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Kathleen D. Foley
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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.

BRIEF OF DEFENDANT-RESPONDENT
MERRICK UNION FREE SCHOOL DISTRICT

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THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Where an injured plaintiff is voluntarily engaged in an extracurricular activity to which the assumption of risk doctrine applies, and defendant did not conceal or unreasonably enhance the risks inherent in the activity, should plaintiff's complaint be dismissed?

1. The Appellate Division properly answered this question in the affirmative.

2. Where plaintiff is engaged in an athletic activity, does he assume the obvious risks presented by the natural terrain on which he plays?

2. The Appellate Division properly answered this question in the affirmative.

3. Where an injured plaintiff is unable to identify the alleged defect involved in his trip and fall accident, may he maintain a negligence suit against the premises owner?

3. The Appellate Division did not need to address this question.

4. Where a plaintiff's negligence claim is dismissable under the assumption of risk doctrine, is there any legal merit to plaintiff's claim that the premises where he fell were negligently maintained?

4. The Appellate Division properly answered this question in the negative.

5. Should the assumption of risk doctrine be modified by this Court such that all landowners, regardless of their invitees' activities on the premises, be assessed under ordinary common-law principles, specifically the duty to maintain one's premises in a reasonably safe condition?

5. Both the Supreme Court and Appellate Division declined to modify the long-standing assumption of risk doctrine as proposed by plaintiffs and the Appellate Division dissent.

PRELIMINARY STATEMENT

This appeal is predicated upon Justice Maltese's dissent in Ninivaggi v. County of Nassau, 177 A.D.3d 981, 113 N.Y.S.3d 178 (2d Dep't 2019). Therein, Justice Maltese questions the ongoing applicability of the long-entrenched assumption of risk doctrine and its relationship to the age-old common-law principle that a landowner owes a duty to maintain his premises in a reasonably safe condition.

While this Court's decision to revisit the intersection of these important legal principles is appreciated, a reversal will undermine the important doctrine of assumption of the risk, compelling property owners, including municipalities, to bar public 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.

Almost forty years ago, this Court's watershed decision in in Turcotte v. Fell, 68 N.Y.2d 432, 510 N.Y.S.2d 49 (1986)(citing Maddox v. City of N.Y., 66 N.Y.2d 270, 496 N.Y.S.2d 726 (1985)) established assumption of the risk as an important doctrine in New York jurisprudence. The Turcotte Court recognized the value of athletic activities as well as the fields upon which those activities are undertaken, and understood that no obligation exists to provide a perfect and unblemished field upon which one can engage in athletic activities.

The Turcotte Court did not hold that the common-law principle of reasonable maintenance of one's property was subordinated to the assumption of the risk doctrine, but rather adopted a rule that embraced both the athlete's voluntary acceptance of the field as it existed and the landowner's duty to maintain that field. The athletes were deemed to have accepted the obvious nature of the field on which they played; they never, of course, were deemed to have accepted any hidden or enhanced risks of which they were unaware. The Second Department's decision in no way affects that important exception to the assumption of risk doctrine, nor does the School District argue that that aspect of the doctrine should be modified.

Plaintiff does not dispute that he was very familiar with the subject field as well as its many natural flaws. Despite his knowledge of the imperfections, he nonetheless decided to play on this field which he knew was uneven and "choppy" as opposed to other available "safer" places. This is the classic assumption of risk scenario and to modify the result in any way would cast serious doubt on decades of decisions cemented in the well-settled jurisprudence of this State and relied upon by property owners in considering whether and how to allow the public to access their lands.

Justice Maltese, in dissenting below, seeks what practically would be the complete eradication of the assumption of the risk doctrine, and sets forth an

unworkable premise that would create a slippery slope. When, exactly, would the assumption of risk doctrine apply and protect the landowner, and when would he be assessed under ordinary common-law principles? Justice Maltese provided no answer to this quandary. He mentions that here the burden on the School District to correct the defect would have been minimal, i.e., a few wheelbarrows full of dirt and some grass seed. But what if the cost were far greater – then does assumption of risk apply? Or should the duty be evaluated by the extent of the hazard posed – if it is a nominal risk, then one standard of care applies, but greater risks are evaluated by a different standard?

This is the looming problem here, and one for which neither Justice Maltese nor plaintiffs provide a reasonable solution. To 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, no harmonious trend for our stare decisis system, and the complete inability for counsel to advise their property owner clients with any modicum of accuracy. The answer would invariably have to be: it depends on where this occurs and who in particular decides the case. This is certainly not in line with New York's legal history, and such a chaotic and unpredictable system should not be adopted by this Court.

In their Appellants' Brief, plaintiffs attempt to change the tone of this appeal. First, on a global level, they argue that the "informal catch" in which plaintiff was involved should not be subjected to the assumption of risk doctrine because it does not rise to the caliber of an "organized athletic activity" to which the doctrine should rightfully apply. Second, they implicitly concede that the doctrine is applicable, yet contend that the "concealed" nature of the hole in issue falls within the long-accepted exception that enhanced or concealed risks are not assumed by the participant. It will be shown that neither argument is persuasive: the activity was unquestionably a covered activity and the naturally-occurring holes were not concealed and, in any event, were well-known to this particular plaintiff.

As such, this Court should affirm the opinion offered by the majority in the underlying case, and allow the continuance of the doctrine which allows for predictability yet adequate protection for property owners and athletes alike.

