IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JOHN DOE, a minor (a pseudonym), by and through his parents and guardians ad litem, MARY DOE and JAMES DOE, et al., **Plaintiffs,** **v.** **CHRIST CHURCH CHILDREN'S CENTER, INCORPORATED, et al.,** **Defendants.**	:	**Civil No. 192060** **Judge Durke Thompson**

THE PLAINTIFFS' RESPONSE TO DEFENDANTS ANDERSON'S AND CHRIST EVANGELICAL LUTHERAN CHURCH'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' SECOND AMENDED COMPLAINT

The plaintiffs, John Doe (a pseudonym), et al., by and through their attorneys, Freeman & Jenner, P.C. and Ross & Rubino, respectfully submit this Response to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and state that there are genuine disputes of material fact which preclude the entry of summary judgment.

I. INTRODUCTION

A. A Brief Introduction to Grooming and the Sexual Abuse of Children.

When parents entrust their child to an entity that holds itself out as a safe and nurturing haven for children, is that entity -- whether it be a church, scout troop, or day-care center -- liable when an employee to whom it has delegated control over the child, *uses that authority* to seduce and molest a child?

At the heart of this issue is the fact that the molestation of a child is generally the result of a careful process of seduction, known in this context as "grooming." Grooming is the cultivation of a child's trust and obedience; it is the process by which a child is conditioned to comply to authoritative figures. The tools of grooming are the inducement of the child's trust, the awarding or withholding of attention and affection, and the infliction of punishment. Except in rare cases where physical force is used, grooming is essential to overcome a child's natural reluctance to submit to an adult's sexual advances.

A master's vicarious liability arises from the insidious fact that outwardly, grooming is indistinguishable from effective teaching, leading and preaching: it is the perverse manipulation of the trust and obedience the servant has been authorized to engender. Grooming is seduction under the cloak of the employer's authority. It is this dark side that makes a teacher, priest or day-care provider the unseen threat to the emotional and physical well0-being of a child.

Thus, although child molestation itself is unlikely to ever fall within the scope of a servant's duties, the acts that allow the employee to groom the child for abuse are authorized by the employer and is indeed encouraged by the master. This is why pedophiles are attracted to child-care professions and, ironically, why they get away with abusing children so often, for so long. Moreover, grooming is not a mere harmless prologue. It is, in fact, the first stage of abuse, and is a direct cause of the child's injury, for it is the violation of the child's trust that ultimately does the greatest harm. A child raped by a stranger has a far better chance for future psychological health than does a child who has been violated by a parent, teacher, religious leader or care-taker. The former may always be wary of strangers, while the latter may never trust anyone again--and a life

without trust is a life of isolation and despair. Grooming is, thus, an integral part of the offense and an inseparable part of the injury.

"Scope of duty" is not the only basis for vicarious liability when a master's authority is used by a servant to seduce a child. An entity that holds itself out as a parental surrogate is entrusted with control over the children in its care, and has implicitly promised that its power will not be abused. A *special fiduciary duty not to injure the child* arises from that promise, and that duty is violated when --through grooming--the master's authority becomes an instrumentality of harm. The master cannot avoid this duty by delegating to a servant its right to control the child, for that would be no duty at all. The work is delegable, but the ultimate responsibility is not.

Lastly, a principal is vicariously liable for any injury that flows from the misuse of the authority the principal has granted its agent. A child often lacks the maturity to distinguish a departure from the legitimate exercise of authority. Children are trained to obey, and they instinctively appreciate their dependence on "trusted adults." When a principal has invested its agent with the power to control a child, the principal is responsible when that power is used against the child.

B. <u>Summary Judgment for the Defendants is Inappropriate</u>.

Summary judgment on behalf of the defendants in this case is patently inappropriate. In this context, it would be difficult for the Court to grant summary judgment without having developed any factual record beyond the self-serving affidavit propounded by defendants. Indeed, there has been no discovery exchanged, no depositions taken, no documents produced. *See John Doe I v. Garcia,* 126 Idaho 1036, 1037, 895 P.2d 1229, 1230 (1995) (failure of trial court to permit plaintiffs to develop evidence of causation between sexual abuse and injuries was reversible error;

trial court erroneously granted summary judgment before the close of discovery and should have permitted further discovery).

Thus, with respect to the allegations of negligent hiring and retention, the case is simply not developed. Maryland Rule 2-501(d) envisions such a scenario, and permits counsel to file an affidavit demonstrating that "the facts essential to justify the opposition cannot be set forth", and the court may deny the motion for summary judgment, or may order a continuance, to permit affidavits to be obtained or discovery to be conducted. The affidavit of undersigned Counsel attesting to the lack of discovery is attached hereto as Exhibit 1.

With respect to the plaintiffs' claim for vicarious liability, defendants' main argument centers upon their suggestion that no liability attaches because the outrageous conduct of their employee took place in plaintiffs' home, rather than in defendants' place of business. ***In fact, the focus of plaintiffs' argument is that in a grooming case such as this, where the child abuser misuses the trust fostered by the institution to abuse the child, the analysis should be on the entire continuum of the conduct by the pedophile, not simply the sexual act itself.*** As will be explained below, with respect to the issue of vicarious liability, the fortuity of the place of the molestation is irrelevant, when the tort of grooming has taken place on the premises during the scope of employment and under the auspices and supervision of the employer. Thus, what is considered "outside the scope of employment," becomes a question of fact.

Therefore, with respect to both direct and vicarious liability, genuine disputes of material fact abound in this case, and the defendants' motion for summary judgment should be denied.

C. **The Plaintiffs' Allegations in this Case.**

A brief outline of the plaintiffs' claims are as follows. It is important to understand that claims of both *direct liability* and *vicarious* liability are being advanced. The plaintiffs' burden of proof, of course, is different as to each, though certainly there is some overlap of the facts underlying each claim.

I. Direct Liability of the Church and Anderson

1. Negligent hiring and screening of Djelilate

   Damages:

   a. Grooming and Molestation of John Doe
   b Emotional Distress of John Doe and Parents
   c. Medical Expenses of John Doe which are the Parent's Responsibility through the age of majority.

2. Negligent Employment (*i.e.,* negligent use of Djelilate, a maintenance worker, as a day care provider)

   Damages: Same as (1), above.

3. Negligent retention of Djelilate following the molestation and following the Doe family's reporting of the incident

   Damages

   a. Emotional distress of John Doe for having to switch day care providers, loss of friendships, trust, isolation, diminished capacity of his mother to care for him, etc.

   b. Emotional distress of parents attendant to Church defendants' failure to legitimize complaints, expelling them from program, and legitimizing perpetrator's defense, thereby giving him the moral backing and opportunity to threaten and harass the plaintiffs, etc.

II. Vicarious Liability of the Church

1. Anderson's negligent hiring and screening of Djelilate

   Damages: All of parents and child

2. Anderson's Negligent Employment of Djelilate (*i.e.,* negligent use of Djelilate, a maintenance worker, as a day care provider)

   Damages: All of parents and child

3. The tort of "grooming" committed by Djelilate.

   Damages: All of parents and child.

4. Molestation by Djelilate

   Damages: All of parents and child.

5. Anderson's negligent retention of Djelilate following the molestation and following the Doe family's reporting of the incident

   Damages: Same as I(3), above.

Defendants Anderson and Christ Evangelical Lutheran Church move to dismiss plaintiffs' complaint. In particular, defendants seek dismissal of Count I alleging negligent hiring and retention; Count II alleging vicarious liability, including respondeat superior; and Count IV, alleging breach of a fiduciary relationship. Defendants also move to dismiss the adult plaintiffs' claims for medical and other expenses on limitations grounds. This Opposition will analyze each of these issues demonstrating that legally and factually, the defendants' arguments have no merit.

II. STATEMENT OF FACTS

James and Mary Doe have been husband and wife since 1987. In May 1990, they had their first child, the plaintiff John Doe. James and Mary Doe set out to find a day care situation that they could trust to care for their child in a safe and nurturing environment while they were at work. (Mary Doe Affidavit, pgh. 3, Exhibit 2).

One of several day care centers the Does evaluated was the Christ Church Children's Day Care Center in Bethesda, operated by the defendant Christ Evangelical Lutheran Church (hereinafter sometimes referred to as "CCC" or "the Church" or "the Center"). They met with the director of the Center, defendant Pastor Dean Anderson, to discuss his day care-related work experience, the training and credentials of the staff, and the day care program itself . The Does also received a Christ Church Children's Day Care Center brochure (Exhibit 3), and a Christ Church Children's Day Care Center "Policy Statement." (Exhibit 4). Mary and James Does took the literature home and reviewed it together. (Mary Doe Affidavit, pghs. 4 and 5, Exhibit 2).

The CCC literature described and promoted a trusting, loving relationship between the Church and the children in its care. The brochure read in pertinent part:

> **Our Philosophy. . .**
>
> Christ Church Children's Day Care Center is a non-discriminatory, non-profit Christian ministry. We offer children an environment where they can develop healthy attitudes, an eagerness to learn, ***trust* in those who care for them, and an awareness that they are special and loved. Individual needs are met in a stimulating, nurturing program and talents are developed through sharing experiences.**

(Brochure of the Christ Church Children's Day Care Center, Exhibit 2, emphasis added). In addition to the brochure, the CCC distributed and the Does read a "POLICY STATEMENT" (Mary Doe Affidavit, pgh. 4, Exhibit 2), which also set forth the philosophy of the program:

> PHILOSOPHY: One of the greatest gifts God gives to our world is that of our children. What we can give back to God is an environment where they can develop healthy attitudes, an eagerness to learn, ***trust in those who care for them*****,** and an awareness that they are special and loved. Christ Church Children's Day Care Center will strive to be such a place where your child's individual needs are met and gifts developed.
>
> PURPOSE: . . . (b) To provide a carefully planned, stimulating program for the mental, physical, ***emotional and spiritual development*** of young children as a non-profit service of Christ Lutheran Church.

