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SHORT FORM ORDER

INDEX No. 08-448
CAL. No. 09-00826-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 6-15-09
ADJ. DATE 9-23-09
Mot. Seq. # 001 - MD

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JOSE HERNANDEZ, an infant under the age of 14 years, by and through his Mother and Natural Guardian, LAURA HERNANDEZ and LAURA HERNANDEZ, Individually,

Plaintiffs,

- against -

MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 15 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 13 - 15 ; Replying Affidavits and supporting papers __; Other defendant's memorandum of law - 12 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Middle Country Central School District seeking summary judgment dismissing plaintiffs' complaint is denied.

The plaintiff Laura Hernandez, as guardian and individually, commenced this action on behalf of her infant son, Jose Hernandez, the infant plaintiff, to recover damages for injuries allegedly sustained by him on October 18, 2006, as a result of a football accident in Centereach, New York. The accident allegedly occurred when the infant plaintiff and another student, Ray Brian, collided with each other while engaged in a game of touch football during gym class on the outdoor field of Centereach High School. The infant plaintiff was 14 years old at the time of the accident. Centereach High School is owned by the defendant Middle Country Central School District.

The defendant now moves for summary judgment on the basis that the infant plaintiff assumed the risk of injury to his shoulder when he voluntarily participated in a game of touch football during gym class. The defendant also asserts that negligent supervision was not the proximate cause of the infant plaintiff's injury. In support of the motion, the defendant submits a copy of the pleadings, copies of the parties'

deposition transcripts, and copies of the parties' 50-h hearing transcripts. The plaintiffs oppose the instant motion on the ground that the defendant's lack of supervision was the proximate cause of the injuries sustained by the infant plaintiff. The plaintiffs also assert that there are material issue of fact as to whether the infant plaintiff voluntarily participated in the game of touch football during gym class. In opposition to the motion, the plaintiffs submit the affidavit of Mrs. Hernandez.

The infant plaintiff testified at his 50-h hearing that he is currently enrolled in Brentwood Freshman Center, but that on the day of the accident he was enrolled in the ninth grade at Centereach High School. The infant plaintiff testified that he attended Centereach High School from September 2006 through December 2006. The infant plaintiff testified that prior to the subject incident he had "chipped" a bone in his right wrist while playing football in his neighborhood, and that he had been given a doctor's note on October 6, 2006 prohibiting him from participating in gym class. He testified that he gave the doctor's note to the nurse at school, and the nurse then provided him with a medical pass that he gave to his gym teacher. He testified that between October 6th and October 18th he did not participate in any activities in gym class. He testified that the incident occurred during his regularly scheduled ninth period gym class and that his regular gym teacher was present the day of the incident. The infant plaintiff testified that on the day of the incident he was not wearing the splint on his wrist that the doctor had prescribed for him, because he had gotten it dirty and his mother was going to wash it. The infant plaintiff testified that his gym class had three teachers, that it lasted for 45 minutes, and that it consisted of three different classes of ninth and tenth graders, with approximately 25 students in each class. The infant plaintiff testified that he usually went to the locker room to change into his gym clothes before heading into class, but that on the day of the incident he did not change his clothes because he was prohibited from participating in gym class. He testified that after attendance was taken he was instructed by one of the teachers, a male teacher that he had not seen before, to change his clothes. He testified that he informed the teacher that he was unable to participate in gym class because he had chipped a bone in his wrist. He testified that the teacher responded that "he did not see anything wrong with it and to go change." He testified he put on his gym clothes and went outside with his class.

The infant plaintiff also testified that on the day of the incident only two of the classes, approximately 50 students went outside to the football field with two of the gym teachers. The infant plaintiff testified that once outside the classes were instructed to either play touch football, frisbee or track. The infant plaintiff testified that he chose to play touch football. He testified that the game consisted of 20 students, class versus class, and that he pretended to play by moving around whenever the students yelled "hike." He testified that the collision occurred when Ray Brian was running towards the student with the football, and he was attempting to run away from that student. He testified that Mr. Brian's head struck the left side of his clavicle and his head, and that neither he nor Mr. Brian saw each other prior to the collision. The infant plaintiff testified that the hit knocked him unconscious and that he awoke to find himself outside on the field with other students around him and his left arm hurting. The infant plaintiff testified that the teachers were on the other side of the field at the time of the accident, and that his teacher was unaware of the incident until he was walked over towards her. The infant plaintiff further testified that he and Mr. Brian were sent to the nurse's office, and that he was later sent via ambulance to the hospital after the nurse placed his arm in a sling.

