IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BARBARA SADLER-IEVOLI, as guardian ad litem for JONATHAN IEVOLI,)
TE VOLI,)
Plaintiffs,) C.A. No. N12C-11-138 MMJ
)
V.)
)
SUTTON BUS & TRUCK CO., INC.,)
RED CLAY SCHOOL DISTRICT,)
NICOE WILLIAMS, as guardian ad)
litem for TIRIQUE WILLIAMS,)
)
Defendants.)

Submitted: April 4, 2013 Decided: June 4, 2013

On Defendant Red Clay School District's Motion to Dismiss **GRANTED**

On Plaintiff Jonathan Ievoli's Motion to Amend the Complaint

GRANTED IN PART AND DENIED IN PART

OPINION

Michael D. Bednash, Esquire, Kimmel, Carter, Roman & Peltz, P.A., Attorneys for Plaintiffs

Colin M. Shalk, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., Attorneys for Defendant Sutton Bus & Truck Co., Inc.

Mark S. Casarino, Esquire (argued) and Sean A. Meluney, Equire, White and Williams LLP, Attorneys for Defendant Red Clay School District

This negligence action arises from an incident that took place on a school bus. Minor Plaintiff Jonathan Ievoli (Plaintiff) alleges that he was assaulted by minor Defendant Tirique Williams (Defendant) on November 18, 2012, on a bus operated by co-Defendant Sutton Bus & Truck Co, Inc. (Sutton). The Red Clay School District (District) also is a co-Defendant.

The District filed a Motion to Dismiss. Plaintiff moved to amend the Complaint in response to the District's motion. The Court held Oral Argument on the motions on April 4, 2013. Two issues are before the Court: (1) whether the Delaware Tort Claims Act (DTCA) grants the District immunity; and (2) whether the District owes the Plaintiff any particular legal duty.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiff filed a complaint on November 15, 2012 against Sutton Bus & Truck Co., Inc., the State of Delaware, Red Clay School District, and Tirique Williams. Plaintiff, a student at Stanton Middle School in the Red Clay School District, alleges that he was assaulted and punched in the face by Defendant, also a student at Stanton Middle School. Plaintiff's proposed Amended Complaint alleges that the District acted with gross negligence in failing to properly supervise Defendant, failing to take reasonable correctional actions towards Defendant, and failing to properly care for Plaintiff. Plaintiff also alleges that the District has a

special relationship with Plaintiff, such that the District has a duty to protect Plaintiff from harm.

On December 26, 2012, the District filed a Motion to Dismiss Plaintiff's Complaint, as it relates to the Red Clay School District, on two grounds. First, the District contends that it has immunity pursuant to the DTCA. In particular, the District argues that the supervision of Defendant and Plaintiff is discretionary. Second, the District contends that it owes no legal duty to the Plaintiff because it had no special relationship with him at the time of the incident. In response to the District's motion, Plaintiff filed a Motion to Amend the Complaint on January 16, 2013.

The District filed a Response and Partial Objection to Plaintiff's Motion to Amend the Complaint on January 31, 2013. The District argues in its Response that the proposed amendments would be futile for two reasons. First, the District maintains that the immunity granted by the DTCA is not overcome by the Amended Complaint because it fails to properly allege gross negligence. Second, the District contends that it owes no duty to Plaintiff.

Sutton filed a Response to the District's Motion to Dismiss on March 28, 2013. Sutton argues that the suit against the District should not be dismissed for

¹ 10 Del. C. § 4001.

three reasons. First, Sutton posits that the District failed to perform a ministerial act in not imposing the necessary disciplinary policies for student behavior on school buses. Second, Sutton contends that the District's breach occurred prior to the incident on the bus when it failed to take steps to prevent the incident from occurring. Third, Sutton argues that the District's knowledge of prior violent acts committed by the Defendant on other students, coupled with the aforementioned failure to take action, constitute gross negligence.

The District filed a Reply to Sutton's Response on April 1, 2013. The District argues in relevant part that, even if the facts that Sutton describes are considered, there still would be no viable claim against the District because of the DTCA, the lack of a legal duty, and the public duty doctrine.

