

2011 WL 10953406 (D.Hawai'i) (Trial Pleading)
United States District Court, D. Hawai'i.

Jane DOE, Individually and as Next Friend of John Doe, a minor; Richard Roe 1, Individually and on behalf of Jane Roe 1, a minor; Richard Roe 2 and Mrs. Richard Roe 2, Individually and on behalf of Jane Roe2, a minor; all Individually and on behalf of a class of persons similarly situated, Plaintiffs,

v.

State of Hawaii, Scott O'Neal, Sydney Dickerson, and John Does 1-10, Defendants;
State of Hawaii, Third-Party Plaintiff,

v.

Peter Poes 1-100, Patricia Poes 1-100, and Parent Poes 1-100, Third-Party Defendants;
Scott O'Neal, Third-Party Plaintiff,

v.

Roxsanne Tomita, Third-Party Defendants.

No. CV11-00550 DAE KSC.

November 3, 2011.

Defendant Scott O'Neal's First Amended Third-Party Complaint Against Roxsanne Tomita; Certificate of Service

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DEFENDANT SCOTT O'NEAL'S FIRST AMENDED THIRD-PARTY COMPLAINT AGAINST ROXSANNE TOMITA

Defendant Scott O'Neal ("O'Neal"), by and through his attorneys, McCorriston Miller Mukai MacKinnon LLP, hereby alleges his First Amended Third-Party Complaint against Roxsanne Tomita ("Tomita") as follows:

1. O'Neal is, and was at all times relevant hereto, a resident of the City and County of Honolulu, in the State of Hawai'i.
2. Upon information and belief, Tomita is, and was at all times relevant hereto, a resident of the County of Hawai'i, in the State of Hawai'i.
3. On August 26, 2011, Plaintiffs Jane Doe, Individually and as next Friend of John Doe, a minor, Richard Roe 1, Individually and on behalf of Jane Roe 1, a minor, Richard Roe 2 and Mrs. Richard Roe 2, Individually and on behalf of Jane Roe 2, a minor, and all Individually and on behalf of a class of persons similarly situated (collectively, "Plaintiffs"), filed their First Amended Complaint in the Circuit Court of the First Circuit, State of Hawai'i, in a proceeding designated as Civil No. 11-1-1712-08 (GWBC) ("First Amended Complaint"), alleging that O'Neal is liable to Plaintiffs.
4. The State proceeding involving the First Amended Complaint was removed on September 9, 2011 to this Court.
5. This Court has supplemental jurisdiction of the claims in this Third-Party Complaint arising under state law pursuant to 28 U.S.C. § 1367 because they are so related to the federal claims asserted by Plaintiffs that they form part of the same case or controversy and derive from a common nucleus of operative fact with the underlying dispute.

6. Venue is proper in the United States District Court for the District of Hawai'i pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims asserted in this Third-Party Complaint occurred in this judicial district.
7. Like O'Neal, Tomita was an independent contractor of the State of Hawai'i Department of Education to provide individual, group, family, and consultative services for students that attended the Hawaii School for the Deaf and the Blind ("HSDB").
8. The same rules and guidelines apply to both O'Neal and Tomita's practices.
9. Upon information and belief, during all times relevant, O'Neal and Tomita were the only outside counselors for HSDB.
10. Both O'Neal and Tomita received their clients through the same procedure: (1) first, an incident or conduct is reported to HSDB; (2) second, the individuals and situations involved are reviewed by the school and a team from the Individualized Education Program ("IEP") administrated by and through the Department of Education ("DOE"), additional evaluations are requested if warranted, and a determination is made by the IEP team as to whether services are required that are beyond the scope of the school to provide directly; and (3) third, a referral is made to either O'Neal or Tomita for behavioral health counseling and therapy.
11. O'Neal was predominantly referred male students for counseling.
12. Tomita was predominantly referred female students for counseling.
13. All students were referred to O'Neal or Tomita for counseling by the IEP process.
14. O'Neal and Tomita co-facilitated a counseling group in 2009 for five boys who had been accused of engaging in inappropriate sexual activities with other students.
15. Along with O'Neal, Tomita worked with these boys for at least the first 7 months of this group.
16. The first several sessions of any counseling session, whether in an individual or group setting, consist of working with the client to determine why they think they are receiving and are being referred for counseling, along with having the client talk about what they did or did not do that resulted in the need for counseling.
17. Plaintiffs allege that "members of the 'Ringleaders' admitted to school officials and counselors, including O'Neal, that they had in fact harmed and assaulted other students."
18. If anything was "admitted" to O'Neal, it would have also been "admitted" to Tomita in the group counseling sessions.
19. One of the Plaintiffs has been a client of Tomita since 2000.
20. If there were things disclosed by this client that needed to be reported, it was Tomita's responsibility to do so.
21. Tomita also met individually with three boys from the group counseling session on a semi-regular basis, meeting with the boys and their girlfriends.
22. If there were things disclosed during these individual session that needed to be reported, it was Tomita's responsibility to do so.
23. Further, Tomita told the parent of one of O'Neal's clients-a student of HSDB-that the client had been raped at HSDB and that both O'Neal and HSDB knew of the incident but did not inform the parent.

