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SHORT FORM ORDER

COPY

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RETURN DATE: **7-22-11**
MOT. SEQ. # **001**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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KRISTEN McCARTHY, an Infant by her father and Natural guardian, THOMAS McCARTHY, and THOMAS McCARTHY, Individually,

Plaintiffs,

-against-

CONNETQUOT CENTRAL SCHOOL DISTRICT,

Defendant.

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CALENDAR DATE: October 12, 2011
MNEMONIC: MG; C/Disp.

PLTF'S/PET'S ATTORNEY:
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Bay Shore, New York 11706

DEFT'S/RESP ATTORNEY:
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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-12 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 13-20 ; Replying Affidavits and supporting papers 21-24 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendant, Connetquot Central School District, for summary judgment and dismissal of the complaint of the plaintiffs', Kristen McCarthy, an infant by her father and natural guardian, Thomas McCarthy, and Thomas McCarthy, individually, pursuant to CPLR §3212 on the grounds of assumption of the risk is granted and the plaintiffs' action is dismissed.

The plaintiff Kristen McCarthy instituted this negligence action for personal injuries alleged sustained as a result of a fall while participating as a member of the cheerleading team at the defendant's school. The plaintiff was 14 years of age, in the ninth grade and attending high school located at 190 Seventh Street in Bohemia, Suffolk County on Long Island, New York. On November 6, 2009, the date of the accident, the infant plaintiff was in the wrestling room at school as a cheerleader practicing with approximately 20 other members of the junior varsity ninth grade squad. The practices were conducted during the summer months once a week and every day after school from about 3:00 pm until 5:30 pm. The plaintiff had been a member of the cheerleading squad since the sixth grade. The plaintiff stated that she fell when she was practicing a stunt with her squad which involved her being lifted in the air as a "flyer" by two other cheerleaders who were the "base" holding her by the ankles and with a spotter behind her. The wrestling room was described by her as having the whole floor covered in matting approximately 3-4 inches thick. The plaintiff also indicated she had fallen during cheerleading around 50 times and observed other cheerleaders fall while attempting to perform stunts. When the plaintiff fell, she fractured her left leg and her father thereafter instituted the present lawsuit on her behalf.

The defendant now moves for summary judgment pursuant to CPLR §3212 seeking dismissal of the plaintiffs' complaint alleging negligent supervision, failure to provide a safe

place to practice and general negligence arguing the defendant was not negligent and that the plaintiff assumed the risks associated with being a voluntary participant in a sporting event/cheerleading and that her fall while being lifted was not an unanticipated or increased risk from those risks generally associated with this activity. The plaintiffs oppose the requested relief and claim, through their expert, Carol L. Albert, Ed. D (hereinafter Albert), that the defendant's coach, Emily Cangeleri, provided no education credentials or training to coach cheerleading and that the plaintiff was not adequately instructed on the correct way to fall. In reply, the defendant argues that Albert's opinion is based upon "non-mandatory guidelines and her own personal belief."

For the following reasons, the defendant's motion for summary judgment and dismissal of the plaintiffs' complaint pursuant to CPLR §3212 is granted in its entirety and the plaintiffs' action is dismissed.

The Court's function on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

The Court must consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The Court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of her day in Court [***VanNoy v. Corinth Central School, District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. ***DiSabato v. Soffee***, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); ***Usefof v. Yamali***, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

A school is not an insurer of the safety of its students from all injuries and is only obligated to exercise such care as a parent of ordinary prudence would exercise under similar circumstances. See, ***David v. County of Suffolk & Smithtown School District***, 295 AD2d 556, 744 NYS2d 863 (2nd Dept.2002) aff'd 1 NY3rd 525, 775 NYS2d 229 (2003). In this regard, as to school sporting activities, certain rules apply as the Courts have "recognized that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and have 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". ***Trupio v Lake George Cent. School District***, 14 NY3d 392, 395, 901 NYS2d 127 (2010).

