

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

VALERIE WARD, as Next Friend of )  
Zachery Ward, a minor, )  
 )  
 ) C.A. No. N17C-08-355 RRC  
Plaintiff, )  
 )  
v. )  
 )  
GATEWAY CHARTER SCHOOL, )  
INC., d/b/a GATEWAY LAB )  
CHARTER SCHOOL, a Delaware )  
Corporation, )  
 )  
 )  
 )  
Defendant. )  
 )

Submitted: July 2, 2018  
Decided: July 18, 2018

On Defendant’s Motion to Dismiss. **GRANTED.**

**MEMORANDUM OPINION**

Gary S. Nitsche, Esquire, and William R. Stewart, III, Esquire, Gary S. Nitsche, P.A., Wilmington, Delaware, Attorney for Plaintiff.

David C. Malatesta, Esquire, Kent & McBride, P.C., Wilmington, Delaware; Arthur P. Caltrider, Jr., Esquire, Zachary A. Miller, Esquire, Bodie, Dolina, Hobbs, Friddell Grenzer, P.C., Towson, Maryland, *pro hac vice*, Attorneys for Defendants.

COOCH, R.J.

## I. INTRODUCTION

This negligence action arises from an incident that occurred in a schoolyard. Valerie Ward, as next friend of Zachery Ward, minor plaintiff, (“Plaintiff”) alleges that he was “assaulted, battered, and head butted” by another student, on October 16, 2015 in a schoolyard owned by Defendant Gateway Charter School, Inc., d/b/a Gateway Lab Charter School (“Defendant”).<sup>1</sup>

Defendant filed a motion to dismiss, pursuant to Superior Court Civil Rule 12(b)(6), seeking to dismiss Plaintiff’s Complaint that asserted 1) a negligent “ministerial” action and 2) “gross or wanton negligence” by Defendant. This Court finds that Plaintiff has not plead sufficient facts to overcome the sovereign immunity otherwise provided to Defendant by the Delaware State Torts Claims Act (“DSTCA”) under 10 Del. C. §4001. Therefore, the Court grants Defendant’s motion to dismiss.

## II. FACTS AND PROCEDURAL HISTORY

Plaintiff, a minor, was on the schoolyard premises owned/operated by Defendant on October 16, 2015.<sup>2</sup> On that date, Plaintiff reportedly was “assaulted, battered, and head butted” by another student, allegedly causing Plaintiff to sustain “serious and permanent personal injuries” as a result of the attack.<sup>3</sup>

Plaintiff brought this negligence claim against Defendant, alleging that Defendant acted “with a reckless indifference to the rights of the minor Plaintiff” at the time of the alleged attack.<sup>4</sup> The Complaint further alleges that Defendant “engaged in willful, wanton, and reckless conduct by allowing Plaintiff to be physically assaulted and battered.”<sup>5</sup>

Specifically, the Complaint provides that:

The Defendant, Gateway Charter School, Inc., d/b/a/ Gateway Lab Charter School was negligent and/or grossly negligent in that it acting with a reckless indifference to the rights of the minor Plaintiff and/or acted with malicious intent in that it:

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<sup>1</sup> Compl., D.I. 1, at ¶ 4-5.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at ¶ 5.

<sup>4</sup> *Id.* at ¶ 6.

<sup>5</sup> *Id.* at ¶ 7.

- (a) Allowed an altercation to erupt on its premises;
- (b) Failed to discover that another student was assaulting the minor Plaintiff on their premises;
- (c) Failed to discover that the minor Plaintiff and/or other persons were likely to be assaulted by another student;
- (d) Failed to give adequate warning to the minor Plaintiff and other visitors to enable them to avoid harm;
- (e) Failed to other protect the minor Plaintiff and other visitors from harm;
- (f) Failed to take reasonable measures to stop the altercation before it escalated and injured the minor Plaintiff;
- (g) Failed to provide adequate security to protect its students;
- (h) Failed to properly and reasonably supervise and train it[s] staffs, employees, securities, or others;
- (i) Permitted another student to assault the minor Plaintiff;
- (j) Failed to otherwise exercise reasonable care;
- (k) As otherwise will be revealed through discovery.<sup>6</sup>

