From: Stephen D. Ellis <SEllis@pfclaw.com>
Sent: Tuesday, May 7, 2019 2:36 PM
To: Therese Corsones <tcorsones@vtbar.org>
Subject: Written testimony of Stephen D. Ellis, Esq. re: H. 330 [PFC-CLIENTS.FID451770]

Sen. Dick Sears, Jr., Chair, Senate Committee on Judiciary, Vermont State House, Montpelier VT 05633

Please consider the following comments in connection with H. 330.

I write in my capacity as a private attorney, with over thirty years of experience in civil litigation. I have chaired the Vermont Bar Association Labor and Employment Law Section for over ten years, and a significant portion of my practice has always involved representing private and public employers. My comments on H. 330 focus not on the interests of persons accused of having perpetrated childhood sexual abuse, but on the interests of other individuals and entities against whom "civil actions based on sexual abuse" might be maintained under various theories based on their relationship with the abuser, as employer, therapist or confidant. The considerations that warrant eliminating the statute of limitations for claims against alleged perpetrators of childhood sexual abuse do not apply with equal force to claims against individuals or entities other than the alleged abuser.

Potential theories of liability against individuals or entities other than the alleged abuser fall into two distinct categories: 1) claims based on vicarious liability (i.e., without actual fault) based on the defendant's status as the alleged abuser's employer or principal, and 2) claims based on the defendant's alleged failure to prevent the abuse.

Generally, an employer or principal would not be vicariously liable for childhood sexual assault, which, like any intentional tort, would be presumed to be outside of the scope of the perpetrator's employment or agency. However, in the case of *Doe v. Forrest*, 2004 VT 37, the Vermont Supreme Court, in a 3-2 decision, held that an employer may be held vicariously liable for an employee's sexual assault where the employee was "aided in accomplishing the tort by the existence of the agency relationship." *Id.* ¶ 46. The concerns about this holding expressed in Justice Skoglund's well-reasoned dissenting opinion (*id.*, ¶¶ 59-80; Amestoy, C. J., joining), apply with even greater force in the context of a claim for vicarious liability asserted long after the fact.

The legislative purposes of providing a remedy to victims of childhood sexual abuse, and deterring such conduct to prevent children from being victimized, will be adequately served if the statute of limitations is preserved for claims against individuals and entities other than the perpetrator based on vicarious liability or "mere negligence," and is eliminated with respect to claims against individuals or entities other than the perpetrator only where the claim is based on allegations of gross negligence in failing to prevent the abuse.

For these reasons, I would recommend revising Subparagraph (d), and adding Subparagraph (e), as follows:

> (d) Notwithstanding 1 V.S.A. § 214, this section shall apply retroactively to childhood sexual abuse that occurred prior to the effective date of this act.
>
> (e) An action based on sexual abuse that occurred more than six years before the action is commenced may be maintained against a person or entity other than the person allegedly committing the sexual abuse only if there are allegations sufficient to support a finding of gross negligence on the part of such person or entity.

Thank you for considering my comments.

Respectfully,

Stephen D. Ellis
Of Counsel
PAUL FRANK + COLLINS P.C.

One Church Street | P.O. Box 1307
Burlington, Vermont 05402-1307
802.658.2311 MAIN OFFICE
802.658.0042 FAX
www.pfclaw.com

7599847_1:00001-00187