IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANTHONY W. BOYLE, Plaintiff, v. CHRISTINA SCHOOL DISTRICT BOARD OF EDUCATION, as defined in Title 14 of the State of Delaware Code through JAMES R. DURR, Individually and as President of the Board; CHRISTIANA HIGH SCHOOL through DR. LILLIAN M. LOWREY, Individually and as Superintendent of Schools and MEGAN MORRISSEY, Individually and as representative of DIAMOND STATE WILDCATS, Defendants.	)	C.A. No. 07C-07-248 JAP

Submitted: August 17, 2009
Decided: November 30, 2009

MEMORANDUM OPINION

Robert Jacobs, Esquire, Wilmington, Delaware – Attorney for Plaintiff.

Stephen J. Milewski, Esquire, Wilmington, Delaware – Attorney for Defendants Christina School District Board of Education, James R. Durr, Christiana High School and Dr. Lillian M. Lowrey.

William J. Cattie III, Esquire, Wilmington, Delaware – Attorney for Defendant Megan Morrissey.

Anthony Boyle alleges he was injured when he fell off of gymnasium bleachers while attending a cheerleading event at Christiana High School. Mr. Boyle and his wife have sued Diamond State Wildcats ("DSW") and Megan Morrissey, the organizers of the event, as well as the Christina School District Board of Education, James Durr (then a member of that board) and Lillian Lowrey (then Superintendent of the Christina School District). These school defendants have moved for an order compelling DSW to defend, indemnify and hold them harmless for the events giving rise to this suit. This motion is **GRANTED**. The school board has moved for summary judgment on the basis that it is immune from suit. This motion is **GRANTED IN PART** and **DENIED IN PART**. Defendants Durr and Lowrey have also moved for summary judgment. Their motion is **GRANTED**.

A. *Standard of review*

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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] When considering a motion for summary judgment, the facts must be viewed "in the light most favorable to the nonmoving

[1] Super. Ct. Civ. R. 56(c)

party."[2] Furthermore, "[f]rom those accepted facts the court will draw all rational inferences which favor the non-moving party."[3]

B. *DSW is obligated to indemnify the school defendants*

It is undisputed that defendant Morrissey, on behalf of DSW, entered into a contract with Christina School District in which DSW leased the gymnasium at Christiana High School for the purpose of putting on a privately sponsored cheerleading competition. The contract contained the following indemnification provision:

> In consideration for permitting DSW ("the organization") to use the buildings, grounds and/or facilities ("The facilities") of the District …, the undersigned duly authorized officer or representative of the Organization agrees, for and on behalf of Organization, to release the District, the Christina Board of Education and their agents, employees and representatives (collectively referred to "the District") from all claims arising from the Organization's use of the facilities. *The Organization also agrees to defend, indemnify and hold harmless the District from all claims arising from the acts, omissions and/or negligence of the Organization, and all invitees of the organization, as well as all claims arising from acts, omissions, and/or negligence of the District.*

The school defendants argue that this language required DSW to defend the school defendants and indemnify them in the event of a judgment against them.

Agreements to indemnify a party from its own negligence are enforceable when they are "crystal clear or sufficiently unequivocal to show that the contracting party intended to indemnify the indemnitee for

[2] *Mason v. USAA*, 697 A.2d 388, 392 (Del. 1997).
[3] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

the indemnitee's own negligence."[4] Here DSW agreed to defend, indemnify and hold the school district harmless from "all claims arising from acts, omissions, and/or negligence of the District." The Court agrees with the school defendants that this language is sufficiently clear and unambiguous so as to require DSW to defend and indemnify them.

DSW does not argue that the language of the indemnification clause is unclear and ambiguous. Rather it argues that a Delaware statute makes such provisions void and unenforceable as against public policy. DSW points to 6 *Del.C.* §2704(a), which provides in pertinent part:

> "[A] contract … *relative to the construction, alteration, repair or maintenance* in the State of a … building, structure, appurtenance or appliance in the State … purporting to indemnify or hold harmless the promissee or indemnitee … from liability for bodily injury … caused partially or solely by … the negligence of such promissee or indemnitee, and is against public policy, is void and unenforceable even where such covenant, promise or agreement or understanding is crystal clean and unambiguous … ."[5]

DSW argues that section 2704(a) is not applicable because the claim arises from the alleged district's negligence in maintaining the bleachers.[6]

