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' REPLY BRIEF

Respectfully submitted,

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ARGUMENT

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

Plaintiffs' primary argument on appeal is that the doctrine of primary assumption of risk is inapplicable because the elimination of the court boundaries caused an "invisible increased risk of injury" and was the "equivalent of moving the bleachers to within 3 feet of the court boundaries," such that Koebel-Secky "was clearly incapable of fully comprehending the potential consequences" [Respondents' Brief, at 16-19]. In other words, plaintiffs claim that a deviation from official rulebook rules, including court boundaries, rather than some hidden defect or unperceived risk, takes this case outside of the law of primary assumption of risk.

Respectfully, there is simply no legal support for that conclusion, and plaintiffs' brief is devoid of any caselaw to support their argument. Indeed, plaintiffs do not cite to a single case involving the sport of basketball, and not a single case where a court held that the alteration of court size or removal of "out of bounds" lines precluded summary judgment.

Instead, plaintiffs cite cases involving racecar driving, tennis, skiing, rock climbing, water slides, softball and sledding. None of those cases, however, stand for the proposition that the changing of rules or dimensions from those involved in a sport's official competition rulebook precludes application of the doctrine of primary assumption of risk. To the contrary, all of those cases stand for the proposition that the doctrine applies so long as the rules and dimensions are (or should be) perfectly obvious to the participants.

The case that plaintiffs have deemed to be the most relevant is a Second Department case called Weinberger v Solomon Schechter School of Westchester, (102 AD3d 675 [2013]), which they claim is "factually quite similar to the case at bar" [Respondents' Brief, at 13]. In that case, a high school softball pitcher "with limited pitching experience" was injured when the coach instructed her to pitch behind a defective L-screen. Plaintiffs argue that Weinberger is "strikingly similar" because in each case "the coach had the team try a new drill which involved changing the usual rules and measurements of the playing field."

It is respectfully submitted that plaintiffs' argument misconstrues the penultimate conclusion in Weinberger. It was not the nature of the drill or

the change in dimensions that concerned the court in Weinberger, but rather the fact that the coach required the player to perform the drill using defective protective equipment. Had the L-screen been functional, the Weinberger court would certainly have dismissed the case as a matter of law even though the "rules" and dimensions of the field were changed to require the pitcher to pitch close to the hitter. This makes perfect sense, of course, as every youth baseball practice in America at some point involves a pitcher pitching behind an L-screen in a batting cage or on a field from a distance less than regulation.

Simply stated, Weinberger is a defective equipment case, and it stands for the proposition that a sports participant does not assume the risk of faulty equipment unless he or she knows of the defective condition and uses the equipment anyway. It does not stand for the proposition, as plaintiffs argue, that the alteration of field dimensions creates a question of fact as to whether the athlete assumed the risk of injury. This critical distinction has been pointed out in many cases, including several cases analyzing Weinberger (see Zelkowitz v Country Group, Inc., 142 AD3d 424 [2016]; Bakkensen v City of New York (2014 NY Slip Op 31965 [U] [New York County 2014], 2014 Misc LEXIS 3362).

Indeed, the changing of court dimensions falls squarely within the doctrine of primary assumption of risk, so long as the risk is inherent in the sport and open and obvious. Thus, even assuming that "the elimination of the court boundaries was the equivalent of moving the bleachers to within 3 feet of the court boundaries" [Respondents' Brief, at 19], as plaintiffs argue, the doctrine of primary assumption of risk still applies and the case must be dismissed as a matter of law. Indeed, anyone who has ever played Catholic Youth Organization ("CYO") basketball in a Catholic school gym knows full well that walls, chairs, benches, stages, bleachers and other obstacles are often within 3 feet of the playing surface. The dimensions of every court and gymnasium are different, and there is often a complete lack of the "buffer zones" that plaintiffs claim to be required.

The question for this Court is not whether there were adequate "buffer zones," but rather whether the risk encountered by Koebel-Secky was inherent in the activity, or whether it was (or should have been) perfectly obvious to Koebel-Secky prior to his participation. In this regard, plaintiffs' attorney concedes that running into the bleachers was an inherent risk in the sport of basketball, and that the condition of the bleachers were open and obvious [Respondents' Brief, at 18]. This is the

exact same conclusion reached by plaintiffs' "expert," who opined that "[t]here 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 risk of running into bleachers is an *inherent risk*, and the condition of the bleachers was *open and obvious*, it is respectfully submitted that this case must be dismissed as a matter of law under the doctrine of primary assumption of risk (see Ribaudo v La Salle Inst., 45 AD3d 556 [2007]; see also Trevett v City of Little Falls, 6 NY3d 884 [2006]; Altagracia v Harrison Central School, 136 AD3d 848 [2016]; Perez v New York City Dept. of Education, 115 AD3d 921 [2014]).

