SHORT FORM ORDER

INDEX No. 09-5213
CAL. No. 11-01811OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 1-31-12
ADJ. DATE: 3-8-12
Mot. Seq. # 001 - MG
002 - MG

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LORETTA LABARBARA and EDWARD LABARBARA,

Plaintiffs,

- against -

THE CENTER FOR DEVELOPMENTAL DISABILITIES, MELISSA SCHOLTZ, THE TOWN OF HUNTINGTON, THE SOUTH HUNTINGTON UNIFIED SCHOOL DISTRICT,

Defendants.

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Upon the following papers numbered 1 to 72 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 - 30 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 31 - 45; 46 - 60 ; Replying Affidavits and supporting papers 61 - 70; 71 - 72 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant The Center for Developmental Disabilities seeking summary judgment dismissing the complaint and the motion (#002) by defendants Town of Huntington and The South Huntington Unified School District seeking summary judgment dismissing the complaint hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant The Center for Developmental Disabilities seeking summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion by defendants Town of Huntington and The South Huntington Unified School District seeking summary judgment dismissing the complaint and all cross claims against them is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Loretta LaBarbara on December 4, 2007, when she was struck by a participant playing basketball in a recreational program sponsored by defendant Town of Huntington and held at a school facility operated by defendant The South Huntington Unified School District. Pursuant to an agreement between the defendants, the recreational program was held at Maplewood Intermediate School located in the Town of Huntington. The accident allegedly occurred when plaintiff, who, having brought her son to the school to participate in the recreation program, was struck by Melissa Scholtz, a resident of defendant The Center for Developmental Disabilities group home, as she was chasing a basketball. As a result of being hit by Melissa Scholtz, plaintiff was knocked to the ground and sustained injuries to her right hip. At the time of the accident, Melissa Scholtz was playing basketball with a staff member of defendant Town of Huntington and plaintiff was standing near the doorway to the gymnasium, with her back turned to the basketball activity, speaking with another parent. Plaintiff's husband, Edward LaBarbara, instituted a derivative claim for loss of consortium.

Defendant The Center for Developmental Disabilities (hereinafter referred to as "CDD") now moves for summary judgment on the bases that the level of supervision provided to Melissa Scholtz at the time of the incident was not the proximate cause of plaintiff's alleged injuries, and that it did not have a duty to prevent the accident from occurring, because Melissa Shoultz was under the supervision of defendant Town of Huntington. CDD also contends that plaintiff assumed the risk of being struck by a participant in the recreational program by remaining in the gymnasium while the activity was taking place. CDD, in support of the motion, submits copies of the pleadings, the parties' deposition transcripts, and the affidavits of Lena Cutrone and Bharesh Bhatt, former employees of CDD. CDD also submits the deposition transcript of nonparty witness Maria Perciavalle. Defendants Town of Huntington and The South Huntington Unified School District (hereinafter collectively referred to as the "Town") move for summary judgment on the bases that the Town provided adequate supervision, and that the accident occurred in such a short span of time that closer supervision would not have prevented it from occurring. In addition, the Town asserts that plaintiff assumed the foreseeable risk of being hit by a ball or participant, because she was a spectator at the recreational activity, and that they did not create any unique condition over and above the usual dangers associated with the sporting activity. The Town, in support of the motion, submits copies of the pleadings, the plaintiff's 50-H hearing transcript, the parties' deposition transcripts, and copies of the accident reports. The Town also submits the deposition transcript of nonparty witness Maria Perciavalle.

Plaintiff opposes the motions on the grounds that CDD and the Town failed to demonstrate that their failure to supervise Melissa Scholtz was not the proximate cause of the injury sustained by her, and that the collision between Melissa Scholtz and herself was a foreseeable risk of the basketball activity that she assumed. Plaintiff, in opposition to the motion, submits copies of the pleadings and the parties' deposition transcripts. Plaintiff also submits the deposition transcript of nonparty witness Maria Perciavalle.

On a motion for summary judgment the court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; (*see* ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]; ***Tunison v D.J. Stapleton, Inc.***, 43 AD3d 910, 841 NYS2d 615 [2d Dept 2007]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316

[1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In considering the motion, the evidence must be construed in the light most favorable to the non-moving party (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). The motion should not be granted where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of parties or witnesses is in question (***Szczerbiak v Pilat***, 90 NY2d 553, 556, 664 NYS2d 252 [1997]; *see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]; ***Dykeman v Heht***, 52 AD3d 767, 861 NYS2d 732 [2d Dept 2008]; ***Cameron v City of Long Beach***, 297 AD2d 773, 748 NYS2d 26 [2d Dept 2002]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Sheppard- Mobley v King***, 10 AD3d 70, 778 NYS2d 98 [2d Dept 2004]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see* ***Zuckerman v City of New York***, *supra*).