COUNTERSTATEMENT OF FACTS

Plaintiff's Accident

On Saturday, November 26, 2011, plaintiff-appellant Michal Ninivaggi, by his parent and natural guardian, Penny Ninivaggi (hereinafter "plaintiff") was playing on the baseball field located at Roland A. Chatterton Elementary School in Merrick, New York, which is owned and operated by defendant-respondent Merrick Union Free School District (hereinafter "School District")(42-43, 64, 142 & 195-196). At the time of the incident, plaintiff was a ninth grade middle school student, but he had attended Chatterton Elementary when he was younger (141), and during that time he used this field on a regular basis for recess and for physical education class (216-217). During seventh and eighth grades, plaintiff's lacrosse team practiced on this same field once a week (217-218). At the time of the incident, plaintiff and his friends had been using this particular field approximately twice a month (208).

That day, plaintiff walked to the school fields to have a football game catch with friends (146). While some of the boys were waiting for others to arrive, they began throwing the ball around in the outfield of one of the three baseball fields located there (149, 198 & 205-206). As plaintiff reached to catch a pass, he caught it, then took a few steps and lost his balance, falling down onto his left arm (152-153, 209-210 & 220). As he lost his balance, he felt like he "stepped into a hole"

(154). At his later deposition, he admitted that he did not look down at the ground after he fell, but he "could tell" there was a hole because there were "holes all over the field" (211); because he was in so much pain, it did not occur to him to look and see why he fell (211-212 & see 292-293). Plaintiff approximated that the hole measured eighteen by six inches; he did not know how deep it was (155). At his later deposition, plaintiff guesstimated that the holes were, "like, maybe five inches, I'm not really sure" (213). The field itself was grassy, but there no grass in the alleged hole (140, 150, 155 & 213-215).

Plaintiff described the field as follows:

> [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.

(211).

When asked to describe the holes on the field, plaintiff responded:

> Well, the one I fell into I just - - I could, like, imagine in my head it was probably around eighteen by six because I felt my whole foot, like, go into it, and I'm a size eleven, so that's, I mean, it kind of makes sense, but there's - -

(213). He confirmed that this was what he "felt," not what he actually observed (213 & see 292-293).

Despite the fact that plaintiff and his friends regularly played on this field, he testified that he had never noticed this particular hole before (156, 208 & 228). Neither plaintiff nor his friends ever complained to anyone about the condition of the field (157).

When attending elementary school there, plaintiff had used this field on a regular basis (157). He had seen holes on the field, testifying, "[i]t's always been choppy" (157 & 197). At the 50-h hearing, plaintiff was asked to look at the photographs taken by his mother to try and identify the defect involved in his accident (158-160). Shown Exhibit F, plaintiff thought it looked like the area of his fall, but he couldn't be 100% sure (158-159). Otherwise, he was unable to accurately identify the defect in the photographs (160-162). Also, at his later deposition, plaintiff admitted that he "looked in the proximity of the area because [he couldn't] remember the exact, like, pinpoint that exact area" (212). The same occurred at his deposition (see 235-240).

At her 50-h hearing (81-132), the infant plaintiff's mother, plaintiff Penny Ninivaggi (hereinafter "Ms. Ninivaggi") testified that she had personally been to the subject field, and that she was aware that her son "occasionally" played ball there (87 & 310). She had been there insofar as all of her children attended school

there (88 & 310). While Ms. Ninivaggi testified that "all the parents" had complained about the condition of the field, she admitted that she had never made any complaints to the School District, nor even to the elementary school itself, and could not specifically recall anyone in particular who had done so (88 & 310). She stated that all of the fields in the town were in poor condition, yet she had never personally observed any concerning conditions on this field prior to her son's accident (88-89).

Ms. Ninivaggi stated that her son told her that he tripped while playing ball, stumbled on a hole and fell to the ground, landing on his arm (110). She went to the subject field two weeks after the incident with her son, who pointed out the approximate area of his fall, saying "I think it was here, I think it was here" (113). She described the field as follows: "- like chunks of not even missing grass, like more than just even holes. Like, just it's almost like hilly and wavy. Like the whole area seemed wavy and then there were spots of holes" (115). At her later deposition, she described the field as "bumpy and wavy," "not flat," and "hilly" (298).

She further claimed that her son identified the specific hole involved in his accident, but when asked if she photographed it, Ms. Ninivaggi only responded, "I thought I did" (115). She described the hole as three to four inches deep and about twelve inches wide (116), but she did not measure it (121). Then she testified that

it was jagged, not straight, and that "[i]t wasn't like a hole" (116). Ms. Ninivaggi had never seen the subject "hole" prior to the incident, and she had no idea how long it had been there on the field (117 & 310). She was not able to identify the specific hole involved in her son's accident when shown photographs which she had taken herself (119-120). She testified at her later deposition that when she and her son went back to the field two weeks after the accident, he pointed out the actual hole on which he tripped (298-299). Yet at her deposition she could not definitively state that photograph Exhibit C was the hole that he pointed out; she vaguely stated "[t]his looks like the area. . . . I think this is the area where he showed me" (299-300). When asked, "[w]hen he said this is the hole, did you walk up to the hole and take a picture of it?' she responded, "[n]o" (302).

Although Ms. Ninivaggi was a PTA Board member at the school, the subject of the condition of the field was never raised at any meetings (124). She believed that would be an issue more likely addressed in Board of Education meetings (124-125). She herself attended a Board of Education meeting where the condition of some fields were addressed, but she did not know if this particular elementary school was discussed (126).

