THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS **SUPERIOR COURT**

Dillon Cohen, by his Legal Guardian and Next Friend, Nancy Cohen

v.

Boys & Girls Club of Greater Salem, Inc.; and Salem School District

Docket No. 08-C-1069

ORDER

The plaintiff, Dillon Cohen ("Dillon"), through his legal guardian and next friend, Nancy Cohen, has brought this personal injury suit against the defendants, Salem School District ("School District") and Boys & Girls Club of Greater Salem, Inc. ("Boys & Girls Club"). The School District has filed a Motion to Dismiss and/or for Summary Judgment on the following grounds: (1) discretionary function immunity; (2) recreational use immunity; and, (3) assumption of the risk. The Boys & Girls Club has joined the School District's Motion in regard to the "assumption of risk" ground.

FACTUAL BACKGROUND

For the purposes of the motions at bar, the Court finds, or accepts, the following facts. On December 4, 2005, Dillon Cohen suffered a skull fracture, a C-7 spinous process fracture, and a left clavicle fracture, when he struck an unpadded cement wall in a gymnasium at Salem High School.

At the time of the incident, Dillon was playing basketball as part of a program organized by the Boys & Girls Club. He was then about thirteen years and eleven months old. According to his Boys & Girls Club registration form, Dillon was in a section for children thirteen years old and older, and his guardian and/or mother had paid

a fee for his participation in the program. See School District's Mot. to Dis. and/or for Summ. J., Ex. C.

Prior to the incident, Dillon had played basketball for a number of years and had played at this particular gymnasium on multiple occasions. When Dillon was five years old, he fractured his wrist while playing basketball. This injury did not occur at the gymnasium at issue in this case.

The wall that Dillon struck stood approximately one and one half feet away from the end line of the basketball court. The wall had been maintained in an unpadded condition since the gymnasium was erected in 1971. Id., Ex. B (Affidavit of Michael W. Delahanty, dated August 4, 2009, ¶2).

When the incident here at issue occurred, the School District either started to look into, or continued to look into, the cost of padding the wall, but it had not yet actually decided "to expend the resources to purchase and install the padding." Id. (Delahanty Affidavit, ¶3). The record is not particularly clear as to "the sequence of events" pertaining to the School District's actions to provide padding to the wall. See Pl.'s Oppos. to Mot. to Dis. and/or for Summ. J, Ex. A (School District's Answer to Interrogatory # 9). It is not clear that any decision making process about the padding was actually underway when Dillon was injured. There is evidence in the record to suggest that another child may have been injured the week before Dillon's incident because of the close proximity of the wall to the end line of the basketball court.

The padding came to be installed in July, 2006, about six months after Dillon's incident, for a cost of $6,700.00, and the Boys & Girls Club paid about one third of the cost, or $2500.00. Id. (School District's Answer to Interrogatory #12).

The Salem High School gymnasium is owned and/or controlled by the School District, and is generally maintained by school employees and custodians. However, the Boys and Girls Club had a contract with the School District to use the facility and exercised control over activities in the gymnasium when it has used it for its programs. Id. (Answer to Interrogatory #3).

Salem's Superintendent of Schools, Michael W. Delahanty, states that "[a] purchasing decision such as this" (i.e. padding the walls) constituted a "capital expenditure" decision for him involving, "consideration of the competing economic interests that exist when funds are allocated within the School District's budget." See School District's Mot. to Dis. and/or for Summ. J., Ex. B. (Affidavit of Michael W. Delahanty ¶4).

The plaintiff alleges that both defendants violated duties of care owed to him; and that they both knew, in acting as they did, (1) that a hazardous condition existed; (2) that there was an economically feasible remedy to alleviate the hazardous condition; and (3) that the children playing on the basketball court were at risk of injury. See Plaintiff's Writ Declarations.

DISCUSSION

Discretionary Function Immunity

The Court first considers the School District's argument that it is entitled to the protection of the discretionary function immunity exception to liability.

The School District avers, through an affidavit of the School Superintendent, that installing padding on the wall would constitute a capital expenditure decision that involved discretionary function type decision making. The plaintiff objects, arguing that

the School District cannot claim discretionary function immunity because (1) the State waived such immunity through RSA 507-B:2 (1997) with regard to premises liability cases such as this one; and (2) the failure to change the unpadded condition of the pertinent wall, or its maintenance as unpadded, involved ministerial not discretionary action or inaction, particularly when the School District had already begun to obtain estimates to pad the wall.

RSA 507-B:2, reads, in part, "[a] governmental unit may be held liable for damages in an action to recover. . . for bodily injury [or] personal injury. . . caused by its fault . . . arising out of ownership, occupation, maintenance, or operation of. . . all premises." A "governmental unit" includes any political subdivision within the State, including a school district. Richard v. Pembroke School District, 151 N.H. 455, 457 (2004); see RSA 507-B:1 (1997 and Supp. 2009).

The School District contends that while RSA 507-B:2 allows for governmental unit premises liability, the statute does not eliminate discretionary function immunity which is subsumed therein. Thus, before the Court addresses whether the School District's pertinent claimed actions or inactions qualify for discretionary function immunity, it must first consider whether RSA 507-B:2 eliminates such immunity for cases such as the one at bar.

In the watershed case of Merrill v. Manchester, 114 N.H. 722, 729 (1974), the New Hampshire Supreme Court abrogated judicially conferred municipal immunity, except, however, "for acts and omissions constituting (a) the exercise of a legislative or judicial function and (b) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree

of official judgment or discretion.'" As the Court recently stated in Tarbell Adm'r, Inc. v. City of Concord, 157 N.H. 678, 684 (2008) (quotations and citations omitted):

> The discretionary function immunity left intact by Merrill is premised upon the notion that certain essential fundamental activities of government must remain immune from tort liability so that our government can govern. In other words, it seeks to limit judicial interference with legislative and executive decision-making because to accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the government body which originally considered it and passed on the matter would be to obstruct normal governmental operations. Thus the doctrine is tailored to satisfy the underlying policy of preserving and respecting our system of separation of powers.

To be sure, RSA 507-B:2, as now in effect, allows for governmental unit liability for damages caused by fault, arising from (among other things) ownership or control of premises, and does so without making any express reference to a discretionary function exception. Yet, the Supreme Court has made clear in a number of rulings over the last several years that it deems this exception generally available to governmental units in connection with many forms of negligence claims, including those associated with premises ownership or control.

In City of Dover v. Imperial Cas. & Indem. Co., 133 N.H. 109, 120 (1990), the Supreme Court declared the then existing version of RSA 507-B:2 "not constitutionally justified" because it denied any right to recover to parties injured on municipal highways and sidewalks. Significantly, the Court observed, in carrying out its review of that statute (one which covered "premises" liability) and in considering the attendant pertinent history regarding municipal immunity and liability, that while "municipal immunity, as a judicially created doctrine, no longer exists, . . . [m]unicipalities continue to enjoy limited protection from tort actions when the injury is the result of the exercise of a legislative or judicial function, or a planning function involving a basic policy decision that is

characterized by a high degree of official judgment or discretion." Id. at 115. The Supreme Court thus recognized the continued viability of the discretionary function immunity exception despite the Legislature's passage of a version of RSA chapter 507-B, a chapter acknowledged to be "intended to define in a comprehensive manner the exposure of local governmental units to liability." Id. at 114.

Since City of Dover, the Supreme Court has held that discretionary function immunity exists, for instance, "for a municipality's decisions concerning: whether to lay out roads, Rockhouse Mt. Property Owners Assoc. v, Town of Conway, 127 N.H. 593, 600 (1986); the location of parking spaces, Sorenson v. City of Manchester, 136 N.H. 692, 694 (1993); the placement or subsequent abandonment of an alleyway on a certain street in a certain place, Gardner [v. City of Concord], 137 N.H. [253, 258 (1993)]; traffic control, Bergeron v. City of Manchester, 140 N.H. 417,422, 424 (1995); and the training and supervision of basketball coaches and referees Hacking [v. Town of Belmont], 143 N.H. [546, 550 (1999)]." See Tarbell, 157 N.H. at 684. Furthermore, and quite significantly, the Court applied the discretionary function exception in the recent Tarbell case, where the City of Concord was sued on claims of, among others, negligence arising out of its alleged failure to properly construct a dam, to properly maintain a drainage system, and to properly control and regulate water level, associated with a water treatment facility premises it managed and operated. Id. at 680-87.

Schoff v. City of Somersworth, 137 N.H. 583 (1993) is worthy of particular attention. There, the liability statute in question, then RSA 231:92, did not make any express reference to a discretionary function immunity exception, and squarely and in some detail imposed liability on Towns

> for damages happening to any person . . . traveling upon a bridge, culvert, or sluiceway, or dangerous embankments of which insufficient warning has been given, upon any highway which the town has a duty of maintaining, by reason of any obstruction, defect, insufficiency, or want of repair of such bridge, culvert, sluiceway or embankments and warning signs or structures which renders it unsuitable for the travel thereon.

Id. at 587. In dealing with that statute, the Supreme Court observed that "[a]lthough some of the acts or omissions for which municipalities may be liable [thereunder], including failure to provide warning signs or guardrails for dangerous embankments, may implicate discretionary functions, . . . the statute permits suits for injuries resulting from such acts or omissions . . . [and] [t]hus the plaintiffs are not precluded on the ground of discretionary immunity from bringing suit under the statute." Id. at 590 (citation omitted). The Court went on, however, to rule that the plaintiffs' case in any event sufficiently advanced "acts or omissions that do not implicate discretionary functions" and the case did not warrant dismissal. Id.

Schoff did not deal with RSA 507-B:2, a statute which provides that a governmental unit such as a school district "may be held liable" for damages flowing from premises fault (thus leaving open the appropriate application of the discretionary function immunity exception), but, rather, one which quite pointedly and clearly imposed liability on Towns for acts or omissions that could encompass discretionary functions. Moreover, the Supreme Court in Bergeron, 140 N.H. at 424, described Schoff as hinging very much on the circumstance that " the conduct complained of was ministerial, rather than discretionary." Id.

The Court concludes that, here, the School District is not precluded from asserting its entitlement to discretionary function immunity, and now turns to whether the School District enjoys the benefit of this exception, and must be deemed immune from liability.

In dealing with discretionary function immunity, the Supreme Court has declined "to adopt a bright line rule to determine what constitutes discretionary planning or merely the ministerial implementation of a plan," see Hacking, 143 N.H. at 549-50, and has adopted the following test:

> When the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability.

Id. (citing Bergeron, 140 N.H. at 421).

In this case, the existence or maintenance of the unpadded wall at the time of Dillon's incident—the essential conduct which allegedly caused Dillon's injuries—may implicate "policy decisions involving the consideration of competing economic, social and political factors," not "operational or ministerial decisions required to implement policy decisions." See Mahan v. N.H. Dep't of Admin. Services, 141 N.H. 747, 750 (1997). Yet the record is insufficiently developed as to whether the existence of the unpadded wall at the pertinent time occurred due to any actual decision making process, or was rather a condition that simply persisted in the absence of any higher level plans, designs, procedures, or attention. See Gardner, 137 N.H.at 258. If the latter, the School District may be deemed not entitled to avail itself of discretionary function immunity. On the present record, the Court **DENIES** the School District's Motion to Dismiss and/or for Summary Judgment based on discretionary function immunity.

Recreational Use Immunity

The Court next considers the School District's argument that it lacks liability by virtue of recreational use immunity. This argument is based on RSA 508:14, I, (1997 and

Supp. 2009) which states, in part: "[a]n owner, occupant, or lessee of land, including the state or any political subdivision, who without charge permits any person to use land for recreational purposes . . . shall not be liable for personal injury . . . in the absence of intentionally caused injury or damage. "

The plaintiff objects and contends that the statute does not apply because the School District did not permit "any person" to use "land," and it not did not do so "without charge." Instead, the plaintiff argues that the pertinent Salem High School gymnasium and the Boys & Girls Club program were, at material times here, (1) confined to Boys & Girls Club-related persons, (2) the gymnasium was not "land" for the purposes of the statute; and, (3) the Boys & Girls Club and/or the School District charged a fee for participating in the Boys & Girls Club program.

The terms "any person," "land," and "without charge" are not defined in RSA 508:14, and there is no accompanying definition section. See RSA 508:14. The Court, when interpreting a statute, first examines "the language of the statute and, where possible, . . . ascribe[s] the plain and ordinary meanings to the words used." Estate of Gordon-Couture v. Brown, 152 N.H. 265, 266 (2005) (citation omitted). The goal is to "apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Id. (citation omitted).

"Statutes in derogation of the common law are to be interpreted strictly. While a statute may abolish a common law right, there is a presumption that the legislature has no such purpose. If such a right is to be taken away, it must be expressed clearly by the legislature. Accordingly, immunity provisions barring the common law right to recover are to be strictly construed." Id. at 266-67 (citations omitted).

Where the Supreme Court has interpreted parts of this and other recreationally-related, or sports-related statutes, it has not allowed an extended breadth of immunity, but one pointedly consistent with legislative purposes. See, e.g., Sweeney v. Ragged Mt. Ski Area, 151 N.H. 239, 243 (2004) (snow-tubing did not constitute "the sport of skiing" for the purposes of the immunity established in RSA 225-A:24, I); Kenison v. Dubois, 152 N.H. 448, 454 (2005) (snowmobile club that voluntarily maintained, groomed, and developed a portion of a recreational trail deemed to not have immunity under RSA 508:14, I concerning a claim of negligence involving one of its snow trail grooming machines, as it was not considered an "occupant" of land).

The language used in RSA 508:14, I, only refers to "land." It does not use other names for real property such as "premises" or "property." The question in this case is whether the term "land" in RSA 508:14, I includes structures upon the land. This Court holds that it does not.

To be sure, the New Hampshire Supreme Court has not explored the meaning of the term "land" in the statute in depth. Yet, it is consistent with the Court's past holdings in regard to the breadth of the immunity to interpret the term "land" in the statute to mean only the land itself, to the exclusion of structures. Moreover, while the parties have brought to the Court's attention certain other recreational use statutes existing in other states that include immunity protection beyond "land," the language in the statutes themselves refer to "buildings or other enclosed recreational facilities" or to "property" instead of just to "land." See 745 Ill. Comp. Stat. 10/3-106; Minn. Stat. Ann. § 466.03 (6e).

Because the pertinent Salem High School gymnasium is part of a building and not just "land", per se, this Court holds that RSA 508:14 does not entitle the School District to recreational use immunity in regard to the incident here at issue.

Furthermore, RSA 508:14 would appear not to apply as it seems the gymnasium was not, at pertinent times here, open to the general public. The Supreme Court has interpreted the term "any person" in the statute to refer to "any person *as a member of the general public*." Gordon-Couture, 152 N.H. at 271 (quotation and citation omitted).

Finally, because Dillon paid a fee (or a fee was paid for him) to participate in the Boys & Girls Club basketball program, which took place in the Salem High School gymnasium, it appears arguable that Dillon was on the premises for a charge, not "without charge."

The Court **DENIES** the School District's Motion to Dismiss and/or for Summary Judgment based on recreational use immunity.

Assumption of the Risk

The Court now turns to the defendants' contention that the plaintiff's case is barred by the doctrine of "assumption of the risk." In support of this argument, it is underscored that Dillon had played basketball for a number of years, multiple times in the particular gymnasium at issue, prior to the accident, and had also previously injured his wrist while playing the game. Given his familiarity with the game, the pertinent facility, and the possibility of injury, the defendants argue that Dillon voluntarily assumed the risks presented by participating in the particular basketball program at the Salem High School gymnasium in which he was hurt.

The plaintiff objects, taking the position that this case survives the defendants' assumption of risk contentions because the presence of the pertinent unpadded cement wall was a hazardous condition or a property defect--not an ordinary risk inherent within the game of basketball then being played that Dillon, then almost fourteen years old, would have known, understood or appreciated. In this regard, the plaintiff urges that it has not been established, for summary judgment purposes, that "the existence of the end line near the unpadded wall was an ordinary risk inherent within the game of basketball that Dillon . . . would have known or appreciated." See Pl.'s Oppos. to Mot. to Dismiss and/or for Summ. J. at 10.

The term "assumption of the risk" has been used to express three distinct common law theories: (1) express assumption of the risk — where a plaintiff expressly consents to expose himself to the defendant's negligence; (2) secondary implied assumption of risk — where both the defendant and plaintiff are negligent, often now referred to as "comparative fault:" and (3) primary implied assumption of risk — where the plaintiff voluntary participates in a reasonable activity with obvious and known risks. Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 413-14 (2002).

In regard to primary implied assumption of the risk, a plaintiff has no claim against a defendant when he "voluntarily and reasonably enters into some relationship with a defendant, which the plaintiff reasonably knows involves certain obvious risks such that a defendant has no duty to protect the plaintiff against injury caused by those risks." Id. at 414. These "obvious" risks certainly encompass those inherent to, or ordinarily associated with, playing in recreational athletic activities. See id. at 416. An organizer of a recreational athletic activity such as the Boys & Girls Club, or an owner or

operator of a facility for such activities such as the School District, however, breach duties owed to participants, such as Dillon, if they unreasonably increase the risks in some way. Id. at 418. Thus, while a plaintiff/participant is deemed to assume obvious *ordinary* risks associated with the sport, thereby precluding liability, he does not assume *unreasonably increased* risks and maintains a claim for recovery. Id. (emphasis added).

Allen provides that "to determine the appropriate standard of care to be applied . . . [it is necessary] to consider (1) the nature of the sport involved; (2) the type of contest, i.e., amateur, high school, little league, pick-up, etc.; (3) the ages, physical characteristics and skills of the participants; (4) the type of equipment involved; and (5) the rules, customs, and practices of the sport, including the types of contact and the level of violence generally acceptable." Id.

Here, the record reflects that Dillon and his guardian/parents assumed the ordinary risks inherent in his playing basketball in a league or program for children or minors, and the defendants owed no duty to protect Dillon from such ordinary and obvious risks. Yet, while it would appear to be within the ordinary risks of a "strenuous," "rough" basketball game that injuries would occur caused by such incidents as being pushed out of bounds and hurt through impact with bleachers on the sidelines, See Paine v. Young Men's Christian Ass'n, 91 N.H. 78 (1940), the Court cannot say here, based on the present record, and as a matter of law, that in exposing a young player like Dillon to the risks of injury associated with playing basketball on a court with an unpadded wall located about one and one-half feet from the court's end line, the defendants lack liability for his injuries. It has not been established that, in so acting, the defendants did not violate duties not to subject Dillon to unreasonable increased risks.

In Hacking, where a sixth-grade girl was seriously injured during a junior high basketball game when the "referees lost control of the game" and players from the other team "twice knocked [the plaintiff] down and stepped on her leg," the Supreme Court recognized that application of assumption of risk was not there appropriate because "one does not ordinarily assume an unreasonably increased or concealed risk." 143 N.H. at 553. Here, we are also dealing with adolescents playing in an organized youth league, where players obviously need strong supervision and structure as they are only developing as players (and as people).

Not only is the record very much undeveloped as to what actually happened in the game in which Dillon was injured and what rules, standards of play, restrictions and oversight were effectively then in place, but perhaps most importantly in regard to the present motion, the record does not establish whether the lack of padding, given the closeness of the wall to the court, violated any recognized, applicable safety standard. See e.g. Greenburg v. Peekskill City School District, 255 A.D.2d 487, 488 (N.Y.2 1998) (expert opinion offered by the plaintiff averred "that the brick wall behind the basket should have been padded because the out-of-bounds area beyond the endline of the basketball court was less than the recommended minimum safety standard of three feet").

The Court **DENIES** the Motion to Dismiss and/or for Summary Judgment based on assumption of the risk.

CONCLUSION

For the reasons set forth above, the Court **DENIES** the Defendants' Motion to Dismiss and/or for Summary Judgment.

So ordered.

January 7, 2010
Date

_____
John M. Lewis
Presiding Justice