Venturella v. Town of Fair Haven Sch. Dist., No. 713-11-04 (Corsones, J., May 28, 2008)

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STATE OF VERMONT
RUTLAND COUNTY

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| FRANK VENTURELLA, SR., | ) | |
| DARLENE VENTURELLA, and | ) | Rutland Superior Court |
| F.V., V.V., T.V. and M.V. by their | ) | Docket No. 713-11-04 Rdcv |
| next friend FRANK VENTURELLA, SR., | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| TOWN OF FAIR HAVEN | ) | |
| SCHOOL DISTRICT, | ) | |
| Defendant. | ) | |

**DECISION**
**Defendant's Motion for Summary Judgment, filed Nov. 2, 2007**

Plaintiffs Frank Venturella, Sr. and Darlene Venturella claim that their children were bullied and harassed while attending Fair Haven Grade School between September 2003 and October 2004. The complaint alleges that defendant Town of Fair Haven School District (1) negligently failed to provide adequate supervision to ensure the safety of the Venturella children during class, recess, and after school, and (2) failed to take effective action to stop the harassment and bullying of the Venturella children, in violation of the Vermont Public Accommodations Act (VPAA). The present matter before the Court is Fair Haven's Motion for Summary Judgment, filed November 2, 2007. Fair Haven is represented by John Zawistoski, Esq. and Allan R. Keyes, Esq. The Venturellas are represented by Pamela A. Marsh, Esq.

Fair Haven makes four arguments in its Motion for Summary Judgment. First, Fair Haven argues that summary judgment should be granted on the claim for negligent supervision because the Venturellas have not produced evidence that the school district had advance notice or any opportunity to prevent the alleged physical assaults. *Edson v. Barre Supervisory Union*, 2007 VT 62, 18 Vt. L. Wk. 212. Second, Fair Haven argues that summary judgment should be granted on the claim for violation of the VPAA because the Venturellas did not exhaust their administrative remedies by making a complaint under the school's harassment policy. 16 V.S.A. § 14(b); *Washington v.*

*Pierce*, 2005 VT 125, ¶ 35, 179 Vt. 318. Third, Fair Haven argues that the complaint should be dismissed to the extent that it seeks damages for emotional distress allegedly suffered by the children's parents, and for economic losses incurred when the Venturellas removed their two youngest children from school. *Brueckner v. Norwich Univeristy*, 169 Vt. 118 (1999); *EBWS, LLC v. Britly Corp.*, 2007 VT 37, ¶ 30, 18 Vt. L. Wk. 136. Finally, Fair Haven argues that summary judgment should be granted on an additional claim that the school district violated 16 V.S.A. § 565(b) by failing to adopt an anti-bullying policy, and by failing to follow its harassment policy, because § 565 does not provide an independent cause of action. For the following reasons, the Motion for Summary Judgment is *granted in part and denied in part*.

<u>Background Facts</u>

The complaint alleges that the Venturellas moved from New York City to Fair Haven at the beginning of the 2003-2004 school year, and enrolled two of their four children in the Fair Haven Grade School. Fair Haven Grade School is the only public elementary school in the Town of Fair Haven. The Venturellas' oldest child, F.V., was enrolled in the sixth grade, and V.V. was enrolled in third grade. The Venturellas' third child, T.V., was enrolled in preschool classes, and the fourth child, M.V., had not yet begun attending programs.

The complaint also alleges that, during the ensuing year, the two oldest Venturella children were verbally harassed on the basis of learning disabilities, their perceived national origin, and their perceived sexual orientation. In addition, the two oldest children were bullied and physically assaulted by other Fair Haven students. The bullying and harassment allegedly began shortly after the children began attending Fair Haven, and continued until October 2004, when the children were removed from the school and enrolled in private school.

Furthermore, the complaint alleges that the bullying escalated into alleged physical assaults, and that the school district did not provide adequate supervision to prevent the assaults from happening. On various dates between February 2004 and October 2004, F.V. was allegedly punched on the playground during a sledding class, slammed to the ground during recess, pushed into a fence during recess, and struck in the face by a dodgeball thrown intentionally by another student, after gym class had ended. F.V. suffered a possible concussion and a broken tooth as a result of these alleged assaults. Also, on various other dates, V.V. was allegedly tripped and assaulted by another student at recess, tripped on another occasion at recess, pushed into a wall by a student, and assaulted by another student in a parking lot prior to soccer practice. V.V. suffered at least a cut lip as a result of these incidents. The so-called "final straw" was the dodgeball incident, which occurred on October 20, 2004, and resulted in F.V.'s broken tooth. The Venturellas withdrew their children from Fair Haven after the incident, enrolled them in private school, and brought the present suit for damages.