Defendant filed an answer and subsequently moved pursuant to the Superior Court Civil Rule 12(b)(6) to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

### III. THE PARTIES' CONTENTIONS

#### A. *Defendant's Contentions*

Defendant argues that 1) "Plaintiff's Complaint fails to plead that [Defendant's] alleged negligent supervision is a ministerial action,"<sup>7</sup> 2) "[t]he Complaint fails to plead that [Defendant] acted without good faith towards their students,"<sup>8</sup> and 3) the Complaint did not "state the circumstances constituting gross negligence with particularity."<sup>9</sup> Defendant asserts that Plaintiff has not met her burden "to plead with sufficiency to overcome the sovereign immunity provided to [Defendant] by the DSTCA."<sup>10</sup>

Defendant contends that the claims for negligent supervision allege discretionary rather than ministerial action by a school because "Delaware courts interpreting the DSTCA have previously 'held that the duty to supervise students is

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<sup>6</sup> *Id.* at ¶ 6.

<sup>7</sup> Def.'s Mot. to Dismiss, D.I. 22, at 5.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 12.

<sup>10</sup> *Id.* at 14.

ministerial; however, the manner and particular methods of supervision are discretionary functions.”<sup>11</sup> The Defendant also contends that “[a] ministerial act is something that ‘a person performs in a prescribed manner without regard to his own judgment concerning the act to be done.’”<sup>12</sup> Defendant argues that the Complaint does not have “any factual support” and “fails to even identify the student who allegedly attacked the Plaintiff.”<sup>13</sup>

Additionally Defendant argues that Plaintiff’s Complaint is insufficient because Plaintiff has “failed to present any facts to support [Plaintiff’s] allegations that [Defendant] did not act with good faith.”<sup>14</sup>

Finally, Defendant argues that “Plaintiffs’ Complaint fails to set forth sufficient facts to overcome [Defendant’s] DSTCA immunity”<sup>15</sup> because a “claim[] of negligence (and gross negligence) may not be conclusory and **must be accompanied by some factual allegations to support them.**”<sup>16</sup> Additionally, “the particularity of [Super. Ct. Civ. R.] 9(b) is not satisfied by merely stating the result or a conclusion of facts arising from circumstances not set forth in the Complaint.”<sup>17</sup> Defendant argues that “the Complaint has failed to meet the particularity requirement of” Super. Ct. Civ. R. 9(b) because “the Complaint fails to allege [Defendant] had prior knowledge that Plaintiff or other students had previously been attacked by this particular student, or that [Defendant] failed to make any reasonable efforts to prevent this incident from occurring.”<sup>18</sup>

Therefore, Defendant asserts that the Complaint fails to state a claim upon which relief can be granted because the Plaintiff “fails to set forth sufficient facts,” with particularity, to overcome Defendant’s DSTCA immunity.<sup>19</sup>

### *B. Plaintiff’s Contentions*

Plaintiff argues in response “that a review of the pertinent case law substantiates the argument that Defendant’s actions were ministerial, not

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<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> *Id.* at 12 (emphasis in original).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 14.

<sup>19</sup> *Id.*

discretionary,”<sup>20</sup> and “that Defendants’ acts and omissions were committed with gross or wanton negligence.”<sup>21</sup>

Plaintiff contends that Defendant’s acts or omissions were ministerial, not discretionary, because “an act is ministerial if the act of the official ‘involves less in the way of personal decision or judgment, or the matter for which judgment is required has little bearing on the importance upon the validity of the act. . . .’”<sup>22</sup> Plaintiff claims that “[i]n order to demonstrate that certain acts or failures to act are ministerial, a plaintiff must show the existence of ‘maintained mandatory policies or procedures that . . . defendants ignored or otherwise failed to follow.’”<sup>23</sup> Plaintiff asserts that “there must be some discovery in order to determine” whether Plaintiff’s “allegations can be supported by mandated policies.”<sup>24</sup>

