COMMONWEALTH OF MASSACHUSETTS
WORCESTER, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 96-101A

VERONICA PAOLANTONIO, Plaintiff)
)
v.)
)
WACHUSETT MOUNTAIN SKI AREA,)
INC., JOHN CHRISTOPHER CASLING,)
THE RECTORY SCHOOL, INC.,)
Defendants)

MEMORANDUM IN SUPPORT OF DEFENDANT, THE RECTORY SCHOOL, INC.'S, MOTION TO DISMISS

I. PLAINTIFF'S ALLEGATIONS

The plaintiff alleges that she suffered a personal injury when a skier named John Christoper Casling, a minor, knocked her down while she was waiting in a lift line. Complaint, ¶7. Mr. Casling was a participant in a ski trip to Wachusett Mountain sponsored by the defendant, Rectory School. Id., ¶19. The school had physical and/or legal custody of Mr. Casling, and a duty to supervise him. Id., ¶20. The school was negligent by failing to supervise Mr. Casling, in that it failed to instruct him to ski carefully, responsibly, and to maintain his speed and course at all times, to obey the law and to curtail his violations of safe conduct. Id., ¶21.

II. APPLICABLE LAW

It is settled that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of <her> claim which would entitle <her> to relief. Nader v. Citron, 372 Mass. 96, 98 (1977), quoting Conley v. Gibson, 355 U.S. 41, 45-46

(1957). In evaluating the sufficiency of a complaint, the allegations of the complaint and any permissible inferences are to be drawn in plaintiff's favor. Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 429 (1991).

In Massachusetts, parents are not generally liable for torts committed by their children. Sabatinelli v. Butler, 363 Mass. 565 (1973). Apart from an exception not applicable here, childrens' negligence is not imputed to their parents. G.L. c. 231, §85G (parents' liability for children's vandalism). In order to state an actionable claim against a parent for negligent supervision of his child, there must be an allegation of the child's "tendency" and "propensity" toward the dangerous conduct which injured the plaintiff. DePasquale v. Della Russo, 349 Mass. 655 (1965). A duty of parental discipline does not arise until the parent knew of his child's "propensity for the type of harmful conduct complained of, and ha<d> an opportunity to take reasonably corrective measures." Caldwell v. Zaher, 344 Mass. 590, 592 (1962). Alioto v. Marnell, 402 Mass. 36, 38 (1988).

A school which has physical custody of a child stands in loco parentis. "Although as a general rule, there is not duty to protect others from the negligent or wrongful acts of third parties, based on social values and customs, such a duty may be premised on the existence of a special relationship between the person or entity on whom it is sought to impose liability." Mosco v. Raytheon, 416 Mass. 395, 401 (1993) (no special relationship between employer and third party injured by an employee acting outside of the scope of his employment). There

are no cases recognizing the existence of a special duty between schools and would be victims of students' tortious conduct.

III. ARGUMENT AND AUTHORITY

The plaintiff has not stated an actionable claim against the Rectory School. The school's obligation to supervise its charges was co-extensive with duties owed by parents. There is no viable claim stated for a school's failure to supervise the conduct of a student absent (1) knowledge of a student's propensity for of the type of dangerous harmful conduct complained of, and (2) an opportunity for the school to take reasonably corrective measures. See Caldwell v. Zaher, 344 Mass. 590, 592 (1962).

Whether there is a duty owed by a particular actor is a question of law for the court. Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624, 629 (1989). See Prosser and Keeton, Torts (5th Ed. 1984), at 236 (determining existence of duty is exclusive province of court). Here, crediting all plaintiff's allegations and indulging all reasonable infererences in her favor yields no more than a school being sued the negligence of one of its students. The fact that the student was on a school-sponsored ski trip does not somehow make the student's alleged negligence imputable. In addition, the school cannot be liable for negligent supervision without an allegation the school knew the student's dangerous propensities and had an opportunity to curb this behavior. In sum, the plaintiff has not pleaded a viable claim since there is no legal duty incumbent upon the defendant school to supervise the plaintiff's alleged tortfeasor, nor is there any other meritorious basis for liability pleaded or

apparent.

