Delaware, have been expanding or eliminating the statutes of limitations for child sex abuse in recent decades because legislators have found that the limitations in place routinely yield injustice. Appendix To Cross-Appellee's Answering Brief On Cross-Appeal And Appellant's Reply Brief On Appeal [hereinafter "Pl. App."]at AR000265 (statement of Sen. Thurman Adams) ("I spoke not long ago with a young woman who was raped by a priest at the age of 13 in the hallway of a building, in a hallway that connected the church and the residence. She said I knew something terrible was happening to me but I didn't know what it was. I didn't know how to describe it to my mother. It felt shameful. It felt dirty. It felt awful. This is common. This young lady was not an exception."); Id. at AR000323 (statement of Pat Michael) ("People must be afforded the opportunity to find justice when they're able to speak about crimes. . . . I was in my 30s before I was able to talk about what happened to me when I was 12."). See also Delaware Governor's Message, Governor Minner Signs Senate Bill 29 (July 10, 2007) ("As a result of its passage, Delaware's children are safer, child sexual abuse victims can finally get justice, and those who molest children will find that they no longer have a safe haven in Delaware.").

There were three primary reasons the General Assembly considered and then passed § 8145, or window legislation, for child sex abuse victims. Each of these compelling state interests deserves this Court's deference.

First, there is an extensive and persuasive body of scientific evidence establishing that child sex abuse victims are harmed in a way that makes it extremely difficult to come forward and, therefore, victims typically need decades to do so.[5] As one clinician has explained:

> Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later and can have a difficult time connecting his adulthood problems with his past.

Mic Hunter, Abused Boys, 59 (1991). See also Pl. App. AR000384 (statement of Sen. Thurman Adams) ("In my own family, a member of my

[5] See generally Ramona Alaggia MSW, PhD, RSW, An Ecological Analysis of Child Sexual Abuse Disclosure: Considerations for Child and Adolescent Mental Health, 19 J. Can. Acad. Child Adolesc. Psychiatry 32, 32 (2010) ("By some estimates between 60-80% of CSA victims withhold disclosure. . . ."); Richard L. Sjoberg & Frank Lindblad, M.D., Ph.D., Limited Disclosure of Sexual Abuse in Children Whose Experiences Were Documented by Video Tape, 159 Am. J. Psychiatry 312, 312-13 (2002) ("[T]here [i]s a significant tendency of . . . abused children to deny or belittle their experiences."); Mary L. Paine & David J. Hansen, Factors Influencing Children to Self-Disclose Sexual Abuse, 22 Clinical Psychol. Rev. 271, 271-75 (2002) (discussing shame and embarrassment about abuse, making victim feel to blame for abuse); Guy R. Holmes, See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?, 17(1) Clinical Psychol. Rev. 69, 69-88 (1997); David Lisak, The Psychological Impact of Sexual Abuse: Content Analysis of Interviews with Male Survivors, 7(4) J. of Traumatic Stress 525, 525-526, 544 (1994) (noting that unlike victim of a toxic tort, there is no medical necessity that abuse will lead to scientifically dispositive injury. Child sex abuse victims simply do not apprehend that the abuse, which they may not even experience as abuse, could lead to devastating effects in adulthood.).

own family now reaching the age of 19 was raped at the age of 13 by two men, two adult men, and it was only until very recently within the past couple of weeks that she was able with a great deal of help from therapists to acknowledge what had happened to her."); Id. at AR000274 (statement of Dr. Carol Tavani).

Second, the success of the California window legislation in protecting children from child predators was remarkable. Under the California window, over 300 previously unidentified perpetrators were disclosed to the public.[6] Most perpetrators abuse multiple children throughout their lives,[7] making public identification of even aged perpetrators a public safety interest of the first order.

Third, there was a burgeoning awareness that institutions had followed procedures to cover up abuse and abusers' identities, making legal reform necessary. Id. at AR000385 (statement of Father Thomas

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[6] Archdiocese of Los Angeles, Report to the People of God: Clergy Sexual Abuse, 1930-2003, 28-34 (February 17, 2004), *available at* http://www.bishop-accountability.org/usccb/natureandscope/dioceses/reports/losangelesca-rpt.pdf; Archdiocese of Los Angeles, Addendum to the Report to the People of God, 4 (October 12, 2005), *available at* http://www.bishop-accountability.org/usccb/natureandscope/dioceses/reports/losangelesca-rpt-addendum_R_10_12_05.pdf (listing newly accused post-2004 report); Archdiocese of Los Angeles, Addendum to the Report to the People of God 4 (November 15, 2005), *available at* http://www.bishop-accountability.org/usccb/natureandscope/dioceses/reports/losangelesca-rpt-addendum-11-15-05.pdf (listing newly accused post-October 2005 addendum); Accused Priests in Los Angeles Archdiocese Database, http://www.latimesinteractive.com/priests/ (last visited August 4, 2010); BishopAccountability.org, http://www.bishop-accountability.org/AtAGlance/lists.htm (last visited August 4, 2010) (detailing nationwide situation regarding diocesan lists of accused priests). See also Pl. App. at AR000326 (statement of Sister Maureen Turlish).

[7] Kenneth V. Lanning, Child Molesters: A Behavioral Analysis, 37 (4th ed. 2001) *available at* http://www.cybertipline.com/en_US/publications/NC70.pdf.

Doyle) ("We have learned in all of this that churches and other institutions will go to scandalous lengths to protect themselves to the detriment of the abuse victims"); Id. at AR000265 (statement of Sen. Thurman Adams) ("Why is legislative reform necessary? I believe it's needed, especially in the cases—case of institutions and churches because these institutions and the churches will not make the needed reforms on their own."). The fact that some of this public knowledge was provided by the experiences of the Roman Catholic Church does not mean that the law either targets the Church or that it primarily affects the Church. Like the California window, which was upheld in federal and state courts, the Delaware window is neutral and generally applicable. Deutsch, 80 Cal. Rptr. 3d at 378-79; Melanie H., No. 04-1596-WQH-(WMc), slip op. at 25. Accordingly, the California and Delaware window cases have included victims from a variety of arenas, including the home, the Explorer Scouts, the Boy Scouts, public schools, private schools, and other religious denominations.

A key to the constitutionality of window legislation on its face lies in the separation of powers and the deference due by the courts to legislative judgments.[8] Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994); Scott v. Local 863, Int'l Bhd. of Teamsters, etc.,725 F.2d 226, 228 (3d Cir. 1984). As this Court stated in 1862,

> Whether it is just or wise, as a general thing, to pass retrospective laws is not the question. We must be content to administer the law as we find it settled by authority, and not as we would have it to be. We have abundant authority for saying that the states may enact such laws. Nothing certainly can be found either in the federal

[8] This amicus brief solely addresses the facial constitutionality of Del. Code Ann. tit. 10, § 8145 (2010).

> constitution, or the constitution of this state, prohibiting them, unless they are properly *ex post facto* laws, or laws impairing the obligation of contracts. Subject to these exceptions, the constitutional powers of the state cannot be doubted.

Cook v. Gray, 7 Del. (1 Houst.) 455, 474 (Del. 1862); Diamond State Iron Co. v. Husbands, 68 A. 240, 246 (Del. Ch. 1898); Garcia v. Nekarda, 1993 Del. Super. LEXIS 53, at *4 (Del. Super. Ct. Feb. 19, 1993) (Ex. 4).

The revival of expired statutes of limitations is something no legislature should take lightly, but in cases of severe injustice like the situation for child sex abuse victims in Delaware until 2007 when the window was enacted, the courts properly defer to the legislative judgment.

Sec. 8145 is constitutional under federal and state law.

I. SEC. 8145 IS CONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION

The United States Supreme Court has opened the door for legislators to enact retroactive civil legislation, while closing the door on retroactive criminal legislation. Compare Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994), with Stogner v. California, 539 U.S. 607, 610 (2003). Under the federal Constitution, retroactive civil legislation is constitutional if the legislative intent is clear and the change is procedural.

The Landgraf Court explained the duty of judicial deference as follows: "legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to

legislative judgments." Landgraf, 511 U.S. at 272. The Court went on to observe that "the *constitutional* impediments to retroactive civil legislation are now modest. . . . Requiring clear intent [of retroactive application] assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." Id. at 272-73 (emphasis in original).

There is an "antiretroactivity presumption" which can be readily overcome by express legislative language. "[T]he antiretroactivity presumption is just that—a presumption, rather than a constitutional command." Republic of Austria v. Altmann, 541 U.S. 677, 692-93 (2004). See also AT&T Corp. v. Hulteen, 556 U.S. ___, at *11, 129 S. Ct. 1962, 1971 (2009); Landgraf, 511 U.S. at 267-68; Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311-12 (1945). Only when retroactive intent is plain can a retroactive statute pass constitutional muster.

The United States Supreme Court has treated statutes of limitations as procedural and instructed courts to give legislatures ample room to alter limitations periods to serve the public good:

> [s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have

> the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Sec. Corp., 325 U.S. at 314 (internal citations omitted). Under this reasoning, the Delaware window is constitutional.

II. SEC. 8145 IS CONSTITUTIONAL UNDER THE DELAWARE CONSTITUTION

Every state permits retroactive application of laws to some degree. Many states have addressed the more particular facial constitutional question in this case: whether a revival of a statute of limitations is constitutional. A majority of states, along with the District of Columbia, has not embraced facial constitutional arguments against revival legislation.[9] The largest category (24 states) has held

[9] City of Tucson v. Clear Channel Outdoor, Inc., 105 P.3d 1163, 1167, 1170 (Ariz. 2005), *barred by statute*, Ariz. Rev. Stat. Ann. § 12-505 (2010); Mudd v. McColgan, 183 P.2d 10, 13 (Cal. 1947) ; Liebig v. Superior Court, 257 Cal. Rptr. 574, 577 (Cal. Dist. Ct. App. 1989); Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs, 948 P.2d 1002, 1012-13 (Colo. 1997); Rossi v. Osage Highland Dev., LLC, 219 P.3d 319, 322 (Col. App. 2009) (citing In re Estate of Randall, 441 P.2d 153, 155 (Col. 1968)); Roberts v. Caton, 619 A.2d 844, 847, 847-49 (Conn. 1993); Riggs Nat'l Bank v. District of Columbia, 581 A.2d 1229, 1241 (D.C. 1990); Vaughn v. Vulcan Materials Co., 465 S.E.2d 661, 662 (Ga. 1996); Roe v. Doe, 581 P.2d 310, 316 (Haw. 1978); Hecla Mining Co. v. Idaho State Tax Comm'n, 697 P.2d 1161, 1164 (Idaho 1985); Metro Holding Co. v. Mitchell, 589 N.E.2d 217, 219 (Ind. 1992); Ripley v. Tolbert, 921 P.2d 1210, 1219 (Kan. 1996); Kienzler v. Dalkon Shield Claimants Trust, 686 N.E.2d 447 (Mass. 1997); City of Boston v. Keene Corp., 547 N.E.2d 328 (Mass. 1989); Rookledge v. Garwood, 65 N.W.2d 785, 790-92 (Mich. 1954); Gomon, 645 N.W.2d at 416 (Minn. 2002); Cosgriffe v. Cosgriffe, 864 P.2d 776, 778 (Mont. 1993); Panzino v. Cont'l Can Co., 364 A.2d 1043, 1046 (N.J. 1976); Bunton v. Abernathy, 73 P.2d 810, 811-12 (N.M. 1937); Hymowitz, 539 N.E.2d at 1079-80; In Interest of W.M.V., 268 N.W.2d 781, 786 (N.D. 1978); McFadden v. Dryvit Systems, Inc., 112 P.3d 1191, 1195 (Or. 2005); Owens v. Maass, 918 P.2d 808, 813 (Or. 1996); Bible v. Dep't of Labor and Indus., 696 A.2d 1149, 1156 (Pa. 1997); McDonald v. Redevelopment Auth., 952 A.2d

revival of the statute of limitations is constitutional. This Court has not yet directly addressed the constitutionality of the revival of a statute of limitations. Its cases, however, have far more in common with the federal approach than the minority, vested rights approach.

A. Delaware Cases Employ the Reasoning of the United States Supreme Court on Retroactivity Issues

Like every other state in the country, Delaware has permitted the retroactive application of statutes. It also has observed the distinction drawn by the federal courts between procedural and substantive retroactive changes in the law, and prescribed deference with respect to procedural rules. Cunningham v. Dixon, 41 A. 519, 522 (Del. 1893); Monacelli v. Grimes, 99 A.2d 255, 267 (Del.1953).

The retroactive application of lengthened statutes of limitations has not been found to disturb vested rights under Delaware law. Helman v. State, 784 A.2d 1058, 1070 (Del. 2001); Hubbard v. Hibbard Brown & Co., 633 A.2d 345, 354 (Del. 1993); Harmon v. Eudaily, 407 A.2d 232, 235 (Del. 1979); Korn v. New Castle Cnty., 2005 WL 2266590, at *9 (Del.Ch. Sept. 27, 2005) (Ex. 5); Whitwell, 2008 Del.Super. LEXIS 141 at *7. Delaware courts also have upheld window legislation in the

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713, 718 (Pa. Commw. Ct. 2008); DeLonga v. Diocese of Sioux Falls, 329 F. Supp. 2d 1092, 1101-1102 (S.D. 1994); Stratmeyer v. Stratmeyer, 567 N.W.2d 220, 223 (S.D. 1997); Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 146 P.3d 914, 922 (Wash. 2006), *superseded by statute*, Wash. Rev. Code. § 25.15.303 (2010); Keene v. Edie, 909 P.2d 1311, 1320 (Wash. Ct. App. 1995); Shelby J.S. v. George L.H., 381 S.E.2d 269, 273 (W. Va. 1989); RM v. State Dept. of Family Servs., Div. of Pub. Servs., 891 P.2d 791, 792 (Wyo. 1995). Four states have yet to address the issue. Bishop of N. Alaska v. Does, 141 P.3d 719, 722-5 (Alaska 2006); Schoenrade v. Tracy, 658 N.E.2d 247, 249-50 (Ohio 1996); Alsenz v. Twin Lakes Vill., 843 P.2d 834, 837-38 (Nev. 1992); Neiman v. Am. Nat'l Prop. & Cas. Co., 613 N.W.2d 160, 164 (Wis. 2000).

context of mass torts. Mergenthaler v. Asbestos Corp. of America, Inc., 534 A.2d 272, 276-277 (Del. Super. Ct. 1987)

A minority of states (18 states) clings to the mechanical approach that disables legislatures from serving the public good through the revival of civil statutes of limitations.[10] This approach is sharply at odds with the spirit of the Delaware retroactivity cases. The Delaware cases, instead, are in harmony with the many states adopting the United States Supreme Court's approach.

B. Even If the Defendants Have a Even If the Defendants Have a Right to Due Process Related to Civil Statutes of Limitations, the Compelling Interests Behind Sec. 8145 Secure Its Constitutionality

There are no absolute constitutional rights other than the absolute right to believe. Cantwell v. Conn., 310 U.S. 296, 304 (1940). See Collins v. African Methodist Episcopal Zion Church, 2006

[10] Johnson v. Garlock, Inc., 682 So. 2d 25, 28 (Ala. 1996); Branch v. Carter, 933 S.W.2d 806, 808 (Ark. 1996); Wiley v. Roof, 641 So. 2d 66, 68 (Fla. 1994); Doe v. Diocese of Dallas, 917 N.E.2d 475, 484 (Ill. 2009); Frideres v. Schiltz, 540 N.W.2d 261, 266 (Iowa 1995); Officeware v. Jackson, 247 S.W.3d 887, 890 (Ky. 2008); Hall v. Hall, 516 So. 2d 119, 120 (La. 1987); Dobson v. Quinn Freight Lines, Inc., 415 A.2d 814, 816 (Me. 1980); Cole v. Nat'l Life Ins. Co., 549 So. 2d 1301, 1304 (Miss. 1989); Doe v. Roman Catholic Diocese, 862 S.W.2d 338, 340 (Mo. 1993); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 240 S.E.2d 345, 352 (N.C. 1978); Gould v. Concord Hosp., 493 A.2d 1193, 1196 (N.H. 1985); Ellington v. Horwitz Enters., 68 P.3d 983, 984 (Okla. 2003); Kelly v. Marcantonio, 678 A.2d 873, 883 (R.I. 1996); Ford Motor Co. v. Moulton, 511 S.W.2d 690, 697 (Tenn. 1974); Baker Hughes, Inc. v. Keco R. & D., Inc., 12 S.W.3d 1, 4 (Tex. 1999); Roark v. Crabtree, 893 P.2d 1058, 1062-1063 (Utah 1995); Starnes v. Cayouette, 419 S.E.2d 669, 671 (Va. 1992).
Four states have strong dictum in opposition to revival, but no on-point holding yet. Dua v. Comcast Cable of Md., Inc., 805 A.2d 1061, 1078 (Md. 2002); Kratochvil v. Motor Club Ins. Ass'n, 588 N.W.2d 565, 573-74 (Neb. 1999); Doe v. Crooks, 613 S.E.2d 536, 538 (S.C. 2005); Murray v. Luzenac Corp., 830 A.2d 1, 3 (Vt. 2003), *but see* Barquin v. Roman Catholic Diocese of Burlington, Vermont, Inc., 839 F.Supp. 275, 280-81 (D.Vt. 1993).

Del. Super. LEXIS 549, at *9 (Del. Super. Ct. Mar. 29, 2006) (Ex. 2); State v. Grossberg, 1998 Del. Super. LEXIS 54, at *14 (Del. Super. Ct. Jan.23, 1998) (Ex. 6); State ex rel. Tate v. Cubbage, 210 A.2d 555, 563 (Del. Super. Ct. 1965). Accordingly, if the government can assert an adequate interest, its legislation is upheld against constitutional attack.

Delaware applies rationality review to due process challenges. Forehand v. State, 2010 Del. LEXIS 285, at *4 (Del. June 22, 2010) (Ex. 3); Sisson v. State, 903 A.2d 288, 314 (Del. 2006); Prices Corner Liquors, Inc. v. Delaware Alcoholic Beverage Control Comm'n, 705 A.2d 571, 576 (Del. 1998). The Delaware window is a rational solution to the injustice created by short statutes of limitations that favor child predators and their enabling institutions over child safety. Roman Catholic Bishop of Oakland v. Superior Court, 128 Cal. App. 4th 1155, 1161-62 (Cal. Ct. App. 2005); Melanie H., No. 04-1596-WQH-(WMc), slip op. at 16-18.

Even if the window were subject to strict scrutiny, it passes muster. Delaware recognizes a compelling interest in protecting children from harm. Waters v. Div. of Family Servs., 903 A.2d 720, 725-726 (Del. 2006). As the California window proved, there is no better or other known means of protecting children from the dangers of hidden child predators. Professor Timothy Lytton has shown that civil tort claims have been the only means by which survivors of clergy abuse have been able to obtain any justice. Timothy Lytton, Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Sexual Abuse (Harvard University Press, 2008).

There are three public purposes served by window legislation: (1) identifying previously unknown child predators to the public; (2) giving child sex abuse survivors a day in court; and (3) righting the balance of power between perpetrators and victims. Moreover, the *only* means of serving these ends is through civil retroactive legislation, because criminal retroactive legislation is unconstitutional. Stogner, 539 U.S. at 610. It would be difficult to identify more compelling interests more narrowly tailored.

CONCLUSION

For the foregoing reasons, *Amici Curiae* request this Court uphold the General Assembly's decision to enact Del. Code Ann. tit. 10, § 8145 (2010), for the purpose of protecting Delaware's children and providing justice to its child sex abuse victims.

Respectfully submitted,

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EXHIBIT 1

Pending before the Court are Plaintiff's Motion to Dismiss the Counterclaim and Defendants' Motion for Summary Judgment. On September 8, 2005, the parties appeared before the Honorable William Q. Hayes for oral argument on both Motions. After considering the arguments raised by the parties in their briefing and during oral argument, the Court now issues the following rulings.

BACKGROUND

On December 30, 2004, Plaintiff Melanie H., a female adult proceeding under a pseudonym, filed a complaint in California State Court alleging that she was sexually molested by a priest and parish/school worker at St. Mary's parish school between 1974 through 1977. The Complaint alleges that the Defendant Sisters of the Precious Blood, the order of nuns that ran the school, negligently failed to supervise the perpetrator and negligently failed to protect Plaintiff.

Plaintiff's Complaint alleges sexual abuse by Father Victor Uboldi. Father Uboldi was a Catholic Priest incardinated at the Diocese of San Diego and assigned to St. Mary's Parish at the time the alleged abuse occurred. Father Uboldi retired to Italy in the early 1980's and is now deceased.

Defendant Sisters removed the action to Federal Court and filed an Answer asserting fifteen affirmative defenses, including a defense based on the statute of limitations. Additionally, Defendants filed a Counterclaim seeking declaratory relief.

Defendant Sisters allege they provided services at the School and Parish at the request of the Bishop of San Diego. The Bishop intervened as a Defendant under the theory that if the Sisters are liable to Melanie, then the Bishop is liable to the Sisters. The State of California intervened as a matter of right to defend the constitutionality of Senate Bill 1779 (codified as California Code of Civil Procedure section 340.1) (hereinafter "SB 1779").

Effective January 1, 2003, the California Legislature enacted SB 1779 in order to create retroactive employer liability in certain types of child abuse actions. The Bill created a one year window for filing certain sexual abuse cases that would have otherwise been barred by the statute of limitations. Prior to 2003, Plaintiff's claim against the Defendants would have become

Fourth Party Defendants.

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barred by the statute of limitations on her 26th birthday. However, with the enactment of SB 1779, Plaintiff's claim would not be otherwise barred by the statute of limitations. In their Counterclaim, Defendants request that the Court grant summary judgment and declare those portions of California Civil Code of Procedure Section 340.1 which were amended by SB 1779 unconstitutional.

SB 1779 provides in pertinent part:

> § 340.1. Childhood sexual abuse; certificates of merit executed by attorney; violations; failure to file; name designation of defendant; periods of limitation; legislative intent
>
> (a) In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions:
>
> (1) An action against any person for committing an act of childhood sexual abuse.
>
> (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.
>
> (3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.
>
> (b) (1) No action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday.
>
> (2) This subdivision does not apply if the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact

> with children is an inherent part of that function or environment. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard.
>
> (c) Notwithstanding any other provision of law, any claim for damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003. Nothing in this subdivision shall be construed to alter the applicable statute of limitations period of an action that is not time barred as of January 1, 2003.

Cal.C.C.P. § 340.1.

I. MOTION FOR SUMMARY JUDGMENT

On May 11, 2005, Defendant Roman Catholic Bishop of San Diego and the Sisters of the Precious Blood filed a Joint Motion for Summary Judgment. The Motion raises several constitutional issues. Among them, the Defendants contend that: (1) SB 1779 violates the First Amendment Free Exercise Clause; (2) SB 1779 violates the First Amendment Establishment Clause; (3) SB 1779 violates the Due Process Clause; (4) SB 1779 violates the Ex Post Facto Clause; and (5) SB 1779 is an unconstitutional Bill of Attainder.

STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party may meet this burden in two ways: (1) by presenting evidence that negates an essential element of the

nonmoving party's case or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party satisfies its initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)) (internal quotations omitted).

In ruling on a motion for summary judgment, "[t]he district court may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the Court is not obligated to "scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). The Court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587. "Credibility determinations [and] the weighing of evidence ... are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

DISCUSSION

I. *The First Amendment Free Exercise Clause*

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303(1940),

provides "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*···." U.S. Const. Amend. I. (emphasis added).

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the right of free exercise of religion does not relieve persons of the obligation to comply with valid or neutral laws of general applicability. In *Employment Division v. Smith*, the Supreme Court held that the State was not prevented by the Free Exercise Clause from outlawing the use of sacramental peyote and denying unemployment benefits to employees discharged for using peyote. The Supreme Court explained that a State would prohibit the free exercise of religion if it was to ban acts solely because of their religious motivation. However, the Supreme Court found that the Free Exercise Clause was not violated when a State required compliance with an otherwise neutral law that incidentally impacted religious practice. The Supreme Court explained:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." *Sherbert v. Verner* at 402. The government may not compel affirmation of religious belief, *see Torcaso v. Watkins*, 367 U.S. 488 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, 322 U.S. 78, 86-88 (1944), impose special disabilities on the basis of religious views or religious status, *see McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953); cf. *Larson v. Valente*, 456 U.S. 228, 245 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, *see Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-452 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-725 (1976).

Employment Div. v. Smith, 494 U.S. at 886 (emphasis added).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), the legislature passed a law forbidding animal slaughtering for sacrificial purposes while still allowing animal slaughtering for other purposes, such as within the meat packing industry. The Supreme Court held that the ordinance in question was unconstitutional because its clear *object* was to prevent animal sacrifice for religious purposes, despite its facially neutral appearance. The Supreme Court stated, "[t]he principle that government, in pursuit of legitimate interests,

cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 542-543. The Supreme Court explained the circumstances under which the protections of the Free Exercise Clause pertain. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532.

