State of New Hampshire
Supreme Court

NO. 2022-0259

2023 TERM

JANUARY SESSION

Larissa Troy
v.
Bishop Guertin High School and
Brothers of the Sacred Heart of New England, Inc.

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY SOUTH SUPERIOR COURT

REPLY BRIEF

January 25, 2023

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ARGUMENT

I. Issues Were Preserved

Bishop Guertin[1] claims Larissa did not preserve the fraudulent concealment issue. *BG's Brf*. at 37. In fact, the matter was discussed at length in her motion for reconsideration, which was filed shortly after the court's order on summary judgment. MOTION FOR RECONSIDERATION at 6-8 (Mar. 10, 2022), *Appx*. at 325.

Bishop Guertin also claims that Larissa did not preserve her argument that she discharged her duty to inquire upon reporting the second assault to Susan Mansor, Bishop Guertin's Dean of Students. *BG's Brf*. at 15, 27. But it was preserved, also in Larissa's request for reconsideration. MOTION FOR RECONSIDERATION at 5 ("Other than going to a person in a position of authority at her high school immediately after the assault, there is not much else that the Plaintiff could reasonably be expected to do to investigate the Defendants.").

An argument "is preserved for our review unless [the party's] failure to raise the issue earlier deprived the trial court of a full opportunity to correct its error." *In the Matter of Kelly*, 170 N.H. 42, 46 (2017); *Fleet Bank-NH v. Christy's Table, Inc.*, 141 N.H. 285, 291 (1996) ("By including this issue in their motion for reconsideration, notice of appeal, and briefs, the [party] properly preserved it for appeal."); *State v. Tselios*, 134 N.H. 405, 407 (1991) (issue preserved where defendant raised it in motion to reconsider).

Here, both Larissa's report to Mansor and Larissa's duty to inquire were discussed throughout the record. The trial court had ample opportunity to address these issues, and after reconsideration, to correct its ruling.

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[1]The defendants are collectively referred to herein as "Bishop Guertin."

Even if not fully preserved, this court should address these matters. Victims with aged causes of action against institutions are omnipresent. As such, the question of whether a victim's contemporaneous report to the institution tolls the statute of limitations is likely to reoccur, and thus should be resolved by this court. *LeClair v. LeClair*, 137 N.H. 213, 221 (1993) ("It is questionable whether [a] fleeting reference provided the trial court with a full opportunity to address this issue, and thus, the issue arguably is not preserved for appellate review. Nonetheless, we find some utility in addressing this … issue because similar claims may be raised in the future.").

II. Where Sexual Assault Occurred is Not Determinative

Bishop Guertin argues that the assaults occurring at school would have alerted Larissa that the school was potentially liable, *BG's Brf*. at 17-26, 35, and that she therefore had several "vicarious liability" claims against the defendants. *BG's Brf*. at 23.

Where the assaults occurred, however, is not determinative. Whether an assault was perpetrated in a school locker room or classroom, off campus during a school outing, or elsewhere, a reasonable 17-year-old would not assume that her school knowingly hired a known pedophile.

Moreover, vicarious liability of employers for acts of employees turns on such matters as whether the employee was working at the direction of the employer, not whether the act occurred on the employer's premises. *Pierson v. Hubbard*, 147 N.H. 760, 766 (2002) ("[A]n employer may be held vicariously responsible for the tortious acts of its employee if the employee was acting within the scope of his or her employment when his or her tortious act injured the plaintiff."); *Wilson v. Peverly*, 2 N.H. 548, 549 (1823) ("When a servant causes an injury to a third person, the master is liable for it, if he directed the injury to be done."). Where the injury occurred is similarly nondeterminative under workers' compensation statutes. *See, e.g., Appeal of Pelmac Industries, Inc.*, 174 N.H. 528 (2021) (award of workers' compensation when injury occurred during employee's travel to work); *Appeal of Lockheed Martin Corp.*, 147 N.H. 322 (2001) (denial of workers' compensation liability even though injury occurred within employer's cubicle).

Bishop Guertin claims that *Ouellette v. Beaupre*, 977 F.3d 127 (1st Cir. 2020), is inapposite because in *Ouellette* "the abuse occurred away from the workplace." *BG's Brf*. at 35. Irrespective of location, the abuser's employer was

readily apparent to the *Ouellette* victim. The abuser in *Ouellette* was a police officer, who "introduced himself as a captain of the BPD," the victim met him "at the police station," and was thence driven to the situs of the abuse "while [the abuser] was on duty with his BPD police radio switched on." *Ouellette*, 977 F.3d at 131.

III. Plaintiff Cannot Know What She Cannot Know

The defendants claim, in two contexts, that, concurrent with the assault, Larissa had sufficient information to know she had causes of action against Bishop Guertin, even without knowing that Bishop Guertin intentionally hired a convicted sex offender and concealed that information while she was a student. *BG's Brf* at 23 (application of discovery rule), 38 (fraudulent concealment).

