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SHORT FORM ORDER

INDEX No. 10-28674
CAL. No. 14-00964OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 8-29-14 (001)
MOTION DATE 10-28-14 (002 & 003)
ADJ. DATE 4-16-15
Mot. Seq. # 001 - MG
002 - MG
003 - MG; CASEDISP

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PATRICIA E. SABIA and VINCENT SABIA,

Plaintiffs,

- against -

SMITHTOWN CENTRAL SCHOOL DISTRICT, "JOHN" NEWHOFF as parent and natural guardian of ANDREW NEWHOFF, an infant under the age of 16 years, and "JOHN" BISHOP, as parent and natural Guardian of SEAN BISHOP, an infant under the age of 16 years,

Defendants.

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Upon the following papers numbered 1 to 69 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 23; 24 - 39 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 40 - 63 ; Replying Affidavits and supporting papers 64 - 69 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 001) by defendant John Newhoff for summary judgment dismissing the complaint against him is granted and the complaint against him is dismissed with prejudice; and it is

further

ORDERED that the motion (# 002) by defendant John Bishop for summary judgment dismissing the complaint against him is granted and the complaint against him is dismissed with prejudice; and it is further

ORDERED that the motion (# 003) by defendant Smithtown Central School District for summary judgment dismissing the complaint against it is granted and the complaint against it is dismissed with prejudice.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Patricia Sabia ("plaintiff") to her left knee on May 13, 2009 on Accompsett Middle School's outside fields when students collided with her while attending a field day as a spectator. By their bill of particulars, the plaintiffs allege, *inter alia*, that defendant Smithtown Central School District ("Smithtown CSD") was negligent in failing to properly instruct and supervise the infant defendants Andrew Newhoff and Sean Bishop, that the infant defendants were negligent in failing to properly and safely participate in the field day activities, and that their dangerous conduct caused the plaintiff's injuries.

Smithtown CSD moves (# 003) for summary judgment dismissing the complaint against it on the ground, *inter alia*, that it provided the infant defendants with an adequate degree of supervision and that the alleged lack of supervision was not a proximate cause of the plaintiff's accident. In support, Smithtown CSD submits, *inter alia*, the pleadings, the bill of particulars and the transcripts of the deposition testimony given by plaintiff Patricia Sabia, Smithtown CSD's teachers, Brian Galgano and Tara Schroeder, and infant defendants Andrew and Sean.

At her deposition, plaintiff Patricia Sabia testified that on the day of the accident, she went to field day at Accompsett Middle School. She stood in an area on the field closest to the water station as a spectator to watch the events with other parents. At around 1:00 p.m., as she was talking to other parents, facing away from the field, she felt something hit the back of her legs, causing her to fall on the ground. She heard in the ambulance that two boys, Sean and Andrew, were running in the area where the parents were standing, and Sean shoved Andrew onto her back. She testified that each class teacher would move with his or her class from station to station. When she was asked the question, "[d]id you ever personally observe Sean Bishop do anything that you felt was inappropriate before the date of this incident," she answered, "[n]o." When she was asked the same question regarding Andrew, she answered, "I can't say specifically."

At his deposition, Brian Galgano testified that he has been employed as a teacher by Smithtown CSD since 2001. On the day of the accident, he was a fourth grade teacher, and Sean was a student in his class consisting of approximately 24 students. Only fourth and fifth grade students comprised the afternoon session of the field day. There were 11 homeroom teachers, two physical education teachers, and one special education teacher on the field supervising the activities of the students. His class was partnered with Schroeder's class. After the field session began, he never left his class at all until the subject accident happened. After each event finished, he and Schroeder would group their students and take a head count. He did not witness the accident. He just observed the plaintiff lying on the ground. At the time of the accident, his class was transitioning from one station to either another station or a water station. His class

and Schroeder's class moved together as a group. He was walking right next to the class. Prior to the incident, he was not aware of any major disciplinary or behavioral problems of either Sean or Andrew, although Sean had a little bit of an attention problem. Galgano did not reprimand either Sean or Andrew.

