To be Argued by:
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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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COUNTER STATEMENT IN REPLY

In its Respondent's Brief, the defendant Merrick School District ("the District")[1], employs "scare tactics" in an effort to convince this Court to affirm the Second Department decision. The District implores this Court to affirm, because to do otherwise would "compel property owners, including municipalities, to bar public

[1] Pages are to the Record on Appeal before the Appellate Division, Second Department.

access to their properties for fear of liability arising out of risks inherent to the property itself. The negative impact on access to municipally-owned property throughout the State from such a decision is undeniable and undesirable." (Respondent's Brief, pg. 2). Furthermore, the District argues that the "[p]ublic will be eventually affected in two ways[2]: increased premiums for their personal coverage and, on top of that, increased taxes to cover the inflation in premiums charged to the municipalities which provide vital public services." (Respondent's Brief, pg. 41).

Respectfully, the plaintiffs do not ask the Court to bar public access to fields, parks and playgrounds owned and operated by municipalities. Rather, we ask the Court to hold this municipality accountable for an obligation that already exists under the law. To the extent that reversal would limit the defense of assumption of risk, it is submitted that such a result would actually serve the public interest, and would give meaning to the legislative intent, as evidenced by the plain language of CPLR 1411. See below at "B".

In this case, the District failed to maintain the school's outfield, even though it was on notice of prior complaints and prior accidents, and even though it's Director of Maintenance admitted he would have addressed the complaints had he known

[2] It is disingenuous to characterize increased insurance premiums and the resultant increase in taxes, to pay those premiums, as two separate impacts. It is yet another example of the hyperbole engaged in by the District. In fact, they are one and the same.

about them[3]. Accordingly, the District should not be permitted to hide behind the doctrine of assumption of risk, because to do so, harms the public. What the District fails to acknowledge, is that when the District used the baseball field for school activities, and "rented" it out to baseball leagues, it represented to the public at large that the baseball field (including the outfield) was safe for play. The District did not "warn" users that the outfield was strewn with holes covered by grass.[4] Nor were these holes de minimus. The hole was described by Michael Ninivaggi as being anywhere from five to six inches deep and eighteen inches long (R. 154-155 and 213), and the holes were described by his mother as being three to four inches deep and twelve inches long. (R. 116). Moreover, there are several holes in just one photograph, all concealed by grass. ("There were a few holes in this vicinity…" R. 299.) Thus, the condition was pervasive and was not readily observable.

We contend that there is no public benefit to shielding a municipality from liability where, as in this case, the municipality had received prior complaints, there were prior accidents[5] and the municipality *admitted* negligent maintenance of its

[3] Kent Eriksen, the Head Custodian, 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. 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.

[4]Mr. Erikson admitted that he had placed orange warning cones in areas deemed dangerous, but he had never done so relative to the baseball fields (349-350).

[5] 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

own outfield. Moreover, this is not just a case of naturally choppy terrain. The District added to the naturally occurring defects in the outfield when it drove trucks over the grass, which either caused or exacerbated the defective and dangerous condition of the outfield[6]. It is hoped that had the District been aware that it could face a liability verdict as a result of its negligence, the District would have addressed the concerns of the community, and maintained both the infield and the outfield. It is readily apparent that the District was not concerned about injuries in the outfield.

Once again, the District uses "scare tactics" when it posits that every dangerous condition cannot be, as here, easily and inexpensively remedied. A change in the law regarding assumption of risk, might lead to a situation where the defect cannot be remedied, as in this case, by merely throwing some dirt into holes. This reverse reasoning should be ignored. In the Supreme Court decision, Justice Steinman hoped that "shame" would be sufficient to convince the District to maintain the outfield. Clearly "shame" had no influence on the District's conduct.

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.

[6] 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.

Indeed, if ball fields, playgrounds and/or basketball courts have known defects and are dangerous, they should either be repaired, or activities limited. The solution is not to turn a blind eye to the problem, while permitting the continued use of the property.