A prima facie case of negligence is established by a plaintiff showing that the defendant's negligence was the substantial cause of the injury producing events (***Boltax v Joy Day Camp***, 67 NY2d 617, 619, 499 NYS2d 600 [1986]; ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]). Although a school or a camp is under a duty to adequately supervise the students in its charge and will be held liable for foreseeable injuries that are proximately related to the absence of such supervision (*see* ***Brady B. v Eden Cent. School Dist.***, 15 NY3d 2897, 907 NYS2d 735 [2010]; ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]), it is not the insurer of safety, since it cannot be expected to continuously supervise and control all of the students's or campers's movements and activities (*see* ***Keavenly v Mahopac Cent. School Dist.***, 71 AD3d 955, 897 NYS2d 222 [2d Dept 2010]; ***Troiani v White Plains City of School Dist.***, 64 AD3d 701, 882 NYS2d 591 [2d Dept 2009]; ***Macalino v Elmont Union Free School Dist.***, 18 AD3d 625, 795 NYS2d 656 [2d Dept 2005]). Concomitantly, a school or camp is required to exercise such care of its students as a parent of ordinary prudence under similar circumstances (***Pratt v Robinson***, 39 NY2d 554, 560, 384 NYS2d 749 [1976]; *see* ***David v County of Suffolk***, 1 NY3d 525, 775 NYS2d 229 [2003]). Whether a student or camper was supervised properly largely depends upon the circumstances attending the event (*see* ***Mei Kay Chan v City of Yonkers***, 34 AD3d 540, 824 NYS2d 380 [2d Dept 2006]; ***Farrukh v Board of Educ. of City of N.Y.***, 227 AD2d 440, 643 NYS2d 118 [1996]).

Furthermore, a plaintiff alleging negligent supervision must demonstrate both that the defendant breached its duty to provide adequate supervision, and that this failure was the proximate cause of the plaintiff's injuries (*see* ***Harris Five Point Mission Camp Olmstedt***, 73 AD3d 1127, 901 NYS2d 678 [2d Dept 2010]; ***Tanenbaum v Minnesauke Elementary School***, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010]) ***MacCormack v Hudson City School Dist. Bd. of Educ.***, 51 AD3d 1121, 856 NYS2d 712 [3d Dept 2008]; ***Paca v City of New York***, 51 AD3d 991, 858 NYS2d 772 [2d Dept 2008]). Although, "a school [or camp] is not liable for every thoughtless or careless act by which one pupil may injure another" (***Lawes v Bd. of Educ. of City of N.Y.***, 16 NY2d 302, 306, 266 NYS2d 364 [1965]; *see* ***McLeod v City of New York***, 32 AD3d 907, 822 NYS2d 562 [2d Dept 2006]; ***Mormon v Ossining Union Free School Dist.***, 297 AD2d 788, 747 NYS2d 586 [2d Dept 2002]), summary judgment will be precluded where inadequate supervision may have unreasonably increased the risk of injury (*see* ***Odekirk v Bellmore-Merrick Cent. School Dist.***, 70 AD3d 910, 895 NYS2d 184 [2d Dept 2010]; ***Kirkland v Hall***, 38 AD3d 497, 832 NYS2d 232 [2d Dept 2007]; ***Siegell v Herricks Union Free School Dist.***,

7 AD3d 607, 777 NYS2d 148 [2d Dept 2004]). However, when an injury is caused by an impulsive, unanticipated act of a fellow student or camper, absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act, a school or camp will not be found negligent (*see* ***Fulger v Capital Dist. YMCA***, 42 AD3d 694, 840 NYS2d 200 [3d Dept 2007]; ***Whitfeld v Board of Educ. of City of Mount Vernon***, 14 AD3d 552, 789 NYS2d 188 [2d Dept 2005]; ***Capotosto v Roman Catholic Diocese of Rockville Ctr.***, 2 AD3d 384, 767 NYS2d 857 [2d Dept 2003]; ***Wuest v Board of Educ. of Middle Country Cent. School Dist.***, 298 AD2d 578, 749 NYS2d 64 [2d Dept 2002]).

