SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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July 10, 2013

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RE: Michael Good and Kellye Good, et al. v. Indian River School District
C.A. No. N12C-05-135 WCC

Submitted: June 14, 2013
Decided: July 10, 2013

Defendant's Motion for Summary Judgment - **DENIED**

Dear Counsel:

Presently before the Court is Defendant's Motion for Summary Judgment. The primary issue, addressed by the Motion and the Plaintiffs' response is whether the failure to repair the area where the plaintiff fell was a ministerial or discretionary act, which would, in turn, affect liability under the Delaware Tort Claims Act ("DTCA").[1] For the reasons set forth below, the Court finds the actions were ministerial, and, therefore, Defendant's Motion for Summary Judgment will be DENIED.

On September 17, 2010, the Plaintiff was an 8th grade student at

[1]The Court notes that "Plaintiff" refers to Ashlynn Good while "Plaintiffs", collectively, refers to the "Plaintiff," and her parents, Michael Good and Kellye Good.

Georgetown Middle School. As the Plaintiff exited the building during a fire drill, she fell and was injured. While the Defendant does not dispute that the accident occurred, it does contest the cause of the event. However, this dispute does not prevent consideration of the summary judgment motion as the Motion relates to whether the Defendant has immunity for its conduct under the DTCA.

DTCA is found in Title 10, *Del. C.* § 4001 and states:

> ...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 members 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 of policy, the interpretation or enforcement of statues, 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 best be served thereby; and
>
> (3) The act or omission complained of was done without gross or wanton negligence.

Simply stated, this has been interpreted to exempt public officials from suit when performing official duties that involve the exercise of discretion, assuming they are performed in good faith and without gross or wanton negligence.[2] The parties appear to agree that subsections 2 and 3 above do not apply here, and, as such, for the litigation to continue, the failure to repair the area must fall under the

[2] *Smith v. New Castle County Vocational Technical School District,* 574 F.Supp. 813, 821 (D. Del. 1983).

non-discretionary exercise of one's official duty found in subsection 1.

The leading case on point is *Scarborough v. Alexis I. duPont High School*[3], in which Judge Bifferato created the "discretionary/ministerial line of demarcation."[4] Discretionary acts are characterized as "those which require some determination or implementation which allows a choice of methods." When acts are discretionary, the immunity provision of DTCA would apply. Ministerial acts, however, are defined as ones that are routine or mandatorily required and, therefore, not afforded immunity. In the *Scarborough* case, Mrs. Scarborough was injured when the wooden bleachers upon which she was standing gave way causing her to fall to the ground. The Scarboroughs asserted that the school district knew or should have known about the unsafe condition and, as a result, failed to exercise reasonable care. The Court held that the act of inspecting the bleachers was mandated by the requirement that the school maintain a safe environment; therefore, the Court found the act of inspecting the bleachers was ministerial and not protected under the DTCA. While the Defendant boldly asserts, without support, that the conclusion reached by Judge Bifferato "is flawed and must be revisited," there is no argument over the present state of the law, simply its application to the particular facts of this case.

For the purposes of this Motion, the Court will accept that no repairs to the accident area had occurred for at least ten (10) years prior to the accident, and no employee had found or believed there was any tripping hazard in the area where the plaintiff fell. As such, this case is not one where an employee was aware of a dangerous area and simply ignored it or one where requests to repair the area had been ignored by those who could authorize the work. Therefore, if there was some hazard here, no employee was aware of the dangerous condition or took any action to correct it.

The Defendant argues that school employees who are charged with the responsibility to oversee the property must use discretion in determining the manner in which to maintain the property. As such, this employee's decision, they argue, should be considered discretionary with the attached immunity. While as a general proposition the Defendant is correct, this argument is inapplicable because there was no action taken here by any employee. Certainly, to find that some discretion was exercised by an employee requires some decision-making process to occur. For example, if the school district fixed a hole in the parking lot with hot mix but a better alternative would have been to use concrete, then that is a discretionary decision where the decision-maker would have been granted

[3] 1986 WL 10507 (Del. Super. Sept. 17, 1986).

[4] *Id*. at, *2.

immunity. Or, if an employee used stones to level the sidewalk area but one could have used a different method, then that too would be considered a discretionary act. Additionally, a discretionary decision can be one in which no corrective action is taken. For example, one could be aware of a particular condition on the grounds of the school property and decide that no repair was needed. If that occurred, the Plaintiffs may argue that decision is still actionable as gross or wanton negligence, but it would not be actionable under the subsection involving non-discretionary acts. The problem here, however, is that these types of decision-making processes did not occur at all.

When the Court views the facts of this case in the light most favorable to the Plaintiffs, it finds that no discretionary act occurred, and since the school has an obligation to provide a safe environment for its students, it failed to perform actions mandated or required to fulfill this obligation.[5] As such, the immunity available under 10 *Del. C.* § 4001, if the facts are established by the Plaintiffs, is no longer available to the school district. Therefore, Defendant's Motion for Summary Judgment must be denied.

The Defendant also asserts that it believes the Plaintiffs were intending to amend the complaint to include claims for negligent hiring and training and gross negligence. In its brief, the Plaintiffs state that they have no intention to do so and, as a result, those arguments have not been addressed by the Court. The Court finds that the negligence assertions set forth in paragraphs 13(a) through 13(d) of the amended complaint may proceed forward.

IT IS SO ORDERED.

William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:twp
cc: Christy Magid, Case Manager

[5] 14 *Del. C.* § 1055.