SUPERIOR COURT FOR THE STATE OF CALIFORNIA

ORIGINAL FILED
April 11, 2007
Los ANGELES SUPERIOR COURT

THE CLERGY CASES I *Molly Moran Harding v. Defendant* *Doe 1* BC 307683	Case No.: JCCP4286 ORDER ON SUBMITTED MATTER

Demurrer of Defendant Doe 1 to the First Amended Complaint

Demurrer is sustained as to 10th Cause of Action without leave to amend; otherwise, the demurrer is overruled. Ten days to answer.

A. Background

The Complaint in this action was filed on December 12, 2003, alleging that Plaintiff was sexually abused by a priest from approximately 1963 through 1966. Plaintiff filed a first amended complaint on January 3, 2007.

B. Analysis

1. Statute of Limitations

Defendant argues that the action is barred by the statute of limitations. Defendant first argues that a plaintiff cannot bring a claim under §340.1 if it was time barred as of January 1, 1999, because "the plain language and historical amendment of §340.1 shows that the revival is limited to claims against third parties that would have been timely on January 1, 1999 . . . (the effective date for third party liability under §340.1)." [Demurrer 3:2-7]. Defendant fails to further explain how the statute's plain language and historical amendment support this argument. Section 340.1(c) states in relevant part:

> [A]ny claim for damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003.

The plain language of the above excerpt indicates that there is no requirement that the revived claims would have been timely on January 1, 1999.

2. Uncertainty

Defendant argues that Plaintiff must allege facts showing that Defendant knew or should have known of the alleged unlawful sexual conduct, and that Defendant ratified that conduct. Defendant argues that Plaintiff's allegations as to how Defendant knew or should have known about the alleged abuse are conclusory. However, paragraph 6 of the FAC sets forth a number of facts alleging how Defendant knew or should have known of the alleged abuse.

In its Reply brief, Defendant argues that the facts pled in paragraph 6 of the FAC cannot give rise to an inference of childhood sexual abuse as a matter of law. Defendant is attempting to argue this demurrer as if it were a motion for summary judgment. No matter how unlikely or improbable, a plaintiff's allegations must be accepted as true for the purpose of a demurrer. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604. Defendant argues that the alleged facts, such as that the alleged abuser kept a picture of Plaintiff on his dresser and spent a "great deal" of time with Plaintiff, among others, could not reasonably give rise to an inference of abuse. This is a question properly decided on a motion for summary judgment or by a jury, once discovery is completed and evidence submitted.

Defendant cites *Drake v. Morris Plan Co.* (1975)53 Cal.App.3d 208, 210-11 for the proposition that "a demurrer for uncertainty is properly sustained where conclusory allegations form the basis for predicate liability such as that 'said facts were known to defendants . . . or should have been known in the exercise of reasonable care.'" [Demurrer 3:19-22]. Defendant somewhat mischaracterizes the holding in *Drake*, which was that pleading in the

alternative can give rise to uncertainty. Defendant does not challenge the FAC in this action on grounds that Plaintiff has pled in the alternative.

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond. Weil and Brown, *California Practice Guide: Civil Procedure Before Trial*, 7:85 (citing *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616).

The Court finds that the FAC is not uncertain.

3. Ratification

Defendant argues that for ratification to apply, the acts ratified (1) must have originally been for the benefit of Doe 1, and (2) Doe 1 must have learned all of the material facts about the acts allegedly ratified before ratifying them. [Reply 4:15-18].

a. Benefit

The Court notes initially that ratification was discussed and ruled upon in the December 14, 2006 Order on the Omnibus Demurrers. In that Order, the Court explained that while defendants argued that no benefit had been conferred, case law shows that retention of an employee is sufficient to establish ratification. In the December 14, 2006 Order, the Court cited *McChristian v. Popkin* (1946) 75 Cal.App.2d 249. In *McChristian*, it was alleged that a special officer working for a movie theater unlawfully assaulted a customer while on the job. The court of appeal explained:

