

Trentacoste v Riverhead Cent. School Dist.

2009 NY Slip Op 31112(U)

March 31, 2009

Supreme Court, Suffolk County

Docket Number: 07-613

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 10-21-08
ADJ. DATE 12-9-08
MNEMONIC: 001 - MG; CASEDISP

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PHILLIP TRENTACOSTE, an infant by his	:	SIBEN & FERBER
mother and natural guardian, ANTONIA	:	Attorneys for Plaintiff
TRENTACOSTE, and ANTONIA	:	Staller Office Park
TRENTACOSTE, individually,	:	1455 Veterans Memorial Highway
	:	Hauppauge, New York 11749
	:	
Plaintiff,	:	
	:	
- against -	:	MULHOLLAND, MINION & ROE
	:	Attorneys for Defendant
RIVERHEAD CENTRAL SCHOOL DISTRICT,	:	374 Hillside Avenue
	:	Williston Park, New York 11596
	:	
Defendant.	:	
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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 12 - 15; Replying Affidavits and supporting papers 16 - 17; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant Riverhead Central School District (hereinafter School) pursuant to CPLR §3212 for summary judgment dismissing the complaint is granted and the complaint is dismissed with prejudice.

The complaint of this action seeks damages for personal injury and sets forth a cause of action for negligence wherein it is asserted that the infant plaintiff, Phillip Trentacoste (hereinafter plaintiff), sustained injury while involved in football practice on October 21, 2005 at the School located at 600 Harrison Avenue, Riverhead, New York. A derivative claim is asserted on behalf of the mother of the infant plaintiff, Antonia Trentacoste.

The defendant seeks summary judgment dismissing the complaint on the basis that it bears no liability in the occurrence, there was adequate supervision, and that the infant plaintiff assumed the risk of injury normally associated with the sport.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film***

Corporation, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In the bill of particulars, the plaintiffs claim, inter alia, that there was inadequate and improper supervision, the practice was overcrowded and unruly, there was improper equipment provided, and that the defendant violated NYSPHSAA Handbook §25. Football, and §VIII of the Modified Football Rules & Guidelines.

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]).

Although the assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury, a court may dismiss a complaint as a matter of law when, based on the evidence before the Court, the evidentiary materials present no factual issues for decision by the trier of fact (*Maddox v. City of New York*, 66 NY2d 270, 496 NYS2d 726 [1985]). The doctrine of assumption of the risk applies to any facet of activity inherent in it and to any open and obvious condition of the place of the activity (*Maddox v. City of New York, supra; Cronson et al. v. Town of North Hempstead*, 245 AD2d 331, 665 NYS2d 98 [2nd Dept 1997]). "It is well settled that those who voluntarily participate in a sporting activity may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty [citations omitted]" (*Pascucci v Town of Oyster Bay*, 186 AD2d 725, 588 NYS2d 663, 664 [2nd Dept 1992]; see also, *Manoly v City of New York*, 29 AD3d 649, 816 NYS2d 499 [2nd Dept 2006]).

At his 50-H hearing, dated July 13, 2006, and his examination before trial (hereinafter EBT), dated October 15, 2007, Phillip Trentacoste testified that while, in the seventh grade, age 13 years, he was injured at the School during football practice when he was tackled by a team mate while running with the ball. That he was playing with other seventh and eighth graders, weighed about 90 or 95 pounds and was about 5'1" tall. He was trying out for the position of quarter back and played wide receiver and corner back. His claimed injury occurred during a pursuit drill at his second or third practice after he returned from a sprained ankle injury sustained in a prior practice. While he was participating in this drill, he was tackled by his team mate, Steven Kimbleman, an eighth grader, who weighed about a 100 pounds and was 5'3" tall. He had started running down the white line about five yards as fast as he could, staring straight ahead, when he was tackled on his right side. He fell onto his left side on the football field injuring his left arm and left leg. Coaches John Rossetti, Sal Loverde and John Rozzano, among others, were at the practice.

