DOCKET NO. FST CV 15 5015035 S	:	SUPERIOR COURT
GIRL DOE PPA MOTHER DOE AND FATHER DOE, et al.	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	:	AT STAMFORD
WILTON BOARD OF EDUCATION AND TOWN OF WILTON	:	NOVEMBER 9, 2017

MEMORANDUM OF DECISION RE

DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT (# 132)

Plaintiffs claim that Girl Doe, a four year old student at a public school in Wilton, was sexually abused by a paraprofessional employed by the Board of Education after he escorted her alone into a bathroom in violation of the school's toileting policy. Before the court is the motion of the defendants for summary judgment. As more fully explained below, the court denies the motion in its entirety.

On March 15, 2017, the minor plaintiff, Girl Doe, with her parents and next friends, Mother and Father Doe, filed the operative complaint with six counts against the defendants, the Wilton Board of Education (the board) and the Town of Wilton (the town). The minor plaintiff asserts a claim for negligence against the board in count one for allowing the abuse to occur, and Mother and Father Doe assert claims for negligent infliction of emotional distress against the board in counts three and five for failing to properly advise them of the school's investigation of the abuse. Counts two, four and six allege that the town is legally responsible for any damages assessed against the board because the board functioned as an arm or agency of the town.

On March 2, 2017, the defendants filed the present motion for summary judgment (# 132) on the grounds that they are immune from liability and that the claims for negligent infliction of emotional distress fail as a matter of law. In support of their motion, the defendants submitted a

memorandum of law and various exhibits (# 133).[1] On March 31, 2017, the plaintiffs filed their objection to the motion for summary judgment along with a supporting memorandum of law and various exhibits (# 141).[2] The defendants filed a reply brief to the plaintiffs' objection on April 17, 2017 (# 142), to which the plaintiffs filed a surreply on April 24, 2017 (# 143). The court heard oral argument on April 24, 2017. Subsequently, the court allowed the parties to submit supplemental briefing on the issue of school policies existing during the relevant time period (# 132.01). The parties filed additional briefs addressing a variety of other issues, which the court agreed to consider (# 162.01).

BACKGROUND

In their complaint, the plaintiffs allege the following: On December 21, 2012, Girl Doe was a four year old student at the Miller-Driscoll School in Wilton (the school). That morning, Mother Doe dropped Girl Doe off at the entrance of the school. After leaving the car, Girl Doe was escorted into the school by Eric Von Kohorn (Von Kohorn), a paraprofessional. Shortly thereafter, Von Kohorn escorted Girl Doe alone into a bathroom without Mother Doe's knowledge. After entering the bathroom, Von Kohorn inappropriately touched and sexually assaulted Girl Doe. Although there was a school policy which prohibited Von Kohorn from taking Girl Doe into the bathroom alone and required other staff members to prevent that from happening, no one stopped or prevented him, even though at least one other staff member was aware he was doing so. When Girl Doe returned home from school that afternoon, Mother Doe

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[1] The defendants submitted exhibits including excerpts from the depositions of Mother and Father Doe and Dr. Fred Rapczynski, the school principal, Dr. Rapczynski's affidavit, and copies of the two reports filed with the Connecticut Department of Children and Families (DCF) relating to the incident.

[2] The plaintiffs submitted exhibits including excerpts from the depositions of Mother and Father Doe, Dr. Rapczynski, and Ann Paul, the Assistant Superintendent for Special Services, James Martin, a school social worker, and a copy of the second DCF report.

noticed visible irritation and injuries to Girl Doe's genital areas. Girl Doe told her parents that Von Kohorn "wiped her too hard."

That same afternoon, the plaintiffs allege that Father Doe attempted to contact the school or the board but did not actually speak to someone until January 3, 2013, when he spoke to Dr. Fred Rapczynski, the school's principal. Father Doe informed Dr. Rapczynski about Girl Doe's injuries and her indication that the injuries were caused by Von Kohorn. Dr. Rapczynski was a mandatory reporter within the meaning of General Statutes §17a-101. Dr. Rapczynski, however, failed to make a report to the Department of Children and Families (DCF) until January 7, 2013, four days after speaking with Father Doe. On January 7, 2013, Dr. Rapczynski filed a written report with DCF that Girl Doe's claims were unsubstantiated on the basis of his interview with Von Kohorn and his investigation. On January 8, 2013, Dr. Rapczynski submitted a second written report to DCF which indicated that Von Kohorn subsequently had admitted that, in fact, he had taken Girl Doe into the bathroom alone, although he stated that he remained outside the stall. Von Kohorn also claimed that he had advised another school staff member that he was taking Girl Doe into the bathroom. Dr. Rapczynski did not inform Mother and Father Doe about the second report or Von Kohorn's admission that he had taken Girl Doe into the bathroom.

