

**Nocilla v Middle Country Central School District**

2002 NY Slip Op 30016(U)

July 30, 2002

Supreme Court, Suffolk County

Docket Number: 0016418/6418

Judge: Patrick Henry

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## SHORT FORM ORDER



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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XV - SUFFOLK COUNTY

PRESENT:

HON. PATRICK HENRY

JOHN NOCILLA, an infant by and through  
his mother and natural guardian, DEBORAH  
M. NOCILLA, and DEBORAH M. NOCILLA,  
individually,

Plaintiffs,

v

MIDDLE COUNTRY CENTRAL SCHOOL  
DISTRICT and STEVEN DENNIS,

Defendants.

Motion Date: 3/28/02, 5/3Motion: 004-MD     Final Disposition  X   Non-Final Disposition

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REID, DONLON, TRAVIS & FISHLINGER,  
ESQS.

By: Laura A. Endrizzi  
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**ORDERED** that this motion by defendant Middle Country Central School District for summary judgment dismissing the complaint, pursuant to CPLR 3212, is denied.

This is **an** action for personal injuries arising out of an intentional assault upon the infant plaintiff by defendant Dennis, a fellow student, inside Newfield High School within movant's School District.

Most of the record facts are not in dispute. The attack occurred in the first floor hallway, crowded with students moving **from** classroom to classroom. The infant plaintiff was walking behind Dennis and his companion, a student identified as a Frank De Stefano. The plaintiff accidentally bumped into Dennis from behind. Dennis, without a word, turned and punched the plaintiff in the mouth, inflicting significant injury to plaintiffs teeth, mouth and jaw.

Defendant Dennis has defaulted in this action, and partial judgment has been entered against him on the liability issue. He had been arrested for this incident -- not his first brush with the law -- and a proceeding held in Family Court, the outcome of which is not clear in the record before us. He apparently cannot now be located, and he was, of course, never deposed.

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At the time of this attack -- January 20, 1998-- Dennis was not a student at Newfield High School, or in the Middle Country School District. He had been, at one time, but his behavior was so uncontrollable that he was transferred to a facility of the Board of Cooperative Education Services ("BOCES") at Brookhaven Learning Center. At the time of this attack, Dennis had been suspended from the BOCES facility for uncontrollable behavior, including transportation on the BOCES school bus. Thus, no one -- except probably Frank De Stefano -- knows how Dennis got to Newfield High School that morning, or how he had gained entry thereto.

The movant was deposed through its coordinator of Special Education. Through her, we learn that Dennis was a deeply troubled youngster, certainly prone to violence and a menace to the students and others wherever he was. He had no business inside the High School, and, if the security guards or other school authorities had known who he was, he would have been ejected. The unanswered question is, who knew he was in the High School that morning?

One of movant's Assistant Principals testified to the security regime at Newfield High; and the Court finds no fault with it.

Dennis's status was that of a trespasser, and the Court acknowledges the School District's difficulty in protecting against unknown trespassers.

Troubling to the Court is the School District's cover-up mentality about the identity of plaintiffs assailant and his apparent notoriety around Newfield High School, even though he was not, as of January 20, 1998, enrolled there.

The infant plaintiff testified at his EBT that, when he was in the school nurse's office after the assault, a number of students came in and named Dennis as the assailant (p. 22 of plaintiff's EBT transcript); that it was rumored that School District students other than Newfield High students intermingled at the High School, without permission (34); and that Dennis had been hanging out at the High School because BOCES had suspended him and he had no place else to go and nothing to do (38).

The infant plaintiff's mother, the co-plaintiff, testified at her EBT and at the municipal claim hearing that, after she had taken her son to the hospital emergency room, she brought him home and she returned to the High School to speak with the Principal; that the Principal would not give her the assailant's name or discuss the incident with her; that she was not allowed to telephone the police from the Principal's Office, she had to use the public telephone in the hall; and that, even prior to all this, a number of students had given her Dennis's name as her son's attacker; and, most significantly, that Dennis was "always" hanging around the High School, without permission (pp. 49-51 of the EBT transcript and pp. 51-53 of the transcript of the municipal claim hearing).


On the basis of the record before us, we find and hold that a question of fact exists, precluding summary adjudication, as to whether defendant Dennis habitually frequented Newfield High School without permission prior to the subject attack, such that School District authorities knew, or should have known, of his habitual presence. The record establishes Dennis's notoriety, both among the students and among the school authorities, as violent and uncontrollable. The infant plaintiff should have the chance to establish, at trial, Dennis's habitual presence at the High School.

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We have considered carefully defendant's authorities of law, and they are accurate for the propositions cited in them. We agree, for example, that defendant's security protocol to protect against trespassers is a governmental function involving policymaking, and thus not subject to judicial second guessing (*Jimenez v. City of New York*, \_\_\_ AD \_\_\_, 738 NYS2d 380 [2<sup>nd</sup> Dep't 2002]). We agree likewise that schools are usually not liable for the acts of a student unidentified (e.g., *Lynch v. City of Yonkers*, \_\_\_ AD2d \_\_\_, 739 NYS2d 441 [2<sup>nd</sup> Dep't 2002]), or for acts that were impulsive, unexpected or unforeseeable (*Mirand v. City of New York*, 84 NY2d 44, 614 NYS2d 372 [1994]; and *Calabrese v. Baldwin Union Free School Dist.*, \_\_\_ AD2d \_\_\_, 741 NYS2d 569 [2<sup>nd</sup> Dep't 2002]). Where, however, the student assailant had previously threatened the victim, and the victim had so notified school authorities, the attack that then came was foreseeable by those who might have prevented it (*Druba v. East Greenbush Central School Dist.*, 289 AD2d 767, 734 NYS2d 331 [3<sup>rd</sup> Dep't 2001]).

There will be a certification conference in this case on August 20, 2002, 9:30 a.m. at the Supreme Court, 235 Griffing Avenue, Riverhead, New York, Courtroom 201.

Dated: 30 July 2002



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J.S.C.