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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SYDNEY R. BATES, Plaintiff below, Appellant, v. CAESAR RODNEY SCHOOL DISTRICT, CAESAR RODNEY HIGH SCHOOL, BOARD OF EDUCATION OF THE CAESAR RODNEY SCHOOL DISTRICT, Defendant below, Appellee.	:	C.A. No.: 13,2021 APPEAL FROM SUPERIOR COURT DECISION, N16C-12-235 FWW

PUBLIC VERISON OF PLAINTIFF BELOW, APPELLANT'S SECOND CORRECTED OPENING BRIEF

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Dated: April 7, 2021

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NATURE OF PROCEEDINGS

Plaintiff Sydney Bates (hereafter "Plaintiff") filed the instant lawsuit on December 17, 2016, naming Caesar Rodney High School, Caesar Rodney School District, Board of Education of the Caesar Rodney School District (hereafter collectively referred to as "Defendant") and Richard "Dickie" Howell, II (hereafter "Richard Howell"), as defendants.

Defendant Caesar Rodney filed a Partial Motion to Dismiss on January 30, 2017. Plaintiff filed a response to Defendant Caesar Rodney's Motion to Dismiss on February 23, 2017. Oral arguments were heard on May 30, 2017. The Court entered an Order dismissing the Intentional Infliction of Emotional Distress and Assault and Battery claims. However, this Court denied the remainder of Defendant Caesar Rodney's Motion.

Defendant Caesar Rodney moved for summary judgment on March 29, 2018. Plaintiff submitted her Answering Brief on April 30, 2018. Defendant Caesar Rodney filed its Reply Brief on May 18, 2018.

Thereafter, on June 29, 2018, the parties requested leave to submit supplemental briefing based on *James Sherman, et al. v. State of Delaware Department of Public Safety,* 2018 WL 3118856 (Del. June 26, 2018). On July 18, 2018, following a teleconference with the parties, leave was granted for the Plaintiff to move for summary judgment as part of her supplemental briefing.

On August 9, 2018, oral arguments on the parties motions for summary judgment were heard. On November 30, 2018, the Superior Court of the State of Delaware issued a decision granting Defendant Caesar Rodney's Motion for Summary Judgement and denying Plaintiff's Cross Motion for Summary Judgment.

Trial was scheduled to begin on July 29, 2019 against Richard Howell. However, Richard Howell filed for bankruptcy on July 25, 2019, thereby automatically staying the proceedings.

Plaintiff filed motions to Lift the Stay and for Entry of Judgment under Superior Court Rule 54(b) on November 24, 2020 after claims were discharged against Richard Howell. Both motions were granted on December 14, 2020.

On January 11, 2021, Plaintiff filed her Notice of Appeal to the Supreme Court. This is Plaintiff's Opening Brief.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING DEFENDANT NOT VICARIOUSLY LIABLE UNDER SECTION 228 OF THE RESTATEMENT WHICH ASSESSES WHETHER RESPONDEAT SUPERIOR LIABILITY APPLIES TO AN EMPLOYER.

II. THE TRIAL COURT ERRED IN FINDING SECTION 219 DOES NOT APPLY TO TEACHERS, AND EVEN IF IT DID, THAT IT DID NOT APPLY TO THE INSTANT CASE.

III. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT WAS NOT GROSSLY NEGLIGENT.

STATEMENT OF FACTS

The Caesar Rodney School District is a political subdivision of the State of Delaware created pursuant to 14 *Del. C.* § 1001, et seq. The Caesar Rodney School District is located in Kent County, Delaware and includes 12 schools, including Caesar Rodney High School.

Richard Howell was a physical education teacher and coach at Caesar Rodney High School. A36-37; A-40. Upon his arrest for sexually abusing Plaintiff, Richard Howell was taken off of the Caesar Rodney payroll. A-48.

Plaintiff was a student at Caesar Rodney High School from August 2011 through May 2015. Plaintiff was born on December 28, 1996. A-14. Plaintiff met Richard Howell when she was a student in Richard Howell's summer gym class in 2012. A-19-20; A-31-33; A-39. At that time, Richard Howell began talking to Plaintiff more often during class, telling her jokes, and tried to be her friend more than her teacher. A-28. Additionally, Plaintiff was a wrestling manager beginning with the 2013-2014 wrestling season. A-38. Plaintiff was also a teacher's aide for Richard Howell's gym class. A-20; A-22; A-32. Richard Howell would talk to Plaintiff more than the other students throughout her time as an aide. A-27. He also showed favorable treatment to Plaintiff at wrestling events. A-28. Richard Howell would do this by offering to buy her lunch or food, candy, whatever. A-28.

Richard Howell and Plaintiff obtained one another's cell phone numbers through the wrestling team phone tree. A-21; A-41; A45-46. Plaintiff and Richard Howell exchanged text messages beginning in the March / April 2014 timeframe when Plaintiff was a minor. A-21. Plaintiff and Richard Howell would text frequently. A-26. While Richard Howell could not recall the exact time frame of the text messages, he believed there were occasions he and Plaintiff text messaged during the day. A-64. [redacted] Plaintiff turned her cellphone over to law enforcement in January 2015. A-29. At that time, detectives were able to retrieve texts messages exchanged between Plaintiff and Richard Howell from Plaintiff's cell phone. A-46-47.

Richard Howell began sexually abusing Plaintiff in March or April of 2014 when Plaintiff was a minor. A-15; A-23. [redacted]

[redacted] While the school day did not begin until 8:00 a.m., students were allowed in the building and permitted to freely roam prior to 7:30 a.m. A-74; A-78. Plaintiff testified that she usually arrived at school around 7:10 a.m. A-17; A-33. Richard Howell would sometimes arrive at school at 7:00 a.m. A-60. Plaintiff testified that Richard Howell would arrive "kind of around the same time [as her]. Sometimes before, sometimes after." A-33. Upon Plaintiff's arrival, she testified she would notice Richard Howell "go in his office, check e-mails, handle anything that was involved with the wrestling team, set up the gym with the certain equipment that was going to be needed for that day. Sometimes he would go to meetings with other faculty members." A-33. From the time Richard Howell arrived at school between 7:00-7:30 a.m., he was performing his job duties. A-61. Plaintiff and Richard Howell would usually meet around 7:30-7:40 a.m. or whenever they were both available. A-17.