Plaintiff testified at an examination before trial that her son, Michael LaBarbara, has autism, mild mental retardation and a seizure disorder, that he has attended the Town's Tuesday night basketball program for 22 years, and that the purpose of the program is socialization and recreation for developmentally disabled adults. Plaintiff testified that parents are not required to remain with their children during the program, but that she generally stays for approximately 10 to 15 minutes to ensure that her son is safe and adjusted. Plaintiff testified that two or three people from the Town supervise the program, that she is unaware of any check-in process, and that there are between 3 and 40 people who attend the program, which is not structured into organized activities. She testified that she has never made any complaints about the program and that she is unaware of anyone else having complained about the program. Plaintiff also testified that she never complained about the CDD staff or its supervision of its clients, but that it was not until after her accident that she became aware that clients from CDD also attended the Town's program.

Plaintiff further testified that when she arrived at the gymnasium on the day of her accident she saw one of the Town's staff members, Jennifer Filippelli, in the middle of the gymnasium, and that the participants were shooting basketballs into basketball hoops. She testified that when her accident occurred she had been in the gymnasium for approximately 10 to 15 minutes, and that she was standing near the doorway, with her back to the gymnasium, talking to her friend, Maria Perciavalle, when she felt "this bang, bang," which caused her to fall to the floor and strike her hip on the metal door buck. Plaintiff testified that she was standing approximately 15 to 20 feet away from the basketball hoop that was being used by the participants, that she never noticed Melissa Scholtz prior to the accident's occurrence, that Mrs. Perciavalle did not say anything before the collision happened, and that she did not hear the sound of a basketball rolling towards her before the incident.

Nonparty witness Maria Perciavalle testified at an examination before trial that she met plaintiff through their children's attendance at the Town's Tuesday night recreation program and that they have known each other for approximately 11 years. Maria Perciavalle testified that her 34 year-old daughter has been attending the program for approximately eight years and that she does not have any complaints about the program. She testified that Michael and Carol Salamando supervise the program and that the Town always has at least two staff members, Jennifer Filippelli and Dina Pagnotta, supervising the participants. She testified that there are two group homes, including CDD, that participate in the program, and that the staff members from the group homes stay at the program with their residents. She testified that she is unaware of any agreements between the group homes and the Town, that the Town does not provide amenities for spectators, and that the few chairs that are placed near the doorway are for the participants who do not want to play or become tired. She testified that when the accident occurred, she and plaintiff had been in the gymnasium for approximately 10 to 15 minutes, standing approximately eight feet from the doorway talking. She testified that "a girl came charging very fast, bumped against her arm, pushing her into the wall, and then slammed into plaintiff, causing her to

fall and hit her right hip on the metal base over the door." Maria Perciavalle testified that she did not see Melissa Scholtz prior to the accident. She further testified that there were approximately 12 participants on the night of plaintiff's accident, that she did not notice anything out of the ordinary prior to the accident, and that the time between the girl running off to chase the ball and the collision with plaintiff was a matter of seconds.

At an examination before trial, Jennifer Filippelli, on behalf of the Town of Huntington, testified that she has worked for the Town for approximately six years as a recreational specialists, and that her duties included supervising people participating in the Town's recreation program. She testified that she did not receive any training prior to becoming a recreational specialist for the Town, but that she had received training on supervising and working with developmentally disabled individuals when she worked with the Association for the Help of Retarded Children just prior to coming to work for the Town. She testified that the Tuesday night basketball program occurs during the school year; that Michael and Carol Salamando, who are her supervisors, are responsible for organizing the program and verify whether a person should participate; and that the amount of participants ranges from between 2 to 20 people. She testified that for the Tuesday night basketball program the entire gymnasium is used, that no barriers or markers are placed on the gymnasium floor, and that approximately four chairs are set up near the door on each side of the gymnasium. She testified that on the night of plaintiff's accident she was playing with Melissa Scholtz, bouncing a basketball back and forth between them, approximately 10 feet from the door was where plaintiff was standing. Jennifer Filippelli testified that Melissa Scholtz ran into plaintiff as she was chasing a basketball that had slipped out of her hands. She testified that she did not stop Melissa Scholtz from going after the ball, because that is what she was expected to do, and she thought Melissa Scholtz would stop before running into anyone. She testified that only seconds passed between the ball slipping from Melissa Scholtz's hands and her running into plaintiff. She testified that Melissa Scholtz, who is nonverbal, had never run into anyone before the accident with plaintiff, and that she is unaware of Melissa Scholtz having any behavioral problems. Jennifer Filippelli testified that Melissa Scholtz was a resident of CDD, that the participants at the Tuesday night basketball program are high functioning, and that the group home residents usually are escorted by staff members from the group homes. Jennifer Filippelli testified that the participants in the program are supervised by the Town's employees; that she is unaware of any complaints ever having been made about the program or CDD's supervision of its residents; that she is unaware of anyone being injured during the program prior to plaintiff's accident; and that there was nothing that she could have done to stop the collision from occurring.

