IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

KENNETH WHITWELL,	:	
	:	C.A. No: 07C-08-006 (RBY)
Plaintiff,	:	
	:	
v.	:	
	:	
ARCHMERE ACADEMY, INC., et al.,	:	
	:	
	:	
Defendants.	:	

Submitted: January 18, 2008
Decided: April 16, 2008

Thomas Crumplar, Esq., Jacobs & Crumplar, Wilmington, Delaware for the Plaintiff.

Stephen J. Neuberger, Esq., and Thomas Neuberger, Esq., The Neuberger Firm, Wilmington, Delaware for the Plaintiff.

Mark L. Reardon, Esq., Elzufon, Austin, Reardon, Tarlov & Mondell, Wilmington, Delaware for Defendant Archmere.

John Balaguer, Esq. and Marc S. Casarino, Esq., White & Williams, Wilmington, Delaware for Defendant The Premonstratenian Fathers, Inc.

William Kelleher, Esq., Elliott, Greenleaf & Siedzikowski, P.C., Wilmington, Delaware for Defendant The Norbertine Fathers of Delaware and The Norbertine Fathers, Inc.

Kathleen M. Jennings, Esq., Oberle, Jennings & Rhodunda, P.A., Wilmington, Delaware for Defendant Rev. Edward J. Smith.

Upon Consideration of
Defendant Norbertine's Motion to Dismiss
Defendant Premonstratensian Fathers, Inc.'s Motion to Dismiss
Defendant Archmere's Motion to Dismiss

OPINION AND ORDER

Young, J.

Kenneth Whitwell ("Plaintiff") was a student at Archmere Academy ("Archmere") in the 1980s. He alleges 33 months of continuous sexual abuse by Edward Smith ("Smith"), a teacher and campus minister at Archmere. Most of the alleged abuse occurred in Delaware.

On August 3, 2007, Plaintiff filed a Complaint pursuant to the newly enacted 10 *Del. C.* §8145 against several defendants. Some of the defendants have been released. The remaining active defendants are Smith,[1] Premonstratensian Fathers, Inc. ("TPF"), Archmere and The Norbertine Fathers, Inc. ("Norbertines"). On January 18, 2008, the Court heard arguments on three case dispositive motions. The Norbertines filed a Motion to Dismiss challenging the constitutionality of the statute. TPF filed a Motion to Dismiss for lack of personal jurisdiction. Archmere filed a Motion to Dismiss for res judicata.

Constitutionality of 10 *Del. C.* §8145

This is a Motion to Dismiss the complaint on the assertion of unconstitutionality of the statute, 10 *Del. C.* §8145. The Legislature passed this statute, the Child Victim's Act, on July 10, 2007. It created a two year window, allowing victims of childhood sexual abuse to bring civil suits previously barred by the statute of limitations. The constitutionality of this statute has not yet been challenged, making this a case of first impression.

[1] Default judgment was entered against Smith on September 21, 2007.

Standard of Review

In testing the constitutionality of a new statute, the Court presumes validity.[2] The burden is on the moving party to prove invalidity.[3] The Court will afford great weight to the General Assembly's articulation of public policy.[4] It will not sit as a super-legislature to debate the wisdom of legislative policy.[5] The Court's role is simply to decide whether this new statute is constitutional.

Discussion

The Defendants argue that the statute violates Due Process for two reasons. First, it impairs vested rights and upsets settled expectations that justice will be swift.[6] Second, they argue that due process favors time limits.[7]

The question of vested rights is the crux of the determination. If the expiration of a statute of limitations is a fundamental vested right, then the General Assembly may not impair that right without violating due process.[8] However, if the expiration of a statute of limitations is merely a legislative convenience, then the General

[2] *Helman v. State*, 784 A.2d 1058 (Del. 2001).

[3] *Id* at 1068.

[4] *Opinion of the Justices*, 358 A.2d 705 (Del. 1976).

[5] *Helman*, 784 A.2d at 1068.