STANDARD OF REVIEW

When reviewing a 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." The Court must accept as true all non-conclusory, well-pled allegations. Every reasonable factual inference

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

 $^{^{3}}$ Id.

will be drawn in favor of the non-moving party.⁴ If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.⁵

DISCUSSION

Delaware Tort Claims Act

The District urges the Court to dismiss Plaintiff's complaint against it because the claim is barred by the Delaware Tort Claims Act (DTCA). The DTCA provides in pertinent part:

- ... no claim or cause of action shall arise ... against the State ... or agency of the State ... in any civil suit or proceeding at law or in equity, or before any administrative tribunal, where the following elements are present:
- (1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, . . . or any other official duty involving the exercise of discretion . . . ;
- (2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and
- (3) The act or omission complained of was done without gross or wanton negligence;

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

⁵ Spence, 396 A.2d at 968.

... in any civil action or proceeding against the State . . . the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section.

Discretionary Act

Discretionary acts require some determination or implementation which allows a choice of methods. Conduct is discretionary if there is no "hard and fast rule" as to a course of conduct.⁶ In contrast, ministerial acts are those which are performed in a prescribed manner, without using individual judgment.⁷ The Court will consider the existence of rules, policies, or regulations that minimize or remove opportunities for independent action, in determining whether an act is discretionary or ministerial.

The determination of whether a particular act is discretionary or ministerial is a question of law.⁸ The duty to supervise student activities is ministerial.⁹ However, the manner and particular methods of supervision are discretionary.

⁶ J. L. v. Barnes, 33 A.3d 902, 914 (Del. Super. 2011).

⁷ Simmons v. Delaware Technical and Community College, 2012 WL 1980409, at *4 (Del. Super.).

⁸Hughes ex rel. Hughes v. Christina Sch. Dist., 2008 WL 73710, at *3 (Del.Super.).

⁹Tews v. Cape Henlopen School Dist., 2013 WL 1087580, at *4 (Del. Super.).

The Delaware Administrative Code requires the District Superintendent to create appropriate policies regarding pupil behavior and discipline on school buses. However, Plaintiff has not addressed this issue in its pleadings. The proposed Amended Complaint alleges that the District was "grossly and/or wantonly negligent" on the grounds that the District:

- a. stood in a special relationship with Defendant;
- failed to properly supervise Defendant despite knowledge of
 Defendant's "tendencies toward violence;"
- failed to properly care for and protect Plaintiff despite knowledge that
 Defendant would be in close proximity with Plaintiff; and
- d. failed to take reasonable correctional actions to help Defendant conform to school policies despite knowledge that Defendant "was prone to breaking school regulations."

None of the listed four grounds establish a *prima facie* case for failure to perform a ministerial act. Rather, the District's alleged deficiencies "b" through

¹⁰ "Local School District Superintendents' and Charter School Heads of School or their designated school transportation supervisors' responsibilities concerning the transportation of pupils shall include but are not limited to the following: ...2.1.7 Assume prime responsibility for pupil conduct and ensure pupil behavior and discipline on the school bus are included in district disciplinary policies." 14 Del. Admin. C. §2.1.

"d" relate to whether the District properly exercised discretion in its duty to supervise Defendant.

Only co-defendant Sutton (in its Response to the District's Motion to Dismiss) contends that the District failed to perform a ministerial act by failing to implement policies pursuant to the Administrative Code. Sutton has not raised the issue of failure to perform a ministerial act in its answer to Plaintiff's Complaint, or in its cross-claim against other defendants.

The standard on a Motion to Dismiss for failure to state a claim requires the Court to accept as true all non-conclusory and well-pled allegations. There have been no allegations by Plaintiff that, if taken to be true, would show that the District failed to take some action mandated by statute or regulations. Neither the Complaint nor the proposed Amended Complaint refer to the terms "discretionary" or "ministerial."

