# SUPERIOR COURT OF NEW JERSEY
## SOMERSET, HUNTERDON & WARREN COUNTIES
## VICINAGE 13

YOLANDA CICCONE
ASSIGNMENT JUDGE

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**March 12, 2014**

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**Re:** **V.B., a Minor by his Parent and Guardian, L.B. v. Flemington-Raritan Regional Board of Education and Hunterdon Central Regional High School and Board of Education; Hunterdon Central and Flemington-Raritan Regional v. C.W., J.A., and K.I.**

**Docket No.** **HNT-L-95-13**

Dear Counselors:

This letter serves as the Court's Opinion regarding Third-party Defendants motion to dismiss the Third-Party Complaint.

## I. Facts and Procedural History

This matter arises out of an action filed by Plaintiff V.B. against Defendants/Third-Party Plaintiffs Flemington-Raritan Regional Board of Education and Hunterdon Central Regional High School and Board of Education alleging violations of the New Jersey Anti-Bullying Bill of Rights Act ("Anti-Bullying Act"), N.J.S.A. 18A:37-13 et seq, and the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-2 et seq. Plaintiff alleged that from the time Plaintiff was in fourth (4th) grade through tenth (10th) grade, he was subjected to a hostile school environment, initially by students and then also by employees of Defendants, initially because of his weight, then because of a sexual orientation perception that he was gay and, most recently, in the eleventh (11th) grade, because of his disability.

Plaintiff alleges that, in fourth (4th) grade (2005-2006) at the Copper Hill School, he was significantly overweight, taunted by students, disparaged by being told on numerous occasions, among other comments, to put down the box of Twinkies and exercise.

Plaintiff alleges that, in the fifth (5th) grade (2006-2007) at the Reading-Fleming Intermediate School, the hurtful teasing continued with students calling him "fat" and "chubby".

Plaintiff alleges that, in the sixth (6th) grade (2007-2008) at the Reading-Fleming Intermediate School, he continued to be subjected to disparaging comments about his weight, which led to comments making fun of his loose fitting clothes. He also alleges his being "pantsed" (pulling down to and actually exposing his underwear) by a D.B. and J. Ma., in the auditorium two (2) times during yearbook signing. On the last day of school, Emily Vanderhom, Substitute Teacher, allegedly witnessed C.W. bullying V.B., which even resulted in Ms. Vanderhom writing the child up.

Plaintiff states that he spoke to Mike McCarthy (Guidance Counselor), Wanda Quinones (Vice Principal) and Dr. Kathleen Suchorsky (Principal), on numerous occasions regarding his, being bullied and that nothing was done. Plaintiff alleges that on one occasion, J.M., threw pasta with gravy on Plaintiff in the lunch room so he would have food stains on his shirt the rest of the school day and so the other students would continue to make fun of him, calling him "chubbs", "lardo" and "flubber," including C.W., J.B., C.E., J.A., T.M. and K.I.

Plaintiff alleges that on several occasions a student, C.K., jabbed Plaintiff in the sides of the stomach until he was in severe pain. Plaintiff states that he reported this to Vice Principal Quinones, and her reply was that "her sister used to do this to her" and went on to give Plaintiff V.B. tips on how to handle bullying but that nothing was done. Plaintiff states that he reported all of this to Principal Suchorsky who replied that "she will talk to the bullies".

Plaintiff alleges that, in the seventh (7th) grade (2008-2009) at the J.P. Case School, the "chubbs" comments continued but Plaintiff was now increasingly being referred to by other students as "gay", receiving negative comments about the length of his hair, and generally not fitting in. On January 29, 2009, Plaintiff L.B. spoke to Kristen Meyer, Math Teacher, regarding instances that took place in math class, and she informed Plaintiff L.B. that she was aware of this and that she was trying to do everything possible to stop it. On February 18, 2009, while Kim Healy, Gym Teacher was present in class, a student, D.W., intentionally threw kickballs at V. B.'s "private area" calling V.B. "gay" and "fag".

Plaintiff L.B. contacted the Raritan Township Police Department and spoke with Officer Tim Apgar, who advised Plaintiff L.B. that this was a school matter and must be handled with the school. He further advised that she should speak to Officer Michael Bokash who handled all school matters. Plaintiff L.B. went to J.P. Case School to speak to Principal Castellano, and was told "you must make an appointment to speak with me, however, you can speak with Officer Bokash". Principal Castellano went on to state, however, that he would look into and investigate this matter and would take whatever steps the Board Policy would allow him to take to correct this matter. Plaintiff alleges none of this was done. Additionally, he stated that Plaintiff L.B. would not be allowed to have the report of the investigation and final outcome because of "Privacy Laws", stating that Peter Sibilia, Vice Principal, would be in touch with her. Plaintiff states that the only information Vice Principal Sibilia shared was that he had spoken to other students in the classroom who did indeed witness the bullying but that nothing further was done.

