Severely Autistic Girl's Parents Found Not Liable to her Occupational Therapist for Injuries Sustained during Treatment at School

Court of Appeals Denies Review of Fourth Department Decision
Affirming Trial Court's Application of
Assumption of the Risk in an Employment Setting

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On September 14, 2010, the Court of Appeals denied Plaintiff/Appellant's motion for leave to appeal a decision of the Fourth Department which affirmed a trial court's decision granting summary judgment based on the defense of implied assumption of the risk, *in an employment setting*. Johnson v. Cantie, 15 N.Y.3d 706 (2010).

Plaintiff, a licensed occupational therapist employed at a school which provided services to children with autism, sustained severe injuries when one of her autistic students became aggressive as she was known by all, including the Plaintiff, to do.

Plaintiff sued the girl's mother and father, alleging that they negligently supervised their daughter and breached a duty to warn her of their daughter's violent tendencies. She also sued the girl's school district which had placed the student at her employer pursuant to a service contract, alleging negligent supervision.

The defendants filed motions for summary judgment arguing that the Plaintiff assumed the risk of her injuries because she voluntarily participated in an activity with knowledge and appreciation of the risk. Although most frequently raised in defense of injuries sustained during athletic or other recreational activities, defendants argued that Plaintiff was fully aware of the risk posed by the child because her education and experience taught her what to expect when treating autistic children, and because she had personal experience dealing with the sometimes aggressive student.

The trial court agreed and found that Plaintiff assumed the risks of her injury, rejecting Plaintiff's argument that assumption of the risk only acts as a complete defense in cases involving sports or other recreational activities. The trial court judge also found that inasmuch as the girl's mother and father did not have an opportunity to control their child, as she was in the care of the Plaintiff and her employer at the time of the incident, that there could be no claim for negligent supervision.

The Plaintiff appealed to the Fourth Department and on the morning of oral argument, New York's Court of Appeals rendered the decision in Trupia v. Lake George Central School District, 14 N.Y.3d 392 (2010) which curtailed but did not eliminate the complete defense of assumption of the risk in non sporting and non recreational activity cases. In Trupia, the Court of Appeals found that

shielding those who facilitate the free and vigorous participation in athletic activities was an important policy consideration because sports and recreational activities have enormous social value. After argument defendants served a post brief submission in light of the Court of Appeals' decision in Trupia, arguing that the education of mentally handicapped children in the least restrictive environment was the type of important policy consideration envisioned by the Trupia court such that assumption of the risk was still a viable complete defense in this employment setting.

The Fourth Department affirmed the trial court agreeing that the girl's mother and father did not have the ability to control their daughter at the time of the injury because she had been entrusted to the school district and to the Plaintiff's care. Hence, the claim based on negligent supervision was dismissed because the parents did not have the opportunity to control their daughter. Additionally, the Appellate Division affirmed dismissal of the cause of action based on failure to warn. The Court found that there is "no duty to warn an individual about a condition of which he or she is actually aware or that may be readily observed by a reasonable use of his or her senses." Johnson v. Cantie, 74 A.D.3d 1724 (4th Department 2010).

Interestingly, there is no mention of the defense of assumption of the risk in the decision. Although the justices referred to the very recent decision in Trupia during oral argument, it did not cite Trupia in Johnson, and the decision is bereft of any discussion of the defense.

The Fourth Department may have been skirting application of the doctrine of assumption of the risk in an employment setting, as it certainly had plenty of fodder for affirming the trial court's determination without holding that the complete defense applies in a non-sporting and recreational activity. Before Trupia, the Fourth and the Second Departments had held that the doctrine had broader application, but the Third and the First Departments had limited assumption of the risk as a compete defense cases involving sporting and recreational activities.

Trupia certainly left the door open for the courts to find assumption of the risk as a complete defense in those situations where there should be free and vigorous participation in a certain activity and as a matter of social policy protection is afforded to those who facilitate such activities. For that reason, assumption of the risk as a complete defense survives "in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled." Trupia at 396.

Under the holding in Trupia, or the Fourth Department's reasoning, the result in Johnson is the same: parents of severely autistic children who entrust their children to educated, highly trained, experienced professionals who fully appreciate the dangers associated with their work, are not subject to potential liability for the risks associated with caring for their children.