IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CYMONDRIA SMITH, as Next Friend of JAMON SMITH, a minor,	)	
Plaintiff,	)	
	)	C.A. No. N10C-06-208 JRJ
v.	)	
CHRISTINA SCHOOL DISTRICT,	)	
Defendant.	)	

Date Submitted: July 1, 2011
Date Decided: November 28, 2011

OPINION

Upon Consideration of Defendant Christina School District's Motion for Summary Judgment: **DENIED**

David J. Soldo, Esq. (argued), David H. Williams, and James H. McMackin, III of Morris James LLP, 500 Delaware Avenue, Suite 1500, P.O. Box 2306, Wilmington, DE 19899, Attorney for the Defendant.

Gary S. Nitsche, Esq., Weik, Nitsche & Dougherty, 1300 N. Grant Avenue, Suite 101, P.O. Box 2324, Wilmington, DE 19899, Attorney for the Plaintiff.

Jurden, J.

INTRODUCTION

Before the Court is Defendant Christina School District's Motion for Summary Judgment. Jamon Smith ("Plaintiff"), through his mother, Cymondria Smith, filed this suit against Defendant alleging that Defendant and its staff were negligent in their supervision of Plaintiff. Plaintiff suffered an injury to his finger while riding a tricycle at school. Defendant argues that the Delaware State Tort Claims Act ("DSTCA") provides Defendant sovereign immunity from Plaintiff's negligence claim, and thus Defendant is entitled to summary judgment. For the reasons that follow, Defendant's Motion for Summary Judgment is **DENIED**.

FACTS

Brennan School ("Brennan") is a state public school in the Christina School District and one of many locations for the Delaware Autism Program. ("DAP").[1] In September of 2009, Plaintiff, a six-year-old non-verbal autistic child, was a student at Brennan.[2] Brennan typically limits its class sizes to four to six students, but for physical education class ("gym class"), two classes are combined to form one.[3]

During gym class on September 16, 2009 Plaintiff was riding a tricycle around the gym. Although no written protocol exists concerning the staff-to-

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[1] http://www.christina.k12.de.us/Schools/DAP/Overview/Presentation_20081118.pdf. The Christina School District, within which Brennan operates, is a political subdivision and/or statutorily created governmental entity, responsible for administering public education in a defined geographical area pursuant to Chapter 10 of Title XIV of the Delaware Code. Plaintiff's Complaint ("Pl.'s comp.") at ¶2.
[2] Deposition of John Dewey ("Dep. of Dewey") at p. 4-5.
[3] Deposition of Joan French ("Dep. of French") at p. 10.

student ratio in gym class, generally a para-educator from each class and a gym teacher are present to supervise the students.[4] On the day Plaintiff was injured, one gym teacher, two para-educators, and a substitute teacher were present in the gym supervising between eight to ten students.[5]

At the beginning of the gym class, Addison Blatchford, an adaptive physical education teacher at Brennan, helped Plaintiff select an intermediate-sized adult tricycle that Blatchford described as appropriate for Plaintiff's size.[6] In addition to Blatchford, two para-educators, Brooke Cleary and Wilma Torres, were also present in the gym supervising the children. During class, Cleary and Torres were helping children who could not ride bicycles because of their physical handicaps walk around the gym.[7] Blatchford stood at one end of the gym conversing with a substitute teacher, Janis Marcozzi.[8] As Plaintiff was riding his tricycle around the gym he amputated the tip of his left middle finger below the nail bed.[9] Although four employees were present when the injury occurred, none of them witnessed Plaintiff's mishap.[10]

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[4] Dep. of Dewey at p. 50; Dep. of French at p. 10.
[5] Dep. of Dewey at p. 18.
[6] Deposition of Addison Blatchford ("Dep. of Blatchford") at p. 18; 23.
[7] Deposition of Wilma S. Torres ("Dep. of Torres") at p. 5-6; 8. Deposition of Brooke Cleary ("Dep. of Cleary") at p. 27.
[8] Dep. of Torres at 46; Dep. of Cleary at p. 27. Blatchford maintains that even if he is talking with someone during class he can still supervise the children in his class.
[9] Pl.'s comp. at ¶4; Dep. of Blatchford at p. 38.
[10] Deposition of Janis Marcozzi ("Dep. of Marcozzi") at p. 17; Dep. of Blatchford at p. 38-39; Dep. of Cleary at p. 27.