Kent Eriksen testified on behalf of the School District (322-380). After working in the School District for eighteen years (327 & 331), Mr. Eriksen became head custodian at the Chattergoon Elementary School (331). His duties entailed

interior work and maintenance of the playground, and his workers cut the grass on the baseball fields and inspected on a daily basis to ensure they were garbage-free (333-335 & 354). The grass was cut with a small tractor once a week between March/April and November (336-337). The School District staff did not, however, groom the actual dirt portions of the fields; that was performed by the little league (334 & 340-341). Nor did the School District seed the fields or apply fertilizer (335). The School District also employed a part-time groundsman, Chris Bandi, who inspected the fields (354-355).

Mr. Eriksen testified that he did walk around and inspect, inter alia, the baseball fields (340-341). If he observed a problem, he would notify his boss, Jim O'Beirne (341-343); there were no occasions, however, where the baseball field was discussed (342 & 373-374). During 2011, Mr. Eriksen never received any complaints about the condition of the fields (343). He identified the photographs of the fields at his deposition and testified that he did not observe any holes or anything that required remediation (344-345). There were times that he placed orange warning cones or roped off an area deemed dangerous on the playground, but he had never done so relative to the baseball fields (349-350).

Other groups also used the subject fields by permit. The fields were used by the little league (334, 357-358 & 465), by the Merrick Avenue Middle School (352

& 462), by the Merrick-Bellmore Classic Softball League (356-358 & 463). The Kiwanis Club also used the fields once a year (359 & 464).

James O'Beirne, the School District's Director of Facilities (388 & 395) also testified on behalf of the School District (382-439). During his tenure, he went to the Chattergoon School at least once a week (396-397). During his visits there, he inspected the interior and exterior of the building, as well as the subject baseball fields (398-404). Mr. O'Beirne confirmed that the Merrick Little League was responsible for maintaining and grooming these fields, and was performed frequently during the baseball season (420-421). He also agreed with Mr. Eriksen, upon being shown photographs (440-457), that there was nothing depicted therein on the fields that required winter maintenance (427). What he did observe he characterized as "winter grass" (427-428).

The Photographs

There are several photographs of the field in question (440-46 & 466-468). None of them depict the eighteen by six inch hole described by plaintiff (155). The first three reflect no aberrations whatsoever (440-442 & see 456-457, 466 & 468). Others show minor unevenness and dirt areas (443, 446, 447, 448, 449, 451, 452, 453, 454, 455 & 461). Defendant's Exhibit B, identified by plaintiff, has a portion circled, but there is nothing hazardous within the circle (459 & 467)!

Defendant's C, also identified by plaintiff, depicts a somewhat darker area, but no actionable hazard (460).

Viewing the photographs next to the testimony given by both plaintiff and his mother call into serious question both the existence and the identification of the alleged hole in question. Plaintiff himself estimated that the hole was eighteen by six inches wide, despite the fact that he never looked at it after the accident (155 & 213). He also guessed that it was some five inches deep (213). Certainly, none of the photographs depict a five inch deep hole (440-46 & 466-468)!

Plaintiff's mother fared no better inaccurately identifying the hole. She thought she photographed the hole identified by her son two weeks after he accident (116), but later denied that (302). At one point she testified that she believed the subject hole was three to four inches deep and twelve inches wide (116), she thereafter candidly admitted that she could not identify the hole in the photographs (119-120).

Thus, beyond all of the other arguments being advanced herein, there was not even an accurate identification of the alleged hole which caused plaintiff's injuries, nor even a single photograph that depicts anything near the defects described by plaintiff and his mother.

The Pleadings

Plaintiffs-appellants Michael Ninivaggi, by his parent and natural guardian, Penny Ninivaggi, and Penny Ninivaggi, individually (hereinafter collectively "plaintiffs") commenced this personal injury negligence action by the filing of a summons and verified complaint dated January 7, 2013 (39-47). It was therein alleged that the School District was liable for having failed to maintain its school premises in a reasonably safe condition and for allowing a dangerous and defective condition (a hole) to exist thereat (42-44).

The School District joined issue by the service of a verified answer (51-55), wherein it raised the affirmative defense of plaintiff's assumption of the risk (52). The County of Nassau also joined issue (56-62). The action against the County of Nassau was discontinued by stipulation (63).

Note of Issue and Certificate of Readiness

Plaintiff filed the Note of Issue and Certificate of Readiness on December 5, 2015 (469-471).

The School District's Motion for Summary Judgment

The School District moved for summary judgment and dismissal of plaintiffs' complaint (15-38). In support, the School District contended that plaintiff had assumed the risk of his injuries (26-35). He was a voluntary participant in an athletic activity and must be deemed to have consented to the

known, apparent and/or reasonably foreseeable consequences of that participation (26). Fourteen-year old plaintiff had been using this particular field on a regular basis since he was in pre-kindergarten and was aware that the field contained depressions and imperfections, yet he nonetheless chose to use the field (28, 29 & 34-35).

Moreover, plaintiff failed to identify the precise defect claimed to be involved in his accident (35-37); he testified that he could not recall the precise area where he fell (36-37). While he identified photographs depicting the general area where he fell, he could not state whether the hole over which he tripped was depicted in those photographs (37). While plaintiff's mother attempted to rehabilitate that fatal testimony, such hearsay should be insufficient to defeat the School District's motion in light of plaintiff's own clear inability to identify the defect (37).

Plaintiffs' Opposition

Plaintiffs opposed the School District's motion (474-485). In support, it was averred that the field condition involved in plaintiff's accident was "unknown and hidden" (474 & 475); that the condition was not a typical inherent risk that could be assumed under the assumption of risk doctrine (474 & 475-476); that the football catch in which plaintiff was involved at the time of the accident was not an "organized" sport to which the assumption of risk doctrine applied (474) and;

because there was evidence that the subject field was not properly maintained and repaired, the School District should be held liable for plaintiff's injuries (474 & 478-479).

