ASSIGNED TO THE HONORABLE PARIS KALLAS
HEARING DATE: OCTOBER 23, 2009 (W/OUT ORAL ARGUMENT)

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

J.B., M.B., and D.L., Plaintiffs, vs. CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE, a sole corporation, et al., Defendants.	NO. 08-2-02341-9 SEA PLAINTIFFS' OPPOSITION TO DEFENDANTS' VARIOUS MOTIONS FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

Plaintiffs respectfully request that the Court deny the defendants' motions to dismiss and for summary judgment.

This consolidated opposition brief addresses the motions filed by the defendants in both the *J.B.* and *A.G.* cases, except for the motion of defendants Christian Brothers regarding the applicability of RCW 9.68A, which was responded to in a separate opposition brief. The present brief has been filed in both cases.

Given that this brief addresses no less than a half-dozen separate motions, and given the legal issues raised by the defendants as to the intentional and egregious nature of their misconduct, Plaintiffs respectfully request that the Court allow them to file an over length brief.

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II. STATEMENT OF FACTS

A. Starting in the 1960s, the Christian Brothers Transferred Brother Courtney Between Four Schools Because He Kept Molesting Boys

In the 1960s, the Provincial Council of the Christian Brothers became aware that Edward Courtney was a sexual predator who preyed on young boys.[1]

In 1960, Courtney was moved from his first teaching assignment at Sacred Heart Elementary School in New York to teach at Brother Rice High School in Chicago, Illinois.[2]

Courtney remained at Brother Rice until he was transferred because, as described by the Council's records, problems arose with Courtney's "homosexuality."[3] "Homosexuality" was their code word for Courtney's history of molesting boys.

In February 1968, the principal of Brother Rice High School in Chicago wrote to Provincial Frick about Brother Courtney, his assistant principal, and suggested that "change might be good for him" because of some "personality problems" and because he has "difficulty relating with adults."[4]

A few months later, after Courtney received word of his transfer, the principal wrote that Courtney "thinks we tried to dump him," but that the transfer would be good because "I think he needs change. It may mature him."[5]

Despite his abuse of boys, a few months later, in August 1968, Courtney received his State of Illinois teaching certificate.[6]

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[1] Form to Be Completed Concerning an Application for a Dispensation From Perpetual Vows or for Exclausatration, Amala Decl., Ex. 1.

[2] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at pp. 75-76.

[3] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 76; Application for Dispensation from Perpetual Vows or for Exclaustration, Amala Decl., Ex. 1, at 1; Defendant Christian Brothers unfairly used the term "homosexuality" to refer to Brother Courtney's molestations of pubescent high school students. *Id.*

[4] Letter to Frick, dated February 19, 1968, Amala Decl., Ex. 3, at 4.

[5] Letter to Louis, dated April 28, 1968, Amala Decl., Ex. 4, at 1.

[6] Illinois Teaching Certificate for Edward Courtney, Amala Decl., Ex. 5.

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Because of his abuse of students at Brother Rice in Chicago, the Provincial transferred Courtney to Brother Rice High School in Birmingham, Michigan, for the 1968-1969 school year. They promoted him to "dean of students."[7] As dean, he promptly began molesting students, as admitted by Courtney and as reported to the Provincial.[8]

On June 14, 1969, Provincial Frick wrote to the principal of Brother Rice and notified him that "[w]e thought it would be best for Chris Courtney to be changed out of Brother Rice" because "it is for the best of all concerned."[9] Courtney testified that this "change" occurred because he had inappropriately touched a student.[10] Upon Courtney's departure, the school principal, Brother D.P. Ryan wrote that Courtney "is still a bit confused. Let's hope a change of atmosphere will help him mentally."[11]

After being caught at Brother Rice in Michigan, the Provincial sent Courtney to sexual deviancy treatment.[12]

Facing these new allegations, and while still undergoing treatment, the Christian Brothers transferred Courtney again.[13] This time, in the Fall of 1969, they sent him back to Chicago to teach at St. Leo High School.[14] He lasted for all of three years, when complaints of sexual abuse reached critical mass and forced the Brothers to transfer him yet again.[15]

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[7] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 77.

[8] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 153-55, 159, 164-65; Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 32-33, 44.

[9] Letter from Brother Frick to Brother Penny, dated June 14, 1969, Amala Decl., Ex. 7.

[10] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 32-33.

[11] Letter from Brother D.P. Ryan, Amala Decl., Ex. 8.

[12] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 32-33, 44.

[13] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 42-43; Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 165.

[14] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 78-79, 165.

[15] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 101-03, 106, 159-60.

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In September 1972, the Provincial Council transferred Brother Courtney to another school in the Chicago metropolitan area, St. Laurence High School.[16] Within a short time, Courtney began molesting students there.[17] Faced with more abuse, the Council voted to keep Courtney "out of school until he had seen a psychiatrist," which he began doing.[18]

By 1973, the Provincial Council knew that Courtney had sexually molested students at four different schools in the mid-West.[19] The Council knew as much as they had transferred Courtney from school-to-school-to-school-to-school because of his sexual abuse of students.[20]

Remarkably, while he was teaching at Brother Rice in Michigan and St. Laurence in Illinois, the Christian Brothers paid for Courtney to receive sexual deviancy treatment, but they never once reported Courtney to the authorities.[21]

Despite their recognition that Courtney posed a threat to students, the Christian Brothers' newsletter from October 29, 1973, shows that Courtney was allowed to coach sophomore football: "The 32 sophomores, under Chris Courtney, are 1-2."[22]

Courtney continued molesting students. In January 1974, Courtney was physically ejected from St. Laurence in the middle of the school year for molest students.[23] He was given "a day or two" to leave.[24] The principal, Brother Manning, delivered the message: "After breakfast, Brother Manning, who was the principal, called me in to talk, and he said

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[16] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 43-45.

[17] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 159-63.

[18] Minutes of the Council Meeting Held at Ryan Hall, dated January 28, 1973, Amala Decl., Ex. 9, at 2; Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 43-45.

[19] *Id.* at 1.

[20] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 159-60, 165.

[21] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 112-13, 148-54.

[22] Newsletter dated October 29, 1973, Amala Decl., Ex. 10, at 2. CB005461.

[23] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 39-44.

[24] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 47.

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there had been complaints and basically told me I was going to have to leave at that time."[25] Manning told Courtney to get a job and get married.[26] During his entire tenure at St. Laurence, Courtney was in sexual deviancy treatment that was paid for by the Brothers.[27]

After being physically removed from St. Laurence, Brother Courtney "lived on the outside and worked at a travel agency" until late August, when the Provincial transferred him to O'Dea High School in Seattle.[28]

In March of 1974, six years after the Provincial Council first learned that Courtney posed a significant danger to students, the Council barred him from any contact with his prior three schools: "Chris is to have no contact with Rice, Leo or Laurence in any way, shape or form." This decision was made shortly after the Provincial moved the headquarters of the Western Province to Vallejo, California.[29]

The Provincial Council appointed a liaison between the Chicago-area Brothers and Courtney: "His sole contact man is to be Bernie Rohan, who will keep us informed of developments. Bernie has agreed to talk with Chris' psychiatrist when he returns from vacation around April 12th"[30]

Less than a month later, the Council considered Courtney's fate for the 1974-75 school year. They considered making him a gardener at their Provincial Headquarters in Vallejo, California, or transferring him to be an administrator at O'Dea High School in

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[25] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 41.
[26] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 41.
[27] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 43-45.
[28] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 41.
[29] Letter from McGowan to Connolly, dated July 18, 1973, Amala Decl., Ex. 11.
[30] Minutes of the Council Meeting Held at Ryan Hall, dated March 27-28, 1974, Amala Decl., Ex. 12, at 2.

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Seattle.[31] Despite a well-documented history of molesting boys, and despite knowledge that he could not be treated, the Provincial Council in Vallejo, California, chose to transfer Courtney to O'Dea.

B. After Physically Ejecting Him From St. Laurence, and After Barring Him From His Three Prior Schools, the Provincial Council Transfer Him to O'Dea

At the same time the Provincial Council considered transferring Courtney out West, to their headquarters in Vallejo or to O'Dea in Seattle, the Council was making administrative changes at O'Dea. In May 1974, Provincial McGowan appointed Brother McGraw the Principal of O'Dea High School and appointed Brother Reilly the Superior of its community, where he was partly responsible for supervising Brother Courtney.[32] Reilly also served as a teacher.[33]

During that transition, Brother McGraw wrote a letter to Provincial McGowan regarding the prospect of Courtney serving at O'Dea.[34] In that letter, McGraw contemplates whether he would be willing to assume responsibility for Brother Courtney: "I could use Chris to help with school finance work, work with the alumni, help with the gym planning perhaps, etc. But I don't know if I could keep him busy enough and I wonder if with a lot of free time in a small place if he might get up tight just looking for things to do. … And would he understand and agree to the conditions which would be set up and I guess governed by me?"[35]

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[31] Minutes of the Council Meeting Held at Ryan Hall, dated April 28-30, 1974, Amala Decl., Ex. 13, at 2; Western American Province, Amala Decl., Ex. 14, at 3.

[32] O'Dea House Annals for March through June 1974, Amala Decl., Ex. 15; deposition of Kevin Reilly, Amala Decl., Ex. 16, at 117-18.

[33] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 16.

[34] Letter from McGraw to McGowan, dated May 12, 1974, Amala Decl., Ex. 17.

[35] *Id.*

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Brother Reilly, the new Superior for the O'Dea community of Brothers, told Provincial McGowan that he believed Courtney should not be assigned to O'Dea.[36] Despite Reilly's objection, and despite the fact that the Provincial had barred him from the three prior schools at which he had served because he had molested so many students, the Council transferred Courtney to O'Dea, where he became a school administrator and member of the Archdiocesan faculty.[37]

According to the Provincial's own record, Courtney "was accepted at O'Dea after an incident at St. Laurence with a freshman boy led to his being withdrawn from the school for the remainder of the year."[38]

As Brother Courtney described it, the Christian Brothers, "probably the Provincial," informed him that O'Dea was his "final trial."[39] He Courtney testified that his "friend," Brother McGraw, and Brother Reilly Superior were both aware of his "past history," but they agreed to this "final trial."[40]

In their meeting minutes regarding Courtney's transfer to O'Dea, the Council noted that Courtney would be performing "suitable duties" at the school: "Chris Courtney has been assigned to O'Dea to perform suitable duties in the house and school under the direction of John Reilly and Pat McGraw."[41]

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[36] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 132.

[37] O'Dea House Annals for September through October 1974, Amala Decl., Ex. 18; Archdiocese of Seattle 1974-1975 Census of School Faculty, Amala Decl., Ex. 19; Application for Teacher's Certificate, dated October 23, 1974, Amala Decl., Ex. 20, at 2; Minutes of the Council Meeting l, dated September 4, 1974, Amala Decl., Ex. 21, at 2.

[38] Application for Dispensation from Perpetual Vows or for Exclaustration, Amala Decl., Ex. 1, at 2.

[39] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 6, at 167-69.

[40] Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 6, at 165-69.

[41] Minutes of the Council Meeting Held at Ryan Hall, dated September 4, 1974, Amala Decl., Ex. 21, at 2.

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Notably, one of the individuals who the Provincial charged with enforcing these "suitable duties," Brother McGraw, testified that Provincial McGowan only told him of one prior "incident" of Courtney and a student and he did not mention that it was sexual.[42] McGraw agreed that he would have imposed "totally" different duties and conditions if he had been aware of Courtney's long history of sexually molesting boys.[43] He was "surprised" to learn that the Provincial had known of Courtney's abuses since the 1960s.[44]

McGraw had, however, met with Courtney's therapist in Chicago, at Provincial McGowan's direction, and understood that Courtney should be barred from direct contact with students.[45]

Provincial McGowan also talked to Brother Reilly about the prospect of Courtney serving at O'Dea. McGowan informed Reilly that Courtney was a pedophile, which Reilly understood at the time to be an incurable disease, but he did not tell him of Courtney's long history of molesting boys.[46] Other than confining him to office work, Reilly testified that Provincial McGowan did not inform him of any other conditions.[47]

Despite his long history of sexually abusing boys, despite his on-going sexual deviancy treatment, and despite his therapist's direction that McGraw should be barred from direct access to students, the "suitable duties" imposed by the Provincial, McGraw, and Reilly did not include keeping Courtney away from students. Less than two months after he started at O'Dea, a Christian Brothers' newsletter notes that "[i]ntramural basketball conducted by

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[42] Deposition of John McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 15-16, 62-64.
[43] Deposition of John McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 67-69.
[44] Deposition of John McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 16.
[45] Deposition of John McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 13-15, 67-68.
[46] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 101-06, 133.
[47] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 107-08.

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Bart Patitucci and Ed Courtney just completed their season. … Over 75 students participated."[48]

C. 1974-1975: The Provincial Learns that Courtney Fails His "Final Trial" and Immediately Begins Molesting Boys, Including Plaintiff J.B.

Courtney failed his final trial. He began molesting boys upon his arrival at O'Dea: "He … did have a problem with a couple of boys the first year."[49] Brother McGraw learned within the first couple of months that Courtney had carried a young boy to the cook's quarters of the Brothers' private residence, supposedly to care for a low-grade fever.

Knowing that Courtney had failed his "final trial," but desperate to keep him on the Archdiocesan payroll, the Provincial Council sent Courtney to counseling with at least his third therapist, Dr. Albert M. Hurley.[50]

Just a few weeks later, on November 24, 1974, the Provincial Council cryptically acknowledges that another "situation" with Courtney had already occurred of which "the grade school students in Seattle are probably already aware." They claimed "the next incident would be the last:"

> The Council was opposed 5-0 to letting Chris Courtney do the recruiting at O'Dea since the grade school students in Seattle are probably already aware of the situation. The Consultors did not wish to make a final decision concerning Chris' case until they had talked with John Reilly. After the talk with John it was agreed that the next incident would be the last.[51]

Despite this apparent concern, less than two months later, Brother Courtney's former principal at St. Laurence, Brother Manning, wrote a glowing recommendation for Courtney to

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[48] Western American Province Newsletter, dated November 7, 1974, Amala Decl., Ex. 25, at 3.

[49] Application for Dispensation from Perpetual Vows or for Exclaustration, Amala Decl., Ex. 1, at 2.

[50] Invoice of Albert M. Hurley for visits from October 29, 1974, through July 22, 1975, Amala Decl., Ex. 22; Invoice of Albert M. Hurley for visits from August 22, 1975, through March 2, 1976, Amala Decl., Ex. 23.

[51] Minutes of the Council Meeting Held at Sierra Madre Retreat House, dated November 24, 1974, Amala Decl., Ex. 26.

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the Superintendent of Public Instruction for the State of Washington ("SPI").[52] As reflected on the recommendation form, the recommendation was required "to determine the eligibility of Brother Edward C. Courtney [address omitted] for a Washington teaching certificate" based on "an evaluation of service under your supervision."[53]

Manning unequivocally recommended Courtney, noting that he "served very efficiently as full time teacher of English and history" and that "I recommend him highly."[54] Brother Manning made this representation to SPI even though he was the Christian Brother who had physically ejected Courtney from St. Laurence, exactly one year earlier, for molesting students.[55]

Two weeks later, on January 29, 1975, SPI issued Courtney his standard Washington state teaching certificate for secondary education.[56] Brother McGraw was sent a copy of SPI's letter.[57]

Teaching certificate in hand, the Christian Brothers asked Dr. Hurley to write Courtney a letter of recommendation so that he could "teach classes at O'Dea High School this summer and during the regular school year."[58] Despite knowing Courtney's long history of sexually molesting students while in treatment, McGowan wrote to Hurley from his headquarters in Vallejo, California, and accepted Hurley's recommendation.[59]

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[52] Evaluation of Experience, Amala Decl., Ex. 27.

[53] *Id.*

[54] *Id.*

[55] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 39, 68-70.

[56] Letter from Brouillete to Courtney, dated January 29, 1975, Amala Decl., Ex. 28; deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 70-71.

[57] Letter from Brouillete to Courtney, dated January 29, 1975, Amala Decl., Ex. 28.

[58] Letter from A.M. Hurley to McGowan, dated May 13, 1975, Amala Decl., Ex. 29.

[59] Letter from McGowan to Hurley, dated May 15, 1975, Amala Decl., Ex. 30.

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At the same time, the Provincial's own Superior at O'Dea, Brother Reilly, did not believe that Courtney should be teaching at O'Dea because he was a pedophile.[60] However, he did not do anything to warn parents or students about Courtney because "[i]t wasn't my job to warn the people about Ed Courtney. I was a teacher and a coach at O'Dea. The people that were in charge were the principal and the deans, etc."[61]

That principal, on the other hand, similarly washed his hands of any responsibility for McGowan's decision to place a pedophile at O'Dea: "So Brother McGowan was well within his position to have those conversations with the Superior of the house, who then was Brother Reilly. I was a member of the community in that residence. I was principal of the school across the street. … I do not know what transpired between the Superior of the house and the Provincial."[62]

Despite their asserted lack of knowledge, or at least responsibility, Courtney's abuses were already widespread. His Vice Principal at O'Dea, Frank LaFazia, recently testified that by that point he had secretly met with McGraw and Reilly in his car because a student's older brother complained that Courtney had inappropriately touched him.[63] They told LaFazia that they would handle it: "They said they would take care of it so that was the end for me."[64]

During that same time frame, Courtney molested and assaulted Plaintiff J.B. He complained to McGraw that Courtney was "humping me," but McGraw replied that Courtney was "just really friendly." After the report to McGraw, Courtney's sexual assaults became more violent. They escalated until J.B. refused to go to Saturday detention because of fear

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[60] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 165.
[61] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 161-62.
[62] Deposition of John McGraw, Amala Decl., Ex. 24, at 43-44.
[63] Deposition of Frank LaFazia, Amala Decl., Ex. 153, at 37-44, 70-71.
[64] Deposition of Frank LaFazia, Amala Decl., Ex. 153, at 42-43.

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that he would be molested by Courtney. In response, McGraw expelled J.B. from O'Dea for his "own good," but he promised to take care of the situation.[65]

J.B.'s former Vice Principal, Frank LaFazia, corroborates J.B.'s story: "He was at O'Dea and I heard he was one of the kids that Ed Courtney bothered, as we say. I don't remember too much about him. He seemed to have a hard time, and if what was happening really was happening, I can understand it …[66]

D. 1975-1976: Courtney is Promoted to Teacher and More Boys are Molested

Despite the fact that Courtney molested several boys during the first year that he was assigned to O'Dea, the Provincial Council in Vallejo, California, returned him to O'Dea for the 1975-76 school year. The Council assigned Courtney to teach English as part of the Archdiocesan faculty at O'Dea.[67]

Shortly thereafter, Provincial McGowan visited O'Dea for a few days and attended two social functions where "he participated … as if he were a member of the O'Dea faculty."[68]

In January 1976, a boy's father reported to McGraw that his son had been molested by his teacher, Brother Courtney. Courtney told the boy to stay after class because Courtney claimed he was chewing gum. After leading the boy to another classroom and locking the door, Courtney pushed the boy to the floor, mounted him, and rubbed himself on the boy for approximately twenty minutes until he climaxed. The boy told his neighbors, who told his parents. The boy's father then went to O'Dea and told Brother McGraw.[69]

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[65] J.B. discovery responses, Amala Decl., Ex. 154, at 9-11.
[66] Deposition of Frank LaFazia, Amala Decl., Ex. 153, at 91.
[67] Archdiocese of Seattle 1975-1976 Census of School Faculty, Amala Decl., Ex. 31.
[68] O'Dea House Annals for September-November 1976, Amala Decl., Ex. 32.
[69] Deposition of D.C., dated September 8, 2006, Amala Decl. Ex. 155, at 31-37, 39-44.