In ***Benitez v. New York City Board of Education***, 73 NY2d 650, 543 NYS2d 29 (1989), the Court of Appeals stated:

> " As an integral part of athletic competitions, persons are generally held by their actual and implied consents to the risks of 'injury-causing events which are known, apparent or reasonably foreseeable consequences of their participation' " citing ***Turcotte v. Fell***, 68 NY2d 432,439, 510 NYS2d 49.

In a case where the plaintiff fell on a jungle gym, the Court in ***Auwarter v. Malverne Free School District***, 274 AD2d 528, 715 NYS2d 852 (2nd Dept 2000) similarly held that where a plaintiff engages in an activity at elevated heights and invites the possibility of falling, he/she assumes the risks of injury attendant with a fall from an elevated position. By engaging in a sport or recreational activity, the plaintiff consents to those commonly appreciated dangers and risks inherent in and which arise from the sport generally and which flow from such participation. See, ***Morgan v. State of New York***, 90 NY2d 471, 662 NYS2d 421 (1997). In assessing whether the defendant has violated a duty of care to the plaintiff, the applicable standard would include whether the conditions caused by the plaintiff's alleged claims of negligence with regard to her fall from an elevated height while engaged in cheerleading practice are "unique and created a dangerous condition over and above the usual dangers inherent in the sport" ***Owen v. RJS Safety Equipment***, 79 NY2d 967, 582 NYS2d 998 (1992).

Here, in the case at bar, the plaintiff was an experienced cheerleader injured during cheerleading practice with the whole squad under the supervision of the cheerleading coach while practicing a lifting stunt in the school's wrestling gym with mats covering the entire floor and two base cheerleaders to hold, lift and steady her along with a spotter. In a case with striking similarities to this case, the Court in ***Lomonico v. Massapequa Public Schools***, 84 AD2d 1033, 923 NYS2d 631 (2nd Dept. 2011) stated:

> "Here, with respect to the issue of liability, the defendant established prima facie, that the infant plaintiff voluntarily engaged in the activity of cheerleading, including the performance of stunts, and that, as an experienced cheerleader, she knew the risks inherent in the activity (see, ***Digiose v. Bellmore-Merrick Cent. High School Dist.***, 50 AD3d 623, 624, 855 NYS2d 199). The defendant also made out a prima facie showing that there was not a

> lack of supervision by the defendant. In addition, the plaintiff assumed the obvious risk of injury from practicing on a bare gym floor (see, ***Traficenti v. Moore Catholic High School***, 282 AD2d 216, 724 NYS2d 24; ***Fisher v. Syosset Cent. School Dist.***, 264 AD2d 438, 694 NYS2d 691)." [lv. denied 94 NY2d 759, 705 NYS2d 5]

In assessing whether the defendant has violated a duty of care to the plaintiff, the applicable standard would include whether the conditions caused by the plaintiff's alleged claims of negligence are "unique and created a dangerous condition over and above the usual dangers inherent in the sport" ***Owen v. RJS Safety Equipment***, *supra*. Here the defendant presents proof that the wrestling room was fully padded, the cheerleading squad was all assembled and each grouping had the two base members, the plaintiff, as the "flyer", and a spotter. Moreover, the type of injury sustained by the plaintiff is the type of injury foreseeable from being elevated above the ground. The fact that the plaintiff understood the risks that she could fall and had fallen approximately 50 times in the past while engaged in the cheerleading activity leads to the conclusion that the possibility of falling was a "known risk" from lifting a cheerleader into the air to perform a stunt. Nowhere does the infant plaintiff suggest or testify about her unawareness of an increased risk from an injury producing event that she could not see or was not aware of at the time she entered the competition of cheerleading. ***Marcano v. City of New York***, 99 NY2d 548, 754 NYS2d 200 (2002).

As the Court noted in ***Joseph v. New York Racing Association, Inc.***, 28 AD3d 105, 809 NYS2d 526 (2nd Dept. 2006), plaintiff may not recover if she is

> "... aware of the existence of a particular condition on the premises where the activity is to be performed, and actually appreciates or should reasonably appreciate the potential danger it poses, yet participates in the activity despite this awareness, he or she must be deemed to have assumed the risk of injury which flows therefrom."

As an integral part of athletic competitions, the plaintiff must be held by her actual or implied consent to the risks of "injury-causing events which are known, apparent or reasonably foreseeable consequences" of her participation in an event or game in which she stands and/or is elevated off the ground to perform a cheerleading stunt which could result in a fall. ***Turcotte v. Fell***, *supra*. Courts have recognized the assumption of such risks inherent in cheerleading such as falling. See, ***Williams v. Clinton Central School District***, 59 AD3d 938, 872 NYS2d 262 (4th Dept. 2009); ***Rendine v. St. John's University, et al.***, 289 AD2d 465, 735 NYS2d 173 (2nd Dept. 2001); ***Webber v. William Floyd School District USFD***, 272 AD2d 396, 707 NYS2d 231 (2nd Dept. 2000); ***Fisher v. Syosset Central School District***, 264 AD2d 438, 694 NYS2d 691 (2nd Dept. 1999);

The plaintiffs' counsel in an attempt to prevent summary judgment to the defendant presents Albert's affidavit which suggests that there was improper supervision or improper padding and that the defendant failed to have a proper experienced spotter present to prevent the plaintiff's fall but the affidavit is conclusory in both form and substance. As was discussed in a similar case involving a cheerleading fall, the Court in ***Digose v. Bellmore-Merrick Central High School District***, *supra*, found that

> "Here, however, the affidavit of the plaintiffs' expert, upon which the plaintiffs relied to oppose the motion, consisted only of speculative and conclusory opinions to support the conclusion that the defendants had unreasonably increased the risks to the plaintiff by failing to provide mats or to instruct and supervise her properly in the activity."

A review of the available testimony does not support the plaintiffs' claim of a lack of supervision, a lack of an experienced spotter, lack of safety or poor professional judgment on behalf of the coach, Emily Cangeleri. See, ***Marcano v. City of New York***, *supra*, which noted that even a complete novice who had not witnessed any contemporaneous incidents was found to have assumed the risks of participation in a specific recreational activity. The risks inherent in performing an elevated cheerleading stunt are well known, certainly obvious and involve risks associated with height and the possibility of a loss of balance resulting in a fall. See, Generally **"Liability of school or school personnel for injury to student resulting from cheerleader activities"** 25 ALR 5th 784. In light of the infant plaintiff's experience of falling some 50 times while cheerleading, the injury in this case, "in sum, was a luckless accident arising from the vigorous voluntary participation in competitive interscholastic athletics." ***Benitez v. New York City Board of Education***, *supra,* at 659. The plaintiffs have failed to establish a factual issue as to an unseen, concealed or unassumed risk to warrant denial of the defendant's motion for summary disposition and dismissal of the plaintiffs' action as the actions engaged in and the resultant fall were known, apparent or reasonably foreseeable consequences of the participation in the elevated lifts associated with cheerleading. ***Gerry v. Commack Union Free School District***, 52 AD3d 467, 860 NYS2d 133 (2nd Dept. 2008); ***Liccone v. Gearing***, 252 AD2d 956, 675 NYS2d 728 (4th Dept. 1998); see also, ***Barbato v. Hollow Hills Country Club***, 14 AD3d 522, 789 NYS2d 199 (2nd Dept. 2005).

Accordingly, the defendant's motion for summary judgment and dismissal of the plaintiffs' complaint pursuant to CPLR §3212 on assumption of the risk grounds is granted in its entirety and the plaintiffs' action is dismissed.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: November 23, 2011

J.S.C.