(CCCDCC Infant/Toddler Program, "Policy Statement," Exhibit 4, emphasis added).

Naturally concerned about the quality of the staff they were prepared to entrust with their child, the Does read in the sales brochure information which promoted the training and background of the CCC employees:

> **. . . and Purpose**
>
> **With Maryland Department of Human Resources approved staff,** the Center makes available, at modest cost, quality, licensed child care, providing carefully planned activities for mental, physical, emotional and spiritual development.

(Exhibit 3). This information was fortified even further with the CCC's Policy Statement:

> **STAFF**: The staff is approved by the Maryland Department of Human Resources, Office of Child Care Licensing and Regulation.
>
> **ADMINISTRATION:** The day care is under the general supervision of Christ Lutheran Church and the specific supervision of the child care board. The Board of nine members, approved by Church Council, makes decisions and sets day care policy.

(Exhibit 4).

In order to observe how the staff cared for the children, Mary Doe then visited the Center with her son for a few hours on May 1, 1991, and most of the day on May 2. Following their on-site evaluation, and relying on the accuracy of the information they read in the CCC literature, the Does enrolled their only child, John Doe, in the CCC program. (Mary Doe Affidavit, pghs. 5-6, Exhibit 2).

When John Doe started attending the Center, James and Mary Doe met CCC employee Alain Djelilate. Over the course of the next few months, they saw that Djelilate was establishing a good rapport with their son as one of the day-care staff. (Mary Doe Affidavit, pghs. 7, Exhibit 2). In September 1991, when the Does went to the Center to pick up their son, they inquired of two of the afternoon staff who were present as to whether Djelilate would be a competent babysitter. The staff told the Does that Djelilate was very reliable, a nice person, and babysat frequently with other children from the Center. (Mary Doe Affidavit, pgh. 9, Exhibit 2). They believed that Djelilate would be an ideal babysitter and they assumed, based upon all of the information presented to them, that he was appropriately screened and trained as a member of the CCC and licensed by the State of Maryland. Moreover, the affirmative efforts that Djelilate was making to befriend their child during the scope and course of his employment was a great source of comfort and assurance to the Does. (Mary Doe Affidavit, pghs. 11, Exhibit 2).

Therefore, based primarily on (1) the Does' belief that Djelilate, a member of a child day care facility, had been suitably screened and that the CCC had performed a reasonable investigation into Djelilate's background; (2) their own inquiries of CCC staff; (3) their observations of Djelilate's interaction with the child, and (4) the literature CCC gave to them touting the licensed nature of the

staff, the Does believed that Djelilate would be a good babysitter and invited him to their home for that purpose. (Mary Doe Affidavit pgh. 11, Exhibit 2).

Mrs. Doe mentioned to Anderson, on multiple occasions, that Alain was babysitting for them. Anderson was interested and pleased with that fact because he thought it benefitted Alain's general welfare, a matter which Anderson had expressed a particular interest in. (Mary Doe Affidavit pgh. 12, Exhibit 2).

On March 14, 1992, when the child was almost two-years-old, Djelilate sexually molested John Doe. The Doe family promptly met with defendant Anderson and, the next day (at Anderson's request), they met with Anderson and Djelilate. Anderson then stated that Alain had not done anything wrong; denounced the plaintiffs for even suggesting that such an event had occurred; and gave two-weeks notice that John Doe was expelled from the Center. (Mary Doe Affidavit, pgh. 14, Exhibit 2). Anderson failed to conduct any semblance of a proper investigation and failed to report the incident to Montgomery County officials, as required.

Immediately following the molestation, after the Does reported the incident to Anderson, neither Anderson nor CCC offered any emotional or practical support, counseling, information, or professional referrals to the parents. Anderson stated that the Does were not welcome at CCC even long enough for their son to say goodbye to his teachers and classmates. Anderson openly questioned the parents' motives and integrity and conveyed his doubts to the Center's staff and to the CCC board. (Mary Doe Affidavit at pgh. 16, Exhibit 2).

Moreover, Djelilate began a program of harassing the parents which included malicious destruction to the Doe household as he continued his employment at the Center. He made harassing

phone calls, and two late-night phone calls were traced to the Center's telephone. The Does feared for their family's personal safety. (Mary Doe Affidavit, pgh. 17, Exhibit 2).

The failure of Anderson and the CCC to investigate the parents' complaints, to respect their family's privacy, to show compassion toward them and their son, to legitimize their anguish, or to offer help, caused *significant* stress, anguish, and despair to the parents. Anderson's and the CCC's actions added immeasurably to the serious emotional turmoil of the family in the year following the abuse and impeded their ability to deal with the aftermath of the abuse productively. (Mary Doe Affidavit, pgh. 17, Exhibit 2).

During the County's investigation of Djelilate, Detective John Horwat told Mary Doe that the County was contacting other CCC families who employed Djelilate as a babysitter, including Greg Decker, then a parent representative to the CCC board, and Gail Osawa, a second parent representative to the board. (Mary Doe Affidavit, pgh. 19, Exhibit 2).

Years later, in August 1998, Djelilate plead guilty to charges relating to possession of child pornography. (Exhibit 5). He was apprehended in an FBI computer sting operation. The CCC continued to employ Anderson through the date of his arrest in early 1998. (Mary Doe Affidavit at pgh. 15, Exhibit 2). In so doing, the moving defendants ratified the acts of the perpetrator, their employee, Djelilate.

III. AN INTRODUCTION OF TEACHING, LEADING AND "GROOMING"

A. The Art of Teaching, Leading and Supervising Children.

The leading, teaching and supervising of children is inherently controlling. Leading is the art of taking people where they would not otherwise go. The skill to obtain compliance and

command attention is, therefore, a fundamental job requirement for a teacher, pastor, or day-care provider. The authority to employ that skill is derived directly from the employer.

Religious leaders supplement their temporal authority with the prestige of divine ordination. Most churches have come to recognize that the trust they enjoy carries the seed of abuse. As one example, the American Lutheran Church's study of sexual misconduct by clergy, states:

> Not only is the pastoral office a position of great trust and responsibility, it is also, by virtue of the trust persons place in the office and the person of pastor, a position of great authority and power over others. * * * Persons in pastoral roles may betray the trust placed in them by misusing power in many ways.[1]

When a school, church or scouting organization hires a person to lead, teach or supervise children, it has given that "trusted adult" the mandate and authority to control, discipline and direct the children in his or her care. It is, however, a power that can be used for either good or ill.

B. **The "Grooming" of a Child for Abuse is the Exploitation of a Trusted Adult's Position.**

The seduction of a child is the slow and deliberate triumph of abused authority:

> The danger of child abuse, contrary to public misconception, is rarely from the sinister stranger lurking around the school yard. Virtually all studies suggest seventy-five to eighty percent of child sexual abuse occurs in the context of "affinity systems" -- father, neighbors or *authority figures.*[2]

1

Quoted in Dr. Marie M. Fortune, Is Nothing Sacred, at 135-6 (Harper 1989).

2

Reuben A. Land, Ph.D., The Annals of Sex Research at 305 (Warner, 1988) (emphasis added).

Mental health and law enforcement professions refer to the misuse of authority to seduce a child as "**grooming**." The process is remarkably consistent regardless of the source of the authority:

> All offenders choose their victims, pursue them, and groom them until they can successfully victimize them. * * * The process and subtleties involved can take days, weeks or even months to lessen a child's inhibitions about engaging in sexual activities which may then escalate and continue over a number of years. The offender often finds the grooming process as interesting and exciting as the acts of sexual contact themselves, and the time it takes is really of no significance to him.[3]

The Behavioral Science Unit of the Federal Bureau of Investigation, in conjunction with the National Center for Missing and Exploited Children, has published two law enforcement manuals that describe how the grooming process derives from innocuous authority. In *Child Molesters: A Behavioral Analysis*, the author describes the subtleties of grooming:

> [A] pedophile may seek employment where he will be in contact with children (teacher, camp counselor, baby sitter, school bus driver) or where he can eventually specialize in dealing with children (physician, dentist, minister***). The pedophile may also become a scout leader, Big Brother, foster parent, Little League coach, and so on.
>
> ******
>
> [Pedophiles] literally seduce the children by befriending them, talking to them, listening to them, paying attention to them, spending time with them, buying gifts for them.[4]

3

Investigation and Prosecution of Child Abuse at 13-14 (American Prosecutor's Research Institute, National Center for the Prosecution of Child Abuse, 1989).

4

Kenneth V. Lanning, Child Molesters: a Behavioral Analysis for Law Enforcement Officers Investigating Cases of Child Sexual Exploitation 19-20 (National Center for Missing and Exploited Children, 1992).

