IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Patricia J. Tews, as Next Friend of Aideen E. Tews, a minor,	)	
Plaintiff,	)	
v.	)	C.A. No. 12C-08-158 JRJ
Cape Henlopen School District, Vivian Bush, and Bonnie Brooks,	)	
Defendants.	)	

Date Submitted: January 7, 2013
Date Decided: February 14, 2013

OPINION

Upon Defendant's Motion to Dismiss: **GRANTED**

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Marc Casarino, Esquire, (argued), Sean A. Meluney, Esquire, White and Williams, LLP, 824 North Market Street, Suite 902, P.O. Box 709, Wilmington, Delaware, 19899-0709. Attorneys for the Defendant.

Jurden, J.

I. INTRODUCTION

Before the Court is Defendants' Motion to Dismiss this personal injury case which involves a student's fall down a set of stairs at a Delaware public school for children with autism. For the reasons set forth below, the Motion to Dismiss is **GRANTED**.

II. FACTS/BACKGROUND

On August 17, 2010, the Minor Plaintiff, a student at Sussex Consortium School, a school for children with autism, fell down a set of stairs while under the alleged supervision of various teachers and paraprofessionals. Patricia J. Tews, as Next Friend of the Minor Plaintiff, alleges that Defendants' gross, willful and wanton negligence caused the Minor Plaintiff to sustain serious and permanent injuries to her legs, ankles, hips and head.[1] Plaintiff further alleges that the Defendants "[p]ermitted the minor to fall down a flight of stairs," failed to properly and reasonably supervise her, failed to provide her with an environment free of dangerous hazards for special education students, hired incompetent and improperly trained and supervised staff, failed to meet the applicable standard of care, failed to comply with Delaware requirements for childcare facilities and daycare programs, and failed to otherwise exercise reasonable care.[2]

[1] *See* Complaint at ¶ 7. [Trans. ID 45920640].
[2] *Id*. at ¶ 8.

Defendant Cape Henlopen School District ("Cape Henlopen") is a political subdivision and/or statutorily created governmental entity, responsible for administering public education in a defined geographical area pursuant Chapter 10 of Title XIV of the Delaware Code. Plaintiff alleges that Cape Henlopen carries insurance coverage for risks and losses and has therefore waived its sovereign immunity pursuant to 10 *Del. C.* § 4001. Plaintiff also alleges, upon "understanding and belief," that Cape Henlopen carries insurance coverage for risks and losses that extend to defendant Vivian Bush, the principal administrator of Sussex Consortium, and defendant Bonnie Brooks, a substitute special education teacher at Sussex Consortium, and thus waives sovereign immunity as to those individual defendants pursuant to 10 *Del. C.* § 4003.

III. DEFENDANTS' ARGUMENTS

The Defendants challenge the complaint on several bases. First, Defendants allege that Plaintiff failed to plead sufficient facts to overcome the sovereign immunity provided to them under the Delaware State Tort Claims Act ("DSTCA").[3] Second, Defendants allege that the Complaint "blithely asserts" gross negligence without the requisite level of particularity required under Superior

[3] Although the Defendants disagree that the purchase of insurance (alleged by Plaintiff) waives the immunity provided by Article I, § 9 of the Delaware Constitution, "for purposes of this Motion to Dismiss, the Defendants … focus on … whether the Plaintiff pled sufficient facts to establish that the DSTCA does not bar this action." *See* Motion to Dismiss ("Motion") [Trans. ID 46551752] at ¶ 2.

