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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| SYDNEY R. BATES,<br><br>Plaintiff Below,<br>Appellant,<br><br>v.<br><br>CAESAR RODNEY SCHOOL DISTRICT, CAESAR RODNEY HIGH SCHOOL, BOARD OF EDUCATION OF THE CAESAR RODNEY SCHOOL DISTRICT, RICHARD "DICKIE" HOWELL, II,<br><br>Defendants Below,<br>Appellees. | : | C.A. No. 13,2021<br><br>On Appeal From The Superior Court of the State of Delaware,<br>C.A. No. N16C-12-235 FWW<br><br>Public Version E-filed April 16, 2021 |

# ANSWERING BRIEF OF DEFENDANTS BELOW, APPELLEES

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Dated: April 1, 2021

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## NATURE OF PROCEEDINGS

Appellant Sydney R. Bates ("Appellant" or "Bates") was a high school student who attended Caesar Rodney School High School. Bates was [redacted] by teacher, Richard Dickie Howell ("Howell").

Bates initiated a lawsuit in Superior Court against Caesar Rodney School District, Board of Education of the Caesar Rodney School District, and Caesar Rodney High School (collectively, "District Defendants")[1] on December 17, 2016. She also sued Howell, individually. District Defendants filed a Partial Motion to Dismiss, and the Superior Court dismissed Bates' fraud claim on May 30, 2017. District Defendants moved for summary judgment on Bates' remaining claims of Assault and Battery (Count I), Gross Negligence (Count II), and Intentional Infliction of Emotional Distress (Count III). Bates filed a cross motion for summary judgment. The Superior Court granted District Defendants' summary judgment motion on November 30, 2018 and denied Bates' motion. (*Bates v. Caesar Rodney*, Del. Super., C.A. N16-12-235 FWW, at *15, Wharton, J. (Nov. 30, 2018)). Bates filed an interlocutory appeal with this Court, which was denied on March 7, 2019. Bates filed a Motion for Entry of Judgment pursuant to Superior Court Civil Rule 54 (d) on

[1] Bates sued the Caesar Rodney School District and Caesar Rodney High School; however, no such entities exist. The Board of Education of the Caesar Rodney School District is the legal entity with the power to sue and be sued. *See Beck v. Claymont Sch. Dist*., 407 A.2d 226 (Del. Super. 1979).

November 24, 2020, which was granted by the Superior Court judge on December 14, 2020. Bates filed an appeal with this Court on January 11, 2021. This is Appellees' Answering Brief.

## SUMMARY OF ARGUMENT

1. Denied. The Superior Court judge correctly held Howell was not acting within the scope of his employment when he [redacted] Bates. Bates cannot establish the required elements of Restatement (Second) of Agency Section 228. District Defendants are not vicariously liable for Howell's action under the theory of *respondeat superior*.

2. Denied. The Superior Court correctly held Restatement of Torts Section 219 (c) and (d) do not apply to teachers and on the facts of this case.

3. Denied. The Superior Court correctly dismissed Bates' gross negligence claim finding there is no evidence District Defendants acted with gross negligence in their supervision of Howell, or knew or should have known, that Howell was [redacted] Bates.

## STATEMENT OF FACTS

Caesar Rodney School District ("District") is comprised of 12 schools, including one high school, Caesar Rodney High School ("CRHS"). CRHS has approximately 2,000 students and 245 staff members. (B-0057.) Howell was hired in 1991 and was employed at CRHS as a physical education teacher and head wrestling coach. Dr. Sherry Kijowski ("Kijowski") became the Principal of CRHS in July of 2014.

Bates was a student at CRHS from August 2011 until she graduated in May of 2015. Howell was Bates' teacher in one class (physical education) in the Summer of 2012 prior to Bates' sophomore year. (A-19–A-20.) Bates volunteered to be one of the wrestling team's managers (B-0077, B-0080) and a teacher's aide in one of Howell's physical education classes in the 2014-2015 school year. (A-20, A-23.)

In the Summer of 2012, Howell talked to Bates more often during class, told her jokes, and tried to be her friend more than her teacher. (A-20.) Bates and Howell had a conversation she interpreted as flirting. (B-0078; A-15.) Bates communicated to Howell she had feelings for him. According to Bates, Howell "was hesitant at first but then gave in." (B-0078; A-15.) Bates and Howell increased their communication by [redacted], and Bates [redacted] with Howell. (B-0085–B-0086.) They began a [redacted] in March

or April of 2014. (B-0076; A-21; B-0081.) There was a break in their relationship between July of 2014 and October of 2014. They reinitiated their [redacted] from November of 2014 until January of 2015.

