

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DENNIS O'BRIEN,)	
)	
Plaintiff,)	Civil Action No. 11-979
)	
v.)	U.S. District Judge Terrence F. McVerry
)	
ARCHABBOT DOUGLAS NOWICKI;)	Chief Magistrate Judge Lisa Pupo Lenihan
JACK PERRY; and SAINT VINCENT)	
ARCHABBEY, an unincorporated)	ECF No. 48
association,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS

I. CASE HISTORY

The matter underlying this case, as transferred to this Court by the United States District Court for the Northern District of California on July 5, 2011, is reflected in the Complaint filed by Plaintiff, a lawyer residing in California, in March, 2011. Plaintiff has asserted claims for negligence, recklessness and fraud and seeks compensatory damages, \$10,000,000 in punitive damages, and injunctive relief.¹

Plaintiff has sued Defendants Archabbot Douglas Nowicki ("Nowicki") and Jack Perry ("Perry"), together with Saint Vincent Archabbey ("Saint Vincent") over their handling of his 2010 complaints regarding alleged abuse by priests² when Plaintiff was a high school student at

¹ Plaintiff's requests include Court imposition of specific abuse reporting and investigation procedures on the Defendants.

² Plaintiff asserts, in correspondence included in an extensive compilation of communications attached to Plaintiff's

Saint Vincent Scholasticate, in Latrobe, Pennsylvania, between August 1966 and May 1970, *i.e.*, approximately forty (40) years ago.³

Plaintiff expressly premises his causes of action on the Defendants' responses to his initial March 2010 and subsequent communications regarding the alleged abuse. More particularly, he complains that:

(1) the information available on the Saint Vincent Archabbey's website - providing a contact telephone number for Perry, as Child Protection Delegate - may deter victims of abuse from reporting and/or seeking assistance with recovery from abuse because it fails to disclose related policies and procedures and alternative means of contact, such as a toll free telephone number, or physical or email addresses;⁴

(2) although Defendants responded to his request for emotional/psychological assistance by funding Plaintiff's counseling sessions with his choice of pre-approved California counselors, the counselor Plaintiff selected neither established a rapport with Plaintiff nor supported him with regard to feelings of religious institutional responsibility or legal liability, and Defendants then refused to fund Plaintiff's sessions with another, independently-selected counselor; and

NEVER
MENTIONED
SPECIFICALLY
EXCLUDED

Declaration in Support of Opposition to Defendants' Motion to Dismiss, that he was subjected to unwelcome tickling, inappropriate and unwelcome touching incident to corporal punishment, and emotional abuse/ridicule.

FILED COMPLAINT
RE POSSIBLE
CHILD SEXUAL
ABUSE

³ As noted by the United States District Court for the Northern District of California in its Order Granting Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Transfer to the Western District of Pennsylvania, Plaintiff sued Saint Vincent but subsequently conceded that The Benedictine Society, which operates Saint Vincent Archabbey, was the proper institutional defendant in the suit because his complaints turn on the communications and investigations made by officials of that Society in response to Plaintiff's 2010 report of prior abuse. Nowicki is a Benedictine Society leader and Perry is the Society's child protection official assigned to Plaintiff's former school. Both are sued in connection with Plaintiff's allegations regarding response to his abuse claims.

ARCHABBY &
SOCIETY ARE THE
SAME

⁴ Plaintiff, however, contacted both Nowicki and Perry in writing by email and certified letter, respectively, that same month to report the demons that had plagued him for years and request assistance in emotional recovery. See Complaint at para. 11. Plaintiff states that Nowicki's email address "as provided elsewhere on the website" and Perry was reached in writing at "an address in care of the Archabbey". Id. Plaintiff also sent a copy of his letter to "Monsignor Persico, the diocesan official in the Archabbey's area who deals with child abuse complaints" but does not identify his source for this additional avenue of communication. Id. at 13. Defendants complied with Plaintiff's April 13, 2010 request for their policies and procedures on April 20, 2010, within a week of his request. See id. para. 15-19; Ex. C.