He maintained that he did accurately identify the condition on which he tripped (476-477), and then attacked the competence of the School District personnel regarding their maintenance of the field, their lack of training to adequately do so, and their alleged failure to maintain maintenance records (479-480). The permit use by several outside groups was also stressed, as well as the fact that, at times, certain vehicles were driven on the fields (482-484). Plaintiffs concluded that there were triable issues of fact regarding the condition of the field and its maintenance by the School District (485).

The School District's Reply

The School District replied (546-547), first stressing that only *material* issues of fact warrant denial of a defendant's motion for summary judgment (547). It was again argued that the assumption of risk doctrine precludes plaintiff's recovery against the School District here because he was a willing participant in an extracurricular activity and there were no unassumed, concealed, or unreasonably increased risks to which plaintiff was exposed (547).

Plaintiffs' argument that the assumption of risk doctrine did not apply since the boys were just "having a catch" rather than playing an "official game" was

disingenuous (549). Counsel distinguished plaintiffs' cited cases which either involved a perceived enhanced risk posed or non-covered "horseplay" conduct (550-551).

The School District again stressed that plaintiff failed to identify the defect on which he tripped (551-552) and rebutted plaintiff's claim that there was no evidence that the School District failed to maintain the subject fields (552-555). Kent Eriksen testified that he had on-the-job training and had attended maintenance seminars (553). It was established that the fields were mowed weekly, and an outside company maintained the dirt portions of the field (553-554). There was also ample testimony regarding daily inspection of the fields (553-555). This was not undermined by the testimony regarding the failure to fill out certain non-required forms (555).

Supreme Court Order Appealed

In granting the School District's motion for summary judgment and dismissal of the complaint, the motion court aptly noted that, "[w]here a plaintiff has assumed the risk of a certain sporting activity, generally, the defendant has no legal duty to that plaintiff" (11). It continued: "a participant consents to risks that are 'inherent in and arise out of the nature of the sport,'" including "'the risks involved in the construction of the field'" (quoting Morgan v. State of New York, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421 (1997) and Maddox v. City of New York,

66 N.Y.2d 270, 277, 496 N.Y.S.2d 726 (1985))(11). Finally, the court reiterated that, "[i]f those risks are 'fully comprehended or perfectly obvious,' a plaintiff has consented to the risks and defendant has satisfied its duty" (quoting Turcotte v. Fell, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49 (1986)).

The court further referenced a 2011 case, Palladino v. Lindenhurst School District, 84 A.D.3d 1194, 924 N.Y.S.2d 474 (2d Dep't 2011), wherein Justice Skelos wrote a concurring opinion where he stated that he believed the majority in that case placed excessive emphasis on plaintiff's prior knowledge of the dangerous condition involved in the accident. Justice Skelos opined that the majority was overly-focused on plaintiff's knowledge of the condition and, rather, should have considered whether the condition was an inherent risk in the sport (handball court)(13).

In deciding the matter at bar, Judge Steinman expressed his agreement with Judge Skelos' opinion, and quoted the Court of Appeals statement in the seminal case Morgan v. State of New York, 90 N.Y.2d 471, 662 N.Y.S.2d 421 (1997) that sporting facility owners should not be exculpated for ordinary types of negligence, even in assumption of risk cases (13). However, it also acknowledged that that case concerned a condition which was *not* inherent in the sport being played (13-14). In this regard, the motion court stated that here, although the evidence demonstrated that the School District failed to attempt to properly maintain its field

to ensure that it was hazard-free, it was nonetheless "constrained" to follow precedent and, thus, granted the School District's motion for summary judgment and dismissal of plaintiff's complaint on the ground that he assumed the risk of the injuries he sustained (14).

Second Department Order Appealed

Following the perfection of plaintiffs' appeal to the Appellate Division, Second Department, that Court issued the order dated November 27, 2019, which affirmed the dismissal of plaintiffs' complaint (567-574). The majority recognized that stare decisis principles required dismissal of plaintiffs' complaint. Plaintiff had voluntarily participated in the football game, and his assumption of the risks posed included the less-than-optimal conditions of the playing field (568). Plaintiff was fully aware of the choppy condition of the playing field, and that unconcealed irregularity posed risks which are inherent to the game of football (568). The Court stressed the distinction between a torn tennis net – the result of permitting the premises to fall into disrepair – and this uneven outdoor field which was a natural and expected condition of a grass field (569).

Judge Maltese, of course, was the lone dissenter (569-574). He commenced by noting that athletes do not assume all risks of injury posed by recreational facilities, and that owners of less-than-optimally maintained premises may share comparative fault. Instead of starting analysis from the assumption of risk

position, he first addressed the landowners' duty to maintain their premises in a reasonably safe condition (569).

Justice Maltese then chastised the majority's feeling that they were "constrained to follow Second Department precedent" (570), but failed to acknowledge the revered principle of stare decisis.

He then noted that while leave to appeal to this Court was granted in the 2018 case Philius v. City of New York, 161 A.D.3d 787, 75 N.Y.S.3d 511 (2d Dep't 2018), the appeal was thereafter withdrawn, thus depriving this Court of revisiting the assumption of risk doctrine (570-571).