At her deposition, Tara Schroeder testified that she has been employed as a teacher by Smithtown CSD for about 11 years. On the day of the accident, she was a fourth grade teacher, and Andrew was a student in her class consisting of approximately 24 or 26 students. Her class and Galgano's class moved together as a group. She testified that she always tries to keep a close eye on her students. When she first observed the plaintiff lying on the field ground and Andrew crying, her class was in the process of transitioning from one activity to another, and she was walking approximately 10 to 15 feet behind her class to make sure that she could see her class. Prior to the incident, she did not feel that Andrew had any behavioral or social problems.

At his deposition, Andrew testified that on the day of the accident, he was a fourth grade student at the Accompsett Elementary School. His homeroom teacher was Schroeder. On the day before the field day, Schroeder told her students that no horseplay would be allowed at the field, and she asked them to stay out of trouble. On the field day, Ed Shivokevich, a gym teacher, explained the rules and the games to all the students. Students were split into four teams; red, blue, white and green. Andrew was on the white team. After finishing the tug-of-war station, his class was going to the next station, which was the tire race. He and Sean, who was on the red team, were running towards their colored cones near the tire race station. While Andrew was running on the right side and Sean was running on the left side, their cones were in the opposite side. At the same time, when Sean and Andrew went to cross to go to their cones, they "ran into each other," causing Andrew to fall down on the plaintiff. Andrew testified that he and Sean did not see each other. At the time of the incident, Schroeder was walking over to the other station, approximately 50 yards away from the incident site. Prior to his fall, Andrew did not see the plaintiff, who was on the right side. Andrew testified that prior to this incident, he had no hostile relationship with Sean and that he did not compete against Sean during the game.

At his deposition, Sean testified that on the day of the accident, he was a fourth grade student at the Accompsett Elementary School. His homeroom teacher was Galgano. On the day of the field day, Galgano told his students, "[t]ry not to get too wild and try to stay with the group and don't like just get too out of line." Sean was on either the blue team or the green team. After finishing the tug-of-war station, his class was going to either the tire race station or the water station. He was running with Andrew and another student, Michael, towards either the tire race station or the water station. When Michael being in front saw the plaintiff, he ran out of the way. Both Sean and Andrew, whose views were obstructed by Michael, did not see the plaintiff and fell into her at the same time. Sean had no recollection as to whether he came into contact with Andrew before he fell into the plaintiff. Sean testified that at the time of the accident, Galgano was close by, and that prior to the incident, he had no hostile relationship with Andrew.

Although schools are under a duty to adequately supervise the students under their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, schools are not insurers of the safety of their students, for they cannot reasonably be expected to continuously supervise and control all of the students' movements and activities (*see* ***Rosborough v Pine Plains Cent. Sch. Dist.***, 97 AD3d 648, 948 NYS2d 373 [2d Dept 2012]; ***Keaveny v Mahopac Cent. School Dist.***, 71 AD3d 955, 955, 897 NYS2d 222 [2d Dept 2010]; ***Legette v City of New York***, 38 AD3d 853, 854, 832

NYS2d 669 [2d Dept 2007]). Even assuming there is a question of fact as to the adequacy of supervision, liability for any such negligent supervision does not lie absent a showing that it constitutes a proximate cause of the injury sustained (*see* ***Gomez v Our Lady of Fatima Church***, 117 AD3d 987, 986 NYS2d 550 [2d Dept 2014]; ***Mayer v Mahopac Cent. Sch. Dist.***, 29 AD3d 653, 815 NYS2d 189 [2d Dept 2006]; ***Lopez v Freeport Union Free Sch. Dist.***, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]). Moreover, 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 defendant school is warranted (*see* ***Gomez v Our Lady of Fatima Church***, *supra*; ***Weiner v Jericho Union Free Sch. Dist.***, 89 AD3d 728, 932 NYS2d 138 [2d Dept 2011]; ***Ronan v School Dist. of City of New Rochelle***, 35 AD3d 429, 825 NYS2d 249 [2d Dept 2006]).

