IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHERI MONTGOMERY-FORAKER, As Next Friend of CIARA J. MONTGOMERY, a minor,	)	
Plaintiff,	)	
v.	)	C.A. No. N13C-01-214 WCC
CHRISTINA SCHOOL DISTRICT and BRENDA PHILLIPS	)	JURY TRIAL DEMANDED
Defendants.	)	

Submitted: July 12, 2013
Decided: October 30, 2013

On Defendant's Renewed Motion to Dismiss.
GRANTED IN PART, DENIED IN PART

MEMORANDUM OPINION

Gary S. Nitsche, Esquire, and Kiadii S. Harmon, Esquire, Weik, Nitsche & Dougherty, 305 N. Union Street, Second Floor, Wilmington, DE 19805. Attorney for Plaintiff Cheri Montgomery-Foraker as Next Friend of Ciara J. Montgomery, a minor.

David H. Williams, Esquire, James H. McMackin, III, Esquire, and Allyson Britton DiRocco, Esquire, Morris James, LLP, 500 Delaware Avenue, Suite 1500, Wilmington, DE 19899. Attorneys for Defendants Christina School District and Brenda Phillips.

CARPENTER, J.

Before this Court is Defendant Christina School District's (the "District") Motion to Dismiss the Amended Complaint, alleging Plaintiff has failed to plead sufficient facts to overcome immunity granted by the Delaware Tort Claims Act (the "DTCA"). The issues are whether allegations of only a teacher's, and not the school district's, wrongdoing are sufficient to render the school district liable and whether the doctrine of *respondeat superior* is applicable to Section 4001 of the DTCA.

FACTUAL BACKGROUND

On or about June 2, 2011, the Minor Plaintiff, a student at Porter Elementary School, which is within the District's purview, allegedly suffered serious and permanent injuries to her arm and shoulder. Plaintiff Cheri Montgomery-Foraker, filing suit on behalf of the Minor Plaintiff, alleges the Minor Plaintiff's teacher, Defendant Brenda Phillips ("Phillips") intentionally and forcefully removed a journal from the Minor Plaintiff's custody and control knowing that the Minor Plaintiff had a previous injury, from which she was still recovering, and that the Minor Plaintiff had been directed by the school counselor to keep her journal private. Additionally, Plaintiff alleges that the District was vicariously liable for Phillips's actions and was negligent and grossly negligent in its supervision, training, and hiring of Phillips.

The District is a political subdivision and/or statutorily created governmental entity, responsible for administering public education in a defined geographical area pursuant to Title 14, Chapter 10 of the Delaware Code. Plaintiff alleges that the District carries insurance coverage for risks and losses and has, therefore, waived its sovereign immunity and such coverage includes risks and losses that extend to Phillips's actions pursuant to 10 *Del. C.* § 4003.

PROCEDURAL POSTURE

Plaintiff, as next friend of the Minor Plaintiff, filed the underlying Complaint on January 25, 2013.[1] The District and Phillips filed a joint Motion to Dismiss on February 28, 2013, contending that Plaintiff failed to sufficiently plead either gross negligence or a ministerial duty as to overcome statutory immunity granted to the Defendants by the DTCA.[2] On May 13, 2013, the Court ordered the Motion stayed pending the filing of an amended complaint by June 1, 2013. The Court allowed Defendants, should they still wish to pursue the Motion, to then file a supplemental memorandum. Plaintiff filed the Amended Complaint on May 31, 2013. Thereafter, Phillips answered the Amended Complaint and dropped her Motion to Dismiss claims. The District, however, renewed their Motion to Dismiss

[1] The original Complaint included an additional defendant, Kelly Services, Inc., who was later dismissed by stipulation on March 7, 2013.
[2] 10 *Del. C.* §§ 4001-4005.

on June 10, 2013. Plaintiff responded in opposition on July 8, 2013, a hearing was held on July 12, 2013, and the Court reserved decision on the Motion.

STANDARD OF REVIEW

The District has filed a Motion to Dismiss under Superior Court Civil Rule 12(b)(6).[3] When reviewing a motion to dismiss pursuant to Rule 12(b)(6), "all well-pleaded allegations must be accepted as true"[4] and the "court must draw all reasonable factual inferences in favor of the party opposing the motion."[5] However, "[w]here allegations are merely conclusory…(*i.e.,* without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss."[6] This Court must use the well-pleaded, non-conclusory allegations to determine, "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[7] If so, the motion to dismiss must be denied.[8]

DISCUSSION

The District alleges that, with the facts pleaded, Plaintiff has failed to overcome DTCA immunity. "To overcome [DTCA] immunity, the Plaintiff must

[3] Super. Ct. Civ. R. 12(b)(6).
[4] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[5] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).
[6] *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).
[7] *Spence v. Funk*, 396 A.2d at 968.
[8] *Id.*

show that: (1) the State has waived the defense of sovereign immunity for the actions mentioned; and (2) the [DTCA] does not bar the action."[9] Here, the District has purchased insurance; therefore, Plaintiff has satisfied the first prong.[10] Accordingly, this Court must determine whether the DTCA bars the action.

