

**Ditta v Nesaquake Middle School**

2011 NY Slip Op 32791(U)

October 20, 2011

Supreme Court, Suffolk County

Docket Number: 10-10230

Judge: Thomas F. Whelan

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INDEX No. 10-10230  
CAL. No. 11-00395OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 4-15-11  
ADJ. DATE 6-6-11  
Mot. Seq. # 001 - MD

-----X		
KRISTINA DITTA, an infant under the age of	:	CHARLES G. EICHINGER & ASSOCs, P.C.
fourteen (14) years, by her mother and natural	:	Attorney for Plaintiff
guardian, BRENDA DITTA and BRENDA	:	One Suffolk Square, Suite 510,
	:	1601 Veterans Hwy.
DITTA, Individually,	:	Islandia, New York 11749
	:	
Plaintiff,	:	AHMUTY, DEMERS & McMANUS
- against -	:	Attorney for Smithtown CSD & Alyssa Papesca
	:	200 I.U. Willets Road
NESAQUAKE MIDDLE SCHOOL,	:	Albertson, New York 11507
SMITHTOWN CENTRAL SCHOOL DISTRICT	:	
and ALYSSA PAPESCA,	:	
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 18 read on this motion; 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 - 16; Replying Affidavits and supporting papers 17 - 18; Other    ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (#001) by the defendants, Smithtown Central School District and Alyssa Papesca, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint insofar as it is asserted against them is denied.

This is an action to recover damages for personal injuries allegedly sustained by Kristina Ditta ("the plaintiff"), an infant, when she fell while performing a cheerleading maneuver during cheerleading practice at Nesaquake Middle School. In the complaint, the plaintiffs allege that the defendants were negligent, *inter alia*, in causing the premises to be unsafe, failing to provide proper mats, and recklessly supervising cheerleading practice

Defendants, Smithtown Central School District ("the School District") and Alyssa Papesca, the cheerleading coach, now move for summary judgment on the grounds that the plaintiff assumed the risks of her participation in cheerleading, that adequate supervision, safety precautions, and devices were

provided on the day of the accident, and that the accident was of such a spontaneous nature that no level of supervision could have prevented it. In support of their motion for summary judgment, the defendants submit a copy of the pleadings, a copy of the transcript from the plaintiff's 50-h hearing, and copies of the deposition transcripts of the plaintiff and Papesca.

The infant plaintiff testified at her 50-h hearing that she has been cheering since she was very young and has always performed stunts in which she was the flyer. She was aware that she could fall while performing stunts and had fallen prior to this accident while performing stunts. The instant accident occurred when she was in the eighth grade while she was practicing a shoulder stand during cheerleading practice. Papesca taught her approximately one month before the accident how to perform a shoulder stand. Papesca was present when the accident occurred and was sitting approximately 20 feet away from where she was located on the mat. The infant plaintiff believes that Papesca did not witness the fall because Papesca was "always texting on her phone". There are four cheerleaders in each base group while performing a stunt, including one flyer. After each stunt is completed, the base group will shout out "cradle" which signals the flyer to jump down and be caught by the group. If the flyer loses balance, she will shout out "cradle" and her group will catch her.

Prior to the accident, Papesca told the cheerleaders to roll out one mat. They normally used two mats during practice but since this practice was right before a game, they only used one mat. When two mats are used, there is more room on the mat for all of the cheerleaders. After rolling out one mat, the infant plaintiff's group performed one shoulder stand and decided to practice another. During the second shoulder stand, the group was not in sync and lost balance. The infant plaintiff fell over the baser's head and onto the gym floor which is made of "hard rubber." She landed on her arm. After she got up, her arm was dangling and she walked over to Papesca and told her that she thought that she broke her arm. The infant plaintiff testified at her deposition that there was no spotter protecting squad members from falls on the date of the accident because spotters are used only when a group attempts new stunts.

Papesca testified at her deposition that she is employed by the School District as a cheerleading coach. She taught all 19 of the cheerleaders at a beginner level. After the plaintiff had been cheering for two months, she was no longer at the beginner level and she was not having any difficulties performing. On the date of the accident, she saw the plaintiff fall on the mat. She was approximately 10-15 feet away from her when she fell. Based on her observations, the plaintiff fell because she did not dismount from the stunt in the way that she was taught and which would have enabled her base group to catch her. She saw the plaintiff fall on the mat. There was no additional spotter other than the plaintiff's base group because the plaintiff had mastered the stunt. A base group consists of a main base, a side base and a spotter. Papesca testified that the purpose of the mat is to provide additional safety for the cheerleaders. The mat is approximately 42 feet long and accommodated all of the cheerleaders. If the cheerleaders were learning a new skill, she would roll out two mats as an extra safety precaution. On game days, they only used one mat because they were not learning any new skills. Cheerleaders had fallen prior to this accident while performing stunts, and she always watches the cheerleaders while they are practicing and performing.

In support of their motion, the defendants rely, in large part, upon the defense of primary assumption of risk. They contend that the proof adduced was sufficient to establish, *prima facie*, their entitlement to summary judgment as a matter of law since it established that the infant plaintiff voluntarily engaged in the activity of cheerleading, including the performance of stunts, and that she understood risks inherent in the activity. The moving defendants further contend that the proof

established that there was no actionable lack of supervision on their part which would warrant the imposition of liability against them under theories of negligent.

In opposition, the plaintiffs argue that an award of summary judgment is unwarranted under the circumstances of this case. The assumption of risk defense, upon which the defendants rely to defeat the plaintiff's negligence claims, has not been established as a matter of law, since there is ample evidence in the record that School District and defendant Papesca unreasonably increased the risks to the plaintiff by failing to provide two mats for the squad as was usual and customary. In this regard, the plaintiffs contend that by providing only one mat for the squad on the day of the accident, the area on which the squad was practicing was reduced by half of that normally used. Squad members thus squeezed together so as to provide all members with mat beneath them. This caused the squad to become stilted, unstable and out of sync in the performance of the shoulder stand from which the infant plaintiff fell. These factors and others, including the production of a sworn statement from Denise King, the mother of another cheerleader, who witnessed Papesca not supervising the cheerleaders performing at a soccer game a week before the plaintiff's accident, are alleged to be sufficient to raise a triable issues of fact that preclude the granting of the instant motion.

For the reasons stated below, the motion is denied.

In 2009, the assumption of risk doctrine was described the Appellate Division, Second Department in *Cotty v Town of Southampton* (64 AD3d 251, 880 NYS2d 656 [2009]) as follows:

Under the doctrine of primary assumption of risk, a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions, and risks which are inherent in the activity (*see Morgan v. State of New York*, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421 [1997]; *Turcotte v. Fell*, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49 [1986]). Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation (*see Morgan v. State of New York*, 90 N.Y.2d at 484, 662 N.Y.S.2d 421; *Turcotte v. Fell*, 68 N.Y.2d at 439, 510 N.Y.S.2d 49 [1986]). Because determining the existence and scope of a duty of care requires "an examination of plaintiff's reasonable expectations of the care owed him by others" (*Turcotte v. Fell*, 68 N.Y.2d at 437, 510 N.Y.S.2d 49 [1986]), the plaintiff's consent does not merely furnish the defendant with a defense; it eliminates the duty of care that would otherwise exist. Accordingly, when a plaintiff assumes the risk of participating in a sporting event, "the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence" (*id.* at 438, 510 N.Y.S.2d 49, 502 N.E.2d 964, quoting Prosser and Keeton, *Torts* § 68, at 480-481 [5th ed.] ).

The policy underlying the doctrine of primary assumption of risk is "to facilitate free and vigorous participation in athletic activities" (*Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650,

657, 543 N.Y.S.2d 29 [1989]). Without the doctrine, athletes may be reluctant to play aggressively, for fear of being sued by an opposing player. As long as the defendant's conduct does not unreasonably increase the risks assumed by the plaintiff, the defendant will be shielded by the doctrine of primary assumption of risk (*see* *Morgan v. State of New York*, 90 N.Y.2d at 485, 662 N.Y.S.2d 421; *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d at 658, 543 N.Y.S.2d 29; *Muniz v. Warwick School Dist.*, 293 A.D.2d 724, 743 N.Y.S.2d 113 [2d Dept. 2002]).

The doctrine also has been extended to the condition of the playing surface. If an athlete is injured as a result of a defect in, or feature of, the field, court, track, or course upon which the sport is being played, the owner of the premises will be protected by the doctrine of primary assumption of risk as long as risk presented by the condition is inherent in the sport (*see* *Trevett v. City of Little Falls*, 6 N.Y.3d 884, 816 N.Y.S.2d 738 [2006]; *Sykes v. County of Erie*, 94 N.Y.2d 912, 707 N.Y.S.2d 374 [2002]; *Ribaudo v. La Salle Inst.*, 45 A.D.3d 556, 846 N.Y.S.2d 209 [2d Dept. 2007]). If the playing surface is as safe as it appears to be, and the condition in question is not concealed such that it unreasonably increases risk assumed by the players, the doctrine applies (*see* *Fintzi v. New Jersey YMHA-YWHA Camps*, 97 N.Y.2d 669, 739 N.Y.S.2d 85 [2001]; *Turcotte v. Fell*, 68 N.Y.2d at 439, 510 N.Y.S.2d 49 [1986]; *Rosenbaum v. Bayis Ne'Emon, Inc.*, 32 A.D.3d 534, 820 N.Y.S.2d 326 [2d Dept 2006]; *Joseph v. New York Racing Assn.*, 28 A.D.3d 105, 108, 809 N.Y.S.2d 526 2d Dept. 2006)).

Since participants will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks, the courts have recognized that “[f]aulty safety features of the playing field, not directly used in playing the game, are ‘not automatically an inherent risk of the sport as a matter of law’ for purposes of summary judgment” (*Cevetillo v Town of Mount Pleasant*, 262 AD2d 517, 692 NYS2d 426 [2d Dept 1999], *quoting*, *Siegel v City of New York*, *sub non*, *Morgan v State of New York*, 90 NY2d 471, 488, 662 NYS2d 421 [1997], *supra*; *see also* *Fithian v. Sag Harbor Union Free School Dist.*, 54 AD3d 719, 864 NYS2d 456 [2d Dept 2008]). In addition, where there is evidence of a failure on the part of school employees to issue safety gear or to assure the use of safety equipment by participating students summary judgment on the assumption of risk doctrine is precluded (*see* *Muniz v Warwick School Dist.*, 293 AD2d 724, 743 NYS2d 113 [2d Dept 2002]). Even in those cases wherein the risk of injury is assumed, “a school must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed, or unreasonably increased risks” (*Lomonico v Massapequa Pub. Schools*, 84 AD3d 1033, 1034, 923 NYS2d 631, 632 [internal quotation marks omitted]; *see* *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29 [1989]; *Musante v Oceanside Union Free School Dist.*, 63 AD3d 806, 881 NYS2d 446 [2d Dept 2009]; *Driever v Spackenkill Union Free School Dist.*, 20 AD3d 384, 798 NYS2d 145 [2d Dept 2005]).

Notwithstanding pronouncements from the Court of Appeals that “[g]enerally, assumption of risk is not an absolute defense, but is treated as an issue of fact” (*Maddox v City of New York*, 66 NY2d 270, at 279, *supra*), appellate case authorities have broadly applied the assumption of risk doctrine as complete defense in bar to negligence claims by persons injured in voluntary sporting events (*see e.g. Reidy v Raman*, 85 AD3d 892, 924 NYS2d 581 [2d Dept 2011]; *Palladino v Lindenhurst Union Free School Dist.*, 84 AD3d 1194, 924 NYS2d 474 [2d Dept 2011]). However, the Court of Appeals recently signaled its concern with such broad applications of the doctrine, since the result is largely incongruent with codified principles of comparative negligence.

In *Trupia ex rel. Trupia v. Lake George Central School*, (14 NY3d 392, 901 NYS2d 127 [2010]), the Court of Appeals recognized that the blanket application of assumption of risk in every sporting activity was not correct and limited application of the doctrine primarily to protect sponsors of athletic and recreational activities from liability that arose from these activities (*id.*, at 396, 901 N.Y.S.2d 127). After observing that “the effect of the doctrine’s application is often not different from that which would have obtained by resort to the complete defenses purportedly abandoned with the advent of comparative causation” the court noted that culpable conduct on the part of a defendant causally related to a plaintiff’s harm is rendered nonactionable by reason of culpable conduct on the plaintiff’s part that does not entirely account for the complained-of harm. Continuing, the Court stated “[w]hile it may be theoretically satisfying to view such conduct by a plaintiff as signifying consent, in most contexts this is a highly artificial construct and all that is actually involved is a result-oriented application of a complete bar to recovery”. The Court declared that a “renaissance of contributory negligence replete with all its common-law potency is precisely what the comparative negligence statute was enacted to avoid” (*id.* at 395, 901 NYS2d 127). The Court went on to state that the protection afforded under the doctrine “was a policy matter because of the enormous social value” that athletic and recreational activities impart, “even while they involve significantly heightened risks” and it noted that it had “employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise” (*id.*).