> It is claimed by appellant theater owners that there was no evidence whatsoever of ratification by them of any alleged unlawful act of defendant Chiselm other than that the latter was retained in the employ of the former. The case of *Edmunds v. Atchison etc. Ry. Co.*, 174 Cal. 246, 249 relied upon by appellants, is authority for the statement that failure to discharge an agent guilty of oppressive acts toward patrons of the employer is in itself evidence tending to show ratification. The intrinsic weight or value of such evidence is dependent upon the circumstances attending such retention by the defendant employer. If the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages.
>
> *Id.* at 256 (emphasis added).

Defendant cites Civil Code §2310 in support of its argument that a benefit must be retained by Defendant in order for ratification to have occurred. Section 2310 states, "[a] ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." Essentially, §2310 is a statement of the "equal dignities rule," which holds that if a writing would be required to confer original authority, then a writing is required to ratify that authority. [See, 3 Witkin, Summary 10th (2005) Agency, § 140, p. 18]. As explained in *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571:

> An actual agency . . . may be created by ratification. But ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified." (Civ.Code, § 2310.) Thus, where the equal dignities rule applies, it requires formal, written ratification. Where a writing is not required, a principal may ratify an agency "by accepting or retaining the benefit of the act, with notice thereof." (Civ.Code, § 2310.)

As the above excerpt demonstrates, §2310 is relevant to the issue of whether a principal has ratified the *agency relationship* itself. However, it does not apply to ratification as between a principal and agent. *Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 76. Plaintiff alleges that the perpetrator was at all times an agent of Defendant and was acting under the direct supervision, employ, and control of Defendant. [FAC ¶¶2.4, 5].

Defendant is not entirely mistaken in arguing that retention of a benefit is relevant in determining whether an act has been ratified. As explained by Witkin, "[t]he usual conduct that will establish ratification is voluntary acceptance of the benefits of the transaction by the principal." 3 Witkin, Summary 10th (2005) Agency, § 141, p. 185. However, *McChristian*, cited and quoted above, demonstrates that failure to discharge can by itself establish ratification.

b. Knowledge of Facts

Again, as explained in *McChristian,* "[i]f the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer

in service, the employer may become an abettor and may make himself liable in punitive damages." *McChristian, supra,* 75 Cal.App.2d at 256.

Plaintiff has alleged that Defendant should have known of the alleged acts of abuse.

c. Whether Notice of the Facts Alleged at Paragraph 6 of the FAC could Constitute Notice for Ratification

Defendant argues that even if the facts alleged at paragraph 6 of the FAC constitute notice, that notice "was after her purported abuse." [Reply 5:13-14]. There is no indication in the FAC that all of the events alleged in paragraph 6 took place after the abuse had ended. Rather, they appear to have allegedly taken place while the abuse was ongoing. It is a question of fact as to whether the facts alleged in paragraph 6 were sufficient to put Defendant on notice of the alleged abuse. It is also a question of fact as to when Defendant should have been put on notice. A fact-finder could find, consistently with the allegations in the FAC, that Defendant should have been on notice of the abuse before the abuse stopped. In that case, Defendant's failure to discharge the alleged perpetrator could establish ratification.

At the hearing, Defendant argues that even if all of the facts alleged in paragraph 6 were assumed to be true, they could not give rise to an inference that Defendant was or should have been on notice of the alleged abuse. Defendant essentially argues that Plaintiff must allege facts that would support an inference of notice. However, California law requires only notice pleading rather than fact pleading. As explained in *Committee On*

Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197 (superseded by statute on other grounds):

> The complaint in a civil action serves a variety of purposes of which two are relevant here: it serves to frame and limit the issues, and to apprise the defendant of the basis upon which the plaintiff is seeking recovery. In fulfilling this function, the complaint should set forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts.

