SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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STEVEN RISPOLI, an infant over the age of 14 by his father and natural guardian, RONALD RISPOLI, and RONALD RISPOLI, individually,

Plaintiff,

-against-

LONG BEACH UNION FREE SCHOOL DISTRICT, LONG ISLAND WRESTLING OFFICIALS ASSOCIATION, INC., and RICHARD PETRACCA,

Defendants.

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TRIAL/IAS PART 20
INDEX No.: 4163/10
Motion Date: 04/05/12
Motion Sequence: 001

DECISION & ORDER

Papers Numbered

Sequence #001
Notice of Motion 1
Memorandum of Law in Support of Motion 2
Affirmation in Opposition 3
Memorandum of Law in Opposition to Motion 4
Reply Memorandum of Law in Further Support of Motion 5

Upon the foregoing papers, defendants', Long Island Wrestling Officials Association, Inc. and Richard Petracca, application pursuant to CPLR §3212 is determined as set forth below.

The plaintiffs in this action seek to recover damages for personal injuries sustained by the infant-plaintiff, Steven Rispoli, while participating in a wrestling match at Long Beach Union Free School District (the "School") on December 6, 2008. Plaintiffs allege that the defendants failed to properly and adequately supervise and control the match. Additionally, they allege that the referee supervising the match was improperly trained, supervised, and prepared as well as negligent, grossly negligent and reckless in failing to make certain calls. Specifically, they fault the referee, Richard Petracca, for failing to call a potentially dangerous position which allegedly would have halted the match in time to prevent the infant- plaintiff's injury.

The defendants, Long Island Wrestling Officials Association, Inc., ("LIWOA") and Referee Petracca, make the instant application seeking summary judgment dismissing the

plaintiffs' complaint based upon the infant-plaintiff's primary assumption of the risk.[1]

"On a motion for summary judgment the facts must be viewed 'in the light most favorable to the non-moving party.' " *Vega v Restani Constr. Corp.*, 18 NY3d 499, quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335. Summary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact . . . and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." *Vega v Restani Constr. Corp., supra*, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320 (internal quotation marks omitted). "The moving party's [f]ailure to make [a] *prima facie* showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Vega v Restani Constr. Corp., supra*, quoting *Alvarez v Prospect Hosp., supra,* at p. 324.

It is well settled that one who voluntarily participates in a sporting activity is deemed to have consented to accept the risk of injuries that are known, apparent or reasonably foreseeable consequences of the participation. See, *Calouri v. County of Suffolk*, 43 A.D.3d 456. The doctrine of assumption of the risk is a form of measurement of a defendant's duty to a voluntary participant in a sporting activity. *Manoly v. City of New York,* 29 AD3d 649. Awareness of the risk assumed must be assessed against the background, skill and experience of the particular plaintiff. *Simmons v. Saugerties Cent. School Dist.* , 82 A.D.3d 1407; *Morales v. Beacon City School Dist.*, 44 A.D.3d 724. The scope of a plaintiff's assumption of risk, and the consequent limitation upon a defendant's duty may vary depending upon a particular plaintiff's capacity to appreciate the risks of an activity. However, application of the doctrine must be loosely circumscribed so as not to seriously undermine and displace the principles of comparative causation. *Trupia v. Lake George Cent. School Dist.,* 14 N.Y3d 392.

The doctrine of assumption of risk will not serve as a bar to liability if the risk is unassumed, concealed or unreasonably increased. *Ribaudo v. La Salle Inst.*, 45 A.D.3d 556. In assessing whether a defendant has violated a duty of care in the context of an injury sustained during a sport or a game, the trier of fact must determine whether the defendant created a unique condition over and above the usual dangers that are inherent in the sport. *Convey v. City of Rye School Dist.,* 271 A.D.2d 154 (citations and internal quotation marks omitted). Further, a participant in a sport will not be deemed to have assumed the risks of reckless or intentional conduct. *Morgan v. State of New York,* 90 N.Y.2d 471.

"Accordingly, the analysis of care owed to plaintiff in the ... sporting event by a coparticipant and by the proprietor of the facility in which it takes place must be evaluated by considering the risks plaintiff assumed when he elected to participate in the event and how those

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[1] The action against the School has been discontinued.

assumed risks qualified defendants' duty to him" *Morgan v. State of New York, supra.*, quoting *Turcotte v. Fell*, 68 N.Y.2d 432 (internal quotation marks omitted).

On the date in question, the infant plaintiff, Steven, was 15 years old and a member of the school's varsity wrestling team. He was participating in the "Battle at the Beach" wrestling tournament hosted by Long Beach High School and was injured during the tournament while wrestling against a member of the New Rochelle High School varsity wrestling team. The injury occurred at the start of the third period, Steven was in the bottom position on all fours and his opponent who was standing wrapped his legs around his torso. Steven stood up with his opponent having "put his legs in." That is, his opponent was hanging on him with his arms as well as his legs wrapped around him and his legs tucked between Steven's crotch. After Steven took a few steps, he fell to the matt and fractured his humerus.

Referee Petracca, defendant, admitted at his examination-before-trial that he stopped the same move three times during the match before Steven got hurt. However, he did so because of the potential danger to Steven's opponent of being flung over Steven's head. He testified that in this position, *i.e.*, the bottom wrestler standing up with the top wrestler hanging on him, it is always the top wrestler's safety that is of concern.

He further testified that each time he stopped the match, he waited two seconds before blowing the whistle to see whether Steven's opponent would "improve his position" but he did not do so. Referee Petracca also testified that when Steven sustained his injury, he had waited approximately two seconds to see if Steven's opponent would "improve his position" by moving his feet toward the mat and he was about to stop the match for the potentially dangerous hold. However, Steven's opponent started to improve his position negating the need to do so. Referee Petracca checked off "potentially dangerous hold" under the category labeled "description of circumstances leading to the injury" when he completed the accident report.

Raymond Adams, the head wrestling coach at the school testified that the risk of a high school student being hurt while wrestling when he is tripped or falls to the mat is inherent in the sport. Roy Scott, a representative who testified on behalf of LIWOA, testified likewise.

The record demonstrates that the infant-plaintiff, Steven, was aware of, appreciated and voluntarily assumed the risk of injury while wrestling. *See, Farrell v Hochhauser*, 65 AD3d 663 (2nd Dept 2009); *Musante v Oceanside Union Free School Dist.*, 63 AD3d 806 (2nd Dept 2009), *lv den.*, 13 NY3d 704 (2009); *Walcott v Lindenhurst Union Free School Dist.*, 243 AD2d 558 (2nd Dept 1997). Nevertheless, the plaintiffs allege that Steven did not assume the risk of negligent refereeing which ultimately caused his injury. At his deposition, Steven testified that before falling, he walked forward and attempted to move out of bounds because the referee failed to make a call. He also testified that his fall was caused by his opponent's weight on his back

Rispoli v. Long Beach UFSD
Index No.: 4163/10

In the instant matter, while viewing the parties' conflicting contentions in the light most favorable to plaintiff (*Pearson v. Kix McBride, LLP*, 63 A.D.3d 895; *Stukas v. Streiter*, 83 A.D.3d 18; *Marine Midland Bank, N.A. v. Dino & Arties' Automatic Transmission Co.*, 168 A.D.2d 610), the record supports plaintiff's contention that there remains a triable question of fact precluding summary judgment. Whether Referee Petracca unreasonably increased the infant-plaintiff's risk of injury by failing to make the proper call remains a question for the trier of fact. See, *Zuckerman v. City of New York*, 49 N.Y.2d 557.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: June 4, 2012
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.

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