At an examination before trial, Lena Cutrone, on behalf of CDD, testified that she currently is employed by CDD at its "day hab, Building Bridges Day Hab Program," but that at the time of plaintiff's accident she was the assistant manager of West Rogues, one of CDD's Individual Residence Alternative ("IRA") residences. She testified that Melissa Scholtz resided at West Rogues, and that she, along with three other residents participated in the Town's Tuesday night basketball program. Lena Cutrone testified that the Town provides staff members to supervise the participants during the program, that the participants randomly shoot basketballs around the gymnasium depending upon their level of functioning, and that she would facilitate the shooting of the basketballs by her clients until their friends arrived. She testified that she never complained about overcrowding at the Town's program, and that on the night of plaintiff's accident residents from three groups and two other individuals were participating in the basketball activity. Lena Cutrone testified that the residents from her group home had only been at the program for approximately 30 minutes when the incident occurred, and that, while she did not see Melissa Scholtz actually run into plaintiff, she witnessed plaintiff fall through the doorway. Lena Cutrone further testified that prior to plaintiff's accident there had not been any incidents involving Melissa Scholtz and that she had never demonstrated any violent tendencies.

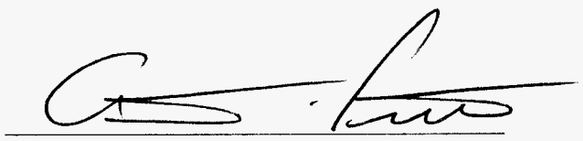
Here, the Town and CDD have established their prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff's injuries were caused by the sudden and spontaneous collision between Melissa Scholtz and plaintiff while she was chasing a basketball during the Town's Tuesday night recreational program for people with developmental disabilities, and that the accident could not have been prevented by the most intense supervision (*see* ***Brian O. v Riverhead Cent. School Dist.***, 95 AD3d 1086, 943 NYS2d 780 [2d Dept 2012]; ***Scarito v St. Joseph Hill Acad.***, 62 AD3d 773, 878 NYS2d 470 [2d Dept 2009]; ***Paragas v Comsewogue Union Free School Dist.***, 65 AD3d 1111, 885 NYS2d 128 [2d Dept 2009]). Indeed, the deposition testimony of nonparty witness, Maria Perciavalle, highlighted the impulsive and sudden nature of Melissa Scholtz's act. "Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the . . .defendants is warranted" (***Weiner v Jericho Union Free School Dist.***, 89 AD3d 728, 729, 932 NYS2d 138 [2d Dept 2011], *quoting* ***Convey v City of Rye School Dist.***, 271 AD2d 154, 160, 710 NYS2d 641 [2d Dept 2000]; *see* ***Luciano v Our Lady of Sorrows School***, 79 AD3d 705, 911 NYS2d 911 [2d Dept 2010]; ***Soldano v Bayport-Blue Union Free School Dist.***, 29 AD3d 891, 815 NYS2d 712 [2d Dept 2006]; ***Reardon v Carle Place Union Free School Dist.***, 27 AD3d 635, 813 NYS2d 150 [2d Dept 2006]). In addition, there is no evidence that any negligent supervision on the part of the Town or CDD was the proximate cause of plaintiff's injuries (*see* ***Keith S. v East Islip Union Free School Dist.***, 96 AD3d 927, 946 NYS2d 638 [2d Dept 2012]; ***Jake F. v Plainview-Old Bethpage Cent. School Dist.***, 94 AD3d 804, 944 NYS2d 152 [2d Dept 2012]). Furthermore, the Town and CDD have established that there was no proof of any prior conduct by Melissa Scholtz that would have put a reasonable person on notice to protect plaintiff against the injury-causing act (*see* ***Diana G. v Our Lady Queen of Martyrs School***, 95 AD3d 944, 944 NYS2d 258 [2d Dept 2012]; ***Buchholz v Patchogue-Medford School Dist.***, 88 AD3d 843, 931 NYS2d 113 [2d Dept 2011]).

