**TRIAL REPORT FORM**

Type of Action: Child Care Center Sexual Assault By Assistant Teacher

Type of Injuries: Sexual Assault, Long Term Psychiatric Injury

Name of Case: Confidential

Court/Case#: Confidential--Fairfax Circuit Court

Special Damages: Future Medical and Other Care Costs

Settlement $2,850,000

Amount:

Submitting

 Attorney/City: Peter S. Everett

 Blankingship & Keith, P.C.

 Fairfax, VA

Other Useful Info:

**A. Facts and Evidence of Negligence**

In August 2010, John and Jane Doe, parents of four year old Jenny, sought to find a child care center for their 4 year old daughter in Fairfax County.

**Representations to Parents**

Prior to enrolling Jenny, Mrs. Doe wanted to make sure that a teacher/assistant would not be alone with her daughter at any time.  This was based upon Jane’s experience working with the children’s ministry at their church.

 To determine whether they should trust the child care center with the safety of their young daughter, Mr. and Mrs. Doe toured the school one morning, in August, before enrolling Jenny. They were taken to the Junior Kindergarten classroom and inquired about the teacher-to-student ratio and specifically asked what the child care center’s rules were for allowing teachers to be alone with students. The child care center assured them that it had two teachers in the room at all times.

 Before that meeting, Mr. Doe had spoken with a child care center employee on the phone and had been assured that two teachers would always be present in the Junior Kindergarten classroom.

 During the tour, Mrs. Doe also asked about cameras in the classroom and a front-desk assistant stated that the classrooms had windows and there was an easy view of what was going on, thus cameras were not used.

 The child care center also promised that all current employees had been thoroughly screened and had undergone criminal background checks.

 The factual representations made by the child care center employees to Jane and John were pivotal factual representations that they relied upon in deciding to entrust their daughter’s safety, protection, and care to the large child care center.

Those factual representations were not true. The Does were misled, to their detriment and to Jenny’s detriment. Teachers regularly left classrooms for significant periods of time, allowing adults access to and to be alone with vulnerable young children. In particular, teachers left classrooms for extended periods of time during naptime, when rooms were darkened and a male aide put in sole charge of the classroom.

There was in fact no clear view of what was transpiring in the Junior Kindergarten classroom. The classroom was arranged such that a teacher’s aide could and did isolate Jenny from view (e.g., behind furniture) and sexually assault her as a result.

 Whether the child care center’s misrepresentations were simply negligent or intentional, they were plainly made with the intent that the Does rely upon them, and rely they did. As a result, they enrolled Jenny at the child care center, and the child care center not only provided the perpetrator access to and the opportunity to be unsupervised and alone with vulnerable young children, they required it, with the classroom teacher gone.

 **Hiring and Retention of The Perpetrator**

The child care center had hired the perpetrator three months earlier, after he lied about his criminal and employment background--lies the child care center could readily have uncovered.

On June 16, 2010, the perpetrator applied for a position in which he would care for very young children as a “Tier 2” teacher On his job application, the perpetrator told the child care center, three times, that he had never been convicted of a crime.

 

and



and



He lied three times. The child care center had the ability to run a criminal records check and did not or did so incompetently and inexplicably neglected to discover that lie. He had been convicted of shoplifting, a crime involving trust and, more importantly, lied about it. His mother and sister--both child care center employees--presumably knew he was a convicted shoplifter, and yet withheld that information even though the child care center’s standard employment application sought it. Alternatively, The child care center director never even asked them--or did, they revealed it and the child care center ignored it.

 The child care center indicated right on the employment application that dishonesty could disqualify an applicant, and this lie, alone, certainly should have.

On his job application, the perpetrator told the child care center that he had 18 months of experience in child care and that he had worked in a licensed day care.



That was a lie--and an obvious lie--since he reported graduating from high school in 2008, and yet claimed to have been working full time in day care since February 2007.

The child care center nonetheless hired him. When a Virginia DSS investigator later interviewed the true owner of the day-care center, she was informed that the perpetrator had worked there 2 months. Again, his mother and sister--both child care center employees--knew he had little experience, and yet withheld that information or were never asked.

The perpetrator told The child care center that he had worked at a licensed day-care facility--a third lie, readily established by the DSS investigator--and one the child care center could have simply checked on-line through the DSS website. As the investigator noted following the crime:

. . . if an applicant lists work experience in a licensed facility, the dss website can be utilized to review compliance history during that applicants stated employment dates.

How did this occur? One clue lies in the application itself--the child care center’s Director interviewed the perpetrator, decided to hire him on June 16, 2010, approved her own hire on June 16, 2010, and permitted him to start on June 16, 2010--an abdication of oversight and due care.

The child care center had a history of performing incompetent background checks. In November 2008, for example, the Department of Social Services cited the child care center for a variety of violations, including a violation of 22VAC15-30-90-A-4, finding that the child care center had not appropriately documented the backgrounds of 3 staff members, one for whom the center had not secured “documentation of experience verified . . . .”

 Again, on June 30, 2009, the DSS investigator inspected the child care center and again determined that it had violated employee background requirements, this time

22 VAC15-30-90-A-2 , by virtue of an incomplete background check. The child care center promised that “[f]rom this point on we will document all details from reference checks.” It plainly did not with regard to the perpetrator.