It is respectfully submitted that permitting the District to ignore the known hazardous condition of a field on its property, when such field is used by the adults and children of the community, does not benefit the public. 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. Many people in Merrick, including employees of the District, knew about the hazardous condition of the outfield. The assumption of risk defense was not intended to be an absolute defense to ordinary negligence. Appellants have always maintained that participants in athletic endeavors should only assume observable risks – not concealed risks. Nor should landowners (including municipalities) be exculpated from ordinary negligence.

In addition, to the extent that the District has granted permits to third-party sports leagues for use of the ballfield, it is likely that the District has required that such third-party permitees purchase insurance to protect the District from liability. Therefore, the District's scare tactics should be ignored.

The District takes issue with the fact that plaintiffs' only argument is that that summary judgment was improperly awarded because a question of fact was raised as to whether or not the holes in the outfield were concealed, which should have precluded summary dismissal. The District contends that this Court would not grant leave to hear this case, unless an issue of state-wide importance was at stake. Explicit in the appellants' arguments, and as urged both by Judge Steinman and Judge Maltese, is that assumption of risk should not bar recovery to this plaintiff. Implicit in our argument is that the public is not served when a municipality may invoke the assumption of risk defense to avoid responsibility for a failure to maintain property which is used by the public for recreational activities. Moreover, the case-law does not adequately identify exactly what are recreational activities, and what aren't. See Discussion on the *Trupia* and *Custodi* cases below at "A".

In addition, the District argues (Respondent's Brief, pg. 4) that in the landmark case *Turcotte v Fell*, 68 NY2d 432 (1986), the assumption of risk defense was held to be a doctrine which "embraced both the athlete's voluntary acceptance of the field as it existed and the landowner's duty to maintain that field." Defendants' interpretation of the *Turcotte* decision is inaccurate. The issue addressed by the *Turcotte* Court was whether one professional jockey owed another professional jockey a duty of care in the course of the race. The *Turcotte* Court held that the plaintiff, a world-renowned jockey, "consented to relieve defendant jockey

of legal duty to use reasonable care". Thus, the principle was enunciated as one of "no duty". The *Turcotte* Court did not hold that the defendant should have "no duty" in cases such as the subject one on appeal.

Similarly, in *Morgan v State*, 90 NY2d 471 (1997), the Court stated that "[a]ssumption of risk in this form is really a principle of no duty…..". It is only by applying assumption of risk as a doctrine of "no duty", that the defense is differentiated from comparative fault. While we don't take issue with the assumption of risk defense as it is applied to professional sporting events, or to spectators at such events, we do take issue with applying a doctrine of "no duty" to the facts of cases, such as this one, which involve informal recreational activity[7].

The District maintains that "[t]o allow each individual court to decide on a case by case basis whether a matter would be considered under ordinary common-law principles or under the assumption of the risk doctrine would unquestionably lead to divergent decisions *** such a chaotic and unpredictable system should not be adopted by this Court." (Respondent's Brief, pg. 5). In fact, the opposite is true; that is the current state of the law. At present, the case-law is unclear, confusing and results in divergent case-by-case opinions. The public would be better served were principles of comparative fault and culpable conduct applied, when a person

[7] *Bennett v Kissing Bridge Corp.,* 5 NY3d 812 (2005), relied upon by the District, is distinguished because (1) the defendant in Bennett warned of the danger by erecting a fence, and (2) skiing is an inherently dangerous activity. Throwing a football is a leisurely recreational activity.

voluntarily engages in a recreational activity knowing that there may be risks involved.

For example, the assumption of risk defense barred recovery to a plaintiff who was having a leisurely game of catch on a cracked and dangerous cement handball court (see *Latimer v City*, 118 AD3d 420[1st Dep't 2014]), but not to a plaintiff who was roller-blading on a similarly defective public sidewalk (see *Ashbourne v City,* 82 AD3d 461 [1st Dep't 2011]). One wonders why a game of catch on a cracked court has more social value than roller-blading on a cracked sidewalk?

The confusing nature of the defense has resulted in decisions which cannot be reconciled with each other. In the past year, there have been decisions which hold that assumption of risk does *not* bar recovery to a child injured on a swing in the playground (*Berrin v Inc. Village of Babylon,* 186 AD3d 1598 [2d Dep't 2020]); a child injured on a ski slope (*Zhou v Tuxedo Ridge, LLC,* 180 AD3d 960 [2d Dep't 2020]); a father injured in a playground pushing his child on a swing (*Raldirid v Enlarged City School District of Middletown,* 179 AD3d 1111 [2d Dep't 2020]); a basketball player injured due to a wet floor (*Asprou v Hellenic Orthodox Community*, 185 AD3d 641 [2d Dep't 2020]); a child injured operating a hover-board (*Scally v J.B.*, 2020 WL 6051222 [2nd Dep't 2020]); an adult injured in an acrobatics class (*Guins v Streb, Inc.*, 68 Misc. 3d 1222A [Sup. Ct. Bx Co., 2020]);

and an ice-skater injured on the rink (*Saporito-Elliot v USA, Inc.*, 180 AD3d 830 (2d Dep't 2020]).

Similarly, in the past year, assumption of risk was applied to *bar* recovery to an inmate who was injured lifting barbells (*Williams v State*, 2020 WL 5867633 [4th Dep't 2020]); a snowboarder injured who slipped on ice after he finished snowboarding (*Kannovas v Yung-Sam Ski, Ltd.*, 2020 WL 5931023 [2d Dep't 2020]); a golfer who slipped and fell on a wet stairway landing (*Conrad v Holiday Valley, Inc.*, 2020 WL 5867630 [4th Dep't 2020]); and to bystanders at a sheaf-throwing competition (*McKay v Rockland Gaelic Athletic Association, Inc.*, 2020 WL 6051510 [2d Dep't 2020]).

In other words, cases run the spectrum and are difficult, if not impossible, to distinguish from one another. Each court is deciding assumption of risk actions on a case by case basis.

It is the opinion of the undersigned, that the only clear-cut decision of the above-mentioned 2020 cases, involves the bystanders at the sheaf throwing competition. A bystander at an event which consists of hurling a pitchfork can readily be deemed to have expressly assumed the risk associated with such activity. It would be too burdensome to the sponsors of such competitions to hold otherwise. The benefit to the public is readily apparent where organized competitive events are concerned. However, the remainder of the 2020 cases involve gray areas, which are

difficult to distinguish from each other. As an example, why is a golfer who slips and falls on a wet stair to be treated differently from any pedestrian who slips and falls on a wet stair? Why is a snow boarder who slips and falls on ice, after he has finished snow-boarding for the day, treated differently from a pedestrian who slips and falls on ice?

It is nearly impossible to explain why a bicycle rider (or a jogger, roller-blader or hover-boarder) does not consent to the negligent maintenance of the public road or sidewalk, while a minor throwing a football around informally, does consent to the negligent maintenance of the ballfield. Quite simply, the courts are required to engage in mental gymnastics to reach their respective results on a case by case basis. At times, playing on monkey bars in a playground acts as a bar to recovery (*See Smith v City of NY*, 84 AD3d 631 [1st Dep't 2011]); while at times falling from playground equipment does not bar recovery (See *J.R. v City of New York*, 170 AD3d 1211 [2d Dep't 2019]).

Few of the cases before the courts are straightforward, and involve participants who have given his/her express consent in such an obvious manner, as to properly relieve the defendant from their obligation to exercise reasonable care. It is submitted that such is not the case in this appeal, and in the numerous other cases which have come before the courts, and are presently pending before the courts.

A. Assumption of Risk Should Not Serve as an Absolute Bar to Recovery.

The defense of assumption of risk has recently been eroded by two significant Court of Appeals decisions. In *Trupia v Lake George Central School District*, 14 NY3d 392 (2010), this Court held 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 an absolute bar to actions. Thus, the defense was diminished in scope by the *Trupia* Court.

The *Trupia* case involved a child who slid down a bannister and became a paraplegic. The *Trupia* court reasoned that horseplay, as opposed to an organized athletic activity, has no social value. Therefore, the plaintiff was permitted to maintain his suit against the school district.

Defendant cites, out of context, a single sentence on page 395 of the *Trupia* decision. That sentence states that "[T]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation." However, it is clear that the *Trupia* Court grappled with its decision, as evidenced by reading the entire decision, and not just that single sentence.

Indeed, Chief Judge Lippman's majority opinion in *Trupia* re-conceptualized assumption of risk as a policy-based exception to comparative fault: The doctrine "is most persuasively justified ... for its utility in 'facilitat[ing] free and vigorous participation in athletic activities'.... We have recognized that athletic and recreative

activities possess enormous social value, even while they involve significantly heightened risks, and have employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits against the prohibitive liability to which they would otherwise give rise." *Id.* at 395. The *Trupia* Court observed that it has not applied the doctrine "outside this context" and that its application "must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation." *Id.*

However, Judge Smith, who concurred in a separate opinion, appeared unsatisfied with the majority opinion, in that *it raised as many questions as it answered*. Judge Smith posited: "[w]hat exactly is 'athletic or recreative' activity?" Also, how does one decide which types of activities have more social value than others? As Judge Smith wrote, the boy in Trupia was sliding down the bannister for fun. Why should that activity be treated differently than the fun of skiing or bobsledding? Judge Smith concluded: "[I] think it is a mistake to make sweeping pronouncements in a case that does not require it, while ignoring the questions those sweeping pronouncements raise." Judge Smith's concerns are evident in the sampling of recent assumption of risk cases, each with decisions which could have gone "either way". Judge Smith's concerns are amply warranted, and should result in reversal in this case.

Two years later, in *Custodi v Town of Amherst*, 20 NY3d 83 (2012), the Court was faced with an action in which the plaintiff was rollerblading on a public sidewalk. The *Custodi* Court 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) (an injured bicyclist did not consent to the negligent maintenance of the roadway by the Town). Thus, the defense as an absolute bar to recovery was further eroded by the *Custodi* Court. As we argued above, it is difficult to understand why roller-blading and bicycle riding (an unorganized activity with social value) are treated differently than Michael Ninivaggi's having a catch (an unorganized activity with social value). Yet in one case, the Town was required to maintain its property, while in this case, the District was "let off the hook".

Notwithstanding the *Trupia* and *Custodi* decisions, the application of the doctrine of assumption of risk as a bar to recovery remains confusing and unclear, as evidenced by the decision in this case, and in the 2020 cases cited above.

B. The Legislature Did Not Intend Assumption of Risk to Be an Absolute Bar to Recovery.

In the Respondent's Brief, the District contends that appellants failed to address the viability of the assumption of risk defense as a complete bar to recovery. In Reply, appellants maintain that to the extent that New York State case-law views the assumption of risk defense as an absolute bar to recovery, it is in derogation of the legislative intent underlying the 1975 passage of CLPR 1411. CPLR 1411 states as follows:

> Section 1411. Damages recoverable when contributory negligence or assumption of risk is established. In any action to recover damages for injury *** the culpable conduct attributable to the claimant or decedent, including contributory negligence *or assumption of risk, shall not bar recovery*, but the amount of damages otherwise recoverable shall be diminished …". (emphasis added).

In *Rodriguez v City of NY,* 31 NY3d 312 (2018), this Court held that in matters of statutory interpretation, a court should look first to the plain language of the statute. The plain language of Section 1411 is that "[a]ssumption of risk shall not bar recovery." It is abundantly evident that the plain language of CPLR 1411 has not been applied to Michael Ninivaggi, who voluntarily engaged in an unorganized athletic and recreational activity. Yet, in the *Rodriguez* case (which was a

comparative fault case, and not as assumption of risk case), the Court stated that a plaintiff can be awarded partial summary judgment as to liability, even where the plaintiff bears some degree of comparative fault. The Court reasoned that the plaintiff's comparative fault only serves to diminish a damages award, and does not serve to bar recovery of a liability award. The Court noted that the statute explicitly and specifically states: "[t]he culpable conduct attributable to the claimant or decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished.".