[6] Def. Mem. at 1.

[7] *Id.*

[8] *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 418 (Del. 1984).

Assembly does have the authority to alter it, thus, no due process violation exists.[9]

The Plaintiff responds by claiming the Delaware and Federal civil due process statutes are interpreted similarly. If true, then a statute of limitation is a creature of legislative grace, over which the legislature has a large degree of control.[10] Federal Court decisions have held consistently that the revival of time-barred civil actions comports with due process.[11] The United States Supreme Court has said, "we think that Congress might constitutionally provide for retroactive application of the extended limitations period."[12] This is, however, a minority view. The majority rule is that a fundamental right vests when a statute of limitation expires. A variety of states have held that the revival of a time-barred civil action violates the due process clause of their state constitution.[13]

Delaware Courts certainly can interpret the Delaware Constitution as providing more protections than the United States Constitution.[14] In some circumstances, the Courts have done just that. Certainly, the Delaware Supreme Court has not mandated

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[9] *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945).

[10] *Id* at 314.

[11] *Id* at 316., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 221 (1995), *International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), *Campbell v. Holt*, 115 U.S. 620 (1885).

[12] *International Union of Electrical, Radio and Machine Workers*, 429 U.S. at 244.

[13] *M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997), *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996), *Johnson v. Garlock, Inc.*, 682 So.2d 25, 28 (Ala. 1996), *Wiley v. Root*, 641 So.2d 66, 68 (Fla. 1994).

[14] *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).

such interpretation. Rather, in the context of the civil due process clause, quite the opposite is true. "[I]n most cases Delaware's Constitution and the United States Constitution are in lockstep."[15]

The Delaware Supreme Court repeatedly has found the state and federal civil due process clauses to be phrased and interpreted in similar ways.[16] The phrases "law of the land" and "due process of law," for example, have been held to have substantially the same meaning.[17] Despite the differences in the actual phraseology, both phrases stem from the language in the Magna Carta and both phrases are read to mean the same.[18] While the Norbertines correctly pointed out the textual differences, they ignored the overlapping historical genesis.

The Delaware Supreme Court has turned down opportunities to interpret this clause more extensively than the federal counterpart. Instead, they have done the opposite, interpreting it "similarly," "co-extensively" or with substantially equivalent meaning. The Court elaborated further in stating "[i]t would seem to follow that in deciding a case of due process under our Constitution we should ordinarily submit our judgment to that of the highest court of the land, if the point at issue has been decided

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[15] *State v. Devonshire*, 2004 WL 94724, at *1 (Del. Super. Jan. 20, 2004).

[16] *Helman v. State*, 784 A.2d 1058, 1070 (Del. 2001), *Black v. Div. of Child Support Enforcement*, 686 A.2d 164, 168 (Del. 1996), *Blinder, Robinson & Co., Inc. v. Bruton*, 552 A.2d 466, 472 (Del. 1989), *Distefano v. Watson*, 566 A.2d 1, 6 n. 7 (Del. 1989), *Cheswold v. Lambertson Constr. Co.*, 489 A.2d 413, 416 n. 5 (Del. 1984), *General Elec. Co. v. Klein*, 106 A.2d 206, 210 (Del. 1954), *State v. Hobson*, 83 A.2d 846, 857 (Del. 1951).

[17] *Opinion of the Justices*, 246 A.2d 90, 92 (Del. 1968).

[18] *State v. Rose*, 132 A.2d 864, 868-9 (Del. Super. Ct. 1926).

by that Court."[19] The United States Supreme Court has decided this matter.[20] This Court will follow this precedent, and interpret the clauses in a similar manner.

The resurrection of time barred civil remedies does not violate due process. The United States Supreme Court has addressed this issue several times.[21] Because statutes of limitations are legislative creations, (which is to say, arbitrary legislative determinations of when a claim should no longer be pursuable), their expiration does not disturb a vested right. Rather, the lengthening of a statute of limitation is the resurrection of a lost remedy, rather than the destruction of a right. The passage of time does not destroy the existence of the past action. It can only fulfill what a legislature once considered an appropriate limitation, which can be statutorily changed through the wisdom of the legislature and the public policy now approved. The Delaware General Assembly determined the statute to be appropriate and necessary, as evidenced by its passage.

