SHORT FORM ORDER INDEX NO. 28571/2003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

MELVIN GOODLEY, an infant by his parent and natural guardian, DAMARIS ESPINOSA, and DAMARIS ESPINOSA, individually,

Plaintiff,

-against-

CENTRAL ISLIP UNION FREE SCHOOL DISTRICT,

Defendant.

ORIG. RETURN DATE: MARCH 8, 2007
FINAL SUBMISSION DATE: MARCH 9, 2007
MTN. SEQ. #: 001
MOTION: MOT D

PLAINTIFF'S ATTORNEYS:
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DEFENDANT'S ATTORNEY:
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Upon the following papers numbered 1 to 6 read on this motion TO DISMISS CAUSE OF ACTION AND PRECLUDE; Motion *in Limine* and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Replying Affidavits and supporting papers 6; it is

ORDERED that this motion *in limine* by the defendant for an Order, pursuant to CPLR 3211(a)(7), dismissing the plaintiff's first cause of action in the within Verified Complaint, dated October 9, 2003, alleging negligence against the defendant for alleged failure to provide adequate security, on the grounds that it fails to state a cause of action, has been rendered moot as more fully set forth herein; and it is further

ORDERED that this motion *in limine* by the defendant for an Order excluding any and all evidence, references to such evidence, testimony or argument relating to the Suffolk County Police Department responses to Central Islip High School, or Wheeler Road, on dates prior to and including the incident alleged in the plaintiff's Verified Complaint, on the grounds that such evidence is irrelevant, immaterial, confusing, and highly prejudicial, is determined as provided herein; and it is further

ORDERED that this motion *in limine* by the defendant for an Order precluding the plaintiff's proposed expert testimony by HENRY BRANCHE, and any and all evidence, references to such evidence, testimony, argument or suggestion in the presence of the jury, that security at Central Islip High School was inadequate on November 6, 2002, the date of the subject incident, or at any time, on the grounds that such evidence is irrelevant, immaterial, confusing, and highly prejudicial, as the disclosed opinions contained in plaintiffs' expert disclosure cannot legally support a finding of negligence against defendant, and that plaintiffs' Expert Witness Disclosure fails to comply with the requirements of CPLR 3101(d), in that it fails to disclose, in reasonable detail, the substance of the facts and opinions on which Mr. Branche is expected to testify, nor a summary of the grounds for Mr. Branche's proposed testimony, is hereby **DENIED**.

This is a case of some importance due to the nature of the parties and the facts and circumstances surrounding the unfortunate events of November 6, 2002. The procedural posture of the case is an unfortunate indication of the nature of litigation in that the substantive issues herein are raised for the first time in the context of *in limine* applications on the eve of trial. The issues presented herein have far reaching implications for parents, students, school districts, administrators, teachers, and other school district personnel.

MOTION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION

The defendant moves for dismissal of the plaintiff's first cause of action, pursuant to CPLR 3211(a)(7), for failure to plead a cause of action upon which relief may be granted. The plaintiff acknowledges the difficulty in pleading a cause of action the gravamen of which is failure to provide adequate security

for a student attending high school. In the face of the defendant's motion, the plaintiff has now sought to characterize the distinction between the first cause of action and the second cause of action as an issue of simple negligence versus recklessness in the school district's duty to supervise those students under its care and control. The plaintiff proffers Article 16 of the CPLR concerning contribution as the legal basis for a separately pleaded cause of action.

The plaintiff concedes that they have not pleaded a cause of action sufficient to withstand scrutiny under the rigors of *Cuffy v City of New York*, 69 NY2d 255 (1987), and has abandoned the attempt. Therefore, that branch of the defendant's motion seeking dismissal of the plaintiff's first cause of action is rendered moot, the plaintiff having conceded the point. As such, the plaintiff will not be permitted to proceed at trial on the theory of failure to provide adequate security. Taking the complaint as a whole and viewing it in the light most favorable to the plaintiff, the gravamen of the action is one for failure of adequate supervision. The record will determine the issue of recklessness versus mere negligence, and the appropriate jury charges and interrogatories will be addressed at the appropriate time prior to summation.

