Nassau County Clerk's Index No. 348/13
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.

MOTION FOR LEAVE TO APPEAL

MOLOD SPITZ & DESANTIS, P.C.
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SUPREME COURT OF THE STATE OF NEW YORK
COURT OF APPEALS

Nassau County
Index No: 7751/13

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MICHAEL NINIVAGGI, by his parent and natural Guardian, PENNY NINIVAGGI, and PENNY NINIVAGGI, Individually,

Plaintiffs-Appellants,

-against-

MERRICK SCHOOL DISTRICT,

Defendants-Respondents.

----------X

NOTICE OF MOTION FOR LEAVE TO THE NEW YORK COURT OF APPEALS

PLEASE TAKE NOTICE, that Plaintiffs-Appellants, MICHAEL NINIVAGGI, by his parent and natural guardian, PENNY NINIVAGGI, and PENNY NINIVAGGI, Individually (hereinafter "Ninivaggi") , will move this Court pursuant to CPLR § 5602(a)(1)(i) and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the record of the prior appeal in this case to the Appellate Division, Second Department, and upon the statement and exhibits submitted herewith, at the Court of Appeals, 20 Eagle Street, Albany, New York 12207, on January 21, 2020 at 9:30 a.m., for an order granting leave to appeal to this Court from a final Decision and Order of the Appellate Division, Second Department dated November 27, 2019 and entered on December 5, 2019.

PLEASE TAKE FURTHER NOTICE, that answering papers if any must be served and filed at the Court of Appeals with proof of service on or before the return date of this motion.

Dated: New York, New York
January 6, 2020

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

By: Marcy Sonneborn
Marcy Sonneborn, Esq.

TO: Clerk of the Court of Appeals
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SUPREME COURT OF THE STATE OF NEW YORK
COURT OF APPEALS

----------x Nassau County

MICHAEL NINIVAGGI, by his parent and natural guardian, PENNY NINIVAGGI, and PENNY NINIVAGGI, Individually,

Index No: 7751/13

Plaintiffs-Appellants,

-against-

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

MERRICK SCHOOL DISTRICT,

Defendants-Respondents.

----------x

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

MARCY SONNEBORN, an attorney duly admitted to practice in the Courts of the State of New York hereby affirms the following to be true under penalties of perjury:

I am an attorney at law and of counsel to the law firm MOLOD SPITZ & DeSANTIS, P.C., for the purpose of preparing appeals. We represent the plaintiffs-appellants with respect to this appeal.

The plaintiffs-appellants seek leave to appeal to the Court of Appeals from a final decision of the Appellate Division, Second Department. The issues involve a matter of State-wide importance, as evidenced in the strong and lengthy dissent of Honorable Justice Joseph J. Maltese. In addition, the decisional law of the other

Appellate Divisions is in conflict with the decision in which leave to appeal is sought. Therefore, this case presents exactly the type of case which should be decided by the Court of Appeals.

A. PROCEDURAL HISTORY.

The Decision of the Appellate Division, Second Department states that it is from the Judgment which dismissed the Complaint, and not from the Order. This 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 Decision is from the Judgment, and not from the Order.

B. SUPPORTING DOCUMENTS.

1. Notice of Appeal, dated August 16, 2016 with the Supreme Court Decision and Order appealed from to the Appellate Division (Exhibit "A").
2. Notice of Entry, dated August 9, 2016 of the Appellate Division's Decision and Order (Exhibit "B").
3. Plaintiffs-Appellants Brief, by Marcy Sonneborn, Esq.
4. Defendant-Respondent's Brief, by Kathleen D. Foley, Esq.
5. Plaintiff-Appellant's Reply Brief, by Marcy Sonneborn, Esq.
6. Record on Appeal.

C. STATEMENT IN SUPPORT OF MOTION PURSUANT TO CPLR § 5602(a)(1)(i)

Plaintiffs-Appellants, Michael Ninivaggi, by his parents and natural guardian, Penny Ninivaggi, and Penny Ninivaggi individually, (hereinafter "Ninivaggi") seek to have their Complaint against Defendant-Respondent MERRICK SCHOOL DISTRICT (hereinafter "District") re-instated and that the issues raised herein by decided by a jury.

D. THE DECISION IS FROM A FINAL JUDGMENT.

The decision of the Appellate Division, Second Department, affirmed dismissal of the plaintiffs' Complaint. Accordingly, this Motion satisfies the rule found in CPLR § 5602(a)(i)(ii) that the Court of Appeals will only review cases which are from a final judgment.

E. TIMELINESS OF THE WITHIN MOTION

On December 5, 2019, the District served via regular mail the Decision of the Appellate Division, Second Department with Notice of Entry on Ninivaggi. This was received by this office on December 17, 2019 (See Exhibit C). On January 6, 2020, Ninivaggi timely served a Motion for leave to appeal to the Court of Appeals, pursuant to CPLR §§ 2221(d)(3), 5513(b) and 22 NYCRR 1250.16(d)(1).

Therefore, the Motion for leave to appeal to the Court of Appeals is timely.

F. QUESTIONS PRESENTED FOR REVIEW

This appeal presents a situation involving the application of the assumption of risk defense. In this case, an infant, 14 years old, was severely injured[1] while throwing a football on the weekend in the outfield of the District's outfield. The outfield served three baseball fields. It was well known that the outfield had numerous holes which were concealed by grass. See photographs annexed as R. 440-468. (References are to the Record on Appeal before the Appellate Division).

The plaintiff broke his arm, when his leg stepped into one of the holes which was concealed by overgrown grass. In fact, there were three similar holes, all concealed by grass, in the immediate area of where the plaintiff was injured.

The Merrick School District was aware of the depressions and uneven surface in the outfield.[2] The School District was also aware that neighborhood children played on the field when school was no longer in session. Nevertheless, the School District allowed the condition of the outfield to remain hazardous. As

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[1] Plaintiff sustained an acute transverse fracture and deformity of the left arm. R. 90. 72-75. Plaintiff required surgical correction, open reduction and internal fixation and bone grafting. Plaintiff's injuries are permanent. R. 72-75.

[2] It seems that everyone in the District community was aware of the poor condition of the field. In fact, the plaintiff testified that other friends of his had fallen over the uneven and choppy terrain (R. 208) and his mother Mrs. Ninivaggi, testified that her nephew broke his wrist on the field. Mrs. Ninivaggi knew of other children who had hurt themselves playing on the field. 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 field was always a subject at PTA meetings. R. 125-126.

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 plaintiffs-appellants seek review in order to have the Court of Appeals determine whether or not the primary assumption of risk defense should be permitted to exculpate a School District from liability where the School District is aware of the risks, and the risks, although known to everyone, are not observable when playing ball.

The plaintiffs-appellants seek review in order to have the Court of Appeals determine whether or not those who participate in recreational athletic endeavors have deemed to assume *concealed* risks which were previously known to the property owner.

The plaintiffs-appellants seek review in order to have the Court of Appeals determine whether or not the primary assumption of risk defense should be permitted to exculpate a School District from liability for ordinary negligence.

The plaintiffs-appellants seek review in order to have the Court of Appeals determine whether or not an outfield which is strewn with holes concealed by grass is properly described (as described by the Second Department) to have "[t]he natural features of a grass field."