Bates and Howell had [redacted] in Howell's home when no one else was present. (A-18.) They also [redacted] at CRHS on certain occasions. They had [redacted] in the wrestling equipment locker (also referred to as the "cage") before school at approximately 7:30 or 7:40 a.m. before classes began at 8:00 a.m. (A-17.) They engaged in [redacted] in the wrestling room at CRHS during the summer of 2014. This occurred after Howell was finished teaching a summer gym class (A-17), and before/after his wrestling club team practices (a non-school affiliated wrestling program). (B-0064; B-0101, B-0107.)

Bates began developing romantic feelings for Howell in November of 2014. Howell informed Bates he did not want to be in a relationship with her because of her age, and because she was a student. (B-0079.) The last time they had [redacted] was on or around December 27, 2014. (B-0092.) Around that time, Bates exchanged text messages with Howell threatening that, if he did not agree to be her boyfriend, she would send him to jail. (B-0091, B-0096.)

The morning of January 12, 2015, Bates visited Howell at his office and told him she was reporting him that day. (B-0084, B-0094, B-0097–B-0098.) Later that

morning, Bates went to the administrative offices of CRHS and reported to Principal Kijowski and Assistant Principal Daniel Lopez ("Lopez") that Bates and Howell had been in a [redacted]. (B-0095; B-0058; B-0110–B-0115.) Kijowski and Lopez immediately contacted District Human Resources Director Dr. Michael Noel ("Noel") and Officer Jones of the Delaware State Police and advised them of the report of Bates. (B-0058.) Officer Jones transported Bates to Delaware State Police Troop 3 for an interview. (B-0099.) Kijowski and Noel met with Howell, and Howell declined to discuss Bates' allegations. (B-0059.) Howell was sent home immediately, instructed not to return to CRHS, and placed on administrative leave pending the outcome of the investigation. (B-0059; B-0116–B-0117.) Howell was arrested and criminally charged with the rape of Bates. He resigned from his employment in lieu of termination. (B-0118.) He accepted a guilty plea and is currently serving his sentence at James T. Vaughn Correctional Center in Smyrna, Delaware.

## ARGUMENT

### I. THE SUPERIOR COURT CORRECTLY HELD HOWELL WAS NOT ACTING IN THE SCOPE OF HIS EMPLOYMENT; THEREFORE, DISTRICT DEFENDANTS ARE NOT VICARIOUSLY LIABLE FOR HIS ACTIONS UNDER THE THEORY OF *RESPONDEAT SUPERIOR*

#### A. Question Presented

Is a teacher's [redacted] of a student within the scope of the teacher's employment if it is not the kind of conduct he was employed to perform, occurred at times he was not supposed to be teaching or coaching, and the conduct was not activated to serve the teacher's employer?

#### B. Scope of Review

This Court's standard of review in an appeal from a grant of summary judgment is *de novo*. *Atamian v. Gorkin*, 746 A.2d 275 (Del. 2000).

#### C. Merits of Argument

Bates asserts her claims of Assault and Battery and Intentional Infliction of Emotional Distress ("IIED") against the District Defendants based upon a theory of vicarious liability under the *respondeat superior* doctrine. Bates alleges Howell's actions were within the scope of his employment,[2] and the District is liable under "agency principles."[3]

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[2] B-0044–B-0045 ¶ 56

[3] *Id.* at ¶ 57

"In Delaware, responsibility for an employee's tortious conduct, committed in the scope of employment, will be imputed to the employer by the doctrine of *respondeat superior*. Liability for the torts of the servant will only be imposed upon the master when those torts are committed by the servant within the scope of employment which, at least in theory, means that they were committed in furtherance of the master's business." *McCaffrey v. City of Wilmington*, 2012 WL 1593062, at *3 (Del. Super. Apr. 25, 2012), *aff'd*, 133 A.3d 536 (Del. 2016). Delaware Courts analyze Restatement (Second) of Agency § 228 ("Section 228") to determine whether an employee's conduct is within the scope of employment and consider whether:

> (1) it is of the kind he is employed to perform;
> (2) it occurs within authorized time and space limits;
> (3) it is activated, in part at least, by a purpose to serve the master; and
> (4) if force is used, the use of force is not unexpectable by the master.

