SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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RENEE JACKSON , as Parent and Natural Guardian of
SHAUN JACKSON, an Infant Under the Age of 14,

Plaintiff,

-against- **DECISION & VERDICT**

MONTICELLO CENTRAL SCHOOL DISTRICT,

Defendants.

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RJI No.: 52-32915 2012
Index No.: 3269-2011

Appearances:

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Schick, J.:

This matter was heard as a non-jury trial on October 9th and October 10, 2013.

Plaintiff was a twelve year old seventh grade student at the Defendant school on December 8, 2010 and was participating in a gym class. Plaintiff alleges that he was injured and

suffered damages as a result of the negligence of the gym class teacher, an employee of the Defendant.

The un-controverted facts are that the gym teacher was instructing the class, which included the Defendant, on how to properly approach and spike a volleyball over the net and into the opposing court. The teacher asked Plaintiff to demonstrate the procedure. The teacher lofted the ball in the air and the Plaintiff was instructed to approach and illustrate how to spike the ball, but the Plaintiff was told not to actually strike the ball itself. The ball was lofted and the Plaintiff, in attempting to show the class, followed through with the illustration but actually struck the ball sending it to the other side of the net. The Plaintiff testified that he accidentally struck the ball, not intentionally, and thought that since he made a mistake he should retrieve the ball and bring it back. The teacher testified that when the Plaintiff struck the ball he indicated that it was unintentional. While the Defendant ran across to the other side of the net to retrieve the ball, the teacher demonstrated the proper maneuver again to the class however this time he lofted and actually spiked the volleyball which flew across the net and struck Plaintiff in the wrist causing the injury. The teacher was not aware that Plaintiff had gone to the other side of the net to retrieve the previous ball and therefore was not aware that Plaintiff was in danger of being injured by his spike.

The teacher admitted that he would not have spiked the volleyball across the net had he been aware that the Defendant was on the other side of the net.

Plaintiff contends that the teacher was negligent in not being aware of where the Plaintiff was at the time he spiked the ball and the teacher admitted that it was his responsibility to be aware of all students at all times during the class.

The defense contends that there is no negligence on their part for the following reasons:

1. The teacher used a ball known as the volleyball lite, which is softer than a normal volleyball and used specifically for instructional purposes to lesson the chance of injury.
2. The volleyball was not fully inflated as an additional safety measure by the Defendant to minimize any chance of injury.

3. The teacher went through a series of steps in how to properly approach and spike the ball and the Plaintiff agreed to help in the demonstration.
4. The teacher formed two lines on one side of the net so none of the students would be on the receiving court when the ball was spiked during the demonstrations.
5. That spiking was the last skilled learned and prior classes had dealt with the teacher explaining how to properly receive the volleyball, and that in the prior years training the students, including the Plaintiff, had learned all of the techniques in playing volleyball and had experienced volleyball games during the prior classes.

The defense further argues that negligence on the part of the teacher was not the proximate cause of the injury. The defense argues that the Plaintiff defied the teachers' instruction not to spike the ball and in fact struck the ball and then on his own initiative went to retrieve the ball on the other side of the net. The defense argues that when the Plaintiff was hit by the ball spiked by the teacher only a few seconds after going to the other side of the net, it was his actions that caused the injury. The defense argues that when a student fails or refuses to follow the instructions by the teacher, such a student cannot be adequately supervised.

Finally, the defense argues that in attending the gym class where the volleyball instruction was undertaken, the Plaintiff assumed the risk of an injury which may be a consequence of the participation in the class.

Plaintiff contends that the teacher was negligent in forcefully striking the volleyball to the other side of the net without realizing that Plaintiff was "in the line of fire" and it was negligence on the part of the teacher not to be aware that the Defendant was in a location where he could be hit by the teachers' spike. Plaintiff further contends that there was no assumption of risk because the gym class is a mandatory class as part of the school education program and one cannot expect a twelve year old, seventh grade student, to reasonably appreciate that he would not be penalized for refusing to participate in the volleyball instruction. Plaintiff further contends that a student does not assume the risk of negligent conduct on the part of a teacher who is in control and command of the classroom.

Assumption of Risk:

This Court finds that by attending a mandatory gym class in the defendant school, the

student does not assume the risk that the instructor will not be aware of his location, and does not assume the risk of injury when the instructor forcefully spikes a volleyball in his direction causing an injury. While a student may assume a risk of injury when playing a game of volleyball with fellow students, this risk assumption does not extend to the conduct of the instructor in losing track of his student. This Court notes that in contrast to a twelve year old seventh grade student, the instructor was a fully developed and muscular adult. The force generated by the spike of the instructor is far greater than anything the student might have expected from his fellow classmates of similar size and development. The instructor had a responsibility and a duty to care for the safety and well being of the students, including the Plaintiff. The facts set forth in the trial of this case did not establish that the Plaintiff assumed the risk generated by the conduct of the instructor. Furthermore, when the student struck the volleyball, it was not intentional and the student did not defy the instructions of the teacher, his actions were accidental. Defendant established no evidence during trial to rebut the testimony of the Plaintiff of his accidental contact with the volleyball causing the ball to be propelled to the other court. In seeking to retrieve the ball, the Plaintiff was behaving and reacting in a fashion that should not have been unexpected by the teacher when a student seeks to atone for an accident or mistake by retrieving the ball. The instructor, according to the testimony, never ordered the Plaintiff not to retrieve the ball he accidentally struck.

