IN THE SUPREME COURT OF THE STATE OF DELAWARE

SYDNEY R. BATES, Plaintiff below, Appellant, v. CAESAR RODNEY SCHOOL DISTRICT, CAESAR RODNEY HIGH SCHOOL, BOARD OF EDUCATION OF THE CAESAR RODNEY SCHOOL DISTRICT, Defendant below, Appellee.	:	C.A. No.: 13,2021 APPEAL FROM SUPERIOR COURT DECISION, N16C-12-235 FWW

PLAINTIFF BELOW, APPELLANT'S REPLY BRIEF

/s/ LAWRANCE SPILLER KIMMEL
LAWRANCE SPILLER KIMMEL, ESQUIRE
Bar ID: 4725

/s/ EMILY P. LAURSEN
EMILY P. LAURSEN, ESQUIRE
Bar ID: 6172
Kimmel, Carter, Roman, Peltz & O'Neill, P.A.
56 W. Main Street, Fourth Floor
Newark, DE 19702
(302) 565-6100
Attorney for Plaintiff below, Appellant

Dated: April 15, 2021

TABLE OF CONTENTS

TABLE OF CITATIONS

NATURE OF PROCEEDINGS

Plaintiff Below, Appellant, hereby incorporates, by reference, the Nature of Proceedings contained in her Opening Brief.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING DEFENDANT NOT VICARIOUSLY LIABLE UNDER SECTION 228 OF THE RESTATEMENT WHICH ASSESSES WHETHER RESPONDEAT SUPERIOR LIABILITY APPLIES TO AN EMPLOYER.

II. THE TRIAL COURT ERRED IN FINDING SECTION 219 DOES NOT APPLY TO TEACHERS, AND EVEN IF IT DID, THAT IT DID NOT APPLY TO THE INSTANT CASE.

III. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT WAS NOT GROSSLY NEGLIGENT.

STATEMENT OF FACTS

Plaintiff Below, Appellant, hereby incorporates, by reference, the Statement of Facts contained in her Opening Brief.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING DEFENDANT NOT VICARIOUSLY LIABLE UNDER SECTION 228 OF THE RESTATEMENT WHICH ASSESSES WHETHER RESPONDEAT SUPERIOR LIABILITY APPLIES TO AN EMPLOYER

A. Question Presented

Whether the Trial Court erred as a matter of law in finding that Richard Howell was not operating within the scope of his employment under Restatement (Second) of Agency §228? (Exhibit A-11).

B. Scope of Review

See Plaintiff's Opening Brief.

C. Merits of Argument

The Superior Court erred in finding that the facts of the instant case failed to meet the four-part test established by Restatement (Second) of Agency §228 for the following reasons:

1. The conduct is the kind Richard Howell was employed to perform

The court below held, and Caesar Rodney argues, "clearly [Howell] was not employed to [redacted] with underaged students." *Bates v. Caesar Rodney, et al*, C.A. No. N13C-12-235 FWW, 12 (Del. Super. Ct., Nov. 30, 2018); Ans. Br. 11. However, as the Court in *Doe v. State* stated, "No one would argue that beatings, stabbings, shooting, or sexual assaults are incident to almost any form of

employment. Wrongful conduct, by definition, is not within the scope of employment in the sense that it is not conduct the employee was hired to perform." *Doe v. State*, 76 A.3d 774, 777 (Del. 2013). The Court went on to indicate that the relevant test considers, "whether the employee was acting in the ordinary course of business during the time frame within which the tort was committed." *Id.* Thus, while Howell was undisputedly not hired to [redacted] Plaintiff, as is the case with any employment, the [redacted] of Plaintiff occurred while Howell was acting in the ordinary course of business during the time frame within which the tort was committed, thus, satisfying the first prong of §228.

