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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CHELSEA SUITOS, a Minor, etc.,

Plaintiff and Appellant,

v.

ELK GROVE UNIFIED SCHOOL DISTRICT et al.,

Defendants and Respondents.

C070377

(Super. Ct. No.
34201000070281CUPOGDS)

A high school softball player appeals the summary judgment granted the Elk Grove Unified School District and Elk Grove High School (District) in her negligence action in which she alleged the District increased the risk of injury over and above those inherent in the sport by providing her a batting helmet with “faulty padding.” We conclude that the District bore its initial burden of producing evidence that the helmet was safe because it had a NOCSAE (National Operating Committee on Standards for Athletic Equipment) stamp on it as required by the National Federation of State High School Associations (NFHS) and the coach declared that he had no reason to believe the helmet he purchased was defective or unsafe. We affirm the summary judgment because,

like the trial court, we conclude plaintiff Chelsea Suitos (plaintiff) does not raise triable issues of material fact as to whether the helmet was defective or whether the District knew or should have known the helmet was defective.

FACTS

The allegations of the complaint frame the issues we must assess on appeal from a summary judgment. (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) The allegation central to this appeal states: “At all times mentioned herein, the helmet [the District] negligently and carelessly supplied to Plaintiff was defective and insufficient to protect Plaintiff’s head from softballs traveling at the speeds which [the District] could reasonably expect plaintiff to encounter during competitive softball games.” The complaint also alleged that the District failed to inspect the helmet and failed to provide appropriate instructions and warnings with respect to the risks presented by the helmet.

In moving for summary judgment, the District contended that the coach who purchased the helmet did not know and had no reason to know or suspect that the helmet was not safe. Indeed, there are many undisputed facts that support the summary judgment. The coach selected the same make and model of helmet his daughter had used as a player at the high school and the same style she wore as a collegiate softball player at Purdue University. As mentioned, the helmet he purchased bore the required NOCSAE stamp, meaning that the manufacturer claimed the helmet met the standards established by NOCSAE. The coach was not aware of any head injuries sustained by a player wearing the helmet, albeit he had never seen a player get hit on the helmet by a batted ball.

Nor are the facts surrounding the injury in dispute. Plaintiff was a junior who played both high school and competitive softball. During a high school game on March 10, 2009, a ball struck plaintiff’s helmet while she was a runner at third base and she sustained a mild brain injury. The District presented evidence that the helmet was

new when the District provided it to her, it was not cracked, and plaintiff did not think it was dangerous at the time of the injury. The umpire examined the helmet before the game and found it was safe to wear. Plaintiff missed the rest of the season following her hospitalization and rehabilitation therapies but was able to resume playing with her competitive team the following summer, with the high school team her senior year, and with a college team following graduation. In fact, she was awarded a full athletic scholarship.

The dispositive question is whether plaintiff's evidence exposed triable issues of material fact. The trial court found she had not presented evidence that the helmet was unsafe or defective. We must examine plaintiff's evidence de novo. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003 (*Kahn*).

While we are acutely aware of our obligation to resolve all doubts in the evidence in favor of plaintiff and to construe it in her favor, there is actually very little evidence to construe. The case hinges on plaintiff's statement in written discovery blaming "faulty padding" for her injury and the expert's opinions that there were superior helmets on the market and that the area struck by the softball "was largely absent of any padding."

During discovery, plaintiff was asked to identify a specific defect, yet all she offered was the conclusory characterization of the padding as "faulty." Her evidence focused not on describing a defect in the helmet, but rather on the availability of better and more expensive helmets. The coach denied her request to wear the helmet she wore on her competitive team. That helmet had additional padding to the \$25 helmets the coach purchased for the high school team. Ultimately, the coach purchased a \$50 helmet with protective padding. The softball team at the University of Arizona, where plaintiff was awarded her athletic scholarship, used the more expensive helmet. She wore the more protective helmet throughout her senior year at the high school.

The essence of plaintiff's claim is that the helmet the District provided lacked padding at the spot where she was hit. According to plaintiff, the absence of padding is

apparent from a simple visual examination of the helmet. Had she been wearing one of the many other more padded helmets available, her injury might have been less severe.

