To Be Argued by: *Christopher K. Mills, Esq.*
Time Requested: *10 Minutes*

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

JOANNE SECKY, Individually and as Mother and Natural Guardian of JAXSON KOEBEL-SECKY,

Respondents,

v

NEW PALTZ CENTRAL SCHOOL DISTRICT and KEITH KENNEY,

Appellants.

APPEAL NO.: 531549

APPELLANTS' BRIEF

Respectfully submitted,

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STATEMENT OF PROCEDURAL HISTORY

This is an appeal from an order of the Supreme Court (Cahill, J.) entered May 11, 2020 in Ulster County, which denied defendants' motion for summary judgment.

PRELIMINARY STATEMENT

This personal injury lawsuit stems from a January 2, 2017 accident that occurred when plaintiff Jaxson Koebel-Secky was inadvertently knocked into a set of bleachers by a teammate during a Junior Varsity (hereinafter "JV") basketball practice in the main gymnasium at New Paltz High School. At the time of the accident Koebel-Secky was a 14-year-old freshman at New Paltz High School, and was a member of the JV basketball team that was coached by defendant Keith Kenney [Exhibit "B," at 6, 16, 17, 20].[1]

As more fully set forth below, it is respectfully submitted that the Complaint must be dismissed as a matter of law because Koebel-Secky voluntarily assumed the risk of running into all open, obvious and known conditions of the gym, including the bleachers at issue in this case.

[1] Koebel-Secky is now over the age of 18.

STATEMENT OF RELEVANT FACTS

The facts are not in dispute. By the time that Koebel-Secky entered 9th grade and became a starter on the New Paltz JV basketball team, he was already an experienced and talented basketball player, having played organized basketball at a high level since he was around seven years old [R: 56]. The record reflects that Koebel-Secky played CYO basketball in 3rd and 4th grade, and then went on to play more competitive AAU[2] basketball for a team called "The Edge" in Poughkeepsie, New York, followed by a stint with the Newburgh Zion Lions in Newburgh, New York [R: 58-59].

As part of his participation on the AAU basketball teams, Koebel-Secky played games year-round throughout the region, and traveled as far away as Pennsylvania and New Jersey to participate in tournaments [R: 60]. At the time of this incident he was playing basketball year-round and playing four or five days per week [R: 62, 67].

Koebel-Secky's JV basketball coach in 2017 was defendant Keith Kenney, an experienced basketball coach with 15 years' experience at both the high school and college levels. At the time of the accident he was in his

[2] AAU, which stands for Amateur Athletic Union, generally represents the highest level of amateur basketball in the country [R: 528].

second year of coaching JV basketball at New Paltz High School, but he was also employed by SUNY New Paltz as the Assistant Athletic Director [R: 415-416]. During the time in question Coach Kenney also served as an assistant coach for the Varsity basketball team at New Paltz High School [R: 415-416]. He is currently the Head Men's Basketball Coach at SUNY New Paltz [R: 412].

The accident that is the subject of this lawsuit occurred on January 2, 2017 over the Christmas break, which is traditionally a down time during the high school basketball season [R: 528]. On that day, Coach Kenney organized a basketball version of the "Olympics" whereby the JV team was split into two teams that would compete in a series of four or five drills [R: 72]. Koebel-Secky described the "Olympics" as a "fun day" with no particular benefit or punishment resulting from the competition [R: 73-74].

One of the "Olympic" events was a two-on-two rebounding drill whereby one twosome began at the foul line while the other twosome began at the bottom blocks closer the basketball hoop [R: 74-75]. Coach Kenney would begin the drill by shooting a basketball from near the three-point line with the intent of missing the shot and causing a rebound [R: 76]. As soon as the shot went up, the twosome on the blocks would run from the blocks

towards the foul line to try and box-out the other twosome and secure the rebound. Once a team got the rebound they would then try and score a basket, with the first team to 10 baskets being declared the winner of the "Olympic" event [R: 75-77]. For purposes of this drill, Coach Kenney indicated that the players were not restricted to the main court boundary lines, and that only major fouls would be called [R: 77-79].

According to notable basketball coach and coaching expert Brian Fruscio, this drill is a very common rebounding drill that is used by many coaches throughout the country, and certainly throughout New York State, for players as young as 4th grade [R: 529]. The drill is designed to teach not only rebounding skills, but also other skills that are critical to athletic success, and certainly basketball success, including toughness, hustle, determination and the desire to compete for tough baskets around the hoop [R: 529].

