

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

D26163  
G/kmg

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Argued - January 11, 2010

PETER B. SKELOS, J.P.  
DANIEL D. ANGIOLILLO  
RUTH C. BALKIN  
PLUMMER E. LOTT, JJ.

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2008-11205

DECISION & ORDER

Susan Balone, et al., respondents, v New York State Amateur Softball Association, Inc., et al., defendants, Dutchess County Girls Fastpitch Softball Association, et al., appellants.

(Index No. 186/06)

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Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains, N.Y. (Glen Feinberg of counsel), for appellants.

Worby Groner Edelman LLP, White Plains, N.Y. (Richard S. Vecchio and Michael Del Vecchio of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendants Dutchess County Girls Fastpitch Softball Association and Dutchess Debs appeal, as limited by their brief, from so much of an order of the Supreme Court, Dutchess County (Brands, J.), dated November 21, 2008, as denied that branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against them.

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

In 2003 the plaintiff Susan Balone (hereinafter the injured plaintiff) allegedly was injured when she was accidentally struck by a ball while participating in one of two simultaneous softball clinics for girls run by the defendants Dutchess County Girls Fastpitch Softball Association and Dutchess Debs (hereinafter together the Dutchess defendants). In moving for summary judgment, the Dutchess defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them by demonstrating that the injured

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plaintiff was aware of and assumed the inherent risk of being struck by a ball while playing softball (see *Murphy v Polytechnic Univ.*, 58 AD3d 816; *Muniz v Warwick School Dist.*, 293 AD2d 724; see also *Morales v Beacon City School Dist.*, 44 AD3d 724).

In opposition, however, the plaintiffs raised triable issues of fact with respect to whether the Dutchess defendants “unreasonably increased” the risk of injury (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658) by, inter alia, failing to implement safety plans, devices, or physical barriers separating the two simultaneous softball clinics (see *Murphy v Polytechnic Univ.*, 58 AD3d at 816-817; *Muniz v Warwick School Dist.*, 293 AD2d at 724; see also *Fithian v Sag Harbor Union Free School Dist.*, 54 AD3d 719). Accordingly, the Supreme Court properly denied that branch of the Dutchess defendants’ motion which was for summary judgment dismissing the complaint insofar as asserted against them.

SKELOS, J.P., ANGIOLILLO, BALKIN and LOTT, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court