## SUPERIOR COURT OF THE STATE OF DELAWARE

RICHARD F. STOKES

JUDGE

SUSSEX COUNTY COURTHOUSE 1 THE CIRCLE, SUITE 2 GEORGETOWN, DE 19947 TELEPHONE (302) 856-5264

May 6, 2013

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RE: Lednum v. Indian River School District, et al.

C.A. No. S12C-06-010 RFS

## Dear Counsel:

This is my decision granting Defendants' motion for summary judgment based on application of the Delaware State Tort Claims Act ("DSTCA"). Title 10 *Del.C.* § 4001–§ 4005. The DSTCA provides immunity to public officials who perform official duties involving the exercise of discretion in good faith and without gross or wanton negligence.<sup>1</sup>

**Facts**. The relevant facts are uncontested. On June 8, 2010, Plaintiff Sydney Lednum ("Plaintiff") was hit in the head with a cowboy boot tossed by a student during the course of organizing theater props and costumes at the end of the school year. Plaintiff was a student at Defendant Sussex Central High School ("Sussex Central"), a Delaware public high school operated by Defendant Indian River School District ("Indian River").

The activities were supervised by Defendant Linda Killion ("Killion"), the theater teacher, and non-party Marla Mooney ("Mooney"), the music director. Both individuals were employees of Sussex Central. Approximately 15 students participated in the activities.

<sup>&</sup>lt;sup>1</sup>Scarborough v. Alexis I. DuPont High Sch., 1986 WL 10507 (Del.Super.).

From among the various tasks being done, Lednum chose to help move and arrange the costumes. The process involved students in the upstairs loft dropping items down to the stage in the so-called drop area. A student above would call out which item was coming down, and the students below would respond "thank you" and move away from the drop area. When the item hit ground, it was retrieved, and the process was repeated.

On the day of the incident, two students were coming and going in the loft, along with Mooney, and two students were in the drop area. Plaintiff stated that she heard a student above call out that a pair of shoes was coming down, and the students below said thanks and stepped back.

After the shoes dropped, Plaintiff stepped forward to retrieve them. She did not hear anyone announce that boots were coming down. She heard a thud and felt pain in the back of her head as the boot struck her. She was bleeding from lacerations and was taken to the school nurse by Mooney. Neither Killion nor Mooney saw Plaintiff being hit with the boot.

**Standard of review**. Summary judgment is appropriate where the record presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The Court must view the record in the light most favorable to the non-moving party, and must draw all reasonable inferences in favor of the non-moving party.<sup>3</sup> The moving party bears the burden of showing that there are no material facts in dispute.<sup>4</sup> If this burden is met, the burden shifts to the non-moving party to set forth specific facts that go beyond the bare allegations of the complaint.<sup>5</sup> Where a party fails to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial, the Court must enter summary judgment against that party.<sup>6</sup>

**Issues**. Defendants argue that Plaintiff has not pled facts sufficient to overcome the protections provided to them under the DSTCA. Plaintiff argues that the DSTCA does not apply to this case because Killion's use of the drop method was a ministerial act. Plaintiff does not allege gross negligence but raises two issues of negligence. Bad faith is not pled.

Plaintiff does not refer to Sussex Central except in the complaint, and there in conclusory

<sup>&</sup>lt;sup>2</sup>Super.Ct.Civ.R. 56( c ).

<sup>&</sup>lt;sup>3</sup>Merrill v. Crothall-American, Inc., 606 A.2d 96, 100 (Del.1992).

<sup>&</sup>lt;sup>4</sup>Talmo v. Union Park Automotive, 2011 WL 5335391, at \*2 (citing Manucci v. The Stop 'n' Shop Companies, Inc., 1989 WL 48587, at \*2 (Del.Super.)).

<sup>&</sup>lt;sup>5</sup>*Id.* at \*3.

<sup>&</sup>lt;sup>6</sup>*Id* at \*4

fashion. Nor is it argued in the brief, and is therefore waived.<sup>7</sup> Thus, summary judgment will be entered as to Defendant Sussex Central.

**The DSTCA**. Because Plaintiff has not pled bad faith or gross negligence, to prevail on summary judgment Defendants must show that no questions of material fact exist as to whether Killion's decision to use the drop method was a discretionary act.<sup>8</sup>

Indian River's alleged failure to train teachers. The complaint alleges that all three Defendants were negligent in failing to protect Plaintiff from harm. In her answers to interrogatories, Plaintiff supports this claim by asserting that Indian River failed to adequately train teachers in student supervision. However, Plaintiff stated in her deposition that she had no knowledge of Indian River's training methods. Plaintiff has not offered any evidence of gross negligence, which is an extreme departure from the ordinary standard of care. Viewing the evidence in the light most favorable to the non-moving party, there is no material question of fact about Indian River's training methods. Judgment will be entered for Defendant on the question of allegedly inadequate training methods.

**Killion's alleged failure to supervise students.** Plaintiff's answers to interrogatories state that under the doctrine of *respondeat superior* Indian River is liable for Killion's alleged failure to adequately supervise the theater students. A teacher has a duty to exercise due care to provide for the safety of his or her students. This duty can be ministerial or discretionary depending on the facts. In *Sadler v. New Castle County*, the Delaware Supreme Court held that when New Castle County rescuers negligently rescued the plaintiff from a fall at Brandywine Falls, their conduct was ministerial. However, their decision to carry the plaintiff across the river rather up a cliff was a discretionary decision. In *Simms v. Christina School District*, the plaintiff sued the school district for negligent supervision of its employee. This Court found the supervision to be discretionary because there was no "hard and fast rule" concerning supervision of employees.