Plaintiff was in the gym area regularly looking for, or in the presence of, Richard Howell. A-22. If she needed to talk to Richard Howell, she would go in the main gym and ask the other teachers where [Howell] was. A-24. This would happen during the school day, when she was not supposed to be in the gym on numerous occasions. A-25.

[redacted]

35. There were other coaches in and out of the equipment locker and wrestling room. A-55. [redacted]

In August 2014, as part of an in-service day, training was provided to the Caesar Rodney teachers. A-67-68. Ms. Collins, Mr. Beron, and Mr. Harris, teachers at Caesar Rodney High School, all attended the in-service day. A-69; A-79; A-81. Ms. Collins, another physical education teacher, testified that at the training, Dr. Kijowski instructed, "do not have sex with students." A-68. Ms. Collins could not remember anything else about the training. A-70. The staff was made aware that it was a crime to have sex with a student, that they would be

terminated for having sex with a student, that they had a duty to report any suspicion of sexual abuse, and that failure to do so was a crime. A-44-45; A-80; A-81-82. Ms. Collins did not recall anything from the training that addressed or instructed staff as to what to look out for in the context of sexual abuse. A-49. Ms. Collins testified they had several other trainings throughout the school year. A-73. Mr. Beron testified that the training in August 2014 was the only mandatory training. A-83. The portion of the training that addressed sexual abuse only lasted about 15 minutes. A-67. Mr. Beron did not recall any other training throughout the school year that addressed sexual abuse or misconduct. A-67.

[redacted]

[redacted]

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING DEFENDANTS NOT VICARIOUSLY LIABLE UNDER SECTION 228 OF THE RESTATEMENT WHICH ASSESSES WHETHER RESPONDEAT SUPERIOR LIABILITY APPLIES TO AN EMPLOYER

A. Question Presented

Whether the Trial Court erred as a matter of law in finding that Richard Howell was not operating within the scope of his employment under Restatement (Second) of Agency §228? (Exhibit A-11).

B. Scope of Review

This Court reviews the grant of a summary judgment de novo. *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.d 1076 (Del. 1997).

C. Merits of Argument

In 1962, the Supreme Court of Delaware decided *Draper v. Olivere Paving & Constr. Co.,* which is the seminal case dealing with an employer's liability for torts committed by an employee. 76 A.3d 774 (Del. 2013). In *Draper*, an employee of Olivere Paving was on a construction job when he assaulted a motorist who disregarded barricades put in place to close the road to traffic. **436-37.* The Court was tasked with determining whether the employer was liable for the tortious conduct of its employee.

Draper adopted the Restatement (Second) of Agency which holds that

conduct of a servant is within the scope of employment if: (1) it is of the kind he is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the master; and (4) if force is intentionally used by the servant against another the use of force is not unexpectable by the master. *See generally, Draper; Restatement (Second) of Agency*. The Court in *Draper* went on to hold that whether a particular tortious act was one performed within the scope of the servant's employment for which the master consequently is liable is one which, of necessity, can be answered only in the light of the particular circumstances of the case under consideration. *Id.* at 442.

In 2013, the Delaware Supreme Court again addressed this issue in *Jane D.W. Doe v. State*, 76 A.3d 774 (Del. 2013). The Court upheld its decision in *Draper* to apply the Restatement (Second) of Agency and provided further guidance on the issue of employer's liability of its employee's tortious acts.

In *Doe*, Giddings, a state trooper, stopped Jane Doe for shoplifting. *Id.* at *775. On the way to the police station, Giddings told Jane Doe if she did something for him, he would do something for her. *Id.* The prospect of jail coerced Jane Doe to perform oral sex on Giddings. *Id.* Jane Doe subsequently filed suit against the State of Delaware raising the doctrine of *respondeat superior*. *Id.* The superior court granted the State's Motion for Summary judgment. *Id.* at 776. Jane Doe appealed the matter to the Supreme Court of the State of Delaware.

Id.

On appeal, the Supreme Court recognized that no one would argue that beatings, stabbings, shooting, or sexual assaults are incidental to any form of employment. *Id.* at 777. However, the relevant test is not whether the sexual assault was within the ordinary course of business of the employer, but whether the service itself in which the tortious act was done was within the ordinary course of business. *Id.* Stated differently, **the test is whether the employee was acting in the ordinary course of business during the time frame within which the tort was committed**. *Id.* (emphasis added). The Court applied the four-part test outlined in the Restatement and applied in *Draper*. *See generally, Draper.*

The Court considered the fact that the assault occurred in Gidding's police car, while Giddings was in uniform and on duty, carrying out police duty by transporting Jane Doe to court, and determined it was sufficient to satisfy the first two prongs of the test. *Doe* at 777. The Court construed the third factor – whether Giddings was activated in part to serve his employer – **broadly** as a matter for the jury to decide. *Id.* (emphasis added). As to the fourth prong, the Court held that **sexual assaults by persons in positions of authority are foreseeable risks**. *Id.* (emphasis added). The Court reversed and remanded the case for further action in accordance with its ruling. *Id.*

While *Doe* dealt with a police officer, rather than a teacher, the same

rationale is applicable to the facts in the instant case. This is supported by the court's 2015 ruling in *Mojica v. Smyrna School District,* 2015 WL 13697693 (Del. Super. Ct. Dec. 17, 2015) and 2019 ruling in *Smith v. Liberty Mutual Insurance Company*, 201 A.3d 555 (Del. Super. Jan. 14, 2019), both of which analyzed sexual assault of students by teachers under Restatement §228.

Mojica, just as in the case at hand, involved a student, Mojica, who was sexually abused by his teacher and coach, Defendant Suarez. *Mojica,* 2015 WL 13697693. In 2012, Suarez told Mojica she had feelings for him when she drove him home from school/practice. *Id.* at *1. Suarez continued to make sexual advances through Mojica's junior year. *Id.* Suarez would occasionally touch Mojica's genital area while he was warming up for practice and, on one occasion, invited him to her classroom after practice where she performed oral sex. *Id.* Mojica subsequently brought a claim against Suarez and Smyrna School District. *Id.*

In *Smith*, a student, who also worked as a student aid, filed a complaint against a high school gym/health teacher alleging assault and battery, intentional inflection of emotional distress, gross negligent infliction of emotional distress and gross negligence. *Smith*, 201 A.3d 355, *557.