The plaintiff Mrs. Hernandez testified that prior to the subject incident, her son had been playing football outside in the yard at their home when he tripped and chipped a bone in his right wrist. The

plaintiff testified that Dr. Rhonda Edwards had written a note stating that her son was not allowed to participate in gym class until he received medical clearance from the orthopedist, and that she gave the doctor's note to her son to inform the school that he was prohibited from participating in gym class. The plaintiff testified that her son wore the splint on his wrist for approximately 3 ½ weeks prior to the subject incident. She testified that she did not call to speak with anyone at the school about the doctor's note before October 18th. The plaintiff testified that on date of the accident her son was not wearing his splint, because it was dirty and she was going to wash it. The plaintiff testified that she discovered that her son had been injured when the school's nurse informed her that her son had passed out after colliding with another student during gym class. The plaintiff testified that her son told her that the incident happened during gym class, and that a substitute teacher "made" him play. The plaintiff further testified that her son wore a sling for approximately five weeks after the incident, and that she did not speak to anyone at the school district besides the school nurse about the incident.

Krystal Drumm testified on behalf of the defendant that she has been employed with the defendant for approximately three years as a physical education teacher. She testified that there are a total of six full time physical education teachers and one part time teacher, Brian Reddening, and a teacher's assistant ("TA"). She testified that the infant plaintiff was in her ninth period gym class and that her class met with two other gym classes. She testified that each class has approximately 30 students, and that two other physical education teachers teach gym class with her during ninth period. Ms. Drumm also testified that on the day of the incident, the ninth period gym class did not have a substitute teacher. She testified that the students are required to change their clothes to participate in gym class, and that once the bell rings for class, the students have five minutes to change into their gym clothes and come out to their "squad" spots to have their attendance taken. She testified that there is either a gym teacher or the TA assigned to the locker room to ensure that the students are not "fooling around" in the locker room. Ms. Drumm testified that the school requires a medical note from a student that is unable to participate in gym class. She testified that the note is given to the school's nurse, who provides the student with a yellow/orange pass to give to his or her gym teacher. She testified that the pass states the student's name, date, and either the date that the student can return to gym or UFN ("until further notice"). She testified that a student with a pass is not required to participate in gym class and is not required to change into gym clothes. Ms. Drumm testified that if a student receives a "long term" medical note then he or she is placed on "paper" gym, and is required to go to the library during gym class. If a student receives a "short term" medical note, then the student comes to gym class and sits on the bleachers. She testified that if the gym class goes outside for its activities, then a student with a "short term" pass should standby the fence.

Ms. Drumm also testified that the infant plaintiff had given her a medical pass on October 6, 2006. She testified that his pass stated that he was not allowed to participate in gym class, including outside gym activities, that it was not at his discretion, and that she was unsure if it had a date certain to return to gym or if it said UFN. She testified that on the day of the incident the gym class went outside to perform the cardiovascular portion of its fitness unit. She testified that the prior week the infant plaintiff had not participated in the weight activities portion of the fitness unit. Ms. Drumm testified that the infant plaintiff was not allowed to stay inside, because his entire gym class went outside, and that once the students were outside they were informed that they should either walk around the track or play two-hand touch football. She testified that the teachers divided the class up into teams for the football game, but did not act as umpires or referees for the game. She testified that the teachers were standing on the track and turf while the students were playing. She testified that she did not give the infant plaintiff any directions and that she

only learned that the infant plaintiff was playing football after the accident had occurred. Ms. Drumm testified that when she inquired as to who told him to play, he said "some man told him." She testified that the accident occurred within three minutes of the students beginning to play touch football, even though she did not witness the collision. She testified that she did not see the collision occur because she was speaking with a few students that arrived late to class. She testified that when the infant plaintiff returned to school and she again inquired about the incident, the infant plaintiff informed her that "a man told him to get dressed and that he had to play." She further testified that she did not speak to any of the other students about the incident, and that she did not inquire as to which teacher was in the locker room on the day of the incident.

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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]).