Court Civil Rule 9(b).[4] Third, Defendants argue that the Complaint is devoid of any indication as to how this accident was caused by Defendants' alleged negligence.[5]

IV. LEGAL STANDARD

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof. When applying this standard, the Court will accept as true all non-conclusory, well-pleaded allegations. In addition, every reasonable factual inference will be drawn in favor of the non-moving party. If the claimant may recover under that standard of review, the Court must deny the motion to dismiss."[6]

V. DISCUSSION

Defendants first allege Plaintiff has failed to overcome DSCTA immunity.[7] To overcome DSCTA immunity, Plaintiff must show that: (1) the State has waived the defense of sovereign immunity for the actions mentioned in the Complaint; and (2) the DSTCA does not bar the action.[8] "Unless waived by the General

[4] *Id*. at ¶ 6.
[5] Motion at ¶ 1.
[6] *Smith v. Silver Lake Elem. Sch.*, 2012 WL 2393722, at *1 (Del. Super.) (citations and footnotes omitted).
[7] Motion at ¶ 3.
[8] *Smith v. Christina Sch. Dist*., 2011 WL 5924393, at *3 (Del. Super.) (citations omitted).

Assembly, the doctrine of sovereign immunity provides an absolute bar to all suits against the State … ."[9]

Here, Cape Henlopen has purchased insurance; therefore Plaintiff has satisfied the first prong.[10] Plaintiff's next hurdle requires her to establish the absence of at least one of the following elements: (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; (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;[11] and (3) the act or omission complained of was done without gross or wanton negligence.[12]

The dispute between the Defendants and Plaintiff with respect to this motion centers on two portions of the DSTCA: whether Defendants' acts were discretionary, and whether Defendants' acts were done without gross or wanton negligence. The Court will address the issue of gross or wanton negligence first.

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[9] *Simmons v. Del. Technical & Cmty. Coll*., 2012 WL 1980409, at *3 (Del. Super.).
[10] *See Smith v. Christina Sch. Dist*., 2011 WL 5924393, at *2 ("Carrying insurance coverage for risks or losses acts as a waiver on behalf of the State to the extent of the coverage available.").
[11] This factor is not at issue here: Plaintiff does not allege in the Complaint that Defendants acted in bad faith.
[12] 10 *Del. C*. § 4001.

Gross or Wanton Negligence

Pursuant to Superior Court Civil Rule 9(b), a plaintiff must state "the circumstances constituting … negligence … with particularity." Gross negligence "requires a showing of negligence that is a 'higher level' of negligence representing extreme departure from the ordinary standard of care."[13]

The particularity requirement of Rule 9(b) is not satisfied by merely stating the result or a conclusion of fact arising from circumstances not set forth in the Complaint.[14] Indeed, as this Court has previously recognized, "claims of negligence (and gross negligence) may not be conclusory and ***must be accompanied by some factual allegations to support them***."[15] Therefore, in order to survive a Motion to Dismiss under Rule 12(b)(6), a plaintiff must plead gross negligence with particularity.

Here, Plaintiff's bare-bones recitation of wholly conclusory allegations is insufficient, and fails to satisfy the particularity requirement for plain negligence, let alone an extreme departure from the standard of care.[16] For example, Plaintiff alleges that Defendants were "grossly, willfully and wantonly negligent." Plaintiff further alleges that "suddenly and without warning she [Minor Plaintiff] was caused to fall down a flight of stairs while under the alleged supervision of various

[13] *Hughes v. Christina Sch. Dist*., 2008 WL 73710, at *4 (Del. Super.).
[14] *See Lee v. Johnson*, 1996 WL 944868, at *2 (Del. Super.).
[15] *Doe 30's Mother v. Bradley*, ___ A.3d ___, 2012 WL 6827652, at *17 (Del. Super.) (citing *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990)) (emphasis added).
[16] *See Brown,* 582 A.2d at 953; *Lee*, 1996 WL 944868, at *2. *See also Smith v. Silver Lake Elem. Sch.*, 2012 WL 2393722, at *2.

teachers and paraprofessionals including the named defendants."[17] This is the extent of the facts pled in support of an extreme departure from the standard of care. Accepting that allegation as true, the mere fact that the Minor Plaintiff fell down some stairs does not establish negligence, let alone the heightened pleading standard of gross negligence.