Mr. Venturella claims that he spoke with school teachers and administrators about the bullying as early as the first week of school, and at other times during the fall and

winter of 2003-2004, and that he made a number of verbal and written complaints to school officials. The Venturellas contend that, despite these warnings, the school failed to take effective steps to stop the harassment.

*Negligent Supervision*

Fair Haven moved first for summary judgment on the claim for negligent supervision. Fair Haven argues that schools do not have a duty of constant supervision, and could not have prevented the assaults in this case. Specifically, Fair Haven argues that its administrators, teachers, and staff lacked prior notice of the alleged assaults, and had no opportunity to prevent them from occurring. Fair Haven filed a statement of material facts detailing each incident, and asserting that the incidents happened so quickly that school officials were unable to anticipate or prevent the incidents from occurring, or that the incidents happened out of the sight of the teachers on duty.

The Venturellas contend that school officials were made aware of bullying and harassment on a number of occasions. For example, Mr. Venturella testified at his deposition that he spoke with Edward Dechen, F.V.'s sixth-grade teacher, during the first week of school in September 2003, and that he told Mr. Dechen that F.V. was being pushed around, bullied, and having books knocked out of his hand. In addition, the deposition testimony tends to show that Mr. Venturella and F.V. met with assistant principal Patricia Davenport to discuss the harassment and escalating bullying sometime prior to the February 2, 2004 sledding incident. Furthermore, F.V. testified that he told the school nurse about the various physical assaults; this testimony is supported by the school nurse's records, and by the school nurse's deposition testimony. Mr. Venturella also testified that he spoke informally with Ms. Davenport from time to time about the harassment and bullying of both students. For her part, Ms. Davenport acknowledged in her deposition that she received at least one letter from Mr. Venturella about an incident in April, 2004.

The Venturellas also submitted documentary evidence tending to show that teachers were aware that the Venturella children were having problems with other students. For example, Cheryl Owen, V.V.'s third-grade teacher, prepared a report in which she indicated that V.V. "gets teased a lot" and "was not liked by other students." In addition, Ms. Owen sent a note to another student's parents indicating that the student had called V.V. "gay" and "a retard."

The question is whether this evidence, taken in the light most favorable to the non-moving party, establishes that the school district breached a duty of care owed to the Venturella children. In Vermont, school districts and school officials owe their students a "duty of ordinary care to prevent the students from being exposed to unreasonable risk, from which it is foreseeable that injury is likely to occur." 16 V.S.A. § 834(a). However, school districts "do not owe their students a duty of immediate supervision at all times and under all circumstances." *Id.* § 834(b). Fair Haven argues that actions by one student against another student are unforeseeable from the school district's point of view,

and cannot be prevented absent constant supervision. *Edson v. Barre Supervisory Union*, 2007 VT 62, ¶ 13, 18 Vt. L. Wk. 212.

In the context of student-on-student behavior including physical assaults, however, the plaintiff may survive summary judgment by demonstrating that school authorities were provided with "sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated." *Whitfield v. Bd. of Educ.*, 789 N.Y.S.2d 188, 189 (App. Div. 2005) (citations omitted), *cited in Edson*, 2007 VT 62, ¶ 14. "Actual or constructive notice to the school of prior similar conduct is generally required, and an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act." *Id.*

Taken in the light most favorable to the non-moving party, the evidence tends to show that the Venturellas made a variety of complaints throughout the 2003-2004 school year, and that at least some of the complaints involved allegations of bullying, harassment, and physical assaults. The content of the complaints is disputed, but the deposition testimony of Mr. Venturella and F.V., along with the nurse's notes, tends to show that school officials were aware that the Venturella children were being physically bullied by specific individuals. The evidence also tends to show that the school district did not respond to the complaints. As such, the Venturellas have demonstrated that genuine disputes exist over whether and when the Venturellas provided Fair Haven with actual or constructive notice of acts of bullying and harassment targeting their children. Furthermore, the evidence shows that there are questions of fact as to whether future bullying and harassment could have been reasonably anticipated in light of the information that the school district was given, and whether the school district breached its duty of ordinary care to prevent the Venturella children from being exposed to unreasonable risks from which it was foreseeable that injury was likely to occur. For these reasons, summary judgment is not appropriate on the claim for negligent supervision. This holding makes it unnecessary to address the Venturellas' arguments that bullying and harassment are generally foreseeable in schools, and that the consequences of bullying on victimized students are foreseeable. E.g., Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 Temp. L. Rev. 641 (2004).