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A month later, the Christian Brothers conducted their annual inspection of O'Dea.[70] Not surprisingly, the visiting Provincial noted the "complaints" coming to Brother McGraw regarding Courtney's abuses:

> Br. Courtney was and is just now a constant source of anxiety for any Principal. Because he is school Bursar he holds a key position and his loss could be a severe blow to the Principal. At the same time [Brother McGraw] cannot ignore complaints coming to his office. At the moment he has asked me to let him deal with this matter until the extent of the trouble is clarified and he is in a position to report to the Provincial. I agreed to this procedure.[71]

When describing Brother Courtney, the visiting Provincial noted that "Brother obviously has his own problems, which, just now, seem to be emerging once again. The Principal is dealing with this matter and will report to the Provincial. It seems hard to me that all the hard work of this community should be jeopardized by the conduct of this man."[72]

A month later, in early March 1976, the Superior General of the Christian Brothers visited O'Dea High School from Rome, Italy.[73] He was accompanied by the Provincial, Brother McGowan.[74] The two leaders met with Archbishop Hunthausen.[75]

E. Spring 1976: the Provincial Council Sends Courtney to Sexual Deviancy Treatment in Canada

A few weeks later, reports of Courtney's abuses caused the Provincial Council to order Courtney to make a "public apology" to the community at O'Dea:

> Chris Courtney – it was the decision of the Council that Chris should make a public apology to the community at O'Dea for his actions which jeopardized the reputation of the Brothers and the good name of the Congregation in Seattle. If

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[70] O'Dea House Annals for February-May 1976, Amala Decl., Ex. 33.

[71] Visitation Report of O'Dea High School, dated February 18, 1976, Amala Decl., Ex. 34, at 4.

[72] Visitation Report of O'Dea High School, dated February 18, 1976, Amala Decl., Ex. 34, at 5.

[73] O'Dea House Annals for February-May 1976, Amala Decl., Ex. 33.

[74] *Id.*

[75] Letter from McGowan to Hunthausen, dated March 27, 1976, Amala Decl., Ex. 35.

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> the community accepts his apology, he may remain at his post in the school until June. If they do not accept the apology, then John Reilly should get in touch with me. He would be advised then to stay with his mother until June when we would consider the case at another Council Meeting.[76]

Courtney apparently rejected that idea. On April 25, 1976, the Provincial Council reviewed Courtney's "situation' and sent him to the Southdown Institute in Canada for three months of sexual deviancy treatment.[77] Courtney testified that the Council made that decision because of his on-going problem of inappropriately touching students.[78] Brother McGraw, however, testified that McGowan did not tell him that Courtney was going to Southdown for sexual deviancy treatment.[79]

While the Provincial sent Courtney to Southdown, the O'Dea High School newspaper provided cover for the Christian Brothers by telling students and faculty that Courtney "has gone to Canada for his Tertianship."[80] Their own community of Brothers was either ignorant of Courtney's problem or assisted in the cover-up, noting in their House Annals that "Brother Chris Courtney left here yesterday for an indefinite period to take a much needed rest at a place called Southdown Institute, Toronto, Canada. We hope to see him back 'home' again in good condition to face the next scholastic year, 1976-1977."[81]

Courtney's point-of-contact with the Christian Brothers while at Southdown was the Provincial himself, Brother McGowan. When Courtney wrote about spending money, the Council directed the Provincial to contact Southdown regarding its policy on spending

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[76] Minutes of the Council Meeting, dated March 27, 1976, Amala Decl., Ex. 36.
[77] Minutes of the Council Meeting, dated April 25, 1976, Amala Decl., Ex. 37, at 2.
[78] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 84-85.
[79] Deposition of John McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 43.
[80] Crosier, dated May 28, 1978, Amala Decl., Ex. 38.
[81] O'Dea House Annals, February-May 1976, Amala Decl., Ex. 33.

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money.[82] Courtney's bills for sexual deviancy treatment were sent to the Provincial Headquarters in Vallejo, California.[83]

It is worth noting that although the Provincial Council had removed Courtney during the middle of the school year and sent him all the way to Canada for treatment, McGowan in his final report on Courtney's abuses claims that "nothing serious enough to warrant alarm on the part of the Principal transpired" during his second year.[84]

F. 1976-77: Brother Courtney Continues Teaching and Continues Molesting Boys; He Is Allowed to Teach Summer School with Brother Reilly

Despite Courtney's long history of sexually abusing boys, and his history of molesting boys at O'Dea during his first two years at that school, the Provincial Council returned Courtney to O'Dea for the 1976-77 school year. When that school year began, the Council assigned him to teach English on the Archdiocesan faculty.[85]

Just a few months later, the Provincial sent Courtney back to Southdown for another six days of sexual deviancy treatment.[86] Again, the bill was sent to the Provincial.[87]

Shortly thereafter, during February 1977, Provincial McGowan conducted a six-day visit to O'Dea in order to "see that operations were functioning smoothly at school and at the Brothers' House."[88]

Before the end of that school year, another boy reported to Brother McGraw that he had been molested by Courtney in the new locker room, but nothing was done.[89]

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[82] Minutes of the Council, dated May 30, 1976, Amala Decl., Ex. 39, at 2.
[83] Bills of George Freemesser, dated June 25, 1976, and July 30, 1976, Amala Decl., Exs. 40 and 41.
[84] Application for Dispensation from Perpetual Vows or for Exclaustration, Amala Decl., Ex. 1, at 2.
[85] Archdiocese of Seattle 1976-1977 Census of School Faculty, Amala Decl., Ex. 42.
[86] Southdown record, dated January 9, 1977, to January 15, 1977, Amala Decl., Ex. 43.
[87] Bill of George Freemesser, dated January 31, 1977, Amala Decl., Ex. 44.
[88] Crosier, dated March 11, 1977, Amala Decl., Ex. 45, at 1.
[89] Deposition of A.C., dated December 28, 2006, Amala Decl., Ex. 156, at 86-91, 119.

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This was near the same time that Plaintiff M.B. was sexually assaulted by Courtney. As with a number of other boys, Courtney invited M.B. to play handball at Seattle University. After they were finished, Courtney took M.B. to his mother's house under the guise of delivering groceries. Courtney then attacked M.B., wrestled him to the ground, and ground his penis onto M.B. until he ejaculated.[90]

It was also during this time period that Courtney began grooming and sexually abusing Plaintiff D.L. The first abuse took place when D.L. visited O'Dea during his eighth grade year and continued through the 1977-78 school year.[91]

Despite his long history of molesting boys before and at O'Dea, in June 1977 the Christian Brothers allowed Brother Courtney to teach summer school at O'Dea: "Brother Reilly and Courtney will be the only two Brothers teaching this summer at O'Dea."[92]

G. 1977-1978: Brother Courtney Continues Teaching and Continues Molesting Boys

Despite Courtney's long history of sexually abusing boys, and his history of molesting boys at O'Dea during his first three years at that school, the Provincial Council returned Courtney to O'Dea for the 1977-78 school year. When that school year began, the Council assigned Courtney to teach English on the Archdiocesan faculty.[93]

Shortly thereafter, in September 1977, Brother Frank McGovern replaced Brother Reilly as the new Superior of the O'Dea community and as a member of the teaching staff.[94] Two months later, Provincial McGowan visited O'Dea. During that visit, O'Dea hosted

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[90] M.B. discovery responses, Amala Decl., Ex. 157, at 10-11.
[91] D.L. discovery responses, Amala Decl., Ex. 158, at 10-11.
[92] O'Dea House Annals, April-June 1977, Amala Decl., Ex. 46.
[93] Archdiocese of Seattle 1977-1978 Census of School Faculty, Amala Decl., Ex. 47, at 1.
[94] O'Dea House Annals, September 1977, Amala Decl., Ex. 48.

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Archbishop Hunthausen for dinner, where the Archbishop provided $30,000 for the school's new library and media center.[95]

The Christian Brothers were well aware of Courtney's teaching certificates. Their "fact sheet" for Courtney dated December 31, 1977, notes that he maintained valid teaching certificates in both Illinois and Chicago.[96]

Just a short while after acknowledging his teaching certificates, in the spring of 1978, the Provincial reported that "there was another confrontation of parents with [the] Principal telling of three incidents during the year when their son had been abused."[97] During this time, as discussed above, Courtney continued molesting Plaintiff D.L.

Presumably facing the prospect of being reported to law enforcement by that mother, the Provincial Council decided to put an end to their "final trial" with Courtney at O'Dea:

> Chris Courtney had his meeting in Southdown with Mark Eveson, Mark's wife and Father Freemesser. It was recommended that he be assigned to a school in the Toronto area and receive periodic counseling from Mark Eveson. The Council recommended the following:
>
> a) Have Chris changed out of O'Dea.
>
> b) Since it would not be fair to the Canadian Province to have them take on one of our problems, Chris should be assigned to Cody Hall to supervise house maintenance, etc.
>
> c) Arrangements should be made with Doctor Korzenowski for periodic therapy.[98]

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[95] O'Dea House Annals, October-December 1977, Amala Decl., Ex. 49.

[96] Individual Brother's Fact Sheet, Western American Province, dated December 31, 1977, Amala Decl., Ex. 50.

[97] Application for Dispensation from Perpetual Vows or for Exclaustration, Amala Decl., Ex. 1, at 2.

[98] Minutes of the Council, dated June 12, 1978, Amala Decl., Ex. 51; *see also* deposition of John McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 22 (testifying that Cody Hall "was a training house for young Brothers").

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H. The Defendants Take No Action Regarding Courtney or His Credentials

Despite recognizing that Courtney was "one of our problems" and that he needed close supervision far away from any school children, the Christian Brothers took no action to ensure his teaching days were over.

The Archdiocese's principal, Brother McGraw, made no such effort, either. The only "authority" to which he reported Courtney's abuses was Provincial McGowan. McGraw failed to report Courtney to the state authorities, even though he was aware that teachers in Washington at the time had to have a valid teaching certificate, he was aware of the mandatory reporting laws, and he understood that those laws were intended to ensure that that the state became aware of problems between teachers and students. When asked why he did not report Courtney to SPI, McGraw responded, "I don't remember."[99]

Similarly, Brother Reilly admitted that he was aware of Washington's mandatory reporting laws while he was a teacher at O'Dea, but that he would have reported Courtney's abuses only to Provincial McGowan.[100]

McGraw did provide one explanation for his failure to protect the boys at O'Dea from Brother Courtney. When asked why he never ejected Courtney from the school, Brother McGraw responded that "I would have reported incidents to the Provincial, and it would have been up to the Provincial." He agreed that his hands were tied:

> Q: Could you have at any point during your time as principal at O'Dea just kicked him out and said I don't want him here anymore?
>
> A: My input was always to the Provincial.
> …

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[99] Deposition of Brother McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 75-77, 95-96, 119-20.

[100] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 53, 138-39.

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Q: Your hands were tied, then. You could not have removed Courtney yourself from O'Dea High School based on the problems that you knew he was having.

…

A: My job, as I saw it, was subject to reporting to my immediate supervisor. My immediate superior in the Congregation [of] Christian Brothers was Brother McGowan. It is to him that I provided all information that I had had.

Q: And then it was his decision whether or not to remove Courtney from the school; is that correct?

A: It would have been his decision, yes.[101]

Brother Reilly concurred: "The government doesn't ask you. They tell you."[102]

At the end of 1978, the Provincial summarized the Council's knowledge of Courtney's abuses at O'Dea in a two-page letter regarding Courtney's request for exclaustration: "Chris has had a problem with homosexuality for a number of years. It seems to have surfaced more than ever within the past five years or so."[103]

The letter then goes on to note the Council's knowledge that Courtney abused boys at O'Dea every year from 1974 through 1978. The Provincial concludes that Courtney should never step foot in a school again:

> I do not believe he should be teaching at all and that he would be much better off physically, mentally, emotionally and spiritually anywhere except in a teaching Congregation.[104]

Despite Provincial McGowan's belief that Courtney should never again step foot in a classroom, despite Reilly's belief that Courtney was an incurable pedophile, and despite the numerous complaints that McGraw received over the four years that Courtney taught at

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[101] Deposition of Brother McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 17-18, 38-39.

[102] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 133.

[103] Amala Decl., Ex. 1.

[104] *Id.* at 2.

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O'Dea, neither the Christian Brothers nor the Archdiocese have produced any evidence to show that they reported Courtney to the authorities or tried to prevent him from teaching.[105]

To his credit, Brother Courtney admits he sexually abused multiple students at O'Dea, and he recalls being confronted with these allegations by Provincial McGowan, McGraw, and Reilly.[106] During at least one of those confrontations, Courtney testified that he admitted to inappropriately touching a student, and he testified that he was terminated from O'Dea for "inappropriate touching."[107] This ended Courtney's teaching days at O'Dea; but sadly for others, not the end of his teaching career or his career as an unreported sexual predator.

I. Rather than Report Courtney to the Authorities, the Defendants Assist Him in Obtaining Teaching Certificates and Administrator Credentials

The Christian Brothers were initially going to transfer Brother Courtney to yet another school, but instead they granted his request to take a "leave of absence."[108]

Despite that slight change in status, however, the Christian Brothers paid for Courtney to obtain his Masters in Teaching Administration from Seattle University so that he could earn principal accreditation from SPI.[109] At the same time, in the late spring and early summer of 1978, no less than three Christian Brothers who knew that Courtney was a serial sexual predator[110] wrote letters of recommendation on his behalf in an effort to help him obtain future employment as a school teacher and administrator:

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[105] Amala Decl., at ¶ 54.

[106] Deposition of Edward G. Courtney, dated August 30, 2007, Amala Decl., Ex. 52, at 14-21; Deposition of Edward Courtney, dated July 14, 2005, Amala Decl., Ex. 2, at 144-45, 171-72, 176-77.

[107] Deposition of Edward G. Courtney, dated August 30, 2007, Amala Decl., Ex. 52, at 14-21.

[108] Deposition of Edward G. Courtney, dated August 30, 2007, Amala Decl., Ex. 52, at 14, 20-21.

[109] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 135-36.

[110] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 39-40 (Rohan) and 140-42 (Bates).

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Brother James C. Bates, Director of Education, Christian Brothers, Canada:

> "Br. Courtney is a most industrious and generous individual … As a teacher Br. Courtney maintains a fine atmosphere in his classroom. Students respond well to his personality and motivation. … I am pleased to recommend Edward C. Courtney as a competent and reliable teacher or administrator."[111]

Brother Gerald Rohan, former Master of Novices and Provincial Council member:

> "He set high standards and expected the best from each student. He maintained good order in his classes without being harsh and rigid. … He was able to handle the complaints of parents, teachers and students in a calm and diplomatic manner. … I am happy to recommend Brother Courtney for a position in the schools of the Archdiocese of Seattle."[112]

Brother John McGraw, Principal of O'Dea High School:

> "I believe Mr. Courtney would be an excellent addition to any school's administration as his skills and talents have been a major cause of the recent growth and academic strength of O'Dea High School."[113]

At the same time, Brothers Bates, McGraw, and Donnelly, who served as principal of Brother Rice in Michigan and St. Laurence while Courtney was abusing students at those schools, wrote similar letters of recommendation for Courtney's file with the Office of Teacher Placement for Seattle University to help him maintain his teaching credentials.[114]

On September 5, 1978, after securing the above recommendations and well on his way to a Masters in Teaching Administration from Seattle University, Courtney wrote to Provincial McGowan and, in accord "with our telephone conservation this morning,"

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[111] Letter from Bates to Sister Agnes, dated June 24, 1978, Amala Decl., Ex. 53.

[112] Letter from Rohan, dated June 26, 1978, Amala Decl., Ex. 54.

[113] Letter from McGraw, dated June 28, 1978, Amala Decl., Ex. 55.

[114] McGraw recommendation, Amala Decl., Ex. 56; Bates recommendation, Amala Decl., Ex. 57; Donnelly recommendation, Amala Decl., Ex. 58.

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requested an official leave of absence from the Christian Brothers so that he could "consider more fully my future as a religious Brother and my ability to live the vowed life."[115]

That same day, Courtney received a letter from SPI regarding Courtney's request to broaden his Washington teaching certificate. Among other items, the letter noted that Courtney needed "student teaching at the elementary level."[116]

Despite his long history of abusing students at O'Dea, the Archdiocese assisted Courtney in that endeavor by creating an "Administrative Assistant and Administrative Intern" position for Courtney at Our Lady of the Lake elementary school.[117] Courtney created the position with Sister Mary Patrick in the Archdiocese's Office of Education.[118]

Five days later, on September 10, 1978, Provincial McGowan and his Council voted 5-0 to grant Courtney one year of exclaustration, which meant Courtney was still a Brother but he lived apart from the community.[119]

Less than three months later, Courtney anxiously wrote to the Archdiocese's Office of Education about expanding his Washington State teaching certificate. In order to do so, he asked that Office to have its Superintendent, Father Clark, provide a statement of satisfactory experience for SPI that would verify his ninety days of service in his Archdiocese-created position at Our Lady of the Lake.[120]

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[115] Letter from Courtney to Felix, dated September 5, 1978, Amala Decl., Ex. 59.

[116] Letter from Terrey, dated September 5, 1978, Amala Decl., Ex. 60.

[117] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 134-37.

[118] Deposition of Edward Courtney, dated April 13, 2009, Amala Decl., Ex. 6, at 136, 143-44.

[119] Minutes of the Council, dated September 10, 1978, Amala Decl., Ex. 61; Deposition of Charles Gattone, dated May 19, 2008, Amala Decl., Ex. 62, at 41-43.

[120] Letter from Courtney to Sister Agnes, dated November 27, 1978, Amala Decl., Ex. 63.

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On November 29, 1978, Father Clark obliged: "As far as we can determine his work has been entirely satisfactory and we endorse and recommend his application for the K-12 teaching certificate and Administrators Credential."[121]

Five weeks later, Courtney applied to SPI for a Standard K-12 Teaching Certificate. As an "experienced teacher," he was required to provide a list of his past employment (all with the Christian Brothers and the Archdiocese) and the verification of service that he had recently obtained from Father Clark.[122] After receiving his application and Clark's letter, SPI issued Courtney his new teaching certificate, a copy of which was sent to the Archdiocese.[123]

Newly-minted teaching certificate in hand, Courtney updated the Archdiocese's Office of Education regarding his efforts to obtain Principal's Credential by June and noted that he would "receive my Master's degree in Educational Administration in August of this year." He thanked that Office "for adding my name to the list of prospective candidates" for the following school year.[124]

Courtney then asked the Archdiocese's Office of Education to fill-out a recommendation form for his placement file at Seattle University because "it would be a good thing for the future."[125] Again, the Archdiocese's Superintendent, Father Clark, obliged, verifying that Courtney served "as assistant to the Principal" at Our Lady of the Lake for the past school year. But he also went one step further, recommending Courtney "for principalship in our schools" and expressing "confidence that he will bring the same expertise

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[121] Letter from Clark to Brouillet, dated November 29, 1978, Amala Decl., Ex. 64.

[122] Application for Certificate, dated January 4, 1979, Amala Decl., Ex. 65.

[123] Teaching certificate dated February 4, 1979, Amala Decl., Ex. 66; *see also* letter from Nore to Courtney, dated February 23, 1979, Amala Decl., Ex. 67.

[124] Letter from Courtney to Sister Agnes, dated February 22, 1979, Amala Decl., Ex. 68.

[125] Letter to Sister Agnes, Amala Decl., Ex. 69.