Plaintiff also contends “that Defendants’ acts and omissions were committed with gross or wanton negligence.”<sup>25</sup> Plaintiff asserts that Defendants’ failure to supervise Plaintiff equates to an “I don’t care attitude,” satisfying the gross negligence threshold.<sup>26</sup>

Lastly, Plaintiff argues that “Defendant’s contention that Plaintiff failed to plead negligence with particularity pursuant to [Super. Ct. Civ. R.] 9(b) is unsubstantiated.”<sup>27</sup> Plaintiff asserts that “[t]o plead negligence with specificity, a plaintiff must specify facts indicating great disparity between the procedures used and what should have been used.”<sup>28</sup> Plaintiff claims that the “Complaint denotes several specific allegations demonstrating that Defendants were grossly negligent” thereby adequately identifying “a wide disparity between how Defendants acted and how Defendants should have acted.”<sup>29</sup>

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<sup>20</sup> Pl.’s Resp., D.I. 25, at 5.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

## IV. STANDARD OF REVIEW

Upon a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Superior Court Rule 12(b)(6), “the Court must determine whether the Plaintiff ‘may recover under any reasonably conceivable set of circumstances susceptible of proof.’”<sup>30</sup> When applying the standard, the Court “will accept as true all non-conclusory, well-pleaded allegations.”<sup>31</sup> “In addition, every reasonable factual inference will be drawn in favor of the non-moving party” and “[i]f the claimant may recover under that standard of review, the Court must deny the motion to dismiss.”<sup>32</sup>

## V. DISCUSSION

### *A. Plaintiff’s Complaint Fails to Sufficiently Plead Facts that Defendant’s Alleged Negligent Supervision was a Ministerial Action.*

The determination of whether an act is discretionary or ministerial is a question of law.<sup>33</sup> This Court has held that a ministerial act is something that “a person performs in a prescribed manner without regard to his own judgment concerning the act to be done.”<sup>34</sup> Whereas discretionary acts “are ‘those which require some determination or implementation which allows a choice of methods, or, differently stated, those where there is no hard and fast rule as to a course of conduct.’”<sup>35</sup> Additionally, the Court interpreting the DSTCA has previously “held that the duty to supervise students is ministerial; however, ‘the manner and particular methods of supervision are discretionary.’”<sup>36</sup>

Plaintiffs’ Complaint alleging that Defendant negligently supervised the minor Plaintiff does not plead sufficient facts to show Defendant engaged

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<sup>30</sup> *Smith v. Silver Lake Elementary Sch.*, 2012 WL 2393722, at \*1 (Del. Super.) (citing *Spence v. Funk*, 369 A.2d 967, 968 (Del. 1978)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Gutierrez v. Advanced Student Transp., Inc.*, 2015 Del. Super. Lexis 352, 2015 WL 4460342 at \*4 (Del. Super. July 14, 2015).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* See *Simms v. Christiana Sch. Dist.*, 2008 WL 73710 at \*3 (Del. Super. Jan. 7, 2008).

<sup>36</sup> *Gutierrez*, 2015 WL 4460342 at \*4 (citing *Sadler-levoli v. Sutton Bus & Trick Co., Inc.*, 2013 WL 3010719 at \*2 (Del. Super. June 4, 2013); See also *Tews v. Cape Henlpen Sch. Dist.*, 2013 Del. Super. Lexis 56, 2013 WL 1087580 at \*4 (Del. Super. Feb. 14, 2013) (providing that supervision is discretionary where “the manner in which teachers supervise a student ... is dependent upon many factors.”).

