Circuit Court for Baltimore County
Case No. 03-C-18-002126

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1469

September Term, 2019

BARBARA L.

v.

BOARD OF EDUCATION
OF BALTIMORE COUNTY

Beachley,
Gould,
Wilner, Alan M. (Senior Judge),
Specially Assigned,

JJ.

Opinion by Wilner, J.

Filed: November 9, 2020

This is a lawsuit by the mother of a middle school student, on behalf of her daughter, against the Baltimore County school board for injuries suffered by the child while engaging in a required physical education (P.E.) event on school property. To protect the child's identity, we shall refer to her as K. The appeal is from the entry of judgment in favor of the school board at the close of the plaintiff's case.

BACKGROUND

The event in question was referred to alternatively as an "obstacle course" and a "monster run." It was held on November 1, 2017 at the Loch Raven Technical Academy, a Baltimore County public middle school, as part of the school's P.E. program. Boys and girls in the sixth, seventh, and eighth grades participated. K. was 11 years old at the time and was in the sixth grade. Five teachers, including Ryan Gambler, were present to supervise the event.

Notwithstanding the contextual adjectives, "obstacle" and "monster," the evidence, including from K., indicated that the event was meant to be a fun activity. The course, which traversed part of the open field on the school property, was divided into four clearly marked zones, each with an obstacle of some kind, such as a jump rope. The students would run through each zone in groups of five or six students at a time. Although boys and girls were mixed together in the groups, each group contained only children in the same grade; seventh and eighth graders were not mixed

with the sixth graders or with each other. As a student completed the task in one zone, he or she would proceed to the next one.

There were about 90 students participating in the event, approximately 30 from each of the three grades. The seventh and eighth grade students, who had participated in the event previously, went first, while the sixth graders watched.

It appears that the event, at least in part, was a competitive one, which may have been part of the fun. Each runner wore a Velcro belt with a "football flag" attached to each side, presumably a flag similar to those thrown by football referees when spotting a foul. While they were running, a small group of four-to-seven other students on the sideline of each zone, referred to as "defenders" and identified by a "pinnie" attached to their clothing, would run on to the course and attempt to grab a flag off a runner's belt. We infer that the objective was for the running student to complete the course with his or her flags intact. The runner was not allowed to hold the flag, so there was not to be any actual bodily contact or tug-of-war between the students; it was a matter of the "defender" just grabbing the flag off the belt. The "defender" students also were tasked with removing any loose flags that had dropped on to the ground so that the running students would not slip on them.

K. had completed the first three zones with one flag intact. One flag had been taken from her, without any problem, while she was in Zone 3. She was close to completing Zone 4 when an eighth grade boy, in a possible attempt to grab her remaining

flag, pushed her to the ground just as she was approaching a paved walkway that ran across the course, causing her to fall and painfully injure her left knee. She did not know the boy, who was never identified, and could not determine whether he had pushed her intentionally. She remembered only that she felt his hand on her back, and that he pushed her. She was knocked unconscious for a brief time and was in great pain when she awoke. She was taken to the hospital and treated for a left knee patella dislocation.

The single-count complaint, in overlapping allegations, charged the school board with negligence in (1) failing to maintain proper supervision and control over K., (2) failing to supervise the eighth grade student and protect K. from that student, who, it was alleged, was bigger, faster, and stronger than K. and inclined to use physical force to injure other students in their haste to complete the obstacle course, (3) failing to properly train its teachers and staff regarding methods and requirements for the safety of children, (4) failing to protect K., a child within its temporary custody and control, (5) creating an unsafe school environment for K., (6) operating the school in an unsafe manner, and (7) in other respects controlling its teachers and staff in a careless, dangerous, and negligent manner.

With respect to liability, the evidence came from only two witnesses – K. and Mr. Gambler; in all material respects, their testimony was consistent. When the children had a P.E. class, they first would report to the locker room and change into the P.E uniform – purple shorts, a gray T-shirt, and athletic shoes. They then walked around the gym to

warm up, following which they sat down with the P.E. teachers, who would explain the activity for the day. On the fateful day, the children were split up; the eighth graders started the course first, then the seventh graders. Mr. Gambler and four other teachers were outside supervising the event. Mr. Gambler said that "no children were left unattended throughout the course of this activity." K. said that each small group stayed together as they traversed the zones.

K. was well into Zone 4 when she was pushed, and she ended up on the sidewalk. When she last saw Mr. Gambler, he was "around" Zone 3, which she said was about half a football field from where she was in Zone 4. She did not indicate where the other supervising teachers were, only that they all were gathered around her when she regained consciousness.

