At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street in the City of Binghamton, New York, on the 25th day of June, 2010.

PRESENT: HON. FERRIS D. LEBOUS
Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

JAMES M. THOMPSON, O/B/O,
MARK THOMPSON, an infant,

Plaintiff,

-vs-

MAINE-ENDWELL CENTRAL SCHOOL DISTRICT,

Defendant.

DECISION AND ORDER

Index No. 2008-0955
RJI No. 2010-0458-M

APPEARANCES:

COUNSEL FOR PLAINTIFF:
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FERRIS D. LEBOUS, J.S.C.

This is an action to recover for personal injuries allegedly sustained by plaintiff Mark Thompson in a fall from folded bleachers at Maine-Endwell High School. By way of this motion, defendant, Maine-Endwell Central School District, moves for summary judgment dismissing the complaint in its entirety pursuant to CPLR § 3212. Plaintiff James M. Thompson, o/b/o Mark Thompson, an infant, opposes the motion.

BACKGROUND

On January 31, 2007, plaintiff, Mark Thompson, then age 17, was an 11th grade student at Maine-Endwell High School. At approximately 1:10 p.m. on that date, plaintiff[1] reported to the gymnasium for his gym class with physical education teacher Deborah Feketa. It is undisputed that the gym class students were allowed to gather unsupervised for 2-4 minutes while Ms. Feketa monitored the locker room. During this brief time period, plaintiff and two fellow students climbed up folded bleachers in the gym. By way of his own description, plaintiff and his friends climbed up the bleachers that were folded up against the wall using their fingertips and toes in the crevices (Defendant's Exhibit D, pp 15-16).[2] Plaintiff estimated the height of the top of the bleachers at 14-15 feet (Ex D, p 20).

Upon entering the gym and seeing plaintiff and his two friends on the bleachers, Ms. Feketa avers she "[g]ave them a look of disapproval and waved them down to join the rest of us.

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[1]For ease of reference, the term "plaintiff" will refer solely to the infant Mark Thompson.

[2]Defendant's Exhibit D is a transcript of the 50-h hearing testimony of plaintiff Mark Thompson held on May 11, 2007.

I told them to crawl down and be careful" (Feketa Affidavit, ¶ 12). In the process of climbing down from the folded bleachers, plaintiff fell approximately 10-12 feet and fractured his right elbow. There are conflicting accounts as to whether Ms. Feketa had previously told plaintiff and/or other students at the beginning of the school year to never climb up on the folded bleachers, whether plaintiff had previously been admonished for such behavior, and whether gym teachers including Ms. Feketa had previously directed students to climb up on the bleachers to retrieve stray balls during class (Defendant's Exhibit P, pp 15, 17, 18, & 21; Feketa Affidavit, ¶ 5).[3]

Immediately after his fall, Ms. Feketa inquired of plaintiff if he was alright to which he admittedly responded that he would "walk it off" (Ex D, p 24, 27; Ex P, 23).[4] There are conflicting accounts as to whether Ms. Feketa suggested plaintiff go to the school nurse (Ex D, p 28; Feketa Affidavit, ¶ 15). In any event, plaintiff finished the remaining 20 minutes or so in the gym class.

At approximately 1:45 p.m., after gym class but before the beginning of his ninth period math class, plaintiff went to see the school nurse, Karen Pierce, as his elbow began to swell and lock up (Ex D, p 39). Upon visiting the school nurse's office, plaintiff wrote "dumb" on the sign-in sheet as the reason for his visit (Pierce Affidavit, Ex A). Again, there are conflicting accounts as to the degree to which nurse Karen Pierce examined plaintiff's elbow. Plaintiff stated she

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[3]Defendant's Exhibit P is a transcript of plaintiff Mark Thompson's deposition held on July 31, 2009.

[4]The court notes that plaintiff did not submit an affidavit in opposition to this motion, but rather relied on the submitted transcripts from his 50-h hearing and deposition testimony.

merely pinched his fingers but never looked at his elbow (Ex P, p 25). For her part, Nurse Peirce avers she fully examined plaintiff and found he "[w]as able to demonstrate active flexion, extension, supination and pronation of his right elbow with no complaints of pain or discomfort. I also checked capillary return, color and temperature of his right arm and hand. All were within normal limits" (Pierce Affidavit, ¶ 4).

There are also differing accounts as to whether Nurse Pierce requested that plaintiff contact his mother. Plaintiff stated that he tried calling his mother, but she did not answer her phone (Ex P, p 25). After obtaining an ice pack from Nurse Pierce, plaintiff continued to his ninth period math class.

At approximately 2:30 p.m., plaintiff's mother picked him up from school as normal. Upon learning of the accident, she did not immediately transport her son to the hospital or doctor's office, but rather went inside the school to examine the bleachers and talk to the school nurse. Thereafter, plaintiff's mother brought plaintiff home briefly to make some telephone calls to her husband and the pediatrician's office, and then transported plaintiff to see his pediatrician and then the hospital for x-rays. In the course of the next few days, plaintiff's parents brought him to several different medical providers to obtain second and third opinions. On February 8, 2007, eight days after the accident, plaintiff underwent corrective surgery on his right elbow.

On April 10, 2008, plaintiff filed a summons and complaint against the School District alleging negligence, negligent supervision and medical negligence. On June 2, 2008, defendant interposed a Verified Answer. The parties engaged in discovery practice. The court heard oral

argument of counsel on this motion on June 25, 2010.

DISCUSSION

I. NEGLIGENT SUPERVISION

On a motion for summary judgment, the moving party must present evidentiary facts that establish the party's right to judgment as a matter of law, while the opposing party must present evidentiary proof in admissible form that demonstrates the existence of a factual issue (*Friends of Animals v Associated Fur Mfrs*., 46 NY2d 1065, 1067-1068 [1979]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is well-settled that schools are not insurers of the safety of its students, but rather are obligated to provide such care that a parent of ordinary prudence would under comparable circumstances (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). That having been said, however, constant supervision of high school students is not required (*Spaulding v Chenango Val. Cent. School Dist*., 68 AD3d 1227, 1228 [3rd Dept 2009], *lv denied* 14 NY3d 707 [2010]).

It is undisputed that plaintiff and his fellow high school gym classmates were left alone for 2-4 minutes at the beginning of gym class. The court finds that leaving high school students alone for 2-4 minutes is not negligent supervision as a matter of law. Stated another way, the court finds that parents of ordinary prudence would - and often do- leave 17 year olds unsupervised for 2-4 minutes and longer.

That having been said, however, the court finds that negligent supervision during the 2-4 minutes at the beginning of gym class is not the real issue in this case, but rather the real issue is

the School District's prior manner of dealing with students who climbed up the bleachers and/or failure to cordon off the bleachers. With respect to those issues, the court finds there are differing versions of every facet of this case preventing judgment as a matter of law. For instance, there are competing stories of whether Ms. Feketa had previously warned plaintiff and other students at the beginning of the year never to climb up on the folded bleachers. There are differing accounts as to whether Ms. Feketa had ever verbally reprimanded plaintiff for climbing up on the bleachers (Feketa Affidavit, ¶ 5). Additionally, it is unclear if Ms. Feketa had previously instructed students to climb up on the folded bleachers to retrieve stray balls.

It is well-settled that a court cannot pass upon the credibility of witnesses at this stage of the litigation (*Vasilatos v Chatterton*, 135 AD2d 1073, 1074 [3rd Dept 1987]) and must view the evidence in the light most favorable to the nonmoving party (*Hourigan v McGarry*, 106 AD2d 845 [3rd Dept 1985]).

Accepting plaintiff's version of events would mean that the School District had prior knowledge of plaintiff and numerous other student's behavior in climbing on these bleachers and reacted with what can best be described as a wink and a smile telling teenage boys only to "get down". In other words, the failure to punish the students for prior similar behavior or failure to make them less accessible once on notice of students' tendencies to climb on them may well be viewed by a jury as acquiescing to said behavior. Moreover, plaintiff's allegations that teachers actually asked students to climb up the bleachers to retrieve stray balls, diminishes the School District's argument that 17 years olds "should have known better" if school personnel directed such behavior. In any event, all these conflicting accounts create questions of fact and issues of

credibility that may not be resolved on this motion.

In view of the foregoing, the court finds it must deny defendant's motion for summary judgment on the negligence cause of action. That having been said, however, that is not to say that plaintiff will be successful at trial or, if so, will not be assessed a significant percentage of comparative fault.

II. MEDICAL NEGLIGENCE

The court turns next to plaintiff's medical negligence cause of action. Plaintiff must establish that the alleged delays, if any, by Ms. Feketa and/or Nurse Pierce "[i]n diagnosis and/or treatment were a proximate or aggravating cause of the claimed injury [citation omitted]" (*Marchione v State of New York*, 194 AD2d 851, 855 [3rd Dept 1993]; *Cronin v Middle County Cent. School Dist.*, 267 AD2d 269, 270 [2nd Dept 1999]).

Here, immediately after his fall at approximately 1:10 p.m., plaintiff indicated to his gym teacher, Ms. Feketa, that he would "walk it off" (Ex D, pp 24 & 27) and finished the remaining time in his eighth period gym class.[5] Short of physically forcing the student to the nurse's office, there was nothing else Ms. Feketa could have or should have done given the student's response. Even if this court were to assume some failing on Ms. Feketa's part, plaintiff has provided absolutely no proof that any omission and/or delay by Ms. Feketa in any way aggravated plaintiff's injury.

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[5]Each period is approximately 40 minutes (Ex D, p 31).

With respect to the school nurse, plaintiff testified at his 50-h hearing and then again at his deposition that the nurse checked and pinched his fingers and told him to get an ice pack from the freezer, but never looked at his elbow (Ex D, p 39; Ex P, p 25). Obviously, Nurse Pierce disputes this description and avers that she personally examined plaintiff's elbow and he demonstrated no complaints of pain or discomfort (Pierce Affidavit, ¶ 4). Furthermore, the record reflects that plaintiff's mother brought him to his pediatrician approximately an hour and a half after picking him up. Plaintiff offers absolutely no competent medical evidence that Nurse Peirce's failure to diagnose or treat plaintiff's elbow, if any, in the remaining hour or so of the school day, was a proximate cause of or exacerbated plaintiff's injury in any way.

Furthermore, the court finds plaintiff's parents' own actions in this matter particularly insightful as to the lack of merit of the medical negligence cause of action. Both Mr. and Mrs. Thompson conceded during their depositions that they were told that surgery should be undertaken within one week or the injury would set (Ex Q, p 6; Ex R, p 12). They admittedly waited a full eight days before approving their son's surgery. Quite simply, any allegations of untimely medical treatment during the last hour and a half of plaintiff's school day are not supported by any evidentiary proof and contradicted by the parents' own inaction during those eight days which resulted in no aggravation of plaintiff's injury. Consequently, defendant's motion for summary judgment dismissing plaintiff's cause of action for medical negligence is granted.

Finally, to the extent that plaintiff argues that defendant violated school policy by failing to contact emergency contacts, the court finds this contention to be without merit. Plaintiff

testified that he tried calling his mother, but she did not answer her phone (Ex P, p 25). Even assuming such a failure and/or violation, plaintiff offers absolutely no evidentiary proof how such failure was a proximate cause of or exacerbated plaintiff's injury in any way.

CONCLUSION

For the reasons stated, defendant's motion for summary judgment is GRANTED IN PART and DENIED IN PART. More specifically, defendant's motion for summary judgment seeking dismissal of plaintiff's negligence cause of action is denied, but granted with respect to plaintiff's medical negligence cause of action. The court will schedule a preliminary conference upon notice to counsel.

It is so ordered.

Dated: July 26, 2010
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court

ALL PAPERS SUBMITTED IN CONNECTION WITH THIS MOTION HAVE BEEN FILED, ALONG WITH THE ORIGINAL DECISION AND ORDER, WITH THE BROOME COUNTY CLERK