G. THE MATTER IS OF STATE-WIDE IMPORTANCE.

The decision sought to be appealed involves matters of State-wide importance. The effect of the decision from which appellants seek leave to appeal, is to permit a School District to ignore the known hazardous condition of one of its' schools' fields even though such field is used by the adults and children of the community. The decision sought to be appealed permits such field to remain in disrepair, for no reason other than the School 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 School 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 "few 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. Participants in athletic endeavors should only assume observable risks – not concealed risks.

H. THERE IS A CONFLICT IN THE VARIOUS APPELLATE COURTS.

1. Precedent in the Court of Appeals.

The Court of Appeals has not always held that the primary assumption of risk defense relieves 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]).

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. *(see Custodi v Town of Amherst,* 20 NY3d 83, 87 [2012]). The Court of Appeals, in *Custodi v Town of Amherst, supra,* held that the assumption of risk doctrine "does not exculpate a landowner from liability for ordinary negligence in maintaining a 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, runner, bicyclists or roller-bladers." See also *Ashbourne v City of New York,* 82 AD3d 461 (1st Dep't 2011); *Cotty v Town of Southhampton,* 64 AD3d 251 (2d Dep't 2009).

The doctrine of primary assumption of risk has been limited by a decision of the Court of Appeals which cautioned that a blanket application of the doctrine is

the equivalent of a return to contributory negligence. (Every assumption of risk case cited by the District which pre-dates 2010 is no longer applicable.)

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 severely broke his arm due to the District's atrocious maintenance of the field. The artificial construct referred to by the *Trupia* Court would deprive a jury of the ability to assess the District's negligence.

As the lower court held:

"What incentive does the District have to ensure future Michaels are not similarly injured from its alleged failure to provide a safe ballfield upon which the children from Merrick can play (besides shame)?"

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. at 395, 901 NYS2d 127).

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."

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 risk. 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. Allowing the assumption of risk doctrine to operate to dismiss this case, was only achieved by resorting to a "highly artificial construct".

The question of negligence on the part of the District, as acknowledged by Judge Steinman, should be decided by a jury.

The Court of Appeals noted that "[P]articipants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced" *(Custodi v Town of Amherst,* 20 NY3d at 88). In this case, the plaintiff was injured as a result of concealed and unreasonably enhanced risk of which the District was aware.

2. Precedent in the Third Department.

Other departments of the Appellate Division have not dismissed cases at the summary judgment stage where there was a triable issue of fact concerning the defendants' maintenance of their sporting facilities. In *Simmons v Saugerties Cent. School Dist.* (82 AD3d 1407, 1409 [3d Dept 2011]), *a case exactly on point,* the plaintiff was injured while playing touch football during recess when he stepped into a large hole in the grassy area on which he was playing. The Third Department held that the plaintiff's allegedly long-standing knowledge of the hole and its open and obvious nature *did not "bar inquiry* into whether the allegedly dangerous condition resulted from [the] defendant's negligent maintenance of its property" *(id.* at 1409). The complaint was not dismissed.

3. Precedent in the Fourth Department.

In *Ryder v Town of Lancaster* (289 AD2d 995 [4th Dept 2001]), *also exactly on point,* the plaintiff was playing volleyball on a grass court maintained by one of the defendants. He was injured when he stepped into a six to eight inch deep hole in the court *(see id.* at 995). The Fourth Department found that *there were triable issues of fact* as to whether the defendant "breached a continuing duty to keep the grass in good repair" *(id.* at 995-996).

4. Precedent in the First Department.

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 First Department 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 First Department 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. Thus, issues of fact were presented of determination by a jury.

5. Precedent in the Second Department.

There are conflicting decisions in the Second Department, and readily apparent interest in having the Court of Appeals determine the issues raised in this case.

The Nassau County Supreme Court in this case, reluctantly dismissed the complaint, stating that it was "*constrained*" to follow the precedents of the Appellate Division, Second Department, concerning the doctrine of primary assumption of risk. Thus, the Supreme Court dismissed the complaint even though it did not believe that was the right thing to do. The Supreme Court stated: "[E]vidence 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 ballfield upon which the children from Merrick can play (besides shame)? But like Justice Skelos [in *Palladino v Lindenhurst Union Free School Dist.* (84 AD3d 1194 [2d Dept 2011])], *this court is constrained to follow the Second Department precedents.*" (emphasis supplied).

Appellants argued, and the Dissent agreed, that the cases that the Supreme Court was "constrained" to follow were cases which should *not* have been

dismissed at the summary judgment stage: *(see e.g. Casey v Garden City Park-New Hyde Park School Dist.,* 40 AD3d 901 [2d Dept 2007]; *Manoly v City of New York,* 29 AD3d 649 [2d Dept 2006]; *Morlock v Town of N. Hempstead,* 12 AD3d 652 [2d Dept 2004]; *Gamble v Town of Hempstead,* 281 AD2d 391 [2d Dept 2001]). As stated above, the cases relied upon by the District are prior to this Court's 2012 *Custodi* decision and 2010 *Trupia* decision.

In addition, in this case, the District knew about the hazardous condition of the outfield, and did nothing about it, even though the defects were concealed, and there had been prior accidents[3]. Indeed, the District may have enhanced the risks by permitting trucks to drive over the fields on a regular basis, thereby belying the Second Department's characterization of the field as having "natural features". R. 421-422; 434. The lower court holding that only "*shame*" could incentivize the District to maintain the outfield for the neighborhood's children, is plainly not the intended consequence of the assumption of risk defense. As the Dissent maintained, some grass-seed and dirt could easily have repaired the defects at little cost or expense to the District.

[3] Plaintiff sustained an acute transverse fracture and deformity of the left arm. R. 90. 72-75. Plaintiff required surgical correction, open reduction and internal fixation and bone grafting. Plaintiff's injuries are permanent. R. 72-75.

It should not be the law of this Department that an owner need not protect participants from known *concealed* risks. The facts here do not present a situation where the holes in the field was *clearly visible* and known to the plaintiff, as was the case in *Tinto v Yonkers,* 139 AD3d 712 (2d Dept 2016). In *Tinto,* the hole was open and obvious and clearly visible and known to the plaintiff. The holes in this case were concealed, and difficult to locate. The purported open and obvious nature of the holes in this case, is belied by the photographic evidence.

A recent case of the Second Department is instructive. 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. Plaintiff Simone jumped to block the ball and landed on a flowerpot, 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. Surely the decisions in *Simone* provides sufficient precedent in the Second Department for this Court to review the issues.

Indeed, the case *Henig v Hofstra Univ.* (160 AD2d 761 [2d Dept 1990]), is on point and in conflict with the decision in this case. In the *Henig* case the complaint was not dismissed. In *Henig*, a football player was injured during play when he stepped into a hole several feet wide and several inches deep. This Court held that "we cannot say, as a matter of law, that a hole with the dimensions described by the plaintiff . . . must necessarily be considered to be representative of the various hazards to which football players normally expose themselves . . . so as to constitute a risk which the plaintiff could or should have foreseen . . . [in] addition to those risks which are admittedly unavoidable in . . . playing [the] 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" *(id.* at 762-763). The decision in *Henig v Hofstra Univ., supra,* is on point with the facts of this case.

The Second Department decision in this case cited to *Bukowski v Clarkson,* 19 NY3d 353 (2012), as support for dismissing the Complaint. We disagree. In the *Bukowski* case, the plaintiff was held to have assumed the risks of being hit by a line drive. It is submitted that the *Bukowski* case is exactly the kind of case assumption of risk is meant to pertain to. In this case, the plaintiff should not have "assumed the risk" of the District's poor maintenance.

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). They 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.