The Supreme Court in *Lukumi* cited to *McDaniel v. Paty*, 435 U.S. 618 (1978) and *Fowler v. Rhode Island*, 345 U.S. 67 (1953) for examples of the type of cause of action that would implicate the Free Exercise Clause. Both *Fowler* and *McDaniel* involved clear intrusion by the State upon the practice of religion. In *Fowler*, the Supreme Court held that a public ordinance which prohibited public preaching by a Jehovah's Witness, but not by a priest or minister, was unconstitutional. In *McDaniel*, the Supreme Court invalidated a law prohibiting clergymen from holding public offices. The Supreme Court found that the challenged provision violated the First Amendment right to the free exercise of religion because it conditioned that right on the surrender of the right to seek office.

The Court's decision in this case is guided by the rulings in both *Lukumi* and *Employment Division*. However, the facts of this case differ significantly in that the legislation at issue is not aimed at promoting or prohibiting religious beliefs, opinions or practices. Both *Lukumi* and *Employment Division* involved regulation of religious practices, sacramental peyote use and animal sacrifice respectively. In comparison, SB 1779 allows tort claims against a third party for failure to supervise or negligent hiring to be filed retroactively.

Plaintiff contends that SB 1779 is "neutral, generally applicable legislation that retroactively extended the statute of limitation for certain claims wholly without regard to the religious or non-religious character of the defendant." Melanie H. Response at 1:22-2:1. Plaintiff contends "...SB 1779 does not attempt to regulate any conduct because of its specifically religious content. On this point, the contrast with *Church of Lukumi Babalu Aye* could not be more striking. The ordinance invalidated in that case effectively forbade the church from

engaging in a religious ritual. In this case, no one suggests that child abuse is a religiously approved, much less religiously mandated, practice." *Id.* at 12:11-15. Plaintiff asserts that "SB 1779 is general, religiously-neutral legislation that extends the statute of limitations for certain childhood sexual abuse claims against all private institutions that knew or should have known about childhood sexual abuse committed by their employees, volunteers, representatives, or agents and that failed to take reasonable steps to avoid future repetitions of such conduct." *Id.* at 6:9-13. Plaintiff further asserts "SB 1779 in no way targets inherently religious or religiously motivated conduct...." *Id.* at 12:16-17.

Defendants concede that the inquiry ends if the law does not burden religious practices[1], but provide several theories for asserting that SB 1779 violates the First Amendment. However, a review of these arguments and the statute itself reveals that SB 1779 does not impermissibly regulate the free exercise of religion because the legislation does not interfere with religious beliefs, opinions, or practices.

Defendants contend that the legislation is unconstitutional because it took away the "counseling defense" and, "as far as we are aware, only the Catholic Church provided and required counseling as one of its responses to inappropriate sexual conduct." Joint Motion at 3:24-26. Defendants further argue that "[c]ourts and juries will second guess the ecclesiastical decisions of Bishops and other Catholic leaders (who are now mostly dead) as to whether they acted 'reasonable' when–years ago–they counseled, disciplined, and assigned priests and other Catholic clergy." Reply Re: First Amendment at 7. Defendants contend, "[t]he Legislature then cut off any argument that the Church had acted reasonably when it sent priests to counseling...." Joint Motion at 6:24-26. Defendants further contend, "[t]he reason that counseling was excluded

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[1] The Court: ...what if the law targets a Church, but the result of the law is that it doesn't burden the religious practices of the Church, what happens then?

Mr. Hennigan [Counsel for Defendants]: If it doesn't burden religious practices, I think we are pretty much at the end of the inquiry.

Oral Argument Transcript at 28:4-9.

as a reasonable response that would allow Catholic institutions to assert the statute of repose defense was that it was the response of the Catholic Church...." *Id.* at 16:16-19. Defendants assert "[i]t is also a core belief of the Catholic Church that each priest represents the 'presence of Christ' among the faithful, and that one of the highest duties of the Bishop is to exercise greatest care in the progressive formation of priests. One context in which a Bishop does that is assuring adherence to vows of celibacy. In that context, the Bishop engages in pastoral counseling, and where, based on prayer and spiritual reflection, he determines that it is necessary and appropriate, he may also refer a priest to lay counseling. Whatever approach he takes, the Bishop must decide, based on the beliefs and teachings of the Church, whether a priest should continue in ministry, with or without restrictions, or be excluded from public ministry." *Id.* at 14:14-21.

The Court concludes that the provision of SB 1779 relating to counseling does not regulate a religious practice. Counseling often occurs apart from any religious belief. Defendants concede that counseling is utilized by the State and required in the Penal Code. Defendants argue that "[m]andating that counseling was never a reasonable response to possible sexual misconduct is also unreasonable because providing counseling for childhood sex offenders has long been public policy in California....Counseling is expressly required as a condition of probation for conviction of child molestation." *Id.* at 22:3-9 (citations omitted). Furthermore, the fact that counseling is not a "religious practice" is especially clear in light of the fact that the Church no longer uses counseling when faced with abuse allegations. Accordingly, counseling can not serve as the "religious practice" giving rise to First Amendment protection.

Defendants raise several arguments regarding the effects of SB 1779 upon the Church's practices of choosing, supervising, and retaining priests. Defendants argue "[a]t the heart of SB 1779 is the implicit command that a priest of the Church must be permanently removed from his position, and from all future contact with children, whenever there is suspicion of misconduct. This standard could never apply to the public schools, and it directly offends basic religious principles of the Catholic Church. Like the public schools, the Church requires real proof and due process before a Bishop can effectively destroy a priests vocation." *Id.* at 18:8-12. Defen-

dants also assert, "[f]reedom to choose clergy is protected by the Free Exercise Clause." *Id.* at 18:13-14. Additionally, Defendants contend, "[t]he legislative history of SB 1779 is marked by intent to reform Catholic practices regarding choice of its clergy and to hold Catholic institutions accountable for those practices." *Id.* at 18:17-19.

The Court concludes that SB 1779 does not burden the choice, supervision, or retention of priests. While the gate keeping function of the statute does not allow an institution to avoid litigation by showing that it counseled its members, the statute does not proscribe any procedure for choosing, supervising, or retaining priests. SB 1779 also does not automatically impose liability on the Church. Rather, it allows certain types of claims to be filed. While Defendants argue that basic religious principles of the Catholic Church have been offended, and that SB 1779 intends to reform Catholic practices regarding choice of clergy, the Court finds that Defendants have failed to show that the practices implicated involve religious beliefs, opinions or conduct.

Furthermore, Defendants argue that the statute burdens the religious practices of the Church by imposing financial burden. Counsel for Defendants described the economic impact as an "economic holocaust" and stated:

> "...to date, in the few cases that have been settled out of a thousand cases pending in the State–180 or so have been settled at the tune of hundreds of millions of dollars. There's 700 cases left, one could do the math–that this is the biggest, if it's survived, will be one of the largest transfers of wealth from an institution to its former parishioners at the urging of the legislature that has ever occurred."

Oral Argument Transcript at 26:10-17. The Court concludes that financial burden in defending lawsuits is not a burden on religious belief or practice. Financial burden incurred as a result of having to defend a lawsuit does not implicate any religious belief, opinion, or practice. Any defendant will incur financial burden in defending a lawsuit against it. Moreover, allowing First Amendment protection under the circumstances presented would create a preference for the Church over other institutions.

A review of the statute itself does not reveal any reference to or attempt to regulate a religious practice or belief. Third party liability for sexual assault does not implicate or effect any religious belief, opinion, or practice. The failure to supervise or negligent hiring of a person that commits sexual assault does not implicate or effect any religious belief, opinion, or practice. SB 1779 regulates only conduct that the State is free to regulate. The Court concludes that SB 1779 is a general law, not aimed at the promotion or restriction of religious beliefs. The law does not "discriminate against some or all religious *beliefs* or regulate or prohibit conduct *because it is undertaken for religious reasons.*" *Lukumi* 508 U.S. at 532 (emphasis added). SB 1779 does not regulate religious beliefs or punish the expression of religious doctrine.

While the Bishop of San Diego and the Sisters of the Precious Blood are the Defendants in this matter, the Court concludes that SB 1779 does not implicate any Catholic beliefs or practices. Religious organizations are not entitled to First Amendment protection based simply on their religious status. The Supreme Court has held that the First Amendment does not provide automatic tort immunity for religious institutions or their clergy. *See United States v. Ballard*, 322 U.S. 78, (1944); *see also Employment Division v. Smith* (explaining that the Court has never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law.) In *Employment Division Smith*, the Supreme Court discussed the historical conflict between otherwise neutral laws that incidentally effect religious practice and explained:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-595 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of

> religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.*, at 166-167.

Employment Div. v. Smith, 494 U.S. at 879.

Defendants contend that "all briefs discussing free exercise agree that if SB 1779 targeted Catholic institutions for disfavored treatment, then it would be unconstitutional." Reply Re: First Amendment at page 1, line 14. However, the Court finds that the dispositive question is whether the statute infringes on a religious *exercise*, meaning a belief or practice. Starting with the very basic principle that "Congress shall make no law...prohibiting the free exercise [of religion]"- it is clear that the legislation must impact some type of "exercise of religion." Accordingly, the Court finds that SB 1779 does not impermissibly regulate the free exercise of religion because the legislation does not interfere with religious beliefs, opinions, or practices. Based on this finding, the Court need not address the arguments of the parties regarding the neutrality and general applicability of SB 1779.

II. The First Amendment Establishment Clause

The Establishment Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), provides that "Congress shall make no law *respecting an establishment of religion,* or prohibiting the free exercise thereof···· " U.S. Const. Amend. I.

Defendants contend that SB 1779 violates the Establishment Clause by disfavoring Catholic institutions. Citing to *Lukumi,* 598 U.S. at 532, the Defendants contend "[t]he establishment Clause forbids official disfavor of a particular religion." Joint Motion at 13.

Defendants further contend that SB 1779 violates the Establishment Clause because it impermissibly entangles the State in the church minister relationship. Defendants argue "[c]ourts and juries will second guess the ecclesiastical decisions of Bishops and other Catholic leaders (who are now mostly dead) as to whether they acted 'reasonable' when–years ago–they counseled, disciplined, and assigned priests and other Catholic clergy." Reply Re: First Amendment at 7. Defendants raise several arguments regarding the Church's practices in

choosing, supervising, and retaining priests, and the effects of SB 1779 upon those practices: "[a]t the heart of SB 1779 is the implicit command that a priest of the Church must be permanently removed from his position, and from all future contact with children, whenever there is suspicion of misconduct. This standard could never apply to the public schools, and it directly offends basic religious principles of the Catholic Church. Like the public schools, the Church requires real proof and due process before a Bishop can effectively destroy a priests vocation." Joint Motion at 18:8-12; "[f]reedom to choose clergy is protected by the Free Exercise Clause." Joint Motion at 18:13-14; and "[t]he legislative history of SB 1779 is marked by intent to reform Catholic practices regarding choice of its clergy and to hold Catholic institutions accountable for those practices." Joint Motion at 18:17-19.

Citing to *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005), Plaintiff contends "[a]n Establishment Clause violation occurs only when a legislature acts with the predominant purpose of advancing [or inhibiting] religion." Melanie H. Response at 13:25-26. Plaintiff further contends "[t]he pertinent question is, therefore, whether section 340.1, as amended by SB 1779, has a 'principle or primary' effect of advancing or inhibiting religion." *Id.* at 13:27-28, and that "[t]here is no need to interpret Church doctrine, since Church doctrine has no bearing on the secular reasonableness of conduct that poses a threat of harm to innocent third parties." *Id.* at 15:17-19. Citing to *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002), Plaintiff contends "[d]isputes between a church and its own ministers 'must be distinguished from disputes between churches and third parties.' " Melanie H. Response at 18: 3-5.

The Establishment Clause prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *see also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). The Establishment Clause prohibits excessive State entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971). However, entanglement must be "excessive" before it runs afoul of the Establishment Clause. *Agostini v. Felton*, 521 U.S. 203, 233 (U.S. 1997).

In *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 793 (9th Cir. 2005), the Ninth

Circuit held "...suits seeking damages for sexual harassment do not pose a threat to First Amendment rights, and are therefore permitted." *Id.* at 793. The Court further explained that "[t]he effect of sexual abuse suits brought by parishioners on the employment practices of the church is thus almost certain to be far greater than the effect of sexual harassment suits by ministers. Yet it is clearly established law that such suits are not constitutionally barred, *see, e.g., Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 430-31 (2d Cir. 1999); *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 72-74 (D. Conn. 1995); *Moses v. Diocese of Colorado*, 863 P.2d 310, 319-21 (Colo. 1993)." 397 F.3d at 792.

The First Amendment Establishment Clause does not prevent courts from deciding secular disputes involving religious institutions even where they require reference to religious matters. *See, e.g., Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (resolution of the dispute would have to involve "extensive inquiry" into religious law and polity before the First Amendment would bar a secular court from adjudicating a civil dispute); *General Council on Fin. & Admin. v. Cal. Superior Court*, 439 U.S. 1369, 1373 (1978)(finding that perceived dangers that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged); *Watson v. Jones*, 80 U.S. 679, 714 (1872)([r]eligious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints); *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 793 (9th Cir. 2005) (holding "[t]he First Amendment protects a church's right to hire, fire, promote, and assign duties to its ministers as it sees fit not because churches are exempt from all employment regulations (for they are not), but rather because judicial review of those particular employment actions would interfere with rights guaranteed by the First Amendment. As we explained in *Bollard*, suits seeking damages for sexual harassment do not pose a threat to First Amendment

rights, and are therefore permitted."); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 431 (2d Cir. 1999) ([t]he First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters."); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 338 (5th Cir. 1998) (citing *Smith*, 494 U.S. at 881; *Yoder*, 406 U.S. at 215; and *Destefano*, 763 P.2d at 283-84 and finding that "to invoke the protection of the First Amendment ...[a party] must assert that the specific conduct allegedly constituting a breach of his professional and fiduciary duties was rooted in religious belief."); *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66, 74 (D. Conn. 1995) (holding the common law doctrine of negligence does not intrude upon the free exercise of religion, as it does not discriminate against [a] religious belief or regulate or prohibit conduct because it is undertaken for religious reasons); *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 811 (Minn. Ct. App. 1992) (conduct by the Church that results in external and secular harm is not protected by the First Amendment.)

The Court finds the *Malicki v. Doe* 814 So.2d. 347 (Fla. 2002) case instructive:

> We recognize that the Free Exercise Clause and the Establishment Clause require constant vigilance to prevent the government from either stifling the free exercise of religion or excessively and impermissibly entangling itself with interpreting religious doctrine on matters solely within the purview of religious institutions. However, with regard to a third party tort claim against a religious institution, we conclude that the First Amendment does not provide a shield behind which a church may avoid liability for harm arising from an alleged sexual assault and battery by one of its clergy members.
>
> By holding that the First Amendment does not bar the court's consideration of the parishioners' allegations, we expressly do not pass on the merits of the underlying case. Our holding today is only that the First Amendment cannot be used at the initial pleading stage to shut the courthouse door on a plaintiff's claims, which are founded on a religious institution's alleged negligence arising from the institution's failure to prevent harm resulting from one of its clergy who sexually assaults and batters a minor or adult parishioner. To hold otherwise and immunize the Church Defendants from suit could risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment.

Id. at 365. Furthermore, the "court inquiring into the reasonableness of the steps a church has taken to prevent or correct sexual harassment need intrude no further in church autonomy . . .

than [a court does], for example, in allowing parishioners' civil suits against a church for the negligent supervision of ministers who have subjected them to inappropriate sexual behavior. " *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 793 (9th Cir. 2005) (internal citations omitted).

The Court concludes that Defendants have not shown that SB 1779 favors one religion over another, or disfavors religion. Defendants have not shown that resolution of cases brought under SB 1779 will involve excessive entanglement of Church and State. The First Amendment does not protect every decision made by a religious leader. Furthermore, SB 1779 does not impose liability, but rather, allows cases which were otherwise barred by the statute of limitations to move forward. A determination of third party liability under SB 1779 whether the Defendants negligently supervised a priest would not "prejudice or impose upon any of the religious tenets or practices of Catholicism." *Malicki v. Doe*, 814 So. 2d 347, 363 (Fla. 2002). "[The First] Amendment embraces two concepts, -- freedom to believe and freedom to act. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Neither is implicated here, and thus, the Court finds that Defendants have failed to show that SB 1779 is unconstitutional under the First Amendment Establishment Clause and will deny summary judgment on the First Amendment Establishment Clause claims.

III. The Due Process Clause

Defendants contend that SB 1779 violates the Due Process Clause because the statute deprives the Catholic Church of fair warning, unconstitutionally revives time barred claims, and unconstitutionally vitiates vested property rights. The Defendants argue that their cases are not defendable, that the witnesses are gone and the evidence lost. In their Counterclaim, Defendants allege: "[t]here were four to five members of the Sisters present at St. Mary's parish between the years of 1975 and 1980. At least three of the members are recently deceased, and one is suffering from Alzheimer's disease. All Pastors of St. Mary's Parish and all Bishops of San Diego at the time of the alleged events are now deceased." Counterclaim at 2. Defendants further contend that "one-hundred-five Complaints, by 140 individuals, have been filed against

the Bishop of San Diego since enactment. The claims involved date back as far as 1939; the most recent is based on events more than a decade old. All but one allege acts prior to 1991 when the current Bishop was installed and amendment of CCPO §340.1 created the statutory tort of childhood sexual abuse. At least one of the cases asserts claims that already resulted in a judgment of dismissal based on the preexisting [s]tatute of [l]imitations." *Id.* at 11.

Defendants allege that, "[o]f the 43 priests with parish assignments in the Diocese of San Diego who are subjects of complaints, 24 are dead. There are also claims based on alleged misconduct by seven Nuns, ten Brothers, four other priests and seven lay persons. To the extent that any information is available to the Bishop, it is that five of the seven Nuns are deceased; the other is no longer affiliated with her Order and her last-known residence was outside of the United States. At least three of the lay persons are deceased and two may be deceased." Joint Motion at 11.

Plaintiff contends that SB 1779 does not violate Defendants Due Process rights because it is a facially neutral, procedural statute. Plaintiff further contends that SB 1779 is permissible legislation extending a civil statute of limitations. Plaintiff also contends that SB 1779 does not deprive Defendants of fair warning, destroy property, or take vested rights.

In *International Union of Electrical v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976), the Supreme Court made clear that the lifting of a statute of limitation, so as to restore a remedy lost through mere lapse of time, is not per se unconstitutional. The Supreme Court explained:

> Respondent contends, finally, that Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period. This contention rests on an unwarrantedly broad reading of our opinion in *William Danzer Co. v.. Gulf & Ship Island R. Co.*, 268 U.S. 633 (1925). *Danzer* was given a narrow reading in the later case of *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 312 n. 8 (1945). The latter case states the applicable constitutional test in this language:
>
> > "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law... Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects

> would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." *Id.*, at 315-316.I
>
> Applying that test to this litigation, we think that Congress might constitutionally provide for retroactive application of the extended limitations period which it enacted.

Id. at 243-244 (1976).

The Ninth Circuit Court of Appeals and the California State Courts have concluded that the legislature can revive civil claims by enacting legislation that retroactively extends the statute of limitations period. *See Underwood Cotton Co. v. Hyundai Merch. Marine*, 288 F.3d 405, 409 (9th Cir. 2002) (holding that there are circumstances in which a legislature can remove a statute of limitations impediment retroactively and that the same can be true of a statute of repose[3] in proper circumstances); *Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730, 733 (9th Cir. 1985) citing *Davis v. Valley Distributing Co.*, 522 F.2d 827, 830 n.7 (9th Cir. 1975) (holding that extending a statute of limitations does not violate due process, even if the right of action has been time barred); *Starks v. S. E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982) (holding that retroactive application of a statute which serves to extend a lapsed statute of limitations is not unconstitutional under the Fourteenth Amendment); *Tietge v. Western Province of the Servites, Inc.*, 55 Cal. App. 4th 382, 386 (Cal. Ct. App. 1997)(relying on *Lent v. Doe* 40 Cal. App. 4th 1177 (1995) finding that the legislature had the power to retroactively revive a cause of action for childhood sexual abuse previously time-barred under prior statute of limitations); *Liebig v. Superior Court,* 209 Cal. App. 3d 828, 830 (Cal. Ct. App. 1989) (holding the Legisla-

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[3]Defendants contend that the legislation in question is a statute of repose, and that "[a] completed statute of repose provides vested rights that cannot be impaired by subsequent legislative act." Joint Motion at 25:12-13. However, the courts have held that even in cases involving a statute of repose, the legislature can act to revive a previously barred claim without offending the constitution. *See Underwood Cotton Co. v. Hyundai Merch. Marine*, 288 F.3d 405, 409 (9th Cir. 2002) (holding that there are circumstances in which a legislature can remove a statute of limitations impediment retroactively and that the same can be true of a statute of repose in proper circumstances). Regardless of whether the statute is one of limitations or repose, the Defendants have not shown that SB 1779 is unconstitutional.

ture has the power to retroactively extend a civil statute of limitations to revive a cause of action time-barred under the former limitations period).

In *Roman Catholic Bishop of Oakland v. Superior Court*, 128 Cal. App. 4th 1155, 1162 (Cal. Ct. App. 2005), the California Court of Appeal discussed at length the past challenges to previously revised sections of the same statute at issue here, and set forth a detailed analysis of the cases as they relate to due process challenges. The court summarized:

> It is equally well settled that legislation reviving the statute of limitations on civil law claims does not violate constitutional principles. In *Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, 314 [89 L. Ed. 1628, 65 S. Ct. 1137], the court held that due process notions were not affected by the revival of a civil law claim because civil limitations periods "find their justification in necessity and convenience rather than in logic. ... They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. ... Their shelter has never been regarded as ... a 'fundamental' right ... the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." (Fns. omitted.) In *Liebig v. Superior Court* (1989) 209 Cal. App. 3d 828, 831-834 [257 Cal. Rptr. 574], the court held that the Legislature had the power to revive lapsed common law claims based on childhood sexual abuse under an earlier version of section 340.1.

Roman Catholic Bishop of Oakland v. Superior Court, 128 Cal. App. 4th 1155, 1162 (Cal. Ct. App. 2005).

The Court finds that the mere passage of SB 1779 does not offend the Due Process Clause of the Constitution. The Court concludes that the legislation is not per se unconstitutional. While the facial challenge to the legislature's right to pass SB 1779 fails, the Court finds that a determination of whether the statute "so manipulated that [its] retroactive effects []offend the Constitution." *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315 (1945) is premature.

Defendants rely on *United States v. Marion* for the proposition that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." Reply Re: Due Process at 2 citing *United States v. Marion*, 404 U.S. 307, 325 (U.S. 1971). However, in *Marion*, the Court explained that even in the criminal context, the Court must evaluate the potential prejudice on a case-by-case basis. "To accommodate the sound administration of justice to the

rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases." *United States v. Marion*, 404 U.S. 307, 325 (U.S. 1971).

The Court concludes that it would be "unwise at this juncture" to "forecast a decision" on the potential prejudice to Defendants as the necessary facts regarding time passed and potential prejudice are not before the Court at this time. *See Id.* First, while many of the cases may involve old claims, faded memories, and missing witnesses, it is not clear that these factors will be involved in all of the cases impacted by the legislation. For example, there may be an instance where a Plaintiff is attempting to recover from the Church and there are witnesses available and evidence that has been preserved. Defendants contend that "[k]ey witnesses are deceased. Memories of victim [sic] and witnesses are faded. Details are lost to time." Reply Re: Due Process at 1:11. In order to determine whether Defendants' due process rights have been violated, the Court would need to examine the circumstances of each case. The Court cannot conclude that due process is per se violated simply because the legislation was enacted, or that due process was violated because time passed. While there has been a significant passage of time indicating potential prejudice to Defendants, such prejudice has not been established. While the unavailability of witnesses and the absence of evidence may, in fact, impact a court's decision on whether due process has been violated, that question is not currently before the Court.

While the parties raise some arguments that relate to an "as applied" challenge, the Court does not decide whether SB 1779 is unconstitutional as applied to the facts of this case or any other case. The record on these issues stands undeveloped at this time. Accordingly, the Court finds that the question of whether the due process rights of the Defendants have been violated is premature. As previously noted, this is a facial challenge and a challenge to the statute as applied may be raised after discovery has been conducted. Accordingly, the Court finds that the enactment of SB 1779 is not per se unconstitutional and denies the Defendants' Motion for Summary Judgment on this issue, without prejudice.

IV. The Ex Post Facto Clause

Defendants contend that SB 1779 violates the Ex Post Facto Clause of the U.S. Constitution because the legislative purpose and motive for the law was to punish the Catholic Church. Defendants further argue that Ex Post Facto applies to both criminal and civil law and that the Ex Post Facto clause prohibits retroactive penal legislation.

Defendants contend that the civil remedies of SB 1779 are simply the civil supplement to a criminal statute, and that therefore, the statute falls within the ban on Ex Post Facto laws. Melanie H. Opposition at 36:27-28. Defendants rely on *Handle v. Artukovic*, 601 F. Supp. 1421(D. Cal. 1985), a Central District Court case involving an extension of the statute of limitations to file civil suits stemming from war crimes. In that case, Judge Rymer (then a District Court Judge) held that the cause of action was for a violation of criminal law, and that the civil statute was simply the civil supplement to a criminal issue. The Court therefore found the statute unconstitutional. In *Handle,* the court explained "[s]tatutes of limitation are enacted as matters of public policy designed to promote justice and prevent the assertion of stale claims after the lapse of long periods of time. Statutes of limitation are not disfavored in the law. To the contrary they are favored in the law because they promote desirable social ends and give security and stability to human affairs." *Id.* at 1434 (internal citations omitted).

