

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

D24048
Y/hu/prt

_____AD3d_____

Argued - June 8, 2009

REINALDO E. RIVERA, J.P.
PETER B. SKELOS
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-11142

DECISION & ORDER

Andrew T. B. (Anonymous), etc., et al., respondents, v
Brewster Central School District, et al., appellants.

(Index No. 840/07)

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

Worby Groner Edelman, LLP, White Plains, N.Y. (Neil W. Silberblatt of counsel), for
respondents.

In an action to recover damages for personal injuries, etc., the defendants appeal from
an order of the Supreme Court, Putnam County (O'Rourke, J.), dated November 13, 2008, which
denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendants'
motion for summary judgment dismissing the complaint is granted.

The infant plaintiff, a kindergarten student, allegedly was sexually molested by two
second- or third-grade students while seated towards the rear of the school bus on his way home from
school. The infant plaintiff, by his mother, and his mother, derivatively, commenced this action to
recover damages for personal injuries, alleging negligent supervision, training, and hiring. The
defendants moved for summary judgment dismissing the complaint. The Supreme Court denied the
motion. This appeal ensued.

The defendants established their prima facie entitlement to judgment as a matter of law

November 17, 2009

Page 1.

B. (ANONYMOUS) v BREWSTER CENTRAL SCHOOL DISTRICT

(see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). In order to find that a school has breached its duty to provide adequate supervision in the context of injuries caused by the acts of fellow students, the plaintiff must show that “school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated” (*Mirand v City of New York*, 84 NY2d 44, 49; see *Bertola v Board of Educ. of City of N.Y.*, 1 AD2d 973). Thus, “[a]ctual or constructive notice to the school of prior similar conduct is generally required because . . . school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily” (*Mirand v City of New York*, 84 NY2d at 49). Here, the defendants submitted proof, including the deposition testimony of a school district employee, that the defendants had neither actual nor constructive notice of any prior similar conduct (see *Hallock v Riverhead Cent. School Dist.*, 53 AD3d 527; *Whitfield v Board of Educ. of City of Mount Vernon*, 14 AD3d 552, 553; see also *Dennard v Small World Ctr., Inc.*, 29 AD3d 730). In addition, the defendants submitted the deposition testimony of the infant plaintiff and his mother that they had not reported any such prior incidents to the defendant. In opposition, the plaintiffs failed to raise a triable issue of fact (see generally *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562). The mother’s assertion, in her affidavit in response to the defendants’ motion, that she believed there were prior similar incidents, was contrary to her deposition testimony and was insufficient to raise a triable issue of fact (see *Luiso v Northern Westchester Hosp. Ctr.*, 65 AD3d 1296; *Knox v United Christian Church of God, Inc.*, 65 AD3d 1017). Accordingly, the Supreme Court should have granted the defendants’ motion for summary judgment dismissing the complaint.

In light of our determination, the defendants’ remaining contention that the derivative cause of action of the infant plaintiff’s mother was time-barred has been rendered academic.

RIVERA, J.P., SKELOS, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court