By granting leave to appeal in this case, the Court of Appeals will have the opportunity to determine these important issues. [Moreover, 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.]

I. THE DECISION SHOULD BE REVERSED.

The threshold issue in any premises liability cause of action is whether the defendants have breached their duty to maintain their premises in a reasonably safe condition. It is undisputed that the District did not properly maintain the subject field despite the constant use of the outfield by the District's students, adult softball leagues, and the public at large. 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.

In addition to failing to inspect and maintain the subject field, the District permitted trucks to regularly drive over the field. R. 421-422; 434. No one walked the fields afterwards to check if the trucks did any damage. R. 423-424.

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.

The Pattern Jury Instructions include an explanation of the relationship between assumption of the risk and comparative negligence: "The law provides

that where the defendant owes a duty of reasonable care to the (plaintiff, decedent), but the (plaintiff, decedent) voluntarily engages in an activity involving a risk of harm and the (plaintiff, decedent) knows and fully understands, or should have known and fully understood, the risk of harm, the plaintiff's damages must be reduced by the extent to which those damages were caused by the (plaintiff's, decedent's) own conduct" (PJI 2:55; *see* CPLR 1411).

The Dissent correctly noted that the Pattern Jury Instructions outline the standard of care for an owner or possessor's liability for a condition or use of a premises. 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" (PJI 2:90). "[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 (2012), 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.

By obviating the determination of the threshold issue of whether landowners have breached their duty to maintain their premises in a reasonably safe condition, the decision in this case (as cautioned by the Supreme Court) has removed landowners' incentive to inspect and repair their premises regardless of

whether they were previously put on notice by the regular use of these sports facilities by young people. As the Dissent correctly stated, it was not a heavy burden for the district to maintain the ballfield in a reasonably safe condition to protect foreseeable users from injury.

The District's field 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. It was well known that the field (the outfield to three baseball fields) had holes hidden by grass. See photographs annexed as R. 440-468.

Serious 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 (2011); *Ryder v Town of Lancaster,* 289 AD2d 995 (2001); *see also Connolly v Willard Mtn., Inc.,* 143 AD3d 1148 (2016)). 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.

In affirming the Order of the Nassau County Supreme Court, the Second Department majority held, *incorrectly,* that the irregular condition of the field "*was not concealed*". The photographs belie that part of the Decision which states that the defects were open and obvious and known to the plaintiff. The photograph and deposition testimony prove that there were numerous holes in the field which were covered with grass, and not readily apparent. Thus, the characterization of the dangerous condition of the playing field as being open and obvious was incorrect. The plaintiff was injured when his foot fell into a concealed hole.

It is respectfully requested that the Court of Appeals review the decision of the Second Department, and that such review should result in reinstatement of the plaintiffs' Complaint.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the plaintiffs-appellants Ninivaggi's motion for leave to appeal the Appellate Division's Decision and Order and grant such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 6, 2020

Marcy Sonneborn

Of Counsel:
Marcy Sonneborn
David Owens
Salvatore J. DeSantis

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MICHAEL NINIVAGGI, by his parents and natural guardian PENNY NINIVAGGI, and PENNY NINIVAGGI, individually,

Index No.: 0348/2013

Plaintiff,

-against-

NOTICE OF APPEAL

THE COUNTY OF NASSAU and
MERRICK UNION FREE SCHOOL DISTRICT,

Defendants.

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PLEASE TAKE NOTICE, that the plaintiffs MICHAEL NINIVAGGI, by his parent and natural guardian PENNY NINIVAGGI, and PENNY NINIVAGGI, individually, hereby appeal to the Supreme Court, State of New York, Appellate Division, Second Department from the August 3, 2016, Order of the Honorable Leonard D. Steinman and entered on August 4, 2016, granting defendant MERRICK UNION FREE SCHOOL DISTRICT summary judgment and dismissing the plaintiffs' Complaint.

PLEASE TAKE FURTHER NOTICE, that the plaintiffs MICHAEL NINIVAGGI, by his parent and natural guardian PENNY NINIVAGGI, and PENNY NINIVAGGI, individually hereby appeal from each and every part of said Order.

Dated: New York, New York
August 16, 2016

Yours, etc.
MOLOD SPITZ & DeSANTIS, P.C.

By: _____
David B. Owens, Esq.
Attorneys for Plaintiffs
1430 Broadway, 21st Floor

New York, New York 10018
(212) 869-3200
Our File: 4734

TO: Congdon, Flaherty, O'Callaghan, Reid,
Donlon, Travis & Fishlinger, Esqs.
Attorneys for Defendant
Merrick Union Free School District
333 Earle Ovington Boulevard – Suite 502
Uniondale, NY 11553-3625

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

FORM A - REQUEST FOR APPELLATE DIVISION INTERVENTION - CIVIL

See §670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

CASE TITLE: Type the title below of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.	For: COURT OF ORIGINAL INSTANCE
SUPREME COURT OF THE STATE OF NEW YORK **COUNTY OF NASSAU** **MICHAEL NINIVAGGI, by his parents and natural Guardian PENNY NINIVAGGI, AND PENNY NINIVAGGI, individually,** **Plaintiff,** **-against-** **THE COUNTY OF NASSAU and MERRICK UNION FREE SCHOOL DISTRICT,** **Defendants.**	# Date Notice of Appeal Filed For: APPELLATE DIVISION #

Please check appropriate item

CASE TYPE#	FILING TYPE#
X Civil Action	X Appeal
___ CPLR article 75 Arbitration	___ Original Proceeding
___ CPLR article 78 Proceeding	___ Transferred Proceeding
___ Special Proceeding	___ CPLR 5704 Review
___ Habeas Corpus Proceeding	

NATURE OF SUIT

(Choose from the following categories to best describe the nature of the case)
(Choose up to 5.) #

A. Administrative Review
___1. Freedom of Information Law
___2. Human Rights
___3. Licenses
___4. Public Employment
___5. Social Services
___6. Other

B. Business & Other Relationships
___1. Partnership/ Joint Venture
___2. Business
___3. Religious
___4. Not-For-Profit
___5. Other

C. Contracts
___1. Brokerage
___2. Commercial Paper
___3. Construction
___4. Employment
___5. Insurance
___6. Real Property
___7. Sales
___8. Secured
___9. Other

D. Domestic Relations
___1. Adoption
___2. Attorney's Fees
___3. Children – Support
___4. Children – Custody/ Visitation
___5. Children – Terminate Parental Rights
___6. Children – Abuse/Neglect
___7. Children – JD/PINS
___8. Equitable Distribution
___9. Exclusive Occupancy of Residence
___10. Expert's Fees
___11. Maintenance/Alimony
___12. Marital Status
___13. Paternity
___14. Spousal Support
___15. Other

E. Miscellaneous
___1. Constructive Trust
___2. Debtor & Creditor
___3. Declaratory Judgment
___4. Election Law
___5. Notice of Claim
___6. Other

F. Prisoners
___1. Discipline
___2. Jail Time Calculation
___3. Parole
___4. Other

G. Real Property
___1. Condemnation
___2. Determine Title
___3. Easements
___4. Environmental
___5. Liens
___6. Mortgages
___7. Partition
___8. Rent
___9. Taxation
___10. Zoning
___11. Other

H. Statutory
___1. City of Mount Vernon Charter § § 120, 127-f, or 129
___2. Eminent Domain Procedure § 207
___3. General Municipal Law § 712
___4. Labor Law § 220
___5. Public Service Law