(3) Defendants declined to permit Plaintiff to (a) actively participate in the manner he desired (e.g., by "representing" himself and presenting oral testimony to the Review Board) in their investigation into his charges, or to (b) provide him with specific information regarding the outcome of that investigation, instead advising him that the recommendations made by Perry and the Review Board would be implemented but that such reports were confidential due to the personal and sensitive nature of the information gathered and contained.⁵

Never
Held,
Never
Acknowledged

→ only covered
raised is witnesses
otherwise, release!

Presently pending before this Court is Defendants' September 22, 2011 Motion to Dismiss and to Strike (ECF No. 48).⁶

II. STANDARD ON MOTION TO DISMISS

A motion to dismiss is an appropriate means of challenging the legal sufficiency of the Complaint. See, e.g., Sturm v. Clark, 835 F.2d 1009, 111 (3d Cir. 1987). It must be granted where the Complaint fails to set forth facts stating "a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 556 (2007). See also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (May 18, 2009) (citing Twombly, 550 U.S. at 555-57). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The Supreme Court further explained that "[t]he plausibility standard is not akin to a 'probability requirement', but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

⁵ See, e.g., Complaint at para. 20; Ex. A.

⁶ When Plaintiff failed to timely file a response to said Motion or request an extension of time, he was granted, *sua sponte*, an extension to respond or file an amended complaint by November 29, 2011, which extension he met by filing a November 28, 2011 Opposition. See November 8, 2011 Order.

→ GRANTED AFTER LETTER

In Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. Aug. 18, 2009), the United States Court of Appeals for the Third Circuit described the Rule 12(b)(6) standard in light of Twombly and Iqbal:

After Iqbal, it is clear that . . . [t]o prevent dismissal, all civil complaints must now set out 'sufficient factual matter' to show that the claim is facially plausible. This then 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' The Supreme Court's ruling in Iqbal emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible.

IMPLAUSIBLE FACTS
NEVER ASSERTED
(EXCEPT FOR FTN)

Fowler, 578 F.3d at 210 (citations omitted).

The Third Circuit set forth the following two-prong test to be applied by the District Courts in deciding motions to dismiss for failure to state a claim:

First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.' In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts. . . . This 'plausibility' determination will be 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'

Fowler, 578 F.3d at 210-11 (citations omitted).

III. ANALYSIS

To state a plausible claim for relief under each Count of his Complaint, Plaintiff must allege facts that would give rise to a duty owed to him in particular, or to a class to which he belongs.⁷ He has not. As Plaintiff's Complaint (1) alleges facts that could only possibly give

Wrong!
INTENTIONAL
WRONG + FRAUD
DO NOT REQUIRE
A DUTY

⁷ The existence of a duty is a question of law. See, e.g., R.W. v. Manzek, 888 A.2d 740, 746 (Pa. 2005).

RESEARCH

rise to a claim stemming from a duty owed to him as a student subjected to abuse in the 1960's, ^{UPON}
i.e., related to his status as a victim, and (2) premises no claim directly on the alleged abuse and
makes no suggestion of entitlement to tolling of the applicable statute of limitations, it presents
no potential claim that is not clearly time barred. And as discussed below, Plaintiff's alternative ^{UPON}
assertion, in his Opposition to Defendants' Motion, that he states a cause of action because
Defendants owed him a present duty (to, e.g., afford and conduct inquiries in a certain manner
and provide particular forms of counseling) on the basis of Restatement (Second) of Torts,
Section 323, is unfounded.⁸ Accordingly, Defendants' Motion to Dismiss should be granted. ^{WHY?}

More particularly, in the absence of any duty, the remedies and benefits afforded Plaintiff
by Defendants were gratuitous. Plaintiff simply cannot state a cause of action by complaining
that they should have been more accessible, public/transparent, extensive, or generous.