<u>*Vermont Public Accommodations Act*</u>

The Venturellas' complaint states a claim for violation of the Vermont Public Accommodations Act. The Venturellas allege that their children were harassed and bullied on the basis of their learning disabilities, perceived national origin, and perceived sexual orientation, and that the harassment was so persistent and severe that it created a hostile school environment and prevented their children from benefitting from a public education. The Venturellas also allege that the school district failed to adopt an anti-bullying policy, and that the school district failed to follow its anti-harassment policy in response to the Venturellas' complaints.

Fair Haven moved for summary judgment on the VPAA claim. Fair Haven argues that the undisputed facts show that the school district adopted a grievance procedure to address claims of unlawful harassment. Fair Haven also asserts that the Venturellas never filed a complaint under this policy until October 13, 2004, when Mr. Venturella met with principal Wayne Cook and assistant principal Patricia Davenport. The school district argues that this meeting was the first time that Mr. Venturella complained specifically of unlawful harassment. Fair Haven therefore argues that the school district cannot be held liable under the VPAA for failure to respond to complaints of unlawful harassment for any acts that occurred prior to October 13th, 2004.

The Venturellas dispute this timeline. Mr. Venturella testified at his deposition that he raised concerns regarding unlawful harassment with V.V.'s special-education team in September 2003 by telling them that V.V. was being teased on the basis of his learning disability. Other deposition testimony tended to establish that F.V. reported name-calling to various teachers throughout the year, and that he and his father discussed verbal harassment and teasing with Ms. Davenport sometime prior to February 2, 2004. F.V.'s deposition testimony specifically indicated that other students were teasing him about their perceptions of his sexual orientation, and that he told Ms. Davenport "what kind of verbal teasing was going on." In addition, a letter written by Ms. Owen indicated that she was aware that another student had called V.V. "gay" and "a retard."

The Venturellas also argue that the terms of Fair Haven's harassment policy do not require self-reporting by student victims of harassment, or their parents. They argue that the policy expressly makes such reporting "voluntary." The relevant provisions are as follows:

> Voluntary: It is the express policy of the Fair Haven Town School District to encourage student targets of harassment and students who have first-hand knowledge of such harassment to report such claims. Students should report incident(s) to any teacher, guidance counselor or school administrator. Students may choose to report to a person of the student's same sex.
>
> Mandatory: Any adult school employees who witness, overhear, or receive a report, formal or informal, written or oral, of harassment shall report it in accordance with procedures developed under this policy.

For these reasons, the Venturellas argue that they made complaints of unlawful harassment, and thereby sought to invoke the school's harassment policy, but that the school district never treated the complaints as alleging harassment, and never followed its harassment policy in response. In the alternative, the Venturellas argue that they were not required to file any complaint under the terms of the harassment policy.

The question is whether the Venturellas exhausted their administrative grievances by making a complaint under the school's harassment policy, or whether they had a good reason for not doing so. Vermont public schools are required to adopt harassment prevention policies. 16 V.S.A. § 565(b). These policies must provide procedures for reporting of violations and the filing of complaints, and require the initiation of investigations into complaints "no later than one school day from the filing of a complaint." *Id.* § 565(b)(1)(E). If a school receives actual notice of "alleged conduct that may constitute harassment", schools are required to promptly investigate whether the alleged conduct occurred. *Id.* § 14(a). If the school finds that the alleged conduct occurred and that it constituted harassment, schools are required to take "prompt and appropriate remedial action reasonably calculated to stop the harassment." *Id.* § 14(b). Harassment is defined as "verbal or physical conduct based on a student's race, creed, color, national origin, marital status, sex, sexual orientation or disability . . . which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive school environment." *Id.* § 11(a)(26).