II. PLAINTIFFS' "EXPERT" IS NOT QUALIFIED TO RENDER OPINIONS WITH REGARD TO PLAINTIFFS' CLAIMS OF NEGLIGENT SUPERVISION.

Plaintiffs next argue that Thomas Bowler, a self-described playground safety consultant from Florida, who has never coached basketball and who has not played basketball in more than 50 years, is qualified to provide an "expert" opinion in this case. Importantly, the parties agree that it is for this Court to determine, as a matter of law, whether Mr. Bowler is qualified to render an expert opinion in this case,

which involves a claim of negligent supervision of a JV basketball player during basketball practice.

In reading the Respondents' Brief on this issue, the best they can muster is to argue that Mr. Bowler has a Bachelor's Degree and a Master's Degree in teaching, and that he has been involved in elementary school physical education and intramural sports over the course of his lengthy career as an academic and professional expert witness [Respondents' Brief, at 26]. While Mr. Bowler may be qualified to render opinions as to playground safety or certain aspects of elementary school physical education class, it is unclear how his education, training or experience could put him in a position to educate the court or jurors on the reasonableness of a high school basketball coach's decision to run a particular drill. Indeed, there is nothing in Mr. Bowler's resume that suggests he is knowledgeable, let alone an expert, on the relevant topic of supervising a JV basketball practice. The fact that Mr. Bowler has a 41-page resume, and that it does not mention the word "basketball" once, should be enough evidence that he is not an expert in the sport of basketball [R: 476-516].

Moreover, Mr. Bowler's opinions come almost exclusively from hearsay publications that are not provided as part of the motion, and which he does not establish to be relied on by experts in the field (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]). The very fact that Mr. Bowler's conclusions come from others' books shows his lack of expertise, and makes him a conduit for inadmissible hearsay. It is concerning that plaintiffs' attorney attempts to bolster the relevance of these hearsay publications by calling them "industry publications" [Respondents' Brief, at 35], as that is exactly the type of argument that cases like Hinlikcy, Wlasiuk and Borden preclude.

Inasmuch as plaintiffs' argument on the underlying motion 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 opinion is a hearsay publication, it is respectfully submitted that plaintiffs 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.

As a final matter, it is notable that plaintiffs' appellate brief spends considerable time attacking the qualifications and opinions of defendants' expert, Brian Frusio. These arguments are both ironic and misplaced. With respect to his qualifications, plaintiffs' attorney has already conceded that "Mr. Fruscio clearly has some impressive credentials and experience in coaching basketball at multiple levels" [R: 554]. Mr. Fruscio's credentials certainly stand in stark contrast to Mr. Bowler's experience as a playground safety consultant.

With regard to Mr. Fruscio's opinions, plaintiffs ignore the fact that Mr. Fruscio's affidavit states that he is a member of the National Association of Basketball Coaches ("NABC") and the Basketball Coaches Association of New York ("BCANY"), which set the standard for the development of coaches and players, and address issues pertaining to basketball at all levels. Mr. Fruscio also makes it clear in his affidavit that he is basing his opinions on the documents he reviewed, including the deposition transcripts, plaintiffs' expert disclosures and the reports of Mr. Bowler, which contain all of the measurements taken by Mr. Bowler. In other words, Mr. Fruscio is relying on all of the same information relied upon by Mr. Bowler, perhaps with the exception of the hearsay

publications in his reports. Thus, it is respectfully submitted that plaintiffs' arguments with respect to Mr. Fruscio's qualifications and opinions should be rejected.

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.

DATED: January 8, 2020

Respectfully submitted,

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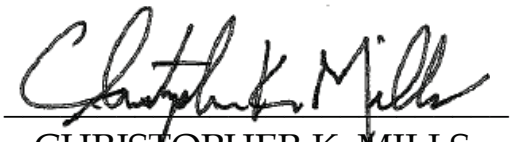
BY: 

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