IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

MICHAEL S. ESPOSITO, and JENNIFER ESPOSITO, h/w, individually, and as parents and natural guardians of MICHAEL R. ESPOSITO, a minor	:	**C.A. No: 12C-08-006 (RBY)**
Plaintiffs,	:	
v.	:	
HEATHER L. TOWNSEND, individually and in her official capacity as a Teacher in the Red Clay Consolidated School District,	:	
And	:	
REBECCA KING, RN, MSN, NCSN, individually and in her official capacity as a Nurse in the Red Clay Consolidated School District,	:	
And	:	
DEBORAH ENGLEHART, RN, BSN, NCSN, individually and in her official capacity as a Nurse in the Red Clay Consolidated School District,	:	
And	:	
RED CLAY CONSOLIDATED SCHOOL DISTRICT	:	
Defendants.	:	

Submitted: November 16, 2012
Decided: February 8, 2013

Upon Consideration of Defendants' Motion to Dismiss
GRANTED IN PART, DENIED IN PART

OPINION AND ORDER

Kathleen Delacy, Esq., and Krista E. Butler, Esq., Reger, Rizzo & Darnall, LLP, Wilmington, Delaware for Plaintiffs.

Mary E. Sherlock, Esq., Weber, Gallagher, Simpson, Stapleton & Fires, Dover, Delaware for Defendants.

Young, J.

SUMMARY

This suit was filed by Michael S. Esposito and Jennifer Esposito individually and on behalf of their minor child ("M.R.E.") as parents/guardians ("Plaintiffs"). The Complaint alleges that Defendants intentionally and jointly engaged in retaliatory conduct while acting as employees of Red Clay Consolidated School District. The conduct in question was an alleged bad faith report of child abuse against Plaintiffs to the Delaware Department of Family Services. There are several defendants: Heather L. Townsend, fourth grade teacher to the minor child at Brandywine Springs Elementary School, Rebecca King, school nurse at Brandywine Springs Elementary School, Deborah Englehart, school nurse at Brandywine Springs Elementary School, and the Red Clay Consolidated School District ("Defendants"). The Defendants have filed a Motion to Dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6). The Court has considered the arguments presented by Defendants' Motion as well as the Complaint and Plaintiffs' Response in Opposition to the Motion to Dismiss under the appropriate standard of review for a motion to dismiss. For the reasons discussed below, Defendants' Motion to Dismiss is **GRANTED IN PART** as to part VII and **DENIED IN PART** as to I-VI, VIII, and as to dismissal of Defendant Nurses.

FACTS

Plaintiff, M.R.E., a minor, was a fourth grade student at Brandywine Springs Elementary School ("BSS") at the time the alleged series of events occurred. His teacher was Defendant Heather L. Townsend ("Townsend"). On April 30 and May 1, 2012, M.R.E. was absent from school. Plaintiff, Jennifer Esposito, M.R.E.'s mother

engaged in an e-mail conversation with Townsend concerning this absence. This correspondence occurred between May 1 and May 9, 2012. The initial e-mail was sent by Jennifer Esposito in an attempt to obtain M.R.E.'s assignments to ensure he did not miss school work while absent. Mrs. Esposito asked specific questions about what was due and when. On May 7, 2012 Jennifer Esposito checked the school's website to view the status of M.R.E.'s grades. She found that he had been given a zero on an assignment that was due the previous week. Mrs. Esposito e-mailed Townsend regarding the missed assignment and low grade. Townsend explained that the assignment was an oversight ,and that as a "compromise" she would allow M.R.E. to turn in the assignment late, reducing it by a letter grade instead of a grade of zero. Mrs. Esposito was unhappy with that solution, questioning the propriety of a grade level deduction due to Townsend's oversight. Townsend responded that M.R.E. had an "A" average in the particular subject area, adding: "I'm not certain how much more you want." Apparently that response led to a "highly contentious" series of e-mails between the women. The correspondence culminated on the evening of May 8, 2012, when Jennifer Esposito sent an e-mail to Townsend's superiors, asking them to intervene in the situation. The e-mails continued into the next day, May 9th, at which point Mrs. Esposito questioned Townsend's understanding of the School District's Code of Conduct, via e-mail with the Principal and Vice Principal also being included on the e-mail.