I. Torts
___1. Assault, Battery, False Imprisonment
___2. Conversion
___3. Defamation
___4. Fraud
___5. Intentional Infliction of Emotional Distress
___6. Interference with Contract
___7. Malicious Prosecution/ Abuse of Process
___8. Malpractice
X 9. Negligence
___10. Nuisance
___11. Products Liability
___12. Strict Liability
___13. Trespass and/or Waste
___14. Other

J. Wills & Estates
___1. Accounting
___2. Discovery
___3. Probate/Administration
___4. Trusts
___5. Other

§§128 or 170

___6. Other

APPEAL

Paper Appealed From:
(Check one)#

___ Amended Decrees ___ Amended Judgment ___ Amended Order ___ Decision ___ Decree	___ Determination ___ Finding ___ Interlocutory Decree ___ Interlocutory ___ Judgment ___ Judgment	X Order/Decision/Order ___ Order & Judgment ___ Partial Decree ___ Resettled Decree ___ Resettled Judgment	___ Resettled Order ___ Ruling ___ Other (please specify below) #
Court: **Supreme**	County: **Nassau**	Dated: **August 3, 2016**	Entered: **August 4, 2016**
Judge's Full Name: **Hon. Leonard D. Steinman**	Index No: **0348/2013**	Stage: (check one) # ___ Interlocutory X Final ___ Post-Final	Trial:# ___ Yes X No If Yes:# ___ Jury ___ Non-Jury

PRIOR UNPERFECTED APPEAL INFORMATION

Are any unperfected appeals pending in this case: ___ Yes X No.
If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ___ Yes ___ No
Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

ORIGINAL PROCEEDING

Commenced By:# _____ Order to Show Cause _____ Notice of Petition _____ Writ of Habeas Corpus	Date Filed:#
Statute authorizing commencement of proceeding in the Appellate Division: #	

PROCEEDING TRANSFERRED PURSUANT TO CPLR 7804(g)

Court: #	County: #
Judge's Full Name: #	Order of Transfer Date: #

CPLR 5704 REVIEW OF EX PARTE ORDER

Court: #	County: #
Judge's Full Name: #	Dated: #

DESCRIPTION OF APPEAL, PROCEEDING OR APPLICATION AND STATEMENT OF ISSUES

Description

If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 780(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Appeal from Order granting defendant's motion for summary judgment.

Amount: If an appeal is due to a money judgment, specify the amount awarded. $_____

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

Issue raised is whether Court erred in granting defendant's motion for summary judgment.

(If you need more space please continue on page 3)

(PLEASE LEAVE THE SPACE BELOW BLANK)

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her or its status in this court.

Examples:
Original: (Include) plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant and intervenor.
Appellate: (Include) appellant, respondent, appellant-respondent, respondent-appellant, petitioner and intervenor.

No.	PARTY NAME	ORIGINAL STATUS	APPELLATE DIVISION STATUS
1.	**MICHAEL NINIVAGGI**	**PLAINTIFF**	**APPELLANT**
2.	**PENNY NINIVAGGI**	**PLAINTIFF**	**APPELLANT**
3.	**MERRICK UNION FREE SCHOOL DISTRICT**	**DEFENDANT**	**RESPONDENT**
4.			
5.			
6.			
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Attorney Information

Instructions: Please fill in attorney or their firm information for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the line marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

1.

Attorney/Firm Name: **CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, Esqs.**			
Address: **225 Broadway, Suite 1803**			
City: **Uniondale**	State: **New York**	Zip: **11553**	Telephone No.: **(516) 542-5900**
Attorney Type:# **X** Retained ___ Assigned ___ Government ___ Pro Se ___ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above or from Form C):# **3** / ___ / ___ / ___ / ___ / ___ / ___ / ___			

2.

Attorney/Firm Name: **MOLOD SPITZ & DeSANTIS, P.C.**			
Address: **1430 Broadway, 21st Fl.**			
City: **New York**	State: **New York**	Zip:# **10018**	Telephone No.: **(212) 869-3200**
Attorney Type:# **X** Retained ___ Assigned ___ Government ___ Pro Se ___ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above or from Form C):# **1** / **2** / ___ / ___ / ___ / ___ / ___ / ___ / ___			

Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in §670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention [Form A, this document], (2) any required Additional Appeal Information Forms [Form B], (3) any required Additional Party and Attorney Information Forms [Form C], (4) the notice of appeal or order granting leave to appeal, (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken, and (6) a copy of the decision or decisions of the court of original instance, if any.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

MICHAEL NINIVAGGI, by his parent and natural guardian PENNY NINIVAGGI, and PENNY NINIVAGGI, individually,

Plaintiffs,

-against-

THE COUNTY OF NASSAU and MERRICK UNION FREE SCHOOL DISTRICT,

Defendants.

----------X

IAS Part 23
Motion Sequence No.: 001
Index No.: 0348/2013

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Defendant's Notice of Motion, Affirmation & Exhibits ----------1
Plaintiffs' Affirmation in Opposition & Exhibits ----------2
Defendant's Reply Affirmation ----------3

Defendant Merrick Union Free School District ("the District") seeks an order pursuant to CPLR § 3212 for summary judgment dismissing the complaint. Plaintiff Penny Ninivaggi brought this action in her individual capacity and as the parent and natural guardian of Michael Ninivaggi, her son and opposes the application.[1] For the reasons set forth below, the District's application is granted.

---

[1] On October 22, 2013, following the commencement of the action, the parties executed a Stipulation of Discontinuance with respect to all claims and cross-claims against defendant County of Nassau.

This action was commenced with the filing of a Summons and Verified Complaint on January 9, 2013. The District filed a Verified Answer on February 14, 2013. Prior to the commencement of the action, a Notice of Claim was served after which Michael testified at a 50-h hearing on July 17, 2012.

This action involves a sports injury that Michael, then 14 years old, sustained in the afternoon on November 26, 2011 on a field at Roland A. Chatterton Elementary School, a premises owned by the District. There is no dispute that at the time of the incident the District was not in session and that at the time of incident Michael was not a participant in an organized sporting activity sponsored by the school or any other organization. It is alleged that the injury occurred while Michael was throwing a football around with a friend on the District's field in an area that was close to the school building and that when Michael ran to catch the ball as it was thrown to him, he caught it, took a few steps, and lost his balance as a result of stepping into what he alleges was an 18" x 6" x 2-3" deep hole. Michael testified that "after I caught it, I took a few steps and lost my balance." Michael fell on his left side, sustaining an acute complete transverse fracture in his left arm and allegedly sustaining several other injuries, including restricted range of motion and arm weakness.

When asked about the incident at his deposition, Michael testified that he previously went to that same area of the field "two times a month" with friends to play ball, and had played on that field many times when a student at the school and in middle school when he played lacrosse there once a week. Michael N. EBT Transcript, pp. 20, 21. Michael testified that playing on the field "my whole life I've known that it's...choppy in a lot of spots;" that there are "holes all over the field;" and that there were holes of various sizes in the area where he played and fell. Michael N. EBT Transcript, pp. 24 – 26. Michael testified that when he played in the area before with his friends "we kind of just, like, tried to play around [the holes]." Michael N. EBT Transcript p. 41. Consistent with Michael's testimony, his mother confirmed at her deposition that she had "been on that field many, many times" and seen "various holes." Penny N. EBT Transcript p. 41.