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and concern to other situations that the has demonstrated this year at Our Lady of the Lake."[126]

J. With the Help of Defendants, Courtney is Appointed Principal of St. Alphonsus Parish School

On February 27, 1979, Courtney's point-of-contact with the Office of Education, Sister Huck, sent out a memo and noted that Courtney had applied to be the Principal of St. Alphonsus Parish School, an Archdiocesan elementary school. This letter was sent out to "Pastors, Principals, Local Education Committee," a group that would have included Courtney's former principal, and now endorser, Brother McGraw.[127] In his application, Courtney listed only Sister Mary Patrick and Brother McGraw as his references, and noted that he was certified to act as a principal in Washington "as of June 1979."[128]

A week later, presumably (or hopefully) oblivious to Courtney's decade-long history of molesting boys, Sister Mary Patrick recommended Courtney as "a man of high moral standards" that "will be an asset to any school either public or private in the capacity of administrator or teacher. I recommend him without any reservation."[129]

On June 13, 1979, the Archdiocese appointed Brother Courtney the principal of St. Alphonsus Parish School. In her welcome letter on behalf of the Archdiocesan Office of Education, Sister Huck noted that "[a]s a teacher in our schools during the past years we certainly feel at home with you."[130]

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[126] Form from Office of Teacher Placement, Amala Decl., Ex. 70.
[127] Letter from Huck, dated February 27, 1979, Amala Decl., Ex. 71.
[128] Principal Application Form, Amala Decl., Ex. 72.
[129] Letter from Sister Patrick, dated March 5, 1979, Amala Decl., Ex. 73.
[130] Letter from Huck, dated June 13, 1979, Amala Decl., Ex. 74.

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Two weeks later, on June 25, 1979, Brother Courtney signed his St. Alphonsus contract with the Pastor of St. Alphonsus, Jeff Sarkies.[131] This was not unusual as Sarkies was actively involved with administrating St. Alphonsus Parish School.

Prior to Courtney being hired as principal, Sarkies was listed by the Archdiocese as the contact person for that position.[132] He was also sent a copy of the standardized Archdiocesan principal contract that he eventually signed with Courtney.[133]

Four days after Courtney signed his principal contract with Sarkies, an "Administrator's Credentials Checklist" from Seattle University, where Courtney's placement file was kept, notes that Courtney (1) had a Standard Teaching Certificate as of February 1979, (2) had completed an internship at the appropriate level, (3) had completed three years of teaching experience and two years at the appropriate level, and (4) had verified elementary experience.[134]

Three days later, SPI issued Courtney his Provisional Secondary Principal Teaching Certificate, which validated Courtney for four years of service as a principal. It noted that his "Recommending Agency" was Seattle University.[135]

K. Father Sarkies, Pat Crowley, Father Clark, and the Archdiocesan Office of Education Learn that Courtney is Molesting Students at St. Alphonsus, But Do Nothing; He is Visited by McGowan and He Asks McGraw to Speak at Graduation, But They Do Nothing

While principal of St. Alphonsus, Father Sarkies, Pat Crowley, Father Clark, and the Archdiocese's Office of Education all learn that Courtney has abused students at St.

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[131] Standardized Principal Contract, dated June 25, 1979, Amala Decl., Ex. 75.

[132] Memorandum from Huck, dated May 29, 1979, Amala Decl., Ex. 96.

[133] Letter from Hunthausen re: contracts for the 1979-1980 school year, Amala Decl., Ex. 97.

[134] Administrator's Credentials Checklist, Amala Decl., Ex. 76.

[135] Certification Record Form, Amala Decl., Ex. 77.

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Alphonsus and/or O'Dea. He is also visited by Provincial McGowan and asks McGraw to speak at graduation. Nobody reports him.

Very early in the 1979-1980 school year, Father Sarkies heard a rumor from his secretary, Mary Ellingsen, that Courtney had engaged in "bonding" with male students at O'Dea. Ellingsen related this rumor with a "concerned voice" and "thought it might be problematic if Ed Courtney came as principal to Saint Alphonsus."[136]

Sarkies called O'Dea High School and spoke with Courtney's former principal, Brother McGraw, to ask him about the rumor. McGraw told him "that it was only rumor – that there was no substance."[137]

In addition to relying on McGraw's confirmation of "only rumor," Sarkies testified that he relied on the Archdiocese's Office of Education to screen Courtney before adding him to the list of principal candidates for St. Alphonsus, and that he relied on that Office to establish that Courtney was certified and qualified.[138] With their recommendations, Sarkies allowed Courtney to serve as principal of St. Alphonsus.

During his time as principal, Courtney admits he molested at least two or three students, although the defendants are aware of at least six victims from St. Alphonsus.[139]

Meanwhile, the Christian Brothers continued to correspond with Brother Courtney. On December 12, 1979, Provincial McGowan responded to a December 3rd letter from Courtney regarding "many of the questions of the Council." The Provincial noted that Courtney had requested an extension of his exclaustration and that it had been sent to the

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[136] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 87-89, 93-94, 97-98.
[137] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 87-89, 93-94, 97-98.
[138] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 20, 27.
[139] Deposition of Edward G. Courtney, dated August 30, 2007, Amala Decl., Ex. 52, at 64-65.

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Superior General. "You present may interesting options in your letter. Hopefully we will be able to consider them after your request for an extension is approved."[140]

A few months later, on April 5, 1980, Provincial McGowan wrote Courtney "concerning our conversation of March 12th" because the Superior General "feels that you should request a dispensation at this time and then apply for readmittance at a later date if you so desire."[141] There appears to be one very good reason for the General's desire to have Courtney dispensed as a Brother. McGowan had visited Courtney at St. Alphonsus in early 1980 while he was principal of the elementary school:

> I would say that you seem to be doing very well at the present time as Principal of that elementary school that we visited. … If I were you, I would stick with that until He should point out to you that He has another direction for your life. Whether in or out, Chris, you know that you can always count on the many friends you have made in the Congregation over the years, not the least of which is the Superior General himself.[142]

Later that month, McGowan and his Council voted to have Courtney decide his future with the Christian Brothers. McGowan forwarded Courtney's letter to the Superior General in Rome with the Council's recommendations.[143]

Shortly thereafter, Courtney wrote to Father Sarkies about a telephone conversation that Courtney had with Provincial McGowan and stated that he was being forced to decide whether to withdraw from the Christian Brothers or resume active status. Courtney chose to resign from St. Alphonsus: "Since I do not wish to choose the former, my only alternative is the letter. … Accordingly, it will be necessary for me to resign my position as principal of St.

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[140] Letter from Felix, dated December 12, 1979, Amala Decl., Ex. 79.

[141] Letter from McGowan, dated April 5, 1980, Amala Decl., Ex. 80.

[142] Letter from McGowan, dated April 5, 1980, Amala Decl., Ex. 80.

[143] Minutes of the Council Meeting, dated April 20, 1980, Amala Decl., Ex. 81.

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Alphonsus School effective June 30, 1980, as I will be unable to contract for another year of service at this time."[144]

Given what happened next, it is unclear whether Courtney's resignation letter was genuine or part of a cover story fabricated by himself, Father Sarkies and Patrick Crowley, the Archdiocese's in-house attorney.

Around that time, Father Sarkies was confronted with allegations that Courtney had sexually abused a student.[145] In response, Sarkies consulted with the Archdiocesan Office of Education about terminating Courtney. He spoke about the allegations with Father Clark, the Archdiocesan Superintendent, and possibly Sister Mary Taylor, his Assistant Superintendent.[146] He also met with Courtney's former principal, Brother McGraw, to ask him about Courtney's history.[147] McGraw informed Sarkies of Courtney's history of sexually molesting students at O'Dea.[148]

After consulting with McGraw, Clark and possibly Taylor, Sarkies states that he confronted Courtney with the Archdiocese's in-house attorney, Patrick Crowley. At that meeting, Courtney admitted to the abuse, and he asked Courtney to resign.[149]

As discussed above, it is unclear whether the resignation letter discussed above was an elaborate effort of smoke and mirrors.

However, on May 27, 1980, Courtney wrote to Father Sarkies and apologized "for the embarrassment and distress that I have caused you recently. It is most unfortunate and I am

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[144] Letter from Courtney to Sarkies, dated May 19, 1980, Amala Decl., Ex. 82.

[145] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 25-26, 42-43.

[146] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 26; Deposition of Agnes Huck, dated June 13, 2008, Amala Decl., Ex. 83, at 16-19.

[147] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 50.

[148] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 52-53.

[149] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 26, 53, 69-70, 85.

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truly sorry." He then asked to withdraw his resignation because "I have assessed the climate during the past week and I do not feel that my remaining would be a source of further embarrassment to me or to others. This assessment includes the attitude I've witnesses from among the students including the sixth graders. The situation … apparently has not been spread any further and would, I believe, not likely be believed by others anyway."

Courtney further rationalized that "I fully realize the seriousness of this situation," but that "I do feel that there was some exaggeration involved in the charges." He promised that "I have not only seen to it that I do not relate improperly to the students, but I am presently getting therapeutic help as an aid in eliminating the problem. … I am resolved that this misconduct will not re-appear!" He begged Sarkies to let him remain as principal.[150]

After receiving this letter, Father Sarkies consulted with Father Clark and his Office of Education. Although Courtney would be removed, Sarkies and Crowley brokered a deal with Courtney and the complaining parents in order to protect the "name and reputation" of the Archdiocesan school:

> After consultation with the Office of Education and following their advice I have decided to accept your letter of resignation and take it as final. I do so with reluctance. …
>
> Ed, it is important that you understand the reason we were able to keep the matter that led to your submitting a letter of resignation quiet was because the parents concerned, who also admired your abilities, were assured that since there were only two weeks left of the school year, you would be allowed to finish the year as usual. But they were also assured that you would then terminate which was in keeping with the agreement we reached in the discussion we had with Mr. Pat Crowley, the Archdiocesan Attorney.
>
> … At the same time it is clear to me that if you were to follow the original cause of action you would there by be allowed to save face and leave the area with the respect and admiration of the majority of the St. Alphonsus School people. To

[150] Letter to Father Sarkies, dated May 27, 1980, Amala Decl., Ex. 84.

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> alter that course would be to run the very real risk of turning this situation into a cause célèbre thereby doing damage to your name and reputation and that of the school.[151]

With the "name and reputation" of Archdiocese protected, Courtney left St. Alphonsus with his own "name and reputation" unscathed and with the "respect and admiration of the majority of the St. Alphonsus School people."

On his way out, Courtney invited Brother McGraw to speak at the St. Alphonsus graduation. Despite seeing that Courtney was the principal of a grade school, McGraw made no effort to report his Brother to the authorities.[152]

L. The Defendants Transfer Brother Courtney to the Public School System

Despite this second major blow-up at an Archdiocesan school, no steps were taken to ensure that Courtney's teaching days were over. Instead, the defendants got rid of their problem by helping him obtain employment in the public school system.

Father Sarkies testified that he did not take any steps to have SPI strip Courtney of his teaching certification because Archdiocesan policies dictated that Father Clark was responsible for informing SPI of adverse employment actions. He assumed Clark would contact SPI to decertify Courtney, particularly where he and Clark had been consulting with Crowley, the Archdiocese's attorney.[153]

Although Sarkies was relying on Clark and Crowley to ensure that Courtney never returned to the classroom, it is clear that Sarkies also qualified as a mandatory reporter because he was actively involved in running St. Alphonsus Parish School.

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[151] Letter from Sarkies to Courtney, dated June 5, 1980, Amala Decl., Ex. 85.

[152] Deposition of John McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 93-96.

[153] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 30-31, 68-69, 98-99.

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For example, just a few months before he would remove Courtney from St. Alphonsus, Father Sarkies was sent a timeline and personnel forms to use as he considered "employment and re-employment of your school personnel."[154] A few weeks after that, he received formal notice that Clark's Office would visit his school on January 31st to review "implementation of Religion, English, and Social Studies."[155] Despite his active involvement with Archdiocesan schools, he never reported Courtney to the authorities.

Instead, he relied on Clark to report Courtney. But rather than do that, Clark wrote Courtney a "thank you" letter for his service and another letter of recommendation for his teaching file. The former includes an expression of "our appreciation and best wishes as you leave your position as principal of St. Alphonsus School" and wishes "[g]ood luck to you in your new endeavors."[156] (Ironically, Brother McGraw received the identical letter that same day for his service at O'Dea.)[157]

The latter was written directly to a Certification Office for the State of Illinois. In it, Clark confirms Courtney's four years of service at O'Dea, his service as "principal intern" at Our Lady of the Lake, and his year as principal of St. Alphonsus. He represents that "[w]e are sorry to lose Edward as he is an excellent teacher and administrator," and concludes by making sure the State of Illinois knows that Courtney "is certified as a teacher grades K-12 and has provisional administrator credentials, issued by the State of Washington."[158]

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[154] Letter from Huck, dated January 2, 1980, Amala Decl., Ex. 98.

[155] Letter from Perri, dated January 18, 1980, Amala Decl., Ex. 99.

[156] Letter from Clark to Courtney, dated May 30, 1980, Amala Decl., Ex. 86.

[157] Letter from Clark to McGraw, dated May 30, 1980, Amala Decl., Ex. 87.

[158] Letter from Clark to the Educational Service Region, Certification Office, dated June 30, 1980, Amala Decl., Ex. 88.

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Sarkies testified that these letters were written after Clark was fully aware that Courtney was being terminated for inappropriately touching a student, which was no later than May 30, 1980.[159] As if his letters of recommendation were not sufficient, Clark then verified Courtney's teaching and principal experience with SPI,[160] even though Sarkies was relying on Clark and Crowley to do the opposite so Courtney could never teach again:

> Q: You were relying upon Father Clark to take the appropriate action to prevent Edward Courtney from using the service record verification and a certificate to become reemployed in a teaching setting, correct?
> …
> A: Correct.
> …
>
> Q: By keeping the allegations against Courtney and his own admissions confidential, didn't that, then, allow others to write positive recommendations since they did not have the knowledge that you did?
>
> A: It could have, yes.
> …
>
> Q: Was that a concern of yours at the time that the matter regarding Courtney was kept confidential?
>
> A: It was not a concern of mine at the time.
>
> Q: Why not?
>
> A: Because I was working with an attorney and followed the directions – we consulted back and forth on what was the best way to approach and resolve the matter.[161]

When shown a copy of Clark's letter of recommendation, Sarkies admitted he was shocked that Clark did not disclose the abuse.[162] Sarkies refused to write a similar letter

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[159] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 43-44, 55.

[160] Service Record Verification for Edward Courtney, dated September 11 and 18, 1980, Amala Decl., Ex. 89.

[161] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 74-75, 98-99.

[162] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 55-56.

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because "I didn't feel, in conscience, that I could recommend him."[163] He further agreed that he did not want to recommend Courtney to another school because of fear that he would molest other students at other schools.[164] He could not do so in good conscience.[165]

There is no question that Father Clark and his Office of Education understood the importance of Courtney's teaching certificate and service verification, which was required on the back of the teaching certificate.[166] Each year, from at least 1977 through 1980, the Archdiocese reminded its principals that "[s]tate law is explicit on Washington Teacher Certification" and mandated that "as of May, 1975, … [t]he verification of successful teaching experience must be signed by Father Clark, Archdiocesan Superintendent. … Upon verification of experience, the forms will be returned to the teacher. Applicant is then responsible to send forms to the E.S.D. office."[167]

When that letter was sent for the upcoming 1979-1980 school year, the same school year that Courtney was eventually removed from St. Alphonsus and then endorsed by Clark, Father Clark's Office added that "Universities require verification of teaching experience to renew certificates. Only the signature of the Superintendent of Catholic Schools is accepted."[168] The emphasis is in the original.

Further, it is indisputable that Father Clark and his Office of Education understood the ramification of writing letters of recommendation for Courtney's placement file and endorsing

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[163] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 67.

[164] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 67-68.

[165] Deposition of Sarkies, dated September 30, 2009, Amala Decl., Ex. 78, at 68.

[166] *Cf.* Professional Education Certificate for Edward Courtney, Amala Decl., Ex. 90.

[167] Notes to Elementary and Secondary Principals, Archdiocese of Seattle, 1977-78, Amala Decl., Ex. 91, at 3; Notes to Elementary and Secondary Principals, Archdiocese of Seattle, 1978-79, Amala Decl., Ex. 92, at 2-3; Notes to Elementary and Secondary Principals, Archdiocese of Seattle, 1979-80, Amala Decl., Ex. 93, at 2-3. (emphasis added).

[168] Notes to Elementary and Secondary Principals, Archdiocese of Seattle, 1979-80, Amala Decl., Ex. 93, at 2-3. (emphasis added).

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his service in the Archdiocese's school system. As his Office dictated to Archdiocesan principals on October 2, 1978, and May 15, 1979:

> This office does not maintain individual teacher personnel files. Letters of recommendation should be sent to the teacher's placement file at the college or university which maintains the teacher's record.
> …
>
> Verification of employment as requested on the back of the teaching certificate requires the signature of Father Clark at the time a teacher leaves the Seattle Archdiocesan system, e.g., seeks employment in the public schools or other private schools. …
>
> Verification of employment as requested on an application for renewal of certification requires the signature of Father Clark. The Archdiocesan Office of Education does not process applications. Teachers mail forms directly to the Educational Service District once Father Clark has verified the teaching experience and signed the application.[169] (emphasis in original 1979 letter)

The failure to act of Clark, Crowley, McGraw, and Sarkies had other ramifications. Presumably ignorant of Courtney's long history of abusing Archdiocesan boys, at least six other Archdiocesan teachers and administrators provided glowing recommendations for Courtney's placement file at Seattle University, the "recommending agency" on his teaching certificate.[170]

M. Courtney Uses His Clean Teaching Certificates and Service Verification to Obtain a Job at Parkland Elementary and then Schools in Othello

His teaching certificate intact and his record clean, Courtney was able to obtain a job as a teacher at Parkland Elementary. His contracts required that he have a valid Washington State Teacher's Certificate and were not effective until his Certificate was registered with the

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[169] Memorandum to Principals from Huck, dated October 2, 1978, Amala Decl., Ex. 94; Memorandum from Huck, dated May 15, 1979, Amala Decl., Ex. 95.

[170] Recommendations of Lorette Schneider, Robert Russell and Janet Caruso, Amala Decl., Ex. 100; Recommendations of Shirley Hegge and Janis Lee, Amala Decl., Ex. 101; Recommendation of Mary Leary, Amala Decl., Ex. 102; Professional Education Certificate for Edward Courtney, issued June 28, 1979, Amala Decl., Ex. 103.

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Educational Services District.[171] Additionally, his first contract notes that he had seventeen years of experience outside of Washington and six years of experience in Washington.[172]

After serving two years at Parkland, Courtney obtained a teaching job at Scootney Springs Elementary School in Othello, Washington, a small farming town in Eastern Washington.[173] Courtney's Othello application listed his Washington Continuing Teaching Certificate and Provisional Administrative Credentials, which he obtained in 1979 after leaving O'Dea, noted that his placement file was up-to-date at Seattle University, and listed his eleven years of teaching experience for the Christian Brothers and/or the Seattle Archdiocese, including his experience at St. Alphonsus, Our Lady of the Lake, O'Dea, St. Laurence, and Leo High School.[174]

As with Parkland, Courtney's teaching certifications and service verification allowed him to obtain that teaching position in Othello. Each of his Othello contracts required a valid Washington State Teacher's Certificate.[175] The cover page of his initial application also stated that it "is not effective unless the holder obtains a valid Washington State Teaching Certificate by the time his period of service begins."[176]

There is no question that Othello made sure that Courtney had a valid Certificate and verified his prior service in the Archdiocese. On August 10, 1982, the secretary of the Othello Superintendent, Peggy Thompson, sent the local Educational Service District a copy of

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[171] Certificated Employee's Contract, signed October 29, 1980, Amala Decl., Ex. 104, at 1; Certificated Employee Contract, signed June 5, 1981, Amala Decl., Ex. 105.