*McCaffrey*, *supra* at *3 (citing Restatement (Second) of Agency § 228 (1958)). Many factors are considered in determining whether a particular tort was committed by a servant within the scope of his employment.

In *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 152 (Del. 2018), this Court analyzed Section 228 in the context of a police officer. In that case, the victim ("Doe") was apprehended by a retail store security officer for shoplifting. She was subject to an outstanding *capias* for her arrest. A Delaware State Police Trooper ("Officer") arrived at the store and took Doe into custody. He placed her in the rear of

his police car and drove to several locations in the mall parking lot. According to her, Officer stopped the car and placed Doe's hands on his genitals. Officer then drove to a remote area where he told Doe he would let her go home if she did something in return. Officer told Doe that, unless she acceded to his demands, he would take her to court, where bail would be set, and she would have to spend the weekend in jail. The prospect of jail coerced Doe to perform oral sex on Officer in the front seat of the police car. Afterwards, Officer drove Doe home and told her to turn herself in on the *capias*. Doe reported the incident to Delaware State Police, and Officer was arrested on charges of sexual misconduct, bribery and official misconduct.

Doe asserted claims of assault, battery, and rape against the State of Delaware under the doctrine of *respondeat superior*. This Court re-analyzed and refined its earlier decision concerning whether Officer's conduct was within the scope of his employment under Section 228, focusing particularly on the third and fourth prongs (motivation and foreseeability). When this Court applied Section 228, it found that all of the requirements were not established as discussed in more detail below.

The *Sherman* Court explained that the third prong (motivation prong) requires the wrongful act must itself be motivated in part by a desire to serve the employer. *Id.* at *174. This Court noted there was no evidence of a mixed motivation on the part of the Officer. *Id.* Doe did not allege that the officer's misconduct was motivated in part

to by a desire to serve the State Police or the State. *Id.* Her complaint alleged that the officer sought oral sex solely to gratify himself. There was no question of mixed motivation for the jury to resolve. *Id.* The Court concluded that "[i]f Doe was required to satisfy the Motivation prong, she could not, and judgment was owed to the State on that ground." *Id.* (emphasis added). In other words, the Court held Doe could not establish the third prong of Section 228 (that the conduct was activated, in part at least, by a purpose to serve the master) because the Officer's conduct was not motivated by purpose to serve the State Police. *Id.* In *Sherman*, this Court also made it clear that Section 228's scope-of-employment test should not go to a jury if there is no issue of fact for the jury to determine. *Id.* at *161.

In addressing the scope of the fourth prong (if force is used, the use of force is not unexpectable), the Court clarified that it requires the general risk of wrongdoing, not the specific risk of the employee engaging in the conduct, be foreseeable. *Id.* at *154. The Court found it was foreseeable that police officers will misuse their authority to extract sexual favors from arrestees, and this prong was established. *Id.* at *175. However, because the third prong (motivation prong) of Section 228 was not established, this Court then went on to analyze whether the requirements of Section 219 were established (Section 219 will be discussed later in this Brief).

In the present case, Bates cannot establish the requirements of Section 228. Like the plaintiff in *Sherman*, Bates did not allege that Howell's misconduct was motivated in part by a desire to serve the District Defendants except for one conclusory allegation in paragraph 12 of the Complaint without any independent facts alleged to support the allegation. "Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant." *Abbate v. Werner Co.*, 2012 WL 1413524, at *1 (Del. Super. Jan. 19, 2012) (citation omitted).

Furthermore, the evidence in the record demonstrates that the Section 228 factors cannot be met.

**(1) Howell's conduct was not the kind he was employed to perform.**

Howell was employed to teach and coach students. He was not employed to sexually abuse students. While it is true he met Bates in school, his conduct [redacted] of Bates) was not the kind he was employed to perform. When Howell and Bates engaged in [redacted] in the equipment room before school began on certain occasions, he was not doing the kind of work he was employed to perform. Howell did not have any teaching or coaching responsibilities at the time when they engaged in [redacted] (before 8:00 a.m.).

**(2) Howell's conduct did not occur within authorized time and space limits.**

Howell was not acting within authorized time and space limits because he had no reason to be with Bates at the time the [redacted] occurred. The undisputed facts in the record show that Howell was not supposed to be teaching Bates, coaching her, or attending a meeting with her when the [redacted] occurred. The record is devoid of any evidence that Howell and Bates were meeting for any school or wrestling-related purpose.

