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

JOHN DOE 6, Plaintiff, v. BOY SCOUTS OF AMERICA, et al. Defendants.	)	C.A. No. 09C-07-085 CLS

On Defendants Boy Scouts of America and Del-Mar-Va Council Inc., Boy Scouts of America's Motion for Summary Judgment. **DENIED**

ORDER

Raeann Warner, Esq., Jacobs & Crumplar, P.A., Wilmington, Delaware. Attorney for Plaintiff.

Mark L. Reardon, Esq., Colleen D. Shields, Esq., Peter S. Murphy, Esq., and Brian D. Tome, Esq., Eckert Seamans Cherin & Mellott, LLC. Attorneys for Boy Scouts of American and Del-Mar-Va Council, Inc. Boy Scouts of America.

Scott, J.

Introduction

Before the Court is Defendants Boy Scouts of America and Del-Mar-Va Council Inc. Boy Scouts of America's ("Institutional Defendants") Motion for Summary Judgment on John Doe 6's ("Plaintiff") claims which were brought pursuant to the July 2007 enactment of the Child Victim's Act, 10 *Del. C.* § 8145 ("CVA"). Plaintiff alleged that in 1968, when he was about 12 years old, he was sexually abused numerous times by his scout leader, Roy Gerhard ("Gerhard"). Plaintiff asserted that the Institutional Defendants were liable for the sexual abuse for several reasons, including having constructive knowledge of the abuse. The Institutional Defendants have moved for summary judgment on the grounds that no act of alleged abuse occurred in Delaware.

Facts

One of Plaintiff's first interactions with Gerhard was in a movie theater in Philadelphia. Plaintiff asserted that, while in the theater, Gerhard touched Plaintiff's leg while Gerhard's coat was placed over both his hand and Plaintiff's leg.[1] Plaintiff also described an incident that happened before going on a trip to Maryland to earn his merit badge in boating after a Boy Scouts meeting in

[1] Pl. Resp., Ex. A, at 136:10-20.

Delaware. In the parking lot where the meeting had occurred, Gerhard allegedly "proceeded to roughly stroke for several minutes, [Plaintiff's] crotch area".[2]

Plaintiff asserted that, in April or May, Gerhard inappropriately touched Plaintiff while inside of a tent on a weekend trip at Camp Caesar Rodney ("Camp Rodney").[3] Also at Camp Rodney, in June or July, Plaintiff stated that he was fondled by Gerhard on a boat in the same manner on a Saturday and again on a Sunday. During each time, Plaintiff was driving a boat with a skier attached to it and Gerhard was acting as a safety person as part of a merit badge exercise.[4] Plaintiff stated that Camp Rodney was in an area called "Northeast" in Maryland in a location from which explosions could be heard coming from the Aberdeen Proving Grounds.[5] The fourth instance of inappropriate touching alleged by Plaintiff occurred while in a cabin in Ocean City, Maryland.[6]

Plaintiff also described an incident that made him uncomfortable which occurred when Gerhard picked Plaintiff up from his home in Delaware to take him to Gerhard's home, which was also located in Delaware. Plaintiff stated:

> "Well, the only thing that he did, and a lot of people do it, where during a conversation they'll put your hands on your knee, your

[2] Pl. Resp., Ex. B.
[3] Defs. Mot., Ex. A, at 76:11-83:11, 112:10-14.
[4] *Id.* at 83:17-84:11, 87:22-88:7.
[5] *Id*. at 89:10-19.
[6] *Id.* at 89:21-91:6.

> shoulder, whatever. And he made -- you know, he was explaining something to me and he just put his hand on my knee. But at that point, Caesar Rodney already happened in the tent, and I was really nervous about that. I do recall that one incident. And I pretty much pushed my body up against the passenger door so I could get as far away from him as I could. But nothing happened other than that."[7]

Parties' Contentions

The Institutional Defendants assert that the only alleged instances of abuse occurred either in Maryland or off the shore of Maryland. Plaintiff responds that he has, in fact, stated that there was abuse which occurred in Delaware and that summary judgment is inappropriate for this reason. Plaintiff also argues that the acts which occurred in Delaware serve to lift the statute of limitations for those acts which did not occur in Delaware.