Victims of student-on-student harassment in schools may seek legal redress pursuant to the Vermont Public Accommodations Act, which prohibits public schools from denying to any person "any of the accommodations, advantages, facilities and privileges" of the school on the basis of a protected characteristic. 9 V.S.A. §§ 4502(a), 4506(a); *Washington*, 2005 VT 125, ¶¶ 18–22. However, alleged victims of harassment may not bring private actions pursuant to the VPAA unless they demonstrate that they have exhausted the administrative remedies available to them under the school's harassment policy. 16 V.S.A. § 14(b); *Washington*, 2005 VT 125, ¶ 35. The showing of exhaustion is not necessary if the plaintiff instead demonstrates that (1) the school does not maintain a harassment policy; (2) the school did not make a determination of harassment within the time limits provided by statute; (3) the health or safety of the complainant would be jeopardized; (4) exhaustion would be futile; or (5) requiring exhaustion would subject the student to substantial and imminent retaliation. *Id.*

In this case, the Venturellas have demonstrated that genuine disputes exist over whether they made any informal complaints of unlawful harassment that school officials should have interpreted as falling within the scope of the harassment policy, and whether school officials failed to follow the harassment policy. The Venturellas have also demonstrated that a genuine dispute exists over whether they were required to report any harassment under the Fair Haven policy for purposes of meeting the exhaustion requirement. Finally, even if the Venturellas were required to report under the policy and failed to do so, the Venturellas have shown facts that raise the issue of whether circumstances existed that relieved them from the exhaustion requirement. *Washington*, 2005 VT 125, ¶ 35. For these reasons, summary judgment is inappropriate on the claim for violation of the VPAA.

*Parents' Recovery for Emotional Distress*

The complaint alleged that Mr. and Ms. Venturella feared for the safety of their children, and sought compensatory damages for their emotional distress. The Venturellas

now concede that they were not within the "zone of danger" or otherwise subjected to a reasonable fear of immediate bodily injury. *Brueckner v. Norwich Univ.*, 169 Vt. 118, 125 (1999). Summary judgment is granted in this respect.

*Economic Loss Rule*

In their complaint, the Venturellas sought recovery for medical expenses for the injuries allegedly suffered by F.V. and V.V., tuition and transportation expenses related to enrolling F.V. and V.V. in private school for one year, compensatory damages for the emotional distress caused to F.V. and V.V., and punitive damages. Additionally, the Venturellas sought tuition, transportation, and other expenses incurred as a result of removing their third child, T.V., from a Fair Haven preschool program and enrolling him in a private program. There has not yet been any allegation that T.V. has been physically harmed.

Therefore, with respect to the transportation, tuition, and other expenses incurred as a result of T.V.'s removal from the Fair Haven preschool program, Fair Haven argues that Vermont law does not impose a duty of ordinary care to avoid purely economic loss to another. *EBWS, LLC v. Britly Corp.*, 2007 VT 37, ¶ 30, 18 Vt. L. Wk. 136.

For the purposes of this motion, the Venturellas concede that the economic loss rule might apply to bar recovery of T.V.'s expenses under a claim for negligent supervision. However, the Venturellas argue that the expenses incurred on behalf of T.V. are recoverable under the VPAA. The Venturellas argue that if they prove that the two older siblings were subjected to a hostile school environment based on pervasive and severe peer harassment, the VPAA does not require younger siblings to experience the same harassment before being eligible to recover for the cost of educating them.

Fair Haven's motion relies on cases applying the economic-loss rule to tort actions. E.g., *Hamill v. Pawtucket Mut. Ins. Co.*, 2005 VT 133, ¶ 7, 179 Vt. 250; *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 314 (2001). Fair Haven has not cited authorities explaining why the economic-loss rule and its underlying policies should apply to a claim under the VPAA. On the other hand, while the Venturellas have argued a policy reason why the court should deny summary judgment on this issue, the Venturellas have not marshaled authorities supporting their position. The issue would benefit from more adversarial testing. Therefore, the court reserves ruling on this issue at this time, and the parties may renew the issue at the time of trial.

*Cause of Action Under 16 V.S.A. § 565*

Finally, the Venturellas' complaint included a third cause of action alleging that Fair Haven violated 16 V.S.A. § 565 by failing to follow their harassment policy in response to the complaints made by the Venturellas, and by failing to adopt an anti-bullying policy. The Venturellas now concede that § 565 does not provide a separate cause of action, and that these claims are more properly part of their claim under the VPAA. Summary judgment is therefore appropriate on the claim for violation of § 565.

**ORDER**

For the foregoing reasons, Defendant's Motion for Summary Judgment, filed November 2, 2007, is *denied* on the claims for negligent supervision and violation of the Vermont Public Accommodations Act, *granted* on the issue of whether Mr. and Mrs. Venturella may recover for their own emotional distress, and *granted* on the claim for violation of 16 V.S.A. § 565. The court reserves ruling on whether the economic-loss rule bars recovery for expenses associated with T.V.

Dated at Rutland, Vermont this ____ day of May, 2008.

_________________________________
Hon. Nancy S. Corsones
Superior Court Judge