THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Jane Doe I and Jane Doe II

v.

Concord School District, School Administrative Unit #8 and William Haubrich

No. 07-C-422

ORDER

On September 7, 2007, the plaintiffs commenced this action against the defendants, Concord School District (the "district"), School Administrative Unit #8 (SAU #8), and William Haubrich. Four counts of the plaintiffs' writ were directed against the district and SAU #8 (jointly referred to as the "school defendants"): Count I Negligence; Count II Breach of Fiduciary Duty/Special Duty; Count III Invasion of Privacy; and Count IV Breach of Contract. By order of December 2, 2009, the court dismissed Count III. The school defendants now move to dismiss the remaining counts against them. The plaintiffs object. Because the plaintiffs have failed to allege contract damages, the school defendants' motion to dismiss Count IV is GRANTED. Because the plaintiffs have alleged sufficient facts to be susceptible of a construction that supports relief as to Count I Negligence and Count II Breach of Fiduciary Duty/Special Duty, the school defendants' motion to dismiss those counts is DENIED.

Facts

Defendant William Haubrich was the Concord High School (the "school") athletic director. The plaintiffs are former school students, who were student athletes. As athletic director, Mr. Haubrich had close contact with student athletes and control over routine photographs of student athletes, such as team photos, including images of the plaintiffs.

During the week of August 20, 2007, the District and the school contacted the plaintiffs' parents to inform them that Mr. Haubrich had kept pictures of the plaintiffs on a laptop computer provided to him by the school. He had also used the school-provided laptop and school-provided Internet access to download pornographic images of women who physically resembled the plaintiffs. Mr. Haubrich informed the school that he did not have a personal computer at home and that he did not have any images of the plaintiffs other than those found on his school-provided laptop. The school accepted Mr. Haubrich's statements and ceased its investigation when Mr. Haubrich resigned. No criminal charges were brought against Mr. Haubrich.

In September 2007, plaintiffs Jane Doe I, Jane Doe II, and Jane Doe III filed suit alleging four counts: Count I Negligence; Count II Breach of Fiduciary Duty/Special Duty; Count III Invasion of Privacy; and Count IV Breach of Contract. Plaintiffs Jane Doe IV and Jane Doe V were later added as plaintiffs. Actions filed by Jane Doe III, Jane Doe IV, and Jane Doe V have been severed, so that the current action concerns only Jane Doe I and Jane Doe II. By prior orders, the court dismissed Count III as to all defendants. The instant motion followed.

Analysis

Standard

In reviewing a motion to dismiss for failure to state a claim, the court must determine whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit relief. *Plourde Sand & Gravel v. JGI Eastern*, 154 N.H. 791, 793 (2007). The factual allegations in the complaint are taken as true and all reasonable inferences drawn from the factual allegations are construed most favorably to the complaining party. *Graves v. Estabrook*, 149 N.H. 202, 203 (2003). The court then engages "in a threshold inquiry that tests the facts in the complaint against the applicable law." *Berry v. Watchtower Bible & Tract Soc.*, 152 N.H. 407, 410 (2005) (quotation omitted). The court "must rigorously scrutinize the complaint to

determine whether, on its face, it asserts a cause of action." *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44-45 (1987). "If the facts as alleged would constitute a basis for legal relief, the motion to dismiss should be denied." *Starr v. Governor*, 148 N.H. 72, 73 (2002). The court "need not assume the truth of statements in the petitioner's pleadings, however, that are merely conclusions of law." *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 611 (2010). A claim may be properly dismissed if a party fails to offer "predicate facts to support [its] legal conclusions." *Id.* at 612.

The school defendants advance many grounds for dismissal. The court will first address the arguments that relate to particular counts, and then the general arguments regarding immunity and federal law that apply to multiple counts.

Count I – Negligence

In Count I, the plaintiffs allege that the school negligently supervised Mr. Haubrich. The school defendants argue that the plaintiffs have failed to state a claim for negligence because they have not alleged that they had any physical manifestations of the emotional distress. It is well settled in New Hampshire that "before a plaintiff can recover damages for emotional distress pursuant to a negligence cause of action, he or she must prove that physical injury resulted therefrom." *Thorpe v. State*, 133 N.H. 299, 304 (1990). Even when the plaintiff is sincerely anxious or upset, "recovery for mental angst, absent additional objectively verifiable physical symptoms, is inconsistent with [New Hampshire's] prior case law." *Palmer v. Nan King Restaurant*, 147 N.H. 681, 684 (2002).