The plaintiffs further allege that, during the following school year, Dr. Rapczynski asked for permission to put Von Kohorn back into a classroom with Girl Doe so that he could assist another special needs student, and promised that Von Kohorn would have no contact with Girl Doe. Mother and Father Doe agreed because they believed that Von Kohorn had never taken Girl Doe into the bathroom. Because Dr. Rapczynski negligently failed to inform Mother and Father Doe of the second report, Girl Doe was subjected to additional harm by being placed in a classroom with Von Kohorn, and her parents suffered great emotional distress upon learning the

truth about Von Kohorn's statements. The board is responsible for the actions of Dr. Rapczynski as well as the other staff members who negligently failed to prevent Von Kohorn from taking Girl Doe into the bathroom alone. The town is also responsible for the acts of its employees and/or agents, including school staff, administrators, and members of the board. Accordingly, the plaintiffs brought suit and asserted causes of action against the board and the town.

CONTENTIONS OF THE PARTIES

In the memorandum in support of their motion for summary judgment, the defendants argue that the acts and omissions of which the plaintiffs complain were discretionary in nature and, therefore, they are entitled to governmental immunity. Further, the only applicable exception is the identifiable person-imminent harm exception, and the plaintiff cannot satisfy all three prongs of the exception because there is no genuine issue of material fact that the harm was neither imminent nor apparent.

In response, the plaintiffs first argue that the school toileting policies were mandatory and constituted ministerial duties, and that there were ministerial duties to enforce the school toileting policy and to report suspected child abuse pursuant to General Statutes §§ 17a-101, et seq. In the alternative, the plaintiffs argue that the identifiable person-imminent harm exception applies to the present case. Specifically, the plaintiffs contend that Girl Doe was identifiable because she was a student at school during school hours and thus falls within an identifiable class of foreseeable victims. Additionally, the plaintiffs argue that Girl Doe was subject to imminent harm when she was taken into the bathroom by Von Kohorn, and that this harm was apparent because other staff members were aware that he was doing so and that the toileting policy was established to prevent this very harm.

In their supplemental briefs, the defendants argue that their acts were discretionary, but, to the extent any acts were ministerial, there is no question that they were not misperformed. Specifically, the defendants argue that there is no admissible evidence to prove that any ministerial duties were violated. Plaintiffs argue that statements made by Von Kohorn to Dr. Rapczynski, which were included in the second report to DCF, establish that the toileting policy was violated and that other staff was aware of the violation, or at least that these statements raise a question of fact. Additionally, although the defendants contend that Dr. Rapczynski was not required to inform Mother and Father Doe of the second report, the plaintiffs argue that this is required both by the defendants' own policies as well as by state statute.

STANDARD OF REVIEW

"[S]ummary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 645 (2016). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle [it] to judgment as a matter of law. The courts hold the movant to a strict standard." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319-20 (2013).

"Once the moving party has met its burden . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for

the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228 (2015).

DISCUSSION

I. Count One – Negligence as to Girl Doe

In count one of the complaint, Girl Doe via her parents alleges negligence against the board. The defendants argue that this claim is barred by governmental immunity because all alleged acts and omissions were discretionary and no exception applies, and, even if immunity does not apply, there is no admissible evidence that defendants breached any duty owed to Girl Doe.

Section 52-557n (a) (2) (B) provides in relevant part that "a political subdivision of the state shall not be liable for damages to person or property caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." "The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Coe* v. *Board of Education*, 301 Conn. 112, 118 (2011).

"Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder . . . there are cases [in which] it is apparent from the complaint . . . [that the nature of the duty] . . . turns on the character of the act or omission complained of in the complaint. . . . Accordingly, [when] it is apparent from the complaint that the defendants' allegedly negligent acts or omissions necessarily involved the

exercise of judgment, and thus necessarily were discretionary in nature, summary judgment is proper." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 565 (2016).

"Generally, evidence of a ministerial duty is provided by an explicit statutory provision, town charter, rule, ordinance or some other written directive. . . . Testimony of a municipal official, however, may provide an evidentiary basis from which a jury could find the existence of a specific duty or administrative directive." (Citation omitted.) *Wisniewski* v. *Darien*, 135 Conn. App. 364, 374 (2012); see also *Strycharz* v. *Cady*, supra, 323 Conn. 566 (finding that testimony of a superintendent provided a sufficient basis to conclude that school administrators had a ministerial duty to assign staff members to respective posts, such as bus duty).

The defendants, in their moving papers for summary judgment characterize the enforcement of the toileting policy as an obligation. Defs.' Mot. Summ. J., p. 15. In their reply to the plaintiff's objection, the defendants explicitly refer to the duty to follow and enforce the policy as a ministerial duty. Defs.' Reply Mem., p. 5.

Further, there is deposition testimony of various staff members, excerpts of which were submitted by both parties, that they were required to follow this policy. See *Wisniewski* v. *Darien,* supra, 135 Conn. App. 374 ("[t]estimony of a municipal official . . . may provide an evidentiary basis from which a jury could find the existence of a specific duty or administrative directive"). Dr. Rapczynski, Assistant Superintendent Paul, and Mr. Martin all testified that a policy prohibiting male staff from taking female students to the bathroom, and requiring staff to prevent it, existed during the relevant time period. Dr. Rapczynski testified that prior to the alleged incident, the toileting policy was not written, but that it was an explicit practice made clear to everyone and that, although it was not written, there was formal training and discussions regarding the policy. Rapczynski Dep. I, 117:3-117:24. Assistant Superintendent Paul testified

that, although it was not a policy in the sense that it had gone before the Board of Education, it was a practice expected in the preschool and that staff were required to strictly follow the policy. Paul Dep., 75:1-75:21. Mr. Martin similarly testified that the toileting policy was well-known by the staff and that they were required to follow it. Martin Dep., 50:3-51:18.

The prohibition against a male employee escorting a female student into the bathroom alone does not, on its face, appear to allow any discretion. However, defendants cite to cases which stand for the proposition that the duty to supervise school children is often considered to be a discretionary governmental duty, rather than a ministerial duty. See *Heigl* v. *Board of Education,* 218 Conn. 1, 8 (1991); *Doe* v. *Board of Education*, 76 Conn. App. 296, 300 (2003).

As a result, in this case, the court finds that it is not apparent from the complaint or the evidence submitted on this motion that the acts or omissions complained of necessarily involved the exercise of judgment. Accordingly, the characterization of the defendants' actions as discretionary or ministerial presents a question of fact for the jury to decide. The court cannot rule that the defendants are shielded by governmental immunity and cannot be held liable if the plaintiffs prove the elements of a negligence cause of action. Accordingly, summary judgment as to count one is denied.

II. Counts Three and Five - Negligent Infliction of Emotional Distress as to Mother and Father Doe

In counts three and five, Mother and Father Doe allege claims of negligent infliction of emotional distress. The defendants argue that these counts are properly construed as alleging bystander claims and fail as a matter of law. Mother and Father Doe contend that they are not alleging bystander claims but, rather, that their claims are on the basis of direct harm suffered as a result of the defendants' actions.

A. Immunity

In the present case, the plaintiffs' negligent infliction of emotional distress claims are premised on Dr. Rapcyznski's failure to notify them that a second report was filed with DCF and that Von Kohorn had admitted he took Girl Doe into the bathroom alone. The defendants argue that any duty to communicate with parents is discretionary and that they were not required to disclose Von Kohorn's admission to Mother and Father Doe. Additionally, they contend that they were not required to notify the parents of the second report because it was merely a "supplement" to the first report, of which the parents were notified. The plaintiffs counter, however, that the school was required to notify them of the second report pursuant to General Statutes § 17a-101b (d) and the school's own policies.

Section 17a-101b (d) provides in relevant part: "Whenever a mandated reporter . . . has reasonable cause to suspect or believe that any child has been abused or neglected by a member of the staff of a . . . public . . . school, the mandated reporter shall report as required in subsection (a) of this section. The Commissioner of Children and Families or the commissioner's designee shall notify the principal, headmaster, executive director or other person in charge of such . . . school . . . . In the case of a public school, the commissioner shall also notify the person's employing superintendent. Such person in charge, or such person's designee, shall then immediately notify the child's parents . . . that a report has been made."

The parties dispute the meaning of this statute. The plaintiffs contend that this statute imposes a ministerial duty on the defendants and that this duty was breached when they failed to inform Mother and Father Doe of the second DCF report. The defendants argue that this statute does not establish a non-discretionary obligation to notify parents of supplemental filings and that the second report was not a stand-alone report, but rather was a supplement to the first

report, of which the parents were notified. The court therefore must interpret the statute to ascertain which party's construction is correct.