According to the Complaint, the first opportunity for Townsend to read the e-mail that included her superiors would have been at some point between 10 and 10:45 a.m. that morning. At 10:45 a.m. Townsend picked her students up from Technology

class. There, she handed a note to M.R.E., which asked him to report to the nurses' office.

As it turns out, on May 5th and 6th, 2012, M.R.E. had participated in a scuba diving class. On May 7, 2012 Townsend evidently had noticed a rash on M.R.E., and asked him about it. He told her that the combination of salt water used in the scuba dive and the shirt he was wearing under his suit had irritated his skin, causing him to develop the rash on this neck. He also showed Townsend the rub/rash marks on his face that the mask had caused.

When M.R.E. reported to the nurses' office, he was questioned by school nurses Rebecca King ("King") and Deborah Englehart ("Englehart"). M.R.E. allegedly told the nurses the same thing he had told his teacher, that wearing the UnderArmor shirt under his suit in the pool had irritated his skin. At some point, either prior or subsequent to M.R.E.'s discussion with the nurses, a report was made from Brandywine Springs School to the Delaware Department of Family Services ("DFS"). The identity of the caller is unknown at this time, as the information is considered protected and confidential by DFS. However, the principal of BSS did confirm that the call had originated from the school.

After the call and report were made to DFS, a case worker was immediately dispatched to BSS. M.R.E. was "forced" to undergo a physical examination, that allegedly included his being forced to lower his pants in front of the case worker and the school's nurse. M.R.E. was also interviewed at some point during the process. According to the Complaint, he asked multiple times to call his parents during either the exam or interview. Plaintiffs' allege that the interview and examination by the

case worker caused M.R.E. to suffer "embarrassment, inconsolable fear, and anxiety."

After the incident, the school transferred M.R.E. to a different fourth grade class for the remainder of the school year. However, according to Plaintiffs, M.R.E. was so anxious as a result of the incident that he became unfocused and unable to attend school for the rest of the term. The Complaint alleges that he had previously been a very good student, truly loving to go to school. Mr. and Mrs. Esposito also claim to have suffered embarrassment, fear for the safety of their child, and a violation of their right to privacy as a result of the false DFS claim allegedly made by a member of the BSS staff. Ultimately, the DFS found no evidence of abuse or neglect by the Espositos.

As a result of this series of events, M.R.E.'s parents have a filed suit on behalf of both themselves and M.R.E., as their minor child. The Complaint alleges five separate claims against Defendants: violation of statute/abuse of process; intentional infliction of emotional distress for M.R.E.; intentional infliction of emotional distress on the part of Michael and Jennifer Esposito; slander *per se*; and negligent supervision/gross negligence. The Defendants' Motion to Dismiss asks the Court to dismiss the case pursuant to Superior Court Civil Rule 12(b)(6).

STANDARD OF REVIEW

The applicable standard of review for a motion to dismiss is well-settled. For this purpose, the Court is to accept all well-pled allegations as true.[1] To be well-pled,

[1] *Loveman v. Nusmile, Inc.,* 2009 WL 847655, at *2 (Del.Super. March 31, 2009), citing *Anglo American Sec. Fund, L.P. v. S.R. Global Intern. Fund, L.P.,* 829 A.2d 143, 148–*49 (Del. Ch. 2003).

the complaint must put the opposing parties on notice of the claims being brought.[2] If the complaint and facts alleged are sufficient to support a claim upon which relief may be granted, the motion must be denied.[3] If any reasonable basis can be conceived to allow Plaintiffs' recovery, the motion to dismiss must be denied.[4] Dismissal is warranted only when "under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."[5] Hence, at this very early stage, the four corners of the Complaint largely carry the day.

DISCUSSION

I. Failure to State a Claim Under Delaware's Child Abuse Protection Act ("CAPA")- 16 *Del. C.* §902 et seq.

Defendants present several sub-arguments under this heading. First, Defendants contend that Plaintiffs have not alleged that one of the individual Defendants made the phone call to DFS. The Defendants' next claim that legislative intent and interpretive case law demonstrate that Plaintiffs are unable to bring a valid claim on these grounds. According to Defendants' Motion, there is only one Delaware case alleging a violation of Title 16, Chapter 9, regarding the reporting of suspected child abuse. Defendants allege two reasons for the dearth of case law in this area: the legislative intent of the statute and related presumptions; and the presumption that all

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[2] *Savor, Inc. v. FMR Corp.*, 2001 WL 541484, at *2 (Del. Super. April 24, 2001) citing *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.,* 654 A.2d 403, 406 (Del.1995).