Following the Supreme Court of Delaware's direction that §228(1) is to be read broadly, the court, in both *Mojica* and *Smith* applied §228(1) to the fact

pattern involving sexual assault of students by teachers. *Mojica*, at *5. Pursuant to Restatement §228:

> If an employee is acting in the ordinary course of business during the time frame within which the tort was committed, then the first two elements of 228(1), whether the conduct is of the kind he is employed to perform and whether the conduct occurs within the authorized time and space limits, are met. The third element, whether an employee is activated by a desire to serve his master, has been determined to be a matter for the jury. Under the fourth element, whether the employee's act was expectable, the Court has determined the acts not specifically authorized or even contemplated by the employer, including serious criminal acts, can be considered expectable. *Id.*
> *Mojica*, 2015 WL 13697693, at *5.

The case at bar closely parallels *Mojica* and *Smith* both in fact and in rationale. Thus, the same analysis should be applied to the instant case.

The Court revisited the facts and law of *Doe* in 2018, as *Sherman v. Delaware Department of Public Safety,* 2018 WL 3118856 (Del. June 26, 2018). The Court in *Sherman* reshaped the analysis of the third and fourth prongs holding that whether tortious conduct is within the scope of employment is decided by the court if the answer is clearly indicated. *Id,* at 170.

1. The conduct is the kind Richard Howell was employed to perform

In *Doe*, the Court relied upon the following facts in satisfaction of the first two prongs: (1) Giddings was in uniform, (2) on-duty, (3) carrying out a police duty by transporting Doe to court, (4) the assault took place in the police car, and

(5) the assault took place when he was supposed to be carrying out police duties. *Doe*, 76 A.3d 774, at 777.

In *Mojica*, the court considered that: (1) the teacher asked the student to accompany her to her classroom at the conclusion of track practice, and (2) she performed the tortious act on school grounds in finding that the first two prongs were satisfied. *Mojica,* 2015 WL 13697693, at *3.

In *Smith*, the court found significant the following facts: (1) the misconduct occurred while plaintiff was on-duty and carrying out his duties as a teacher, (2) on school property, and (3) acting during school hours. *Smith*, 201 A.3d 555, at 566. Relying on these facts, the court found that the first two prongs were satisfied.

In the present case, just as in *Mojica* and *Smith*, Richard Howell was a teacher and coach at the high school Plaintiff attended. [redacted]

While there is no dispute that Richard Howell, or the teachers or officers in the above cases, was hired to teach and coach students at Caesar Rodney High School rather than sexually assault them, he used his authority as a teacher/coach/employee of Defendant to access and sexually assault Plaintiff thus, satisfying the first prong of §228.

2. Richard Howell's abuse of Plaintiff occurred within the authorized time and space limits of his employment with Defendant.

In the present case, just as in *Mojica* and *Smith*, Richard Howell was a teacher and coach at the high school Plaintiff attended. The perpetrators in *Doe*, *Mojica*, and *Smith* would not have had access to their victims but for their employment (whether as police officers or teachers). The same is true in the instant case – [redacted] just like Suarez's position did in *Mojica*, the teacher's position in *Smith* and the officer in *Doe*.

In *Mojica*, the court noted that there were phone calls and explicit comments exchanged for which no time frame was given, as well as an occasion where the teacher asked the student to go to her class room at the conclusion of track practice. *Mojica*, 2015 WL 13697693, at *3. The request led to oral sex on school grounds. *Id.* at *1. The court noted that the teacher was still in a position of authority and on school grounds at the time the request was made. *Id.* at *3. Moreover, Suarez would occasionally touch Mojica's genital area when Mojica was warning up for practice. *Id.* at *1.

[redacted]

[redacted]

Moreover, testimony from both Plaintiff and Ms. Collins established that prior to the 7:30 a.m. contract hours, Richard Howell would arrive at school and begin his day-to-day tasks. A-61. Plaintiff testified that she usually arrived at school around 7:10 a.m. A-33. Upon Plaintiff's arrival, she would notice Richard Howell "go in his office, check e-mails, handle anything that was involved with the wrestling team, set up the gym with the certain equipment that was going to be needed for that day. Sometimes he would go to meetings with other faculty members." A-33. [redacted]

3. Richard Howell's conduct was activated, in part at least, by a purpose to serve the master, the Defendants.

The third prong is referred to as the Motivation Prong and requires that the conduct "is activated, in part at least, by a purpose to serve the master."

Restatement (Second) of Agency §228.

Having previously considered this prong in the context of *Draper*, a mixed-motivation case, the Court in *Doe* left unanswered the question of whether it was an officer's specific tortious conduct or the general conduct which must be considered when analyzing prong three. *Sherman,* 190 A.3d 148, at 173; *Draper*, 181 A.2d 565. The Court in *Sherman* answered the question, holding that the Motivation Prong focuses on the specific tortious conduct itself. *Id.* To satisfy Section 228's Motivation Prong, the allegedly tortious conduct must be "actuated, at least in part, by a purpose to serve the master." *Id.*

The court in *Smith* addressed this prong, finding that the teacher's actions of focusing on the student in the weight room or waiting for the student to walk by his classroom could be actuated *in part* by the teacher's desire to supervise the student in carrying out the teacher's duties. *Smith*, 201 A.3d 555, 566. Likewise, pulling the student out of her classroom to wish her luck could be *in part* attempting to encourage the student, thereby serving the school board. *Id.*

Just as in *Smith*, as required by the third prong, the complaint in the instant case alleges that "Richard Howell was actuated at least in part by a purpose to serve [Defendant]."

[redacted]

4. If force is used, the use of force is not unexpectable given the nature of Richard Howell's employment with Defendant.

The fourth and final prong is referred to as the Foreseeability Prong, which requires that "if force is used, the use of force is not unexpectable." Restatement (Second) of Agency §228.