Justice Maltese posited that the Second Department's following of precedent 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" (572). It further allows landowners such as the School District at bar to prevail according to the "*law of tough luck*" (573). He directed this at the School District, maintaining that such a posture provides disincentive for those young persons who opt to get fresh air via outdoor activities rather than "sitting around playing video games" (573).

He then addressed the simple and inexpensive burden that would have ameliorated the poor condition of the field, i.e., "a few wheelbarrows of dirt and grass seed" (573).

He claimed toward the end of the dissent that "[s]erious injury incurred when attempting to play 'around' numerous holes and depressions is not an ordinary risk of playing ball on a field" (573-574). This statement, obviously, ignores the plethora of cases that applied the assumption of risk doctrine to find the respective defendants not liable for the injured plaintiff's injuries.

Judge Maltese then seemingly embraced the assumption of risk principles by asserting that a trier of fact should be permitted to assess whether the School District "unreasonably increased the risks inherent in the activity by failing to maintain the ballfield" (574). Obviously, he thereby puts a whole new slant on the meaning of "increased/enhanced risk" for which a landowner may be held liable. He also modified the entire doctrine by failing to admit that the assumption of risk doctrine explicitly provides that a defendant has fulfilled his duty of care to the athlete by having the premises as safe as they appear to be. See Bukowski v. Clarkson Univ., 19 N.Y.3d 353, 357, 948 N.Y.S.2d 568, 570 (2012). Justice Maltese's proffered modification of the doctrine would eradicate the principle that maintaining the premises "as safe as they appear to be" is sufficient to fulfill defendant's duty. Unfortunately, he failed to provide any public policy reasons why the assumption of risk doctrine should be so drastically modified to the extent that it would have no teeth remaining whatsoever.

In their Appellants' Brief to this Court, plaintiffs somewhat reiterate Judge Maltese's position, but actually only concentrate on two main arguments: 1) that the hole involved in plaintiff's accident was concealed, i.e., an unappreciated enhanced risk; and 2) that the "informal catch" in which plaintiff was involved should not be an activity covered by the assumption of risk doctrine.

Thus, interestingly, while Judge Maltese called for modification of the assumption of risk doctrine, plaintiffs themselves actually do not. Plaintiffs merely ask that the Court extend the Trupia holding and find that the informal football catch does not invoke the assumption of risk protection or, alternatively, if the activity is covered, then invoke the long-accepted exception that plaintiffs cannot assume unknown or concealed risks.

POINT I

PLAINTIFF ASSUMED THE INHERENT RISKS ASSOCIATED WITH PLAYING FOOTBALL ON A GRASS/DIRT FIELD

The two important factors in this primary assumption of risk case are: 1) the naturally-occurring and uneven and choppy condition of the baseball outfield in question and; 2) the experienced plaintiff's awareness of the irregular condition of the playing field. What the Second Department dissent found worthy of this Court's review is the theoretical point where assumption of the risk ends and the duty of a premises owner to maintain his property in a reasonably safe condition begins. In essence, the Second Department is asking this Court to draw a red line between the two legal concepts. The School District's response to this is: a defined red line simply will not work without complete eradication of the assumption of risk doctrine.

What plaintiffs and the Appellate Division dissent 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 plaintiffs argue, of such a degree to bring the case outside of the

realm of the assumption of risk doctrine and under the umbrella of the duty to maintain one's premises in a reasonably safe condition.

In fact, as stated, plaintiffs have now altered the focus of this appeal. They now advance two separate less theoretical arguments. First, they maintain that the assumption of risk doctrine should not be applied here in light of the non-organized aspect of the "informal" game of catch in which plaintiff was involved. This was never a focus of either opinion penned by the Second Department; neither the majority nor the dissent questioned the application of the doctrine, as it stands, to the activity in which plaintiff was involved. This is a weak and untenable position on plaintiffs' part.

Alternatively, plaintiffs stick to the facts of the case and contend that the hole(s) at issue were concealed, thus constituting an enhanced/concealed risk which was not assumed by plaintiff. This is a better argument theoretically but, again, not the reason why leave to appeal to this Court was granted.

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.

Yes, this is an issue of Statewide importance to the extent that the proposed modification of the doctrine 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.

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?

The traditional assumption of risk 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).

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)).

The plaintiff in the seminal case 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.

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. See Scally v. J.B., 2020 NY Slip Op 05791 (2d Dep't 2020)(defendants not protected by assumption of risk doctrine where plaintiff was injured using defendants' hover board in driveway).

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

In fact, then-Presiding Justice Lippman implicitly acknowledged his distaste for the assumption of risk doctrine when he first admitted that "assumption of risk has survived [the abolition of contributive fault] as a bar to recovery," yet, in the next paragraph cautioned that "[t]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation." Id.; see Palladino v. Lindenhurst Union Free Sch. Dist., 84 A.D.3d 1194, 1197, 924 N.Y.S.2d 474, 476 (2d Dep't 2011)(J. Skelos, concurring)(acknowledging "the Court's recognition of

the tension between primary assumption of risk and the law of comparative causation prescribes prudent application of the doctrine generally").

Justice Lippman, in writing the Trupia decision, was, however, constrained to limit his dismissal of the defense in that case to the fact that plaintiff there was sliding down a bannister while in a school-like setting.

Notably, however, he fully accepted the circumscribed value of the doctrine for:

> its utility in 'facilitat[ing] free and vigorous participation in athletic activities,' recogniz[ing] that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and [we] have 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.

