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Gym class liability case clarifies immunity claims

In June, I wrote in my "Sports Torts" column that the 1st District Appellate Court's opinion in *Barr v. Cunningham*, 2016 IL App (1st) 150437, "provides some further clarity on the expectations of facilitators and supervisors of youth sports and recreation as well as the relationship between the facilitator's conduct and the inherent risk of injury."

Well, as the legendary Lee Corso is apt to state on ESPN's wildly successful "College GameDay" — "not so fast, my friends."

Last week, the Illinois Supreme Court reversed the appellate court and affirmed the trial court's grant of a directed verdict in favor of the defendant. *Barr v. Cunningham*, 2017 IL 120751.

The facts in *Barr* are rather straightforward — a Conant High School student was injured while playing floor hockey in gym class.

During the supervised game, a squishy ball being used in place of a puck bounced up and hit Evan Barr in the eye, causing injury.

Barr, the plaintiff, alleged that Laurel Cunningham, the physical education instructor, was willful and wanton in failing to require the students to wear protective eyewear while playing floor hockey.

In response, the defendants, Cunningham and Township High School District 211, asserted affirmative defenses alleging statutory immunity under Sections 2-201 (i.e., discretionary immunity) and Section 3-108 (i.e., supervisory immunity) of the Tort Immunity Act.

Motions for summary judgment on these bases were denied and that case proceeded to trial.

At trial, Cunningham admitted that goggles were available in the school's supply closet which would have provided protection from eye injury. Nevertheless, Cunningham "decided not to require the use of goggles because she did not believe that a serious injury would occur given the other equipment the students were using."

Cunningham testified that she did impose certain rules for the players' safety, including no high sticking, no checking, no jabbing, no slashing, no tripping and no bending of the sticks. Students were instructed to keep the ball on the floor and to stop playing when Cunningham blew her whistle.

At the close of evidence, the trial court granted the defendants' motion for directed verdict, finding that the evidence could not support a verdict based upon willful-and-wanton conduct.

On appeal, a divided 1st District reversed, holding that the facts adduced at trial required the trier of fact to resolve the case as the teacher's conduct "involves the sort of conduct that a jury could find amounts to a conscious disregard for the safety of her students."

Our Supreme Court reversed, holding that "the evidence showed that Cunningham consciously considered student safety when she determined that the floor hockey equipment, together with the rules students were required to follow, was sufficient to prevent injuries."

Since "school employees who exercised some precautions to protect students from injury, even if those precautions were insufficient, were not guilty of willful-and-wanton conduct ... Cunningham's decision not to require the students to use available safety equipment, standing alone, does not rise to the level of willful-and-wanton conduct."

Does *Barr* expand supervisory immunity so much that public entities enjoy blanket immunity when a public school teacher supervises an activity and exercises some precaution to protect students from injury? Not so fast, my friends.

The *Barr* court reminds us that where a governmental entity defendant is on notice of prior injuries involving an activity or the activity being supervised is generally associated with a risk of serious injuries, willful-and-wanton conduct subject that entity to liability.

SPORTS TORTS

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The ruling referenced several prior cases, among them *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 246 (2007); *Choice v. YMCA of McHenry County*, 2012 IL App (1st) 102877 and *Hadley v. Witt Unit School District 66*, 123 Ill. App. 3d 19, 23 (1984).

For instance, in *Murray*, a student suffered a spinal cord injury while using a mini-trampoline during an extracurricular tumbling program. Our Supreme Court held that genuine issues of material fact on the question of willful-and-wanton conduct existed where the school district allegedly failed to provide adequate safety precautions in light of their knowledge of the inherent dangers of the activity raised.

The *Murray* court explained in reversing summary judgment:

"It is well known that use of a mini-trampoline is associated with the risk of spinal cord injury from improperly executed somersaults and that catastrophic injuries, including quadriplegia, can result from an improperly executed somersault.

"The evidence also indicates that the tumbling/trampoline program was not supervised by an instructor with professional preparation in teaching trampolining, nor was it taught in a proper manner with reminders of the risk of injury incorporated into the teaching process.

"The evidence also indicated that trained spotters and safety equipment were not provided at all times, and none of the United States Gymnastic Federation Safety Manual guidelines were followed."

In another case, *Hadley v. Witt Unit School District 66*, the plaintiff filed suit against a teacher and school district after being injured in a high school industrial arts class. In *Hadley*, the plaintiff and three other boys were not following the woodworking assignment and instead attempted to pound a piece of scrap metal through a hole in an anvil. The teacher saw the boys shirking their assignment, but did not tell them to stop or instruct them to put on safety goggles.

A metal chip flew into the plaintiff's eye, causing trauma and visual impairment. The appellate court held that the teacher's failure to act after observing the students engaging in a "dangerous activity" could constitute willful-and-wanton conduct. The *Barr* court endorsed the *Hadley* court's determination that the issue should have gone to the jury instead of being disposed of by summary judgment.

Indeed, *Barr* cements the proposition that if a public entity supervises an obviously dangerous activity or is on notice of prior injuries involving the activity at issue or fails to exercise any precautions to protect students from injury, liability may attach.

So, in the end, the *Barr v. Cunningham* case has, in fact, provided some further clarity on the expectations of facilitators and supervisors of youth sports and recreation as well as the relationship between the facilitator's conduct and the inherent risk of injury.

I was just a little quick on my prediction.