The plaintiffs raise several objections, including that they are not required to plead the physical symptoms but only to prove them at trial. Under New Hampshire's "system of notice pleadings," the court takes "a liberal approach to the technical requirements of pleadings." *Pike Industries v. Hiltz Construction*, 143 N.H. 1, 3 (1998). The court agrees with the plaintiffs that

the writ adequately notifies the school defendants of the theories of liability. The plaintiffs are not required to provide in their writ documentation of all injuries they sustained. Though the plaintiffs may be required to prove physical symptoms of their distress at trial or to provide some evidence of physical symptoms if this issue is raised in a motion for summary judgment, the court concludes that the writ is sufficient to withstand a motion to dismiss. Accordingly, the school defendants' motion to dismiss Count I is DENIED.

Count IV – Breach of Contract

In Count IV, the plaintiffs aver that they and/or their parents signed a release authorizing the defendants to use their images or likenesses for limited purposes associated with the school and its athletic program. They allege that Mr. Haubrich violated the contract when he used their images for purposes not within the scope of the release. They allege that the school is liable for Mr. Haubrich's actions "under the doctrine of *respondeat superior*."

"A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 at 5 (1981). A party breaches a contract by failing, "without legal excuse, to perform any promise which forms the whole or part of a contract." *Poland v. Twomey*, 156 N.H. 412, 415 (2007) (quotation omitted). The burden is on the plaintiffs to prove that their damages resulted from the defendant's breach of contract. *Bell v. Liberty Mut. Ins. Co.*, 146 N.H. 190, 194 (2001). Damages for mental distress "are generally not recoverable in a contract action." *Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607, 615 (1978). There may be exceptions to this rule. *Guerin v. N.H. Catholic Charities*, 120 N.H. 501, 506 (1980).

The court agrees with the school defendants that the plaintiffs cannot recover for mental distress in a breach of contract action. Though there may be exceptions to this rule, the plaintiffs have not shown that any exception applies to this case. "Emotional pain, humiliation, embar-

rassment and anguish, as well as loss of enjoyment of life and other non-pecuniary and pecuniary losses" are the only damages identified in Count IV. Because these damages for mental distress are not recoverable for the alleged breach of contract, the count fails to state a claim upon which relief could be granted. Accordingly, the school defendants' motion to dismiss Count IV is GRANTED.

Governmental Immunity, RSA 507-B:5

The school defendants argue that RSA 507-B:5 entitles them to immunity from common law causes of action for personal injury and, accordingly, that the plaintiffs cannot prevail on their negligence and breach of duty claims. The plaintiffs object on four grounds: (1) that RSA 507-B:5 was meant only to bar suits brought against governmental units based on their occupation, maintenance, and operation of motor vehicles and buildings; (2) that RSA 194:3-d provides a cause of action against the defendants and, thus, abrogates the immunity; (3) that New Hampshire case law recognizes the tort of negligent supervision against schools; and (4) that the defendants cannot claim immunity if they have insurance that covers this risk. The court will address each of these objections in turn.

First, the plaintiffs argue that the school defendants misinterpret RSA 507-B:5. "The interpretation of a statute is a question of law...." *Zorn v. Demetri*, 158 NH. 437, 438 (2009).

> [In interpreting a statute, courts] look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. [Courts] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [Courts] construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, [courts] do not consider words and phrases in isolation, but rather within the context of the statute as a whole.

Id. at 438-39 (citation omitted).

The language of RSA 507-B:5 is plain and unambiguous. "No governmental unit shall be held liable in any action to recover for bodily injury, personal injury or property damage except as provided by this chapter or as is provided or may be provided by other statute." The language of the provision does not support the plaintiffs' argument that it is meant only to apply to claims based on ownership, occupation, or maintenance of vehicles or buildings. Indeed, this is a misreading of the statutory scheme, as there is a separate provision in the same chapter that **permits** suits against governmental units for negligence related to premises and vehicles. *See* RSA 507-B:2. The plaintiffs fail also offer any case law for their argument that the provision only applies to premises and vehicles. This suit is an action for personal injury. *See id.* at 507-B:1, III(a). The school defendants are governmental units. *Id.* at 507-B:1, I. This action is, therefore, barred under RSA 507-B:5 unless otherwise provided for by law.

The plaintiffs' next argument is that other law does allow this action. Specifically, they maintain that they have a statutory cause of action under RSA 194:3-d, I. That statute provides that "[e]very school district which has computer systems or networks shall adopt a policy which outlines the intended appropriate and acceptable use, as well as the inappropriate and illegal use, of the school district computer systems and networks, including but not limited to, the Internet." The plaintiffs' argument is flawed in at least two respects.

First, even if the court assumes that this provision creates a private cause of action, the plaintiffs' suit is not premised on an allegation that the school defendants violated this statutory provision. The writ does not reference this provision of law. The writ does not allege that the district failed to adopt a policy outlining the appropriate use of computer systems and networks. The writ alleges common law negligent supervision and common law breach of duty based on a special relationship.