Howell and Bates engaged in [redacted] in Howell's home, in a house where Bates was house-sitting, and in the equipment and wrestling rooms at CRHS. (A-43; B-0101–B-0102.) Bates testified that when they engaged in [redacted] at CRHS, it was before school at 7:30 or 7:40 a.m. before classes began, or in the summer before or after Howell's summer gym class. (A-17; A-43; B-0101.) As a teacher, Howell was required to report to work by 7:30 a.m. (B-0053.) Teachers began teaching students in class at 8:00 a.m. (B-0053.) Howell did not have any instructional teaching duties or wrestling coaching duties before 8:00 a.m. (A-44; B-0053–B-0054; B-0143–B-0144; B-0159–B-0160, B-0174.) There were occasions when faculty meetings, department meetings, or other meetings were held between 7:30 a.m. and 8:00 a.m. (B-0053–B-0054; B-0186–B-0189; B-0159-B-0160; A-60.) Teachers generally used the time between 7:30 a.m. and 8:00 a.m. to prepare for class and

monitor hallways. (B-0196; B-0176, B-0190–B-0192; A-61; B-0106.) Assistant wrestling coach and teacher, Christopher Harris ("Harris"), testified that when he saw Howell in the mornings between 7:30 and 8:00 a.m., Howell was sitting at his desk, having coffee, and perusing the wrestling website that tracks weights of wrestlers from all teams. (B-0171.) Howell testified that before 8:00 a.m. he usually kept an eye on the locker room area and prepared for the day, but he was not assigned a duty to supervise a specific area during that time. (A-60–A-61; B-0106, B-0108–B-0109.)

In contrast to the State Trooper transporting a perpetrator to a police station in *Doe*, when Howell [redacted] Bates in the equipment room before school began, he was not doing the kind of work he was employed to perform. Howell did not have any teaching or coaching responsibilities at that time. (A-44.) Furthermore, Howell was not acting within authorized time and space limits because he had no reason to be with Bates at that time: he was not supposed to be teaching her, coaching her, or attending a meeting with her. The record is devoid of any evidence that Howell and Bates were meeting for any school or wrestling-related purpose. Howell was not activated to serve his employer in any manner while he was [redacted] Bates.

**(3) Howell's conduct was not activated, in part at least, by a purpose to serve the master.**

Howell engaged in [redacted] to gratify himself. Howell's conduct in [redacted] a student is not the type where he had more than one motive as was

the case in *Draper v. Olivere Paving & Const. Co.*, 181 A.2d 565, 567 (Del. 1962), and Howell is not an employee with duties like a security officer or law enforcement where some degree of force is required to serve the employer faithfully. *Id.* at *445. Consistent with the *Sherman* decision, this Court should find that the third prong of Section 228 cannot be established here.

Bates misplaces reliance on *Mojica v. Smyrna School District*, 2015 WL 13697693 (Del. Super. 2015) in suggesting the Motivation Prong of § 228 is a question for the jury. In *Mojica* the court denied a partial motion to dismiss holding that the Motivation Prong has been determined to be a matter for the jury. In *Sherman,* this Court subsequently made it clear that § 228's Motivation Prong of the scope-of-employment test should not go to a jury if there is no issue of fact for the jury to determine. In making this determination the Court noted that: "…this Court failed on two occasions to provide any insight to help the trial court determine what was required to satisfy, as a matter of law, the Motivation and Foreseeability Prongs of § 228, and indicated the jury was supposed to decide whether the State was liable…" *Sherman* at *171. Howell engaged in [redacted] solely to gratify himself, just as the police officer in *Sherman* sought oral sex solely to gratify himself.

In addition, Bates heavily relies upon *Smith v. Liberty Mutual*, 201 A.3d 555 (Del. Super. 2019). *Smith* is distinguishable. To begin with, the issue in *Smith* was

whether there was a duty to defend. In this procedural context the court must find a duty to defend: "…unless, as a matter of law, there is no possible factual or legal basis upon which the insurer might eventually be obligated to indemnify the insured." 201 A. 3d at 560. Any doubt about whether the complaint alleges there is an insured risk must be resolved in favor of the insured. Here, there is a record making it clear that the conclusory allegation in the complaint is not supported by the evidence. The evidence is that Howell's [redacted] of Bates did not take place when Howell was teaching or coaching (in *Smith* the alleged conduct of touching and communicating sexual innuendo occurred when *Smith* was carrying out his duties as a teacher), and it is clear Howell engaged in the [redacted] solely to gratify himself.