Plaintiff L.B. later spoke to Officer Michael Bokash who asked Plaintiff L.B. if her son was gay and advised that Plaintiff V.B.'s civil rights were not violated unless he was gay. Plaintiff L.B. asked Vice Principal Sibilia and Principal Costellano to have the mother of student D.W. contact her because this behavior was unacceptable. When Plaintiff L.B. spoke to D.W,'s mother that evening she stated she cannot control her son, that he was "uncontrollable".

In the eighth (8th) grade (2009-2010) at the JP Case School, in response to the increasing negative effects of the bullying comments, Plaintiff suffered a dramatic debilitating weight loss. On December 16, 2009, Plaintiff L.B. called Anna McGuire, Math Teacher, about her concerns and was advised that she was also concerned about Plaintiffs well-being since he was being bullied in class. Ms. McGuire told Plaintiff L. B. that she would move Plaintiff V. B.'s seat in class away from students, C.E. and J. B., and that she would, and did, speak to Vice Principal Sibilia to make him aware of the situation.

Thereafter, Plaintiff L.B. spoke to Vice Principal Sibilia on numerous occasions including on December 17, 2009 regarding the bullying. Vice Principal Sibilia, advised Plaintiff

L.B. that he had spoken to Ms. McGuire and that she had reached out to him to make him aware of what was happening in her class. He further stated that he would look into the matter and take the necessary steps to handle it.

In the ninth (9th) grade (2010-2011) at the Hunterdon Central Regional High School, the comments continued but Plaintiff V, B., was now also being called "caveman" because of the hair on his legs, making him again self-conscious and concerned about his body image while being called "gay", "homo" and "fag".

In or about January of 2011 the cyber bullying began, with Facebook messages by students including one by a student, T.M., that "my brother thinks you're a fag" and other students seeing this comment and leaving comments such as "I knew you were". Plaintiff V.B. reported this to Facebook to have it removed and then spoke to Kevin Maldanodo (Guidance Counselor) and Susan Cooley (Sophomore Class Vice Principal) to report this incident. Plaintiff L.B. contacted T.M.'s parents and visited with his father in an effort to have this behavior stopped, during which she was told that the Facebook post was done without his or his wife's knowledge.

In the tenth (10th) grade (2011-2012) at Hunterdon Central Regional High School, Plaintiff V.B. alleges that he continued to endure bullying more focused on the perception that he was gay. Plaintiff V.B. was hospitalized at the Somerset Medical Center beginning April 2012 and into June of 2012. When Plaintiff V.B. returned for the last two weeks of the school year, it was made clear to Defendant that his ongoing intensive treatment for anorexia required a continuing medical accommodation in teaching as it related to the issue of "weight", and that he would be restricted in his exercising as it was medically necessary for him to gain weight.

In the eleventh (11th) grade (2012-2013) at Hunterdon Central Regional High School, Plaintiff alleges that while the name calling and bullying continued, Defendant Hunterdon Board continued to fail and refuse to accommodate Plaintiff V.B.'s disability, physical and emotional, consequent to the bullying and lack of effective remedial action. V.B. alleges that Defendant Hunterdon Board, not only required him to study weight issues in health class, about "the importance of being thin", but also to participate in gym with the others, which included strenuous activities such as rock climbing.

Plaintiff did not name any of the Third-Party Defendants as defendants in that action. Defendants/Third-Party Plaintiffs filed a third party complaint against Third-Party Defendants seeking contribution and indemnification under the Anti-Bullying Act, the LAD and the New Jersey Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 et seq.

## II. Third Party Defendant's Motion to Dismiss

Third-Party Defendants argue that the Anti-Bullying Act does not provide for individual liability and creates no right for contribution or indemnification. They state that the law requires any alleged violation go through the local school administration and then through the County Superintendent, and that redress is limited to previously existing causes of action. Third-Party Defendants argue that because the Anti-Bullying Act is a school law, Third Party Plaintiffs failed to exhaust administrative remedies by not bringing this matter the Commissioner of Education. They state that the burden is on the Third-Party Plaintiffs to show they are exempt from this requirement and that they have not made that showing. Additionally, K.I. alleges that the claims against him are time barred as the allegation against him occurred in 2007-08 prior to the enactment of the statute.