Moreover, Caesar Rodney attempts to allude liability under prong 1 by stating that Howell did not have any teaching or coaching responsibilities at the time when he [redacted] Plaintiff before 8:00 a.m. Ans. Br. 11. However, as discussed in the Opening Brief and addressed below, (1) Howell had access to and manipulated Plaintiff through his position with Caesar Rodney as Plaintiff's teacher/coach, (2) the [redacted] often occurred on Caesar Rodney grounds, and (3) after Howell had already begun his job-related functions.

2. Richard Howell's [redacted] of Plaintiff occurred within the authorized time and space limits of his employment with Defendant.

Caesar Rodney indicates that Howell's conduct did not occur within the authorized time and space limits because he had no reason to be with Plaintiff at

the time the [redacted] occurred. Ans. Br. 12. However, the test is not whether Howell had reason to be with Plaintiff when he [redacted] her. The test is whether Howell was acting within the authorized time and space at the time of the tort [redacted] Restatement (Second) of Agency §228. The undisputed facts, including Howell's own admissions, indicate that he was within the authorized time and space at the time of the tort, thus satisfying the second prong of §228.

Both Howell and Plaintiff testified that numerous [redacted] encounters occurred in the Caesar Rodney wrestling room and the equipment room. A-44. In fact, Howell testified that he [redacted] Plaintiff **at least fifteen times while on Caesar Rodney's campus.** A-63. Plaintiff testified Richard Howell [redacted] her between twenty and thirty times while on Caesar Rodney grounds, often using a key he had to access locked spaces such as the wrestling and equipment room. A-16; A-56-57. Therefore, the space element of this prong is easily met.

In regards to the time element, Howell's contract hours began at 7:30. B-53. Testimony from Plaintiff and Ms. Collins established that Howell would arrive at school and begin his day-to-day tasks prior to 7:30 a.m. A-61. Plaintiff testified that she usually arrived at school around 7:10 a.m. A-33. Upon Plaintiff's arrival, she observed Howell "in his office, check e-mails, handle anything that was involved with the wrestling team, set up the gym with the certain equipment that

was going to be needed for that day. Sometimes [Howell] would go to meetings with other faculty members." A-33. They would **then** [redacted] on Caesar Rodney grounds. A-33. In other words, Howell had already begun his duties for the day **before** he would [redacted] Plaintiff while on school grounds. While he was not actively teaching or coaching while [redacted] Plaintiff, his contract hours began at 7:30 a.m., as had the performance of his job-related duties, and thus, the undisputed evidence establishes [redacted] occurred within the time of his employment with Caesar Rodney.

Employer attempts to distinguish the instant case from *Doe* indicating that Howell did not have any teaching or coaching responsibilities at the time in which he [redacted] Plaintiff on Caesar Rodney property. Ans. Br. 12. However, this ignores the above testimony that his contract hours began at 7:30 a.m. and that he had already begun his work duties before [redacted] Plaintiff on school grounds.

Therefore, the record establishes that the [redacted] occurred on school grounds (space) and after Howell's contract hours and his work day had begun (time), thereby bringing his conduct within the authorized time and space of employment with Defendant and satisfying the second prong of §228.

Notwithstanding the above, Caesar Rodney attempts to have it both ways – in one instance, Caesar Rodney indicates that Howell had no reason to be with Plaintiff at the time the [redacted] occurred. Ans. Br. 12. However, later, Caesar

Rodney indicates that "it would not be out of the ordinary to see [Plaintiff] in the gym or wrestling room areas in Howell's presence." Ans. Br. 27. If it would not be out of the ordinary for Plaintiff to be in the presence of Howell in the gym area, this further supports the above analysis.