According to the manual, the abuser's authority plays a critical role in obtaining a child's "consent:"

> Many parents specifically instruct their children to respect and obey adults. Children are aware that their very survival depends on these powerful adults.*** Some child molesters exploit their status as stepfathers, guardians, Big Brothers, or scout leaders to entice children into sexual activity.[5]

A second FBI manual, *Child Sex Rings: A Behavioral Analysis*, expands on this theme:

> Preferential child molesters seduce children the same way that adults seduce one another. The major difference, however, is the disparity between the adult authority of the child molester and the vulnerability of the child victim. *This is especially important if the child molester is a prestigious authority figure, such as a teacher, police officer, priest, scout leader, and so on.*

The manual also explains how an abuser can exploit the mantle of a trusted organization:

> Unfortunately, certain youth organizations inadvertently provide the child molester with almost everything necessary to operate a child sex ring [i.e., in which more than one child is being molested at a time]. A scouting organization, for example, fulfills the sex ring offender's needs for: 1) access to children of a specific age or gender, 2) a bonding mechanism to ensure the cooperation and secrecy of victims, and 3) opportunities to spend the night with a victim or have a victim change clothing. The bonding mechanism of the scouts is especially useful to the offender. Loyalty to the leader and the group, competition among boys, a system of rewards and recognition, and indoctrination through oaths and rituals can all be used to control, manipulate, and motivate victims.[6]

---

[5] Id. at 41.

[6] Id. at 16. This theme is developed more fully in Peter Boyle, Scouts Honor (Sexual Abuse in American's Most Trusted Institution) (1994); and Jason Berry, Lead Us Not into Temptation, (1992) (comprehensive investigation of the child molestation crisis occurring in Catholic Churches in the United States).

Once a pedophilic teacher has established trust and control over the children in his care, molestation is merely a matter of choosing a time and place. A child with emotional needs and sexual curiosity is no match for a trusted authority figure with a plan.

IV. STANDARD OF REVIEW: SUMMARY JUDGMENT

Summary judgment may be granted only if no genuine issue of material fact exists and judgment should be entered as a matter of law. Md. R. Civ. Proc. 2-501. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986); *Tucker v. KFC Nat'l Management Co.,* 689 F. Supp. 560, 561 (D. Md. 1988). In determining whether an issue of material fact exists, the trial court must take any evidence that is favorable to the non-movant as true.

If the pleadings show evidence from which the finder of fact would reasonably find for the party opposing judgment, summary judgment should not be granted. *See Anderson*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). That is, where a genuine dispute exists as to a material fact or where different inferences may reasonably be drawn therefrom, summary judgment may not be properly rendered. *Brown v. Suburban Cadillac, Inc.,* 260 Md. 251, 272 A.2d 42 (1971). Where more than one inference is possible, the choice between the inferences should not be made as a matter of law, rather they should be submitted to the trier of fact. Moreover, all inferences must be resolved against the moving party. *Syme v. Marks Rental, Inc.,* 70 Md. App. 235, 520 A.2d 1110 (1987). *See also Jensen v. American Motors Corp., Inc.,* 50 Md. App. 226, 437 A.2d 242, 245 (1981)(stating that where there is sufficient evidence from which different inferences regarding the existence of a defective design can be made, summary judgment is not appropriate).

In submitting the affidavit of defendant Anderson, the moving defendants effectively concede that a motion to dismiss cannot be granted. Where a court considers such extrinsic materials in connection with a motion to dismiss, it becomes a motion for summary judgment. *Tall v. School Commissioners,* 120 Md. App. 236, 706 A.2d 659, 664 (1998).

V. ARGUMENT

As outlined in Section I(C) above, the plaintiffs are bringing claims for both direct and vicarious liability. Each category of claim will be discussed separately.

A. Direct Negligence of the Church and Anderson.

The plaintiffs bring claims against the Church and Anderson for (1) negligent hiring, and screening; (2) negligent retention and employment; and (3) negligent retention of Djelilate following the molestation and following the Doe family's reporting of the incident to the Church.

1. Direct Causes of Action Against the Church and Anderson for Negligent Hiring.

In hiring and retaining someone, an employer owes a duty to the general public to use reasonable care. *Evans v. Morsell,* 284 Md. 160, 395 A.2d 480 (1978). The ultimate duty of an employer is to refrain from hiring or retaining anyone whom they know or, in the exercise of reasonable care, they should have known was potentially dangerous. *Id.*

This principle has been reiterated time and again in Maryland. In the case of *Cramer v. Housing Opportunities Commission of Montgomery Co.,* 304 Md. 705, 711, 501 A.2d 35, 38 (1985), the Court of Appeals reiterated that when an employee is expected to come into contact with the public, the employer is under a duty to ascertain the employee's fitness, or have some basis for believing that he can rely on the employee. Other courts, of course, are in accord. *See, e.g.,*

Moses v. Tenantry, 863 P.2d 310, 327 (Colo. 1993) (Diocese could be liable for the negligent hiring and supervision of a priest who had sexual relations with a parishioner at the church following his grooming and counseling of her).

The scope of the employer's duty in exercising reasonable care in a hiring decision depends on the employee's anticipated degree of contact with other persons in carrying out the duties of employment. The requisite degree of care increases, and may require expanded inquiry in the employee's background, when the employer expects the employee to have frequent contact with children. Restatement (Second) of Agency Section 213, Comment d.[7]

In this case, the record is completely devoid of any information giving insight into the quality of investigation performed by the moving defendants. Certainly, the plaintiffs must be permitted the opportunity to develop those facts to establish whether someone hired "primarily as a maintenance worker" was also screened to be, secondarily, a day-care provider? What steps, if any, did the defendants take to ensure that the maintenance person they were hiring was reasonably fit to be near children? What tests were administered? What prior employers were spoken to? What references were given? All of these questions, of course, are questions of fact. They have not been

---

7

The relevant part of Comment d. to Section 213 reads: "The dangerous quality in the agent may consist of his incompetence or unskillfulness due to his youth or his lack of experience considered with reference to the act to be performed. An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, **and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity**. The negligence may be in entrusting an agent with instrumentalities which, in connection with his known propensities and the qualities of the instrumentalities, constitute an undue risk to third persons. These propensities may be either viciousness, thoughtlessness, or playfulness.

investigated during the course of discovery, insofar as this action is just underway. (See Affidavit of Robert K. Jenner, Esquire, Exhibit 1). Maryland recognizes the tort of negligent hiring. If the defendants can prove that the hiring was negligently done, then a jury could find, under Maryland law, that the plaintiffs' damages are compensable.

2. Direct Causes of Action Against the Church and Anderson for Negligent Retention and Employment as a Day Care Provider.

In defendant Anderson's affidavit, he states that Djelilate was employed at the Day Care Canter primarily as a maintenance worker, and that only on occasion did he participate in group supervisory activities involving children enrolled in the Center. In this regard, the Court of Appeals decision of *Henley v. Prince George's County,* 305 Md. 320, 503 A.2d 1333 (1986), is enormously instructive.

In *Henley*, the employer hired Wantland as a construction worker and carpentry instructor on a job site. Because of repeated break-ins and robberies on the site, Wantland also served in a position of security guard. Wantland was an convicted felon, having been sentenced to 30 years in prison for second degree murder and had a record of various other crimes. When a vandal came onto the premises, Wantland brutally murdered him.

The plaintiff's estate sued Wantland's employer based upon a theory of negligent hiring and retention. They contended that although the employer may not have been negligent in hiring Wantland as a carpentry instructor, the employer was negligent in later extending Wantland's duties to include security functions. *Henley,* 305 Md. at 330, 503 A.2d at 1338. The Court of Appeals stated that a genuine dispute existed as to whether Wantland had been authorized by the employer

to perform the security duties, and that this issue was a justiciable question of fact. *Henley,* 305 Md. at 330, 503 A.2d at 1338.

In the present case, Djelilate was hired as "primarily a maintenance worker." Apparently, as the feelings moved them, or perhaps even depending upon staffing availability, this "maintenance worker" was given full access to bond with and nurture children. As stated in Mrs. Doe's affidavit, *she had no idea that Djelilate was hired as a maintenance worker, and at all times believed he was full-time staff! At no time did anybody at the Church tell her otherwise, or give her any indication to believe that Djelilate was not fully trained, screened, licensed, and qualified to be near children!* (Mary Doe Affidavit, pgh. 8, Exhibit 2). Unlike the case in *Henley*, there is no dispute that Djelilate was given the authorization to perform the additional duties of day-care provider in addition to his "maintenance" responsibilities. The only question before this Court, at this juncture, is whether the plaintiffs can maintain an action against the moving defendants for their direct negligence in mis-appropriating Djelilate and for their failure to warn and inform the plaintiffs that he was not a licensed day-care provider. Maryland law permits such a cause of action to proceed, even where, as in *Henley*, the intentional tort went well-beyond the scope of his duties. The defendants' motion should be denied.

3. The Defendants' Argument That a Negligent Hiring Claim Is Untenable in this Case Because (1) No Employment Relationship Existed at the Time of the Molestation, and (2) There Is No Proof That the Perpetrator Was Incompetent, Misstates Maryland Law, and Reflects a Misunderstanding of the Claims in this Case.

