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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2009-1595

NICHOLAS PARSONS, by his mother and next friend DONNA PARSONS, et al., Plaintiffs,

v.

TOWN OF TEWKSBURY, TYLER WILLETTE, et al.,

Defendants.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This case involves liability arising out of a 2006 fight on the premises of a middle school in Tewksbury, which resulted in severe injuries to a middle-school student, plaintiff Nicholas Parsons ("Nicholas"). Claims against the Town of Tewksbury and its employees were previously dismissed.

Defendants Doreen and Timothy Willette ("Willette Parents"), the parents of defendant Tyler Willette ("Tyler"), who allegedly severely injured Nicholas, have moved for partial summary judgment on the Count 9 claim of Nicholas's parents, Donna Parsons and Gary Parsons, for loss of consortium. (Filing # 31) Tyler Willette has moved for summary judgment on the Count 7 claims respectively of Donna and Gary Parsons and Nicholas Parsons ("Plaintiffs") for negligent infliction of emotional distress, and Plaintiffs' respective Count 11 claims of negligence. (Filings # 32-34) Defendant Stefan Herceg, who allegedly instigated the fight, has moved for summary judgment on all counts against him, including Plaintiffs' claims of negligent infliction of emotional

distress (Count 7) and negligence (Count10), and the Count 9 claim of Donna and Gary Parsons for loss of consortium. (Filing # 35) A hearing was held on February 27, 2014.

For the reasons set forth below, the Willette Parents' motion for partial summary judgment (Filing # 31) is **ALLOWED**. Tyler Willette's motions for summary judgment against Donna Parsons and Gary Parsons (Filings # 32-33) are **ALLOWED**. Tyler Willette's motion for summary judgment against Nicholas Parsons (Filing # 34) is **DENIED** as to Count 11, and **MOOT** as to Count 7. Stefan Herceg's motion for summary judgment as to all counts against him (Filing # 35) is **ALLOWED** as to the Count 7 and Count 10 claims of Donna and Gary Parsons, and **DENIED** as to the Count 9 claims of Donna and Gary Parsons and the Count 10 claim of Nicholas Parsons.

RELEVANT FACTS

Plaintiff Nicholas Parsons ("Nicholas"), defendant Tyler Willette ("Tyler"), and defendant Stefan Herceg ("Herceg") were all seventh-graders at John Wynn Middle School in Tewksbury in the spring of 2006. (SH SOF 3)[1] In the weeks before April 26, 2006, Nicholas was bullied by Tyler and other students. (SH SOF 5) Tyler and Nicholas fought in a boys' bathroom at the school on April 26, 2006. (SH SOF 1) The fight left Nicholas with a broken femur, and confined him to a wheelchair for two months. (SH SOF Exh. B)

The parties dispute the extent of Herceg's role in organizing and executing the fight. Sometime before April 26, 2006, Herceg heard that a fight had taken place between Tyler and Nicholas during the April 2006 school vacation. (SH SOF 9)

[1] Citations are to Tyler Willette's Joint Statements of Undisputed Facts as to which Gary Parsons is the named plaintiff ("GP SOF") and as to which Donna Parsons is the named plaintiff ("DP SOF"), the Joint Statement of Undisputed Material Facts in Support of Defendant Stefan Herceg's Motion for Summary Judgment ("SH SOF"), and the exhibits attached to those pleadings ("SOF Exh.").

Nicholas testified that, before the April 26th fight, he told Herceg that he wanted his conflict with Tyler and others to end, and Herceg responded that fighting was the only way to resolve matters. (SH SOF 11) Nicholas further testified that he initially declined to fight Tyler, but Herceg persuaded him, and he let Herceg arrange the fight. (SH SOF 11, 18) Similarly, Tyler testified that he initially declined to fight Nicholas, but changed his mind due to peer pressure from Herceg and others. (SH SOF 12, 20)

There is some evidence that other students played a role in instigating the fight. (SH SOF 19) However, Herceg appears to have been the only witness to the fight. (SH SOF 2) Neither Nicholas nor Tyler expected that Herceg's presence would prevent them from being injured. (SH SOF 22) After Tyler kicked one of Nicholas's legs out from under him and hit him twice, Herceg stopped the fight. (SH SOF Exh. C, p. 111)