After Coach Kenney explained the rules to Koebel-Secky and his teammates, there were no issues, objections or concerns expressed by any of the players, including Koebel-Secky [R: 78]. All of the players, including Koebel-Secky, were "fine" with the fact that play could continue even if the ball or players were out of the bounds of the main court [R: 78]. Koebel-

Secky then watched as three or four sets of players competed in the drill before it was his team's turn [R: 85]. Importantly, it is undisputed that there was no aggressive play in these first three or four groups, and the players were not committing any fouls that required Coach Kenney to intervene and blow his whistle [R: 79-80, 86]. In fact, Koebel-Secky testified that he had never seen any situation prior to January 2, 2017 where there was a serious foul or physical altercation between this group of teammates [R: 79-80].

When it was Koebel-Secky's turn to compete, he stepped out with his partner and competed against another twosome that included his friend Zach Grazioso [R: 88-89]. Koebel-Secky had been friends with Zach for two years, and they both were part of the same group of friends [R: 89]. They played basketball, golf and other sports together, and spent time at each other's houses [R: 89-90]. Koebel-Secky had never had any issues or problems with Zach during basketball, and had never seen Zach engage in intentional fouling or pushing of any other player at any time prior to January 2, 2017 [R: 93].

After Coach Kenney shot and missed the ball, the rebound was secured by Koebel-Secky's teammate, who immediately passed it to Koebel-Secky at the top of the key [R: 94]. Koebel-Secky then took a shot, which hit off the rim and kicked off the hands of another player who was competing for the rebound [R: 94]. Koebel-Secky pursued the ball from the top of the key towards the bleachers, which were pushed up against the wall to his left as shown in the photograph to the left [R: 95].

As Koebel-Secky reached the side court baseline near the bleachers, which is shown in red in the photograph above, he was able to stop and secure the ball. He was about to spin back towards the main court basket when Zach Grazioso accidentally bumped into him from behind and knocked Koebel-Secky into the bleachers, causing an injury to Koebel-Secky's shoulder [R: 100-103, 110].

Plaintiffs subsequently commenced this lawsuit against the New Paltz Central School District (hereinafter "the School District") and Coach Kenney alleging that they were negligent in their supervision of Koebel-Secky [R:

253-263]. More specifically, plaintiffs alleged that Coach Kenney was negligent in: (1) conducting a drill that eliminated the main court boundary lines and (2) failing to have padding on the bleachers, which at the time were pushed up against the wall [R: 275-276].

After completion of discovery, the School District moved for summary judgment arguing that: (1) Jaxson Koebel-Secky assumed the risk of injury by voluntarily participating in the sport of basketball, (2) Coach Kenny met or exceeded the standard of care for supervision and (3) the accident occurred suddenly and spontaneously such that the allegedly negligent supervision was not a proximate cause of the injury. Supreme Court denied the motion, finding that there were questions of fact based on conflicting opinions set forth in affidavits by the parties' proffered experts [R: 8-13].

As more fully set forth below, however, it is respectfully submitted that Supreme Court erred in denying the motion for two reasons. First, the undisputed facts of this case fall squarely within the doctrine of primary assumption of risk as the bleachers were open and obvious and the risk of running into bleachers is inherent in the sport of basketball.

Second, Supreme Court erred in considering the affidavit of plaintiffs' "expert," Thomas Bowler, which the court used to find questions of fact with

regard to the negligent supervision claim. As more fully set forth below, Mr. Bowler is inherently unqualified to offer any expert opinion with regard to the sport of basketball, and therefore his affidavit should have been rejected. As plaintiffs failed to submit any expert proof to contradict the opinions of the School District's expert, Brian Fruscio, the Complaint should have been dismissed on the merits as a matter of law.

ARGUMENT

I. JAXSON KOEBEL-SECKY ASSUMED THE RISK OF INJURY BY VOLUNTARILY PARTICIPATING IN THE SPORT OF BASKETBALL.

"Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation'" (Brown v Roosevelt Union Free Sch. Dist., 130 AD3d 852, 853 [2015], quoting Morgan v State of New York, 90 NY2d 471, 484 [1997]). Among the risks inherent in participating in a sport are any open and obvious conditions of the place where the sport is played (see Bryant v Town of Brookhaven, 135 AD3d 801, 802 [2016]; Ziegelmeyer v United States Olympic Comm., 7 NY3d 893, 894 [2006]; Sykes v County of Erie, 94 NY2d 912, 913 [2000]; Maddox v City of

New York, 66 NY2d 270, 277 [1985]; Galski v State of New York, 289 AD2d 195, 196 [2001]; Welch v Board of Educ. of City of N.Y., 272 AD2d 469 [2000]; Trevett v City of Little Falls, 6 NY3d 884, 885 [2006]).