The court in *Doe* held that "to be within the scope of employment any force used must not be unexpectable." *Doe*, 76 A.3d 774, 777. The Court further held that whether the degree of force the tortfeasor used was 'not unexpectable' was an issue for the jury to decide. *Sherman*, 190 A.3d 148, at 161. In *Doe*, the Court followed several other jurisdictions by citing cases for the proposition that sexual assaults by police officers and others in positions of authority are foreseeable risks. *Id.*

When the Court re-considered §228 in deciding *Sherman* in 2018, the Court addressed the scope of the foreseeability prong providing clarity on the fourth prong of Section 228. *Sherman*, 190 A.3d 148. The Court held that Plaintiff is not required to show that it was foreseeable that the police officer posed a risk of committing sexual misconduct against an arrestee. *Id.* at 175. Rather, all that is

required is that, as a general matter, it was foreseeable that an officer will misuse their authority to extract sexual favors from arrestees. *Id.*

Acts not specifically authorized or even contemplated by the employer, including serious criminal acts, can be considered expectable. *Mojica*, 2015 WL 13697693, at *5. Whether the act was seriously criminal, and therefore not conduct the employee was hired to perform, was immaterial. *Id.* **The holding in *Doe* specifically notes that acts of sexual abuse by persons in positions of authority are foreseeable risks and therefore, must be considered expectable.** *Id.* (emphasis added).

In *Sherman*, the Court held that the plaintiff had no obligation to go further than pointing to undisputed evidence of this kind that sexual misconduct was generally foreseeable. *Sherman*, 190 A.3d 148, 177. While evidence regarding a particular tortfeasor's propensity to commit a sexual assault might bear importantly when accusing the employer of fault-based conduct, it is not necessary to satisfy the foreseeability prong of §228. *Id.* In other words, **there is no obligation to show that the particular teacher in question was known to have a proclivity for sexual misconduct to satisfy 228's foreseeability prong**. *Id.* The Court in *Sherman* entered judgment as a matter of law in favor of Sherman finding that foreseeability was no longer a question for a jury but an issue of law.

While *Doe / Sherman* dealt with a police officer, *Mojica* and *Smith* applied

this same finding to teachers, holding that abuse by teachers is foreseeable. *Smith*, 201 A.3d 555, *567 citing *Mojica*, 2015 WL 13697693, at *5. (emphasis added).

The court in *Mojica* held that although teachers and police officers are in different lines of work with different expected uses of force, teachers are brought under the purview of *Doe* as they are in positions of authority. *Mojica*, 2015 WL 13697693, at 3. Like a police officer, a teacher has the ability to punish a student, even if that punishment is not of the corporal variety. *Id.* For example, a teacher may award a lower grade, assign detention, implement proceedings for suspension or expulsion. *Id.* A minor may not question a request by a teacher for fear of receiving some type of punishment or simply because they have been taught they have to listen to the teacher. *Id.* For this reason, a teacher does maintain authority over a student, even if that authority is not the same type as that of a police officer. *Id.* For the foregoing reasons, the court in *Mojica* found that prong four was satisfied.

Similarly, in *Smith*, the court held that a teacher has significant authority entrusted to him or her. *Smith*, 201 A.3d 555, 567. Because of this, the court held that the foreseeability prong was satisfied because misuse of authority over minors is not unexpectable. *Id.*

In the instant case, Defendant Howell, who was Plaintiff's teacher, was in a position of authority. As *Mojica* and *Smith* illustrated, teachers have power

(especially as perceived by a minor) over students. As *Doe Mojica* and *Smith* held sexual assaults by people in positions of authority are foreseeable risks.

Consistent with the above cases, judgment as a matter of law should be entered in favor of Plaintiff in satisfaction of prong 4.

II. THE TRIAL COURT ERRED IN FINDING SECTION 219 DOES NOT APPLY TO TEACHERS, AND EVEN IF IT DID, DID NOT APPLY TO THE INSTANT CASE.

A. Question Presented

Whether the Superior erred as a matter of law in determining that the scope of Restatement (Second) of Agency §219 does not apply to teachers generally, or to the facts of this case? (Exhibit A-12; Exhibit A-16).

B. Scope of Review

This Court reviews the grant of a summary judgment de novo. *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.d 1076 (Del. 1997).

C. Merits of Argument

The Restatement (Second) of Agency Section 219

When *Doe* was before the Court in 2013, the plaintiff pointed to §219 of the Restatement arguing that it was applicable as it was designed to provide exceptions to §228. Section 219, in relevant part, reads as follows:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of employment.
> (2) A master is not subject to liability for the torts for his servants acting outside the scope of their employment, unless:
> a. The master intended the conduct or the consequences, or
> b. The master was negligent or reckless, or
> c. The conduct violated a non-delegable duty of the master, or
> d. The servant purposed to act or to speak on behalf of the principal and there as reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

Restatement (Second) of Agency §219.

Despite the plaintiff's argument in *Doe* in reliance upon the aforementioned provisions, the Court declined to analyze the case under §219. *Sherman,* 190 A.3d 148, at *153-54. Rather, the Court decided the case solely in the purview of Restatement (Second) of Agency §228. *Id.*

In revisiting the issue in 2018, this time as *Sherman*, the Court held that adhering to the law of the case, namely analyzing the facts under only §228, would produce an unjust result. *Id.* at 154. Thus, the Court departed from the law of the case, holding that Restatement (Second) of Agency §228, which has been adopted as Delaware law, should operate within the context of its Restatement counterpart, §219, as the Restatement intends. *Id.* When embracing the Restatement, this Court should be inclined to embrace its relevant provisions in their entirety and not cherry-pick isolated sections. *Id,* at 177. The Court went on to consider §219 which "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment." *Id*, at 177 (citing *Restatement (Second) of Agency §219 cmt e*).

In the event that §228 is not satisfied, the finding in *Sherman* requires an analysis under §219. See *Sherman* generally. Section 219 enumerates the situations in which a master may be liable for torts of servants acting solely for

their own purposes and hence not in the scope of employment. *Id.* at 154. (citing Restatement (Second) of Agency §*228 cmt a.*). **When §219's exceptions apply, an employer can be held responsible under *respondeat superior* even if § 228 is not satisfied.** *Id.* (emphasis added). **The purpose of §219 is to address situations when it would be inequitable to deny a tort victim a recovery against the tortfeasor's employer when §228 does not permit recovery.** *Id.*

In *Sherman,* the Court recognized that *Doe I* was correct that "'the question of whether a tortfeasor is acting within the scope of his employment is fact-specific and, ordinarily, is for the jury to decide,' the question of whether tortious conduct falls within the scope of employment is 'decided by the court if the answer is clearly indicated.'" *Id,* at 170. The two relevant subsections of §219 that were determined to be applicable are: "§219(2)(d) which provides for respondent superior liability outside the scope of employment when the tortfeasor was "aided in accomplishing the tort by the existence of agency relation," and "§219(2)(c) which does the same for situations which the employer owed a 'non-delegable duty' to the tortfeasor's victim." *Id.*

1. *Sherman* and the application of Restatement (Second) of Agency §219

The Court submitted *Sherman* to an analysis under §219 because of its concern of allowing the State to escape liability when one of its police officers, in

the course of making and processing a valid arrest, misused his legal authority over an arrestee, thus providing an inequitable result. *Id.*

In *Doe*, the Court held "that, as a matter of law, if a police officer makes a valid arrest and then uses that leverage to obtain sex from his arrestee, his misconduct need not fall within the scope of his employment under §228 to trigger his employer's liability." *Id.* at 154-55. In reaching this finding, the Court took into account the unique, coercive authority entrusted in our police under Delaware law, the reality that when an arrestee is under an officer's authority, she cannot resist that authority without committing a crime. *Id.* at 155. Because the officer's position aided him in obtaining sexual favors – satisfying §219(2)(d)– and the state owed a non-delegable duty to safeguard the arrestee from harm while she was under arrest – satisfying §219(2)(c) – *Doe* does not have to satisfy §228 for the state to be liable for the officer's misconduct. *Id.* at 154.

2. *Bates's* November 2018 decision and the application of Restatement (Second) of Agency §219

The instant case was the first case to address §228 and §219 after *Sherman*. In its November 30, 2018 decision, the court below held that Richard Howell was not acting within the scope of his employment with the Defendant under §228, so only §219 could apply. In analyzing §219, the court below held that (1) §219 does not apply to teachers and (2) even if §219 did apply to teachers, it did not apply to

the specific facts of that case. *See Bates,* C.A. No. N13C-12-235 FWW (Del. Super. Ct. Nov. 30, 2018).

The same concern and rationale exist in the instant case as did in *Sherman* – namely, a teacher/coach using his position to manipulate and groom a minor student for sexual purposes. Clearly, if it would be inequitable to allow a police officer abuse an adult arrestee, it would be inequitable to allow the State to get away with sexual abuse of a minor student by a teacher. The decision below discards the concerns of the Court in *Sherman*, allowing an employer to escape responsibility for the conduct of their employee, denying a tort victim recovery, resulting in an inequitable outcome. Plaintiff will address each applicable subsections of §219 in turn.

3. Restatement (Second) of Agency Section 219(2)(d)

In applying and analyzing §219(2)(d) to the facts of *Doe*, the Court concluded was plain that the tortfeasor was "aided in accomplishing the tort by the existence of the agency relation." *Sherman,* 190 A.3d 148, at 177-78. In *Sherman*, the Court considered the force of threat made by the officer and the fact that someone in Doe's position rightly would fear if she refused compliance. *Id*, at 179. In coming to its conclusion, the Court considered the potential repercussions citizens face when refusing the direction and instruction of police officers, including, but not limited to, higher bail, jail time, etc. *Id.*

Police officers with arrest authority have a coercive power that distinguishes them from ***most*** employees, as those they arrest are required to comply and cannot resist, even peaceably, their authority. (emphasis added). *Id.* at 180. The Court went on to distinguish police officers from plumbers, electricians, accountants, and other providers of services as these professions did not wield the same coercive power as police officers. *Id.* at 181.

The court below, in determining that §219 did not apply to teachers, analogized the student-teacher relationship to that of plumbers, electricians, accountants and their customers, over that of a police officer-arrestee. *Bates*, at 14. The court below found that teachers do not wield the potent coercive power entrusted to police officers as they are not issued handcuffs, deadly weapons or other less than lethal weapons, and may not arrest students and take them into custody by force. *Id.*

While Plaintiff appreciates the unique role that police officers hold in society, there is also a unique role that teachers, coaches and administrators hold over minor students entrusted to their care. For this reason, the teacher-student relationship is more in line with that of officers-arrestees than it is of plumbers/electricians/accountants-customers, thus, bringing the instant case within the purview of §219.

While *Bates* was the first decision to address §219 after *Sherman*, it has not

been the only. In January 2020, in the matter of *John Doe v. Bickering*, the Court addressed the applicability of §219. *John Doe v. Bicking*, 2020 WL 374677, *7 (Del. Super. Jan. 2020). The court cited to, and analyzed, the finding in the *Bates* decision, ultimately disagreeing with the below holding that §219 does not apply to teachers. The court held the following:

> High school teachers and coaches bear the imprimatur of authority with respect to their students – they are not like 'plumbers, electricians, or accountants, and myriad other providers of services ... to their customers.' [Emphasis Supplied]. Teachers and coaches are not plumbers, and students are not customers. Students look up to their teachers and coaches as role models and authority figures, and teachers and coaches do not provide 'services' like plumbers, electricians or accountants. Teachers' and coaches' 'services' are critical to the formation of character and the intellectual development of their students. As such, the existence of the student-teacher relationship imposes a heavy incentive on the student to obey a teacher or coach, lest she get into trouble, get bad grades, or otherwise be marginalized by the teacher or coach. Just because teachers and coaches do not carry handcuffs or guns does not mean that they lack coercive authority."

Id, at *8. The court held that teachers have an imprimatur of authority and power vis-à-vis their students such that §219 applies. *Id.* at *11.

