IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

ALEX PIERSCIONEK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	14 CH 19131
	)	
ILLINOIS HIGH SCHOOL ASSOCIATION,	)	
	)	
Defendant.	)	

ORDER

Defendant, Illinois High School Association, seeks to dismiss plaintiff's class action complaint by way of motions to dismiss pursuant to §§2-615 and 2-619. For the reasons that follow defendant's motions are granted. Plaintiff's First Amended Class Action Complaint alleges failures on the part of the Illinois High School Association to act in a way that would minimize the risk of concussion for student athletes in Illinois. It seeks two forms of remedies on behalf of the Class: 1) Injunctive relief intended to correct the deficiencies with IHSA's current policies and procedures and bring those practices in line with the current research and best practices for handling concussions in youth athletes, and 2) Medical Monitoring by way of establishment of a fund to pay for the medical monitoring of Class members and to provide notice to Class members that they may require Medical Monitoring.

§2-615 Motion to Dismiss

IHSA asserts five reasons that the first amended complaint should be dismissed with prejudice pursuant to §2-615.

1. This is a nonjusticiable public policy dispute for the legislature and school boards.

Defendant urges dismissal of the first amended complaint because the claims contained therein improperly ask the court to impose policies as dictated by the plaintiff, when such policies are properly determined within the province of the Illinois legislature and various local school boards. It points to *City of Chicago v. Beretta USA*, 213 Ill.2d 351 (2004) as a similar case in which our Supreme Court determined that the City's negligence action against handgun manufacturers, distributors and dealers failed to state a claim for purposes of §2-615 because defendants were in compliance with current law and the Supreme Court declined to expand common law nuisance to encompass such novel claims because such changes should be enacted by the legislature.

Plaintiff argues that the case presents no separation of powers issue, as detected by the Supreme Court in *Beretta*, because that case was a public nuisance case and the case at bar states claims for Negligence and Medical Monitoring. Plaintiff reiterates the allegations from his first amended complaint that the IHSA has utterly failed to act in a way that fulfills its duties to protect high school student athletes. Plaintiff asserts that the claims are sufficiently pled so that they should survive the §2-615 attack.

The court agrees with IHSA that the claims contained in plaintiff's first amended complaint ask the court to impose policy and enact legislation by way of the grant of an injunction when determining policy and enacting legislation lies within the distinct province of the legislature. Interestingly, the plaintiff has specifically alleged that the legislature has charged IHSA with addressing concussions in student athletes at paragraph 9 and again at paragraph109 of his first amended complaint: "[T]he Act {the Protecting Our Student Athletes Act} made the IHSA solely responsible for promulgating the rules that would minimize the risk of concussions

in Illinois' student-athletes." In spite of this recognition of the legislature's dictates in this regard, plaintiff asks this court to enter mandatory injunctions 1) requiring IHSA to implement specific "corrective measures" and 2) establishing a medical monitoring program.

The court's pronouncement that the two claims in the first amended complaint are subject to dismissal because of separation of powers concerns might, at first blush, appear to be overly sweeping for purposes of the 'sufficiency of pleadings' analysis to be employed in the context of §2-615. Upon closer inspection of the allegations, however, it is clear that the vast majority of the allegations are merely conclusions. Generally stated, plaintiff alleges that the IHSA has failed to properly act to protect student athletes and that his prescribed measures must be imposed to correct the alleged shortcomings. These are not allegations of fact which lend themselves to be proven in a dispositive motion or at trial. This is precisely the same sort of conclusion-pleading that was addressed and found to be a basis for dismissal pursuant to §2-615 by the Supreme Court in *City of Chicago v. Beretta US.* In fact, it is clear to this court that IHSA has acted to protect student athletes in this State, that the measures alleged to be necessary by plaintiff are simply conclusions and not factual allegations capable of being proven at all, and under no circumstances would it be an appropriate endeavor for the court to impose any or all of those measures upon the IHSA by way of the extraordinary relief that is injunctive relief. Plaintiff has failed to allege facts to support his theories in either count of his first amended complaint, nor can he ever allege such facts. For these reasons, Counts I and II are dismissed with prejudice pursuant to §2-615. This ruling obviously indicates the end of this case but the court will speak to the remaining bases asserted for dismissal 1) for the edification of the parties and 2) in the event of an appeal.

2. <u>"Negligent rulemaking" is not a cause of action.</u>

Count I is a Negligence claim brought on behalf of plaintiff and the Class against the IHSA. Plaintiff alleges that IHSA had a duty to him and the Class to "supervise, regulate, monitor and provide reasonable and appropriate rules to minimize the risk of injury to Illinois' high school football players." He alleges that IHSA was careless and negligent by breaching its duty of care to plaintiff and the Class by failing to enact specific procedures which he believes should have been enacted. Plaintiff alleges that as a result, he and the Class were and are endangered. He asserts that as a remedy, he is entitled to injunctive relief in implementing specific measures he believes should be enacted.