Although Plaintiff complains of an insufficiently efficacious means of contact provided
to former victims by the Society's website(s), he was in fact able to, and did, communicate his
charges in writing to both Nowicki and Perry, and discussed them by phone with Perry, within a
matter of weeks of his first inquiry via the Archabbey's website. See Complaint at para. 9, 11,
21. The policy and procedural information Plaintiff requested was also timely provided. See
<sup>LITIGANT DISCUSSION
NOT PERMITTED</sup>
<sup>WAS
HARMED</sup>
^{NOT JUST GRATUITOUS}
supra. Whether other alleged victims were deterred would be - even if Plaintiff set forth facts
supportive of a duty, which he has not - irrelevant to this litigation where the facts presented do
not suggest that the availability of contact information and/or means of reporting prior abuse
harmed this Plaintiff. Secondly, although Plaintiff complains of Defendants' unresponsiveness

⁸ Section 323 provides that one "who undertakes . . . to render services to another *which he should recognize as necessary for the protection of the other's person or things*, is subject to liability to the other *for physical harm* resulting from his failure to exercise reasonable care [in the undertaking], *if* (a) his failure . . . increases the risk of such harm or (b) the harm is suffered [as a result of] reliance upon the undertaking."

to his requests and demands for procedural modifications,⁹ private organizations have no general duty to permit third parties a participatory role in their deliberations or decisions, or to disclose them. That is, third parties have no standing to participate in a private organization's internal investigative procedures or hearings, nor do they have any entitlement of access to the results.

NO CITE
NOT A
THIRD PARTY!

Indeed, Plaintiff expressly acknowledges that he premises these asserted rights - and Defendants' corresponding asserted duty - on his standing as a former victim, which basis is time barred.

ONLY ONE
BASIS OF DUTY

See, e.g., Opposition at 7 and 11. Thirdly and similarly, Plaintiff cannot maintain a cause of action based on Defendants' failure to fund counseling with another, alternative therapist of his choice where Plaintiff's counseling assistance was provided gratuitously, and did not arise from a legally cognizable duty.

UNLESS
DELIBERATE

The Court observes the public policy considerations weighing strongly against imposing liability on private organizations electing to afford gratuitous assistance and/or remediation to alleged victims of otherwise time-barred wrongs. If by proffering a gratuitous, measured response an institution exposed itself to legal liability premised on second-guessing the nature of its investigation or remediation, the effect would be chilling, if not preclusive. See generally Defendant's Memorandum of Law in Support at 5-8 (discussing and applying the factors weighed in considering whether a duty exists: (1) relationship between the parties, (2) social utility of defendant's conduct, (3) nature of risk imposed and foreseeability of harm incurred, (4) consequences of imposing duty on defendant, and (5) overall public interest in proposed solution)¹⁰ (citing Althaus ex rel. Althaus v. Cohen, 756 A.2d 1166, 1168 (Pa. 2000)).¹¹

BUT IS HARMFUL,
CAUSES CHANGE,
NOT CHILL

REPEATED IN
DETAIL

⁹ See, e.g., Complaint at para. 24 ("On July 14 . . . I sent a letter to the Archabbot, demanding that I be allowed to appear before the Review Board and for changes to be made in the Archabbey's Child Protection Policies and Procedures.").

¹⁰ As Defendants duly explicate in their Memorandum of Law in Support, the relationship between Plaintiff and Defendants is that he graduated from the Scholasticate forty years ago, the conduct/omissions of which he complains are not such as would entail risk to the person or foreseeable harm, and the probable adverse consequences of

