DATE FILED: July 22, 2013
CASE NUMBER: 2013CV30055

DISTRICT COURT, COUNTY OF BROOMFIELD, COLORADO Court Address: 17 DesCombes Drive Broomfield, Colorado 80020 Plaintiffs: **ALEX TERRANOVA and FREDERICK TERRANOVA** v. Defendants: **ADAMS 12 FIVE STAR SCHOOL DISTRICT, TYRONE GIORDANO, in his individual capacity, ED HARTNETT, in his individual capacity, CATHY NOLAN, in her individual capacity, LEE PETERS, in his individual capacity, and CHRIS GDOWSKI, in his individual capacity.**	Case No. 2013CV30055 Division A
ORDER	

THIS MATTER COMES BEFORE THE COURT ON A MOTION TO DISMISS from the Defendants. This Court, having reviewed Defendants' Motion to Dismiss, both Parties' [Proposed] Findings of Fact and Conclusions of Law Regarding Defendants' Motion to Dismiss, STAYS IN PART AND GRANTS IN PART Defendants' motion.

INTRODUCTION

All Defendants move to dismiss Plaintiffs' Amended Complaint pursuant to Colorado Rule of Civil Procedure 12(b)(1), arguing that this Court is without subject matter jurisdiction to hear the suit because the Plaintiffs fail to allege adequately allege a waiver of governmental immunity. Plaintiffs contend they properly allege a waiver of governmental immunity where applicable and otherwise claim that Defendants are not, at this stage, immune from suit.

The Colorado Governmental Immunity Act ("CGIA") bars all tort actions against public employees and public entities unless an enumerated exception applies. As each of the

defendants is either a public entity or a public employee, the defendants are immune from liability and this Court lacks subject matter jurisdiction to hear the case absent proof that the CGIA is waived or an exception applies. Whether the CGIA waives governmental immunity to a claim for relief is a question of subject matter jurisdiction the Court must decide pursuant to Colorado Rule of Civil Procedure 12(b)(1). *Medina v. State*, 35 P.3d 443, 451-52 (Colo. 2001). Colorado Revised Statute §24-10-108 of the CGIA requires the trial court to resolve all issues of governmental immunity before trial. *Finne v. Jefferson County Sch. Dist. R-1*, 79 P.3d 75, 85 (Colo. 2003). On a motion to dismiss for lack of subject matter jurisdiction, a plaintiff must show that governmental immunity is waived. *Tidwell v. City and County of Denver*, 83 P.3d 75, 85 (Colo. 2003).

STATEMENT OF FACTS

Alex Terranova and Frederick Terranova sue Adams 12 Five Star Schools District ("Adams 12"), as well as Tyrone Giordano, Ed Hartnett, Cathy Nolan, Lee Peters and Chris Gdowski for Alex Terranova's baseball-related injury. Tyrone Giordano is Legacy High School's baseball coach, Ed Hartnett is Adams 12 Five Star Schools' Activity and Athletic Director, Cathy Nolan was Legacy High School's Principal in 2011, Lee Peters was Legacy High School's Athletic Director and Assistant Principal in 2011, and Chris Gdowski is Adams 12 Five Star Schools' Superintendent. Plaintiffs allege that during a baseball try-out on March 3, 2011, a student-pitched baseball hit Alex Terranova in the helmet while he was batting. Then, during a March 30, 2011 practice, Alex Terranova was hit in the head by a student-thrown baseball while participating in an instructional "pick-off" drill.

Alex Terranova claims he suffered a head injury as a result of these two events. Frederick Terranova does not allege an independent injury; he seeks compensation only for medical expenses his son incurred as a minor. (Amended Complaint ¶2) Alex and Frederick Terranova bring this lawsuit pursuant to "the provisions of the Colorado Governmental Immunity Act." (Amended Complaint ¶9).

FINDINGS

Plaintiffs' First Claim for Relief

Plaintiff's first claim for relief is brought again Tyrone Giordano, the varsity baseball coach at Legacy High School. He is alleged to have acted willfully and wantonly on March 3, 2011 and March 30, 2011, and, alternatively, is alleged to have been an independent contractor as opposed to an employee of Adams 12 Five Star Schools.

Defendant Giordano, in framing his aspect of the Motion to Dismiss as one challenging subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), postures his argument as one asserting that jurisdiction over Plaintiffs' claim that Giordano was an independent contractor and therefore not a public employee and therefore not a subject to the protections of the CGIA, does not exist.

However, "[w]hen the alleged jurisdictional facts are in dispute, the trial court should conduct an evidentiary hearing and enter findings of fact." *Tidwell*, 83 P.3d at 85; *see Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). Plaintiffs, in such circumstances, are entitled to discovery necessary to decide the issue of sovereign immunity. C.R.S. §24-10-108. *See Tidwell*, 83 P.3d at 86 ("We restate our direction to the trial court to allow the parties latitude in discovering or introducing evidence tending to prove or disprove jurisdiction if necessary to the ultimate determination.").

Here, Defendants have attached a coaching contract, pay-stubs and an independent contractor agreement as exhibits to their Motion, and argue that these exhibits prove that Mr. Giordano was an employee and not an independent contractor. As Defendants have noted in their Motion, the "control" test is often used to decide the question of whether a person is an employee or an independent contractor, which involves scrutiny of whether the alleged employer exercised control over the means and methods of accomplishing the contracted service. *See Brighton School Dist. v. Lyons,* 873 P.2d 26, 28 (Colo. App. 1993); *see also Dana's Housekeeping v. Butterfield,* 807 P.2d 1218, 1220 (Colo. App. 1990). In order for Plaintiffs to marshal their arguments in support of the allegation that Giordano was an independent contract, they must be permitted the opportunity to undertake discovery directed toward this issue.

Accordingly, the Court reserves ruling on this issue pending limited discovery consisting of no more than five (5) interrogatories, five (5) requests for production, and two (2) depositions limited to one hour apiece in length, after which the Court will conduct a *Trinity* hearing on the limited topic of whether Defendant Giordano was an employee or an independent contractor.

Insofar as the allegations that Defendant Giordano acted willfully and wantonly are concerned, the Court finds and concludes that Plaintiffs have failed to plead sufficient facts that, even if proven, would amount to willful and wanton conduct. Mr. Giordano's actions and omissions, even as alleged by Plaintiffs, are not meaningfully different than actions undertaken by baseball coaches at all levels of competitive baseball. Plaintiffs identify no facts that would tend to show Mr. Giordano purposefully disregarded a risk to any of his players, Alex Terranova included. Accordingly, Plaintiffs' allegation that Mr. Giordano acted willfully and wantonly fails as a matter of law and does not operate to waive governmental immunity.

Plaintiffs' Second Claim for Relief

Defendants move to dismiss the parties individually named in Plaintiff's second claim for relief (Defendants Gdowski, Hartnett, Nolan, and Peters, respectively) for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1). Plaintiffs argue that these Defendants, by their actions, waived immunity under the CGIA and are therefore amenable to suit; Defendants contend that immunity was not waived, and therefore these parties may be properly dismissed.

Each of the defendants named in Plaintiffs' second claim for relief is a public employee immune to suit under CGIA unless it is established that he or she acted willfully and wantonly. "Willful action means voluntary; by choice; intentional; purposeful. Wantonness signifies an even higher degree of culpability in that it is wholly disregardful of the rights, feelings and safety

of others." Pettingell v. Moede, 271 P.2d 1038, 1042 (Colo. 1954). To make a sufficient showing in support of a claim of willful and wanton conduct, Plaintiffs must show not only that Defendants Gdowski, Hartnett, Nolan, and Peters voluntarily, did, intentionally or with purpose cause injury to Alex Terranova, but also that their actions demonstrated a clear disregard for the rights, feelings, and safety of Mr. Terranova.

Whether plaintiffs have pled sufficient facts to make a claim reaching the level of willful and wanton conduct (i.e. whether the 'individually named defendants' have waived immunity under CGIA) is a question that can be resolved as a matter of law in this case. See, Jarvis v. Deyoe, 892 P.2d 398 (Colo. App. 1994); see also Moody v. Ungerer, 885 P.2d 200, 204-05 (Colo. 1994).

Plaintiffs allege that the supervisors should have known about the "pick-off" drill and insisted it be performed another way. These claims, if true, do not amount to willful and wanton behavior as a matter of law. Total awareness of every individual drill performed by each sports team, and of the manner in which these drills are performed cannot be expected of each of the individually named defendants. Furthermore, this Court is unable and unwilling to reach the conclusion that the pick-off drill culminating in Mr. Terranova's injury was intentionally or purposefully designed or orchestrated by the individually named defendants. Plaintiffs argue the individually named Defendants could be found to have acted wilfully and wantonly if they acted with culpability exceeding recklessness but falling short of intention in causing injury to Mr. Terranova. People v. Marcy, 628 P.2d 69, 79 (Colo. 1981). Plaintiffs provide an insufficient factual basis for the Court to conclude that the individually named Defendants recklessly, intentionally, or generally disregarded Mr. Terranova's rights, feelings, or safety in "failing to insist that Defendant Giordano perform the pick-off drill in an appropriate manner."

The actions of Defendants Gdowski, Hartnett, Nolan, and Peters have not been shown to rise to the level of 'willful and wanton' conduct; their immunity under CIGA has not been waived. Therefore, this Court finds subject matter jurisdiction lacking under C.R.C.P. 12(b)(1).

Accordingly, Defendants' motion to dismiss Gdowski, Hartnett, Nolan, and Peters pursuant to C.R.C.P. 12(b)(1) is GRANTED.

Plaintiffs' Third Claim for Relief

Plaintiffs' third claim for relief, the only count against only Adams 12 Five Star Schools, alleges that Alex Terranova's injury March 30, 2011 resulted from a dangerous condition of a public facility. C.R.S. § 24-10-106(1)(e) states that sovereign immunity is waived if an injury results from:

> [A] dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility.
>
> A dangerous condition is defined as:
>
> a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility. . . . A dangerous condition shall not exist solely because the design of any facility is inadequate.

C.R.S. § 24-10-103 (1.3).

Plaintiffs allege the baseball pitcher's mound on the baseball field at Legacy High School presented a dangerous condition "due to . . . the unscreened apex of the mound, combined with its use."

Plaintiffs have not sufficiently alleged facts to show that the baseball mound created a dangerous condition on account of its construction or maintenance, or that Alex Terranova's injury resulted from the baseball mound's inherently dangerous condition. *See, e.g., Sanchez by & Through DeFerdinando v. School Dist. 9-R,* 902 P.2d 450, 453 (Colo. App. 1995) ("[T]he dangerous condition must stem from 'a physical or structural defect in the [public] building' rather than from an activity conducted within the building.") (*quoting Jenks v. Sullivan*, 826 P.2d 825 (Colo. 1992), overturned on other grounds); *see also Douglas v. City & County of Denver*, 203 P.3d 615, 619 (Colo. App. 2008) (ruling that the "failure to post warning signs or to supervise does not involve the use of a dangerous physical condition of the building that is associated with its maintenance."); C.R.S. § 24-10-103(2.5) ("Maintenance" is keeping a facility in the same general state of repair or efficiency as initially constructed; it "does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility.").

Plaintiffs' allegation that the coaching staff negligently failed to use protective screens — even if one assumes that this would have been a workable solution — cannot, as a matter of law, be characterized as deficient maintenance or construction. Additionally, Plaintiffs do not satisfactorily allege that the mound's dangerous condition caused Alex Terranova's injury.

Allowing this claim under these circumstances would impermissibly undermine the purpose of the CGIA. Expanding 'condition' of a public facility to include 'use' of a public facility would improperly expand the intent of waiver under the CGIA because it would subject every school district in Colorado to a waiver of immunity any time a public facility is used if the manner of use could be alleged as dangerous. This Court believes allowing this claim by expanding 'condition' to include 'use' contradicts the intent of the Colorado legislature to limit tort actions against public employees and public entities.

The safety of young athletes, especially in the context of head injuries, is of paramount importance. However, baseball is an inherently dangerous sport. Players assume some risk of

being struck in the head by a baseball when they play and practice baseball because the sport depends on the throwing and hitting of a baseball. The faster the ball travels, the better. Pitchers don't wear helmets at any level.No one can completely and accurately predict the trajectory of a baseball-turned-projectile. While Plaintiffs speculate screens would have solved or mitigated the hazard posed in this case, this Court remains unconvinced the Plaintiffs have sufficiently alleged behavior on behalf of the Adams County Five Star School District that rises to the level of wanton and willful. From a public policy standpoint, Plaintiffs' argument as to the third claim would impose an undue burden on school districts across Colorado to safeguard against unforeseeable risks during any 'use' of a public facility. Such a consequence impermissibly undermines the legislative intent behind CGIA to bar tort actions against public employees and public entities, except in enumerated exceptions.

Accordingly, Plaintiffs do not establish a waiver of governmental immunity pursuant to C.R.S. § 24-10-106(1)(e) because they do not show Alex Terranova's injury resulted from a public facility's dangerous condition. Accordingly, Plaintiffs' third claim for relief on these grounds is, therefore, dismissed as the Court is without subject matter jurisdiction to hear the allegation.

For the reasons stated herein, the Defendants' Motion to Dismiss is GRANTED as to Plaintiffs' Second Claim for Relief. As to Plaintiff's First Claim for Relief, Defendants' Motion to Dismiss is GRANTED as to the willful and wanton allegations against Defendant Giordano, and is STAYED pending limited discovery at to the allegation that he was an independent contractor. As to Plaintiff's Third Claim for Relief, Defendants' Motion to Dismiss is GRANTED as to the physical condition

Pursuant to C.R.S. §24-10-108, all other discovery is stayed and no further proceedings shall be conducted on this case until this Court resolves the question of Defendant Giordano's status as an independent contractor or employee. If Defendant Giordano is determined to have been an independent contractor, then the CGIA is inapplicable to him and the claim for relief against Giordano will be governed by negligence principles. If Giordano is determined to have been an employee, then the claim for relief against him will be governed by the willful and wanton standard.

Dated this 22nd day of July, 2013.

BY THE COURT:

PATRICK T. MURPHY
District Court Judge