

Schmidt v Massapequa High School

2010 NY Slip Op 32396(U)

August 20, 2010

Supreme Court, Nassau County

Docket Number: 21382/08

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

PATRICK SCHMIDT,

Plaintiff,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 6/9/10

MASSAPEQUA HIGH SCHOOL, MASSAPEQUA
PUBLIC SCHOOL DISTRICT and VINCENT
D'AGOSTINO,

INDEX NO.: 21382/08

Defendants.

-
- The following papers having been read on the motion (numbered 1-3):
- Notice of Motion.....1
 - Affirmation in Opposition.....2
 - Attorney's Affirmation in Reply and in Further Support.....3

Motion by defendants Massapequa Union Free School District s/h/a Massapequa High School, Massapequa Public School District (hereinafter collectively referred to as "Massapequa UFSD") and Vincent D'Agostino (hereinafter referred to as "D'Agostino") for an order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's complaint is **denied**.

On January 22, 2008, plaintiff allegedly suffered an injury while participating in a high school wrestling practice with D'Agostino, the volunteer assistant coach. Head Coach Joe Catalanotto and Assistant Coach Ronny Cerano were in the wrestling room at the time of the accident. Coach Catalanotto actually eye-witnessed the accident.

In the complaint, the then 17-year-old plaintiff alleges, *inter alia*, that the Massapequa UFSD was negligent in its supervision of plaintiff and in the supervision of D'Agostino. As to D'Agostino, plaintiff alleges that he was

negligent in engaging in live wrestling practice with him.

In the bill of particulars, plaintiff alleges, in pertinent part, as follows:

The Massapequa UFSD, their agents, servants and employees were negligent, careless and reckless in allowing defendant D'Agostino to enter and participate in school-sponsored wrestling practice; that the Massapequa UFSD was negligent and careless in failing to properly control, manage and confine the wrestling practice to students and licensed coaches; that the defendant Massapequa UFSD was negligent and careless in failing to properly train all coaches and wrestling team staff members and the defendant D'Agostino: that the defendant Massapequa UFSD was negligent and careless in the supervision of the wrestling practice, that these defendants failed to avoid the occurrence; that the defendant Massapequa UFSD was negligent and careless in allowing an adult man, specifically the defendant D'Agostino, who possessed markedly superior size, strength and skill, to participate in wrestling practice and in allowing defendant D'Agostino to wrestle teenage boys, and specifically the plaintiff herein; that the defendant Massapequa UFSD within whose custody the then infant plaintiff was in at the time of the accident, failed to act as a reasonably prudent parent would have acted to ensure the welfare and safety of the infant plaintiff; that the defendant Massapequa UFSD negligently and carelessly failed to provide a safe atmosphere and environment for the then infant plaintiff to participate in wrestling practice; that the defendant Massapequa UFSD failed in its non-delegable duty to keep the infant free from harm.

[T]he defendant Vincent D'Agostino was negligent and careless in that this defendant, a man of superior size, strength and wrestling skill, engaged wrestling team members and specifically this then infant plaintiff in wrestling practice; that this untrained defendant in coaching youth wrestlers, thought himself qualified to participate in wrestling practice; that this defendant created a dangerous and

hazardous environment to the wrestlers and specifically the plaintiff by removing the individual wrestlers and specifically the plaintiff herein from wrestling with team members, and this defendant engaged the young wrestlers and performed physical acts upon these wrestlers and specifically the plaintiff herein, that were entirely inappropriate to perform and thereby created a hazardous and dangerous environment; that on January 22, 2008, this defendant decided to and was allowed by the defendant Massapequa UFSD to participate in wrestling practice; that during this practice this defendant engaged the then infant plaintiff and picked the plaintiff up and forcibly threw the plaintiff to the ground, and this defendant's body fell onto the body of the plaintiff causing injury.

It is undisputed that plaintiff was an experienced wrestler as he wrestled from 7th grade through 12th grade. At the time of the accident, Schmidt was 6'2", weighed approximately 275 pounds and was on the varsity wrestling team. It is further undisputed that D'Agostino was a 2000 graduate of Massapequa High School and was considered a heavyweight. In January 2008, he was a voluntary assistant coach of the wrestling team at Massapequa; he was 27 years old and weighed 275 pounds.

At his examination-before-trial, defendant D'Agostino testified that he graduated Massapequa High School in 2000. He wrestled all four years, and was all conference as a freshman, all county as a sophomore, he was county champ and second in NY State in junior year, and second in Nassau County during his senior year, and fourth best heavy weight in the country. He got a scholarship to Rider College for wrestling, and wrestled there for three years. While in college, he was ranked 19th in the country, in the heavyweight division.

Massapequa UFSD and D'Agostino move for summary judgment dismissing the complaint on the grounds that plaintiff, an experienced wrestler, assumed the foreseeable risk of injury by participating in wrestling practice.

In support of their motion, defendants rely upon the following exhibits:

- (a) Summons and Verified Complaint;
- (b) Verified Answer;
- (c) Plaintiff's Verified Bill of Particulars;
- (d) Transcript of July 21, 2008 50-h municipal hearing of plaintiff Patrick Schmidt;
- (e) Transcript of May 15, 2009 Examination Before Trial of plaintiff Patrick Schmidt;
- (f) Transcript of May 15, 2009 Examination Before Trial of defendant Vincent D'Agostino;
- (g) Transcript of June 17, 2009 Examination Before Trial of defendant by witness Joseph Catalanotto, head wrestling coach for the varsity team;
- (h) Transcript of August 17, 2009 deposition of non-party witness Michael Curry, good friend of plaintiff and former wrestler at Massapequa High School;
- (i) Transcript of August 17, 2009 non-party witness Thomas Grimes, a fellow wrestler;
- (j) Note of Issue and Certificate of Readiness;
- (k) Affidavit of Joseph Catalanotto;
- (l) Affidavit of Thomas Maddock, an expert on high school wrestling on Long Island; and
- (m) Defendant's February 27, 2009 Response to Plaintiff's January 29, 2009 Notice for Discovery and Inspection.

Based upon the foregoing documents, defendants conclude that plaintiff had the necessary experience as a wrestler to be aware of the potential risks inherent in the sport, including the inherent risk of a leg fracture. Specifically, defendant

argues that plaintiff was “admittedly aware of defendant D’Agostino’s size, skill and experience before wrestling with him on the date of the incident, as he had wrestled with D’Agostino in countless prior occasions, but plaintiff participated in the practice live-wrestling session with D’Agostino nonetheless.”

As to plaintiff’s argument that Massapequa UFSD did not adequately supervise him, defendants note that, in the context of voluntary extra-curricular activities, the standard of care for school districts is the “ordinary reasonable care” standard. In this respect, defendants assert that the record is devoid of any evidence establishing that plaintiff and D’Agostino were behaving in a reckless or inappropriate manner which would have warranted any closer supervision by the coaching staff.

Even viewing the evidence in the light most favorable to the plaintiff, defendants assert that plaintiff’s injury was a known, apparent and reasonably foreseeable consequence of his voluntary participation in high school wrestling and, as such, he assumed the risk of same. Moreover, the subject incident occurred so quickly that no greater amount of supervision could have prevented it.

In sum, defendants conclude that the District was not negligent in its supervision of the wrestling practice nor in its training of the wrestling team staff, and there were no concealed, unreasonably increased risks present at the time of the incident, and plaintiff, who was an experienced wrestler, voluntarily assumed the risk of participating in the practice. Hence, the application of the doctrine of primary assumption of risk is warranted and the complaint should be dismissed as a matter of law.

In opposition, plaintiff argues that the application of the doctrine of primary assumption is unwarranted here. Plaintiff submits his own affidavit; his mother’s affidavit and an affidavit of Steven Shettner.

Mr. Shettner has many years of experience in wrestling, coaching wrestling

of the sport generally and flow from such participation (*Morales v Beacon City School District*, 44 AD3d 724 [2nd Dept. 2007], quoting *Morgan v State of New York*, 90 NY2d 471, 484 [1997]). However, “[a]ssumption of risk in competitive athletics is not an absolute defense but a measure of the defendant’s duty of care” (*Benitez v New York City Bd. of Educ.*, *supra* [internal quotation marks omitted]; see *Baker v Briarcliff School Dist.*, 205 AD2d 652, 654 [1994]). Thus, “[s]tudents who voluntarily participate in extracurricular sports assume the risks to which their roles expose them, but not risks which have been unreasonably increased” (*Baker v Briarcliff School District*, *supra* [internal quotation marks omitted]). “Awareness of the risk assumed is to be assessed against the background of the skill and experience of the particular plaintiff” (*Benitez v New York City Bd. of Educ.*, *supra*).

Notwithstanding an athlete’s assumption of risks inherent in playing any sport, a school district remains under a duty to exercise ordinary reasonable care to protect the infant plaintiff from unassumed, concealed or unreasonably increased risks (*Benitez v New York City Bd. of Educ.*, *supra*; *Rawson v Massapequa Union Free School District*, 251AD2d 311 [2nd Dept. 1998]; *Muller v Spencerport Cent. School Dist.*, 55 AD3d 1388 [4th Dept. 2008]), *lv to app den.* 57 AD3d 1531 [4th Dept. 2008]).

In the instant case, we find that an issue of fact exists as to whether reasonable care was exercised in the supervision of the live wrestling practice and whether D’Agostino’s conduct in permitting a mismatched exercise unreasonably increased plaintiff’s risk of injury (*see generally DeGala by DeGala v Xavier High School*, *supra*).

In view of the foregoing, the motion for summary judgment is **denied**.

This Constitutes the Order of the Court.

Dated: August 20, 2010


J.S. **ENTERED**

AUG 31 2010

NASSAU COUNTY
COUNTY CLERK’S OFFICE