The policy underlying the primary assumption of risk doctrine is "to facilitate free and vigorous participation in athletic activities" (Benitez v New York City Bd. of Educ., 73 NY2d 650, 657 [1989]; see Cotty v Town of Southampton, 64 AD3d 251, 254 [2009]). The application of the doctrine is designed to foster socially beneficial athletic activities by shielding coaches, participants, venue owners and others, including school districts, from "'potentially crushing liability'" (Custodi v Town of Amherst, 20 NY3d 83, 88 [2012], quoting Bukowski v Clarkson Univ., 19 NY3d 353, 358 [2012]; see Trupia v Lake George Cent. School Dist., 14 NY3d 392, 395 [2010]).

It is not necessary to the application of the assumption of risk doctrine that the injured plaintiff have foreseen the exact manner in which his injury occurred, so long as the participant is, or should be, aware of the potential for injury and the mechanism from which the injury results (see Maddox v City of New York, supra at 278; Shivers v Elwood Union Free Sch. Dist., 109 AD3d 977, 979 [2013]; O'Connor v Hewlett-Woodmere Union Free Sch. Dist., 103 AD3d 862, 863 [2013]). Awareness of risk is not to be determined in a

vacuum, but is rather "to be assessed against the background of the skill and experience of the particular plaintiff" (Morgan v State of New York, supra at 486 [internal quotation marks omitted]; see Maddox v City of New York, supra at 278; Joseph v New York Racing Assn., 28 AD3d 105, 108 [2006]). While participants are not deemed to have assumed risks that are concealed, "[i]f the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be" (Brown v City of New York, 69 AD3d 893, 893 [2010]; see Turcotte v Fell, 68 NY2d 432, 439 [1986]; Joseph v New York Racing Assn., supra at 108).

The duty of care that must be exercised is to "make the conditions as safe as they appear to be" (Turcotte v Fell, supra at 439), and "[i]f the risks of the activity are fully comprehended or perfectly obvious, [the participant] has consented to them and defendant has performed its duty" (id. [citations omitted]; accord Bukowski v Clarkson Univ., supra at 357; Kaminer v Jericho Union Free Sch. Dist., 139 AD3d 1013, 1014 [2016]).

The doctrine of assumption of risk has been applied in many contexts, but there are several relevant cases where New York State courts have applied the doctrine to the sport of basketball and the conditions of a

gymnasium. In this regard, it is well settled that the doctrine requires dismissal of cases involving "risks engendered by less than optimal conditions, provided that those conditions are open and obvious and that the consequently arising risks are readily appreciable" (Roberts v Boys & Girls Republic, Inc., 51 AD3d 246, 248 [2008]; see Bukowski v Clarkson Univ., supra at 356; Sykes v County of Erie, 94 NY2d 912, 913 [2000]; Maddox v City of New York, supra at 277-278).

Here, the undisputed evidence establishes that Koebel-Secky was injured when he was inadvertently knocked into bleachers that were pushed up against one wall of the gymnasium. As can be seen by the photographs [R: 519-522], the condition of the bleachers is open and obvious and readily appreciable by any participant. They are, for all intents and purposes, a wall. The bleachers were not in any way concealed, and it is (or should be) perfectly obvious to any athlete, and certainly an experienced high school athlete, that if you engage in the sport of basketball there is some risk of being knocked into walls or bleachers surrounding the gym.

