

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

MIGDALIA RODRIGUEZ, as	)	
Next Friend of Ruben Rodriguez, a	)	
minor,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 05C-09-012 MMJ
	)	
THEODORE A. WIEDEMANN,	)	
RED CLAY CONSOLIDATED	)	
SCHOOL DISTRICT, and MOSES	)	
BEMBRY,	)	
	)	
Defendants.	)	

Submitted: September 24, 2007  
Decided: October 24, 2007

Upon Defendants' Motion for Summary Judgment  
Upon Defendants' Motion to Dismiss

MEMORANDUM OPINION

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**Johnston, J.**

## **PROCEDURAL CONTEXT**

On September 1, 2005, Migdalia Rodriguez filed a personal injury action against Red Clay Consolidated School District and Moses Bembry. Rodriguez filed suit on behalf of her minor son, Ruben Rodriguez. Rodriguez amended the complaint on November 4, 2005. On August 10, 2007, Bembry filed a Rule 56, Motion for Summary Judgment. Rodriguez filed a second amended complaint on August 20, 2007. The Court allowed the amendment pursuant to Superior Court Rule 15(a). On September 14, 2007, Red Clay filed a Motion to Dismiss the allegations in the second amended complaint and a Motion for Summary Judgment. The Court heard oral argument on September 24, 2007.

## **STATEMENT OF FACTS**

Rodriguez is suing Bembry and Red Clay based on a vehicular accident that injured Ruben Rodriguez. Ruben is a Red Clay special needs student. Bembry is a school bus driver, employed by Red Clay. Defendant Theodore A. Wioldemann is the driver of the car that struck Ruben Rodriguez.

On the morning of December 1, 2004, Ruben was not at his scheduled bus stop. Bembry proceeded on his assigned route, stopping at the intersection of Fourth and Rodney Streets. From this location Bembry

noticed Ruben on his front porch. Ruben proceeded across Fourth Street toward the bus. He was hit by an oncoming car.

Rodriguez filed suit against Bembry based on motor vehicle violations under 21 Del. C. §4176 and 21 Del. C. §4168. Additionally, Rodriguez first amended complaint attributes negligence to Red Clay based on the doctrine of *respondeat superior*.

Rodriguez's second amended complaint includes further allegations based specifically on the conduct of Red Clay. The new claim states that Red Clay: (1) failed to inform Bembry that Ruben was a special needs student; (2) failed to train Bembry concerning special needs students; (3) improperly hired Bembry; (4) failed to utilize a safe bus stop pick up and drop off point; and (5) failed to follow its own policies and procedures when picking up Ruben.

### **RED CLAY'S MOTION TO DISMISS**

Red Clay argues the amended complaint was not filed within the applicable statute of limitations period and the complaint is in violation of Superior Court Rule 15(c)(2).

Rule 15(c)(2) states: "An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the

claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.”<sup>1</sup> Rule 15(c) establishes particular requirements and leaves the Court with no discretionary authority.<sup>2</sup>

Rodriguez filed the second amended complaint two years after Ruben was injured. The amended complaint was not filed within the statute of limitation period.<sup>3</sup> Thus, the Court must determine whether the claims in the amended complaint relate back to the original pleading. Specifically, the Court must decide if the amendment: (1) satisfies the conduct, transaction, or occurrence criteria; and (2) whether the amendment prejudices the adverse party.<sup>4</sup>

The amendment must be grounded in the “same general fact situation as the claims in the original complaint.”<sup>5</sup> An amendment may change the legal theory of the original action.<sup>6</sup> However, the amendment must “give fair notice of the general fact situation out of which the claim or defense

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<sup>1</sup> Super. Ct. Civ. R. 15(c).

<sup>2</sup> *Parker v. Bracken*, 620 A.2d 229, 231 (Del. 1993).

<sup>3</sup> 10 Del.C. § 8119.

<sup>4</sup> *Bailey v. Brown*, 1999 WL 167785, at \*3 (Del. Super.).

<sup>5</sup> *Id.* at \*4.