Defendants cite to the five elements of a cause of action for negligent hiring or retention: (1) existence of an employment relationship; (2) employee's incompetence; (3) employer's actual

or constructive knowledge; (4) employee's tortious acts; (5) proximate causation between the injuries and the negligent hiring or retention.[8] *Henley v. Prince George's County,* 60 Md. App. 24, 479 A.2d 1375 (1984), *rev'd on other grounds,*305 Md. 320, 503 A.2d 1333 (1986). While the defendants make passing reference to plaintiffs inability to prove these elements, they only provide factual and legal support for elements (1) lack of employment relationship; and (2) lack of discoverable incompetency. Those two elements are addressed as follows.

a) An Employment Relationship Existed Between Djelilate and the Church.

The first element of the tort requires there to be an employment relationship between the employer and the tortfeasor. It is undisputed that Djelilate was an employee of the Church. (Anderson Affidavit). The defendants argue, however, that because the molestation itself did not occur during working hours, no liability attaches for the employer. To that end, the defendants are misapplying the analysis set forth in the Court of Special Appeal's decision in *Henley v. Prince George's County* to support their position. 60 Md. App. 24, 479 A.2d 1375 (1984), *rev'd on other grounds*, 305 Md. 320, 503 A.2d 1333 (1986).

8

With respect to the issue of proximate cause, the defendants had a duty to undertake reasonable care in the selection and retention of its employees; and plaintiffs were in the zone of foreseeable harm. *But for* Djelilate's employment by defendants, he would not have been in a position in which he could have committed the grooming or the molestation. Moreover, as the plaintiff explained in her Affidavit, much of the damages attendant to this case were a result of the defendants' failure to legitimize their complaints, the negligent and inappropriate dismissal of their concerns, and through the ultimate insult, throwing the Doe family out of the day-care center, and retaining Djelilate. Wisely, the defendants do not take the time to dispute this issue as it is ultimately a factual determination which must be resolved by a jury.

In their Brief at page 4, the moving defendants set forth the criteria the *Henley* appellate court discussed in determining whether an employee/employer relationship existed.[9] Those criteria, however, are used not to determine whether an employer/employee relationship existed *at the time* of the tort. Those criteria are used to determine whether the tortfeasor was in fact an employee or was, perhaps, an independent contractor. Henley, 60 Md. App. at 38-9, 479 A.2d at 1383. The court explained:

> These criteria are important, not because they distinguish an employee from an independent contractor -- an employer may be liable for negligently hiring either, *Evans v. Morsell, supra, 284 Md. at 166 n. 3, 395 A.2d 480* -- ***but because they show that the employer was put on notice of his responsibility to evaluate the qualifications of the employee.*** Appellants have presented no evidence under these criteria to show that appellee Jones hired Wantland for a caretaker or security position.

Henley, 60 Md. App. at 39, 479 A.2d at 1383 (emphasis added). Thus, the “control” factors the moving defendants set forth are not dispositive at the time of the molestation to establish the element of employment. They are used only to determine whether, in the first instance, the employer is under a duty to investigate the qualifications at the outset of the employment. As stated in *Henley,* whether the carpenter was qualified to be a security guard was the relevant issue. The Court of Appeals stated that this issue is a question of fact for the jury. *Henley,* 305 Md. at 330, 503 A.2d at 1338.

---

[9] The defendants quoted the following portion: "Several criteria have been applied from time to time in determining the existence of an employer-employee relationship: the right to control and direct the worker in the performance and manner of doing the work (declared by the Court of Appeals in *Thompson v. Paul C. Thompson & Sons, 258 Md. 391, 395 [265 A.2d 915],* to be 'the most decisive test'), the selection and engagement of the worker, the payment of wages, the power of dismissal, whether the work is a part of the regular business of the employer, whether the parties believe they were (sic) creating the relationship of employer and employee.”

The public policy articulated in *Henley* is equally compelling here. The court was concerned about the employer having notice and opportunity to investigate the background of the tortfeasor. Certainly in the present case, the moving defendants were "on notice of their responsibilities to evaluate the qualifications" of Djelilate as a child-care worker. Indeed, that matter is not even a point of debate. It is the *adequacy* of that investigation, and the wisdom and *reasonableness* of assigning him as a day-care provider without a proper investigation, that are matters of genuine dispute.

b. A Claim for Negligent Hiring, Supervision or Retention Does Not Require That the Tortious Conduct Occur Within the Scope of Employment.

That the employment relationship does not need to exist at the time of the molestation is further evident by Maryland law which simplifies the issue of causation in negligent hiring cases. A claim arising for negligent hiring, supervision or retention does not require that the tortious conduct occur within the scope of the employment, so long as proximate cause can be established. The Court of Special Appeals wrote:

> [T]he plaintiff must show that the employee was the cause in fact of his injury, and. . . that the employer's negligent hiring or retention of the unfit employee proximately caused that injury. *Lancaster v. Canuel, 193 A.2d 555, 558 (D.C.1963).* ***Unlike respondeat superior, a claim of negligent employment does not require proof that the employee's tort was committed in the scope of employment, as long as proximate cause is established.*** *Stricklin v. Parsons Stockyard Company, 192 Kan. 360, 388 P.2d 824, 829 (1964); Fleming v. Bronfin, supra, 80 A.2d at 917,* quoted in *Evans v. Morsell, supra, 284 Md. at 166, 395 A.2d 480;* 53 Am.Jur.2d Master and Servant § 422 at 437 (1970); Annot., *48 A.L.R.3d 359, 361 (1973).*

Henley, 60 Md. App. at 38, 479 A.2d at 1383. Simply, if the tort grew out of, and was a substantial contributing factor to the injury, a claim for negligent hiring is viable. Because an employment relationship in fact existed at the time, and in fact astonishingly *continued* after the molestation, this element of the tort is met. That the actual molestation occurred "off the clock" is legally dispositive of a claim for the defendant's direct negligence.

c. The Defendants Impermissibly Assume that the Plaintiffs Could Not Prove Any Facts to Establish Unworthiness of Djelilate.

Defendants propound the affidavit of defendant Anderson to the effect that they had no foreknowledge of his unfitness. This, of course, begs the question as to whether defendant *should have known* in the reasonable exercise of their duty. *Henley*, 60 Md. App. at 37, 479 A.2d at 1382.[10] The inquiry takes on even greater dimensions in this case given the fact that the perpetrator was hired as a "maintenance worker," and was engaged in the job of day-care provider. Plaintiffs argue that the burden, under the current circumstances, shifts to the defendants to *prove* that the perpetrator was a competent day-care provider. As stated in *Cramer,* when an employee is expected to come into contact with the public, it is the employer's duty to have some basis for believing that he can rely on the employee. 304 Md. at 711, 501 A.2d at 38. What evidence have the defendants advanced, as it should be *their* burden to do, to prove that had a valid investigation been done, they would have found evidence that he was competent to be a day-care provider?

10

"For example, hiring a person with a lengthy criminal record to be a security guard may indeed constitute negligence." *Henley*, 60 Md. App. at 38, 479 A.2d at 1383 (citation omitted).

Moreover, even at this early stage of the proceedings, it is not plaintiffs' burden to prove prior incompetence. Before discovery has begun, it is plaintiffs' burden to prove that Maryland law permits such a cause of action under a set of facts advanced. Defendants have not yet been deposed; nor has the Court yet had the opportunity to look the defendants in the eye to weigh their credibility in their bald assertion of fact. *At the very least, a question of material fact exists as to whether a person hired and retained as a "maintenance worker," is competent to supervise, nurture, and train children.*

B. **The Defendants are Vicariously Liable for the Torts of Anderson and the Perpetrator.**

The Church is liable not only for its direct liability, as described above, but it is also vicariously liable for the tortious acts of its employees, Anderson and Djelilate. Specifically, the Church is vicariously liable for:

1. Anderson's negligent hiring and screening of Djelilate;
2. Anderson's Negligent Employment of Djelilate (*i.e.,* negligent use of Djelilate, a maintenance worker, as a day-care provider);
3. The tort of "grooming" committed by Djelilate;
4. Molestation by Djelilate; and,
5. Anderson's negligent retention of Djelilate following the molestation and following the Doe family's reporting of the incident.

Under the principle of *respondeat superior* ("let the master reply"), an employer will be liable for the torts of his employee, and even the intentional torts, under certain circumstances:

> Respondeat superior, or vicarious liability as it is also known, is a principle of tort law which "means that, by reason of some

> relationship existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it." *W. Prosser [Handbook of the Law of Torts]* § 69, at 458.

James v. Prince George's County, Maryland, 288 Md. 315, 332, 418 A.2d 1173, 1182 (1980). Defendants correctly observe that consistent with *Henley v. Prince George's County, supra,* employers may be vicariously liable for the torts of their employees by way of respondeat superior.

Modern respondeat superior doctrine has evolved into the idea that the employer should assume the risk of liability by virtue of being in a better position to bear it than the injured plaintiff. What has emerged as the modern justification for vicarious liability is a deliberate allocation of risk. Prosser and Keeton, The Law of Torts, Sec. 69, 500 (5th ed. 1984). The liability is placed upon the employer because the employer is better able to bear the costs of the liability through prices, rates, or liability insurance. Henderson et al., The Torts Process, 172 (4th ed. 1994).

1. Because An Employer Is Liable for the Negligence of its Employee Under Certain Conditions, the Church is Vicariously Liable for Defendant Anderson's Negligence.

The Church is vicariously responsible for defendant Anderson's negligence. Under the most basic principles of vicarious liability, an employer is responsible for the negligence of its employees when that negligence is committed during the scope of employment or under the express or implied authorization of the master. *Cox v. Prince George's County,* 296 Md. 162, 165, 460 A.2d 1038, 1039 (1983).