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

[4] *Id.*

[5] *Id.*

reports of suspected child are made in good faith in the absence of evidence of malice or willful misconduct. The Defendants argue that Plaintiffs have not met their burden of demonstrating the presence of malice or willful misconduct. Again, at this stage, "meeting the burden" required little more than sufficiency of allegation.

Defendants' Motion discusses that one Delaware case alleged to be on point. The case is *Hedrick v. Quest Diagnostic Clinical Laboratory, Inc.*[6] Defendants rely upon this case to demonstrate Defendants' immunity from liability. In *Hedrick*, a laboratory mix-up led the technicians to believe that there was sperm present in a young girl's urine sample.[7] As a result, a child abuse report was made, requiring the girl to undergo a rape examination and two interviews.[8] The Court found that Quest was immune from liability under Title 16, granting a summary judgment motion in its favor.[9] To reach that decision, *Hedrick* engaged in an analysis of the statute. Defendants point to the Court's opinion describing the primary intent of the statute to be the encouragement of reporting suspicion of abuse without placing "an undue chill on the willingness to do so."[10]

In reviewing a complaint, courts must view the facts in the light most favorable

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[6] *Hedrick v. Quest Diagnostic Clinical Laboratory, Inc.,* 807 A.2d 584 (Del. Super. 2002).

[7] *Hedrick,* 807 A.2d at 586.

[8] *Id.*

[9] *Id.* at 584-85.

[10] *Id.* at 583.

to the non-moving party.[11] As stated, for these purposes, "[p]laintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences."[12] This Court is being asked to infer that one of the three people, among them Defendant Townsend, made the report to DFS. Based on the particularized facts alleged in the Complaint, such an inference is both reasonable and logical. The Court is aware of the Plaintiffs' limited ability to obtain all the facts surrounding the report to DFS. The identity of the caller and other information about it has been deemed "confidential" by DFS, and thus made unavailable to the Plaintiffs without a Court order.

The claims in *Hedrick* arose from an erroneous lab test, a mistake that led to a false report of child abuse.[13] Though the discussion of the legislative intent of CAPA found in the case is, perhaps, relevant to this matter, the case is easily distinguishable. In the instant case, Plaintiffs allege that Defendants failed to act in good faith when making the child abuse report, not that some objective or good faith error was made.

In response to Defendants' claims that Plaintiffs have not demonstrated malicious or willful conduct, the Plaintiffs simply direct the Court to the facts alleged

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[11] *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009).

[12] *White v. Panic,* 783 A.2d 543, 549 (Del. 2001)(quoting *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000)).

[13] *Hedrick v. Quest Diagnostic Clinical Laboratory, Inc.,* 807 A.2d 584 (Del. Super. 2002).

in the Complaint, stressing that the allegations made in the Complaint are to be accepted as true, and the test of sufficiency is leniently applied.[14] The allegations and facts as set forth in the Complaint do meet this test, in that "retaliation" as opposed to "participating in good faith" is claimed. The accuracy of that, at this point, is not the criterion. Hence, Defendants' Motion to Dismiss for failure to state a claim under Delaware's Child Abuse Protection Act is **DENIED.**

Defendants have made reference to the lack of involvement or alternatively the potential immunity of the school nurses. There are several other arguments that either involve or discuss the nurses. These arguments will be discussed collectively at the end of the Court's Opinion.