John H. Rosetti (hereinafter Rosetti) testified at his EBT, dated October 15, 2007, that he was employed by the School as a seventh grade math teacher for eleven years in the middle school, and was also the seventh grade class advisor, head coach in the middle school, and head coach for the varsity boy's basketball and lacrosse teams. He coached football for ten years as head coach and assistant head coach. In 2005-2006, Sal Loverde was the head coach and he was the assistant coach and there were two other paid coaches, Jim Walter and Pat Walter, and two parent volunteer coaches, Greg Meyer and John Rozzano. In choosing two teams (the Blue and the White), size, ability and aggressiveness were considered and an effort was made to achieve a rough balance between the two teams which consisted of about 37 players on each team, of whom 37 were seventh graders. No written manuals or instructions were given to the students. Full contact was not permitted until two weeks into practice, which was supervised by all five coaches. Stretching and laps were required prior to playing. Knee pads, hip pads, shoulder pads, butt pads, thigh pads, helmets, girdle, practice bands and practice jerseys were provided to the players who supplied their own cleats. He was the plaintiff's coach on the date of his injury, and he was about fifteen yards from him when the plaintiff's injury occurred. Each coach supervised about fifteen students. The students were engaged in pursuit tackling with one student running and the other, about four yards away at approximately a forty five degree angle, tackling the runner. The purposes for the drill were to instruct the defensive backs in tackling and angle of pursuit, and also how to run and hold the ball correctly. When each line of students had a turn at either running or tackling, they would then switch lines and do whichever they had not done on the last turn. Prior to the plaintiff being injured that day, he told Rossetti that he was afraid, and Rossetti gave reassurance to the plaintiff. The plaintiff had previously told him he wanted to be a quarter back, but he changed the plaintiff's position to a defensive back position based upon his prior observations of the plaintiff.

The defendant has submitted the expert affidavit of Patrick Pizzarelli, dated September 19, 2008, wherein he stated he is currently the District Director of Physical Education, Health and Athletics (K-12), for the Lawrence Public School District with permanent certification as a School District Administrator, School Administrator and Supervisor and Physical Education K-12, and was further certified by the National Interscholastic Athletic Administrators's

Association as an Athletic Administrator. He had coached football on the college and high school levels for twelve years, as well as lacrosse, wrestling and basketball. He stated that the pursuit tackling engaged in by the plaintiff at the time of the accident was a well-established football drill also known as angle tackling and was used in all levels of organized football from Pee Wee through Division I college football. He stated that the level of supervision was not the proximate cause of the accident, but rather that the injuries suffered by the infant plaintiff resulted from the sudden and spontaneous event of being knocked down by his team mate during routine football practice drill, which did not violate the NYSPHSAA Handbook, §25 or §8 of the Modified Football Rules and Guidelines. He additionally stated that the drill being used was appropriate for middle school students, that there was nothing inappropriate about using this drill, and the instructions given to the plaintiff and other students were appropriate and conformed with established coaching protocol and procedures. The equipment the plaintiff was wearing, *i.e.*, helmet, knee pads, thigh pads, shoulder pads and cleats, were appropriate for football practice.

Based upon the foregoing, the Court finds that the defendant has established prima facie entitlement to summary judgment as a matter of law that the defendant was not negligent and did not cause the infant plaintiff to sustain injury and that the infant plaintiff assumed the risks of injury by participating in football practice.

In opposing this motion the plaintiff has submitted an attorney's affirmation, a picture of the infant plaintiff, and a copy of the New York Law Journal, September 26, 2008, publication of *McCarthy v Spins Gymnastics Parents Club, Inc.* Index No. 04-18726 wherein a seven year old blind child sustained injury in vaulting a horse when the defendant instructors allegedly released him too soon causing him to fall and injure his back on a wooden springboard which was not covered by a mat which had been removed.

The Court finds as a matter of law that the plaintiffs have failed to raise a factual issue to demonstrate that the defendant coaches were negligent, that they breached any duty to the infant plaintiff, or that their actions were the proximate cause of the infant plaintiff's injuries. Further, as a matter of law the Court finds that the infant plaintiff assumed the risk of injury in engaging in the sport of football.

"A board of education, its subordinate employees, and interscholastic athletic organizations must exercise only reasonable care to protect student athletes in sports competitions from injuries arising out of an unassumed, concealed, or unreasonably increased risks" (*Benitez v New York City Board of Education et al*, 73 NY2d 650, 543 NYS2d 29 [1989]). In the instant action, reasonable care by the defendant has been demonstrated and no unassumed, concealed, or unreasonably increased risks have been demonstrated. In fact, the infant plaintiff testified that during practice prior to the injury giving rise to the instant action, that he sprained his ankle during practice while warming up, and during the several weeks while he was healing, he observed the practice and drills on a daily basis. Although this was his very first time during the participation as a runner, he had previously participated as a tackler.

