

**Berman v Rolling Riv. Assoc., Ltd.**

2008 NY Slip Op 30848(U)

March 17, 2008

Supreme Court, Nassau County

Docket Number: 4559-06/

Judge: Thomas Feinman

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
DANA BERMAN, an Infant, by her Mother and  
Natural Guardian, CINDY BERMAN; CINDY  
BERMAN,

Plaintiffs,

- against -

ROLLING RIVER ASSOCIATES, LTD. a/k/a  
ROLLING RIVER DAY SCHOOL AND CAMP,

Defendant.

TRIAL/IAS PART 20  
NASSAU COUNTY

INDEX NO. 4559/06

MOTION SUBMISSION  
DATE: 2/13/08

MOTION SEQUENCE  
NO. 001

The following papers read on this motion:

- Notice of Motion and Affidavits.....   X
- Memorandum of Law in Support of Motion.....   X
- Affirmation in Opposition.....   X
- Reply Affirmation.....   X

The defendant, Rolling River Associates, Ltd. a/k/a Rolling River Day School and Camp, (hereinafter referred to as the "day camp"), moves for an order pursuant to CPLR §3212 granting summary judgment as a matter of law to the defendant. The defendant submits a Memorandum of Law in support of the motion. Plaintiffs submit opposition. The defendant submits a reply affirmation.

BACKGROUND

The infant plaintiff, Dana Berman, (hereinafter also referred to as "Dana"), then seven years old, was enrolled in a summer day camp program with the defendant on July 3, 2003. While she was attending a gymnastic class, she fell and fractured her left elbow.

The plaintiff was one of approximately twelve campers who elected the gymnastic class. The day camp provided approximately four counselors to supervise and instruct the campers through an obstacle course. The obstacle course consisted of running towards a springboard, jumping onto a mat, tumbling to a lower mat, crawling through a circular passage, jumping over a V-shaped apparatus, running through a playhouse, and finishing a section with rings.

The infant plaintiff was injured at the portion of the obstacle course which required jumping over the V-shaped apparatus. Approximately six or seven children ahead of Dana either jumped over the V-shaped apparatus, or just walked around it. The plaintiffs maintain that Dana was the only one who stepped directly on the V-shaped apparatus. Dana provides that the V-shaped apparatus rolled over, causing her to lose her balance and fall upon her left arm, severely fracturing her left elbow.

The defendant maintains that it provided adequate supervision by providing at least four counselors to instruct and supervise the campers, and that it provided proper precaution against a foreseeable fall by placing a foam mat underneath the V-shaped apparatus. Moreover, the defendant submits that the obstacle course was an appropriate recreational activity offered to seven-year old campers as it merely involved jumping, tumbling and climbing, whereby a seven-year old could appreciate the inherent risks of falling and potential injury. Additionally, defendant submits that Dana consented to engage in the activity, and therefore, consented to the inherent risk in climbing, tumbling, running and jumping.

The defendant's head counselor testified that each staff member is assigned to a piece of equipment, whereby the person assigned, a "spotter", would make sure that the children get on and off the equipment safely. The defendant's nurse, Alicia Stone, testified that she attended to Dana after her fall and filled out an incident report thereto. Ms. Stone testified that the counselors informed Ms. Stone that three counselors were spotting the infant, in that one was on one side of the V-shaped apparatus, one on the other side, and one in the middle. Ms. Stone testified that her reference to a category, letter "L", in the incident report, signifies that the "[v]ictim lacked necessary ability." Ms. Stone made that determination upon Dana as "a seven-year old is not an expert at every piece of equipment in the gymnastics area . . . based upon her age."

The plaintiffs maintain that the V-shaped apparatus was left unattended, and that it was not reasonable to expect that it would roll over simply by stepping on it, or climbing upon it. Dana avers that there were no counselors at the V-shaped apparatus to supervise or spot her at the time of the incident. Dana provides that there were spotters at other locations on the obstacle course, but not at the V-shaped apparatus, and not near Dana. The plaintiffs contend that the day camp failed to follow its own procedure in that the V-shaped apparatus was left unsupervised and unattended, and that it was not readily apparent that the V-shaped apparatus would roll over to a seven-year old, to wit, to Dana who attended the gymnastic class for the first time. As the other children who went before Dana either jumped over it, or walked around it, Dana, who stepped or climbed upon it, had no prior indication that it would roll over.

#### Applicable Law

In assessing whether the owner or operator of an athletic facility has violated a duty of care to its participants who are injured while they are engaged in voluntary sports activities, the Court of Appeals in *Morgan v. State of New York*, 90 NY2d 471, has set the applicable standard. The standard includes whether the conditions caused by the defendant's negligence "are unique and create a condition over and above the usual dangers that are inherent in the sport". A showing of some negligent act, or inaction, which may be said to constitute a substantial cause of event which produced the injury is necessary. (*Id.*)

Additionally, the Court of Appeals in *Morgan, supra*, provides that the doctrine of assumption of risk, “in assessing the duty of care owed by such a defendant”, requires that the “participant have knowledge of the injury causing defect and also appreciation of the resulting risk”. The application is “to be assessed *not in a vacuum* but against the background of the skill and experience of the particular plaintiff”. (*Id.*) (Emphasis added). The assessment of an injured person’s awareness and appreciation of the risk must include consideration of the skill and expertise of that person, (*Id.*), as well as his or her age. (*Taylor v. Massapequa Intl. Little League*, 261 AD2d 396).

In *Taylor v. Massapequa Int’l Little League, supra*, a ten-year old was injured when his coach allegedly told him for the first time that he and his teammates had to slide into the bases, or else they would be automatically “out”. The infant plaintiff had never slid into base before, and was not taught the proper way to do so. The Second Department in *Taylor*, citing *Morgan v. State of New York, supra*, for the proposition that the doctrine of assumption of the risk is not an absolute defense, but a measure of the defendant’s duty of care, and in taking into consideration the infant plaintiff’s background, skill and experience, held that given “the young age of the plaintiff at the time of the injuries at issue and the lack of proper instruction, we agree that, on the record presented, it may not be determined as a matter of law that the plaintiff was aware of, appreciated, and voluntarily assumed the risks from which his injuries allegedly arose”. The infant plaintiff in *Taylor* had two years of baseball experience prior to the incident. The Court in *Bello v. Fieldhouse at Chelsea Piers*, 18 AD3d 272, found a genuine issue of material fact existed as to whether the “ten-year old girl had the capacity to appreciate the risks associated with an unfamiliar piece of equipment for an unintended purpose”. The Court precluded summary judgment when the ten-year old girl sustained injuries during an obstacle course of balance beams. (*Id.*)

In the following cases, the Second Department has held that the doctrine of assumption of risk did not provide a bar recovery to certain infants. A thirteen-year old was not barred recovery upon assumption of risk when she slipped and fell on a ground level support bar she was attempting to jump at a track and field event sponsored by a league, given her “age, her level of experience, and league’s failure to furnish [the] infant with adequate instructions”. (*Bennett v. City of New York*, 303 AD2d 614). A genuine issue of material fact existed as to whether one infant ice skater was aware of, appreciated, and voluntarily assumed risks inherent in ice skating. (*Guzman v. Iceland*, 18 AD3d 704). A seven-year old had not assumed the risk of injury on a swing set when there was no proof offered that the infant plaintiff had appreciated the risk of the use of a swing set. (*Trainer v. Camp Hadar Hatarah*, 297 AD2d 731).

However, in certain cases, the Second Department has held that certain infants had assumed the risks inherent in the activity. An eleven-year old, as a matter of law, assumed the risks inherent in playing on a jungle gym. (*Auwater v. Malvern Union Free District*, 274 AD2d 528). In assessing whether the infant participant consented to the risks inherent in the sport or recreational activity, the Court in *Auwater* took into consideration that the infant plaintiff was a seventh-grader, and that three years had passed since he attended the school which maintained the jungle gym that he had been playing on when he got hurt. A thirteen-year old snow boarder voluntarily assumed the risk of snow boarding in a sump containing garbage and debris owned by the County. (*Giugliano v. County of Nassau*, 24 AD3d 504). The infant “[h]ad gone snow boarding at that location on many prior

occasions” and “acknowledged that he was aware of the nature of the site and the presence of garbage”. (*Id.*) An infant plaintiff who was injured when he jumped his bike off a wooden ramp. (*Conway v. O’Keefe*, 22 AD3d 784). An infant who was injured while playing a game of “kick the can” with other children, including the infant defendant in the defendant’s backyard. (*Lumley v. Motts*, 1 AD3d 573).

### Discussion

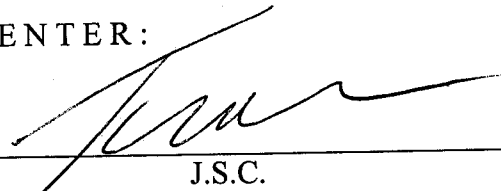
In the case *sub judice* it cannot be determined as a matter of law that this infant plaintiff, a seven-year old participating in a gymnastic class at the day camp for the first time, appreciated the risks associated with the obstacle course. The risk of stepping directly on, or climbing upon, the V-shaped apparatus, causing it to turn was not, as a matter of law, a risk that was appreciated by the infant plaintiff given her age and level of experience.

Notably, a majority of the cases relied upon by the defendant are distinguishable from the case at bar. In *Auwater v. Malvern*, *supra*, the infant, an eleven-year old, was a student at the school for three years prior to falling off the school’s jungle gym. In *Giugliano v. County of Nassau*, *supra*, the infant had gone snow boarding at the sump on many occasion prior to the incident, and was aware of the dangers associated thereto. In *Sauer v. Hebrew Institute*, 17 AD2d 245, a thirteen-year old engaged in a water fight with a group of campers slid on grass. The Court stated that in a water fight played on a grass covered area, it was inevitable that the grass would become wet. (*Id.*) In *Klein v. Hoffman*, 15 AD2d 899, there was no proof on the trial of the event which caused the infant’s injury, or any direct proof on the trial by any witness who saw the contemporaneous events. “No one seems to have seen it.” (*Id.*) In *Sajkowski v. Young Men’s Christian Association of Greater New York*, 269 AD2d 105, the plaintiff who fell off a swing rope was an adult who observed several adults participate in the activity before her lose their grip on the swing rope and fall. In *Fintzi v. New Jersey YMHA-YMHA Camps*, a ten-year old fell on a “grassy field that was wet due to morning humidity and fog”. In *Tobin v. Hewlett Branch Athletes, Inc.*, the infant who was injured while playing a game of tossing a ball with a counselor and other campers, had played the game “for a number of years” and “had frequently engaged in and enjoyed the game and was adept in playing it”. In *Conway v. O’Keefe*, *supra*, the infant plaintiff failed to raise an issue of fact as to whether the defendant unreasonably increased “the inherent risks of injury associated with the infant plaintiff jumping his bike off the subject ramp”. In *Lumley v. Motts*, *supra*, the infant plaintiff sued a fellow infant’s parent for injuries sustained in a game, “kick the can”, played at the defendant’s house.

Additionally, while the defendant contends that it provided adequate supervision as it provided four counselors, there is insufficient proof that the defendant provided adequate, if any, instruction. Apparently one counselor told the children that they will be going through an obstacle course, jumping over this and through that, including jumping over the V-shaped apparatus. Such proof is insufficient to demonstrate proper or adequate instruction. In any event, an issue of fact exists as to whether the defendant provided adequate supervision as plaintiff contends there were no spotters assigned to the V-shaped apparatus at the time of the incident.

In light of the foregoing, the defendant's motion for summary judgment is denied.

ENTER:

  
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J.S.C.

Dated: March 17, 2008

cc: Jonathan Silver, Esq.  
Wilson, Elser, Moskowitz, Edelman & Dicker LLP

NASSAU INDEX # 20  
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MAR 20 2008  
COUNTY CLERK OF  
NASSAU COUNTY