IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LAURIE SMITH, as parent, next friend and natural guardian of DERRICK SMITH,	)	
Plaintiffs,	)	C.A. No. N11C-09-026 MMJ
v.	)	
SILVER LAKE ELEMENTARY SCHOOL and APPOQUINIMINK SCHOOL DISTRICT,	)	
Defendants.	)	

Submitted: March 27, 2012
Decided: June 25, 2012

On Defendants' Motion to Dismiss
GRANTED

MEMORANDUM OPINION

Kristopher T. Starr, Esquire, Ferry, Joseph & Pearce, P.A., Wilmington, Delaware, Attorneys for Plaintiffs

Marc S. Casarino, Esquire (argued), Sean A. Meluney, Esquire, White and Williams, Wilmington, Delaware, Attorneys for Defendants

JOHNSTON, J.

Plaintiff Laurie Smith ("Laurie"), on behalf of Derrick Smith ("Derrick"), (collectively "Plaintiffs") filed suit against Defendants Silver Lake Elementary School ("Silver Lake") and Appoquinmink School District ("ASD"), Town of Middletown ("Middletown"), MOT Big Ball Marathon d/b/a Big Ballers LLC, and Big Ball LLC ("Big Ball"), (collectively referred to as "Defendants"), claiming simple negligence, gross negligence, and negligent infliction of emotional distress.

Pursuant to Superior Court Rule of Civil Procedure 12(b)(6), Silver Lake and ASD moved to dismiss Plaintiffs' Amended Complaint, arguing: (1) Plaintiffs' negligence claim is barred by statutory immunity; (2) Plaintiffs did not plead gross negligence with sufficient particularity; and (3) Plaintiffs' claim of negligent infliction of emotional distress is barred by the two-year statute of limitations.

For the following reasons, the Defendants' Motion to Dismiss is granted.

FACTUAL BACKGROUND

For purposes of this motion, all facts are set forth in the light most favorable to the non-moving party. On September 4, 2009, Laurie and her son Derrick attended a softball marathon on the grounds of Silver Lake, which is a school within the ASD. Derrick played on the playground at the

site and Plaintiffs claim that Derrick slipped and fell where the playground mulch gave way to a grassy surface beyond. Derrick claims he was injured in this accident.

Silver Lake authorized Big Ball to organize the marathon activities in the vicinity of the school and to use the school's facilities. Also, ASD authorized Silver Lake and Big Ball to organize the marathon activities. Middletown was responsible for the maintenance, repair of, and improvements to the grounds of Silver Lake. There was an insurance policy covering any loss, including any liability attaching to physical or emotional injuries or incidents occurring on or about the premises of Silver Lake.

On September 6, 2011, the Plaintiffs filed suit against Silver Lake, ASD, Big Ball, and Middletown, alleging negligence and *respondeat superior*.

On October 20, 2011, Defendants filed a Motion to Dismiss. This Court held a hearing on the Motion and ordered that Plaintiffs could amend their complaint. Plaintiffs filed an Amended Complaint on February 8, 2012, claiming negligence, gross negligence, and negligent infliction of emotional distress.

Defendants filed a Motion to Dismiss Amended Complaint on February 21, 2012. Plaintiffs' Response to Motion was filed on March 22, 2012.

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."[1] When applying this standard, the Court will accept as true all non-conclusory, well-pleaded allegations.[2] In addition, every reasonable factual inference will be drawn in favor of the non-moving party.[3] If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.[4]

DISCUSSION

The Defendants has statutory immunity from ordinary negligence under 14 Del. C § 1056(h).

The Title 14, Section 1056(h) of Delaware Code provides that "[a]ny school which permits the use of public school property for any use other

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

[2] *Id.*

[3] *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)).

[4] *Spence*, 396 A.2d at 968.

than for public school use shall not be liable in tort for any damages by reason of negligence in the construction or maintenance of such property."[5] Although Defendants cannot be liable for ordinary negligence in the maintenance of the school, the statute does not grant immunity for acts constituting gross or wanton negligence.[6]

Delaware courts consistently have recognized a school's statutory immunity from ordinary negligence claims.[7] Therefore, Plaintiffs' ordinary negligence claims against Defendants must be dismissed.

