

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

D19322  
O/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - April 21, 2008

WILLIAM F. MASTRO, J.P.  
REINALDO E. RIVERA  
DANIEL D. ANGIOLILLO  
WILLIAM E. McCARTHY, JJ.

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2006-11810

DECISION & ORDER

Nance Shatzkin, etc., et al., respondents, v Village  
of Croton-on-Hudson, et al., appellants.

(Index No. 4690/05)

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Monte J. Rosenstein, Middletown, N.Y., for appellant Village of Croton-on-Hudson.

Barry, McTiernan & Moore, New York, N.Y. (Laurel A. Wedinger of counsel), for  
appellant Croton-Harmon Union Free School District.

Ellen S. Davis, Croton-on-Hudson, N.Y., for respondents.

In an action to recover damages for personal injuries, etc., the defendants separately  
appeal, as limited by their respective briefs, from so much of an order of the Supreme Court,  
Westchester County (Smith, J.), dated November 21, 2006, as denied their separate motions for  
summary judgment dismissing the complaint insofar as asserted against each of them.

ORDERED that the order is reversed insofar as appealed from, on the law, with one  
bill of costs, and the motions for summary judgment dismissing the complaint are granted.

The infant plaintiff, a high school varsity softball player, was injured during a game  
when she ran into a chain link fence while chasing a fly ball across the foul line on a field owned by  
the Village of Croton-on-Hudson. In their action against Croton-Harmon Union Free School District  
(hereinafter the School District) and the Village of Croton-on-Hudson, the plaintiffs claim, inter alia,  
that the fence was placed too close to the foul line and unreasonably increased the risks inherent in  
the game.

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The Supreme Court erred in holding that a prior order was the law of the case, as that order did not reach the merits of the defendants' motions, but rather determined that the motions were premature (*see People v Evans*, 94 NY2d 499, 502; *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722).

The defendants established their prima facie entitlement to summary judgment by showing that the infant plaintiff was an experienced softball player, that the condition of the fence was open and obvious, and that the infant plaintiff appreciated the risks of playing near the fence (*see Sanchez v City of New York*, 25 AD3d 776; *Schoppman v Plainedge Union Free School Dist.*, 297 AD2d 338; *Conway v Deer Park Union Free School Dist. No. 7*, 234 AD2d 332; *Bailey v Town of Oyster Bay*, 227 AD2d 427; *see also Morgan v State of New York*, 90 NY2d 471, 484). In opposition, the conclusory affidavit of the plaintiffs' expert failed to raise a triable issue of fact (*see Veccia v Clearmeadow Pistol Club*, 300 AD2d 472; *Speirs v Dick's Clothing & Sporting Goods*, 268 AD2d 581; *Levitt v County of Suffolk*, 145 AD2d 414, 415; *see also Cranston v Nyack Pub. Schools*, 303 AD2d 441, 442).

MASTRO, J.P., RIVERA, ANGIOLILLO and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court