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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSE LUIS AVILA, Plaintiff and Appellant, v. CITRUS COMMUNITY COLLEGE DISTRICT, Defendant and Respondent.	B158572 (Los Angeles County Super. Ct. No. KC037803)

APPEAL from a judgment of the Superior Court of Los Angeles County. Conrad R. Aragon, Judge. Reversed.

Law Offices of Alan E. Wisotsky and Brian P. Keighron for Plaintiff and Appellant.

Gibeaut, Mahan & Brisco, Gary Robert Gibeaut and John W. Allen for Defendant and Respondent.

Appellant Jose Luis Avila was a student at Rio Hondo Community College and played on that college's baseball team. On January 5, 2001, during a game against the Citrus Community College District, he was hit in the head with a pitch. He sued for negligence, naming as defendants the Rio Hondo Community College District, respondent Citrus Community College District,[1] and others. Citrus College demurred, contending that it was immune from suit under Government Code[2] section 831.7 on recreational immunity and that it had no duty to supervise appellant or any other student playing in the game. The trial court sustained the demurrer on both grounds without leave to amend and dismissed the case. We reverse.

Discussion[3]

On the day of the incident, appellant was 19 years old, a student at Rio Hondo Community College, and a player on that College's baseball team. On that date, he played in a game against Citrus College, at the Citrus College field. He was hit in the head with a Citrus College pitch which was thrown with such force that it cracked his helmet. He alleged, inter alia, that the pitch was thrown in a deliberate attempt to retaliate for a Rio Hondo pitch which hit a Citrus College player.

Appellant staggered, felt dizzy, and felt pain. The Citrus College coaching staff did not tend to him or summon medical care. The Rio Hondo coach told appellant to go to first base. He did so, and when he complained to the first base coach he was told to stay in the game. At second base, he still felt pain, numbness, and dizziness. A Citrus

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[1] Appellant also sued respondent for premises liability, but has abandoned that cause of action.

[2] All further statutory references are to that code.

[3] In accord with the well-known rules of review, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context, and treat the demurrer as admitting all material facts properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

player yelled to the Rio Hondo dugout that Rio Hondo needed a new runner. Appellant walked off the field and went to the Rio Hondo bench. His injuries were not tended to.

Appellant alleged that Citrus College was negligent in that it failed to summon or provide medical care for him when he was obviously in need of medical care, failed to supervise and control the Citrus College pitcher and the game, failed to provide umpires or other supervisory personnel to control the game and prevent retaliatory or reckless pitching, and failed to provide adequate equipment to safeguard him from serious head injury. Finally, appellant alleged that Citrus College acted negligently by failing to take reasonable steps to train and supervise managers, trainers, employees and agents in providing medical care to injured baseball players and by conducting an illegal preseason practice game in violation of community college baseball rules designed to protect participants such as appellant.

In its demurrer, Citrus College contended that it was protected by section 831.7, subdivision (a), which provides that "Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity . . . for any damage or injury to property or persons arising out of that hazardous recreational activity." "Hazardous recreational activity" is defined in the statute. It means "a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator." (§ 831.7, subd. (b).)

Citrus College also contended that under *Ochoa v. California State University* (1999) 72 Cal.App.4th 1300, it had no duty.

Our opinion here is limited to those two issues.

1. Section 831.7

Appellant relies on *Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471 and *Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218 to argue that the statute does not immunize school districts for injuries sustained in school sponsored and supervised activities. Respondent relies on *Ochoa v. California State*

University, supra, 72 Cal.App.4th 1300, which held that *Acosta* and *Iverson* have no bearing on the liability of colleges to adult students. We consider each of the cases in turn, and conclude that *Acosta* and *Iverson* have it right, and that the statute does not immunize community college districts for negligence to students in connection with school sponsored and supervised sports.

Acosta and Iverson

In *Acosta*, *supra*, 31 Cal.App.4th 471, a member of a high school gymnastics team was injured during a practice supervised by his coach. He sued the school district, which asserted section 831.7 immunity. The Court began its analysis by citing the long-standing California law that a school district has a duty to exercise reasonable care in supervising students engaged in extracurricular activities and by observing that "If the term 'hazardous recreational activity' is interpreted to include school sponsored and supervised activities, schools would be immune from liability for the negligent supervision of students engaged in virtually every extracurricular sport (e.g., football, basketball, baseball, gymnastics, soccer, wrestling), as well as activities which are often part of a school's physical education program such as archery and trampolining. . . . [T]his would constitute a major revision of California law with respect to school district tort liability." (*Id.* at p. 477.)

The Court chose not to make that major revision of law, and its reasoning is well worth quoting at length: "A court will not conclude the Legislature 'intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.' [Citation.] Nowhere in section 831.7 or its legislative history is there an express declaration the Legislature intended to immunize school districts from liability resulting from negligent supervision of extracurricular activities in general or athletics in particular. Nor is such immunity conferred by necessary implication. Under section 831.7 a school district would not be liable for purely 'recreational' activities which happen to be conducted on school property. (*Yarber v. Oakland Unified School Dist.* [(1992)] 4 Cal.App.4th [1516] at p. 1519 [school district immune from liability under § 831.7 for injury to player in adult

community basketball league using gym after school hours].) However, we believe a clear distinction exists between allowing the public to use school facilities after hours, on weekends or during vacations and school-sponsored athletic practices under the supervision of school personnel after school or during the off-season." (*Id.* at p. 473.)

Acosta held that as a matter of law, school sponsored and supervised extracurricular athletic activities are not hazardous recreational activities under the statute. (*Id.* at p. 476.)

In *Iverson*, *supra*, 32 Cal.App.4th 218, the plaintiff was a junior high school student injured during a soccer match conducted as part of a gym class. *Iverson* agreed with *Acosta* that application of section 831.7 to a school's physical education program would constitute a major revision of California tort law, noting that school districts have a duty to supervise children. *Iverson*'s analysis sets forth the Legislative history: the bill was proposed and supported by park and recreation districts, municipalities, and similar entities which wanted to keep their land open to recreational users but "sought some protection against increasing numbers of personal injury actions by public property users engaging in such activities as hang gliding and rock climbing, and attendant escalating insurance rates. The Senate Judiciary Committee's analysis noted that 'The primary purpose of this bill is to prevent the hang glider or rock climber from suing a public entity when that person injured himself in the course of the activity.'" (*Iverson, supra,* 32 Cal.App.4th at p. 224.)

Iverson held that "A body contact sport incorporated into a school time physical education class is not a 'recreational' activity within the meaning of section 831.7, subdivision (a) -- hazardous as that activity may be in the abstract. We hold, as a matter of law, that section 831.7 is inapplicable in the context of the injuries incurred here -- injuries sustained on school grounds during a physical education class required by the school and conducted during school hours." (*Iverson, supra,* 32 Cal.App.4th at p. 227.)

Ochoa

In the case respondent cites, *Ochoa v. California State University, supra,* 72 Cal.App.4th 1300, the plaintiff was a student at California State University, Sacramento. who played intramural soccer on a student team representing a dormitory. The game was run under the auspices of a nonprofit corporation called Associated Students Inc., a corporate entity distinct from Cal State, and primarily funded by student fees. The referees and the student supervisor who oversaw them were employees of Associated Students, Inc.

The plaintiff was punched in the jaw during a game which ended in combative behavior. He sued Cal State in tort, alleging that it negligently failed to supervise the game. Cal State successfully raised section 831.7 immunity.

Ochoa essentially based its holding on its finding that under California law, colleges and universities have no duty to supervise the activities of their adult students. The cases *Ochoa* cited in support of that proposition are *Crow v. State of California* (1990) 222 Cal.App.3d 192, and *Baldwin v. Zorad* (1981) 123 Cal.App.3d 275. Neither case concerns sports teams or the duty of coaches or trainers to supervise games or to provide medical care to students injured during sports events. Neither case concerns section 831.7. Instead, both cases concern student drinking and criminal behavior.

In *Crow v. State of California, supra,* 222 Cal.App.3d 192, the plaintiff was a student who was punched and kicked by a drunken fellow-student at a keg party in a dormitory. The lawsuit alleged that the university negligently operated, maintained, and supervised the dormitory. (*Id.* at p. 207.) The Court found that the essential question was the university's liability for the criminal acts of a third party, that there is no such liability without a special relationship, and that the university/student relationship was not such a special relationship. The Court noted that the plaintiff before it was an adult college student voluntarily drinking beer at the dormitory, and that there was no allegation that the university should have known of any particular risk of harm at that dormitory. (*Id.* at pp. 208-209.) *Crow* also relied on *Baldwin v. Zorad, supra,* 123 Cal.App.3d 275, and quoted it at length.

In that case, a group of Cal Poly students drank "great amounts" of alcohol, then raced their cars, with predictably tragic results. The plaintiff was a student who was a passenger in one of those cars. She sued the Trustees of the California State University, alleging that they had permitted the students to possess and consume alcohol and failed to control those students. The Court used a *Rowland v. Christian* (1968) 69 Cal.2d 108 analysis and found that the Trustees had no duty of care to prevent the injuries. In the portions of the opinion quoted in *Crow*, *Baldwin* noted that colleges no longer acted *in loco parentis*, and no longer controlled student morals or alcohol use. (*Id.* at p. 287.)

Analysis

We believe that extending section 831.7 immunity to the facts alleged here would (as *Acosta* and *Iverson* held concerning the facts of those cases) go well beyond the intent of the Legislature and constitute an unwarranted change in California tort law.

In finding that section 831.7 applied to the facts before it, *Ochoa* relied on cases which concerned a college or university's *in loco parentis* duty to supervise student drinking and student dormitories, not the facts here. *Ochoa* itself concerned a student brawl, albeit one which began at a student soccer game, and the game in question was not school organized or supervised, but instead was organized by a student organization and supervised by that organization's employees.

In contrast, this case involves allegations that the game was school sponsored and school supervised, and that those supervisors failed to supervise properly or to provide medical assistance to a student injured in the game. The long-standing rule relevant to those facts is that "coaches and instructors owe a duty of due care to persons in their charge." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535 [duty of instructor to student at a riding school]; *Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817 [riding instructor had a duty to avoid an unreasonable risk of injury to plaintiff].) We see nothing in section 831.7 which constitutes anything like an express declaration or necessary implication (*Acosta*, *supra*, 31 Cal.App.4th 479) that the Legislature wished to change that rule.

Nor do we see that, when supervision of school-sponsored sports is concerned, there is any meaningful difference between a high school supervising a teenager's gymnastics practice and a community college supervising a teenager's baseball game. Section 831.7 was intended to prevent users of public land who chose to engage in hazardous activities such as hang-gliding from suing public entities when they got hurt. It was not intended to affect the relationship between schools and their students.[4]

2. Duty

In its demurrer, Citrus College contended that it had no duty to supervise appellant or any other student in the game, citing *Ochoa, supra,* 72 Cal.App.4th 1300. The question *Ochoa* considered was whether colleges or universities had a duty to protect students from the criminal acts of third parties. The Court noted that the usual rule is "nonliability for the criminal conduct of a third party absent special relationship between the plaintiff and the defendant which imposed a duty on the defendant to protect the plaintiff from the type of harm that occurred." (*Id.* at p. 1301.) *Ochoa* found no such special relationship, and that general tort law and public policy militated against creation of a duty. *Ochoa* also reviewed the *Rowland v. Christian* (1968) 69 Cal.2d 108 factors and reached the same result.

We have no quarrel with *Ochoa's* holding, but do not find that it resolves the question before us, which is not liability for the criminal conduct of third parties. Instead, the complaint includes a variety of allegations against Citrus College, including the allegations that appellant was injured by Citrus College's failure to exercise reasonable care to protect him from the harm he alleged, under the circumstances set out in the complaint.

[4] We note, too, that another body of law, that concerning the doctrine of assumption of the risk, applies to the relationship between athletes and any entity which sponsors or supervises athletic events.

We conduct a *Rowland* analysis to determine whether Citrus College had a duty to protect the plaintiff from the harm alleged in the complaint.

Rowland began by noting the "general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances." (*Rowland v. Christian, supra,* 69 Cal.2d. at p. 112; see Civ. Code, § 1714.) It went on to hold that "A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Id.* at pp. 112-113.)

We find that the factors militate toward a finding of duty. It is surely foreseeable that a student might be injured if supervision is lax (or non-existent) at a school-sponsored sports event, and if medical care is not summoned when any injury occurs. It is also easy to conclude that future harm to students might be prevented if school-sponsored sports games were to be properly supervised and equipped and managers and other school employees whom the school has made present at the game are trained to provide or summon medical care.

Lax supervision of a student sports event is not perhaps the most blameworthy conduct. However, reasonably read, the complaint alleges that Citrus College coaches could have, but did not, prevent or ameliorate the injury which occurred, so that the "moral blame" factor must be decided in favor of duty. We find, too, that on this demurrer, the factor concerning the connection between Citrus College's conduct and appellant's injury must also be decided in favor of duty.

The final two factors, concerning availability of insurance and the burden to the defendant, are more problematic, since the record contains no evidence on either factor and the briefs contain no argument. *Ochoa* found that the cost of insurance would be

"extraordinary" and that the likely consequence would be that colleges would abandon intramural sports. (*Ochoa, supra,*72 Cal.App.4th at p. 1306.) That might be true under the facts of *Ochoa*, where the issue concerned a duty to prevent crime, a very difficult task indeed, but those are not the facts alleged here. Nothing in our understanding of colleges and sports makes it seem likely that a finding of duty here would cause insurance premiums to rise astronomically or schools to abandon sports.

Disposition

The judgment is reversed. Appellant to recover costs on appeal.

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ARMSTRONG, J.

I concur:

MOSK, J.

GRIGNON, J., Dissenting.

An adult student of Rio Hondo Community College, plaintiff and appellant Jose Luis Avila, is injured during a pre-season intercollegiate baseball game, when he is struck in the head by a pitched baseball while at bat. Plaintiff sues the opposing college, defendant and respondent Citrus Community College District, for negligence, alleging Citrus College was negligent for failing to: (1) provide medical care; (2) supervise and control its pitcher; (3) provide umpires or other supervisory personnel; and (4) provide adequate safety equipment. Citrus College demurs to the complaint on the grounds of lack of duty and governmental immunity under Government Code section 831.7. The majority concludes Citrus College owes a duty to plaintiff and the immunity is inapplicable to intercollegiate sports. In my view, the existence of a duty of a college to a member of an opposing intercollegiate sports team is problematic. However, because I conclude the immunity is applicable, I do not reach the more difficult duty issue.

Government Code section 831.7, subdivision (a) provides in pertinent part: "Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity . . . for any damage or injury to . . . persons arising out of that hazardous recreational activity." " '[H]azardous recreational activity' means a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant . . . . [¶] 'Hazardous recreational activity' also means: [¶] . . . [¶] [B]ody contact sports (i.e., sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants) . . . . " (Gov. Code, § 831.7, subd. (b).) Body contact sports include soccer (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218; *Ochoa v. California State University* (1999) 72 Cal.App.4th 1300, 1308) and basketball (*Yarber*

v. Oakland Unified School Dist. (1992) 4 Cal.App.4th 1516, 1519-1520). The parties do not dispute that baseball is a body contact sport.

Under the clear and unambiguous language of the immunity statute, Citrus College is a public entity that is immune from liability to plaintiff for the personal injuries he suffered arising out of the intercollegiate baseball game that took place on the property of Citrus College. Ordinarily, an unambiguous statute does not need to be construed by resort to public policy or legislative history. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) The majority, however, carve out an exception to the clear language of the immunity statute and hold: Government Code section 831.7 does not immunize community college districts for negligence to students on opposing teams in connection with personal injuries arising out of intercollegiate sports. This exception is certainly not supported by the clear and unambiguous language of the statute. I also do not believe the exception is supported by the authorities on which the majority relies or is necessary to effectuate the intent of the Legislature.

I will look first at the authorities relied on by the majority. Government Code section 831.7 was adopted in 1983 and was intended to provide immunity to public entities for injuries due to hazardous recreational activity conducted on the land of the public entity. (*Iverson v. Muroc Unified School Dist., supra,* 32 Cal.App.4th at p. 225.) In 1995, in *Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, this district held that Government Code section 831.7 does not apply to injuries sustained by a minor high school student, who was injured in off-season gymnastic practice at his school's gymnasium under the supervision of his coach. The appellate court held that " 'hazardous recreational activities' do not include school sponsored extracurricular athletic activities under the supervision of school personnel." (*Id*. at p. 476.) The appellate court relied on the established duty of a school district to supervise its students during school sponsored extracurricular sport programs. (*Id*. at pp. 477-478.)

Also in 1995, this district in *Iverson v. Muroc Unified School Dist., supra,* 32 Cal.App.4th 218, held that Government Code section 831.7 does not apply to injuries sustained by a minor junior high school student, who was injured in a soccer game at his

junior high school during his eighth grade physical education class. The appellate court reasoned that "[a] body contact sport incorporated into a schooltime physical education class is not a 'recreational' activity within the meaning of section 831.7, subdivision (a) . . ." (*Id*. at p. 227.) The appellate court emphasized that the activity was part of a class required by the school and conducted during school hours. The appellate court relied on the duty of school districts to supervise their students during school activities. (*Id*. at pp. 227-228.)

In sum, *Acosta* and *Iverson* stand for the proposition that a school district is not immune for injuries caused by its negligence to its students arising out of sports activity conducted on its property as part of regular school classes or school sponsored extracurricular activities. In contrast to these two cases is *Ochoa v. California State University, supra,* 72 Cal.App.4th 1300. In *Ochoa*, the Third District refused to apply the reasoning of *Iverson* and *Acosta* to injuries suffered by an adult college student during an intramural soccer game. Ochoa had been struck in the jaw by an opposing team member during a game-interrupting melee. The appellate court held that the college was immune from liability for the injuries suffered by its student during intramural sports. (*Id*. at pp. 1306-1309.) The appellate court relied on the absence of any duty by the college to supervise its adult students. In this way, it distinguished *Iverson* and *Acosta*, which relied on the duty of supervision owed by a school district to its minor students.

I am persuaded by the reasoning of *Ochoa* and conclude it should be dispositive of this case, which is identical to *Ochoa* except in two particulars. First, plaintiff here was not merely participating in an intramural sports activity; he is a member of the Rio Hondo College baseball team. In this way, he is more like the gymnastics team member in *Acosta*, practicing off-season under the supervision of his coach. The exact nature of the baseball game, however, is not clear from the record. It took place in January in the pre-season and "was also conducted under the auspices and control of teams known as the Whittier Roadrunners and Triple Crown Sports Team and was operated, supervised, and

controlled by National Youth Baseball and the California Community Baseball League."[1] Thus, it is not clear whether plaintiff was expected or required by his college team to participate in the baseball game. It is not at all clear that the baseball game was school sponsored and supervised. Assuming plaintiff was required to participate and the game was school sponsored, this distinguishing factor might point in the direction of finding no immunity. A second distinguishing factor, however, completely counterbalances the first. This appeal does not concern an action by a college student against his or her college for the negligence of the college in connection with supervision of a college sport. Plaintiff is suing the opposing team's college. It is clear that Citrus College has no special relationship with plaintiff. Plaintiff is not a student of Citrus College and Citrus College did not have charge of plaintiff. (Compare *Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535; *Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817, 822-823.) Citrus College is in a position similar to a mere provider of the recreational facilities. (See, e.g., *Yarber v. Oakland Unified School Dist., supra,* 4 Cal.App.4th 1518 [school district immune for injuries suffered during adult basketball game, played after hours in junior high school gymnasium].) Thus, Citrus College should be immune from liability.

The facts of this case underline the reasonableness of this conclusion. Plaintiff is struck in the head by a pitched ball. Plaintiff does not know whether the ball was thrown at his head intentionally, recklessly, or negligently. I note that the ball that struck plaintiff was thrown after a Rio Hondo College pitcher struck a Citrus College batter with a ball. It is not unusual for batters to be struck by pitched baseballs. (See *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 49.) Plaintiff has not alleged that Citrus College was on notice of any propensity of the pitcher to intentionally throw at batters. After plaintiff was struck in the head and was reeling from the impact, the Rio

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[1] Plaintiff has also sued Rio Hondo Community College District, his coach, Whittier Roadrunners, Triple Crown Sports Team, National Youth Baseball, and California Community Baseball League. These defendants are not parties to this appeal.

Hondo College coach directed plaintiff to keep playing and get to first base. After arriving at first base, plaintiff complained of not feeling well to the Rio Hondo College first base coach, who told plaintiff to stay in the game. When plaintiff arrived at second base, a Citrus College player informed the Rio Hondo College team that plaintiff was injured. Plaintiff requested a trainer for his injuries. Instead, his coach ordered him to run for 30 minutes with the rest of the team and derided the extent of his injuries.

Plaintiff alleges that Citrus College was negligent for failing to summon or provide medical care, failing to provide umpires or other supervisory personnel, failing to supervise and control the game, failing to provide adequate safety equipment, and failing to train managers and trainers to provide medical care to injured players. But plaintiff was at the game with his own managers, coaches, and trainers, and they elected not to obtain medical care for plaintiff, even though he requested care from them.[2] It is common knowledge that an injured athlete is cared for by his or her own team without interference from the opposing team. It seems particularly inappropriate under these circumstances to impose liability on Citrus College for any passive neglect. This is precisely the kind of situation for which the immunity was enacted.

GRIGNON, J.

[2] Plaintiff alleged: "After the game, [the manager] and the other Rio Hondo coaches and trainers continued to ignore [his] need for medical care."