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Court of Appeals

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.

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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THE STATE OF NEW YORK

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AFFIRMATION
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Return Date:
1/21/20

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KATHLEEN D. FOLEY, being an attorney duly admitted to practice law in the State of New York, under the penalties of perjury, affirms as follows:

1. Your affirmant is associated with the law firm CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, attorneys for Defendant-Respondent MERRICK UNION FREE SCHOOL DISTRICT in the above-captioned matter and as such, am fully familiar with the facts and circumstances of this case from papers and documents contained in our office file, and also from having participated in plaintiffs' appeal to the Appellate Division, Second Department.

2. This Affirmation is respectfully submitted in opposition to the plaintiffs-appellants' motion, pursuant to C.P.L.R. 5602(a)(1)(i), for leave to appeal to the Court of Appeals from the order of the Appellate Division, Second Department, dated November 27, 2019.

3. Plaintiffs posit no valid ground for seeking leave to appeal to this Court; they simply do not like the proper yet unfavorable decision rendered by the Second Department. In the present motion, they do not present any cogent reason why this case should be heard by the Court of Appeals. There is no legal issue of statewide importance which warrants review by this Court, no unresolved conflict between the four judicial departments of this State, and no conflict between this case and any prior Court of Appeals' decision on any particular legal point raised by the facts of this case. See 22 NYCRR section 500.11(d)(1)(v).

4. The two important factors in this primary assumption of risk case are: 1) the naturally-occurring uneven and choppy condition of the baseball outfield in question and; 2) the experienced plaintiff's knowledge of the irregular condition of the playing field.

5. What plaintiffs presently ask this Court to do is create an undesirable "slippery slope" for determination of all assumption of risk cases. In this regard, to rule in plaintiffs' favor would essentially kill the doctrine entirely for factually-similar cases because it would necessarily cause the motion court to deny landowners' motions because there would always be a question of fact regarding whether the "severity" of the involved condition was assumed or, as plaintiff argues, of such a degree to bring the case outside of the realm of the assumption of risk doctrine.

6. Plaintiffs here argue that there was not just one hole in this natural grass field; there were many, leading to the conclusion that the field was in overall disrepair and, thus, the condition of it could not be assumed by plaintiff within the meaning of the doctrine. What if there were two holes, or three, or seven? At what point does the condition of the field take the case out of the long-enforced assumption of risk doctrine? Obviously, it could never be determined as a matter of law, which would virtually eradicate the doctrine altogether.

7. And, yes, this is an issue of Statewide importance to the extent that it would compel landowners Statewide to shut down their fields for fear of excessive liability. Of course, this was recognized by this Court in Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 901 N.Y.S.2d 127 (2012), when it acknowledged that the doctrine comprehends that some "risks may be voluntarily assumed to preserve these beneficial [athletic] pursuits as against the prohibitive liability to which they would otherwise give rise." Trupia, 14 N.Y.3d at 395.

8. While plaintiffs argue --as the Appellate Division dissent did – that it would have been relatively simple and inexpensive to make the needed repairs, this is not the determinative factor controlling whether the doctrine applies and, again, is something that would have to always be decided on a case by case basis. Would landowner A be responsible where the repairs would have only cost $300 but Landowner B would be exonerated under the doctrine because the needed repairs were far more expensive and/or onerous?

9. The traditional doctrine holds that 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 N.Y.2d 471, 484, 662 N.Y.S.2d 421 (1997). Importantly, 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 N.Y.3d 353, 356, 948 N.Y.S.2d (2012).

10. As quoted in the Morgan case, "'assumption of risk in this form is really a principle of no duty, or no negligence and so denies the existence of any underlying cause of action. Without a breach of duty by the defendant, there is thus logically nothing to compare with any misconduct of the plaintiff.'" Morgan, 90 N.Y.2d at 485 (quoting Prosser and Keeton, Torts

§ 68, at 496-497 [5th ed]). In this regard, defendant fulfills its duty of care by making the premises "as safe as they appear[ed] to be." Lincoln v. Canastota Cent. Sch. Dist., 53 A.D.3d 851, 852, 861 N.Y.S.2d 488, 490 (3d Dep't 2008); Joseph v. N.Y. Racing Ass'n, 28 A.D.3d 105, 108, 809 N.Y.S.2d 526, 529 (2d Dep't 2006)(both quoting Turcotte v. Fell, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49, 53 (1986)).