As a result, on September 21, 2010, The child care center’s Junior Kindergarten teacher left the safety of an entire Junior Kindergarten classroom for a lengthy period of time in the hands of an unskilled, poorly vetted male--in effect promoting him into a position he was not hired for, not competent to undertake, nor should ever have been given.

**The Virginia Department of Social Services Investigation**

The Department of Social Services investigated the child care center’s action in hiring the perpetrator and uncovered the numerous hiring flaws outlined above.

After the perpetrator sexually assaulted Jenny the child care center promised to make four changes to protect children under its care, reflected in the DSS investigation:

[1] Center and Corporate management reviewed the room arrangements in each classroom to assure maximum visibility while remaining developmentally appropriate.

[2] Video surveillance and digital video recording equipment were installed in all classrooms at the center.

[3] Center managers were to “continue” to be vigilant in monitoring the building on a regular basis, especially during nap time.

[4] All employees received enhanced training in recognizing and preventing abuse and neglect offered online through Virginia Commonwealth University.

Each one of these protective measures--and several others--should have been adopted, fully, before the perpetrator assaulted Jenny.

**Sentencing**

The sexual assaults on Jenny were deeply disturbing. Judge Randy Bellows sentenced the perpetrator to 30 years, with 13 years suspended, with lifetime probation. Judge Bellows’ comments bore directly upon the civil case and the impact upon the victim:

. . . . The guidelines in this case is six years at the low end of the guidelines, 11 years and four months at the mid-point of the guidelines, and 13 years and seven months at the upper end of the guidelines.

 This is a case where for three reasons I believe it's appropriate to depart upward from the guidelines. One is the age of the victim. Two is the complete betrayal of trust, the -- involved in this case.

And third is the impact on the victim as indicated by the victim impact statement that the parties have.

 The sentence of this Court is 30 years in prison of which 13 are suspended. That's 17 to serve. It is suspended for life.

 He is placed on probation for life. Special terms of probation is that he register as a sex offender, that he not work at any point around children, that he have special -- specialized sex offender treatment to include polygraph testing, and that he have no contact with the victim in this case, Ms. Doe.

## **B. Employer Liability Under *Respondeat Superior***

Virginia’s *respondeat superior* law readily establishes liability against employers for the criminal actions of employees who victimize others. The fact that the predicate act entailed an assault does not immunize an employer:

It is manifestly right and just that both corporations and individuals be required to answer in damages for wanton and malicious assaults inflicted upon others by their servants, while acting within the scope of the servant's employment and duty, and it matters not whether the act of the servant is due to lack of judgment, the infirmity of temper, or the influence of passion, or that the servant goes beyond his strict line of duty and authority in inflicting such injury . . . .

Gina Chin & Associates, Inc. v. First Union Bank, 260 Va. 533, 540, (2000), citing Davis v. Merrill, 133 Va. 69, 74 (1922). Moreover, the employee’s actions need not be designed to further the employer's interest. *Id*. at 541-542.

 Instead, where the injury is caused by an intentional, often criminal act, clearly not contemplated by the employer as within the scope of employment, but which nonetheless was performed incident to the employment and even facilitated thereby, the test is

"whether the service itself, in which the tortious act was done, was within the ordinary course of such business." *Davis v. Merrill,* 133 Va. 69, 78, 112 S.E. 628, 631 (1922); *accord Commercial Business Systems,* 249 Va. at 44, 453 S.E.2d at 265.

Gina Chin 260 Va. at 542-543.

## **C. Direct Negligence and Fraud Claims Against The Child Care Center**

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Under the facts outlined above, the Plaintiffs pursued 5 direct negligence claims against the corporate defendant.

### *1.* *Negligent Hiring & Retention of the Perpetrator*

 2. *Violation of Rule of Two*

 *3*. *Failing to Install a Security Camera System*

 *4*. *Failing to Monitor the Classroom Adequately in Person*

*5.* *Line of Sight Violations*

## The Plaintiffs also sought recovery for fraud and violations of the Virginia Consumer

Protection Act, based upon the representations made by child care center staff that two adults would always be present in classrooms, that all current employees had been thoroughly screened and had undergone criminal background checks, and that each classroom could be readily monitored without security cameras.

##  **D. Damages**

The damages in these cases were extraordinary and deeply troubling. Before the assaults, Jenny was a sweet children, outgoing, raised by loving parents and well adjusted.

In the aftermath of the assaults, especially as she grew older, she manifested a host of tell tale symptoms of sexual assault, anxiety and post traumatic stress disorder, including profound sleep dysfunction, psychological distress, terrifying nightmares, impaired attention and academic performance, fear of males who resembled the perpetrator, fear of the police (stemming from police interviews), and incontinence and hypersexualized behavior, at a very young age.

Even worse, she is at considerable risk for deteriorating behavior, as the scientific and medical evidence make clear. “Sleeper effects,” serious symptoms that may not appear until later in life are a unique characteristic of childhood sexual abuse.

                Plaintiff’s Counsel:

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