This is exactly why the Appellate Division has applied the doctrine of assumption of risk to grant summary judgment under nearly identical circumstances. In Ribaudo v La Salle Inst. (45 AD3d 556 [2007]), the Second

Department reversed Supreme Court's denial of a school's motion for summary judgment and dismissed the complaint as a matter of law. In Ribaudo, "the infant plaintiff, an experienced basketball player who had played amateur competitive basketball for years, was injured while playing in a basketball tournament at the defendant La Salle Institute of Troy, N.Y" (id. At 556). During the course of the game, the infant plaintiff attempted to save a ball going out of bounds, and ran full speed into a concrete wall that was not covered with any padding. La Salle moved for summary judgment, arguing that the conditions of the gymnasium were readily apparent, and that as an experienced player the infant plaintiff assumed the risk of playing under those conditions. The Appellate Division agreed, and held that "the risk of colliding with a wall" is "inherent in the sport, and the condition of the wall was open and obvious" (id. At 557). The same is true here. The risk of colliding with bleachers, whether they are pulled out or pushed back to form a wall, is inherent in the sport and there is no question that the condition of the bleachers was open and obvious.

This conclusion is so obvious and apparent that even plaintiffs' "expert" agrees, concluding on page 4 of his "Response to Defendant's Expert Witness Disclosure" that "There are times in which athletes will run

into bleachers and/or walls. This is an *inherent risk* in a basketball game" [emphasis in original] [R: 592]. If the plaintiffs' own "expert" agrees that the risk of running into the bleachers is an "inherent risk" of the sport in which he was engaged, certainly the case should be dismissed.

There are many other cases where a player runs into a fixed object outside the bounds of the court. In two cases, a player ran into a pole upholding the basket a few feet from the out-of-bounds line. In both cases, the courts held that the player assumed the risk of injury (see Trevett v City of Little Falls, 6 NY3d 884 [2006]; Altagracia v Harrison Central School, 136 AD3d 848 [2016]). In Trevett, the Court of Appeals held, as a matter of law, that the distance between the court and the pole was "open and obvious, and thus the risk of collision with the pole was inherent in playing on the court" (Trevett v City of Little Falls, supra at 885).

This holding should control here where there is a claim that the court boundaries were improperly eliminated. If the Court of Appeals' holding in Trevett is applied here, it should be irrelevant whether the court, as defined by Coach Kenney's rules, created some possibility of playing basketball in proximity to the bleachers so long the distance between the bleachers and the playing surface was "open and obvious." Here, Koebel-Secky was fully

aware, and it should have been obvious, that the drill permitted play to continue outside the main court boundaries, such that the playing conditions were open and obvious, and thus the risk of collision with the bleachers was inherent in the activity (see Trevett v City of Little Falls, supra at 885). Indeed, it was the same risk as if Koebel-Secky was playing on the cross court and was knocked into the bleachers.

In Perez v New York City Dept. of Education (115 AD3d 921 [2014]), a basketball player's arm went through and shattered a pane of glass in one of the entrance doors to the gymnasium. In dismissing the case, the Appellate Division noted that the risks associated with any particular gym, including any open and obvious conditions, are assumed by a voluntary participant in the sport of basketball. "If the risks are known by or perfectly obvious to the participant, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be" (id., at 921).

These cases stand for the proposition that running into a fixed object, whether it be a wall, pole, door or bleachers, is inherent in the sport of basketball so long as those objects are open and obvious. If running into the bleachers is inherent in the sport of basketball, as plaintiffs' "expert"

concedes, the doctrine of primary assumption of risk applies and the lawsuit must be dismissed.

The public policy considerations of the doctrine also support a dismissal in this case, as a finding to the contrary would serve to prevent the "free and vigorous participation in athletic activities" (Benitez v New York City Bd. of Educ., 73 NY2d 650, 657 [1989]; see Cotty v Town of Southampton, 64 AD3d 251, 254 [2009]), would have the practical effect of eliminating a drill that is performed throughout the state with children as young as 4th grade [R: 525], and would open the door to "potentially crushing liability" (Bukowski v Clarkson Univ., 19 NY3d 353, 358 [2012]; see Trupia v Lake George Cent. School Dist., 14 NY3d 392, 395 [2010]).

Here, there is no doubt that Koebel-Secky was an experienced player (see Legal v South Glens Falls Central School District, 150 AD3d 1582 [2017]), and he was certainly aware (or should have been aware) of the possibility that a player could be accidentally knocked into a wall, the bleachers, a scorer's table or any other stationary object outside the painted lines of the court. Indeed, inasmuch as the risk of collision with the open and obvious set of bleachers was inherent in the activity being played, it is respectfully

submitted that the negligence claim must be dismissed as a matter of law (see Trevett v City of Little Falls, supra at 885).