3. Richard Howell's conduct was activated, in part at least, by a purpose to serve the master, the Defendants.

While it is true that *Smith* is procedurally distinguishable from the instant case, the substance and rationale of the analysis remains applicable to the instant case. *Smith v. Liberty Mutual Ins. Co.,* 201 A.3d 555 (Del. Super. Ct. 2019). The Superior Court's findings that the actions of the tortfeasor focusing on the student in the waiting room or waiting for the student to walk by, could be actuated in part of his desire to supervise the student in carrying out the duties to the school. *Id.,* at 566. The Superior Court found the act of attempting to encourage the student for purposes of fostering student self-confidence and optimal student performance sufficient to serve the school board. *Id., at* 566-67. The same holds true in the instant case. Howell's favoritism and manipulation of Plaintiff resulted in Plaintiff becoming a teacher's aid and a wrestling manager. Caesar Rodney benefited from Plaintiff's role in both capacities. Thus, a jury could reasonably find that Howell's conduct was activated in part to serve Caesar Rodney.

4. If force is used, the use of force is not unexpectable given the nature of Richard Howell's employment with Defendant.

To satisfy the foreseeability prong, all that is required is that, as a general matter, it was foreseeable that an [employee] will misuse their authority to extract sexual favors [...]. *Sherman v. State*, 190 A.3d 148, 175 (Del. 2018). **The holding in *Doe* specifically notes that acts of sexual abuse by persons in positions of authority are foreseeable risks and therefore, must be considered expectable.** *Id.* (emphasis added). Thus, it is immaterial whether the act was seriously criminal and thus, on conduct the employee was hired to perform.

As illustrated in *Mojica* and *Smith*, and as argued below, teachers, in the eyes of their students, are persons of authority. As such, it is foreseeable that they would misuse their authority to extract sexual favors. *Mojica v. Smyrna School District,* 2015 WL 13697693 (Del. Super. Ct. Dec. 17, 2015); *Smith,* 201 A.3d 555.

II. THE TRIAL COURT ERRED IN FINDING SECTION 219 DOES NOT APPLY TO TEACHERS, AND EVEN IF IT DID, DID NOT APPLY TO THE INSTANT CASE.

A. Question Presented

Whether the Superior Court erred as a matter of law in determining that the scope of Restatement (Second) of Agency §219 does not apply to teachers generally, or to the facts of this case? (Exhibit A-12; Exhibit A-16).

B. Scope of Review

See Plaintiff's Opening Brief.

C. Merits of Argument

The Restatement (Second) of Agency Section 219

In the event that the Court finds that the four prongs of §228 are not satisfied, the finding in *Sherman* requires an analysis under §219. *See Sherman* generally. When §219's exceptions apply, an employer can be held responsible under *respondeat superior* even if §228 is not satisfied. *Id.* at 154. **The purpose of §219 is to address situations when it would be inequitable to deny a tort victim a recovery against the tortfeasor's employer when §228 does not permit recovery.** *Id.* at 178. The instant case fits squarely within the purpose of §219.

1. Restatement (Second) of Agency Section 219(2)(d)

The Court in *Sherman* held that the State can be held responsible under

respondeat superior when a police officer acts in a tortious manner, including sexual abuse. *See Sherman* generally. While the Court highlighted the unique role of police officers, it did not limit the holding to police officers. It is undisputable that police officers hold a unique role maintaining a coercive power that requires those they arrest to comply. *Sherman,* 190 A.3d 148, 180. However, teachers hold a unique role in the framework of schools and in the eyes of students, most of which are minors. As articulated by the Superior Court in *Doe v. Bicking*, "[h]igh school teachers and coaches bear the imprimatur of authority with respect to their students [...] students look up to their teachers and coaches as role models and authority figures [...] teachers' and coaches' 'services' are critical to the formation of character and the intellectual development of their students." *Doe v. Bicking*, 2020 WL 374677, at *8 (Del. Super. Jan. 2020). Thus, the finding in *Sherman* should be applied to schools when teachers/coaches [redacted] students entrusted to their care.