[172] Certificated Employee's Contract, signed October 29, 1980, Amala Decl., Ex. 104, at 2.

[173] In-lieu of Contract form, dated June 30, 1982, Amala Decl., Ex. 106.

[174] Application for Certificated Employment, dated April 20, 1982, Amala Decl., Ex. 107, at 2-3.

[175] Provisional Certificated Employee Contract, dated October 1, 1982, Amala Decl., Ex. 108; Certified Employee's Contract, dated May 27, 1983, Amala Decl., Ex. 109; Certificated Employee's Contract, dated May 22, 1984, Amala Decl., Ex. 110; Certificated Employee's Contract, dated May 15, 1985, Amala Decl. Ex. 111.

[176] Application for Certificated Employment, dated April 20, 1982, Amala Decl., 107, at 1.

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Courtney's Certificate: "Also enclosed is Professional Education Certificate for Edward C. Courtney who will be teaching in the Othello School District for the 1982-83 school year."[177] Thompson was responsible for sending a teacher's teaching certificate to the local Educational Service District for registration.[178] Moreover, a few weeks later, Courtney was required to fill-out "Individual Personnel Data" sheet that verified he had a valid teaching certificate.[179]

Othello also relied on Clark's signed verification that Courtney served in the Archdiocese as both a teacher and a principal: his Othello file contains both verifications.[180] When Courtney's applicant qualifications were reviewed in June 1982, Othello noted that he had "considerable" teaching experience, "considerable" professional membership and activities, "exceptional" professional education, and "exceptional" credentials. Othello concluded: "Very fine candidate. Wide and valuable experience."[181]

James Jungers, the former Superintendent of the Othello School District who signed Courtney's original teaching contract, has provided a declaration affirming that Courtney was hired to teach in Othello because of his letters of recommendation and his long history of teaching with the Christian Brothers and serving in Archdiocesan Schools, including O'Dea:

> I was involved with hiring Edward Courtney to teach at Scootney Springs. I remember when Courtney first applied to teach in the Othello School District. We took a hard look at him because he was a Christian Brother who taught at O'Dea High School and we had previously hired another Christian Brother, Pete Patitucci, who had also taught at O'Dea High School and with whom we had good results. I recall that we were impressed with his history of teaching

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[177] Letter from Peggy J. Thompson to Gloria Cartagena, dated August 10, 1982, Amala Decl., Ex. 112.

[178] Declaration of James Jungers, dated October 5, 2009, Amala Decl., Ex. 113, at ¶ 5.

[179] Othello Public Schools, Individual Personnel Data sheet, Amala Decl., Ex. 114.

[180] Service Record Verification for Edward Courtney, dated September 11 and 18, 1980, Amala Decl., Ex. 89; Amala Decl., at ¶ 91.

[181] Othello School District Summary of Applicant's Qualifications, dated June 28, 1982, Amala Decl., Ex. 115.

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> assignments and letters of recommendation. Our policy at the time was to verify prior teaching assignments and to call some references.[182]

Jungers also confirms that Courtney would not have been able to teach in Othello but for his valid Washington State Teaching Certificate, and that they would not have hired him if they knew that he had a history of sexually abusing boys:

> The policies and procedures of our school district at the time that Edward Courtney was hired to teach at Scootney Springs required that he have a valid Washington teaching certificate. We would not have hired Courtney to teach in our school district, and we would not have allowed him to keep teaching in our school district, unless he had a valid Washington teaching certificate. No exceptions were made to the requirement that a teacher have a valid Washington teaching certificate. We also would not have hired Courtney to teach in our school district if we had known that he had a history of sexually abusing children, which we did not know when we hired him.[183]

When Jungers later learned that Courtney had been accused of sexually molesting a student in Othello, he was immediately placed on administrative leave and was not allowed to return to the classroom.[184] Courtney packed-up his things, returned to Seattle, and fled to Reno, Nevada.[185] He remained there until the police found him and extradicted him back to Washington to face charges for his abuse of boys in Othello.[186]

N. Throughout His Time at St. Alphonsus, Parkland, and Othello, the Christian Brothers Supervised Courtney and Monitored His Sexual Deviancy Treatment

While Father Clark and other Archdiocesan teachers and administrators endorsed Courtney and helped him obtain teaching jobs at Parkland and in Othello, Provincial McGowan continued his efforts to recruit back into his teaching congregation.

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[182] Declaration of James Jungers, dated October 5, 2009, Amala Decl., Ex. 113, at ¶ 3.

[183] Declaration of James Jungers, dated October 5, 2009, Amala Decl., Ex. 113, at ¶ 4.

[184] Deposition of Edward Courtney, dated April 20, 2009, Amala Decl., Ex. 159, at 112-15.

[185] Deposition of Edward Courtney, dated April 20, 2009, Amala Decl., Ex. 159, at 131-32.

[186] Deposition of Edward Courtney, dated April 20, 2009, Amala Decl., Ex. 159, at 132-37.

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On June 8, 1980, as Courtney was being terminated from St. Alphonsus, McGowan wrote Courtney and asked him to make a decision: "Then, I have the General inquiring as to whether or not I have heard from you. What he is referring to, Chris, is your decision at this point in time. … If you wish to return to community, fine – if not, that is your prerogative."[187]

A year later, the Provincial Council, under a new Provincial, Brother Morris, voted to ask Courtney "to either return to the Brothers in a non-teaching capacity or to ask for a dispensation (5-0)."[188] By that vote, the Council implicitly acknowledged that Courtney posed a threat to students if he returned to a school in a teaching capacity.

A few months later, the Council again extended Courtney's exclaustration another year "[s]ince Chris is presently receiving psychiatric help and spiritual direction on a regular basis, the Council feels his request to extend this treatment for one more year to be a reasonable one."[189]

That same day, Provincial Morris wrote to Courtney's new psychologist, Dr. James Reilly, and thanked him for treating Courtney: "Thank you again for taking on this responsibility and for what you are doing for Ed Courtney."[190] In other words, the Christian Brothers were still monitoring Courtney and his sexual deviancy treatment.

Three weeks later, on November 17, 1981, Provincial Morris wrote to Courtney and thanked him "for your reply." The Christian Brothers have not produced a copy of

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[187] Letter from Felix, dated June 8, 1980, Amala Decl., Ex. 116.

[188] Provincial Council Meeting, dated June 28, 1981, Amala Decl., Ex. 117.

[189] Form to be Completed Concerning an Application for a Dispensation from Perpetual Vows or for Exclaustration, dated October 29, 1981, Amala Decl., Ex. 118.

[190] Letter from Provincial Morris to Reilly, dated October 29, 1981, Amala Decl., Ex. 119.

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Courtney's letter, so it is not clear whether Courtney wrote the letter from his home or from his new school elementary school.[191]

Less than a year later, in September 1982, the Provincial Council again took up the matter of Brother Courtney: "the Provincial read the letter he had sent to Ed. In the letter, the guidelines for a re-entry were spelled out, as well as setting a deadline of October 5th for a decision.[192]

Three weeks later, the Council noted that Courtney "is still up in the air about whether he will be returning or not. The General will see him also when he is in Seattle."[193]

A month after that, in November 1982, the Council's minutes reflect that "[t]he Provincial reported on the General's talk with Ed. The General reiterated his support of our pointers. Ed has until the end of the month to decide if he will return or not."[194]

In December 1982, the Provincial Council continued their monitoring of Brother Courtney, and very clearly recognized the danger he still posed to boys: "in his last letter, he states that he wishes to return, but there seems to be a bit of confusion even in that letter. The Provincial has written to Ed to point out the difficulties he will face if he returns, and then specifying the exact details of a return immediately after Christmas to Cantell, if he wishes to return."[195]

A month later, after having sufficient time to groom himself into an elementary school in Othello, Brother Courtney finally chose to leave the Christian Brothers. The Council's

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[191] Letter from Brother Morris, dated November 17, 1981, Amala Decl., Ex. 120.
[192] Council Meeting, dated September 19, 1982, Amala Decl., Ex. 121, at 2.
[193] Council Meeting, dated October 16, 1982, Amala Decl., Ex. 122.
[194] Council Meeting, dated November 12-23, 1982, Amala Decl., Ex. 123, at 2.
[195] Council Meeting, dated December 11-12, 1982, Amala Decl., Ex. 124.

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minutes state that Courtney's "papers requesting dispensation have been sent to Rome. He has written a letter to the General directly."[196]

After the Superior General approved of Courtney's dispensation, Brother Houlihan, a member of that Council, reached-out to Courtney on behalf of Provincial Morris to let him know that the Council had "received the dispensation form and are forward it to Seattle. … These have been difficult years for you and we are hoping that all will go much better for you in the years that lie ahead. You are in our prayers and will continue to be remembered."[197]

On February 27, 1983, five years after taking a leave of absence for molesting school boys at five different Christian Brothers' schools, Brother Courtney was "dispensed" from the Brothers.[198]

Despite acknowledging his years of molesting boys, when Provincial McGowan was asked about Courtney's abuses by a fellow Christian Brother, Brother Gattone, he stated that Courtney had a "gay problem, not an abuse problem."[199] According to Gattone, "in my conversations with Brother McGowan, it came across that he never felt that this was child abuse."[200]

O. After Receiving Notice of the Othello Allegations, SPI Made Sure the Othello Authorities Were Investigating Courtney So His Certificates Could be Revoked

In June 1988, less than ten years after Courtney was removed from O'Dea High School for molesting boys, and less than eight years after he was removed from St. Alphonsus

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[196] Council Meeting, dated January 22-23, 1983, Amala Decl., Ex. 125.
[197] Letter from Houlihan, dated February 18, 1983, Amala Decl., Ex. 126.
[198] Christian Brothers of Ireland form for Edward Courtney, Amala Decl., Ex. 127.
[199] Deposition of Charles Gattone, Amala Decl., Ex. 62, at 53, 65-66.
[200] Deposition of Charles Gattone, Amala Decl., Ex. 62, at 116-17.

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for the same, the Archdiocese received a formal complaint about Courtney's abuses at O'Dea.[201]

In their resulting "investigation," the Archdiocese concluded that "The Catholic School Office was not made aware of the reasons for Edward's departure from the Christian Brothers or any reasons for not employing him in any of the Archdiocesan schools." The Archdiocese reached that self-serving conclusion even though its investigation included an interview with Father Clark, who "remember[ed] the situation but very little of the details." The investigation also makes no mention of the fact that Father Clark and Patrick Crowley were actively involved with removing Courtney from St. Alphonsus.[202]

P. After Receiving Notice of the Othello Allegations, SPI Made Sure the Othello Authorities Were Investigating Courtney So His Certificates Could be Revoked; They Are Revoked Within Four Months

In December 5, 1988, shortly after an article regarding Courtney's abuses were published in the Spokesman-Review, an internal memo shows that SPI was making sure that those abuses were being investigated and prosecuted by the Othello authorities so that his certificates could be revoked.[203]

On December 28, 1988, the Prosecuting Attorney for Adams County notified SPI that Courtney changed his plea to Guilty for Indecent Liberties with a minor.[204] Within a month, SPI notified Courtney that his certificate was being investigated and suggested that he voluntarily surrender his teaching certificates.[205] Within two months of that, Courtney had

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[201] Memorandum from Francine Breedlove, dated June 14, 1988, Amala Decl., Ex. 128.

[202] Memorandum from Sister Carol Ann, dated June 1, 1988, Amala Decl., Ex. 129.

[203] Letter from Adelle, dated December 5, 1988, Amala Decl., Ex. 130; Letter from Nore, dated December 22, 1988, Amala Decl., Ex. 131.

[204] Letter from Miller, dated December 28, 1988, Amala Decl., Ex. 132.

[205] Letter from Nore, dated January 27, 1989, Amala Decl., Ex. 133.

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voluntarily surrendered his three Washington teaching and principal certificates and SPI had revoked those certificates.[206]

Q. The Christian Brothers and the Archdiocese Were Financially Motivated to Keep Courtney Employed at O'Dea High School

When Courtney became a Christian Brother, he devoted all of his earthly belongings to the Brothers and irrevocably agreed to "render all my services of every kind to and for the said Congregation without compensation of any kind or character and no reward or remuneration shall ever be made to me for my labors … which I may execute or shall have executed while a member of the said Congregation."[207]

Similarly, he agreed that "I will not at any time seek any remuneration for the work I may do as a matter of the said Congregation and at no time will I ever claim compensation therefor, it being my distinct understanding that any services rendered by me are rendered without any promise of pay or any expectation of pay or remuneration."[208]

The Christian Brothers were very cognizant of this financial benefit to keeping Courtney at O'Dea. In his May 1974 letter to Provincial McGowan, Brother McGraw was concerned about the Archdiocese not "covering" Brother Courtney if he were not teaching.[209]

When shown this same letter, Courtney's Superior at O'Dea, Brother Reilly, agreed that it was in the financial best interests of the Christian Brothers to have as many Brothers at O'Dea as possible because the remuneration for their service went into their operating fund.[210]

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[206] Voluntary Surrender of Certificate, dated February 28, 1989, Amala Decl., Ex. 134; Letter from Billings, dated March 20, 1989, Amala Decl., Ex. 135.

[207] Amala Decl., Ex. 136.

[208] Amala Decl., Ex. 137.

[209] Letter from McGraw to McGowan, dated May 12, 1974, Amala Decl., Ex. 138.

[210] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 106, 110-15.

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Likewise, the Archdiocese understood that Courtney was cheap labor. In May 1978, Father Clark wrote to the Archbishop regarding O'Dea's subsidies. He recommended that the Archbishop increase O'Dea's annual subsidy because Brother McGraw "is very depressed, and feels that maybe he should ask for a transfer." Clark noted that this would be a "great loss to the Archdiocese" and suggested the Archbishop should approve the increase because he did not want to lose their cheap labor: "[I]t is a mere pittance compared to what we would have to pay out in order to replace the Brothers."[211]

R. The Seattle Archdiocese Owned O'Dea High School and Jointly Operated O'Dea with the Christian Brothers Defendants

Since September 1973, O'Dea High School has been owned and jointly operated by defendants Seattle Archdiocese, the Congregation of the Christian Brothers, and the Christian Brothers Institute.

In January 1973, the Provincial Council approved a new contract for O'Dea. (This was the same meeting where the Council voted to keep Courtney "out of school until he had seen a psychiatrist.")[212]

That July, the Provincial wrote to Archbishop Connolly regarding the finishing touches on the O'Dea contract and noted that the Provincial headquarters had recently been moved to Vallejo, California.[213] In August, the Archbishop sent the Provincial a signed copy of the O'Dea contract at the headquarters in Vallejo.[214] Shortly thereafter, the Provincial

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[211] Letter from Clark to Hunthausen, dated May 19, 1978, Amala Decl., Ex. 139.

[212] Minutes of the Council Meeting Held at Ryan Hall, dated January 28, 1973, Amala Decl., Ex. 9, at 2.

[213] Letter from McGowan to Connolly, dated July 18, 1973, Amala Decl., Ex. 11.

[214] Letter from Connolly to McGowan, dated August 3, 1973, Amala Decl., Ex. 140.

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Council met in Vallejo and reported that the O'Dea contract "was sent to the Superior General for his signature."[215]

By August 23, 1973, the O'Dea contract had been agents of the three defendants: (1) Archbishop Connelly, as Archbishop of Seattle, (2) John McGowan, as Vice-President and Provincial of the Christian Brothers Institute, and (3) Justin Kelty as Superior General of the Congregation of the Brothers of the Christian Schools of Ireland.[216] The preamble of the contract notes that the Christian Brothers are based in Vallejo, California.[217]

The contract includes the following terms: (1) the Archdiocese "will retain over-all ownership of the property …," (2) "the Brother Principal shall be responsible for coordinating the school program in conformity with State and Archdiocesan regulations," and (3) the Archdiocese was required to provide "[c]ompensation to the Brothers for each full-time Brother on the staff of the school at the rate of $4,400 in exchange for teaching and administrative services …"[218]

Although the defendants have produced very little documents regarding their operation of O'Dea High School, the few documents they have produced show that they operated the school as a joint venture. For example, from 1973 until at least 1976, the Archdiocese included the Christian Brothers as an additional insured on their Comprehensive General Liability insurance policy "with respect to the operation of O'Dea High School."[219]

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[215] Minutes of the Council Meeting Held at Ryan Hall, dated August 26, 1973, Amala Decl., Ex. 141.
[216] O'Dea Contract, dated August 23, 1973, Amala Decl., Ex. 142.
[217] *Id.* at 1.
[218] *Id.* at 1-2.
[219] Comprehensive General Liability policy, dated April 18, 1973, Amala Decl., Ex. 143, at 3.

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Similarly, the contracts for Frank LaFazia, the Vice Principal of O'Dea from 1974-1978, were each signed by the principal Brother on behalf of the Archdiocese's school.[220]

The Christian Brothers also described O'Dea as an Archdiocesan school. In 1975, a summary of their Western Province notes that O'Dea is a "Diocesan" school, of which the Brothers "form part of a staff made up of Brothers, Sisters, priests and laymen and laywomen."[221]

Similarly, in May 1975, Father Clark wrote to the State of Washington and listed O'Dea as a school "under the jurisdiction of the Archdiocesan Office of Education" and confirmed that O'Dea met certain basic state standards for approval.[222] Father Clark's Office of Education also collected an annual tax from O'Dea for its operations.[223]

The Christian Brothers were also assimilated into the operations of the Archdiocesan school district. For example, on October 19, 1975, the Personnel Director from the Archdiocese's Office of Education, Sister Agnes Huck, asked the Christian Brothers to meet with her office in order to keep them "informed of our educational planning, policies, procedures and current events relative to the schools. We also strongly feel that you have professional expertise, plans, and policies that affect our Archdiocesan personnel that you would be willing and anxious to share with us."[224]

A few weeks later, Brother McGraw attended a "Meeting of Education Office Staff with Directors of Education" that was held by the Archdiocese's Department of Education.[225]

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[220] *See generally* LaFazia contracts from 1974-1978, Amala Decl., Ex. 144.

[221] Western American Province, Amala Decl., Ex. 14, at 2.

[222] Letter from Clark, dated May 29, 1975, Amala Decl., Ex. 145, at 1, 3.

[223] Letter from Clark, dated August 8, 1978, Amala Decl., Ex. 146.

[224] Letter from Huck to Brickell, dated October 17, 1975, Amala Decl., Ex. 147.

[225] Meeting of Education Office Staff with Directors of Education, dated November 13, 1975, Amala Decl., Ex. 148.

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The purpose of the meeting was to discuss the "educational focus" of Archdiocesan schools for 1975-1978 and various personnel programs.[226]

The Archdiocese also oversaw critical decisions at O'Dea and dictated school policy. For example, in March 1976, Father Clark wrote to Archbishop Hunthausen because Brother McGraw had expelled a Filipino student from O'Dea. After interviewing the student, his mother, McGraw, and the student's pastor, Clark told Hunthausen that he believed McGraw's decision was "procedurally correct" and felt that the ultimate decision rested with McGraw.[227]

Similarly, on April 4, 1978, Archbishop Hunthausen sent McGraw a copy of the "Personnel Policy Revisions recommended for my approval by the Archdiocesan Education Board," and asked McGraw to "thoroughly acquaint yourself and your Board members with these materials as you finalize your hiring negotiations for the coming year."[228]

Prior to McGraw leaving O'Dea in June 1980, he and the other Brothers at O'Dea became eligible for the Archdiocese's retirement program. As Father Clark stated, "[t]o deny the Brothers this benefit could have serious morale effects on our relationship with them."[229]

S. Defendant Christian Brothers Institute Signed the 1973 O'Dea Contract and Was Recognized by McGraw and Reilly as Being Involved with O'Dea's Operations

When shown a coy of the 1973 O'Dea contract, Brother McGraw shed light on the difference between defendants Congregation of the Christian Brothers and the Christian Brothers Institute:

> Well, the Congregation of the Brothers of the Christian Schools, that's the European reference to the Brothers. The Christian Brothers Institute would have been the United States, in my recollection. And in my understanding, even today,

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[226] *Id.*

[227] Memorandum from Clark, dated March 8, 1976, Amala Decl., Ex. 149.