Finally, the considerations reflected in Section 323 of the Restatement (Second) of Torts, on which Plaintiff now attempts to impose a legal duty that Defendants implement particular investigation procedures and afford particular benefits, are patently distinguishable. The "good samaritan" rule requires that one undertaking (even gratuitously) services "necessary for the protection of [another]'s person" take the recognizably reasonable degree of care to protect that person, and imposes liability for physical harm where failure to exercise reasonable care in the undertaking either (a) increases the risk of such harm or (b) causes harm suffered in reliance. See supra. As a general matter, Defendants would have no reason to anticipate – and should not be charged with an expectation – that the person of another could be endangered by the type or amount of contact or policy information posted to their website, or by their procedures or policies for responding to allegations of prior abuse. Section 323 – even if otherwise fitting to the facts at issue, which it is not – is expressly applicable to circumstances of physical harm. See also Myers v. Garfield & Johnson Enters., Inc., 679 F.Supp.2d 598, 616 (E.D. Pa. 2010) (noting that Pennsylvania courts have adopted this limitation); id. (citing Morina v. S. Hills Health Sys., 462 A.2d 680 (Pa. 1983)). And there is no plausible suggestion of a failure to take reasonable care where Plaintiff made inquiry about alleged past abuse and Defendants responded by written and oral communications affording him an opportunity to voice his allegations, investigating those allegations, and offering and providing professional counseling.

Questions of fact!!!

Q. of fact

imposing the general duties Plaintiff asserts would be substantial. See id. at 5-8.

¹¹ The Court has undertaken fairly comprehensive research and found no case suggesting any general duty – owed, e.g., to alumnus who were the victims of alleged abuse – as to reporting and investigative procedures or remedial measures, but only a particularized duty arising from the student's relationship to the defendants at the time of the wrongful conduct and subject to the law of the statute of limitations. Cf. Defendants' Memorandum of Law in Support at 4 ("Plaintiff can point to no authority in support of his contention that Defendants owe a *current* duty by virtue of his having attended the Scholasticate 40 years ago.") (emphasis in original).

IV. RECOMMENDATION

As Defendants owed (a) no general duty as to the claims alleged and (b) no particularized duties to Plaintiff other than those arising from his attendance as a student forty (40) years ago – as to which the statute of limitations has long expired, it is respectfully recommended that Defendants' Motion to Dismiss be granted.¹² The Court is not unsympathetic to Plaintiff's clearly sincere expressions of concern regarding comparable remedial efficacies as between the manner(s) of addressing allegations of child abuse in some European (*e.g.* German) and American Dioceses. The Federal Court is, however, not an appropriate forum or vehicle through which to lobby for policy and procedural changes within a religious organization. See generally Plaintiff's Complaint, Opposition, and Exhibits.

In accordance with the Magistrate Judges Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Rules of Court, the parties are allowed fourteen (14) days from the date of service of a copy of this Report and Recommendation to file objections. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file timely objections will constitute a waiver of any appellate rights.



LISA PUPO LENIHAN
United States Chief Magistrate Judge

Dated: January 27, 2012

¹² The Court notes, but in light of the absence of duty, need not base its Recommendation on, Defendants' well-reasoned additional briefing regarding (a) Pennsylvania's requirement of physical injury or impact to recovery for negligent infliction of emotional distress, which requirement is not met by the Complaint; (b) the absence of an independent action for "recklessness" (as alleged in Count II of the Complaint) under Pennsylvania law; and (c) the absence from the Complaint of factual support sufficient to any plausible fraud claim. See Defendants' Memorandum of Law in Support at 8-10.

INT. INF. OF 2407. DIST.

WROTE
Q. OF FACT.
BALD ASSERTION

April 19, 1853

[with 1973 Amendment]

D&N

An Act

To incorporate the Benedictine Society in Westmoreland County.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by authority of the same, That Monifce Wimmer, Celestine Englbracht, Peter Henry Lemki, Utho Huber, citizens of the State of Pennsylvania, and their associates, members of the society called the Benedictine Order, being a society of religious men living in community and devoted to charitable works and the education of youth, be and they are hereby are constituted a body politic and corporate, by the name, style and title of "The Benedictine Society," to have perpetual succession, to use a common seal and alter and renew the same at pleasure, to take, hold and enjoy lands, tenements and hereditaments, and to make such by-laws, for their government and for the admission of members into the corporation, as they shall deem necessary and proper: Provided that such by-laws shall not be repugnant to nor inconsistent with the constitution and laws of the United States or of this State. And provided also, That the clear yearly income of the real estate to be held by said corporation, exclusive of the houses occupied by the society and grounds thereto attached, shall not exceed the sum of three thousand dollars: And provided; That no person shall be or remain a corporator, except regular members of said religious society living in community and governed by the by-laws thereof.

