STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

MONICA DANIEL-MARSHALL and
EDWARD G. MARSHALL, SR., individually
and as parents and natural guardians of
CHEYANN A. S. DANIEL-MARSHALL,
an infant under the age of eighteen,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 08-925
RJI NO. 19-09-4214

WAYNE JOHNSON and CATSKILL
CENTRAL SCHOOL DISTRICT,

Defendants.

Supreme Court Greene County All Purpose Term, April 12, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Simon & Schneider
Sara Schneider, Esq.
Attorneys for Plaintiffs
6193 Main Street
Tannersville, New York 12485

Law Office of Epstein & Rayhill
Jeffrey T. Culkin, Esq.
Attorneys for Defendants
950 New Loudon Road, Suite 230
Latham, New York 12110

TERESI, J.:

On November 30, 2005, then nine year old Cheyann A.S. Daniel-Marshall (hereinafter "Cheyann") was practicing volleyball. Practice was held at a Catskill Elementary School District

(hereinafter "Catskill") gym and coached by Wayne Johnson (hereinafter "Johnson")[1]. After Cheyann finished participating in a running drill, she ran under the volleyball net. The top of her head caught the bottom of the net, she fell and was injured. On this record, the above facts are uncontested.

Plaintiffs commenced this action seeking damages due to the injuries Cheyann sustained. Issue was joined by Defendants, discovery is complete and a trial date certain is set. Defendants now move for summary judgement, claiming that the doctrine of "primary assumption of the risk" bars Plaintiffs' claims against both Defendants and, as against Catskill, that no evidence of negligence exists. Plaintiffs opposes the motions. Because Defendants failed to demonstrate their entitlement to judgment as a matter of law on either theory, their motions are denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

It is well established that the proponent of a summary judgment motion bears the "threshold burden of tendering evidentiary proof in admissible form establishing entitlement to judgment as a matter of law." (Chiarini ex rel. Chiarini v. County of Ulster, 9 AD3d 769 [3d Dept. 2004], Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008], Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). A movant fails to meet their burden by "pointing to gaps in... proof", rather the movant's obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries, Inc., 223 A.D.2d 913, 914 [3d Dept.1996]). Moreover, while the submission of an attorney's affidavit with attachments containing testimony of individuals with "personal

[1] Catskill and Johnson will hereinafter be collectively referred to as Defendants.

knowledge" is not fatal to the proponent's motion for summary judgment (Olan v. Farrell Lines Inc., 64 NY2d 1092 [1985]), the motion must still be supported by a "person having knowledge of the facts" or other "admissible proof". (CPLR §3212(b), Alvarez v. Prospect Hospital, supra).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]; Manculich v. Dependable Auto Sales and Service, Inc., 39 AD3d 1070 [3d Dept. 2007]).

At issue on this motion is the doctrine of primary assumption of risk, which the Court of Appeals specifically addressed earlier this month in Trupia v. Lake George Central School Dist., (__NY3d__, 2010 WL 1286414 [2010]). In an apparent break from precedent, Trupia states: "[w]e do not hold that children may never assume the risks of activities, such as athletics, in which they freely and knowingly engage, either in or out of school-only that the inference of such an assumption as a ground for exculpation may not be made in their case... except in the context of pursuits both unusually risky and beneficial that the defendant has in some non-culpable way enabled." (Id.) Although no "unusually risky" element is found in the Court's prior assumption of risk precedent (*see* Turcotte v. Fell, 68 NY2d 432 [1986]; Morgan v. State of New York, 90 NY2d 471 [1997]; Benitez v. New York City Bd. of Educ., 73 NY2d 650 [1989]; Arbegast v. Board of Educ. of S. New Berlin Cent. School, 65 NY2d 161 [1985]), its holding in Trupia inescapably requires such finding for application of the assumption of risk doctrine.

Prior to analyzing the Trupia "unusually risky" requirement with the facts herein, analysis of Defendants' proof shows that their submissions are, in large measure, defective. Defendants first support their motion with their attorney's affirmation. However, because it was not based

upon "personal knowledge of the operative facts [it is of no]... probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009], Zuckerman v. City of New York, 49 NY2d 557 [1980]). Similarly, two deposition transcripts[2] supporting Defendants' motion are unsigned, unsworn, uncertified and do not constitute admissions; they are therefore inadmissible. (McDonald v. Mauss, 38 AD3d 727 [2d Dept. 2007], Pina v. Flik Intern. Corp., 25 AD3d 772 [2d Dept. 2006], Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2d Dept. 2008], Chisholm v. Mahoney, 302 AD2d 792 [3d Dept. 2003]). Such exclusions leave Defendants' motion supported only by the pleadings and the facts set forth in Cheyann's 50-h hearing, an exhibit at the hearing and her deposition transcript.[3]

Such proof, however, fails to sufficiently demonstrate, as a matter of law, that Cheyann's "pursuit", volleyball or jogging, was "unusually risky." (Id.) Cheyann's testimony establishes that she was injured while engaged in her second or third volleyball practice, participating in a timed running drill. The players, including Cheyann, were directed to run from one end of the school's gym to the other, with no obstacles obstructing their way. The players took turns, one at a time, completing the timed run. Upon completion, each player would return to the start side of the gym, passing under a large well marked volleyball net to do so. Cheyann did not testify that she was directed to run under the net or to even return quickly to the start side of the gym.

---

[2] Deposition transcripts of Wayne Johnson and John Willabay.

[3] While neither the 50-h hearing transcript or the deposition transcript were signed or exchanged in accord with CPLR §3116(a), they were certified. As such both will be considered herein because on "a motion for summary judgment, just as an affidavit may be used, an unsigned certified deposition may also be used." (In re Estate of Ciraolo, 10 Misc3d 1070(A) [Sur. Ct. Kings Co. 2005]).

Rather, she testified that, as she jogged back to the start side of the gym, she was undistracted, she was looking straight at the net and saw the net well before coming into contact with it. She further verified that the gym was lit. Such testimony fails to demonstrate that either the volleyball practice in general, or the specific running drill in particular, were "unusually risky." As such, Defendants did not demonstrate the applicability of the assumption of risk doctrine as a matter of law, and their summary judgment motion is denied.

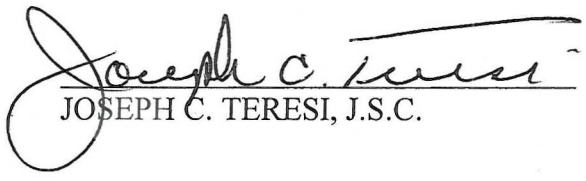
Similarly unavailing is defendant Catskill's motion for summary judgment. Catskill's motion is fundamentally flawed because it impermissibly places the burden of proof on their summary judgment motion onto Plaintiffs. Catskill's premise, as supported solely by their attorney's affirmation, is that "there is no evidence of any defect in the gym or the volleyball net." Catskill offers no probative evidence for such proposition, instead relying on an alleged lack of Plaintiffs' proof. Such argument, which merely "point[s] to gaps in... proof", fails to demonstrate Catskill's entitlement to judgment as a matter of law. (Antonucci, supra).

Accordingly, both of Defendants' motions for summary judgment are denied.

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 29, 2010
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 16, 2010, Affirmation of Jeffrey Culkin, dated March 16, 2010, with attached Exhibits A-I.
2. Affirmation of Sarah Schneider, dated April 2, 2010.
3. Reply Affirmation of Jeffrey Culkin, dated April 9, 2010, with attached Exhibit A.