To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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E.J., An Infant By His Guardian THELMA JORDAN, and THELMA JORDAN individually,

Plaintiffs,

-against-

CITY SCHOOL DISTRICT OF NEW ROCHELLE and B.S.,

Defendants.

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Index No. 63489/2018

DECISION and ORDER

Motion Sequence No.5

RUDERMAN, J.

The following papers were considered in connection with the motion by defendant City School District of New Rochelle for an order pursuant to CPLR 3212 granting dismissal of the complaint as against it:

Papers	Numbered
Notice of Motion, Affirmation, Memorandum of Law, Exhibits 1, A - S	1
Affirmation in Opposition, Affidavit, Exhibits A - O	2
Reply Affirmation	3

On January 18, 2018, at approximately 8:20 a.m., while infant plaintiff E.J. was a junior at New Rochelle High School, he was stabbed during class by defendant B.S., another student at the school. E.J. had been sitting at his desk in Spanish class, taking a midterm exam, when B.S., walking by after getting a pass from the teacher, stabbed him twice in his left side, below his armpit. B.S. then ran out of the classroom. The teacher obtained the assistance of a school security aide, who walked E.J. to the school nurse's office, where the wound was bandaged,

E.J.'s guardian was called, and an ambulance was summoned. The School District's Medical Director, Dr. Brooke Balchan, happened to be in the school that morning, and took over E.J.'s care from the nurse. E.J. sustained a collapsed left lung and lacerated spleen and diaphragm that required emergency surgery later that day.

This action was commenced by the filing of a summons and complaint on August 28, 2018, alleging as against the school district that it provided negligent supervision, negligent security, and a negligent response to E.J.'s injury following the incident. Discovery has been completed and a note of issue has been filed.

Defendant School District now moves for summary judgment dismissing the complaint as against it. It submits in support witness affidavits and testimony, and expert opinions from security expert Christopher Grniet, physician Preston L. Winters, M.D., and Russell B. Moore, Ph.D., a former high school principal with degrees in Educational Administration. It contends that summary judgment is warranted due to the lack of evidence that it had notice of the danger B.S. posed to E.J., or that the care it provided to E.J. after the stabbing was improper or caused him any injury.

On the issue of notice, the School District asserts that (1) there was no prior history of violence or any prior interaction between plaintiff E.J. and B.S.; (2) there were no indications that B.S. was about to engage in any dangerous behavior prior to the attack on E.J.; (3) the attack occurred so suddenly that E.J. himself was unaware and surprised by its occurrence; and (4) no amount of further observation or supervision of the plaintiff, B.S., or the classroom, could have prevented the attack. On the issue of its responsive care of E.J., it relies on its expert's opinion that there was neither any act nor any omission with regard to nursing care on the part of the School District that either did, or could have, altered E.J.'s medical condition, course of care,

prognosis or subsequent recovery. Regarding the negligent security claim, it argues that it may not be held liable in regard to its performance of a security function in the absence a special relationship based on notice of particularized risk of harm.

In opposition regarding the negligent supervision claim, plaintiffs argue that evidence supports a finding that in the days leading up to the stabbing of E.J., the School District was aware of a series of violent incidents between its high school students, some of which included B.S. Specifically, first there had been an altercation between high school students on January 10, 2018 that led to a fatal stabbing of one student; neither plaintiff nor B.S. are alleged to have been involved. Second, on the day before the subject incident, on January 17, 2018, B.S. had himself been attacked by a group of students at a local pizzeria, following an earlier claim that B.S. had stolen another student's headphones; another student suffered a laceration in the January 17th altercation. E.J. was not involved in that event, although he testified that friends of his were among B.S.'s attackers. Third, plaintiffs rely on an incident that occurred in May 2016, approximately twenty months earlier, in which B.S. stabbed another student while both were in middle school. Indeed, at the time of E.S.'s stabbing, B.S. was still serving two years of probation for that offense. The School District emphasizes that none of the foregoing incidents were between B.S. and E.J.

With regard to other aspects of their claims challenged by the School District, plaintiffs contend that the moving papers fail to satisfy the movant's burden of proof. They also rely on the School's own Emergency Response Plan, and the opinion of their expert on school safety and security, to establish defendant's breach of its duty.

Discussion

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). "Where, as here, the underlying injury is caused by the intentional act of a fellow student, the plaintiff [must] demonstrate, by the school's prior knowledge or notice of the dangerous conduct which caused the injury, that the acts of the fellow student[ ] could have reasonably been anticipated' " (*Johnson v Ken-Ton Union Free School Dist.*, 48 AD3d 1276, 1277 [4th Dept 2008], quoting *Doe v Board of Educ. of Morris Cent. School*, 9 AD3d AD3d 588, 589-590 [3d Dept 2004]). In other words, to prove negligent supervision, the plaintiff must show that the school had "notice or prior specific knowledge of the aggressor student's propensity to engage in such conduct" (*La Page v Evans*, 37 AD3d 1019, 1020 [3d Dept 2007]). Otherwise, "[i]njuries caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" (*Morman v Ossining Union Free Sch. Dist.*, 297 AD2d 788, 788-789 [2d Dept 2002]).

Where a school district fails to establish that it lacked notice of the assailant-student's past dangerous behavior, it may not be awarded summary judgment on a negligent supervision claim (*see Johnson v Ken-Ton Union Free School Dist.*, 48 AD3d at 1278). In *Johnson*, a grant of summary judgment to the school district was reversed, where the Court observed that evidence of the assailant-student's past aggressiveness was demonstrated in the submitted deposition testimony of the assailant in which he testified that he had picked up and "spun" the injured student in the classroom on a prior occasion with the knowledge of both the teacher and teacher's

aide, and further, the injured student had testified at his deposition that the assailant had lifted him up before and that he had told "a teacher" what had occurred (*id.*).

It is not required that the assailant's prior dangerous conduct have been against the plaintiff. A grant of summary judgment to a defendant school district was reversed in *Wood v Watervliet City School Dist.* (30 AD3d 663 [3d Dept 2006]), where the assailant-student

> "had an ignominious disciplinary record that included several recent physical acts. In the five months before the subject incident, [he] was involved in 10 reported disciplinary matters. Of these, several included fighting and other physical acts, including throwing a chair against the wall in his classroom on January 22, 2002, fighting with a student in the cafeteria on February 7, 2002, physically pushing adults who attempted to restrain him and police being summoned to assist in dealing with the incident, being restrained by an adult while attempting to reach a female student at whom he was shouting obscenities on March 26, 2002, pushing a student on May 1, 2002, and engaging in three fights on a school bus on May 15, 2002. This evidence amply raise[d] a triable issue regarding the foreseeability that [the aggressor] would engage in assaultive conduct" (*id.* at 664).

There was no requirement that the injured plaintiff was the foreseeable victim of the foreseeable assaultive conduct.

The School District relies on case law dismissing an assaulted student's claim where "the assailant's disciplinary record contained several instances of nonviolent, disruptive behavior and a single, remote incident of fighting two years and nine months prior to the instant assault," with the reasoning that the school's burden of establishing a lack of notice was satisfied based on the absence of violence other than one incident of "fighting" (*see Jake F. v Plainview-Old Bethpage Cent. School Dist.*, 94 AD3d 804, 805-806 [2d Dept 2012]). It equates B.S.'s middle school stabbing of another student with the "a single, remote incident of fighting" in *Jake F.*, and characterizes B.S.'s stabbing of E.J. as a sudden, spontaneous and unforeseeable attack, which "even the most intense supervision could not have prevented" (*see Convey v City of Rye School*

Dist., 271 AD2d 154, 160 (2d Dept 2000]). It asserts that there was no "history of aggression" and no prior interaction between the two students, although it alludes to B.S.'s "disciplinary history." It cites *Taylor v Dunkirk City Sch. Dist.* (12 AD3d 1114, 1114 [4th Dept 2004]), where the aggressor-student "had behaved disruptively and defiantly toward the classroom teacher and may have been verbally aggressive toward the injured party during class, [but] had no history of physically aggressive behavior." It also relies on *Miccio v Bay Shore Union Free Sch. Dist.* (289 AD2d 542 [2d Dept 2001]), where the school district "demonstrated that it did not have any actual knowledge constituting notice of a particular danger at a particular time" (internal quotation marks omitted). Notably, although the *Miccio* Court stated that "[s]everal days earlier, that same [aggressor-]student allegedly stole property from [the injured plaintiff] and threatened him with a knife," the decision does not indicate whether the school district had been made aware of those earlier events (*id.* at 543).

Here, although there is no "history of aggression" between B.S. and E.J., B.S.'s own history of violence cannot be ignored or minimized. It far exceeds mere "nonviolent, disruptive behavior" and unspecified "fighting," of the type described in *Jake F. v Plainview-Old Bethpage Cent. School Dist.* (94 AD3d at 806). B.S.'s stabbing of another student is undisputed; he was still serving two years of probation for it, and had been suspended from school for the entire previous school year. The School District cannot claim to lack notice of that fact. Indeed, the disciplinary history of a student-assailant can establish triable issues of fact as to whether the School District had specific knowledge of that student's dangerous propensities (*see K.J. v City of New York*, 156 AD3d 611, 614 [2d Dept 2017]). Moreover, the violent events among New Rochelle High School students in the days leading up to January 18, 2018, especially the attack

on B.S. one day earlier, could have put the School District on alert to the possibility of some sort of retaliation or responsive attack.

The attack on E.J. may have been sudden, and may have appeared to be spontaneous; however, this Court cannot conclude as a matter of law that it was unforeseeable. In view of both the recent violent events and B.S.'s disciplinary history, issues are raised as to whether the School District could reasonably have been expected to foresee the possibility of another attack by B.S., and to adopt means or methods of supervision which could have prevented such an attack.

This Court therefore rejects the School District's argument that, as a matter of law, it lacked the requisite notice for a negligent supervision claim.

With regard to plaintiff's negligent security cause of action, the School District cites case law dismissing claims against school districts based on "alleged security deficiencies [arising] from the allocation of the school defendants' security resources" where the plaintiff has not established any "special relationship" (*see e.g. Doe v Town of Hempstead Board of Educ.*, 18 AD3d 600 [2d Dept 2005], applying the rule of *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). However, while plaintiff cannot succeed in a claim that the school negligently allocated security resources, a school's duty in loco parentis toward its students may include, along with adequate supervision, a duty "to maintain a safe environment" (*see Maynard v Board of Educ.*, 244 AD2d 622, 622 [3d Dept 1997]). To the extent plaintiffs' claim that the School District negligently ensured the students' security may be understood as a failure to maintain a safe environment, the negligent security claim will not be dismissed here based on the absence of the elements of a "special relationship."

With regard to plaintiffs' claim that the school negligently responded and cared for E.J. after the stabbing, the School District made a prima facie showing that its response and care were timely, conformed with good and accepted practices, and were not a proximate cause of any injuries. The affidavit of Dr. Winters explained that E.J.'s injuries and course of recovery as well as his treatment were in no manner altered by virtue of any purported insufficiency or delay on the part of the School District. In response, plaintiffs contend that Dr. Winters' opinion does not satisfy defendant's burden of proof on this motion. They submit an affidavit of Kenneth S. Trump, President of National School Safety and Security Services, Inc., who discusses the asserted failures of various representatives of defendant, including having E.J. walk up stairs after he was stabbed, and failing to call 911 without delay. They emphasize that the first call from the nurse's office was to E.J.'s guardian, in which the caller indicated that E.J. should be picked up, and that he might need stitches. However, while the School District did not establish when or how an ambulance was contacted, it is undisputed that E.J. had been transported by ambulance to the hospital by the time his guardian arrived at the school. Moreover, plaintiffs have not offered any evidence that any delay proximately caused E.J. any injury.

Plaintiffs argue that they are not required to prove damages in defense of a motion for summary judgment on the issue of liability. However, the elements of a negligence claim include the requirement that the claimed breach of duty proximately caused some injury to the plaintiff (*see Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]), although the nature and extent of that injury may await trial. It is appropriate on a summary judgment motion to require of the party opposing the motion to submit evidence creating an issue of fact as to whether the

claimed breach of duty contributed to the plaintiff's injury (*see Cronin v Middle Country Cent. Sch. Dist.*, 267 AD2d 269, 270 [2d Dept 1999]).

Accordingly, notwithstanding plaintiffs' contention that the School District's employees failed to call 911 as timely as they should have, plaintiff has failed to demonstrate the existence of an issue of fact as to whether that claimed breach of duty was a proximate cause of injury to E.J. The School District's motion to dismiss that aspect of plaintiffs' claim therefore must be granted.

Accordingly, it is hereby

ORDERED that the School District's motion for summary judgment is granted in part, based on the foregoing, so as to dismiss the aspects of plaintiffs' negligence claims based on the care provided after E.J. was stabbed, and the negligent allocation of security resources (but not the negligent failure to maintain a safe environment), and it otherwise denied; and it is further

ORDERED that the parties shall appear in the Settlement Conference Part of this Court on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
April 28, 2021

HON. TERRY JANE RUDERMAN, J.S.C.