**(4) The use of force is not unexpectable by the master.**

Since the first three prongs of Section 228 cannot be established, this Court must conclude Howell's conduct is not within the scope of employment (without the need for the Court to reach the fourth prong of Section 228 regarding foreseeability).

The Superior Court judge correctly held the [redacted] of Bates was not committed within the scope of Howell's employment – "clearly he was not employed to have [redacted] underage students, nor was this conduct motivated by a purpose to serve his employer." *Bates*, *supra* at *12.

## II. THE SUPERIOR COURT CORRECTLY HELD THAT RESTATEMENT SECTION'S 219(2)(C) AND (D) DO NOT APPLY TO TEACHERS AND ON THE FACTS OF THIS CASE

### A. Question Presented

Whether a school district is strictly liable for the conduct of a teacher which falls outside the scope of employment even though the teacher's legal authority over a student falls far short of the coercive power of a police officer over an arrestee?

### B. Scope of Review

This Court's standard of review in an appeal from a grant of summary judgment is *de novo*. *Atamian v. Gorkin*, 746 A.2d 275 (Del. 2000).

### C. Merits of Argument

In *Sherman*, this Court adopted Restatement of Torts § 219 which "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment." *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 177 (Del. 2018). This Court analyzed § 219(2)(d), which provides for *respondeat superior* liability outside the scope of employment when the tortfeasor was "aided in accomplishing the tort by the existence of the agency relation," and § 219(2)(c), which does the same for situations in which the employer owed a "non-delegable duty" to the tortfeasor's victim. *Id.* at 177–78.

This Court in *Sherman* held: "Because an arrestee is "wholly dependent on [her arresting] officer for her safety and survival and ha[s] no ability to control her

environment or protect herself from harm," we find that the logic behind the § 219(2)(c)'s non-delegable duty exception to *respondeat superior*'s scope of employment requirement is applicable under Delaware law." *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 182–83 (Del. 2018).

**Section 219(2)(d)**

The *Sherman* court held:

> As a matter of law, if a police officer makes a valid arrest and then uses that leverage to obtain sex from his arrestee, his misconduct need not fall within the scope of his employment under § 228 to trigger his employer's liability. In so finding, we take into account the unique, coercive authority entrusted in our police under Delaware law, and the reality that when an arrestee is under an officer's authority, she cannot resist that authority without committing a crime. Because the Officer's position aided him in obtaining sexual favors—satisfying § 219(2)(d)—and the State owed a non-delegable duty to safeguard the arrestee from harm while she was under arrest—satisfying § 219(2)(c)—Doe does not have to satisfy § 228 for the State to be liable for the Officer's sexual misconduct.

*Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 155 (Del. 2018).

This Court found: "there is no question that the Officer was aided in accomplishing the sexual misconduct by his position of authority, because 'the wrongful acts flowed from the very exercise of this authority.'" The Court further noted, had he not been "in uniform, in a marked patrol vehicle" and effectuating an arrest, Doe "would not have stopped at his direction and the events that followed would not have occurred." This Court noted the "critical differences between police

officers who act to arrest people and employees of most businesses. However important plumbers, electricians, accountants, and myriad other providers of services are to their customers, none of them wield the potent coercive power entrusted to our police under our laws. None of these employees have the presumptive legal authority to deprive a person of her liberty and subject her to a period of incarceration. By contrast, that is the authority our police officers possess, which is enforced by criminal laws punishing arrestees for resisting any exercise of their authority." *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 180–81 (Del. 2018).

In the present case, the Superior Court distinguished *Sherman*, and held 219(2)(d) does not apply to teacher-student relationships. The trial judge found the coercive power of teachers falls much closer to that of plumbers, electricians, and accountants than to police officers because a teacher does not "wield the potent coercive power" entrusted to police by Delaware law. "Teachers are 'not issued handcuffs, deadly weapons or other less than lethal weapons, and may not arrest students and take them into custody by force.'" The trial judge noted "the fact that Howell came into contact with Bates because he was a teacher and she was a student does not mean that the agency relationship facilitated the commission of the tort." Importantly, the trial judge also pointed out: "If the § 219(2)(d) exception were triggered by the mere fact that that the agency relationship placed the tortfeasor and

the victim of the tort in contact with each other, then the exception would apply in nearly every case, eviscerating the general rule of § 228."

