At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, on the 19th day of March, 2004

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

In the Matter of the Claim of PAMELA CLARK, Individually and as Parent and Natural Guardian of REBECCA CLARK, an infant,

Plaintiffs,

vs.

SUSQUEHANNA VALLEY CENTRAL SCHOOL DISTRICT,

Defendant.

DECISION AND ORDER

Index No. 2001-1225
RJI No. 2004-0062-M

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This action was commenced by the plaintiff, Pamela Clark, mother and natural guardian of Rebecca Clark, a student in the ninth grade at the defendant Susquehanna Valley Central School District. The student was injured while participating in a physical education class.

The following facts are not in dispute. While in the school gymnasium, the teachers, Ms. Hoteling and Mr. Howell, directed the students to participate in a relay race activity using what are referred to at the school and by the parties as "scooters." These scooters are small square flat devices with four wheels attached at the corners which can be ridden by students who either propel themselves along with their feet or hands or are pushed along by fellow students. During the class in question, the students were using the scooters for "relay races."[1] In these races, one student was on the scooter either kneeling or sitting and being pushed by another student from one point to another in the gymnasium. The students would then switch positions and return to the point of origin. During the course of that activity, the plaintiff student was injured when she fell from the scooter she was riding, hitting her chin on the gymnasium floor. The plaintiff student suffered injuries to her jaw and a broken tooth.

The school district moves for summary judgment asserting that there is no factual issue as to the proper supervision of the activity and that applicable case law clearly establishes that

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[1] The School District asserts that despite the reference to the activity as a "relay race," the activity was not competitive, there was no reward or incentive to win or finish first, and the speed with which the activity was completed would not effect a student's grade for the class. However, as with many things in life, it is inevitable that some will compete and try to be first and fastest and others will not.

school districts are not insurers of the safety of their students. The school district cites numerous cases

granting summary judgment to school districts where students were injured in physical education class.

In opposing the motion, the plaintiff submits affidavits disputing the content and/or sufficiency of the instructions given to the students in the class regarding this activity and submits an "expert" affidavit that contends that a relay race using scooters is not an appropriate physical education class activity for students of the plaintiff student's age.

Both parties refer to the depositions taken both of the plaintiff mother and the student pursuant to General Municipal Law § 50-h and those of the plaintiff mother and the student and the two teachers supervising the class, Ms. Hoteling and Mr. Howell, taken after commencement of the action.

The determination of the defendant's motion hinges on whether the fact questions that clearly do exist in this action are of such a nature as to prevent summary judgment. The defendant school district contends that whatever fact issues exist are not pertinent to any issue that is relevant to resolution of this action. The plaintiff asserts that those fact issues bear on the very core of this action and therefore prevent summary judgment.

THE FACTUAL DISPUTES

There are, to be sure, several factual disputes regarding what happened and how.

They include:

- What was the level of instruction given to the students prior to starting the activity?

- Were the students told to only sit on the scooters, were they told to sit or kneel, were they only told not to stand, or were they told nothing in this regard?
- Does proper supervision require that the teachers observe the students riding the scooters and intercede and stop any of them from riding the scooters on their knees?
- Was the accident the result of a collision between two scooters or did the plaintiff student simply fall off her scooter while being pushed by a fellow student?
- Did the female physical education teacher observe the collision?

THE LAW

Relying on several cases, the defendant asserts that school districts are not insurers of the safety of students and that they are only "obligated to exercise such care of their students 'as a parent of ordinary prudence would observe in comparable circumstances'" (*David v. County of Suffolk*, 1 NY3d 525 [NY 2003], citing *Mirand v. City of New York*, 84 NY2d 44, 49 [1994], citing *Lawes v. Board of Educ. of City of New York*, 16 NY2d 302, 305 [1965]). There are numerous cases that cite and uphold this principle in dismissing claims such as the plaintiff's claim herein. Many of those cases dismiss claims arising out of student collisions in physical education class activities where such collisions are an inherent part of the activity (*see Capotosto v. R.C. Diocese of Rockville Ctr.*, 2 AD3d 384 [2d Dept 2003] [summary judgment granted to a school district where eight year old third grader attempting to catch a ball was struck in the head by a classmate's knee]; *Sangineto v. Mamaroneck Union Free School Dist.*, 282 AD2d 596 [2d Dept 2001] [summary judgment granted to school district where high school student suffered a broken nose in collision with fellow student trying to catch a frisbee in a frisbee-touch football

game]).