A year prior, in January 2019, shortly after the *Bates* decision, the court addressed §219 in a sexual abuse case which also involved misconduct between a teacher and student in *Smith v. Liberty Mutual*. 201 A.3d 555. The court again

held that teachers "have unique, coercive authority entrusted to them and leverage over students. A student may face immediate or future substantial risk for insubordination or challenging a teacher's authority." *Id.* at 568.

In fact, the court in *Smith* explained that the power a teacher wields over a student may even be more powerful than that of a police officer-arrestee. **The court in *Smith* noted that the power that a teacher held in that instant case was over a minor – a more vulnerable person.** *Id.* Additionally, unlike the *Sherman* case where the adult's own conduct resulted in her arrest, a minor's attendance at school is compulsory and a teacher's authority begins upon a student's enrollment and is not precipitated by any act affirmatively committed by the minor. *Smith,* at 569.

Several years before the *Sherman* decision, the court in *Mojica* likened the authority that police officers held to that of teachers over students. 2015 WL 13697693. While the case did not analyze §219, the analogies drawn between officers/arrestees and teachers/students remain true. *Mojica* held that while not equipped with the same authority as police officers, teachers, in the eyes of their students, are nonetheless equipped with authority. *Id.* "Like a police officer, a teacher has the ability to punish a student, even if that punishment is not of the corporal variety. For example, a teacher may award a lower grade, assign detention, or implement procedures for suspension or expulsion. A minor may not

question a request by a teacher for fear of receiving some type of punishment or may acquiesce simply because they have been taught they have to listen to the teacher." *Id, at 3.* In sum, "a teacher does maintain authority over a student even if that authority is not the same type as that of a police officer." *Id.*

As noted by the *Sherman* dissent, the reach of the finding in *Sherman* was left somewhat unanswered by the opinion of the majority. *Id*, at 202-03. While the Court cautioned future litigation regarding the unique authority of police officers, the Court had the power to limit its holding to abuse by police officers, but declined to do so, leaving the door open for equitable relief against the tortfeasor's employer for tort victims.

Section 219(2)(d) applies when an employee misuses his authority to obtain sex. *Id*, at 180. The rationale behind §219 is not, and should not, be limited to police officer abuse. *Id.* (citing *Ocana v. Am. Furniture Co.*, a New Mexico case, that dealt with an employee who made claims that her supervisor was sexually harassing her. 91 P.3d 58, 71 (N.M. 2004)). Determinations of vicarious liability and the doctrine of *respondeat superior* should not be limited given the specific type of employer; rather, the determination to be made under §219(2)(d) should be whether, because of the imprimatur of authority conferred on the tortfeasor under the particular facts of the case, he or she has coercive power over the alleged victim. *John Doe v. Bicking,* 2020 WL 374677, at *12.

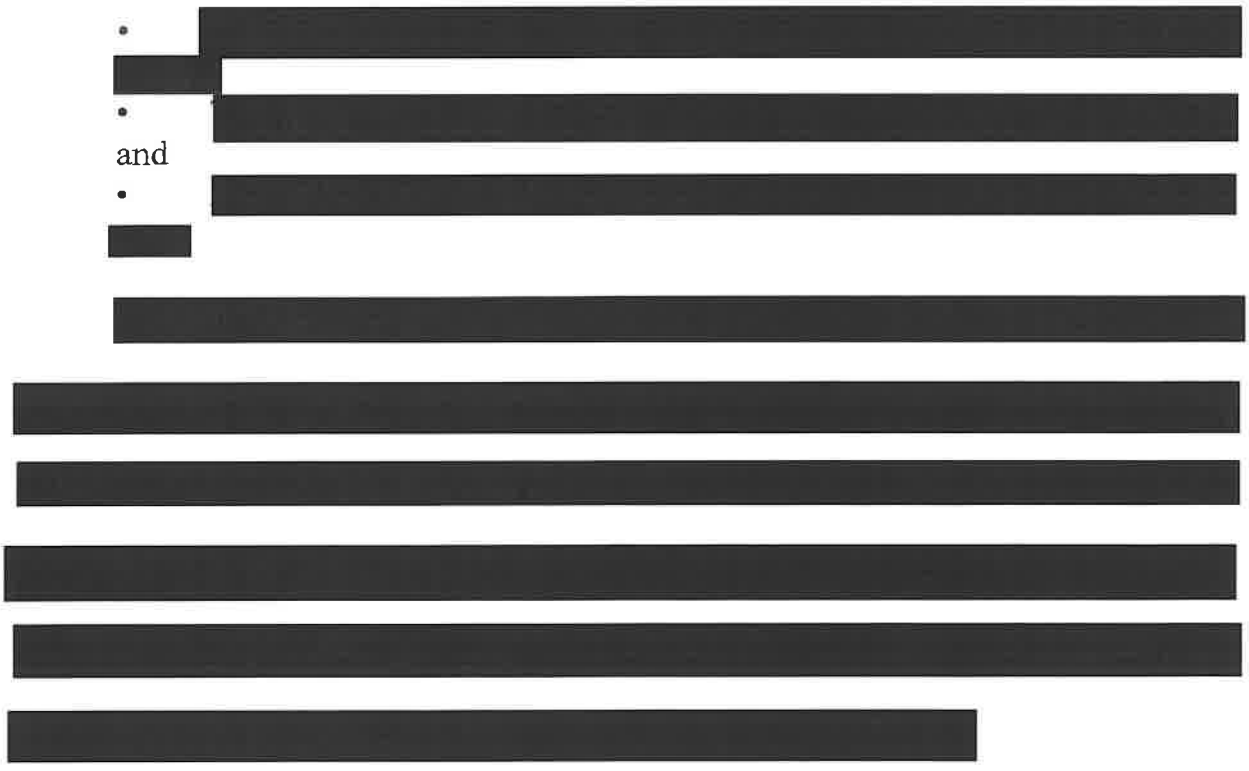
This Delaware Supreme Court has decided that police officers arresting adult subjects committing a crime have coercive authority over their subjects. Clearly, an adult teacher in the course and scope of his employment has control over a minor student while on school property.