As an initial matter, defendant asserts and plaintiff tacitly agrees that there is no precedent in Illinois for a private party to bring a negligence claim against a governmental entity for failure to promulgate laws or otherwise act, as evidenced by citation to only non-Illinois decisions such as Ohio and Florida. This lack of precedent in Illinois for any such claim is enough of a basis for this court to dismiss Count I and Count I is dismissed with prejudice for that reason.

The court makes two additional observations regarding Count II. First, it is noted that plaintiff has not alleged the element of proximate cause—that defendant's alleged breach of its duty proximately caused "endangerment" (as opposed to injury) to plaintiff. This omission, the court opines, is the very reason that there is no recognized cause of action for negligence by an individual against a governmental entity. It would appear that plaintiff has not alleged that IHSA's failure to act in a particular way proximately caused endangerment to plaintiff because he cannot make such an allegation. Second, the parties address the Florida case of *Miulli v. Fla. High Sch. Ath. Ass'n.*, 998 So. 2d 1155 (Fla. Ct. App. 2008) in the absence of Illinois cases, but the *Miulli* decision affirmed dismissal of plaintiff's claim with prejudice and holding that "no

private cause of action exists under [the statute] for an alleged failure to enact or enforce a particular bylaw." *Id.* at 1175.

Count I is dismissed with prejudice for these reasons.

3. Plaintiff's action fails under the Contact Sports Exception.

Defendants seek dismissal of Count I pursuant to the contact sports exception as enunciated by our supreme court in *Karas v. Strevell*, 227 Ill.2d 440 (2008). (This basis for dismissal is made alternatively but the court will address it in any event for the reasons articulated above.) In *Karas*, the plaintiff alleged that his minor son was injured during a hockey game because the defendant organizations failed to take adequate steps to enforce a rule against body checking from behind. He alleged willful and wanton conduct on the part of the amateur hockey league, other organizational defendants and on the part of the opposing team's players. He also alleged a civil conspiracy between the hockey league and officials' associations to forgo enforcement of a rule against bodychecking players from behind. The trial court dismissed the entire complaint with prejudice based upon this State's contact sports exception. The appellate court reversed in part and affirmed in part. It concluded that plaintiff had successfully pled willful and wanton conduct on the part of the player defendants, had successfully pled negligence on the part of the organizational defendants, and had successfully pled a civil conspiracy. It affirmed the trial court's dismissal of plaintiff's allegations of willful and wanton conduct against the organizational defendants. The supreme court reversed the appellate court's decision to the extent that it reversed the trial court and affirmed the appellate court's affirmance of the trial court's ruling as to willful and wanton conduct against the organizational defendants. In short, the supreme court affirmed the trial court's decision dismissing the entire complaint but it remanded with instructions to allow plaintiff an opportunity to amend three counts. After considering whether an ordinary negligence standard is appropriate in the context of contact

sports, where there are inherent risks and where the imposition of too strict a standard of liability could have a chilling effect on the sport, the supreme court in *Karas* held that whether the contact sports exception applies to a nonparticipant defendant is a policy determination that rests on the circumstances of the sport and its inherent risks, the relationship of the parties to the sport and to each other, and whether imposing broader liability on the defendant would harm the sport or cause it to be changed or abandoned." *Id.* at 465. The *Karas* court concluded the contact sports exception did apply to the organizational defendants so that it was necessary for the plaintiff to allege that the defendant acted with intent to cause the injury or that the defendant engaged in conduct totally outside the range of the ordinary activity. *Id.* at 464-465.

Shifting to the case at bar, upon weighing the factors as articulated in *Karas* this court concludes that the contact sports exception applies to this nonparticipant defendant—IHSA. Certainly, there are inherent risks in the sport of football as is the case with hockey. Looking at the relationship of the parties to the sport and to each other, plaintiff's relationship to football is similar to *Karas'* relationship to hockey but IHSA could be considered to be even less of a participant than the organizational defendants were in *Karas*. IHSA is simply a governmental entity charged with safeguarding student athletes; it has no direct relationship to either the sport of football or to plaintiff. Finally, imposing broader liability on this defendant would certainly change the sport of football and potentially harm it or cause it to be abandoned. *See Karas.* In fact, imposing these changes to the sport as suggested by plaintiff, by way of mandatory injunction, is clearly the desired result of this action. Consequently, plaintiff would necessarily be required to plead that the defendant acted with intent to cause the injury or that the defendant engaged in conduct totally outside the range of the ordinary activity. Plaintiff has not so plead

and because it is this court's determination that plaintiff is unable to so plead under the facts of this case, Count I is dismissed pursuant to §2-615 with prejudice.