The challenged statute, therefore, is not unconstitutional. The Delaware Supreme Court has interpreted Delaware's civil due process clause similarly with regard to the federal due process clause. Federal Courts have upheld similarly situated statutes. This statute, 10 *Del. C.* §8145, merely creates a demarcated opportunity to remedy a past wrong. The available precedent demonstrates to this Court that a finding of constitutionality is proper.

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[19] *General Elec. Co.*, 106 A.2d at 210.

[20] *International Union of Electrical, Radio and Machine Workers*, 429 U.S. at 244.

[21] *Chase Securities Corp.*, 325 U.S. at 314-16, *Danzer & Co., Inc. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925), *Campbell v. Holt*, 115 U.S. 620, 628 (1885).

Personal Jurisdiction

This Motion to Dismiss is for lack of personal jurisdiction, pursuant to Superior Court Civil Rule 12(b)(2). TPF is a Wisconsin corporation. Because Delaware's long-arm statute reaches the Defendant, and because the exercise of jurisdiction does not offend due process, TPF's Motion is DENIED.

Standard of Review

Personal jurisdiction is established through Delaware's long arm statute and the Court's satisfaction that the exercise of jurisdiction complies with the due process requirements of the Fourteenth Amendment of the United States Constitution.[22] The Plaintiff has the burden of establishing prima facie evidence showing the long-arm statute confers jurisdiction.[23] Consideration of a motion to dismiss for personal jurisdiction can include looking to necessary documents outside the pleadings.[24] In making the determination, all factual disputes are drawn in the light most favorable to the plaintiff.[25]

The Defendant argued vigorously about the apparent fatal deficiencies in the Complaint itself. However, that is not persuasive. The Court does not wear blinders in addressing a motion under Rule 12(b)(2). Additionally, the Complaint is deemed

[22] *Boone v. Oy Partek Ab*, 724 A.2d 1150 (Del. Super. Ct. 1997).

[23] *Outokumpu Engineering Enterprises, Inc. v. Kvaerner Enviropower, Inc.*, 685 A.2d 724 (Del. Super. Ct. 1996).

[24] *Sloan v. Segal*, 2008 WL 81513, at *6 (Del. Ch. Jan. 3, 2008).

[25] *Id.*

amended to the evidence.[26] So, even if the Court were looking only at the Complaint, it would be amended to include the additional evidence cited by the Plaintiff.

Discussion

At the outset, the Court will dispose of the Defendant's main argument regarding its individual corporate identity. The Plaintiff does not allege jurisdiction solely through an agency theory. Refuting an agency theory, even successfully, does not relieve the Defendant of the burden of jurisdiction. Plaintiff's allegations are direct and specific to TPF itself.[27] Therefore, TPF's arguments about a separate corporate identity are superfluous. Personal jurisdiction exists without regard to TPF's corporate form.

Long-Arm Statute

A long-arm statute allows a state to acquire jurisdiction over non-residents. Jurisdiction can be general or specific. Subsections (1), (2) and (3) of 10 *Del. C.* §3104(c) address specific jurisdiction, which is at issue when the claims arise out of acts or omissions taking place in Delaware.[28] The jurisdictional theory is then based on the relationship between the action and the forum.[29]

General jurisdiction is codified at 10 *Del. C.* §3104(c)(4). With general jurisdiction, the relationship between the forum and the controversy is immaterial;

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[26] Super. Ct. Civ. R. 15(b).

[27] Pl. Ans. at 12-14.

[28] *Boone*, 724 A.2d at 1155.