The DTCA provides, in pertinent part:

> no claim or cause of action shall arise…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…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 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…;
>
> (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;….[11]

"Where, as here, the defendant is a public school district or the employee of a school district, the [DTCA] grants immunity from liability for acts done in good faith which involve the exercise of discretion, unless the act is done with gross or

---

[9] *Tews v. Cape Henlopen Sch. Dist.*, 2013 WL 1087580, at *2 (Del. Super. Feb. 14, 2013) (citing *Smith v. Christina Sch. Dist.*, 2011 WL 5924393, at *3 (Del. Super. Nov. 28, 2011)).

[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] 10 *Del. C.* § 4001.

wanton negligence."[12] Therefore, "to avoid application of the Act, Plaintiff must show that the [District] engaged in [either]: (1) ministerial actions, (2) actions taken in bad faith and not in the public interest, or (3) actions of gross or wanton negligence."[13]

I. The District's Supervisory Liability

Plaintiff contends that she has sufficiently pleaded facts to show that the District engaged in ministerial actions and actions of gross or wanton negligence in the discharge of their supervision, training, and hiring duties. In pleading the former, Plaintiff needed to allege facts to show "the absence of a discretionary act on the part of [the District]."[14] Even taking all factual inferences in a light most favorable to Plaintiff, as this Court must, there are absolutely no facts alleged supporting the contention that the District's supervision, training, and/or hiring of Phillips was ministerial. Similarly, claims of gross or wanton negligence "must be accompanied by some factual allegations to support them."[15] "The Complaint contains no facts indicating how [the District] deviated from the applicable standard of care, what the applicable standard of care is, or why [Phillips] was

[12] *Hughes ex rel. Hughes v. Christina Sch. Dist.*, 2008 WL 73710, at *3 (Del. Super. Jan. 7, 2008) (quoting *Simms v. Christina Sch. Dist.*, 2004 WL 344015, at *8 (Del. Super. Jan. 30, 2004)) (internal quotation marks omitted) *aff'd sub nom. Hughes ex rel. Hughes v. Christiana Sch. Dist.*, 950 A.2d 659 (Del. 2008).
[13] *Thomas v. Bd. of Educ. of Brandywine Sch. Sch. Dist.*, 759 F. Supp. 2d 477, 500-02 (D. Del. 2010). *See also Scarborough v. A.I. duPont High Sch.*, 1986 WL 10507, at *2 (Del. Super. Sept. 17, 1986).
[14] *Tews v. Cape Henlopen Sch. Dist.*, 2013 WL 1087580, at *4.
[15] *Id.* at *2.

unsuited for employment…."[16] Like the claim of ministerial actions, there are absolutely no facts pleaded that support Plaintiff's claim that the District was negligent or grossly negligent in their supervision, training, and/or hiring duties. Therefore, Plaintiff has failed to plead sufficient facts relating to the District's supervisory liability.

This Court notes that the Amended Complaint is sufficiently similar to the complaint dismissed in *Tews v. Cape Henlopen School District*.[17] As the court found in *Tews*, the Amended Complaint, insofar as it relates to the District's supervisory liability, "is a swamp of unsupported legal conclusions and vague allegations."[18] Counsel for Plaintiff—who was also plaintiff's counsel in *Tews*—was on notice of the *Tews* decision when drafting the Amended Complaint and should have appreciated that the assertion of vague claims in the hope of developing facts during discovery to support them is no longer acceptable to the Court. As stated in *Tews*, "[p]resentation of undeveloped or unsupported allegations results in a waste of valuable Court resources, unnecessary expense for the Defendants, and does little to advance this Court's ability to render swift

[16] *Id.* at *4.
[17] 2013 WL 1087580.
[18] *Id.* at *5 n.32.

justice."[19] Accordingly, the claims of the District's negligent and grossly negligent supervision, training, and hiring are dismissed.

II. The District's Liability Under *Respondeat Superior*

Although there were no facts pleaded to support the District's liability in its supervisory capacity, the Court's inquiry does not end there. Plaintiff may still have a viable claim couched in *respondeat superior*.[20] Although neither the Complaint nor Amended Complaint use the term *respondeat superior*, it is clear that Plaintiff intended to rely on such through the use of the plural "Defendants" in both counts.[21] Further, Plaintiff argued against the dismissal by relying upon the doctrine of *respondeat superior* and the District had the opportunity to respond to the argument both in briefing and at the hearing. "[T]he court's task is not to determine the artfulness of the complaint or its choice of language, but rather if the [District] was fairly on notice."[22] The Court finds that the Amended Complaint

[19] *Id.*

[20] Although this Court finds the Amended Complaint, insofar as it alleged the District was liable for its supervisory activities, is substantially similar to the one in *Tews*, the Amended Complaint does allege sufficiently pleaded facts of Phillips's individual actions. Since there were facts pleaded as to Phillips's actions, there is the possibility of the District being held liable under *respondeat superior*. The *Tews* complaint is, therefore, distinguishable as it failed to plead facts supporting the alleged liability of the teacher, let alone the district. *See Tews*, 2013 WL 1087580.