Thus, this Court has pronounced, on more than one occasion, its recognition that the engagement in the protected activities naturally expose participants to heightened risks of which they are aware. The sidewalk pedestrian is not normally expecting that he is exposing himself to harm by walking/biking to the store; this is precisely why the doctrine understandably does not and should not apply to such situations. See, e.g., Cotty v. Town of Southampton, 64 A.D.3d 251, 257, 880 N.Y.S.2d 656, 662 (2d Dep't 2009); Eagle v. Chelsea Piers, L.P., 46 A.D.3d 367,

368, 848 N.Y.S.2d 59, 61 (1st Dep't 2007); Grisoff v. Nicoletta, 107 A.D.2d 1047, 1048, 486 N.Y.S.2d 579, 580 (4th Dep't 1985).

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."

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 were to be 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).

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. See Plaintiffs' Appellants' Brief, pp. 48-50.

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. 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.

Moreover, the Simmons plaintiff was not in a designated athletic field/venue; he was playing in the school's "bus circle" – an area obviously frequented by many people simply walking as opposed to engaging in athletic activities.

Notably, plaintiff makes this observation and compares himself to a jogger, pedestrian or rollerblader on a public thoroughfare. Plaintiffs' Appellants' Brief, pp. 30-31. That is precisely the point: plaintiff here was *not* on a public thoroughfare where pedestrians regularly walked; he was on an athletic field known to be "choppy" and uneven. True, had he been playing in the street, defendant's argument would be different and, quite likely, the basis for this Court's reversal. Unfortunately for plaintiff, that is not the case.

Plaintiffs also 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.

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.

Even the 1990 case Henig v. Hofstra Univ., 160 A.D.2d 761, 553 N.Y.S.2d 479 (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. Moreover, the Henig decision is now thirty years old, and basically serves as an aberrant case for modern-day plaintiffs to grab onto.

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

Less than a decade ago, this Court took the opportunity to re-examine the assumption of risk doctrine and how and why it had been applied in earlier cases:

> Consistent with this justification, each of our cases applying the doctrine involved a sporting event or recreative activity that was sponsored or otherwise supported by the defendant, or occurred in a designated athletic or recreational venue. In Morgan, for example, we dismissed claims by a bobsledder injured on a bobsled course, and by two students who were injured while attending martial arts classes (90 N.Y.2d at 486-488). Similarly, we applied assumption of the risk to bar claims by plaintiffs who suffered injuries while participating in collegiate baseball (see Bukowski, 19 N.Y.3d at 358); high school football (see Benitez, 73 N.Y.2d at 658-659); recreational basketball on an outdoor court (see Sykes v. County of Erie, 94 N.Y.2d 912, 913, 728 N.E.2d 973, 707 N.Y.S.2d 374 [2000]); professional horse racing (see Turcotte, 68 N.Y.2d at 437); speedskating on an enclosed ice rink (see Ziegelmeyer v. United States Olympic Comm., 7 N.Y.3d 893, 894, 860 N.E.2d 60, 826 N.Y.S.2d 598 [2006]); and a round of golf at a golf course (see Anand v. Kapoor, 15 N.Y.3d 946, 948, 942 N.E.2d 295, 917 N.Y.S.2d 86 [2010]).

Custodi v. Town of Amherst, 20 N.Y.3d 83, 88-89, 957 N.Y.S.2d 268, 270-71 (2012).

The Custodi Court declined to expand the doctrine to publicly-accessed roadways (as opposing to a field on the premises), which would impinge on the public's right to expect that premises are generally maintained in a reasonably safe condition. Plaintiffs here, of course, rely heavily on this case, but fail to equate the school athletic field to the public sidewalk on which the Custodi plaintiff was rollerblading. It is a distinction

with a huge difference. Public thoroughfares are not protected by the assumption of risk doctrine, nor should they be.

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.

(211).

The foregoing, of course, obliterates counsel's repeated contention that these holes were "concealed by grass." Plaintiffs' Appellants' Brief, pp. 2, 3, 4, 5, 8, etc. These holes were not concealed and did not present any unassumed or enhanced risk. Again, plaintiff himself testified that there was not any grass in the bottom of the holes: "It was just dirt" (213-214). When asked if there was grass at the top of the hole, plaintiff did not know (214) – contrary to counsel's desperate urging, plaintiff *never* testified that the holes were concealed by grass. In actuality, plaintiff's best description of the field was "choppy" (211, 212, 235, 236 & 238).

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").

These cases are properly distinguished from the cases where the assumption of risk doctrine has not protected defendant premises owners because the risks presented did not inhere in the activity, i.e., they were over and above what would

be considered a normal and appreciated risk. See e.g., Owen v. R.J.S. Safety Equip., 79 N.Y.2d 967, 970, 582 N.Y.S.2d 998, 999 (1992)(unique contour of track and design of guardrail posed "additional risks that 'do not inhere in the sport'"); Jamjyan v. West Mountain Ski Club, Inc., 169 A.D.3d 772, 773, 93 N.Y.S.3d 442, 444 (2d Dep't 2019)("plaintiff's expert raised a triable issue of fact as to whether the design of the tubing park contributed to the dangerous condition allegedly created by the actions of the tubing park attendant"); Ozog v. Western N.Y. Motocross Ass'n, 100 A.D.3d 1393, 1394, 953 N.Y.S.2d 520, 520 (4th Dep't 2012)(plaintiffs raised issue of fact regarding whether allegedly improperly trained or negligent flag person posed risk inherent to motocross racing); Mussara v. Mega Funworks, Inc., 100 A.D.3d 185, 192, 952 N.Y.S.2d 568, 573 (2d Dep't 2012)(" dangerous condition posed by the ride was unique and over and above the usual dangers that are inherent in riding down a water slide").