The Court in *Trupia* found that application of the doctrine of assumption of risk “must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation (*see Arbegast v. Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 168, 490 NYS2d 751[1985]) that the Legislature has deemed applicable to any action to recover damages for personal injury, injury to property, or wrongful death’ (CPLR 1411 [emphasis added])”. “Little would remain of an educational institution’s obligation ... to supervise the children in its charge if school children could generally be deemed to have consented in advance” to the dangers arising from their risky or imprudent conduct. (*Id.* at 396, 901 NYS2d 127). The Court thus declined to apply the assumption of risk doctrine to bar the claims of the 12 year old infant plaintiff who was injured sliding down a bannister while at summer school because the case was not one where defendant “solely by reason of having sponsored or otherwise supported some risk-laden, but socially valuable voluntary activity has been called to account in damages” (*id.* at 396, 901 NYS2d 127). In closing, the majority noted as follows: “We 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, or for that matter where adults are concerned, except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled” (*id.*).

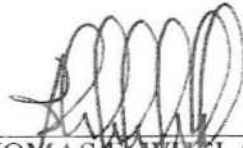
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Here, the court finds that genuine questions of fact exist regarding the applicability of the doctrine under the facts and circumstances presented herein regarding the injury sustained by the infant plaintiff (see *Palladino v Lindenhurst Union Free School Dist.*, 84 AD3d 1194, *supra*, Skelos, J.P., *concurring op.*); *Smith ex rel. Smith-Haywood v City of New York*, 84 AD3d 631, 923 NYS2d 504 [2d Dept. 2011]; *Gallagher v County of Nassau*, 74 AD3d 877, 902 NYS2d 640 [2d Dept. 2010]; *Rosenbaum v Bayis Ne'Emon, Inc.*, 32 AD3d 534, 820 NYS2d 326 [2d Dept. 2006]; *Munz v Warwick School Dist.*, 293 AD2d 724, 743 NYS2d 113 [2d Dept 2002]; *Siconolfi v Lakeland Cent. School Dist.*, 281 AD2d 469, 721 NYS2d 564 [2d Dept 2001]). Such questions include whether the placement of a single mat rather than the customary two mats, and/or the absence of a spotter constituted a breach of the defendants' duty to protect the infant plaintiff from unassumed, concealed, or unreasonably increased risks (see *Bukowski v Clarkson University*, 86 AD3d 736 928 NYS2d 369 [3d Dept. 2011]; *Fithian v Sag Harbor Union Free School Dist.*, 54 AD3d 719, 864 NYS2d 456 [2d Dept. 2009]; *Morales v Beacon City School Dist.*, 44 AD3d 724, 843 NYS2d 646 [2d Dept 2007]; *Muniz v Warwick School Dist.*, 293 AD2d 724, *supra*). Questions of fact also exist regarding whether defendant Papesca failed to adequately supervise the cheerleading squad on the date of the infant plaintiff's accident (see *Sarnes v City of New York*, 73 AD3d 1154, 900 NYS2d 894 [2d Dept 2010]; *Smith v City of New York*, 84 AD3d 631, 923 NYS2d 504 [1<sup>st</sup> Dept 2011]; *Simmons v Saugerties Cent. School Dist.*, 82 AD3d 1407, 918 NYS2d 661 [3d Dept 2011]; *Traficenti v Moore Catholic High School*, 282 AD2d 216, 724 NYS2d 24 [1<sup>st</sup> Dept 2001]; *Cody v Massapequa Union Free School Dist. No. 23*, 227 AD2d 368, 642 NYS2d 329 [2d Dept 1996]).

In view of the foregoing, the instant motion is denied.

Dated: \_\_\_\_\_

10/26/11

  
\_\_\_\_\_  
THOMAS F. WHELAN, J.S.C.