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MARCY SONNEBORN
(Time Requested: 30 Minutes)

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Appellate Division–Second Department Docket No. 2016-08990

Court of Appeals

of the

State of New York

MICHAEL NINIVAGGI, by his Parents and Natural Guardian, PENNY NINIVAGGI, and PENNY NINIVAGGI, Individually,

Plaintiffs-Appellants,

– against –

THE COUNTY OF NASSAU,

Defendant,

– and –

MERRICK UNION FREE SCHOOL DISTRICT,

Defendant-Respondent.

BRIEF FOR PLAINTIFFS-APPELLANTS

MOLOD SPITZ & DESANTIS, P.C.
Attorneys for Plaintiffs-Appellants
1430 Broadway, 21st Floor
New York, New York 10018
Tel.: (212) 869-3200
Fax: (212) 869-4242

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COURT OF APPEALS
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Plaintiffs-Appellants,

- against –

MERRICK UNION FREE SCHOOL DISTRICT,

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COUNTY OF NASSAU,

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BRIEF FOR PLAINTIFF-APPELLANT

QUESTIONS PRESENTED

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1. Did the lower court, as affirmed by the Appellate Division, err in determining that the Primary Assumption of Risk defense applied to the facts of this case, where the plaintiff was injured while playing ball on a field owned and maintained by the Merrick Union Free School District,

and such field was known by the School District to contain numerous holes which were concealed by grass?

1. The answer should be in the affirmative.
2. Did the lower court, as affirmed by the Appellate Division, err in failing to apply standards of ordinary negligence to the facts of this case?
2. The answer should be in the affirmative.
3. Did lower court, as affirmed by the Appellate Division, err in determining that the School District was not liable for ordinary negligence in maintaining its premises?
3. The answer should be in the affirmative.

PRELIMINARY STATEMENT

This Brief, submitted by the plaintiff-appellant, seeks to reverse an Order of the Appellate Division, Second Department, 177 AD3d 981 (2d Dep't 2019), affirming a Judgment of the Supreme Court, Nassau County, 2016 West Law 11669251 dated September 2, 2016, Honorable Leonard Steinman presiding, which granted the Motion for Summary Judgment of the defendant Merrick School District ("the District"). R. 9-14. It is respectfully submitted that the decision should be reversed because questions of fact exist which should be resolved by a jury.

The decision sought to be appealed involves matters of State-wide importance.[1] The practical effect of the Judgement permits the Merrick Union Free School District (the "District") to ignore the known hazardous condition of a field on its property, even though such field is used by the adults and children of the community. The Judgment permits the District's field to remain in disrepair, for no reason other than the District can hide behind the primary assumption of risk defense. Appellants submit that a participant in a recreational game of ball should not be required to assume the risks of being injured due to the presence of holes which are concealed by overgrown grass. Everyone in Merrick, including the District, knew about the hazardous condition of the outfield. As Judge Maltese declared in his Dissent: The District could easily have repaired the holes with a "[f]ew wheelbarrows of dirt and grass seed. This is not a heavy burden."

To hold otherwise, as the Supreme Court, Nassau County and Second Department have done, is in essence, to determine that the assumption of risk defense is an absolute defense to ordinary negligence. Appellants have always maintained that participants in athletic endeavors should only assume observable risks – not concealed risks.

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[1] As an aside, the Decision of the Appellate Division, Second Department is from the Judgment which dismissed the Complaint, and not from the Order. That is because, inadvertently, a second Notice of Appeal was served after Judgment was entered, and while the appeal of the Decision and Order had already been perfected. Thus, the appeal to the Second Department was from the entered Judgment, and not from the Order.

This case involves a ninth-grade student who was injured while having an informal game of catch with a football. The plaintiff fell into a hole, *concealed by grass,* on the outfield owned by the District. As a result of the District's failure to maintain the outfield, the plaintiff fell and broke his arm in two places. The plaintiff's arm is permanently deformed. R. 72-75; see photos at R. 450.

The outfield was used by elementary school children during the week for baseball games and physical education classes, neighborhood children on weekends, and by Little League and other organizations on evenings and weekends. The outfield serviced three baseball fields.

It was known to the District that the outfield contained holes concealed by grass, and that other children had sustained injury due to the poorly maintained outfield. The District had actual notice of complaints concerning the poor condition of the outfield. This case is ripe for review by the Court of Appeals.

STATEMENT OF FACTS

On Saturday, November 26, 2011, the plaintiff, a ninth-grade boy, walked over to Chatterton Elementary School, the local elementary school, to meet some friends to play football. R. 86-90. The Chatterton Elementary School is one of the schools within the District. The Chatterton Elementary School had three baseball fields and one outfield (R. 143-144). The outfield was a grassy area enclosed by a fence. R. 144-148, 158.

The plaintiff arrived early, and was throwing a football with two of his friends in the outfield, while waiting for other friends to arrive. R. 147, 149. The plaintiff testified that as he was running to catch the football, he took several steps sideways, whereupon his foot fell into a large hole, causing him to fall. R. 154. The hole was concealed by grass. R. 179, 235, 240, 456, 457; See photographs annexed as R. 440-468. The plaintiff described the hole as being about 18” long and 6” wide and 5” deep. R. 154-155. Plaintiff’s accident was about 10 yards from the fence which enclosed the outfield. R. 153.

The outfield where the plaintiff fell into a hole, was used by the Chatterton elementary school for its’ baseball games and physical education classes; by the Merrick Avenue Middle School for afternoon practice; by Merrick-Bellmore Classic Softball league, an adult men’s softball league; by the Kiwanis Club; by the Merrick/North Merrick Little League and by neighborhood children and adults on the weekends. R. 356, 357, 358, 359, 530. The outfield was well-used by children and adult organizations, and as such, should have been properly maintained by the District for the use of the District’s school children and for the community at large. Proper maintenance would have, and should have, included filling in the hidden holes with dirt and seed, See photographs at R. 440-468 which show that the holes are well-hidden.

Kent Eriksen, the Head Custodian for the Chatterton school, testified that the only maintenance done to the subject field was mowing. R. 331, 334. Nevertheless, Mr. Eriksen admitted that if he saw a hole in the outfield, it would require attention and that he would tell his boss at the District to "take care of it". R. 347. Even though Mr. Eriksen admitted that holes should be "taken care of", Mr. Eriksen did *not* inspect the outfield for holes. Moreover, Mr. Eriksen conceded that a hole of 18 inches in length and 6 inches in width (the size of the hole that plaintiff's foot fell into) should have been addressed and taken care of. R. 347. Clearly, holes in the field were never taken care of.

Mr. Eriksen testified that his inspection of the playing fields *did not include* walking the entire outfield. Nor did Mr. Eriksen direct his staff or the Chatterton elementary school staff to inspect the outfield after a game. R. 356, 358, 359. Therefore, the Head Custodian's inspection would not have revealed the hole that the plaintiff fell in, and no one would have been directed to fill in the hole. The holes in the outfield were never filled in.

Mr. Eriksen also testified that he was unaware that so many different groups used the ball fields after school hours. Nor was he aware that the various groups which used the fields, completed a permit form in order to gain permission for use. The permit form has a section entitled, "Custodian's Report". However, when questioned, Mr. Eriksen, the Head Custodian, admitted to never being asked to

complete the “Custodian’s Report” after a group used the District’s fields. R. 359-360. This is because the District neither maintained nor inspected the outfield and ignored its’ condition. The District was obviously negligent in its failure to maintain the outfield for use by the students and the public.

In addition to failing to inspect and maintain the subject field, and to fill in the holes with dirt, the District exacerbated the poor condition of the ballfields by driving trucks over the fields. For example, Mr. O’Beirne testified that in conjunction with the Little League baseball operations, the Little League was permitted to drive a Ford F-150 pick-up truck onto the field, with a 10’ to 12’ box trailer attached, unload a “groomer” for the infield surfaces, and then drive that groomer around the infield. To do so, the pick-up truck and the grooming machine would drive from field to field, which necessarily involved crossing over the fields in a truck. R. 421-422. Most importantly, Mr. O’Beirne confirmed that in the course of a baseball season, the truck regularly drove over the fields. R. 421-422. Additionally, even though Mr. O’Beirne indicated that he was aware that the Little League trucks drove over the fields, no one walked the fields afterwards to check if the trucks did any damage. R. 423-424. Mr. O’Beirne also testified that the school’s trucks drove over the field to pick up garbage. R. 434.