Additionally, *Sherman* held that §219(2)(d) applies not only to cases involving abuse of apparent authority, but also cases in which the tortious conduct is made possible or facilitated by the existence of the actual agency relationship. *Sherman,* 190 A.3d 148, 181. The United States Court of Appeals for the Seventh Circuit held that "when an officer takes advantage of the opportunity that his authority and proximity and privacy give him to extract sexual favors, that behavior should be sufficiently within the orbit of his employer-conferred powers to bring the doctrine of *respondeat superior* into play, even though he is not acting to further the employer's goals, but instead is on a frolic of his own." *Id,* at 180 (citing *W. By & Through Norris v. Waymire*, 114 F.3d 646, 652 (7th Cir. 1997)). The Court in *Sherman* went on to conclude that the officer in the present case was "aided by the existence of the agency relationships," thereby satisfying §219(2)(d). *Sherman, at 180.*

The court in *Smith* conducted a similar analysis, also finding that the teacher was aided in his alleged tortious acts by the existence of his agency relation with the school. *Smith*, 201 A.3d 555, 569. The court pointed to the fact that (1) the

student was instructed to reveal her cell phone number to the teacher when serving as his student aid making it possible for the teacher to harass the student via text message, and (2) the teacher used his role to pull the student out of class where he would make inappropriate comments or overly focus on her. *Id.* But for his role as a teacher, on school property, functioning in a supervisory role over minors during school hours, he would have had no authority or ability to commit some of the alleged acts. *Id.*

Similarly, Richard Howell's ability to accomplish the tort was founded solely on the existence of the agency relationship with Defendant. The undisputed facts in the present case are as follows:



[redacted] The record is clear that Richard Howell was aided by the existence of the agency relationship (namely, teacher-student) which he misused to obtain sex, which brings the facts of the instant case squarely within the purpose and policy behind §219(2)(d).

4. Restatement (Second) of Agency Section 219(2)(c)

Despite satisfying §219(2)(d) the Court in *Doe* analyzed the facts under §219(2)(c), ultimately concluding that *Doe* was entitled to liability under this exception as well. *Smith,* at 182.

Sherman held that §219(2)(c)'s non-delegable duty expectation to *respondeat superior's* scope of employment requirement is applicable under Delaware law. *Id.* When an arrestee is in custody, he/she is wholly dependent on her arresting officer for her safety and survival and has no ability to control her environment or protect herself from harm. *Id.* The same can be said of a student while in school. Children are legally required to attend school. While at school, students are required to follow the instructions imposed by the school and their teachers. Students have no choice but to listen to their superiors; failure to do so would result in consequences, including detention, suspension, expulsion, etc. Thus, just as the State has a duty to protect an arrestee, **a school has a non-delegable duty to protect its students** (most of which are minors).

For the following reasons, *Smith* found that schools owe a similar duty to students in their custody as the State owes to an arrestee in custody: Students are expected to surrender authority to the adults in charge, they are not free to leave school unless authorized to do so, and students who defy the school's authority are subject to detention, suspension and police intervention. *Smith,* at 568.

The duty owed by a school to a student is non-delegable. Therefore, Defendant Caesar Rodney should be found liable to Plaintiff for the abuse of its employee, pursuant to §219(2)(c).

The court below, as did the court in *Collins*, raised concern regarding the potential public policy implications that may arise in finding employers liable in the instant context. *Collins v. Dutton*, 2019 WL 6048979 (Sel. Super. Ct. Nov. 14, 2019). Specifically, the court below pointed to concerns regarding financial and policy implications. As the court stated, just because there may be public policy implications does not necessarily mean that such public policy implications are undesirable. *John Doe v. Bicking,* 2020 WL 374677, at *11. Not only may liability insurers be better equipped to bear the damages resulting from the tortious conduct of their agents and employees than individual tortfeasors, who may be judgment proof, but employers are well positioned to adopt policies and procedures that address and prevent sexual assault by their employees and to discipline their employees for violations of those policies. *Id.* This ultimately will

result in members of the public being better protected from sexual assault. *Id.*

III. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT WERE NOT GROSSLY NEGLIGENT

D. Question Presented

Whether Defendant was grossly negligent in a manner that proximately led to Richard Howell's sexual abuse of Plaintiff? (Exhibit A-17).

E. Scope of Review

This Court reviews the grant of a summary judgment de novo. *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.d 1076 (Del. 1997).

F. Merits of Argument

The Delaware State Tort Claims Act (hereafter "DSTCA"), provides immunity to any political subdivisions of the state, including school districts and their employees, from liability when a discretionary act is performed in good faith, without gross negligence. Delaware State Tort Claim Act. However, DSTCA is not a complete bar to recovery to injured Plaintiffs. Upon a showing of gross or wanton negligence, a plaintiff can overcome the DSTCA. *Thomas v. Bd. of Educ. of Brandywine Sch. Dist.*, 759 F.Supp.2d 477 (Del. Super. Dec. 30, 2010).

Gross negligence has been defined as an extreme departure from the ordinary standard of care that signifies more than ordinary inadvertence or inattention. *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1199 (Del. 2015). In the context of an employer/employee relationship, an employer

may be liable for grossly negligent supervision where the employer is [grossly] negligent in giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity. *Id.* The deciding factor is whether the employer had or should have had knowledge of the necessity to exercise control over its employee. *Id.*

Pursuant to the Restatement (Second) of Torts, and as the Delaware Supreme Court noted in *Hecksher*, employers have a duty to control their employees to protect against an unreasonable risk of harm to others. *Id.* at 1206. **This obligation is heightened in a school setting, where the staff assumes responsibility for its students' safety.** *Id* at *1204.*

In order to prevail on a motion for summary judgment, Defendant must show that the record is insufficient to support a jury finding that the defendants were grossly negligent in their supervision of plaintiff. *Jane Doe #7 v. Indian River School District*, 2012 WL 1980562, *6 (Del. Super. Ct. Apr. 11, 2012). However, the record in the present case supports a finding that Defendant was grossly negligent for (1) failing to properly implement rules and policies about sexual abuse prevention and/or detection and (2) failing to properly supervise its employees. For the reasons stated below, a reasonable jury could conclude that Defendant was grossly negligent in their supervision of Richard Howell.