24. This allegation of rape was unfounded and the evidence relied upon by Tomita when informing the parent did not exist.
25. This was a false and unfounded claim that Tomita fostered but failed to do any level of confirmation.
26. The parent subsequently removed the client from HSDB and refused to allow O'Neal to work with the client.
27. Upon information and belief, Tomita has reported other untrue incidents to parents to incite their anger and create police reports to get students she felt were guilty of committing crimes arrested or prosecuted.
28. Tomita has also interrogated students who are clients of O'Neal's, without informing O'Neal and in an effort to block O'Neal from communicating with his own clients.
29. Tomita has conducted many of these interrogations without requesting parental consent or even notification or consent.
30. For instance, although a parent stated that Tomita could meet with a child-O'Neal's client-if and only if O'Neal was present, Tomita still met with the student repeatedly, all without the parent's permission.
31. This conduct is in violation of both DOE and professional standards.

COUNT I

(Indemnification, Contribution, Subrogation, and/or Reimbursement)

32. The allegations set forth in Paragraphs 1 through 31 above are re-alleged and hereby incorporated by reference, as if fully set forth in full herein.
33. If Plaintiffs suffered any injuries or damages as alleged in their First Amended Complaint, said injuries or damages are the liability and responsibility of Tomita.
34. If Plaintiffs are entitled to recover, Plaintiffs' right of recovery is against Tomita and not O'Neal.
35. If there was any wrongful conduct on the part of O'Neal, O'Neal's conduct was merely passive and secondary; whereas the negligence, liability, or other fault of Tomita was active and primary.
36. In the event that it is determined that O'Neal is liable to Plaintiffs, O'Neal is entitled to indemnification, contribution, subrogation, and/or reimbursement from Tomita.

COUNT II

(Tortious Interference with Contractual Relations)

37. The allegations set forth in Paragraphs 1 through 36 above are re-alleged and hereby incorporated by reference, as if fully set forth in full herein.
38. At all relevant times, O'Neal had a valid contract to provide individual, group, family, and consultative services for students that attended HSDB.

39. Tomita was aware or should have been aware of said contract.
40. Tomita had and continues to maintain a purposeful intent to interfere with said contract.
41. Tomita's purposeful intent is evidenced by a concerted effort to tarnish O'Neal's reputation at HSDB.
42. There is no justification on the part of Tomita for her tortious interference.
43. Tomita has much to gain by her tortious interference.
44. Only two providers in the State of Hawai'i-O'Neal and Tomita-provide individual, group, family, and consultative services to the deaf community.
45. By tortiously interfering with O'Neal's contract, as described above, Tomita could ensure that she becomes the only provider, and thus be open to taking on all the students at HSDB.
46. As a direct and proximate result of Tomita's tortious interference, O'Neal sustained damages in an amount to be shown at trial.

PRAYER FOR RELIEF

WHEREFORE, O'Neal prays as follows:

- A. That the First Amended Complaint against O'Neal be dismissed against him;
- B. That if Plaintiffs are entitled to a judgment, such judgment be entered against Tomita, not O'Neal;
- C. That, if judgment is entered in favor of Plaintiffs and against O'Neal, O'Neal be awarded a corresponding judgment against Tomita;
- D. That, if it be determined that Tomita and O'Neal are joint tortfeasors with respect to the allegations of Plaintiffs, the relative degree of fault of each tortfeasor be determined and O'Neal be given a judgment over and against Tomita for the amount in excess of their pro rata share of such judgment;
- E. That judgment be entered in favor of O'Neal and against Tomita on all claims presented in this First Amended Third-Party Complaint;
- F. That general and special damages be awarded in O'Neal's favor and against Tomita;
- G. That O'Neal's be awarded his costs and attorneys' fees in this Third-Party Complaint against Tomita; and
- H. That O'Neal be awarded such other and further relief as the Court deems just and equitable under the circumstances.

DATED: Honolulu, Hawai'i, NOV 03 2011.

<<signature>>

RANDALL K. SCHMITT

JORDON J. KIMURA

Attorneys for Defendant

SCOTT O'NEAL