At the end of the plaintiff's case, the school board moved for judgment. It treated the plaintiff's case as centering on a lack of supervision, negligently allowing boys and girls to participate together in P.E. classes, and negligence in the design of the obstacle course, in particular having it include a paved area. It argued that there was no evidence that any school employee could or should reasonably have foreseen that K. would be intentionally pushed or injured, that the complaint about mixing boys and girls in the activity was a claim of educational malpractice, which is not recognized in Maryland law, and that, even if it were, the plaintiffs failed to produce evidence of what the applicable standard of care would be. The plaintiff responded that the standard of care was an

affirmative duty to protect students, which emanated from the school's standing *in loco parentis* to the students.

The court found merit in the board's argument. Relying largely on *Berg v. Merricks*, 20 Md. App. 666 (1974), the court concluded that K. was injured when she was pushed by an unknown boy, that there was no evidence to indicate that the boy had previously been disruptive so as to create a risk of harm, that the sidewalk had nothing to do with causing K. to fall, that the students were properly instructed regarding the event, and that the plaintiff had not produced any professional standard to guide the jury's evaluation of the evidence.

DISCUSSION

Appellant presses the point that, in considering whether to enter judgment under Md. Rule 2-519 in favor of the school board as a matter of law, the court must construe the evidence and all reasonable inferences therefrom in a light most favorable to her. She urges that the appropriate standard of care was the duty of the school board, acting *in loco parentis*, to protect K., and that it failed to do so by (1) designing the course to include paved areas, (2) allowing older boys to participate with sixth grade girls, which was looking for trouble, (3) allowing students to pull flags off the runner's body, which encouraged physical contact with the running student, and (4) not properly supervising the event. In that last regard, she claims that there were no teachers anywhere near K. in

Zone 4 when she was pushed. K. said that Mr. Gambler was in Zone 3 at the time, half a football field away. There was no evidence as to where the other four teachers were.

Legislators, educators, and courts all have recognized the importance of physical education as part of the grade-school curriculum, both as a pedagogical and health imperative. That is why P.E. classes are mandatory in most of the States, including Maryland, for elementary through high school students. Maryland Code, § 7-409 (a) of the Education Article requires each public school to have "a program of physical education that is given in a planned and sequential manner to all students, kindergarten through grade 12, to develop their good health and physical fitness and improve their motor coordination and physical skills." *See* also §§ 7-4B-01 through 7-4B-06 (Physical Education Programs for Students with Disabilities) and Code of Maryland Regulations (COMAR) 13A.04.13.01.

The courts have recognized the obvious – that P.E. activities, which involve physical exertion of the body and often physical contact with other students or objects, may present a heightened prospect of injury to a student that must be guarded against to the extent practicable. The cases that abound throughout the country, and in Maryland, have attempted to define, at least for purposes of civil liability, the nature and scope of the duty that teachers and administrators have to protect students in their care from that heightened prospect of injury. In a general sense, that duty comprises two elements: (1) designing the program in a way that takes account of and reasonably attempts to

ameliorate foreseeable risks of injury, and (2) supervising the students' participation in the program, also in a way that takes account of and reasonably attempts to ameliorate foreseeable risks of injury. At their core, appellant complains of a failure of both elements.

The Court of Appeals initially addressed both of those elements in *Segerman v. Jones*, 256 Md. 109 (1969).

The case involved an action by a parent against a teacher and a fourth-grade student for an injury sustained by the parent's child (Mary) during a P.E. class. Judgment was entered in favor of the student (Bobby) but against the teacher (Ms. Segerman), who appealed. The event involved various calisthenics engaged in by 30 fourth-grade, nine-year-old children in an indoor classroom that was 32 feet long, 25 feet wide, with 30 movable desks, 30 chairs that slid under the desks, a three-foot by six-foot work table, two 11 by 28-inch bookcases, a 29 ½ by 53 ½-inch teacher's desk, and a chair that slid under that desk.

In that crowded classroom, the children were placed arms-lengths apart, as close to their desks as possible, and told not to move from where they were placed. The teacher then played a phonograph record that had been made to implement a program designed by the President's Council on Youth Fitness that directed the children in doing push-ups, toe-touches, sit-ups, torso twists, pogo springs, jumping jacks, march-in-place, arm circles, bicycle ride, deep breathing, and run-in-place, all in fast time. Some of the

children were familiar with the record; Mary and Bobby were not. While the children were still seated, the teacher played the record for the children.