It is the movant, here defendant, who has the burden to establish its entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). "CPLR § 3212(b) requires the proponent of a motion for summary judgment to

demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). The District contends that it is entitled to summary judgment because Michael assumed all risks inherent in playing football on the field at issue, including the known poor condition of the field prior to the date in question.

In order to recover in a negligence action, a plaintiff must establish that the defendant owed him/her a duty to use reasonable care, and that it breached that duty. *Akins v. Glen Falls City Sch. Distr.*, 53 N.Y.2d 325 (1981). Where a plaintiff has assumed the risk of a certain sporting activity, generally, the defendant has no legal duty to that plaintiff. *Cotty v. Town of Southampton*, 64 A.D.3d 251 (2d Dept. 2009). The assumption of risk doctrine applies when a consenting participant in a sporting activity "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks." *Morgan v. State of New York*, 90 N.Y.2d 471, 484 (1997). By engaging in a sporting activity, a participant consents to risks that are "inherent in and arise out of the nature of the sport generally and flow from such participation." *Id.*

"The risks of a game which must be played upon a field include the risks involved in the construction of the field...." *Maddox v. City of New York*, 66 N.Y.2d 270, 277 (1985). Such risks include those having to do with the construction of the playing surface and "any open and obvious condition on it." *Joseph v. New York Racing Ass'n, Inc.*, 28 A.D.3d 105, 108 (2d Dept. 2006). A defendant owner of the premises on which the sporting activity takes place has a duty of care qualified by those risks which the plaintiff assumed—that is, a duty to exercise care to "make the conditions as safe as they appear to be." *Turcotte v. Fell*, 68 N.Y.2d 432, 439 (1986). If those risks are "fully comprehended or perfectly obvious," a plaintiff has consented to the risks and defendant has satisfied its duty. *Id.*

The Second Department has had a number of opportunities to examine the assumption of risk doctrine in the context of injuries suffered by a participant in a sporting activity caused by the condition of the playing surface. In *Melko v. Town of Islip*, 172 A.D.2d 729 (2d Dept. 1991), a softball player was injured when he slid toward home plate and came into "abrupt contact with a depression in the surface of the field." *Id.* The plaintiff was aware of the depression on the field prior to the game and, as a result, the court held that the plaintiff

consciously assumed the risk, reversed the trial court and granted defendant's summary judgment. *Id.*

In *Morlock v. Town of North Hempstead*, 12 A.D.3d 652 (2d Dept. 2004), an infant plaintiff was injured when his roller-hockey stick got caught in a crack of the surface of a cement rink. The Second Department again reversed the trial court and entered summary judgment in favor of the defendant because the plaintiff testified that he had played on the rink many times before and was aware of its defects; he therefore assumed the risk "of encountering cracks and holes in the surface of the cement rink while playing roller hockey." *Id.* at 653.

And as recently as May of this year, the Appellate Division reversed a trial court and entered summary judgment in favor of the defendant where a child-plaintiff was injured after stepping into a large, deep hole while playing a pick-up game of football with his friends on a grass field. *Tinto v. Yonkers Board of Education*, 139 A.D.3d 712 (2d Dept. 2016). The plaintiff was aware of the hole, which was open and obvious; he thus assumed the risk of injury from stepping into it. *Id.* at 713. *See also Bendig v. Bethpage Union Free School District*, 74 A.D.3d 1263 (2d Dept. 2010)(reversing trial court's denial of summary judgment to defendant where 14 year old girl was injured by allegedly defective tennis net). *But see Henig v. Hofstra University*, 160 A.D.2d 761 (2d Dept. 1990)(affirming denial of summary judgment where plaintiff was injured playing football as a result of hole in the field; no mention as to whether plaintiff had knowledge of the field condition).

As in *Tinto*, Michael was well aware of the obviously poor condition of the field he chose to play on and knew that the field was "choppy" and contained holes. He had been on that field many times for organized sports activities, as a student at the school during recess, and "two times a month" for some period of time to throw a ball around with friends, which is exactly what he was doing when he was injured. Indeed, the poor condition of the field was known to others who observed it, including his mother. It is not material that Michael may not have been previously aware of the precise hole that caused his fall. It is not "necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the

potential for injury of the mechanism from which the injury results." *Id.* at 1264, quoting *Maddox v. City of New York*, 66 NY2d at 278.

It may be argued that the Second Department's application of the assumption of risk doctrine as described above and as applied herein is not mandated by the Court of Appeals' decisions upon which they purport to be based. In *Palladino v. Lindenhurst Union Free School District*, 84 A.D.3d 1194 (2d Dept. 2011), that was precisely the point of the concurring opinion. There, the court again reversed the trial court and dismissed the infant plaintiff's personal injury claim stemming from a severe cut sustained from an improperly placed grate located on a handball court on which he was playing. The majority opinion focused on the plaintiff's prior knowledge of the defective condition. Justice Skelos, in his concurring opinion, suggested that the court was too focused on such knowledge and argued that courts must also look to see if the alleged defective condition is an inherent risk of the sport that is being played. *Id.* at 1198 – 1201.

Justice Skelos' view that the Second Department decisions appear to place too much emphasis on prior knowledge is borne out by the Second Department's decision in *Henig*. In that case it must be assumed that the plaintiff had no knowledge of the hole that caused his injury. The court denied summary judgment because it could not find as a matter of law that the hole as described therein "is typical of the terrain upon which the game of football is normally played." *Henig* at 762. But it cannot be said that a defective grate is typical of the terrain of a handball court; or that holes are normally found and expected in the surface of roller rinks. And the plaintiff's prior knowledge of the hole in the playing field in *Tinto* appears to be the only distinguishing fact from the circumstances in *Henig*.

This court believes that Justice Skelos is correct. As stated by the Court of Appeals in *Morgan*, its precedents "do not go so far as to exculpate sporting facility owners of...ordinary type[s] of alleged negligence." *Morgan*, 90 N.Y.2d at 488, 489. As a result, the plaintiff in *Siegel v. City of New York*, decided with *Morgan*, prevailed notwithstanding his knowledge of the defective condition that caused his injury for over two years. *Id.* at 482. If the dangerous condition causing the injury is not by its nature an inherent risk of a sport "it may qualify as and constitute an allegedly negligent condition occurring in the ordinary

course of any property's maintenance and may implicate typical comparative negligence principles." *Id.* at 488.

That would seem particularly applicable here. 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 ballfield upon which the children from Merrick can play (besides shame)? But like Justice Skelos, this court is constrained to follow the Second Department precedents. As a result, plaintiff has failed to raise a genuine issue of material fact and defendant's motion for summary judgment, pursuant to CPLR § 3212, on the issue of liability is granted.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: August 3, 2016
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

Karen Figueroa, being duly sworn, deposes and says:

I am not a party to this action, am over 18 years of age and reside in Cliffside Park, New Jersey.

On the 17th day of August 2016, I served a true copy of the within **NOTICE OF APPEAL AND REQUEST FOR APPELLATE DIVISION INTERVENTION** on the following attorneys at the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

TO: **CONGDON, FLAHERY, O'CALLAGHAN, REID**
DONLON, TRAVIS & FISHLINGER, ESQS
Attorneys for Defendant
Merrick Union Free School District
333 Earle Ovington Boulevard – Suite 502
Uniondale, NY 11553-3625

Karen Figueroa

Sworn to before me on this
17th day of August, 2016

Vishanti Ramsumair
Notary Public, State of New York
No. 01R6239150
Qualified in Queens County
Commission Expires April 18, 2019

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

MICHAEL NINIVAGGI, by his parent and natural guardian PENNY NINIVAGGI, and PENNY NINIVAGGI, individually,

Plaintiffs,

-against-

THE COUNTY OF NASSAU and MERRICK UNION FREE SCHOOL DISTRICT,

Defendants.