II. Failure to State a Claim for Statutory Penalties Under 16 *Del. C.* §914

Plaintiffs are seeking statutorily prescribed penalties for making a false child abuse claim under 16 *Del. C.* §914. §914 imposes statutory penalties of $10,000 and/or $50,000 for violations of 16 *Del. C.* §903. §903 is the portion of the statute making reporting mandatory for anyone who in good faith suspects child abuse. Defendants contend that Plaintiffs cannot claim such penalties in a private right of action, as a matter of law. Further, Defendants argue that, even if they could claim such penalties in a private right of action, they would be applicable only for nonfeasance, as opposed to Plaintiffs' claim of misfeasance. In support of their

[14] *Travelers Property Cas. Corp. ex rel. Latina v. George Kledaras, OD, P.A.,* 2001 WL 1198954, at *2 (Del. Super. Sept. 18, 2001)(citing *State ex rel. Certain-Teed Prods. Corp. v. United Pac. Ins. Co.,* 389 A.2d 777 (Del. Super. 1978)).

contention Defendants cite to passages of the court's ruling in *Doe v. Bradley*.[15]

Defendants' position on this point is incorrect. *Bradley* discusses a claim's being based in malfeasance:

> Although perhaps in a nuanced way, in the CAPA at least, the General Assembly appears to have appreciated the distinction. At §908, the General Assembly provides that when a mandated reporter takes the affirmative step of making a report of child abuse, and does so in a manner that exhibits a lack of "good faith," that reporter is not immune from liability, "civil or criminal," for having made such a report. In other words, the General Assembly has determined that malfeasance in the process of performing the statutorily mandated report may subject the reporter to "civil liability" in a "judicial proceeding."[16]

Defendants seem to be confused regarding the definitions of terms utilized in this section of their argument. Plaintiffs claims are based on an act of malfeasance, defined as: "A wrongful or unlawful act; esp. wrongdoing or misconduct by a public

[15] *Doe v. Bradley*, 2011 WL 290829 (Del. Super. Jan. 21, 2011).

[16] *Id.* at *16.

official..."[17] If this were a claim based on misfeasance or nonfeasance, Defendants might well be correct in stating that case law and legislative intent do not support the implication of statutory penalties. However, when, as alleged here, a reporter takes the affirmative step of making a child abuse report, doing so in a manner exhibiting the absence of good faith, that is malfeasance for which the reporter will not be immune from liability. This is a position clearly supported by case law and legislative intent, found in the very case law cited by Defendants. An act of malfeasance in the course of performing the statutorily mandated child abuse report may, under circumstances as presently alleged, subject the reporter to liability in judicial proceedings. For the foregoing reasons, Defendants' Motion to Dismiss for failure to state a claim for statutory penalties is **DENIED.**

III. Failure to State a Claim Under Delaware Tort Claims Act 10 *Del. C.* §4001

According to 10 *Del. C.* §4001, when state actors or employees are sued in their individual capacities, they are exempt from liability pursuant to the State Tort Claims Act ("DTCA") when:

> (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 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,

[17] BLACK'S LAW DICTIONARY 1042 (9th ed. 2009).

> 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;[18]

Defendants argue that the allegations in the Complaint demonstrate that the individually named Defendants were all acting in connection with the performance of their official duties, and that such decisions (whether to report child abuse, whether to interview the child, whether to send the child to the nurse) were all discretionary decisions, matters of judgment, not ministerial in nature.

The Plaintiffs respond to this contention by alleging that the Defendants' Motion misstates and adds words to the statutory language changing it from what is actually present. In addition, the Plaintiffs point out that the case law cited by Defendants in support of their argument entitling them to immunity, deals with the failure to act by a state actor, not with the "affirmative step of making a report of child abuse", and doing "so in a manner that exhibits a lack of good faith." Plaintiffs further assert that they are alleging a lack of the element of good faith, based on the facts as presented.

Though some argument has occurred on the subject of whether the nature of

[18] 10 *Del. C.* §4001.

the act in question was discretionary as opposed to ministerial, the focus on that topic is misplaced. The real issue here is that Plaintiffs have claimed that the act was done in bad faith. At this preliminary stage in the proceeding, Plaintiffs have alleged sufficient facts to demonstrate the possibility and conceivability that the act was done in bad faith. That is all that is necessary for Plaintiffs' claim to survive a motion to dismiss. For the foregoing reasons, Defendants' Motion to Dismiss for failure to state a claim under the State Tort Claims Act is **DENIED**.

IV. Failure to State a Claim for Abuse of Process

The elements of the tort of Abuse of Process are: "(1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings."[19] Defendants argue that there have not been any allegations of improper motive or coercion on the part of two of the named Defendants (King and Englehart). Defendants further argue that the Complaint has attempted to string the facts together in such a way to create a motive for Defendant Townsend, based on the disagreement she had with Mrs. Esposito. It appears Defendants are trying to disconnect the disagreement with the mother from the investigation of the father. The Motion to Dismiss claims that the father was the only one to be investigated.