Plaintiff argues that Defendant's Ex Post Facto arguments fail because SB 1779 is not penal for Ex Post Facto purposes. Plaintiff argues that "SB 1779's extension of the statute of limitations imposes 'no affirmative disability or restraint' beyond an obligation to pay damages, and that civil damages have historically been regarded as a civil remedy, not a criminal penalty." Melanie H. Response at 30:20-22 *citing Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

The Ex Post Facto Clauses of the U.S. Constitution prohibit the Federal Government and the States from enacting laws with certain retroactive effects. *See* Art. I, § 9, cl. 3; *Stogner v. California,* 539 U.S. 607, 610 (2003). *Stogner* involved a law that created a new criminal limitations period extending the time within which prosecution was allowed. The Supreme

Court explained:

> Long ago the Court pointed out that the Clause protects liberty by preventing governments from enacting statutes with "manifestly unjust and oppressive" retroactive effects. *Calder v. Bull*, 3 U.S. 386, 3 Dallas 386, 1 L. Ed. 648 (1798). Judge Learned Hand later wrote that extending a limitations period after the State has assured "a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest." *Falter v. United States*, 23 F.2d 420, 426 (CA2), cert denied, 277 U.S. 590, 72 L. Ed. 1003, 48 S. Ct. 528 (1928). In such a case, the government has refused "to play by its own rules," *Carmell v. Texas*, 529 U.S. 513, 533, 146 L. Ed. 2d 577, 120 S. Ct. 1620 (2000). It has deprived the defendant of the "fair warning," *Weaver v. Graham*, 450 U.S. 24, 28, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981), that might have led him to preserve exculpatory evidence. F. Wharton, Criminal Pleading and Practice § 316, p 210 (8th ed. 1880) ("The statute [of limitations] is . . . an amnesty, declaring that after a certain time . . . the offender shall be at liberty to return to his country . . . and . . . may cease to preserve the proofs of his innocence"). And a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both "arbitrary and potentially vindictive legislation," and erosion of the separation of powers, *Weaver*, supra, at 29, and n 10, 450 U.S. 24, 67 L Ed 2d 17, 101 S Ct 960. *See Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 137-138, 3 L. Ed. 162 (1810) (viewing the Ex Post Facto Clause as a protection against "violent acts which might grow out of the feelings of the moment").

Id. at 611. In *Calder v. Bull*, 3 U.S. 386, (1798), the Supreme Court set forth four categorical descriptions of *ex post facto* laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Id. at 391 (U.S. 1798). The Court concludes that SB 1779 is not unconstitutional under the Ex Post Facto Clause. The Court concludes that SB 1779 does not impose a criminal penalty and SB 1779 is not an extension of criminal punishment. Rather, SB 1779 extends the statute of limitations for the filing of a civil tort cause of action. Accordingly, the Court finds that Defendants' Motion for Summary Judgment based on the Ex Post Facto Clause should be denied.

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V. Bill of Attainder

Defendants contend that SB 1779 is an unconstitutional Bill of Attainder because of its "retributive focus on legislatively-condemned past conduct by Catholic Institutions that cannot possibly be undone." Joint Motion at 32:2-3. Defendants argue that the Bill of Attainder Clause prohibits the legislature from "singling out disfavored persons" and "meting out summary punishment for past conduct." *Id.*

Plaintiff contends that SB 1779 "does not impose punishment, let alone punishment without trial. Section 340.1 enables trial; it does not bypass one." Melanie H. Opposition at 30:3-4.

The Constitution instructs Congress that "No Bill of Attainder ··· shall be passed." U.S. Const. art. I, § 9, cl. 3. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977).

> Statutes are presumed constitutional. *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder. *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 83, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961). In judging the constitutionality of [a statute, the Court will] look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect.

SeaRiver Maritime Financial Holdings, Inc. v. Mineta 309 F.3d 662, 668 -669 (9th Cir. 2002). A statute that (1) specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial, is a bill of attainder. *See Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 847 (1984).

The Court finds that the third factor of the test is clearly dispositive, and therefore, the Court need not discuss the first and second factors. Defendants have failed to show that the statute inflicts punishment without a judicial trial. *See Selective Serv. Sys.* 468 U.S. at 847. SB 1779 extends the statute of limitations for the filing of a civil tort cause of action. SB 1779 does

not automatically impose liability on the Church. Rather, it allows certain types of claims to be filed. Defendants have failed to show that the statute inflicts punishment without a judicial trial, and the Court will deny Defendants' Motion for Summary Judgment based on the Bill of Attainder Clause.

II. MOTION TO DISMISS

Plaintiff moves for dismissal on abstention grounds. Plaintiff contends that dismissal, or in the alternative, a stay is required under three abstention doctrines. Plaintiff's Motion is only filed against Defendant Roman Catholic Bishop. Therefore, Plaintiff does not contend that the Court should abstain from hearing the claims by and against the Sisters. Additionally, the State, who intervened to defend the constitutionality of the legislation, has not moved for abstention.

On August 6, 2004, Defendants removed the case to Federal Court on the basis of diversity jurisdiction. Defendant Sisters of the Precious Blood is a non-profit Ohio Corporation; Plaintiff is a citizen of California. Accompanying the Notice of Removal, Defendant filed an Answer and Counterclaim. Defendant's Answer asserts fifteen affirmative defenses, including a defense based on the statute of limitations.[3] Additionally, Defendants filed five Counterclaims seeking declaratory relief requesting that the Court declare California Civil Code of Procedure Section 340.1 subdivisions (b)(2), (c) and (d) unconstitutional. The Bishop joined in the Counterclaims and Melanie H. now asks the Court to refrain from deciding the constitutionality issue as the Bishop is a party to many similar actions currently pending in State Court.

Plaintiff's arguments are moot. Plaintiff asks the Court to refrain from deciding the constitutionality of the issue so that the decision cannot have a res judicata effect in the coordinated proceedings pending in State court. However, as clear from this Order, the Court finds that based on the current record, SB 1779 is constitutional. Thus, to the extent that the

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[3]Defendant's eighth affirmative defense reads: Plaintiff's claims are barred by the applicable statute of limitations, including, without limitation, Cal.Code of Civ. Proc. Sections 335.1, 338, 340(c), 340.1, and 343.

Plaintiff attempts to prohibit a finding of unconstitutionality from "interrupting" the coordinated proceedings pending in State court, the Court finds that the issue is moot. Accordingly, the Court will deny Plaintiff's Motion to Dismiss as moot.

CONCLUSION & ORDER

The Court finds that SB 1779 does not violate the Free Exercise Clause or the Establishment Clause of the First Amendment because SB 1779 does not target a religious practice, a religious belief, or religious conduct of the Church.

The Court finds that SB 1779 is not per se unconstitutional under the Due Process Clause. The Court further finds that many of the Due Process arguments are premature, and will deny the portion of the Motion relying on Due Process without prejudice.

The Court finds that SB 1779 does not violate the Ex Post Facto Clause. The Defendants have failed to show that the law is penal in nature. The Court further finds that SB 1779 is not an unconstitutional bill of attainder. The Defendants have failed to show that the legislation inflicts punishment without a judicial trial.

The Court finds that the Motion to Dismiss is moot. For these reasons, and for all of the reasons discussed above, the Court will deny Defendants' Motion for Summary Judgment, and deny Plaintiff's Motion to Dismiss or Stay this action as moot.

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Accordingly,

IT IS ORDERED Plaintiff's Motion to Dismiss is **DENIED** as moot.

IT IS FURTHER ORDERED Defendants' Motion for Summary Judgment with respect to the Due Process Clause claim is **DENIED** without prejudice.

IT IS FURTHER ORDERED Defendants' Motion for Summary Judgment with respect to the First Amendment, Ex Post Facto, and Bill of Attainder claims is **DENIED** with prejudice.

IT IS SO ORDERED.

Dated: 12/20/05

WILLIAM Q. HAYES
United States District Judge

CC: Magistrate Judge McCurine;
All parties

EXHIBIT 2

LEXSEE 2006 DEL. SUPER. LEXIS 549

Analysis
As of: Aug 03, 2010

KATINA COLLINS, Plaintiff, v. THE AFRICAN METHODIST EPISOCOPAL ZION CHURCH, a North Carolina Corporation; BISHOP MILTON A. WILLIAMS, SR.; SCOTT A.M.E. ZION CHURCH; and REV. D. WILLIAM L. BURTON, JR.; Defendants.

C.A. No. 04C-02-121

SUPERIOR COURT OF DELAWARE, NEW CASTLE

2006 Del. Super. LEXIS 549

December 13, 2005, Submitted
March 29, 2006, Decided
April 17, 2006, Filed

SUBSEQUENT HISTORY: [*1]
Amended: April 10, 2006.
Appeal dismissed by *Collins v. African Methodist Episcopal Zion Church, 907 A.2d 145, 2006 Del. LEXIS 419 (Del., 2006)*

DISPOSITION: Upon Consideration of Church Defendants' Motion for Summary Judgment. GRANTED.

CASE SUMMARY:

PROCEDURAL POSTURE: In a case arising from the alleged harassment of plaintiff church member by defendant pastor, plaintiff sued defendants, the church corporation, a bishop, and an individual church (church defendants), for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. Before the court was the church defendants' motion for summary judgment (Superior Court Civil Rule 56).

OVERVIEW: The court found that the member's claims invoked the church's disciplinary book. Therefore, the court's adjudication of the claims would necessarily involve an inquiry into the propriety of the decisions of church authorities on matters of discipline, internal organization, ecclesiastical rule, custom, and law. This was exactly the inquiry that the First Amendment prohibited. The church defendants would be compelled to defend as reasonable its formal internal processing and handling of the member's claims. Every step the church took to respond and react to the claims would be reviewed to determine whether it was reasonable. Such an inquiry into whether the church exercised

reasonable care would involve, by necessity, discovery and examination by litigation of the church's disciplinary procedures and subsequent responses. In addition, the consideration of the member's claim that the bishop did not take any action against the member after an investigative committee had determined that he violated the disciplinary book was barred by the First Amendment. Adjudication of the member's claims would ultimately involve an examination of the church tribunal's decision-making process.

OUTCOME: The motion was granted.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
[HN1] Summary judgment may only be granted when no genuine issues of material fact exist. The moving party bears the burden of establishing the non-existence of genuine issues of material fact. If the burden is met, the burden shifts to the non-moving party to establish the existence of genuine issues of material fact. Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e). Summary judgment will not be granted if the record reasonably indicates a material fact in dispute or a need to inquire more thoroughly into the facts to clarify the application of law to the circumstances. The court must view the facts in the light most favorable to the non-moving party.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Standards > Appropriateness
Torts > Negligence > General Overview
[HN2] Summary judgment is generally not appropriate for actions based on negligence. It is rare in a negligence action because the moving party must demonstrate not only that there are no conflicts in the factual contentions of the parties but that, also, the only reasonable inferences to be drawn from the uncontested facts are adverse to the plaintiff.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
Constitutional Law > Bill of Rights > State Application
[HN3] The *First Amendment to the United States Constitution* provides that Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. *U.S. Const. amend. I.* This constitutional guarantee is made applicable to the states through the Fourteenth Amendment. The First Amendment contains two clauses regarding religion, the Free Exercise Clause and the Establishment Clause.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN4] The Free Exercise Clause guarantees first and foremost, the right to believe and profess whatever religious doctrine one desires. Moreover, at a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. The Free Exercise Clause protects religious relationships by preventing the judicial resolution of ecclesiastical disputes turning on matters of religious doctrine or practice. The United States Supreme Court has explained that the Free Exercise Clause embraces two concepts--freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. Thus, the First Amendment has never been interpreted to mean that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN5] Government regulation includes both statutory law and court action through civil lawsuits. Importantly, before the constitutional right to free exercise of religion is implicated, the threshold inquiry is whether the conduct sought to be regulated was rooted in religious belief. Further, in order to launch a free exercise challenge, it is necessary to show the coercive effect of the enactment as it operates against the individual in the practice of his religion. If it is demonstrated that the conduct at issue was rooted in religious beliefs, then the court must determine whether the law regulating that conduct is neutral both on its face and in its purpose. If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. The State may, however, regulate conduct through neutral laws of general applicability. Thus, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

[HN6] The Establishment Clause states that government shall make no law respecting an establishment of religion. *U.S. Const. amend. I*. This aspect of the First Amendment involves the separation of church and state and prevents the government from passing laws that aid one religion, aid all religions, or prefer one religion over the other. The United States Supreme Court has explained that there are three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

[HN7] In Lemon, the U.S. Supreme Court provided a three-part test to determine whether a neutral law violates the Establishment Clause: (1) the law must have a secular legislative purpose; (2) the primary or principal effect of the law must neither advance nor inhibit religion; and (3) the law must not foster an excessive government entanglement with religion. Under Lemon, entanglement is measured by the "character and purposes" of the institution affected, the nature of the benefit or burden imposed, and the resulting relationship between the government and the religious authority.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

[HN8] Excessive government entanglement is merely a factor to consider in evaluating the second prong of the Lemon test to determine whether a neutral law violates the Establishment Clause; that is, whether the principal effect of the statute is to advance or inhibit religion.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN9] The U.S. Supreme Court has held that the First Amendment prevents courts from resolving internal church disputes that would require adjudications of questions of religious doctrines. For example, the Supreme Court has stated that it is not within the judicial function and judicial competence of civil courts to determine which of two competing interpretations of scripture are correct. Instead, civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law. Thus, the First Amendment provides churches with the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN10] Civil courts may not take jurisdiction over a religious organization's internal, ecclesiastical matters.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > Bill of Rights > State Application

[HN11] Where resolution of disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > Bill of Rights > State Application

[HN12] The First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decision as binding upon them. Church members give their implied consent to be subject only to such appeals as the organism itself provides for.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

[HN13] Interaction between the church and state is inevitable and some level of involvement between the two is tolerated.

Entanglement must be excessive before it runs afoul of the Establishment Clause.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
[HN14] A court must determine whether a dispute is an ecclesiastical one about discipline, faith, internal organization, or ecclesiastical rule, custom or law, or whether it is a case in which it should hold religious organizations liable in civil courts for purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
[HN15] If a court is required to interpret church law, policies, or practices, the First Amendment prohibits such an inquiry.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
[HN16] Secular evaluation of the procedures that ecclesiastical law requires the church to follow is precisely the type of inquiry the First Amendment prohibits.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
[HN17] When the issue of one's fitness to serve a church organization as minister is brought before the courts, the First Amendment is implicated and the courts must then make a careful determination of whether the issues brought before it are ecclesiastical or secular in nature.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
[HN18] The assessment of an individual's qualifications to be a minister, and the appointment and retention of ministers, are ecclesiastical matters entitled to constitutional protection against judicial or other state interference.

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JUDGES: Calvin L. Scott, Jr.

OPINION BY: Calvin L. Scott, Jr.

OPINION

AMENDED MEMORANDUM OPINION

SCOTT, J.

Having reviewed the decision of Defendant's Motion for Summary Judgment per Defendant's request, AME Church is hereby changed to AME Zion Church throughout the opinion. This is the amended opinion.

I. INTRODUCTION

This case arises from the alleged harassment of Plaintiff Katina Collins ("Collins") by Reverend William L. Burton, Jr. ("Burton"). Collins has sued the African Methodist Episcopal Zion Church, Bishop

Milton A. Williams, Sr., and Scott African Methodist Episcopal Zion Church (hereinafter "the Church Defendants") for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. Presently before the Court is [*2] the Church Defendants' Motion for Summary Judgment. Because Collins is essentially seeking civil court review of ecclesiastical policies and procedures and the subjective judgments of religious officials concerning Reverend Burton, the Court grants the Church Defendants' Motion. [1] The Court is constitutionally precluded from entertaining religious and ecclesiastical matters of this kind by virtue of the *First Amendment* to the Constitution.

1 *See Allen v. Board of Incorporators, 1992 U.S. Dist. LEXIS 19464, 1992 WL 390755, at *1 (N.D. Ill.)*(defendants' motion to dismiss plaintiffs' complaint that alleged violation of ecclesiastical rules and documents was dismissed for lack of subject matter jurisdiction).

II. BACKGROUND

Collins alleges Defendant Burton made sexually harassing, intimidating phone calls to her between the period of November 2002 until September 2003. Burton was pastor and Collins was a member and Vice Chairman of the Steward's Board at the Scott Church during the time in question. Collins states she initially went to the administration of Scott African Methodist Episcopal Zion Church ("Scott Church") to stop the harassing phone calls, but no action was taken. Collins next attempted to contact Bishop [*3] Milton A. Williams, Sr., ("Bishop Williams") who presided over the Mid-Atlantic District of the denomination and who was also a representative for International Ministers. Bishop Williams refused to listen to tape recordings of Burton's comments to Collins and initially refused certified letters from Collins.

In September 2003, Collins filed a complaint with the Wilmington Police Department who subsequently arrested Burton. Bishop Williams then convened a committee who found Burton guilty of sexual harassment in violation of International Ministers' and *The Book of Discipline of the A.M.E. Zion Church* ("*The Book of Discipline*").

Collins states she has suffered from a stroke, slurred speech, and mental and emotional anguish as the result of the Defendants failure to act.

III. STANDARD OF REVIEW

[HN1] Summary judgment may only be granted when no genuine issues of material fact exist. [2] The moving party bears the burden of establishing the non-existence of genuine issues of material fact. [3] If the burden is met, the burden shifts to the non-moving party to establish the existence of genuine issues of material fact. [4] "Where the moving party produces an affidavit or other evidence sufficient under [*4] Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial." [5] Summary judgment will not be granted if the record reasonably indicates a material fact in dispute or a need to inquire more thoroughly into the facts to clarify the application of law to the circumstances. [6] The court must view the facts in the light most favorable to the non-moving party. [7]

2 *Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979).*
3 *Id.*
4 *Id. at 681.*
5 Super. Ct. Civ. R. 56(e); *Ramsey v. State Farm Mutual Automobile Insurance Co., 2004 Del. Super. LEXIS 329, 2004 WL 2240164, at *1 (Del. Super.)*(citing *Celotex Corp. v. Catrett,*

477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

6 *Ebersole v. Lowengrub, 54 Del. 463, 180 A.2d 467, 470, 4 Storey 463 (Del.1962)*.

7 *Lupo v. Medical Center of Delaware, 1996 Del. Super. LEXIS 46, at *5 (Del. Super.)*.

Moreover, [HN2] summary judgment is generally not appropriate for actions based on negligence. [8] It is rare in a negligence action "because the moving party must demonstrate 'not only that there are no conflicts in the factual contentions of the parties but that, also, the only reasonable inferences to be drawn from the uncontested [*5] facts are adverse to the plaintiff." [9]

8 *Ebersole, 180 A.2d at 468*.

9 *Upshur v. Bodie's Dairy Market*, 2003 WL 21999598 at *3 (Del. Super.).

IV. DISCUSSION

The Church Defendants argue that the *Establishment Clause of the First Amendment* bars consideration of Collins' claims against them because each count in the Second Amended Complaint arises out of the claim that the Defendants owed Collins a duty as set forth in the Policies & Procedures Concerning Sexual Misconduct contained in *The Book of Discipline*. Specifically, Counts IV and V set forth claims of negligent infliction of emotional distress and negligence against Scott Church. Collins contends that Scott Church had a duty as set forth in *The Book of Discipline* to refer all complaints of sexual misconduct to the Bishop. [10] Scott Church allegedly breached that duty by failing to notify the Bishop of Collins' complaint which was in direct violation of *The Book of Discipline*. [11] As a result of these actions, Collins suffered emotional distress, depression, a stroke, headaches, and developed slurred speech. [12] In addition, Counts VII and VIII set forth claims of negligent infliction of emotional distress and negligence against Bishop Williams [*6] and the African Methodist Episcopal Zion Church ("A.M.E. Zion Church"). Collins contends that Bishop Williams, one of the twelve bishops with the authority to perform duties on behalf of the A.M.E. Zion Church, had a duty as set forth in *The Book of Discipline* to promptly and thoroughly investigate Collins' complaint of sexual misconduct. [13] Bishop Williams allegedly breached that duty by failing to take any action or by avoiding to deal with Collins' concerns. [14] Collins also contends that Bishop Williams did not appoint an investigative committee until September 2003, after Reverend Burton was arrested. [15] Moreover, it is alleged that Bishop Williams did not take any action against Burton after the investigative committee determined that he was guilty of violating *The Book of Discipline*. [16] These actions by Bishop Williams and the A.M.E. Zion Church are allegedly in direct violation of the Policies & Procedures Concerning Sexual Misconduct contained in *The Book of Discipline*. [17]

10 Compl. at PP 87, 95.
11 *Id.* at PP 88, 89, 96, 97.
12 *Id.* at PP 90-91, 98.
13 *Id.* at PP 115, 126.
14 *Id.* at PP 116-117, 127-128.
15 *Id.* at PP 118, 129.
16 *Id.* at PP 119, 130.
17 *Id.* at PP 121, 132.

In Count VI Collins alleges [*7] a claim of intentional infliction of emotional distress against Bishop Williams and the A.M.E. Zion Church. Collins contends that Bishop Williams was aware of the extreme and outrageous conduct of Reverend Burton but failed to take any action against him. [18] It is also alleged that Bishop Williams did not appoint an investigative committee until September 2003, after Reverend Burton was arrested. [19] Again, it is alleged that Bishop Williams did not take any action against Burton even after the

investigative and trial committee had determined that Reverend Burton was guilty of violating *The Book of Discipline*. [20] Collins alleges that Bishop Williams' failure to act was intentional. [21] The Church Defendants, however, contend that Collins has failed to allege sufficient facts to support a claim of intentional infliction of emotional distress against Bishop Williams and the A.M.E. Zion Church. Specifically, the Church Defendants argue that there is no allegation that either Bishop Williams or the A.M.E. Zion Church acted extremely or outrageously. Rather, Collins' allegations for intentional infliction of emotional distress stem from the fact that Bishop Williams was aware of Burton's [*8] extreme and outrageous conduct but failed to take any action or avoided dealing with Collins' concerns. [22] The Defendants contend that these allegations rest upon their alleged failure to remove or discipline Burton, which is an ecclesiastical issue.

18 *Id.* at PP 104, 105.
19 *Id.* at P 107.
20 *Id.* at P 108.
21 *Id.* at P 111.
22 *Id.* at PP 104, 105, 106.

A. Overview Of The First Amendment

[HN3] The *First Amendment to the United States Constitution* provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." [23] This constitutional guarantee is made applicable to the states through the *Fourteenth Amendment*. [24] The *First Amendment* contains two clauses regarding religion, the *Free Exercise Clause* and the *Establishment Clause*. [HN4] The *Free Exercise Clause* guarantees "first and foremost, the right to believe and profess whatever religious doctrine one desires." [25] Moreover, "[a]t a minimum, the protections of the *Free Exercise Clause* pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." [26] The *Free Exercise Clause* [*9] protects religious relationships...by preventing the judicial resolution of ecclesiastical disputes turning on matters of "religious doctrine or practice." [27] The United States Supreme Court has explained that the *Free Exercise Clause* "embraces two concepts -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." [28] Thus, the *First Amendment* has never been interpreted to mean that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation." [29] [HN5] Government regulation includes both statutory law and court action through civil lawsuits. [30] Importantly, before the constitutional right to free exercise of religion is implicated, the threshold inquiry is whether the conduct sought to be regulated was "rooted in religious belief." [31] Further, in order to launch a free exercise challenge, it is necessary "to show the coercive effect of the enactment as it operates against [the individual] in the practice of his religion." [32] If it is demonstrated that the conduct [*10] at issue was rooted in religious beliefs, then the court must determine whether the law regulating that conduct is neutral both on its face and in its purpose. [33] "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." [34] The State may, however, regulate conduct through neutral laws of general applicability. [35] Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." [36]

23 *U.S. Const. amend. I.*

24 *See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000)*; *Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995)*.

25 *Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*.

26 *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 508 U.S. 520, 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)*.

27 *Sanders v. Casa View Baptist Church, 134 F.3d 331, 335-36 (5th Cir. 1998)*.

28 *Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)*.

29 *Smith, 494 U.S. at 882*.

30 *See Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191, 80 S. Ct. 1037, 4 L. Ed. 2d 1140 (1960)*.

31 *Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)*; [*11] *see Sanders, 134 F.3d at 337-38*; *Destefano v. Grabrian, 763 P.2d 275, 283-84 (Colo. 1988)*.

32 *School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 223, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963)*.

33 *See Lukumi, 508 U.S. at 531*.

34 *Id. at 533*.

35 *Id. at 531*.

36 *Id.*

The second aspect of the *First Amendment* religion clause, [HN6] the *Establishment Clause*, states that government "shall make no law respecting an establishment of religion." [37] This aspect of the *First Amendment* involves the separation of church and state and prevents the government from passing laws that "aid one religion, aid all religions, or prefer one religion over the other." [38] The United States Supreme Court has explained that there are "three main evils against which the *Establishment Clause* was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" [39] [HN7] In *Lemon*, the Court provided a three-part test to determine whether a neutral law violates the *Establishment Clause*: (1) the law must have a secular legislative purpose; (2) the primary or principal effect of the law must neither advance nor inhibit religion; and (3) the law must not foster an excessive government entanglement with religion. [*12] [40] Under *Lemon*, entanglement is measured by the "character and purposes" of the institution affected, the nature of the benefit or burden imposed, and the "resulting relationship between the government and the religious authority." [41] More recent cases examining the *Establishment Clause* have clarified that [HN8] excessive government entanglement is merely a factor to consider in evaluating the second prong; that is, whether the principal effect of the statute is to advance or inhibit religion. [42]

37 *U.S. Const. amend. I.*

38 *Schempp, 374 U.S. at 216*.