In this case, the plaintiffs allege that the Church is vicariously liable for defendant Anderson's negligence insofar as:

1. Dean Anderson negligently failed to investigate Djelilate's background to ensure and obtain sufficient cause to believe that he was suitable to be left supervising children, knowing full well that parents of the children were using Djelilate for babysitting services;

2. Anderson negligently placed Djelilate in a position of a day-care supervisor of children, when he was hired to be a maintenance worker; and,

3. Anderson negligently retained Djelilate following the molestation and following the Doe family's reporting of the incident.[11]

Thus, plaintiffs allege that these acts were negligent, and that they proximately caused the plaintiffs' injuries. These are prototypical jury questions, and summary judgment is wholly inappropriate under the circumstances.

2. Because an Employer May be Liable for the Intentional Torts of His Employee Under Certain Circumstances, the Church is Vicariously Liable for the Perpetrator's Tort of "Grooming."

As discussed at length above, "grooming" is the cultivation of a child's trust and obedience; it is the process by which a child is conditioned to comply. It is evil, it is insidious, and it occurred in this case during the time the perpetrator and John Doe were together at the day-care center during regular day-care hours. The process of grooming has been recognized by various courts nationwide.[12]

11

The negligent retention caused damages to both the parents, who suffered emotional distress following this trauma, and to the child for his isolation, fear, and loss of parental support following the negative impact to the parents. (Mary Doe Affidavit, pghs. 14, 16-18, Exhibit 2).

12

The concept of grooming has been discussed by the courts in the context of criminal proceedings, as well. *See, e.g., State of Washington v. Clemens,* 78 Wash. App. 458; 898 P.2d 324 (1995) ("We are aware that in some cases involving the rape of a child, the child has been manipulated (or "groomed") by the defendant into initiating or participating in sexual contact. In such cases, an older defendant takes advantage of the youth and immaturity of the victim to create a circumstance in which the victim approaches the defendant for a sexual relationship.")

In fact, in at least one court, the process of grooming has been discussed as part of the criminal acts for which child abuse statutes were designed to protect against. In *Keene v. Edie,* 77 Wash. App. 1068, 909 P.2d 1311, 1321 (1995), the court stated: "Requiring a victim [of sexual abuse] to prove he or she was in apprehension of imminent physical violence is not what the Legislature intended under the current criminal sexual abuse statutes. Many victims of childhood sexual abuse are groomed or enticed into sexual acts. It would defy common sense to hold that such children do not fall under the protection of the [state's child abuse] statute." Indeed, the evil that is abuse takes on many insidious forms.

Moreover, courts have recognized that the grooming process can occur at a time the perpetrator is an employee, even when the final molestation occurs much later. In *John Doe I v. Garcia,* 126 Idaho 1036, 1037, 895 P.2d 1229, 1230 (1995), Doe, who was then 13-years-old, was admitted to a hospital following an accident. While there he met Garcia, a respiratory therapist employed by the hospital. Before Doe's discharge, Garcia gave the boy his home telephone number and asked him to call sometime. About a month after his release from the hospital, Doe contacted Garcia and began seeing him. With his parents' permission, Doe visited with Garcia regularly and often spent the night at Garcia's residence. Garcia took the boy on numerous outings and in general appeared to befriend the boy. The hospital subsequently fired Garcia for misconduct involving young male hospital employees. At some point in the summer of 1989, ten months after he had been fired by the hospital, Garcia began to sexually abuse Doe. Plaintiffs sued the hospital for negligent hiring and retention.

The hospital claimed that it was not liable to Doe because the molestation was too remote in time and circumstance from the hospital's negligent acts of hiring and retention. Simply, the

hospital argued that because the molestation occurred ten months after it's termination, any negligence in the hiring or retention of Garcia could not be the proximate cause of the molestation and plaintiff's injuries.

The court began its analysis by reviewing hornbook law on the issue of causation. The court concluded that the legal responsibility element of proximate causation is satisfied if at the time of the defendant's negligent act, the plaintiff's injury was reasonably foreseeable as a natural or probable consequence of the defendant's conduct. *John Doe,* 126 Idaho at 1041, 895 P.2d at 1234. To the point:

> Doe also contends that the hospital, having psychologists and psychiatrists on its staff, must be charged with knowledge of the methodologies of sexual predators, which may include a protracted **grooming** process. . . . [A] lengthy grooming process is often used by child sexual abusers, and that the time period that elapsed between Doe's first acquaintance with Garcia and the beginning of the sexual abuse is very common. Thus, argues Doe, "Whether a jury should impute to the Hospital at least rudimentary fore knowledge of the fact that most sexual predators use a long grooming process goes to the very heart of both duty and proximate cause, because it defines what is reasonably foreseeable."[13]

126 Idaho at 1043, 895 P.2d at 1236 (emphasis added). In this case, not only was Anderson still an employee, but also the Church *retained* him as an employee after the molestation, and *"fired"* the Doe family, unceremoniously kicking them out of the day-care center. (Mary Doe Affidavit, pgh. 14, Exhibit 2).

13

The *John Doe* court concluded that the trial court impermissibly granted the defendant's motion for summary judgment. The plaintiff had not yet had the opportunity to conduct discovery to fully develop those facts which would support the defendant's knowledge of the defendant's deviant conduct.

That the Church or Anderson did not countenance such grooming is irrelevant. In Maryland, "There is a range of tortious conduct on the part of an agent that may bind the principal and subject him to liability even where . . . the act was *not* done in the manner authorized or directed by the principal, and where the result was *not* authorized or intended by the principal." *Sanders v. Rowan*, 61 Md. App. 198, 484 A.2d 1023, 1029 (1984) (emphasis in original).

In *Sanders,* the Court quoted from a long-line of Maryland cases recognizing that a strong public policy requires an employer to be responsible for the misconduct of its employees:

> In the early case of *Tome v. Parkersburg R.R. Co., 39 Md. 36, 70-71 (1873),* the Court adopted the broad rule enunciated in Story On Agency, § 452, that a principal
>
> > "'is liable to third persons in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies respondeat superior; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby in effect, he warrants his fidelity and good conduct in all matters within the scope of the **agency**.'"

Sanders, 61 Md. App. at 54, 484 A.2d at 1030. Given Maryland law which holds an employer liable for the intentional torts of his employee, under what circumstances may an employer be liable for such outrageous conduct? As will be demonstrated next, an employer will be liable for the misdeeds

of his employee if the employee was aided in accomplishing the tort by the existence of the agency relationship.

3. Anderson and the Church Are Liable for the Perpetrator's Tortious Conduct Because it Was the Natural Outgrowth and Continuum of the Grooming Process, and He Was Aided in Accomplishing the Molestation by the Existence of the Agency Relationship.

i. The Molestation of John Doe Was a Natural Outgrowth of the Grooming Process.

It is critically important that the Court understand the nature of pedophilia. An uneducated analysis to "scope of employment, " as is evident by the defendants' brief, would summarily dismiss the perpetrator's molestation as being "off the clock" of the employer. ***In fact, the focus of plaintiffs' argument is that in a grooming case such as this, where the child abuser misuses the trust fostered by the institution to abuse the child, the analysis should be on the entire continuum of the conduct by the pedophile, not simply the sexual act itself.***

Diverse perspectives concerning child abuse nonetheless converge on this truth: pedophiles commit most of their crimes against children who trust them.[14] The critical link between the trust and the abuse is one which, all too often, leads these individuals to the ranks of schools, day care centers, and church youth programs. It is why so many child abusers are able to amass dozens, even hundreds, of victims. It is the very trust fostered by these institutions which the pedophiles use to

---

[14] R.A. Land, The Annals Of Sex Research (1988), suggests that as many as 75-80% of all child sex abuse occurs in the context of a trusted adult -- fathers, neighbors or authority figures.

seduce the children.[15] It is the respected institutions of our society that provide to the sexual predator his shroud of secrecy, enabling him to assault children. But while the church, the pedophile, the victim and his family all recognize the critical link between trust and abuse, the moving defendants reflect a misunderstanding, if not an ignorance, of that connection. The defendants want to treat the perpetrator's sexual abuse of John Doe by his day-care provider exactly as if it had been a case of sexual abuse by a total stranger.

The consequences of this result of the defendants' position is also significant from a practical standpoint: it means employers, charities, and nonprofits will not need to take every reasonable precaution to know what abuse exists in their institution, and to prevent it, because the law tells them that if they do not know, they have no liability. It also means there will be no source of compensation for healing the victims of child abuse; indeed, child abuse victims remain scarred for life.[16] Child abuse victims, unhealed, will themselves stand a very high chance of becoming sexual abusers of children.[17]

15

Child Molesters: A Behavioral Analysis (National Center for Missing and Exploited Children, in conjunction with the Federal Bureau of Investigation, 1992) at 19-20.

16

Exploited children are often unable to develop healthy relationships, and show severe dysfunctions later in life. Schoettle, Child Exploitation, A Study of Child Pornography, 19 Journal of the America Academy of Child Psychiatry, at 289 (1980); Bryer, Childhood Sexual and Physical Abuse As Factors In Adult Psychiatric Illness, 144 American Journal of Psychiatry (1987) at 1426-30.