After instructing and placing the children and starting the record again, the teacher left the room to go to the principal's office across the hall. She was gone for four to five minutes. While she was gone, Bobby left his assigned place, moved closer Mary, and, as they were doing push-ups, kicked her in the head, causing her to lose several teeth. The kick arose from the fact that, instead of doing the pushups with his toes on the ground, as he had been instructed, Bobby kept his knees on the ground, which left his feet free to kick Mary. His moving from his assigned place and doing the exercise in that manner, the Court concluded, was an "intervening force which became a superseding cause" of the injury. *Id.* at 134.

The Court of Appeals reversed the judgment against Ms. Segerman on the ground that, even if she had been negligent in leaving the room and leaving the children totally unsupervised, her absence, as a matter of law, was not the proximate cause of Mary's injury. The teacher's presence, the Court said, could not have prevented the injury, and "liability could be imposed only if the injury was reasonably foreseeable." *Id.* at 123.[1]

After reviewing cases from other States and some journal articles, the Court concluded that "[i]f a rule can be developed from the teacher liability cases, it is this: a

[1] No account was taken – perhaps it was not argued – of whether Bobby would have left his assigned place had the teacher been present or, if he did, Ms. Segerman would have ordered him back before he could kick Mary.

teacher's absence from the classroom, or failure properly to supervise student activities, is not likely to give rise to a cause of action for injury to a student unless under all the circumstances the possibility of injury is reasonably foreseeable." *Id.* at 130-31. Stating then the corollary, the Court concluded that "a teacher could be liable to an injured student, whether or not the teacher could have prevented the injury, if the injury is a reasonably foreseeable consequence of absence or failure to supervise. Under such circumstances, the intervening force does not become a superseding cause which breaks the chain of causation but becomes a part of the original tort." *Id*. at 131.

Closing the circle, the Court adopted the view of a Washington court that, whether foreseeability is considered from the standpoint of negligence or proximate cause, "the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable" but "whether the actual harm fell within a general field of danger which should have been anticipated." *Id.* 132. Applying that test, the Court concluded that it would be difficult to say that the teacher could be held to have reasonably anticipated that any injury would result, whether the class performed the exercises while she was present in the room or after she had left. More specifically, the Court held, as a matter of law, that, having spaced the children and instructed them, "[t]o say that Bobby's acts should have been foreseen by [the teacher] would be sheer conjecture." *Id.* at 134.

The Court of Appeals cited *Segerman* with approval in *Madden v. Clouser*, 262 Md. 144 (1971) but in a manner that appears to be pure *dicta*. A parent sued a teacher

and two students when his son was seriously injured in a fight between the two other students while the teacher was absent from the classroom. The trial court entered summary judgment for the teacher, and the parent appealed. The appeal was dismissed for want of a final judgment, as the case against one of the students remained open. Notwithstanding the dismissal on that jurisdictional ground, the Court stated that the case against the teacher was "controlled" by *Segerman* and that the summary judgment for the teacher was correctly granted. The Court's mandate, however, simply dismissed the appeal and did not purport to affirm the summary judgment.

The Circuit Court in this case relied mostly on *Berg v. Merricks*, *supra*, 20 Md. App. 666 (1974), *cert. denied*, 272 Md. 737 (1974). *Berg* involved a 19-year-old high school student who fractured his neck while performing on a trampoline during a P.E. class, rendering him a paraplegic. Suit was filed against the P.E. teacher, the principal of the school, the county superintendent of schools, the county school board and its individual members, and the county. Judgments were entered for all of the defendants, for different reasons. Most pertinent to this case was the "directed verdict" – the predecessor of a judgment entered as a matter of law at the close of the case under current Rule 2-519 – in favor of the teacher.

The injury occurred when the teacher, Mr. Merricks, was conducting a 12th grade class of 38 students in how to perform a "back pull over" on a trampoline. In a footnote (20 Md. App. at 669-70, n. 2), this Court explained that the students were instructed to

stand at one end of the trampoline, jump up slightly, and drop down to the trampoline on their "seat." The trampoline would then propel the student's legs over his head, and he would land on his stomach, hands and knees, or feet. The back pullover combined the seat drop and the back roll in one continuous movement. The teacher, who was well trained in P.E. and had himself participated in trampoline competition, had explained the dangers of a trampoline to the students and directed that there was to be "no horseplay."

There were two trampolines located about 25 feet apart. Two students would perform at a time, one on each trampoline. The other students would gather around the two trampolines, 18 around each of them, to act as "spotters," to assist any performer who might be projected toward the frame of the trampoline. The teacher stood between the two trampolines. The teacher gave instructions for the back pullover and had one of the advanced students illustrate it before any of the other students got on the trampoline.