Id. at 211-212 (citations omitted). Plaintiff in the instant case has pled ultimate facts constituting the cause of action. Paragraph 6 of the FAC states, "Plaintiff is informed and believes, and on that basis alleges, that the Defendants were aware of, had notice of, and should have known, of the molestations by the Perpetrator." This allegation alone would be sufficient to frame the issue and apprise Defendant of the basis upon which recovery is sought. The additional facts pled in paragraph 6 are merely supplemental examples of evidence, but are not determinative. The Court finds that a determination of whether the evidence is sufficient to sustain a claim or what inferences may be drawn from the evidence is properly postponed until a motion for summary judgment or trial.

d. Direct Liability

Even if Plaintiff could not establish liability through ratification, the Court explained in its December 14, 2006 Order that the third and fourth

causes of action for negligent supervision and negligent hiring/retention could be maintained on a theory of direct liability. [12/14/06 Order at 35-42]. It appears that the second cause of action for negligence may also be maintained on a theory of direct liability.

4. Fifth Cause of Action for Fraud

Defendant argues that Plaintiff has not pled fraud with the required specificity. Plaintiff's FAC makes the same allegations as the master complaint to which Defendant's Omnibus Demurrer was directed. The Court overruled that demurrer as to the fifth cause of action. This demurrer is overruled for the reasons stated in the December 14, 2006 Order, specifically that the facts related to this nondisclosure would likely be more available to Defendants than to Plaintiffs. [See 12/14/06 Order at 42-44].

5. Seventh Cause of Action for Breach of Fiduciary Duty

Defendant argues that Plaintiff has not pled any facts showing that a confidential relationship existed between her and Doe 1. Defendant concedes that Plaintiff "has described a relationship between the School or the accused and herself," but not between her and Doe 1. This ignores Plaintiff's allegation that the perpetrator was at all times relevant acting as the agent and employee of, and under the control of, Doe 1. [FAC ¶¶2.4, 5]. Defendant offers no authority or argument as to why Plaintiff's confidential relationship with the alleged perpetrator should not be imputed to Doe 1.

Defendant cites *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556 for the holding that a church had no special relationship with a plaintiff based on allegations that it held itself out as a safe environment and held the perpetrator out as a competent priest when he was in fact dangerous and not properly supervised. [Demurrer 7:13-15]. However, in *Roman Catholic Bishop*, the court of appeal specifically noted that the contact between the plaintiff and the priest took place in public places and hotels, and that the plaintiff "did not attend a church school, where an affirmative duty to protect students may exist." *Roman Catholic Bishop, supra,* 42 Cal.App.4th at 1567. In the instant case, Plaintiff alleges that the molestation occurred while she attended or was an employee at schools controlled by Defendant. [See FAC ¶¶2, 8, 9].

Furthermore, to the extent that Defendant's argument is essentially that Plaintiff has not pled specific facts supporting her allegation that a confidential relationship existed between herself and Doe 1, [See Reply 9-10] this is a demurrer based on uncertainty. As explained in the December 14, 2006 Order, whether or not a confidential relation existed is a question of fact. [12/14/06 Order at 47-48 (citing *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 273 fn.6)].

This issue was more fully discussed in the December 14, 2006 Order at pages 46-49.

6. Ninth Cause of Action for Intentional Infliction of Emotional Distress

Defendant argues that Plaintiff has not sufficiently alleged facts that Doe 1 saw or had knowledge of the alleged abuse. As stated in the Court's December 14, 2006 Order, "the existence of specific facts supporting the cause of action are properly resolved on a motion for summary judgment or adjudication or at trial." [12/14/06 Order at 53].

Defendant also argues that even if Doe 1 had seen or had knowledge of the abuse, "it is not the seeing of or knowing about the abuse that caused the extreme emotional distress; it was the alleged abuse that caused that." [Demurrer 8:15-18]. However, it would be possible for a jury to find that the alleged concealment of the abuse and retention of the alleged perpetrator by Doe 1 [see FAC ¶7], if proven, are sufficient by themselves to sustain a claim for intentional infliction of emotional distress.

