

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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RE: *Maureen Jordan and Nina Jordan, a minor, by and through Maureen Jordan, Guardian Ad Litem and Next Friend v. Indian River School District and Lisa A. McVey*, C.A. No. S14C-02-036 RFS

Date Submitted: April 16, 2014
Date Decided: July 31, 2014

Upon Defendants' Motion to Dismiss Plaintiffs' Complaint. **DENIED**

Dear Counsel:

In this civil action Plaintiffs Maureen Jordan and Nina Jordan seek damages for the personal injuries Plaintiff Nina allegedly sustained while she was a student at Defendant Indian River School District. At the time of the events of this case, Defendant Lisa A. McVey was employed as a teacher at Southern Delaware School of the Arts, Indian River School District. Defendants have moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) ("Rule 12(b)(6)"), on the

grounds that the facts pled fail to overcome the immunity granted to Defendants under Delaware's State Tort Claims Act ("STCA")¹, 10 *Del. C.* § 4001.

FACTS

The facts are taken from the Complaint. On or about October 22, 2012, Plaintiff Nina, a minor, was a student of the Southern Delaware School of the Arts, Indian River School District. On this date, Plaintiff Nina "competed" in Defendant McVey's class experiment ("the experiment"), recreating The Titanic accident. The experiment consisted of placing a hand up to the mid-forearm in ice water for as long as one was able to withstand the cold temperature. Plaintiff Nina held her right hand and arm in the ice water for approximately forty minutes. Upon removing her hand from the water, she noticed numbness and tingling, as well as a lack of sensation in the hand. The Complaint alleges the experiment was ill-advised and not properly

¹ 10 *Del. C.* § 4001, requires each of the following elements for immunity to apply:

(1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination or policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;

(2) the act or omission complained of was done in good faith and in the belief that the public interest would be best served thereby; and

(3) the act or omission complained of was done without gross or wanton negligence.

supervised by Defendant McVey. As a result, Plaintiff Nina has sustained serious and permanent injuries to her right upper extremity.

STANDARD OF REVIEW

When considering a defendant's motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."² The Court must accept as true all non-conclusory, well-pled allegations.³ Every reasonable factual inference will be drawn in favor of the non-moving party.⁴ Lastly, the Court must deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.⁵

PARTIES' CONTENTIONS

First, Defendants argue Plaintiffs' Complaint must be dismissed pursuant to Rule 12 (b)(6) because the allegations set forth in the Complaint are conclusory and lack factual support.⁶ Specifically, the Complaint fails to sufficiently plead facts

² *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

³ *Id.*

⁴ *Wilmington Sav. Fund Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super. Mar. 9, 2009) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

⁵ *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011).

⁶ Defs.' Mot. to Dismiss at para. 3.

demonstrating any gross negligence.⁷ Plaintiffs' [C]omplaint largely is a recitation of conclusory allegations with no factual support, of the kind this Court routinely and recently has found insufficient to overcome the immunity provided by the STCA."⁸

Further, Plaintiffs fail to set forth any facts to support their claim that Defendants' conduct was an extreme departure from the ordinary standard of care.⁹ "There simply are no facts alleged supporting a finding that the teacher or school district here were aware of some substantial and unjustifiable risk relative to having a student participate in this experiment."¹⁰

Lastly, Defendants argue that their actions in conducting the experiment were discretionary and performed in good faith.¹¹ "Decisions of teachers in managing classrooms are discretionary, and therefore protected under the STCA."¹² Additionally, "there has been no allegation of some policy, directive, or any other

⁷ *Id.*

⁸ *Id.* See *Tews v. Cape Henlopen Sch. Dist.*, 2013 WL 1087580 (Del. Super. Feb. 14, 2013) (Autistic student fell down a set of stairs while under the alleged supervision of various teachers and paraprofessionals); *Morales v. Family Found. Acad., Inc.*, 2013 WL 3337798 (Del. Super. June 11, 2013) (Student was instructed to move a classroom television cart while under the alleged supervision of teacher).

⁹ *Id.* at para. 6.

¹⁰ *Id.*

¹¹ *Id.* at para 7.