1. Plaintiff fails to state a claim for injunctive relief.

Defendants assert that Count I should be dismissed because plaintiff has failed to establish three of the four elements necessary for injunctive relief. Count I of plaintiff's complaint purports to state a claim for negligence but it seeks imposition of a mandatory injunction requiring IHSA to enact several measures plaintiff asserts are appropriate. The court will make a passing observation (also voiced by defendant) that by bringing a legal claim (negligence) against defendant, he is not entitled to injunctive relief as a remedy because one of the elements necessary for injunctive relief is the absence of an adequate remedy at law. In any event, because plaintiff's Count I is being dismissed there is no reason to discuss the remedy sought in that claim in any detail.

2. Illinois law does not recognize a medical-monitoring-only cause of action.

Defendant seeks dismissal of Count II with prejudice pursuant to §2-615 because Illinois does not recognize cause of action solely for medical monitoring. In addition to his own assertion that this is the law in Illinois, he cites to two appellate court decisions which commented upon the lack of recognition of a medical monitoring claim in this State. *Jensen v. Bayer AG*, 371 Ill.App.3d 682 (1st Dist. 2007) and *Campbell v. A.C. Equip. Servcs. Corp.*, 242 Ill.App.3d 707 (4th Dist. 1993). Plaintiff does not address these cases and instead points to *Lewis v. Lead Indus. Ass'n., Inc.*, 342 Ill.App.3d 95 (1st Dist. 2003) as authority for his claim for medical monitoring in the absence of a present injury. As a matter of fact, the *Lewis* case is instructive but it does not aid Plaintiff's cause. The court recognizes a similarity between the complaint in *Lewis* (which was dismissed pursuant to §2-615) and the complaint in this action.

The *Lewis* court held that "[t]he defendants are correct in their assertion that, in order for a plaintiff to recover damages for an increased risk of future harm in a tort action, he or she must establish, among other things, that the defendant's breach of duty caused a present injury which resulted in that increased risk." *Id.* at 101. The court in *Lewis* was concerned with some of the same issues presented in the case at bar—a plaintiff who fails to allege the existence of a present injury and the fundamental difference between a claim seeking damages for an increased risk of future harm and one that seeks compensation for the cost of medical examinations. Ultimately, the *Lewis* decision determined that plaintiffs had failed to plead tort claims because they failed to establish a causative link between the tortious acts of a specific defendant and damages sought – the cost of screening for lead poisoning *Id.* at 103. The complaint before this court seeks ongoing medical monitoring as opposed to screening for a medical condition but the pleading fails to establish a causative link between IHSA and the damages sought. Consequently, Count II is dismissed pursuant to §2-615 with prejudice.

§2-619 Motion to Dismiss

For the reasons indicated above, the court will also address the defendant's §2-619 motion to dismiss, brought in the alternative to the §2-615 motion to dismiss.

1. Statute of Limitations

Defendant asserts that based upon plaintiff's allegations, he suffered his concussion no later than August, 2012 but he filed his complaint in December, 2014, more than two years after the alleged injury. For this reason, defendant seeks dismissal with prejudice pursuant to §2-619. Plaintiff responds that pursuant to 735 ILCS 5/13-211, a minor may bring an action for personal injury within two years of reaching the age of majority. The court concludes that plaintiff's action is not subject to dismissal for the reason asserted by plaintiff and further observes that had

the action survived the §2-615 motion to dismiss, the timeliness of the putative class members' claims vis-à-vis their reaching the age of majority could have been addressed in a class definition. This action is not subject to dismissal for failing to file within the appropriate statute of limitations.

2. Assumption of the Risk

Defendant urges that plaintiff's complaint is subject to dismissal because he expressly assumed the risk of injury. Both plaintiff and his parent signed an Athletic Permit which contained language expressly assuming the risk. The actual language is: " I am also aware of certain risks of physical injury and I agree to assume the full risk of any injuries that may occur." In conjunction with the Athletic Permit, a Concussion Information Sheet was also provided to plaintiff and signed by plaintiff and his parent. Plaintiff urges that the terms of these documents did not provide that plaintiff had expressly assumed the risk, the documents were not executed by IHSA, and that any waiver contained in the documents cannot be enforced against a minor. Plaintiff also argues that fact questions exist as to whether he actually understood the risk associated with the sport and he has attached his affidavit stating that he did not know of the risks involved at the time he signed the documents relied upon by defendant.

In considering the arguments regarding assumption of the risk, the court finds defendant's argument in reply regarding ratification of a contract by a minor if he fails to disaffirm it within a reasonable time after attaining majority to be compelling. Plaintiff signed his affidavit, which purports to disaffirm the Athletic Permit he (and his parent) executed which contains an express assumption of the risk, approximately 16 months after he turned 18. The court concludes that plaintiff's conduct operated to ratify the Athletic Permit he executed. For this reason, the complaint would be subject to dismissal with prejudice pursuant to §2-619(a)(9).

This is a final order and there is no just reason to delay enforcement or appeal thereof.

ENTERED
JUDGE LeROY K. MARTIN JR.-1844
OCT 27 2015
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

DATE: _____

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HON. LEROY K. MARTIN, JR.