Plaintiffs contend that Defendants argument for failure to state a claim for abuse of process rests on a determination of whether Defendants acted with a lack of good faith. The Plaintiffs have alleged that the claim was made in retaliation. Since

[19] *Toll Bros., v. General Acc. Ins. Co.*, 1999 WL 744426, at *5 (Del. Super. Aug. 4, 1999).

the act of retaliation is the ulterior purpose required by the first element of the tort, Plaintiffs (by the Complaint allegations) satisfy that requirement at this point.

Next, Plaintiffs point out that the Defendants have misread the facts, because Mr. and Mrs. Esposito were both investigated. DFS sent letters to both parents to provide them with an outcome of the investigation against each of them. Due to a clerical error, only one of the letters was provided with the Complaint. However, the facts of the Complaint explicitly indicate that both parents were investigated. As both parents were allegedly investigated, the remainder of Defendants' argument on this point is irrelevant. For the foregoing reasons, Defendants' Motion to Dismiss for failure to state a claim for abuse of process on the basis argued is **DENIED**.

Though not argued, the question of whether merely "being investigated" can be the basis for any tort at all. If an investigation led to contact with an employer, or coverage in a newspaper, or community black listing, or some such event, the allegation could survive. However, the fact alone that an investigation took place, without consequences, would not appear to state any claim. That concept has not been asserted as any basis by Defendants or argued by either side. Accordingly, it is not addressed here.

V. Failure to State a Claim for Intentional Infliction of Emotional Distress

In Delaware, the elements of the tort of intentional infliction of emotional distress ("IIED") are defined by *Restatement (Second) of Tort* §46.[20] The *Restatement*

[20] *Fanean v. Rite Aid Corp. of Delaware, Inc.,* 984 A.2d 812, 818 (Del. Super. 2009) (citing *Mattern v. Hudson*, 532 A.2d 85, 86 (Del. Super. 1987)).

defines the elements of IIED as:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
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> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.[21]

Plaintiffs have brought claims for intentional infliction of emotional distress in two separate counts. Count II is the claim of intentional infliction of emotional distress brought by Mr. and Mrs. Esposito on behalf of their minor child, M.R.E. Count III is the claim of intentional infliction of emotional distress brought by and for the parents. In response to Plaintiffs' claims for intentional infliction of emotional distress, the Defendants argue that Mrs. Esposito and the minor child do not have valid claims against Defendants for intentional infliction of emotional distress. The Defendants argue that if Mrs. Esposito or M.R.E. have claims at all, they would fall

[21] RESTATEMENT (SECOND) OF TORTS §46 (1965).

under the second form of IIED liability, for conduct directed at a third party. According to Defendants, as neither Mrs. Esposito or M.R.E. was present when the phone call to DFS was made, neither would have a valid claim for IIED.

DFS investigated both parents, not just Mr. Esposito. Therefore, Mrs. Esposito has the same direct claim of IIED as her husband (whatever that claim may be). It does not matter whether she was present at the time the phone call was made or not.

Defendants' argument that M.R.E. has no valid claim for IIED as he was not present when the phone call was made is fundamentally flawed, because it is irrelevant under these facts. Defendants are arguing that the extreme and outrageous conduct in question is the phone call made to report child abuse. While technically that was the only physical act done directly by the tortfeasor, the results of that call (i.e., the investigation of the parents and examination and questioning of the child) are what actually caused the harm. The harm was directly caused to each individual Plaintiff by whoever made the phone call knowing it would result in an initiation of investigation. As a result of the phone call, a chain of events was set in motion. Whoever made that phone call knew, or should have known, what those events would be. School teachers and nurses are generally trained to handle child abuse detection and reporting as part of their job. They know that when such a phone call is made, a thorough investigation will result. Again, though, the absence of any allegation of consequences of "the investigation" to the parents could be fatal to the claim. That is not, however, the subject of this Motion.