[228] Letter from Hunthausen to McGraw, dated April 4, 1978, Amala Decl., Ex. 150.

[229] Memorandum from Father Clark, dated March 13, 1980, Amala Decl., Ex. 151.

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> the Christian Brothers Institute would be the individual provinces in this country.[230]

Similarly, Brother Reilly testified that the Christian Brothers Institute is the "financial institute of the Christian Brothers" that it is controlled by the Provincial Council, and that it oversaw the financial operations of the O'Dea community.[231]

Their testimony is not surprising, as the Christian Brothers' internal documents refer to O'Dea as an "establishment[] in The Christian Brothers Institute of New York."[232]

III. EVIDENCE RELIED UPON

> This opposition brief relies upon the Declaration of Jason P. Amala that is submitted in support thereof, as well as the pleadings, exhibits, and documents previously filed in this case.

IV. LEGAL ARGUMENT

Negligence, even gross negligence, does not sufficiently describe the underlying misconduct of the defendants. Their attempt to evade liability and damages for their egregious actions should be denied.

DEFENDANTS ARE LIABLE TO J.B., M.B., D.L., AND D.F. FOR CLAIMS ARISING OUT OF THEIR INTENTIONAL MISCONDUCT

A. Defendants are Vicariously Liable for Letting Their Managing Agents Expose Plaintiffs to a Serial Sexual Predator

The defendants are vicariously liable for Courtney's abuse of Plaintiffs because their managing agents knew that he was molesting boys and they made the deliberate decision to continue giving him access. Their decisions were made within the scope of their employment and with the knowledge of the defendants.

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[230] Deposition of John McGraw, dated October 8, 2009, Amala Decl., Ex. 24, at 49-52.

[231] Deposition of Kevin Reilly, Amala Decl., Ex. 16, at 55-57.

[232] List of Internal and External Establishments of CBI, Amala Decl., Ex. 152.

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Unlike *Niece*, *C.J.C.* and the other cases cited by the defendants, this is not a case where their managing agents "step[ped] aside from the employer's purposes in order to pursue a personal objective of the employee." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 47-48, 929 P.2d 420 (1997).

Instead, a reasonable jury could conclude that their managing agents, including Provincial McGowan, the Provincial Council, Brother McGraw, Brother Reilly, Father Sarkies, Father Clark, Patrick Crowley, and the Archdiocese's Office of Education, were acting on the defendants' behalf when they decided to continue giving Courtney access to Plaintiffs and other school boys. *Id.* at 48 (employer is liable for an employee's acts when the employee is acting on the employer's behalf).

The decisions of these managing agents were not made on a "frolic and detour." To the contrary, these decisions were made with their employer's full knowledge of what they were doing and the ramifications of those actions.

For example, the Christian Brothers cannot claim that its Provincial and its Provincial Council were acting outside the scope of their employment when they voted dozens of times to transfer Courtney between schools, despite his long history of abusing students while in treatment. These decisions were codified in dozens of minutes and their Superior General was actively informed of them. The correspondence and reports being sent back to the Provincial and his Council also show that they were aware of, and approved of, the decisions of McGraw and Reilly to keep Courtney at O'Dea despite the constant complaints they received about his abuse of boys.

Similarly, the Archdiocese cannot claim that McGraw, Reilly, LaFazia, Sarkies, Clark, Crowley and its Office of Education were acting outside the scope of their employment or that

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it was ignorant of those decisions. The evidence shows that these managing agents actively communicated about their efforts to retain Courtney and their efforts to avoid reporting him. They wanted his cheap labor, and when they could no longer ignore complaints coming to their offices, they worked together to keep his abuses quiet in order to protect the "name and reputation" of their employer.

The decisions of these managing agents were made within the scope of their employment. They had the apparent and actual authority to make these decisions and they did so, with the full knowledge of their employer. They chose to expose Plaintiffs and other school children to Courtney rather than give up the fruits of his cheap labor and expose themselves to liability. Given the evidence present, a jury should be allowed to determine whether these managing agents acted with the actual or apparent authority of their principals. *Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wn. App. 53, 57, 808 P.2d 1167 (1991) (whether an agent had actual or apparent authority to act is a question for the jury).

Unlike *Niece*, vicarious liability in this case is not premised solely on the special relationship between the defendants, their managing agents, Courtney, and the Plaintiffs. It is also premised on knowledge and ratification: the defendants knew of their employee's intentional and wrongful acts, the defendants knew that Plaintiffs and others would continue to suffer harm, but they did nothing to stop them because they benefited from those acts. *Newton Ins. Agency v. Caledonian Ins.*, 114 Wn. App. 151, 157-58, 52 P.3d 30 (2002) (an entity acts intentionally if it desires to bring about the result or if the result is substantially certain to occur because of the entity's actions).

In other words, these are not the intentional acts of the employees, but the intentional acts of the employer. They may be intentional acts, but they are intentional acts that were

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committed within the scope and agency of employment. *Cf. Niece*, 131 Wn.2d at 56 (only rejecting vicarious liability for intentional acts "outside the scope of employment"). For that reason, holding the defendants vicariously liable for the intentional acts of their managing agents would not be the same as the concept of strict liability that the Court rejected in *Niece*. Instead, the jury here would be holding the defendant employers liable for the intentional acts of their employees of which they had knowledge and from which they benefited.

The defendants cannot evade liability for the intentional acts of their managing agents when they knew of those acts, benefited from those acts, and took no steps to cure them. Under the facts of this case, if the defendants were correct on this issue, an employer could never be held liable for the intentional acts of its employees of which it is aware. That is not the law, or should not be the law. Corporations can only act through their agents.

Plaintiffs have produced substantial evidence that the intentional acts of the defendants' managing agents were made within the scope of their employment in order to benefit the defendants. A jury should be allowed to make the ultimate decision on this issue.

B. Defendants Ratified Courtney's Conduct and that of Their Managing Agents

The defendants are directly liable for Courtney's abuse of Plaintiffs because they ratified that conduct over many, many years, reaping the benefits while later trying to repudiate its consequences. *Gaffney v. Megrath*, 23 Wn. 476, 492-93, 63 P. 520 (1900).

A principal ratifies the unauthorized act of its agent if the principal avails itself of the benefit of the act. *Id.* at 493. As the Washington Supreme Court noted in *Gaffney*, "The methods by which a ratification may be effected are as numerous and as various as the complex dealings of human life." *Id.*

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The Christian Brothers and the Archdiocese knew for many, many years that Courtney was sexually abusing students. They knew that Courtney had molested students while receiving therapy from at least three different therapists. They knew that no cure existed for pedophilia. They knew that he would continue molesting students if given access. They ignored that knowledge. They gave him access. He continued abusing Plaintiffs and other students in their care. They did nothing.

Instead, throughout this period, they repeated the benefits of his labor. The Christian Brothers reaped the financial benefits of the Archdiocese's payment for his services, and the Archdiocese, in turn, reaped the benefits of his cheap labor. And when push came to shove, they pulled out all stops to help their "problem" obtain employment in the public schools.

By keeping his abuses quiet, and by keeping Courtney under their control and in their favor, the defendants also reaped the benefit of avoiding liability and protecting "their name and reputation."

"The principal cannot avail himself of the benefit of the act and repudiate its obligations." *Gaffney*, at 493, This is particularly true where both defendants, through Provincial McGowan, Brother McGraw, Brother Reilly, Father Sarkies, Father Clark, and the Archdiocese's Office of Education, were repeatedly informed that Courtney was continuing to molest students, but they simply looked the other way. They were financially motivated to keep Courtney at O'Dea and they were financially motivated to keep his abuses quiet. They accepted the benefits of Courtney's labor. Now that they have been caught, they cannot "repudiate its obligations."

Moreover, as noted by a case relied on by the Archdiocese, even if the intentional decisions of the defendants' managing agents were outside the scope of their employment, the

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defendants ratified those decisions by possessing full knowledge of the act, accepting the benefits of the act, and intentionally assuming the obligation of the act without inquiry. *McCurley,* 61 Wn. App. at 57.

Under the compelling facts of this case, a jury should be allowed to decide whether the defendants ratified Courtney's conduct for their own benefit.

C. Plaintiffs May Pursue Claims for Outrage and Willful and Wanton Misconduct

When applied to the facts of this case, Washington law allows Plaintiffs to pursue claims for outrage and willful and wanton misconduct.

1. Plaintiffs May Pursue Claims for Outrage Because They Were Within the Zone of Foreseeable Danger Created by the Defendants' Outrageous Conduct

A plaintiff establishes a claim for outrage when there is evidence of (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002); *see also Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003).

The defendants have not moved for summary judgment on these elements.

Instead, they assert that Plaintiffs cannot move forward on their claims because they were not physically present when the Provincial, the Provincial Council, McGraw, Reilly, and LaFazia gave a known sexual predator the keys to O'Dea High School and kept him there despite years of complaints that he was sexually abusing Plaintiffs and other students. Nor was D.F. present when they conspired to keep Courtney's abuses quiet and worked together to help him obtain employment in the public school system, including Othello.

They also assert that Plaintiffs cannot bring claims for both outrage and negligence.

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First, Plaintiff J.B. was very much present when he repeatedly told Brother McGraw that Courtney was molesting him, McGraw feigned ignorance and innocence, and then expelled J.B. from O'Dea because he refused to be molested again by Courtney at detention. If that conduct is not outrageous, what is?

Second, the policy rationale behind the "presence" requirement is to ensure that a plaintiff falls within a zone of protection; in other words, within the scope of foreseeable harm. Through their outrageous acts, the defendants started a chain of reaction that caused Plaintiffs to be sexually abused. While they may not have been physically present for those outrageous acts, they are surely within the zone of foreseeable harm.

For that reason, the defendants' reliance on cases like *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), is misplaced. In *Reid*, the plaintiffs suffered extreme emotional distress when they learned that pictures of their deceased relatives had been circulated at cocktail parties and in scrapbooks. *Id.* at 198-200. Despite the emotional distress they suffered, the Court held that the plaintiffs could not recover under a tort of outrage because they were not present for the outrageous conduct. *Id.* 201-04.

However, in re-affirming the presence requirement, *Reid* relied on its earlier decisions in *Schurk v. Christensen*, 80 Wash.2d 652, 656-57, 497 P.2d 937 (1972), and *Lund v. Caple*, 100 Wash.2d 739, 742, 675 P.2d 226 (1984), which both involved claims for emotional distress by a plaintiff whose relative was the person actually injured or harmed. *Id.* at 203.

Reid also noted that the presence requirement stems from comment l of Restatement § 46(g) (Supp.1948), which required that "the plaintiff must be an immediate family member of the person who is the object of the defendant's actions, and he must be present at the time of such conduct."

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These cases, and the quoted portion of the Restatement, demonstrate that the tort of outrage requires a plaintiff to be present only when the plaintiff is not the one who is physically harmed by the defendant's outrageous conduct. That is not the case here. Through their outrageous conduct, the defendants directly caused Plaintiffs to suffer sexual abuse. The fact that they were not sexually abused in the office where the outrageous conducted occurred, such as the meeting location of the Provincial Council, in McGraw's office, or at the Archdiocese's Office of Education, does not preclude them from recovering for that conduct.

Allowing a jury to hold the defendants liable for their outrageous conduct also comports with the Court's rationale in *Grimsby v. Samson*, 83 Wn.2d 52, 530 P.2d 291 (1975), the first Washington case that codified the tort of outrage.

In *Grimsby*, the Court acknowledged the policy consideration that "unlimited liability" could result from "extending recovery for harm to others than those directly involved in the accident," but also noted that Washington allows recovery for mental anguish and distress in cases (1) involving malice and wrongful intent, or (2) where there has been "an actual invasion of a plaintiff's person or security, or a direct possibility thereof." *Id.* at 56, 58. While the Court acknowledged the "presence" requirement found in Restatement § 46(g), it did so in the context of addressing the prospect of a defendant having "potentially unlimited liability." *Id.* at 59.

That public policy consideration does not exist here. Plaintiffs seek to hold the defendants liable for their outrageous conduct that caused them to be sexually abused and to suffer severe emotional distress. They are not seeking damages for emotional distress to their wives, their parents, their children, their relatives, or their friends.

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2. Plaintiffs Have Provided Evidence of Willful and Wanton Misconduct and May Pursue Causes of Action for that Misconduct

A cause of action for willful misconduct requires a showing that the defendants intended to injure, and a cause of action for wanton misconduct requires a showing that the defendants were recklessly indifferent to injury that would probably result from their conduct. *Adkisson v. Seattle*, 42 Wn.2d 676, 684-85, 258 P.2d 461 (1953); WPI 14.01 (wanton misconduct requires that "a reasonable person would know, or should know, that such conduct would, in a high degree of probability, result in substantial harm to another").

Washington recognizes causes of action for both willful and wanton misconduct. *Adkisson*, 42 Wn.2d at 684-85 (recognizing both); *Sorensen v. McDonald's Estate*, 78 Wn.2d 103, 109-10, 470 P.2d 206 (1970) (recognizing "concepts of intentional accident, wanton misconduct and gross negligence" and holding that plaintiff was not restricted to a cause of action for gross negligence); *Hanson v. Freigang*, 55 Wn.2d 70, 73-74, 345 P.2d 1109 (1959) (recognizing separate causes of action exists for negligence and wanton misconduct).

Plaintiffs have provided substantial evidence that would allow a jury to conclude that the defendants acted willfully and wantonly when they transferred Courtney to O'Dea High School, ignored complaints that he was sexually abusing Plaintiffs and others, and then solved their "problem" by helping him obtain employment in the public school system.

By the time he was transferred to O'Dea, the Christian Brothers knew that Courtney had molested scores of boys, had physically ejected him from one school for molesting students, and had barred him from returning to three others. They also knew that all of that abuse occurred while Courtney was in sexual deviancy treatment. When Courtney immediately began abusing students at O'Dea, they did nothing. Instead, they obtained a self-serving letter of recommendation from a third or fourth therapist and returned him to the

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classroom. This is not negligence or gross negligence. At best for the defendants, it is reckless.

Similarly, the Archdiocese's principal, McGraw, and its teacher, Reilly, were well-aware of Courtney's history of molesting students before he came to O'Dea. McGraw admits that he met with Courtney's therapist about a singular "incident" and was told to keep Courtney away from students. Reilly admits that he knew Courtney was an incurable pedophile, and that they needed to keep him away from students, but he claims protecting students was not his job. Despite their knowledge, they allowed Courtney to immediately start coaching basketball, and within a year, Courtney was back in the classroom.

Moreover, during that first year, the Archdiocese's principal and teacher found themselves huddled in a car with their lay vice-principal, LaFazia, discussing a complaint that Courtney was engaging in inappropriate contact. LaFazia testified that McGraw and Reilly agreed to handle the situation, but nothing was done. Similarly, Plaintiff J.B. and other boys have testified that McGraw did nothing when he learned of their abuse.

When they were finally forced to remove Courtney from O'Dea and St. Alphonsus, the defendants did not report him. Instead, they wrote him letters of recommendation, actively assisted him in obtaining and retaining his teaching certificate, and pushed him into the public school system.

The Archdiocese cannot side-step the knowledge of McGraw, Reilly, LaFazia, Sarkies, Clark, Crowley, or its Office of Education, because it had a non-delegable duty to protect Plaintiffs from foreseeable harm. These men were the Archdiocese's managing agents and employees at its schools. Clark was its Superintendent.

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The Archdiocese cannot now distance itself from the Christian Brothers. It paid them. It insured them. It ensured they had teaching certificates. It dictated their policies and procedures. It notified the State of Washington of their faculty positions at O'Dea. And it took the position that O'Dea High School was its high school, an Archdiocesan high school.

If the Archdiocese wants to blame the Christian Brothers, it should have filed a cross-claim against them. It strategically chose not to do so.

The defendants can argue to the jury that Courtney was in treatment, so their actions were "only negligent," but viewing the evidence in a light most favorable to Plaintiffs, a reasonable jury could conclude that they acted willfully and wantonly.

3. Plaintiffs May Pursue Multiple Claims for the Same Misconduct and Are Only Prevented from Double Recovery

The defendants suggest that under *Rice v. Janovich*, 109 Wn.2d 48, 61-61, 742 P.2d 1230 (1987), Plaintiffs claims for outrage and willful and wanton misconduct must be dismissed because they have also pled negligence. This is an incorrect reading of *Rice*.

In that case, the Court held that it was error for the trial court to instruct the jury on both assault and outrage because the former subsumes the latter. *Id.* at 61-62. In other words, it would provide the plaintiff with an impermissible double-recovery. *Id.* at 62.

The Court did not, however, hold that a trial court should dismiss a plaintiff's claim under one legal theory because the plaintiff may eventually be able to recover damages under another legal theory with a lower burden of proof. Plaintiffs are not required to elect their remedies before trial, and the defendants have provided no legal authority for that position.

D. Plaintiffs May Pursue Claims for Outrage and Willful and Wanton Misconduct

As discussed above, and as outlined in Plaintiffs' pending motion for summary judgment on the issue of duty, the Archdiocese cannot side-step the knowledge or acts of

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McGraw, Reilly, LaFazia because it had a non-delegable duty to protect Plaintiffs from foreseeable harm. A school district, its schools, its administrators, and its teachers owe a non-delegable duty to protect their students from foreseeable harm. *Carabba v. Anacortes School Dist. No. 103,* 72 Wn.2d 939, 955-58, 435 P.2d 936 (1967); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 54-56, 929 P.2d 420 (1997) (noting the same); *Travis v. Bohannon*, 128 Wn. App. 231, 244, 115 P.3d 342 (2005) (school district's duty is non-delegable); *see generally McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 36, 255 P.2d 360 (1953) ("… the protective custody of teachers is mandatorily substituted for that of the parent").

McGraw, Reilly, and LaFazia were the Archdiocese's managing agents and employees of O'Dea. It paid them. It insured them. It ensured they had teaching certificates. It dictated their policies and procedures. It notified the State of Washington of their faculty positions at O'Dea. And it took the position that O'Dea High School was its high school, an Archdiocesan high school. If the Archdiocese wants to blame the Christian Brothers, it should have filed a cross-claim against them. It strategically chose not to do so.

Moreover, if the Archdiocese wants to take the position that it exercised "no control or oversight" over McGraw, Reilly, or LaFazia, then the Court should enter summary judgment in Plaintiffs' favor – that admission would mean no genuine issue of material fact exists as to whether the Archdiocese made any effort to protect the students in its care from foreseeable harm, regardless of its non-delegable duty. *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 720-21, 985 P.2d 262 (1999); *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 320-22, 255 P.2d 360 (1953) (a school has a duty to protect its students from foreseeable harm).

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E. Debate Regarding the Due Diligence Exercised by Plaintiffs, Combined with Undisputed Evidence of Concealment, Presents a Factual Dispute Precluding Summary Judgment on the Issue of Fraudulent Concealment

Plaintiffs reasonably believed that the sex abuse perpetrated by Courtney was isolated, and never suspected the defendants had failed to properly protect them. Due diligence is satisfied when, as here, the defendants' concealment explains why the Plaintiffs did not investigate their claims. Had the defendants abided by their duty and disclosed the fact that scores of boys had been abused by Courtney, Plaintiffs would have had notice of their claims, and could have thoroughly investigated those claims.