Moreover, students, an overwhelming majority of which are minors, are legally required to attend school and required to comply with school authorities. A minor may not question a request by a teacher for fear of receiving some type of punishment or may acquiesce simply because they have been taught that they have to listen to the teacher. *Mojica,* 2015 WL 13697693, *at 3*. "A teacher maintains authority over a student even if that authority is not the same type as that of a

police officer." *Id.* While teachers are not issued handcuffs or deadly / letteral weapons, they are wielded with power that, in the eyes of many students, is authoritative in the same sense. Teachers are often asked to write letters of recommendation to colleges/employers, they issue grades reviewed by admission boards, and decide who makes extra-circulator teams – in the eyes of their students, they are perceived to hold the keys to their future. Moreover, teachers have the power to issue detention and/or suspend students who fail to obey their instruction. This is analogous with officer's ability to detain and arrest members of the public who disobey their instruction. For all intents and purposes, in the eyes of a student, while the repercussions are not that of corporal punishment, they carry the same deterrent.

Plumbers, electricians, accountants and the like are *selected for hire* by the person seeking their services. Students, for the most part, do not have the luxury of selecting their school or teachers. They are required to attend schools within their feeder patterns and required to take certain courses offered by certain teachers. Unlike plumbers, electricians, accountants, and other professions of hire, students may not terminate the "services" of teachers given a difference of opinion or disagreement on issues. Rather, students are required to attend school and take certain classes in order to graduate. As *Smith* noted, a minor's attendance at school is compulsory and a teacher's authority begins upon a student's enrollment and is

not precipitated by any act affirmatively committed by the minor. *Smith,* 201 A.3d 555, 569.

Additionally, the court below and Caesar Rodney both indicate that the "fact that Howell came into contact with [plaintiff] because he was a teacher and she was a student does not mean that the agency relationship facilitated the commission of the tort." *Bates*, C.A. No. N13C-12-235 FWW, Page 14; Ans. Br. 18. However, this mischaracterizes and ignores the fact that while Howell had access to Plaintiff because of his role as a teacher and coach, he used his power and authority as a teacher and coach with Caesar Rodney to manipulate and [redacted] [redacted] Plaintiff. It is not merely Howell's ability to access Plaintiff through their teacher/coach-student relationship, but his use of power within that relationship.

Determinations of vicarious liability and the doctrine of *respondeat superior* should not be limited given the specific type of employer; rather, the determination to be made under §219(2)(d) should be whether, because of the imprimatur of authority conferred on the tortfeasor under the particular facts of the case, he or she has coercive power over the alleged victim. *Doe v. Bicking,* 2020 WL 374677, at *12. This Delaware Supreme Court has decided that police officers arresting adult subjects committing a crime have coercive authority over their subjects. Clearly, an adult teacher in the course and scope of his employment has control over a minor student while on school property should be held liable under the same

standard.

2. Restatement (Second) of Agency Section 219(2)(c)

Caesar Rodney argues that there is no evidence in the record to suggest Howell used any coercion or threats. Ans. Br. 20. However, the question under §219(2)(c) is not whether Howell used any coercion or threats; rather, the question posed by §219(2)(c) is whether Howell, as a teacher and employee of Caesar Rodney, violated a non-delegable duty of the master. Restatement (Second) of Agency Section 219. In the context of a teacher-student relationship, the teacher, as an employee of the school, clearly violated a non-delegable duty of the master by [redacted] a student.

In *Sherman*, the Court reflected on a police officer's duty to protect an arrestee while in the officer's custody and control. *Sherman*, 190 A.3d 148, *27. The Court went on to hold that, "when the State authorizes police officers to take away the liberty of arrestees, it cannot delegate away its own responsibility to make sure that an arrestee is not harmed by the tortious conduct of its arresting officers." *Id.* Similarly, in *Hecksher*, the Court held that Fairwinds, a small religious school, had a duty to protect the students in its charge, which depend on its staff willingness to put their duty to the school and its students first. *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1192 (Del. 2015). Moreover, as *Smith* illustrated in analogizing teachers/students to police officers/arrestees,

students are expected to surrender authority to the adults in charge, they are not free to leave school unless authorized to do so, and students who defy the school's authority are subject to detention, suspension and police intervention" thus finding schools owe a similar duty to students in their custody as the State owes to an arrestee in custody. *Smith,* 201 A.3d 555, 568. Thus, just as a police officer owes a non-delegable duty to arrestees, schools owe a non-delegable duty to its students. Just as the State cannot delegate away its responsibility to make sure arrestees are unharmed by tortious conduct of arresting officers, the State in the context of schools, cannot delegate away its duty to maintain its responsibility to ensure students are not harmed by the tortious conduct of its teachers/coaches.