17

Schoettle, at 296; Burgess, Abused to Abuser, 144 American Journal of Psychiatry (1987) at 1431-1436; *See also*, Seghorn, Childhood Sexual Abuse in the Lives of Sexually Aggressive Offenders, 26 Journal of the American Academy Child and Adolescent (1987) at 262-267.

For purposes of summary judgment, the facts and allegations must be resolved in favor of the non-movant. ***The critical allegation, and one that must be made clear to this Court, is that the grooming conduct was committed in connection with the perpetrator's duties as a day-care provider; was committed within the time and space limits of his responsibilities as a day-care provider; was committed out of a desire, at least initially and partially, to fulfill his duties as day-care provider; and, was generally of a kind and nature which the perpetrator was required to perform as a day-care provider.***

The second fact about pedophilia which must be understood is that it is a progressive pathology, and where the pedophile is on the continuum of progression, remains a critical question of fact in determining what his motivation was. The truth of the matter is that recent clinical study has discerned several distinct motivations for individuals with pedophilia. Some actually purport to care about children, and some actually care about the institutions in which they serve. The Court cannot, therefore, decide as a matter of law what the perpetrator's motivation was. Too many questions of fact remain.

These facts about pedophilia and the unresolved factual questions they raise, lead back to a central legal question in any vicarious liability claim: what precisely is the tortious action under scrutiny? In a grooming case such as this, where the child abuser misuses the trust fostered by the institution to abuse the child, the analysis should be on the entire continuum of the conduct by the pedophile, not simply the sexual act itself.

ii. Restatement (Agency) Section 219(2)(d) Finds an Employer Vicarious Liable When the Employment Aided Him in Accomplishing the Tort.

Restatement of Agency (Second) §219(1) asserts the general proposition that a master is liable for acts committed within the scope of employment. Consistent with §219(2), a master is not liable for acts committed outside the scope of employment, *unless* certain conditions are met. In such circumstances, employers remain liable for the acts of their employees *outside* the scope of employment so long as the employer has acted or failed to act as described in §219(2)(d) or if the conduct was made possible by the express or *implied* authority of the master.

Restatement of Agency Section 219 states that employers *are* liable for the torts committed <u>outside</u> the scope of employment *if*:

(a) the master intended the conduct or the consequences, <u>or</u>

(b) the master was negligent or reckless, <u>or</u>

(c) the conduct violated a non-delegable duty of the master, <u>or</u>

(d) the servant purported to speak on behalf of the principal and there was reliance upon apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation.*

That requirement is worthy of repeating: the employer will be liable if he was aided in accomplishing the tort by the existence of the agency relationship. Thus, the defendants are vicariously liable for the grooming process effectuated by perpetrator Djelilate, consistent with §219(2)(d), insofar as the perpetrator was not merely aided in his heinous acts by the existence of the agency relation; rather, it would have been impossible and would not have occurred without such employment.

4. The Church is Vicariously Liable for the Molestation of John Doe.

a. The Perpetrator Was Aided to Accomplishing the Molestation Because of the Existence of the Agency Relation.

As discussed, the tort of "grooming" took place during "work-hours" of the day-care center, under the supervision of Anderson. The molestations occurred, fortuitously at best, and by design with all probability, at John Doe's home, away from the public. It was the holding out of the day-care providers as trustworthy, loving providers, who were screened, touted as "licensed' by the State, and promoted through brochures and literature, and who were given access to children and the homes of parents, which made this intentional tort possible and forseeable.

Again, pursuant to Restatement of Agency Section 219(d)(2), the employer will be liable if he was aided in accomplishing the tort by the existence of the agency relationship. The placement of a "maintenance worker" in a leadership position within a day-care center, to engage and groom a child, to set himself up as a "baby sitter" to ensure no critical supervision by adults, is a forseeable consequence of the grooming process.

b. Scope of Employment Is a Question of Fact Which May Only Be Resolved by a Jury.

This Court has held that in most circumstances it is up to the jury, as the finder of fact, not the court, to determine whether an employee was acting within the course and scope of employment. *Cox v. Prince George's County,* 296 Md. 170, 460 A.2d 1042.

Although the case of *Chesterman v. Barmon,* 305 Or. 439, 753 P.2d 404 (1989), is from a foreign jurisdiction, the analysis is persuasive. In that case, the plaintiff was sexually assaulted

by the employee of a construction company and sued the company under the doctrine of *respondeat superior*. In an unusual, but not analytically unique set of facts, the employee had taken a hallucinatory drug while on a potential customer's property late at night, believing it would give him energy to continue working on a bid for a remodeling project for his company. On the way to his boat, where he planned to work, he began to hallucinate and went to the home of the plaintiff, thinking her a former girlfriend, broke into her house and sexually assaulted her. This court noted that although the sexual assault itself taken in isolation was not within the scope of employment, a jury might conclude that the taking of the drug to continue working might be within the scope of employment. *Chesterman,* 305 Or. at 443-4, 753 P.2d at 406-407.

> Applying the foregoing requirements to this case, Barmon's act of entering plaintiff's house and sexually assaulting plaintiff were, as a matter of law, outside the scope of employment. They were outside the authorized limits of time and space, were not motivated by a purpose to serve the employer and were not of a kind in which Barmon was hired to perform.
>
> Consequently, if plaintiff had attempted to premise the corporation's vicarious liability solely on Barmon's acts of entry and assault, the corporation would not be vicariously liable. ***The corporation still may be found vicariously liable, however, if other acts which were in Barmon's scope of employment resulted in the acts which led to the injury to plaintiff.*** Plaintiff has premise to vicarious liability on such other conduct. If the finder of fact decided that the assault was a result of the ingestion of the drug and found that the ingestion of the drug was within the scope of employment, then the employer could be found liable under *respondeat superior*.

305 Or. at 443-4, 753 P.2d at 406.

The lesson of *Chesterman* is that the jury, not the pleading court, should decide what caused the tort, and whether, under the totality of the circumstances, the actions of the tortfeasor were in the course and scope of employment. It is a lesson with direct application in this case.

Other states are in accord. *See, e.g., Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (holding an employer liable for sexual assault by its deliveryman when entry into the victim's home and a dispute that preceded the assault were both employment-related); *White v. County of Orange,* 212 Cal. Rptr. 493, 496 (Ct. App. 1985) (holding that the county could be vicariously liable for the threats made by a deputy sheriff to rape and murder a motorist he had stopped); *Samuels v. Southern Baptist Hosp.,* 594 So. 2d 571, 573 (La. Ct. App. 1992) (holding a hospital vicariously liable for sexual assault by a nurse's assistant, whose job enabled him to have authority over and contact with the victim); *Applewhite v. City of Baton Rouge,* 380 So. 2d 119, 121-22 (La. Ct. App. 1979) (holding the city liable when police officers, while threatening to arrest the victim for vagrancy, raped her); *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. Ct. App. 1989) (holding that a complaint stated sufficient grounds for vicarious liability of a church when the tortfeasor allegedly abused his position as pastor to sexually assault the plaintiff); *Simmons v. United States,* 805 F.2d 1363, 1369 (9th Cir. 1986) (opining that therapist-patient sexual contact occurring in conjunction with counseling activities could be within the scope of employment); *Doe v. Samaritan Counseling Ctr.,* 791 P.2d 344, 348 (Alaska 1990) (finding respondeat superior liability may exist when the sexual relations between a therapist and the patient are "incidental" to the therapy); *Marston v. Minneapolis Clinic of Psychiatry,* 329 N.W.2d 306, 311 (Minn. 1983) (holding that respondeat superior was appropriate when the tortious sexual conduct of the employee-psychologist toward the patient was enabled by the employment context).

In this case, the perpetrator was led to believe, by his employer, that being around children was not only proper, but authorized and appropriate. The Church required that as art of that day-care process, the day-care provider foster a loving, trusting relationship. That relationship was the

pretext for the grooming. Part of the grooming included his being invited as a guest to the Does' home, and thereafter becoming a "friend" of the child. The subsequent molestation occurred off the day-care premises, of course, because the perpetrator needed to be in a position where he was left alone. The acts of the grooming were acts which led to the assault. At the very least, a jury should be able to reach these conclusions.

Merely arguing that the acts are beyond the scope of employment is, therefore, not dispositive of defendants' vicarious liability. The scope of employment can, under these facts, subsume sexual abuse where the abuse is recklessly actuated by the employer's failure to fulfill its duty of reasonable care in the hiring, retention and training of its deviant employee. The scope of employment may also reach the tortious and criminal conduct of the employees when such conduct is so intimately related to the employment that it is actuated or facilitated by such employment. *See, e.g.,* Restatement of Agency Section 228. Under this concept, an employer would be liable for acts which are so closely connected with what the servant is actually employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, *even though quite improper ones*, of carrying out the objectives of the employment.

5. The Church Is Liable for the Molestation of John Doe under the Doctrine of Apparent Agency.

Thus, defendants' liability does not turn merely on Djelilate's status as a servant (employee) at the moment of his tort, but whether he could be an *agent* under Restatement concepts of agency. For example, under Restatement of Agency §261, "a principal who puts a servant or other agent *in a position which enables the agent*, while apparently acting within his authority, to commit a fraud upon third persons, is subject to liability to such third persons for the fraud."

i. The Church Is Liable for the Acts of the Perpetrator Because They Were Done under the Church's Implied Authority.