It seems that everyone in the District community was aware of the poor condition of the outfield. In fact, the plaintiff testified that other friends of his had

fallen over the uneven and choppy terrain (R. 208). Mrs. Ninivaggi, testified that her nephew broke his wrist on the outfield. Mrs. Ninivaggi knew of other children who had hurt themselves playing on the outfield. R. 122. Mrs. Ninivaggi testified that many people complained about the poor condition of the playing fields at Chatterton Elementary School. R. 88. In fact, it had been the subject of Board of Education meetings that Mrs. Ninivaggi attended. R. 124-126. Mrs. Ninivaggi testified that the poor condition of the ballfields was always a subject at PTA meetings. R. 125-126. Thus, the District had actual notice of the poor condition of the outfield. Nevertheless, the District did nothing to fill in the holes in the outfield that were concealed by grass. It is undisputed that the District had both actual and constructive notice of the deplorable condition of the outfield.

In the lower court, the District argued that the complaint should be dismissed because the plaintiff was unable to identify which of several holes was the one he fell into. While the Court of Appeals does not address issues of fact, and as such, the District's allegation that plaintiff was unable to identify which hole caused his accident is not an issue before this Court, the fact that the holes were difficult to identify highlights the concealed and hidden nature of the holes. See photographs at R. 456-457. For example, Mrs. Ninivaggi testified that it was difficult for her son to identify which hole he fell into because there were several holes in the vicinity of where he fell: "There were a few holes in this vicinity…" R. 299. Thus, it is readily

apparent that there was more than one hole concealed by grass in the same area of the outfield. Plainly, a review of the photographs reveals a grassy area with holes hidden by grass. It is not surprising that several holes in the same area all looked alike.

The District claimed that because plaintiff was familiar with the deplorable condition of the District's field, the plaintiff knowingly assumed the risks of an uneven field strewn with holes. R. 207. However, the holes, as demonstrated in the photographs, were concealed by grass, and were not readily observable. Therefore, the fact that plaintiff was acquainted with the field is of no moment because the holes were not open and obvious. The law of this State should not permit a school district to escape liability for allowing a dangerous condition to exist where, as here, the condition could have been easily and inexpensively remedied.

As a result of falling into the hole, the plaintiff's "arm was protruding from his skin". R. 89. Plaintiff was rushed by ambulance to St. Joseph's Hospital where it was determined that he sustained an acute transverse fracture and deformity of the left arm. R. 72-75; 90. Plaintiff required surgical correction, open reduction and internal fixation and bone grafting. Plaintiff's arm is permanently deformed. R. 72-75.

1. The District Knew of the Hazardous Condition in the Outfield and Did Nothing.

As stated, Mrs. Ninivaggi testified that the poor condition of the ballfields was always a subject at PTA meetings. R. 125-126. Thus, the District had actual notice of the poor condition of the outfield. It was submitted to the Supreme Court, that Mr. Erikson's testimony established that the District permitted a known hazardous condition to exist unabated due to the utter lack of maintenance of the outfield. Mr. Erikson admitted if he had known about the concealed holes in the outfield (which were not inspected) he would have had them filled in with dirt. Accordingly, the plaintiff raised an issue of fact with respect to the District's knowledge of a hazardous condition and of its failure to maintain the subject property. The District knew, or should have known, of the deplorable condition of the outfield.

As stated, Mr. Erikson admitted that he did not inspect the outfield. Similarly, James O'Beirne, Mr. Eriksen's supervisor in the District, did not inspect the outfield. *Both men confirmed that the only maintenance of the field was mowing.* R. 400, 402. As with Mr. Eriksen, Mr. O'Beirne admitted that holes in the field should have been taken care of. R. 347, 401. (Mr. O'Beirne testified that the holes would have been "filled in" had he been aware of the condition. Mr. O'Beirne stated: "*If only I had noticed it*". R. 401. The two District employees charged with maintenance of the subject field, admitted that the holes should have been corrected but that they

were not due to failure to inspect. The District's employees charged with maintaining the outfield field, admitted to their failure to maintain the field.

The following exchange confirmed that the District considered holes in the field to be dangerous, but did nothing about filling in the holes, in part, because the subject field was never inspected:

"Q. On the field in specific, what are you looking at relative to the surface?

A. Anything out of the normal.

Q. Something left on the field, *holes in the field.* …R. 401.

Q. When you do this inspection, *do you walk the entire grounds?*

A. Probably not." R. 402.

Thus, Mr. O'Beirne's testimony established that the holes posed a danger but that no one actually conducted anything more than a visual scan of the field. ("Q. Is this a visual inspection scanning the field? A. Yes." R. 402.). The holes were rendered dangerous not only because they were used regularly and often during sporting events, but also because they were concealed and were not open and obvious.

The deposition testimony established that staff at Chatterton did not seed, thatch, fertilize or use weed block for the maintenance of the fields. R. 429. Nor were they given any topsoil to fill in holes. R. 429-430. No steps were taken to level out the fields. R. 429-430.

Most important, when you look at the photographs it is apparent that it is difficult to precisely describe which grassy patch contains a hole underneath it, because the holes were concealed. R. 456, 457. Thus, the defects were not open and obvious, but were concealed.

In addition to failing to inspect and maintain the subject field, the District permitted improper use of the field. For example, the District permitted trucks to drive over the field. For example, Mr. O'Beirne testified that in conjunction with the Little League baseball operations, the Little League was permitted to drive a Ford F-150 pick-up truck onto the field, with a 10' to 12' box trailer attached, unload a "groomer" for the infield surfaces, and then drive that groomer around the infield. To do so, the pick-up truck and the grooming machine would drive from field to field, which necessarily involved crossing over the fields in a truck. R. 421-422. Most importantly, Mr. O'Beirne confirmed that in the course of a baseball season, the truck regularly drove over the fields. R. 421-422. Mr. O'Beirne also testified that the school's trucks drove over the field to pick up garbage. R. 434. Additionally, even though Mr. O'Beirne indicated that he was aware that the Little League trucks drove over the fields, no one walked the fields afterwards to check if the trucks did any damage. R. 423-424.

The testimony of Mr. O'Beirne and Mr. Eriksen established a complete failure to maintain the outfield where the plaintiff fell. Both Mr. O'Beirne and Mr. Eriksen

testified that no one walked the field looking for holes or depressions. Apparently, the numerous complaints raised at PTA meetings (in which the District was represented) were not communicated to the two District employees charged with maintenance of the subject field. The ballfield belonged to the District and was used by numerous young students and others such as the Merrick Little League, which allegedly maintained the infield, but not the outfield. It was the responsibility of the District's maintenance crew to maintain the outfield as well.

It is submitted that the plaintiff raised material questions of fact in the Supreme Court with regard to the District's failure to reasonably maintain its premises. The plaintiff raised material questions of fact with regard to the District's knowledge of and exacerbation of a *recurring hazardous* condition on its' premises. The plaintiff raised material questions of fact as to whether the plaintiff can be said to have assumed the risks of playing catch with a football on a poorly maintained outfield, where the dangerous condition was concealed and which was not "open and obvious". Finally, the plaintiff raised material questions of fact as to whether an owner can be exculpated for its own negligence under the doctrine of primary assumption of risk.

A. The Supreme Court Decision.

It is submitted that the Supreme Court (improperly) held that the plaintiff assumed the risks inherent in playing a game of catch on a sub-par field. It is further

submitted that the Supreme Court erred in dismissing the plaintiffs' complaint on the theory that Michael Ninivaggi "assumed the risks" inherent in having a catch on a grassy field, strewn with hidden holes. R. 11. The Supreme Court reasoned as follows: "Such risks include those having to do with the construction of the playing surface '*and open and obvious condition on it*'. citing, *Joseph v NY Racing Ass.,* 28 AD3d 105 (2d Dep't 2006)." (emphasis supplied) R. 10.

The plaintiff has always maintained that the condition which caused the accident was neither open nor obvious. In addition, the defective condition which caused the plaintiff's accident resulted entirely from the District's failure to use reasonable care in maintaining its' outfield. Plaintiff submits that the law regarding the doctrine of assumption of risk, as enunciated by this Court, should not operate to absolve a landowner from ordinary negligence.