This is not the case here. The holes at issue here – as well as the potential danger they posed – were open and obvious to any reasonable user of the field. See, e.g., Maddox v. City of New York, 66 N.Y.2d 270, 274, 496 N.Y.S.2d 726 (1985)(baseball player assumed risk of playing on wet and muddy field); Tinto v. Yonkers Bd. of Educ., 139 A.D.3d 712, 713, 32 N.Y.S.3d 176, 177 (2d Dep't 2016)(plaintiff assumed obvious risk posed by known hole on football field); Perez v. City of N.Y., 118 A.D.3d 686, 686, 986 N.Y.S.2d 850, 851 (2d Dep't

2014)(plaintiff assumed risk of slipping in mud on softball field); O'Connor v. Hewlett-Woodmere Union Free Sch. Dist., 2, 103 A.D.3d 862, 863, 959 N.Y.S.2d 750, 752 (2d Dep't 2013)(plaintiff assumed risk of known "lip condition" where infield grass of baseball field met infield dirt).

It should also be stressed here that the holes/irregularities at issue here were "natural" conditions of this dirt playing field. In this regard, this Court and many others have equally applied the assumption of risk doctrine to man-made irregularities located on/near playing fields. See, e.g., Ziegelmeyer v. United States Olympic Comm., 7 N.Y.3d 893, 894, 826 N.Y.S.2d 598, 598 (2006)(speedskater non-suited where she fell on ice and hit padded boards surrounding rink); Trevett v. City of Little Falls, 6 N.Y.3d 884, 885, 816 N.Y.S.2d 738, 738 (2006)(plaintiff injured when he collided in mid-air with pole supporting basketball backboard and rim non-suited under assumption of risk doctrine); Sykes v. City of Erie, 94 N.Y.2d 912, 913, 707 N.Y.S.2d 374 (2000)(recessed drain near basketball free throw line); Franco v. 1200 Master Ass'n, Inc., 177 A.D.3d 858, 859, 112 N.Y.S.3d 200, 202 (2d Dep't 2019)(plaintiff assumed risk of colliding with fence located close to basketball court); Krzenski v. Southampton Union Free Sch. Dist., 173 A.D.3d 725, 725, 102 N.Y.S.3d 693, 694 (2d Dep't 2019)(plaintiff could not recover for injuries sustained when she collided with extended bleachers during indoor floor hockey game); Felton v. City of N.Y., 106 A.D.3d 488, 488,

965 N.Y.S.2d 414, 415 (1st Dep't 2013)(plaintiff non-suited where he claimed cracked and uneven basketball caused him to twist ankle); Scaduto v. State, 86 A.D.2d 682, 682, 446 N.Y.S.2d 529, 529 (3d Dep't 1982), aff'd, 56 N.Y.2d 762, 763, 452 N.Y.S.2d 21(1982)(State not liable where injured plaintiff slid on drainage ditch in muddy playing field).

The foregoing distinction between the "types" of field irregularities was addressed by Justice Skelos in his concurring opinion in Palladino v. Lindenhurst Union Free Sch. Dist., 84 A.D.3d 1194, 1200, 924 N.Y.S.2d 474, 479 (2d Dep't 2011), upon which Justice Maltese relied here in his dissent (571). The underlying issue to be addressed in assessing the type of irregularity involved is the "inherency" of that defect to the activity. This is predicated upon this Court's ruling in Morgan v. State, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 426 (1997), that "for purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the *sine qua non*." Morgan, 90 N.Y.2d at 484. Thus, there is a huge difference between misplaced or irregular drains, warped floors, and – versus naturally-occurring holes in dirt and grass playing fields. Consequently, "[w]hile a plaintiff cannot 'reasonabl[y] expect[ ]' an optimal playing surface or space and, thus, the defendant does not have a duty to provide one, the plaintiff might reasonably expect that certain ordinary defects in the

features of the playing surface will be repaired." Palladino, 84 A.D.3d at 1200 (citing Turcotte, 68 N.Y.2d at 437).

Plaintiffs at bar continues 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' Appellants' Brief, pp. 24-33, 34, 37-38 & 51-54.

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; see Latimer v. City of N.Y., 118 A.D.3d 420, 422, 987 N.Y.S.2d 58, 60 (1st Dep't 2012)(primary assumption of risk doctrine applies although plaintiff was involved in a "leisurely game of catch," not an organized sporting event or recreational activity). 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).

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

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 or retract on the scope of the doctrine as it presently stands.

It has been reiterated many, many times that "[a]ssumption of risk is not an absolute defense but a measure of the defendant's duty of care." Asprou v. Hellenic Orthodox Community of Astoria, 185 A.D.3d 641, 642, 127 N.Y.S.3d 584 (2d Dep't 2020) (citing Turcotte, 68 N.Y.2d at 439); Franco v. 1200 Master Ass'n, Inc., 177 A.D.3d 858, 859, 112 N.Y.S.3d 200, 202 (2d Dep't 2019); see Morgan v. State, 90 N.Y.2d 471, 485-86, 662 N.Y.S.2d 421, 427(1997); Buchanan v. Dombrowski, 83 A.D.3d 1497, 1499, 923 N.Y.S.2d 804, 806 (4th Dep't 2011); Tilson v. Russo, 30 A.D.3d 856, 859, 818 N.Y.S.2d 311, 314 (3d Dep't 2006).

Here, plaintiff was engaged in a covered activity and encountered the open and known, uneven yet natural feature of the dirt/grass on which he was playing. Insofar as the School District did not enhance the risk posed by the uneven surface of the playing field, plaintiffs' complaint was properly dismissed and should be affirmed by this Court.