<sup>6</sup> *Oakes v. Gilday*, 351 A.2d 85, 89 (Del. 1976).

arose.”<sup>7</sup> An amended claim based on the same incident or injury is not sufficient.<sup>8</sup> The amendment must arise out of “the specific conduct of the defendant alleged in the original complaint.”<sup>9</sup>

Originally, Rodriguez’s claim against Red Clay was based on the agency theory of *respondeat superior*. The complaint did not include allegations pertaining to the training, design, hiring or implementation of the Red Clay busing program. The facts relevant to prove negligence based on the actions of Red Clay are completely different than the facts relevant to prove the existence of an agency relationship.<sup>10</sup> The Court finds that the additional allegations in the Second Amended Complaint are entirely new and qualitatively different from the claims against Red Clay in the first and second complaints. The new claims are barred by the statute of limitations and do not relate back to the original complaint. Therefore, the Court need

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<sup>7</sup> *DiFonzo v. Robelen Piano Co.*, 144 A.2d 247, 247 (Del. 1958).

<sup>8</sup> *Bailey*, 1999 WL 167785, at \*6.

<sup>9</sup> *Id.*

<sup>10</sup> *See Bailey*, 1999 WL 167785 (citing *Guveiyian v. Keefe*, D.N.Y., C.A. No. 97-CV-9210, Glasser, J. (March 24, 1998), (Federal District Court did not permit plaintiff to amend complaint to include claims against employer based on actual participation in the events. The original complaint was based solely on *respondeat superior*.); *Cupertino v. Schneider*, 981 F.2d 1250 (4<sup>th</sup> Cir. 1992) (Maryland Federal District Court did not permit plaintiff to amend a complaint to add claim for negligent entrustment when the original complaint was based on agency theory of *respondeat superior*.)).

not consider whether the second amended complaint is prejudicial to Red Clay.

However, Rodriguez may introduce evidence that Bemby failed to properly use the loud speaker and horn located on the bus. The Court finds the failure to properly utilize the horn and loud speaker relates back to the earlier allegation that Bemby failed “to operate the emergency lights [and] apparatus.”

### **MOTION FOR SUMMARY JUDGMENT**

Red Clay and Bemby filed Rule 56 Motions for Summary Judgment. Red Clay argues that Rodriguez has not provided evidence showing that Red Clay proximately caused Ruben’s injuries. Additionally, Red Clay claims immunity from liability pursuant to the Tort Claims Act.<sup>11</sup> Bemby argues that the record evidence does not support the allegations of negligence.

This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the non-existence of material issues of fact.<sup>12</sup> Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence

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<sup>11</sup> 10 Del.C. § 4001.

<sup>12</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

of material issues of fact.<sup>13</sup> Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.<sup>14</sup> If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.<sup>15</sup>

A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.<sup>16</sup> The Court must evaluate the facts in the light most favorable to the non-moving party.<sup>17</sup> Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.<sup>18</sup>

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<sup>13</sup> *Id.* at 681.

<sup>14</sup> Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

<sup>15</sup> *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. 322-23.

<sup>16</sup> *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

<sup>17</sup> *Id.*

<sup>18</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

Viewing the facts in the light most favorable to Rodriguez, the Court finds that genuine issues of material fact include (but are not limited to):

- (1) whether aspects of Red Clay's school busing program are ministerial or discretionary under the Torts Claims Act;
- (2) whether, under *respondeat superior*, Red Clay was negligent and proximately caused Ruben's injuries;
- (3) whether Bembry was negligent and proximate caused Ruben's injuries; and
- (4) whether Ruben and/or his mother were comparatively negligent.

Rodriguez has established genuine issues of material fact for both defendants Red Clay and Bembry.

### **CONCLUSION**

The Court finds that the new claims alleged in the Second Amended Complaint are barred by the applicable statute of limitations.

**THEREFORE**, the Court hereby **GRANTS Red Clay's Motion to Dismiss**.

The Court finds that Rodriguez has established genuine issues of material fact for claims against Red Clay and Bremby. **THEREFORE**, the Court hereby **DENIES both Motions for Summary Judgment**.



**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston

oc: Prothonotary