7. Tenth, Eleventh, and Twelfth Causes of Action for Statutory Violations

Defendant argues that the Court was mistaken in its December 14, 2006 Order in ruling that the statutory causes of action created a private right of action. Defendant cites *Vikco Ins. Services, Inc. v. Ohio Indem. Co*. (1999) 70 Cal.App.4th 55 and *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121 in support of its argument. Both of these cases involve whether a private right of action may be brought for violation of a regulatory statute, namely the Insurance Code. Here, Plaintiff does not allege violation of regulatory statutes, but of the Penal Code. As clearly set forth in the December 14, 2006 Order, "[v]iolation of a criminal statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the criminal statute. Any injured member of the

public for whose benefit the statute is enacted may bring an action." [12/14/06 Order at 54-55 (citing *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1224).

a. Tenth Cause of Action for Violation of Penal Code §32

Penal Code §32 states:

Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

In its December 14, 2006 Order, the Court explained that even though Penal Code §32 is not explicitly listed as a predicate offense under CCP §340.1(e), the list of statutes set forth in §340.1(e) is not exhaustive. Defendant argues that even though the list may not be exhaustive, the "predicate offenses must still be of a similar nature." [Demurrer 9:19-20]. Defendant offers no authority for this proposition. Even if Defendant were correct, it does not explain why aiding and abetting a perpetrator might not be of a sufficiently similar nature to qualify as a predicate offense.

Defendant next argues that agents and employees cannot aid and abet their corporate principals or employers. [Demurrer 9:21-22 (citing *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 78]. The court of appeal in *Janken* explained that "[a] corporate employee cannot conspire with his or her corporate employer; that would be tantamount to a person conspiring with

himself . . . since a corporation can act only through its employees, the element of concert is missing." *Id.* at 78. Under the same logic, the converse must be true; i.e., that an employer cannot aid and abet its employee.

Plaintiff appears to argue that it is a question of fact as to whether the perpetrator and the other Defendants were agents of Doe 1. [Opp. 10:17-20]. However, Plaintiff has herself alleged that all Defendants are agents and employees of the others, and that the accused was an agent and employee of Defendants. [FAC ¶¶4 and 5].

Defendant also argues that liability for aiding and abetting requires that the Defendant knew the full extent of the accused's criminal purpose and gave aid and encouragement, sharing his specific intent to facilitate commission of the crime. [Demurrer 10:4-9 (citing *People v. Prettyman* (1996) 14 Cal.4th 248, 259)]. As explained above, whether or not Defendant had knowledge of the abuse is a question of fact.

The demurrer to the tenth cause of action is sustained because an employer cannot aid and abet an employee. It is Plaintiff's burden to show why leave to amend should be granted.

b. Eleventh Cause of Action for Violation of Penal Code §11166

Penal Code §11166 imposes a mandatory reporting requirement upon certain persons who have "knowledge of or observe[] a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect."

Defendant argues that clergy members did not become "mandatory reporters" under the statute until January 1, 1997, and that child care custodians did not become mandatory reporters until 1976. However, §11166 requires that a mandatory reporter make a report "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect." It is conceivable that a clergy member or child care custodian could have learned of the alleged abuse and failed to report it after becoming a mandatory reporter under §11166. This conclusion is supported by §11166(3)(B), which applies specifically to clergy members, and which states that it "shall apply even if the victim of the known or suspected abuse has reached the age of majority by the time the required report is made."

c. Twelfth Cause of Action for Violation of Penal Code §273a

Penal Code §273a essentially imposes criminal liability on:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered

Defendant, citing *People v. Superior Court (Duval)* (1988) 198 Cal.App.3d 1121, argues that this cause of action should be dismissed because §273a is a general statute that is superseded by more specific statutes. In *Duval,* the defendant was charged with oral copulation with a minor (Pen. Code, § 288a(b)(1)), unlawful sexual intercourse (Pen. Code, § 261.5), and felony child abuse (Pen. Code, § 273a(1)). The court of appeal upheld the dismissal of the §273a charge because it found that the other two statutes, which prohibit sex with a minor even if consensual, superseded the more general application of §273a. However, the *Duval* court explained at length that its ruling was predicated on the fact that the sex in that case was consensual. The court characterized the question at issue as "whether a [single] consensual act of intercourse alone can sustain a section 273a, subdivision (1) charge," and explained that for conduct to violate §273, "first, the conduct must be willful; second, it must be committed under circumstances or conditions likely to produce great bodily harm or death." *Id.* at 1134. The court found that although consensual sex with a minor could technically violate the statute because of the risk of pregnancy, which could be characterized as "great bodily harm," the legislature could not have intended that "every act of unlawful sexual intercourse [even if consensual] would necessarily be a violation of section 273a." *Id.* at 1135. The court however distinguished a case, *People v. Todd* (1969) 1 Cal.App.3d 547, in which the defendant had raped a two-and-a-half year old child and been convicted for rape (§ 261(1)), lewd conduct with a child under 14 years of age (§ 288), and child abuse under § 273a. The court explained that "[a]n act of intercourse with a child of two and one-half years involves a high probability of both physical pain and injury and constitutes an act of child

abuse in its most vile form. By contrast the situation here involved an act of consensual intercourse between an adult and a teenager and is substantially different from *Todd*." *Id.* at 1136 fn.7.

The instant case appears more analogous to *Todd* than to *Duval*. Plaintiff has not alleged that any of the acts between her and the alleged perpetrator were consensual, and alleges that some were "forced." [FAC ¶9]. Although the facts required to fully establish whether Plaintiff's §273a claim can be successful are not available at this stage, the allegations in the FAC are sufficient to survive this demurrer.

Demurrer of Defendant Doe 5 to the FAC

Demurrer is sustained as to Seventeenth Cause of Action with 10 days leave, from April 10, 2007, to amend that Cause of Action only. Demurrer is overruled as to all other Causes of Action.

Doe 5's demurrer raises many of the same issues addressed above. To the extent that the issues raised by Doe 5's demurrer are not discussed below, the Court finds that the above analysis applies.

Whether Defendant Doe 5 had Control Over the Environment where the Alleged Abuse Occurred

Defendant argues that Plaintiff has not adequately pled that it had any control over the environment where the abuse allegedly occurred. However, Plaintiff alleges that "the Perpetrator was professed and/or admitted in

Defendant Order 1 [Defendant Doe 5] during the dates of abuse; and that Defendant Order 1 is the religious order that had jurisdiction and control over the Perpetrator during the dates of abuse." [FAC ¶2.2]. Plaintiff also alleges that the Perpetrator "while he was an ordained priest, was at all relevant times mentioned herein an agent, employee, or servant of the Defendants, and/or was under the jurisdiction and control of the Defendants." [FAC ¶5].

Defendant relies on the allegation in FAC ¶2.1(b) that Defendant Doe 4 "owned and/or controlled Defendant School/Parish 1 and/or Defendant School Parish 2 at the time of the abuse" to argue that the employees of the school and the parish would be agents of Defendant Doe 4 and not Defendant Doe 5. [Reply 3:4-14; 5:1-14]. Assuming the allegation in ¶2.1(b) is true, as the Court must on a demurrer, it is unclear why it would foreclose a finding that the perpetrator was also an agent of Defendant Doe 5. A determination of agency is a factual question not properly decided on a demurrer.