in “ministerial” acts. The Complaint states that Defendant “was negligent and/or grossly negligent in [] acting with a reckless indifference to the rights of the minor Plaintiff and/or acted with malicious intent.”<sup>37</sup> However, Plaintiff’s Response asserts that “[a] school teacher has a legal duty to exercise due care to provide for the safety of his students” which “the Courts have held [] supervising students [to be] a ministerial act not precluded from liability under 10 Del. C. §4001.”<sup>38</sup>

In *Gutierrez v. Advanced Student Transp.*, a case very close on point, and heavily relied upon by defendant, this Court found that “allegations [that] are conclusory at best and lack factual support” have “not met [their] burden of proving the absence of discretionary conduct, as required to overcome” DSTCA immunity.<sup>39</sup> The negligence action in *Gutierrez* arose from “an incident that took place on a school bus” that was “owned and/or leased” by the school.<sup>40</sup> The minor plaintiff was allegedly assaulted by the minor defendant while “passenger[s] on [the] school bus owned and/or leased by [the school].”<sup>41</sup> The complaint in *Gutierrez* stated that the school “was aware that” the minor defendant “had caused issues” on the bus before.<sup>42</sup> However, the assertions made in *Gutierrez* did not contain facts that addressed how the school “knew or should have known” of minor defendant’s prior bad behavior, “nor [did] they contain facts from which it would [have been] reasonable for the Court to infer that [defendant] knew of” the alleged behavior.<sup>43</sup>

Plaintiff contends that “supervising students is a ministerial act not precluded from liability”<sup>44</sup> because “the Court has classified ministerial actions as those that are ‘more routine, and typically involve conduct directed by mandatory rules or policies.’”<sup>45</sup> Yet, Plaintiff failed to “plead facts that show that Defendant’s knew or should have known that the Plaintiff was being attacked or would be attacked by another student.”<sup>46</sup> “Plaintiffs’ Complaint

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<sup>37</sup> Compl., D.I. 1, at ¶ 6.

<sup>38</sup> Pl.’s Resp., D.I. 25, at 4.

<sup>39</sup> *Gutierrez*, 2015 WL 4460342 at \*6.

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 6.

<sup>44</sup> Pl.’s Resp., D.I. 25, at 4.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> Def.’s Reply in Support of its Mot. to Dismiss, D.I. 26, at 2.

fails to provide any facts that show that Defendant's failed to supervise, or exercise due care to protect the Plaintiff or provide for his safety."<sup>47</sup>

Notably, Defendant's position is very much based on *Gutierrez*; however, Plaintiff failed to even mention *Gutierrez* in Plaintiff's Response. In fact, Plaintiff conceded at oral argument that if *Gutierrez* applied, insofar as allegations of a ministerial action were involved, Plaintiff's claim would be defeated and the motion to dismiss granted. The Court agrees with Defendant that Plaintiff has "failed to meet [her] burden of proving the absence of discretionary conduct by Defendant's."<sup>48</sup>

*B. The Complaint Fails to Sufficiently Plead Facts that Defendant Acted with Gross or Wanton Negligence.*

Another way for Plaintiff to potentially overcome DSTCA immunity is to "plead facts, with particularity, which demonstrate[] that the school district acted with gross or wanton negligence"<sup>49</sup> regarding student supervision. "[I]n a failure to supervise context, gross negligence generally involves foreknowledge of a problem with no attempt to address the problem."<sup>50</sup> This Court has stated that "[g]ross negligence requires a showing of a high level of negligence that constitutes an extreme departure from the ordinary standard of care," and that "[w]anton negligence is conduct that is so unreasonable and dangerous that a person knows or should know that an imminent likelihood of harm can result."<sup>51</sup> Pursuant to Super. Ct. Civ. R. 9(b), gross or wanton negligence must be plead with particularity, "may not be conclusory and ***must be accompanied by some factual allegations to support them.***"<sup>52</sup>

The Complaint alleges that Defendant acted in a "grossly negligent" manner with a "reckless indifference to the rights of the minor Plaintiff."<sup>53</sup> However, Plaintiff's contentions are conclusory and ad Defendant argues "the Complaint has failed to meet the particularity requirement" because "[a]t no point in the Complaint did Plaintiff allege any facts that would prove Defendant's actions were an extreme

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Def.'s Mot. to Dismiss, D.I. 22, at 11.

