Docket No.: AAN-CV22-6047752-S : SUPERIOR COURT

JAMES J. PALMER, JR. : J.D. OF ANSONIA / MILFORD

v. : AT MILFORD

STATE OF CONNECTICUT : MAY 7, 2024

MEMORANDUM OF DECISION

The instant action is a suit in negligence for injuries sustained by the plaintiff, James J. Palmer, Jr., during a baseball practice held by the defendant, State of Connecticut, at Southern Connecticut State University (SCSU). Before the court is the plaintiff's motion for summary judgment as to liability and the defendant's objection to the same along with the defendants cross-motion for summary judgment as to liability. For the following reasons, the plaintiff's motion is denied and the defendant's cross-motion is denied.

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I

FACTUAL BACKGROUND

This matter arises from an incident that took place on October 10, 2017, when the plaintiff was injured during a SCSU baseball practice. The plaintiff was hit by a ball thrown by the catcher to third base while running from second base to third. The plaintiff was severely struck in the left side of his head by this errant throw and required hospitalization. The plaintiff was not wearing a baseball helmet at the time he was struck.

At the time of the injury, the SCSU baseball team was engaged in a drill called "dirt ball reads." The drill was run by Head Coach Timothy Shea, who would throw a ball to the catcher. If the ball hit the dirt, or was going to hit the dirt, before getting to the catcher, then the

baserunner would attempt to steal third base. The catcher would attempt to throw the baserunner out.

Both Coach Shea and Assistant Coach Michael Doran were present during the practice at the time of the injury.

At the time of the injury, the plaintiff was twenty-one years old. He was an experienced baseball player. He began playing competitive baseball at around thirteen years of age. In high school he was "All-Conference" and his high school team captain. The plaintiff began his collegiate career at the University of Rhode Island (URI), which is a National Collegiate Athletic Association (NCAA) Division I program. The plaintiff played at URI for one year and then transferred to SCSU.

The dirt ball reads drill was intended to simulate a real game situation. Coach Shea explained the drill beforehand and walked through it with the players on the infield, including plaintiff, so everyone could understand what was going to happen.

At some point in time, baseball helmets were made available during the drill. There are disputed issues of fact about when helmets were made available and whether and/or when the coaches told the players to wear helmets. It is not disputed, however, that the plaintiff was not wearing a helmet while he was participating in the drill.

On May 14, 2018, the plaintiff filed a Notice of Claim with the Office of the Claims Commissioner. On April 18, 2022, the Claims Commissioner granted the plaintiff the right to pursue a civil action.[1]

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[1] Sovereign immunity does not apply to this instant matter. See *Perrone* v. *State*, 122 Conn. App. 391, 998 A.2d 256 (2010) ("In the absence of a statutory waiver of sovereign immunity, the plaintiff may not bring an action against the state for monetary damages without authorization from the claims commissioner to do so. When the Claims

On October 23, 2023, the plaintiff filed the instant partial motion for summary judgment as to liability and supporting memorandum. On November 22, 2023, the defendant filed its memorandum in support of its objection to the plaintiff's motion for summary judgment and cross-motion for summary judgment.

II

STANDARD

The law governing summary judgment is well settled. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the 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. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018). "The test [for summary judgment] is whether a party would be entitled to a directed verdict on the same facts." *Fernandez* v. *Mac Motors, Inc.*, 205 Conn. App. 669, 673, 259 A.3d 1239 (2021). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 233, 32 A.3d 307 (2011).

"The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must

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Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable." [Citations omitted.]).

recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 165, 204 A.3d 717 (2019). "Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . ." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 476, 200 A.3d 202 (2018).

III

DISCUSSION

The plaintiff's motion for summary judgment argues that the defendant had a duty to ensure the reasonable safety of their players which included mandating the wearing of a helmet in base running drills with a live ball. The plaintiff further contends that undisputed material facts demonstrate that the defendant breached that duty, and that the defendant's breach caused the plaintiff's injuries. The defendant responds that it did not engage in any conduct that would breach the duty of care for ordinary negligence. It further contends that ordinary negligence is not the correct standard to apply to the present matter. Instead, the defendant argues that the standard that is appropriately associated with the activity that gives rise to the plaintiff's injuries is recklessness, which the plaintiff has failed to sufficiently plead.

