SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. **GEORGE R. PECK,**

Justice

GEMMA BAEHR, an infant under the age of fourteen (14) years, by her mother and natural guardian, PATRICIA BAEHR,	TRIAL/IAS PART 45 NASSAU COUNTY
Plaintiff(s),	MOTION SEQ. No. 2
-against-	INDEX No. 14024/00
BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF NASSAU COUNTY,	MOTION SUBMISSION DATE: 1/14/03
Defendant(s).	

The following papers read on this motion: 4

Notice of Motion.....X
Answering Affidavits.....X
Replying Affidavits.....X
Memorandum of Law.....X

Upon the foregoing papers, the defendant's motion for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint is denied upon the ground that there are triable issues of fact.

This is a personal injury action arising out of an incident that occurred on June 4, 1999. At the time of the incident, the plaintiff was engaging in the "trust fall" activity in which the plaintiff fell backwards expecting to be caught by a fellow fifth grader. This incident occurred during a field trip that was sponsored and supervised by BOCES. Furthermore, the "trust fall"

activity was part of the curriculum for the students attending the field trip on that day.

Summary judgment is often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue. *Moskowitz v. Garlock,* 23 A.D.2d 943, 259 N.Y.S.2d 1003 (3rd Dept 1965); Siegel, *New York Practice 3rd Ed.,* § 278. Furthermore, summary judgment is "a rare event in negligence cases." *Andre v. Pomeroy,* 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974).

The first argument raised by BOCES in support of its motion for summary judgment is that it exercised the same degree of care as a reasonably prudent parent would have exercised under the circumstances in this case, citing *Lawes v. Board of Education, 16 N.Y.2d 302, 266 N.Y.S.2d 364 (1965).* BOCES attempts to demonstrate that a reasonably prudent parent would have permitted the plaintiff to participate in the "trust fall" activity by stating that the plaintiff's parent did not object to the plaintiff's participation in this activity. However, based upon the evidence presented in this motion, this court cannot conclude as a matter of law that the failure of the plaintiff's parent to object to her daughter's participation in the "trust fall" activity or the willingness of BOCES to permit the plaintiff to participate in the "trust fall" activity" were the acts of a reasonably prudent parent. In particular, there is no evidence in the record about the plaintiff's physical abilities, intellectual capacity, maturity level, emotional state, or history of compliance with instructions. Furthermore, there is no evidence regarding the fifth grade student who was assigned to catch the plaintiff. Such evidence is necessary because a reasonably prudent parent also would have considered the physical and mental abilities and history of the plaintiff's catcher in making a determination as to whether or not the plaintiff should have participated in the "trust fall" activity.

BOCES also argues that the plaintiff has not established that it had sufficiently specific knowledge or notice of the dangerous conduct which caused the injury, citing *Mirand v. City of New York,* 84 N.Y.2d 44, 614 N.Y.S.2d 372 (1994), *Malik v. Greater Johnstown Enlarged School District,* 248 A.D.2d 774, 669 N.Y.S.2d 729 (3rd Dept 1998), and *Gattyan v. Sdcarsdale U.S.F.D.,* 152 A.D.2d 650, 543 N.Y.S.2d 732 (2nd Dept 1989). Initially, the court notes that the "trust fall" activity may be deemed dangerous conduct because there is substantial risk of physical harm when engaging in the activity, particularly when the person falling does not fall as instructed or when the catcher does not catch as instructed. Furthermore, BOCES was well aware of the plaintiff's participation in the "trust fall" activity as it was part of the curriculum for that day. Accordingly, this argument is without merit.

The next argument set forth by BOCES is that the plaintiff's injuries were not foreseeable, citing *Mirand, supra*, and *Danna v. Sewanhaka Cent. School District,* 242 A.D.2d 361, 662 N.Y.S.2d 71 (2nd Dept 1997). In support of this argument, BOCES emphasizes the fact that the plaintiff and her catcher successfully completed three "trust falls" prior to the incident, and, therefore, BOCES concludes that it could not foresee that the plaintiff's catcher would "suddenly and spontaneously" fail to catch the plaintiff. This court is of the opinion that merely knowing that three "trust falls" were successfully completed prior to the incident is insufficient evidence for it to conclude as a matter of law that BOCES could not have foreseen the incident. In order to determine whether or not this incident was foreseeable, evidence about the physical and mental abilities of the plaintiff and her catcher is required. In particular, did the catcher have a short attention span, a history of unreliability, or a record of being less cooperative when not receiving direct adult supervision. Evidence to resolve these issues has not been provided.