"There is no duty owed when the risk which results from the plaintiff's injury is not one which could be reasonably anticipated by the defendant." Glick v. Prince Italian Foods of Saugus, Inc., 25 Mass. App. Ct. 901, 902 (1987) (allowing motion to dismiss for failure to state a claim). Cf., Husband v. Dubose, 26 Mass. App. Ct. 667, 670 (1988) (no duty on social host to anticipate a guest might violently attack another guest with a deadly weapon). Hence, in this case the plaintiff was not owed a duty of protection by the school since the school had no reason to suppose this accident would occur.

The facts of this case are more analogous to those decisions which had not found a "special relationship" between a defendant and a plaintiff than those which have. Compare, Nickerson v. Commonwealth, 397 Mass. 476 (1986) (registratrar of motor vehicles had no special relationship with driver injured by uninsured motorist); Ribeiro v. Granby, 395 Mass. 608 (1985) (no special relationship between code inspector and victim of fire caused by a known code violation); Sampson v. Lynn, 405 Mass. 29 (1989) (no special relationship between gunshot victim and city issuing gun permit); Appleton v. Hudson, 397 Mass. 812, 815-816 (1986) (no special relationship between police and unidentifiable foreseeable perpetrators who might injure plaintiff), with A.L. v. Commonwealth, 402 Mass. 234 (1988) (probation officer owed a special duty to students molested by teacher, where terms of teacher's probation forbade him from teaching at school); Irwin v. Ware, 392 Mass. 745 (1984) (police officer owed other

motorists a special duty to detain an intoxicated driver); and Sharpe v. Peter Pan Bus Lines, Inc., 401 Mass. 788 (1988) (common carrier owing passengers highest duty of care was bound to take measures to protect passengers from crime).

The decided cases from other jurisdictions have uniformly failed to find any special relationship between a school and a tort victim of one of its students. In University of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987), it was held that a college did not have special relationship with each student necessary to oblige it to take steps to protect students from harm posed by a trampoline owned by a fraternity and located on land the fraternity leased from the college. Id., at 58. Accord, Rabel v. Illinois Wesleyan University, 514 N.E.2d 552, 561 (Ill. App. 1987) (university owed no duty to control the conduct of another student so as to prevent that student from harming others); Swanson v. Wabash College, 504 N.E.2d 327, 330 (Ind. App. 1987) (college had no duty to supervise a recreational baseball practice session or control, and had no special relationship with baseball player/student who caused injury to another student).

A motion to dismiss for failure to state a claim was affirmed in Cook v. School District UH3J, 731 P.2d 443, 444 (Ore. App. 1987), where it was held a school district owed no duty to supervise an "away" basketball game, absent any allegation the district knew fighting would ensue. Similarly, a military college owed no duty to control the conduct of a student cadet who shot two railway engineers. The court ruled there was no special relationship between the college and the student; the

college did not have a right of control over the actions of the student. Smith v. Day, 538 A.2d 157, 158 (Vt. 1987). Cf., Nero v. Kansas State University, 861 P.2d 678, 773 (affirming that part of summary judgment that held that university-student relationship did not, in itself, impose a duty on the university to protect would-be tort victims from its students).

IV. CONCLUSION

For all the foregoing reasons, the defendant respectfully requests the Court to dismiss Count III against it.

THE RECTORY SCHOOL, INC.,
Defendant

By ______________________________
JOHN B. STEWART (BBO #551180)
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MOTION TO DISMISS

Now comes the defendant, The Rectory School, Inc. ("Rectory School") and moves the Court to dismiss the plaintiff's claim against it for failure to state a claim upon which relief may be granted. The Rectory School files herewith a memorandum of law supporting it motion.

WHEREFORE, the Rectory School respectfully requests the Court to dismiss the plaintiff's claim against it (Count III).

THE RECTORY SCHOOL, INC.,
Defendant

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