| **Watkins v Belte** |
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| 2008 NY Slip Op 32812(U) |
| October 9, 2008 |
| Supreme Court, Suffolk County |
| Docket Number: 03-23529 |
| Judge: Peter H. Mayer |
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SHORT FORM ORDER

INDEX NO. 03-23529

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

***PRESENT:***

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-20-07 (011)
MOTION DATE 11-29-08 (012 & 013)
MOTION DATE 1-24-08 (014)
ADJ. DATE 3-4-08
Mot. Seq. # 011 - MD
# 012 - MD
# 013 - XMD
# 014 - MG

CHERYL WATKINS and ALLEN WATKINS,

Plaintiffs,

- against -

CARL BELTE, an infant under the age of 18 years, by his parents and natural guardians "JOHN" and "MARY BELTE", first names being fictitious and unknown but intended to be the parents of the individual who assaulted the plaintiff, CHRIS DeLOUISE , an infant under the age of 18 years by his parents and natural guardians, "JOHN and MARY DeLOUISE", first names being fictitious and unknown but intended to be the parents of the individual who assaulted the plaintiff, JOE CASH, an infant under the age of 18 years by his parents and natural guardian "JOHN and MARY CASH", first names being fictitious and unknown but intended to be the parents of the individual who assaulted the plaintiff, JACOB GROSSKREUZ, an infant under the age of 18 years, by his parents and natural guardians, GEORGE HECHTEL and LEE GROSSKREUZ HECHTEL, and PORT JEFFERSON UNION FREE SCHOOL DISTRICT NO. 6,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Jacob Grosskruez, dated October 25, 2007, and Notice of Motion/Order to Show Cause by the defendant Chris DeLouise, dated November 5, 2007, and Notice of Motion/Order to Show Cause by the defendant Port Jefferson Union Free School District, dated December 10, 2007, and supporting papers (including Memorandum of Law by defendant Port Jefferson Union Free School District dated December 10, 2007); (2) Notice of Cross Motion by the defendant Joe Cash, dated November 19, 2007, and supporting papers; (3) Affirmations in Opposition by the defendant Karl Belte, dated December 4, 2007, and Affirmation in Opposition by the defendant Karl Belte, dated December 13, 2007 and Affirmation in Opposition by the plaintiff Cheryl Watkins, dated January 17, 2008 and Affirmation in Opposition by the defendant Karl Belte dated January 21, 2008 and supporting papers; (4) Reply Affirmation by the defendant Chris DeLouise, dated December 12, 2007, and Reply Affirmation by the defendant Joe Cash, dated January 21, 2008 and Reply Affirmation by defendant Karl Belte dated January 22, 2008, and Reply Affirmation by defendant Port Jefferson Union Free School District dated January 23, 2008 and Reply Affirmation by defendant Port Jefferson Union Free School District, dated February 19, 2008 and supporting papers; (5) Other (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

***ORDERED*** that defendant Chris De Louise's motion for summary judgment dismissing plaintiffs' complaint is denied; and it is further

***ORDERED*** that defendant Joe Cash's cross motion for summary judgment dismissing plaintiffs' complaint is denied; and it is further

***ORDERED*** that defendant Jake Grosskruez's motion for summary judgment dismissing plaintiffs' complaint is denied; and it is further

***ORDERED*** that defendant Port Jefferson Union Free School District's motion for summary judgment dismissing plaintiffs' complaint is granted.

Plaintiffs commenced this action to recover damages for personal injuries Cheryl Watkins allegedly sustained on June 12, 2003, when she was struck by a water balloon thrown from a moving vehicle. The water-balloon was thrown by defendant Carl Belte, who was riding as a passenger in a motor vehicle owned and operated by defendant Chris De Louise. Defendants Joe Cash and Jake Grosskruez also allegedly were riding as passengers in the vehicle at the time of the incident. With the exception of defendant Carl Belte, who had previously graduated, the defendants were all senior high school students of defendant Port Jefferson Union Free School District ("the school district"). The plaintiffs' complaint alleges that defendant Chris Belte ("Belte") caused Cheryl Watkins ("the plaintiff") serious injuries and emotional distress by way of his intentional and reckless conduct. The complaint also alleges that defendants Joe Cash, Jake Grosskruez and Chris De Louise actively participated in causing the plaintiff's injuries by way of their negligent and reckless conduct. The complaint further alleges that the school district failed to adequately supervise the defendants while they were present on the school's property and includes claims against each defendant for the loss of consortium and companionship suffered by plaintiff Allen Watkin as a result of his wife's injuries.

Defendants Joe Cash, Jacob Grosskreuz and Chris De Louise now move for summary judgment dismissing plaintiffs' complaint against them. Although the defendants are moving in their individual capacities, they each seek summary judgment on the ground that there is no evidence that they directly or

indirectly participated in a common plan or design to commit the tortious act that caused plaintiff's injuries[1]. They also argue that the portions of plaintiffs' complaint asserting causes of action for battery and seeking punitive damages must likewise be dismissed, since there is no evidence that they made physical contact with the plaintiff or engaged in any conscious intentional disregard of her rights. In support of their motions, the defendants submit, inter alia, copies of the pleadings and the transcripts of the parties' deposition testimony.