<sup>50</sup> *Sadler-Ievoli*, 2013 WL 3010719 at \*5.

<sup>51</sup> *Id.* at \*4.

<sup>52</sup> *Tews*, 2013 WL 1087580 at \*2 (emphasis in original).

<sup>53</sup> Compl., D.I. 1, at ¶ 6.



departure from the ordinary standard of care or that it acted with a conscious indifference towards the Plaintiff.”<sup>54</sup>

In *Gutierrez*, this Court found that “[w]ithout such facts, allegations of gross negligence and wanton negligence are not well-pleaded.”<sup>55</sup> *Gutierrez* explained that “[a] pattern of behavior of the [M]inor [Defendant]” that was established prior to Plaintiff’s alleged assault on a school bus did not show “an extreme departure from the ordinary standard of care or that Plaintiff’s conduct was ‘so unreasonable and dangerous that a person knows or should know that an imminent likelihood of harm [would] result.’”<sup>56</sup>

At oral argument, Plaintiff conceded that if *Gutierrez* applied insofar as allegations of gross or wanton negligence are involved, Plaintiff’s claim would be defeated and the motion to dismiss granted. Plaintiff’s Complaint in the case at hand “failed to present any facts,”<sup>57</sup> that Defendant acted “with a reckless indifference to the rights of the minor Plaintiff,”<sup>58</sup> thus falling short of the evidence threshold needed to support allegations of gross and wanton negligence.

Because the Court finds that Plaintiff has failed to plead that Defendant’s alleged actions or failures to act were ministerial, that Defendant acted in bad faith<sup>59</sup>, or that Defendant acted with gross or wanton negligence, Plaintiff has not met its burden to overcome Defendant’s entitlement to immunity as established in the DSTCA. Therefore, Plaintiff has failed to state a claim upon which relief can be granted.

*C. Plaintiffs Request for Further Discovery is Not Warranted.*

Plaintiff’s argument that further discovery is needed is unavailing. The Court finds that “Plaintiff’s contention that discovery will cure the defects in the Complaint demonstrates a misunderstanding of the purpose of discovery.”<sup>60</sup> This Court “has previously held, [that] ‘[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

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<sup>54</sup> Def.’s Mot. to Dismiss, D.I. 22, at 14.

<sup>55</sup> *Gutierrez*, 2015 WL 4460342 at \*7.

<sup>56</sup> *Id.* at \*6-7 (citing *Sadler-Ievoli*, 2013 WL 3010719 at \*4)

<sup>57</sup> Def.’s Mot. to Dismiss, D.I. 11, at 10.

<sup>58</sup> Compl., D.I. 1, at ¶ 6.

<sup>59</sup> The Court notes that the Complaint did not plead that Defendant acted without good faith, therefore it is not included in the Court’s discussion.

<sup>60</sup> *Tews*, 2013 WL 1087580 at \*4.


complaint, which must contain the facts that are believed to constitute the plaintiffs' cause of action."<sup>61</sup>

Plaintiff's Response provided that "there must be some discovery in order to determine" whether Plaintiff's allegations can be supported.<sup>62</sup> The Court disagrees. At oral argument, Plaintiff requested the Court to allow further discovery to occur, but acknowledged that the discovery that had taken place to date had not developed any significant new facts to be potentially added to Plaintiff's amended complaint, including the identity of the student who assaulted the Plaintiff. Given that the above mentioned discovery did not allude to further support for Plaintiff's allegations, the Court denies the opportunity for further discovery.

## VI. CONCLUSION

The Court finds that Plaintiff has failed to overcome the sovereign immunity provided to Defendant under DSTCA.

Defendants' Motion to Dismiss is **GRANTED**.

  
Richard R. Cooch, J.

cc: Prothonotary

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at \*6.