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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
JUDICIAL DISTRICT OF NEW HAVEN AT MERIDEN.

RAY, II, Alec J.
v.
TESTA, Vincent, et al.

DOCKET NO. NNI CV 20 602 1079-S
|
MAY 26, 2023

**MEMORANDUM OF DECISION**

John F. Riley, Jr.

FACTS

***1** In this negligence action, plaintiff Alec J. Ray II (Ray), a minor brings this action through his mother plaintiff Luriena K. Palmares (the plaintiff). The plaintiff alleges that on September 27, 2019, as part of Ray's high school curriculum at Lyman Hall High School in Wallingford, CT, Ray attended a culinary class taught by the defendant Vincent Testa (Testa). Docket Entry Nos. 111.[1] On that same day, the plaintiff alleges that Testa instructed Ray and a fellow student, defendant Chelsea Crouch (Crouch), to retrieve knives from the storage room. Id. After retrieving the knives, the plaintiff claims that Crouch engaged in horseplay by swinging her knife close to Ray's face. Id. To block his face, Ray put up his right hand, which was then cut by the Crouch's knife. Id.

1 Docket Entry Nos. 111 is the plaintiff's amended complaint, which was filed on March 30, 2021.

The plaintiff has filed an eight-count complaint alleging six counts of negligence against Vincent Testa, Joseph Corso (Corso) the Principal of Lyman Hall High School, Salvatore Menzo (Menzo) the Superintendent of Wallingford schools, the Wallingford Board of Education, the Town of Wallingford, and Chelsea Crouch.[2] Id. The complaint also alleges a count of indemnification against Testa, Corso, and Menzo, and a separate count of liability against the Town of Wallingford under General Statutes § 52-577n.

2 Chelsea Crouch is a negligent apportionment defendant, all references to the defendants do not include Crouch as she is not a party to the to the motion for summary judgment (Docket Entry Nos. 122) or the defendants' reply to the plaintiff's objection to the motion for summary judgment (Docket Entry Nos. 124).

On October 5, 2022, the defendants filed a motion for summary judgment (Docket Entry Nos. 121) on the grounds that the negligence claims are barred by **governmental immunity** and that there is no appliable exception to immunity in this case. The plaintiff responded with an objection to the motion for summary judgment (Docket Entry Nos. 123), on January 5, 2023. In her objection she argues that there is a genuine issue of material fact regarding whether Ray was subject to imminent harm, which is an exception to **governmental immunity**. Id. The plaintiff in her response, did not address the defendants' assertion that Testa's actions were discretionary or that any alleged imminent harm was not apparent. Id. The defendants filed a reply (Docket Entry Nos. 124) on February 3, 2023, arguing that they are entitled to **governmental immunity** as the defendants were engaged in discretionary acts, even if Ray was subject to imminent harm, because that alleged harm was not apparent to the defendants. Id. The court heard oral arguments on the motion for summary judgment and the opposition thereto on March 20, 2023.

DISCUSSION

"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.... The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried.... However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury ... the moving party for summary judgment is held to a strict standard ... of demonstrating his entitlement to summary judgment."

  

(Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

***2** "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). "[B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 745,196 A.3d 328 (2018).

The defendants move for summary judgment arguing that the plaintiff's claims are barred by **governmental immunity**. In doing so, the defendants maintain that there is no applicable exception to immunity under General Statutes § 52-577n. The defendants contend, in their motion for summary judgment, that they were engaged in the performance of a public duty, Testa's supervision of the students was a discretionary act, Ray was not subject to imminent harm, and even if he was subject to imminent harm, it was not apparent to the defendants. Docket Entry Nos. 121. The plaintiff counters that the defendants have failed to meet their burden of establishing that Ray was not subject to imminent harm. Docket Entry Nos. 123.

Section 52-577n (a) (2) provides in relevant part, "[e]xcept as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) 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." In *Kolaniak* v. *Board of Education*, 28 Conn. App. 277, 280-81, 610 A.2d 193 (1992), the Appellate Court clarified that "[g]overnmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature.... On the other hand, ministerial acts are performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action.... Generally, liability may attach for a negligently performed ministerial act, but not for a negligently performed governmental or discretionary act." (Citation omitted; internal quotation marks omitted.) Stated more succinctly, "[i]f an act is ministerial there is no **governmental immunity**; if it is discretionary there is." *Cancisco* v. *Hartford*, Superior Court, judicial district of Hartford, Docket No. CV-93-0519929-S (June 27, 1995, *Corradino, J.*).

In the present action, there is no argument surrounding if the act was discretionary, therefore, there is no need to address whether the act was ministerial or discretionary. Even though an act is discretionary, however, there may be an applicable exception to **governmental immunity**. "The immunity from liability for the performance of discretionary acts by a municipal employee is subject to three exceptions or circumstances under which liability may attach even though the act was discretionary: first[3], where 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 ...." *Evon* v. *Andrews*, 211 Conn. 501, 505, 559 A.2d 1131 (1989). "This identifiable person-imminent harm 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.) *Haynes* v. *Middletown*, 314 Conn. 303, 312-13, 101 A.3d 249 (2014).