The school district also moves for summary judgment dismissing plaintiffs' complaint on the ground that they did not owe the plaintiff a duty of care, since the students were off the school's premises at the time of the incident and were no longer within its control or physical custody. Alternately, the school district argues that even if it owed plaintiffs a duty of care, plaintiffs' complaint should still be dismissed, because its alleged negligence was not the proximate cause of the plaintiff's injuries.

Defendant Carl Belte opposes both the motions of the individually moving defendants and the school district. Belte argues that the motions of his co-defendants should be denied, because issues of fact exist as to whether they acted in a common scheme to commit the tortious act that caused the plaintiff's injuries. Likewise, Belte argues that the school district's motion should be denied, because an issue of fact exists as to whether the school's duty to supervise the students continued after they left its premises since the hazard which caused the plaintiff's injuries, the throwing of water balloons, started inside of the school's parking lot.

Plaintiffs also oppose the motions of the above mentioned moving defendants on similar grounds. Plaintiffs assert that the motions of the student defendants should be denied, because issues of fact and credibility exist as to whether the students acted in a common scheme to commit the tortious act. Plaintiffs, further argue that the school district's motion should be denied, because the school permitted the water fight to happen on its premises and failed to ensure that the water balloons were taken from the students before they left the school grounds.

In order to obtain summary judgment, the movant must establish his cause of action or defense sufficiently, by tender of evidentiary proof in admissible form, to warrant the court to direct judgment in his favor as a matter of law. On the other hand, to defeat a summary judgment motion, the opposing party must show facts sufficient to require a trial of any issue of fact. Thus, on a motion for summary judgment the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Nevertheless, mere conclusions or unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*see* ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

To establish liability under the theory of concerted action, a plaintiff must demonstrate that each defendant actively took part in a common plan or design to commit a tortious act and that each defendant furthered it by cooperation or request, or lent aid or encouragement to the wrongdoer, or ratified and adopted his acts for their benefit (*see* ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]; ***Perry v City of New York***, 170 AD2d 350, 556 NYS2d 263 [1991]). Express agreement to

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[1]The Court notes that the motion submitted by defendants Joe Cash, Mary Cash and Jeffery Cash was incorrectly labeled as a cross motion.

perform the tortious activity is not necessary, and all that is required is that there be a tacit understanding between co-defendants (*see* ***Abid v Edwards***, 8 AD3d 510, 779 NYS2d 522 [2004]; ***Herman v Westgate***, 9 AD2d 938, 464 NYS2d 315 [1983]). Moreover, whether co-defendants participated in a concerted act is generally a question for the trier of fact (*see* ***De Carvalho v Brunner***, 223 NY 284, 119 NE 563 [1918]; ***Prough v Olmsted***, 210 AD2d 603, 619 NYS2d 404 [1994]; ***Herman v Westgate***, *supra*).

Although the moving co-defendants have testified that there was no prior discussion about defendant Belte throwing a water balloon at plaintiffs' car, plaintiffs have demonstrated the existence of issues of fact and credibility as to whether the moving defendants furthered the tortious act, or lent aid or encouragement, or ratified and adopted Belte's acts for their own benefit (*see* ***Prough v Olmsted***, *supra*; ***Herman v Westgate***, *supra*; *see also* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). In contrast to the moving defendants, who testified that they were surprised that Belte threw the water balloon and that they only glimpsed him doing so, the plaintiff testified that at the time she was struck with the water balloon, she observed all the students in the car laughing and facing her as they drove away. Further, while defendants Cash and Grosskruez testified that they did not say anything to Belte after he threw the balloon, defendant De Louise testified that he realized for the first time that Belte had thrown the water balloon when he heard the defendants in the rear of the car laughing loudly. In addition, the plaintiff testified that she heard the sound of De Louise's car swerving near her parked vehicle at the time that she was struck with the water balloon and that she also observed the students swerve back into the center of the lane before they sped off.

The conflicting testimony of the defendants about the presence of water balloons on the back seat of the car also raises issues of fact and credibility (*see* ***Roth v Barreto***, *supra*; ***O'Neill v Fishkill***, *supra*).While defendant De Louise testified that the bag filled with water balloons was taken from his car into the school's cafeteria, defendants Belte and Grosskruez testified that they obtained water balloons from the back seat of the car during the water fight that took place in the student's parking lot. Thus, the sharp contrast between defendant Belte's testimony that he obtained the water balloon used to hit the plaintiff from a bag containing left over balloons on the back seat of the car between himself and defendant Grosskruez, and the testimony by the remaining defendants that there were no remaining water balloons in the car raises questions of fact and credibility which preclude summary judgment (*see* ***De Carvalho v Brunner***, *supra*; ***Prough v Olmsted***, *supra*; ***Herman v Westgate***, *supra*). Accordingly, the motions of defendants Joe Cash, Jacob Grosskreuz and Chris De Louise seeking summary judgment dismissing the plaintiffs' complaint are denied.