39 *Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)*(quoting *Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)*.

40 *Lemon, 403 U.S. at 612-13*.

41 *Id. at 615*.

42 *See Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000)*; *Agostini v. Felton, 521 U.S. 203, 233, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)*. We note that several U.S. Supreme Court Justices have expressed dissatisfaction with the *Lemon* test, advocating an alternative analytical framework for evaluating First Amendment claims. *See e.g., Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992)*(advocating and applying a coercion-accommodation

test); *Lynch v. Donnelly, 465 U.S. 668, 691, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)*(O'Connor, J., concurring)(advocating adoption of an endorsement test). [*13] *But see Pinette, 515 U.S. at 766-67*, plurality opinion by Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ., (rejecting endorsement test because it "exiles private religious speech to a realm of less-protected expression ...[T]he *Establishment Clause* ... was never meant ...to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.") However, we must continue to apply the *Lemon* test until the U.S. Supreme Court reaches a consensus on the successor to the *Lemon* test.

As particularly relevant to the analysis of the First Amendment challenge in this case, [HN9] the Supreme Court has also held that the *First Amendment* prevents courts from resolving internal church disputes that would require adjudications of questions of religious doctrines. [43] For example, the Supreme Court has stated that "it is not within 'the judicial function and judicial competence'" of civil courts to determine which of two competing interpretations of scripture are correct. [44] Instead, civil courts "are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, [*14] internal organization, or ecclesiastical rule, custom or law." [45] Thus, the *First Amendment* provides churches with the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." [46]

43 This protection has been referred to as the religious autonomy principle. *See Smith v. O'Connell, 986 F.Supp. 73, 76 (D.R.I. 1997)*. Although the United States Supreme Court has often discussed this principle in the context of the *Free Exercise Clause*, *see United States v. Lee, 455 U.S. 252, 256, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982)*; *Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107-08, 73 S. Ct. 143, 97 L. Ed. 120 (1952)*, the United States Supreme Court has also referred to this principle in the context of the *Establishment Clause*. *See Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969)*. It is apparent that the religious autonomy principle articulated by the United States Supreme Court may implicate both the *Free Exercise Clause* and the *Establishment Clause*.

44 *Lee, 455 U.S. at 256*.

45 *Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S 696, 713, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976)*.

46 *Kedroff, 344 U.S. at 116*; *see Serbian Eastern Orthodox Diocese, 426 U.S. at 724-25*.

This [*15] rule, sometimes referred to as the "deference rule" was first enunciated by the U.S. Supreme Court in *Watson v. Jones.* [47] That case revolved around the attempt of the national body of the Presbyterian Church to regain possession of a church property in Louisville that had been seized by a group of pro-slavery dissidents. In deferring to the ruling concerning ownership made by the national body, the court stated:

> Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them in their application to the case before them. [48]

The court went further to hold:

> Each [church] has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, *their books of discipline,* in their collections of precedents, in their usage and customs, which as to each constitutes a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with it. It is not to be supposed that the judges of the civil courts can be as competent in the [*16] ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. [49]

In addition to finding church authority better able to decide such disputes within the church, the *Watson* court eschewed the prospect of civil courts examining "with minuteness and care" not only the "subject of doctrinal theology." but also "the usages and customs, the written laws, and fundamental organization of every religious denomination." [50] The court also quoted a decision of the Pennsylvania Supreme Court which stated:

> The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they be so unwise as to attempt to supervise their judgments on matters which come [before] their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do any thing but improve either religion or good morals. [51]

Despite the language in *Watson* this Court does not read this case or any of [*17] the following cases to say that the "deference rule" or the doctrine of church autonomy suggests blanket protection of the church from all accountability in our civil courts. We read *Watson* to hold only that [HN10] civil courts may not take jurisdiction over a religious organization's internal, ecclesiastical matters. For instance, the Catholic Church only allows men to be priests. Such policy would not long survive a Title VII challenge in the secular world. However, Title VII recognizes an unwritten "ministerial exception" which places this Catholic policy outside the reach of civil courts. [52] Although *Watson* was not based on *First Amendment* grounds its "deference rule" did explicitly become part of the body of *First Amendment* law in *Kedroff.*

47 *80 U.S. 679, 20 L. Ed. 666 (1871).*

48 *Watson, 80 U.S. at 727.*

49 *Id. at 729* (emphasis added).

50 *Id. at 733.*

51 *The German Reformed Church v. Seibert, 3 Pa. 282, 1846 WL 4859, at *8.*

52 *Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 955-57 (9th Cir. 2004)*; *Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 945 (9th Cir. 1999).*

In *Kedroff,* the Supreme Court held unconstitutional a New York state statute which was passed specifically to address an intrachurch property [*18] dispute. [53] *Kedroff* explained that the *Watson* "opinion radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference,

matters of church government as well as those of faith and doctrine." [54] Moreover, in *Serbian Eastern Orthodox Diocese,* the U.S. Supreme Court reviewed a ruling by the Illinois Supreme Court that had held that the church's proceedings were procedurally and substantively defective under the internal regulations of the church and were therefore arbitrary and invalid. [55] In reversing the judgment of the state court, the Supreme Court explained:

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes... To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide ... religious law [governing church polity] ... would violate [*19] the *First Amendment* in much the same manner as civil determination of religious doctrine. *For [HN11] where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them,* in their application to the religious issues of doctrine or polity before them. [56]

The U.S. Supreme Court ruled that it was immaterial that the church authorities' actions were "arbitrary" in the sense they were not done in accordance with church laws and regulations, and the inquiry by the civil court was impermissible because it was bound to accept the decisions of the church authorities "on matters of discipline, faith, internal organization or ecclesiastical rule, custom or law." [57] Furthermore, and importantly, the Supreme Court opined that a civil court's inquiry into whether church law or regulation has been complied with "must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church adjudicatory [*20] to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the *First Amendment* prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry... [58] The Supreme Court further asserted that there is no "dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern ..." [59] Thus, in short, [HN12] the *First* and *Fourteenth Amendments* permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decision as binding upon them. [60] Church members give their "implied consent" to be "subject only to such appeals as the organism itself provides for." [61]

53 *Kedroff, 344 U.S. at 121.*

54 *Id. at 116.*

55 *See Serbian Eastern Orthodox Diocese, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976).*

56 *Id. at 708-09* [*21] (emphasis added) (citations omitted) (quoting *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc, 396 U.S. 367, 90 S. Ct. 499, 24 L. Ed. 2d 582 (1970)*(Brennan, J., concurring))).

57 *Serbian Eastern Orthodox Diocese, 426 U.S. at 713.*

58 *Id.*

59 *Id. at 717.*

60 *Id. at 724-25.*

61 *Id. at 711.*

Courts, however, have distinguished between intrachurch disputes and disputes between churches and third parties. For instance, in *General Council on Fin. & Admin. v. California Superior Court*, Justice Rehnquist observed, in rejecting the argument that the Free Exercise Clause barred the Court's exercise of jurisdiction in a civil dispute involving a third party:

> In my view, applicant plainly is wrong when it asserts that the *First* and *Fourteenth Amendments* prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes... [62] But this Court has never suggested that those constraints [*22] similarly apply outside the context of such intraorganization disputes....[*Serbian Eastern Orthodox Diocese* and other related cases] are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. *Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.* [63]

62 *See Serbian Eastern Orthodox Diocese*

63 *General Council on Finance & Administration of United Methodist Church v. Superior Court of California, 439 U.S. 1355, 1372-73, 99 S. Ct. 35, 58 L. Ed. 2d 77 (Rehnquist, Circuit Justice 1978)* (emphasis added).

It should be noted, however, that Justice Rehnquist's conclusion that the *Free Exercise Clause* did not bar the Court's exercise of jurisdiction in a civil dispute between churches and third parties was expressly limited to "purely secular disputes between third parties ... [and religious organizations] ... in which fraud, breach of contract, and statutory violations are alleged. These circumstances [*23] are not present here. In addition, it should be noted that the Supreme Court has also recognized that not all entanglements have the effect of advancing or inhibiting religion. [64] In *Agostini v. Felton*, the court stated that [HN13] interaction between the church and state is inevitable and that some level of involvement between the two is tolerated. [65] Entanglement

must be "excessive" before it runs afoul of the *Establishment Clause*. [66]

64 *Agostini v. Felton, 521 U.S. 203, 233, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)*.
65 *Id.*
66 *Id.*

[HN14] A court thus must determine whether the dispute "is an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule, custom or law,' or whether it is a case in which [it] should hold religious organizations liable in civil courts for 'purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization.'" [67]

67 *Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 331 (4th Cir. 1997)*(quoting *Serbian Eastern Orthodox Diocese, 426 U.S. at 713*; and *General Council on Finance, 439 U.S. at 1373*).

B. Consideration Of Collins' Claims Of Negligent Infliction Of Emotional Distress And Negligence Against Scott Church, Bishop Williams, And [*24] **A.M.E. Zion Church Is Barred By The First Amendment**

In applying these *First Amendment* principles to Collins' claims against the Church Defendants, we must examine whether the determination of her claims necessarily implicates an excessive entanglement with religion. [HN15] If the court is required to interpret church law, policies, or practices, the *First Amendment* prohibits such an inquiry. While it is true that the pleading caption in the instant case does identify a dispute between church officials and a third party, a closer inquiry reveals that the nature of the dispute in this instance, i.e., negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress would implicate a secular examination into "intra-church" policies, practices, process and procedure; an action proscribed by our Constitution. Succinctly stated, Collins complains about both the manner and the outcome of the investigatory and disciplinary procedures that were started because of Collins' complaint about Reverend Burton. Therefore, it seems to the Court that its adjudication of these claims would necessarily involve an inquiry into the propriety of the decisions of church authorities [*25] on matters of discipline, internal organization, ecclesiastical rule, custom, and law. [68] It would inherently entail inquiry into these areas; and, as stated by the U.S. Supreme Court in *Serbian Eastern Orthodox Diocese*, "this is exactly the inquiry that the *First Amendment* prohibits." [69] The purpose of the deference rule is to require a civil court to defer to the decisions of the church in resolving internal disputes. Such intrusion into the internal affairs of the church would amount to excessive government entanglement of religion by the state and, therefore, such a claim is barred by the *First Amendment*.

68 *Podolinski v. Episcopal Diocese of Pittsburgh, 23 Pa. D. & C. 4th 385, 411 (Armstrong C.P. 1995)*
69 The court in the instant matter recognized that the pleadings do not establish whether the decisions are decisions of the "highest ecclesiastical tribunal", which is what the U.S. Supreme Court said must be given deference in *Serbian Eastern Orthodox Diocese.* Whether the instant case involves decisions of the highest tribunal or of some intermediate tribunal is logically of no import. *See Young v. Northern III. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994)*. The [*26] court distinguishes the case at bar and *Young* from *Poesnecker v. Ricchio, 158 Pa. Commw. 459, 631 A.2d 1097 (Pa. Commw. 1993)*. In *Poesnecker*, the Commonwealth Court

arguably placed great weight on the "highest ecclesiastical tribunal" requirement. However, a close reading of the case reveals that the contestants were "church" authorities of equal stature or rank within their religious body. In *Poesnecker,* there was simply no decision of a higher church authority to which the courts could defer, and a literal reading of the written organic laws of the body was capable of providing the basis for a resolution of the dispute.

As a statement of the church's policy and procedures regarding sexual misconduct, *The Book of Discipline* poses a serious risk of religious entanglement for a court attempting to discern its limits. [70] In *Allen v. Board of Incorporators,* the court stated that courts are virtually unanimous in concluding that disputes concerning the employment or status of pastors, or the interpretation and application of ecclesiastical rules of polity and procedure like that contained in the *Book of Discipline,* constitutionally cannot be the subject of civil court review. [71] The court held that it lacked [*27] jurisdiction over the action since a number of plaintiffs' claims invoked the A.M.E. Church's *Book of Discipline* which would require the court to interpret and apply what is fundamentally an ecclesiastical document. The court noted that such an inquiry was constitutionally impermissible, as set forth by the Supreme Court in *Serbian Eastern Orthodox Diocese.* [72] Similarly, in *Belin v. West,* the appellee relied on the rules in *The Book of Discipline* in his complaint and at trial as establishing his reasonable reliance on a bishop's alleged promise of employment. [73] In the court's decision, it noted that the A.M.E. Church was a hierarchical religious organization that had its own judicial structure. [74] It also noted that *The Book of Discipline* contained the law, statutes, historical statements, and guidelines for behavior for all positions in the church. [75] It contained the rules regarding the settlement of disputes between church members, set out the method for having these disputes decided, and provided for appeal to the Judicial Council which is the highest judicatory body of the A.M.E. Church. [76] The court in that case found that the trial court lacked jurisdiction because it was impossible [*28] to decide the promissory estoppel claim without inquiring into A.M.E. Church doctrine and polity and drawing conclusions as to what those doctrines provided. [77] Additionally, in *United Methodist Church, Baltimore Annual Conference v. White,* a reverend filed suit claiming that the church had failed to comply with its own regulations as set forth in the *Discipline.* [78] The court found that the *Discipline* of the United Methodist Church ("UMC") was a religious document which the court could not construe without usurping the rights of the UMC to construe its own law. [79] The court held that if the court were to review the merits of the claims it would necessarily become entangled in matters of a highly religious nature and issues at the core of internal church discipline, faith and church organization. [80]

70 *See Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 436 (Minn. 2002).*

71 *Allen, 1992 U.S. Dist. LEXIS 19464, 1992 WL 390755, at *2* (citing *Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986)*(dismissal of Methodist minister's common law claims challenging forced retirement under church disciplinary rules), cert. denied, *479 U.S. 885, 107 S. Ct. 277, 93 L. Ed. 2d 253 (1986)*; *Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985)*(ruling [*29] *Religion Clauses* required dismissal of race and sex discrimination claims of plaintiff denied pastoral position), cert. denied, *478 U.S. 1020, 106 S. Ct. 3333, 92 L. Ed. 2d 739 (1986)*; *Hafner v. Lutheran Church-Missouri Synod, 616 F.Supp. 735 (N.D.*

Ind. 1985)(dismissal for lack of subject matter jurisdiction pastor's suit for alleged denial of benefits allegedly provided under terms of church constitution).

72 *426 U.S. at 713*; see also *United Methodist Church, Baltimore Annual Conference v. White, 571 A.2d 790, 794 (D.C. 1990)*([HN16] "secular evaluation of the procedures that ecclesiastical law requires the church to follow is precisely the type of inquiry the *First Amendment* prohibits").

73 *Belin v. West, 315 Ark. 61, 864 S.W.2d 838, 841 (Ark. 1993)*.

74 *Id.*

75 *Id.*

76 *Id. at 841-42*.

77 *Id. at 842*.

78 *United Methodist Church, Baltimore Annual Conference, 571 A.2d at 794*.

79 *Id.* (citing *Knuth v. Lutheran Church Missouri Synod, 643 F.Supp.444, 448 (D.Kan. 1986)*.

80 *Id. at 794-95* (citing *Kaufmann v. Sheehan, 707 F.2d 355, 358 (8th Cir. 1983)*.

Like *Allen, Belin,* and *United Methodist Church, Baltimore Annual Conference,* Collins' claims invoke the A.M.E. Zion Church's *Book of Discipline,* which contains more than simply internal procedures concerning sexual misconduct. [*30] *The Book of Discipline* is subjective [81] and at times inextricably intertwined with the Church's religious tenants. Inquiry into Collins' claims would therefore require our interpretation and application of what is fundamentally an ecclesiastical document [82] and would require an inquiry into the internal policies and practices of the church, a determination beyond the court's scope of review. The Church Defendants would be compelled to defend as reasonable its formal internal processing and handling of Collins' claims. Every step the church took to respond and react to the claims would be reviewed to determine whether it was reasonable. Such an inquiry into whether the church exercised reasonable care would involve, by necessity, discovery and examination by litigation of the church's disciplinary procedures and subsequent responses.

81 *See The Book of Discipline,* Policies and Procedures Concerning Sexual Misconduct, 2000 (stating that if the alleged offender is proved to be guilty of the charges brought by the alleged victim, he/she will be dealt with in accordance with Paragraphs 280-317 of the *Book of Discipline of the African Methodist Episcopal Zion Church.* The Bishop will meet with [*31] the offender, who also may be accompanied by another person, if so desired. The Bishop will discuss with the offender *the actions the Bishop intends to take. If appropriate,* the Bishop will refer the offender for therapy by persons professionally qualified in treatment of Sexual Misconduct. (emphasis added)).

82 *United Methodist Church, Baltimore Annual Conference, 571 A.2d at 794* (citing *Minker v. Baltimore Annual Conference of United Methodist Church, 282 U.S. App. D.C. 314, 894 F.2d 1354. 1358-59 (D.C. Cir. 1990)*(holding "the Book of Discipline [of the Methodist Church] is inherently an ecclesiastical matter").

In addition, the consideration of Collins' claim that Bishop Williams did not take any action against Burton after the investigative committee had determined that he violated *The Book of Discipline* is barred by the *First Amendment* for the above stated reasons. It is not within this Court's power to decide what procedures the church should have used or what the church should have done after Burton was found guilty of violating *The Book of Discipline.* If the Court were to inquire into this, it would in effect be limiting the church's

ability to supervise and decide what to do when an individual had violated [*32] *The Book of Discipline*. Any award of damages would have a chilling effect, leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the *First Amendment*. Moreover, [HN17] when the issue of one's fitness to serve a church organization as minister is brought before the courts, the *First Amendment* is implicated and the courts must then make a careful determination of whether the issues brought before it are ecclesiastical or secular in nature. After examining case law presenting both sides of the question the Court concludes that the reasoning of those courts holding that the *First Amendment* bars a claim for negligent hiring, retention, and supervision is more compelling in the present case. Courts have found that [HN18] the "assessment of an individual's qualifications to be a minister, and the appointment and retention of ministers, are ecclesiastical matters entitled to constitutional protection against judicial or other state interference" [83] and that the selection and deployment of clergy is about as central to the life and purpose of a group of affiliated churches as anything we can imagine. [84] Courts have held that the *First Amendment* [*33] is implicated because mainstream denominations differ greatly in their rules and policies for "calling" and removing clergy and often their decision is guided by religious doctrine and/or practice. Thus, some courts have established that any inquiry into the decision of who should be permitted to become or remain a priest necessarily would involve prohibited excessive entanglement with religion. Based upon these decisions, the Court finds that it would be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently retained Reverend Burton. [85]

83 *See Alberts v. Devine, 395 Mass. 59, 479 N.E.2d 113 (Mass. 1985).*

84 *Ehrens v. The Lutheran Church-Missouri Synod, 269 F.Supp.2d 328, 333 (S.D.N.Y. 2003), aff'd, 385 F.3d 232 (2d Cir. 2004)*

85 *Id.* (The court agreed that it was prevented by the *First Amendment* from determining, after the fact, that the ecclesiastical authorities of the Lutheran Church negligently supervised or retained a clergyman. The Court noted that New York courts have ruled that "any attempt to define the duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion." *Langford v. Roman Catholic Diocese, 271 A.D.2d 494, 705 N.Y.S.2d 661, 662 (2d Dep't 2000).* [*34] The court in *Ehrens* held that the same was true with regard to the duty of care in determining the continued eligibility of a priest to serve as a pastor. The court referenced the holding in *Schmidt v. Bishop,* where a plaintiff's claims against the church defendants were dismissed as a matter of law because: Any inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises the same kind of First Amendment problems of entanglement ... which might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs. Insofar as concerns retention or supervision, the pastor of a Presbyterian Church is not analogous to a common law employee. He may not demit his charge nor be removed by the session, without the consent of the presbytery, functioning essentially as an ecclesiastical court. The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation. Church governance is founded in scripture, modified by reformers over

almost two millennia [sic]. *269 F.Supp.2d at 332*.).

Accordingly, the Court finds [*35] that adjudication of Collins' claims would ultimately involve an examination of the church tribunal's decision-making process. [86] It would require the church to justify not only its entire disciplinary process, but also its ultimate decisions and actions. The internal governance of the church would be on trial, thereby, requiring this court to interpret the rules of the A.M.E. Zion Church. This situation, would involve a gross substantive and procedural entanglement with the church's core functions, its polity, and its autonomy. Collins should have stated her causes of action by reference to neutral standards and not by reference to *The Book of Discipline.* Thus, it is for these reasons that the Church Defendants' Motion for Summary Judgment is granted with respect to the negligent infliction of emotional distress and negligence claims.

86 *Davis Lee Pharmacy, Inc. v. Manhattan Central Capital Corp., 327 F.Supp.2d 159, 165 (E.D.N.Y. 2004)*.

C. The Church Defendants' Motion For Summary Judgment Should Be Granted With Respect To The Intentional Infliction of Emotional Distress Claim

In determining whether or not the *First Amendment* bars Collins' cause of action against the Church Defendants [*36] for intentional infliction of emotional distress, it is necessary first to look closely at the complaint and discern the conduct which allegedly gave rise to the tort. In so doing, the alleged tortious conduct consists of the following:

1) Bishop Williams was aware of the extreme and outrageous conduct of Reverend Burton but failed to take any action against him; [87] 2) Bishop Williams did not appoint an investigative committee until September 2003; [88] and 3) Bishop Williams did not take any action against Reverend Burton even after the investigative and trial committee had determined that Reverend Burton was guilty of violating *The Book of Discipline.* Having found that this Court is jurisdictionally barred from hearing the negligence and negligent infliction of emotional distress claims, we hold the same reasoning applies, to the claim of intentional infliction of emotional distress. This claim also involves the internal disciplinary procedures utilized by Bishop Williams. Accordingly, the Court will invoke the deference rule with regard to the intentional infliction of emotional distress cause of action. Permitting an inquiry into the disciplinary and investigatory procedures is barred. [*37] [89]

87 Compl. at PP 104, 105.
88 *Id. at P 107.*
89 *Podolinski, 23 Pa. D. & C. 4th at 413*.

Moreover, even if not barred by the *First Amendment*, taking Collins' allegations as true, the Court is nonetheless convinced that she has failed to state a cause of action. The elements of the tort of intentional infliction of emotional distress appear in *Restatement (Second) of Torts §46* (1965) as follows:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

The Court must first determine whether Defendants' conduct was so extreme and outrageous as to permit recovery. [90] The Court may look to the *Restatement (Second) of Torts §46 comment d* (1965) for guidance in determining if extreme and outrageous conduct has been established. [91] There, it is provided:

> *Extreme and outrageous conduct.* The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended [*38] to inflict emotional distress, or even that his conduct has been characterized by 'malice' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim Outrageous!

90 *Mattern v. Hudson, 532 A.2d 85, 86 (Del. Super. Ct. 1987)*; *Ham v. Brandywine Chrysler-Plymouth, Inc., 1985 Del. Super. LEXIS 1353, 1985 WL 189010, at *2 (Del. Super.)*; *Restatement (Second) Torts §46 comment h* (1965).

91 *Mattern, 532 A.2d at 86*.

In the Complaint, Collins has failed to allege that Bishop Williams' conduct was extreme and outrageous as those terms are defined above. She has merely stated that Bishop Williams was aware of the extreme and outrageous conduct of Reverend Burton and failed to take any action against him. Allegations of extreme and outrageous conduct are required in order to plead a [*39] claim for intentional infliction of emotional distress. [92] Therefore, Collins has not plead facts sufficient to establish her claim for intentional infliction of emotional distress.

92 *Atamian v. Nemours Health Clinic, 2001 Del. Super. LEXIS 438, 2001 WL 1474819, at *2 (Del. Super.)*(citing *Goldsborough v. 397 Properties, L.L.C., Del. Super., No. 98C-09-001, 2000 Del. Super. LEXIS 440, 2000 WL 3310878, Vaughn, J., at *3 (2000)*.

For the foregoing reasons, the Church Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to the claim of intentional infliction of emotional distress.

IT IS SO ORDERED.

/s/ Calvin L. Scott, Jr.

Judge Calvin L. Scott, Jr.

EXHIBIT 3

LEXSEE 2010 DEL. LEXIS 285

KEVIN L. FOREHAND, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.

No. 292, 2009

SUPREME COURT OF DELAWARE

2010 Del. LEXIS 285

April 28, 2010, Submitted
June 22, 2010, Decided

NOTICE:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

PRIOR HISTORY: [*1]

Court Below: Superior Court of the State of Delaware, in and for New Castle County. Cr. No. 0809000884.

DISPOSITION:

CASE SUMMARY:

PROCEDURAL POSTURE: While serving a Level IV probation portion of a sentence for second degree assault, defendant failed to return to custody. Defendant was apprehended a week later and pled guilty to escape after conviction. The Superior Court of the State of Delaware, in a for New Castle County sentenced him as an habitual offender to a minimum mandatory term of 8 years at Level V. Defendant appealed.

