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

KELLIE DIMAIO and KELLIE DIMAIO)	
and JOHN DIMAIO, JR., as Parents)	
and Natural Guardians for DD, a minor,)	
)	
Plaintiffs,)	
)	
V.)	C.A. No. N12C-02-131 JRJ
)	
CHRISTIANA SCHOOL DISTRICT)	
)	
Defendant.)	

ORDER

AND NOW, TO WIT, this 6th day of February, 2013, upon consideration of Defendant's Motion to Dismiss, and Plaintiffs' opposition thereto, **IT APPEARS TO THE COURT THAT**:

1. On February 9, 2012, Plaintiffs, Kellie DiMaio and Kellie DiMaio together with her husband, John DiMaio, Jr., on behalf of their son, DD, a minor, filed a Complaint alleging: Violation of the Delaware Whistleblower's Protection Act (Count I); Breach of covenant of good faith and fair dealing (Count II); Negligence (Count III); and Gross negligence (Count IV). On May 10, 2012, Defendant, Christiana School District, filed a motion to dismiss pursuant to

² Trans. ID 42423670.

¹ The minor plaintiff is referred to as "DD" in order to protect his privacy.

Superior Court Civil Rule 12(b)(6).³ On December 6, 2012, this Court issued an order denying Defendant's motion to dismiss Counts I and II, granting Defendant's motion to dismiss Count III, and deferring consideration of Defendant's motion to dismiss Count IV until after Plaintiffs filed an Amended Complaint.⁴ Plaintiffs filed their Amended Complaint on December 13, 2012.⁵

2. Under the Delaware State Tort Claims Act (the "DSTCA"), Plaintiffs must allege the absence of one or more of the following elements in order to overcome sovereign immunity: "(1) the action was discretionary in nature; (2) the action was done in good faith; [or] (3) the action was done without gross or wanton negligence." Count IV alleges gross negligence on the part of Defendant. "Gross negligence is a higher level of negligence representing 'an extreme departure from the ordinary standard of care." It is "more than ordinary inadvertence or inattention." In fact, the Delaware Supreme Court has compared gross negligence with criminal negligence as defined in

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³ Trans. ID 44179290.

⁴ Trans. ID 48227063.

⁵ Trans. ID 48407773.

⁶ Smith v. Christina Sch. Dist., 2011 WL 5924393 at * 3 (Del. Super. Nov. 28, 2011), citing Stevenson v. Brandywine Sch. Dist., et al., 1999 WL 742932, at *2 (Del. Super. July 9, 1999), citing Sprout v. Ellenburg Capital Corp., 1997 WL 716901 (Del. Super. Aug. 16, 1997); 10 Del. C. § 4001.

⁷ Browne v. Robb, 583 A.2d 949, 953 (Del. 1990), quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 150 (2d ed. 1955).

⁸ Jardel Co., Inc. v. Hughes, 523 A.2d 518, 530 (Del. 1987).

11 Del. C. § 231(a). Thus, 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 observe in the situation." The Court

finds that the averments in Count IV of Plaintiffs' Amended

Complaint are stated with sufficient particularity to plead gross

negligence, and therefore, 11 Defendant's Motion to Dismiss Count IV

is **DENIED**.

IT IS SO ORDERED.

/s/Jan R. Jurden

Jan R. Jurden, Judge

cc: Prothonotary

⁹ *Id.*¹⁰ 11 Del. C. § 231(a).
¹¹ Super. Ct. Civ. R. 9(b).

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