11. The seminal plaintiff in Maddox v. City of N.Y., 66 N.Y.2d 270, 274, 496 N.Y.S.2d 726, 727 (1985) slipped and fell when playing on a wet and muddy baseball field. What truly distinguishes that from the uneven field here? Nothing except the nature of the irregularity, both of which were perceived by the participants. The Maddox case has been controlling precedent for thirty-five years, and there is no cogent reason to overrule it at this point.

12. Plaintiffs here rely on the watershed Court of Appeals' case Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 901 N.Y.S.2d 127 (2012), but that case is distinguishable on two important grounds. First, the Trupia plaintiff was sliding down a bannister, certainly not a qualifying activity for the assumption of risk doctrine.

13. Second, the Trupia plaintiff was attending a School District summer program such that assumption of risk principle does not apply, as it does not to school-day gym class incidents, where participation is not deemed "voluntary."

14. The facts presented here are more akin to those faced by this Court in Bennett v. Kissing Bridge Corp., 5 N.Y.3d 812, 813, 803 N.Y.S.2d 22, 22 (2005), where the Court determined that plaintiff's skiing "accident was caused by variations in terrain and ice."

15. The Bennett case also serves to prove the School District's point regarding the "slippery slope" that would be created by the adoption of plaintiffs' position here. If the School

District here was held liable for failing to maintain its relatively small outfield, then the Bennett defendants would also necessarily be held liable for failure to maintain their far-larger ski slopes, because it would be ludicrous to hold that a landowner of "X" number of acres cannot benefit from the doctrine, while an owner of "Y" number of acres is exonerated. See also Baron v. Se. Sports Complex, LLC, 166 A.D.3d 721, 722, 85 N.Y.S.3d 784, 785 (2d Dep't 2018)(plaintiff's complaint dismissed where he was deemed to have voluntarily assumed the risk of coming into contact with a divot on defendant's outdoor ice skating rink).

16. Plaintiffs also rely on Simmons v. Saugerties Cent. Sch. Dist., 82 A.D.3d 1407, 1408, 918 N.Y.S.2d 661, 664 (3d Dep't 2011) to attempt to convince this Court that there is discrepancy between the Departments of this State on the assumption of risk doctrine.

17. Like Trupia, the Simmons case also involved the intertwined issue of negligent supervision by a school, where the school was in a loco parentis relationship with the plaintiff.

18. No such issue is presented here, where plaintiff was using the School District's premises after hours when not under the School District's supervision.

19. Plaintiffs further cite Simone v. Doscas, 142 A.D.3d 494, 494, 35 N.Y.S.3d 720, 721 (2d Dep't 2016) in support of their position. The Simone plaintiff was playing basketball and was injured when he jumped to block a shot and landed on a misplaced flower pot.

20. In denying defendant's motion, the Simone Court found that there was a question of fact regarding whether the flower pot's "placement unreasonably increased the inherent risks of the activity." Simone, 142 A.D.3d at 495. Of course, unlike here, the flower pot at issue there was not an integral part of the playing field, whereas here, plaintiff claims he fell as a result of the uneven and bumpy condition of the field itself.

21. Even the 1990 case Henig v. Hofstra Univ., 160 A.D.2d 761 (2d Dep't 1990), also cited by plaintiffs, is distinguishable because the hole in question was not only several feet wide and several inches deep, but was located on the actual playing area of the football field. It is also unknown if the Henig plaintiff was aware of the existence of the hole.

22. Here, plaintiff chose to use the school district's baseball outfield, despite his awareness of the condition of the field, on his own accord, and not as a result of any direction by the School District.

23. It is understood that the assumption of risk doctrine has come under criticism as of late. Even if this Court were to find it reasonable to re-examine the doctrine anew, this is not the appropriate case for doing so. In this regard, plaintiff here testified:

> [The holes] [t]hey're like, of all sizes and everything, but it's mainly because, like, the grass isn't, like, there's really not a lot of grass, it's just dirt. There's a lot of, like, divots and - -
>
> . . .
>
> Well, playing on the field, like, my whole life I've known that it's, like, been choppy in a lot of spots.

Record, p. 211.

24. The foregoing, of course, obliterates counsel's contention that these holes were "concealed by grass." Plaintiffs' Motion for Leave to Appeal, pp. 4, 15, 20 & 21. These holes were not concealed and did not present any unassumed or enhanced risk.

25. While of course one is usually able to find aberrant cases to support one's position, there are, of course, an equal number of cases, if not more, supporting the School District's position here: Tinto v. Yonkers Bd. of Educ., 139 A.D.3d 712, 713, 32 N.Y.S.3d 176, 177 (2d Dep't 2016)(plaintiff football participant assumed risk of tripping on large hole in grassy field); Lincoln v. Canastota Cent. Sch. Dist., 53 A.D.3d 851, 852, 861 N.Y.S.2d 488, 489 (3d

Dep't 2008)(plaintiff assumed risk of playing on "wavy" and uneven outdoor basketball court); Rivera v. Glen Oaks Vill. Owners, Inc., 41 A.D.3d 817, 820-21, 839 N.Y.S.2d 183, 188 (2d Dep't 2007)(plaintiff bicyclist assumed risk of striking hole while riding on dirt trail); Morlock v. Town of N. Hempstead, 12 A.D.3d 652, 653, 785 N.Y.S.2d 123, 124-25 (2d Dep't 2004)("plaintiff assumed the risk of encountering cracks and holes in the surface of a cement rink while playing roller hockey, including the inherent risk of having his hockey stick get caught in a crack"); Clements v. Skate 9H Realty Inc., 277 A.D.2d 614, 615, 714 N.Y.S.2d 836, 837 (3d Dep't 2000)(plaintiff ice skater assumed risk of injury caused by obvious imperfect condition of skating surface); Gahan v. Mineola Union Free Sch. Dist., 241 A.D.2d 439, 441, 660 N.Y.S.2d 144, 146 (2d Dep't 1997)(experienced softball player assumed risk of falling into hole on field when she was aware that there were "lot[s] of holes" in the outfield, "like ditches").

26. Plaintiffs at bar also seem to make the argument that the assumption of risk doctrine should not even be available to the School District here insofar as "plaintiff did nothing more than catch a ball." Plaintiffs' Motion for Leave to Appeal, p. 8.

27. The assumption of risk doctrine has never been limited to "official" organized games; it applies to those "engaging in a sport or recreational activity." Morgan, 90 N.Y.2d at 484. Of course not every "recreational activity" is covered by the doctrine, but the "policy underlying this tort rule is intended to facilitate free and vigorous participation in athletic activities." Benitez v. N.Y.C. Board of Educ., 73 N.Y.2d 650, 657, 543 N.Y.S.2d 29, 33 (1989).

28. There is no serious question that plaintiff here was participating in a qualifying activity to which the doctrine of the assumption of risk applies.

29. In conclusion, plaintiff was a voluntary participant in a game of football on the School District premises. He was both experienced in the game, and was well aware of the

uneven and choppy condition of this field, which he had used on many prior occasions over the years. Plaintiff nonetheless elected to play there with his friends, and tripped as a result of the open and obvious less-than-optimal condition of the outfield which had no concealed or enhanced defects of which plaintiff was unaware. This is classic assumption of the risk case, providing no reason for this Court to review it further, warranting denial of the present motion.

30. For all of these reasons, defendants ask this Court to deny plaintiffs' motion for leave to appeal to this Court.

WHEREFORE, it is respectfully requested that this Court issue an Order denying plaintiffs' motion in its entirety, together with such other and further relief as to which this Court deems just and proper.

Dated: Uniondale, New York
January 20, 2020

KATHLEEN D. FOLEY