Indeed, at oral argument, Plaintiff's counsel conceded that the Complaint failed to plead gross negligence:

> **The Court**: Wait. You have to agree with me that gross negligence is not even – is not pled in this complaint. Show me what facts are pled in this complaint that justify the conclusory allegation of gross negligence, willful and wanton conduct. Where is it?
>
> **Plaintiff's Counsel**: The failure to supervise, Your Honor.
>
> **The Court**: Failure to supervise is negligence. Unless you've got some indication in your complaint that they did something above and beyond some egregious conduct, there was a prior fall by a student at the exact same spot and they knew there was a dangerous hazard with the step – I mean, I can think of 20 different examples. Failure to supervise is not gross negligence.
>
> **Plaintiff's Counsel**: Failure to supervise in combination with the fact that these are special needs students. Because the special needs students, Your Honor, require just – basically require a heightened level of supervision. That's why they have para professionals … .
>
> **The Court**: If that's true, what you just said is true, then why isn't it in this complaint?
>
> **Plaintiff's Counsel**: Well, I – I believe that it is.

[17] Complaint at ¶ 7.

> **The Court**: No, it's not. What's not in this complaint is an allegation averring that students with these complex problems require heightened state of care, heightened state of supervision. It's not in there.
>
> **Plaintiff's Counsel**: I agree, Your Honor, and I concede that fact. I agree, is it not in there.[18]

As the Court noted, Plaintiff's Complaint pleads no facts suggesting there were other or similar falls on the stairs, that Defendants knew or should have known of prior falls, that Defendants knew or should have known the steps were hazardous or unsafe, that the Minor Plaintiff required assistance negotiating the stairs, or that before Minor Plaintiff's fall, Defendants had provided assistance to her on the stairs, but on the day she fell, they failed to do so.[19] Plaintiff's Complaint falls short of adequately pleading a claim for gross or wanton negligence.

Discretionary v. Ministerial

Defendants also argue that all the averments of negligence are "clearly discretionary" acts. Plaintiff disagrees, arguing that supervision of students is always ministerial.[20] Relying on *Sussex County, Delaware v. Morris*,[21] Plaintiff argues that the acts in question involve "less in the way of personal decision or judgment," are "more routine," and involve conduct directed by mandatory rules or

[18] *Tews v. Cape Henlopen Sch. Dist.*, Tr. Mot. Dismiss (Jan. 7, 2013), at 25-26.
[19] *See, e.g., Smith v. Silver Lake Elem. Sch.*, 2012 WL 2393722, at *2 (finding that Plaintiff's failure to allege any facts that could demonstrate Defendants' knowledge of any prior incidents did not satisfy Rule 9(b)'s particularity requirement).
[20] Plaintiff's Complaint nowhere mentions the word "ministerial."
[21] 610 A.2d 1354, 1359 (Del. 1992).

policies.[22] Plaintiff notes that in order to demonstrate that certain acts or failures to act are ministerial (as opposed to discretionary), Plaintiff must show the existence of maintained mandatory policies or procedures that Defendant ignored or otherwise failed to follow.[23] And, according to Plaintiff, before she can do that, she requires discovery.[24]

Under well-settled Delaware law, a teacher has a duty to exercise due care to provide for the safety of his or her students and to protect those students.[25] "Included within these duties is the duty to supervise the students' activities."[26] "This latter duty is ministerial, not discretionary."[27] However, the manner in which teachers supervise a student while the student walks down a set of stairs is dependent upon many factors, such as, the student's special needs, whether the student is familiar with the stairs, or whether the student has ever encountered or exhibited difficulty in negotiating stairs, whether other students have fallen while negotiating the stairs. These are just some of the factors that Defendants in this case may have considered in determining the manner in which they supervised the Minor Plaintiff on the stairs.

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[22] Plaintiff did not plead this in the Complaint.
[23] *See* Plaintiffs' Response to Defendants' Motion to Dismiss (hereinafter "Response") at ¶ 5. [Trans. ID 473175151].
[24] *See id*.
[25] *See Jeste*r *v. Seaford Sch. Dist*., 1991 WL 269899, at *4 (Del. Super.); *Adams v. Kline*, 239 A.2d 230, 233 (Del. Super. 1968).
[26] *Jester*, 1991 WL 269899, at *4 (citations omitted).
[27] *Id*. (citing *Baker v. Oliver Machinery Co*., C.A. No. 80C-JA-11, Stiftel, P.J. (Del. Super. March 30, 1981)); *Longacre v. Christina Sch. Dist*., C.A. No. 10C-04-257, at 22-23 (Del. Super. March 13, 2012) (TRANSCRIPT).