Section 2. That the essential objects of said corporation shall be the relief and support of sick, destitute and dependent persons, the maintenance of orphans, the care and education of youth and the establishment of churches and conducting of service therein.

Section 3. That no misnomer of the said corporation and their successors, shall defeat or annul any gift, grant, devise or bequest, to or for the said corporation: Provided, That the intent of the party or parties shall sufficiently appear on the face of the gift, will, grant, or other writing, whereby any estate or interest was intended to pass to or for the said corporation.

Section 4. That any person or persons now holding or hereafter to hold any goods, chattels or property, real or personal estate, or interest whatever, in trust or for the use of the said society or any of the members, are hereby authorized to convey, transfer, grant and make over the same to the corporation, hereby created, freed and discharged from all such trusts: Provided, That the said corporation shall appropriate the same to the same uses as the donors or grantors, by whom the said property, real or personal, was originally given or granted, shall have given or granted the same: - Provided further, That no private rights or vested interests shall be effected or in any way prejudiced by such conveyance to the corporation.

W. P. Schell,

Speaker of the House of Representatives.

The Carson,

Speaker of the Senate.

Approved-The nineteenth day of April, one thousand eight hundred and fifty three.

Wm Bigler,

Archabbot Douglas Nowicki
Saint Vincent Archabbey
Latrobe, Pennsylvania

March 21, 2010

Archabbot Nowicki,

I am writing now to try to expunge some demons that have plagued me for years.

I attended Saint Vincent Scholasticate, commonly called Saint Vincent Prep, from 1966 to 1970. Our class graduated only 16, the class after us 12, after which the school was closed, never to re-open.

About ten years ago, many of us from several classes started attending annual reunions. Those occasions offered an opportunity both to catch up on news and to reflect upon our time in school together. It was at those gatherings that some of us began to talk about how we were treated, and sometimes mistreated, by a couple priests there.

The priest most talked about was Father _____ (deceased), who taught Latin to freshmen and sophomores while being the dorm monitor for the juniors and seniors. During the Latin classes, he would stand behind many of the students at their desks while quizzing them. If they hesitated at all, he would begin to tickle and poke them in the ribs and belly. Sometimes he seemed to go lower.

He once tried that with me. Even though I was able to answer the questions correctly, he insisted on poking and tickling anyway, trying to get some sort of reaction. My response was to put up a wall against expressing any emotion. It was my shield, my defense mechanism, my way of dealing with behavior that was apparently accepted by the institution. And it worked. He just harrumphed and moved on to the next freshman. I maintained that emotional control throughout my time there, and well beyond.

During sophomore year, he was doing it to Dennis Ward, who was particularly ticklish. But when Father _____ seemed to go very low, Dennis yelled, "Stop groping me, you pervert!" or something like that. Father _____ immediately went back to the front of the room, his face very red. And at the end of the term, Dennis Ward was asked to leave.

There are some at our alumni gatherings who don't think it was that bad, but many others were bothered by the unwelcome touching. Indeed, some spoke of classmates who stayed away even from our gatherings because of those episodes. There is also the Class of 1969, who reportedly agreed as a group never to return to Saint Vincent. With rare exception, they have kept that pledge.

The other priest is Father _____. I will speak only of my personal experience.

Father used a thick wooden paddle to discipline students. We were told he was acting in loco parentis, though my parents hadn't spanked me since pre-school. He decided to discipline me one day for seeking permission from another priest for something that he had already denied.