There are also several cases that dismiss claims arising out of student collisions where such collisions are not an inherent part of the activity. *DiMisa v. Elwood Union Free School Dist.* (269 AD2d 488 [2d Dept 2000]), involves the very same activity – relay races – at issue here. In *DiMisa*, the injury at issue occurred when a student ran into and fell on top of another student during the course of the relay race (*see id.*). However, the Court held that the activity was adequately supervised by two physical education teachers and five fourth grade teachers (*see id.*).

In *Muniz v. Warwick School Dist.* (293 AD2d 724 [2d Dept 2002]), a student participating in a softball game was injured when he was hit in the head by a baseball bat released by a fellow student after hitting the ball. There the Court acknowledged that "being struck in the head by a bat is a risk inherent in the sport of softball," but denied the school district's motion for summary judgment (*id.*). The Court found that questions of fact existed as to whether the risk of injury was unreasonably increased by the teacher's failure "to issue helmets to the players and to direct them regarding a safe place to stand on a field lacking fences, on-deck circles, or dugouts" (*id.*).

In *Pike v. Gouverneur Central School Dist.* (249 AD2d 820 [3d Dept 1998]), the school district's motion for summary judgment was denied where a ninth grade student was injured when riding a tube or sled down an icy and irregular hill. The Court reasoned that, "evaluated under the 'reasonably prudent parent' standard, evidence that the hill was icy and irregular, with a three-foot drop-off that caused students to become airborne and several to fall off their sled or tube, permits a finding of negligence" (*id.* at 821).

THE THIRER EXPERT AFFIDAVIT

The plaintiff submits the affidavit of Joel Thirer, the Director of Athletics and a tenured professor in the Department of Health, Physical Education and Athletics at Binghamton University. The Thirer affidavit contends that the activity in question, "was not a legitimate part of the curriculum." However, such expert affidavits or testimony are probative only when they establish the foundation or the source of the standards underlying their conclusions (*see David*, 1 NY3d at 525). In addition, such affidavits or testimony cannot rely on non-mandatory recommendations and guidelines promulgated by governmental or professional entities absent proof that the guideline or standard has been adopted in actual practice (*see Capotosto*, 2 AD3d at 386).

The Thirer affidavit references numerous guidelines and standards that do not mention the use of scooters as an appropriate activity in the type of situation presented here. However, there is no indication or evidence that the referenced guidelines or standards are mandatory or comprehensive and are meant to apply or are applied to prohibit or exclude any activity not specifically mentioned or approved therein. Accordingly, the Thirer affidavit does not provide probative support for the proposition that the activity presented here is inappropriate or, as claimed in the affidavit, a "recipe for disaster." The Courts have made it clear that non-mandatory recommendations or guidelines do not establish standards unless adopted in actual practice. Here, there is some evidence that some schools have adopted guidelines or curriculums that do not provide for use of scooters in ninth grade or high school physical education classes. However, because there is not a single reference or citation to a guideline or standard that sets forth an all-inclusive or comprehensive list of appropriate activities or that prohibits or

specifically or directly discourages or limits the use of scooters in this type of situation, Mr. Thirer's expert opinion is not considered probative as to the issues presented in this case.

THE APPROPRIATE LEVEL OF SUPERVISION

The issue here is not whether there is a definitive lack of appropriate supervision but whether there is a fact issue regarding the appropriate level of supervision. Three points raised in connection with this motion are critical to a determination of the motion. The first point involves the dispute regarding what instructions were given to the class before the scooter relay races began, which goes to what happened or should have happened before the activity began. Unless it can be said that the plaintiff's version of the instructions given to the students constitutes appropriate supervision as a matter of law, summary judgment must be denied. The second critical point is the factual dispute regarding how the accident happened. The third point involves the testimony of Mr. Howell, one of the teachers, regarding what he would have done had he observed a student riding on his or her knees on the scooter, which goes to what should have happened during the time the activity was taking place (i.e. while the students were riding the scooters).

The plaintiff submits the affidavits of two students – Nicki Mead and Abbey Mastin – who both essentially contend that the instructions given constituted a description of the activity that they would be doing.[2] At her deposition, Ms. Hoteling described the level of instruction given differently and in greater detail. It is clear that there is a factual dispute regarding what

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[2] The class had used the scooters for other types of relay races in class that same day, prior to the students using the scooters with one student pushing another.

instruction was given prior to the students beginning this activity.[3]

There is also a marked factual dispute regarding how the accident happened. The plaintiff supplies affidavits and testimony providing that the accident was the result of a collision between two scooters. However, Ms. Hoteling testified at her deposition that the accident was the result of the plaintiff student falling off the scooter while being pushed by her partner and that there was no collision with another scooter. Her testimony in this regard was:

> **Q**: Is it your testimony that a collision did not occur between the scooter Rebecca was on and another scooter in the class?
>
> **A**: Yes. I did not see two groups of people collide together.

The third significant factual issue arises through the testimony of the other teacher, Mr. Howell, who states that although he did not observe the accident, he would have stopped students from kneeling on the scooters while being pushed by another student had he observed it. The following is his testimony in this regard:

> **Q**: Okay. And if you saw a student kneeling on the scooters and being pushed from behind, what, if any, action would you take?
>
> **A**: I'd probably go right up to them, run up to them and try to get them to sit down instead of kneeling.
>
> **Q**: Would you stop them right there on the spot?
>
> **A**: Either stop them; if they wouldn't stop then set them aside, you know, in the gym. If they're not going to stop.

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[3] There are several plausible explanations for this discrepancy, including the possibility that the instructions were appropriate and sufficient, but the young teenage students were not completely attentive when the instructions were given or that the instructions were not particularly detailed, as the use of scooters may have been a last minute change in plans due to the inability to have class outdoors due to inclimate weather.

Q: Why would you take that kind of action?

A: Just to prevent, for safety - -

The testimony of the injured student is that she was kneeling when the injury occurred. In her deposition pursuant to General Municipal Law § 50-h, she stated:

> **Q**: Okay. You said at the time of the accident, though, you were kneeling on the scooter?
>
> **A**: Yeah.
>
> **Q**: Okay. How come you were kneeling on it instead of sitting on it?
>
> **A**: I think that was the - - what we were told to do.

It is clear that the injured student states that she was kneeling at the time of the accident and that Mr. Howell has stated that he would have stopped students from kneeling if he had observed them kneeling. The testimony of Ms. Hoteling is that she actually saw the accident happen. Taken together and crediting these versions of what happened the day plaintiff was injured, the record contains evidence tending to show, but not establishing as a matter of law (i.e. there is a fact dispute), that the plaintiff student was kneeling on the scooter, Ms Hoteling saw her on the scooter immediately prior to the accident, and if Mr. Howell had observed her kneeling on the scooter he would have "run up to [her]" and stopped her from kneeling on the scooter.

Admittedly, what is lacking is any definitive proof from either party as to whether kneeling was a proximate cause of the plaintiff student's injuries. It is the defendant's burden to establish the lack of proximate cause as a matter of law (*Powers v. St. Bernadette's R.C.*

Church (309 AD2d 1219 [4th Dept 2003]). That determination can not be made at this point on this record.

The facts presented here make this case analogous and in line with *Pike v. Gouverneur Central School Dist.* (249 AD2d at 820, *supra*) and *Muniz v. Warwick School Dist.* (293 AD2d at 724, *supra*).

The record establishes that there are factual disputes regarding the instructions given at the outset of the activity, whether the accident was the result of a collision of two scooters, and whether, if the plaintiff student was kneeling, she should have been promptly stopped and directed to sit on the scooter, as well as the appropriate level of supervision for this type of activity with students of plaintiff student's age.

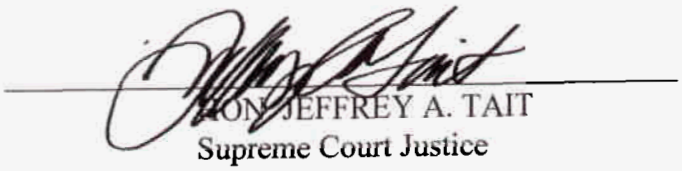
CONCLUSION

The factual disputes regarding the instructions given prior to the students undertaking the activity, whether a prohibition on kneeling was or should have been one of the instructions, and whether if the injured student was observed kneeling she should have been stopped and told to sit

on the scooter create fact issues sufficient to defeat the school district's motion for summary judgment. For the foregoing reasons, the motion for summary judgement is denied without costs.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: August 20, 2007
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Notice of Motion dated January 21, 2004 and accompanying Affidavit of Keith A. O'Hara, Esq. sworn to January 21, 2004

- Affidavit of Mailing of Michele L. Mollo sworn to January 23, 2004

- Answering Affidavit of Kevin T. Williams, Esq. sworn to February 19, 2004, Affidavit of Joel Thirer, PhD, sworn to February 19, 2004

- Reply Affidavit of Keith A. O'Hara, Esq. sworn to March 16, 2004