“Awareness of the risk assumed is to be assessed against the background of the skill and experience of the particular plaintiff, and in that assessment a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport (*Maddox v City of New York*, 66 NY2d 270, 496 NYS2d 726 [1985]). “As respects voluntary participation in a sport, the doctrine of assumption of risk applies to any facet of the activity inherent in it and to any open and obvious condition of the place where it is carried on and imports a knowledge and awareness of the particular hazard that caused the injury” (*Diderou et al v Pincrest Dunes, Inc.*, 34 AD2d 672, 310 NYS2d 572 [2nd Dept 1970]). “Awareness of the general scope of the risk combined with the skill and experience of the actor in question are primary factors influencing the determination whether the assumption of risk doctrine will be applied” (*Dillard v Little League Baseball Incorporated et al*, 55 AD2d 477, 390 NYS2d 735 [4th Dept 1977]; but compare, *Arnold v Schmeiser*, 34 AD2d 568 wherein the nine year old boy was held not to have assumed the risk where he was asked by two older boys in the neighborhood to play fireman’s chair; they hurled him into the air, then walked away and allowed him to hit the ground without making any attempt to catch him. The Court held that the plaintiff did not assume the risk of the defendants’ total failure to make any attempt to catch him and that the plaintiff did not assume the risk of a total absence of a fireman’s chair.). “By engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation...[t]hus, students who voluntarily participate in extracurricular sports assume the risks to which their roles expose them, but not risks which have been unreasonably increased. Awareness of the risk assumed is to be assessed against the background of the skill and experience of the particular plaintiff (*Morales v Beacon City School District*, 44 AD2d 724, 843 NYS2d 646 [2nd Dept 2007]). The uncontroverted testimony in this case further supports that the infant plaintiff voluntarily participated in this intrascholastic, extracurricular sport, and even though he stated to his coach that he was “afraid”, he did not refuse to participate in the practice and was not forced to participate. The Court finds as a matter of law that the plaintiff voluntarily assumed the risks associated with tackling and being tackled, and in fact had practiced tackling in prior practices (see, *Tripi v Byram Hills School District*, 300 AD2d 650, 752 NYS2d 703 [2nd Dept 2002] wherein the Court found as a matter of law that the plaintiff assumed the risk of injury from being tackled; compare, *Calouri et al v County of Suffolk et al*, wherein the assumption of the risk should not be applied with the same force as in the case of an experienced athlete where the student was in a gym class and was instructed to perform by the instructor whose directions she was obliged to follow). The Court further finds that it has not been demonstrated that there was anything the defendant did or did not do to increase the risks assumed by the infant plaintiff to raise a triable issue of fact (see, *Muniz v Warwick School District*, 293 AD2d 724, 743 NYS2d 113 [2nd Dept 2002]).

The uncontroverted evidence establishes that the pursuit drill is used in all levels of organized football from Pee Wee through Division I college football and that the level of supervision was not the proximate cause of the accident, but rather that the injuries suffered by the infant plaintiff were caused by the sudden and spontaneous event of being knocked down by his team mate during routine football practice drill. No violation of the NYSPHSAA Handbook, §25 or §8 of the Modified Football Rules and Guidelines has been demonstrated.

The uncontroverted testimony establishes that the drill being used was appropriate for middle school students, there was nothing inappropriate about using this drill, and the instructions given to the plaintiff and other participating students were appropriate and conformed with established coaching protocol and procedures. Additionally, it has been established that the equipment the plaintiff was wearing, a helmet, knee pads, thigh pads, shoulder pads and cleats, were appropriate for football practice. The plaintiff has failed to submit any expert evidence to raise a factual issue concerning the defendant's expert's opinion.

In choosing teams, size, ability and aggressiveness were considered by the coaches and an effort was made to achieve a rough balance between the two teams. Plaintiff's own testimony establishes that he was trying out with other seventh and eighth graders, weighed about 90 or 95 pounds, and was about 5' 1". He was tackled by his team mate, an eighth grader who weighed about 100 pounds and was about 5' 3" (see, *Tepper et al v City of New Rochelle School District*, 143 AD2D 133, 531 NYS2d 367 [2nd Dept 1988] wherein a junior at the high school was injured by an opponent who was a 260 pound senior with three years of experience). It is uncontroverted that the defendant did not negligently permit an imbalance between the plaintiff and the student who tackled him such that injury would be anticipated to occur with contact between them. Additionally, no reckless or intentional conduct or acts have been alleged or demonstrated (see, *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [1986]) to give rise to liability, nor has it been alleged or demonstrated that the playing field was maintained in a dangerous condition (see, *Maddox v City of New York*, supra) causing the plaintiff to fall and sustain injury.

Accordingly, motion (001) for summary judgment dismissing the complaint is granted and the complaint is dismissed with prejudice.

Dated: March 31, 2009



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION