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A Sharply Divided First Department Holds that a School Is Not Liable for Failing to Notify a Parent about a Fist Fight Involving Her Son which Occurred On School Grounds and Which Led to a Subsequent Fist Fight Which Occurred Off of the School Grounds.

Stephenson v. City of N.Y., 2011 N.Y. Slip Op. 05178 (1st Dept. 2011).

In this case, the infant plaintiff was involved in a fist fight with a fellow student which occurred on school grounds and which the plaintiff's assailant had initiated. The assailant first punched the plaintiff and the plaintiff then punched back twice. As a result of the scuffle, the plaintiff received a one day, in-school suspension while his assailant received a one to two week suspension. Additionally, the school ordered the plaintiff to leave school early on the very day of the altercation so as to avoid any further run-ins with his assailant. Neither the school nor the plaintiff notified the plaintiff's mother or grandmother about the incident.

Plaintiff's one day, in-school suspension came and went without incident. However, the next morning, after the plaintiff exited a subway station two blocks from the school while en route to school, the very same assailant repeatedly punched the plaintiff in the face as two accomplices held the plaintiff's hands behind his back. Plaintiff's jaw was fractured as a result.

The plaintiff's mother and grandmother commenced suit against the City, alleging that the School negligently failed to take measures to prevent the second fight by notifying them about the first fight. In support of this position, the plaintiff's mother stated in an affidavit that she would have taken various precautionary measures had the school apprised her of the first fist fight; including keeping her son at home, escorting him to school or asking to meet with the assailant's parents and the school to resolve any issued between the boys. The lower Court granted the plaintiff's motion for summary judgment on liability, finding that while a school normally has no duty to protect its students from injury occurring off of the school grounds, the school breached its duty of care by failing to notify the plaintiff's mother of the first fist fight.

Of note, the lower Court had previously resolved the issue of the defendants' actual or constructive notice in the plaintiff's favor because the defendants failed to comply with discovery demands pertaining to notice. Accordingly, when the defendants' appealed the lower court's decision, the defendants' notice had already been deemed established.

On appeal, the First Department reversed the lower Court's decision, finding no liability on the defendants' part. The Court opined that while the first fist fight occurred on school grounds and the school knew about it, it would be unreasonable to impose a duty upon the school to notify the plaintiff's parent about a physical altercation that the school had already addressed. The Court emphasized the fact that the danger to the plaintiff presented during the second

altercation was not attributable to the school's failure to address the first one, but rather, to the acts of third parties which occurred outside of the school grounds.

The Court further found the affidavit of the plaintiff's mother to be speculative. Despite the contention of the plaintiff's mother that she could have prevented the second altercation had she known of the first, the Court noted that her son could have been attacked at any time or place and that his mother's presence or preventative measures would not necessarily have deterred the "targeted attack." The Court further indicated that the school did not see a need to contact the juvenile authorities about the first fist fight and that accordingly, the second fight would not have necessarily been prevented if the plaintiff's mother had done so. In fact, the Court stated that it was unreasonable to believe the authorities would have intervened at all because fist fights are common among middle school students.

A sharp dissent opined that schools, as *loco parentis*, are indeed responsible to supervise and protect students against foreseeable injuries when those students are in the schools' custody, and that schools can accordingly be liable for foreseeable injuries which are proximately cause by inadequate supervision. The dissent stated that the pertinent inquiry is twofold. The first inquiry is whether the school breached its duty to the student by failing to act as a parent of ordinary prudence would have in similar circumstances, and the second inquiry is whether the school's breach was a proximate cause of the student's injury. In determining proximate causation, the dissent indicated that the student's injury must be foreseeable.

While the dissent acknowledged that the school's duty to protect and supervise its students only applies to those students who are on school grounds, the dissent also indicated that a school has a duty to take preventative measures when students are on school grounds in order to protect them from physical attacks which may later occur off of school grounds. The dissent reiterated that a school simply has an affirmative duty to prevent further escalation of a known danger to its students.

Applying these precedents to the present facts, the dissent emphasized that notice had already been established against the defendants as per the lower court's sanction. Therefore, the dissent argued that the defendant school was obligated to take reasonably calculated measures to prevent the second fight between plaintiff and his assailant. While the dissent noted that schools are not statutorily required to notify parents of physical altercations involving their children as part of taking such preventative measures, the Court argued that the defendants had a common law duty to do so.

Thus, the dissent found a question of fact as to whether the school breached its duty of care by failing to notify the plaintiff's mother of the first altercation and noted that informing the plaintiff's mother about the incident was one possible means of appropriate intervention. The dissent did not think it would be unreasonable to require the school to notify the plaintiff's mother of the first altercation even after the school addressed it, because the school may not have addressed it properly.

The dissent also found an issue of fact as to whether the school's potential breach proximately caused the plaintiff's injuries. The Court opined that the majority could not find the second altercation unpreventable as a matter of law because plaintiff's mother could have exercised several options to prevent the second fist fight had she known of the first, including

accompanying her son to school or contacting the juvenile authorities. The dissent characterized the majority's decision as a "backhanded" dismissal of the potential precautionary measures that the plaintiff's mother could have taken to protect her son and exhibited a "defeatist" approach that parents should not have to tolerate.

The dissent ultimately concluded that reasonable jurors could find that the school breached its duty of care in failing to notify the plaintiff's parent of the first fist fight and that this breach proximately caused the second and more severe fist fight.

After a Family Was Injured by a Rockslide in a State Park, the Court Finds Questions of Fact Regarding the Adequacy of the State's Protective Measures and Park Warning Signs.

Arsenault v. State of New York, 2011-018-220 (N.Y. Ct. Cl. 2011).

In this case, a family hiked along a prohibited creek bed and were observing scenery near the base of a waterfall in a State Park when a barrage of falling rocks came down upon them, piercing the mother's skull and causing the father and two minor children to suffer several lacerations. The decedent mother's estate and the remainder of the family commenced suit against the State alleging that the State failed to maintain its park in a reasonably safe condition by failing to scale the walls in the waterfall's immediate vicinity, failing to erect otherwise proper barricades to protect park patrons, failing to erect proper warning signs (particularly, warning park goers of rock slides),failing to properly enforce park rules, failing to properly supervise the park and in failing to prohibit park goers from entering the prohibited waterfall area even knowing that park goers did frequent this area in violation of existing warning signs.

The Court of Claims denied the State's motion for summary judgment, which argued that the plaintiffs were the sole proximate cause of their injuries and that the State's duty to the them was discharged by the erection of numerous warning signs prohibiting park patrons from entering the accident site. The State's motion further argued that the plaintiffs had assumed the risk of falling rocks which the State characterized as an "open and obvious" condition. The Court denied the State's motion, opining that it could not find as a matter of law that the park was in a reasonably safe condition or that the State's warning signs and protective measures discharged its duty to the plaintiffs.

The subject park, the Taughannock Falls State Park, has three designated hiking trails. It is undisputed that at the base of one of the three trails is a sign which warns park patrons to "Stay on the Main Trails," "Keep Away from the Cliff Edge" and "Beware of Falling Rocks and Loose Stones on Trails." These same admonitions are posted outside the very camp area where the plaintiffs left from on the morning of the accident. Additionally, in an observation area separated from the park waterfall by a low stone wall, signs were posted which read "Stay This Side of the Wall," and "End of Trail, Hiking Prohibited Beyond This Point." The park also had two signs along the railing of a footbridge in the area of the creek bed which read "Do Not Enter" and "Warning, Stop, You Are in a Falling Rock Area Proceed No Further and Return to Trail."

Nonetheless, the plaintiffs did not use the designated park trails, but instead, proceeded down a wooded path, under the footbridge and eventually to a creek bed which led to the base of a 215 foot waterfall. While in the area, the plaintiffs stood upon rocks below a 215 foot face of a rock cliff and took pictures. There were approximately fifteen other park patrons also standing and observing along the creek bed just before the accident. Moments later, rocks came falling down from the top of the rock cliff, injuring the entire family.

The New York State Park Police patrolled the park once or twice a day and would look for patrons who disobeyed the park warning signs, proceeded off the designated trails or near the falls or who otherwise broke park rules. Additionally, park rangers would patrol the park and randomly warn park goers about the dangers in the park, although there was no indication that any park rangers were near the water fall on the morning of the accident.

The Court found it significant that a member of the park police testified that prior to the accident, one to ten percent of park patrons would visit the subject creek bed instead of proceeding along the designated trails. Specifically, in the weeks leading up to the accident, the park police witness testified that he had directed hundreds of people out of the creek bed and that he found twenty to thirty people walking along the creek bed at any given time. However, he stated that he did not find as many people around the water fall because it was "very well posted" that park goers should remain on the trail. A park ranger similarly testified that less people ventured off to the plunge pool (the area where the plaintiffs were standing) as opposed to the creek bed. The park ranger then testified that he would not be surprised to find that more than fifteen people were in the area of the falls on the day of the accident.

The Court opined that the State, like any landowner, has a duty to maintain its park in a reasonably safe condition and that it can be liable even for open and obvious conditions and even where warnings are in place, if its property is not in a reasonably safe condition under all of the circumstances. The Court further opined that liability against a property owner, including the State, can stand if the landowner has reason to know or anticipate that those on the subject property may be distracted and not discover what would normally be obvious, forget what has been discovered, or fail to protect themselves against any such dangers. In the plaintiffs' case, the Court emphasized the fact that the plaintiffs did not see the warning signs and were not aware of the risk of falling rocks because, by plaintiffs' own admission, they may have been distracted while traversing over rocks and stones along the creek bed.

While the Court acknowledged the existence of numerous warning signs in the park, it declined to find these signs sufficient as a matter of law because the State knew that many park goers disregarded them and hiked outside of the designated trails. Viewing the evidence in the light most favorable to the non moving plaintiffs, the Court found a question of fact as to the adequacy of the park's warning signs and the safety measures implemented by the State to protect park patrons.

Lower Court Dismisses Class Action Suit for Lack of Standing Because Plaintiffs Failed to Show How an NYPD Database Containing Their Information Gave Rise to a Constitutional Violation or How the Criminal Procedure Law Provided for Their Private Cause of Action.

Lino v. City of N.Y., 2011 N.Y. Slip Op. 51204 (Sup. Crt. 2011).

In this class action, the plaintiffs alleged that the NYPD violated their rights under Criminal Procedure Law ("CPL") section 160.50 and 160.55, 42 U.S.C. § 1983, the New York Constitution and Common Law and the First, Fourth and Fourteenth Amendment by maintaining a computerized database of information compiled in UF-250 Stop, Question and Frisk work sheets even after the plaintiffs' criminal proceedings were terminated in their favor.

As per the NYPD's Patrol Guide, the questioning officer during a stop, question and frisk (even which does not result in an arrest) must fill out a UF 250, which includes the detainee's name, address and general information. A NYPD directive from May 2006 mandates that information itemized in UF-250s be compiled in a centralized NYPD computer database in order to assist in investigations for the subsequent location and apprehension of criminal suspects. Plaintiffs are several individuals who has been stopped and frisked by the NYPD and whose UF 250 information was being routinely stored in the NYPD's database.

In support of their claim, the plaintiffs argued that CPL 160.50 and 160.55 requires that the record of a criminal proceeding or records for minor traffic infractions/violations be sealed if and when said proceeding is terminated in the accused's favor. These statutes further provide that the accused's photos and fingerprints be destroyed and that official records and papers related to the individual's arrest and/or prosecution be sealed as well. The Court opined that CPL 160.50 and 160.55 serve to protect those wrongfully accused from any "stigma" which may flow from their participation in a criminal proceeding and to afford these individuals protection in the pursuit of employment, education, professional licensing etc.

Nonetheless, the Court found that the plaintiffs lacked standing to sue because they needed to have suffered an "injury in fact" and an had actual legal stake in their suit, but never established how the existence of the NYPD database with their information violated CPL 160.55 or 160.55. The Court found that neither CPL 160.50 nor 160.55 required that anything other than photos or fingerprints be destroyed post termination of a criminal proceeding in the accused's favor. The Court stated that the CPL merely required the NYPD to seal all other records, such as the information contained in UF 250s and only to release this information under specific circumstances set forth in the statute. Because the plaintiffs' information was properly sealed and none of the plaintiffs' information had been wrongfully released, the Court found that the plaintiff's lacked the requisite injury and accordingly, lacked standing.

The Court noted that even if the NYPD was in violation of the CPL by maintaining the database, a CPL violation does not give rise to a constitutional violation nor does the statute provide for a private suit such as the plaintiffs' class action. The Court deemed a violation of the CPL to be unrelated to any First, Fourth or Fifth Amendment rights because the plaintiffs had no inherent right to any indicia of their arrest or detainment after the charges against them are dismissed.

Because the Court dismissed the plaintiff's complaint for lack of standing, it declined to address the merits of the plaintiffs' claims.

Third Department Finds that Plaintiff Sufficiently Stated a Cause of Action Against a School District for Negligent Supervision and Retention During Former School District Director's "Reign of Terror."

Gray v. Schenectady, 2011 N.Y.S Slip Op. 05925.

In this case, a former director of the Schenectady School District commenced a "reign of terror" against the plaintiff, which included vandalizing the plaintiff's property and using school district resources such as computers, vehicles, personnel and various other methods to threaten and harass the plaintiff on at least five occasions. Plaintiff subsequently commenced suit against the former director and school district alleging that the defendants intentionally inflicted emotional distress onto the plaintiff and that the defendant school district was negligent in the supervision and retention of the former director despite numerous complaints made about his behavior.

The defendants moved under CPLR 3211 (a)(7) to dismiss all of plaintiff's claims for failure to state a cause of action. The Court noted that in deciding such a motion, it had to accept the alleged facts as true, draw every reasonable inference in the plaintiff's favor and only rely on defendants' evidence which conclusively established the falsity of plaintiff's alleged facts. In doing so, the Court found that while the plaintiff sufficiently stated a cause of action for intentional infliction of emotional distress against the former director and negligent supervision/retention against the school district, it dismissed the plaintiff's claims of intentional infliction of emotional distress against the district.

The Court noted that the plaintiff had to sufficiently allege that the school district's actions were so "extreme and outrageous" as to surpass all bounds of decency. The Court found that the district's mere inaction in response to the former director's behavior could not be deemed extreme and outrageous, but that the director's own harassing, threatening and menacing actions could be. The Court opined that the district could be vicariously liable for the director's actions, if performed in the scope of or in furtherance of his employment. While the Court acknowledged that this inquiry would normally create a question of fact, it found that the plaintiff's evidence to show that the director acted in the scope of his employment was lacking. Therefore, the Court found that the plaintiff sufficiently stated a cause of action against for intentional infliction of emotional distress against the director only.

However, the Court found that the plaintiff sufficiently stated a cause of action against the district for negligent supervision and retention because while the director was not likely acting in the scope of or in furtherance of his employment, the plaintiff provided enough evidence to suggest that the director had continued access to the school district's resources to carry out his behavior without any discipline or investigation on the school district's part.

Third Department Holds That a College Baseball Player Assumed the Risk of Being Hit In the Face with A Fastball at a Indoor Training Facility While Practicing with His Team.

Bukowski v. Clarkson Univ., 2011 Slip Op. 05912.

Plaintiff was a college freshman pitcher who was pitching on a artificial mound at a regular distance in an indoor training facility when a line drive struck him in the face. Plaintiff was an experienced baseball player who testified that he had been pitching in baseball leagues for many years, under various conditions and on various types of fields, and that 50 to 100 times, he had balls batted directly at him. On the date of his accident, the plaintiff was participating in a "live" practice, wherein no protective "L" screens were used.

The plaintiff alleged that there was an issue of fact as to whether the backdrop and lighting of the indoor facility unreasonably enhanced the risk of being hit by a ball. Of note, the plaintiff testified that he was familiar with the indoor training facility and that his team regularly held practice there. Specifically, the plaintiff's coaches told him that they intended to hold live practices and, in fact, the plaintiff practices in these lives practices at least two weeks before his accident.

The Appellate Division for the Third Department affirmed the lower Court's dismissal of the plaintiff's action finding that voluntary participants in sporting activities, like the plaintiff, assume the risks inherent in the activity. While the Court acknowledged that organizers of sporting activities owe a duty of reasonable care to protect participants from injuries which arise out of un-assumed, concealed, or unreasonably increased risks, it emphasized that a participant's assumption of risk extends to even less than optimal conditions, provided that they are open, obvious and readily appreciable.

Accordingly, the Court found that the plaintiff had assumed the risk of being hit by a line drive, as he fully appreciated the risk and could readily observe what the Court deemed to be the "open and obvious" conditions present in the indoor training facility. The Court found the risk of being hit with a line drive to be "inherent", whether the facility was indoors or not, and emphasized the fact that no rule or regulation required that the plaintiff be provided with a protective screen or a different backdrop during his practices. For these same reasons, the Court rejected the plaintiff's negligent supervision claim.

The Court similarly rejected the plaintiff's argument that he did not assume the risks of the game because his coaches compelled him to practice without an L-screen because, as the Court noted, he never even asked to use an L- screen during practices.

The Dissent declined to conclude that there was no rational basis by which a jury could have concluded that the defendant's were negligent. While the dissent conceded that athletes voluntarily assume the risk inherent in their sport, it also stated that this was not an absolute defense and that the record here demonstrated that the plaintiff had always used an L-screen for protection at the indoor facility prior to the accident. The dissent also noted that the plaintiff's expert opined that the indoor training facility presented a "pretty dangerous" and "unsafe" condition because the lighting, backdrop, flooring and netting made it increasingly difficult for a pitcher to observe the balls coming from the hitter. The dissent went as far as to say that the plaintiff produced "ample" evidence from which a jury could have found that the inherent risks of playing baseball were unreasonably increased and that the defendants, therefore, had a duty to protect the plaintiff from those risks.

Second Department Finds that a Fire truck Operator's Conduct While Responding to an Emergency Call Did Not Amount to "Reckless Disregard."

Hemingway v. City of N.Y., 916 N.Y.S.2d 167 (2d Dept. 2011).

Reaffirming a well established principal of law, the Second Department held that a fire truck operator did not act with the requisite "reckless disregard" for the safety of others when he struck the plaintiff's vehicle while responding to an emergency call.

The Second Department opined that because the fire truck (an "emergency vehicle") was in the process of responding to an emergency call, the plaintiff faced a heightened standard to establish the defendants' liability in that the plaintiff had to prove that the operator acted with a reckless disregard for the safety of others, as opposed to mere negligence. The Court defined the "reckless disregard" necessary to satisfy this heightened standard as the intentional commission of an unreasonable act in disregard of a known or obvious risk so great as to make it highly probable that harm would result there from.

The fire truck operator in this case struck the plaintiff's vehicle while traversing a Queens intersection with its siren and horns on. The fire truck slowed down as it approached the subject intersection, just before impact, and stopped its vehicle post accident. The operator additionally aborted his response to the emergency call and made provisions for a different fire truck to respond to the emergency situation by notifying his dispatcher of the accident and his inability to respond to the emergency as planned.

The Court unequivocally held that the operator's actions did not exhibited the requisite reckless disregard needed to impose liability and that the plaintiff failed to establish a prima facie case. Accordingly, the Court affirmed the lower Court's decision granting summary judgment to the defendants.