OVERVIEW: Defendant sought reversal of is sentence on the basis that *Del. Code Ann. tit. 11, § 4201(c)* was unconstitutional because there as no rational basis on which to classify a "walk away" escape as a violence felony and that the sentence violated the Eighth Amendment. The court disagreed. As to the constitutionality of *§ 4201*, the court noted that a convicted felon who failed to return to custody while on work release demonstrates, by his conduct, that it was a mistake to place him or her at that level of supervision. The assumption that such a criminal was safe to be in the community, likewise, would be negated. An escaped convict must find a place to hide in order to avoid recapture, and it would be reasonable to anticipate that a person in those circumstances might resort to violence or threats of violence. The court further concluded that the sentence was not grossly disproportionate under the Eighth Amendment, as defendant did not just walk away and return the next morning, but was at large until the police arrested him a week later.

OUTCOME: The judgment of the trial court was affirmed.

LexisNexis(R) Headnotes

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > Presumptions
[HN1] Statutes are presumptively valid, and will be upheld if there is any rational basis to support the legislature's classification.

Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > Criminal History > Three Strikes
Criminal Law & Procedure > Sentencing > Imposition > Statutory Maximums
[HN2] A person with three prior felony convictions may be declared an habitual criminal after being convicted of a fourth felony. The maximum sentence is life imprisonment, and, if the fourth felony is a violent felony, as defined in *Del. Code Ann. tit. 11, § 4201(c)*, the minimum sentence may not be less than the maximum sentence for that crime. *Del. Code Ann. tit. 11, § 4214 (a)*.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Escape > Elements
[HN3] See *Del. Code Ann. tit. 11, § 1253*.

Criminal Law & Procedure > Criminal Offenses > Classifications > Felonies
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Escape > General Overview
[HN4] Felonies are denominated Class A through Class G, with Class A felonies being the most serious. *Del. Code Ann. tit. 11, § 4205*. In addition, approximately 75 crimes, enumerated in *Del. Code Ann. tit. 11, § 4201 (c)*, are designated as violent felonies. Escape after conviction is included in the list.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > Presumptions
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN5] The Constitutions of both the United States and the State of Delaware protect against deprivations of life, liberty, or property, without due process of law. *U.S. Const. amend V*; *Del. Const. art. 1, § 9*. A statute violates the guarantee of substantive due process if it manifests a patently arbitrary classification, utterly lacking in rational justification. But the statute is presumed to be constitutional, and the burden is on a defendant to show that there are no facts, either known or which could have been reasonably assumed, which afford support for the legislation.

Criminal Law & Procedure > Criminal Offenses > Classifications > Felonies
[HN6] The habitual criminal statute, *Del. Code Ann. tit. 11, § 4214*, subjects repeat felons to enhanced punishment. The extent of that enhanced punishment depends on the number and gravity of the habitual offender's prior crimes as well as the gravity of the crime for which the offender is being sentenced. The General Assembly designated certain crimes as "violent" felonies for purposes of enhanced

sentencing. The listed felonies do not always involve violence, but they are dangerous crimes that place innocent people at risk of harm. Escape after conviction, even in its most benign form, properly falls into that category. A convicted felon who fails to return to custody while on work release demonstrates, by his conduct, that it was a mistake to place him or her at that level of supervision. The assumption that such a criminal is safe to be in the community, likewise, is negated. An escaped convict must find a place to hide in order to avoid recapture, and it is reasonable to anticipate that a person in those circumstances might resort to violence or threats of violence.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment
[HN7] The *Eighth Amendment of the United States Constitution* limits the sentencing discretion under Delaware's habitual offender statute by prohibiting sentences that are greatly disproportionate to the conduct being punished. To determine whether a particular sentence is prohibited, a court must undertake a threshold comparison of the crime committed and the sentence imposed. If such a comparison leads to an inference of gross disproportionality, then the court must compare a defendant's sentence with other similar cases to determine whether the trial court acted out of step with sentencing norms.

COUNSEL: Joseph M. Leager, Jr., Esquire, Office of the Public Defender, Wilmington, Delaware, for Appellant.

Paul R. Wallace, Esquire and Elizabeth R. McFarlan, Esquire (argued), Department of Justice, Wilmington, Delaware, for Appellee.

JUDGES: Before STEELE, Chief Justice, HOLLAND, BERGER, JACOBS and RIDGELY, Justices, constituting the Court en Banc. STEELE, Chief Justice, dissenting, with JACOBS, Justice.

OPINION BY: BERGER

OPINION

BERGER, Justice, for the majority:

In this appeal, we consider the constitutionality of a statute that classifies a "walk away" escape after conviction as a violent felony. Appellant was serving Level IV probation and failed to return to the Plummer Community Corrections Center after work. He was arrested one week later and returned to custody. For purposes of a constitutional analysis, the fact that appellant's escape did not involve violence is irrelevant. [HN1] Statutes are presumptively valid, and will be upheld if there is any rational basis to support the legislature's classification. It is entirely reasonable to label all escapes after conviction as violent felonies because the perpetrators [*2] are convicted criminals who may use violence to avoid apprehension by the police. Accordingly, we uphold the constitutionality of the classification and affirm.

Factual and Procedural Background

Kevin L. Forehand was arrested in March 2007 and indicted on charges of possession with intent to deliver crack cocaine, second degree assault, felony resisting arrest, and other drug related crimes. He was released after posting bail, but Forehand failed to appear at his arraignment. In May 2007 he was committed to prison in lieu of bail. In August 2007 Forehand pled guilty to second degree assault. He was immediately sentenced to 8 years at Level V, suspended after one year for four years at Level IV work release, suspended after 19 months for Level III supervision.

On September 1, 2008, Forehand was serving his Level IV probation at the Plummer Community Corrections Center. After work that day he failed to return to custody. The next morning a warrant was issued, and Forehand was apprehended on September 8, 2008. Forehand pled guilty to escape after conviction and was sentenced as an habitual offender to a minimum mandatory term of 8 years at Level V. This appeal followed.

Discussion

The relevant [*3] portion of Delaware's habitual offender statute provides that [HN2] a person with three prior felony convictions may be declared an habitual criminal after being convicted of a fourth felony. The maximum sentence is life imprisonment, and, if the fourth felony is a "violent felony, as defined in *§ 4201 (c)*," the minimum sentence may not be less than the maximum sentence for that crime. [1] Forehand pled guilty to escape after conviction, which is defined as follows:

> *§ 1253*. Escape after conviction; class B felony; class C felony; class D felony:
>
> > [HN3] A person shall be guilty of escape after conviction if such person, after entering a plea of guilty or having been convicted by the court, escapes from a detention facility or other place having custody of such person . . . .
> >
> > Escape after conviction shall be a class D felony; provided, however, that if the defendant uses force or the threat of force against another person or possesses a deadly weapon at the time of escape, it shall be a class C felony. If the defendant inflicts injury upon another person during the escape or from the time of escape until such person is again in custody, it shall be a class B felony . . . .

1 *11 Del. C. § 4214 (a)*.

[HN4] Felonies [*4] are denominated Class A through Class G, with Class A felonies being the most serious. [2] In addition, approximately 75 crimes, enumerated in *§ 4201 (c)*, are "designated as violent felonies." Escape after conviction is included in the list. As a result, Forehand was sentenced as an habitual offender to 8 years at Level V.

2 *11 Del. C. § 4205*.

Forehand seeks reversal of his sentence on two grounds. First, he argues that *§ 4201 (c)* is unconstitutional because there is no rational basis on which to classify a "walk away" escape as a violent felony. [HN5] The Constitutions of both the United States and the State of Delaware protect against deprivations of "life, liberty, or property, without due process of law . . . ." [3] A statute violates the guarantee of substantive due process if it "manifests a patently arbitrary classification, utterly lacking in rational justification." [4] But the statute is presumed to be constitutional, and

the burden is on Forehand to show that there are no "facts, either known or which could have been reasonably assumed, which afford[ ] support for the legislation." [5]

> 3 *U.S. Const. Amend V. See, also*: *U.S. Const. amend XIV*; *Del. C. Ann. Const. art. 1, § 9.*
> 4 *Flemming v. Nestor, 363 U.S. 603, 611, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).*
> 5 *Di Stefano v. Watson, 566 A.2d 1, 7 (Del. 1989).* [*5] *See, also*: *Harrah Independent School District v. Martin, 440 U.S. 194, 198, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979).*

[HN6] The habitual criminal statute, *11 Del. C. § 4214*, subjects repeat felons to enhanced punishment. The extent of that enhanced punishment depends on the number and gravity of the habitual offender's prior crimes as well as the gravity of the crime for which the offender is being sentenced. The General Assembly designated certain crimes as "violent" felonies for purposes of enhanced sentencing. The listed felonies do not always involve violence, but they are dangerous crimes that place innocent people at risk of harm. [6] Escape after conviction, even in its most benign form, properly falls into that category. A convicted felon who fails to return to custody while on work release demonstrates, by his conduct, that it was a mistake to place him or her at that level of supervision. The assumption that such a criminal is safe to be in the community, likewise, is negated. An escaped convict must find a place to hide in order to avoid recapture, and it is reasonable to anticipate that a person in those circumstances might resort to violence or threats of violence.

> 6 *See: Williams v. State, 539 A.2d 164, 174 (Del. 1988)* [*6] (General Assembly properly characterized a daytime residential burglary as a serious crime involving *potential* violence and danger to human life.).

Forehand also argues that his 8 year sentence violates the *Eighth Amendment of the United States Constitution*. In *Crosby v. State*, [7] this Court explained:

> [HN7] The *Eighth Amendment of the United States Constitution* limits the sentencing discretion under Delaware's habitual offender statute by prohibiting sentences that are greatly disproportionate to the conduct being punished. To determine whether a particular sentence is prohibited, this Court must undertake a threshold comparison of the crime committed and the sentence imposed. If such a comparison leads to an inference of gross disproportionality, then this Court must compare [Forehand's] sentence with other similar cases to determine whether the trial court acted out of step with sentencing norms. [8]

Crosby had been sentenced to life in prison (calculated at 45 years) after committing forgery in the second degree, a class G felony. This Court held that Crosby's sentence was the rare case where an habitual offender received a grossly disproportionate sentence. In doing so, the Court noted that [*7] a 10 year sentence (which had been requested by the State) would not be unconstitutional.

> 7 *824 A.2d 894 (Del. 2002).*
> 8 *Id. at 908 (Quotations and citations omitted.).*

Forehand's *Eighth Amendment* claim fails at the outset, as a threshold comparison of the crime committed and the sentenced imposed

does not lead to an inference of gross disproportionality. Forehand committed the crime of escape after conviction, a Class D felony. He did not just walk away from work release and return the next morning. Rather, he remained at large until the police arrested him one week later. An 8 year prison sentence may be considered harsh, but it does not approach the grossly disproportionate standard required for *Eighth Amendment* protection.

Conclusion

Based on the foregoing, the judgment of the Superior Court is affirmed.

DISSENT BY: STEELE

DISSENT

STEELE, Chief Justice, dissenting, with **JACOBS**, Justice, joining:

The General Assembly classified Class D Escape After Conviction -- a crime without any rational connection to violence -- as a violent felony. As a result of this overbroad classification, Kevin Forehand faces a mandatory minimum sentence for failing to return to his residential halfway house. We would reverse and remand [*8] for resentencing and, therefore, dissent from the majority's decision affirming the Superior Court's judgment of conviction.

1. Habitual offenders face a mandatory minimum for violent felonies.

The habitual criminal sentencing statute, *11 Del. C. § 4201(a)* subjects qualifying defendants (3 felony convictions) to possible life imprisonment for a "4th " felony conviction. [9] Under this statute, a sentencing judge may sentence an habitual criminal up to life in prison after the triggering "4th" felony. *Section 4201(a)* further limits judges' discretion by creating an additional minimum penalty for *violent* habitual criminals as *11 Del. C. § 4201 (c)* defines them. [10] For these qualifiers, the statute mandates that there be a minimum sentence equal to or exceeding the maximum sentence for that triggering felony.

> 9 *11 Del. C. § 4201(a)*. "Any person who has been 3 times convicted of a felony, other than those which are specifically mentioned in subsection (b) of this section, under the laws of this State, and/or any other state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony of this State is declared to be an habitual criminal, and [*9] the court in which such 4th or subsequent conviction is had, in imposing sentence, may in its discretion, impose a sentence of up to life imprisonment upon the person so convicted. Notwithstanding any provision of this title to the contrary, any person sentenced pursuant to this subsection shall receive a minimum sentence which shall not be less than the statutory maximum penalty provided elsewhere in this title for the 4th or subsequent felony which forms the basis of the State's petition to have the person declared to be an habitual criminal except that this minimum provision shall apply only when the 4th or subsequent felony is a Title 11 violent felony, as defined in *§ 4201(c)* of this title. . . ."
>
> 10 *See 11 Del. C. § 4201 (c)*.

Under this statutory scheme, the sentencing judge must sentence Forehand to at least eight years up to life imprisonment. *Section 4201 (a)* eliminates, for an habitual criminal's sentencing, the maximum ceiling for Class D Escape which is eight years. If the General Assembly had not classified Class D Escape as a *violent* felony, the sentencing judge could exercise rational discretion proportionate to Forehand's actions up to life imprisonment. Because the General [*10] Assembly classified Class D Escape After Confinement as a

"violent" felony regardless of the factual underlying circumstances, Forehand faces an eight year mandatory minimum sentence simply for failing to return to a halfway house.

2. All *§ 4201 (c)* felonies rationally relate to violence -- except Class D Escape After Conviction.

The violent felonies listed in *§ 4201 (c)* include expressly violent crimes, [11] crimes rationally connected to violence or deadly weapons, [12] and "Escape After Conviction" -- an offense decreed to be "violent" without regard to the facts underlying the offense.

> 11 *See, e.g., 11 Del. C. § 612* Second Degree Assault; *11 Del. C. § 826* First Degree Burglary; *11 Del. C. § 1253* Class C Escape After Conviction.
>
> 12 *See, e.g., 11 Del. C. § 617* Criminal Youth Gangs; *11 Del. C. § 1108* Sexual Exploitation of a Child; *11 Del. C. § 782* First Degree Unlawful Imprisonment; 16 *Del. C.* § Trafficking in Marijuana, Cocaine, Illegal Drugs, Methamphetamine, LSD, Designer Drugs or MOMA.

a. *Section 4201 (c)* lists violent and violence-related felonies.

We do not dispute that the General Assembly has a rational purpose for increasing the sentences of habitual criminals who commit expressly violent [*11] crimes. The mandatory minimum ensures that repeatedly violent criminals will be segregated from the community.

Nor do we dispute that the four classes of non-expressly violent crimes -- drug distribution, sex trade, organized crime, and physical detainment -- rationally relate to violence. Violence pervades the illicit drug and sex trades -- just as it once pervaded the Prohibition-era alcohol trade. [13] *Section 4201 (c)* does not include drug possession crimes, but rather limits the attribution of violence to drug crimes related to distribution. Similarly, we accept that criminal organizations increase the likelihood of violence and often engage in violence to further their other interests. Crimes related to detainment, such as Kidnapping or Unlawful Imprisonment, imply or require physical control against the captive's will, which is consistent with the common sense definition of physical violence.

> 13 *See* Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 228 (Fall 1984); Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 Am. Crim. L. Rev. 671, 676 (Fall 2006).

Class C and B Escape After Conviction by their very terms also require force, [*12] threats, or possession of a deadly weapon, all of which rationally relate to violence. Class D Escape, by contrast, requires "escape from a detention facility or other place having custody." That leads to the clear inference that the State will charge Escape C or B -- but not Escape D -- if the defendant is armed, commits violence, or attempts a violent act. Escape D, therefore, excludes by its very terms direct violence, and would require truly extraordinary circumstances to result indirectly in actual or attempted violence. Classifying all Escape After Conviction offenses as violent, including Escape D, based solely on a remote possibility or potential for indirect violence, ignores the express terms, considered policy, and significant penalty resulting from a conviction for Escape After Conviction D under our violent habitual criminal sentencing statute. That legislative judgment mistakes the forest of reality for a leaf of possibility. A rational basis requires only a slight logical connection, but the infinitesimally tenuous connection required to uphold the legislative judgment that Escape D is a violent act, is tantamount to no connection at all.

Unlike the four classes of non-expressly [*13] violent crimes, we cannot rationally infer an inherent threat of violence from Escape D. *Section 4201* should exclude Escape D, just as it has excluded nonviolent Burglary and mere drug possession. We find the General Assembly's decision to classify only those Burglary offenses where violence can reasonably be expected to be rational. We suspect that our penal code's division of Burglary offenses into separately defined statutory crimes facilitated that rational judgment. By contrast, Escape After Conviction does not divide the three Escape offenses into separately defined crimes within three different statutes. The General Assembly, for whatever reason, chose to combine the three bases for violating the law into one "catch all" offense -- Escape After Conviction. The gradation of offensive conduct is expressed only by penalty. The penalty increases as violent conduct first appears and then aggravates.

We suggest that, unlike Burglary, where the General Assembly rationally classified some -- but not all burglaries -- as violent, no distinction appears for Escape After Conviction, because of the inclusive, non-segregated legislative expression of the offense. It may well be that the General [*14] Assembly inadvertently overlooked the gradation of the Escape After Conviction's degrees of culpability and listed them as one without focusing on the unintended consequences. Whether inadvertent or intentional, the classification of Escape After Conviction D as violent along with Escape B and C, both of which expressly contemplate violence, constitutes a sweeping and overbroad approach that cannot pass the rational scrutiny test. The media does not put the community on "high alert" when someone fails to report to Level IV work-release or to a residential halfway house. Nor do State Troopers scour the community, guns drawn, to recapture the fugitive. Escape D does not create fear of the danger of violence that escaping accompanied by a violent act or armed from Level IV or V facilities could plausibly create among the community and law enforcement. No one can conclude that classifying Escape After Conviction D as a violent crime is rational.

b. *Section 1253* combines violent and nonviolent forms of Escape.

Section 4201(a) is a single paragraph that comprises three distinct circumstances constituting Escape After Conviction. Unlike the Burglary statutes, which divide each degree into a [*15] separate statutory offense, the Escape After Conviction statute specifies the three respective, felonious levels of criminal conduct, but omits degrees, within a single section. The General Assembly has concluded that even nonviolent Escape, a crime that the defense alleges the State most frequently charges for failure to report for work or curfew, warrants a D-class felony penalty. It is not within our purview to challenge that judgment. However, because the General Assembly did not divide Escape into degrees, as it has done with burglary, violent Escape, B and C and nonviolent D are all subsumed within the rubric of Escape After Conviction in *§ 4201*. This irrational joining of these three offenses as if they were one raises a constitutional issue with which we must unavoidably grapple.

The State has created halfway houses and community assimilation programs for individuals, such as Forehand, that it deems non-threatening. The community, penal system and the convicted criminal benefit from these programs. Although it is theoretically possible that the State would prosecute an individual for Escape D from a Level V facility, those instances not involving violence are unlikely. Rather, [*16] Escape D, generally and in actual practice applies to failure to report for work or a missed curfew. Here, Forehand did not commit a mere technical violation by missing his curfew by a few minutes; rather he seriously breached the trust of his supervisors.

The General Assembly has connected serious, felonious accountability to the mutually beneficial work-release and halfway residential programs. We recognize the General Assembly's unfettered right to do so. Forehand should -- and will -- face serious penalties for his felonious conduct as an habitual criminal. The real question is whether these penalties should be enhanced on the theory that the offense is one that involves violence.

Forehand did not commit a violent crime, nor was he charged with one. The State and its experts investigated and monitored Forehand before deciding that he should be transferred to a Level IV facility and be released for work. That decision assumes that they did not expect him to violently threaten the community. The State determined a low probability that Forehand would act violently, and in fact he never did. The General Assembly could not rationally penalize Forehand as if he had been violent on the [*17] fallacious assumption that he *might* have been violent. That falsely implies that he posed a rational threat of violence -- a threat that the State rejected by placing him in the halfway house in the first instance. An enhanced minimum mandatory habitual offender penalty, based on non-exhibited "violent" conduct, would serve neither retributive nor preventative justice.

As the Supreme Court of the United States recently observed, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." [14] Clearly a violent crime lacks a direct relationship to a crime that is neither violent nor related to violence. This sentencing scheme, therefore, does not properly condemn the offender or morally rebalance the community. [15] As the U.S. Supreme Court also discussed in *Graham*, a penalty's preventative effect may justify a reasonably harsh sentence. [16] Because Forehand's actions that breached Class D Escape After Conviction were not "violent" and Corrections placed him in a class of non-threatening convicted criminals, penalties for violent conduct will not affect his behavior. Thus, including Escape D in *§ 4201* [*18] fails to prevent the conduct intended to be covered by Escape D.

14 *Graham v. Florida, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 2010 WL 1946731, at *16 (U.S. 2010)* (quoting *Tison v. Arizona, 481 U.S. 137, 149, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987))*.

15 *Graham, 130 S. Ct. 2011, 176 L. Ed. 2d 825, 2010 WL 1946731, at *16*.

16 *See id*.

3. *Section 4201 (c)* creates an overbroad class of 'violent' felonies.

The Supreme Court of the United States has held that a legislative irrefutable presumption that is at odds with real world facts creates an unconstitutionally overbroad classification. [17] The State argued that we may not review the General Assembly's decision to classify a nonviolent crime as a violent crime. This legislative presumption here characterizes nonviolent conduct as violent conduct, and withers under constitutional scrutiny.

17 *Haig v. Agee, 453 U.S. 280, 305, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981)* (citing *Aptheker v. Sec. of State, 378 U.S. 500, 511, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964))*.

In *Sugarman v. Dougall*, the Court struck down a New York law requiring citizenship for competitive civil service jobs. It held that the "citizenship restriction sweeps indiscriminately" and fails to meet rational basis scrutiny. [18] Justice Blackmun wrote that the state "proves both too much and too little," in that the restriction "applies to many positions with respect [*19] to which the State's proffered justification has little, if any, relationship." [19]

18 *413 U.S. 634, 643, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973)*. Although the U.S. Supreme Court wrestled with the appropriate standard of "close scrutiny" to apply to alien discrimination cases, it required only a "showing of some rational relationship." *Foley v. Connelie, 435 U.S. 291, 296, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978)* (explaining the standard of review in *Sugarman*).

19 *Sugarman, 413 U.S. at 642*.

In this instance, the Delaware General Assembly has also cast a wide, but thin net for sentencing the nameless sea of habitual criminals. Like aliens in New York, these individuals have limited rights and representation, but still have undeniable Constitutional protections. The Constitution proscribes overbroad, irrefutable presumptions precisely to prevent the State from irrationally declaring that one plus one is three, or that nonviolent conduct is violent conduct. As Forehand's case demonstrates, this classification has an irrational connection to the actual conduct and significant consequences for sentencing.

For these reasons, we would reverse and remand for resentencing; and, therefore, dissent.

EXHIBIT 4

LEXSEE 1993 DEL. SUPER. LEXIS 53

Garcia v. Nekarda

C.A. No. 92C-06-008

SUPERIOR COURT OF DELAWARE, KENT

1993 Del. Super. LEXIS 53

November 30, 1992, Submitted
February 19, 1993, Decided

LexisNexis(R) Headnotes

DISPOSITION: [*1] Upon Defendants' Motion to Dismiss Granted

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants, an alleged child abuser and others, filed a motion to dismiss a personal injury action by plaintiffs, representatives for a minor child.

OVERVIEW: The representatives for a minor child claimed that the minor child was sexually molested by the alleged child abuser over a five year period. The representatives filed the present personal injury action, and the alleged child abuser filed a motion to dismiss on the ground that it was barred by the two year statute of limitations in *10 Del. C.§ 8119*. The court granted the motion. The court acknowledged that the discovery rule could delay the running of the statute of limitations in personal injury cases where the injury complained of was inherently unknown. However, the minor child revealed the abuse she experienced to a teacher three years before the action was filed. Further, the court found that the victim did not suffer any physical disabilities or post-traumatic stress disorders that prevented her from verbalizing the abuse she experienced.

OUTCOME: The court granted the motion to dismiss.

Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule
[HN1] The Delaware Supreme Court adopted the discovery rule to delay the running of the statute of limitations in personal injury cases where the injury or injuries complained of were "inherently unknown" to the plaintiff.

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JUDGES: STEELE

OPINION BY: MYRON T. STEELE

OPINION

This case involves the alleged sexual molestation of Tannis Garcia from the age of 5 to the age of 10. The date of the last alleged molestation occurred in May, 1988. Although the victim revealed the abuse she experienced to a schoolteacher in 1988, plaintiffs did not discover the sexual abuse until August, 1991.

Pursuant to Superior Court Civil Rule 12(b)(6), Defendants moved to dismiss Plaintiffs' personal

injury action on the ground it is barred by the two year statute of limitation in *10 Del. C. § 8119.*

Plaintiffs oppose the motion with the assertion their inability to discover the sexual abuse until August 1991 entitles them to an expansion of the statute of limitations under *section 8119* pursuant to the "discovery rule."