Plaintiff also argues that Defendant Doe 4 could be liable for failure to inform subsequent employers that the alleged Perpetrator was a danger to minors. Under *Randi W. v. Muroc Joint Unified School District* (1997) 14 Cal.4th 1066, an educator who knows or has reason to know that a teacher or school administrator is a child molester owes a duty to potential victims of that molester not to misrepresent his character. Plaintiff argues that here, Defendant Doe 5 knew or should have known of the alleged Perpetrator's tendencies and yet allowed him to be assigned to work at other schools. [Opp. 4:18-22]. In its Reply brief, Defendant Doe 5 argues that the FAC does not contain any allegations that it had knowledge of the abuse. However, as

discussed with respect to Defendant Doe 1's demurrer, above, the Court finds that there are sufficient allegations on this point to survive a demurrer.

At the hearing, Defendant argues that Plaintiff has not pled sufficient facts to establish that Doe 5 controlled the school such that it could have had notice of the alleged abuse. As discussed above with respect to Doe 1's demurrer, California requires only notice pleading.

Fifth Cause of Action for Fraud

Defendant argues that the fraud cause of action cannot be revived under §340.1 because "plaintiff claims that the source of her injury is an alleged fraud, and not sexual abuse—and because only claims for 'damages suffered as a result of childhood sexual abuse' can be revived by CCP §340.1(c)." [Reply 6:1-6].

Plaintiff alleges in her fifth cause of action:

> Defendants misrepresented, concealed, or failed to disclose information relating to sexual misconduct of the Perpetrator as described herein, and that Defendants continued to misrepresent, conceal, and fail to disclose information relating to sexual misconduct of the Perpetrator as described herein.

[FAC ¶31]. Although this language is not entirely clear, it appears that Plaintiff is alleging an ongoing fraud, such that Plaintiff is able to proceed under the three year statute of limitation for fraud under CCP §338(d).

Furthermore, §340.1(e) states:

"Childhood sexual abuse" as used in this section includes any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and that would have been proscribed by [certain Penal Code provisions] or any prior laws of this state of similar effect at the time the act was committed. Nothing in this subdivision limits the availability of causes of action permitted under subdivision (a), including causes of action against persons or entities other than the alleged perpetrator of the abuse.

Section 340.1(a)(2) states that an action may be brought "against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff."

Under the plain language of the statute, it is conceivable that a fraud or misrepresentation by Defendant could have been the legal cause of continuing childhood sexual abuse resulting in injury to the Plaintiff. If Plaintiff can show that Defendant knew or should have known of the abuse but concealed it, Plaintiff might be able to show that the concealment resulted in the continuation of the abuse.

Seventh Cause of Action for Breach of Fiduciary Duty

This cause of action is discussed above with respect to Defendant Doe 1's demurrer.

Eighth Cause of Action for Negligent Failure to Warn

Defendant argues that it did not owe a duty to Plaintiff. This issue is discussed at length in the December 13, 2006 Order at 35-42. Although that discussion is specifically directed toward the third and fourth causes of action, it applies equally to the eighth cause of action.

Tenth Cause of Action for Violation of Penal Code §32

Defendant argues that this cause of action is not revived because it alleges damages resulting from concealment, rather than from the abuse itself. This is substantially the same argument as that directed toward the fraud cause of action, discussed above.

Eleventh Cause of Action for Violation of Penal Code §11166

This cause of action is discussed above with respect to Defendant Doe 1's demurrer.

Twelfth Cause of Action for Violation of Penal Code §273(a) and (b)

Defendant argues that Plaintiff has not adequately pled liability under the higher "criminal negligence" standard of Penal Code §§273(a) and (b). The Court finds that it is a question of fact whether Defendant's conduct was criminally negligent.

Second, Third, and Fourth Causes of Action for Negligence, Negligent Supervision, and Negligent Hiring/Retention

These causes of action are discussed at length in the December 13, 2006 Order at 35-42. Whether Defendant exercised control over the alleged Perpetrator is discussed above.

Seventeenth Cause of Action for Premises Liability

Defendant argues that it cannot be liable under this cause of action because Plaintiff alleges that "the Perpetrator was transferred to Defendant School/Parish . . . owned by and/or under the control of Defendant Archdiocese and/or Defendant Archdiocese Education Corporation." [FAC ¶5E].

