SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CIVIL TERM, PART 6
HON. JAMES G. STARKEY

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DIANDRA MORRISON, an Infant by her Mother and Natural Guardian, CHARMANE MORRISON, DERRON MORRISON, an Infant, by his Mother and Natural Guardian, CHARMANE MORRISON, and CHARMANE MORRISON, Individually,

Index No.: 29671/2004

Plaintiff,

DECISION

-against-

LECESTER GRANT, SYMONE D. GRANT, GENERATIONS YOUTH CENTER, INC., individually and d/b/a CAMP GENERATIONS, DERRICK DAWSON, DERRICK DAWSON, individually and d/b/a CAMP GENERATIONS, and KERAN PHILLIP,

Dated: July 2, 2008.

Defendants.

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APPEARANCES OF COUNSEL

For the Plaintiff(s):
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For the Defendant(s): GENERATIONS YOUTH CENTER, INC., individually and d/b/a CAMP GENERATIONS and KERAN PHILLIP
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For the Defendant(s): DERRICK DAWSON, DERRICK DAWSON individually and d/b/a CAMP GENERATIONS,
MULHOLLAND, MINION & ROE
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For the Defendant(s): LECESTER GRANT & SYMONE D. GRANT
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Caption: MORRISON v. GRANT, et al. Index No.: 29671/2004

By notice of motion dated October 22, 2007, and amended notice of motion dated October 29, 2007, defendants Generations Youth Center, Inc., individually and d/b/a Camp Generations, and Keran Phillip, seek summary judgment pursuant to CPLR § 3212 dismissing all plaintiffs' claims in this matter. By notice of cross motion dated November 1, 2007, defendants Derrick Dawson and Derrick Dawson, individually and d/b/a Camp Generations, join in seeking summary judgment pursuant to CPLR § 3212.

FACTS AND PROCEDURAL BACKGROUND

On June 9, 2004, then seven year old infant plaintiff Diandra Morrison and her brother, co-plaintiff Derron Morrison, were driven home by defendant Keran Phillip operating a van from an after school program operated by defendants. At approximately 7:30PM, defendant Phillip parked the van next to the curb across the street from the Morrison residence on Ashford Street, Brooklyn, New York. Infant plaintiffs were the last passengers on this van to be dropped off that day and defendant Phillip intended to get out of the van (as he had done in the past in accordance with custom and practice for such employees) and help them cross the street. While defendant Phillip engaged in conversation with plaintiff Derron Morrison, infant plaintiff Diandra Morrison alighted from the van through the curbside door and attempted to cross the street, unassisted, from behind the van. She was struck by a vehicle owned by defendant Symone D. Grant and operated by her father, co-defendant Lecester Grant. Defendants claim that the infant plaintiff's attempt to cross the street, unassisted and against the prior instructions of her mother and the warnings of defendant Phillip to remain on the bus, constitute both a superseding or intervening

cause relieving all moving defendants of liability, or alternatively, a complete bar as infant plaintiff assumed the risk of crossing the street.

LAW AND APPLICATION

Summary judgment is a drastic remedy, and should be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). The burden is upon the moving party to make a prima facie showing that the movant is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. *Giuffrida v. Citibank*, 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772 (2003). A failure to make that showing requires the denial of the motion, regardless of the adequacy of the opposing papers. *Ayotte v. Gervasio*, 81 NY 2d 1062, 601 N.Y.S.2d 463, 619 N.E.2d 400 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez v. Prospect Hospital*, *supra,* at 324.111

Where the acts of a third party intervene between the defendants' conduct and the plaintiff's injury, the causal connection is not automatically severed. Instead, liability turns upon whether the intervening act was a foreseeable consequence of defendants' negligence. See *Derdiarian v. Felix Contr. Co.*, 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980). As noted above, defendant Phillip intended to get out of the van and help plaintiffs cross the street, as he had done in the past, and crossing the children was custom and practice for the bus operators. A prime hazard associated with the dereliction or failure to cross the children safely is the possibility that they would be struck by another motor vehicle. In such circumstances, the court cannot say as a matter of law that infant plaintiff's conduct was unforeseeable, and

therefore a superseding cause or event which interrupted the link between defendants' negligence and plaintiff's injuries. See *Derdiarian v. Felix Contr. Co.*, supra at 316; *Shutak v. Handler*, 190 A.D.2d 345, 347, 599 N.Y.S.2d 24 (1st Dept. 1993).

Further, defendants had a duty to supervise adequately infant plaintiffs entrusted to their care, and can be held liable for foreseeable injuries proximately related to the lack of adequate supervision. See *Singh v. Persaud*, 269 A.D.2d 381, 702 N.Y.S.2d 628 (2nd Dept. 2000); *Breland v. Flushing YMCA*, 245 A.D.2d 410, 666 N.Y.S.2d 473 (2nd Dept. 1997). Defendants also had a duty to exercise reasonable care at all times, including the obligation to provide a safe place to alight the vehicle, especially when the passenger is an infant. See *Ross v. Ching*, 146 A.D.2d 55, 539 N.Y.S.2d 181 (4th Dept. 1989). What constitutes reasonable care depends on the facts and circumstances of the case and presents questions of fact proper for jury resolution. See *Ross v. Ching*, supra at 58.

As to the claim of assumption of the risk by the infant plaintiff, the doctrine provides a defense to a personal injury claim if it is shown that the condition or activity that caused the injury involved an inherent, known and obvious risk that was voluntarily assumed by plaintiff. See *Clark v. Interlaken Owners, Inc.*, 2 A.D.3d 338, 339, 770 N.Y.S.2d 58 (1st Dept. 2003). But awareness of the risk is not to be determined in a vacuum, but against the background, skill and experience of a particular plaintiff. See *Morgan v. State of New York*, 90 N.Y.2d 471, 486, 662 N.Y.2d 421, 685 N.E.2d 202 (1997). For this doctrine to apply, plaintiff must have the capacity to understand and fully appreciate the risk involved. See *Clark v. Interlaken Owners, Inc.*, supra at 339. By that standard, it cannot be said as a matter of law that the seven year old plaintiff assumed the risk as a matter of law.

As to the claim of the infant plaintiff Derron Morrison of negligent infliction of emotional distress however, it does fall short of the necessary elements. It is true that a plaintiff who has been negligently exposed by a defendant to an unreasonable risk of bodily injury or death may recover, as a proper element of his or her damages, injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family. See *Bovsun v. Sanperi*, 61 N.Y.2d 219, 230, 473 N.Y.S.2d 357, 461 N.E.2d 843 (1984). But the infant plaintiff, Derron Morrison, was not himself exposed to an unreasonable risk of bodily injury or death, since he remained either on the bus or on the sidewalk when his sister was struck by the vehicle. Therefore, he was never in the "zone of danger", a pre-requisite for recovery. See *Gonzalez v. New York City Housing Authority*, 181 A.D.2d 440, 580 N.Y.S.2d 760 (1st Dept. 1992). Therefore, summary judgment is appropriate on his claims.

CONCLUSION

Defendants' motions therefore are denied to the extent that they seek summary judgment of infant plaintiff Diandra Morrison's claims, as well as the associated derivative claims of her mother, co-plaintiff Charmane Morrison. However, defendants' motions are granted to the extent that they seek dismissal of the claims of infant plaintiff Derron Morrison, as well as the associated derivative claims of his mother.

This constitutes the decision of the court. Plaintiff is directed to settle order on notice.

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J.S.C.