

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

SHREE HOLMAN parent and)
natural guardian/next friend to)
DAVANTE FERNANDEZ, a minor,)
DAVANTE FERNANDEZ, individually,)

Plaintiffs,)

v.)

C.A. No. N11C-07-008 ALR

CHRISTINA SCHOOL DISTRICT,)
JERRY DAVIS, DAN FREEL,)
JERRY SCHUSTER, and/or)
JASON SHUSTER, MARK OSMAN,)
NOREEN LASORSA, and)
DARWIN MANGES)

Defendants.)

Submitted: November 4, 2013

Decided: November 20, 2013

**Upon Defendants' Motion for Summary Judgment
DENIED**

David J. Lyons, Esquire, THE LYONS LAW FIRM, attorney for Plaintiffs

Mary E. Sherlock, Esquire, of WEBER, GALLAGHER, SIMPSON, STAPLETON, FIRES &
NEWBY, LLP, attorney for Defendants

Rocanelli, J.

On January 29, 2010, a group of students who were members of the Christina High School wrestling team gathered in the school gym. It is undisputed that the student-athletes were not supervised and that they were not engaged in an organized school activity. Davante Fernandez was injured in the school gym while playing a wrestling game with other student-athletes.

Plaintiffs claim that Defendants, the school district and a number of school officials and/or coaches, are responsible for Fernandez's injury. Defendants contend that the Tort Claims Act bars any liability under the circumstances presented here. Defendants have filed a motion for summary judgment.

Summary judgment may be granted only where the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹ The moving party bears the initial burden of proof, and once that is met, the burden shifts to the non-moving party to show that a material issue of fact exists.² In connection with a motion for summary judgment, the Court must view the facts "in the light most favorable to the non-moving party."³

According to Plaintiffs, the record evidence establishes that Defendant Mark

¹ Super. Ct. R. Civ. P. 56.

² *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

³ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

Osman, the wrestling coach, saw the student-athletes engaged in horse-play in the gym. It is disputed what steps Coach Osman took when he saw the student-athletes in the gym. Fernandez was injured after Coach Osman left the school.

For the purpose of considering the issues presented in the motion for summary judgment, the Court must address whether Coach Osman had any discretion or whether he was required to act. For example, did Coach Osman have an affirmative obligation to instruct the student-athletes to cease their unsupervised play in the gym and require that they leave school premises? Or did Coach Osman have discretion regarding his interaction with the unsupervised student-athletes?

This distinction is critical to whether Defendants have immunity under the Tort Claims Act.⁴ Defendants, here the moving party, have the burden to demonstrate that, even considering the evidence in the light most favorable to Plaintiffs, here the non-moving party, Defendants are entitled to judgment as a matter of law.

The Tort Claims Act governs this dispute.⁵ No liability can be established or damages awarded 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, the granting

⁴ The Court only addresses the first element set forth in the statute and does not reach the questions of good faith and degree of negligence.

⁵ See 10 *Del. C.* §4001.

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 best be served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence.⁶

There is a legal dispute whether Coach Osman was engaged in a ministerial act or a discretionary act. According to Plaintiffs, Coach Osman had no discretion. Rather, he was required to exercise due care to provide for the safety of students. Specifically, Coach Osman should have instructed the student-athletes to leave the gym and to supervise them in following his instructions. However, Defendants claim that Coach Osman was exercising discretion in connection with his interaction with the otherwise unsupervised student-athletes, which grants immunity under the Tort Claims Act as long as he acted in good faith and was not grossly or wantonly negligent.

The grant of immunity under the Tort Claims Act is only available for discretionary acts. In order to enjoy the protection of the statute, Coach Osman must have exercised discretion when he came upon the student-athletes in the gym.

⁶ *Id.*

There can only be liability if Coach Osman had no discretion and was required to tell the students to leave the gym and to supervise them in following his instructions. If Coach Osman was acting in a ministerial capacity and failed to exercise due care as required, Defendants may have liability despite the Tort Claims Act.

For support, the parties rely on a few key Delaware decisions which address discretionary and ministerial acts under similar circumstances. According to the Delaware Supreme Court, “[t]he determination of whether a particular act is discretionary or ministerial is a question of law, which may sometimes require a factual determination.”⁷ An act is ministerial when it is “routinely or mandatorily required.”⁸ A discretionary act is an act that “require[s] some determination or implementation which allows a choice of methods”⁹ The determination of a ministerial or a discretionary act is a question of degree.¹⁰ A teacher has a legal duty to exercise due care to ensure the safety of students.¹¹ The duty to supervise students’ activities is a ministerial duty.¹²

In *Jester*, a student was injured while participating in a piggy-back relay

⁷ *Hughes ex rel. Hughes v. Christiana School Dist.*, 950 A.2d 659 (Table), at *2 (Del. 2008).

⁸ *Jester v. Seaford School Dist.*, 1991 WL 269899, at *4 (Del. Super. Nov. 4, 1991).

⁹ *Id.*

¹⁰ *James v. Laurel School Dist.*, 1993 WL 81277, at *4 (Del. Super. March 3, 1993).

¹¹ *Jester*, 1991 WL 269899, at *4.

¹² *Id.*

during a supervised indoor track practice.¹³ The Court found that the coaches did not fail to supervise the practice, the location of the relay race was safe, and that they used her discretion in allowing the piggy-back relay to occur.¹⁴ Thus, the coaches met their ministerial duties to supervise and exercise due care to provide for the safety of students and allowing them to participate in the relay was a discretionary act.¹⁵

In *James*, the coach was conducting tryouts for a cheerleading competition team when the plaintiff was injured.¹⁶ The tryouts were supervised by a coach and two other adults.¹⁷ No mats were used during the tryouts and there was no school policy requiring the use of mats.¹⁸ Here, the Court determined that the coach used her discretion based on her experience as a coach in determining how to conduct the practice because there was no policy regarding the use of mats.¹⁹

Defendants argue that Coach Osman's acts were discretionary based on the *Jester* and *James* cases. Specifically, they argue that Coach Osman exercised his discretion when he arrived at the school, saw the student-athletes, and told the students to leave the premises. Plaintiffs argue that, unlike *Jester* and *James*, the steps Coach Osman should have taken were ministerial acts, and he failed to

¹³ *Id.* at *1.

¹⁴ *Id.* at *4.

¹⁵ *Id.*

¹⁶ *James*, 1993 WL 81277, at *1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at *4.

exercise his duty to ensure student safety by not telling the students to leave and by failing to supervise them to ensure they left school premises. Plaintiffs argue that this duty is also ministerial because school policy requires that students who are not on the premises for school activities are required to leave.

The student-athletes were not engaged in a school-sanctioned and supervised activity. Nevertheless, Coach Osman interacted with them. The parties have not presented record evidence of school policies or procedures that identify the obligations of students or requirements for school officials that speak to the question of students remaining in the building after school hours when those students are not participating in a supervised activity. Thus, the determination of whether Coach Osman was engaged in a discretionary or ministerial act requires a factual determination that cannot be made on the record now presented to the Court. Accordingly, Defendants are not entitled to summary judgment on this record.

NOW, THEREFORE, this 20th day of November, 2013, Defendants' Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