Defendant cites *Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557 and *Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477 for the rule that a defendant cannot be liable for premises liability if it did not own, possess, or control the property at issue.

Plaintiff argues that she has alleged at ¶112 of the FAC that "Defendants were in possession of the property where the Plaintiff was groomed and assaulted by the Pereptrator, and had the right to manage, use and control that property." Plaintiff argues that she is entitled to plead inconsistent theories of recovery, citing the December 13, 2005 Order. [Opp. 13:9-18]. However, in that Order, the Court quoted the rule that "inconsistent theories of recovery are permitted [even though] a pleader cannot blow hot and cold as to the facts positively stated." Manti v. Gunari (1970) 5 Cal.App.3d 442, 449.

In this case, Plaintiff has positively stated inconsistent facts rather than theories of recovery. It is Plaintiff's burden to show how the FAC may be

successfully amended. See, *Ass'n of Community Orgs. For Reform Now v. Dept. of Industrial Relations* (1995) 41 Cal.App.4th 298, 302.

Motion of Defendant Doe 1 to Strike Portions of the Complaint

See Below.

Attorney's Fees

Plaintiff agrees to strike allegations seeking attorney's fees. [Opp. 2:21-24].

Allegations that the Accused Priest was Acting within the "Course and Scope" of Employment

Defendant argues that all allegations that the alleged perpetrator was acting within the course and scope of his employment while committing the alleged abuse should be stricken pursuant to the December 13, 2006 Order.

Defendant is correct that, as a matter of law, the alleged perpetrator cannot have been acting within the course and scope of his employment while committing the alleged abuse. [December 13, 2006 Order at 31-32 (citing *Rita M. v. Roman Catholic Archbishop* (1986) 187 Cal.App.3d 1453)]. Defendant seeks to strike paragraphs 4, 5, 18, 23, 27, and 50. However, only paragraph 4 alleges that the perpetrator was acting within the course and scope of his

employment at all relevant times. The other paragraphs allege only that the perpetrator was an employee or an agent of Defendants. Defendant has not shown that the latter allegation is impermissible as a matter of law. Paragraph 4 is ordered stricken with 10 days leave to amend.

"Other Persons"

Paragraph 26 of the FAC alleges that "Defendants had a duty not to hire and/or retain the Perpetrator, and other employees, agents, volunteers, and other representatives, given the Perpetrator's dangerous and exploitative propensities." Defendant argues that the reference to "other employees, agents, volunteers, and other representatives" is irrelevant and should be stricken. Plaintiff does not dispute that it is irrelevant, but argues that "the present motion seeks to strike the majority of the FAC," and should be denied because it is too broad. [Opp. 3:13-20]. This argument is unclear as it applies to this paragraph. The above-quoted reference is ordered stricken.

Everything Following the Second Cause of Action

Defendant seeks to strike everything following the second cause of action as redundant. As noted in the December 13, 2006 Order, the court of appeal in *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256 explained:

> [I]t is improper for a court to strike a whole cause of action of a pleading under Code of Civil Procedure section 436. As we have

said, what the court essentially did here with respect to the entire survival claim was to strike it. While under section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike.

Id. at 1281 (citation omitted).

Plaintiff's Objections and Opposition to Joinder of Defendant Does 2, 3, and 4 in Demurrer and Motion to Strike of Defendant Doe 1

Objections are overruled.

Plaintiff opposes the electronically-filed joinder on the basis that Plaintiff's case is not listed in the caption of the document purporting to provide notice, and the date of the hearing stated on the notice is incorrect. Plaintiff has not provided any authority showing why this joinder should not be permitted, given that Plaintiff appears to have received actual notice, nor does she establish any prejudice.

Dated: April 11, 2007 __signed (**HALEY J. FROMHOLZ)**_____

HALEY J. FROMHOLZ

JUDGE OF THE SUPERIOR COURT