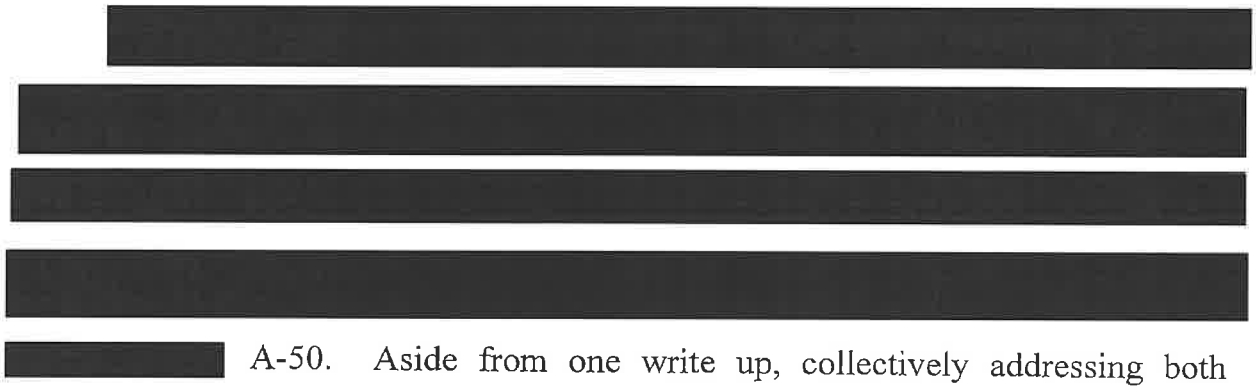
1) Defendant failed to implement policies or procedures regarding sexual abuse and further failed to properly train its teachers/staff as to signs to look out for suspected abuse.

Defendant failed to implement and/or enforce any procedures sufficient to prevent, detect and/or report abuse. Ms. Collins, Ms. Harris, and Mr. Beron testified that they were aware they had a duty to report abuse. A-60-61; A-70-72. However, they further testified that they never received any training on what to look for in order to determine if there is abuse. While all of the teachers testified that they attended the August in-service training, the only thing that they could recall was a singular statement made by Dr. Kijowski that 'you shouldn't have sex with students.' A-68; A-81; A-82. Mr. Beron testified that the portion of the training on sexual abuse lasted approximately 15 minutes. A-83. Ms. Collins testified that she did not remember anything being said about what types of things teachers should look for in the context of sexual abuse. A-72. Mr. Beron further testified that as far as he could recall, he did not get any other training on sexual abuse or misconduct throughout the school year. A-83.

Given that Defendant has students/minors ranging in age, on average, from 14 to 18 (a majority of which are minors), it is imperative that the teachers/staff are properly trained and educated as to what constitutes abuse and how to detect it. A reasonable jury could find that offering a 15-minute lecture at the start of the school year, of which no one was able to recall anything other than a singular

statement, constitutes gross negligence insofar as lack of proper training and/or education on sexual abuse of its staff.

2) **Despite prior write ups, Defendant Caesar Rodney failed to properly supervision and/or monitor Defendant Howell's conduct with female students.**



A-50. Aside from one write up, collectively addressing both incidents, Defendant took no further action to either discipline **or monitor** Richard Howell's interactions with female students. A-77-78; A-66. In fact, Defendant took no discernable steps to respond to the incidents. Instead, Defendant allowed a male teacher, whose conduct with female students had been called into question on two separate occasions, to be alone and behind closed doors with female students. The court below held that the above inappropriate conduct was insufficient to put Defendant on notice that Richard Howell was likely to engage in a sexual relationship with a student. However, the fact that Defendant found it necessary to issue a disciplinary letter dated April 15, 2013 shows that the conduct was concerning and inappropriate. A-49-50.

Moreover, Defendant failed to properly monitor the school grounds.

Students were allowed to come to school property prior to 8:00 a.m. classes. A-74. While certain hallways were monitored, no one was monitoring the gym hallway. A-74-76. Had the school grounds been properly monitored while students were allowed to roam the hallways, it is likely someone would have seen Richard Howell abuse Plaintiff or, at the very least, have seen Plaintiff being in an area where she had no reason to be before school hours, and, presumptively, investigate further. A-74-76. Therefore, a reasonable jury could find that Defendant was grossly negligent in its supervision of its campus and staff.

3) Ignorance is not a defense.

Richard Howell and Plaintiff's attempt to keep the relationship quiet does not relieve Defendant of its obligation to protect students entrusted to it. Defendant seemingly argues because Mr. Harris, Mr. Beron, and Ms. Collins never observed students in Defendant Howell's office, Richard Howell giving special privileges to female students, Richard Howell hugging or touching female students or communicating with female students via cell phone, that these actions did not happen. However, ignorance is not a defense. The appropriate test is not whether Defendant knew of the conduct. The appropriate test is whether Defendant knew, *or should have known,* of the conduct. Willful ignorance is not a defense to sexual abuse of minors.

The record supports a finding that had Defendant properly trained and/or

supervised its students and staff, Defendant would have known of Defendant Howell's abuse. [redacted] A-29; A-26; H-51. Plaintiff was frequently seen in the gym, or gym vicinity, looking for Richard Howell, when she had no reason to be there. A-22-25. [redacted] The abuse occurred right under the nose of Defendant's personnel. Based on the record, a reasonable jury could determine that Defendant was grossly negligent in its supervision of Richard Howell in a manner that proximately led to the abuse of Plaintiff.

For the foregoing reasons a reasonable jury could determine that Defendant was grossly negligent in its supervision of Richard Howell. Therefore, the Superior Court decision granting Defendant's Motion for Summary Judgment should be reversed.

CONCLUSION

The court below erred as a matter of law in denying Plaintiff's Motion for Summary Judgment and granting Defendant Caesar Rodney's Motion for Summary Judgment. The court below erred in finding (1) Plaintiff did not satisfy the elements required by Section 228, (2) that Section 219 does not apply to teachers, (3) that even if it did apply to teachers, it did not apply to this set of facts, and (4) that Defendant was not grossly negligent in a manner that led to Plaintiff's injuries and damages. Therefore, Plaintiff respectfully requests this Honorable Court reverse the decision of the court below.