[HN1] The Delaware Supreme Court adopted the discovery rule to delay the running of the statute of limitations in personal injury cases where the injury or injuries complained of were "inherently unknown" to the plaintiff. [*2] ***Cole v. League for Planned Parenthood,*** *Del. Supr., 530 A.2d 1119, 1124 (1987)* (discovery rule applies in action against family planning organization for negligent counseling of potential long term complications of abortion); ***Collins v. Wilmington Medical Ctr., Inc.,*** *Del. Supr., 319 A.2d 107 (1974)* (discovery rule applicable in medical malpractice action where injury arising from medication prescribed was "inherently unknowable" by plaintiff); ***Layton v. Allen,*** *Del. Supr., 246 A.2d 794 (1968).*

Plaintiffs assert, because Delaware has recognized the applicability of the discovery rule to personal injury actions, the Court should delay running the limitations period to August, 1991, the date plaintiffs discovered the sexual abuse. Plaintiffs rely on ***Callahan v. State,*** *464 N.W.2d 268 (Iowa 1990)* to contend where a minor child has been a victim of sexual or physical abuse and the abuse is "inherently unknowable" until discovered by a next friend, the discovery rule permits the statute of limitations to accrue on the date the next friend is chargeable with knowledge [*3] of the child's injuries. In **Callahan,** the court held where discovery, by the plaintiff (the mother), of the sexual and physical abuse of a deaf and cerebral palsied minor child occurred two years after the statute of limitations for tort claims ran, the applicable statute of limitations did not bar her action as next friend on behalf of the child because of her inability to discover the injuries.

The Court finds **Callahan** distinguishable from the present case. In **Callahan,** the child suffered physical disabilities and a post-traumatic stress disorder which prevented him from verbalizing the sexual and physical abuse he experienced. Unlike the child in **Callahan,** the facts presented in this case indicate Tannis Garcia did not suffer any physical disabilities or post-traumatic stress disorders which prevented her from verbalizing the abuse she experienced. In fact, plaintiffs admit Tannis Garcia informed her school teacher of the sexual abuse she suffered. Thus, while plaintiffs did not discover the child's injuries until August of 1991, someone, although an unrelated teacher of the child, knew of the harm. No one filed a claim within the two year statute of limitations.

[*4] Although the Supreme Court has applied the discovery rule to specific personal injury actions, it has not expanded the rule to apply to the particular facts of this case, nor has it endorsed liberal application of the rule to all personal injury actions. It is disingenuous at best to argue the facts of this case fit within a category of "inherently unknowable" injuries when the facts concerning the incident complained of and any resulting injuries were disclosed to a responsible adult. Thus, while this Court is sensitive to the situation and realizes fact situations such as this create difficult cases, the Court must follow Delaware law as it currently exists. The purpose of statutes of limitations is to prevent the revival of stale claims in which prejudice may result to a party due to the loss of evidence and witnesses. ***Railroad Telegraphers v. R.Y. Express Agency,*** *321 U.S. 342, 348-349, 64 S.Ct. 582, 586 (1944)*. Any expansion of the statutes of limitation involves important public policy considerations best left to the legislature who may receive facts and testimony with time for reflection upon countervailing societal interests. The [*5] Court must conclude plaintiff's action is barred by *10 Del. C. § 8119.*

Defendant's Motion to Dismiss is granted.

IT IS SO ORDERED.
Myron T. Steele, Judge

EXHIBIT 5

Not Reported in A.2d, 2005 WL 2266590 (Del.Ch.)
(Cite as: 2005 WL 2266590 (Del.Ch.))

Court of Chancery of Delaware.
Richard J. **KORN** and Andrew Dal Nogare, Plaintiffs,
v.
NEW CASTLE COUNTY, a political subdivision of the State of Delaware, Christopher A. Coons, as County Executive and David W. Singleton, as Chief Administrative Officer, and Paul G. Clark, as President of **New Castle County** Council, and Joseph Reda, Robert S. Weiner, William J. Tansey, Penrose Hollins, Karen G. Venezky, Patty W. Powell, George Smiley, John J. Cartier, Timothy P. Sheldon, JEA P. Street, David Tackett, and James W. Bell as Members of **New Castle County** Council, Defendants.
No. Civ.A. 767-N.

Submitted July 15, 2005.
Decided Sept. 13, 2005.
Revised: Sept. 27, 2005.

Gary F. Traynor and Paul A. Fioravanti, of Prickett, Jones & Elliott, P.A., Wilmington, Delaware, and Ronald G. Poliquin, of Young, Malmberg and Howard, P.A., Dover, Delaware, for Plaintiffs.

Gregg E. Wilson, Carol J. Dulin, and Dennis J. Siebold, Acting County Attorney, New Castle County Law Department, New Castle, Delaware, for Defendants.

OPINION AND ORDER

CHANDLER, J.

***1** This is the Court's decision on New Castle County's Motion for Summary Judgment on the second amended and supplemented complaint of plaintiffs Richard Korn and Andrew Dal Nogare. Plaintiffs first brought suit against the County on October 20, 2004, asserting five counts-all premised on allegations that the County had exceeded its statutory grant of authority when it had accumulated, over a period of eight years, over $200 million in surplus revenues. On February 10, 2005, this Court issued an Opinion and Order: (1) granting the relief requested in Counts I through III of the complaint, (2) dismissing Count IV of the complaint, which sought to preliminarily enjoin the County's impending $80 million bond sale, and (3) declining to grant summary judgment on Count V of the complaint, which requested a permanent injunction against the same bond sale.

The effect of the Court's February 10, 2005 Order was to permit the County to maintain cash reserves, so long as those reserves were established in accordance with the County's charter, and the procedures used to allocate monies to those reserves were transparent. After this Court's Order, the newly installed County government moved quickly to remedy the budgetary deficiencies they inherited from the previous administration and which this Court addressed.

On February 22, 2005, twelve days after the Opinion and Order was issued, plaintiffs filed their first motion to amend the complaint. That motion sought leave to add Count VI, which alleges that the actions New Castle County took pursuant to this Court's Order are unconstitutional and void to the extent those actions: (1) amend Section 14.01.013 of the New Castle County Code to permit the County to maintain reserves beyond five percent of the respective fund's revenues; and (2) create new reserve accounts to bring "on budget" the County's other surplus revenues. The Court granted plaintiffs' motion to amend. FN1

FN1. *See Korn v. New Castle County*, C.A. No. 767-N, Let. Op. (Mar. 9, 2005), Chandler, C.

On March 24, 2005, plaintiffs again filed for leave to amend their complaint. That motion sought leave to

add Counts VII through IX. Because defendants did not timely oppose plaintiffs' second motion to amend, the Court granted the motion.[FN2] Count VII of the amended complaint seeks a judgment declaring that "(a) the [County's] practice of commingling general tax revenues in its Sewer fund violates Chapter 22 of Title 9, 9 *Del. C.* § 8102 and Defendants' fiduciary duties, and (b) ... [the County's] practice of charging costs unrelated to its sewer operations to the Sewer Fund violates their fiduciary duties." Count VIII of the amended complaint seeks an accounting of the County's Sewer Fund to ascertain the extent that general tax revenues have been commingled with the Sewer Fund. Plaintiffs also ask the Court to permanently enjoin future commingling of monies between the General and Sewer Funds. Count IX of the amended complaint alleges that the defendants have been unjustly enriched through the retention of revenues in excess of the limitations imposed by Delaware's constitution and NCCC § 14.01.013. To the extent the County has illegally retained surplus revenues the plaintiffs ask that the money be disgorged.

FN2. *Korn v. New Castle County*, C.A. No. 767-N, Let. Op. (Apr. 21, 2005), Chandler, C.

***2** After a discovery dispute, plaintiffs' sought leave to supplement their complaint with their final claim that the County has illegally accumulated surplus revenues within the Light Tax Fund.[FN3] The Court granted plaintiffs' motion. Now, the plaintiffs allege that 9 *Del. C.* § 2103 requires that all surplus monies within the Light Tax Fund be applied to the succeeding fiscal year's budget to reduce the applicable tax rate. Accordingly, plaintiffs seek: (1) an accounting of the Light Tax Fund, (2) an injunction preliminarily and permanently enjoining the County from maintaining a surplus in the Light Tax Fund beyond the current fiscal year, and (3) an order directing the County to apply all surplus funds currently held in the Light Tax Fund to the reduction of the Light Tax rates for Fiscal Year 2006. For the reasons discussed below, I enter summary judgment in favor of New Castle County, on all Counts.

FN3. On May 2, 2005, plaintiffs filed a motion to compel the production of certain discoverable documents. The Court granted plaintiffs' motion; in response, defendants produced several documents indicating that the County had accumulated, over a number of years, surplus revenues within the County's Light Tax Fund: a fund used by the County to finance its obligation of providing street and highway lighting. Armed with this newly acquired information, plaintiffs sought leave to supplement their complaint to incorporate allegations concerning the County's purportedly illegal accumulation of surplus revenues within the Light Tax Fund.

I. BACKGROUND

A. Plaintiffs' Original Complaint Challenges New Castle County's Budgetary Practice of the County Executive Setting Aside Reserves in Excess of the Amounts Permitted Under New Castle County Code § 14.01.013

The facts giving rise to this suit are recounted in detail in my February 10, 2005 Opinion. Nevertheless, I will endeavor to highlight the most salient facts relevant to the present dispute. Plaintiffs' original claims stem from certain disclosures the previous County Executive made as part of his 2004 annual budget address to the New Castle County Council. In that speech, Thomas Gordon identified twelve "reserve" accounts his administration had set aside to earmark over $200 million in surplus revenues. These revenues were set aside without legislative action, and were well in excess of the twenty percent limitation the County Code placed on County reserves. Based on these disclosures, plaintiffs filed suit and charged the County Executive with usurping his authority, and they demanded that the money be returned to the taxpayers.

Adding fuel to the fire, the County was in the process of approving a bond issuance worth $80 million. Plaintiffs contended that the County should not be permitted to issue the bonds at the same time the County was enjoying a $200 million surplus. The County, on the opinion of the County's former chief financial officer, Ronald A. Morris, continued to support its decision to issue the bonds. In a report issued to the County Council, Morris opined that beginning in fiscal year 2005, the County's 2004 General Fund revenues would be insufficient to fund current expenditures. According to Morris, this left the County with two options: tap the undesignated reserves to fund General Fund operating deficits, or issue $80 million in County debt to fund projects previously approved. Morris reported that if the bond sale was not approved, operating deficits would fully deplete the County's reserves by fiscal year 2009, and the taxpayers would face an immediate property tax increase of as much as fifteen percent, and regular annual increases of about five percent beyond that. On October 5, 2004, New Castle County Council approved the $80 million bond issuance; but before the bonds

were issued, plaintiffs filed their complaint challenging the County's practice of accumulating surplus revenues and sought to both preliminarily and permanently enjoin the bond issuance.

***3** Faced with the question whether these reserves were lawful, the Court found that the executive procedures used to establish the County's reserves were contrary to the County's charter, as well as the bicameral requirement that the legislative body, and not the executive, appropriate funds from the treasury.[FN4] I concluded that the Gordon administration had exceeded its authority and that a majority of the County's reserves were being held "off budget" in clear violation of law. Accordingly, my February 10 Opinion admonished the County for its past budgetary policies and encouraged the County to incorporate sound fiscal principles into their budget process.[FN5] I then concluded that any deviation in the amount that is appropriated to the County's reserves must be effectuated by either amending the County's Code, or by altering the permitted appropriation for that year by a supermajority, five-sevenths vote of the County Council.[FN6] For those reasons, I granted summary judgment in plaintiffs' favor on Counts I, II, and III of the complaint. But, because the County had voluntarily stayed its bond issuance, and the Court did not have reason to conclude that the County would proceed with the bond sale, I dismissed, as moot, plaintiffs' request for a preliminary injunction, and declined to enter summary judgment in favor of either party on plaintiffs' request to permanently enjoin the bond sale.

FN4. *See Korn v. New Castle County*, C.A. No. 767-N, Mem. Op. (Feb. 10, 2005), Chandler, C. at 17-18.

FN5. *See generally*, *Korn*, C.A. No. 767-N, Mem. Op. at 14.

FN6. *Id.* at 24-25.

Immediately following the February 10 Opinion, plaintiffs filed their first amended complaint to challenge whether the County was constitutionally permitted to maintain reserves in excess of five percent. Plaintiffs contended that Delaware's constitutional proscription against the State's authority to set aside a budget reserve in excess of five percent of its general fund revenues also prohibited New Castle County from doing the same.

B. New Castle County Adopts New Legislation in Response to This Court's Order and Plaintiffs file their Second Amended Complaint

Notwithstanding plaintiffs' new constitutional claim, the County moved quickly to implement the Court's decision. To that end, the County Council introduced two new ordinances (collectively the "New Ordinances"). The first ordinance created two new reserve accounts: a Tax Stabilization Reserve Account, and a Sewer Rate Stabilization Reserve Account (the "New Reserve Accounts"). Neither reserve account has a ceiling on the amount the County can set aside as reserves. The second ordinance would retroactively amend the fiscal year 2005 operating budget to appropriate all "off-budget," reserve funds, in excess of the twenty-percent limitation imposed on the County's existing rainy day funds, to the New Reserve Accounts.

On March 22, 2005, the County Council held a public meeting to address the merits of the New Ordinances, and during that meeting the Council considered several factors including: (1) the complexity of distributing funds among various classes of taxpayers, who may or may not have lived in the County at the time the tax was collected; (2) the considerable costs a rebate would pose to the County; and (3) the reality that if the County were to rebate the accumulated funds, the County would be forced to immediately increase taxes in the forthcoming tax year.[FN7] One of the plaintiffs, Richard Korn, attended this meeting, and publicly voiced his objections.[FN8] After public comments were closed, the Council, in a unanimous vote, adopted the New Ordinances.[FN9]

FN7. *See* Defs.' Answering Br. in Opp'n to Pls.' Mot. for a T.R.O. and Prelim. Inj., Ex. A ("Transcript of Mar. 22, 2005 Council Meeting") at 5-6.

FN8. *See id.* at 2.

FN9. On March 31, 2005, the County Executive signed the New Ordinances into law.

***4** On March 24, 2005, just two days after the Council passed the New Ordinances, plaintiffs sought leave to file a second amended complaint. The second amended complaint integrates plaintiffs' constitutional challenge with the adoption of the New Ordinances, and in addition to this constitutional claim, also challenges the New Ordinances on the grounds that: (1) they constitute impermissible retroactive legislation; (2) they do not serve a public purpose; (3) the County was unjustly enriched by the unlawful accumulation of

surplus revenues; and (4) the New Ordinances authorized impermissible commingling of general tax revenues with sewer revenues in violation of 9 *Del. C.* § 8102 and 9 *Del. C.* ch. 22.

Plaintiffs formulated their commingling claim on the premise that the Sewer Fund budget has accumulated a surplus during a period when the County has operated that fund at a deficit (since fiscal year 2000) and is currently collecting only eighty five percent of the Sewer Fund's operational expenses. Plaintiffs therefore conclude that the Sewer Fund surplus must have been funded with money from non-sewer charges and that this is in violation of law.

On April 21, the Court granted plaintiffs leave to amend the complaint to incorporate these new allegations, and on April 25, plaintiffs filed a motion for a temporary restraining order and preliminary injunction enjoining the County from: (1) making any further expenditure of the accumulated surplus; (2) appropriating any funds to the New Reserve Accounts; and (3) from proceeding with the bond sale.

C. Plaintiffs Bolster and Supplement their Complaint with Newly Discovered Evidence

On April 26, 2005, the accounting firm, NachmanHaysBrownstein ("NHB"), furnished to the New Castle County Council Finance Committee an audit report which disclosed two revelations important to plaintiffs' claims. The first concerned a preliminary finding, which according to plaintiffs bolsters their commingling claim. The relevant portion of the report stated:

> Preliminary research and anecdotal evidence suggests that, as early as 1998, transactions were run through various funds to balance out what had been considered "advances" from other funds. A prime example of this is the lease of approximately 268 police cars in 1998, at a cost of $7.8 million. While this may be perfectly normal activity for the Special Services Department to undertake ... the transaction would normally have come from the general fund ... not the sewer fund.[FN10]

FN10. Ex. I to Aff. of David W. Gregory at NCC04204.

The second portion of the NHB report, which is of importance to the plaintiffs, concerned the discovery of an accumulated surplus of approximately $650,000 within the County's Light Tax Fund. Armed with this new knowledge, plaintiffs compared this disclosure to what was disclosed in the fiscal year 2006 budget, which Executive Coons presented on March 29, 2005. According to the 2006 budget, however, the County designated $3,352,793 in "Special Assessments" (*i.e.*, the light tax) and would spend that amount on administering the County's street and highway light services-no surplus was disclosed. Relying directly on the NHB report, plaintiffs sought leave to supplement their complaint to add a claim challenging the County's policy of accumulating a surplus within the Light Tax Fund. The Court granted this request.

***5** On May 31, I heard oral argument on plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. Based on the parties' presentations, I concluded that plaintiffs had not met their burden for injunctive relief. In my oral ruling, I denied plaintiffs' motion and noted that while "[t]here is no pending dispositive motion, ... I think it is intuitively clear from my remarks that that would be appropriate going forward based on what I view as the ... weakness of the claims that are now before the Court ." [FN11] On June 23, 2005, the County filed its motion for summary judgment on all Counts of the second amended and supplemented complaint.

FN11. *See* Tr. at 73.

II. ANALYSIS

A. Standard of Review on a Motion for Summary Judgment

A party is entitled to summary judgment, upon motion, "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [FN12] The record must be read in a light most favorable to the non-moving party.[FN13] When issues are decided on summary judgment, the parties must have a reasonable opportunity to present all facts pertinent to the motion. [FN14] Once the non-movant has been afforded the opportunity to demonstrate that genuine issues of material fact exist, the burden again shifts to the movant to demonstrate the absence of such disputes. Then, and only if the Court concludes based on the entire record that there is no genuine issue of material fact, the Court may enter judgment as a matter of law.[FN15]

FN12. CT. CH. R. 56(c).

FN13. *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del.1986).

FN14. *Id.*

FN15. *Id.*

B. Standard for Declaratory Judgment

To exercise declaratory judgment jurisdiction, four elements of an actual controversy must be established: (1) it must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination.[FN16] In my February 10 Opinion, I determined that:

FN16. *Gannett Co. v. Bd. of Managers of the Del.Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del.2003).

> As taxpayers and residents of New Castle County, plaintiffs have a 'direct interest in the proper use and allocation of tax receipts.' Moreover, since the County's budget is being challenged and any relief granted will affect the County Executive's and Council's authority to propose and adopt their annual budgets, plaintiffs have asserted a claim against those 'who [have] an interest in contesting the claim.' Finally, because the parties' interests are real and adverse and the issues are ripe, the Court concludes that the standard set forth in *Gannett* is met here.[FN17]

FN17. *Korn*, C.A. No. 767-N, Mem. Op. at 23.

To the extent plaintiffs amended and supplemented complaint seeks declaratory relief, the standard has again been met.

C. Count VI: Does Article VIII §§ 6(b)-(d) of Delaware's Constitution apply to the County's Budget Reserves?

***6** Count VI of the second amended complaint seeks a judgment declaring that "any reserves held by New Castle County that exceed five percent of total revenues for the fiscal year violate the five percent limitation imposed by Article VIII, § 6(b)-(d) of the Delaware Constitution, and that any provision of the New Castle Code that permits the creation or maintenance of a reserve in excess of the five percent limitation, including but not limited to NCCC § 14.01.013 and the [New Ordinances], is unconstitutional and void." [FN18] Plaintiffs contend that New Castle County, as a political subdivision of the state, necessarily derives all authority from the State. To the extent the State is constitutionally prohibited from acting, so must the County be equally prohibited. The constitutional question presented by Count VI of the complaint is one of statutory interpretation and requires a purely legal determination.[FN19] Therefore, summary judgment is appropriate.

FN18. Am. Compl. ¶ 82.

FN19. *See Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1287 n. 30 (Del.1994) (relying on *Hercules Inc. v. Leu Trust & Banking Ltd.*, 611 A.2d 476, 481 (Del.1992), *cert. dismissed*, 507 U.S. 1025, 113 S.Ct. 1836, 123 L.Ed.2d 463 (1993).

When the intent of the General Assembly is logically reflected by the unambiguous language of the Delaware Constitution, the Court need not turn to rules of construction, and the language itself is controlling. In that circumstance, the role of the judiciary is limited to giving that language its literal effect.[FN20] Rules of constitutional construction are only applied when a constitutional provision is ambiguous or if a literal application of the text would yield an absurd or illogical result.[FN21]

FN20. *In re Opinion of the Justices*, 290 A.2d 645 (1972).

FN21. *In re Opinion of Justices*, 575 A.2d 1186, 1189 (1990).

After careful consideration of the parties' submissions, I conclude that the unambiguous language of Article VIII §§ 6(b)-(d) demonstrates that those particular sections of Delaware's Constitution do not place a five-percent limitation on the budget reserves carried by New Castle County. Specifically, those sections provide that:

> (b) No appropriation, supplemental appropriation or budget act shall cause the aggregate *State General Fund* appropriations enacted for any given fiscal year

to exceed 98 percent of the estimated *State General Fund* revenue for such fiscal year ...

... The amount of said revenue estimate and estimated unencumbered funds remaining shall be determined by the most recent joint resolution approved from time to time by a majority of the members elected to *each House of the General Assembly and signed by the Governor.*

(c) Notwithstanding subsection (b) of this section, any portion of the amount between 98 and 100 percent of the estimated *State General Fund* revenue for any fiscal year as estimated in accordance with subsection (b) of this section may be appropriated in any given fiscal year in the event of emergencies involving the health, safety or welfare of the *citizens of the State,* such appropriations to be approved by three-fifths of the members elected to *each House of the General Assembly.*

(d) There is hereby established a Budget Reserve Account within the General Fund. Within 45 days after the end of any fiscal year, the excess of any unencumbered funds remaining from the said fiscal year shall be paid into the Budget Reserve Account, provided, however, that no such payment will be made which would increase the total of the Budget Reserve Account to more than 5 percent of only the estimated *State General Fund revenues* as set by subsection (b) of this section. The excess of any unencumbered funds shall be determined by subtracting from the actual unencumbered funds at the end of any fiscal year an amount which together with the latest estimated revenues is necessary to fund the ensuing fiscal year's General Fund budget including the required estimated General Fund supplemental and automatic appropriations for said ensuing fiscal year less estimated reversions. *The General Assembly by a three-fifths vote of the members elected to each House,* may appropriate from the Budget Reserve Account such additional sums as may be necessary to fund any unanticipated deficit in any given fiscal year or to provide funds required as a result of any revenue reduction enacted by the *General Assembly.*[FN22]

FN22. DEL. CONST. art. VIII, §§ 6(b)-(d) (emphasis added).

***7** From a plain reading, it clear that these Constitutional procedures apply exclusively to the State and not the Counties. Article VIII §§ 6(b)-(d) only make mention of the State's General Fund, require action on a State level-by specific reference to both houses of the General Assembly-to establish and appropriate the State's budget reserve, and conspicuously make no mention of New Castle County. This language, and its omissions, cannot be presumed to be incorrect. Therefore, I conclude that the language in Article VIII §§ 6(b)-(d) is unambiguous and its literal intent is to restrict the fiscal policies of the State, but not New Castle County.

Having concluded that a literal reading of Article VIII §§ 6(b)-(d) applies to the State alone, I must determine whether this literal interpretation of the language produces an illogical or absurd result because "[e]very provision of the Constitution must be construed, whenever possible, to give effect to every other provision." [FN23] I conclude that a literal reading of §§ 6(b)-(d) does not render an illogical or absurd result. Article VIII embodies the State's taxing and spending authority. Our Supreme Court has already determined that Article VIII § 6 was amended to impose upon the State an annual balanced budget requirement.[FN24] Moreover, it has been determined that fulfillment of the mandate of Article VIII § 6 requires the State to account for all sources of State revenue and to have "complete control" over such revenue sources.[FN25] Finally, Article VIII, where appropriate, delineates when the Constitution's restrictions on taxing and spending affect the respective Counties-a distinction notably absent from § 6.[FN26] From this constitutional scheme arises a logical and consistent distinction between the taxing and spending power of the State and other political subdivisions. Nothing I have concluded here disrupts this scheme; nor would the exclusion of New Castle County from the prohibition of Article VIII § 6 render an absurd result. To the extent the State must balance its own budget, it is required to have plenary control over State revenues. But because each respective County takes charge of its own budget, it is clear that a literal interpretation of the scope of § 6 does not act to wrest away from the State control over any revenue which it would need to balance its budget. Therefore, because Article VIII literally evinces a demarcation between the State and the Counties, and recognizing this literal distinction does nothing to disrupt the intended result of § 6 that the State balance its own budget, I decline to look to other tools of constitutional interpretation and am satisfied that a plain reading of Article VIII § 6 makes clear that it was not the General Assembly's intent to similarly restrict the Counties. As such, as to Count VI, I enter summary judgment in favor of New Castle County and plaintiffs' request for declaratory relief is denied.

FN23. *In re Opinion of the Justices*, 225 A.2d 481, 484 (1966).

FN24. *Opinion of Justices*, 575 A.2d at 1189 ("The third part of the 1980-1981 amendments to Article VIII, set forth in Section 6, imposed upon the General Assembly, with some qualification, a requirement to balance the State budget.").

FN25. *Id.* at 1189-90 ("The enactment of Section 10(a) and 11, at the time of adoption of the budget balancing requirements under the amendments to Section 6 of Article VIII, accomplished an essential element of the budget balancing process by providing the General Assembly with complete control over any tax or license fee.").