The Court finds that the method of supervision of students on a school bus, as well as actions that the District took or could have taken prior to students embarking on the bus, were discretionary acts. The allegations in Plaintiff's Complaint do not establish a *prima facie* case that any act or omission by the

¹¹ Plaintiff has not alleged, for example, that no one was supervising the children, that the supervisor was negligent, or that there was a regulation requiring that a monitor be placed on the bus, and that the District ignored this or similar regulations.

District was ministerial. Therefore, Plaintiff has not met its burden of proving the absence of discretionary conduct, as required to overcome the District's immunity established by the DTCA.

Good Faith

Good faith is defined as "honesty of purpose and integrity of conduct." The Complaint makes no allegations of a lack of good faith, or that the District knowingly took actions contrary to the best interests of the public. Plaintiff has failed to allege facts that would establish a *prima facie* case that the District acted with a dishonest or sinister motive.

Sutton urges the Court to consider certain disciplinary records of Defendant.

Sutton argues that these records could demonstrate the District's bad faith. Even were the Court to consider the contents of these records, the mere fact that Defendant was disciplined prior to the incident on the bus does not establish that the District acted in bad faith.

In any event, the Court will not consider any extraneous matters for the purpose of ruling on the Motion to Dismiss. Such records only will be considered by the Court at this point for the purpose of determining whether further

¹² Martin ex. rel. of Estate of Martin v. State, 2001 WL 112100, *7 (Del. Super.).

amendment of the Complaint would be futile.¹³ It would not be appropriate at this early stage of the proceedings to convert the Motion to Dismiss to a motion for summary judgment.

None of the allegations contained within the original or proposed Amended Complaint actually address the good faith/public interest element of the DTCA.

Therefore, the Court finds that Plaintiff has not alleged facts sufficient to negate the District's immunity established by the DTCA.

Gross Negligence

The final element established by the DTCA requires that Plaintiff allege facts, with particularity, which would demonstrate gross or wanton negligence on behalf of the State. Pursuant to Superior Court Civil Rule 9(b), a plaintiff must state the circumstances constituting gross negligence with particularity. Gross negligence requires a showing of a high level of negligence that constitutes an extreme departure from the ordinary standard of care.

In *Tews v. Cape Henlopen School District*,¹⁴ the Court ruled: "The particularity requirement of Rule 9(b) is not satisfied by merely stating the result or a conclusion of fact arising from circumstances not set forth in the Complaint.

¹³ See Super. Ct. Civ. R. 12(b)(6); Super. Ct. Civ. R. 15.

¹⁴ 2013 WL 1087580 (Del. Super.).

Indeed, as this Court has previously recognized, 'claims of negligence (and gross negligence) may not be conclusory and *must be accompanied by some factual allegations to support them.*' Therefore, in order to survive a Motion to Dismiss under Rule 12(b)(6), a plaintiff must plead gross negligence with particularity."¹⁵

"Although the concepts of gross negligence and wanton conduct are not identical, each requires a showing of more than mere inattention or carelessness. Moreover, since the alleged acts of gross negligence and/or recklessness involve errors of judgment, the burden on the plaintiff is a substantial one." Gross negligence is an extreme departure from the ordinary standard of care. Wanton negligence is conduct that is so unreasonable and dangerous that a person knows or should know that an imminent likelihood of harm can result. Wanton conduct is beyond gross negligence, and is evidenced by conscious indifference and an "I don't care" attitude.

¹⁵Id. at *2 (emphasis in original) (citing *Doe 30's Mother v. Bradley*, 58 A.3d 429 (Del. Super. 2012).

¹⁶ Knoll v. Wright, 544 A.2d 265, 265 (Del.1988) (citing Jardel Co., Inc. v. Hughes, 523 A.2d 518, 530-31 (Del. 1988)).

¹⁷Browne v. Robb, 583 A.2d 949, 953 (Del. 1990).

¹⁸ Morris v. Blake, 552 A.2d 844, 847-48 (Del. Super. 1988).

In an effort to cure the initial deficiencies of the Complaint, which in its first iteration included allegations that would at best establish negligence, Plaintiff filed a Motion to Amend that included allegations of gross and wanton negligence. The Amended Complaint specifically alleges: that the District failed to supervise Defendant despite prior knowledge of his tendencies towards violence; that the District failed to protect Plaintiff while he was in close proximity to Defendant; and that the District failed to take reasonable actions to "help" Defendant conform to school policies despite foreknowledge that he was prone to breaking school regulations.