The Supreme Court failed to acknowledge that (1) the plaintiff fell into a hole which was concealed by grass, therefore the condition of the playing surface was not "open and obvious", (2) when a defective condition is *not* open and obvious, the defense of assumption of risk is not a defense to the action, (3) the doctrine of assumption of risk should not exculpate an owner from ordinary negligence where, as here, the District failed to reasonably maintain its premises and of which the District had notice, (4) the District heightened the risks inherent in having a catch on the ball field by failing to inspect and maintain the field and by permitting trucks to

travel on the field, (5) playing an informal game of catch should not invoke the defense of "assumption of risk" because it is not an organized sporting event which involves heightened risks.

Most important, the Supreme Court failed to grasp that there is no public benefit to permitting landowners to ignore proper maintenance of their premises particularly, where, as here, the District was on notice of prior accidents due to improper maintenance of the field. Indeed, the plaintiff's cousin had fractured his wrist playing in the outfield prior to the plaintiff's accident.

In its Decision, the lower court acknowledged that *it did not want to dismiss the action*. R. 9-14. The lower court believed that the District was negligent in its' maintenance of the field, and that it owed a duty to the plaintiff and others who regularly used the field. Nevertheless, the lower court said that it felt *constrained* to follow Second Department precedent, which it felt required it to dismiss the complaint. R. 13. Thus, the lower court stated:

"Evidence was presented from which it could be concluded that the *District failed to even attempt to properly maintain the field to ensure that it was not hazardous to the children* and members of the community that were welcomed to play on it. What incentive does the District have to ensure that future Michaels are not similarly injured from its alleged failure to provide a safe ball-field upon which the children from Merrick can play (*besides shame*)?" R. 13. (emphasis supplied).

Judge Steinman said that he felt constrained by Second Department precedent to dismiss the action, while fully admitting his reluctance to do so. Judge Steinman wished that "*shame*" would operate to persuade the District to maintain the field. The reluctance of the Supreme Court is fully understandable. However, the law should serve the public good and principles of justice. It defies logic to permit assumption of risk to apply to the facts of this case, where to do so, gives license to the District to continue to ignore the dangerous condition of the outfield.

Plaintiff submits that the lower court could have (and should have) found a basis for denying the District summary judgment by following the precedent enunciated by this Court in its' decisional law. There is a substantial body of law in the Court of Appeals which, if followed, would have resulted in this case going before a jury on issues of comparative fault.

Ten years ago, in 2010, this Court held in *Trupia v Lake George Central School,* 14 NY3d 392 (2010), that *the public is better served when principles of comparative negligence are applied,* rather than have courts determine that the doctrine of assumption of risk is a bar to actions. *See also Custodi v Town of Amherst,* 20 NY3d 83 (2012) and full discussion in Point I below.

Indeed, the Supreme Court acknowledged that the public was *not* served by its' decision dismissing the action, yet if failed to follow the precedent of the *Trupia* case. The lower court could have, *and should have*, denied the District summary

judgment, particularly where it said that it did not want to, because the public would have been better served had it allowed a jury to decide the action.

In addition, there are two cases exactly on point in the First and Third Departments, upon which the Second Department could have relied, which support denial of the District's Motion. See *Clarkin v In Line Restaurant Corp.,* 148 AD3d 559 (1st Dep't 2017) (the plaintiff stepped into a hole in grass on the restaurant's front lawn while throwing a frisbee); see *Simmons v Saugerties Central School District,* 82 AD3d 1407 (3d Dep't 2011) (summary judgment to school district denied, when high school student fell into an open and obvious hole on a grassy field while playing recreational football). *See* discussion at Point I below.

It is respectfully submitted that this Court reverse the ambivalent decision of the Supreme Court, Nassau County, as affirmed by the Second Department, and apply the reasoning employed in its own decisional law. The question of negligence on the part of the District, as acknowledged by Judge Steinman of Supreme Court, Nassau County, should be decided by a jury.

B. The Second Department Decision.

The Second Department affirmed dismissal of the complaint, stating that the plaintiff was an experienced football player, who was familiar with the (albeit poor) condition of the field. The Second Department reasoned that the plaintiff, was a voluntary participant in a recreational activity, and consented to those "[c]ommonly

appreciated risks", which included the "irregular" surface of the field. R. 567-574. The Second Department stated: "In other words, the topography of the grass field on which the infant plaintiff was playing was irregular. The risks posed by playing on that irregular surface were inherent in the activity of playing football on a grass field." R. 568.

The majority decision differentiated this case, from cases where owners have permitted premises to fall into disrepair (such as, a hole in the net on a tennis court), and which would not be subject to dismissal based upon the assumption of risk defense. The majority decision held that this case was subject to dismissal because the defect which injured the plaintiff "*resulted from the natural features of a grass field*." R. 568. (emphasis supplied.)

Justice Maltese issued a strong Dissent and voted to reverse. R. 569-574. Justice Maltese disagreed with the majority depiction that the topography of the outfield was similar to the "[n]atural features of a grass field". J R. 568. Justice Maltese noted that the photographic evidence proved that the grass field was *not* a *de minimis* uneven surface. The Dissent stated: "[T]he joint outfield of these three baseball fields has several depressions which could have very easily been maintained with a few wheelbarrows of dirt and grass seed. Indeed, when the infant plaintiff and his mother returned to the scene in order to take photographs of the hole which caused him to fall and break his left arm, he found not one, but three similar holes,

shrouded with grass." R. 573.

The Dissent found that the majority's application of the assumption of risk defense eroded the enactment by the Legislature (in 1975) of CPLR 1411. CPLR 1411 eliminated contributory negligence and assumption of the risk as absolute bars to recovery in most cases, by substituting comparative negligence as the norm. The Dissent argued that comparative negligence, and not assumption of risk, should be applied to the facts of this case, because dismissal of the complaint absolved the District from its own negligence.

Indeed, New York's comparative fault regime, a "pure" system of comparative fault (*see* Dan B. Dobbs, The Law of Torts § 201 [2000]), is of the most liberal variety, allowing a plaintiff to recover even where his or her percentage of fault exceeds the defendant's percentage of fault. Thus, a plaintiff who is 99% at fault can still recover 1% of his or her damages from a negligent defendant.

Thus, the Court of Appeals reasoned that the doctrine of primary assumption of risk was not extinguished by the enactment of comparative fault because the focus of the doctrine is not on the plaintiff's negligence, but on a finding that the defendant had completely performed any duty owed to the plaintiff, as signified by the plaintiff's voluntary participation in the activity. See, *Morgan v State of New York,* 90 NY2d (1997). Conceptualized this way, the doctrine of primary assumption of risk was said to embody a principle of "no duty" or "no negligence" on the part of

the defendant. [“ ‘Without a breach of duty by the defendant, there is thus logically nothing to compare with any misconduct of the plaintiff’ ” quoting Prosser & Keeton, Torts § 68 at 496–497 (5th ed. 1984)]). Years later, in *Trupia v. Lake George Central School*, 14 NY3d 392 (2010), the Court of Appeals qualified this analysis, holding that while the “no duty” concept was “theoretically satisfying,” the theory of implied consent “is a highly artificial construct,” which, in reality, is simply “a result-oriented application of a complete bar to recovery” that was “precisely what the comparative negligence statute was enacted to avoid”. *Trupia at 395.* Given that “[t]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation,” the *Trupia* Court posited that the most persuasive argument in favor of retaining the doctrine was its social utility, noting that “athletic and recreative activities possess enormous social value” (*id.*).

Acknowledging the social value of athletics, the Dissent did not believe that a participant in a sporting or recreational activity should automatically assume all the risks of injury while utilizing a sports or recreational facility *that is not properly maintained*. To hold, as the majority did, absolved the District of its failure to reasonably maintain the premises.

The Dissent stated that the owner of a sports or recreational facility has a duty to maintain those premises *in a reasonably safe condition.* Judge Maltese believed that the comparative fault should apply to the facts of this case, and that comparative

fault should be decided by a jury.

The Dissent noted that the plaintiff should not have to assume "[c]oncealed, or unreasonably increased risks". citing, *Manoly v City of New York*, 29 AD3d 649 (2d Dep't 2006). Thus, the assumption of risk defense is not an absolute bar to recovery where the property owner may have some liability for failure to maintain the premises in a reasonably safe condition. Nor should the defense be applied where the owner failed to warn users of those defects.

The Dissent properly stated that the threshold question with respect to any premises liability cause of action is whether the owner or possessor of the land (or building) *breached the duty to use reasonable care* to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable. Citing PJI: 2:90. (An owner or possessor of property "has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable".)