With regard to the school district's motion for summary judgment, a school's duty to supervise the conduct of its students is co-extensive with its physical custody of the child (*see* ***Pratt v Robinson***, 39 NY2d 554, 384 NYS2d 749 [1976];***Chalen v Glen Cove School Dist.***, 29 AD3d 508, 814 NYS2d 254, *lv denied* 7 NY3d 709, 822 NYS2d 757 [2006]). The school's duty is strictly limited by time and space and exists only so long as the student is in its care and custody during school hours, and terminates when the child has departed from the school's custody (*see* ***Harker v Rochester City School Dist.***, 241 AD2d 937, 661 NYS2d 332, *lv denied* 90 NY2d 811, 666 NYS2d 100 [1997];***Thompson v Ange***, 83 AD2d 193, 443 NYS2d 918 [1981]). Thus, a school does not have a duty to shield the public or fellow students from a student operating a motor vehicle off the school's grounds (*see* ***Woodworth v Hink***, 34 AD3d 1192, 824 NYS2d 545 [2006]; ***Thompson v Ange***, *supra*). Nevertheless, even where the student has not passed out of the orbit of the school's supervision, the school is not liable for the student's dangerous conduct unless it has knowledge of the student's propensity toward such conduct (*see* ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; ***Pratt v Robinson***, *supra*). Furthermore, schools are not the insurers of students safety and

cannot be reasonably expected to continuously supervise and control all the movements and activities of their students(*see* ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994];***Calabrese v Baldwin Union Free School Dist.***, 294 AD2d 388, 741 NYS2d 569 [2002]). Indeed, constant supervision of students at the high school level is not required (*see* ***Rose v Onteora Cent. School Dist.,*** 52 AD3d 1161, 861 NYS2d 442 [2008]; ***Johnsen v Carmel Cent. School Dist.***, 277 AD2d 354, 716 NYS2d 403 [2000]).

Here, the school district has established its entitlement to summary judgment dismissing plaintiffs' complaint by demonstrating that it neither owed the plaintiff nor the student defendants a duty of care (*see* ***Pratt v Robinson***, *supra*; ***Pollock v Bones***, 52 AD3d 343, 860 NYS2d 514 [2008]; ***Chalen v Glen Cove School Dist.***, *supra*; ***Woodworth v Hink***, *supra*; ***Harker v Rochester City School Dist.***, *supra*; ***Thompson v Ange***, *supra*). Although the incident occurred a short distance from the school's entrance, it is undisputed that the school day was over and that the students had passed out of the orbit of the school's supervision when they left the school grounds (*see* ***Chalen v Glen Cove Sch. Dist.***, *supra*; ***Harker v Rochester City School Dist.***, *supra*; ***Thompson v Ange***, *supra*). While defendant Belte submitted evidence that raises an issue of fact as to whether the school's football coach squirted water at students who were in the student's parking area, the incident giving rise to the plaintiff's injuries took place off the school grounds between four and seven minutes after the school yard water fight died down. Contrary to plaintiffs' assertion, there is no evidence that Belte or any other of the student defendants had engaged in any similar prank, or that the school's staff had prior knowledge that there would be a water fight that day. Similarly, plaintiff failed to submit any evidence in admissible form that the school's principal or its staff had specific prior knowledge of or participated in the water fight. Moreover, the facts of this case are distinguishable from cases in which school districts were found to have a continuing duty to students off their premises, because they released the students into forseeably hazardous settings the school district had a hand in creating (*see* ***Ernest v Red Cr. Cent. School Dist.***, 93 NY2d 664, 695 NYS2d 531 [1999]). Here, the school district complied with its duty to supervise the safe release of its students by ensuring that students boarded the buses safely and cars exited the school premises in a safe manner (*see* ***Affleck v Buckley***, 96 NY2d 553, 732 NYS2d 625 [2001]; ***Sheila C v Povich***, 11 AD3d 120, 781 NYS2d 342, *aff'd and mod* 781 NY2d 342 [2004]; ***Marshall v Cortland Enlarged City School Dist.***, 265 AD2d 782, 697 NYS2d 395 [1999]).

There also is no evidence that the school district's lack of adequate supervision caused the water fight (*see* ***Mirand v City of New York***, *supra*; ***Calabrese v Baldwin Union Free School Dist.***, *supra*). Principal Nolan testified that despite his lack of knowledge of any specific plan among the students for the senior prank day, he warned them that participation in any such activity would be a violation of the students rules of conduct and would result in disciplinary action. Mr. Nolan also testified that in addition to confiscating water balloons and a super-soaker from students during the school day, he and other staff immediately intervened and stopped approximately ten-to-twelve students who were throwing water balloons in the student parking area. Mr. Nolan further stated that he and other members of staff, including a member of the school's security personnel, yelled at the students to stop and return to their homes. Accordingly, the school district's motion dismissing plaintiffs' cause of action is granted.

Dated: 10/9/08

Peter H. Mayer
PETER H. MAYER, J.S.C.