FN26. *See, e.g.*, DEL. CONST. art. VIII, § 1 ("County Councils of New Castle and Sussex Counties and the Levy Court of Kent County are hereby authorized to exempt from county taxation ..."); art. VIII, § 4 ("No appropriation of the public money shall be made to, nor the bonds of this State be issued or loaned to any county ..."); art. VIII, § 8 ("No county, ... shall lend its credit or appropriate money to, or assume the debt of, or become a shareholder or joint owner in or with any private corporation or any person or company whatever.")

D. Plaintiffs' Retroactive Legislation and Public Purpose Arguments

***8** Notwithstanding plaintiffs' constitutional claims, they put forth two catchall arguments as to why the County's surplus revenues should be disgorged: the New Ordinances are impermissible retroactive legislation and the carrying of unlimited surplus revenues is not a valid public purpose. I will address each in turn.

1. *Retroactive Legislation*

Plaintiffs argue that the County cannot cure the past practice of accumulating "off-budget" reserves by retroactively legislating two new "on-budget" reserve accounts and then appropriating the illegally accumulated surplus to those accounts. Plaintiffs contend that the ordinances themselves must be interpreted to be prospective since there is no clear legislative intent to have the ordinances act retrospectively. Next, plaintiffs contend that any law that infringes upon vested or substantive rights must act prospectively. Finally, plaintiffs argue that since the appropriation of the surplus to the newly created reserves is in effect a tax, Delaware's strong public policy against retroactive taxation would prohibit the statute from acting retroactively. For these reasons, plaintiffs assert that any surplus accumulated by the County prior to the enactment of the New Ordinances cannot be cured by appropriating the money retroactively and the surplus must be returned to the taxpayers.

I consider plaintiffs' retroactive legislation arguments unpersuasive. First, I conclude that it was the County's intent to cause the New Ordinances to act retroactively. In my February 10 Opinion, I made clear that the County had the authority to *accumulate* reserves. In fact, the Court recognized that it was sound fiscal policy for the County to have access to easily liquidated assets to fund unanticipated budget deficits. My decision did not go to substance, but rather procedure, and I held that the power to accumulate reserves should be exercised legally and transparently. My rationale was prompted by the Court's concern with the then County Executive creating "off-budget" reserve accounts, and in effect, opaquely appropriating money in clear violation of law. The issue was resolved: if the County was to maintain reserve accounts it needed to comply with the fundamental principles of the separation of powers and its own laws. I then instructed the County how to come into compliance with the law: amend the existing code or adopt new legislation. This is what the County did. Plaintiffs cannot now challenge the ultimate authority of the County to maintain reserves. The true nature of plaintiffs' claims takes issue with the political decision of the County to maintain a specified amount of money, which plaintiffs consider to be too large. This may indeed be a legitimate contention, but it is a political contention that must be answered at the polls and not through the Courts. Thus, there can be no dispute over the County's intention to have the New Ordinances act retroactively.[FN27] Consequently, because the County has the inherent authority to collect and maintain reserves, it follows that the County has the power to enact corrective legislation over a subject matter it had the power to legislate originally.[FN28]

FN27. Plaintiffs' attempt to avoid dismissal by arguing there is a genuine issue of material fact and urge depositions of one or more of the defendants to ascertain the purposes for which the stabilization accounts are intended. This is a makeweight argument. I conclude

that there is no genuine issue of fact in this regard. It is clear what the County was doing, and as a matter of law, I conclude that the effect of the New Ordinances is retroactive. *See* *Price v. All Am. Eng'g Co.*, 320 A.2d 336, 341 (Del.1974). ("[R]etroactive legislation, effect is impelled if ... the retrospective legislative intent is unmistakable.").

FN28. *Mayor and Council of Wilmington v. Wolcott*, 112 A. 703, 707 (Del.1921), ("It is not questioned that the Legislature could make [any] act retroactive ... [a]nd it is well settled that the Legislature may [retroactively] validate an act which it could originally have validated.").

***9** Plaintiffs' concern over the effect the retroactive legislation will have on vested rights and the tax rate are equally unconvincing. A vested right is a right that equates to legal or equitable title to the present or future enjoyment of property or to the present or future enforcement of a demand, or a legal exception from a demand made by another.[FN29] The money in question here has already been lawfully assessed and collected. Once the tax is assessed, the citizens' obligations were fixed and the right to the money vested with the County and not the taxpayers. The New Ordinances do not infringe upon any vested or substantive rights.

FN29. 16B AM.JUR.2D CONST. LAW § 690; *see also* *Hazzard v. Alexander*, 173 A. 517, 519 (Del 1934) ("A vested right was defined ... as one which is absolute, complete, and unconditional to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency.").

Additionally, the transfer of the surplus money to the new reserve accounts does not function as a new tax levy, nor does it have the effect of increasing the applicable tax rate for the relevant fiscal year. Again, the money in question has already been lawfully assessed and collected, and its transfer does not create a new liability, or impose any other obligation on the County's residents that did not exist before the New Ordinances were enacted.

In sum, the Court concludes that: (1) it was the County's clear intent to have the New Ordinances act retroactively in an obvious attempt to comply with this Court's February Order; (2) the County has enacted a curative measure over a subject matter it could have legitimately legislated in the first instance; (3) the New Ordinances do act to abridge any vested rights; (4) and the New Ordinances do not impose a retroactive tax. To the extent the complaint relies on these arguments, summary judgment is entered in favor of the County and the complaint is dismissed.

2. *Public Purpose*

With respect to the surplus funds held in the various reserve accounts, plaintiffs contend that the money is not being used for a public purpose because the money is "not being 'used' for anything, let alone a public purpose." [FN30] Plaintiffs cite to a 1933 Illinois court decision for the proposition that an unnecessary accumulation of money in the public treasury is unjust.[FN31] I find this precedent to be of dubious value at best. There is no exact definition or strict formula for determining what is a public purpose, since the concept expands with population, scientific knowledge, and changing social and economic conditions.[FN32] A more fluid test is appropriate, and the question has been phrased by some courts in terms of whether a particular appropriation is for the support of government, or for any of the recognized objects of government.[FN33]

FN30. Pls.' Answering Br. in Opp'n to Defs.' Mot. for Summ. J. at 27.

FN31. *See* *People ex. rel. Schaefer v. New York, C. & St. L.R. Co.*, 353 Ill. 518, 187 N.E. 443 (Ill.1933).

FN32. *See* *Wilmington Parking Auth. v. Ranken*, 105 A.2d 614 (Del.1954); *see also* 63C AM.JUR.2D PUBLIC FUNDS § 58.

FN33. 63C AM.JUR.2D PUBLIC FUNDS § 58.

New Castle County's charter vests the County with wide authority to "assume and have all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute." [FN34] This includes the power to tax and spend for the general welfare of the County's residents.[FN35] If the County, in its wisdom, has decided that maintaining tax and sewer rate stabilization reserves best serves its citizens, then that decision is entitled to judicial deference, unless it is irrational or arbitrary and capricious.[FN36] Plaintiffs offer no reason why the accumulation of surplus revenues does not serve a public purpose, except to say that the amount held by

the County is too much. Generally, courts have found a public purpose so long as the ends of the expenditure promote the public health, safety, morals, security, *prosperity*, contentment, and the general welfare of all the inhabitants.[FN37] In the circumstances of this case, I conclude, as a matter of law, that the accumulation of surplus revenues by the County, and the appropriation of money to that end, serve a public purpose. To the extent plaintiffs seek to have the surplus revenues disgorged on the ground of a lack of public purpose, the complaint is dismissed and summary judgment is entered in favor of the County.

FN34. 9 *Del. C.* § 1101(a).

FN35. *See generally* *Wolcott ex rel. Taxpayers' League, Inc. v. Wilmington*, 95 A. 303, 305 (Del.1915) ("The power to determine the fitness of measures to promote the interests or discharge the duties of the public, and of each political division thereof, is inherent in the sovereignty of every state having an organized government. Necessarily coincident with this power is the power to raise money by taxation levied upon the whole body politic, or some subordinate organization thereof, as may be deemed just and proper, for the purpose of accomplishing the intended object.").

FN36. *See* *Wolcott*, 95 A. at 305 ("The legislative power over municipal corporations is large and ordinarily its determination of what is a public purpose for taxation, or the appropriation of money, is uncontrollable by the courts. But where the Legislature clearly devotes public funds to an object in no sense public, the judiciary may, and should, declare its action invalid."). It is generally recognized that the phrase "public purpose" has a broad, expansive definition, and that the term should not be construed in a narrow or restrictive sense. *See* 63C AM.JUR.2D PUBLIC FUNDS § 58. Since the State has the power to appropriate money for any purpose for which taxes may be levied and collected, it follows that New Castle County's charter vests the same power in the County. This is not a situation where the County is raising and hoarding money for that sake alone-rather the County is using the reserves to systematically defray increasing costs to their citizens-clearly a public purpose. *Cf.* *In re Opinion of Justices*, 177 A.2d 205, 213-214 (Del.1962).

FN37. 63C AM.JUR.2D PUBLIC FUNDS § 58.

D. Count VII: Plaintiffs' Allegations Concerning the Improper Commingling of Revenues Between the General and Sewer Funds and the Unlawful Expenditure of Sewer Funds on Unrelated Operations

***10** Count VII of the amended complaint seeks a judgment declaring that "(a) the [County's] practice of commingling general tax revenues in its Sewer fund violates Chapter 22 of Title 9, 9 *Del. C.* § 8102 and Defendants' fiduciary duties, and (b) ... [the County's] practice of charging costs unrelated to its sewer operations to the Sewer Fund violates their fiduciary duties." [FN38]

FN38. Am. Compl. ¶ 82.

Plaintiffs resist the County's motion for summary judgment on this Count by arguing (1) that the County cannot show there are no genuine issues of material fact, and (2) that plaintiffs first must have access to information exclusively within the County's control before summary judgment can be granted. Specifically, plaintiffs argue that they are entitled to additional discovery relating to the conclusions reached in the NHB report before summary judgment would be appropriate. The County contends that the plaintiffs have had ample opportunity to present their positions, and the record is sufficiently developed to show that there are no genuine issues of material fact. The Court agrees with the County.

Since November 8, 2004, the plaintiffs have been conducting discovery. Key officers of New Castle County, including County Executive Coons (who was the Council President during the previous administration), the County's Accounting and Fiscal Manager, Michael D. Finnigan, and the County's former Chief Administrative Officer, David W. Singleton have been deposed. Plaintiffs have had access to voluminous internal documents of the County, and have had access to all past County budgets within the relevant time periods, as that information has been made publicly available and have also been produced during discovery. Additionally, this Court has been called to intervene on behalf of the plaintiffs, on several occasions, and has ordered the production of the documents plaintiffs sought. In short, plaintiffs have had a reasonable opportunity to develop the record and put forth all pertinent material. It is not appropriate to use the summary judgment standard for

dilatory tactics or to avoid the inevitable. Additional discovery is not appropriate in this case when its only purpose would be "to assist [the plaintiffs] in a mere roving speculation ... to see whether [they] can fish out a case from the [County]." FN39

FN39. *Colvocoresses v. W.S. Wasserman Co.*, 13 A.2d 439, 442 (Del.1940).

1. *Plaintiffs' Claim that the County Unlawfully Leased Police Cars with the Use of Funds Generated by Sewer Service Charges is barred by laches*

For all of plaintiffs' efforts, they have been able to point only one instance where the County may have potentially used sewer funds for non-sewer uses: the lease of approximately 268 police cars in 1998, at a cost of $7.8 million. I say, "may have" because the NHB report itself is not evidence of wrongdoing, and in fact notes that this expenditure may have been normal. Nevertheless, the ultimate question whether this expenditure violated 9 *Del. C.* § 8102 and 9 *Del. C.* ch. 22 is no longer justiciable because laches bars recovery. To prove laches, it is a defendant's burden to establish that: (1) the plaintiffs have knowledge of the claim; and (2) prejudice to the defendant arising from an unreasonable delay by plaintiff in bringing the claim. FN40 Plaintiffs argue that laches is a fact sensitive question and, in this instance, it is inappropriate to grant summary judgment. The Court disagrees and concludes that it is not necessary to engage in a traditional laches analysis because an analogous statute of limitations has run its three-year course.FN41 Courts of equity do not normally apply statutes of limitations directly; but because equity follows the law, the Court of Chancery will, in appropriate circumstances, apply the statute of limitations by analogy.FN42 Plaintiffs' seven-year-old claim is barred.

FN40. *Fike v. Ruger*, 752 A.2d 112, 113 (Del.2000).

FN41. *See* 10 *Del. C.* § 8104 ("No action shall be brought upon the official obligation of any ... county treasurer ... against either the principal or sureties, after the expiration of 3 years from the accruing of the cause of such action."); *see also* 10 *Del. C.* § 8106 ("... no action based on a statute ... shall be brought after the expiration of 3 years from the accruing of the cause of such action....").

FN42. *See NL Indus., Inc. v. MAXXAM, Inc.*, 659 A.2d 760 (Del.Ch.1995).

***11** Even if the Court did not apply the relevant statute of limitations by analogy, it would still be appropriate to bar Count VII to the extent the complaint relied on the 1998 lease of the police cars. The ordinance approving that expenditure was publicly budgeted and approved by the County Council. FN43 The plaintiffs do not contest this point. It is appropriate to charge taxpayers with notice of this budget expenditure because the public, by law, was provided notice of its adoption, and had the right and opportunity to participate in a public hearing.FN44 Finally, it cannot be disputed that after seven years the County has changed its financial position dramatically and has expended significant funds from both the General and Sewer Funds. If the Court were to order an accounting that would date back to 1998 it would certainly be prejudicial to the County in light of eight years without a word from the taxpayers.FN45 Laches is, therefore, appropriate in this instance. Accordingly, to the extent Count VII relies on the 1998 lease of police cars, plaintiffs' claims are barred and summary judgment is entered in favor of the defendants.

FN43. *See* Finnigan Aff. ¶ 11.

FN44. *See* 9 *Del. C.* § 1152(b) (requiring public notice and public hearing on all ordinances); *see generally*, *Grand Lodge of Del. v. Odd Fellows Cemetery of Milford*, 2002 Del. Ch. LEXIS 136, at *26-27, 2002 WL 31716359 (Nov. 18, 2002) (holding that a plaintiff is chargeable with knowledge of a claim obtained upon inquiry, provided the facts already known to that plaintiff were such as to put the duty of inquiry upon a person of ordinary intelligence).

FN45. *See Kerns v. Dukes*, 2004 Del. Ch. LEXIS 36, at *30, 2004 WL 766529 (Apr. 2, 2004) (adopting the principle that a court of equity's hostility toward one who unjustifiably delays filing suit carries even greater force when the suit attacks the legality of the collection and spending of public monies).

2. *Plaintiffs cannot State a Claim that Defendants' violated Chapter 22 of Title 9*

Plaintiffs' claims as they relate to Chapter 22 of Title 9 rely exclusively on the interpretation of New Castle County's charter and therefore present questions of statutory interpretation and require a purely legal determination. The complaint specifically alleges that

the County has violated Chapter 22 Title 9, but to get to this point, plaintiffs rely exclusively on 9 *Del. C.* § 2208(b)(2) which states that: "[t]he service charges prescribed shall be such as will procure revenue at least sufficient: To provide for all expenses of operation and maintenance of such sewerage systems, including reserves therefore." Plaintiffs then contend "the source of the funds for 'all expenses of operations [of the County sewage systems], including reserves therefore" must be sewer services charges, not other revenues." [FN46] By juxtaposition, plaintiffs contend that it is "impossible for [a] surplus to have been created from excess sewer service charges which, according to Coons, presently cover only 85% of the sewage system's operating expenses" [FN47] and it must be the case that the County is commingling non-Sewer Fund revenues with the Sewer Fund in violation of § 2208.

FN46. Pls.' Opening Br. in Supp. of Mot. for a T.R.O. and Prelim. Inj. at 14.

FN47. *Id.* at 11.

Defendants do not dispute that at the time the complaint was filed the Sewer Fund held a $97 million surplus [FN48] and that Coons had indeed made an admission that "since fiscal 2000 ... our customer charges cover only 85% of our operating expenses." [FN49] What defendants argue is that § 2208 is inapplicable and plaintiffs have not pointed to any source of law to support their claim. The Court agrees with defendants.

FN48. *See* Compl. Ex. A ("2003 Ernst & Young Audit") at 2.

FN49. *See* Athey Aff. Ex. F ("Coon's March 16, 2005 Address to County Employees") at 4.

Plaintiffs mischaracterize 9 *Del. C.* § 2208 by selectively drawing the Court's attention to § 2208(b)(2).[FN50] The unambiguous language of the *entire* statute, however, makes clear that its application is dependent upon the issuance of revenue bonds under Chapter 22. Only in that circumstance is the County obliged to set sewer service charges at least sufficient to provide for all expenses. Plaintiffs cannot selectively parse out statutory language to distort the purpose of the section. Consequently, § 2208 must be read in its entirety and it is clear that the statute has no bearing on the merits of this case because plaintiffs have not pointed to any evidence that the County has invoked the provisions of § 2208 by issuing revenue bonds to fund sewer projects. The reason for that omission is simple: the County has not done so. [FN51] Accordingly, to the extent the plaintiffs charge the County with violating Chapter 22 of Title 9, the complaint fails to state a claim upon which relief can be granted and summary judgment is entered on Count VII in favor of the County.

FN50. 9 *Del. C.* § 2208 reads in its entirety:

> (a) If the County issues revenue bonds under this chapter, the County Council shall prescribe and collect reasonable service charges for the services and facilities rendered or afforded by the sewerage systems, the revenues of which are pledged to the payment of such bonds, and shall revise such service charges from time to time whenever necessary.
>
> (b) The service charges prescribed shall be such as will procure revenue at least sufficient:
>
> (1) To pay when due all revenue bonds and interest thereon, for the payment of which such revenue is or shall have been pledged, charged or otherwise encumbered, including reserves therefor; and
>
> (2) To provide for all expenses of operation and maintenance of such sewerage systems, including reserves therefor.
>
> (c) The service charges when collected shall be applied to the payment of the revenue bonds and interest and to the expenses of such operation and maintenance in accordance with the resolutions authorizing the revenue bonds.

FN51. *See* Finnigan Aff. ¶ 13.

3. *Defendants have Established that There is an Absence of Evidence to Support the Plaintiffs' Claim that the County has Violated* 9 Del. C. *§ 8102*

***12** Without resort to § 2208 the complaint falls back on 9 *Del. C.* § 8102. Section 8102 provides in relevant part:

> (a) Notwithstanding any statute to the contrary, the county government of each county shall have the power by ordinance to impose and collect a tax, to be

> paid ... upon the transfer of real property....
>
> ....
>
> (c) Any funds realized by a county pursuant to this section shall be segregated from the county's general fund and the funds, and all interest thereon, shall be expended solely for the capital and operating costs of public safety services, economic development programs, public works services, capital projects and improvements, infrastructure projects and improvements, and debt reduction.[FN52]

FN52. *9 Del. C.* § 8102(a) & (c).

Nowhere in the complaint is it alleged that the County has failed to properly segregate revenues derived from the real estate transfer tax. Rather, the complaint states a broad supposition that the County must have violated § 8102 because the sewer service charge does not meet the County's sewage operating expenses, and yet there is a surplus within the fund. In light of the broad authority the County is given in designating sewer service charges, it is unremarkable that the fund has a surplus. Indeed, Coons admitted that the County's sewer customer charges were eighty-five percent of sewer operation expenses. But these are not the only sewer revenues assessed by the County. Section 2209 of Title 9 specifically authorizes the County to charge for both the direct *and indirect* use of the sewerage system. This practice would clearly encompass more than direct fees for domestic and commercial uses. Fees for septic waste haulers, who for example discharge waste from septic systems into the County's sewerage system for treatment, are chargeable. Indirect uses would also encompass groundwater and wastewater discharge fees and may encompass survey and inspection fees, lateral connection fees, wastewater discharge fees, and numerous other fees listed by the County as sewer-related revenues.[FN53] The record clearly shows that New Castle County earns other money that goes into the Sewer Fund in addition to the actual user fees. [FN54] A concrete example of this is the interest income the Sewer Fund earns, which in some years, the record demonstrates, had amounted to more than $8 or $9 million.[FN55] These revenues could, over a period of years, generate a surplus within the Sewer Fund notwithstanding the fact that the user fees themselves may be insufficient to meet operating expenses. Plaintiffs do not contest these facts.

FN53. *See* Finnigan Dep. at 111-113.

FN54. *See* Athey Aff. Ex. H ("Ex. A to Defs.' Resp. to Pls.' Second Set of Interrogs.").

FN55. *Id.*

Despite eight months to formulate a single concrete example supporting their all but conclusory claim, plaintiffs have failed to set forth one instance of the County failing to segregate real estate transfer taxes as required by § 8102. Moreover, the County has offered an uncontested and perfectly logical and lawful explanation for the discrepancy between Coons' statement and the Sewer Fund surplus-customer sewer charges are not the only revenues flowing into the Sewer Fund. For these reasons, I am satisfied that the County has established that "that there is an absence of evidence to support the nonmoving party's case" [FN56] and the County is entitled to summary judgment. To the extent Count VII relies on *9 Del. C.* § 8102, it is dismissed.[FN57]

FN56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

FN57. *See Giordano v. Marta*, 1998 Del. Ch. LEXIS 63, at *13, 1998 WL 227888 (Apr. 27, 1998) ("While the moving party bears the initial burden in support of its motion [for summary judgment], the burden may be discharged if the moving party demonstrates the absence of evidence supporting the nonmoving party's case."). The conclusions reached in the above two subsections are sufficient justification to grant summary judgment in favor of the County on plaintiffs' fiduciary duty claims because defendants have discharged their burden by demonstrating an utter lack of evidence to support a claim for breach of fiduciary duty. *See id.* Additionally, to the extent plaintiffs ask this Court to make distinctions between related and unrelated sewer costs, the issue is non-justiciable because *9 Del. C.* § 2209 gives the County that authority, and it is exclusively a legislative function to make that determination. Challenges to that determination may be brought only to the extent plaintiffs can allege that the County failed to follow the general principle that the charges must be reasonable, fair, and equitable, not arbitrary, and must be uniform and without undue discrimination against particular property owners. No such claim is in the complaint. *See generally*, 56 AM JUR 2D MUNICIPAL CORPORATIONS § 526.

F. Counts VIII and IX: Plaintiffs' Request for an Accounting and the Unjust Enrichment Claim

***13** Count VIII of the complaint demands an accounting of the Sewer Fund. A plaintiff must establish a right to an accounting.[FN58] For the reasons discussed above, plaintiffs' claims, as they relate to the County's Sewer Fund, fail. Accordingly, plaintiffs' request for an accounting of the Sewer Fund is denied and summary judgment is entered in favor of the County.

FN58. *See Terry v. Stull*, 169 A. 739, 741 (Del.Ch.1933).

Similarly, plaintiffs' claims fail to establish that the County has retained any ill-gotten profits from retaining the surplus revenues. The Delaware Supreme Court has defined unjust enrichment as:

> [T]he unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. To obtain restitution ... plaintiffs [are] required to show that the defendants were unjustly enriched, that the defendants secured a benefit, and that it would be unconscionable to allow them to retain that benefit.[FN59]

FN59. *Schock v. Nash*, 732 A.2d 217, 232-233 (Del.1999).

This Court has already determined that the underlying revenue measures by which the County generated its surplus were valid. The illegality of the County's budgetary practice arose not by the collection of the revenue, but in how the surplus was appropriated to executively designated reserves. Because those deficiencies have been remedied there is no unjust enrichment in the retention of money by the County. For the reasons discussed herein, plaintiffs' claims of unjust enrichment are dismissed and summary judgment is entered in favor of the County.

G. Plaintiffs' Supplemental Claim: The Illegal Accumulation of Surplus Within the Light Tax Fund

Plaintiffs' final allegation concerns the accumulation of approximately $675,000 of surplus revenue within the Light Tax Fund. Plaintiffs point to 9 *Del. C.* § 2102(a), which provides in relevant part:

> The County Council, for the purpose of providing street and highway lighting pursuant to § 2101 of this title, shall levy for the installation and maintenance of such lights an annual tax based on the full annual cost of such lighting, plus up to but not exceeding 10% thereof to cover the actual direct and indirect costs of administration and billing.[FN60]

FN60. 9 *Del. C.* § 2102(a).

Additionally, plaintiffs cite 9 *Del. C.* § 2103, which reads in relevant part:

> If, after payment of all contracts entered into pursuant to this chapter, there remains a surplus in the light account, the surplus shall be applied to reduce the light tax rate for the succeeding taxable year.[FN61]

FN61. 9 *Del. C.* § 2103.

Plaintiffs conclude from these two provisions that the County is prohibited from accumulating any surplus revenue beyond the current fiscal year and that any surplus currently held needs to be applied to this fiscal year's budget to reduce the Light Tax. The plain meaning of this statutory language clearly withholds the authority to accumulate a Light Tax Fund surplus from year to year, and obliges the County to operate the Fund on an annual cash basis.

***14** At the May 31 oral argument, plaintiffs acknowledged that "[i]t would appear that a good deal of the surplus that we claimed as being unlawfully maintained and not applied to reduce the tax rate was applied." [FN62] Counsel for the County expressed his opinion, at the oral argument, that the issue was moot. Additionally, the Court noted: "both parties conceded that the issue had been mooted by the action of County Council." [FN63]

FN62. Tr. at 32.