Third-Party Defendants also argue that the LAD claim for contribution fails because the school districts are responsible for the students during school. They state that under the LAD, individual liability is limited to acts of discrimination by a person in a supervisory capacity who aids and abets the hostile environment and discrimination of the employer. They state that they were not in a supervisory capacity to V.B. nor were they his employer. K.I. alleges that the claims against him are time barred and the continuing violation theory does not apply as there are no allegations against him after the 2007-08 school year. They argue that the LAD claims against the parents fail as they are entitled to parental immunity which can only be overcome by a showing of a willful and wanton failure to supervise.

## III. Defendant's/Third-Party Plaintiff's Opposition

Hunterdon states that because the actions alleged by Plaintiff sound in tort, if Plaintiff is successful, Third-Party Defendants are direct and active tortfeasors such that the JTCL would allow contribution.

Hunterdon states that while the Anti-Bullying Act does not create an independent cause of action, civil liability remains as to other causes of action which predate that statute. They state that this matter need not have gone before the Commissioner of Education because their jurisdiction does not extend to all matters involving the Board of Education when the cause of action is based on another aspect of the law. Hunterdon states that a cause of action may exist for Plaintiff under the LAD. They further argue that third party liability is available under the LAD. They state that if Plaintiff proves their LAD claim then there was no question that Third-Party Defendants were aware of the tortious activity directed towards Plaintiff.

Hunterdon states that parental immunity only applies in circumstances implicating customary child care issues or a legitimate exercise of parental authority or supervision. They state that discovery will show that the parents were made aware of the conduct of their children and any failure to act may be deemed willful or wanton behavior. They further state that dismissal on the basis of the school's in *loco parentis* status is not warranted given that some of the alleged instances of bullying occurred outside of the school.

Flemington does not assert that Third-Party Defendants are liable under the Anti-Bullying Act or the LAD but that they are liable for contribution under the Joint Tortfeasors Contribution Law. They state that under the JTCL the right of contribution exists whenever one party's injury is caused by the tortious conduct of two or more persons. They further state that the fact that Third-Party Defendants were not sued for the same tort does not foreclose contribution. They state that, but for the conduct of Third-Party Defendants, Plaintiff would not be able to assert the LAD and Anti-Bullying Act claims against them. Flemington argues that parental immunity does not apply because some of the alleged bullying occurred off of school property.

**IV. Third-Party Defendant's Reply**

Third-Party Defendants state that Third-Party Plaintiffs are not entitled to contribution because their actions did not create liability under the LAD or Anti-Bullying Act. They further argue that there can be no contribution because they have not committed any common law tort.

They argue that Third-Party Plaintiffs are not entitled to contribution under the Joint Tortfeasor Contribution Law. They state that Defendants/Third-Party Plaintiffs cannot prevail unless they can show that Plaintiff also had a cause of action for the tortious injury against Third-party Defendant. They also state that under the JTCL, no person shall be entitled to contribution from any person entitled to be indemnified by him. Third-Party Defendants assert that they would have such a right.

Third-Party Defendants also argue that there is no right to contribution under Federal Anti-Discrimination Laws.

They argue that there is no right to contribution for Third-Party Defendants parents as there is no allegation that they were ever apprised of any alleged bullying and the parents were not responsible for their children during the school day. They state that even if notice had been provided the parents would still be entitled to immunity because the allegations against them cannot be considered willful, wanton and reckless disregard of their parental duties to supervise.

**V. Defendant's/Third-Party Plaintiff's Sur-Reply**

Flemington states that Third-Party Defendants reliance on federal case law is inapplicable as their claim for contribution arises out of NJ law. They state that contribution can apply where tortfeasors are liable under different legal theories when the resulting damage is the same. They state that situation where the Plaintiff selectively chooses their defendant is where the Joint Tortfeasor Contribution Law is most applicable to prevent a wrongdoer from escaping liability. They state that the Board and Third-Party Defendants are joint tortfeasors because, without their alleged acts of bullying there would have been no conduct from which the Board failed to protect Plaintiff. They argue that there is no case law to support the position that a student could seek indemnification from them for their own willful acts of bullying.

Flemington argues that parental immunity does not apply because the allegations in the complaint are broad enough to leave open the possibility that Third-Party Defendants engaged in conduct of which their parents were aware. Lastly, Flemington states that it was not incumbent upon them to notify the parents regarding the conduct of their own children.