[29] *Id.*

rather, jurisdiction is premised on the relationship between the forum and a party.[30] General jurisdiction is dependent also on timing. An allegation of general jurisdiction asserts a general presence in the forum state, which can be withdrawn at any time.[31]

Plaintiff argues both specific and general jurisdiction can be found in this case. The Defendant argues the opposite. The Plaintiff has listed 21 allegations as evidence of the propriety of finding personal jurisdiction. Plaintiff alleges TPF provided car insurance to Archmere Academy priests. This would constitute a satisfaction of 10 *Del. C.* §3104(c)(2). Plaintiff also alleges TPF provides religious and educational services in Delaware, as it has for decades. This general presence satisfies general jurisdiction. These satisfactions were not challenged by the Defendants in the briefs or in arguments.

Due Process

The next step of the jurisdictional analysis is to determine whether this finding comports with due process. The Due Process Clause is meant to give a "degree of predictability to the legal system" so that potential defendants will have a minimum assurance as to when and where conduct may yield liability.[32] An additional two part test is necessary for the Due Process determination. The Court must "first determine whether a defendant has the requisite minimum contacts with the forum state, and then, whether asserting personal jurisdiction over the defendant is fair and

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[30] *Id.*

[31] *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 1995 WL 653510, at *9 (Del. Super. Aug. 11, 1995).

[32] *Boone*, 724 A.2d at 1158.

reasonable."[33]

A finding of minimum contacts requires an intent or purpose to serve the Delaware market. The Defendant must have purposefully availed itself to serving the Delaware market.[34] This intent was established when Plaintiff alleged that the Defendant organization has been baptizing children, forgiving sins and holding religious services in Delaware for decades.[35] It is established more generally through Plaintiff's allegations of the continuous relationship between the Defendant and Delaware, with the establishment and running of Archmere Academy, a Delaware school.[36]

Even if the Defendant were not physically present in Delaware, there was a purposeful intent to transact the business of educational and religious services in Delaware. In *Boone*, general jurisdiction was found through a combination of two visits to Delaware and a stream of commerce analysis. The contacts in this case far exceed those in *Boone*, because here the Defendant has offered services in Delaware for decades.

Irrespective of the foregoing, traditional notions of fair play and substantial justice cannot be offended by the exercise of jurisdiction over a foreign defendant.[37]

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[33] *Id.* citing *Asahi Metal Ind. Co. v. Super. Ct. of Cal., Solano Cty,* 480 U.S. 102, 107-115 (1997).

[34] *Boone*, 724 A.2d at 1159 (citing *Hanson v. Denckla*, 357 U.S. 235 (1958)).

[35] Pl. Ans. at 13.

[36] *Id* at 12-14.

[37] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

Fairness turns on the following factors: the burden on the defendant, the interest of the forum state in adjudicating the dispute, the plaintiff's interest in obtaining relief. The Court also considers the interest of the interstate judicial system in resolving disputes efficiently, and the combined interest of the sovereigns in advancing substantial social policies.[38] The primary concern is the burden on the defendant, which usually is outweighed once minimum contacts are established.[39] If the Defendant was conducting business in Delaware in the way Plaintiff alleges, which was not disputed, then it is fair to call the Defendant to litigate claims in Delaware. Since all inferences are drawn in favor of the Plaintiff, then the exercise of jurisdiction over the Defendant comports with notions of fair play and substantial justice.

TPF's Motion to Dismiss for lack of Personal Jurisdiction is DENIED.

Res Judicata

The theory of res judicata is to bar the re-litigation of suits that have already had a day in court. A litigant should not be able to bring the same suit repeatedly, because he or she is unhappy with the result. The situation at hand is unique because of the enactment of 10 *Del. C.* §8145, which was enacted after the federal damages trial. The current suit is exactly the type of litigation contemplated in the enactment of this new statute. Therefore, it is incongruous to think res judicata should bar it. Since this opinion finds the new statute constitutional, then res judicata will not act

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[38] *Id.*

[39] *Asahi*, 480 U.S. at 114.

as a bar to this suit.