----------x

Index No.: 0348/13

ORDER WITH NOTICE OF ENTRY

Justice Assigned: Hon. Leonard Steinman

PLEASE TAKE NOTICE, that the within is a true copy of an Order of the HON. LEONARD D. STEINMAN, dated August 3, 2016, and duly entered with the Office of the Nassau County Clerk on August 4, 2016.

Dated: Uniondale, New York.
August 9, 2016

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER

By: Paula Pavlides
PAULA PAVLIDES
Attorneys for Defendant
MERRICK UNION FREE SCHOOL DISTRICT
333 Earle Ovington Boulevard -Suite 502
Uniondale, New York 11553-3625
(516) 542-5900
[File No.: 2NYS2408]

TO: MOLOD SPITZ & DeSANTIS, P.C.
Attorneys for Plaintiff
1430 Broadway
New York, New York 10018
(212) 869-3200

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

MICHAEL NINIVAGGI, by his parent and natural guardian PENNY NINIVAGGI, and PENNY NINIVAGGI, individually,

Plaintiffs,

-against-

THE COUNTY OF NASSAU and MERRICK UNION FREE SCHOOL DISTRICT,

Defendants.

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IAS Part 23
Motion Sequence No.: 001
Index No.: 0348/2013

DECISION AND ORDER

LEONARD D. STEINMAN, J.

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Plaintiffs' Affirmation in Opposition & Exhibits ----------2
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[1] On October 22, 2013, following the commencement of the action, the parties executed a Stipulation of Discontinuance with respect to all claims and cross-claims against defendant County of Nassau.

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As in *Tinto*, Michael was well aware of the obviously poor condition of the field he chose to play on and knew that the field was "choppy" and contained holes. He had been on that field many times for organized sports activities, as a student at the school during recess, and "two times a month" for some period of time to throw a ball around with friends, which is exactly what he was doing when he was injured. Indeed, the poor condition of the field was known to others who observed it, including his mother. It is not material that Michael may not have been previously aware of the precise hole that caused his fall. It is not "necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the

potential for injury of the mechanism from which the injury results." *Id.* at 1264, quoting *Maddox v. City of New York*, 66 NY2d at 278.

It may be argued that the Second Department's application of the assumption of risk doctrine as described above and as applied herein is not mandated by the Court of Appeals' decisions upon which they purport to be based. In *Palladino v. Lindenhurst Union Free School District*, 84 A.D.3d 1194 (2d Dept. 2011), that was precisely the point of the concurring opinion. There, the court again reversed the trial court and dismissed the infant plaintiff's personal injury claim stemming from a severe cut sustained from an improperly placed grate located on a handball court on which he was playing. The majority opinion focused on the plaintiff's prior knowledge of the defective condition. Justice Skelos, in his concurring opinion, suggested that the court was too focused on such knowledge and argued that courts must also look to see if the alleged defective condition is an inherent risk of the sport that is being played. *Id.* at 1198 – 1201.

Justice Skelos' view that the Second Department decisions appear to place too much emphasis on prior knowledge is borne out by the Second Department's decision in *Henig*. In that case it must be assumed that the plaintiff had no knowledge of the hole that caused his injury. The court denied summary judgment because it could not find as a matter of law that the hole as described therein "is typical of the terrain upon which the game of football is normally played." *Henig* at 762. But it cannot be said that a defective grate is typical of the terrain of a handball court; or that holes are normally found and expected in the surface of roller rinks. And the plaintiff's prior knowledge of the hole in the playing field in *Tinto* appears to be the only distinguishing fact from the circumstances in *Henig*.

This court believes that Justice Skolos is correct. As stated by the Court of Appeals in *Morgan*, its precedents "do not go so far as to exculpate sporting facility owners of...ordinary type[s] of alleged negligence." *Morgan*, 90 N.Y.2d at 488, 489. As a result, the plaintiff in *Siegel v. City of New York*, decided with *Morgan*, prevailed notwithstanding his knowledge of the defective condition that caused his injury for over two years. *Id.* at 482. If the dangerous condition causing the injury is not by its nature an inherent risk of a sport "it may qualify as and constitute an allegedly negligent condition occurring in the ordinary

course of any property's maintenance and may implicate typical comparative negligence principles." *Id.* at 488.

That would seem particularly applicable here. 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 ballfield upon which the children from Merrick can play (besides shame)? But like Justice Skelos, this court is constrained to follow the Second Department precedents. As a result, plaintiff has failed to raise a genuine issue of material fact and defendant's motion for summary judgment, pursuant to CPLR § 3212, on the issue of liability is granted.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: August 3, 2016
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCANNED

----------x

MICHAEL NINIVAGGI, by his parent and natural guardian PENNY NINIVAGGI, and PENNY NINIVAGGI, individually,

Index No.: 0348/13

D30/KF 4734

NOTICE OF ENTRY

Plaintiffs,

-against-

THE COUNTY OF NASSAU and MERRICK UNION FREE SCHOOL DISTRICT,

Defendants.

----------x

C O U N S E L O R S :

PLEASE TAKE NOTICE, that the within is a true copy of a Decision and Order dated and duly entered with the Office of the Clerk of Supreme Court, State of New York, Appellate Division, Second Department, on the 27th day of November, 2019.

Dated: Uniondale, New York.
December 5, 2019

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER

By: _____
KATHLEEN D. FOLEY
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[File No.: 2NYS2408]

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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D60847
G/htr

_____AD3d_____ Argued - June 18, 2018

RUTH C. BALKIN, J.P.
JOHN M. LEVENTHAL
ROBERT J. MILLER
JOSEPH J. MALTESE, JJ.

2016-08990 DECISION & ORDER
2016-10228

Michael Ninivaggi, etc., et al., appellants, v County of Nassau, defendant, Merrick Union Free School District, respondent.

(Index No. 348/13)

Molod Spitz & DeSantis, P.C., New York, NY (Marcy Sonneborn and Salvatore J. DeSantis of counsel), for appellants.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, NY (Kathleen D. Foley of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Nassau County (Leonard D. Steinman, J.), dated August 3, 2016, and (2) a judgment of the same court entered September 2, 2016. The order granted the motion of the defendant Merrick Union Free School District for summary judgment dismissing the complaint insofar as asserted against it. The judgment, upon the order, is in favor of the defendant Merrick Union Free School District and against the plaintiffs dismissing the complaint insofar as asserted against it.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed; and it further,

ORDERED that one bill of costs is awarded to the defendant Merrick Union Free School District.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

The infant plaintiff allegedly was injured when he and a friend were playing catch with a football on a multipurpose athletic field on the premises of an elementary school owned by the defendant Merrick Union Free School District (hereinafter the district). The injury occurred when the infant plaintiff stepped into a "depression" or "hole" on the grassy field, lost his balance, and fell. The depth of the depression was variously described by the plaintiffs as being two-to-three inches, three-to-four inches, and five inches. The infant plaintiff, who was 14 years old when he was injured, was an experienced football player, had previously played on the field, and admitted that he was familiar with the condition of the field.