While schools are under a duty to adequately supervise the students in their custody and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (***Mirand v City of New York***, 84 NY2d 44, 49, 614 NYS2d 372 [1994]; ***Janukajtis v Fallon***, 284 AD2d 428, 429, 726 NYS2d 451 [2001]; *see also* ***Lopez v Freeport Union Free School Dist.***, 288 AD2d 355, 734 NYS2d 97 [2001]; ***Schlecker v Connetquot Cent. School Dist. of Islip***, 150 AD2d 548, 541 NYS2d 127 [1989]), they are not insurers of the safety of their students, since they cannot be reasonably expected to continuously supervise and control all of the students' movements and activities (*see* ***Bellinger v Ballston Spa Cent. School Dist.***, 57 AD3d 1296, 871 NYS2d 432 [2008]; ***Lindaman v Vestal Cent. School Dist.***, 12 AD3d 916, 785 NYS2d 549 [2004]; ***Convey v City of Rye School Dist.***, 271 AD2d 154, 710 NYS2d 641 [2000]; *Garcia v City of New York*, 222 AD2d 192, 646 NYS2d 508 [1996]). Whether a student was supervised properly largely depends upon the circumstances attending the event (*see* ***Mei Kay Chan v City of Yonkers***, 34 AD3d 540, 824 NYS2d 380 [2006]; ***Farrukh v Board of Educ. of City of N.Y.***, 227 AD2d 440, 643 NYS2d 118 [1996]). A plaintiff alleging negligent supervision must demonstrate both that the defendant breached its duty to provide adequate supervision, and that this failure was the proximate cause of the plaintiff's injuries (*see* ***Mirand v City of New York***, *supra*; ***MacCormack v Hudson City School Dist. Bd. of Educ.***, 51 AD3d 1121, 856 NYS2d 712 [2008]). Although, "a school is not liable for every thoughtless or careless act by which one pupil may injure another" (***Lawes v Bd. of Educ. of City of N.Y.***, 16 AD3d 302, 306, 266 NYS2d 364 [1965]; *see also* ***McLeod v City of New York***, 32 AD3d 907, 822 NYS2d 562; ***Mormon v Ossining Union Free School Dist.***, 297 AD2d 788, 747 NYS2d 586 [2002]; ***Nelson v Sachem Cent. School Dist.***, 245 AD2d 434, 666 NYS2d 456 [1997]), summary judgment will be precluded where inadequate supervision may have unreasonably increased the risk of injury (*see* ***Taylor v Massapequa Intl. Little League***, 261 AD2d 396, 689 NYS2d 523 [1999]; ***Kennedy v Rockville Ctr. Union Free School Dist.***, 186 AD2d 110, 587 NYS2d 442 [1992]). However, when an injury is caused by an impulsive, unanticipated act of a fellow student, absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act, a school will not be found negligent (*see* ***Fulger v Capital Dist. YMCA***, 42 AD3d 694, 840 NYS2d 200 [2007]; ***Capotosto v Roman Catholic Diocese of Rockville Ctr.***, 2 AD3d 384, 767 NYS2d 857 [2003]; ***Wuest v Board of Educ. of Middle Country Cent.***

School Dist., 298 AD2d 578, 749 NYS2d 64 [2002]; ***Shabot v East Ramapo School Dist.***, 269 AD2d 587, 703 NYS2d 268 [2000]).

Based upon the adduced evidence, the defendant failed to establish, prima facie, its entitlement to judgment as a matter of law by demonstrating that it was not negligent in its supervision of the infant plaintiff (*see* ***Mei Kay Chan v City of Yonkers***, *supra*; ***Farrukh v Board of Educ. of City of N.Y.***, *supra*; *see also* ***Rodriguez v Board of Educ. of City of New York***, 104 AD2d 978, 480 NYS2d 901 [1984]; *see generally* ***Zuckerman v City of New York***, *supra*). The record demonstrates that the students were required to participate in either two hand touch football or run track as part of their gym class activities, and that neither teacher provided the students with any instructions for either activity. The record also shows that neither of the teachers outside with the gym class witnessed the collision between the infant plaintiff and Ray Brian, and that Ms. Drumm only became aware of the incident when the infant plaintiff and Mr. Brian approached her. In addition, Ms. Drumm testified that at the time of the accident she was "tending to students that came late to class." Despite the fact that Ms. Drumm testified that she was unaware that the infant plaintiff was playing football, she also testified that the gym teachers separated the students into teams before they began playing two-hand touch football. Further, Ms. Drumm testified that she was aware that the infant plaintiff was not allowed to participate in any gym activities, and that his participation was not at his discretion. Under the instant circumstances, there has been no showing by the defendant that the teacher even attempted to enforce the school's policy prohibiting students with passes from participating in gym (*see* ***Merkley v Palmyra-Macedon Cent. School Dist.***, 130 AD2d 937, 515 NYS2d 932 [1987]; ***Germond v Bd. of Educ.***, 10 AD2d 139, 197 NYS2d 548 [1960]; ***Vonungern v Morris Cent. School***, 240 AD2d 926, 658 NYS2d 760 [1997]; *cf.* ***Gattyan v Scarsdale Union Free School Dist. No. 1***, 152 AD2d 650, 543 NYS2d 732 [1989]). Given this proof and the fact that the accident happened during gym class, questions of fact exist as to whether Ms. Drumm provided adequate supervision of the infant plaintiff's gym class, and whether the infant plaintiff's injuries were a foreseeable consequence of the teacher's inadequate supervision (*see* ***Mei Kay Chan v City of Yonkers***, *supra*; ***Oakes v Massena Cent. School Dist.***, 19 AD3d 981, 797 NYS2d 640 [2005]; ***Siller v Mahopac Cent. School Dist.***, 18 AD3d 532, 795 NYS2d 605 [2005]; ***Merkley v Palmyra-Macedon Cent. School Dist.***, *supra*; ***Alferoff v Casagrande***, 122 AD2d 183, 504 NYS2d 719 [1986]; *cf.* ***Doyle v Binghamton City of School Dist.***, 60 AD3d 1127, 874 NYS2d 607 [2009]). Accordingly, the defendant's motion for summary judgment is denied.

Dated: 9 March 2010

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION