

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

D34101  
W/kmb

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Argued - January 17, 2012

PETER B. SKELOS, J.P.  
RUTH C. BALKIN  
SHERI S. ROMAN  
SANDRA L. SGROI, JJ.

2011-04093

DECISION & ORDER

Tiffany Testa, etc., et al., respondents, v East Meadow  
Union Free School District, appellant, et al., defendant.

(Index No. 6724/09)

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel),  
for appellant.

Picciano & Scahill, P.C., Westbury, N.Y. (Gilbert J. Hardy and Mary Ann Candelario  
of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant East Meadow Union Free School District appeals from an order of the Supreme Court, Nassau County (Murphy, J.), entered March 11, 2011, which denied its motion for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendant East Meadow Union Free School District for summary judgment dismissing the complaint insofar as asserted against it is granted.

The plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by the infant plaintiff when she fell while performing a cheerleading stunt, which she had performed numerous times in the past. The defendant East Meadow Union Free School District (hereinafter the defendant) established its prima facie entitlement to judgment as a matter of law based on the defense of primary assumption of risk by demonstrating that the infant plaintiff assumed the risk of injury by voluntarily engaging in the activity of cheerleading with knowledge of its inherent risks (*see Lomonico v Massapequa Pub. Schools*, 84 AD3d 1033; *DiGiose v*

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TESTA v EAST MEADOW UNION FREE SCHOOL DISTRICT

*Bellmore-Merrick Cent. High School Dist.*, 50 AD3d 623; *Rendine v St. John's Univ.*, 289 AD2d 465; *Weber v William Floyd School Dist.*, *UFSD*, 272 AD2d 396; *Fisher v Syosset Cent. School Dist.*, 264 AD2d 438). The defendant also made a prima facie showing that it did not fail to properly supervise the infant plaintiff (*see Lomonico v Massapequa Pub. Schools*, 84 AD3d 1033).

In opposition, the plaintiffs failed to raise a triable issue of fact. The opinion of the plaintiffs' expert, submitted in opposition to the motion, was insufficient to raise a triable issue of fact, as it was not in admissible form (*see CPLR 2106; Doumanis v Conzo*, 265 AD2d 296; *see also Moore v 3 Phase Equestrian Ctr., Inc.*, 83 AD3d 677; *Hegy v Coller*, 262 AD2d 606), and no excuse was provided for the failure to tender the evidence in admissible form (*see generally Moffett v Gerardi*, 75 AD3d 496, 498).

Accordingly, the defendant's motion for summary judgment dismissing the complaint insofar as asserted against it should have been granted.

SKELOS, J.P., BALKIN, ROMAN and SGROI, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court