**Section 219(2)(c)**

The *Sherman* Court also analyzed Section 219(2)(c) and held: "Because an arrestee is 'wholly dependent on [her arresting] officer for her safety and survival and ha[s] no ability to control her environment or protect herself from harm,' we find that the logic behind the § 219(2)(c)'s non-delegable duty exception to *respondeat superior*'s scope of employment requirement is applicable under Delaware law." *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 182–83 (Del. 2018).

In the present case, the Superior Court judge distinguished *Sherman* and found § 219(2)(c) does not apply generally to school districts and their teacher employees because the coercive authority of a police officer is not comparable to the authority of school districts. The trial judge discussed the significant detrimental effect of a contrary holding:

> To hold that school districts are responsible under § 219 generally for torts committed by teachers, either because the agency relationship aided in the accomplishment of the tort, or because the school districts owe a non-delegable duty to their students, would have significant collateral ramifications. Such a shift in the law would "generate vicarious liability in virtually every case of student-teacher harassment." The financial and policy implications of an expansion of liability are beyond this Court's ability to ascertain. Indeed, the Court believes expansion of § 219 liability to teachers generally, if it is to occur, is best accomplished by those better "situated to effectively examine the empirical data, hold

> public hearings, debate the social and economic issues implicated, and then decide.. ."

*Bates*, *supra* at *15-16 (citations omitted).

The Superior Court judge also correctly held sections § 219(2)(d) and 219(2)(c) do not apply on the facts of this case because Howell (teacher and coach) did not possess any coercive authority over Bates (student and teacher's aide). Howell did not control her grades and did not have the authority to suspend or expel her. The Superior Court judge noted it was "apparent that Bates did not feel coerced by Howell at all." The Superior Court judge distinguished a police officer who can incarcerate a suspect compared to Howell's hypothetical tool of coercion which was limited to the mere threat of a detention. The Superior Court judge explained:

> Howell did not wield the legal authority emphasized by the *Sherman* Court to deprive Bates of her liberty or punish her refusal to comply, nor did his position as a coach aid him in accomplishing the sexual misconduct. Any authority Howell wielded over Bates pales in comparison to the characteristic coercive power of a police officer. If § 219 did apply on these facts, nearly any tort committed by an employee would invoke *respondeat superior* liability, and the exception would completely swallow the rule. The critical coercive element distinguished in *Sherman* would be rendered moot.

*Bates*, *supra* at *17.

Moreover, there is no evidence in the record suggesting Howell used any coercion or threats. The only evidence of coercion is that Bates threatened Howell

that, if he did not agree to be her boyfriend, she would report their relationship to the police.

The *Smith* case is distinguishable for the reasons set forth in Argument I.C. There was no coercion in the present case. The [redacted] did not occur when Howell was performing his duties to teach or coach. Moreover, for the reasons stated in the Superior Court's decision, the legal authority wielded by Howell pales in comparison to the legal authority a police officer wields against an arrestee.

## III. THE SUPERIOR COURT CORRECTLY HELD THERE IS NO EVIDENCE THE DISTRICT DEFENDANTS WERE GROSSLY NEGLIGENT

### A. Question Presented

Whether a school district is grossly negligent in supervising a teacher if there is no evidence the school district had knowledge of the [redacted] of a student, and there is no evidence demonstrating it should have known of the abuse?

### B. Scope of Review

This Court's standard of review in an appeal from a grant of summary judgment is *de novo*. *Atamian v. Gorkin*, 746 A.2d 275 (Del. 2000).

### C. Merits of Argument

Bates alleges District Defendants were grossly negligent in their supervision of Howell. The legal standard for this type of claim is as follows:

> An employer is liable for negligent hiring or supervision where the employer is negligent in giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity. The deciding factor is whether the employer had or should have had knowledge of the necessity to exercise control over its employee. Thus, under either theory, the basis for liability rests upon whether it was foreseeable that the employee would engage in the type of conduct that caused the injury.

*Doe v. Indian River Sch. Dist.*, 2012 WL 1980562, at *4–5 (Del. Super. Apr. 11, 2012) (quotations and citations omitted).