FN63. Tr. at 49-50, 72.

Now faced with this dispositive motion, plaintiffs want yet another opportunity to conduct even more discovery, to ascertain how the Light Tax Fund surplus has been utilized. In an attempt to stir up a genuine issue of fact, plaintiffs cite figures from the NHB Report to the Court and rely upon them as if they were audited budget amounts. It is undisputed, however, that

County council has directly and transparently addressed the Light Tax Fund in the fiscal year 2006 budget-a publicly available document. Additionally, plaintiffs had the opportunity to examine Mr. Finnigan about the Light Tax Fund issue at his deposition, but-apart from a brief reference to the manner in which the light tax formula was calculated-they chose not to pursue that line of questioning.[FN64] Defendants have entered into the record the Annual Revenue Ordinance .[FN65] That Ordinance showed that the amount of the Light Tax Fund surplus was applied to reduce light tax rates for fiscal year 2006.[FN66] Plaintiffs had every opportunity to participate in the budget hearing and the record is clear that the County has now complied with § 2103. It is equally clear that plaintiffs' arguments are simply dilatory, and do not present genuine issues of material fact. Therefore, I conclude that there are no genuine issues of material fact, and summary judgment is entered in favor of the County on plaintiffs Light Tax claims.

FN64. *See* Tr. at 73-74.

FN65. *See* Answer to the Supp. to Pls.' Am. Compl. Ex. A.

FN66. Any discrepancy between the amount of the surplus held within the Light Tax Fund and the Revenue Ordinance appropriating that money is explained by the fact that the difference between the total available cash surplus and the amount certified for reduction of light tax rates (*i.e.,* $55,345) is being applied to projected electric rate increases by Conectiv Power, and that any available surplus that may be determined to be available once New Castle County's annual audit is completed for Fiscal Year 2005 will be applied to reduce light tax rates in Fiscal Year 2007. *See* Defs.' Reply Br. in Supp. of Defs.' Mot. for Summ. J. Ex. A (“Finnigan Aff.”).

H. Count V: Enjoining the $80 million Bond Sale

I finally turn to the question whether to issue an injunction on the $80 million bond sale. The standard for granting a permanent injunction requires a plaintiff to demonstrate that: (1) it has proven actual success on the merits of the claims; (2) irreparable harm will be suffered if injunctive relief is not granted; and (3) the harm that will result if an injunction is not entered outweighs the harm that would befall the defendant if an injunction is granted .[FN67] For the reasons stated herein, plaintiffs have not met the first prong of this standard. Accordingly, their request for a permanent injunction is denied.

FN67. *Examen, Inc. v. Vantagepoint Venture Partners 1996*, 2005 Del. Ch. LEXIS 103, at *4-5, 2005 WL 1653959 (July 7, 2005).

III. CONCLUSION

For the reasons discussed herein, I conclude that there are no genuine issues of material facts and the County is entitled to judgment as a matter of law. Therefore, I enter summary judgment in favor of the County on all Counts of plaintiffs' second amended and supplemental complaint and plaintiffs' claims are dismissed with prejudice in their entirety. An Order consistent with this Opinion has been entered.

ORDER

***15** For the reasons set forth in this Court's Opinion entered in this case on this date, it is

ORDERED that summary judgment of dismissal is entered in favor of defendants and against plaintiffs and the amended and supplemental complaint is dismissed. Each party shall bear its own costs and attorneys' fees.

Del.Ch.,2005.
Korn v. New Castle County
Not Reported in A.2d, 2005 WL 2266590 (Del.Ch.)

END OF DOCUMENT

EXHIBIT 6

Analysis
As of: Aug 03, 2010

STATE OF DELAWARE v. AMY S. GROSSBERG, Defendant. ID No. 9611007818

IN96-12-0127; IN96-12-0128

SUPERIOR COURT OF DELAWARE, NEW CASTLE

1998 Del. Super. LEXIS 54

December 10, 1997, Submitted
January 23, 1998, Decided

SUBSEQUENT HISTORY: [*1] Released for Publication by the Court March 12, 1998.

DISPOSITION: Upon Defendant Amy S. Grossberg's and Movants Sonye Grossberg's and Alan Grossberg's Motion to Quash Attorney General's Subpoenas DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant and her parents filed a motion to quash a subpoena served on the parents after defendant was charged with murder in the first degree, pursuant to *Del. Code Ann. tit. 11, § 636(1)*, and murder by abuse or neglect in the first degree, pursuant to *Del. Code Ann. tit. 11, § 634*, for the death of defendant's newborn son.

OVERVIEW: On appeal, the court denied the motion to quash the subpoenas. First, the court held that the subpoenas were not an abuse of process and were necessary to the investigation seeking material, unprivileged information regarding the circumstances leading to the death of the newborn, which was not discoverable by other means. Next, the court held that a basis for a parent-child testimonial privilege had not been established because the slight benefit of a parent-child privilege was substantially outweighed by the societal benefit seeking the effective and efficient administration of criminal justice. Third, regarding the parents' right to the free exercise of religion, the court held that the parents' freedom to act, not their freedom to believe, was implicated by any testimony about their daughter. Thus, the freedom to act had to yield to the compelling state interest in hearing the evidence. Finally, the court held that the attorney-client privilege was not

implicated because under the privilege, only communications were protected and not the underlying facts of which the parents had knowledge. Thus, the court denied the motion.

OUTCOME: The court denied the motion to quash the subpoenas after holding that the issuance of the subpoenas was not an abuse of process, the communications were not protected by a parent-child privilege, the subpoenas did not infringe first amendment rights to the free exercise of religion, and that the communications were not protected by the attorney-client privilege.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Discovery & Inspection > Discovery by Government > General Overview
Criminal Law & Procedure > Discovery & Inspection > Subpoenas > General Overview
Torts > Intentional Torts > Abuse of Process > General Overview
[HN1] Since a presumption of regularity attaches to a Delaware Attorney General's subpoena, the party objecting to enforcement has the burden of making some showing of irregularity evidencing an abuse of process. The Attorney General's subpoena power, while ordinarily used prior to securing an indictment, may also extend to his duty to prosecute or defend litigation for the State. The investigatory power of *Del. Code Ann. tit. 29, § 2504(4)*, necessarily encompasses the need to examine witnesses as part of the state's trial preparation, particularly where a witness may have information which is otherwise undiscoverable. Thus, in the absence of a showing by the movant of an abuse of process, the Attorney General's subpoena power will not be limited.

Evidence > Privileges > General Overview
Evidence > Procedural Considerations > Rule Application & Interpretation
[HN2] The Delaware Rules of Evidence provide only a limited number of privileges which may be asserted to protect against disclosure of communications and/or documents. Del. R. Evid. 501.Privileges should be recognized only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

Evidence > Privileges > Parent-Child Privilege
[HN3] The U.S. Court of Appeals for the Third Circuit has refused to create a parent-child privilege. Such a privilege did not exist at common law and it has not been recognized by the vast majority of federal and state courts. A four prong test has been utilized by courts addressing the creation of new testimonial privileges. The test provides: (1) the communication must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation of between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

Evidence > Privileges > Parent-Child Privilege
[HN4] Declining to recognize a parent-child privilege, the U.S. Court of Appeals for the Third Circuit cited several reasons in support

of its decision: (1) a majority of state and federal courts have been unwilling to adopt a parent-child privilege; (2) the *Federal Rules of Evidence 501* does not support creation of such a privilege; (3) creation of the privilege conflicts with prior teachings of the Supreme Court; and (4) the legislature is better suited to establish such a privilege.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN5] Courts must resolve free exercise of religion issues only on the basis of "neutral principles of law," without considering doctrinal matters such as the ritual and liturgy or the tenets of faith.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN6] The *First Amendment of the United States Constitution* does not go so far as to require that the secular law governing the trial of criminal cases must give way to the religious beliefs of every accused or of every witness.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN7] The First Amendment 'embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to the regulation for the protection of society. Therefore, the existence of a compelling state interest may justify the regulation of the free exercise of religion. Compliance with secular law in a secular court does not infringe upon the individual's free exercise of his religion. It does not oblige him to alter his beliefs, even though it may compel him to do an act contrary to those beliefs.

Civil Procedure > Parties > Self-Representation > General Overview
Evidence > Privileges > Attorney-Client Privilege > General Overview
Legal Ethics > Client Relations > Confidentiality of Information

[HN8] Del. R. Evid. 502(b) provides: (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

Evidence > Privileges > Attorney-Client Privilege > General Overview
Evidence > Privileges > Government Privileges > Waiver
Evidence > Privileges > Marital Privileges > Adverse Spousal Testimony > Waiver

[HN9] An in camera hearing as a forum for counterposing an asserted privilege against an evidential need is not new to the law, and is a generally acknowledged device for determining whether a privilege is to be honored.

Evidence > Privileges > Attorney-Client Privilege > Scope

Legal Ethics > Client Relations > Confidentiality of Information

[HN10] Upon a claim of attorney-client privilege, the defense has the burden of demonstrating to a court that the communication at issue is privileged. However, in Delaware, although the attorney-client privilege is highly regarded, it is not absolute, and must yield to the interests of justice.

COUNSEL: Peter N. Letang, Esq., Paul R. Wallace, Esq. and Thomas Brown, Esq., Deputy Attorneys General, Department of Justice, Wilmington, Delaware, for the State of Delaware.

John S. Malik, Esq., Wilmington, Delaware and Robert K. Tanenbaum, Esq., Beverly Hills, California and Jack L. Gruenstein, Esq., Philadelphia, Pennsylvania, for Defendant Amy S. Grossberg and Movants Sonye Grossberg and Alan Grossberg.

JUDGES: RIDGELY, President Judge.

OPINION BY: RIDGELY

OPINION

OPINION

RIDGELY, President Judge

Defendants Amy S. Grossberg ("Grossberg") and Brian C. Peterson ("Peterson") are charged with murder in the first degree, *11 Del. C. § 636(1)*, and murder by abuse or neglect in the first degree, *11 Del. C. § 634* of their newborn son on November 12, 1996. The State has served subpoenas on defendant Grossberg's parents, Alan Grossberg and Sonye Grossberg ("the Grossbergs"), pursuant to *29 Del. C. § 2504(4)*. [1] Counsel for Grossberg and her parents have filed a motion to quash the subpoenas. [*2]

1 *Section 2504* permits the Office of the Attorney General to "investigate matters involving the public peace, safety and justice and to subpoena witnesses and evidence in connection therewith . . . ." *29 Del. C. § 2504(4)*.

Grossberg and her parents contend that the subpoena should be quashed because (1) the issuance of the subpoenas was an abuse of process, (2) their communications are protected by a parent-child privilege; (3) the subpoenas infringe the Grossbergs' first amendment right to the free exercise of religion; and (4) the communications are protected by the attorney-client privilege of D.R.E. 502. The State responds that the Grossbergs have material, unprivileged information relating to the investigation into the death of the Grossberg-Peterson child. The Grossbergs have admitted that on numerous occasions they have participated in detailed discussions with defendant Grossberg, outside the presence of counsel, about the circumstances surrounding the death of the Grossberg-Peterson child. [2]

2 Motion of Amy S. Grossberg, Sonye Grossberg and Alan Grossberg To Quash Attorney General's Subpoenas, at 2 P6 [hereinafter Defendant's Motion].

[*3] **DISCUSSION**

A. The Abuse of Process Issue

The Grossbergs argue that the Attorney General's office exceeded its subpoena power under *29 Del. C. § 2504(4)*, because the State issued the subpoenas in retaliation for the Grossbergs' and defendant Grossberg's participation in the 20/20 interview, on or about June 6, 1997. [3] The State responds that the subpoenas were issued as part of an ongoing investigation into the death of the

Grossberg-Peterson child and the Grossbergs may have material information related to the child's death which is undiscoverable by any other means.

3 During this "20/20" interview with Barbara Walters the Grossbergs described, among other things, how their daughter appeared the previous summer, their close relationship with her, and her seizures at the hospital on the date of her hospital admission. Sonye Grossberg also stated she knew why her daughter did not tell her of her pregnancy. See Exhibit E to Motion For Rule To Show Cause (Dkt. No. 101).

[HN1] Since a presumption of [*4] regularity attaches to the Attorney General's subpoena, "the party objecting to enforcement has the burden of making some showing of irregularity" evidencing an abuse of process. [4] In *State v. MacDonald*, this Court ordered compliance with an Attorney General's subpoena noting that "'the Attorney General's subpoena power, while ordinarily used prior to securing an indictment, may also extend to his duty to "prosecute or defend litigation for the State".'" [5] The investigatory power of *section 2504(4)* necessarily encompasses the need to examine witnesses as part of the State's trial preparation, particularly where a witness may have information which is otherwise undiscoverable. [6] Thus, in the absence of a showing by the movant of an abuse of process, the Attorney General's subpoena power will not be limited. [7]

4 *In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 92 (3d Cir. 1973)*. In Delaware "the purpose of this statutory grant of power was to 'confer upon the Attorney General, in the investigation of crime and other matters of public concern, powers similar to those inherent in grand juries,' including the grand jury's power to 'compel the appearance of witnesses and the production of documents.'" *In re McGowen, Del. Supr., 303 A.2d 645, 647 (1973)* (citing *In re Hawkins, Del. Supr., 50 Del. 61, 123 A.2d 113 (1956))*.

[*5]

5 *State v. MacDonald, 1993 Del. Super. LEXIS 8*, *8-9, Del. Super., 1993 WL 20042 (Jan. 20, 1993) (ORDER) (quoting *In the Matter of Frank Acierno, Del. Supr., 582 A.2d 934 (1990)* (ORDER) (quoting *29 Del. C. § 2504(4)*)). *See also In re Pennell, Del. Super., 583 A.2d 971 (1989)*.

6 *See MacDonald, 1993 Del. Super. LEXIS 8*, *9, Del. Super., 1993 WL 20042 (Jan. 20, 1993) (ORDER).

7 *Id.*

Given the record showing the Grossbergs' knowledge of what may be material information, this Court is satisfied that the State is not "attempting to use its subpoena power as a Court-assisted trial discovery technique, and one that would be unavailable to the defense." [8] Unlike the movants in *Pennell*, the Grossbergs have not been interviewed at all by the State. The State has shown that the subpoenas are necessary to its investigation in that the Grossbergs may have material, unprivileged information relating to circumstances leading to the death of the Grossberg-Peterson child, which is not discoverable by other means. The subpoenas issued here are not an abuse of process by the prosecution, but rather the proper [*6] exercise of investigative authority conferred upon the Attorney General by statute.

8 *Pennell, 583 A.2d at 974*.

B. Parent-Child Privilege Issue

The Grossbergs contend that, although Article V of the Delaware Rules of Evidence does not provide for a parent-child privilege,

the facts of this case support a finding by this Court that such a privilege should be established to protect the conversations between defendant Grossberg and her parents. [9] To determine whether a parent-child privilege should be recognized, this Court must decide whether the privilege against adverse testimony by a parent against a child, or vice-versa, "promotes sufficiently important interests to outweigh the need for probative evidence in the administration of justice." [10]

9 [HN2] The Delaware Rules of Evidence provide only a limited number of privileges which may be asserted to protect against disclosure of communications and/or documents. D.R.E. 501.

[*7]

10 *Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 912, 63 L. Ed. 2d 186 (1980).*

The fundamental principle underlying the testimonial privileges is the "maxim that the public . . . has a right to [everyone's] evidence." [11] Therefore, privileges should be recognized "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." [12]

11 *United States v. Bryan, 339 U.S. 323, 331, 70 S. Ct. 724, 730, 94 L. Ed. 884 (1950)* (quoting 8 J. Wigmore, Evidence § 2192, at 64 (3d ed. 1940)). In his treatise discussing evidentiary privileges, Wigmore states:

> when the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define situations in which, by experience, the exaction would be unnecessary or disadvantageous.

8 Wigmore, Evidence § 2192, at 64 (McNaughton rev. 1961).

[*8]

12 *Elkins v. United States, 364 U.S. 206, 234, 80 S. Ct. 1437, 1454, 4 L. Ed. 2d 1669 (1960)* (Frankfurter, J., dissenting).

In *In re Grand Jury*, [HN3] the U.S. Court of Appeals for the Third Circuit affirmed the U.S. District Court's refusal to create a parent-child privilege. [13] Such a privilege did not exist at common law and it has not been recognized by the vast majority of federal and state courts. [14] Judge Robinson of the U.S. District Court for the District of Delaware employed Wigmore's four prong test which has been utilized by other courts addressing the creation of new testimonial privileges. [15] The test provides:

> (1) The communication must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory

maintenance of the relation of between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* [*9] thereby gained for the correct disposal of litigation. [16]

Applying these principles, the district court declined to recognize a parent-child privilege holding that the privilege was not essential to the continued vitality of the parent-child relationship. The district court also found that the societal benefit of obtaining all relevant evidence in a criminal case far exceeded the minimal injury to the parent-child relationship resulting from the non-recognition of the privilege.

13 *35 V.I. 516, 103 F.3d 1140 (3d Cir. 1997), cert. denied, Roe v. United States, 520 U.S. 1253, 117 S. Ct. 2412, 138 L. Ed. 2d 177, 65 U.S.L.W. 3798 (1997)*. [HN4] Declining to recognize a parent-child privilege, the federal court cited several additional reasons in support of its decision: (1) a majority of state and federal courts have been unwilling to adopt a parent-child privilege; (2) the *Federal Rules of Evidence 501* does not support creation of such a privilege; (3) creation of the privilege conflicts with prior teachings of the Supreme Court; and (4) the legislature is better suited to establish such a privilege. *103 F.3d at 1147-1156*.

[*10]

14 *Id. at 1150*.

15 *See In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990)*.

16 8 Wigmore, Evidence § 2285, at 527 (McNaughton rev. 1961) (emphasis in original). To establish a privilege, Wigmore suggests that all four principles be satisfied. *Id.*

After a similar analysis using the same Wigmore test, I concur that the second and fourth factors have not been satisfied. With regard to the second principle, while there is the need for open communication between family members and the familial harmony that such communication may engender, a testimonial privilege between a parent and child is not indispensable to the maintenance of that relationship. With respect to the fourth principle, I also agree with the district court's analysis that the cost of establishing a parent-child privilege would impair the "truth-seeking function of the judicial system and the increased likelihood of injustice resulting from the concealment of relevant information." [17] Thus, the slight benefit of a parent-child privilege is substantially outweighed by the societal benefit in the effective [*11] and efficient administration of criminal justice. Accordingly, a basis for a parent-child testimonial privilege has not been established.

17 *Grand Jury*, 103 F.3d at 1153.

C. The Free Exercise of Religion Issue

The Grossbergs next assert that their religious beliefs prohibit them from testifying against their daughter in any legal proceeding. [18] They contend that court-ordered compliance with the Attorney General's subpoenas would violate their first amendment right to freely exercise their religious beliefs. Other courts which have addressed this issue have rejected the freedom of religion argument asserted by the Grossbergs. [19] While the specific issue raised here has not been addressed before in

Delaware, the preference for using neutral principles of law rather than religious doctrine to decide matters before the courts is clear. [20]

18 Specifically, the Grossbergs contend that as Conservative Jews they are prohibited by Jewish law, as set forth in the *Torah*, from testifying against their child in any legal proceeding. Defendant's Motion, at 8 PP 41-43.

[*12]

19 *See Smilow v. United States, 465 F.2d 802 (2d Cir. 1972), vacated on other grounds, 409 U.S. 944, 93 S. Ct. 268, 34 L. Ed. 2d 215 (1972). See also In re Marriage of Gove, 117 Ariz. 324, 572 P.2d 458 (1977)*; *United States v. Braunstein, 474 F. Supp. 1 (D. N. J. 1978). Cf. In re Grand Jury Proceedings (Greenberg)*, 1982 U.S. Dist. LEXIS 18355, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982) (permitting a limited privilege based on the freedom of religion clause in the first amendment).

20 *Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church, 1991 Del. Ch. LEXIS 90*, Del. Ch., C.A. No. 12055, Jacobs, V.C. (May 15, 1991) (Mem. Op.), *affirmed, Conference of African Union First Colored Methodist Protestant Church v. Mother African Union First Colored Methodist Protestant Church, 633 A.2d 369* (Oct. 14, 1993), *cert. denied, 510 U.S. 1025, 114 S. Ct. 637, 126 L. Ed. 2d 595 (1993)*.

In *African Union*, the Court of Chancery was required to determine the ownership rights to church property claimed by two churches. Citing decisions by the United [*13] State Supreme Court interpreting the *First Amendment of the United States Constitution*, the Court declined the invitation to apply religious tenets to resolve the property dispute, stating that [HN5] "courts may--indeed must--resolve such disputes only on the basis of 'neutral principles of law,' without considering doctrinal matters such as the 'ritual and liturgy or the tenets of faith.'" [21]

21 *African Union*, Del. Ch., C.A. No. 12055, Jacobs, V.C. (May 16, 1991) (Mem. Op.) at *5 (citing *Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979)* (quoting *Maryland & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 368, 90 S. Ct. 499, 500, 24 L. Ed. 2d 582 (1970))). Accord Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976), reh'g denied, 429 U.S. 873, 97 S. Ct. 191, 50 L. Ed. 2d 155 (1976)*; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969)*.

[*14] Similarly, in *Braunstein*, the district court rejected a legal argument like the Grossbergs' present one, stating that [HN6] the First Amendment of the Constitution "does not go so far as to require that the secular law governing the trial of criminal cases must give way to the religious beliefs of every accused or of every witness." [22]

22 *Braunstein, 474 F. Supp. at 5*.

These rationales are pragmatic and will be applied in this case. [HN7] "The First Amendment 'embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to the regulation for the protection of society.'

[Therefore,] the existence of a compelling state interest may justify the regulation of the free exercise of religion." [23] "Compliance with secular law in a secular court does not infringe [upon] the individual's free exercise of his religion. It does not oblige him to alter his beliefs, even though it may compel him to do an act contrary to those [*15] beliefs." [24] In this case, because it is the Grossbergs' freedom to act, not their freedom to believe, which is implicated by any testimony about their daughter, this Court finds that the Grossbergs' freedom to act must yield to the compelling state interest in hearing everyone's evidence. [25]

23 *Gove, 572 P.2d at 461* (quoting *Cantwell v. State of Connecticut, 310 U.S. 296, 303-04, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940)).*

24 *Braunstein, 474 F. Supp. at 5*.

25 *See Smilow, 465 F.2d at 804-05* (citation omitted).

D. The Attorney-Client Privilege Issue

Finally, Grossberg and her parents argue that D.R.E. 502(b) [26] protects from disclosure to third parties confidential communications between a client and her attorney when made for the purpose of facilitating the rendition of professional legal services to the client and that the Grossbergs are within that circle of confidentiality.

26 [HN8] D.R.E. 502(b) provides:

> (b) *General rule of privilege*. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

[*16] The State responds in part that "the prosecutors and investigators in this case have absolutely no intention of requesting the content of any communications between defendant Grossberg and her defense counsel only Sonye Grossberg's and Alan Grossberg's knowledge of facts prior to and subsequent to the charged crime and their communication with defendant Grossberg about relevant events." [27] This description certainly includes communications that may have had nothing to do with facilitating the rendition of professional legal services.

27 State's Response To Defendant's Motion To Quash Attorney General's Subpoena, at 7 n.2.

On the present record I find no basis to quash the subpoenas because it is apparent that the Grossbergs may have knowledge of material facts unrelated to the rendition of legal services. Under the attorney-client

privilege only communications are protected, not the underlying facts of which the Grossbergs may have knowledge. [28] In the event that the State inquires into an area that is protected [*17] by the attorney-client privilege, or the State disputes the validity of a privilege asserted by defense counsel, either party may seek redress through an in camera hearing before this Court. [29] In that way the privilege issue may be resolved in the context of a specific inquiry which is made. [HN9] "An in camera hearing as a forum for counterposing [sic] an asserted privilege against an evidential need is not new to the law, and is a generally acknowledged device for determining whether a privilege is to be honored." [30]

28 *Upjohn Co. v. United States, 449 U.S. 383, 395-96, 101 S. Ct. 677, 685-86, 66 L. Ed. 2d 584 (1981)*.

29 [HN10] Upon a claim of attorney-client privilege, the defense has the burden of demonstrating to this Court that the communication at issue is privileged. *Moyer v. Moyer, Del. Supr., 602 A.2d 68 (1992)*. However, "in Delaware, although the attorney-client privilege is highly regarded, it is not absolute, and must yield to the interests of justice." *Hoechst Celanese Corp. v. National Union Fire Ins., Del. Super., 623 A.2d 1118, 1123 (1992)*.

30 *State v. Allen, 27 Wash. App. 41, 615 P.2d 526, 530 (1980)*. *See In re Grand Jury Investigation, 587 F.2d 589 (3d Cir. 1978)* (permitting the defendant to indicate that material he believed to be privileged in an in camera hearing); *See also Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)* (ordering an *ex parte* in camera hearing to determine whether disclosure of the prosecution's confidential informant's identity was necessary); *Grand Jury*, 103 F.3d at 1145-46 (holding that the district court's *ex parte* in camera hearing of witness's testimony was necessary to protect the confidential nature of the grand jury proceeding).

[*18] **CONCLUSION**

For the foregoing reasons, the motion of defendant Grossberg and her parents to quash subpoenas is ***DENIED***.

IT IS SO ORDERED.

Henry DuPont Ridgely, President Judge