Notwithstanding the above, the facts recited by Caesar Rodney intending to show a lack of coercion are unsubstantiated by the record. Caesar Rodney indicates that Howell did not control Plaintiff's grades and did not have the authority to suspend or expel her. Ans. Br. 20. This is not supported by the record. Regardless of the foregoing, it was Howell's overall position as a teacher, coach and authority figure within Caesar Rodney and the wrestling community that lead to his sexual abuse and manipulation of Plaintiff.

III. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT WERE NOT GROSSLY NEGLIGENT

D. Question Presented

Whether Defendant was grossly negligent in a manner that proximately led to Richard Howell's sexual abuse of Plaintiff? (Exhibit A-17).

E. Scope of Review

See Plaintiff's Opening Brief.

F. Merits of Argument

In the event the Court finds that Restatement (Second) of Agency is satisfied, there is no need to find gross negligence. Nonetheless, Plaintiff contends gross negligence existed sufficient to submit this case to a jury.

Caesar Rodney argues that the testimony elicited from Caesar Rodney employees indicate that Howell was observed to be an effective teacher who acted professionally with the students. However, the same Caesar Rodney employees went on to testify that they never received any training on what to look for in order to determine if there is [redacted] The training that Caesar Rodney offered regarding [redacted] was limited to 15 minutes. A-83. Other than a single comment not to [redacted] with students, none of the Caesar Rodney employees could recall anything else from the training showing how ineffective and insufficient the training was. Thus, a reasonable jury could find that it's not that Howell always

acted appropriately but, rather, that Caesar Rodney failed to train its employees as to what would constitute appropriate verse inappropriate conduct with a student and/or what type of conduct to look for.

While the facts of the instant case are distinguishable from *Thomas* and *Doe*, they still constitute sufficient gross negligence such that a jury could reasonably find an "I don't care attitude" on behalf of Caesar Rodney. *Thomas v. Bd. Of Educ. Of Brandywine Sch. Dist.*, 759 F.Supp.2d 477 (Del. Super., Dec. 30, 2010); *Doe v. Indian River School District*, 2012 WL 1980562 (Del. Super. Ct., Apr. 11, 2012). Previous reports were made regarding Howell's inappropriate conduct with female students. Shy of a letter advising that such conduct was unprofessional, no further action was taken to monitor or supervise the conduct of Howell, especially around minor female students. Caesar Rodney's failure to act in a manner that would prevent future misconduct by Howell highlights Caesar Rodney's "I don't care attitude."

Lastly, Caesar Rodney emphasized Bates' and Howell's attempts to conceal the relationship. While such attempts were made, that does not dispel of the fact that the continued [redacted] occurred under the nose of Caesar Rodney while Caesar Rodney turned a blind eye.

For the foregoing reasons a reasonable jury could determine that Defendant was grossly negligent in its supervision of Richard Howell and training of its staff.

CONCLUSION

The court below erred as a matter of law in denying Plaintiff's Motion for Summary Judgment and granting Defendant Caesar Rodney's Motion for Summary Judgment. The court below erred in finding (1) Plaintiff did not satisfy the elements required by Section 228, (2) that Section 219 does not apply to teachers, (3) that even if it did apply to teachers, it did not apply to this set of facts, and (4) that Defendant was not grossly negligent in a manner that led to Plaintiff's injuries and damages. Therefore, Plaintiff respectfully requests this Honorable Court reverse the decision of the court below.