

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D14070
G/cb

_____AD3d_____

Argued - January 26, 2007

ROBERT W. SCHMIDT, J.P.
ROBERT A. SPOLZINO
GABRIEL M. KRAUSMAN
RUTH C. BALKIN, JJ.

2006-04159

DECISION & ORDER

Jessica Benson, etc., et al., respondents, v Union
Free School District #23, appellant.

(Index No. 017745/04)

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, N.Y.
(Christine Gasser of counsel), for appellant.

Gurfein Douglas, LLP, New York, N.Y. (Preston J. Douglas of counsel), for
respondents.

In an action to recover damages for negligent supervision, etc., the defendant appeals,
as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Spinola, J.),
entered April 5, 2006, as denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs,
and the motion for summary judgment dismissing the complaint is granted.

The infant plaintiff allegedly was injured while attending the defendant's summer camp
program, when, as she was swinging on the rings in the defendant's playground, she lost her grasp
and fell into a pile of sand beneath the rings. The defendant established its prima facie entitlement to
judgment as a matter of law by demonstrating that there was adequate playground supervision and
that a lack of supervision was not the proximate cause of the accident (*see Botti v Seaford Harbor
Elementary School Dist.*, 24 AD3d 486). While the plaintiffs contend that a heightened level of
supervision was warranted under these circumstances, where the infant plaintiff suffered from a
condition known as Erb's Palsy, this contention was belied by the deposition testimony of the infant

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plaintiff's mother that no doctor had ever restricted the scope of the activities in which the infant plaintiff could participate.

The evidence submitted by the plaintiffs in opposition to the motion failed to raise a triable issue of fact. The expert's affidavit failed to establish the foundation or the source of the standards underlying the expert's conclusion that the defendant should have provided more intense supervision. As such, the affidavit lacked probative force (*see David v County of Suffolk*, 1 NY3d 525, 526).

SCHMIDT, J.P., SPOLZINO, KRAUSMAN and BALKIN, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer
Clerk of the Court