In the instant case, the question for the court is whether the injury sustained by the plaintiff was foreseeable and if so, what duty is owed by the defendant, a college athletic coach

running a drill that was meant to simulate the vigorous play of a competitive game, to an adult participant in that drill.

The answer to the first question is that the plaintiff's injury was, in fact, foreseeable. "The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" *Jaworski* v. *Kiernan*, 241 Conn. 399, 405, 696 A.2d 332 (1997) (quoting *Frankovitch* v. *Burton*, 185 Conn. 14, 20-21, 440 A.2d 254 [1981]). In the seminal case *Jaworski*, the Supreme Court concluded that an injury during a contact sport, such as soccer or football, was indeed foreseeable. Connecticut courts have recognized baseball to be a contact sport.[2] Moreover, the injury of being hit by a ball from an errant throw during a drill designed to simulate game time play can be anticipated. Thus, the plaintiff's injuries in the present matter were foreseeable.

Although foreseeable, the issue of what duty is owed by the defendant remains. *Jaworski* v. *Kiernan*, supra, 405. In *Jaworski*, the Supreme Court addressed the issue of the duty owed by a defendant while both the plaintiff and defendant were participating on opposing teams in an adult coed soccer game. There, the plaintiff filed a two-count complaint against the defendant: the first count was in negligence, and the second count was in reckless conduct. During that

[2] See *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672, 699, 849 A.2d 813 (2003) (distinguishing contact sports from non-contact sports as those activities where contact is an inherent part of the game that cannot be eliminated totally). See also *Hotak* v. *Seno*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-00-0072461-S (June 12, 2001, *Arnold, J.*) (29 Conn. L. Rptr. 609); *D'Amico* v. *Tomkalski*, Superior Court, judicial district of Waterbury, Docket No. CV-98-0147377-S (March 2, 1999, *Pellegrino, J.*) (24 Conn. L. Rptr. 119); *Mallin* v. *Paesani*, 49 Conn. Supp., 457, 892 A.2d 1043 (2005).

game, while the plaintiff was in control of the soccer ball, the defendant negligently and/or recklessly hit her from behind while attempting to take the ball away from her, causing a tear of the anterior cruciate ligament of her left knee.

At trial, the jury returned a verdict in favor of the plaintiff on the negligence count and for the defendant on the reckless conduct count. "The defendant moved to set aside the verdict and for judgment notwithstanding the verdict as to the negligence count, claiming, again, that an action for personal injuries sustained in an athletic competition must be predicated on recklessness and not mere negligence." (Internal quotation marks omitted.) Id. 401–02.

On appeal, the Supreme Court concluded "that participants in a team athletic contest owe a duty to refrain only from reckless or intentional conduct toward other participants . . . ." Id. In making this determination, the court relied on several different factors, including: "(1) the normal expectations of participants in the sport in which the plaintiff and the defendant were engaged; (2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." Id. 407. In doing so, the court held that that recklessness or intentional conduct is the appropriate standard as: "the normal expectations of participants in contact team sports include the potential for injuries resulting from conduct that violates the rules of the sport. . . . A proper balance of the relevant public policy considerations surrounding sport injuries arising from team contact sports also supports limiting the defendant's responsibility for injuries to other participants to injuries resulting from or intentional conduct. . . . [T]here exists the potential for a surfeit of lawsuits it becomes known that simple negligence . . . will suffice as a ground for recovery for an athletic injury. . . . The majority of jurisdictions

addressing the issues has chosen to adopt either a reckless or an intentional conduct standard of care when determining liability for injuries that occur during an athletic contest." Id. 408–10.