Although doctors were able to reattach Plaintiff's fingertip, he suffered from post-surgical complications that required multiple surgeries and in-patient hospitalization.[11] As a result, Plaintiff was unable to return to school full-time until January 4, 2010.[12] Plaintiff subsequently filed this lawsuit alleging, *inter alia*, that the Brennan staff's inattention amounts to negligence and caused Plaintiff's injuries.

THE PARTIES' CONTENTIONS

Defendant has moved for Summary Judgment arguing that the DSTCA[13] bars any claim by Plaintiff because it provides the State, its entities, and employees immunity from liability provided certain criteria are met.[14]

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[11] Deposition of Cymondria Smith at p. 60.
[12] *Id*. at p. 98.
[13] 10 *Del. C.* §§ 4001-4005.
[14] 10 *Del. C.* § 4001 provides: Except as otherwise provided by the Constitutions or laws of the United States or of the State, as the same may expressly to be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State or any public officer or employee, including the member of any board, commission, conservation district or agency of the State, whether elected or appointed, and whether now or previously serving as such, 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 or policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;

(2) The act or omission complained of was done in good faith and in the belief that the public interest would be best served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence.

Plaintiff contends that, notwithstanding the provisions of the DSTCA, further reading of the statutory language in the State Tort Claims Act in Title Ten, Chapter Forty establishes that Defendant does not have immunity. Specifically, Plaintiff cites 10 *Del. C.* § 4012, which states:

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:
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> 1. In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.

Plaintiff contends that because Defendant negligently failed to exercise its duty to supervise and provide a safe tricycle for Plaintiff to ride, Defendant is not immune from liability under the DSTCA. Plaintiff's statutory interpretation of the DSTCA is incorrect.[15] Sections 4010-4013 of Title Ten, Chapter Forty of the Delaware

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[15] *Schueler v. Martin*, 674 A.2d 882, 887 (Super. Ct. 1996) notes the distinction between Subchapter I, §§ 4001-4005, entitled "State Tort Claims" and subchapter II, §§ 4010-4013, entitled "County and Municipal Tort Claims" of Title Ten, Chapter Forty of the Delaware Code. The Court stated:

> Thus, on its face, the Tort Claims Act separates liability (waiver of immunity) and immunity based on the government unit involved. In addition, the primary immunity for the respective unit, § 4001 for the State or its instrumentalities and § 4011 for local entities are worded differently. Those activities of the State or its instrumentalities which are immune do not correspond to the activities for which local governmental entities are immune. Further, the activities exposing the State or a local governmental entity to liability are not identical. A comparison of the provisions whereby local government entities lose their immunity to the provisions whereby the State or its instrumentalities can lose their immunity underscores the point. Section 4012 strips local entities of immunity under specified circumstances where the conduct was *negligent*. *Id*. (emphasis in original).

Of course, under Section 4001, the plaintiff must show the act or omission complained of was done *without gross or wanton negligence*. Thus, a statutory distinction exists between the two subsections. The General Assembly enacted the Tort Claims Act in 1978. *Schueler*, 674 A.2d at 888. At the time, the Act only contained §§ 4001-4005, which covered the State and its instrumentalities. *Id*. The General Assembly added the provisions covering counties and municipalities in 1979. *Id*. "That legislation *added* §§ 4010-4012 and evidenced the legislature's explicit awareness of the 1978 legislation because the second enactment designated the two subchapters

Code apply to *County and Municipal* Tort Claims, and Defendant is a *State* entity. However, as explained below, a genuine issue of material fact remains for trial.

THE STANDARD OF REVIEW

When a party moves for summary judgment, the Court's task is to determine whether genuine issues of material fact remain for trial.[16] The Court will only grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[17] If, however, the record developed through discovery reveals that material facts are in dispute or if the record has not been thoroughly developed to allow the Court to apply the law to the facts of the case, then summary judgment must be denied.[18]

Initially, the moving party bears the burden of "demonstrating that the undisputed facts support his claim for dispositive relief."[19] Should the moving party properly support its motion, "then the burden shifts to the non-moving party to demonstrate that material issues of fact remain for resolution by the ultimate fact-finder and/or that the movant's legal arguments are unfounded."[20] As such,

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as they now exist." *Id*. Consequently, in a lawsuit against the State or its entities, the plaintiff must allege something more than ordinary negligence. After all, gross negligence is a higher level of negligence that shows "an extreme departure from the ordinary standard of care." *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990).

The Court notes that under *Schueler*, §§ 4001-4005 of the *State* Tort Claims Act apply to the facts of this case. Defendant is a State entity. Any prior attempt by Plaintiff to reference §§ 4010-4013 of the County and Municipal Tort Claims Act must be disregarded. Moreover, the same applies for any future references by Plaintiff.