The defendants' reliance on *August v. U.S. Bancorp* is misplaced, as the case supports denying summary judgment on a fraudulent concealment claim when the defendants violated their duty to disclose information. The case has two basic holdings: 1) that an institution commits fraudulent concealment when it contravenes its duty to disclose information which implies liability, and 2) that a plaintiff's duty to exercise "due diligence" depends on when information is available.

What information was available, and when, is a factual determination that makes summary judgment improper:

> The Bank argues that the failure to provide information does not establish fraudulent concealment. But *Thorman* held that silent or passive conduct is not deemed fraudulent unless there is a fiduciary relationship; under these circumstances, there is a duty upon the defendant to make a disclosure. *Thorman,* 421 F.3d at 1096. The Bank also argues that Nick did not file suit in 2002 and never filed a motion to compel production of the documents he believed were missing or withheld. Again, *Nick's duty to be diligent relies on the factual determination as to when Nick knew, or should have known, the elements of a cause of action*. The question as to what Nick knew is a question of material fact that cannot be resolved here.

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146 Wn.2d 328, 348-9, 190 P.3d 86 (2008) (emphasis added); *see also Allen v. State,* 118 Wn.2d 753, 826 P.2d 200 (1992) (holding that exercise of due diligence is typically a question of fact.)

Similarly, under the mandatory reporting act, RCW 26.44, the defendants were required to disclose the ample evidence they had of Courtney's prolific sexual abuse. They did not. Fraudulent concealment is established per se under *August*.

The Archdiocese's retort, that Plaintiffs failed to exercise due diligence, presupposes that they had available adequate information to trigger that duty. Clearly, they did not. It was not until Plaintiffs became aware that they were not alone, that Courtney's sexual misconduct was not an isolated act of perversion unknown by their Church, that the defendants' liability was revealed and their duty to exercise due diligence triggered.

At issue is whether the Plaintiffs should have known they had a cause of action against the defendants for bringing a known pedophile into their school and into their lives. If they did, the next question is whether they exercised due diligence in unearthing the Church's liability which, to all Plaintiffs and all reasonable people, was simply unthinkable.

A jury must decide whether the trust of Plaintiffs J.B., M.B., and D.L. in their Church and school was unreasonable, such that their failure to vigorously investigate Church liability was a failure of due diligence. This is a purely factual question. The defendants claim that knowledge of a cause of action against Courtney alerted Plaintiffs to a cause of action against the defendants is not factually correct as a matter of law. There is an alternative reasonable account: Plaintiffs reasonably believed the Church was innocent, and Courtney an aberration. This is not the forum to resolve this factual dispute. As *August* commands, this is a factual question for the jury. Summary judgment should be denied on this basis.

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Moreover, even if the Court concludes as a matter of law that Plaintiffs' failure to investigate Church liability was unreasonable and a failure of due diligence, the question remains whether the exercise of due diligence would have succeeded in uncovering evidence of Church liability. As the Court of Appeals explained in *Douglas v. Stranger*, a party's failure to bring a claim is excusable if the basis for the claim "*could not* [be] discovered until within 3 years prior to the commencement of the action." 101 Wn.App. 243, 255, 2 P.3d 998 (2006) (*emphasis* added) (quoting *Interlake Porsche & Audi, Inc. v. Bucholz,* 45 Wn.App. 502, 518, 728 P.2d 597 (1986)).

In this case, there is ample evidence that no measure of "due diligence" would have compelled the defendants to produce evidence of their complicity, let alone admit to it.

As the Court is aware, the defendants stonewalled producing documents on Courtney for years, going so far as to accuse Plaintiffs' counsel of "harassing" them when they insisted that more documents must exist. Eventually, bits and pieces of the truth emerged, but major parts have apparently been scurried away to the darkest corners and farthest reaches of the defendants' archives. If Plaintiffs have barely been unable to obtain the truth through formal discovery, a reasonable jury could conclude that they would have had no chance on their own.

Plaintiffs diligently pursued their claims once they became aware of the Church's involvement in transferring Courtney from school-to-school-to-school-to-school-to-school-school. Their motion should be denied.

F. Washington Law and Public Policy Weigh Heavily Against the Laches Defense

Washington's strong and unequivocal public policy in favor of allowing victims of childhood sexual abuse to assert their claims severely undercuts the Archdiocese's attempt to

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hide behind a laches defense, particularly where the defendants knew of Courtney's abuses in the 1970s and did nothing to stop him.

The doctrine of laches rests upon considerations of public policy – exactly the concern of the Legislature in the enactment of the statute of limitations. *See Crodle v. Dodge*, 99 Wn. 121, 130-131, 168 P. 986 (1917); laws of 1991, ch. 212, § 1(1)-(6) (amending RCW 4.16.340 in part to clarify the application of the discovery rule to childhood sexual abuse cases).

The legislative findings when RCW 4.16.340 was modified demonstrate the Legislature's knowledge of an abuse victim's potential inability to recognize the harms that flow from childhood sexual abuse and emphasize that the limitation periods set forth in RCW 4.16.340 are to be liberally construed in favor of childhood victims of sexual abuse. The Legislature noted:

> (1) Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.
>
> (2) Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.
>
> (3) The victim of childhood sexual abuse may repress the memory of the abuse *or be unable to connect the abuse to any injury until after the statute of limitations has run*.
>
> (4) *The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs*.
>
> (5) *Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later*.
>
> (6) The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. At that time the legislature intended to reverse the Washington Supreme Court decision in *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986).

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Laws of 1991, ch. 212, § 1 (emphasis added).

The Washington Supreme Court has held that in enacting this statute the Legislature "specifically provided for a broad and generous application of the discovery rule to civil actions for injuries caused by childhood sexual abuse." *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 712, 985 P.2d 262 (1999).

In *C.J.C.,* 138 Wn.2d 699 (1999), the Court recognized the Legislature's articulated public policy in favor of allowing victims of childhood sexual abuse to bring claims against religious entities like the Archdiocese. *Id.* at 712-714. Given the legislative history, the Court concluded that there is a strong public policy in favor of protecting children against acts of sexual abuse. *Id.* at 726.

Similarly, the Washington Court of Appeals has held that the legislature enacted Part (c) of the statute in order to address instances "where the victim of childhood sexual abuse was initially unable to connect the abuse to mental or emotional disorders caused by the abuse." *See Hollmann v. Corcoran*, et al., 89 Wn. App. 323, 325, 949 P.2d 386 (1997).

The *C.J.C.* decision directly disposes of the Archdiocese's arguments based on the timing of Plaintiffs' claims, because in that case the abuse had occurred over thirty years earlier, and the perpetrator had died by the time the plaintiffs brought suit against the Church. 138 Wn.2d at 705. The Court allowed the plaintiffs to pursue their claims against the religious entity, noting that "[n]owhere in RCW 4.16.340 does the Legislature articulate concern for defendants who might be sued." *Id.* at 713.

Allowing the Archdiocese to avoid the plain intentions of *C.J.C.* and RCW 4.16.340 through a backdoor laches defense would defeat the strong public policy enunciated in the statute. Given the Legislature's intent, the Archdiocese's laches analysis is not available under these circumstances. All of Plaintiffs' claims fall squarely within this state's statute of

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limitations period. There is nothing unusual or unfair about a plaintiff bringing a claim pursuant to a statute that clearly provides for injuries that emerge many years after child sexual abuse. Public policy and the law favor a remedy for victims, not a shield (much less a shield grounded in equity) for perpetrators.

G. The Claim of Laches is Contrary to the Separation of Powers

The United States Supreme Court long ago recognized that, while the doctrine of laches has survived as a limitation upon certain relief in equity, "[l]aches within the term of the statute of limitations is no defense at law." *United States v. Mack*, 295 U.S. 480, 489 (1935).

In a more recent case, Justice Stevens observed that the inapplicability of laches to certain legal actions is a matter of separation of powers between the legislative and judicial branches: "In deference to the doctrine of the separation of powers, the Court has been circumspect in adopting principles of equity in the context of enforcing federal statutes." *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 262 n. 12, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) (Stevens, J. dissent). The Washington Supreme Court has repeatedly stated the same concern:

> While we may find a waiting period of years to be intolerable, we would find it even more intolerable for the judicial branch of government to invade the power of the legislative branch. Just because we do not think the legislators have acted wisely or responsibly does not give us the right to assume their duties or to substitute our judgment for theirs. The judiciary is the branch of government that is empowered to interpret statutes, not enact them.

Hillis v. Dept. of Ecology, 131 Wn. 2d 373, 390, 932 P.2d 139 (1997).

This concern is particularly true where the Legislature has made definitive legislative findings of public policy. For example, in *Weyerhaeuser Company v. Commercial Union Insurance Company*, 142 Wn. 2d 654, 688, 15 P.3d 115 (2000), the Washington Supreme

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Court noted that the plaintiff's arguments were "best categorized as matters of 'sound public policy'. … [A]s such, this Court is not the proper forum…" It disposed of the arguments by noting that public policy is a matter usually left to the Legislature, not to the courts. *Id.*

In short, the Archdiocese's laches arguments do not provide the Court with a legal basis for making a determination contrary to the statute of limitations. The Legislature has fully occupied this field. Public policy is settled to promote a remedy for victims, not relief for perpetrators and those who harbored them.

H. The Defense of Laches is Not Available Where Plaintiffs Only Recently Gained Knowledge of the Facts Constituting a Cause of Action Against the Archdiocese

Laches is an affirmative defense and it requires that the defendant prove two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay. *Clark County Public Utility District No. 1 v. Wilkinson*, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000).

In order to meet the "inexcusable delay" element, the Archdiocese must meet its burden of proof by showing that "the plaintiff had knowledge of the facts constituting a cause of action or a reasonable opportunity to discover such facts." *In re Marriage of Hunter*, 52 Wn. App. 265, 270, 758 P.2d 1019 (1988) (quoting *In re Marriage of Watkins*, 42 Wn. App. 371, 374, 710 P.2d 819 (1985)). A plaintiff must know of his legal right and negligently fail to enforce that right before a defendant may avail himself of the laches defense. *Johnson v. Schultz*, 137 Wn. 584, 588, 243 P. 644 (1926); *see also Crodle*, 99 Wn. 121.

In *Johnson*, the Washington Supreme Court noted that the touchstone is the plaintiff's negligence: "When a court sees negligence on one side and injury therefrom on the other it is ground for denial of relief." 137 Wn. at 588; *see also Hogan v. Kyle*, 7 Wn. 595, 601, 35 P. 399 (1894) (a plaintiff must acquiesce "for an unreasonable length of time after the party was in a situation to enforce his right under the full knowledge of the facts…").

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The requirement that a plaintiff must know all of his rights is directly related to the "inexcusable delay" element of the laches defense. *Hunter*, 52 Wn. App. at 270. As in the present case, Washington courts have repeatedly recognized that victims of childhood sexual abuse often do not discover their cause of action until many years after the abuse occurs. *See, e.g., Cloud v. Summers*, 98 Wn. App. 724, 734-735, 991 P.2d 1169 (1999). Victims of childhood sexual abuse "may not know … that the abuse might have been prevented if persons having a special relationship with the child had not breached a duty to protect the child from abuse." *Id.* Accordingly, the statute of limitations for a claim based on childhood sexual abuse is not triggered until the victim subjectively makes the connection between the abuse and his or her harm. *Id.* at 735; *Hollman*, 89 Wn. App. at 324-325.

The defendants have failed to show that Plaintiffs had knowledge of their claims "since the late 1970s" because a reasonable jury could very easily decide that Plaintiffs had no reason to believe the defendants had enabled Courtney to abuse them.

This is borne-out by the testimony of the Plaintiffs, who each testified that they were not aware of the role of the defendants in enabling their abuse until very recently.[233]

Moreover, the defendants have made zero showing of prejudice from the asserted delay. The paragraph of their motion devoted to this issue was apparently copied and pasted from an earlier motion in the *Biteman* litigation because it refers to Archbishop Connolly, Monsignor Doogan, Archbishop Hunthausen, and "other Archdiocese officials or witnesses."[234] The Christian Brothers also offers no evidence of prejudice.

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[233] Deposition of J.B., Amala Decl., Ex. 161, at 60-62 Deposition of M.B., Amala Decl., Ex. 162, at 34-35, 51, 82; Deposition of D.L., Amala Decl., Ex. 163, at 48-50, 53-55; Deposition of D.F., Amala Decl., Ex. 164, at 177-80.

[234] Defendant Archdiocese's Motion for Summary Judgment Re: Various Claims, at 19-20.

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This is not surprising, because the following key witnesses are still alive (and have been deposed): Courtney, McGraw, Reilly, LaFazia, Sarkies, Clark, Huck, and Crowley. No prejudice exists.

I. Equitable Defenses Are Not Available to a Defendant with Unclean Hands.

He who seeks equity must do equity. Washington follows the rule that equitable defenses are available to innocent parties only. *Mut. of Enumclaw Co. v. Cox*, 110 Wn.2d 643, 651, 757 P.2d 499 (1988). Since laches is an equitable defense, it does not benefit those who withheld information that would have prompted action at an earlier time. *Shew v. Coon Bay Loafers, Inc.*, 76 Wn.2d 40, 51, 455 P.2d 359 (1969); *see also Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket*, 96 Wn.2d 939, 949, 640 P.2d 1051 (1982) (rejecting the defense as defendants withheld "information which would have prompted action at an earlier date"). The defense of laches thus cannot be based on omissions that were in any part induced by the defendants' own conduct, concealment, or representations.

Any prejudice suffered by the defendants is from the deliberate choices they made: to harbor a known serial sexual predator in order to protect the name and reputation of the Church, to conceal evidence of its knowledge from the public, and to ignore allegations of Courtney's abuse by disowning him when convenient.

A competent inquiry, begun when Courtney's misconduct first became public, would have uncovered his rampant sexual abuse and given the Plaintiffs an opportunity to begin to heal. That did not occur. The defendants have no standing in equity in this Court.

J. Plaintiffs' Claims are Governed by RCW 4.16.340, not RCW 4.16.100

The defendants' mistakenly rely on RCW 4.16.100 to argue that a two-year statute of limitations applies. To the contrary, Plaintiffs' claims are based on the sexual abuse they suffered as children, which is governed by RCW 4.16.340. The fact that the sexual abuse was

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"physical," and that Plaintiffs have shown that the defendants intended for the abuse to occur, does not allow the defendants to bypass the statute of limitations for childhood sexual abuse.

By definition, intentional sexual abuse can only be brought about by intentional and physical acts. Their motions should be denied.

K. Division One Recently Affirmed that Plaintiffs May Pursue Punitive Damages Against the Christian Brothers for their Egregious Conduct

Plaintiffs should be allowed to pursue punitive damages against the Christian Brothers defendants because their most egregious acts took place not in Washington, but at their Provincial Headquarters in California and Illinois.

The Court need not review those acts in a light most favorable to Plaintiffs in order to appreciate the horrific nature of those acts; that lens simply provides more reason why a jury should be allowed to decide whether punitive damages are appropriate.

Although its conduct was also egregious, Plaintiffs do not seek punitive damages against the Seattle Archdiocese.[235]

1. Plaintiffs May Pursue Punitive Damages Under the Laws of California and Illinois

As recently as July 6, 2009, the Washington Court of Appeals reaffirmed that, when appropriate, Washington courts will apply the law of a different state on the sole issue of punitive damages. *Singh v. Edwards Lifesciences Corp*., 151 Wn. App. 137, 210 P.3d 337, 340 (July 6, 2009).

In deciding that the trial court properly allowed the plaintiffs to pursue and obtain punitive damages under California law, the Court focused on (1) which state has the more

[235] To the extent CBI asserts that it is not liable for the actions of the Christian Brothers, as reflected below, Plaintiffs request a continuance under CR 56(f) because CBI is still producing discovery that it was ordered to produced more than a month ago and because Plaintiffs will be filing a motion to compel additional discovery that CBI refuses to produce.

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significant contacts regarding the conduct at issue, and (2) which state has the greater interest in the determination of a particular issue. *Id*. at 143-48.

Here, as in *Singh*, the Court should apply punitive damages from California and Illinois, the two states where the Christian Brothers, through their Provincial and their Provincial Council, chose to:

(1) sign the O'Dea contract, which required them to protect its students from foreseeable harm (California);

(2) transfer Courtney to O'Dea, despite transferring him from his past four assignments for molesting boys (California);

(3) keep Courtney at O'Dea, despite frequent complaints that he was molesting Plaintiffs and others (California);

(4) return Courtney to the classroom under the auspices of a "recommendation" by his therapist, despite knowing that Courtney had molested scores of boys while in treatment with at least two prior therapists (California);

(5) keep Courtney at O'Dea, despite sending him to sexual deviancy therapy in Canada (California);

(6) conceal their knowledge of Courtney's long history of abusing boys, from parents, children, and the authorities, despite finally removing him from O'Dea because so many boys and parents were complaining (California and Illinois);

(7) take no action to prevent Courtney from abusing Plaintiffs and other boys, despite actively supervising him before and after he was removed from O'Dea, even after their Provincial visited Courtney during his tenure as principal of a grade school in Washington (California and Illinois); and,

(8) write numerous letters of recommendation for Courtney's placement file, despite removing him from no less than five schools for molesting boys (Illinois).

Brothers McGraw, Reilly, and LaFazia all testified that these decisions rested with the Provincial and his Council:

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> "My job, as I saw it, was subject to reporting to my immediate supervisor. My immediate superior in the Congregation [of] Christian Brothers was Brother McGowan. It is to him that I provided all information that I had had." – McGraw
>
> "The government doesn't ask you. They tell you." – Reilly

Given their testimony, a jury could conclude the Provincial and his Council concealed the fact that they knew Courtney was a serial sexual predator before O'Dea, concealed the fact that he could not be cured, and concealed the reports that they were separately receiving from McGraw and Reilly.

It is difficult to imagine a set of facts that are more egregious than these. Consistent with the *Singh* decision, California and Illinois have a greater interest in making certain that businesses headquartered in their respective states are deterred from wrongful conduct. Washington, on the other hand, has a greater interest in ensuring that victims of childhood sexual abuse are allowed to pursue civil claims for their abuse and obtain full and fair compensatory damages.

The Court should allow Plaintiffs to pursue punitive damages under the laws of California and Illinois, while applying Washington's statute of limitations for childhood sexual abuse.

2. Washington's Courts Will Incorporate And Apply The Law of Another State On The Issue of Punitive Damages.

The conflict of law analysis in Washington is "a hybrid of the Restatement (second) of Conflict of Laws and a governmental interest analysis." *Singh*, 151 Wn. App. at 143-44. "Where a conflict exists, Washington courts decide which law applies by determining which jurisdiction has the most significant relationship to a given issue." *Id.* at 143. "The court must evaluate the contacts both quantitatively and qualitatively, based upon the location of the most significant contacts as they relate to the particular issue at hand." *Id.*

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The relevant conflicts for evaluation include "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Id.* (quoting *Johnson v. Spider Staging Corp*., 87 Wn.2d 577, 581, 555 P.2d 997 (1976)).

"In holding that Washington law applied, the *Johnson* court enunciated a two-step analysis to be employed to determine the appropriate choice of law." *Id.* at 143-44. "The court must first evaluate the contacts with each potentially interested state and then if balanced, evaluate the public policies and governmental interests of the concerned states." *Id.* at 144.