The Federal Suit

The Plaintiff filed a personal injury suit against most of the same defendants in United States District Court for the District of Delaware on November 17, 2005 ("Federal Suit").[40] The defendants in the Federal Suit were Archmere Academy, Inc., Catholic Diocese of Wilmington, Inc., Edward Smith and Bishop Michael A. Saltarelli.[41] The Plaintiff's allegations in the Federal Suit involved four specific incidents of sexual abuse occurring on ski trips to Vermont.[42] Archmere, the Diocese and Saltarelli filed motions to dismiss. The motions to dismiss were granted due to the expiration of the Delaware statute of limitations.[43]

Smith did not defend against the suit, and the District Court entered a default judgment against him. The District Court held a damages trial on March 29-30, 2007.[44] The jury's only responsibility in the damages trial was to determine "whether plaintiff has proven that he suffered such long-term or other personal injuries and conditions and, if so, whether a monetary award against Smith is appropriate."[45]

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[40] *Whitwell v. Archmere Academy, Inc.*, 463 F. Supp. 2d 482 (D. Del. 2006).

[41] *Id.* (The present suit adds the Premonstratensian Fathers, Inc, the Norbertine Fathers of Delaware, Inc and the Norbertine Fathers, Inc. as additional defendants.)

[42] *Id* at 483.

[43] Plaintiff argued that Vermont law should apply because the acts of abuse occurred in Vermont. The Court determined that Delaware law applied under a Conflict of Laws analysis, applying the Most Significant Relationship test.

[44] Pl. Prelim. Opp'n ¶D, E.

[45] *Id* at ¶F.

(Emphasis added). The jury did not address the issue of liability, because a default judgment accepts as true all the averments in the complaint, as a matter of law.[46] During the damages trial, Plaintiff testified about the incidents in Vermont as well as the Delaware incidents of abuse, alleging a total of 234 acts.[47]

Standard of Review

Res Judicata is based on a five pronged test. The elements are:

1. The court making the prior adjudication had jurisdiction;

2. The parties in the present action are either the same or in privity with the parties from the prior adjudication;

3. The cause of action is the same in both cases or the issues decided in the prior action are the same as those raised in the present case;

4. The issues in the prior action were decided adversely to the plaintiff's contentions in the instant case; and

5. The prior adjudication is final.[48]

The primary contentious issue here is the third element, whether the issues or causes of actions are the same in both cases (though elements 2 and 4 could present issues). This determination turns on whether the Court will consider the alleged continuous sexual abuse on a transactional tort theory. If the Court applies the transactional

[46] *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994).

[47] Pursuant to *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), a federal jury should hear testimony concerning the continuous or isolated nature of the incident, among other things, in deciding punitive damages. The Plaintiff argues this was the reason for testimony on the continuous nature of the sexual abuse.

[48] *Bailey v. City of Wilmington*, 766 A.2d 477 (Del. 2001).

theory, viewing the continuous nature of the acts as a single act, then the federal case addressed the entirety of the abuse, arguably making res judicata an appropriate bar. If the Court does not apply the transactional theory, then the instant claims are separate from the previously litigated claims.

Discussion

In support of the parties' contentions regarding the transactional theory, each cites *Eden v. Oblates*.[49] In this case, the plaintiff has alleged 901 incidents of sexual abuse over the course of nine years. The plaintiff reported the last incident to his parents.[50] The plaintiff presented psychological evidence showing that he mentally blocked the nine years of abuse, allowing the case to circumvent the two years statute of limitations provision under the Discovery Rule for inherently unknowable injuries. This rule forces the statute of limitations to begin when the injury becomes known or knowable if it was otherwise inherently unknowable.[51] The Court held that the Discovery Rule applied to the first 900 cases but not to the one reported case. While not directly discussing the propriety of the transactional theory, that Court grouped the 900 incidents together for the purposes of the statute of limitations analysis.