Defendants can similarly be vicariously liable for torts which result from plaintiffs' reliance on or belief in statements made by Djelilate or other conduct within his apparent authority. Restatement (Second) (Agency) §265(1); see also *Sanders*, 484 A.2d 1029-1030. "Under Maryland law, a master is liable for the acts of his servant when such acts are performed with the employer's actual *or implied* authority." *Rubin v. Weissman*, 59 Md. App. 392, 475 A.2d 1235, 1241 (1984) (emphasis added).

The deviant was employed by defendants in their day-care facility. They concede that at least some of his duties consisted of supervising young children. It is clear, and certainly an issue of material fact, that plaintiffs relied to their detriment upon the representations of the defendants and of Djelilate himself that he was fit to babysit. (Mary Doe Affidavit, pghs. 4-11, Exhibit 2).

Were these representations made within the *apparent or implied* authority of the defendants? It is fair for a concerned parent to suppose that a church-related organization would employ persons committed to some minimal precepts of morality? In this context, the *apparent* authority of these representations is manifest. At the very least, these questions are in dispute.

It was entirely reasonable for plaintiffs to rely upon these representations. Did defendants owe a duty to plaintiffs? Were plaintiffs in the zone of foreseeable risk? The employer has a duty "to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee." *Henley*, 503 A.2d at 1341.

Because the employer-defendants had such a duty, it is reasonably clear that *their customers*, *i.e.,* the plaintiffs were in fact reasonably relying upon the competent exercise of that duty in the selection of child care personnel. Otherwise, defendants' day-care center would have no customers whatsoever. It is hardly any stretch to understand plaintiffs' reasonable reliance on defendants' competent exercise of that same duty in permitting defendants' same employee to babysit.

ii. Defendants Are Vicariously Liable for the Acts of Their Employees and Agents by Virtue of Apparent Authority When Their Conduct Is Incident to the Employment.

There is abundant authority in the various states holding employers vicariously liable for the offenses of their employees. Most impose liability on the theory that the employee's misconduct was within the scope of employment. Some find that even sexual abuse is within the scope of employment for purposes of vicarious liability, if it is incident to or arises from the employment. *See e.g. Does 1-9 v. Compcare, Inc.,* 52 Wash. App. 688, 695, 763 P.2d 1237, 1242 (1988), *Erickson v. Christenson,* 99 Or. App. 104, 109, 781 P.2d 383, 386 (1989); *Doe v. Samaritan,* 791 P.2d 344, 346 (Al. 1990).

For example, in *Doe v. Roman Catholic Church for Archdiocese of New Orleans*, 615 So.2d 410 (La. 1993), the minor plaintiff was sexually assaulted by a volunteer youth group leader. Defendant claimed that its volunteer leader was not an employee. The court of appeals observed that the church's liability turned upon its right to control the volunteer's activities as such. The right of the Church to control is a question of fact, determined by the following questions: (1) the degree of contact between the charity and the volunteer, (2) the degree to which the charity orders the volunteer to perform specific actions, and (3) the structural hierarchy of the charity". 615 So. 2d

at 414. The court reversed in part and affirmed in part, *inter alia*, finding that the jury could reasonably have found that the volunteer was not employer's servant because the record was devoid of evidence concerning the structural hierarchy and the extent to which the church had ordered the volunteer to perform specific duties.

In this case, the plaintiff's affidavit makes clear that the Church and Dean Anderson knew that the perpetrator was babysitting not only for the plaintiffs, but also for other family members of the Church. (Mary Doe Affidavit, pghs. 12, 19, Exhibit 2). In Maryland, knowledge of a fact by members of an entity's board of directors is imputed as knowledge of the corporate entity. *Maryland Trust Co. v. Mechanics Bank,* 102 Md. 08, 629, 63 A. 70 (1906). Notice to an officer or agent of a corporation is notice to the corporation "where the officer or agent in the line of his duty ought, and could reasonably expected, to act upon or communicate the knowledge to the corporation." *Id.* Thus, the actions of Djelilate, and the extent of his participation in these child-care activities done with the knowledge and consent of the Church, can easily be seen as an extension of his "child-care" responsibilities at the day-care center and, at the very least, presents a genuine dispute of material fact.

Other courts have found vicarious liability for acts which might otherwise be outside the scope of employment, but would not have happened, but for the employment. The "but for" test is typically coupled with some analysis of the degree of control exercised by the employer or the acts of the employer to provide the presumptive or apparent authority or means for the commission of the tort.

In *Turner v. State*, 494 So. 2d 1292 (La. App. 1986) defendant employee was a recruiting officer for the defendant National Guard. In his capacity as a recruiting officer, defendant falsely

represented to plaintiffs that he was authorized to conduct physical examinations. Defendant national guard argued, *inter alia,* that the acts of its employee were conducted purely for his own gratification and were thus outside the scope of employment.

Applying a test similar to the Restatement test, the court rejected this argument. The court observed, "If the tortious conduct of the employee is so closely connected in time, place, and causation to his employment duties as to be regarded a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interests, it can then be regarded as within the scope of the employee's employment, so that the employer is liable in tort to third persons injured thereby." 494 So. 2d at 1295.

The court considered a state of facts remarkably close to those presented here, noting that the defendant's torts were closely connected in time, place and causation to his duties. He visited the plaintiffs in his capacity as a person capable of provider competent child supervision. The supervision at the home of John Doe and others was done with the knowledge and consent of the Church. Certainly, a jury could reasonably come to that conclusion. "The fact that the primary motive of the employee is to benefit himself does not prevent the tortious act of the employee from being within the scope of employment; if the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is liable." *Samuels v. Southern Baptist,* 594 So. 2d 571, 573 (La. App. 1992).

To that end, the Restatement of Agency has provided:

> If the principal places the agent in a position to defraud, and the third person relies upon his apparent authority to make the representations, the principal is liable *even though the agent was*

> *acting for his own purposes* . . . It is immaterial that the principal receives no benefits from the transaction.

Restatement (Second) Agency §§ 261, 262, and Appendix, Rep. Notes, pp. 420, 429.

In *Lyon v. Carey,* 533 F.2d 649, 655 (D.C. Cir. 1976), the homeowner was raped by defendant's deliveryman. Defendant argued that employee's act was beyond the scope of employment. The court observed that, "but for" the employment as a deliveryman, the assault would not have happened. Further, "It is a jury's job to decide how much of plaintiff's story to believe, and how much if any of the damages were caused by actions, including sexual assault, which stemmed from job-related sources rather than from purely personal origins." The court found that the defendant can be vicariously liable.

Irrespective of the scope of employment argument, the defendants are nevertheless vicariously liable for the torts of their employees acting with apparent authority. The defendants, by virtue of their actions and inactions, willfully, recklessly and negligently clothed the perpetrator with the employer's mantle of apparent authority, as he entered their homes with the Church's knowledge, consent and encouragement. Defendants provided the perpetrator with the place and means of committing his offenses.

C. Maryland Recognizes a Claim for Breach of Fiduciary Duty, and the Defendants' Argument to the Contrary Misstates Maryland Law.

Defendants suggest that Maryland does not recognize an action for breach of fiduciary duty pursuant to *Kann v. Kann,* 344 Md. 689, 690 A.2d 509 (1997), a recent decision from the Court of Appeals. Defendants' argument is misleading at best, and is certainly a distortion of the holding of the case. Defendants argue that *Kann* held "that allegations of breach of fiduciary duty, in and

of themselves, do not give rise to an omnibus or generic cause of action at law that is ascertainable against all fiduciaries. . . ." (See Defendants' Brief at 8). Defendants conveniently omit the very next sentences of the *Kann* opinion which are critical to the analysis. The holding in its entirety states:

> [W]e hold that there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries. ***This does not mean that there is no claim or cause of action available for breach of fiduciary duty.*** Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion. Counsel are required to identify the particular fiduciary relationship involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem. Whether the cause or causes of action selected carry the right to a jury trial will have to be determined by an historical analysis.

Kann, 344 Md. at 713, 690 A.2d at 521 (emphasis added).

The import of the analysis in *Kann* is not whether a cause of action exists, but whether, based on the specific facts of the case, the claim sounds in *equity,* triable to the court, or in *law,* triable to a jury. The Court of Appeals in *Kann* specifically recognizes §874 of the Restatement of Torts for the proposition that "***a breach of a fiduciary duty is a civil wrong, but the remedy is not the same for any breach by every type of fiduciary. For some breaches the remedy may be at law, for others it may be exclusively in equity, and for still others there may be concurrent remedies.***" *Kann,* 344 Md. at 710, 690 A.2d at 519 (emphasis added).

Here, the plaintiffs' complaint sets out in some detail the nature of the fiduciary relationship and the manner in which it was breached. Defendants held themselves out as both competent providers of day-care and as caring religious figures. Defendants induced plaintiffs to rely upon defendants for spiritual and emotional guidance, and plaintiffs did in fact so rely. While it is

apparent based on the facts as plead that legal (jury), and not equitable (judge), remedies would be most appropriate under the circumstances, the legal-equitable dichotomy is not currently at issue. This matter may be determined once the evidence is presented, or at a different stage of motions practice. Defendants' only argument here is that no cause of action exists. Their argument is, clearly, wrong.[18]

D. Statute of Limitations

1. Time Line

The Court might benefit from a recital of a brief time line of events, supported by the Affidavit of Mary Doe (Exhibit 2, pgh. 20).