The Appellate Court relied on these principles in *Maselli* v. *Regional School District Number 10*, 198 Conn. App. 643, 235 A.3d 599, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020), recognizing that the holding in *Jaworski* is applicable to a situation involving a team practice rather than a formal game. In *Maselli*, the minor plaintiff was a member of a soccer team at her middle school and was engaged in practice when she was struck in the face by a ball which had been forcefully kicked by her adult coach. The plaintiff brought negligence and recklessness claims against the coach and the school. Although with respect to the negligence claims, the defendants were ultimately deemed to have municipal governmental immunity, the court relied on *Jaworski* in its analysis as to whether the plaintiff was in "imminent harm" when she was injured, which would present an exception to immunity. The court held that the plaintiff was not in an unusually harmful situation, because, whether it is a practice or an official game, the risk of being struck by the ball is apparent in a contact sport. "[A] player getting hit by a ball, even in the face, whether during a practice scrimmage or actual game is a not so uncommon of a risk." Id. 658–59. The court then concluded, even when the injury was caused by a forceful kick by an adult coach playing with thirteen-year-old girls, that the injury suffered by the plaintiff was not intentional and that being hit with the ball is a risk every time a contact sport is played, and that "the only reasonable and logical conclusion that a jury could reach is that this was a simple accident, an inherent part of a contact sport." Id. 663.

Similarly, our Superior Courts have issued decisions illuminating the contours of the *Jaworski* holding. In *Baer* v. *Regional School District 16,* Superior Court, judicial district of Waterbury, Docket No. CV98-0148373 (July 19, 1997, *Pellegrino, J.*) (24 Conn. L. Rptr. 119),

the court held that *Jaworski* applied to an elementary school child participating in a floor hockey game which took place during a physical education class and struck negligence counts from the plaintiff's complaint. In so doing, the court rejected the plaintiff's argument to distinguish *Jaworski* because "(1) there are material differences between a recreational contact team sport and a floor hockey game played in physical education class during school hours; (2) *Jaworski v. Kiernan* involved adults, while the case at bar involves minor children; (3) the participants in *Jaworski v. Kiernan* were voluntary, while in the present case, the children were compelled to participate because the physical education class was a part of their mandatory school curriculum; (4) physical contact is not always accepted as part of the sport when the facts deal with children and physical education class; and (5) the plaintiff is a member of a narrowly defined class of persons exposed to an imminent threat of harm, falling within the foreseeable class of victims exception." (Internal quotation marks omitted.) Id. *1.

The Superior Court has, on at least one occasion, applied *Jaworski* to cases involving baseball and softball. In *D'Amico* v. *Tomkalski*, Superior Court, judicial district of Waterbury, Docket No. CV98-0147377-S (March 2, 1997, Pellegrino, J.) (31 Conn. L. Rptr. 72), the court struck a count of negligence for injuries sustained by the plaintiff from a ball that was thrown by the defendant, secondhand baseman, and struck the plaintiff in the face as the plaintiff was running toward second base from first base. In rejecting the plaintiff's argument that softball is not a contact sport, the court stated that "softball is a contact sport regardless of the particular or peculiar rules of the game in which the parties to this action participated. A game where a ball is thrown, even at a slow speed, toward a batter so that it will be hit and, if possible caught by fielders poses risk of injury. The injury can arise from a batter being hit, a runner being struck, a

fielder misjudging the trajectory of a hit or thrown ball. . . . Baseball is a contact sport." Id. The court then applied *Jaworski* to grant the defendant's motion to strike a count of negligence.

The plaintiff in *D'Amico* filed an amended complaint alleging that the defendant acted "in reckless disregard for the safety of the plaintiff" when he threw the ball which struck the plaintiff. Id. The defendant moved for summary judgment arguing that the plaintiff can present no facts or evidence to demonstrate that the defendant's conduct was willful, wanton and/or reckless as a matter of law. The court agreed and granted judgment in favor of the defendant, noting that "softball players are exposed to risk of injury by pitched or thrown balls, softball is a contact sport and the reasoning in *Jaworski* does apply in this case. Players are not liable for harms which they knew or should have known, based on the normal expectations of participants in the sport. . . . The possibility of being struck in the face by a ball thrown between bases is a normal expectation for a baserunner." (Citation omitted; internal quotation marks omitted.) *D'Amico* v. *Tomkalski*, Superior Court, judicial district Waterbury, Docket No. CV98-0147377-S (November 30, 2001, Doherty, J.) (31 Conn. L. Rptr. 72).