Justice Maltese noted that the Court of Appeals has held that "[w]ith the enactment of the comparative negligence statute . . . *assumption of risk is no longer an absolute defense*" citing, *Turcotte v Fell,* 68 NY2d 432 (1986). Instead, the doctrine of assumption of risk "has been described in terms of the scope of duty owed to a participant" in a sporting or recreational activity. citing, *also Custodi v Town of Amherst,* 20 NY3d 83 (2012); *see Point I below*. "[A]ssumption of the risk

'does not exculpate a landowner from liability for ordinary negligence in maintaining a premises' *(Custodi v Town of Amherst,* 20 NY3d at 89, quoting *Sykes v County of Erie,* 94 NY2d 912, 913 [2000]). Yet, when these cases are dismissed at the summary judgment stage, jurors are not given those instructions, which should also be applied by the motion courts.

As the Dissent stated, it would not have been a burden for the District to throw some dirt and grass seed into the holes to even out the playing surface.

The Dissent asked this Court to clarify the following issue: When will the assumption of risk defense exculpate an owner for ordinary negligence? In this case, serious disabling injury incurred to the infant plaintiff when attempting to play "around" numerous holes and depressions in the outfield. This is not an ordinary risk of playing ball on a field *(see Simmons v Saugerties Cent, School Dist.,* 82 AD3d at 1409; *Ryder v Town of Lancaster,* 289 AD2d 995; *see also Connolly v Willard Mtn., Inc.,* 143 AD3d 1148). The District knew of the dangerous condition as a result of prior accidents and complaints, and through a proper inspection of the ballfield, which would have allowed ample time to repair it. The trier of fact should determine whether the District unreasonably increased the risks inherent in the activity by failing to maintain the ballfield.

Accordingly, appellants submit that the Supreme Court decision, as affirmed by the Second Department, failed the community of Merrick. Accordingly, the

plaintiff submits that the rule of comparative fault be applied to the facts of this case, and that the complaint be reinstated.

ARGUMENT

POINT I

THE ASSUMPTION OF RISK DEFENSE DOES NOT APPLY BECAUSE THE DISTRICT FAILED TO PROPERLY MAINTAIN ITS PROPERTY

The Court of Appeals has long held that the assumption of risk doctrine is not an absolute or complete defense in a negligence action, nor does it relieve a premises owner from all liability for negligence in maintaining their premises or property. *Turcotte v Fell,* 68 NY2d 432 (1986); *Siegel v City of New York,* 90 NY2d 471 (1997). The doctrine of assumption of risk is simply a measure of a defendant's duty of care. The fact that the doctrine of assumption of risk is not a complete defense and is a measure of defendant's duty of care, demonstrates that there are questions of fact that exist which should have precluded summary judgment.

The Supreme Court properly suggested that the District's poor maintenance of the field where the plaintiff fell "may qualify and constitute an allegedly negligent condition in the ordinary course of any property's maintenance *and may implicate typical comparative negligence principles*." R. 11. (emphasis supplied.) Nevertheless, the Supreme Court reluctantly dismissed the complaint, stating that it was required to do so by Second Department precedent. It is submitted that the

lower court misapprehended the precedent in the Second Department, and certainly misapprehended the precedent in this Court.

The Court of Appeals has held that the primary assumption of risk defense does not relieve the landowner from the duty to reasonably maintain its sports and recreation facilities. The Court of Appeals earlier held that "[w]ith the enactment of the comparative negligence statute . . . assumption of risk is no longer an absolute defense". *Turcotte v Fell,* 68 NY2d 432, 438 (1986).

Indeed, had the plaintiff merely traversed the uneven area, strewn with concealed holes, *which the District had knowledge of,* plaintiff would have had a viable action against the District for negligent maintenance of the premises. Common sense dictates that it should not matter that plaintiff was having a catch as opposed to merely walking, when he fell and was injured. *Sykes v County of Erie,* 94 NY2d 912 (2000); *Benolol v City of New York,* 94 AD3d 414 (1st Dep't 2012); *Morgan v State of New York,* 90 NY2d 471 (1997). There is no public benefit to applying assumption of risk to the facts of this case.

In *Trupia v. Lake George Central School*, 14 NY3d 392 (2010), the Court of Appeals limited the blanket application of assumption of risk with respect to sporting activities. The *Trupia* Court observed that the effect of the doctrine's application was often no different from that which would be obtained simply by resort to the defenses purportedly abandoned with the advent of comparative causation. The

Trupia Court stated "[w]hile it may be theoretically satisfying to view such conduct by a plaintiff as signifying *consent*, in most contexts this is a *highly artificial* construct and all that is actually involved is a result-oriented application of a complete bar to recovery". (emphasis supplied)

The reasoning of the *Trupia* Court is particularly applicable to this case, where the plaintiff did nothing more than catch a ball, hardly an organized sporting event, and sustained a permanently deformed arm due to the District's atrocious maintenance of the field. The artificial construct referred to by the *Trupia* Court has deprived a jury of the ability to assess the District's negligence. Were the District held responsible by a jury, it is likely that the District would fill the holes in with dirt. As Justice Maltese noted, the public is not benefited by resort to the artificial construct of the assumption of risk defense.

The *Trupia* Court declared that a "renaissance of contributory negligence replete with all its common-law potency is precisely what the comparative negligence statute was enacted to avoid" (id. at 395, 901 NYS2d 127). The protection afforded under the doctrine of primary assumption of risk "was a policy matter because of the enormous social value" that athletic and recreational activities impart, even while they involve significantly heightened risks" and it noted that it had "employed the notion that these risks may be *voluntarily assumed* to preserve

these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise" (id.).

The *Trupia* Court found that the application of the doctrine of assumption of risk "must be *closely circumscribed* if it is not seriously to undermine and displace the principles of comparative causation (citing, *Arbegast v. Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 168, 490 NYS2d 751 [1985]) that the Legislature has deemed applicable to any action to recover damages for personal injury, injury to property, or wrongful death' (CPLR 1411 [emphasis added]. Little would remain of an educational institution's obligation to supervise the children in its charge if school children could generally be deemed to have consented in advance" to the dangers arising from their risky or imprudent conduct. (Id. at 396, 901 NYS2d 127).

Therefore, the *Trupia* Court *declined* to apply the assumption of risk doctrine to bar the claim of a 12 year old plaintiff who was injured sliding down a banister while at summer school. In closing, the *Trupia* majority noted as follows: "We do not hold that children may never assume the risks of activities, such as athletics, in which they freely and knowingly engage, either in or out or school -- only that the inference of such an assumption as a ground for exculpation may not be made in their case, or for that matter where adults are concerned, except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled" (id.).

The *Trupia* Court found that genuine questions of fact existed regarding the applicability of the doctrine to the 12 year old plaintiff. The *Trupia* Court identified possibly heightened risks by virtue of the absence of extra mats in the vicinity of the banisters.

It is submitted that the reasoning of the *Trupia* Court's decision encompasses the facts of this case. The plaintiff here was engaged in an informal game of catch, and was not engaged in an organized sporting activity, which often involves heightened risks. The District (there were admissions by two separate directors) conceded that they would have contacted someone to remedy the hazard had they known about it. (As stated, complaints about the field were the subject of PTA meetings). Allowing the assumption of risk doctrine to operate to dismiss this case, was only achieved by resorting to a "highly artificial construct", which the *Trupia* Court warned against.

The District argued that the *Trupia* case is not applicable to this case, because having an informal game of catch is an athletic activity covered by the assumption or risk defense, whereas sliding down a bannister is not. However, the concurring opinion in the *Trupia* case found flaws with such reasoning. The concurring opinion asked why sliding down a banister is different from sliding down a ski slope, and/or any other recreational activity? The conundrum is that the banister-sliding child (involved in improper horse-play) can recover in common law negligence whereas

the skier, engaged in activities which are more socially valuable, cannot recover damages. Similarly, why would having an informal catch with a football be an activity in need of the "protection" of the assumption of risk defense. Is throwing around a ball more akin to horseplay or to the NFL? There are vast differences between having a catch with a football, and playing football competitively. Plaintiff submits that having a catch is more similar to sliding down a bannister, or walking across the field, than it is to playing football competitively.

Plaintiff urges that the *Trupi*a decision should be interpreted to limit the primary assumption of risk defense to risky athletic endeavors *which the defendants have not made riskier*. Thus, the *Trupia* Court held: "We do not hold that children may never assume the risks of activities, such as athletics, in which they freely and knowingly engage, either in or out of school--only that the inference of such an assumption as a ground for exculpation may not be made in their case, or for that matter where adults are concerned, *except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled.*" (emphasis supplied). In this case, the District made having a catch riskier, by allowing concealed holes (of which it had notice) to exist in the field. The *Trupia* Court stated: "Extensive and unrestricted application of the doctrine of primary assumption of the risk to tort cases generally *represents a throwback to the former*

doctrine of contributory negligence, wherein a plaintiff's own negligence barred recovery from the defendant".

