

**Ross v New York Quarterly Meeting of Religious
Society of Friends**

2005 NY Slip Op 30045(U)

January 5, 2005

Supreme Court, New York County

Docket Number: 0109343/9343

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: _____
Justice

PART 12

0109343/2002

ROSS, ALEXANDRA
VS
RELIGIOUS SOCIETY OF FRIENDS

SEQ 3

SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

109 343/02

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

JAN 10 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/5/05



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

BARBARA R. KAPNICK
J.S.C.

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
ALEXANDRA ROSS, an Infant, by her Father
and Natural Guardian, KEN ROSS and KEN ROSS,
individually,

Plaintiffs,

- against -

DECISION/ORDER
Index No. 109343/02
Motion Seq. No. 003

NEW YORK QUARTERLY MEETING OF THE
RELIGIOUS SOCIETY OF FRIENDS a/k/a
FRIEND'S SEMINARY,

Defendant.

-----X

BARBARA R. KAPNICK, J.:

Plaintiffs seek to recover damages for personal injuries sustained by Alexandra Ross on April 5, 2002 while taking part in an extracurricular softball practice in the gymnasium of the school operated by defendant New York Quarterly Meeting of the Religious Society of Friends a/k/a Friend's Seminary at 222 East 16th Street, New York, New York.

Plaintiff Alexandra Ross, who was thirteen years old at the time of the incident, claims that she was injured when her leg became entangled in slippery parachute material while she was performing a sliding exercise on the hardwood floor.

Defendant now moves for summary judgment dismissing plaintiffs' complaint on the ground that the infant plaintiff assumed the risk of injury. See, Arbogast v. Board of Education, 65 N.Y.2d 161 (1985).

Specifically, defendant argues that both Alexandra Ross and her mother, Amy Ross, expressly assumed the risk of injury by reading and signing a Parental Consent Form which provides, in relevant part, as follows:

While the coaching staff and responsible school officials will do everything within reason to protect my child against injury, including the provision for appropriate equipment, safe facilities and training designed to reduce the impact of accidents, I understand that injuries may occur and on a very rare occasion may be serious and disabling.

Defendant further argues that Alexandra, who was an experienced student athlete who had previously played in a softball league and in other sports activities, must be deemed to have assumed the risk of injury because "[s]liding into base is an integral part of the game of softball." Totino v. Nassau County Council of Boy Scouts of America, 213 A.D.2d 710,711 (2nd Dep't 1995), lv. denied 86 N.Y.2d 708 (1995). See also, Stadelmaier v. Town of Tonawanda, 2 A.D.3d 1369 (4th Dep't 2003); Martinelli v. Town of East Fishkill, 300 A.D.2d 551 (2nd Dep't 2003); Tiedemann v. Notre Dame Academy, 227 A.D. 2d 545 (2nd Dep't 1996).

"Pursuant to the doctrine of assumption of risk, an injured party may not seek compensation for injuries incurred as a consequence of some risk or danger usually associated with a pursuit voluntarily undertaken. Thus, when it is shown indisputably that a particular injury was caused by a condition or practice which is common to a particular sport (citation omitted), summary judgment is warranted." (citations omitted).

Totino v. Nassau County Council of Boy Scouts of America, supra at 711.

Plaintiffs, however, argue that neither Alexandra nor her mother expressly assumed the risk of injury to which Alexandra was actually exposed, because there is no wording in the Consent Form that expressly releases defendant and/or states that the school would be protected should the child's injury be caused by the school's negligence.¹

Plaintiffs further argue that plaintiff Alexandra Ross cannot be deemed to have impliedly assumed the risk of injury because defendant's negligence exposed her to risks which are not "inherent" to the sport. See, Morgan v. State of New York, 90 N.Y.2d 471 (1997).

The Court of Appeals has held that "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 Board of Education, 73 N.Y.2d 650, 658 (1989). See also, Zmitrowitz v. Roman Catholic Diocese of Syracuse, 274 A.D.2d 613 (3rd Dep't 2000).

Plaintiffs argue, through an affidavit from their expert, Anthony M. Viollis, an experienced physical education teacher and

¹ Plaintiffs also note that the Consent Form was signed by the infant plaintiff's mother, who is not a party to this action, as opposed to the father who is the plaintiff herein in his capacity as guardian of the infant plaintiff and in his individual capacity.

coach, that defendant unreasonably increased the risk of injury (i) by instructing the infant plaintiff to wear sneakers to slide on the hardwood floor; (ii) in failing to teach the sliding skill in progressive steps or to use "spotting" from the coaches; (iii) in advising the students to slide first on the hardwood floor and then to allow their momentum to carry their bodies onto the parachute material; and (iv) in failing to re-set the parachute material and smooth it out after the prior student slid.

Although it is undisputed that plaintiff Alexandra Ross voluntarily participated in the extracurricular softball activity, this Court finds that there are issues of fact as to whether or not her risk of injury was unreasonably increased as a result of defendant's negligence, thereby exposing plaintiff Alexandra Ross to risks which were not inherent to the sport, which preclude the granting of summary judgment.

Accordingly, based on the papers submitted and the oral argument held on the record on October 20, 2004, this motion by defendant is denied.

A pre-trial/settlement conference shall be held in IA Part 12, 60 Centre Street, Room 341 on February 9, 2005 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: January 5, 2005


 BARBARA R. KAPNICK
 J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED

JAN 10 2005

NEW YORK
 COUNTY CLERK'S OFFICE