Sean Shimada, Ph.D., a biomechanist and bioengineer, examined the helmet plaintiff was wearing at the time of the injury. He explained that the right lateral, posterior, and superior region of the helmet was directly impacted by the softball and “was largely absent of any padding.” He further declared, “A review of commercially available softball helmets revealed that there are helmets containing padding with a larger interior surface area as compared to the subject helmet worn by [plaintiff]. Such as [*sic*] helmet would have attenuated the impact from the softball thereby reducing the forces and accelerations on [plaintiff’s] brain.” Conspicuously missing from his declaration is an expert opinion that the helmet was defective or that the location of the padding constituted a design defect.

Plaintiff’s expert also explained that NOCSAE “has developed and published methods and minimum performance requirements for testing protective head gear; however, the NOCSAE does not conduct surveillance to assure compliance to the standards.” He opined that the standards themselves were flawed because they defined only linear acceleration impact limits and ignored the equally important rotational acceleration limits to the head.

In discharging our obligation to construe what evidence there is in favor of plaintiff, we consider the gaps in the District’s declarations. The coach admitted that he purchased the least expensive helmet based on his limited budget. He had no training or knowledge regarding helmet safety, he did not consult with anyone about which were the safest helmets to buy, and he received no guidance or instruction from the District regarding which helmet he should buy. Candidly, he admitted he believed that “all helmets are created equal.”

Nor did the athletic director take any action to assure the helmet selected was safe. He did not examine the helmet or discuss it with the coaches. He did not give the coach

any instructions about buying helmets, provide any training, or inquire if he had any knowledge about the safety of the helmet. Like the coach, he did not conduct any research into the types of helmets available or the safety of different helmets. Rather he believed there are no significant differences in the padding of different helmets, and that any differences that exist are “merely cosmetic.” He relied exclusively on the coach but had never evaluated his performance as he was expected to do.

The trial court granted the District’s motion for summary judgment. Plaintiff appeals.

DISCUSSION

Although a “drastic remedy,” a summary judgment dispenses with a meritless lawsuit. The objective is sound; the difficulty is in the execution. Well-worn formulations of the standard of appellate review guide our assessment of whether the lawsuit has potential merit. We must at all times remain mindful that because a summary judgment denies a plaintiff her right to a jury rather than a judicial assessment of the merits of her claim, “[w]e liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.”

(Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1037.)

“A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff’s causes of action, or shows that one or more elements of each cause of action cannot be established. [Citation.] A moving party defendant bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to the responding party plaintiff to demonstrate the existence of a triable issue of material fact. [Citation.] From commencement to conclusion, the moving party defendant bears the burden of persuasion that there is no triable issue of material fact and that the defendant is entitled to judgment as a matter of law.” *(Eriksson v. Nunnink (2011) 191 Cal.App.4th 826, 847-848.)*

Plaintiff's sole cause of action is for negligence. We must determine whether there is any merit to her claim that the District breached its duty of care not to increase the inherent risks of playing softball by providing her a helmet that did not protect her. The relevant law can be simply stated.

We need not explore the more nuanced situations involving coparticipants in the sport and primary assumption of the risk. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154-1158; *Knight v. Jewett* (1992) 3 Cal.4th 296.) Here the District's liability is based on the duty of the coach and athletic director to a student athlete entrusted to them. "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' (*Knight, supra*, 3 Cal.4th at p. 318) involved in teaching or coaching the sport." (*Kahn, supra*, 31 Cal.4th at p. 1011.)

Moreover, our case involves an allegedly defective piece of equipment—the batter's helmet. "Generally, defective or unnecessarily dangerous equipment is not considered an inherent risk of a sport. [Fn. omitted.] This is entirely sensible. The main concern animating inherent risk analysis is the potential for chilling vigorous participation and altering the fundamental nature of a particular sport. [Fn. omitted.] However, these concerns are not present in lawsuits alleging defective or unnecessarily dangerous equipment where the issue is whether the defendant increased the risk above the inherent risk of the sport." (*Zipusch v. LA Workout, Inc.* (2007) 155 Cal.App.4th 1281, 1292.) Simply put, the District had a duty " 'not to supply faulty equipment.' [Citation.]" (*Bjork v. Mason* (2000) 77 Cal.App.4th 544, 554.)