Singh noted that Washington courts have held that these same choice of law principles apply to the issue of punitive damages." *Id.* It quoted and endorsed *Kammerer v. Western Gear Corp.,* 96 Wn.2d 416, 635 P.2d 708 (1981), where the trial court allowed a jury to use California law to award punitive damages against a Washington corporation for a claim based on fraudulent representation:

> California has an interest in deterring fraudulent activities by corporations having a substantial business presence within its borders. Washington has no interest in protecting persons who commit fraud. Western Gear asserts that differences in Washington and California law governing fraud suggest that Washington has a policy of greater caution in allowing judgments for fraud. Because we do not find any difference, material to this case, in the laws of the two states, we do not find any interest served by application of Washington law. Because Washington has no interests superior to or inconsistent with the interests of California in this controversy, application of the Restatement rule dictates that California law govern the Kammerers' claim for fraud.
>
> 96 Wn.2d at 416.

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In deciding whether to allow punitive damages, *Singh* noted that the most relevant factor was the location of the defendant's bad acts.

Although *Kammerer* involved fraudulent representations, which is analogous to the Christian Brothers' fraudulent representations that Courtney posed no harm to boys at O'Dea and beyond, *Singh* is even more analogous. There, the defendant manufactured a heart monitor that malfunctioned during a heart bypass surgery, resulting in irreparable damage to the patient's heart. 151 Wn. App. at 146-47. Evidence showed that the corporation's managing agents knew about problems with its monitors, but did not issue a recall. *Id.*

The defendant was sued by the patient, Singh, and his family in Snohomish County Superior Court for a products liability claim. The hospital where the injury occurred also sued the corporation for fraud, violations of Washington's Consumer Protection Act and breach of contract. *Id.* at 141. All of the plaintiffs "sought punitive damages under California law." *Id.* The matter went to trial and resulted in an award of compensatory damages of $31,750,000 and an award of $8,350,000 in punitive damages based on California law. *Id.* at 142. The defendant appealed the trial court's decision to apply California law for punitive damages. *Id.*

In affirming the trial court's decision and the jury's verdict, the Court reiterated that Washington will evaluate conflicts of law on "a given issue." *Id.* at 143 (emphasis added). The Court also noted that "[a]lthough there is presumption that the law of the state where the injury occurred applies in personal injury cases, this presumption may be overcome if another state has a greater interest in determination of a particular issue." *Id.* at 145-46 (emphasis added). Thus, the Court determined that it was appropriate to apply California law only on the issue of punitive damages. *Id.* at 146.

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B. This Court Should Apply California and/or Illinois Punitive Damages Law

After explaining when Washington applies the punitive damages law from another jurisdiction, the Court in *Singh* went on to analyze whether it was appropriate to apply punitive damages law from California under the facts of that case.

The defendant argued that its contacts were more significant in Washington than California. *Id.* at 146-48. The Court disagreed because (1) the defendant's headquarters were located in California, (2) the defective product was discovered in California as early as 1998, (3) by 2002, the foreseeable harm of that defect was known, but the decision was made in California not to recall the product or warn users. *Id.*

After analyzing the defendant's contacts with California, the Court considered the relevant "governmental policy interest[s]" between Washington and California:

> In analyzing which state has the greater governmental policy interest, [the defendant] contends that it is Washington with its policy that rejects the award of punitive damages unless provided for by statute. [The defendant] argues that Washington's interest is in permitting full compensation for injured parties and none in permitting a windfall for Plaintiffs. But, as already noted, Washington courts have allowed punitive damages in other cases. In *Kammerer*, in particular, the court explicitly stated that Washington has no interest in protecting companies who commit fraud. The conduct that serves as the basis of the punitive damage award here occurred in California and that state has an interest in deterring its corporations from engaging in such fraudulent conduct.
>
> *Id.* at 342.

Here, just as in *Singh*, an analysis of the relevant contacts and governmental interest demonstrates that the punitive damages laws of California and Illinois should apply.

First, as with *Singh*, the Provincial Headquarters (the "corporate headquarters") were located in California and Illinois. As documented in their own meeting minutes, and as discussed above, the key decisions regarding Courtney's transfer to O'Dea, and the key

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decisions to keep him at O'Dea in a teaching position, were made by the Council at the behest of their Provincial.

Moreover, McGraw and Reilly testified that Provincial McGowan hid much of Courtney's past abuses from them, that they had no idea he went to Southdown for sexual deviancy treatment, and that they were not aware of the complaints that each were providing to McGowan about his abuses at O'Dea.

Second, as with *Singh*, the "defective product" was discovered in Illinois as early as the 1960s. As McGowan noted in 1979, "[t]he Provincial Council has been aware of Chris' problem with homosexuality for years. He had trouble in Brother Rice, Chicago, back in the sixties – then more trouble at Br. Rice, Birmingham, Leo, St. Laurence, and now O'Dea."[236]

The Provincial and his Council were undoubtedly aware of the scope and magnitude of their "problem" when Courtney was physically ejected from one of their high schools in January 1974. A short while later, they barred him from going back to any of their former schools: "Chris is to have no contact with Rice, Leo or Laurence in any way, shape or form." This decision was made from the Provincial's Headquarters in Vallejo, California.

Third, and as with *Singh*, despite barring Courtney from going back to any of his former schools, and despite knowing that his on-going sexual deviancy treatment with no less than two different therapists was not working, the Provincial and his Council decided not to recall their problem or warn users. Instead, from their headquarters in California, they chose to send him to O'Dea.

Finally, as recognized in *Singh*, Washington courts permit their citizens to apply the punitive damages laws of other states, particularly in cases where a defendant sends its

[236] Form to Be Completed Concerning an Application for a Dispensation From Perpetual Vows or for Exclausatration, Amala Decl., Ex. 1.

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"problem" into Washington, under the representation that no problem exists, and then does nothing to protect Washington citizens when the harm materializes.

Moreover, Washington has repeatedly recognized its compelling state interest in protecting victims of childhood sexual abuse and allowing them full access to the courts. *See generally C.J.C. v. Corp. of the Catholic Bishop of Yakima,* 138 Wn.2d 699, 985 P.2d 262 (1999); RCW 4.16.340; Laws of 1991, ch. 212, § 1.[237] Washington also allows a victim of childhood sexual abuse to recover his or her attorneys' fees and costs. RCW 9.68A.

There is no conflict to allowing Plaintiffs to pursue their claims under Washington's statute of limitations for childhood sexual abuse, while allowing Plaintiffs to pursue punitive damages for the Christian Brothers egregious misconduct in California and Illinois that gave rise to their claims. The former is compensatory, and as recognized by the Christian Brothers in their own motion, the latter is punitive and designed to punish and deter wrongful acts that are committed in those states. The Christian Brothers' motion should be denied.

DEFENDANTS OWED A DUTY TO D.F. BASED ON THEIR RELATIONSHIP WITH COURTNEY AND THEIR AFFIRMATIVE ACTS AND OMISSIONS

The defendants' argument that they had no duty to prevent Courtney from molesting more boys, including D.F., is a sad reminder of their indifference towards the safety of school children.

The defendants claim that, although they had knowledge of Courtney's molestation of students, they were free to endorse Courtney's teacher certification, had no duty to report

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[237] *See also* Cal.C.C.P. § 340.1 (statute of limitations does not apply when an entity knew or had reason to know of unlawful sexual conduct by an employee and failed to take reasonable steps to avoid future unlawful sexual conduct by that person). Given the evidence that the Christian Brothers knew for years of Courtney's abuses, and did nothing to stop him, Plaintiffs' claims would not be barred by the statute of limitations in California.

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founded accusations of his abuse of many boys to SPI, and had no duty to report Courtney's criminal sexual abuse to law enforcement once he left their employment.

The defendants claim that once Courtney ended his employment with them, they had no special relationship with him, had no special relationship with the students of Othello, and thus no duty to protect these foreseeable victims. Rather than take steps to end Courtney's career as a teacher, they armed him with letters of recommendation, verified his "successful" teaching and administrative experiences to SPI, assisted him in obtaining new teaching certificates in 1979, and did nothing to ensure that future schools were warned that his "impressive" history of teaching was riddled with abuse of children.

They never lifted a finger to prevent Courtney from teaching again, even though they had at least twelve years (Christian Brothers) and seven years (Archdiocese) of experience with Courtney annually and repeatedly molesting boys. Every year, at every one of their schools, Courtney molested boy after boy after boy.

They did nothing, other than aid and abet his efforts to find yet another school and yet another group of child victims. They solved their "problem" by sending him out into the public school system, even though there was absolutely no doubt that he would re-offend.

They did this, but now claim they had no duty to keep a known sexual predator out of the classroom. That three institutions presently responsible for educating thousands of children and overseeing hundreds of teachers would present this argument for serious consideration by the Court is alarming. It is, in any case, contrary to well established law.

The defendants were well aware that Courtney was a serial sexual predator whose abuse of children could not be stopped through treatment. McGowan, McGraw, Reilly,

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LaFazia, Sarkies, Clark, Crowley, and the Archdiocese's Office of Education were all aware that Courtney had repeatedly abused students in their schools.

Despite this knowledge, it is undisputed that they failed to report Courtney to law enforcement or SPI, and failed to take any other steps to ensure that Courtney was unable to continue teaching, as required by the relevant standard of care and RCW 26.44.030.

It is also undisputed that rather than report him, the defendants protected his teaching certificate, protected his criminal record, protected his reputation, and endorsed his career as an educator with glowing letters of recommendation to SPI and verification to SPI of "successful" teaching experiences in their schools.

Moreover, after they wrote him glowing letters of recommendation, the Christian Brothers actively monitored Courtney, knew he continued working in schools, and knew he molested students at St. Alphonsus, all while they stayed in contact with his sexual deviancy therapist. Still, they did nothing, even though their own Provincial wrote in 1978 that "I do not believe he should be teaching at all and that he would be much better off physically, mentally, emotionally and spiritually anywhere except in a teaching Congregation."

As a result of their acts and omissions, Courtney renewed his Washington State Teacher's Certificate, earned more teaching and administrative credentials, and stayed out of jail. Those credentials, and his "impressive" experience, allowed him to obtain a teaching position in Othello, Washington. He then repeated his behavior of the prior fourteen years: he molested Plaintiff D.F. and other students.

The defendants owed a duty to D.F. and those other victims. A duty can be established in a number of ways that are present here.

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First, the defendants' failure to report Courtney's criminal misconduct to law enforcement, pursuant to RCW 26.44.030, gives rise to an implied civil cause of action. The mandatory reporting requirement exists to prevent future abuse by identifying and arresting individuals who harm children. The defendants failed to do this and D.F. was abused.

Second, the defendants' failure to report Courtney's professional misconduct to SPI was a violation of the standard of care and the common law duty of schools to protect foreseeable victims. The duty to report is based on the special relationship of control and oversight that they had over teachers. It required them to notify SPI when a teacher admits to molesting a student, rather than accepting the teacher's resignation and transferring him to a new school district. This duty is owed to all foreseeable victims, particularly those students who may fall victim to this child molester should he be allowed to continue teaching. This duty is based on the common law and Restatement of Torts (Second) § 315.

Third, the defendants were aware that their affirmative acts of renewing Courtney's teaching certificate, improving his credentials, and endorsing him to SPI, would cause him to have contact with students in the public school system. These affirmative acts were reckless, not merely negligent, and violated their common law duty based on Restatement (Second) of Torts § 302B.

Finally, the defendants are liable for these affirmative, negligent representations they provided on Courtney's behalf. The record shows that the Othello School District relied on these representations when they hired Courtney to teach at D.F.'s schools in Othello. Pursuant to Restatement of Torts (Second) § 311, D.F. may pursue a cause of action for those negligent misrepresentations because he was directly harmed because of them.

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A. The Court of Appeals Decision in *Doe v. Corp. of President of Church of Jesus Christ of Latter Day Saints* Should Not Be Overturned and Supports a Private Cause of Action Based on Violations of RCW 26.44.030

In *Doe*, the Court of Appeals recognized a private cause of action is available to victims of a party's failure to report a child molester in violation of RCW 26.44.030. *Doe v. Corp. of President of Church of Jesus Christ of Latter Day Saints*, 141 Wn.App. 407, 421-422, 167 P.3d 1193 (2007). The defendants recognize as much, but complain that "*Doe* is wrongly decided."[238]

Their attempt to distinguish *Doe* is unpersuasive.

First, defendants asserts that *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (200), which identified a private cause of action based on this statute, "offers only an implied remedy of a parent against the State." This is correct, but irrelevant: the Court of Appeals relied on *Tyner* only to the extent it identified legislative intent to allow for private remedies based on RCW 26.44. The Court noted, "[i]f the legislature intended a remedy for parent victims of negligent child abuse investigations, it is reasonable to imply an intended remedy for child victims of sexual abuse when those required to report the abuse fail to do so." *Doe*, 141 Wn.App at 422.

Second, the defendants assert that the criminal penalties available under RCW 26.44 are "already a motivation" to report abuse. They suggest that the legislature is opposed to "over-motivating" professionals to report child abuse. This argument is contrary to well-established law. Statutes that impose criminal penalties very often imply an action sounding

[238] Archdiocese's motion, at 8.

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in tort. *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990). *Doe* correctly found an implied cause of action in RCW 26.44.030. That judgment should be respected.

The defendants next argue that the implied cause of action should apply only to "known or readily identifiable potential victims." Again, this argument is unpersuasive.

The Court in *Doe* observed that the legislature intended to "protect victims of childhood sexual abuse." 141 Wn. App. at 422. The defendants disagree and assert the legislature only intended to protect some victims of childhood sexual abuse, and not others. It is an odd argument. The statute itself mandates reporting when, among others, professional school personnel have "reasonable cause to believe that a child has suffered abuse or neglect." RCW 26.44.030(1)(a). It does not require reasonable cause to believe a "readily identifiable child" has suffered abuse or neglect. Regardless, in this case, a reasonable jury would very likely find that any boy at a school where Courtney taught would be a "readily identifiable child," particularly with the defendants' peculiar knowledge that Courtney could not be cured.

The legislature intended to protect children from child abuse – both present and future. The declared purpose of the mandatory reporting statute is the protection of children. RCW 26.44.010. On multiple occasions, the Washington Supreme Court has affirmed that "children are within the class of individuals the legislature intended to protect" in enacting RCW 26.44 et seq., and that this protection is of "paramount" importance. *C.J.C. v. Corp. of the Catholic Bishop of Yakima,* 138 Wn.2d 699, 728, n. 16, 985 P.2d 262 (1999); *see also Tyner,* 141 Wn.2d at 79; *Yonker v. DSHS,* 85 Wn. App. 71, 82, 930 P.2d 958 (1997).

The defendants' argument that the legislature intended to protect some children but not others, or victims of current abuse but not future abuse, is unfounded and stretches the

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boundaries of common sense. The legislature intended to compel professionals to report child abusers, like Courtney, to the authorities in order to protect children from the dangers of serial abusers, like Courtney.

The defendants identify various features of RCW 26.44 that focus on "parents, custodians, and guardians," and conclude that because the legislature focused so much attention on this class of potential child abusers, a civil cause of action should not be available to children harmed by a party's blatant failure to report (to say nothing of their affirmative acts to help him continue abusing).

The defendants want the Court to limit the private cause of action established in *Doe* to victims known to the mandatory reporter, because they argue such a limitation "is consistent with RCW 26.44's primary focus on prevention of further abuse against children who have already reported abuse."

Although RCW 26.44 has many provisions that are specific to "parents, custodians, and guardians," those provisions are irrelevant to the question of who the statute is intended to protect. *Most* instances of child abuse that present to a mandatory reporter are likely to occur when a parent or custodian or guardian is the abuser. But not all. And thus the statute does not limit the reporting requirement to those instances of abuse, nor did the legislature intend to protect only those "readily identifiable" victims.

Instead, the legislature requires professionals to alert law enforcement of *any* instance in which one has "reasonable cause to believe that a child has suffered abuse or neglect." RCW 26.44.030(1)(a). The legislature intended to require professionals, including school personnel like McGowan, McGraw, Reilly, LaFazia, Sarkies, Crowley, Clark, and the

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Archdiocese's Office of Education, to report abuse. It did so to protect children – all children – D.F. included. D.F. is entitled to pursue a private cause of action based on the Archdioceses' failure to comply with the mandatory reporting statute RCW 26.44.030.

Finally, the Archdiocese's argument that it is not liable for failing to report Courtney because Sarkies was a priest is misplaced for two reasons. First, even if that was true, which it is not, the Archdiocese does not explain why McGraw, Reilly, LaFazia, Clark, and its Office of Education are not mandatory reporters. To the contrary, as teachers, school administrators, and professional school personnel, who learned of Courtney's abuses of children in that capacity, each of these individuals had a duty to report. RCW 26.44.010 (1975-80). They refused to do so, going so far as to conspire to avoid reporting Courtney in order to protect their "name and reputation."

Second, Sarkies learned of Courtney's sexual abuse of children in his capacity as an administrator of St. Alphonsus Parish School. The Archdiocese has failed to show that Sarkies was functioning in his ministerial capacity when he worked with Courtney, Clark, Crowley, McGraw, and the Office of Education to discretely remove Courtney from St. Alphonsus in order to protect the "name and reputation" of Courtney and his school.

Other than its unsupported, self-serving statements, there is no evidence to show that Sarkies received information regarding Courtney in confession or in any other privileged context. To the contrary, he actively discussed it with Clark, Crowley, McGraw, and the Office of Education.

For that reason, the Archdiocese's reliance on *State v. Motherwell*, 114 Wn.2d 353, 788 P.2d 1066 (1990) is highly misplaced. Although the Court did conclude that clergy for a

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time were exempt from RCW 26.44, it specifically held that (1) clergy can fall under other groups that have a mandatory duty to report, such as "social workers," and (2) more importantly, "establishing one's status as 'clergy' is not enough to trigger the exemption in all circumstances. One must also be functioning in that capacity for the exemption to apply." *Id.* at 359-60.

Given *Motherwell*, the Archdiocese's suggestion that neither it, nor Sarkies, nor any of the above individuals are "social workers" or "professional school personnel" is more than a strained reading of the relevant statutes. These individuals learned of Courtney's abuses "in the actual regular course of employment," as required by *Doe v. Corporation of President of Church of Jesus Christ of Latter Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007) (mandatory reporting statute applies to professionals who learn of abuse in the regular course of employment).

That role brings the Archdiocese, the Christian Brothers, and all of the individuals named above within the definitions of "professional school personnel" and "social worker." RCW 26.44.010 (1975-80) (professional school personnel "shall include, but not be limited to, teachers, counselors, administrators, child care facility personnel, and school nurses;" social worker "shall mean anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support or education of children, or providing social services to adults or families, whether in an individual capacity, or as an employee or agent of any public or private organization or institution).

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B. The Special Relationship Between the Defendants and Courtney Establishes a Duty to Report Courtney's Abuses to SPI; This Duty Was Owed to All Foreseeable Victims

Washington law has long recognized that those charged with overseeing third parties, and who have the ability to prevent those third parties from committing injury, are obligated to take reasonable steps to prevent foreseeable harms. *See Peterson v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983) (citing Restatement (Second) of Torts § 315).

The defendants do not dispute that when Courtney was under their control as a teacher and administrator, they were obligated to exercise reasonable care to prevent foreseeable harms occasioned by his misconduct. *See generally Scott v. Blanchet High Sch.,* 50 Wn. App. 37, 43, 747 P.2d 1124 (1987); *Niece v. Elmview Group Home* , 131 Wn.2d 39, 49, 929 P.2d 420 (1997); *McLeod v. Grant County Sch. Dist. No. 128,* 42 Wash.2d 316, 320, 255 P.2d 360 (1953); s*ee also J.N. ex rel. Hager v. Bellingham Sch. Dist. No. 501,* 74 Wn. App. 49, 871 P.2d 1106 (1994); *Briscoe v. School Dist. No. 123,* 32 Wash.2d 353, 201 P.2d 697 (1949).