DSW's argument fails because the contract between it and the school district is not one for "the construction, alteration, repair or maintenance" of a state facility. Rather the contract is for the *use* of the

[4] *State v. Interstate Amiesite Corp.*, 297 A.2d 41, 44 (Del. 1972).
[5] 6 *Del. C.* § 2704(a) (emphasis added).
[6] DSW points to the school defendant's reliance upon 14 *Del.C.* § 1056(h) in support of its motion for summary judgment seeking dismissal of Plaintiff's claims. Section 1056(h) provides that "Any school board which permits the use of public school property for any use other than for public school use shall not be liable in tort for any damages by reason of negligence in the construction or maintenance of such property." The Court agrees with DSW that the maintenance of the bleachers is implicated in this case.

school district's facility. Consequently the Court finds that section 2704(a) is not applicable and the indemnification provision at issue here is not void as against public policy.

C. *The school defendants are entitled to dismissal of Plaintiff's negligence claims.*

The school defendants have also moved for summary judgment seeking dismissal of Plaintiff's claims against them on the ground that they are immune from suit by virtue of 14 *Del. C.* §1056(h). That statute which provides:

> "Any school board which permits the use of public school property for any use other than for public school use shall not be liable in tort for any damages by reason of negligence in the construction or maintenance of such property."[7]

Plaintiff responds in a three-fold manner. First, he argues that the statute only applies when the school district gratuitously allows an outside entity to use its facilities. Second, Plaintiff contends that the act of setting up bleachers does not come within the terms of the statute. Third, he asserts that the statute does not apply because the school district's employees acted recklessly or wantonly when they erected the bleachers without installing the guard rails.

Plaintiff contends that section 1056 applies only to instances in which the school district is gratuitously allowing an outside entity to use its facilities. There is no support for this in the language of the statute.

[7] 10 *Del. C.* § 1056(h).

Indeed, the concept of gratuitous use does not appear anywhere in section 1056(h). To the contrary, the section refers to "any use." The Court therefore concludes that the statute is not limited to instances involving the gratuitous use of school facilities.[8]

Plaintiff next contends that the act of erecting the bleachers does not constitute "maintenance" and therefore section 1056(h) is inapplicable. The term "maintenance" is not defined in the statute, and thus the Court must first look to the statute's purpose to glean some meaning. Section 1056(h) is intended to "encourage the citizens of any community to participate in worthwhile community activities" at school facilities.[9] It goes without saying that the fulfillment of this purpose is in large part dependent upon the willingness of school districts to allow community use of their facilities. There is no financial incentive for school districts to lease their facilities as they are limited to charging users for the actual costs incurred by the district as a result of the use.[10] Thus, if school districts are to be encouraged to allow the use of their facilities for community activities, they must have some assurance that

[8] Plaintiff cites *Beck v. Claymont School District*, 407 A.2d 226 (Del. Super 1979), *aff'd*, 424 A.2d 662 (Del. 1980) (*per curiam)* for the proposition that section 1056(h) applies only to gratuitous use of school facilities. It is true that with reference to section 1056(h) this Court in *Beck* this Court that the "General Assembly has spoken to the issue of school district liability for acts of negligence in the letting without charge of school buildings." However the question whether section 1056(h) is limited to gratuitous use of school facilities was not presented in B*eck* and the court conducted no analysis of section 1056 beyond the aforementioned reference to its existence. Thus *Beck* does not require a different result from that reached in the text of this opinion.

[9] 14 *Del. C.* § 1056(d).

[10] *Id*. at § 1056(e).

allowing such use will not embroil them in lawsuits. This requires a broad reading of the immunity granted to them in subsection (h).

The Court concludes that under a broad reading of subsection (h), the setting up of the bleachers constitutes "maintenance." Suppose for example that Mr. Boyle had been injured as a result of the failure of the janitorial staff to clean up a spill on the floor. This failure would indisputably constitute "maintenance" and therefore the district would be immune by reason of subsection (h). In the Court's view there is no meaningful distinction between the failure to erect the safety rails when setting up the bleachers and the failure to clean up a spill. Both therefore constitute "maintenance" for purposes of subsection (h).