The argument is made that the third party form of IIED liability would be applicable if the claim brought on M.R.E.'s behalf was for severe emotional distress,

because he was upset by having his parents investigated. That is not the claim here. As a result of the report to DFS, M.R.E. was forced to undergo a physical examination, involving lowering his pants for a case worker and one of the school nurses. He was also interviewed by the case worker. The interview and examination allegedly caused M.R.E. "embarrassment, inconsolable fear and anxiety." These are consequences. During the time he was being questioned, M.R.E. allegedly asked for his parents repeatedly. According to the Complaint, M.R.E.'s emotional distress manifests itself in his inability to focus in school and consuming fear. He purportedly became so anxious that he was unable to return to school for the rest of the term. The IIED claim brought on behalf of M.R.E. clearly does not fall under (2) IIED liability. His claim is for direct harm allegedly caused to him by the conduct of the Defendants. For the foregoing reasons, Defendants' Motion to Dismiss for failure to state a claim for intentional infliction of emotional distress is **DENIED**.

VI. Failure to State a Claim for Slander *Per Se*

Defamation is a tort divided into two categories: libel and slander.[22] Libel is written defamation and slander is oral.[23] In order to state a claim of defamation properly, a plaintiff must satisfy five elements: (1) defamatory communication; (2) publication; (3) the communication refers to the plaintiff; (4) a third party's

[22] *Spence v. Funk*, 396 A.2d 967, 970 (Del.1978).

[23] *Id.*

understanding of the communication's defamatory character; and (5) injury.[24] Claims of slander, generally require proof of special damages.[25] However, if the defamation alleged falls within one of four categories, it is considered slander *per se*, requiring no proof of special damages.[26] The four categories are: (1) maligning a person in his or her trade or business; (2) imputing a crime of moral turpitude; (3) implying that the person suffers from a loathsome disease; and (4) imputing unchastity to a woman.[27]

Defendants claim that the Complaint, on its face, fails to allege the elements of slander per se. Assuming *arguendo* that the Court finds the Complaint properly pleads the elements of slander *per se*, Defendants raise further issues with the merits. Both Plaintiffs and Defendants cite to a Court of Common Pleas case, *Rhone v. Dickerson*, which held false accusations of child abuse, not made in good faith, to be slander *per se*.[28] Each party argues for a different interpretation of that case.

Defendants argue that the present situation is distinguishable from *Rhone* because neither *Rhone* nor any case it cites involves a school district employee making a false report to DFS. Those cases point out again that there is a presumption that a report made under 16 *Del. C*. §903 is made in good faith, with Plaintiffs bearing the burden of setting forth facts to overcome that presumption. Once again, we are

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[24] *Reed v. Carpenter,* 1995 WL 945544, at *2 (Del. Super. June 8, 1995)

[25] *Reed,* 1995 WL 945544, at *2.

[26] *Id.*

[27] *Id.*

[28] *Rhone v. Dickerson,* 2003 WL 22931336, at *2 (Del. Com. Pl. Oct. 16, 2003).

dealing here with a Motion to Dismiss, essentially testing the mere sufficiency of the Complaint's allegation.

The Court is to accept all of the non-moving party's well-pled allegations of fact as true, drawing all reasonable inferences in a light most favorable to them.[29] Thus, for this purpose, the Plaintiffs have met their burden of alleging the elements of slander *per se*. For the foregoing reasons, Defendants' Motion to Dismiss for failure to state a claim for slander *per se* is **DENIED**.

VII. Failure to State a Claim for Negligent/Gross Supervision Against Defendant Red Clay Consolidated School District

The Defendant School District has raised several arguments as grounds of the dismissal of the claim against it. Only one of these arguments requires consideration. Defendants claim protection from liability by the State Tort Claims Act. Under 10 *Del. C.* §4001, protections are provided for state actors and employees which a plaintiff must overcome in order for liability to be found. The State Tort Claims Act provides, in pertinent part that;

> 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 nor or

[29] *See e.g., Palma, Inc. v. Claymont Fire Co., No. 1,* 2009 WL 3865395, at *1 (Del. Super. Nov. 18, 1995) (*citing In re Tri-Star Pictures, Inc. Litig.,* 634 A.2d 319, 326 (Del. 1993)).

> 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:
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> (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 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;
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> (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
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> (3) The act or omission complained of was done without gross or wanton negligence...[30]

To avoid application of the State Tort Claims Act, Plaintiffs must show that Defendant School District engaged in ministerial actions, taken in bad faith and not in the public interest, or actions of gross or wanton negligence. Defendant School District alleges that Plaintiffs have not demonstrated the existence of any of these three requirements.