In its memorandum of law, BOCES has cited cases in which students were pushed, tripped, and knocked down by other students or threw snowballs or rocks. All of these cases involve activities that were unauthorized and unanticipated by the school. Accordingly, these acts have been deemed "sudden and spontaneous" and, therefore, unforeseeable. In the instant case, however, BOCES sponsored and supervised the "trust fall" activity and had knowledge of the particular fifth grader who was assigned to catch the plaintiff. Accordingly, the issue is not whether the failure to catch the plaintiff was "sudden and spontaneous" but whether a reasonably prudent person could have foreseen that the particular fifth grader assigned to catch the plaintiff might not always do so given the physical and mental abilities and history of the catcher.

Another argument asserted by BOCES is that the record does not establish that BOCES breached their duty to supervise and that this breach of duty was the proximate cause of the plaintiff's injuries, citing *Mirand, supra, and Danna v. Sewanhaka Cent. School District,* 242 A.D.2d 361, 662 N.Y.S.2d 71 (2nd Dept 1997). BOCES maintains that the teacher who was in charge of the students at the time of the incident was well trained and instructed the students as to how to conduct the "trust fall" activity. Even assuming, *arguendo,* that theses assertions are correct, these facts alone are insufficient to warrant summary judgment because issues still exit regarding whether a reasonably prudent parent would have permitted the plaintiff to participate in the "trust fall" activity and whether BOCES was negligent in permitting the "trust fall" activity to be conducted without the use of mats or other protective equipment.

A further argument raised by BOCES is that the infant plaintiff assumed the risk inherent in the "trust fall" activity. BOCES maintains that when students voluntarily participate in athletic activities, they generally consent, by their participation, to those injury causing events which are

known, apparent or reasonably foreseeable consequences of their participation, citing *Turcotte v. Fell,* 68 N.Y.2d 432, 510 N.Y.S.2d 49 (1986), and *Kennedy v. Rockville Centre U.F.S.D.,* 186 A.D.2d 110, 587 N.Y.S.2d 442 (2nd Dept 1992). Whether or not the "trust fall" activity in this case was a voluntary athletic activity is an issue of fact. Moreover, even assuming that it was, there is insufficient evidence before this court to determine whether the plaintiff had the experience and intellectual ability to understand and appreciate the risks inherent in the "trust fall" activity. *Marcano v. City of New York,* 296 A.D.2d 43, 743 N.Y.S.2d 456 (1st Dept).

A final issue in this motion is whether BOCES was negligent in permitting the "trust fall" activity to take place without the use of any specialized equipment, such as a mat. The court has read the opinion of Kenneth Demas which is annexed to BOCES' moving papers. Mr Demas states, *inter alia,* that "[t]he trust activity is a typically performed outdoors on a field or on a bare gymnasium floor. The use of matting is not the industry standard. According to the Risk Homeostasis Theory, the use of matting in this activity would raise the risk level and cause participants to take extra risks rather than trust the ability of their partner." Initially, it should be noted that the opinion of an expert may be accepted or rejected by the trier of fact, even if it is uncontradicted. *Mechanick v. Conradi,* 139 A.D.2d 857, 527 N.Y.S.2d 586 (3d Dept 1988); see also, 58A *N.Y. Jur. 2d* Evidence and Witnesses § 676. Moreover, Mr. Dumas' statement is not entirely clear. Specifically, does the risk homeostasis theory relate to an increased risk of physical injury to participants resulting directly from the physical characteristics of matting or does the theory relate to an increased psychological perception of risk by participants which might be created by the presence of matting. Furthermore, Mr. Dumas has not stated whether any scientifically conducted studies have been conducted to test the risk homeostasis theory or the

results of any such studies. It should also be noted that compliance with customary or industry practices is not dispositive of due care but constitutes only some evidence thereof. *Miner v Long Island Lighting Co.,* 40 N.Y.2d 372, 386 N.Y.S.2d 842 (1976); see also, 79 *N.Y. Jur.2d* Negligence § 30.

It is, so ordered.

Dated: March 19, 2003

A. J. S. C.