The evidence in this case establishes that the Plaintiff accidentally struck the volleyball, went to retrieve it, and the teacher then spiked another volleyball accidentally injuring Plaintiff. None of the conduct by either party was intentional, however the teacher had a responsibility and a duty to his student. His actions in spiking the ball without regard to Plaintiff's position was negligent and was the proximate cause of the injury to the Plaintiff.

Based upon the testimony induced at trial, this Court finds that Defendant is 100% liable for the injuries sustained by Plaintiff.

Damages:

The negligence by the teacher, an employee of the Defendant, caused the injury sustained by Plaintiff. Both expert witnesses testified that the injury amounted to a fracture of the growth plate in the left wrist of the Plaintiff. The expert witness for the Defendant, Doctor DeSalvio

testified that the fracture was a Salter/Harris I, while the expert witness for the Plaintiff testified that the growth plate fracture was a Salter/Harris V. This Court finds that the testimony of the Plaintiff's expert, Doctor Israelski, who is the treating physician of the Plaintiff, was far more complete and credible than the testimony of Doctor DeSalvio. Doctor Israelski relied upon the x-rays taken at the hospital, while Doctor DeSalvio did not have the x-rays to review during her testimony. Doctor Israelski credibly testified by showing the xray and demonstrating with his hands that the fracture was in fact a Salter/Harris 5, which is the worst possible growth plate fracture of the wrist. Corroborating the testimony of the Plaintiff, Doctor Israelski testified that because of the Plaintiff's age, surgery is a worst case scenario, and the proper treatment was what occurred in the emergency room of the hospital when a physician needed to twice manipulate the bones into proper place. It is clear that the bones were manipulated and a cast was incased over Plaintiff's wrist, and then the cast had to be removed and the bones manipulated again after x-rays showed that the bones hadn't been properly realigned. Both the Plaintiff and Doctor Israelski testified to the extreme pain suffered by the Plaintiff when the bones are manipulated in this manner. Plaintiff was required to have his wrist maintained in a cast from December 8, 2010 to the end of January 2011, when the cast was replaced by a volar splint. Thereafter physical therapy was prescribed for the Plaintiff, which took place from February to October 2011. It is clear from the testimony of Doctor Israelski that Plaintiff made excellent progress and he was very fortunate to have recovered so well. Based upon the very credible testimony of Doctor Israelski this Court finds that by September 4, 2013, the last visit by Plaintiff to the Doctor, two years and nine months after the fracture, appears to have made an excellent recovery, and this Court finds no further evidence that any permanent injury has been sustained.

Nevertheless, this Court finds that the injury was extremely painful to the Plaintiff causing the bones to need manipulation twice on the day of the injury which causes great suffering. The credible testimony of Doctor Israelski, the Plaintiff, and his family indicates that the Plaintiff is very stoic and is not a complainer. This Court finds that the Plaintiff suffered great pain and a very altered life style for approximately two years wherein he was unable to engage in normal activities of a person of his youth. Plaintiff certainly appears to have been concerned and fearful about re-injuring his wrist while playing sports, which from all testimony, he was very

skillful at. There was no question that the injury experience was a traumatic event in this young person's life.

This Court finds that a fair and just compensation to Plaintiff for the injuries sustained as a result of the negligence by the Defendant, taking into consideration all of the testimony and evidence produced at trial, is $60,000.00. Additionally, Plaintiff is entitled to compensation for the transportation to and from the eight visits to Doctor Israelski at a twenty three mile round trip and for the twenty visits to a physical therapist at a two and one-half mile round trip. This Court, therefore awards the Plaintiff expenses at fifty cents per mile for those trips for a total amount of $117.00. In addition, Plaintiff established insurance company expenses of $1,065.56, and the necessary purchase by the Plaintiff of a sling splint in the amount of $59.00.

Therefore the total amount awarded to Plaintiff from Defendant is $61,241.56.

This shall constitute the Decision of the Court. The original Decision and Order and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

SO ORDERED.

Dated: Monticello, NY
October 21, 2013

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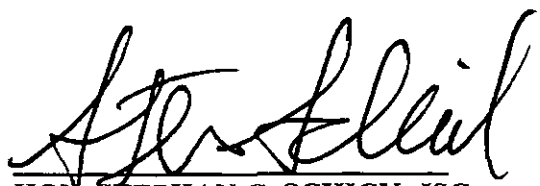

HON. STEPHAN G. SCHICK, JSC