Every night we had study hall for two hours, freshmen and sophomores in one big room. 's office was in the next room. During study hall, he takes me in, tells me of the transgression, then paddles me till I'm screaming and crying, all heard by the students in the study hall. He then has me lie on a daybed, explaining that he had to rub alcohol on my naked butt to take care of the pain and swelling, which he proceeded to do thoroughly.

I was more embarrassed than at any other moment in my life. I felt ashamed, powerless, and without anyone to turn to. Massive anxieties now accompanied an emotional shutdown.

They still do. That's why I'm writing.

Now I'm not sure if this behavior amounts to sexual abuse, though some might say technically yes. It was certainly unwelcome touching, and the effects on the lives of those who experienced it, though a wide spectrum, are undeniable.

It has certainly affected my life. I have done all I can to address the other factors that affect my current well-being, and I must now address this one. Yes, I still have dreams where I am at Saint Vincent, being chased by people whose faces I never see, looking for hiding places and escapes in the various buildings and tunnels that I knew as a scholastic. And waking up in a sweat if ever I was about to be caught.

What used to be called demons are now anxieties, and as I said at the beginning, I am still bedeviled by them. I am hoping that this letter will start the process of reducing their effect on my life, and perhaps the lives of others. From what I hear in the news, the church is starting to pay more attention to these acts and their effects, even when done long ago in the past.

Please help.

Sincerely,

Dennis O'Brien
Class of 1970

Cc: Delegate for Child Protection



OFFICE OF THE ARCHABBOT

SAINT VINCENT ARCHABBEY
300 FRASER PURCHASE ROAD
LATROBE, PENNSYLVANIA 15650-2690

July 15, 2010

Mr. Dennis O'Brien
1201 Parducci Road
Ukiah, CA 95482

Dear Dennis,

In accordance with the Archabbey policy entitled "Creating a Safe Environment for the Protection of Children and Young People," the Allegation Review Board was provided with all of the facts, documents and circumstances relating to your allegations regarding Fr. Herman and Fr. Stanley, including all of the supporting information which you provided to the Archabbey's Delegate. The Board also reviewed your concerns regarding the review process itself.

The Review Board has evaluated each of the matters submitted to it and has made unanimous recommendations to me. While the work of the Review Board is and will remain confidential, I may advise you that all of the recommendations of the Board regarding your concerns have been implemented.

I am grateful that you have found counseling which we have made available to you helpful and encourage you to continue with it.

Sincerely,

+Douglas R. Nowicki O.S.B.

+Douglas R. Nowicki, O.S.B.
Archabbot of Saint Vincent

cc: Msgr. Persico, Diocese of Greensburg

Appendix: Harmful Effects of Defendants' Acts on Plaintiff
as Alleged in Complaint and Exhibits

Elevated heart rate
Elevated blood pressure
Depression
Crying
Loss of sleep
Nightmares
Distress
Emotional distress
Mental anguish
Suicidal ideation
Withdrawal
Fear
Anger
Despair
Helplessness
Outrage
Anxiety
Irritability
Doubt
Confusion
Turmoil
Intimidation
Embarrassment
Shame
Distrust
Discouragement
Loss of Faith
Injured
Harmed
Destroyed
Torn apart
Psyche in chaos
Made to feel overly demanding
Denied resolution/closure
Needing medical treatment
Side effects of drugs
Revictimized: feeling unheard, unacknowledged, marginalized, and dismissed

OTHER FACTS

26. Saint Vincent Scholasticate, a high school for young men interested in becoming Benedictine monks, closed in 1971. It was operated by The Benedictine Society.

27. The investigation of and Delegate and Review Board recommendations regarding Plaintiff's allegations, like most, remain confidential to protect the identity of witnesses and to provide members of the Review Board with information to determine the credibility of the allegations.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: May 16, 2011.

Archabbot Douglas R. Nowicki
Archabbot Douglas R. Nowicki, on behalf of
The Benedictine Society (erroneously sued as the
Saint Vincent Archabbey) and himself