Second, the plaintiffs fail to show that RSA 194:3-d, I creates a private cause of action and abrogates governmental immunity. The provision neither explicitly nor implicitly provides for private actions against school districts. Where the legislature has neither explicitly nor impliedly created a private right of action enabling private citizens to seek declarations that a statute has been violated, damages, or other relief, courts will find that no such right of action exists. *Blagbrough Family Realty Trust v. A&T Forest Prods.*, 155 N.H. 29, 45 (2007); *Cross v. Brown*, 148 N.H. 485, 486-87 (2002); *Snierson v. Scruton*, 145 N.H. 73, 79 (2000). RSA 194:3-d, I—the statute cited by the plaintiffs in their objection—does not provide a cause of action that would allow them to avoid the immunity provision of RSA 507-B:5.

It is unclear in the plaintiffs' objection whether they are also arguing separately that RSA 194:3-d, I supplies the standard of conduct for a common law cause of action. *See Marquay v. Eno*, 139 N.H. 708, 713 (1995) (distinguishing statutory causes of action from negligence *per se*). To the extent that the plaintiffs are arguing that they have a common law cause of action and that RSA 194:3-d supplies the standard of conduct to which the school defendants should be held, *see id.*, their argument still fails because the common law action is barred by RSA 507-B:5. This argument is also deficient because, as the court has explained above, the plaintiffs' claims are not based on the district's failure to adopt a policy under RSA 194:3-d, I. Thus, even if RSA 194:3-d could be construed as supplying a duty for a common law cause of action, the plaintiffs' claim is not based on breach of that duty.

The plaintiffs' next argue that New Hampshire recognizes the tort of negligent supervision brought against a school district. *See Marquay*, 139 N.H. at 716-20. Even if the plaintiffs are correct that the tort is cognizable, it does not follow that the defendants are not nevertheless immune. Indeed, immunity would be a meaningless doctrine if it only applied to situations where

there was no underlying liability. The fact that RSA 507-B:5 immunizes governmental units against certain common law causes of action does not mean that those causes of action do not exist. It simply means that the governmental units cannot be held liable upon them. The plaintiffs have failed to explain how this argument defeats the school defendants' invocation of immunity.

The plaintiffs next argue that the school defendants cannot claim immunity if they are insured against this risk. *See* RSA 507-B:7-a. The school defendants respond that they do not have insurance, although the school does participate in Primex—a pooled risk management program. The court cannot determine based on the face of the writ, alone, whether Primex constitutes insurance or whether it would provide coverage in this case. If Primex is insurance and does provide coverage, the plaintiffs are correct when they claim that immunity has been waived, at least to the extent of the coverage. This issue might be addressed in the context of summary judgment, but it cannot be addressed on a motion to dismiss.

The court concludes that RSA 507-B:5 immunizes the school defendants against the plaintiffs' common law claims—negligence and breach of special duty—unless this is a risk against which they procured insurance. The court cannot decide the issue of insurance upon the present motion. On this basis, the motion must be denied. If, however, the school defendants file an appropriate motion that documents a lack of insurance, which cannot be genuinely disputed by the plaintiffs, the court will revisit this issue.

Discretionary Function Immunity

The school defendants next assert that they are protected from suit by discretionary function immunity. In light of the court's analysis of RSA 507-B:5 statutory immunity, it is unnecessary to consider separately the question of discretionary function immunity. Though the two types of immunity differ, the school defendants will be in no better position if both types of im-

munity exist rather than only one type. If the school defendants disagree, they may file a renewed motion with court asking it to address this issue.

Communications Decency Act

Finally, the school defendants argue that the Communications Decency Act protects them from suit. *See* 47 U.S.C. §230. In light of the court's ruling on immunity, it would appear unnecessary for the court to address this issue in detail at this time. If state law immunizes the school defendants from suit, the court need not consider whether imposing liability on the facts of this case would conflict with federal law. Again, if the school defendants disagree, they may file a renewed motion asking the court to address this issue.

Conclusion

Based on the foregoing, the court concludes that the plaintiffs have failed to allege contract damages. Accordingly, the school defendants' motion to dismiss Count IV (Breach of Contract) is GRANTED. As the plaintiffs have alleged facts that are susceptible of a construction that will allow relief on their remaining open claims, the school defendants' motion to dismiss Count I (Negligence) and Count II (Breach of Fiduciary Duty/Special Duty) is DENIED.

So ORDERED.

Date: June 21, 2010

LARRY M. SMUKLER
PRESIDING JUSTICE