[21] Am. Compl. ¶¶ 6-12. *See Tell v. Roman Catholic Bishops of Diocese of Allentown*, 2010 WL 1691199, at *9 (Del. Super. Apr. 26, 2010) (finding reliance on the doctrine of *respondeat superior* clear from the complaint even though the terminology was never used).

[22] *Eaton v. Univ. of Del.*, 2001 WL 863441, at *5 (D. Del. July 31, 2001).

gave sufficient notice to the District that liability was being pursued both for the District's supervisory activities and under the doctrine of *respondeat superior*.[23]

The District relies on *Hedrick v. Webb*[24] and *Washington v. Wilmington Police Department*[25] for the proposition that the doctrine of *respondeat superior* is unavailable under the DTCA. This reliance, however, is misplaced. Both cases required the Superior Court to interpret Section 4011 of the DTCA, which pertains to municipalities. Section 4011(c), addressed in both *Hedrick* and *Washington*, states in pertinent part: "[a]n employee may be personally liable for acts or omissions causing property damage, bodily injury or death in instances in which the governmental entity is immune under this section…."[26] The Superior Court found this language "expressly separates the tortious acts of employees of the municipality from the municipality itself."[27] Accordingly, the court found that if a municipality, who can only act through its agents, "could be held liable for the acts of its employees under *respondeat superior,* the Tort Claims Act [as it applies to Section 4011] would be rendered meaningless."[28]

---

[23] *Id.* at *7 (D. Del. July 31, 2001) (finding the underlying "complaint [wa]s sufficient to put the [employer] on notice of his claim of respondeat superior liability" despite the absence of that precise terminology). *See Fanean v. Rite Aid Corp. of Del.*, 984 A.2d 812, 815 n.1 (Del. Super. 2009) ("Under the liberalized pleading standards pertaining to a motion to dismiss the Court finds sufficient allegations to invoke *respondeat superior* but 'invites' the parties to revisit this issue during discovery.").

[24] 2004 WL 2735517 (Del. Super. Nov. 20, 2004).

[25] 1995 WL 654158 (Del. Super. Sept. 18, 1995).

[26] 10 *Del. C.* § 4011(c).

[27] *Washington v. Wilm. Police Dep't*, 1995 WL 654158, at *3. *See also Hedrick v. Webb*, 2004 WL 2735517, at *8-9.

[28] *Id.*

This Court, in *Scheuler v. Martin*,[29] explained the textual and historical impetus for construing Sections 4001 and 4011 in different manners. First, the two sections are found in different subchapters of the DTCA: Section 4001 is within the "State Tort Claims" subchapter and Section 4011 is within the "County and Municipal Tort Claims" subchapter. "Further, the activities exposing the State or local governmental entity to liability are not identical."[30] Specifically, under Section 4011(c) (quoted above) only an employee can be held liable for wanton negligence or actions done with willful or malicious intent, whereas under Section 4001 "assuming several other essential preconditions are also present, the *State* or any agency of the State can be liable where the act was done with gross or wanton negligence."[31] Historically speaking, Section 4011 was added after Section 4001 and, as such, the unique differences between the statutes further evidence the availability of entity liability under Section 4001. "[W]hen different terms are used in various parts of a statute, it is reasonable to assume that distinctions between the terms were intended."[32] Therefore, the plain text of Section 4001 and the historical backdrop of the DTCA make the exclusion of *respondeat superior* liability from Section 4011, as noted in *Hedrick* and *Washington*, inapplicable to

[29] 674 A.2d 882 (Del. Super. 1996).
[30] *Id.* at 887.
[31] *Id.* at 888.
[32] *Id.*

Section 4001. Accordingly, there is no statutory preclusion to applying the doctrine of *respondeat superior* to Section 4001 of the DTCA.

Having determined that a *respondeat superior* claim may survive under the DTCA, under the liberalized pleading standards pertaining to a motion to dismiss, the Court cannot grant the District's Motion. This Court notes that under *respondeat superior* liability "the employer cannot be held liable unless the employee is shown to be liable."[33] Therefore, the District faces potential liability only if Plaintiff can overcome the DTCA as it relates to the actions of Phillips. As Phillips has not joined in this Motion, the Court will not address the strength of the allegations against her other than to say that by answering the Complaint, Phillips does not dispute that the allegations appear to be sufficient at this stage to allow the case to proceed forward. Should Phillips be found liable for her individual actions, only then may the District face potential liability under the doctrine of *respondeat superior*. The case should become factually and legally clearer once discovery is complete and if appropriate, the District's claims can be considered later within the context of a summary judgment motion.

For the foregoing reasons, the District's Renewed Motion to Dismiss is hereby granted in part and the Amended Complaint dismissed insofar as it

[33] *Greco v. Univ. of Del.*, 619 A.2d 900, 903 (Del. 1993) (quoting *Clark v. Brooks*, 377 A.2d 365, 371 (Del. 1977)) (internal quotation marks omitted).

contains allegations of the District's allegedly negligent supervision, training, and hiring but denied in part insofar as the Amended Complaint alleges the District is liable under the doctrine of *respondeat superior*.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.