The Court did not, as Defendants would assert, group the 900 incidents into a single transaction. The Defendants claim that the transaction theory saved the plaintiff's cause of action. However, this assertion is flawed. The Court actually applied the statute of limitations to the reported and unreported incidents differently.

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[49] 2006 WL 3512482 (Del. Super. Dec. 4, 2006).

[50] *Id.*

[51] *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119 (Del. 1987).

The Defendants argue that the Court could only allow the 900 incidents to remain under the transaction theory, because otherwise each would expire two years after the incident occurred.[52] This argument ignores the existence and application of the Discovery Rule. The Court said the 900 incidents were the subjects of inherently unknowable injuries because these incidents were unreported entirely. The Court did not explicitly group the 900 incidents or claim the grouping was the reason the claims survived the statute of limitations, as the Defendant suggests. The Plaintiff is more closely correct in stating that Judge Scott rejected the transactional theory of continuous sexual abuse.

Delaware Courts explicitly have rejected the transactional theory in criminal sexual offense cases. Courts draw lines between each individual sexual act or attempt. If the act has a separate intent, then it is a separate offense, allowing a separate prosecution without offense to the Double Jeopardy clause.[53] The time span between each sexual offense can be very short without negating the individuality of the offenses.[54] The Defendants argue that criminal law should not be applied to this civil case. However, the lack of applicable civil law leaves few options for analogy.

The Restatement Second of Judgments discusses the transactional theory in tort

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[52] Def. Reply at 2.

[53] *Feddiman v. State*, 558 A.2d 278, 289 (Del. 1989).

[54] *Pierce v. State*, 911 A.2d 793 (Del. 2006). The Defendant argued he could not properly be convicted of two rapes and two attempted rapes for acts that happened within only 15 minutes. The Delaware Supreme Court disagreed because there were separate intents and separate orders connected to each offense.

cases.[55] In determining whether a transactional view is appropriate, the Restatement says, "[w]hat factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[56]

The Plaintiff alleges continuous sexual abuse spanning a 33 month period. The Complaint outlines specific and separate incidents of sexual abuse. Applying the theory used in criminal cases, each separate intent is punishable separately. There is no persuasive legal reason to view these 230 incidents as a part of a singular, and previously litigated, incident.

The Court asked the parties to address (1) whether the total damages were established by the federal jury and, if so, (2) will the current trial address only liability, making any institution(s) found liable jointly and severally liable for the amount found by the federal jury. The Plaintiff responded by saying, reluctantly, that the only application of res judicata could be on damages alone. Archmere said the total damages were established, and adjudication against Archmere was final when Plaintiff abandoned his federal appeal, essentially avoiding the question posed.

In asking these questions, the Court was seeking to elicit whether res judicata could apply to liability, since the Federal Trial was a damages hearing only. Since damages were the only thing decided at the federal level, since Archmere was

[55] Restatement (Second) of Judgments §24(b) (1982).

[56] *Id* at (2).

dismissed pursuant to a statute of limitations that is not currently applicable, and since the federal trial addressed only the liability related to incidents in Vermont, it seems the only plausible way to make a res judicata argument is to claim total damages were decided by the federal jury.

No party points to a reason to believe the damage award was not meant to relate only to the Vermont acts. Perhaps the amount of the award could lead some to believe that it encompasses more than two weekends. However, a jury is presumed to have followed the instructions given by a judge.[57] Neither party makes the direct argument that the jury ignored the judge's instructions in focusing on the Vermont incidents alone.

A damages trial based on 4 occurrences should not eliminate the opportunity to litigate the liability for an additional 230 incidents. Defendant Archmere's Motion to Dismiss for res judicata is DENIED.

/s/ Robert B. Young
J.

RBY/sal
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[57] *Johnson v. State*, 918 A.2d 338 (Del. 2006) (TABLE), *Hendricks v. State*, 871 A.2d 1118 (Del. 2005), *Capano v. State*, 781 A.2d 556, 589 (Del. 2001), *Pennell v. State*, 602 A.2d 48 (Del. 1991).