II. PLAINTIFFS' "EXPERT" IS NOT QUALIFIED TO RENDER OPINIONS IN THIS CASE, AND SUPREME COURT ERRED IN RELYING ON HIS OPINIONS TO DENY THE SCHOOL DISTRICT'S MOTION.

The only two documents submitted in opposition to the School District's *prima facie* showing of entitlement to judgment as a matter of law were a discovery response signed by plaintiffs' attorney [R: 587] and an affidavit of playground safety consultant Thomas Bowler [R: 568]. It is respectfully submitted that neither of these documents are sufficient to create a material issue of fact with regard to the doctrine of primary assumption of risk, and therefore the Complaint should have been dismissed in its entirety as a matter of law.

Turning first to the discovery response, there should be no question that a discovery response is legally insufficient to create a material issue of fact sufficient to overcome the School District's *prima facie* showing of entitlement to judgment as a matter of law. The response is signed by plaintiffs' attorney, but it is unsworn and it attaches another unsworn document.

All that is left is the affidavit of Mr. Bowler, a self-described playground safety consultant and the principal of "Total Playground Consulting Services" from Merritt Island, Florida [R: 5689]. As more fully set forth below, it is respectfully submitted that Mr. Bowler's affidavit and opinions must be rejected in their entirety as he is not qualified to render an expert opinion in this case.

A precondition to the admissibility of expert testimony is that the proposed expert is "possessed of the requisite skill, training, education, knowledge and experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (Superhost Hotels Inc. v Selective Ins. Co. of Am., 160 AD3d 1162, 1164 [2018] [internal quotations and citations omitted]). Here, Mr. Bowler's affidavit provides absolutely no indication that he has the requisite skill, training, education, knowledge or experience to qualify him as an expert with regard to the standards applicable to a high school basketball practice.

According to his affidavit, Mr. Bowler taught elementary school physical education, coached cross country and track, and played (but did not coach) JV basketball some 50 years ago. In the 50 years since he played JV basketball, he has not had any education, training or experience that

would indicate he has any specialized knowledge of the sport of basketball or the standards applicable to coaches.

While he claims to be an "expert witness for attorneys throughout the United States for the past 26 years," he does not identify a single case in which he was recognized as an expert in the sport of basketball. In fact, his 41-page resume doesn't mention the word "basketball" once [R: 476-516]. Moreover, a search of his name in Lexis reveals only four cases he participated in, none of which involve basketball and which identify him as a "certified playground consultant," "certified playground safety inspector" or "playground, physical education, and sports specialist" (see Hasiak v Borough of Wallington, 2014 NJ Super. Unpub Lexis 2155 [NJ Superior Courts, Appellate Division 2014]; Intemann v Town of Trumbull Bd. Of Educ., 2014 Conn. Super. Lexis 2491 [Superior Court of Connecticut 2014]; Norman v City of New York, 16 Misc3rd 1130 (A) [Richmond County 2007]; Neumon v City of New Haven, 2006 Conn. Super. Lexis 2702 [Superior Court of Connecticut 2006]).

It does not appear from his affidavit or his report that he has any specialized knowledge, skill, experience, training or education with regard to the sport of basketball that would help the finder of fact to understand the

evidence or determine a fact in issue, which is the standard for admitting testimony and opinions in New York State (see NY Unified Court System Guide to NY Evidence § 7.01, Opinion of Expert Witness [available at https://www.nycourts.gov/JUDGES/evidence/7-OPINION/7.01_OPINION_OF_EXPERT_WITNESS.pdf]). As such, it is respectfully submitted that his opinions are inherently unreliable and must be rejected as a matter of law (see Flanger v 2461 Elm Realty Corp., 123 AD3d 1196, 1198 [2014]; Dalder v Incorporated Vil. of Rockville Ctr., 116 AD3d 908, 910 [2014], lv denied 23 NY3d 908 [2014]).

To make matters worse (and perhaps not surprisingly given his lack of expertise), the principle bases for Mr. Bowler's opinions appear to be hearsay publications rather than his personal knowledge of industry-wide standards or accepted practices. Indeed, it appears that his opinions are taken primarily from a 2012 book or pamphlet written by a man named Richard Borkowski called "Game plan for sport safety"[R: 578-584]. The document is not provided such that author cannot be cross examined about his conclusions and whether they apply here. In other words, it is pure hearsay.