Similarly, Judge Arnold applied the holding of *Jaworski* in *Hotak* v. *Seno*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV00-0072461-S (June 12, 2001, Arnold, J.) (29 Conn. L. Rptr. 609). There, the plaintiff, an injured minor, sued the defendant, a minor baseball player, for injuries suffered when he was struck in the head by the player's baseball bat while playing baseball in a school gym's class. In granting the motion to strike the plaintiff's action sounding in negligence, the court found that "the plaintiff was a member of the gym class and a participant in the baseball game. He was a member, thus, of one of the baseball teams. The teams were engaged in a contact sport promoting vigorous athletic competition. While the plaintiff's team was at bat and the plaintiff may not have actually been on the playing field, he

was a participant in the game. The game was being held as part of a school physical education class which encouraged vigorous recreational activity in sports, under the supervision of school personnel." Id. The court also relied on one of the decisions cited by the *Jaworski* court, *Crawn* v. *Campo*, 136 N.J. 494, 496, 643 A.2d 600 (1994). "In that case, the New Jersey Supreme Court said the '[p]laintiff was playing catcher in a pickup softball game when [the] defendant, attempting to score from second base, either slid or ran into him at home plate.' In rejecting the standard, the court stated: 'One might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play-a traditional source of a community's conviviality and cohesion-spurs litigation. The heightened recklessness standard recognizes a commonsense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms.'" (Citation omitted; internal quotation marks omitted.) *Hotak* v. *Seno*, supra. Thus, the court concluded that "[p]roof of mere negligence is insufficient to create liability." Id.

Although informative, most of these decisions involved claims by one participant against another participant in contact sports (even if that participant was a coach), involved minors, and/or focused on the imminent harm exception to municipal government immunity. The present case instead involves claims against the state for how they conducted a drill that allegedly resulted in the plaintiff's injuries. The plaintiff seeks to distinguish the instant facts from *Jaworski* by arguing that a negligence standard should apply to how a coach runs a practice as opposed to a coach's participation in a practice. The court agrees.

First, in *Hendry* v. *Fratus*, Superior Court, judicial district of New London, Docket No. 558176 (August 23, 2002, *Hurley, J.*) (32 Conn. L. Rptr. 733), the court found that the

negligence standard applied where the plaintiff, a minor, was injured by a ball thrown by the defendant coach during baseball practice. In doing so, the court relied on sister state decisions, highlighting the fact that the issue of whether a coach may be liable for injuries incurred by players has not yet been decided by the Connecticut courts. "A high school baseball coach was not liable for injuries to a student who was hit in the head by a ball during batting practice because the coach had rules, procedures and routines for orderly batting practice which an expert witness testified met the standard used by coaches to allow reasonable supervision and safety of the players. *Herring v. Bossier Parish School Bd.*, 632 So.2d 920, 89 Ed. Law Rep. 1041 (La.Ct.App.2d Cir., 1994). Conversely, the failure of a coach to properly prepare and instruct a student before the student attempted a long jump at a maximum effort was a cause in fact of the injuries and the coach was liable because he had a duty not to expose the student to an unreasonable risk of injury. *Scott v. Rapides Parish School Bd.*, 732 So.2d 749, 135 Ed. Law Rep. 304 (La.Ct.App.3d Cir., 1999), writ denied, 747 So.2d 22 (La., 1999). The Nebraska Supreme Court determined that an instructor of wrestling who injured a student wrestler while instructing on a particular move, was held to the simple negligence standard, rather than the wilful and reckless standard of co-participants because he and the student were not considered "participants" in a contact sport, and he was engaged in providing instruction. *Hearon v. May*, 540 N.W.2d 124, 130, 104 Ed. Law Rep. 1360 (1995)." *Hendry* v. *Fratus*, supra.

Ultimately, the court denied the motion to strike the complaint holding that "the present case may be distinguishable from *Jaworski* because it is alleged that the minor participant who was injured was engaged in practice, not in a competitive game and the injury was not the result of an act by another minor participant, but rather from his adult coach who failed to properly instruct." Id. Similarly, the plaintiff in the instant action was engaged in a practice, not a

competitive game, and similarly alleges that his injuries are a result of the defendant's failure to instruct him to utilize a helmet during said practice.

Second, balancing the *Jaworski* factors leads to the conclusion that a negligence standard ought to apply in the instant matter.

