

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

D21748
G/nl

_____AD3d_____

Argued - December 12, 2008

ANITA R. FLORIO, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-01311

DECISION & ORDER

Patricia Murphy, respondent, v Polytechnic
University, et al., appellants.

(Index No. 18645/06)

Wade Clark Mulcahy, New York, N.Y. (Paul F. Clark and Lora H. Gleicher of
counsel), for appellants.

Jacoby & Meyers (Finkelstein & Partners, LLP, Newburgh, N.Y. [Kara L. Campbell],
of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal, as limited
by their brief, from so much of an order of the Supreme Court, Kings County (Kramer, J.), dated
December 31, 2007, as denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff, a member of the women's softball team of the defendant Polytechnic
University, allegedly was injured when, during a team practice, she was hit in the head with a bat
swung by her coach, the defendant James Barrett, a/k/a Jimmy Barrett. On their motion for summary
judgment dismissing the complaint, the defendants demonstrated their entitlement to judgment as a
matter of law based upon the doctrine of primary assumption of the risk, which provides that a
voluntary participant in a sport or recreational activity consents to those commonly appreciated risks
which are inherent in and arise out of the nature of the sport or activity generally and flow from such
participation (*see Morgan v State of New York*, 90 NY2d 471, 484), such as the risk of getting hit
with a bat swung during softball practice (*see Chaikin v Long Is. City YMCA*, 29 AD3d 619, 619-

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620; *Napoli v Mount Alvernia, Inc.*, 239 AD2d 325, 326). However, in opposition, the plaintiff raised triable issues of fact as to whether the defendants “unreasonably increased” that risk (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658; see *Muniz v Warwick School Dist.*, 293 AD2d 724; *Stryker v Jericho Union Free School Dist.*, 244 AD2d 330, 330-331), and as to whether she was injured as a result of “reckless . . . conduct” (*Morgan v State of New York*, 90 NY2d at 485; cf. *McGee v Board of Educ. of City of N.Y.*, 16 AD2d 99, 101-102). Accordingly, the Supreme Court properly denied the defendants’ motion for summary judgment dismissing the complaint.

FLORIO, J.P., COVELLO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court