Here, the adduced evidence demonstrated that there were 14 teachers on the field supervising the activities with the students; that since Galgano's class was partnered with Schroeder's class, both Galgano and Schroeder together supervised approximately 50 students; that after each event finished, they took a head count of their students; they did not leave their class at all until the accident happened; and that prior to the accident, the teachers were not aware of any behavioral problems of the infant defendants. Smithtown CSD met its *prima facie* burden of demonstrating that the alleged inadequate supervision was not the proximate cause of the injured plaintiff's accident (*see* ***Gomez v Our Lady of Fatima Church***, *supra*; ***Odekirk v Bellmore-Merrick Cent. Sch. Dist.***, 70 AD3d 910, 895 NYS2d 184 [2d Dept 2010]; ***Mayer v Mahopac Cent. Sch. Dist.***, *supra*) and the accident could not have been prevented by any reasonable degree of supervision (*see* ***Calcagno v John F. Kennedy Intermediate Sch.***, 61 AD3d 911, 877 NYS2d 455 [2d Dept 2009]; ***Ronan v School Dist. of City of New Rochelle***, *supra*; ***Lopez v Freeport Union Free Sch. Dist.***, *supra*).

In opposition, relying on an analysis of the plaintiffs' expert, Carol Alberts, a professor in the Health and Human Performance Department at Hofstra University, the plaintiffs contend that Smithtown CSD breached its duty of care to the plaintiff, causing the accident. In her affidavit, Alberts indicates that she reviewed all of the documents submitted by the defendants in support of their motion. Alberts opines that Smithtown CSD "failed to adhere to industry standards and good and accepted practice in the organization, design, set-up, management, maintenance, operation, control and supervision" of the subject field day. She further opines that in particular, Smithtown CSD failed to provide "more specific supervision" when the students were running from one station to another.

It is well settled that the opinion testimony of an expert must be based on facts in the record or personally known to the witness (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 480 NYS2d 195 [1984]; ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; ***Santoni v Bertelsmann Property, Inc.***, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion (*see* ***Shi Pei Fang v Heng Sang Realty Corp.***, *supra*). Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Leggio v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2d Dept 1988]). Here, Alberts' expert opinion consisted primarily of theoretical allegations with no independent factual basis and it was therefore speculative, unsubstantiated and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). Thus, the plaintiffs have failed to raise a triable issue of fact as to

whether Smithtown CSD failed to provide the infant defendants with an adequate degree of supervision and whether the alleged lack of supervision was a proximate cause of the plaintiff's accident. Accordingly, Smithtown CSD's motion is granted, and the plaintiffs' complaint and all cross claims asserted against it are severed as well as dismissed.

Defendant John Newhoff moves (# 001) for summary judgment dismissing the complaint against him on the ground that Andrew bears no liability for the plaintiff's injuries because she assumed the risk of her injuries by voluntarily participating in a sporting or recreational activity, namely, standing on the field as a spectator. In support, defendant Newhoff submits, *inter alia,* the pleadings, the bill of particulars and the transcripts of the deposition testimony given by plaintiff Patricia Sabia, Smithtown CSD's teachers, Brian Galgano and Tara Schroeder, and infant defendants Andrew and Sean.

Defendant John Bishop also moves (# 002) for summary judgment dismissing the complaint against him on the ground that Sean bears no liability for the plaintiff's injuries because she assumed the risk of her injuries by voluntarily participating in a sporting or recreational activity, namely, standing on the field as a spectator. In support, defendant Bishop submits, *inter alia,* the pleadings, the bill of particulars and the transcripts of the deposition testimony given by plaintiff Patricia Sabia and infant defendant Sean.