The *Trupia* Court noted that the doctrine of primary assumption of risk “[h]as been described as a ‘principle of no duty’ rather than an absolute defense based upon a plaintiff's culpable conduct”. citing, *Morgan v State of New York*, 90 NY2d 471(1997). The *Trupia* Court noted that the reality is that the effect of the doctrine's application “[i]s often not different from that which would have obtained by resort to the complete defenses purportedly abandoned with the advent of comparative causation--culpable conduct on the part of a defendant causally related to a plaintiff's harm is rendered nonactionable by reason of culpable conduct on the plaintiff's part that does not entirely account for the complained-of harm. While it may be theoretically satisfying to view such conduct by a plaintiff as signifying consent, in most contexts this is a highly artificial construct and all that is actually involved is a result-oriented application of a complete bar to recovery. Such a renaissance of contributory negligence replete with all its common-law potency is precisely what the comparative negligence statute was enacted to avoid.” Appellants submit that the Judgment in this case was only achieved by resorting to a highly artificial construct in order bar to recovery.

Appellants submit that the Decision in the *Ninivaggi* case is not supported by the decision in *Trupia.*

Nor is the *Ninivaggi* decision supported by this Court's decision in *Custodi v Town of Amherst,* 20 NY3d 83 (2012). In that case, the Court of Appeals held that the assumption of risk doctrine "does not exculpate a landowner from liability for ordinary negligence in maintaining its premises, because such an exception would swallow the general rule of comparative fault if sidewalk defects or dangerous premises conditions were deemed 'inherent' risks assumed by non-pedestrians who sustain injuries, *whether they be joggers, runners, bicyclists or roller-bladers.*" (emphasis supplied). See also *Ashbourne v City of New York,* 82 AD3d 461 (1st Dep't 2011) (assumption of risk did not apply to roller-blading on sidewalk – activity was not an organized sporting event); *Cotty v Town of Southhampton,* 64 AD3d 251 (2d Dep't 2009).

In the *Custodi* case, the plaintiff was rollerblading on a public sidewalk. Plaintiff fell when she struck a two-inch height differential. The Court of Appeals concluded that assumption of the risk did not apply to that fact pattern.

The District claimed that the *Custodi* case is not applicable to this case because it took place on a public sidewalk. However, the *Custodi* Court specifically noted that the injured person was *not rollerblading at a rink, a skating park, or in a competition.* The *Custodi* Court held: "[E]xtension of the doctrine to cases involving persons injured while traversing streets and sidewalks would create an unwarranted diminution of the general duty of landowners, both public and private,

to maintain their premises in a reasonably safe condition." It is submitted that the reasoning of the *Custodi* Court applies to the facts of this case. There is no reason exists to distinguish the duty an owner has to maintain a public sidewalk, with the duty of the District to maintain a public playing field. The public is best served when owners maintain public premises in a reasonably safe condition.

The *Custodi* Court made a distinction between rollerblading on a sidewalk (a recreational activity to which the assumption of risk doctrine does *not* apply) and rollerblading in a competition, in which the assumption of risk doctrine applies. It is submitted that having a catch on a Saturday afternoon more akin to the recreational activity of rollerblading on a sidewalk, than to playing football competitively. Employing the logic utilized by this Court in the *Custodi* case, should result in reversal. Indeed, had plaintiff been merely walking on the field to meet his friends, and his foot fell into a concealed hole in the field, he would be permitted to bring an action against the District. That is why the *Custodi* Court held that a plaintiff does not assume the risks of defects which are concealed or enhanced. The risks in this case were both concealed and enhanced by the District's failure to maintain its' field.

In *Siegel v City of New York*, 90 NY2d 471 (2001), a companion case to *Morgan v State of New York,* 90 NY2d 471 (1997), the plaintiff snagged his foot in a ripped tennis court net, which the plaintiff had prior knowledge of. The *Siegel* Court concluded that the plaintiff should not be deemed legally to have assumed the

risk of injuries caused by his tripping over the torn net. *"Our precedents do not go so far as to exculpate sporting facility owners of this ordinary type of alleged negligence."* It is submitted that the *Siegel* decision compels a reversal of summary judgment. The District should not be exculpated from ordinary negligence which the Supreme Court referred to as "shameful".

The *Siegel* Court refused to apply the doctrine as a matter of law, where an inherent feature of a playing surface or space was itself defective, *even though the plaintiff was aware of the defect*. The automatic negation of a landowner's duty in such circumstances would give landowners license to allow properties, upon which sporting and recreational activities are held, to fall into disrepair. (The District allowed the field to fall into disrepair even though it knew of prior injuries.) In *Siegel v City of New York, supra,* the Court of Appeals held:

"…in assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are 'unique and created a dangerous condition *over and above the usual dangers that are inherent in the sport." See also, Owens v RJS Safety Equip.,* 79 NY2d 967; *Cole v NY Racing Association,* 24 AD2d 993; aff'd 17 NY2d 761. It is submitted that in this case, the danger of having a catch with a football were over and above the usual dangers inherent in having a catch. See also *Bukowski v. Clarkson Univ.,* 19 N.Y.3d 353

(2012) (a university baseball pitcher assumed the risk of injury when he was hit by his own pitch during indoor batting practice.)

The Dissent asked this Court to examine the issue and provide clarification and consistency. The interdepartmental inconsistency over the applicability of the assumption of risk defense, as demonstrated below, should be resolved by the Court of Appeals.

A. Precedent in the First Department.

In *Clarkin v In Line Restaurant Corp.,* 148 AD3d 559 (1st Dep't 2017), *a case exactly on point,* the plaintiff stepped into a hole in the grass on the restaurant's front lawn while playing frisbee. The Supreme Court denied defendant's motion for summary judgment, and the First Department affirmed The *Clarkin* Court applied rules of ordinary negligence, and stated that the restaurant failed to establish actual inspection and maintenance of the lawn. The restaurant also failed to show that they lacked actual notice of the hole in its lawn, or that that there were no similar accidents at the subject location. In affirming the denial of summary judgment to the restaurant, the First Department held: "*Lastly, we find that plaintiff did not assume the risk of injury by playing the Frisbee game, because it is undisputed that the hole was not perfectly obvious.*"

The facts are exactly on point with the facts of this case. Clearly, the First Department would not have dismissed the *Ninivaggi* case as it is undisputed that the

District did not inspect the outfield, reasonably maintain the outfield and had notice of prior accidents and complaints. Furthermore, the hole that Michael Ninivaggi fell into was not obvious.

In *Furnari v City of New York,* 89 AD3d 605 (1st Dep't 2011), the plaintiff was injured while playing softball on an asphalt play area at a City park. After fielding a ball, the plaintiff fell when he planted his foot to throw the ball. Plaintiff argued that he fell as a result of an uneven playing surface caused or concealed by a tar patch applied by the defendant. The Appellate Division held that the assumption of risk doctrine did not apply. The plaintiff described his injury as his left foot getting "stuck" in something, he did not know what, causing him to fall. The Court held that the accident was caused by an unevenness in the playing field, which *is not inherent* in the sport when it is played on a flat surface.

In *Ellis v The City of New York,* 281 AD2d 177 (1st Dep't 2001), the City owned and maintained a baseball field with holes. The First Department held that the holes were not open and obvious. The assumption of risk doctrine was not charged at trial.

It is submitted that the assumption of risk doctrine does not apply where, as here, the plaintiff was involved in an informal game of catch, not an organized sporting event. This case is analogous to the informal activity the plaintiff in the *Ashbourne* case was involved in. See *Ashbourne v City of New York,* 82 AD3d 461

(1st Dep't 2011). In the *Ashbourne* case, plaintiff was injured when, *while roller blading*, she struck a raised sidewalk. The First Department held that although plaintiff was rollerblading, an activity one could consider recreational and risky, *plaintiff was not participating in an organized sporting event*. Thus, the Appellate Division held that the plaintiff did not consent to the negligent maintenance of the sidewalk. Here too, Michael Ninivaggi, who was engaged in an informal game of catch, did not consent to the negligent maintenance of the outfield.

B. Precedent in the Second Department.

The decisional law in the Second Department is inconsistent.