"Under Delaware law, gross negligence is a higher level of negligence representing an extreme departure from the ordinary standard of care." *Thomas v. Bd. of Educ. of Brandywine Sch. Dist.*, 759 F. Supp. 2d 477, at *501–02 (D. Del. 2010) (*citing Browne v. Robb*, 583 A.2d 949, 953 (Del.1990)). "A person acts wantonly when, 'with no intent to cause harm,' she 'performs an act so unreasonable and dangerous' that the person knows or should know that 'there is an eminent likelihood of harm which can result.'" *Id.* (*citing Hughes ex rel. Hughes v. Christina Sch. Dist.*, 2008 WL 73710, at *4 (Del. Super. Jan. 7, 2008), *aff'd sub nom. Hughes ex rel. Hughes v. Christiana Sch. Dist.*, 950 A.2d 659 (Del. 2008)). Wanton conduct is the "I don't care attitude." *Id.*; *Doe*, *supra* at *4–5.

In *Thomas*, a student asserted a claim of gross negligence against the school district when a female teacher sexually abused him. *Thomas*, *supra* at *502. The Court held there was a genuine issue of material fact as to whether the school district defendants acted with gross negligence because there was evidence in the record that the teacher's supervisors had knowledge the teacher was: "sitting on students' laps; hugging and kissing students on the cheek; driving students home in a personal vehicle, even after being directed not to do so; instant messaging students late at night; socializing with students on weekends; and calling students 'boo' or 'baby.'"

*Thomas*, *supra* at *502. The Court held that the school district defendants' responses were grossly inadequate.

In *Doe*, a student asserted a gross negligence claim against the school district when a high school principal (Goodman) sexually abused her. The Court declined to grant summary judgment because it found there was evidence in the record that Goodman's abuse of a student was foreseeable because: a staff member testified that she informed the Superintendent and two members of the Board that she felt as though Goodman could carry on a relationship with a student and testified that she was not surprised when Goodman was arrested because, as she put it, "you could just see the writing on the wall;" school officials were aware that Goodman was text messaging with students; two Assistant Principals testified about female students adjusting their clothing to request favors from Goodman; and an Assistant Principal and several staff members witnessed girls spending inappropriate amounts of time in Goodman's office. *Doe*, *supra* at *6 (Del. Super. Apr. 11, 2012).

There is no such evidence in the present case. Kijowski testified that she observed Howell's interactions with students, and his interactions were appropriate, the gym was appropriately monitored, and Howell was an effective teacher. (B-0055.) Kijowski monitored and observed the physical education classes in the gym area on a weekly basis, and the assistant principals also monitored activities of students in the

hallways and walked through classrooms to monitor instruction. (B-0072–B-0073; B-0193–B-0194.) Sabra Collins ("Collins") is a physical education teacher who taught classes with Howell in the gym six periods per day (approximately six hours per day) since 2010. She characterized Howell's interactions with students as professional. (B-0142, B-0145–B-0146, B-0149.) She never observed Bates and Howell interacting. (B-0150–B-0151.)

Kijowski, Mazzola, physical education teachers, and the assistant wrestling coach who worked closely with Howell on a daily basis (Robert Beron, Sabra Collins, and Christopher Harris) never observed Howell making inappropriate comments or engaging in inappropriate interactions with female students, having female students in his office, giving special privileges to female students, hugging or touching female students, or communicating with female students via cell phone. (B-0062, B-0068–B-0069; B-0197–B-0200; B-0178–B-0180, B-0182; B-0155; B-0162, B-0166–B-0167.) The District administration did not receive any reports from Bates concerning Howell prior to January 12, 2015. (B-0062.) Kijowski and the other staff members were shocked when they learned of Bates' allegations. (B-0060–B-0063; B-0204; B-0181; B-0152–B-0153; B-0165.)

Harris testified that he observed typical coach-manager interactions when he saw Howell and Bates speaking to each other at wrestling matches or tournaments.

(B-0163–B-0164, B-0172–B-0173.) For example, Howell asked Bates to obtain equipment, or mop the wrestling mats. (B-0164.) Harris never observed any inappropriate interactions between them. (B-0164.) Harris never walked into the wrestling equipment room and saw Howell and Bates alone together. (A-79.)