**VI. Oral Argument on the Motion**

During argument on the motion, Defendant/Third-Party Plaintiff Hunterdon dropped their reliance on the Anti-Bullying Act and LAD as supporting a right to contribution and joined Flemington in reliance on the Joint Tortfeasor Contribution Law. Likewise, Third-Party Defendants abandoned reliance on federal statutes and case law and directed the bulk of their arguments toward the JTCL.

**VII. Court's Decision**

This matter presents a question of first impression. Specifically, where a plaintiff has only brought statutory claims against a defendant that could also be held liable in tort, whether that defendant may bring a claim for contribution against a joint tortfeasor that the plaintiff chose not to sue. This matter comes to the Court by way of a Third Party Defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

The standard governing a motion to dismiss pursuant to Rule 4:6-2(e) is to examine the legal sufficiency of the facts alleged on the face of the complaint. See Rieder v. Department of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The Court, in reviewing a motion to dismiss for failure to state a claim, must search the complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement while giving the plaintiff every reasonable inference. See Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). If the motion to dismiss for failure to state a claim raises matters outside the pleading,

the motion shall then be treated as one for summary judgment and disposed of as provided by R. 4:46. See R. 4:6-2.

All parties acknowledge that there is no independent right of contribution arising out of either the Anti-Bulling Bill of Rights Act, N.J.S.A. 18A:37-13 et seq. or the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Defendant/Third-Party Plaintiffs' argument is that contribution is available to them under the Joint Tortfeasor Contribution Law ("JTCL").

Under the JTCL, N.J.S.A. 2A:53A-1 et seq.:

> Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought.

[N.J.S.A. 2A:53A-3].

"[T]he terms joint tortfeasors means two or more persons jointly or severally liable in tort for the same injury to person or property whether or not judgment has be recovered against all or some of them." N.J.S.A. 2A:53A-1.

> The allowance of contribution is founded upon principles of equity to insure a fair and just division of losses between responsible tortfeasors. See Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 386 (1954) (The right to receive contribution "arises out of a payment in excess of the payor's just share of the common obligation ensuing from a common wrongful act, neglect or default . . .").

[Polidori v. Kordys, 217 N.J. Super. 424, 429].

> How joint tortfeasors arrive at the litigation should not affect the substantive right of contribution. Sattelberger [v. Telep, 14 N.J. 353], 369-72(1954); Markey v. Skog, 129 N.J. Super. 192, 200 (Law Div. 1974). . . . '[I]f plaintiff chooses to sue only one joint tortfeasor and that joint tortfeasor is consequently compelled to bring his own contribution action against other tortfeasors, he should in the contribution action be both entitled to and burdened by the same contribution consequences which would have obtained had plaintiff himself sued both tortfeasors.'

[Holloway v. State, 125 N.J. 386, 402 (1991).]

> It is well settled that 'the true test [for joint tortfeasor contribution] is joint liability and *not* joint, common or concurrent negligence.' Farren v. New Jersey Tpk. Auth., 31 N.J. Super. 356, 362 (App. Div. 1954) (emphasis supplied) (citing Guerriero v. U-Drive-It Co. of New Jersey, 22 N.J. Super. 588, 603 (Law Div. 1952)). The test's core proposition may be stated succinctly: 'It is common liability at the time of the accrual of plaintiff's cause of action which is the *Sine qua non* of defendant's contribution right.' Markey, [supra, 129 N.J. Super. at 200.]

[Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 72 (2004).]

"In order, therefore, to answer whether tortfeasors are 'joint' under the JTCL, we ask whether [Third-Party Plaintiffs and Third –Party Defendants] are subject to common liability to the plaintiff at the time the plaintiff's cause of action accrued." Ibid.

For the purposes of this action, Defendants/Third-Party Plaintiffs' do not dispute their potential liability to Plaintiff in the underlying action. They assert, however, that, while Plaintiff has only sued them based on statutory violations, those violations result from both negligent conduct on their part and that of Third-Party Defendants. The negligent conduct asserted is their failure to supervise the various acts of bullying alleged to have been carried out, and the failure to supervise by Third-Party Defendants' parents.

In Titus v. Lindberg, 49 N.J. 66 (1967), the plaintiff was injured on Fairview School property when the defendant shot him with a paperclip fired with an elastic band. Id. at 70. Lindberg's records described him and very rough and as a bully. Id. at 71. Co-defendant Smith was the principal of Fairview School and testified that "he did the supervising of the arrival of the children." Ibid. The Plaintiff filed suit via complaint alleging negligence by Lindberg in firing the paper clip and negligence by Smith and the School Board for their failure to adequately supervise the children. Id. at 72. The Supreme Court held that, under the JTCL, Smith and the School Board were one entity for the purposes of contribution. See N.J.S.A. 2A:53A-1. After finding that Smith could be held liable despite the fact that school hours has not begun at the time of the incident, the Supreme Court held that, under the JTCL, Smith and the School Board should contribute "no more than half of the judgment." Id. at 80.

