

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

D30983  
O/kmb

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

Argued - April 7, 2011

PETER B. SKELOS, J.P.  
JOHN M. LEVENTHAL  
SANDRA L. SGROI  
ROBERT J. MILLER, JJ.

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2010-09095

DECISION & ORDER

Patrick Schmidt, respondent, v Massapequa  
High School, et al., appellants.

(Index No. 21382/08)

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Congdon, Flaherty, O’Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, N.Y.  
(Gregory A. Cascino of counsel), for appellants.

Cerussi & Gunn, P.C., Garden City, N.Y. (Linda P. O’Gorman and Brian R. Gunn of  
counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an  
order of the Supreme Court, Nassau County (Winslow, J.), dated August 20, 2010, which denied  
their motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The doctrine of primary assumption of risk provides that a voluntary participant in a  
sporting or recreational activity “consents to those commonly appreciated risks which are inherent  
in and arise out of the nature of the sport generally and flow from such participation” (*Morgan v State  
of New York*, 90 NY2d 471, 484). Such an assumption of risk does not provide an absolute defense  
to an action, but rather sets the measure of a defendant’s duty of care (*see Benitez v New York City  
Bd. of Educ.*, 73 NY2d 650, 657; *Turcotte v Fell*, 68 NY2d 432, 439). “[A] board of education, its  
employees, agents and organized athletic councils must exercise ordinary reasonable care to protect  
student athletes voluntarily involved in extracurricular sports from unassumed, concealed or  
unreasonably increased risks” (*Benitez v New York City Bd. of Educ.*, 73 NY2d at 658).

April 26, 2011

SCHMIDT v MASSAPEQUA HIGH SCHOOL

Page 1.

The Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint, since they failed to submit evidence sufficient to establish their prima facie entitlement to judgment as a matter of law. Under the circumstances, triable issues of fact exist as to whether there was a lack of proper supervision and whether the defendants unreasonably increased the risk of harm to the plaintiff during practice (see *DeGala v Xavier High School*, 203 AD2d 187; *DeLucas v City of Lockport School Dist.*, 26 Misc 3d 1227[A], *affd* 70 AD3d 1382; see also *Karr v Brant Lake Camp*, 261 AD2d 342; *Maurer v Feinstein*, 213 AD2d 383). Since the defendants failed to meet their initial burden as the movants, we need not review the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

SKELOS, J.P., LEVENTHAL, SGROI and MILLER, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court