Standard of Review

Summary judgment is to be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[8] When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party.[9] Where there is a material fact in dispute or if it seems

[7] Pl. Ex. A, at 135:1-136:1. Plaintiff also stated that he did not consider the incident in the car or in the theater to be sexual abuse, but he did feel uncomfortable. *Id.* at 147:22-148:3.
[8] Super. Ct. Civ. R. 56; *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[9] *Bailey v. City of Wilmington*, 766 A.2d 477, 479 (Del. 2001).

desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment is inappropriate.[10] If a motion for summary judgment is properly supported, the burden shifts to the non-moving party to show that there are material issues of fact.[11]

Discussion

10 *Del. C.* § 8145(b) creates a two-year window lifting the statute of limitations for "victims of child sexual abuse that occurred in this State" following July 9, 2007.[12] The statute not only allows victims to file suit against their abusers, but it also permits suit against a legal entity that had responsibility for the alleged abuser and owed a duty of care to the minor at the time of the abuse, so long as there is a finding of gross negligence.[13] The action may proceed if it is founded upon "sexual acts that would constitute a criminal offense under the Delaware Code."[14] The applicable criminal offenses must be determined by the version of the Delaware Code that was in existence when the alleged abuse occurred.[15]

Defendant's motion is denied because a question of fact exists as to whether Gerhard "lewdly and lasciviously" played or toyed with Plaintiff while in Delaware. The criminal statute upon which Plaintiff bases his case upon is 11 *Del.*

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[10] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (1962).
[11] *State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. 1991).
[12] § 8145(b).
[13] *Id*.
[14] § 8145(a).
[15] *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1258 (Del. 2011).

C. § 822 (1953) which prohibited the "lewdly and lasciviously play[ing] or toy[ing] with a child under the age of 16 years".[16] This means "as you would suppose it to mean, playing or dallying or touching or handling [the child] in an indecent and obscene manner—a manner calculated to excite the passions or arouse lustful thoughts or impulses."[17] As stated above, § 8145(b) specifically provides that redress is provided for "victims of child sexual abuse *that occurred in this State*".[18] Plaintiff described incidents that happened while in the car on the way to Gerhard's home in Delaware and in a parking lot after the scouts' meeting in Delaware. A reasonable juror could conclude that such behavior, happening in Delaware, was of the type "calculated to excite or arouse lustful thoughts or impulses." Therefore, summary judgment is denied on this basis alone.

Although summary judgment is denied based on the Delaware incidents, the Court finds it necessary to address the Maryland and Pennsylvania incidents. Plaintiff asserts that the CVA's lifting of the statute of limitations for the time-barred acts of abuse applies not only to the abuse occurring in Delaware, but to the abuse occurring out of state.[19] Plaintiff's argument is founded upon a verbal ruling

[16] 11 *Del. C.* § 822 (1953).
[17] *State v. Martin*, 183 A. 334, 334 (1936) (Defining "lewdly and lasciviously" for section 4708 of the Revised Code, a statute criminalizing "playing or toying with a female child under the age of 16 years in a lewdly and lascivious manner").
[18] (emphasis added).
[19] Plaintiff directs the Court to consider the plaintiff's brief in *Dingle* regarding this same issue. D.I. 366.

by President Judge Vaughn in the matter of *Dingle v. Catholic Diocese of Wilmington*, *et al.* C.A. 07C-09-025, where Judge Vaughn recognized that the express language of §8145(b) demonstrated that §8145(b) applied to victims of child sexual abuse which occurred in Delaware, but did not apply to victims of child sexual abuse which occurred only outside of the state. Judge Vaughn also stated that "if a person is a victim of child sexual abuse that occurred in this state, that the lifting of the bar of the civil statute of limitations applies to all of that victim's claims, all claims which were previously barred, whether they occurred in this state or without this state."[20] The Court is unable to ascertain the grounds upon which this conclusion is based on and requests that the parties submit supplemental memoranda addressing the ruling and discussing the alleged acts of sexual abuse in this case occurring outside of Delaware.

The General Assembly created the 2-year window for "victims of child sexual abuse that *occurred in this State* who have been barred from filing suit against their abusers by virtue of the former civil statute of limitations …"[21] Considering the important policy considerations regarding the protection of children from sexual abuse, which prompted the enactment of the CVA, the Court finds it unlikely that the General Assembly would have inadvertently included the limiting language, "abuse that occurred in this State" in section (b). The Court also

[20] *Id.* at 3:18-23.
[21] §8145(b)(emphasis added).

questions the legal basis which would enable the General Assembly to lift the statute of limitations for an act which occurred out of state. The parties should agree on a briefing schedule and submit supplemental memoranda addressing the Court's concerns.

For the foregoing reasons, the Institutional Defendants' Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

Date: March 5, 2013