<sup>&</sup>lt;sup>7</sup>Emerald Partners v. Berlin, 726 A.2d 1215, 1224 (Del.1999).

<sup>&</sup>lt;sup>8</sup> James v. Laurel Sch. Dist., 1993 WL 81277, at \*3 (Del.Super.).

<sup>&</sup>lt;sup>9</sup>Tews v. Cape Henlopen Sch. Dist., 2013 WL 1087580, at \*2 (Del.Super.)

<sup>&</sup>lt;sup>10</sup>Id. at \*4 (citing Jester v. Seaford Sch. Dist., 1991 WL 269899, at \*4 (Del.Super.)).

<sup>&</sup>lt;sup>11</sup>*Id.; Simms, supra*; *Longacre v. Christina Sch. Dist.*, Bench Ruling, Mar. 13, 2012 (Del.Super.).

<sup>&</sup>lt;sup>12</sup>565 A.2d 917 (Del.1989).

<sup>&</sup>lt;sup>13</sup>2004 WL 344015 (Del.Super.).

<sup>&</sup>lt;sup>14</sup>*Id.* at \*8.

Here, Killion testified that she was talking to another student about 15 or 20 feet away from Plaintiff and did not see what happened to Plaintiff. Plaintiff rests on this fact. However, in *Longacre v. Christina School District*, this Court held that a teacher's playground supervision of 12 to 15 students was discretionary where the teacher was on the other side of the playground when the plaintiff was injured. The teacher had not violated a school policy, and no school protocol defined playground supervision. *Longacre* was not a case of no supervision, just as this one is not. No question exists as to whether Killion was in fact supervising the students or whether a school policy prescribed the manner of playground supervision. Although Killion did not see the incident occur, her manner of supervision was discretionary. Because Plaintiff has not raised a question of material fact as to supervision, it follows that Indian River cannot be found grossly negligent or negligent under the doctrine of *respondeat superior*. Indian River's immunity remains intact.

**Ministerial or discretionary act.** Defendants argue that Killion's decision to use the drop and fall method was a discretionary act. Delaware has adopted the general definition of "ministerial" from the Restatement (Second) of Torts: "An act is ministerial if the act of the official involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act."<sup>16</sup>

Discretionary acts require some determination or implementation which allows a choice of methods, that is, acts for which there is no rule as to a course of conduct.<sup>17</sup> The distinction between discretionary and ministerial acts is always one of degree,<sup>18</sup> and there is no "hard and fast rule" as to what makes an act discretionary.<sup>19</sup> Whether an employee's conduct is ministerial or discretionary is a question of law.<sup>20</sup>

Plaintiff testified that "[s]ince there was no policy in place, Ms. Killion had to use her best judgment in the running of the theater." Plaintiff stated that the drop system was a good system if used properly and that she had been instructed in how the system worked. She described the event as an accident and a miscommunication. She believed that Killion "was a very good teacher [who] knew how to handle a bunch of rowdy students." She imputed no fault to Killion in her choice of

<sup>&</sup>lt;sup>15</sup>Bench Ruling, Mar. 13, 2012 (Del.Super.).

<sup>&</sup>lt;sup>16</sup>Sussex County, Delaware v. Morris, 610 A.2d 1354, 1359 (Del.1992)(quoting Restatement (Second) of Torts, § 895D cmt h (1979) (internal quotation marks and ellipses omitted.)).

<sup>&</sup>lt;sup>17</sup>Simms v. Christina Sch. Dist., 2004 WL 344015, at \*8 (Del.Super.).

<sup>&</sup>lt;sup>18</sup>*Hughes, supra*, at \*3.

 $<sup>^{19}</sup>Id.$ 

<sup>&</sup>lt;sup>20</sup>Morris, supra (citing Martin v. State of Delaware, 2001 WL 112100 (Del.Super.)).

the drop system for the costumes or her supervision of the students.

Killion stated that she had not been instructed by anyone in a procedure for moving costumes or organizing costume room. Other methods of moving theater gear include using a bucket or a sling. In deciding to use the drop method for costumes, Killion "just saw what was happening and acted accordingly." The drop method was the "usual way of dropping things down. . . . we'd always done it that way." Mooney also testified that the drop method was commonly used and had been the general practice under Killion's predecessor.

The affidavit of Jay Owens, principal of Sussex Central, supports Killion's statements. Owens stated that although Indian River has general rules for classroom management, there is no rule or policy governing either management of stage costumes or organization of the costume loft. He said that theater teachers are professionals who are allowed to use their "discretion, and professional judgment" in managing tasks such as organizing the costume loft.

Thus, Plaintiff herself found the drop method to be safe. There was no procedure in place for moving costumes, and Killion did not act in violation of any rule. Defendants have met their burden of showing that there are no questions of material fact as to whether Killion's use of the drop method for the theater costumes was discretionary.

For these reasons, the Court finds as a matter of law after viewing the facts in the light most favorable to Plaintiff that Killion's use of the drop method to move the costumes was a discretionary act done without gross negligence or in bad faith. It follows that there is no fault to impute to either Sussex Central or Indian River under the DSTCA.

Defendants' motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary