2019 WL 670079
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Windham at Putnam.

Savannah T. RODRIGUEZ, PPA Andrew W. Kacavich and Wanda Kacavich

v.

Laurence PRENTISS et al.

WWMCV176011483S
|
January 24, 2019

Opinion

Cole-Chu, J.

***1** By complaint filed on March 13, 2017, the plaintiff, Savannah T. Rodriguez, a minor suing per proxima amici Andrew W. Kacavich and Wanda Kacavich, sues the defendants Laurence Prentiss, Michael W. Jolin, Daniel Pisaturo, the Town of Thompson (Town), and the Thompson Board of Education (Board) for injuries she sustained on the morning of March 10, 2015, while she was a student in a physical education class at Tourtellotte Memorial High School (the school), a public high school in Thompson, Connecticut. The physical education activity that morning was badminton. The plaintiff alleges that the class's physical education teacher, Prentiss, assigned the students to play badminton in teams of two. The plaintiff was assigned a male student, Latrell Dupre, as her partner.[1] The plaintiff alleges that Dupre had "disciplinary issues at school." The plaintiff further alleges that, while playing badminton, Dupre attempted to hit the badminton birdie with all his might at an unsafe distance from the plaintiff, and struck the plaintiff in her left eye, causing serious injuries.

Count one of the complaint is against Prentiss, and alleges that Prentiss was negligent in failing to supervise the students in the class so as to prevent the plaintiff from being struck by Dupre's racquet. Counts two and three are, respectively, against Jolin (Thompson's then-Superintendent of Schools) and Pisaturo (then Principal of Tourtellotte Memorial High School) for, in essence, negligent failure to ensure that the physical education class was supervised to a degree that would have prevented the plaintiff from being injured. Counts four and five are for indemnification for any judgment against the other defendants by, respectively, the Board pursuant to General Statutes § 10-235 and the Town pursuant to General Statutes §§ 7-101a and 7-465.

By motion filed on May 1, 2018, the five defendants moved for summary judgment on all five counts on the ground that, as a matter of law, the plaintiff's claims are barred by the doctrine of governmental immunity. On July 13, 2018, the plaintiff filed her opposition to the motion. On August 21, 2018, the defendants filed a reply.[2] On August 31, 2018, the plaintiff filed a surreply. The motion was argued on September 5, 2018. At oral argument, the plaintiff agreed to the granting of the motion as to count four and as to part of count five.[3] The court allowed the plaintiff to file an additional brief to address cases the defendants raised at oral argument, which she did on September 11, 2018. The motion was submitted on that day.

DISCUSSION

***2** "Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Grenier v. Commissioner of Transportation,* 306 Conn. 523, 534, 51 A.3d 367 (2012). "Summary judgment in favor of the defendant is properly granted if the defendant in its motion raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact." (Internal quotation marks omitted.) *Serrano v. Burns,* 248 Conn. 419, 424, 727 A.2d 1276 (1999). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Stuart v. Freiberg,* 316 Conn. 809, 821, 116 A.3d 1195 (2015).

The defendants move for summary judgment on the ground that, as a matter of law, governmental immunity bars the plaintiff's claims in counts one, two, three, and five. Whether governmental immunity bars a claim is a question of law. *Doe*

v. Petersen, 279 Conn. 607, 613, 903 A.2d 191 (2006). The plaintiff alleges that there is a genuine issue of material fact which prevents summary judgment, to wit, whether there are sufficient facts to show that the identifiable person-imminent harm exception applies.

"At common law, a municipality was, under certain circumstances, immune from liability for the torts it committed." *Considine v. Waterbury,* 279 Conn. 830, 841, 905 A.2d 70 (2006). General Statutes § 52-557n abandoned that principle and established "the circumstances in which a municipality may be liable for damages ... One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties ... [Section] 52-557n(a)(2)(B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Martinez v. New Haven,* 328 Conn. 1, 8, 176 A.3d 531 (2018).[4]

Generally, where § 52-557n(a)(2)(B) applies, the court must determine whether the municipal officer's allegedly negligent act or omission was discretionary or ministerial. That analysis is unnecessary here because the plaintiff does not dispute that the defendants' alleged omissions were discretionary: the plaintiff agrees that the defendants are protected by qualified immunity unless an exception applies—but she asserts that the identifiable person-imminent harm exception applies.

The identifiable person-imminent harm exception applies "when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm ..." (Internal quotation marks omitted.) *Violano v. Fernandez,* 280 Conn. 310, 320, 907 A.2d 1188 (2006). The exception "has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm ... All three must be proven in order for the exception to apply." (Internal quotation marks omitted.) *Martinez v. New Haven, supra*, 328 Conn. 8.[5] Whether there is a triable issue of material fact as to each of the elements of the exception is a question of law. See *Williams v. Housing Authority,* 159 Conn.App. 679, 706, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017).

***3** The defendants concede that the plaintiff was an identifiable victim because she was a schoolchild attending a public school during school hours. See *Grady v. Somers,* 294 Conn. 324, 352, 984 A.2d 684 (2009) ("[t]he only identifiable class of foreseeable victims that we have recognized ... is that of schoolchildren attending public schools during school hours ..." [internal quotation marks omitted]). In this light, the issues on which the present motion turns are the existence of triable issues of material fact as to, first, whether there was an imminent harm to the plaintiff in the physical education class, particularly, the badminton game, on March 10, 2015, and, second, whether it was apparent to Prentiss that his conduct was likely to subject the plaintiff to that harm.

"[T]he proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." *Haynes v. Middletown,* 314 Conn. 303, 322-23, 101 A.3d 249 (2014). The analysis focuses not on "the duration of the alleged dangerous condition, but on the magnitude of the risk that the condition created." (Emphasis omitted.) *Id.*, 322. For example, "a reasonable juror could conclude that the fact that thousands of students had walked on [an] icy walkway and from the lunchroom to the recess yard over the course of the years without being injured supports the conclusion that the harm was not imminent." *Id.*, 321 n.13.

"[T]he plaintiff [is] not required to prove actual knowledge on the part of the defendants. As we have stated previously, the applicable test for the apparentness prong of the identifiable person-imminent harm exception is an objective one, pursuant to which we consider the information available to the [school official] at the time of [his or] her discretionary act or omission ... Under that standard, [w]e do not ask whether the [school official] actually knew that harm was imminent but, rather, whether the circumstances would have made it apparent to a reasonable [school official] that harm was imminent." (Citation omitted; internal quotation marks omitted.) *Strycharz v. Cady,* 323 Conn. 548, 589, 148 A.3d 1011 (2016).

In this light, the court concludes that, as a matter of law, there is no genuine issue of material fact that the harm that befell the plaintiff was not an imminent harm within the meaning of the identifiable victim-imminent harm exception. Viewing the evidence in the light most favorable to the plaintiff; see *Bozelko v. Papastavros,* 323 Conn. 275, 282, 147 A.3d 1023

(2016); even if Prentiss had been observing the plaintiff and Dupre, Dupre swinging his racket in the badminton game to hit the birdie—an object of the game—even vigorously, was not so likely to cause harm that Prentiss had a clear and unequivocal duty to act immediately to prevent that harm. There is no evidence of any prior incidents or similar injuries occurring during a badminton game. See *Martinez v. New Haven,* 328 Conn. 11-12 (no imminent harm when no prior incidents of students running with safety scissors reported); *Washburne v. Madison,* 175 Conn.App. 613, 630-31, 167 A.3d 1029 (2017) (no imminent harm when no prior incidents of soccer injuries reported); but see *Haynes v. Middletown, supra*, 314 Conn. 325 (jury could find imminent harm because school knew, for seven months, of dangerous condition of rusty locker and horseplay in locker room). Thus, a reasonable jury would be unable to conclude that Dupre swinging a racket in a game—in competition—was so likely to cause harm that Prentiss had a clear and unequivocal duty to act immediately to prevent the harm.[6]

***4** That Dupre had a disciplinary history at the school, including having been disciplined by Prentiss for refusing to follow directions, swearing, and inappropriate behavior, does not change the foregoing analysis or its conclusion. The plaintiff does not allege that Dupre intentionally hit her, let alone that Prentiss had actual or constructive notice of such intent. As a matter of law, there is insufficient evidence for this court to find a triable issue of material fact that Dupre's behavior on the day the plaintiff was injured (or on any other day) was such that a reasonable jury could conclude that Prentiss had a clear and unequivocal duty to remove Dupre from the game or the class or to take any other action to prevent the racquet accident. There is no evidence that Dupre was a danger to other students—that, in particular, he presented, unintentionally or intentionally, a threat of imminent harm to other students playing badminton. Again, construing the evidence in favor of the plaintiff, the court assumes there was cause for one of his classmates to say he was "a little bit of a troublemaker." But, both Dupre and the plaintiff refer to the incident as an accident, and there is no evidence that the accident was an imminent harm within the meaning of the identifiable victim-imminent harm exception. See *Evon v. Andrews,* 211 Conn. 501, 508, 559 A.2d 1131 (1989) (identifiable victim-imminent harm exception did not apply to all potential victims of a fire).

Further, the power of Dupre's swing of the badminton racquet does not change the court's conclusion. The evidence shows that Prentiss instructed the students not to swing overhand and not to swing too hard; that Dupre did not follow those directions; that Dupre was "waving the [racquet] around and ... swung it with all his strength ..." If such disregard of a high school teacher's instructions creates an imminent harm within the meaning of the identifiable victim-imminent harm exception, the exception would expand geometrically. Similarly, Dupre's misuse of the racquet—a student's goofing off with a piece of sports equipment—cannot, by itself, be said to present a risk of such magnitude that the court must find a triable issue of fact as to whether Prentiss, assuming he knew of such misuse, had an unequivocal duty to act immediately to protect the plaintiff. "Using the equipment incorrectly may increase the risk of injury, but that does not mean that the probability of harm is high enough to require the defendants act to prevent it, and do so immediately." *Panarella v. Greenwich,* Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6028575-S (October 31, 2017) (65 Conn. L. Rptr. 414, 418). There is no evidence that Dupre consistently misused the racket or had previously injured other students or otherwise presented an imminent danger of harm to other the plaintiff or other students such that a reasonable jury could find Prentiss had to act to prevent harm to the plaintiff.

Therefore, there is no genuine issue of material fact that the plaintiff was not subject to imminent harm within the meaning of the identifiable victim-imminent harm exception—all of the elements of which must be established. For failure of this one of three elements, the exception cannot apply. See *Martinez v. New Haven, supra*, 328 Conn. 8. It is unnecessary to analyze whether there is a triable issue of material fact as to the third *Martinez* element of the identifiable victim-imminent harm exception, *i.e.,* whether it was apparent to Prentiss that his conduct—the way in which he supervised the class on the day the plaintiff was injured—was likely to subject the plaintiff to being hit in the eye with Dupre's racquet. The court will simply state that, there being no evidence of a triable issue of material fact as to the imminent harm element, there could be no evidence that Prentiss was chargeable with knowledge of such a harm and, in fact, no evidence of facts (as distinguished from claims and opinions) was presented on that point.

The foregoing analysis of the first count, against Prentiss, extends to the second and third counts, as to Jolin and Pisaturo, respectively, who, allegedly, were negligent in their failure to provide a safe class environment for the plaintiff, in general, and to properly supervise Prentiss, in particular.

All the individual defendants are protected by governmental immunity.

The plaintiff also cannot recover from the Town under count five because "[a] claim for indemnification against a municipality under § 7-465 is entirely dependent upon establishing liability against a municipal employee." *Bonington v. Westport,* 297 Conn. 297, 316, 999 A.2d 700 (2010). Because the plaintiff may not recover from the individual defendants, she may not recover from the Town for indemnification.[7]

CONCLUSION

***5** For the foregoing reasons, the defendants' motion for summary judgment as to counts one, two, three, and five is granted. The motion is granted as to count four by agreement.

All Citations

Not Reported in Atl. Rptr., 2019 WL 670079

Footnotes

1 The defendants impleaded Latrell Dupre (ppa Amy Perry) as apportionment defendant, alleging that, if the defendants are found to have been negligent, it was Dupre, as the plaintiff's badminton partner in the class, who was responsible for the plaintiff's injuries in that he negligently struck the plaintiff in her left eye with his badminton racquet. Dupre is not a party to this motion.

2 On August 16, 2018, the defendants filed a motion (# 153) to strike paragraphs six through eleven of the plaintiff's affidavit in opposition to the present motion for summary judgment on the ground that those paragraphs conflict with her deposition testimony. On August 31, 2018, the plaintiff filed an objection to that motion. On September 5, 2018, the parties were permitted to argue the motion and the court took the matter under submission. "A motion to strike is the proper method to attack a counteraffidavit that does not comply with the rules." *2830 Whitney Avenue Corp. v. Heritage Canal Development Associates, Inc.,* 33 Conn.App. 563, 569 n.3, 636 A.2d 1377 (1994). "[I]f an affidavit contains inadmissible evidence it will be disregarded." *Id.*, 569. However, the fact that an affidavit may contradict a witness's previous deposition testimony does not mean it should be stricken. *Kenneson v. Eggert,* 176 Conn.App. 296, 311, 170 A.3d 14 (2017). "Any inconsistency may of course bear on the question of credibility, but it does not destroy all probative value." *Id.* Here, the court finds that the subject paragraphs do not expressly contradict the plaintiff's deposition testimony and, even if they did, contradictions are for the court to consider in determining whether the defendants are entitled to judgment as a matter of law. See *id.* Motion # 153 is denied.

3 See pl's br. (# 147), p.2, n.1.

4 General Statutes § 52-557n(a)(2)(B) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by ... negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

5 Before *Martinez,* "imminent harm" was, in *Williams v. Housing Authority,* 159 Conn.App. 679, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017), broken down into two elements: "[Sufficient] likelihood [that there is a] harm" and "[high] probability that harm will occur." "[I]n order to qualify under the imminent harm exception, a plaintiff must satisfy a four-pronged test. First, the dangerous condition alleged by the plaintiff must be apparent to the municipal defendant ... We interpret this to mean that the dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant ... Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of the harm is insufficient to satisfy the *Haynes* [*v. Middletown*] test. Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty ... to alleviate the dangerous condition ... Thus, we consider a clear and unequivocal duty ... to be one that arises when the probability that harm will occur from the dangerous condition is high enough to necessitate that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm. All four of these prongs must be met to satisfy the *Haynes* test, and our Supreme Court concluded that the test presents a question of law." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Id.*, 705-06.

6 Viewed in the four-element test of *Williams v. Housing Authority,* the court finds, as a matter of law, that the likelihood of the harm to a student from Dupre, or any of the other fifteen students playing badminton at the time swinging his racket is not sufficient to place upon Prentiss a clear and unequivocal duty to alleviate the dangerous condition. Furthermore, the court finds, as a matter of law, that the probability that harm will occur to an identifiable victim was not so high as to require Prentiss to act immediately to prevent the harm. See *Williams v. Housing Authority, supra*, 159 Conn.App. 705-06.

7 As stated above, the plaintiff has conceded the defendants' claim that § 7-101a creates no direct cause of action against the municipality. See *Pacheco v. Waterbury,* Superior Court, judicial district of Waterbury, Docket No. CV-99-0151152 (August 3, 1999).

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