Relying on the first prong, the expectations of the parties involved in the present matter differ from the expectations of the participants in *Jaworski*. In *Jaworski,* the court held that the recklessness standard applies as ". . . it is reasonable to assume that the competitive spirit of the participants will result in some rule violations and injuries. . . . [S]ome injuries may result from such violations, but such violations are nonetheless an accepted part of any competition." *Jaworski* v. *Kiernan*, supra, 407. Here, unlike in *Jaworski*, the parties involved were not engaged in competition but instead in practice, designed to enhance the players' skills for game day. This practice was intended to simulate a game scenario, which could involve contact such as the contact experienced by the plaintiff. The suit, however, is not against the catcher that threw the ball that struck the plaintiff, rather the defendant for its alleged failure to safely run a practice.

As for the third prong, the concern presented in *Jaworski* regarding the potential increase of litigation differs as requiring coaches to provide non-negligent instruction would reduce the likelihood of injuries stemming from negligent instruction. See *Schmus* v. *Davis*, Superior Court, judicial district of Danbury, Docket No. DBD-CV-20-6037300-S (October 20, 2021, *Brazzel-Massaro, J.*).

Finally, the decisions of our sister states, the fourth prong, support the holding that negligence is the applicable standard and are most persuasive.

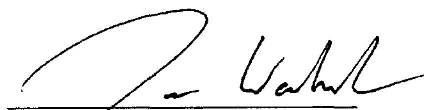
In *Galardi* v. *Seahorse Riding Club*, 16 Cal. App. 4th 817, 830, 20 Cal. Rptr. 2d 270, review denied, 1993 Cal. Lexis 4820 (1993), the court distinguished the duty of care held by a participant contrasted with the duty of a coach holding that "although co-participants in a sport ordinarily owe no duty to each other, the general rule is that *coaches* and instructors owe a duty of [ordinary] care to their charges." (Emphasis added.) Id. 823. There, the plaintiff, an equestrian, was training for an upcoming horse show when during a practice the defendant, an instructor at the riding club, twice raised the height of the jumps without lengthening the distance between each obstacle. Ultimately, while practicing jumps, the plaintiff's horse landed too close to the second jump causing the plaintiff to lose her balance, fall, and injure her coccyx and two vertebrae.

Furthermore, the decisions of our sister state Massachusetts similarly led to this conclusion. In *Brandt* v. *Davis*, 98 Mass. App. 734, 159 N.E 3d 191 (2020), appeal denied, 486 Mass, 1111 (2021), the plaintiff brought claims against Suffolk University and its head softball coach following injuries sustained during softball practice. Although the court was unable to examine the plaintiff's claim for negligence as the university had an enforceable liability waiver barring same, the court stated that "[a]lthough a coach's duty of care to opposing players is the same recklessness standard that applies to the players she coaches, we assume without deciding that that a coach ordinarily has the duty of ordinary reasonable care to her own player." (Citation omitted.) Next, the decision in *Dugan* v. *Thayer Academy*, supra, 32 Mass. L. Rptr. 657, similarly held that the standard which applies to coaches is negligence. There, the plaintiff, a member of her school's varsity field hockey brought a negligence claim against the defendant following injuries she sustained playing for her coach. In October of 2011, the plaintiff was hit in the head while playing a game and suffered a head injury and/or concussion which her coach

witnessed but did not attempt to further investigate, remove her from the game, nor prevent her from attending subsequent team practices. Later in the month, the plaintiff was allowed to play in another game even though she was never evaluated nor received clearance from a medical professional where she suffered a second injury caused by being struck in the head by an opposing player. In analyzing the plaintiff's negligence claim, the court stated that "the better authority indicates that a player's own coach must exercise that degree of care of a reasonably prudent coach (i.e. the negligence standard) and may face liability without proof of recklessness." Id. The court further stated that "[s]imply because the alleged tortious conduct occurred in connection with the conduct of a sport does not mean the recklessness standard must apply." Id. Ultimately, the court denied the defendant's partial motion for judgment on the pleadings.

In weighing the *Jaworski* factors, the court finds that a negligence standard ought to apply to the case at hand. Notwithstanding, material issues of fact remain disputed as to the specific duty of the defendant and whether that duty was violated by the defendant. Thus, both the plaintiff's motion for summary judgment and the defendant's cross motion are denied.

By the Court,



Welch, J.