Case law is clear that an expert witness cannot rely on hearsay documents such as Mr. Borkowski's publication as the principle basis for his

opinion, and any such opinions are inadmissible as a matter of law (see Hinlicky v Dreyfuss, 6 NY3d 636, 645-646 [2006]; People v Wlasiuk, 32 AD3d 674, 680-681 [2006]; Borden v Brady, 92 AD2d 983, 984 [1983]). In the three cases cited above, expert opinions were all rejected because they relied on hearsay documents whose authors and opinions could not be cross examined. An expert cannot be the conduit for inadmissible testimony. The same is true here. Moreover, these publications are not relied upon by any basketball coach, do not create a standard and do not address the specific issues in this case [R: 532].

Inasmuch as plaintiffs' opposition is reliant solely on opinions by a playground safety consultant from Florida who is not qualified as an expert witness, and whose principal basis for his opinions is a hearsay publication, it is respectfully submitted that plaintiffs have failed to overcome the School District prima facie showing of entitlement to judgment as a matter of law, and therefore the School District is entitled to summary judgment dismissing the Complaint.[3]

[3] Given Mr. Bowler's lack of qualifications and the acknowledgement by plaintiffs' attorney that "Mr. Fruscio clearly has some impressive credentials and experience in coaching basketball at multiple levels" [R: 554], there is a good deal of irony in plaintiffs' claim that Brian Fruscio's opinions are "based entirely on speculation, conjecture and surmise, without any proper scientific or evidentiary foundation for them" [R: 554]. Such a claim is without merit, however, inasmuch as "[i]t is well-established that an expert may be qualified without specialized academic training through long observation and actual experience"

Even assuming that Mr. Bowler's opinions were to be considered by the Court, which they should not, it is respectfully submitted that they fail to raise a triable issue of fact as to any element of the doctrine of primary assumption of risk, and more particularly the scope of the School District's duty to a voluntary participant in a high school basketball practice.

The fundamental flaw in Mr. Bowler's analysis is that his opinions as to the School District's duty of care are premised on his "risk management" analysis rather than the applicable duty of care, which is prescribed by the doctrine of primary assumption of risk. Mr. Bowler's criticisms of Coach Kenney, such as they are, focus on the wrong duty of care. Mr. Bowler's opinions are focused on his perception of the reasonableness of the drill rather than whether Koebel-Secky consented to commonly appreciated risks which are inherent in, and arise out of, the nature of the sport generally and flow from such participation. In other words, Mr. Bowler fails to address the elements of the doctrine of primary assumption of risk.

Instead of addressing the elements of primary assumption of risk, he offers self-evident statements as to how injuries could be minimized based

(Superhost Hotels Inc. v Selective Ins. Co. of Am., 160 AD3d 1162, 1164 [2018] [internal quotation marks and citations omitted]; see also Caprara v Chrysler Corp., 52 NY2d 114, 121 [1981] [holding that an expert's competency can be derived just as well "from the real world of everyday use" as from a laboratory]).

on his personal view of "risk management" and how the practice could have been "safer." Of course, any sporting activity could be made "safer." Basketball players could be made to wear helmets or pads, and they could be required to practice and play the game surrounded by walls and bleachers covered in bubble wrap. But sports have inherent risks, and one playground safety consultant's view of "risk management" is not the standard by which this Court must evaluate the School District's legal duty of care under the doctrine of primary assumption of risk.

The duty of care that must be exercised is to "make the conditions as safe as they appear to be" (Turcotte v Fell, 68 NY2d 432, 439 [1986]), such that "[i]f the risks of the activity are fully comprehended or perfectly obvious, [the participant] has consented to them and defendant has performed its duty" (id. [citations omitted]). Here, Mr. Bowler does not deny that the risks of the drill were fully comprehended and perfectly obvious. He does not argue that the rules or conditions were concealed or obscured, or even that Koebel-Secky was so inexperienced that he was unable to comprehend them. Instead, he merely argues that the drill could have been made "safer" [R: 573-584], which is not the standard of care.

The only aspect of Mr. Bowler's opinion that touches on the doctrine of primary assumption of risk is his conclusion that running into bleachers and/or walls "is an *inherent risk* in a basketball game" [emphasis in original] [R: 592], which of course is the very conclusion that requires dismissal of the claim as a matter of law. Inasmuch as Mr. Bowler's opinions fail to raise a question of fact as to the doctrine of primary assumption of risk, it is respectfully submitted that the Complaint must be dismissed as a matter of law.