The Plaintiffs' Claim of Gross Negligence Is Dismissed Under Rule 12(b)(6) Because It Is Not Pleaded With Sufficient Particularity.

Plaintiffs made the claim of gross negligence for the first time in the Amended Complaint. Under Superior Court Rule of Civil Procedure 9(b), a plaintiff must "state the circumstances involving all allegations of fraud, negligence, mistake or condition of mind with particularity."[8] Gross negligence "requires a showing of negligence that is a 'higher level' of

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[5] 14 *Del. C.* § 1056(h).

[6] *Boyle v. Christina School Dist. Bd. Of Edu*c., 2009 WL 4653832, at *2 (Del. Super.).

[7] *See Bantum v. New Castle County Vo-Tech Education Assoc.*, 21 A.3d 44 (Del. 2011); *Boyle*, 2009 WL 4653832 at *2.

[8] DEL. SUPER. CT. CIV. R. 9.

negligence representing extreme departure from the ordinary standard of care."[9]

The purpose of particularity is to alert the defendant of potential liability. It is not sufficient merely to make a "general statement of facts which admits almost any proof to sustain it."[10] A recitation of conclusory allegations is not sufficient meet the particularity requirement when the plaintiff has not provided any facts supporting a claim of extreme departure from the standard of care.[11]

In order to survive the Motion to dismiss under Rule 12(b)(6), Plaintiffs must plead gross negligence with sufficient particularity, which Plaintiffs failed to do in the Amended Complaint. In support of the gross negligence claim, Plaintiffs only added descriptive terms to the language of the original simple negligence claim. Plaintiffs did not plead facts that would demonstrate that Defendants' acts were an extreme departure from the standard of care.

Plaintiffs stated that there were several similar incidents on the playground, and that Defendants knew or should have known of those prior injuries. However, aside from mentioning those alleged prior incidents in a

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[9] *Hughes ex rel Hughes v. Christina School Dist.*, 2008 WL 73710, at *4 (Del. Super.).

[10] *Mancino v. Webb*, 274 A.2d 711, 713 (Del. Super. 1971).

[11] *Brown v. Robb*, 583 A.2d 949, 953 (Del. 1990).

short paragraph, Plaintiffs did not provide any further information or details about such incidents. Plaintiffs failed to plead the "when, where and who" of any previous accidents, purportedly similar to the circumstances at issue in this case.

Further, Plaintiffs have not alleged any facts that could demonstrate Defendants' knowledge of any prior incidents. In claiming gross negligence, Plaintiffs did nothing more than re-package the negligence claim with gross negligence language. Without providing the required particularity to provide an inference that Defendants' acts were an extreme departure from the standard of care, Plaintiffs' claim of gross negligence must be dismissed pursuant to Rule 12(b)(6).

Plaintiff Laurie Smith's claim of negligent infliction of emotional distress is barred by statutory immunity.

In the Amended Complaint, Plaintiffs added a new claim of negligent infliction of emotional distress. Plaintiff Laurie Smith alleged that witnessing her son's incident caused her emotional distress. This claim must be dismissed because it is barred by statutory immunity. Section 1056(h) is intended to "encourage the citizens of any community to participate in worthwhile community activities" at school facilities.[12] The school districts

[12] 14 *Del. C.* § 1056(d).

must have some assurance that allowing such use would not embroil them in lawsuits.[13] This requires a broad reading of the immunity granted to school districts in subsection (h) to carry out the legislative intent.[14] Therefore, Section 1056(h) shields Defendants from liability arising from ordinary negligence, including negligent infliction of emotional distress.

CONCLUSION

The Court finds that Plaintiffs' Amended Complaint fails to state valid claims of negligence, gross negligence or negligent infliction of emotional distress, against the Defendants. Pursuant to Rule 12(b)(6), Plaintiffs' Complaint must be dismissed.

THEREFORE, Silver Lake Elementary School and Appoquinimink School District's Motion to Dismiss Amended Complaint is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston

[13] *Boyle*, 2009 WL 4653832 at *2.

[14] *See Bantum*, 21 A.3d at 49; *Boyle*, 2009 WL 4653832 at *2.