The court is guided by the well-established principles regarding statutory construction. General Statutes § 1–2z provides:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

"[I]t is the duty of the court when engaged in statutory interpretation to apply a construction which harmonizes all sections of a statutory scheme to the extent possible and to give meaning to such sections; see *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 157–58 (2002)." *Connery* v. *Gieske*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-13-6012836-S (October 16, 2013) (57 Conn. L. Rptr. 18, 21), aff'd on other grounds, 323 Conn. 377 (2016).

Section 17a-101b (d) is clear and unambiguous in its directives, using such language as "whenever," "shall," and "immediately." The text provides that a person in charge of a school "shall . . . immediately notify the child's parent . . . that a report has been made." The text contains no distinctions between first or second reports and contains no reference to supplemental filings, and the defendants do not point to any language to the contrary. Moreover, the defendants cite no case law in support of their argument that the school was not obligated to notify the Doe parents of the second report because it was "supplemental." The plain language of § 17a-101b (d) requires that parents be notified that a report has been made, whether it be the first or second report. Any other construction would be untenable, as it would allow schools to keep parents in the dark, which in turn would affect parents' ability to protect their children.

Further, it would violate the public policy behind the statutory scheme, as set forth in § 17a-101 (a), which provides in pertinent part:

> The public policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care . . . and for these purposes to require the reporting of suspected child abuse or neglect . . . .

Accordingly, the court interprets Section 17a-101b (d) to require notification of the Doe parents after the second report to the DCF to promote or facilitate the purposes of the statute, i.e., "to protect children" and "to strengthen the family and to make the home safe by enhancing the parental capacity for good child care." Advising the parents of Von Kohorn's admission[3] of violating the school toileting policy was important to enhancing the parents' "capacity for good child care."

Therefore, defendants had a ministerial, non-discretionary duty to notify the Doe parents when the second report was made to DCF. As a result, the defendants are not protected by governmental immunity and can be held liable if the plaintiffs establish the elements of a negligent infliction of emotional distress claim.

B. Negligent Infliction of Emotional Distress

A cause of action for negligent infliction of emotional distress has four elements: "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 444 (2003).

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[3] The court does not address the veracity of the admission but only considers it to the extent that it was made and was not disclosed to the Doe parents.

The defendants contend that the plaintiffs cannot assert a direct claim of negligent infliction of emotional distress because they did not owe the Doe parents a duty, see *Durrant* v. *Board of Education*, 284 Conn. 91 (2007); *Prescott* v. *Meriden*, 273 Conn. 759 (2005). The court, however, has determined that the defendants had a statutory duty to notify the Doe parents of the second report pursuant to § 17a-101b (d). Thus, the defendants owed the Doe parents a direct duty,[4] and they can assert direct claims for negligent infliction of emotional distress based on the defendants' alleged breach of this duty.

Direct claims involve conduct causing emotional distress that is directed toward the plaintiff, and bystander claims involve conduct causing emotional distress that is directed toward another. See *Marsala* v. *Yale-New Haven Hospital, Inc.*, 166 Conn. App. 432, 444 (2016). Because the school owed the Doe parents a direct duty under the mandatory reporting statute, their claim for negligent infliction of emotional distress cannot be considered as one asserting bystander liability.

Finally, defendants assert only in a conclusory statement that the plaintiffs cannot establish the elements of their claim. They present no evidence to support their motion with respect to the claim for negligent infliction of emotional distress, and the complaint alleges the necessary elements of the tort.

The defendants have therefore failed to demonstrate that they are entitled to judgment as a matter of law on the negligent infliction of emotional distress claims. Accordingly, the motion for summary judgment as to counts three and five is denied.

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[4] Schools generally do not owe a duty to parents, and this decision should not be construed as extending the duties owed to schoolchildren to their parents. The direct duty recognized in this case is limited to its circumstances and arises solely out of the obligation to notify parents that a report has been made pursuant to § 17a-101b (d).

III. Counts Two, Four and Six - The Town's Liability

In counts two, four and six, the plaintiffs allege that the town is liable for any damages assessed against the board, because the board is an agent of the town. Having determined that the board is not protected by governmental immunity, the town cannot escape liability on this basis. Accordingly, the defendants' motion for summary judgment as to counts two, four and six is denied.

CONCLUSION

By reason of the foregoing, the defendants' motion for summary judgment is denied as to all counts.

Charles T. Lee

Hon. Charles T. Lee

Decision entered in accordance with the foregoing.
Notice sent to
Atty. Paul Slager – Silver Golub & Teitell
Atty. Thomas Gerarde – Howd & Ludorf
November 9, 2017
Shannet Jumpp-Court Official