Recently, in *Philius v City of New York* (161 AD3d 787 [2d Dept 2018], *lv granted* 2018 NY Slip Op 80737[U] [2d Dept 2018], *appeal withdrawn* 32 NY3d 1108), the plaintiff was injured while playing basketball on an outdoor court that had fallen into a state of disrepair, with deep, long-persisting cracks in the surface of the basketball court. Justice Connolly, joined in her concurrence by Justice Austin, observed that, although the primary assumption of risk doctrine encompasses risks that involve sub-optimal conditions, applying this doctrine where a landowner has "unreasonably allowed a sporting venue to fall into a state of disrepair *is incompatible* with the theoretical and pragmatic rationales behind the doctrine" *(id* at 796). [The deep cracks in a cement basketball court in the *Philius* case were

readily observable, whereas holes in the District's outfield concealed by grass, were not.].

Justices Connolly and Austin further pointed out that this Court has given too much deference to the doctrine of primary assumption of risk to, in effect, obviate the duty of defendant landowners to inspect and repair their sports facilities and otherwise maintain them in a reasonably safe condition. While the Second Department directed dismissal of the plaintiffs' complaint, it simultaneously granted leave to appeal to the Court of Appeals. *It appears that the Second Department is wrestling with the issues presented here.* Unfortunately, the defendant New York City Housing Authority resolved that appeal (presumably with a settlement), and the appeal was withdrawn *(see id)*.

The concurring opinion pointed out what appellants have urged *in the interests of justice:* The doctrine of primary assumption of risk was never intended to allow a landowner to permit a recreational facility to fall into a neglectful state of disrepair, completely relieving it of any duty to sports participants. Indeed, in the *Philius* case, the plaintiff was aware of the openly and obvious crack, but chose to play basketball anyway. It is readily apparent, that in this case the holes were concealed with overgrown grass.

Moreover, insofar as the doctrine of primary assumption of the risk was carried over after the enactment of comparative fault for public policy reasons *it does*

not make public policy sense to allow landowners who completely abdicate their duty to perform any kind of maintenance or repair on their property to gain the benefit of the defense. (*see, Palladino v. Lindenhurst Union Free School Dist.*, 84 A.D.3d at 1199, 924 N.Y.S.2d 474) [Skelos, J., concurring on constraint] ["The automatic negation of a landowner's duty in such circumstances would give landowners license to allow properties, upon which sporting and recreational activities are held, to fall into disrepair"]). While athletics and recreation are socially valuable endeavors, society also has an interest in the safety of participants of those activities. Thus, insofar as one of the principal aims of tort law is to deter conduct that produces harm (*see* Dan B. Dobbs, The Law of Torts § 11 [2000]), it does not comport with public policy to preclude only sporting participants from suing landowners who have negligently allowed their properties to deteriorate—indeed, if the plaintiff had been a pedestrian who tripped while simply passing through the basketball court, he would be allowed to hold the defendant responsible for its negligence.

Seven years before the *Philius* case, in *Palladino v. Lindenhurst Union Free School Dist.,* 84 A.D.3d 1194 (2d Dep't 2011), the Second Department applied the assumption of risk defense to a case where an infant was injured playing hand-ball, because the infant was aware that a defect existed in the grate on the handball court. Judge Skelos issued a concurring opinion in support of dismissing the complaint,

but did so reluctantly. In the concurring opinion, Judge Skelos expressed his view that the application of the doctrine under the circumstances of the *Palladino* case was neither mandated by Court of Appeals precedent nor consonant with the narrow reach properly afforded the doctrine, as clarified by this Court in *Trupia v Lake George Cent. School District,* 14 NY3d 392 (2010). The Court of Appeals acknowledged in the *Trupia* case this consent-based theory is a "highly artificial construct," which has led to "a renaissance of contributory negligence replete with all its common-law potency".

Judge Skelos noted that this Court was concerned in the *Trupia* case with defining the *types of activities* which fall within its ambit. Thus the *Trupia* Court noted that the doctrine was held to be applicable to cases involving competitive athletic endeavors, such as (1) in *Ziegelmeyer v US Olympic Comm.,* 7 NY3d 893 (2006) (where the plaintiff, an Olympic speed-skater, who was aware of the exact manner in which safety pads had been set up on the boards surrounding the rink, fell in such a way that her feet lifted the pads, causing her hip to directly strike the boards) and (2) in *Maddox v City of New York,* 66 NY2d 270 (1965) (the plaintiff, a professional baseball player, assumed the risk related to wet and muddy condition of baseball field]; *Scaduto v State of New York,* 86 AD2d 682 (3d Dep't 1982), aff'd 56 NY2d 762 (1982) (college softball player assumed risk of injury on drainage ditch near the third-base line, which he was aware of and which was necessary for drainage

of field]). Judge Skelos observed that this Court has applied the doctrine of primary assumption of risk to irregular surfaces or features in playing spaces that existed as they were designed. However, the Court refused, in *Siegel v City of New York*, 90 NY2d 471 (2001), to apply the doctrine as a matter of law, where an inherent feature of a playing surface or space was itself defective, even though the plaintiff was aware of the defect. It troubled Judge Skelos, as appellants repeatedly caution, that by applying assumption of risk to the facts of this case, amounts to an automatic negation of a landowner's duty and gives landowners license to allow properties, upon which sporting and recreational activities are held, to fall into disrepair. This is exactly what troubled Judge Steinman (Supreme Court, Nassau County) when he wrote: What incentive does the District have to ensure that future Michaels are not similarly injured from its alleged failure to provide a safe ball-field upon which the children from Merrick can play (*besides shame*)?" R. 13. (emphasis supplied).

In *Simone v Doscas,* 142 AD3d 494 (2d Dep't 2016), summary judgment to the defendants was reversed on appeal. In that case, *as here*, the plaintiff was playing ball and was injured due to a less than optimal playing surface. When Simone jumped to block the ball, he landed on a flower pot, which was resting on the grass. Rather than determine that the plaintiff assumed the risks of a less than optimal playing surface (even though it can well be considered that a flower pot is an open and obvious condition), the Second Department reversed the lower court's grant of

summary judgment to the defendant. The *Simone* Court held that the defendants failed to establish that the assumption of risk defense was a bar to the suit. It is difficult to understand how the decision in the *Simone* case can be reconciled with the decision in the *Ninivaggi* case.

In *Cotty v Town of Southhampton,* 64 AD3d 251 (2d Dep't 2009), the Second Department declined to extend assumption of risk to a *plaintiff-bicyclist* who collided with an oncoming vehicle after she swerved in the road to avoid collision with another cyclist due to a "lip" in the road. In the *Cotty* case, the case was governed by ordinary negligence, and not by the affirmative defense of assumption of risk.

The *Cotty* Court held: "[I]t is not sufficient for a defendant to show that the plaintiff was engaged in some form of leisure activity at the time of the accident. If such a showing were sufficient, the doctrine of primary assumption of risk could be applied to individuals who, for example, are out for a sightseeing drive in an automobile or on a motorcycle, *or are jogging, walking, or inline roller skating for exercise*, and would absolve municipalities, landowners, drivers, and other potential defendants of all liability for negligently creating risks that might be considered inherent in such leisure activities. *Such a broad application of the doctrine of primary assumption of risk would be completely disconnected from the rationale for its existence.* The doctrine is not designed to relieve a municipality of its duty to

maintain its roadways in a safe condition, and such a result does not become justifiable merely because the roadway in question happens to be in use by a person operating a bicycle, as opposed to some other means of transportation." (emphasis supplied.) It is submitted that the reasoning of the *Cotty* Court should govern the facts of this case.

The case *Henig v. Hofstra U*niv., 160 A.D.2d 761 (2d Dep't 1990) has identical facts to this case, except that in Henig, the activity was organized. The plaintiff alleged that Hofstra allowed its' athletic playing field, to become "*uneven, rough, full of holes and otherwise dangerous*". The plaintiff further claimed that Hofstra's conduct was negligent and that, by reason of its negligence, he was caused to fall and to sustain injury, while playing in a intramural competition. Hofstra moved for summary judgment against the plaintiff, asserting the affirmative defense of assumption of the risk. Hofstra argued that summary judgment was warranted as it was shown that the injury in question occurred during an athletic event, irrespective of whether a defect in the playing field attributable to the owner's negligence might have been a contributing factor. The *Henig* Court disagreed and held:

"Since we agree with the Supreme Court that the doctrine of assumption of the risk is not so all encompassing, we sustain the denial of summary judgment……In the present case, we cannot say, as a matter of law, that a hole with

the dimensions described by the plaintiff at his pretrial deposition (several feet wide and several inches deep) must necessarily be considered to be representative of the various hazards to which football players normally expose themselves. We do not believe in this instance that it may be determined as a matter of law whether the hole in question is typical of the terrain upon which the game of football is normally played, so as to constitute a risk which the plaintiff could or should have foreseen, or whether, on the contrary, this hole constituted an unreasonable, unnecessary and unforeseen addition to those risks which are admittedly unavoidable in the playing of this sport. This question should be decided by the jury, which may take into account the magnitude of the hole, its location, and all other relevant circumstances." Similarly, in this case, the question of whether it may be determined as a matter of law whether the hole in question is typical of the terrain upon which having a catch is normally played, should be decided by a jury. See also, *Greenburg v Peeksville City School District,* 255 AD2d 487 (2d Dep't 1998) (Out of bounds area at basketball court end line was not an assumption of risk case); *Clark v State of New York,* 245 AD2d 413 (2d Dep't 1997) (steep drop off several inches from asphalt basketball area was not an assumption of risk case); *Warren v Town of Hempstead,* 246 AD2d 536 (2nd Dep't 1998) (issue of fact as to whether defendant's use of sealant rendered the depth of cracks in basketball court to not be open and obvious.)

see also, *Colucci v Nansen Park,* 226 AD2d 336 (2d Dep't 1996). The decision cannot be reconciled with the *Ninivaggi* decision.

In *Warren v Town of Hempstead,* 246 AD2d 536 (2d Dep't 1998), a decision granting summary judgment to the Town was reversed. In that case, as in this case, the plaintiff was injured playing ball when he tripped on a concealed crack on an outdoor basketball court. A question was raised as to whether the crack was open and obvious. Here too, questions of fact were raised.

Schmerz v Salon, 26 AD2d 691 (2d Dep't 1996) is also on point. In that case, the plaintiff sued for injuries that resulted while playing baseball. The defect in question were *holes that were left in the base-paths*, which the Second Department determined were *not an inherent risk of playing baseball*. Thus, the Second Department held that the defendant breached its duty to maintain the field in a reasonably safe condition for its' anticipated use. As in this case, the holes were concealed with grass and blended into the surrounding grass. The decision cannot be reconciled with the *Ninivaggi* decision.

Cases in which summary judgment was granted to defendants on the basis of "open and obvious" conditions, are distinguished by the fact that in this case, the holes are concealed. See *Manoly v City of New York,* 29 AD3d 649 (2d Dep't 2006) (involved a soccer player who fell over a raised manhole which was permanent, and was open and obvious); *Morlock v Town of N. Hempstead,* 12 AD3d 652 (2nd Dep't

2004) (involved a roller hockey player who knew that the surface had permanent cracks, which the Court considered to be open and obvious); *Schoppman v Plainedge Union Free School District,* 297 AD2d 338 (2d Dep't 2002) (involved a softball player who ran into a chain link fence which was open and obvious).

In this case, the District conceded that the outfield was poorly maintained, and the hole which caused the plaintiff to break his arm, was concealed, and was neither open nor obvious. See also, *Cruz v City of New York*, 288 AD2d 250 (2d Dep't 2001) (the plaintiff did not assume risk where a heavy piece of equipment was negligently placed proximate to sidelines of football field]; *Allwood v CW Post Coll*., 190 AD2d 704 (2d Dep't 1993) (question of fact as to assumption of risk where gymnasium floor used for basketball practice was warped, uneven, and contained puddles of water); *Henig v Hofstra Univ*., 160 AD2d 761 (2d Dep't 1990) (question of fact as to whether hole on football field was "typical of the terrain upon which the game of football is normally played" and, thus, as to whether plaintiff assumed risk).

C. The District's Cases are not applicable.

The District argued that the decision in *Tinto v. Yonkers Bd. of Educ.,* 139 A.D.3d 712 (2d Dep't 2016) controlled. Appellants argued that reliance on *Tinto* is misplaced. In the *Tinto* case, the hole was outside the boundary of the football field, whereas in this case the hole was firmly within the outfield, and not near the boundary to the outfield. In addition, the plaintiff in *Tinto* was 16 years old, was

playing tackle football, an admittedly risky activity. Here, plaintiff was having a catch, albeit with a football.

Finally, the hole in the Tinto case was open and obvious, whereas the hole in this case was concealed. Indeed, the Headnote to the published *Tinto* decision states: "Fall in *Clearly Visible* Hole While Playing Football". (emphasis supplied.) Accordingly, the *Tinto* decision has no application to the facts here.

The District relied upon the Second Department decision in *Palladino v. Lindenhurst Union Free Sch. Dist*., 84 A.D.3d 1194 (2d Dep't 2011). That case involved the plaintiff's infant son who was playing handball on the defendant's premises when he allegedly stepped on an improperly placed grate, sustaining personal injuries. The decision granting the District summary judgment was premised upon the fact that the infant was (1) aware of the condition of the grate and (2) the condition of the defective grate was open and obvious. Thus, the decision was based upon the fact - - absent here - - that the risks were perfectly obvious to the plaintiff. In the concurring opinion, Judge Skelos noted that the grates were ordinarily secured with bars, however, the security bar on the subject grates had been removed, and one of the grates was improperly placed, such that it was lying partially on top of another properly placed grate, leaving a *three-to-six-inch* uncovered space between the edge of the cement block and the edge of the improperly placed grate. *On the day of the accident, the plaintiff warned his friends about the space, and told*

them to "be careful." The *Palladino* Court noted that the Court of Appeals has held that such a consent-based theory is a "highly artificial construct," which has led to "a renaissance of contributory negligence replete with all its common-law potency" (citing, *Trupia*, 14 NY3d at 395). The *Palladino* Court noted that while the Court was concerned in *Trupia* with a different aspect of the doctrine, namely, the types of activities falling within its ambit, the Court's recognition of the tension between primary assumption of risk and the law of comparative causation *prescribes prudent application of the doctrine generally.* It is submitted that in this case the plaintiff could not see the defects such as to avoid them. Therefore, the *Palladino* decision is distinguished.

The District's argument is that the plaintiff knew that the outfield had holes, and therefore consented to them. This argument should be unavailing, in light of the numerous school and adult groups who utilized the field. Knowledge of concealed holes should not bar this action, as the plaintiff would have had to inspect the field for holes every-time he traversed it. Since the District didn't bother to inspect the field, it would be unjust for the Court to require the plaintiff to have undertaken that burden. Compare *Casey v Garden City Park-New Hyde Park Sch. Dist*., 40 AD3d 901, 837 NYS2d 186 [2007] [hole in the surface of a basketball court 1 1/2 feet wide and 2 inches deep]; *Manoly v City of New York*, 29 AD3d 649, 816 NYS2d 499 [2006] [raised manhole cover on soccer field, and surrounding fence that was in

disrepair]; *Morlock v Town of N. Hempstead*, 12 AD3d 652, 785 NYS2d 123 [2004] [cracks and holes in surface of cement hockey rink]; *Ciocchi v Mercy Coll*., 289 AD2d 362, 735 NYS2d 144 [2001] [badminton poles stored in corner of gym while it was being used for football game]); *Sykes v County of Erie,* 94 NY2d 912 (2000)(plaintiff injured his knee when he stepped into a 'recessed drain' while playing basketball on an outdoor court); *Maddox*, 66 NY2d 270 (1985)(the plaintiff, a professional baseball player, assumed the risk related to wet and muddy condition of baseball field;

Indeed, had the plaintiff merely traversed the uneven area, strewn with concealed holes, plaintiff would have had a viable action against the District for negligent maintenance of the premises. Principles of fairness and equity dictate that it should not matter that plaintiff was having a catch as opposed to merely walking, when he fell and was injured. *Sykes v County of Erie,* 94 NY2d 912 (2000); *Benolol v City of New York,* 94 AD3d 414 (1st Dep't 2012); *Morgan v State of New York,* 90 NY2d 471 (1997).

The Record evidence supports the fact that the District did not properly maintain its outfield. The Head Custodian admitted that no one in the District inspected the outfield for defects. Moreover, both the Head Custodian and his supervisor admitted that the defect, the hole into which the plaintiff's foot fell, *should have been corrected*. The lower court admonished the District for this failure,

and asked how many more "Michaels" needed to be injured before the District takes action to properly maintain the area. The Second Department erred in affirming dismissal of the action.