¹² *Id.*

factual circumstance taking the teacher’s discretion in how to supervise this experiment outside the realm of her own discretion of judgment.”¹³

Based on the aforementioned, Plaintiffs are unable to overcome the immunity granted to Defendants pursuant to the STCA.¹⁴

In response, Plaintiffs argue Defendants are not immune from liability because they have failed to satisfy the requirements pursuant to 10 *Del. C.* § 4001.¹⁵ Plaintiffs’ Complaint sets forth facts that if proved show that none of the requirements for immunity are present.¹⁶

To begin, Plaintiffs’ Complaint specifically pleads gross or wanton negligence.¹⁷ “Specifically, the Defendant [McVey] had the students engage in a competitive project that had the obvious potential to cause injury—namely, immersing one’s appendage in ice cold water.”¹⁸ She then “compounded this gross error in

¹³ *Id.*

¹⁴ *Id.* at para. 2. (“Delaware’s State Tort Claims Act, 10 *Del. C.* § 4001 (“STCA”) grants immunity from liability to public school districts and their employees for acts done: 1) in good faith; 2) involving the exercise of discretion; 3) unless the act is done with gross or wanton negligence”).

¹⁵ Pls.’ Resp. at para. 2.

¹⁶ *Id.*

¹⁷ *Id.* at para. 3

¹⁸ *Id.*

judgment by failing to supervise the students' efforts".¹⁹ Together, Defendant McVey's actions constitute gross or wanton negligence.²⁰

Furthermore, Plaintiffs' Complaint is not "wholly conclusory" as alleged by Defendants.²¹ Unlike the conduct at issue cited in *Tews*²² and *Morales*,²³ which posed no substantial or unjustifiable risk to student, the experiment presented an obvious safety risk to participating students.²⁴ Defendant McVey was aware of the obvious and substantial risk of prolonged exposure to low temperatures, and consciously disregarded it by failing to monitor the competition.²⁵

Finally, Defendants are mistaken in their reliance upon a "ministerial/discretionary distinction".²⁶ Delaware law provides that "a teacher has a legal duty to exercise due care to ensure the safety of students. *The duty to*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at para. 5.

²² 2013 WL 1087580.

²³ 2013 WL 3337798.

²⁴ Pls.' Resp. at para. 5.

²⁵ *Id.*

²⁶ *Id.* at para. 7.

supervise students' activities is a ministerial duty."²⁷ The Defendants' argument that their actions were discretionary goes too far.²⁸ Essentially, "Defendants' argument could justify a teacher using a game of 'Russian Roulette' to teach students about random chance."²⁹

DISCUSSION

Under Delaware's STCA, any political subdivision of the State, including school districts and their employees, have immunity from liability when a discretionary act is performed in good faith, without gross negligence.³⁰ Consequently, the dispute between Plaintiffs and Defendants with respect to this motion appears to center on two of the elements of Delaware's STCA: whether Defendants' acts were ministerial or discretionary, and whether Defendants' acts were done without negligence and/or gross negligence. The Court first addresses the issue of negligence and/or gross negligence.

Negligence and/or Gross Negligence

Plaintiffs allege Defendants' conduct gives rise to claims sounded in

²⁷ *Id.* (citing *Holman v. Christina Sch. Dist.*, 2013 WL 6114433 (Del. Super. Nov. 20, 2013)).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Morales*, 2013 WL 3337798, at *1.

negligence and gross negligence.³¹

Delaware has adopted the general definition of “negligence” from the Restatement (Second) of Torts: “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm”³²

Negligent conduct may be either: (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.³³

On the other hand, gross negligence is a higher level of negligence representing extreme departure from the ordinary standard of care.³⁴ It is more than “ordinary inadvertence or inattention.”³⁵ “Gross negligence exists when a person fails to perceive a risk . . . of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would

³¹ Pls.’ Comp. contains two counts: Count I (Negligence) and Count II (Gross Negligence).

³² *Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 6 (Del. 2013) (quoting Restatement (Second) of Torts, § 282 (1965)).

³³ *Id.*

³⁴ *Hughes v. Christina Sch. Dist.*, 2008 WL 73710, at *4 (Del. Super. Jan. 7, 2008).

³⁵ *Morales*, 2013 WL 3337798, at *2.

observe in the situation.”³⁶

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court is limited to the well-pleaded allegations set forth in Plaintiffs’ Complaint, which, in this case are as follows: (1) Plaintiff Nina participated in a classroom experiment, recreating The Titanic, in which she submerged her hand and forearm into freezing cold water for nearly 40 minutes; (2) Defendant McVey failed to adequately supervise Plaintiff Nina in her participation of the experiment; and (3) Plaintiff Nina sustained serious and permanent injuries from the risks associated with freezing water.