Co-defendant Sutton requests that the Court consider specific instances of misconduct by Defendant, not pled in Sutton's Answer or Cross-Claim. Sutton contends that this prior misconduct put the District on notice that the incident on the bus was possible. This foreknowledge, Sutton argues, constitutes gross negligence for failure to take action that might have prevented the alleged assault. Even if the Court were to consider these prior instances, ¹⁹ the records proffered by Sutton (not by Plaintiff or the District) reveal that the District disciplined Defendant after each transgression. In a failure to supervise context, gross

¹⁹ The school records of the minor Defendant are not properly a part of the evidence on this Motion to Dismiss. They were presented for the first time during the hearing on this Motion by counsel for Sutton.

negligence generally involves foreknowledge of a problem with no attempt to address the problem. Absent some allegation that the District failed to take other particular, available, and reasonable efforts to address Defendant's misbehavior, there has been no conduct identified that would rise to the level of gross or wanton negligence by the District.

Plaintiff has failed to allege what acts, if any, the District should have taken and what acts, if any, the District omitted, that would have constituted an extreme departure from the ordinary standard of care. For example, no facts were alleged respecting whether there was a failure to place a monitor on the school bus, or whether there was a failure to properly discipline the Defendant after particular disciplinary transgressions.

On the issue of wanton negligence, the Complaint is bereft of facts, or even conclusory statements, that could lead a reasonable juror to conclude that the District acted with conscious indifference. Without alleging such facts, the Complaint's gross negligence and wanton negligence allegations are insufficient.²⁰ Therefore, neither the Complaint nor the proposed Amended Complaint adequately state the basis for a claim of gross or wanton negligence, as required to contravene the immunity provided by the DTCA.

²⁰ See Tews, 2013 WL 1087580, at *2.

Duty

The issue of duty in this case would be one of first impression in Delaware. The question is the scope of the duty, if any, of a school district regarding the safety of students riding school buses operated by an independent contractor.

Plaintiff asserts that the District has a duty to him by virtue of a special relationship. Plaintiff and Sutton also urge the Court to find that a duty exists through a permutation of this theory, namely that the District had a duty to Plaintiff that was breached prior to the incident on the bus. In this context, Plaintiff and Sutton both contend that the District had a duty to take reasonable actions to prevent the alleged assault prior to Plaintiff and Defendant leaving the District's custody.

Because the District's Motion to Dismiss has been resolved on the basis that the claims against the District are barred by the immunity established by the DTCA, the Court need not address the contentions of the parties regarding the existence of a special relationship, or the scope of any duty under the precise circumstances presented in this case.

Plaintiff's Motion to Amend the Complaint

A motion to amend a pleading will not be granted if the amendment would

be futile, that is, if it clearly would not survive a motion to dismiss.

Plaintiff's Motion to Amend the Complaint makes three requests: (1) to change Plaintiff's name from Joseph to Jonathan; (2) to add Nicoe Williams as guardian *ad litem* for Defendant; and (3) to add additional allegations against the District for gross and wanton negligence.

Requests (1) and (2) shall be granted. The last request shall be denied. Even Plaintiff's proposed Amended Complaint would be futile for reasons discussed in full above.

CONCLUSION

The Court finds that the Delaware Tort Claims Act grants Red Clay School District immunity from liability. Plaintiff has failed to allege facts that, if taken to be true, would establish: that the District's acts or omissions were not discretionary; that the District acted in the absence of good faith; and that the District acted with gross or wanton negligence.

THEREFORE, Defendant Red Clay School District's Motion to Dismiss is hereby **GRANTED**. Plaintiff's Motion to Amend the Complaint is **DENIED** respecting all amendments adding allegations against Red Clay School District, and **GRANTED** in all other respects.

IT IS SO ORDERED.

/s/	Mary	m	<u>Johnston</u>	
The	Hono	rable	Mary M. J	Johnston