The infant plaintiff, by his mother, and his mother suing derivatively, commenced this action, inter alia, to recover damages for personal injuries. After discovery was complete, the district moved for summary judgment dismissing the complaint insofar as asserted against it on the ground, among others, that the plaintiffs' claims were barred by the doctrine of primary assumption of risk. The Supreme Court granted the district's motion, and a judgment was entered dismissing the complaint insofar as asserted against the district. The plaintiffs appeal.

Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity "consents to those commonly appreciated risks [that] are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484). The doctrine applies to inherent risks related to the construction of the playing field or surface and "encompasses risks involving less than optimal conditions" (*Bukowski v Clarkson Univ.*, 19 NY3d 353, 356; *see Ziegelmeyer v United States Olympic Comm.*, 7 NY3d 893, 894; *Sykes v County of Erie*, 94 NY2d 912, 913; *Maddox v City of New York*, 66 NY2d 270, 277).

Here, the district established its prima facie entitlement to judgment as a matter of law on the basis of primary assumption of the risk. The plaintiffs described the grass field on which the accident occurred as "choppy," "wavy," and "bumpy," with several depressions. 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 (*see Sykes v County of Erie*, 94 NY2d 912; *Morgan v State of New York*, 90 NY2d 471; *Maddox v City of New York*, 66 NY2d at 274-275). Moreover, the infant plaintiff's testimony demonstrated that he was aware of and appreciated the inherent risks, and that the irregular condition of the field was not concealed (*see Bukowski v Clarkson Univ.*, 19 NY3d at 357).

Like our dissenting colleague, we acknowledge the Court of Appeals' admonition that the doctrine of primary assumption of risk "does not exculpate a landowner from liability for ordinary negligence in maintaining a premises" (*Sykes v County of Erie*, 94 NY2d at 913; *see Custodi v Town of Amherst*, 20 NY3d 83, 89; *Cotty v Town of Southampton*, 64 AD3d 251, 257). Thus, the doctrine does not necessarily absolve landowners of liability where they have allowed

certain defects, such as a hole in a net in an indoor tennis court, to persist (*see Morgan v State of New York*, 90 NY2d at 488). In this case, we do not determine the doctrine's applicability to defects similar to that of a hole in an indoor tennis net, as there is a distinction between accidents resulting from premises having fallen into disrepair and those resulting from natural features of a grass field (*see Bukowski v Clarkson Univ.*, 19 NY3d at 357). As to the condition presented on the facts of this case, application of the doctrine of primary assumption of risk is appropriate (*see id.*; *Sykes v County of Erie*, 94 NY2d 912; *Morgan v State of New York*, 90 NY2d 471; *Maddox v City of New York*, 66 NY2d at 274-275).

Accordingly, we affirm the judgment.

BALKIN, J.P., LEVENTHAL and MILLER, JJ., concur.

MALTESE, J., dissents, and votes to reverse the judgment, deny the motion of the defendant Merrick Union Free School District for summary judgment dismissing the complaint insofar as asserted against it, and reinstate the complaint insofar as asserted against that defendant, with the following memorandum:

In 1975, the Legislature enacted CPLR 1411, which eliminated contributory negligence and assumption of the risk as absolute bars to recovery in most cases, by substituting comparative negligence as the norm.

A participant in a sporting or recreational activity does not automatically assume all the risks of injury while utilizing a sports or recreational facility that is not properly maintained for foreseeable users. The owner of a sports or recreational facility has a duty to maintain those premises in a reasonably safe condition for its foreseeable users. If the owner maintains the premises in a less than optimal condition that is nonetheless used in an ordinary manner by foreseeable users, both the owner and the user may each bear some comparative fault if an injury occurs to a person using the facility.

Under the doctrine of primary assumption of risk, a voluntary participant in a sporting activity "is deemed to have consented to apparent or reasonably foreseeable consequences of engaging in the sport; the landowner need protect the plaintiff only from unassumed, concealed, or unreasonably increased risks, thus to make conditions as safe as they appear to be" (*Manoly v City of New York*, 29 AD3d 649, 649 [2d Dept 2006]).

While this Court has held that the doctrine of primary assumption of risk is a defense to personal injury causes of action based upon participation in sporting or recreational activities, it 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 and fails to warn users of those defects. 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 (*see* PJI 2:90).

Here, the 14-year-old infant plaintiff and his friend were tossing a football around on a school ballfield owned by the defendant Merrick Union Free School District (hereinafter the district). The area where they were playing served as a joint outfield to three baseball fields. The infant plaintiff tripped in a hole while running to catch the football, causing him to fall on his left arm, which was fractured as a result of the fall.

The infant plaintiff and his mother alleged that the ballfield was not in a reasonably safe condition in that the outfield portion of the baseball field had several holes in it, which they described as a choppy and wavy condition that was hidden by grass. At a hearing held pursuant to General Municipal Law § 50-h, the infant plaintiff testified that the depression in which he fell was 18 inches long, 6 inches wide, and approximately 5 inches deep. He also testified that he had played on the field when he was a student at the school and that he knew of the field conditions before playing on the field on the day of the accident.

The Supreme Court reluctantly dismissed the complaint insofar as asserted against the district as a matter of law, stating that it was "constrained" to follow the precedents of the Appellate Division, Second Department, concerning the doctrine of primary assumption of risk and further stated: "[E]vidence 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 ballfield upon which the children from Merrick can play (besides shame)? But like Justice Skelos [in *Palladino v Lindenhurst Union Free School Dist.* (84 AD3d 1194 [2d Dept 2011])], this court is constrained to follow the Second Department precedents." However, the cases that the Supreme Court was "constrained" to follow (*see e.g. Casey v Garden City Park-New Hyde Park School Dist.*, 40 AD3d 901 [2d Dept 2007]; *Manoly v City of New York*, 29 AD3d 649 [2d Dept 2006]; *Morlock v Town of N. Hempstead*, 12 AD3d 652 [2d Dept 2004]; *Gamble v Town of Hempstead*, 281 AD2d 391 [2d Dept 2001]), should not have been dismissed at the summary judgment stage. Those cases should have gone to trial, where a jury or a judge as the trier of fact would have reviewed the evidence and specific circumstances of each accident.

Some of the cases from this Court have expanded the doctrine of primary assumption of risk in cases involving activities played upon grass or dirt surfaces. In *Tinto v Yonkers Bd. of Educ.* (139 AD3d 712 [2d Dept 2016]), a young boy playing a non-school-sponsored pick-up game of football with friends on a grassy field stepped into a large hole and was injured. This Court reversed the Supreme Court's order denying the defendant's summary judgment motion, finding that the doctrine of primary assumption of risk applied because the hole was open and obvious and clearly visible and known to the plaintiff. This is the same argument made by the district herein.

Recently, in a case with a similar set of facts, two Justices of this Court, in a concurrence on constraint, found that this Court's precedents have expanded the doctrine of primary assumption of risk in cases where the plaintiffs were injured while engaged in sporting activities on public sports facilities. 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). They 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 this Court directed dismissal of the plaintiffs' complaint, it granted leave to appeal to the Court of Appeals, but interestingly, the defendant New York City Housing Authority resolved that appeal (presumably with a settlement), and the appeal was withdrawn (*see id.*).

Earlier, in 2011, in *Palladino v Lindenhurst Union Free School Dist.* (84 AD3d at 1199), a former colleague, Justice Skelos, concurred on constraint in an action where an 11-year-old boy playing handball on school property was injured when he stepped on an improperly placed grate.

