

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

KELLIE DIMAIO and KELLIE DIMAIO	)	
and JOHN DIMAIO, JR., as Parents	)	
and Natural Guardians for DD, a minor,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. N12C-02-131 JRJ
	)	
CHRISTIANA SCHOOL DISTRICT	)	
	)	
Defendant.	)	

**ORDER**

**AND NOW, TO WIT**, this 6<sup>th</sup> day of February, 2013, upon consideration of Defendant’s Motion to Dismiss, and Plaintiffs’ opposition thereto, **IT APPEARS TO THE COURT THAT:**

1. On February 9, 2012, Plaintiffs, Kellie DiMaio and Kellie DiMaio together with her husband, John DiMaio, Jr., on behalf of their son, DD, a minor,<sup>1</sup> filed a Complaint alleging: Violation of the Delaware Whistleblower’s Protection Act (Count I); Breach of covenant of good faith and fair dealing (Count II); Negligence (Count III); and Gross negligence (Count IV).<sup>2</sup> On May 10, 2012, Defendant, Christiana School District, filed a motion to dismiss pursuant to

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<sup>1</sup> The minor plaintiff is referred to as “DD” in order to protect his privacy.  
<sup>2</sup> Trans. ID 42423670.

Superior Court Civil Rule 12(b)(6).<sup>3</sup> On December 6, 2012, this Court issued an order denying Defendant’s motion to dismiss Counts I and II, granting Defendant’s motion to dismiss Count III, and deferring consideration of Defendant’s motion to dismiss Count IV until after Plaintiffs filed an Amended Complaint.<sup>4</sup> Plaintiffs filed their Amended Complaint on December 13, 2012.<sup>5</sup>

2. Under the Delaware State Tort Claims Act (the “DSTCA”), Plaintiffs must allege the absence of one or more of the following elements in order to overcome sovereign immunity: “(1) the action was discretionary in nature; (2) the action was done in good faith; [or] (3) the action was done without gross or wanton negligence.”<sup>6</sup> Count IV alleges gross negligence on the part of Defendant. “Gross negligence is a higher level of negligence representing ‘an extreme departure from the ordinary standard of care.’”<sup>7</sup> It is “more than ordinary inadvertence or inattention.”<sup>8</sup> In fact, the Delaware Supreme Court has compared gross negligence with criminal negligence as defined in

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<sup>3</sup> Trans. ID 44179290.

<sup>4</sup> Trans. ID 48227063.

<sup>5</sup> Trans. ID 48407773.

<sup>6</sup> *Smith v. Christina Sch. Dist.*, 2011 WL 5924393 at \* 3 (Del. Super. Nov. 28, 2011), citing *Stevenson v. Brandywine Sch. Dist., et al.*, 1999 WL 742932, at \*2 (Del. Super. July 9, 1999), citing *Sprout v. Ellenburg Capital Corp.*, 1997 WL 716901 (Del. Super. Aug. 16, 1997); 10 Del. C. § 4001.

<sup>7</sup> *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990), quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 150 (2d ed. 1955).

<sup>8</sup> *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).

11 Del. C. § 231(a).<sup>9</sup> Thus, gross negligence exists when a “person fails to perceive a risk . . . of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”<sup>10</sup> The Court finds that the averments in Count IV of Plaintiffs’ Amended Complaint are stated with sufficient particularity to plead gross negligence, and therefore,<sup>11</sup> Defendant’s Motion to Dismiss Count IV is **DENIED**.

**IT IS SO ORDERED.**

                  /s/Jan R. Jurden                    
Jan R. Jurden, Judge

cc: Prothonotary

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<sup>9</sup> *Id.*

<sup>10</sup> 11 Del. C. § 231(a).

<sup>11</sup> Super. Ct. Civ. R. 9(b).