POINT II

THERE WILL BE STATEWIDE IMPLICATIONS FOR LANDOWNERS, MUNICIPAL AND OTHERWISE, – AND CONSEQUENT TRICKLE-DOWN EFFECTS – IF THIS COURT MODIFIES THE ASSUMPTION OF RISK DOCTRINE AS PROPOSED

Insurance concerns silently underlie virtually all litigation. Who is well-insured, who has a deep pocket, who is judgment-proof? Money makes the world go ‘round.

Reducing the effect and application of the assumption of risk doctrine will increase exposure for everyone, not just municipalities. The public will be eventually affected in two ways: 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. This benefits no one, except, perhaps, the few future plaintiffs who will profit from the reduced burden of proof in cases like this.

The eradication of the assumption of risk doctrine will concomitantly force municipalities to pull the reigns in on their offerings, including the public’s use of their properties. School Districts, towns and villages themselves do not benefit from allowing the public to use their properties; why, then, should they expose themselves to additional liability when it in no way benefits them and serves only to increase their legal liability and/or insurance premiums?

A parallel issue was examined decades ago in "The Insurance Liability Crisis in New York: Is Article 16 Our Saving Grace?" (Gail Huberty Glance, 9 Pace L. Rev. 165 (1989))(Available at: https://digitalcommons.pace.edu/plr/vol9/iss1/5). The article starts with the headline: "*No Risky Businesses Need Apply.*" It proceeds to explain that in light of the 1985-1986 insurance crisis, and the hardest-hit municipalities, "many communities were forced to cut services to cover premiums, or in extreme cases, were forced to go without insurance at all." The public outcry, of course, led to the enactment of Article 16 of the CPLR which reformed the doctrine of joint and several liability. Just as the enactment of the Insurance Law's "grave injury" requirement later reduced the legal exposure of employers, so, too, Article 16 reduced the exposure of those defendants with only a small percentage of fault for plaintiff's injuries.

As the article mentions, federal and state governmental entities enjoyed sovereign immunity until the 1929 Court of Claims Act, which was not interpreted and enforced by the Courts until 1945. The article also discusses the Court of Appeals' abolition of the distinction between active and passive tortfeasors in the watershed case Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972).

Of course, in most assumption of risk cases, the negligence attributed to the municipality/defendant is of the passive kind, i.e., failure to maintain or repair, as opposed to actively creating a danger (which would still be encapsulated by the "enhanced risks" for which assumption of risk tortfeasors remain liable). Thus, the relinquishment of sovereignty exposed the municipalities to more liability, yet the Dole v. Dow abolishment allowed for any tortfeasor to implead any type of torfeasor, whereas previously only passive tortfeasors were permitted to implead.

The Dole decision led to the replacement of the contributory negligence rule by comparative fault, thus allowing partially negligent plaintiffs to still sue and have their percentage of fault assessed by a jury. All of the foregoing allowed for more third-party actions and liability. As a result, insurance became a problematic issue and unavailable to those previously covered.

The assumption of the risk doctrine, however, "has survived New York's adoption of comparative fault." Zhou v. Tuxedo Ridge, LLC, 180 A.D.3d 960, 962, 119 N.Y.S.3d 251, 255 (2d Dep't 2020)(Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 395, 901 N.Y.S.2d 127, 129 (2010)). So, as recently as ten years ago, this Court found that the two legal principles could be harmonized with the understanding that "by freely assuming a known risk, a plaintiff commensurately negates any duty on the part of the defendant to safeguard him or her from the risk." Trupia, 14 N.Y.3d at 395. The Trupia Court explained: the

primary assumption of risk doctrine, when applicable, limits defendant's "duty through consent -- indeed, it has been described a 'principle of no duty' rather than an absolute defense based upon a plaintiff's culpable conduct." Id.

There is no valid reason for this Court to now modify the assumption of risk doctrine. This year's pandemic has put crushing pressure on municipalities of every type, requiring unforeseen and unbudgeted huge costs and expenditures to protect the public, including our thousands of struggling school children and working parents. The State's budget, never a five-star athlete, is now crippled for the foreseeable future. To adopt Judge Maltese's proffered dissent will do nothing but encourage more locked gates, even after the threat of viral infection has passed.

Moreover, as stated, this Court does not need to adopt the dissent's position in order to decide plaintiffs' case as requested. In this regard, pursuant to the Appellants' Brief, this Court need only make two lesser decisions: 1) is the informal football catch a covered activity and; 2) did the uneven and choppy terrain of the subject playing field present an enhanced risk for which the School District should be held liable? Neither of these facile questions mandates an assessment of the entire assumption of the risk doctrine, especially in these troubling times of public safety and welfare.

Again, we ask that this Court decline to modify the assumption of risk doctrine and concomitantly affirm the dismissal of plaintiffs' complaint.

CONCLUSION

For all of the foregoing reasons, the order of the Appellate Division, Second Department, dated November 27, 2019, which affirmed the dismissal of plaintiffs' complaint based upon the assumption of risk doctrine, should be affirmed in all respects, together with such other relief as this Court deems appropriate.

Dated: Uniondale, New York
October 19, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §500.1(j) that the foregoing Brief was prepared on a computer.

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Julian S. Vila, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to this action, and resides at 225 First Street, Mineola, New York 11501.

That on October 19, 2020, he served 3 copies of the Brief of Defendant-Respondent *(Michael Ninivaggi v The County of Nassau)* on:

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