Additionally, the Town and CDD made a prima facie showing of its entitlement to judgment as a matter of law based upon the doctrine of primary assumption of the risk by submitting evidence demonstrating that plaintiff was a spectator at the time of her accident and that she was able to appreciate the risks posed by standing inside the gymnasium while the Town's Tuesday night basketball program was occurring (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Nigro v New York Racing Assn., Inc.***, 93 AD3d 647, 939 NYS2d 565 [2d Dept 2012]; ***Koenig v Town of Huntington***, 10 AD3d 632, 782 NYS2d [2d Dept 2004]; ***Starke v Town of Smithtown***, 155 AD2d 526, 547 NYS2d 383 [2d Dept 1989]). Pursuant to the doctrine of primary assumption of risk, one is deemed to have assumed, as a voluntary participant, spectator, or even bystander, certain risks occasioned by athletic or recreational activity; and to the extent of such an assumption, any legally enforceable duty to reduce the risks of such activity is limited (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]; ***Roberts v Boys & Girls Republic, Inc.***, 51 AD3d 246, 850 NYS2d 38 [1st Dept 2008], *aff'd* 10 NY3d 889, 861 NYS2d 603 [2008]; ***Newcomb v Guptill Holding Corp.***, 31 AD3d 875, 818 NYS2d 655 [3d Dept 2006]; ***Procopio v Town of Saugerties***, 20 AD3d 860, 799 NYS2d [3d Dept 2005], *lv denied* 5 NY3d 716, 807 NYS2d 17 [2005]). Spectators and bystanders also assume the risks associated with a sporting event or activity, even at times when they are not actively watching the event (*see* ***Sutton v Eastern N.Y. Youth Soccer Assn., Inc.***, 8 AD3d 855, 779 NYS2d 149 [3d Dept 2004]). Thus, the appreciation of the risk posed by standing approximately 10 to 12 feet from where basketballs were being shot does not require a thorough knowledge of the sport; the risk of injury was perfectly obvious and, therefore, assumed by plaintiff (*see* ***Streichler v Plainview/Old Bethpage Cent. School Dist.***, 82 AD3d 1082, 918 NYS2d 883 [2d Dept 2011]; ***Navarro v City of New York***, 87 AD3d 877, 929 NYS2d 236 [1st Dept 2011]; ***Clark v Goshen Sunday Morning Softball League***, 122 AD2d 769, 505 NYS2d 655 [2d Dept 1986]).

Plaintiff's papers in opposition, even when viewed in the light most favorable to plaintiff, failed to raise triable issues of fact as to whether there was adequate supervision of the activity and, if not, whether a lack of supervision was the proximate cause of her injuries (*see* ***Zuckerman v City of New York***, *supra*; ***Pedroza v City of New York***, 92 AD3d 404, 937 NYS2d 582 [2012]; ***Weinblatt v Eastchester Union Free School Dist.***, 303 AD2d 581, 756 NYS2d 766 [2d Dept 2003]). Moreover, plaintiff failed to demonstrate that the collision between herself and Melissa Scholtz was anything other than a sudden, impulsive act that could not reasonably have been foreseen or prevented (*see e.g.* ***Kamara v City of New York***, 93 AD3d 449, 940 NYS2d 53 [1st Dept 20112]; ***Lizardo v Board of Educ. of the City of New York***, 77 AD3d 437, 908 NYS2d 395 [1st Dept 2010]; *cf.* ***Oliverio v Lawrence Pub. Schools***, 23 AD3d 633, 805 NYS2d 638 [2d Dept 2005]). No evidence has been presented to demonstrate that any of the Town's or CDD's staff could have anticipated that Melissa Scholtz while chasing a basketball would not stop running, but instead run directly into plaintiff, causing her serious injuries. Finally, plaintiff failed to demonstrate that her injury resulted from an unassumed, concealed, or unreasonably increased risk from which the Town and CDD should have protected her against (*see* ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]). After observing the individuals playing basketball, plaintiff elected to place herself within close proximity to that activity, thereby assuming the risk that resulted in her injuries (*see* ***Morgan v State of New York***, *supra*; ***Schoneboom v B.B. King Blues Club & Grill***, 67 AD3d 509, 888 NYS2d 54 [1st Dept 2009]). Inasmuch as plaintiff assumed the risk which resulted in her injury, "[r]ecovery may not ... be had on a theory of negligent supervision" (***Roberts v Boys & Girls Republic, Inc.***, *supra* at 251).

Accordingly, CDD's and the Town's motions for summary judgment dismissing the complaint are granted. The action is severed and continued as against the remaining defendant, Melissa Scholtz.

Dated: September 27, 2012



J.S.C.

_____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**