3 The two other exceptions are not applicable and neither party relied upon them, so only the first exception is addressed.

**I.** ***Ray was an identifiable victim.***

***3** The "only identifiable class of foreseeable victims that [the Connecticut Supreme Court has] recognized ... is that of schoolchildren attending public schools during school hours ...." *Martinez* v. *New Haven*, 328 Conn. 1, 9, 176 A.3d 531 (2018). The defendants concede that Ray was an identifiable victim as he was a student attending public school during school hours, however, the parties disagree over the other two requirements.

**II.** ***There is no genuine issue of material fact regarding whether Ray was subject to a risk of imminent harm and if such harm was apparent to Testa.***

There is no disagreement as to the fact that Testa as Ray's teacher at a public school was a public official. The defendants contend, however, that Ray was not subject to imminent harm, in doing so, the defendants rely on *Haynes* v. *Middletown*, supra, 314 Conn. 303. In *Haynes*, the plaintiff was "injured when he was pushed into the jagged edge of a broken locker at Middletown High

  

School (school)." Id., 306. The court rationalized that "evidence showed that the school had informed students in writing at the beginning of the school year that horseplay in the locker room was prohibited.... [S]chool officials knew that horseplay in the locker rooms was an ongoing issue [and] there was evidence that the locker was in a dangerous condition and that it had been in that condition since the beginning of the school year, seven months before the injury occurred. The jury reasonably could have inferred from this evidence that the dangerous condition was apparent to school officials." Id., 325. The Supreme Court provided that "the 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. We therefore overrule *Burns* and *Purzycki* to the extent that they adopted a different standard." (Footnote omitted.) Id., 322-23.

The defendants dispute that the alleged harm was not imminent because there was a wide range of factors involved and Ray's injury could have occurred at some unspecified time in the future. Docket Entry Nos. 121. The plaintiff relies on Ray's affidavit to counter that the harm he suffered could only have occurred during a time when more than one student was retrieving a knife. The plaintiff also argues that Ray's injury was imminent given the safety concerns the defendants had regarding knives and horseplay. Docket Entry Nos. 123. In her opposition, the plaintiff relies on *Martinez* v. *New Haven*, supra, 328 Conn. 3, where the plaintiff attempted to establish "the imminent harm to identifiable persons exception to the defense of **governmental immunity** with respect to facial injuries that he sustained when other students engaged in horseplay by running with a pair of safety scissors in the auditorium of his school." However, the court "conclude[d] that the plaintiff failed to satisfy the imminent harm prong of the exception because he failed to prove that it was apparent to the defendants that the claimed dangerous condition, namely, students running with safety scissors, was so likely to cause harm that a clear and unequivocal duty to act immediately was created." (Footnote omitted.) Id., 11. The court made their decision because "the defendants had not experienced any problems with student behavior in the auditorium. Thus, the defendants had no reasonable way to anticipate that a student would be cut in the course of attempting to pick up safety scissors in the auditorium at the same time as another student." Id., 12 "There is also no evidence that any similar incident had occurred in the past that would have alerted the defendants that additional safety procedures were needed in the auditorium." Id., 11-12.

***4** The present action is akin to *Martinez* v. *New Haven*, supra, 328 Conn. 1, because Testa also had no reasonable way to anticipate the harm that occurred, and he had not experienced any problems with the students or any similar situations prior to the incident. Testa averred that he did not see Crouch pick up a knife, swing it at Ray, and there was no indication that Crouch would have swung a knife at Ray, because the students in the class including Crouch and Ray had previously always followed safety instructions. Testa Aff. ¶¶15-19. Furthermore, Testa averred that there was no history of students suffering injuries other than the occasional nick of the finger while chopping. Id. ¶20 Testa also stated there had not been any disciplinary or horseplay issues with Ray or Crouch in his classroom. Id.¶19 Therefore, there was no reasonable way for Testa to know that harm was likely to occur, it was not apparent to him and as such he did not have a duty to immediately act to prevent that nonapparent harm.[4]

4 See *Haynes* v. *Middletown*, supra, 314 Conn. 322-23, harm is imminent if "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."

In her objection, the plaintiff relies on *Burns* v. *Board of Education*, 228 Conn. 640, 638 A.2d 1 (1994), and *Purzycki* v. *Fairfield*, 244 Conn. 101, 108, 708 A.2d 937 (1998), which were overruled in part by *Haynes* v. *Middletown*, 314 Conn. 303, regarding the standard for determining if harm was imminent. The plaintiff attempts to draw similarities between the present case and *Purzycki*, by quoting portions of *Purzycki* cited in *Brooks* v. *Powers*, 165 Conn. App. 44, 51, 138 A.3d 1012 (2016), rev'd, 328 Conn. 256, 178 A.3d 366 (2018), which is no longer controlling law. In *Brooks*, the court quoted *Purzycki* and stated that "school administrators knew that elementary school children needed to be supervised lest they run and engage in horseplay that often results in injuries." (Internal quotation marks omitted.) *Brooks* v. *Powers*, supra, 72. The present case, however, involved high school students, with Ray being sixteen years old at the time of his injury, which is old enough to obtain a driver's license[5] and to work[6] in Connecticut. High school students require less supervision than elementary students. Accordingly, it was not apparent that Ray and Crouch, teenagers who had followed the rules and safety procedures in all prior classes, would engage in such conduct.

5 General Statutes § 14-36 (b).

6 See General Statutes § 31-23 (b) (1) that permits "a minor who has reached the age of fourteen ..." to work in certain occupations.

  

In *Brooks* v. *Powers*, supra, 165 Conn. App. 64, the court explained that the **governmental immunity** "exception requires not only that it be apparent that a victim was at risk of imminent harm, but also that it be apparent that the defendants' chosen response or nonresponse to the imminent danger was likely to subject the victim to that harm." In the present case, it was not apparent that Ray was at risk of imminent harm. The students in the class had no prior behavioral issues, so it was not apparent that they would engage in horseplay involving knives. Testa Aff. ¶¶19-21. Even if Ray was at risk of imminent harm, it was not apparent that Testa staying in the classroom while students collected their knives from the pantry, as they did every class, would subject Ray to harm. As Testa averred in his affidavit and Ray answered in his deposition, there were safety procedures for handling the knives, the class was instructed on said safety procedures, students were sent in small groups to obtain knives for class from the storage area, Testa stayed in the classroom approximately ten to fifteen feet away from the pantry while students collected the supplies, and this was the usual procedure for class, which Ray and the other students followed in all prior classes with Testa. Testa Aff. ¶22 and Ray Dep. pp., 13-14. Testa was not aware of any conditions or behaviors that would require additional safety precautions while students obtained their class materials.

***5** In *Martinez* v. *New Haven*, supra, 328 Conn. 11-12, where there was "no evidence that any similar incident had occurred in the past that would have alerted the defendants that additional safety procedures were needed in the auditorium. In fact, Stewart never previously had experienced problems caused by any dangerous student behavior in the auditorium, students running with scissors or otherwise. Moreover, Stewart saw neither the students running nor the safety scissors." Testa also never experienced any problems caused by students misbehaving in his class or engaging in horseplay, and he had not experienced any issues with students getting materials from the storage room. Testa Aff. ¶ 21. In his affidavit, Testa averred that he did not see Crouch approach the storage area, pick up the knife, or swing the knife toward Ray. Testa Aff. ¶¶14-16. Therefore, even though Testa was a public official, it was not apparent to him that this alleged dangerous condition was so likely to cause harm that he had a clear and unequivocal duty to act immediately to prevent the harm. See *Haynes* v. *Middletown*, supra, 314 Conn. 322-23, setting forth that "the 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."

The Appellate Court has stated that "the [identifiable person-imminent harm] exception to the general rule of **governmental immunity** for employees engaged in discretionary activities has received very limited recognition in this state" (Internal quotation marks omitted.) *Doe* v. *Board of Education*, 76 Conn. App. 296, 302, 819 A.2d 289 (2003). In *Doe*, a twelve year old student was sexually assaulted by several other students in a classroom during school hours. The "plaintiff allege[d] that the defendant did not provide an adequate number of hall monitors, did not implement a system for ensuring that students were not roaming the halls unsupervised and did not take steps to provide for adequate supervision of students known to have disciplinary problems or to secure vacant rooms so that they could not be used for unlawful purposes." Id. 297. The court determined that "[u]nder the facts alleged ... it would not have been apparent to the defendant that its discretionary policy decisions subjected students to imminent harm." Id., 305.

In the present case, it was not have been apparent to the defendants that the safety policy and procedure of allowing small groups of students to retrieve their class supplies from the storage room would subject the high school students to imminent harm. Testa had taught the culinary class for several years, had experience with Ray and Crouch as students, and had never had any horseplay or behavior issues regarding knife safety. Testa Aff. ¶¶ 6-22. Because there was no imminent harm and even if there was imminent harm it was not apparent to the defendants, there is no applicable exception to **governmental immunity**. Therefore, the plaintiff has failed to contradict the evidence and establish that there is a genuine issue of material fact.

## CONCLUSION

As the plaintiff has failed to establish that Ray was subject to an imminent risk of harm and that any such risk of imminent harm was apparent to the defendants, she has failed to create a genuine issue of material fact. Accordingly, the defendants' motion for summary judgment is granted and the plaintiff's objection is overruled.

**All Citations**

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