As set forth in our statement of facts, the District provided evidence that the coach chose a helmet with the requisite NOCSAE stamp, that he believed the helmet was

approved and appropriate for use by high school athletes, and that he had no knowledge the helmet was defective or otherwise inadequate for use. Neither the umpire nor plaintiff, both of whom examined the helmet before plaintiff played while wearing it on the day of the injury, detected any defects to prevent her from using the helmet. Thus, the District's evidence, taken alone, substantiated its claim that it had not breached a duty of care to plaintiff because it did not know, and had no reason to suspect, the helmet was dangerous or increased the risks inherent in playing softball. We agree with the trial court that the District's evidence was sufficient to shift the burden to plaintiff.

We also agree with the trial court's further conclusion that plaintiff did not sustain her burden to demonstrate the helmet was dangerous or defective, and that fundamental failure of proof entitles the District to summary judgment. Plaintiff's declaration did not describe with any particularity the helmet's deficiencies. Rather vaguely, she asserted, "The helmet had faulty padding." Plaintiff's factually devoid response strongly supports an inference that she has no facts to support her claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590.) Her expert did not help to substantiate her raw allegation that the helmet was defective.

Plaintiff's expert, a biomechanist and bioengineer by training, opined that the padding was largely missing from the area where the ball contacted plaintiff's head and that the helmet provided some linear, but not rotational, protection. But he did not opine that the quality or quantity of the padding constituted a defect or, for that matter, that a helmet equipped with a different padding design would have prevented the injury.

Rather than introducing evidence to substantiate the vague allegation that the helmet was defective or dangerous, both plaintiff and her expert presented evidence that there were superior models on the market. They suggest that if the District had spent more money on helmets her injury might have been avoided, and they point to a \$50 helmet the District purchased the following year and helmets used by other teams as evidence of a triable issue of fact. But the question is not what more money could buy,

but whether the helmet the District selected was defective. Plaintiff has failed to present substantial evidence to create a triable issue that it was.

Even if plaintiff demonstrated a viable possibility that the helmet was defective or dangerous, she presented no evidence to suggest the coach or the athletic director knew or should have known it was defective. She criticizes them for failing to conduct a more thorough investigation of other helmets. But without a showing that a helmet certified for its safety presented some risk of injury to the players, we cannot infer that the failure to examine helmets beyond the allocated budget was negligent. Indeed, it was plaintiff's burden to produce some evidence, other than the mere availability of more costly helmets, that the coach or athletic director actually knew or should have known the helmet they provided plaintiff was defective or unsafe. According to their depositions, neither the coach nor the athletic director was aware of any other injuries to players or any other reason to suspect the helmet would not provide adequate protection.

In a strictly procedural vein, plaintiff argues that the District's notice of motion for summary judgment was deficient. The motion reads: "Said motion is filed on the basis that there is no triable issue of material fact that either [the District] knew or should have known that a softball helmet provided for Plaintiff's use was defective in any manner" In the District's separate statement of undisputed material facts and points and authorities in support of summary judgment it addressed whether the helmet was defective. We agree with the District that the notice of motion was sufficient because its knowledge of a defect embraces the threshold question as to whether or not the helmet was defective, and if the notice itself left any doubt, the accompanying papers certainly put plaintiff on notice of the fundamental issue in this negligence case.

Finally, we reject plaintiff's argument that the court abused its discretion by overruling her objection to NFHS evidence. Plaintiff objected to the introduction of the NFHS Softball Rules Book for the 2009 season on the basis that no foundation was established that the exhibit was a true and correct copy of that publication. The attorney

representing the District stated in her declaration, based on her own personal knowledge, that the exhibit was a true and correct copy of the excerpts from the publication as represented.

Moreover, the coach's declaration and deposition testimony also support the authentication. The coach states that he was required to follow the NFHS rules in effect for the season and that section 6, article 1 provides: "A batting helmet with a permanently affixed NOCSAE stamp and legible exterior warning label is mandatory for each batter, on[-]deck batter, players/students in the coaches' boxes, runners and retired runners. The exterior warning label may be affixed to the outside of the helmet, which includes both sides of the bill, in either sticker form or emboss[ed] (at the point of manufacture)." This is precisely the language set forth in plaintiff's exhibit. In his deposition testimony, the coach also references the NFHS rule book and provides additional authentication. In light of the declarations of the District's attorney and the coach, we cannot say the trial court abused its discretion in considering the pertinent excerpts from the 2009 rule book.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

NICHOLSON, J.