The Complaint sets forth facts, that if true, demonstrate an obvious safety risk to students participating in the experiment. Just as we ask juries to utilize common sense, the Court recognizes that common sense seems to dictate that injury would result from extreme exposure to cold water as presented here. Therefore, Defendants’ argument that Plaintiffs have failed to establish Defendants were aware of some substantial and unjustifiable risk associated with conducting the experiment must fail. The Court notes that the Titanic itself is a prime example of how people die suddenly from cold water and itself an example of the tragic consequences resulting from sailing blindly into a hazardous area.

³⁶ *Id.* (“The Delaware Supreme Court has compared gross negligence to that of criminal negligence set forth in 11 *Del. C.* § 231(a).”).

Furthermore, a teacher owes a heightened duty when involving students in a hazardous activity.³⁷ Students should be protected from engaging in a dangerous undertaking simply for the hope of a prize, *i.e.*, protected by an adult against immaturity of keeping an arm in freezing water way too long.

Discretionary v. Ministerial Act

The grant of immunity under Delaware’s STCA is only available for discretionary acts.³⁸ Discretionary acts are those which “require some determination or implementation which allows a choice of methods, or . . . those where there is no hard and fast rule as to a course of conduct.”³⁹ On the other hand, an act is ministerial if it is “routinely or mandatorily required.”⁴⁰ Simply put, a ministerial act is conducted “without regard to [the actor’s] own judgment concerning the act to be done.”⁴¹ The determination of whether an act is ministerial or discretionary is normally

³⁷ *Joseph M. v. Northeastern Educational Intermediate Unit 19*, 516 F. Supp. 2d 424, 442 (M.D. Pa. 1997) (“The basic duties which arise from the teacher-student relationship are a duty to supervise, a duty to exercise good judgment, and a duty to instruct as to correct procedures, particularly, not but exclusively, when *potentially hazardous conditions or instrumentalities are present*. . .”).

³⁸ *Holman*, 2013 WL 6114433, at *2.

³⁹ *Jester v. Seaford Sch. Dist.*, 1991 WL 269899, at *4 (Del. Super. Nov. 4, 1991).

⁴⁰ *Id.*

⁴¹ *Simms v. Christiana Sch. Dist.*, 2004 WL 344015, at *8 (Del. Super. Jan. 30, 2004).

a question of law.⁴² It is, however, “well-settled Delaware law [that] a teacher has a duty to exercise due care to provide for the safety of his or her students and to protect those students.”⁴³ “Included within these duties is the duty to supervise the students’ activities.”⁴⁴ *The duty to supervise students’ activities may, however, be deemed ministerial or discretionary depending on the facts.*⁴⁵ Nonetheless, a teacher does not have the discretion to decide whether or not to exercise due care for the safety of her students.⁴⁶

In the case *sub judice*, liability may extend to either: (1) a ministerial act done with negligence, or (2) a discretionary act done with gross negligence. The Court has previously determined that the face of Plaintiffs’ Complaint adequately alleges negligence and/or gross negligence. Therefore, Defendants’ reliance on the contention that Defendant Mcvey’s conduct was discretionary and therefore protected under Delaware’s STCA is not warranted. Defendants ignore the blatant

⁴² *Id.*

⁴³ *Tews*, 2013 WL 1087580, at *4.

⁴⁴ *Jester*, 1991 WL 269899, at *4.

⁴⁵ *Lednum v. Indian River Sch. Dist.*, 2013 WL 1909524, at *2 (Del. Super. May 6, 2013) (citing *Simms v. Christina Sch. Dist.*, 2004 WL 344015 (Del. Super. Jan. 30, 2004) (emphasis added)).

⁴⁶ *Baker ex rel. Baker v. Oliver Machinery Co.*, 1981 WL 376973 (Del. Super. Mar. 30, 1981).

and obvious risk associated with having students place their arms and hands into freezing cold water. Defendants' cannot sidestep the apparent issues of negligence and gross negligence by simply claiming their actions were discretionary.

CONCLUSION

Considering the foregoing, the Court concludes Defendants' Motion to Dismiss is **DENIED**.

_____ **IT IS SO ORDERED.**

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

pc: Prothonotary