A plaintiff is barred from recovery for injuries which occur during voluntary sporting or recreational activities if it is determined that he or she assumed the risk as a matter of law (*see* ***Reidy v Raman***, 85 AD3d 892, 892, 924 NYS2d 581 [2d Dept 2011]; ***Leslie v Splish Splash at Adventureland***, 1 AD3d 320, 321, 766 NYS2d 599 [2d Dept 2003]). The doctrine of primary assumption of risk provides that a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation (*see* ***Morgan v State of New York***, 90 NY2d 471, 484, 662 NYS2d 421 [1997]; ***Herman v Lifeplex, LLC***, 106 AD3d 1050, 966 NYS2d 473 [2d Dept 2013]; ***Philippou v Baldwin Union Free Sch. Dist.***, 105 AD3d 928, 963 NYS2d 701 [2d Dept 2013]). Spectators and bystanders also assume risks associated with a sporting event or activity, even at times when they are not actively watching the event (*see* ***Newcomb v Guptill Holding Corp.***, 31 AD3d 875, 818 NYS2d 655 [3d Dept 2006]; ***Procopio v Town of Saugerties***, 20 AD3d 860, 860, 799 NYS2d 316 [3d Dept 2005]; ***Sutton v Eastern N.Y. Youth Soccer Assn., Inc.***, 8 AD3d 855, 857, 779 NYS2d 149 [3d Dept 2004]). A defendant seeking to be relieved from liability based on such doctrine must establish that the injured plaintiff was aware of the risks, appreciated the nature of the risks, and voluntarily assumed the risks (*see* ***Morgan v State of New York***, *supra*; ***Turcotte v Fell***, 68 NY2d 432, 439, 510 NYS2d 49 [1986]; *see e.g.* ***Carracino v Town of Oyster Bay***, 247 AD2d 501, 669 NYS2d 328 [2d Dept 1998]). Awareness of a risk is to be assessed against the background of the skill and experience of the particular plaintiff (*see* ***Fenty v Seven Meadows Farms, Inc.***, 108 AD3d 588, 969 NYS2d 506 [2d Dept 2013]; ***Weinberger v Solomon Schechter Sch. of Westchester***, 102 AD3d 675, 961 NYS2d 1798 [2d Dept 2013]). Thus, "[i]f the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" to make the conditions as safe as they appear to be (***Turcotte v Fell***, *supra*; *see* ***Manoly v City of New York***, 29 AD3d 649, 816 NYS2d 499 [2d Dept 2006]).

Here, defendants Newhoff and Bishop established their prima facie entitlement to summary judgment as a matter of law by presenting evidence that plaintiff Patricia Sabia, who was an adult at the time of the accident, understood and voluntarily assumed the risks inherent in the field day. Plaintiff Patricia Sabia conceded that at the time of the accident, she was standing and facing away from the field

only a few feet away from the main field where the various events were going on. As a parent of her children, a first grader and a fourth grader, plaintiff Patricia Sabia had attended several field days previously and was familiar with the risks involved in the field day activities. The Court finds that she was a spectator close enough to an active sporting field to have assumed the inherent risks (*see* ***Newcomb v Guptill Holding Corp.***, *supra*).

In opposition, the plaintiffs contend, *inter alia*, that since plaintiff Patricia Sabia was a spectator who was not engaging or participating in any sport activities, she is not liable for her injuries. However, it is clear that spectators also assume risks associated with a sporting event or activity, even at times when they are not actively watching the event (*see* ***Newcomb v Guptill Holding Corp.***, *id.*; ***Procopio v Town of Saugerties***, *supra*). The plaintiffs further contend that the risk inherent in the field day was increased due to the affirmative acts of negligence on the part of the Smithtown CSD. As discussed above, the plaintiffs' complaint and all cross claims asserted against Smithtown CSD are dismissed. The plaintiffs failed to raise triable issues as to the existence of a dangerous condition over and above the risk inherent in the field day activities. Furthermore, there is no evidence that the infant defendants violated any field day rules or that either infant defendant had any behavioral or social problem on the day of the field day event or prior to that day. The court has considered the plaintiffs' remaining claims and found them to be without merit.

Accordingly, the motion for summary judgment by defendants Newhoff and Bishop are granted, and the plaintiffs' complaint and all cross claims asserted against them are dismissed.

Dated: NOV 17 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**