SHORT FORM ORDER

INDEX No. 04/16829
CAL. No. 06-01719-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11/22/06
ADJ. DATE 1/24/07
Mot. Seq. # 002 - MotD

AMANDA SCHLEE, and infant by her father and natural guardian, ROBERT SCHLEE and ROBERT SCHLEE, individually, Plaintiffs, - against - HOOP START LONG ISLAND, INC. d/b/a/ J.D. WALSH BASKETBALL SCHOOL, J.D. WALSH, individually, THE ROMAN CATHOLIC DIOCESE OF ROCVILLE CENTRE and ST. JOHN THE BAPTIST HIGH SCHOOL, Defendants.	CONGDON FLAHERTY O'CALLAGHAN REID DONLON TRAVIS & FISHLINGER Attorneys for Plaintiffs 333 Earle Ovington Boulevard, Suite 502 Uniondale, New York 11553 PEREZ FUREY & VARVARO Attorneys for Defendants Hoop Start, Walsh & St. John the Baptist High School 333 Earle Ovington Boulevard PO Box 9372 Uniondale, New York 11553

Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 21; Replying Affidavits and supporting papers 22 - 24 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Hoop Start Long Island, Inc., d/b/a J.D. Walsh Basketball School, J.D. Walsh, individually, and St. John the Baptist High School for summary judgment is determined as follows.

This is an action to recover damages for personal injuries allegedly sustained by the infant plaintiff, Amanda Schlee, then 11 years old and in the fifth grade, when on May 16, 2004 she fell in the gymnasium at defendant St. John the Baptist High School (High School) in West Islip, New York. At the time of her accident the infant plaintiff was one of approximately fifty children of both sexes, ranging in age from fifth to ninth grade, participating in a drill at a basketball clinic sponsored by defendant Hoop Start Long Island, Inc. (Hoop Start) under the direction of defendant J.D. Walsh. The drill required the children to line up on the baseline of the basketball court and then run to the opposite baseline and back when a whistle was blown. In

the course of the drill, the infant plaintiff was bumped or tripped from behind by a boy causing her to fall to the floor fracturing her left elbow and opening a wound on her chin. Both of Amanda's injuries required surgical repair. The gravamen of plaintiffs' claim as against the moving defendants is that they failed to properly supervise the practice drill during which the infant plaintiff was injured.

Defendants now seek summary judgment on the basis that they bear no liability for infant plaintiffs' injuries because she assumed the risk of her injuries by voluntarily participating in the basketball clinic. In opposition, plaintiffs contend that the assumption of the risk doctrine will not serve to bar liability where the risk was unassumed, concealed or, as the plaintiffs claim here, unreasonably increased by the defendants' lack of proper supervision over the practice drill.

Although the organizers of sporting events are not responsible for the consequences of every hazard encountered in play activity (*see,* ***Fintzi v New Jersey YMHA-YWHA Camps,*** 97 NY2d 669, 739 NYS2d 85 [2001]; ***Sauer v Hebrew Inst. of Long Island,*** 17 AD2d 245, 233 NYS2d 1008 [1962] aff'd 13 NY2d 913, 243 NYS2d 859), injuries which arise out of unassumed, concealed or unreasonably increased risks may raise a factual issue as to the foreseeable risk of unjustifiable danger (*see,* ***Benitez v New York City Board of Education,*** 73 NY2d 650, 543 NYS2d 29 [1989]; ***Greaves v Bronx YMCA,*** 87 AD2d 394, 452 NYS2d 27 [1982] app dism 58 NY2d 780; ***Eddy v Syracuse University,*** 78 AD2d 989, 433 NYS2d 923 [1980]).

In the matter at hand, the deposition testimony given by the infant plaintiff, her father, who was at the scene, and defendant Walsh, is consistent in that they all describe the High School gymnasium as containing three individual basketball courts situated in a contiguous row. Infant plaintiff and her father both testified that defendant Walsh directed all the drill participants to stand along the baseline of the center basketball court, and that because there were as many as fifty children joining in the drill they were all standing within two or three inches of each other, without any differentiation as to size or age. In contrast, defendant Walsh testified that while he had no recall as to the exact drill during which the infant plaintiff was injured, that in running this type of drill the clinic coaches always required the children to line up along the baselines of all three basketball courts with enough space between the children so that each child with his or her arms stretched out could only touch the fingertips of the adjoining child.

Defendant Walsh explained that this spacing of children is done for safety reasons. In this regard, plaintiffs rely upon an affidavit by Kenneth R. Demas, B.S., M.S., a retired teacher and adjunct associate professor, who taught Physical Education for 29 years at a middle school within the Mamaroneck UFSD where he was Chairman of the Physical Education Department for 14 years. He also states that he has taught graduate and undergraduate courses in Pedagogy and Adventure Education at Hofstra University within Hofstra's Department of Physical Education and Sports Sciences for seven years. He opines that defendant Walsh and his coaching

staff failed to exercise reasonable care to comport with accepted standards of safe practice in the field of Physical Education in supervising the children performing the running drill and that these failures unreasonably increased the risk of injury to the infant plaintiff. In particular, they failed to exercise reasonable care: 1) to spread out and space the children so that there were reasonably distant from one another; 2) to group the children properly based on categories such as maturation, physical size, age and skill; and 3) to position themselves as coaches in different locations around the court so that they could view all the children from different angles at the same time. Mr. Demas also opines that defendant Walsh and his staff should have anticipated that the running drill activity, as conducted in the manner in which it was, could be dangerous. He further opines that had reasonable care been exercised that the infant plaintiff's accident would have been prevented.

Based upon the foregoing, the Court concludes that material issues of fact have been raised as to whether the coaches in charge of the basketball clinic failed to exercise the appropriate level of supervision in conducting the practice drill thereby exposing the infant plaintiff to an unreasonably increased risk of injury. Summary judgment on the basis that the infant plaintiff assumed the risk of her injury is therefore precluded (*see,* ***Cody v Massapequa UFSD,*** 227 AD2d 368, 642 NYS2d 329 [1996]; ***Baker v Briarcliff School District,*** 205 AD2d 652, 613 NYS2d 660 [1994]; *see also,* ***Taylor v Massapeaqua International Little League,*** 261 AD2d 396, 689 NYS2d 523 [1999]).

Defendants' request for summary judgment on basis that plaintiffs' claims are barred by Amanda Schlee's mother's execution of a waiver of liability is denied. The purported waiver of liability is contained on the registration form signed by the infant plaintiff's mother when she enrolled her daughter in the basketball clinic. The copy of the registration form submitted by defendants in support of this motion is illegible and is thus without probative value. In any event the Court is well aware of the general rule that a minor is not bound by a release executed by his or her parent (***Alexander v Kendall Central School District,*** 221 AD2d 898, 634 NYS2d 318 [1995]. It thus seems unlikely that infant plaintiff's claims herein would be barred by the release executed by her mother. Moreover, inasmuch as plaintiff Robert Schlee's claims are derivative of his daughter's, it also seems unlikely that his claims would be barred by his wife's execution of a waiver of liability (***Santangelo v City of New York,*** 66 AD2d 880, 411 NYS2d 666 [[1978]).

Defendant J.D. Walsh's request for summary judgment dismissing plaintiffs' complaint against him in his individual capacity is denied. At his examination before trial Mr. Walsh testified to the effect that the basketball clinic was conducted by the corporate defendant, Hoop Start Long Island, Inc., and that, as a matter of law, he bears no individual liability for plaintiffs' claims. Defendant Walsh in his deposition testimony, however, stated that he is the sole owner and corporate officer of Hoop Start Long Island, Inc. Moreover, the adduced evidence establishes that the entire clinic, including the drill during which infant plaintiff was injured, was conducted under the direct supervision of Mr. Walsh. While a director or officer of a

corporation does not incur personal liability for its torts merely by reason of his official character, if a director or officer commits, or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby (***Greenway Plaza Office Park-1, LLC v Metro Construction Services, Inc.,*** 4 AD3d 328, 771 NYS2d 532 [2004]; *see also* ***Modulars by Design, Inc., v DBJ Development Corporation,*** 174 AD2d 885, 571 NYS2d 168 [1991]; ***Van Wormer v McCasland Truck Center, Inc.,*** 163 AD2d 632, 558 NYS2d 683 [1990]). Under these circumstances, defendant Walsh has failed to make a prima facie showing of entitlement to summary judgment on the basis that he bears no individual liability for the infant plaintiff's injuries.

Finally, defendant St. John the Baptist High School requests summary judgment dismissing the complaint against it on the basis that it had no notice of any unsafe conditions or practices existing at the subject basketball clinic. Defendant High School's representative, Ralph Dalton, testified to the effect that he is the athletic director and a physical education teacher at the High School and while the High School provided its facilities for the basketball clinic, it was not involved in the actual coaching of the participants as those activities were exclusively performed by Mr. Walsh and his assistant coaches. The High School was concerned primarily with providing security for the participants and the school facilities. Mr. Dalton also testified to the effect that while he would occasionally monitor the clinic sessions he was not involved in running them and that he received no complaints as to the manner in which the coaching sessions were conducted. The adduced evidence thus established that the infant plaintiff's activities at the basketball clinic were not under the direct control and supervision of defendant High School. Inasmuch as defendant High School did not did not unreasonably increase the risks assumed by the infant plaintiff by her voluntary participation in the basketball clinic, defendant High School's is not liable for her injuries and its request for summary judgment is granted (*see,* ***Sheehan v Hicksville Union Free School District,*** 229 AD2d 1026, 645 NYS2d 181 [1996]).

Accordingly, defendants' motion for summary judgment is granted only to the extent that the complaint is dismissed as to defendant St. John the Baptist High School, and is otherwise denied. The action is severed and shall continue as against the remaining defendants.

Dated: APR 19 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**