The lynchpin of the defendants' argument is that they owed no duty to D.F. because D.F. was not their student and Courtney was not their teacher. This position is aptly summarized by the Archdiocese: "[t]he Archdiocese did not have a special relationship with either Plaintiffs or Courtney *at the time of the abusive acts* and thus no duty applies."[239]

The defendants have confused the law of torts. The timing of the injury is irrelevant to their legal duty – the issue is the timing of the breach. If the defendants owed D.F. a duty to exercise reasonable control over Courtney, when it had a "special relationship" with him and the ability to control him, and during that crucial time period they breached that duty, it is a jury question as to whether they are responsible for the resulting conduct. A duty may end,

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[239] Defendant's Motion at 5 (emphasis added).

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but a defendant is liable for all foreseeable injuries no matter how far into the future those injuries may materialize. A ticking bomb is a ticking bomb. *Theurer v. Condon* , 34 Wn.2d 448, 460, 209 P.2d 311 (1949) ("[t]he defendant who sets a bomb which explodes ten years later, or mails a box of poisoned chocolates from California to Delaware, has caused the result, and should obviously bear the consequences.")

The defendants fail to recognize that when Courtney was employed as their teacher and principal, they had a "special relationship" with him pursuant to Restatement of Torts (Second) § 315 and they owed a duty to his foreseeable victims. Nor do the defendants recognize that by failing to take steps to revoke Courtney's teaching certificate and by failing otherwise disclose Courtney to the authorities, including SPI, they violated the relevant standard of care. Instead, they advance the untenable proposition that they had to be in a "special relationship" with Courtney when he injured D.F.

The Court need look no further than the foundational case of *Petersen v. State,* 100 Wn.2d 421, 424, 671 P.2d 230 (1983), where a psychiatrist negligently released a dangerous psychotic who, in the exercise of reasonable care, would have been committed to a psychiatric hospital:

> Dr. Miller discharged Knox from the hospital the following morning. At the time, it was Dr. Miller's opinion Knox was not schizophrenic but that he had suffered a schizophrenic-like reaction from the angel dust he had taken. In Dr. Miller's opinion Knox had recovered from the drug reaction, was in full contact with reality, and was back to his usual type of personality and behavior.
>
> Five days later, the accident occurred in which Cynthia Petersen was injured.

Under the defendants' analysis, Dr. Miller's special relationship terminated when Knox was released from his care, the equivalent of the defendants' terminating Courtney from

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O'Dea and/or St. Alphonsus. *Petersen* rejected that argument because the "special relationship" was in place when they breached their duties. The consequences of that breach could be many days, months, or years away. The argument that the defendants had to be in a "special relationship" with Courtney at the time of injury was rejected.

Finally, the defendants assert that they did not "know" D.F. when he was abused, so he was not a foreseeable victim. This misses the point. In *Peterson* and its progeny, the negligent tortfeasor rarely "knows" the exact foreseeable victim. Instead, "the scope of the duty to control a third person's conduct is limited to those precautions necessary to protect against the *foreseeable risks of danger* imposed by the third person." *Petersen,* 100 Wn.2d at 428 (emphasis added).

In *Peterson*, the psychiatrist did not know the plaintiff, just as the defendants did not know D.F., but the Court nevertheless imposed liability because the risk that the psychotic patient would harm someone, anyone, was foreseeable.

Similarly, in *Bailey v. Town of Forks*, Justice Utter explained that a police officer owed a duty to all "users of public highways" to properly enforce drunk driving laws. 108 Wn.2d 262, 269, 737 P.2d 1257 (1987). In that case, a plaintiff was injured by a drunk driver who was detained and then released to his vehicle by a police officer, in violation of state law. The plaintiff sued the officer and the Town of Forks for negligence, claiming that the officer owed her a duty to enforce the law. The Court agreed and Justice Utter explained, "[w]hen statutes intend to insure the safety of the public highways, a governmental officer's knowledge of an actual violation creates a duty of care to all persons and property who come within the ambit of the risk created by the officer's negligent conduct." *Id.* at 270. Said another way, "[w]hen a governmental agent knows of the violation, a duty of care runs to all persons within

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the protected class, not merely those who have had direct contact with the governmental entity." *Id.* at 269-70.

As in *Peterson* and *Bailey*, the question of whether D.F. was a foreseeable victim within the zone of danger, particularly under the egregious facts of this case, is for the jury.

Courtney molested numerous school children while a teacher and school principal for the defendants. McGowan, McGraw, Reilly, LaFazia, Sarkies, Crowley, Clark, and the Archdiocese's Office of Education became aware of Courtney's sexual abuse of boys while he was in that capacity and within their control.

Pursuant to the *Petersen*, the Restatement of Torts (Second) § 315, and the relevant standard of care, a "special relationship" existed that imposed upon those individuals a duty to exercise reasonable care to contain the threat posed by the man under their charge. They were duty bound to "anyone who might foreseeably be endangered by" Courtney. *Peterson*, 100 Wn. 2d at 428. This included D.F. and other students who would be molested if Courtney was allowed to teach again. They failed to do so.

Instead, they concealed his abuses, they wrote him letters of recommendation, they helped him renew his teaching certificates, and they verified his teaching experience with SPI. Those affirmative acts and glaring omissions caused Courtney to gain employment in Othello and caused him to sexually abuse D.F. Public policy compels holding the defendants liable. *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 726, 985 P.2d 262, 265 - 289 (1999) ("Our decision not to foreclose the imposition of a duty as a matter of law under these facts is supported by the strong public policy in favor of protecting children against acts of sexual abuse.")

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C. Affirmative Acts by the Defendants Enabled Courtney to Retain and Renew His Teaching Certificate, and Even Improve His Credentials, Establishing a Duty Under Restatement (Second) of Torts § 320

As discussed above, the defendants had a special relationship with Courtney that required them to take reasonable steps to protect foreseeable victims from his dangerous misconduct. However, even in the absence of that relationship, the defendants created a duty by taking affirmative steps to protect Courtney's teaching certificate.

A special relationship is "generally" the only occasion in which a defendant owes a duty to take reasonable steps to deter a third party's misconduct, but it is not the only occasion. The commentary to the Restatement (Second) of Torts clarifies that a duty to protect a third party accrues "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable [person] would take into account." Restatement (Second) of Torts § 302B cmt. e (1965).

The Court of Appeals recently affirmed this principle, stating "a defendant may be liable for harm caused by a third party *even where there is no special relationship*. Such circumstances exist 'where defendant affirmatively brings about 'an especial temptation and opportunity for criminal misconduct' which will give rise to a duty on defendant's part to take precautions against it.'" *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 511-512, 182 P.3d 985 (2008) (*quoting Hutchins v. 1001 Fourth Ave. Assoc.,* 116 Wn.2d 217, 230, 802 P.2d 1360 (1991), *citing* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 33, at 201 (5th ed.1984)).

Section 302B itself provides that "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another

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through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." Restatement (Second) of Torts § 302B (1965).

Justice Madsen's concurrence in *C.J.C.* directly addressed this theory of liability in the context of preventing sexual abuse of children:

> A duty as described in cmt. *e,* para. D might be found in this case if, for example, defendants knew Wilson was likely to molest children, yet allowed him association with children during church activities under circumstances where a peculiar temptation or opportunity for molestation existed. . . . There is no allegation or evidence in the record that defendants recommended Wilson or his wife as child care providers, or that they had anything to do with the child care arrangements.
>
> …
>
> This case is thus unlike *Golden Spread Council, Inc. v. Akins,* 926 S.W.2d 287 (Tex.1996), where the court held that under cmt. *e,* para. D, the Golden Spread Council of the Boy Scouts of America had a duty not to recommend an individual as a scoutmaster if the council knew or should have known that the individual was peculiarly likely to molest boys. Because defendants in this case made no comparable recommendation, reliance upon that case by plaintiffs and the Court of Appeals is misplaced.
>
> *C.J.C.,* 138 Wn.2d at 739 n. 3,.

As Justice Madsen implies and *Golden Spread Council* holds, the defendants' affirmative acts and omissions in recommending a serial sexual predator for future teaching assignments, and endorsing the credentials that allowed him to obtain those assignments, creates a duty to protect his foreseeable victims, regardless of whether a "special relationship" exists.

In *Golden Spread Council*, the Texas Supreme Court explained that "GSC's [Golden Spread Council's] affirmative act of recommending Estes as a potential scoutmaster to the church created a duty on the part of GSC to use reasonable care in light of the information it

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had received [that Estes may have molested young boys]." 926 S.W.2d at 291. This duty to use reasonable care applied, the Court explained, despite the fact that there existed no "special relationship:"

> The dissent errs by concluding that absent a special relationship, there can be no duty in this case. 926 S.W.2d 293 (Enoch, J., dissenting). This Court, in Bird, 868 S.W.2d at 769-70, set forth the proper duty analysis. First, the Court balanced the duty factors reiterated at length in this opinion. Id. at 769. The Court then, after deciding that these factors did not weigh in favor of imposing a duty, examined whether a special relationship existed. Id. at 770. This two-part analysis is proper when deciding whether a duty exists. There are some cases in which a duty exists as a matter of law because of a special relationship between the parties. Otis Eng'g, 668 S.W.2d at 309. In such cases, the duty analysis ends there. However, in most negligence cases a special relationship does not exist and, contrary to the dissent's view, the duty factors must be weighed by the Court. If the dissent's conclusion that without a special relationship there can be no duty were correct, there could be no recovery in most negligence cases.
>
> *Id.* at 292.

The evidence supporting liability in *Golden Spread Council* was simply that the defendants recommended a scout master against whom allegations of sexual misconduct were reported. The Court observed that "the summary judgment evidence shows that GSC knew of complaints that Estes was 'messing with' some boy scouts and was concerned that they might be serious. Only two to three months later, a local church asked Herbert, a GSC employee, to introduce it to a potential scoutmaster. Herbert, with full knowledge of the allegations, recommended Estes to the church." *Id.* at 290.

The evidence in this case is even stronger, and the imposition of a duty under § 302B even more compelling. The defendants were well aware of Courtney's long history of abusing students – putting aside the direct complaints from boys and their parents, Courtney admitted to the abuse. Nevertheless, they recommended him to SPI and others and verified

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that he had successfully served for a half-dozen years within their schools (and another half-dozen years within the Christian Brothers schools). Given their affirmative acts and omissions, Courtney obtained and retained his teaching certificates, improved his credentials, and was hired to teach at D.F.'s schools in Othello.

The duty owed under § 302B extends to all foreseeable victims, including D.F. The defendants could easily predict that, armed with a teaching certificate and their glowing endorsements of his service, Courtney would teach again. And if he taught again, he would molest again. D.F.'s injuries were foreseeable. The defendants' failure to take any steps, let alone reasonable steps, to counteract the consequences of their affirmative acts breached the duty they owed to D.F. and the other foreseeable victims.

D. The Defendants Negligently Misrepresented Courtney's "Success" to SPI, Enabling Him to Maintain His Teaching Certificate, Obtain Employment with the Othello School District, and Molest D.F.; This Establishes a Duty Under Restatement (Second) of Torts § 311

The defendants, with full knowledge of Courtney's long history of sexual abusing boys, misrepresented Courtney's background and qualifications to SPI, Seattle University, and Othello. They wrote positive letters of recommendation for his file, they formally verified his "successful" teaching experience in Seattle, they helped him obtain and retain teaching certificates, they helped him improve his credentials, and obviously, they never reported him.

From the forms they were filling out, as well as their own policies and procedures, the defendants knew, or should have know, that SPI, Seattle University, and Othello would rely on these false reports in deciding to maintain Courtney's teaching certificate and other credentials, to assist in placing him at Othello, and to hire him to teach in Othello.

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These misrepresentations implicate Restatement (Second) of Torts § 311: Negligent Misrepresentation Involving Risk of Physical Harm:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other, or
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.
>
> (2) Such negligence may consist of failure to exercise reasonable care
>
> (a) in ascertaining the accuracy of the information, or
>
> (b) in the manner in which it is communicated.

Restatement (Second) of Torts § 311.

Under facts similar to this case, California and New Mexico have applied this section of the Restatement to former employers who, despite knowledge of their employees' dangerous propensities, wrote letters of recommendations endorsing the employees and omitting evidence of their dangerous misconduct. *See Randi W. v. Muroc Joint Unified School District,* 14 Cal.4th 1066, 1081, 60 Cal.Rptr.2d 263, 929 P.2d 582 (1997)); *Davis v. Board of County Commissioners of Dona Ana County,* 127 N.M. 785, 987 P.2d 1172, 1179 (1999). In both cases the dangerous employees found new employment, aided in part by these letters of endorsement, and sexually assaulted victims entrusted to their care.

The Washington Court of Appeals, in *Richland School Dist. v. Mabton School Dist.*, 111 Wn. App. 377, 387-389, 45 P.3d 580 (2002) described these cases in detail:

> In *Randi W.,* officials at several school districts gratuitously and unreservedly recommended a former employee who had been the subject of numerous complaints involving sexual misconduct with students. The employee moved from school district to school district as the complaints added up, each time

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> recommended without reservation by the previous administration. On two occasions, the employee was forced to resign under pressure due to sexual misconduct charges. *Randi W.,* 14 Cal.4th at 1072, 60 Cal.Rptr.2d 263, 929 P.2d 582. Yet the recommendations from these school districts stated he was recommended "'for almost any administrative position he wishes to pursue,' " and lauded his efforts to make "'a safe, orderly and clean environment for students and staff.'" *Id.* The California Supreme Court found that these letters of recommendation constituted affirmative representations that strongly implied the former employee was fit to interact safely with female students. *Id.* at 1084, 60 Cal.Rptr.2d 263, 929 P.2d 582. Because these representations were misleading in light of the school districts' knowledge that the former employee had been repeatedly charged with sexual improprieties, the court found that the injured student had established a prima facie case of negligent misrepresentation. *Id.*
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> In *Davis,* a New Mexico mental health technician, Joseph Herrera, sexually assaulted a woman under his care during psychiatric therapy. In a prior employment as a county detention sergeant, Mr. Herrera had been investigated for sexually harassing inmates under his authority. A report compiled by the sheriff's department concluded that while not all of the allegations against Mr. Herrera could be confirmed, his conduct was suspect. He resigned before the county could schedule a disciplinary hearing. Within days, the director of the detention center wrote a positive recommendation without reference to the reprimand, the allegations of sexual harassment, or the results of the investigation. *Davis,* 987 P.2d at 1175-76. The letter also lauded Mr. Herrera as an excellent employee who developed social programs for the inmates. *Id.* at 1176, 987 P.2d 1172. The woman who was assaulted at Mr. Herrera's new job sued the county for negligent misrepresentation pursuant to Section 311. Finding that the allegations of sexual harassment were "far more than mere gossip or innuendo," *Davis,* 987 P.2d at 1179, held that a reasonable person who had this information should have foreseen that omission of the report and disciplinary actions in the recommendation would pose a threat of physical harm to those like the plaintiff.

The facts of this case mirror those in *Randi W.* and *Davis*, and warrant the same result. The defendants took affirmative steps to promote Courtney's career as a teacher, knowing that SPI, Seattle University, and Othello relied on those endorsements to perpetuate his teacher's certificate, assist in placing him in Othello, and hiring him to teach in Othello.

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Section 311 is a variant of the tort of negligent misrepresentation, and it may be used by victims to whom the misrepresentation was neither made nor relied upon. The California Supreme Court explained, "the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons." *Randi W.*, 14 Cal.4th at 1081.

D.F., as a future student who would very likely be subjected to Courtney's abuses, was a foreseeable victim. He was owed the duty of an honest appraisal of Courtney's background. By misleading SPI, Seattle University, and Othello, the defendants breached their duty to D.F.

The facts of this care are indeed unique – it is (thankfully) rare that an organization endorses a sexual predator as a school teacher. As such, the application of section 311 is a matter of first impression. The Court of Appeals observed, in *Richland*, that no Washington case has had occasion to adopt or reject it. *Id.* at 389. The Court declined to adopt section 311 "on these facts," citing the absence of reasonable risk of physical harm to students: "Mabton officials [defendant], with some personal knowledge of the parties involved in the allegations, decided that the [molestation] charges were baseless. A reasonable person would not foresee that a person with Mr. Caballero's record of questionable accusations and minor discipline problems posed a risk of physical harm to students." *Id.* at 389. The Court further found, in accord with *Randi W.* and the Restatement, that the tort is inapplicable in the absence of a victim "physically harmed." *Id.* (citations omitted).

Unlike the Richland School District, who sought to apply section 311 in the absence of a real victim, D.F. was physically harmed as a result of the misrepresentations made by the defendants. These facts make the adoption of section 311, at least in this case. As in *Randi*

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W., Courtney moved from school to school, and with each new opportunity he molested new students. It was foreseeable that he would molest again. But rather than end Courtney's career of molesting boys, the defendants misrepresented his history so that their "problem" could obtain employment in the public school system. He did so, and he sexually abused D.F.

E. Causation is a Question for the Jury

The defendants' argument that D.F. cannot prove causation is misplaced for several reasons.

First, Othello would not have hired Courtney but for the fact that he had a valid teaching certificate and his experience appeared to be "impressive." Moreover, the defendants do not dispute that Courtney was able to groom and abuse D.F. through his position as a teacher in Othello.[240] Evidence of "but for" causation is established.

Second, history disputes the defendants' argument that there is no evidence that Courtney would have been removed from Othello if the defendants had reported his earlier misconduct. As soon as Othello received a report of abuse, Courtney was immediately suspended. But for the failure of defendants to report him, he could not have molested D.F.

Third, history also disputes the defendants' argument that it took "three years" for the authorities to ensure he was not teaching. To the contrary, the police immediately began investigating Courtney, which is why he fled to Nevada. Once he was extradicted back to Washington and SPI was made aware of the charges, SPI made sure his abuses were being investigated. Within a few months, his teaching certificates were revoked.

This is no surprise, as the former Superintendent at the time, Judith Billings, has testified that Courtney would have been investigated and his teaching credentials revoked if

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[240] *See also* deposition of Deborah Cress, Amala Decl., Ex. 165, at 50-52, 87-89.

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the defendants had reported his abuses earlier. She also testified that their failure to report Courtney, or take any other action to keep him from teaching, violated the relevant standard of care.[241]

Ironically, by arguing that nothing would have happened if Courtney had been reported earlier, the defendants are basically asserting that they would have lied to the authorities in order to protect Courtney further. Public policy obviously cannot operate under that assumption. But for causation is established.

Finally, to the extent the defendants want to suggest that other non-party entities caused D.F.'s injuries, they can make their causation argument to the jury. But the issue of foreseeable harm, and whether their acts and omissions were a proximate cause of D.F.'s harm, are questions of fact for the jury. This is particularly true where the defendants were aware of the scope and magnitude of Courtney's abuses. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 477-79, 951 P.2d 749 (1998) (issue of foreseeability is a question for the jury).

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[241] Deposition of Judith Billings, Amala Decl., Ex. 166, at 11-13, 17, 63-64, 79, 158-59.

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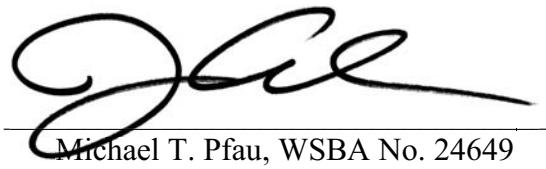
V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the defendants' motions to dismiss and for summary judgment.

Dated this 12th day of October 2009.

PFAU COCHRAN VERTETIS KOSNOFF PLLC

By 

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CERTIFICATE OF SERVICE

I, **Bernadette Lovell**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Kosnoff PLLC, and that on this 12th day of October 2009, I served Plaintiffs' Opposition to Defendants' Various Motions for Summary Judgment, including the Declaration of Jason P. Amala in support thereof, via E-Service, Legal Messenger, and/or U.S. Mail as indicated below by directing delivery to the following individuals:

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