Sometime after the fight, Nicholas's father, Gary Parsons, received a telephone call informing him that Nicholas had been in a fight and was being taken to the hospital. (GP SOF 26) He immediately contacted his wife, and both drove to Saints Memorial Hospital, where they learned that Nicholas had been transferred to Lowell General Hospital. (GP SOF 27-28) Upon their arrival at Lowell General Hospital, Gary and Donna Parsons saw their son "on a gurney, with swelling red bruises on his face, very upset, very scared." (DP SOF 23) Both Gary and Donna Parsons remained at the hospital that day while Nicholas underwent surgery, and attended to him during his recovery. (DP SOF 24)

Gary and Donna Parsons have testified that Nicholas's injuries had a major impact on their marriage. (DP SOF 25-27; GP SOF 33-36) However, the evidence of physical manifestations and objective symptoms of their distress is more limited and

remote from the time of the fight. Around 18 months after the fight, Donna fainted and required medical attention for shortness of breath after being told by Gary that he had reconnected with an old girlfriend. (DP SOF Exh. D, pp. 180-182) Gary testified that at some point, he developed irritable bowel syndrome, but did not seek medical treatment. (GP SOF 43; Exh. D, p. 174)

Gary testified that his emotional reaction to his son's injuries had an impact on his job performance. (GP SOF 42). In 2011, Donna and Gary attended marriage counseling. (GP SOF 37-38; DP SOF 29) Donna continued with individual therapy, and has been prescribed anti-anxiety medication and anti-depressants as part of her treatment. (DP SOF 30)

DISCUSSION

A. Defendants Doreen and Timothy Willette's Motion for Partial Summary Judgment as to Count 9 (Loss of Consortium)

Doreen and Timothy Willette seek a ruling limiting their liability to plaintiffs Donna and Gary Parsons to the limit of liability under G. L. c. 231, § 85G, on the grounds that there is no genuine issue of material fact as to their lack of negligence, and that G. L. c. 231, § 85G limits their liability as to any strict liability claim arising out of their son Tyler's conduct, including a claim of loss of consortium. The Willette Parents are entitled to the relief that they seek.

It would be completely unreasonable for any trier of fact to find that Doreen and Timothy Willette negligently caused the injury resulting from their son Tyler's fight with Nicholas Parsons. There is no evidence that either of them had advance notice of the fight, that either of them encouraged the fight in any way, or that either of them facilitated in any way their son's actions. Therefore, any claim against Doreen or Timothy Willette must be based upon strict liability, which is governed by G. L. c. 231, § 85G.

Donna and Gary Parsons argue that G. L. c. 231, § 85X, the statute giving them a claim for loss of consortium, is not limited by G. L. c. 231, § 85G. However, they fail to provide of any logical explanation for why the Legislature would have made an exception to G. L. c. 231, § 85G for such claims. More importantly, the argument fails based upon statutory language and principles of statutory construction.

Generally, it is appropriate to interpret statutes that relate to the same subject matter harmoniously. Green v. Wyman-Gordon, Co., 422 Mass. 551, 554 (1996) (internal citations omitted). Under G. L. c. 231, § 85X, "[t]he parents of a minor child or an adult child who is dependent on his parents for support shall have a cause of action for loss of consortium of the child who has been seriously injured against any person who is legally responsible for causing such injury." The statute says nothing about modifying any statutory limits on liability. To consider one extension of plaintiffs' argument, under G. L. c. 231, § 85K, the liability for medical malpractice claims against charities providing health care services is limited to $100,000. There is absolutely no reason to believe that the Legislature intended to exempt claims of loss of consortium from this statutory limit, but that would be the logical corollary of plaintiffs' argument.

The Willette Parents are "legally responsible" for Tyler's injury solely under G. L. c. 231, § 85G, which limits their liability to the lesser of the amount of proved loss or damage or $5,000.[2] A harmonious reading of these two statutes allows Donna and Gary Parsons' claim for loss of consortium, but limits the Willette Parents' liability to the lesser of the amount of proved loss or damage or $5,000.

[2] This Court leaves for the trial court the determination of whether there is a separate $5,000 limit for each parent and/or each cause of action.

B. Tyler Willette's Motion for Summary Judgment on Donna and Gary Parsons' Claims of Negligent Infliction of Emotional Distress (Count 7) and Negligence (Count 11)

Tyler Willette has moved for summary judgment on Donna and Gary Parsons' claims of negligent infliction of emotional distress and negligence. As to Donna and Gary Parsons, these two claims appear to be identical in substance, a conclusion that Plaintiffs' counsel did not dispute during oral argument.

The question of whether a middle-school child has a duty to avoid creating emotional distress for the parents of his schoolmates appears to be an issue of first impression in the Massachusetts courts. This Court does not reach that issue, however, because the plaintiffs have not produced sufficient evidence of to satisfy other elements of their claim.

In order to establish a claim for negligent infliction of emotional distress, a plaintiff must prove (1) the defendant's negligence, (2) the plaintiff's emotional distress, (3) causation, (4) physical harm manifested by objective symptomatology, and (5) that a reasonable person would have suffered emotional distress under the circumstances. Sullivan v. Boston Gas Co., 414 Mass. 129, 132 (1993). In Dziokonski v. Babineau, 375 Mass. 555 (1978), the Supreme Judicial Court held that "a parent who sustains substantial physical harm as a result of severe mental distress over some peril or harm to his minor child caused by the defendant's negligence states a claim for which relief might be granted, where the parent either witnesses the accident or soon comes on the scene while the child is still there." *Id.* at 568. In Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507 (1980), the Court held that a plaintiff who suffers substantial physical harm as a result of severe mental distress upon a rushing to a hospital has the same claim that one would have upon rushing to the scene of the accident. *Id.* at 518. However, the premise

for liability is physical harm resulting from "shock [that] follows *closely* on the heels of the accident." *Id.* (emphasis added).

Here, there is no evidence of substantial physical harm to Donna or Gary Parsons closely after seeing Nicholas at the hospital. In the case of Donna Parsons, the earliest evidence of physical harm manifested by objective symptomatology did not occur until around 18 months after her son's injuries. See *supra* at 4. A trier of fact could not reasonably find that this harm to Donna Parsons was caused by her shock at seeing Nicholas at the hospital 18 months earlier, especially when she admitted that she experienced these symptoms immediately after being told by her husband about his relationship with another woman. Similarly, it would not be reasonable for a trier of fact to find that Gary Parsons' irritable bowel syndrome was the result of shock caused by seeing his son at the hospital, when there is no evidence as to the time of onset of the syndrome, and no diagnosis as to its causes. *A fortiori,* it would be pure speculation for any trier of fact to conclude that Donna Parsons' depression and anxiety in 2011 were caused by the sight of her son five years earlier.

To the extent that Donna and Gary Parsons' emotional issues had an impact on their relationship with their son, that fact might be relevant to their claim of loss of consortium. However, this evidence does not support a claim of negligent infliction of emotional distress. Therefore, Tyler Willette's motions for summary judgment against Donna and Gary Parsons on Count 7 and Count 11 must be allowed.

C. Tyler Willette's Motion for Summary Judgment on Nicholas Parsons' Claims of Negligent Infliction of Emotional Distress (Count 7) and Negligence (Count 11)

At oral argument, counsel for Nicholas Parsons informed the court that Nicholas was not pursuing a claim for negligent infliction of emotional distress, based upon a lack

of evidence of emotional distress separate from the evidence of physical harm resulting from his fight with Tyler. Therefore, as to Count 7, Tyler's motion is moot with regard to Nicholas. However, unlike Donna and Gary Parsons' claims of negligent infliction of emotional distress and negligence, Nicholas Parsons has a negligence claim that is distinct from his claim of negligent infliction of emotional distress.

In order to establish negligence, a plaintiff must prove that the defendant owed him a duty of care, that the defendant breached the duty of care, that the plaintiff suffered injury or harm, and that the defendant's breach of duty was a cause of the plaintiff's injury or harm. Massachusetts Superior Court Civil Practice Jury Instructions, § 2.1 (2008). Minors are liable for their torts; their conduct is to be judged by the standard of behavior expected from a child of like age, intelligence, and experience. Mann v. Cook, 346 Mass. 174, 178 (1963). There is sufficient evidence from which a trier of fact could find that Tyler Willette breached a duty of care to Nicholas Parsons, and thereby caused him injury and harm. While this claim may ultimately be redundant of other claims, it clearly survives summary judgment.

D. Stefan Herceg's Motion for Summary Judgment

Defendant Stefan Herceg has moved for summary judgment on the three counts against him, including Donna and Gary Parsons' claim for negligent infliction of emotional distress (Count 7),[3] their claim for loss of consortium (Count 9), and the Plaintiffs' claim of negligence (Count 10). For the same reasons that summary judgment must be granted in favor of Tyler Willette on Donna and Gary Parsons' claims for negligent infliction of emotional distress and negligence, summary judgment must be granted in favor of Stefan Herceg on these claims. For purposes of Herceg's motion for

[3] As noted above, Nicholas Parsons has dropped his Count 7 claim.

summary judgment, this leaves only Nicholas Parsons' Count 10 claim of negligence, and Donna and Gary Parsons' Count 9 claim for loss of consortium.

Herceg is subject to the same law of negligence and the same standard of conduct as Tyler Willette. See *supra* at 7-8. The obvious difference between them is that Herceg did not hit Nicholas or otherwise cause him direct harm. Two core principles of tort law apply here. First, in general, "we do not owe others a duty to take action to rescue or protect them from conditions we have not created." Cremins v. Clancy, 415 Mass. 289, 296 (1993) (O'Connor, J., concurring). Second, in general, "a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." Jupin v. Kask, 447 Mass. 141, 147 (2006) (additional citations omitted). The question is whether a reasonable trier of fact could find that Herceg created conditions in which it was reasonably foreseeable that Nicholas Parsons would be endangered, and that this conduct was a proximate cause of injury to Nicholas. This Court concludes that a reasonable fact finder could make such a determination.

One who organizes an activity that results in harm can be held liable for negligence, without directly causing the harm. See, e.g., Judge v. Carrai, 77 Mass. App. Ct. 803, 805 (2010) (upholding liability against adult organizer and participant in backyard softball game resulting in serious injury to guest at the home). The Appeals Court in Judge relied in part on the fact that the defendant was an adult. However, the amount of care that a prudent person must exercise increases with the likelihood and severity of the harm threatened. See Massachusetts Superior Court Civil Practice Jury Instructions, § 2.1.4 (2008), citing Upham v. Château de Ville Dinner Theater, Inc. 380

Mass. 350, 355-356 (1980). A fight without protective gear and no adult supervision obviously involves a strong likelihood of harm.

The evidence in this case permits a finding that Herceg did far more than a seventh grader who spontaneously encourages classmates to fight, or eggs on the participants after a fight has started. Both participants in the fight initially told Herceg that they did not want to fight. Herceg told Nicholas that fighting was the only alternative to further bullying. Indeed, Herceg seems to admit that he created peer pressure that prompted the fight and he arranged the fight. See *supra* at 3.

While Herceg claims to have acted as a referee, there was an understanding that he would not prevent injury to the fighters. Moreover, Herceg did not intervene until after Tyler had kicked out Nicholas's leg from under him and continued punching Nicholas. Given these circumstances, a reasonable jury could conclude that Herceg wanted to see Nicholas and Tyler fight, arranged the fight, pressured the participants to fight, and that those actions were a substantial contributing cause of Nicholas's injuries. See generally Massachusetts Superior Court Civil Practice Jury Instructions, § 2.1.8(b) (2008). Of course, a jury may well reach a contrary conclusion with regard to Herceg, but the matter cannot be resolved by way of summary judgment.[4]

Donna and Gary Parsons' Count 9 claim against Herceg for loss of consortium survives summary judgment because it is derivative of Nicholas's claims against Herceg, and does not require a separate finding of breach of duty toward Nicholas's parents. See MA Superior Court Civil Practice Jury Instructions, § 2.1.14(e) (2008), and cases cited

[4] Plaintiffs' claims against Herceg are not based upon a theory that he failed to prevent harm by third parties, a point which Plaintiffs concede in their brief in opposition to Herceg's motion at page 7. Therefore, Luoni v. Berube, 431 Mass. 729, 731 (2000) and other cases relied on by Herceg involving limits on social host liability are not applicable.

therein; G.L. c. 231, § 85X.

ORDER

Doreen and Timothy Willette's motion for partial summary judgment (Filing # 31) is **ALLOWED**. Tyler Willette's motion for summary judgment against Donna Parsons and motion for summary judgment against Gary Parsons (Filings # 32-33) are **ALLOWED**. Tyler Willette's motion for summary judgment against Nicholas Parsons (Filing # 34) is **DENIED** as to Count 11, and **MOOT** as to Count 7. Stefan Herceg's motion for summary judgment as to all counts against him (Filing # 35) is **ALLOWED** as to the Count 7 and Count 10 claims of Donna and Gary Parsons, **MOOT** as to the Count 7 claim of Nicholas Parsons, and **DENIED** as to the Count 9 claims of Donna and Gary Parsons and the Count 10 claim of Nicholas Parsons.

Robert L. Ullmann
Justice of the Superior Court

Dated: April 14, 2014