In response, Plaintiffs present three opposing arguments. First, Plaintiffs

[30] 10 *Del. C.* §4001.

contend that the acts in question, namely ensuring that teachers received yearly training and effectively ensuring that each teacher knows and understands the "Roles and Responsibilities" of child abuse reporting, were ministerial in nature. Plaintiffs claim these acts are ministerial because they are "acts that a person or board performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or exercise of his or their own judgment upon the propriety of the act being done."[31] Next, Plaintiffs contend that Townsend and the Nurse Defendants did not follow any of the indicator tests or provisions provided to the School District by DFS. Finally, Plaintiffs argue that, whether the teacher was negligently trained or, alternatively, made the child abuse report in bad faith as retaliation is a factual issue that needs to be determined by a finder of fact.

The first topic for analysis is the distinction between discretionary and ministerial acts. "Discretionary acts are those which require some determination or implementation which allows a choice of methods. Differently stated, discretionary acts are those where there is no hard and fast rule as to a course of conduct. Ministerial acts, by contrast, are those which a person performs in a prescribed manner without regard to his own judgment concerning the act to be done."[32] 14 *Del. C.* §4123(a) requires that "[e]ach public school shall ensure that each full-time teacher receives 1 hour of training every year in detection and

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[31] *Smith v. New Castle County Vocational Technical Sch. Dist.,* 574 F. Supp. 813, 821 (D. Del. 1983).

[32] *Simms v. Christina School Dist.,* 2004 WL 344015, at *8 (Del. Super. Jan. 30, 2004).

reporting of child abuse. This training, and all materials used in such training, shall be prepared by the Division of Family Services."[33]

Defendant argues that supervision of employees is, by its very nature, a discretionary act. The specific context in this case is training, which appears to be mandated, at least to some degree by the Statute. At this stage of the proceedings, viewing the facts in the light most favorable to the non-moving party, it is at the very least, arguable that the acts in question were ministerial. Though the first portion of the test may not show resolution in a manner leaving a clear and determinative answer, the second and third portions of the test by the State Tort Claims Act do resolve the issue.

Plaintiffs are required by the State Tort Claims Act to demonstrate that the act was done in bad faith. There is no allegation that the School District acted in bad faith when training and supervising its employees, particularly with regard to the procedures for reporting child abuse. Plaintiffs have alleged no facts indicating that Red Clay Consolidated School District failed to meet this statutory requirement, or in any other way failed properly to train or supervise either the individually named Defendants or its employees generally.

"The Act does not provide immunity for actions-even discretionary, good faith actions- that are wanton or grossly negligent."[34] Therefore, even in the absence of a showing of bad faith, Plaintiffs could avoid application of the State

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[33] 14 *Del. C.* §4123(a).

[34] *Thomas v. Bd of Educ. of Brandywine Sch. Sch. Dist.,* 759 F.Supp. 2d 477, 501 (D. Del. 2010).

Tort Claims act by satisfactorily asserting that the School acted with gross or wanton negligence. " Gross negligence is a higher level of negligence representing an extreme departure from the ordinary standard of care."[35] Plaintiffs' Complaint fails to set forth what the Defendant School District did not do with regard to supervision or training of its employees. There are no facts stated that allege any indication of gross negligence on the part of Defendant School District. As Plaintiffs have failed to demonstrate that the School District acted either in bad faith or with gross negligence, the Motion to Dismiss as to the claim of Negligent/Gross Supervision against Defendant Red Clay Consolidated School District is **GRANTED.**

VIII. Failure to State a Claim for Punitive Damages

Under Delaware law, punitive or exemplary damages may be awarded "where the defendant's conduct exhibits a wanton or wilful disregard for the rights of plaintiff. For a defendant's conduct to be found wilful or wanton, the conduct must reflect a 'conscious indifference' or 'I don't care' attitude."[36] According to Defendants, the claims against them are for violations of CAPA, a statute which requires a showing of malice or willful conduct to overcome the good faith presumption in favor of those who report child abuse. Again, Defendants argue

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[35] *Doe v. Indian River Sch. Dist.,* 2012 WL 1980562, at *5 (Del. Super. April 11, 2012).