There are no facts pled in the Complaint that show Defendants failed to supervise, or that Defendants failed to exercise due care to protect the Minor Plaintiff or provide for her safety. The scant facts pled in the Complaint fail to establish the absence of a discretionary act on the part of the Defendants.[28]

Negligent Hiring

The Complaint also contains an allegation sounding in negligent hiring. Decisions about whether to hire, fire or discipline an individual are discretionary.[29] Thus, to sufficiently plead the inapplicability of the DSTCA, the Plaintiff was required to plead facts to support the contention that Cape Henlopen was grossly negligent in hiring Brooks. The Plaintiff failed to do so. The Complaint contains no facts indicating how Cape Henlopen deviated from the applicable standard of care, what the applicable standard of care is, or why Brooks was unsuited for employment as a substitute special education teacher.

Perhaps recognizing that her Complaint is deficient, Plaintiff asks the Court to allow discovery on the issue of negligent hiring, and insists that she could not plead this claim with the requisite particularity because of the lack of discovery. The Court disagrees. Even at this stage, the Plaintiff is obligated to plead some facts supporting her allegations with respect to the negligent hiring claim. Not all the facts are in the possession of Defendants. The Court finds that Plaintiff could

[28] *See Jester*, 1991 WL 269899, at *4.
[29] *See Simms v. Christina Sch. Dist*., 2004 WL 344015 at *9 (Del. Super.).

have (and should have) pled her claims with greater particularity. A thorough investigation as to, among other things, the standards that Cape Henlopen is mandated or required to follow with regard to hiring, the standards to which a teacher is held when teaching in a Delaware public school (all information that should be available to Plaintiff without the aid of discovery), could have (and should have) been conducted before the Complaint was filed.

Moreover, Plaintiff's contention that discovery will cure the defects in the Complaint demonstrates a misunderstanding of the purpose of discovery.[30] As this Court has previously held, "[t]hough discovery may be properly used to supplement the pleadings with additional details, its function is not to serve as a substitute for the complaint, which must contain the facts that are believed to constitute the plaintiffs' cause of action."[31]

In sum, the Court finds that Plaintiff has failed to overcome the sovereign immunity provided to Defendants under the DSTCA. Plaintiff has neither demonstrated that Defendants acted with gross negligence nor that Defendants' alleged actions or failures to act were ministerial. Absent such a showing, Plaintiff's claims are barred by the DSTCA.

[30] *See Brewington v. Kent Gen. Hosp., Inc*., 1986 WL 4851, at *1 (Del. Super.).
[31] *Id*. (citing 61A Am.Jur.2d *Pleading* § 71 (1981)).

VI. CONCLUSION

As explained above, the ten-paragraph Complaint falls short of sufficiently pleading gross negligence, negligent hiring, or the absence of a discretionary act by Defendants. It is therefore **DISMISSED** pursuant to Rule 12(b)(6).[32]

IT IS SO ORDERED.

Jan R. Jurden Judge

[32] In so ordering, the Court feels compelled to note that the bare-bones averments in this Complaint suggest a lack of attention to Superior Court Civil Rule 9(b) and/or a lack of understanding as to the burden imposed on a plaintiff under the DSTCA. The ten-paragraph Complaint is a swamp of unsupported legal conclusions and vague allegations. (*See Cooper ex rel. Frazier v. Villaburdi*, 2001 WL 1198933, at *1 (Del. Super.)). Presentation of undeveloped or unsupported allegations results in the waste of valuable Court resources, unnecessary expense for the Defendants, and does little to advance this Court's ability to render swift justice. (*See Abbott v. Gordon,* 2008 WL 821522, at *26; *see also Fairthorne Maint. Corp. v. Ramunno*, 2007 WL 2214318, at *11 (Del. Ch.)).