D. Precedent in the Third Department.

The case *Simmons v Saugerties Central School District,* 82 AD3d 1407 (3d Dep't 2011), cannot be reconciled with the Second Departments' *Ninivaggi* decision.

In *Simmons v Saugerties Central School District,* 82 AD3d 1407 (3d Dep't 2011), the plaintiff, a high school student, was injured when he stepped into a large hole while playing touch football in the "bus circle" during recess at defendant's high school. Defendant's superintendent of buildings and grounds indicated that the bus circle was the area in front of the high school where the buses picked up the students and that students also played there. Plaintiff was 16 years old and played football in the grassy circle daily.

The school district, on strikingly similar facts to those in this case, moved for summary judgment, which was denied. The Second Department affirmed. Both courts acknowledged that an athlete assumes the risks inherent in a particular sport, including the construction of the playing surface, however, the Second Department cautioned that this doctrine, "[i]s not an absolute defense but a measure of the defendant's duty of care". citing, *Benitez v NYC Bd. Of Education,* 73 NY2d 650 (1989). The *Benitez* Court held: schools remain obligated "to exercise ordinary,

reasonable care to protect student athletes voluntarily involved in extracurricular sports from un-assumed, concealed or unreasonably increased risks."

It is respectfully submitted that the decision of the Third Department in the *Simmons* case cannot be reconciled with the decision of the Second Department in this case. The *Simmons* Court held:

"the doctrine of assumption of risk does not exculpate a landowner, including a school, from liability for ordinary negligence in maintaining a premises. *Sykes v County of Erie,* 94 NY2d 912 (2000); *Morgan v State of New York,* 90 NY2d 912 (1997). *Contrary to defendant's argument, the open and obvious nature of the large hole in the bus circle and plaintiff's allegedly long-standing knowledge of it does not bar inquiry into whether the allegedly dangerous condition resulted from defendant's negligent maintenance of its property* (*see Sykes v County of Erie,* 94 NY2d at 913; *Morgan v State,* 90 NY2d at 482. Defendant misapprehends the scope of the primary assumption of risk doctrine in arguing that a voluntary participant in a sport or recreational activity consents to *all* defects in a playing field so long as the defects are either known to the plaintiff or open and obvious. The doctrine, as defined by the Court of Appeals, does not extend so far." (emphasis supplied).

The *Simmons* Court affirmed the trial court's decision which denied summary judgment to the school district, holding that "[t]here are questions of fact regarding whether defendant's negligent maintenance of the bus circle created a dangerous

condition over and above the usual dangers that are inherent in the sport" of touch football."

It is respectfully submitted that the decision of the *Simmons* Court provided sufficient precedent to the Supreme Court and the *Ninivaggi* Second Department to deny the District summary judgment.

E. Precedent in the Fourth Department.

Ryder v Town of Lancaster, 289 AD2d 995 (4th Dep't 2011) is exactly on point with the facts of this case and cannot be reconciled with the *Ninivaggi* decision. In that case, the plaintiff stepped into a six to 8 inch deep hole while playing volleyball on a grass curt maintained by the Town. In the *Ryder* case, the Fourth Department held that triable issue of fact existed as to whether the defendant/Town breached a continuing duty to keep a grass volleyball court, in which there existed a six-to-eight-inch deep hole, in good repair.

It is readily apparent that there is intradepartmental inconsistency. Appellants contend that the assumption of risk doctrine is not intended to operate as an absolute defense in a negligence action, nor should it relieve a premises owner from all liability for negligence in maintaining their premises or property. The *Ninivaggi* decision should be reversed.

POINT II

THE PUBLIC IS NOT BENEFITED WHEN THE ASSUMPTION OF RISK DEFENSE IS EXTENDED BEYOND ORGANIZED ATHLETIC EVENTS WHICH INVOLVE HEIGHTENED RISK

The doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation. As this Court has stated, its retention is most persuasively justified not on the ground of practical compatibility, but simply for its utility in "facilitating free and vigorous participation in athletic activities". See *Trupia v Lake George Central School,* 14 NY3d 392 (2010) (*the public is better served when principles of comparative negligence are applied,* rather than have courts determine that the doctrine of assumption of risk is a bar to actions.); *Benitez v NYC Bd.* Of *Education,* 73 NY2d 650 (1989); *Morgan v State of New York,* 90 NY2d 471 (1997); *Turcotte v Fell, 68 NY2d 432 (1986).*

Thus, appellants here submit that the doctrine of assumption of risk should only be applied in the context of pursuits both *unusually risky* and *beneficial* that the defendant has in some nonculpable way enabled. As we have argued above, the facts of this case do not warrant the extraordinary protection of the assumption of risk defense. The activity - - having a casual catch with a football - - should not involve heightened risk, and its application to the facts here dis-serves the public. Applying the assumption of risk defense to this case does impede "free and vigorous

participation in athletic activities". see *Trupia v Lake George Central School,* 14 NY3d 392 (2010). Compare *Maddox v City of NY,* 66 NY2d 270 (1985) (a New York Yankee assumed the risk of a less than optimal playing surface of which he had prior knowledge.)

As we argued above, an informal game of catch is more akin to the recreational rollerblading activity addressed by the Court of Appeals in *Custodi v Town of Amherst*, 20 NY3d 83 (2012), or to the horse-play involved in sliding down a bannister in *Trupia v Lake George Central School,* 14 NY3d 392 (2010), than to an organized athletic event, such as found in the *Bukowski* case. (In *Bukowski v Clarkson University,* 19 NY3d 353 [2012], the plaintiff was a University baseball player.) Both the *Trupia* and *Custodi* cases attempt to set forth which activities deserve the protection of the assumption of risk defense (recognizing the enormous social value of athletic events) and which activities should be governed by comparative fault.

In *Cotty v. Town of Southampton*, 64 A.D.3d 251 (2d Dep't 2009), the Second Department distinguished between leisure recreational activities and those athletic activities which involve heightened risks, holding: "[I]t is not sufficient for a defendant to show that the plaintiff was engaged in some form of leisure activity at the time of the accident. If such a showing were sufficient, the doctrine of primary assumption of risk could be applied to individuals who, for example, are *** on a

motorcycle, or are jogging, walking, or inline roller skating for exercise, and would absolve municipalities, landowners, drivers, and other potential defendants of all liability for negligently creating risks that might be considered inherent in such leisure activities. *Such a broad application of the doctrine of primary assumption of risk would be completely disconnected from the rationale for its existence.”*. (emphasis supplied).

The activity of throwing a ball around on a District field is more akin to sliding down a bannister, as in *Trupia v Lake George Central School,* 14 NY3d 392 (2010), or rollerblading, as in *Custodi v Town of Amherst*, 20 NY3d 83 (2012), than it is to the engaging in organized and competitive athletic events.

In this case the plaintiff was a minor who was waiting for more friends to arrive and had started having an informal game of catch. There is no logic to the District’s argument that the activity plaintiff was involved in was in need of the protection of the assumption of risk defense. In fact, it is relatively undisputed that rollerblading, bicycle riding, and sliding down banisters is riskier than having a game of catch. Yet the activity of rollerblading is not deemed sufficiently “beneficial” to require the protection of the assumption of risk defense. Thus, the logic behind the assumption of risk defense is that when athletes engage in sports, they assume the risk of injury. Since athletic completion is beneficial to society at large, it should be encouraged and not impeded. However, there is no logic in exculpating a District

from liability for the subpar condition of an outfield that is used by the public, particularly school children. The *Trupia* Court warned that the blanket application of the assumption of risk defense should exculpate owners from liability for their own negligence.

Appellants contend that society Is not benefited when a child having a catch is said to have assumed the risks of his School District's negligence. The *Ninivaggi* decision should be reversed.

CONCLUSION

For the reasons stated above, it is respectfully requested that this Court reverse the decisions of the Supreme Court and Appellate Division, and reinstate the Complaint, and grant such other and further relief as this Court deems just and proper.

Dated: August 24, 2020
New York, New York

MARCY SONNEBORN, ESQ.

Of Counsel:
Marcy Sonneborn
David Owens
Salvatore J. DeSantis

NEW YORK STATE COURT OF APPEALS
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I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
August 24, 2020

Respectfully submitted,

Yours etc.,

MARCY SONNEBORN, ESQ.
MOLOD SPITZ & DeSANTIS, P.C.
1430 Broadway, 21st Floor
New York, New York 10018
(212) 869-3200