While not directly on point, this case is instructive in that it allows for contribution under the JTCL between a Board of Education and a student when both parties conduct resulted in a particular injury to the Plaintiff. In Titus, supra, as here, the defendants' allegedly tortious conduct was their failure to adequately supervise the students and take action to prevent further bullying. In fact, the Supreme Court's discussion of the issue of contribution was so limited it suggests they thought it was a relatively unremarkable proposition; that an individual could

obtain contribution from the entity that failed to supervise them despite their own liability for the harm that occurred. While this Court can find no case that says so directly, the converse situation seems equally reasonable; i.e. that, under the principles of joint liability, that the negligent supervisor could obtain contribution from those they failed to supervise when they are both responsible for the same harm.

What remains then is whether the nature of Plaintiff's underlying suit affects Third-Party Plaintiffs' ability to seek contribution. It is clear from the language cited above that this is not the case. Here, the fact that Plaintiff's sole cause of action against Defendants/Third-Party Plaintiffs is for statutory violations, does not alter the fact their underlying conduct was potentially negligent. Plaintiff points to numerous instances where teachers were aware of Third-Party Defendants conduct, where he contacted school officials to report the acts of alleged bullying and that no action was taken. As early as the sixth grade, Plaintiff alleges that he informed Principal Suchorsky, Vice Principal Quinones and Guidance Counselor McCarthy of the alleged bullying. Plaintiff indicates that there were teachers that had observed the bullying he complained of. As early as the seventh grade, Plaintiff contacted local law enforcement to seek assistance but was referred back to school officials who he alleges took no action. Plaintiff alleges that, even after Vice Principal Sibilia confirmed the alleged acts of bullying nothing was done. Had Defendants/Third-Party Plaintiffs' acted sooner, the acts of alleged bullying which occurred in Plaintiff's latter school years could, potentially, have been prevented.

Additionally, Defendants/Third-Party Plaintiffs' negligence is only made evident by occurrence of Third-Party Defendants' negligence. Third-Party Defendants' conduct is alleged to have begun as early as Plaintiff's fourth grade year. Plaintiff states that he reported their behavior numerous times. Despite these reports and whatever remedial action Defendants/Third-Party Plaintiffs took, Third-Party Defendants continued their behavior.

Absent Defendants/Third-Party Plaintiffs' alleged negligence Third-Party Defendants' alleged negligence would not have occurred or would have been significantly limited. Both acts of negligence were required here for Plaintiff to suffer harm. Plaintiff alleges that he was repeatedly assured that corrective action would be taken and yet, he alleges that nothing was done. Defendants/Third-Party Plaintiffs failure to adequately respond to Plaintiff's complaints of bullying allowed further bullying to take place.

Lastly, there is the issue of the asserted parental immunity.

> [T]he parental immunity doctrine would 'preclude liability in cases of negligent supervision, but not for a parent's willful or wanton failure to supervise his or her children.' Further, the Court stated that the doctrine would be applicable only in 'special situations

> that involve the exercise of parental authority and customary child care.'

[Buono v. Scalia, 179 N.J. 131, 136-37 (2004) (citing Foldi v. Jeffries, 93 N.J. 533, 549, 551 (1983)).]

"Ultimately, whether conduct implicates parental decision-making, or whether it satisfies the 'willful or wanton' exception to the immunity doctrine, will depend on the totality of circumstances in a given case, subject to a fact-sensitive analysis by the trial judge and, when warranted, by a jury." Id. at 138.

Third-Party Defendants ask the Court to dismiss Third-Party Plaintiffs' complaint on the grounds that they are protected by the doctrine of parental immunity. Plaintiff's complaint includes several allegations that acts of bullying and harassment took place on Facebook and that Plaintiff had to contact Facebook directly to have to offending statements removed. Additionally, Plaintiff L.B. states that they spoke directly to the parents of Third-Party Defendants D.W. and T.M. regarding their child's conduct. Finding that contribution is available in this matter and given that very little discovery has been conducted on this issue, dismissal of Third-Party Plaintiffs' complaint on this ground is not warranted.

**VII. Conclusion**

For the foregoing reasons Third-Party Defendants motion to dismiss the Third-Party Complaint is **DENIED**.

Very truly yours,

Hon. Yolanda Ciccone, A.J.S.C.

YC:lg
Enclosures