It is submitted that applying the reasoning of the *Rodriguez* Court to this case, would result in reversal. Michael Ninivaggi's voluntary decision to throw around a football on an outfield he knew to be poorly maintained, might diminish his recovery in damages, but should not bar recovery.

Ten years after enactment of CPLR 1411, and despite the plain language of the statute *(assumption of risk, shall not bar recovery)*, this Court interpreted the above statute to say the opposite, when it held that the defense of assumption of risk is a complete bar to recovery. See *Arbegast v Bd of Education,* 65 NY2d 161 (1985). For many years the courts have reasoned that the legislature intended to exclude "express" and "primary" assumption of risk from the scope of CPLR 1411, despite the fact that the statute does not say that. Confusion and conflicting decisional law has resulted.

The Practice Commentaries to CPLR Section 1411 (**C1411:3. Plaintiff's Conduct as a Complete Bar to Recovery)** state that the Court of Appeals continued its retreat from the primary assumption of risk doctrine in *Custodi v Town of Amherst*, 20 NY3d 83 (2012). In the *Custodi* case, the Court stated that the exceptions to CPLR 1411 are in "[c]ases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues." As we stated above, this amounts to an artificial construct. We contend that having an informal game of catch on a school outfield on the weekend is a recreational pursuit, which did not take place at a "designated venue". An informal weekend game should not be considered to come within the exception.

The Practice Commentaries section entitled "**Exceptions**", holds that athletic activities are held to comprise the third and fourth (of four) exceptions to the plain language of CPLR 1411.

The Practice Commentaries consider an "*express* assumption of risk" to constitute the third exception to CPLR 1411 (assumption of risk shall not bar recovery), citing *Arbegast v Bd of Education*, 65 NY2d 161 (1985). Thus, by "consenting" to the activity, the defendant "need not use reasonable care for the benefit of plaintiff." *Id.* at 169. In the *Arbegast* case, the plaintiff expressly consented to absolve the defendant of liability during a fund-raising basketball game,

in which the players rode on the backs of donkeys after having been informed beforehand that they participated at their own risk. When plaintiff Arbegast was injured, his action was barred. It is readily apparent that Michael Ninivaggi did not "*expressly* consent" to assume the risks of the outfield, such as to absolve the District of liability for its own negligence.

The fourth exception enunciated by the Practice Commentaries is "*primary* assumption of risk." Primary assumption of risk was explained by the *Turcotte* Court to include the voluntary participation in competitive athletics--professional, amateur, interscholastic *and even informal*. *Turcotte v Fell,* 68 NY2d 432 at 439 (1986). By choosing to participate, the plaintiff is deemed to have consented "to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation." See, *Turcotte v Fell,* at 439. The *Turcott* Court of Appeals characterized primary assumption of risk "[a]s eliminating the defendant's duty of care to the plaintiff, thus rendering the concept of comparative fault irrelevant." *Id.* at 437-39. Plaintiff maintains that the fourth exception to CPLR 1411 should be eliminated as it pertains to voluntary participation in informal athletic activities because to hold otherwise, renders the plain language of the statute meaningless. Indeed, this is exactly the question addressed by Judge Smith in his concurring opinion in *Trupia*. The *Trupia* decision left unclear which activities are "recreative" and/or "recreational", and which are not.

It is submitted that no reason exists to contort the plain language of CPLR 1411 to bar from recovery the type of unorganized informal athletic activity which is before the Court on this appeal.

CONCLUSION

The courts of this State have produced conflicting and divergent decisions attempting to apply the assumption or risk defense to cases involving recreational athletic activity which do not involve organized competitive events. It is respectfully submitted that the doctrine of assumption of risk should be viewed as a measure of a defendant's duty of care, and not as a complete defense, or a duty of "no care". In cases such as the one before this Court, principles of comparative fault and culpable conduct should apply. Accordingly, as it is undisputed that the District had notice of prior accidents and complaints, and further, admitted to negligent maintenance of this outfield, it was error to dismiss the complaint.

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: November 2, 2020
New York, New York

Marcy Sonneborn

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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
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Respectfully submitted,

Yours etc.,

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