III. THE SUPERVISION PROVIDED BY KEITH KENNEY MET OR EXCEEDED THE STANDARD OF CARE, AND WAS NOT A PROXIMATE CAUSE OF THE INJURIES.

Even assuming that the case is not dismissed as a matter of law under the doctrine of primary assumption of risk, it is respectfully submitted that the Complaint must nevertheless be dismissed as a matter of law because the supervision provided by Keith Kenney met or exceeded the standard of care, and was not a proximate cause of the subject injury.

To the extent that plaintiffs argue that the doctrine of primary assumption of risk is inapplicable, and that the supervision provided by Coach Kenney was negligent, the School District presented *prima facie* evidence establishing that the supervision was reasonable and appropriate,

and met or exceeded the standard of care for coaching JV basketball. According to basketball coaching expert Brian Fruscio, there should be no question from the evidence submitted that the coaching and supervision provided by Keith Kenney was at all times reasonable and appropriate, including his use of the rebounding drill in question [R: 526].

In this regard, plaintiffs first allege that it was negligent to remove the main court boundaries for this drill. It is respectfully submitted that such an allegation must be denied as a matter of law. Coaches of all sports routinely eliminate the main boundaries to conduct drills, and that is certainly true in basketball. While an expert opinion should not be needed for such a truism, Brian Fruscio's expert affidavit makes it clear that coaches do this all the time, and that it is not a departure from any known or accepted standard of supervision to conduct the drill in the manner described [R: 526].

The two on two rebounding drill, without boundaries, is one that is used by many coaches throughout the country, and certainly in New York State [R: 529, 531]. This drill, which is appropriate for players as young as 4th grade, is designed to teach various skills that are critical to athletic success, and complies with all safety guidelines accepted by New York State high school basketball coaches [R: 529, 531]. The drill does not require

adherence to the boundaries of the main court, and in fact adherence to the main court boundaries defeats the primary purpose of this drill [R: 532]. It is a regular and common occurrence for coaches to remove the boundary lines depending on the drill and the skills being taught, such that the use of the drill in the manner described by both Koebel-Secky and Coach Kenney was reasonable and appropriate [R: 531].

Moreover, Coach Kenney was providing active supervision throughout the drill. According to Koebel-Secky's own testimony, Coach Kenney was participating, watching, coaching and supervising the players from near the three-point line, which is only a matter of feet away from where the play was occurring [R: 530]. Coach Kenney was positioned to stop play in the event it became dangerous, such that the supervision met or exceeded the standards of care for supervision of a high school basketball player [R: 535]. Inasmuch as the supervision provided by Coach Kenney met or exceeded the standard of care, it is respectfully submitted that the negligent supervision claim must be dismissed as a matter of law.

In opposition to this prima facie showing, plaintiffs have produced nothing more than the affidavit of Mr. Bowler, who is unqualified to offer expert opinions and relies exclusively on hearsay documents. Without

admissible evidence to contradict the School District's prima facie showing that the supervision provided by Keith Kenney met or exceeded the standard of care, it is respectfully submitted that the negligent supervision claim must be dismissed as a matter of law.

Even assuming that there was a question of fact as to whether the supervision was appropriate, which there is not, the Complaint must nevertheless be dismissed because the allegedly negligent supervision was not a proximate cause of the injury. According to Koebel-Secky's own testimony, that this was a sudden, spontaneous accident that occurred in such a short period of time that there was no way Coach Kenney could have intervened to prevent it from occurring [R: 534].

There is simply no reason to believe that Coach Kenney should or could have stopped play when the players were still within the boundary lines of the cross courts and were not playing up against the bleachers [R: 534]. In fact, the undisputed proof is that Jaxson had already began to turn back towards the hoop at the time of the accidental contact, such that no reasonable coach would have stopped play at that time [R: 534]. Inasmuch as the accident was sudden and spontaneous, it is respectfully submitted

that the negligent supervision claim must be dismissed as a matter of law (see Perez v New York City Dept. of Education, 115 AD3d 921, 922 [2014]).

CONCLUSION

Inasmuch as plaintiffs failed to overcome the School District's prima facie showing that Koebel-Secky voluntarily assumed the risk of being injured by running into bleachers while playing the sport of basketball, it is respectfully submitted that the Complaint must be dismissed as a matter of law.

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Respectfully submitted,

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