The District provided mandatory training to staff every year concerning the sexual abuse of students. (B-0185; A-67–A-71; A-79.) Kijowski provided the training to staff in August of 2014 just after she was hired as principal. (B-0205–B-0233; B-0064.) She instructed the staff that it was a crime and a violation of District policies to engage in a relationship with a student or have [redacted] with a student. (B-0064–B-0068; B-0202; A-81–A-82; A-67–A-71; A-80.) Kijowski explicitly stated in the training: "Do not have [redacted] with children." (B-0067; B-0201; A-68.) District employees were also reminded of their mandatory duty to report any good faith suspicions of [redacted]. (B-0203; A-71; A-80.) Employees were told that if they needed to communicate with students, to use the app "Remind101" or use group messaging to students and parents. (B-0070–B-0071.) Howell attended the training (B-0070; A-71–A-72), and he was aware that his conduct violated Delaware criminal laws and District policies. (B-0234–B-0237; B-0067; B-0211.) Howell was aware of the consequences of his conduct and communicated to Bates that if their

relationship was revealed, he would lose everything, including his job, house, and children, and he would end up prison. (B-0087–B-0088.)

In support of her allegations that the District should have known that Bates and Howell were in a [redacted], Bates claims certain staff members saw her in the gym area four or five times each year. (A-25.) Bates was a wrestling manager and teacher's aide for one of Howell's physical education classes. Thus, it would not be out of the ordinary to see her in the gym or wrestling room areas in Howell's presence. (B-0061, B-0074; B-0183–B-0184; B-0156–B-0157; B-0161–B-0164, B-0168–B-0170.) The fact that certain teachers may have seen Bates in passing in the gym area four or five times per year is not sufficient to put the District on notice that Howell was sexually abusing Bates.

Moreover, Bates and Howell were adept at concealing the relationship. (B-0082; A-22.) In fact, Bates became angry and upset with Howell when he ignored her in public and did not pay any attention to her because Howell was paranoid that people would find out about them. (B-0083, B-0089–B-0090, B-0093.) No District staff member or administrator had any knowledge that Howell was [redacted] Bates (B-0055–B-0056, B-0074), including other physical education teachers and the assistant wrestling coach who worked in close proximity to Howell for several hours daily. (B-0177; B-0148; B-0162–B-0163.) The District had no knowledge that

Howell was [redacted] Bates, nor is there evidence demonstrating that it should have known of the [redacted]. The evidence indicates that the District investigated and took appropriate action when it was aware of any issues regarding Howell.

In 2013, CRHS administration received a complaint that Howell pulled a female student's ponytail during physical education class on April 9, 2013 when she and another student did not move when Howell asked them to do so. The student also complained that Howell touched her forehead to determine if she was sweating during physical education class. (B-0238; B-0146–B-0147, B-0154.) The student reported that on December 19, 2012, on the Christian Mingle website, Howell saw the student's picture and commented, "Yo. You're too young to be on here. How are you?" The student's parents made a report to the school resource officer on April 10, 2013.

The District and Delaware State Police investigated the complaints. As a result, Howell received a written reprimand regarding his unacceptable professional judgment. (B-0238.) The District's response regarding Howell's unprofessional conduct was not grossly inadequate. Furthermore, although Howell's conduct was unprofessional, it did not indicate that Howell had the propensity to [redacted] a student. Howell's conduct does not remotely compare to the teacher's conduct in *Thomas* or the principal's conduct in *Doe*.

In January of 2010, the District issued a letter of reprimand to Howell for inadequate supervision of students at an overnight wrestling tournament in December of 2009. (B-0239.) An incident occurred during the middle of the night where a female wrestling manager snuck into the room of a student wrestler by climbing outside from her room's balcony to the wrestler's room's balcony, and the two students had sexual intercourse. (B-0103–B-0105.) Howell's conduct would not have put the District Defendants on notice that he had propensity to [redacted] a student, and the District's response was not grossly inadequate.

Bates falls far short of getting over the high hurdle of establishing gross negligence (i.e., an extreme departure from the ordinary standard of care; unreasonable and dangerous conduct that District Defendants knew was likely to create the harm of sexual abuse, or exhibited an "I don't care attitude"). No reasonable juror could find gross negligence or conduct amounting to a wanton and willful disregard of harm to Bates. *See Simms*, *supra* at *9 (where the Court granted summary judgment on plaintiff's gross negligence claim for the school district defendants in a sexual abuse case). There is no genuine issue as to any material fact, and District Defendants are entitled to judgment as a matter of law.

## CONCLUSION

For the foregoing reasons, Superior Court's summary judgment decision should be affirmed.

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