The defendants assert that the discovery rule does not apply because "there was no need for [Larissa] to have actual knowledge of wrongdoing by the Defendants to be on notice that she had causes of action against them." *BG's Brf* at 23. Similarly, with respect to fraudulent concealment, they argue that any concealment of information was irrelevant to the statute of limitations because Larissa knew, at the time off the assaults, "facts essential to her causes of action." *BG's Brf* at 38. The defendants argue that Larissa "appears to be confusing two different issues." *Id.*

The defendants' purposeful concealment (of McEnany's history), and the facts Larissa would have had to know in order to be aware she had causes of action against the defendants, are the *same*. Bishop Guertin's hiring of a convicted pedophile and its subsequent concealment of that fact form the foundation of Larissa's causes of action against the defendants. It is particularly convoluted for Bishop Guertin to argue that Larissa could have known she had causes of action against them without knowing that they engaged in "wrongdoing." *BG's Brf* at 23. Apart, perhaps, from some narrow exceptions, such as strict liability torts, causes of action are rooted in allegations of wrongdoing – it is an element of what makes them actionable.

For Larissa to have known, at the time of the assaults, that Bishop

Guertin did something wrong, and thus she had causes of action against them, she would have had to know that the school knew that McEnany was a molester when they hired him. Because she did not know this crucial fact, and could not have known it, she did not know, and could not have known, that she had causes of action against Bishop Guertin.

IV. Impact of Publicity was Gravamen of Trial Court's Decision

Bishop Guertin asserts that Larissa overstated the centrality, to the trial court's decision, of its assertion that clergy sex abuse was "common knowledge." *BG's Brf*. at 14.

To support its determination that Larissa's duty of inquiry was triggered before 2017, when she received her brother-in-law's text, the trial court offered only two grounds.

First, it contrived a four-part inquiry under which it found Larissa knew she was abused on Bishop Guertin's property, and summarized its holding by referencing to Michigan intermediate appeal and a subsequently-overturned Georgia case.

The court then provided an alternative basis for its holding:

> Moreover, by May 2015, it was common knowledge that Catholic institutions in New Hampshire and elsewhere had a practice of knowingly employing men who had previously sexually abused children, and that this practice existed at the time the plaintiff attended BGHS.… *Because this fact was a matter of common knowledge … the plaintiff knew or should have known* that she had a possible claim against the defendants at some point prior [to] that date.

ORDER ON SUMMARY JUDGMENT at 10 (Feb. 22, 2022), *Appx*. at 311, 322 (emphasis added).

In her brief, Larissa called the supposed "common knowledge" the "gravamen" of the court's decision. *Troy's Brf*. at 20. *See Dion v. City of Omaha*, 973 N.W.2d 666, 682 (Neb. 2022) ("In general, the 'gravamen' is the substantial point or essence of a claim, grievance, or complaint.") (quotation and citation omitted).

If this court determines that the trial court's four-part test is not the correct standard, the only remaining grounds for the trial court's decision would be the supposed legal effect of the purported "common knowledge." Therefore, it was appropriate to characterize the trial court's treatment of the supposed "common knowledge" of clergy sex abuse as the "gravamen" of its decision.

V. Cases Cited by Defendants Are Easily Distinguished

The several New Hampshire cases Bishop Guertin cites in support of its position are easily distinguished. As noted in Larissa's opening brief, in *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708 (2010), knowledge of the defendant's negligence was obvious – the plaintiff was put on notice about potential accounting malpractice when he received a tax deficiency notice from the IRS.

The defendants attempt to analogize their situation to *Glines v. Bruk*, 140 N.H. 180 (1995), and *Perez v. Pike Industries, Inc.*, 153 N.H. 158 (2005). In *Glines*, the plaintiff injured his back while lifting a mechanized dock; he sued the owner of the premises, but neglected to sue the dock manufacturer until later. In *Perez*, the plaintiff injured his ankle when he sunk into soft pavement; he sued the State, as it was a State road project, but neglected to sue the State's contractor until later.

Both cases involved plaintiffs with obvious physical injuries and obvious causes of action, who later tried to add defendants to existing complaints, on the grounds the plaintiffs only learned of the additional defendants during pre-trial discovery. But pre-trial discovery was not actually necessary for the *Glines* plaintiff to know someone had manufactured the dock or for the *Perez* plaintiff to know someone had done the road work. By contrast, Larissa had no reason, until 2017, to know that any party other than McEnany could be liable for his actions.

The defendants also cite many out-of-state cases to bolster their claims. *BG's Brf*. at 32-33. As was pointed out in Larissa's opening brief, however, the case law is not as supportive of the school's position as it contends.

The Pennsylvania case on which Bishop Guertin relies, *Rice v. Diocese of*

Altoona-Johnstown, 255 A.3d 237 (Pa. 2021), does indeed side with defendants' position. Unlike Larissa's case, however, in *Rice*, the victim made no report or inquiry until 2016, thirty-five years after the assaults, and she thus encountered no contemporaneous denunciation, as Larissa did, by a church employee.

> [Rice's] complaint does not allege that she made any formal or informal inquiries of the Diocese regarding, among other things, what it knew about [the assailant], its efforts to supervise or monitor him or its protocols, in general, for the placement of priests in parishes. Rice concedes that she did nothing until the grand jury report was published in 2016.