MOTION TO EXCLUDE PRIOR INCIDENTS

The foregoing, however, as indicated raises other issues for which the defendant requests additional relief. The plaintiff avers that the first cause of action was, in the first instance, one for failure to adequately supervise students under the school district's control on a theory of negligence. For purposes of justifying the pleading of two separate causes of action, the plaintiff at this late date alleges that the second cause of action was pleaded as the same failure to provide adequate supervision of students under the school district's control, but on a theory of recklessness rather than negligence. The proffered reason was to avail the plaintiff of the CPLR Article 16 protections on the issue of contribution, and the plaintiff specifically adopts CPLR 1602(7) as his rationale. This somewhat strained logic is quite unnecessary. The crux of the matter is the theory of negligent failure of the school district to provide adequate supervision. If the plaintiff wishes to proceed on a theory of recklessness as an alternative theory of liability, he is certainly welcome and permitted to do so.

As a result of the plaintiff's strategic and now tactical choices, the issue becomes which individuals were inadequately supervised. There are but a limited selection of persons in need of supervision. The infant plaintiff himself, the plaintiff's attackers, the two combatants and the others present who may have been merely spectators at an altercation. The plaintiff also seems to argue that the school district was under an affirmative duty to supervise the original combatants who served as the attraction to the other students when there is absolutely no indication that they themselves were students attending the school in question.

The Court of Appeals has held that schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*Mirand v City of New York*, 84 NY2d 44 [1994]; *Lawes v Board of Educ.*, 16 NY2d 302 [1965]; *Decker v Dundee Cent. School Dist.*, 4 NY2d 462 [1958]). Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students (*Lawes v Board of Educ.*, 16 NY2d 302, *supra*; *Ohman v Board of Educ.*, 300 NY 306 [1949]).

In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury, so that the third-party conduct could reasonably have been anticipated (*see e.g. Bertola v Board of Educ.*, 1 AD2d 973 [1956]). Actual or constructive notice to the school of prior similar conduct is "generally required" (*Mirand v City of New York*, 84 NY2d 44, *supra*). If a breach of the duty of supervision is established, the question arises whether such negligence was the proximate cause of the injuries sustained. The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence (*see e.g. Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]; *Parvi v City of Kingston*, 41 NY2d 553 [1977]; *Dunn v State of New York*, 29 NY2d 313 [1971]).

Defendant's second *in limine* request seeks to exclude any and all evidence relating to the Suffolk County Police Department responses to Central Islip High School, or Wheeler Road, on dates prior to and including the incident.

The plaintiff seeks the use of prior reported incidents as evidenced only by the existence of county police reports. As such, they are hearsay if offered for the truth of their content (*see generally Hanly v Quaker Chem. Co., Inc.*, 29 AD3d 860 [2006]; *Gomez v Sammy's Transp., Inc.*, 19 AD3d 544 [2005]; *State Farm Mut. Auto. Ins. Co. v Langan*, 18 AD3d 860 [2005]). The plaintiff alleges that they are proffered only in support of the issue of the school district's knowledge of illegal activities at or around the time of school dismissal. The prior police reports will be permitted for this purpose only with an admonition to the jury as to that limitation. This Court is of the opinion that the issue of notice or knowledge is a factual one for the jury's determination.