Plaintiff's argument that the setting up of the bleachers is not "maintenance" is belied by the allegations in his amended complaint wherein he asserts:

> Plaintiff's fall was proximately caused by the negligence of defendants, their agents, servants and/or employees, in that they
>
> a. failed to maintain the bleachers in a safe condition;
>
> * * *
>
> d. failed to have the premises inspected or maintained sufficiently to eliminate the aforesaid dangerous conditions.

Finally Plaintiff argues that section 1056(h) does not grant immunity for gross or wanton conduct. The Court agrees. That section provides immunity only for "damages *by reason of negligence* in the

construction or maintenance of such property."[11] "Gross" and "wanton" negligence are qualitatively different than mere negligence.[12] There is simply no room in the language of this statute to expand that immunity granted for negligence to encompass gross or wanton negligence. Accordingly, the Court finds that section 1056(h) does not grant immunity for acts constituting gross or wanton negligence.

The school district argues that even if section 1056(h) does not provide immunity for gross or wanton conduct, as a matter of law the conduct of the custodial staff who set up the bleachers was not gross or wanton negligence. Ordinarily the question whether a defendant's conduct constitutes gross or wanton negligence is left for the trier of fact.[13] There are, on occasion, rare cases in which the determination whether a defendant's conduct amounts to gross or wanton conduct is subject to determination on a motion for summary judgment.[14] This is not one of them. In the present case there is evidence upon which a reasonable trier of fact could find that school employees, without justification, deliberately chose not to install safety devices and thus created a known safety risk. There is therefore a genuine dispute of material fact and the Court must deny the school district's motion

[11] 14 *Del. C.* §1056(h) (emphasis added).
[12] *See James v. Laurel School Dist.*, 1993 WL 81277 (Del. Super.) (stating that "[a]lthough the concepts of gross negligence and wanton conduct are not identical, each requires a showing of more than mere inattention or carelessness").
[13] *Garden v. Sutton*, 683 A.2d 1041, 1044 (Del. 1996); *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. 1983)
[14] *See, e.g., Sternberg v. Nanticoke Memorial Hosp., Inc.*, 2009 WL 3531791 (Del. Super.).

insofar as it relates to the alleged wanton or gross negligence of its employees.

D. *The motion of defendants Durr and Lowrey for summary judgment.*

Lillian Lowrey (then the Superintendent of the Christina School District) and James Durr (then the President of the Board) have moved for summary judgment. Plaintiff pays scant attention to the motions of Dr. Lowrey and Mr. Durr in his response to the school defendants' motion. Indeed, he does not explain why Mr. Durr's motion should be denied, and therefore the Court will grant his motion as unopposed. Plaintiff's failure to devote much effort to rebutting this aspect of the motion is understood when the allegations in his complaint are examined. The Amended Complaint alleges that they, along with the other defendants, were the "owners, occupiers, operators, lessees and/or possessors" of the Christiana High School gymnasium and thus owed a duty of care to invitees who enter the property.[15] Plaintiff failed to adduce any evidence that either Dr. Lowrey or Mr. Durr were the "owners, occupiers …" of the Christiana High School gymnasium. Thus, Plaintiff has provided no evidence to the Court that these school officials personally owed a duty of care to him.

With respect to Dr. Lowrey, Plaintiff argues:

> Plaintiff urges that the Superintendent was sued in his individual capacity. According to the testimony of principal, Ms. Noreen LaSorsa, the Superintendent allows the rental of the property as

[15] Amended Complaint, ¶7.

> authorized by the School Board. Therefore, it is his individual conduct with respect to not properly understanding whether or not the letting is done in a safe and non-wanton manner which causes him to be individually liable.[16]

This theory is not alleged in the Amended Complaint and therefore must be rejected for this reason alone.[17] Moreover, it does not follow that merely because Dr. Lowrey "allows the rental of property as authorized by the School Board" that she is an insurer of the safety of that property.

E. *Conclusion*

Plaintiff's claims against defendants Lowrey and Durr are dismissed in their entirety. His claims against the school district are dismissed insofar as they are grounded in negligence. The remaining claims against the school district will go forward and DSW is obligated to provide a defense as to those claims.

John A. Parkins, Jr.

oc: Prothonotary

[16] Docket Item 17, at ¶ 7.
[17] Superior Court Civil Rule 9(b) (requiring that negligence be plead with specificity): *Shively v. Klein*, 551 A.2d 41 (Del. 1988) (in light of Rule 9(b) it was not error to refuse loss of chance instruction when that theory not alleged in the complaint.).