Id. at 251. Although the defendant in *Rice* generally gave the impression that the abusive priest was "a cleric in good standing,"

> none of these alleged misrepresentations misdirected Rice from her knowledge that [the assailant] assaulted her…. With that knowledge, her duty was to inquire into potential other causes of her injury, including the Diocese.

Id. at 252-53. Larissa, however, was affirmatively misdirected by Susan Mansor, Bishop Guertin's Dean of Students, when Larissa complained immediately following the second assault.

Moreover, *Rice* has a concurring opinion which suggests the majority's decision misconstrues Pennsylvania's discovery rule. *Id.* at 256 (*Baer*, C.J., concurring). There were also two members of the court in dissent. *Id.* at 257 (*Wecht* and *Todd*, JJ., dissenting). The dissent argues:

> The Majority's conclusion that Rice failed to exercise reasonable diligence in investigating the Diocese's role in her attack is based on nothing more than the fact that Rice knew that she was assaulted on church property by a priest employed by the Diocese. This analysis dramatically

> oversimplifies the reasonable diligence inquiry. As we explained in [an earlier case], "courts may not view facts in a vacuum when determining whether a plaintiff has exercised the requisite diligence as a matter of law, but must consider what a reasonable person would have known had he or she been confronted with the same circumstances that the plaintiff faced at the time." Furthermore, "the objective reasonable diligence standard is 'sufficiently flexible to take into account the differences between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question.'"
>
> The Majority replaces these nuanced, fact-specific jury questions with a bright-line rule that plaintiffs who are aware of the primary cause of their injury are necessarily "on notice" of potential secondary tortfeasors. … [T]he Majority fails to consider that a jury might well conclude that a reasonably diligent plaintiff of Rice's age, experience, and circumstances would not have launched an investigation into whether the Diocese intentionally sheltered and effectively abetted known child abusers.

Id. at 260 (citations omitted).

VI. Defendants Mischaracterize Plaintiff's Position and Stress Irrelevant Facts

Bishop Guertin characterizes Larissa's argument as, "[p]laintiff could file suit at just about any time she saw fit," and asserts that "[s]uch a rule is unsustainable." *BG's Brf*. at 29.

That supposedly "unsustainable" rule is now New Hampshire law. As of 2020, victims of sexual abuse "may commence a personal action at any time." RSA 508:4-g.

It is also the rule in other states, and in federal law. *See, e.g.,* 18 U.S.C. § 2255(b) ("There shall be no time limit for the filing of a complaint commencing an action under this section."); COLO. REV. STAT. ANN. § 13-80-103.7(1)(a) (Colorado) ("Notwithstanding any other statute of limitations …, or any other provision of law that can be construed to limit the time period to commence an action described in this section, any civil action based on sexual misconduct, including any derivative claim, may be commenced at any time without limitation."); DEL. CODE ANN. tit. 10, § 8145 (Delaware) ("A cause of action based upon the sexual abuse of a minor by an adult may be filed in the Superior Court of this State at any time following the commission of the act or acts that constituted the sexual abuse."); ME. REV. STAT. tit. 14, § 752-C (Maine) ("Actions based upon sexual acts toward minors may be commenced at any time."); VT. STAT. ANN. tit. 12, § 522 (Vermont) ("A civil action brought by any person for recovery of damages for injury suffered as a result of childhood sexual or physical abuse may be commenced at any time after the act alleged to have caused the injury or condition."); *see generally* <https://childusa.org/2023sol/>.

Moreover, the defendants mischaracterize Larissa's position. For Larissa's claims, the statute of limitations was tolled until a reasonable person

in her situation – a victim of childhood sexual abuse – would reasonably discover causation. In Larissa's case, that was in 2017, making her suit timely filed.

In their brief, the defendants attempt to cast doubt about the assaults – despite knowing McEnany was a convicted pederast – and also suggest that Larissa's trauma was caused by her mother's disbelief of Larissa's contemporaneous account of the assault. *BG's Brf*. at 9-10, 20-21. Those issues are for the jury, and are not relevant here.

The defendants also focus on the fact that McEnany is deceased. That fact is not part of any statute of limitations analysis.

VII. Statute of Limitations Was Tolled Until 2017

Bishop Guertin says that "[i]ndispensable to Plaintiff's overarching argument on appeal is the idea that Plaintiff's report to the Dean of Students 'discharged' her duty to investigate her claims." *BG's Brf*. at 27.

Not so. While Larissa argues, and the facts support, that she indeed discharged her duty of inquiry upon her report to Mansor immediately following the second assault, she argues in the alternative that the statute of limitations was tolled until 2017 when she learned Bishop Guertin had hired a known child molester.

CONCLUSION

For the reasons expressed in Larissa's opening brief, and here, this court should reverse.

Respectfully submitted,

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Dated: January 25, 2023

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CERTIFICATIONS

I hereby certify that this brief contains no more than 3,000 words, exclusive of those portions which are exempted.

I further certify that on January 25, 2023, copies of the foregoing will be forwarded to the parties registered on this court's e-filing system.

Dated: January 25, 2023

Joshua L. Gordon, Esq.