

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

D33810
H/ct

_____AD3d_____

Argued - January 17, 2012

MARK C. DILLON, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
PLUMMER E. LOTT, JJ.

2011-01031

DECISION & ORDER

Georgina Crawford, etc., appellant, v Smithtown
Central School District, respondent, et al., defendant.

(Index No. 40387/08)

Salenger Sack Kimmel & Bavaro, LLP, New York, N.Y. (Michael F. Schwartz of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel), for respondent and defendant Accomsett Elementary School.

In an action to recover damages for personal injuries, etc., the plaintiff appeals from an order of the Supreme Court, Suffolk County (Rebolini, J.), dated November 29, 2010, which granted the motion of the defendant Smithtown Central School District for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is affirmed, with costs to the respondent.

The plaintiff's infant daughter allegedly sustained personal injuries when she tripped and fell over a rock or a piece of asphalt in the schoolyard of her elementary school during her lunch recess. The defendant Smithtown Central School District (hereinafter the defendant) established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not create or have actual or constructive notice of the alleged condition which proximately caused the accident (*see Gordon v American Museum of Natural History*, 67 NY2d 836). In opposition, the plaintiff failed to raise a triable issue of fact. The Supreme Court properly declined to consider the plaintiff's new theory of liability raised for the first time in opposition to the motion in light of the plaintiff's protracted delay in presenting it (*see Horn v Hires*, 84 AD3d 1025; *Medina v Sears, Roebuck & Co.*,

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41 AD3d 798).

Accordingly, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint insofar as asserted against it.

DILLON, J.P., LEVENTHAL, BELEN and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court