5/14/90	John Doe Date of Birth
5/91	John Doe is enrolled at the Church day-care center
3/14/92	Perpetrator sexually molests John Doe
6/3/92	Mary and Jane Doe meet with defendant Susan Elgin, Esquire, for legal advice.
3/93	Elgin's and Doe family's professional relationship terminates; clients are not apprised of the statute of limitations.
10/97	A health care provider advises the clients that the severe emotional problems that John Doe was having over the years was causally related to the sexual molestation.

2. The Role of Defendant Susan Elgin, Esquire

18

See also Maryland Civil Pattern Jury Instructions, 3:10: "An agent, employee, or partner has a fiduciary relationship to the principal, employer, or other partners. . . .; and, 10:12.7: "For punitive damages to be recoverable as a result of the breach of a fiduciary duty owed by the defendants to the plaintiff, the wrongful conduct must be characterized by evil motive, intent to injure, ill will, or fraud."

The plaintiffs saw attorney Susan Elgin shortly after the molestation for legal advice. She charged the clients an hourly fee to "investigate" the matter. Settlement was made, but was ultimately unsuccessful. Plaintiffs allege that Elgin discharged the Doe family without advising them of the statute of limitations, or without obtaining a tolling agreement with the defendants. Thus, plaintiffs allege further that Elgin is responsible for those damages suffered by the parents which cannot be attributed to the Church defendants because of the statute of limitations. The question before the Court is which elements of damages, to the extent that can be determined at this juncture, are attributable to the Church and Anderson, and which elements of damage, are attributable to attorney Elgin.

3. For Negligence Claims, Maryland Law Recognizes a Three Year Statute of Limitations for Adults, as Modified by the Discovery Rule.

Cts. & Jud. Proc. Section 5-101 provides that for adults, a civil action at law shall be filed within three years from the date it "accrues."[19] Because the term "accrue" is undefined by the legislature, the question of accrual is left to judicial determination. *Poffenberger v. Risser*, 290 Md. 633, 431 A.2d 667 (1981). Therefore, when limitations are at issue, it is necessary to judicially determine when accrual occurred in order to trigger the operation of the statute. This determination may be based solely on law, solely on fact, or on a combination of law and fact. *Id.,* 290 Md at 634, 431 A.2d at 679.

19

For children, the statute of limitations is three years after the disability is removed. Md. Cts & Jud. Proc. Code Ann. Section 5-201. The defendants have not moved for judgment on John Doe's claims.

Recognizing the unfairness inherent in charging a plaintiff with slumbering on rights not reasonably possible to ascertain, Maryland has adopted what is known as the "discovery rule," which provides that a cause of action accrues when a plaintiff in fact knows or reasonably should know of the wrong. *Id.* The discovery rule has been appropriately applied to those cases involving the detection of latent diseases.[20]

The discovery rule requires that a plaintiff must have notice of a claim to start the running of limitations. Notice is defined as "express cognition or awareness implied from 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'" *Poffenberger,* 290 Md. at 637, 431 A.2d at 681.

In *Poffenberger*, the court ruled that mere constructive notice -- which rests not on facts, but on strictly legal presumptions – is insufficient to maintain adequate notice in that it would "recreate the very inequity the discovery rule was designed to eradicate." *Id*. In the case at bar, it is insufficient to assume that John Doe's parents had knowledge sufficient to start the clock at the time they discovered their child had been molested. *The inherent question of whether the parents*

---

[20] *Pierce v. Johns-Manville Sales Corp*., 296 Md. 656,464 A.2d 1020 (1983)(plaintiff's exposure to asbestos resulted initially in the manifestation of asbestosis, and resulted subsequently in the manifestation of lung cancer, a separate, distinct latent disease, and the plaintiff had not sought tort recovery for the injuries resulting from asbestosis, a cause of action for the harm resulting from lung cancer accrued when lung cancer was or reasonably should have been discovered.); *Smith v. Bethlehem Steel Corp.,* 303 Md. 213, 429 A.2d 1268 (1985), (plaintiff, who also worked near asbestos, developed asbestosis and then cancer, and brought suit within three years of being diagnosed with cancer. Smith court ruled that if the plaintiff could prove that colon cancer was a latent disease separate and distinct from asbestosis, his action for damages from cancer did not accrue until the cancer was diagnosed.); *Pennwalt Corp. v. Nasios*, 314 Md. 443, 550 A.2d 1155 (1988) (In a product liability action, holding that the statute of limitations does not begin to run until the plaintiff knows or should know of the injury, its probable cause, and either manufacturer wrongdoing or product defect.

knew that John Doe would manifest psychological damage as a direct and proximate result of the molestation is a question of fact for the jury.

Thus, with respect to the plaintiffs' claims as set forth in Section I(C) above, the following principles would apply. For the negligent hiring and screening of Djelilate, and the negligent employment of Djelilate, the parents' claims would need to filed three years after a time when they knew or reasonably should have known that the difficulties and acting-out behaviors John Doe manifested over the years were causally related to the grooming and molestation. Simply, when the *damages* manifested themselves sufficiently to put the plaintiff's of notice of a claim is a question of fact. This same analysis is applicable for the vicarious liability claims of negligent hiring, negligent employment, grooming, and molestation. These present questions of fact for a jury, to be resolved practically by special verdict.

The jury could reasonably find that the parents did not know and did not have reason to know of the association between their child's difficulties and the molestation. If the jury so finds, the moving defendants would be liable if the jurors also find that the Doe family filed their lawsuit within three years after learning of the association. On the other hand, if the jury finds that the claim was filed three years after the time they knew of should have known of the association between the molestation and their son's damages, then the defendant Elgin, if found culpable for failing to warn of the statute, would be responsible for any damages attendant to the parents' losses for these claims.

A different situation, however, is presented for the negligent retention of Djelilate following the molestation, and the vicarious liability for the same tort. These claims are barred against the moving defendants, the Church and Anderson, by the statute of limitations. The parents would have

reason to know of this claim immediately after they happened. Liability for those damages would fall on the shoulders of the defendant Elgin, if she is found culpable for failing to advise them of the existence of this claim and/or the statute of limitations for it.

IV. **CONCLUSION**

Maryland recognizes a claim for wrongful hiring and retention. The facts are not yet developed in this case, and the plaintiffs should have the opportunity to conduct discovery on this issue before this Court rules that no facts could possibly exist to establish such a claim. While Anderson argues that he knew nothing, the question in this case is more complex: what *should* he have known, and what facts did he have to justify of the extension of the perpetrator's role from maintenance worker to child-care provider. Those are issues of fact to be determined by a jury.

After being informed of Djelilate's assault on the minor plaintiff, defendants undertook a course of action constituting outright denial and unwillingness to conduct any proper investigation. Rather than confront their negligence in hiring Djelilate, defendants denounced plaintiffs, expelled the minor plaintiff and continued to employ the pedophile. Those damages are appropriate under Maryland law, as well, for the negligent, if not malicious approach they took with the plaintiffs.

Defendants' position with respect to each of the counts sought to be dismissed rests upon fundamental issues of material fact. Defendants themselves have raised issues of material fact by way of the Anderson affidavit. In the complete absence of discovery, they assert what elements plaintiffs will or will not be able to prove. Summary judgment cannot be granted.

States nationwide are taking serious steps to prevent child abuse. Thirty-one states and the District of Columbia have enacted statutes requiring criminal history screening for some categories

of child care personnel. Maryland provides for the notification of youth-related organizations when a convicted child molester moves into the community.[21]

The allocation of risk in this case must place the burden of sex abuse on the institutions of trust: otherwise, these institutions will be able to rest assured that they need not do everything in their power to root out child abuse because they will only be liable if they are actually negligent. Given the magnitude of child abuse problems in this country, and the strong public policy Marylanders have expressed elsewhere to root out child abuse and heal its victims, it is entirely just that the staggering losses resulting from an agent's misdeeds within an institution of trust must be borne by the institution.

There can be no serious consideration given to the allegations and issues in this case, therefore, unless the Court begins with this critical weighing, this policy allocation, this question of justice, in mind. Where a day-care provider (or “maintenance worker”), uses his position, respect and authority to gain access to, groom, and sexually molest a child, who is in a better position to bear the devastating consequences? The Church with its insurance policy, or the child? The trusting or the trusted? The venerable or the vulnerable?

21

See Child Sexual Offenders - Notification and Registration Act, ch. 142, 1995 Md. Laws 1820, 1823-27 (mandating notice of child-sexual-offender registration to victims, witnesses against the offender, and school principals, and permitting notice to community organizations, religious organizations, and any other organization that relates to children or youth).

This is the fundamental and, in many ways, the only question this Court must decide.

Respectfully submitted,

By: ______________________________

Robert K. Jenner
Freeman & Jenner, P.C.
One Church Street
Suite 200
Rockville, Maryland. 20850
(301) 315-0200

By: ________________________________

Stephen Rubino (pro hac vice)
Ross & Rubino
Sentry Office Plaza, Suite 600
216 Haddon Avenue
Westmont, New Jersey 08108
(609) 365-0500

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing response was sent via hand-delivery on this **19th day of January, 1999:**

H. Patrick Donohue
Armstrong, Donohue & Ceppos
204 Monroe Street, Suite 101
Rockville, Maryland 20850

and via regular mail to:

Shirlie N. Lake, Esquire
Eccelston & Wolf
Scarlett Place, 7th Floor
729 E. Pratt Street
Baltimore, Maryland 21202-3113

____
Robert K. Jenner