When it was his turn, the plaintiff, Mike Berg, bounced once or twice and went over without doing the seat drop, in effect flipping over backwards from a standing position. Coming down, he twisted his body and landed on a slant, fracturing his neck. Mr. Berg's complaint alleged a failure of Mr. Merricks to exercise due care for Mr. Berg's safety by failing to watch him while he performed, requiring the class to hurry, neglecting to stand on the frame of the trampoline ready to break Mr. Berg's fall, instructing that the students were to land on their stomach, ignoring confusion on the part

of the students, failing to take account of the individual abilities of the students, and teaching trampoline without adequate background or expertise.

Citing *Segerman*, this Court concluded that none of the alleged deficiencies on the part of Mr. Merricks, even if true, had anything to do with the injury to Mr. Berg, which occurred because he failed to follow the teacher's instructions, something that Mr. Merricks could not reasonably have anticipated. Enunciating the point noted earlier in this Opinion, the Court concluded:

> "The nature of physical education activities comprehends physical hazards. The instructor must avoid as many of these hazards as he is humanly able considering the limitations under which he instructs, but the system cannot be made childproof. That such danger could reasonably have been anticipated and avoided in this setting is the standard appellants have failed to provide."

Id. at 675.

Segerman and *Berg* set the appropriate standard in these kinds of cases, which is the general and traditional one of foreseeability: did the injury that occurred fall within a general field of danger that should have been anticipated? As noted in *Patton v. USA Rugby*, 381 Md. 627, 637 (2004): "Where the failure to exercise due care creates risks of personal injury, the principal determinant of duty becomes foreseeability. The foreseeability test is simply intended to reflect current societal standards with respect to an acceptable nexus between the negligent act and the ensuing harm." (citations and internal punctuation omitted).

Where the alleged breach of duty is a failure to supervise a P.E. event, the court looks first to determine whether, with greater or different supervision, the teacher could have prevented or lessened the impact of the injurious occurrence, and, even if not, whether the injurious occurrence was within a general field of danger that should have been anticipated in the absence of greater or different supervision. *Segerman* establishes that principle, which is common in other States as well. The New York courts have explained that, although schools "are under a duty to supervise students in their charge and will be held liable for foreseeable injuries related to the absence of adequate supervision," they "are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students." *Santos v. City of New York*, 30 N.Y.S.3d 258, 259-60 (A.D. 2016) (quoting from other New York decisions).

The uncontradicted evidence here was that there were five teachers supervising this event, in which 30 children, properly instructed and in groups of five or six, were running across a four-zone field with flags attached to their Velcro belts and groups of other children were running on to the field attempting to remove those flags. The only other evidence regarding supervision was that Mr. Gambler was in Zone 3 presumably observing what was going on in that zone. There was no evidence as to where the other four teachers were, whether, indeed, any were in Zone 4. Nor was there any evidence that any other runner had been pushed, either in this event, or the events in which the seventh and eighth graders participated, or in the events in prior years, or that the boy

who pushed K. was known to be a problem. As noted, K. herself did not know whether the push was deliberate. In short, there was no evidence from which a reasonable jury reasonably could find inadequate supervision by school personnel.

As noted, the duty of care applies also to the design of P.E. programs. COMAR 13A.04.13.01 requires the local school systems to establish planned and continuous programs to adequately train its teachers, administrators, supervisors, and personnel in order to update knowledge, instructional materials, and methodology in physical education. Mr. Gambler testified that he had taken pedagogical courses dealing with effective, best practices, age-appropriate curriculum. He and his staff designed the course, and, in doing so, made sure that the zones were clearly marked, and "clearly laid out all the safety expectations" including that the runners were not to hold on to their flags and the defenders were merely to grab them off the Velcro belts. The Circuit Court reasonably could conclude that the design and running of the course did take into account the children's safety, and that it was not reasonably foreseeable that a student would violate the instructions given by deliberately pushing another student rather than just grabbing the flag.

With respect to the complaint about mixing boys and girls in the event, the plaintiff offered no evidence of any recognized standard within the educational community, or data that would support a standard, that prohibits male and female children from participating together in P.E. activities, especially those not intended to

involve physical contact of a kind that foreseeably may cause physical injury. Absent evidence to the contrary, size and agility are likely more important considerations than mere gender or a one-to-two-year difference in age. Allowing an 90-pound girl (or boy) to play the position of right guard on an intramural football team with 140-pound boys (or girls) may lead to a different result, but the plaintiff has not shown that allowing 11- to 13-year old boys and girls, under supervision and after adequate instruction, to participate in what was not intended to be a contact sport presents a foreseeable risk of injury. The law, in our view, does not prohibit a school from allowing a budding Billie Jean King to play a hard-fought tennis match against a budding Bobby Riggs.

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.