MOTION TO PRECLUDE PLAINTIFF'S EXPERT

There are numerous factual determinations to be made in this case, which relates to the defendant's third *in limine* request concerning the preclusion of the proffered "school security and administration" expert. As a procedural matter, the defendant suggests that the CPLR 3101(d) disclosure notice is insufficient. The Court disagrees. A trial court should not preclude expert testimony offered by a defendant based on a claim by the plaintiff that the defendant's response to a request made pursuant to CPLR 3101(d)(1)(i) was inadequate, where the response was not so inadequate as to have been misleading nor so insufficient that it resulted in prejudice or surprise to the plaintiff (*see Casimir v Bar-Zvi*, 36 AD3d 578 [2007]; *Gagliardotto v Huntington Hosp.*, 25 AD3d 758 [2006]; *Beard v Brunswick Hosp. Ctr.*, 220 AD2d 550 [1995]).

The more substantive argument has to do with whether or not in light of the plaintiff's abandonment of the "failure to provide adequate security" cause of action, the defendant is precluded from the use of a "school security and administration expert." The answer is not so readily apparent. The defendant correctly argues that as to a cause of action for failure to adequately supervise, the issue of security planning and implementation are relevant and material to the extent that security personnel are a component of supervision provided by the school district (*see Mirand v City of New York*, 84 NY2d 44, *supra*; *Glick v New York*, 42 NY2d 831 [1977]; *Matter of Doe v Bd. of Educ. of Penfield Sch. Dist.*, 12 Misc 3d 1197[A] [Sup Ct, Monroe County 2006]). The defendant argues that the existence of a security plan does not establish a baseline of responsibility from which a departure will compel a finding of negligence against the school district.

While Education Law § 1709 provides that the board of education of every union free school district shall have the power and duty "[t]o establish such rules and regulations concerning the order and discipline of the schools . . . as they may deem necessary to secure the best educational results" (Education Law § 1709[2]), there is no legal duty of which this Court is aware for a board of education to formulate a written security plan. It is not an established obligation, and the parties have not directed the Court's attention to any controlling precedent.

The Court is, however, aware that a school district is inherently required to assign sufficient personnel for the purpose of providing adequate supervision for all of its students, including at dismissal time (*see Mirand v City of New York*, 84 NY2d 44, *supra*; *Nossoughi v Ramapo Cent. Sch. Dist.*, 287 AD2d 444 [2001]). Whether that supervision serves to safeguard a vulnerable individual by limiting and supervising their movements and actions, or serves to control and restrain an individual who may intentionally or unintentionally do harm to others, both individuals fall within the duty to supervise.

The instant action presents an additional layer of interest in that the individuals who attacked the infant plaintiff are not known to be students of the school, and the infant plaintiff is expected to testify that he was never able to identify his assailants. Further, this incident took place either upon or adjacent to the southwest side of the school grounds, and after the final dismissal of the day. Education Law § 2801(1) states, in pertinent part, that "school property means in or within any building, structure, athletic playing field, playground, parking lot or land, contained within the real property boundary line of a public elementary or secondary school..." (Education Law § 2801[1]; *Marcano v. City of New York*, 2001 NY Slip Op 40126[U] [Sup Ct, NY County 2001]). As discussed, a school is not an insurer of the safety of its students, and the duty owed to its students "is co-extensive with the school's physical custody and control over them" (*Morning v Riverhead Cent. School Dist.*, 27 AD3d 435 [2006]; *see Mirand v City of New York*, 84 NY2d 44, *supra*; *Maldonado v Tuckahoe Union Free School Dist.*, 30 AD3d 567 [2006]). Thus, if "a student is injured off school premises, there can generally be no actionable breach of a duty that extends only to the boundaries of school property" (*Tarnaras v Farmingdale School Dist.*, 264 AD2d 391 [1999]; *see Bowers v City of New York*, 294 AD2d 526 [2002]; *Bertrand v Board of Educ. of City of N.Y.*, 272 AD2d 355 [2000]; *Bodaness v Staten Is. Aid*, 170 AD2d 637 [1991]). It is conceded that the portion of the grounds involved are not fenced

and are accessible directly from an adjacent roadway and public area. The unique factual circumstances of this case therefore will need to be determined by a jury. In view of the foregoing, defendant's application to preclude the plaintiff's expert from testifying is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: May 18, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court