[16] *J.L. v. Barnes*, 2011 WL 3300702, at *4 (Del. Super.) (citing *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973)).

[17] *Id*.

[18] *Id*. (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

[19] *Id*. (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

[20] *Id*. (other citations omitted).

"Rule 56(c) mandates entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case."[21]

DISCUSSION

The General Assembly enacted the DSTCA to codify the "common law principles of sovereign immunity" in Delaware.[22] The General Assembly sought to protect public officials or employees from lawsuits that might hamper their ability to exercise discretion while performing official duties.[23] The first line of protection for the State and its agencies is that neither party can be sued without its consent.[24] Despite this shield, the General Assembly "can waive sovereign immunity by an Act that clearly evidences an intention to do so."[25] Carrying insurance coverage for risks or losses acts as a waiver on behalf of the State to the extent of the coverage available.[26]

Defendant, as a public school district, has immunity from liability under the DSTCA.[27] To overcome this immunity, Plaintiff must show that: "(1) the State has waived the defense of sovereign immunity for the actions mentioned in the

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[21] *Id*. (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).
[22] *See Doe v. Cates*, 499 A.2d 1175, 1180 (Del. 1985).
[23] See *id.* at 1180-81.
[24] *Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004).
[25] *Id*. (citing Del. Const. Art. I § 9; *Shellhorn & Hill, Inc. v. State*, 187 A.2d 71, 74 (Del. 1962)).
[26] *Id*. at 574. (citing *Turnbull v. Fink*, 668 A.2d 1370, 1376 (Del. 1995)). 18 *Del. C.* § 6511 provides: "The defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate."
[27] *Simms v. Christina School District*, 2004 WL 344015, at *8 (Del. Super.); 10 *Del. C.* § 4001, 4003

complaint; and, (2) the State Tort Claims Act does not bar the action."[28] Here, Defendant has insurance; therefore, Plaintiff has satisfied the first prong.[29]

Plaintiff's next hurdle requires him to establish the absence of the following elements under 10 *Del. C.* § 4001 of the DSTCA to proceed: (1) the action was discretionary in nature; (2) the action was done in good faith; and (3) the action was done without gross or wanton negligence.[30] The dispute between Defendant and Plaintiff with respect to this Motion centers on two portions of the Act: whether Defendant's acts were discretionary and whether Defendant's acts were done without gross or wanton negligence.

In the Complaint, Plaintiff alleged ordinary negligence on the part of Defendant.[31] Defendant answered, and then filed the instant Motion for Summary Judgment. In *Lee v. Johnson*, the defendant filed a Motion to Dismiss arguing that the DSTCA precluded liability because the plaintiff alleged only ordinary negligence. The Court in *Lee* noted that the plaintiff bears the burden of "alleging circumstances that would negate the existence of one or more of these . . . elements of immunity [from Section 4001]."[32] In *Lee*, the Court determined that insufficient

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[28] *Id*; *see Stevenson v. Brandywine School District*, *et. al.*, 1999 WL 742932, at *1 (Del. Super. 1999).
[29] *See* Defendant's Answers to Form 30 Interrogatories at ¶ 6.
[30] *Stevenson*, 1999 WL 742932, at *2. (emphasis in the original) (citing *Sprout v. Ellenburg Capital Corp.*, 1997 WL 716901 (Del. Super. 1997)).
[31] Pl.'s comp. at ¶6.
[32] *Lee v. Johnson*, 1996 WL 944868, at *2 (Del. Super. 1996) (citing *Vick v. Haller*, 512 A.2d 249, 252 (Del. Super. 1986)).

facts were pled to meet the pleading requirement because an allegation of ordinary negligence is insufficient to establish liability under the statute.[33]

Here, Plaintiff has alleged ordinary negligence in the Complaint.[34] Because Plaintiff alleges only ordinary negligence, had Defendant filed a Motion to Dismiss (as the defendant in *Lee* did), dismissal would have been proper. However, the facts of *Lee* differ from this case because the parties here have conducted and completed fact discovery. The record developed during discovery establishes that a genuine issue of material fact exists as to whether the acts of the Defendant were: (1) discretionary; (2) done in good faith; and (3) done without gross and wanton negligence. Thus, Defendant is not entitled to judgment as a matter of law.

Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

cc: Prothonotary

[33] *Lee*, 1996 WL 944868, at *2.
[34] Plaintiff's Complaint at ¶ 5, 6.