[36] *Colroben Chemical Corp. v. Comegys,* 464 A.2d 887, 891 (Del. 1983) (citing *Riegal v. Aastad*, 272 A.2d 715, 718 (Del. 1970); *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. 1983)).

that no evidence of malice or willful conduct is plead on the face of the Complaint. They further argue that to find such conduct to be grounds for punitive damages would have a chilling affect, defeating the General Assembly's "purpose and intent in enacting the Statute."

Plaintiffs' response is that the allegations in the Complaint provide the basis for a reasonable inference that the child abuse report was made only after the parents involved the teacher's superiors in the disagreement, despite the rash's being openly present for at least two full days. Plaintiffs also cite case law discussing the focus being upon the defendant's state of mind.

As discussed, the standard on a motion to dismiss is "whether a plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint."[37] Accepting the non-moving party's allegations as true, the Court concludes that it is conceivable that Defendants' alleged conduct was wanton or willful, thereby meeting the standard for the award of punitive damages. For the foregoing reasons, Defendants' Motion to Dismiss for failure to state a claim for punitive damages is **DENIED**.

Defendant Nurses

Defendants have made several references in their Motion to the Defendant Nurses and an alleged disconnect between them and any purported bad faith. More specifically, Defendants argue that the nurses had nothing to do with the dispute

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

between Mr. and Mrs. Esposito and Townsend. Thus, they are disconnected from any malicious or retaliatory motive necessary to support many of Plaintiffs' claims.

Plaintiffs argue that, at this stage, discovery has not yet been conducted so as to reveal who made the phone call to DFS. Plaintiffs contend that if the Complaint were against only a Teacher, and it was one of the Nurses who actually made the call, Defendant would be arguing for dismissal based on failure to include all necessary parties. Moreover, if it were not Townsend who made the call, and was one of the Nurses instead, then Plaintiffs allege that the teacher would have had to communicate to the Nurses about why she was sending M.R.E. to see them. It is that communication that would have prompted one of the Nurses to make the call, if that is in fact what occurred.

Delaware is a notice pleading jurisdiction, meaning that a complaint "need only give general notice as to the nature of the claim asserted against the defendant in order to avoid dismissal for failure to state a claim."[38] A complaint is well pled, so long as it "puts the opposing party on notice of the claim being brought against it."[39] Simply being vague or lacking detail is not enough for a dismissal pursuant to Rule 12(b)(6).[40] "A well-pled complaint shifts the burden to

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[38] *Nye v. Univ. of Delaware,* 2003 WL 22176412, at *3 (Del. Super. Sept. 17, 2003).

[39] *Universal Capital Mgmt., Inc. v. Micco World, Inc.,* 2012 WL 1413598, at *2 (Del. Super. Feb. 1, 2012)(quoting *Precision Air, Inc. v. Standard Chlorine of Del., Inc.,* 654 A.2d 403, 406 (Del. 1995)).

[40] *Universal Capital Mgmt., Inc. v. Micco World, Inc.,* 2012 WL 1413598, at *2 (Del. Super. Feb. 1, 2012).

the defendant to 'determine the details of the cause of action by way of discovery for the purpose of raising legal defenses.'"[41]

Plaintiffs have presented the court with facts under which it is conceivable that they could be entitled to relief. The facts, as pled, are sufficient to find continued inclusion of the Defendant Nurses to be appropriate. It is early in the proceedings. Discovery has not yet occurred. Plaintiffs' can only construct their Complaint based on the information available to them now. This is particularly true, because the identity of the child abuse reporter is still considered "confidential." The parties need to determine, through discovery, the details of the cause of action. If at some point after discovery it becomes apparent to Defendants that there is an alleged disconnect between the claims and the Nurses, the Court will, of course, be willing to entertain additional motions regarding dismissal of the Nurses, at the appropriate time. For these reasons, Defendants' Motion to Dismiss the claims against Defendant Nurses is **DENIED**.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED IN PART** as to part VII and **DENIED IN PART** as to I-VI, VIII, and as to dismissal of Defendant Nurses.

SO ORDERED this 8th day of February, 2013.

/s/ Robert B. Young
J.

[41] *Id*. at *2 (quoting *Klein v. Sunbeam Corp.,* 94 A.2d 385, 391 (Del. 1952)).

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