The threshold issue in any premises liability cause of action is whether the defendants have breached their duty to maintain their premises in a reasonably safe condition and, if not, what was the comparative negligence of the plaintiff and the defendant landowner. By directing dismissal of these actions based upon the doctrine of primary assumption of risk, this Court may have thwarted the determination of this threshold issue where the determination should have been made by a trier of fact.

Yet, this Court and the Court of Appeals have not always held that the primary assumption of risk defense relieves the landowner from the duty to reasonably maintain its sports and recreation facilities. In *Henig v Hofstra Univ.* (160 AD2d 761 [2d Dept 1990]), a football player was injured during play when he stepped into a hole several feet wide and several inches deep. This Court held that "we cannot say, as a matter of law, that a hole with the dimensions described by the plaintiff . . . must necessarily be considered to be representative of the various hazards to which football players normally expose themselves . . . so as to constitute a risk which the plaintiff could or should have foreseen . . . [in] addition to those risks which are admittedly unavoidable in . . . playing [the] 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" (*id.* at 762-763).

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" (*Turcotte v Fell*, 68 NY2d 432, 438 [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 (*see Custodi v Town of Amherst*, 20 NY3d 83, 87 [2012]). The Pattern Jury Instructions include an explanation of the relationship between assumption of the risk and comparative negligence: "The law provides that where the defendant owes a duty of reasonable care to the (plaintiff, decedent), but the (plaintiff, decedent) voluntarily engages in an activity involving a risk of harm and the (plaintiff, decedent) knows and fully understands, or should have known and fully understood, the risk of harm, the plaintiff's damages must be reduced by the extent to which those damages were caused by the (plaintiff's, decedent's) own conduct" (PJI 2:55; *see* CPLR 1411).

The Court of Appeals has noted that "[w]e have not applied the doctrine [of assumption of risk] outside of this limited context [of facilitating participation in athletic activities] and it is clear that its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation" (*Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395 [2010]). A person who chooses to engage in such an athletic activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *see Custodi v Town of Amherst*, 20 NY3d at 88). "[P]articipants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced" (*Custodi v Town of Amherst*, 20 NY3d at 88).

The Pattern Jury Instructions outline the standard of care for an owner or possessor's liability for a condition or use of a premises. 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" (PJI 2:90). "[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.

Other departments of the Appellate Division have not dismissed cases at the summary judgment stage where there was a triable issue of fact concerning the defendants' maintenance of their sporting facilities. In *Simmons v Saugerties Cent. School Dist.* (82 AD3d 1407, 1409 [3d Dept 2011]), the plaintiff, a high school student, was injured while playing touch football during recess when he stepped into a large hole in the grassy area on which he was playing. The Third Department held that the plaintiff's allegedly long-standing knowledge of the hole and its open and obvious nature did not "bar inquiry into whether the allegedly dangerous condition resulted from [the] defendant's negligent maintenance of its property" (*id.* at 1409). In *Ryder v Town of Lancaster* (289 AD2d 995 [4th Dept 2001]), the plaintiff was playing volleyball on a grass court maintained by one of the defendants. He was injured when he stepped into a six- to eight-inch-deep hole in the court (*see id.* at 995). The Fourth Department found that there were triable issues of fact as to whether the defendant "breached a continuing duty to keep the grass in good repair" (*id.* at 995-996).

By obviating the determination of the threshold issue of whether landowners have breached their duty to maintain their premises in a reasonably safe condition, the Second Department has removed landowners' incentive to inspect and repair their premises regardless of whether they were previously put on notice by the regular use of these sports facilities by young people.

In this case, the school's head custodian testified at his deposition that a grounds crew cut the grass on the baseball fields once per week from March through November, but did not seed or fertilize the grass. The custodian testified that he inspected the fields by just walking around them, but did not maintain records of his inspections. If there was a problem with the baseball fields, he would inform his boss and let his boss address the problem. He testified that, if he observed a condition that was 18 inches long, 6 inches wide, and 4 inches deep, he would contact his boss about it, but that he never had a conversation with his boss about such a condition on the fields. The head

custodian also stated that he never received a complaint about the conditions on the fields. Yet, the plaintiff mother testified at a hearing pursuant to General Municipal Law § 50-h that the poor condition of the ballfields was discussed at Parent-Teacher Association (PTA) meetings and at Board of Education meetings that occurred before the accident. When presented with the photographs depicting the condition taken by the plaintiffs, the head custodian testified that he did not see any holes that needed repair. Additionally, he testified that he never placed any warning cones in the fields. These self-serving statements should be presented before a trier of fact rather than being the basis of a summary dismissal of the case.

Counsel for the district here argued that, based upon this Court's precedent, we are bound by the principle that a plaintiff who knows that an uneven surface exists on a playing field and nonetheless proceeds to play a sport upon that playing surface assumes the risk of any personal injury that may be sustained by reason of tripping upon that uneven surface, regardless of the extent of that surface condition. By relying on the primary assumption of risk defense without the trier of fact making a finding of whether the sports facilities were in a reasonably safe condition, the district relies on the *law of tough luck*. The essence of the district's argument is that the users know the district does not adequately maintain its ballfields in a reasonably safe condition, so they should not play upon them. And if users choose to do so, as opposed to sitting around playing video games, they do so at their own risk.

The majority has characterized the topography of the outfield as the natural features of a grass field. That is not correct. The photographic evidence in this case is clear—this was not a de minimis uneven surface. The 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. He selected the one he believed caused his fall. Yet, instead of acknowledging the faulty condition of its field, the district has argued that the plaintiffs cannot identify the exact location of the accident because the infant plaintiff was not initially certain which specific hole he fell in—as there were several in the poorly maintained field.

This is not a pothole case where, due to the number of miles of roadway, the municipality may not know of a pothole's existence without prior notice. This is a ballfield belonging to the district that is used by numerous young students and others such as the Merrick Little League, which allegedly maintained the infield, but not the outfield! That admittedly was the responsibility of the district's maintenance crew.

Here, it was not a heavy burden for the district to maintain the ballfield in a reasonably safe condition to protect foreseeable users from injury. Although the infant plaintiff admittedly knew that the ballfield was in a state of disrepair, and although an injured person's knowledge plays a role in determining the applicability of the doctrine of primary assumption of risk, the inherency of the risk in the activity "is the sine qua non" (*Morgan v State of New York*, 90 NY2d at 484; *see Simmons v Saugerties Cent. School Dist.*, 82 AD3d at 1409).

Serious injury incurred when attempting to play "around" numerous holes and

depressions 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 should not be allowed to hide behind the alleged lack of formal written notice of this dangerous condition. The district knew or should have known of the dangerous condition 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.

Here, the majority has made a factual determination that the defective condition of the ballfield was open and obvious and, rather than allow a jury to assess the extent of that danger, the majority affirms the summary judgment dismissal by the Supreme Court on constraint of this Department's precedents.

I agree with the legal commentators who have written on this inconsistent use of the primary assumption of risk defense concluding that the Court of Appeals should clarify this area of the law (*see* Robert S. Kelner and Gail S. Kelner, *Play Ball, But Beware the Cracks*, NYLJ, Sept. 25, 2018 at 3, col 1; Danielle Clout, *Assumption of Risk in New York: The Time Has Come to Pull the Plug on This Vexatious Doctrine*, 86 St John's L Rev 1051 [2012]).

Accordingly, I vote to reverse the judgment, deny the district's motion for summary judgment dismissing the complaint insofar as asserted against it, reinstate the complaint insofar as asserted against the district, and restore this action to the trial calendar.

ENTER:

Aprilanne Agostino
Clerk of the Court